

## BOOK ESSAY

# OUR CONFLICTING JUDGMENTS ABOUT PORNOGRAPHY

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*Only Words.* Catherine MacKinnon. Harvard University Press, 1993. Pp. v, 152. \$14.95.

*The Invention of Pornography: Obscenity and the Origins of Modernity, 1500-1800.* Lynn Hunt, ed. New York, NY: Zone Books, 1993. Pp. 411. \$26.95.

It is difficult to turn on one's television these days without receiving a brief lesson on free speech, as the bounds of the First Amendment are debated by some and tested by others. On a recent night in New York City, for example, a television viewer could watch a debate on free expression, starring the likes of Robert Bork, William F. Buckley, and Cornel West.<sup>1</sup> On an adjacent channel, a public access station broadcast a sadomasochistic videotape apparently made in a fetish club near Times Square.<sup>2</sup> In the latter broadcast, a woman lay nude

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1. The debate was broadcast as an episode of *Firing Line*. Staged at the University of Pennsylvania, the proposition debated was "Political Correctness Is a Menace and a Bore." William F. Buckley, Robert Bork, Ira Glasser of the American Civil Liberties Union, and Catharine Stimpson, dean of the Rutgers graduate school, argued for the proposition. Opposing were Mark Green, public advocate for New York City; Leon Botstein, Bard College president; Linda Greene, University of Wisconsin law professor; and Cornel West, director of Afro-American studies at Princeton University. For a partial text, see *The Next-to-Last Word on Political Correctness*, N.Y. TIMES, Dec. 11, 1993, at A23.

2. The show, apparently a regular feature of New York public access television, was entitled *Club Fetish*. The particular episode described in the text was broadcast on December 14, 1993.

on a table, bound and gagged, as another woman pinched her with clothes pins, dripped hot wax on her exposed breasts, and massaged her genitalia with an open pen knife.

The juxtaposition between First Amendment theorizing and First Amendment practice is not always so stark. But there is no doubt that free speech issues have been among the most controversial constitutional topics of the last few years. In particular, the debate about the appropriate bounds of pornography and sexually explicit speech is raging, not only on television but also in legal academia,<sup>3</sup> Congress,<sup>4</sup> the federal bureaucracy,<sup>5</sup> states and localities,<sup>6</sup> and the courts.<sup>7</sup> The conflict, along with the somewhat related controversies over hate speech and "political correctness," is reminiscent of the abortion debate in its divisiveness and apparent lack of common ground.

Catherine MacKinnon's new book, *Only Words*, has been a lightning rod. MacKinnon, of course, is no stranger to controversy, as she has been at the forefront of the political and social debate on issues of pornography, sexual harassment, prostitution, and the rights of women for over a decade.<sup>8</sup> *Only Words* is the most recent addition to an impressive body of work. Her 1987 book *Feminism Unmodified*,<sup>9</sup> a collection of essays, may be one of the most read and most discussed works in American law schools. The controversial model anti-pornography ordinance she authored with Andrea Dworkin has been considered by a number of localities, most notably Minneapolis, where

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3. See, e.g., EDWARD DEGRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* (1991); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 209-27 (1993); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993); James Lindgren, *Defining Pornography*, 141 U. PENN. L. REV. 1153 (1993); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993); Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845 (1993).

4. See, e.g., Pornography Victims Compensation Act, S. 1521, 102d Cong., 2d Sess. (1992) (proposing to permit victims of forcible sex crimes to sue producers, distributors, exhibitors, and sellers of obscene materials and child pornography on showing that those materials contributed to victimization).

5. See, e.g., ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT (1987) (examining pornography's impact on society).

6. See, e.g., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (striking down Indianapolis ordinance making pornography actionable as civil rights violation), *aff'd*, 475 U.S. 1001 (1986).

7. See, e.g., *Alexander v. United States*, 113 S. Ct. 2766 (1993); *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *Osborne v. Ohio*, 495 U.S. 103 (1990); *Hudnut*, 771 F.2d 323.

8. MacKinnon was recently identified as one of the 100 most influential lawyers in the United States. See *The 1994 Power List*, NAT'L L.J., Apr. 4, 1994, at C4, C9. For a profile of MacKinnon, see Fred Strebeigh, *Defining Law on the Feminist Frontier*, N.Y. TIMES, Oct. 6, 1991 (Magazine), at 29.

9. CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987).

it was passed by the City Council but vetoed by the Mayor,<sup>10</sup> and Indianapolis, where it was adopted only to be struck down by the Seventh Circuit.<sup>11</sup>

It is no surprise, therefore, that *Only Words* has become the focus of much attention and debate. Its brevity and polemical tone make it both a manifesto-like call to arms and a convenient target of blistering counterattacks.<sup>12</sup> Whatever else might be said, MacKinnon succeeds in a way in which few law professors ever do: she creates a stir.

MacKinnon argues that pornography<sup>13</sup> changes men<sup>14</sup> and harms women (p. 15). The harm to women is of three kinds. Women are coerced (either overtly or through their position of inequality and powerlessness) into making pornography (pp. 15, 20); women are victimized by sexual crimes committed by men who are incited by pornography to commit rape and other acts of violence (pp. 18-20); and women are subordinated and devalued in a society infused with pornographic images and expression (pp. 19, 25). According to MacKinnon, such real harm should be cognizable within First Amendment doctrine, making pornography regulable in any number of ways.

The collection of historical essays contained in *The Invention of Pornography* is a quieter addition to the debate. Its focus is purely historical, and, at first glance, its relevance to the modern debate is tangential at best. In examining the use and regulation of sexually explicit expression in Western Europe from the fifteenth century to the beginning of the nineteenth century, *Invention* is a scholarly and, at times, dense contribution.

*Invention* does, however, offer a worthy source of analysis on modern issues surrounding pornography. Although editor Lynn Hunt<sup>15</sup> refuses to make explicit judgments on the current issues

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10. See Howard Kurtz, *New War on Pornography: Librarians Argue with Preachers Over City Law*, WASH. POST, July 29, 1984, at A4.

11. *Hudnut*, 771 F.2d at 332.

12. See, e.g., Michiko Kakutani, *Pornography, the Constitution and a Fight Thereof*, N.Y. TIMES, Oct. 29, 1993, at C26 (stating that *Only Words* is "very angry book"); John Leo, *Censors on the Left*, U.S. NEWS & WORLD REP., Oct. 4, 1993, at 30 (stating that *Only Words* is "one long scream about sex and men"); Richard Posner, *Book Review*, NEW REPUBLIC, Oct. 18, 1993, at 31 (calling *Only Words* "a verbal torrent that appeals, much like pornography itself . . . , to elemental passions . . . rather than to the rational intellect").

13. MacKinnon defines "pornography" as "graphic sexually explicit materials that subordinate women through pictures or words." MACKINNON, *supra* note 9, at 22.

14. See also MACKINNON, *supra* note 9, at 189-90 (stating that pornography hurts men's capacity to relate to women).

15. Lynn Hunt is an Annenberg Professor of History at the University of Pennsylvania.

surrounding pornography,<sup>16</sup> she nevertheless asserts that understanding the history of sexually explicit expression is "essential" to understanding the current debates (p. 11). According to Hunt and her co-contributors, the emergence of sexually explicit expression as a separate category of understanding was linked to "the long-term emergence of Western modernity" (pp. 10-11). Early modern pornography revealed "some of the nascent characteristics of modern culture" (p. 11). As in all honest history, the moral of the story is not crystalline. But one comes away from reading *Invention's* essays with the impression that, from a historical perspective, pornography is not as unambiguously negative as MacKinnon asserts.

In a sense, both books explore something that existing First Amendment doctrine does not fully address. *Invention* plausibly stands for the notion that sexual expression was and is important in aiding individuals to develop a sense of autonomy and freedom necessary to modern society and, presumably, modern democracies. Existing First Amendment law, however, devalues sexuality and sexually explicit speech. One obvious example is how the legal category of "obscenity" is limited to expression that appeals to the prurient, i.e., sexual, interest of the audience.<sup>17</sup> It is of course easy to identify expressive material that is both highly "offensive" and lacking in literary value, but which has nothing to do with sex. By including within the legal test for "obscenity" the requirement that the expression be sexual in nature, current First Amendment law allows sexual expression to be subject to regulation in ways that expression appealing to other emotions or urges, or to the intellect, is not.<sup>18</sup>

MacKinnon, too, points to an obtuseness in the First Amendment tradition. To draw on the same example, obscenity law depends on "offense," "community standards," and "serious value"—none of which captures very well (if at all) a consideration of the harms MacKinnon

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16. Hunt and her colleagues define "pornography" as sexually explicit expression aimed at arousing sexual feelings, declining to incorporate the subordination aspect of MacKinnon's definition. *THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500-1800*, at 10 (Lynn Hunt ed., 1993).

17. See *Miller v. California*, 413 U.S. 15, 24 (1973). Under *Miller*, obscenity is beyond the protection of the First Amendment. Obscenity is defined as expressive material that depicts or describes sexual conduct and that (a) according to community standards appeals to the "prurient interest"; (b) is "patently offensive" as defined by state law; and (c) taken as a whole, lacks "serious literary, artistic, political, or scientific value." *Id.*

18. Another example of the second-class constitutional status of sexual speech can be found in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456. A plurality of the Supreme Court acknowledged the expressive nature of nude dancing, *id.* at 2460, but nevertheless upheld an Indiana prohibition of such dancing in order to protect "societal order and morality." *Id.* at 2461. This basis for decision would be unthinkable in a different First Amendment context.

identifies.<sup>19</sup> As MacKinnon suggests, the more pervasive the harm, the less shocking or "offensive" it may become, and the less likely it is that the obscenity test will identify it. If, for example, society is permeated with an assumption that women are subordinate to men, the average jury may not be offended by material expressing that subordination.

Thus, both *Invention* and *Words* suggest that the lines defining protected and unprotected sexually explicit speech are unacceptable. Moreover, as we seek out a better definitional line, existing doctrine—with its talk of obscenity,<sup>20</sup> content-based regulation,<sup>21</sup> and viewpoint neutrality<sup>22</sup>—does not seem to lead us to the right questions. The existing theoretical framework fails to frame the inquiry in a helpful way, and the debaters speak past each other.<sup>23</sup>

Existing doctrine does not allow the articulation of an intermediate position that would recognize the ambiguities surrounding, and conflicting judgments about, sexually explicit speech. On the one hand, MacKinnon certainly seems correct in recognizing that some, if not most, existing explicit sexual expression is denigrating to women, that some men are negatively influenced by it in nontrivial ways,<sup>24</sup> that some women are coerced into aiding in its production,<sup>25</sup> and that pervasive images of women in subordinate roles influence our societal subconscious.<sup>26</sup> On the other hand, sexuality has a convincing claim to being a part of any version of the Good Life,<sup>27</sup> and expression of one's sexuality and the opportunity to experience the sexual expression of others may legitimately be seen as an important part of sexuality in general.<sup>28</sup>

19. See MACKINNON, *supra* note 9, at 150 (contending that obscenity law is not consonant with "feminist critique," which would regulate pornography to protect women).

20. *Miller*, 413 U.S. at 24.

21. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992) (noting that content-based regulations are presumptively invalid).

22. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328, 332 (7th Cir. 1985) (striking down anti-pornography ordinance because it was not viewpoint neutral).

23. For an example of how prominent theorists can speak past one another, see *The First Amendment, Under Fire from the Left*, N.Y. TIMES, Mar. 13, 1994 (Magazine), at 42 (publishing debate between Floyd Abrams and Catherine MacKinnon).

24. For a review of the evidence on this point, see SUNSTEIN, *supra* note 3, at 217-18.

25. See, e.g., LINDA LOVELACE & MICHAEL MCGRADY, ORDEAL (1980) (describing Lovelace's experience of being coerced into making pornographic film *Deep Throat*).

26. See SANDRA L. BARTKY, FEMININITY AND DOMINATION 25, 83-98 (1990) (arguing that subordination of women is so pervasive that it appears to be natural and that women are more likely than men to see themselves as inadequate or diminished); see also SUNSTEIN, *supra* note 3, at 219-20.

27. See Martha Nussbaum, *Aristotelian Social Democracy*, in LIBERALISM AND THE GOOD 203, 220-21 (R. Bruce Douglas et al. eds., 1990).

28. See SUNSTEIN, *supra* note 3, at 215.

To admit to believing both of these seemingly contradictory propositions is not to acknowledge intellectual schizophrenia. Rather, it is to recognize the immense complexity of the subject of sexuality and the honest conflicts contained within the intuitions and reflective judgments of many individuals grappling with these issues. Unfortunately, when these tensions are most conspicuous—in the context of a proposed pornography regulation, for example—existing First Amendment doctrine does not seem to provide much help. For the most part, existing theory deserves judicial analysis and guides courts away from considering both the benefits and harms that we as individuals recognize and acknowledge.

Parts I and II of this Essay will outline how *Words* and *Invention* analyze pornography and sexually explicit expression, suggesting some of the ways in which existing law fails to recognize either the harms or benefits of such expression. Part III attempts to sketch a new First Amendment theory that posits as its core value the development of human capacity. Such a theory would allow both the benefits and harms of sexual expression to be recognized and balanced. While I do not here propose definitive answers to the most difficult issues of pornography regulation, I do propose, in Part IV, that a First Amendment doctrine based on the importance of the development of human capacity would challenge us to reflect about sexual expression in a way that would result in principled and consistent First Amendment answers.

## I.

It seems that the voice often missing from the debate over pornography and its regulation has been that which would support sexual expression for the benefits it provides individuals and society. As author Susie Bright recently asserted:

[E]ither you get the liberals whining that 'It's freedom of speech. I guess we're gonna have to live with it,' or you get the *Playboy* philosophy, which is, I don't know, running around in your slippers with a bunny chasing you. And then you have the anti-porn people. . . . But does that really describe human sexuality?<sup>29</sup>

*Invention's* historical perspective is helpful in this regard. Though the essays in the volume routinely acknowledge the possible evils and harms of pornography, they also show some of the reasons why the case against pornography need not be as open and shut as

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29. Dwight Garner, *Susie Bright, Sex Queen*, BOSTON PHOENIX, Dec. 17, 1993, at 6-7 (quoting Susie Bright). Bright is the editor of *The Best American Erotica 1993* (1993).

MacKinnon would have it. According to *Invention*, throughout the history of Western culture, pornography and sexually explicit speech have provided benefits that are both political and personal. Moreover, *Invention* suggests that some of these benefits come hand in hand with aspects of the speech often used to identify its offensiveness.

According to *Invention*, pornography slowly developed as a legal and artistic category in the years between 1500 and 1800, but emerged as a distinct category only in the early nineteenth century (pp. 9-10). Before that time, pornography was not a distinct legal category in Western culture (p. 10). Instead, it was considered a part of other styles of political or social commentary and criticism. Hunt argues that as late as 1806, the distinction between sexually explicit expression and other forms of heresy, philosophical radicalism, and political subversion was not widely understood (p. 16). In France, pornographic stories were regulated as "philosophical books," along with any other book that threatened religion or the state, from satires of the church to political pamphlets advocating such subversive ideas as an independent judiciary (pp. 18-19).

According to Hunt, an analysis of pornography before the nineteenth century cannot be separated from an analysis of "the long-term emergence of Western modernity" (pp. 10-11). Early pornography, she says, reveals "some of the emerging characteristics of modern culture": free thinking, heresy, science and natural philosophy, and attacks on political authority (p. 11).

*Invention's* essays seek to make this point through a detailed exposition of various threads of the history of Western European pornography. Beginning in sixteenth-century Renaissance Italy, as described in the first essay by Paula Findlen,<sup>30</sup> sexually explicit expression revealed elements of the modern, including a dedication to the senses and an irreverence for social hierarchy and convention. In one of the earliest pornographic works of prose, Pietro Aretino's *Ragionamenti* (1534-1536), women narrated tales of their erotic experiences, and were seen as sexual beings discovering their own passions (p. 74). The subversive anti-clerical aspect of the work is made clear as one of the female characters recounts how she was initiated into the pleasures of sex while a nun at a monastery (p. 74).

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30. Paula Findlen, *Humanism, Politics and Pornography in Renaissance Italy*, in *THE INVENTION OF PORNOGRAPHY*, *supra* note 16, at 49. Findlen teaches in the Department of History and the Program in the History and Philosophy of Science at the University of California, Davis. *Id.* at 401.

Aretino's most famous work, which became known as "Aretino's Postures" (p. 25), contained detailed engravings of various positions for lovemaking, accompanied by explicit sonnets praising the experience of sex (pp. 65-74). Like *Ragionamenti*, the Postures became one of the most enduring pornographic works in European history. Findlen suggests that the Postures "reinforced the dangerous powers of the senses" by describing the sensations of sex in explicit detail (p. 74). Aretino apparently seems "modern" because of his willingness to take an almost scientific perspective on both sexual technique and the patterns of physical pleasure.

Aretino's contemporaries also used graphic sexual images to spice up their political satire. One notable example depicts factional struggles in Siena in terms of competition between the patrician Pricks and Cunts, the aristocratic Balls, and the plebeian Asses (pp. 86-92). These Italian works marked a breakthrough by flaunting sexual taboos to make political satire and social commentary. Findlen asserts that such works were the precursor for the political pornography that appeared with increasing frequency in Europe during the seventeenth and eighteenth centuries (pp. 107-08).

Aretino and his contemporaries also marked themselves as "modern" by utilizing the new technology of printing to distribute their works widely (p. 54). The reactions of various authorities to pornographic works were motivated less by the offensiveness of the ideas than by extreme discomfort that the general public had increasing access to them (pp. 54-55). For Philip II to have Titian's erotic paintings hidden behind a curtain for viewing only by visitors of the monarch's choosing was one thing. It was quite another for Aretino's Postures to be available to an increasingly literate public (pp. 54-55).

Some learned elite pointed to the distribution of pornographic works as the fulfillment of the "most dire prophesies" that a "market-place of ideas" would lead to society's ruin (p. 55). Pope Paul IV established the Index of Forbidden Books in 1559, banning "lascivious or obscene" books along with heretical works and Protestant writings (p. 55). But, according to Findlen, censorship elevated the status of pornography by making it difficult to acquire (p. 57). The censorship also may have facilitated the spread of the pornographic culture to France and England, where the Inquisition held less sway (p. 58). By the end of the sixteenth century, Aretino's works were being printed in London and smuggled into Italy (p. 58).

The international trade in pornographic works that grew up over time was quite profitable (p. 57). Printing allowed eroticism to be



commodified, permitting printers, engravers, and importers to exercise their modern sensibilities and make money in the process, as long as they were willing to risk the occasional hazard of imprisonment (pp. 54-59). Findlen argues that pornography became "the preferred medium through which to vent one's outrage about the ills of society while, at the same time, making a tidy profit" (p. 108).

The next major moment in the development of a pornographic tradition came in the late 1600s with the publication of the first major French pornographic works, *L'Ecole des filles, ou la philosophedes dames* and *L'Académie des dames*. Both built on Aretino's tradition of female narration, but they also tested new novelistic formulations (pp. 119-23). Both were seen as politically subversive. The women in *L'Academie*, for example, agreed that the "civil laws are contrary to those of nature" (p. 172). By 1660, Hunt asserts, all the themes of later prose pornography were present: "the self-conscious aim of arousing sexual desire in the reader"; the stark comparison between the material truth of sex and the hypocritical conventions of society and the church; and a cataloguing of the different ways to gratify the senses (p. 30).

Pornographic writing gained another burst of creative energy in the 1740s with the publication of a number of influential works, the most famous being John Cleland's *Fanny Hill*.<sup>31</sup> According to Hunt, it is not coincidental that this rise in pornographic writings marked the beginning of the high period of the Enlightenment (p. 33). With a greater understanding of nature came the belief that "repression of sexual appetite was artificial and pointless" (p. 34).

Sexual enlightenment, according to essayist Margaret Jacob,<sup>32</sup> was an important component of the "vast philosophical transformation" that occurred in European thought in the late seventeenth century (p. 157). The ability to "mechanize and atomize physical nature" brought with it the philosophy of materialism (p. 158). Humans, like other bodies in nature, were seen as subject to natural laws and impulses. According to Jacob, the pornographic novel became the "vehicle for explaining and inventing the sexual bodies" occupying a "privatized space occupied only by bodies in motion" (p. 158). With a greater

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31. JOHN CLELAND, *FANNY HILL, OR, MEMOIRS OF A WOMAN OF PLEASURE* (large print ed. 1991). *Fanny Hill* continued to be a subject of controversy more than two centuries after its publication. In 1966, the U.S. Supreme Court struck down a Massachusetts ruling that the book was obscene. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413, 419 (1966).

32. Margaret C. Jacob, *The Materialist World of Pornography*, in *THE INVENTION OF PORNOGRAPHY*, *supra* note 16, at 157. Jacob is Professor of History in the University of the New School for Social Research. *Id.* at 401.

materialist inspiration, happiness turned less on the hereafter than the here and now. It became possible in Western culture to believe that eroticism was an important part of happiness—"passions might have a beneficial influence in making humans happy in this world" (p. 34).

In fact, materialist pornography was part of the "new sociability" in the cities and larger towns of Europe (p. 159). In contrast to the traditional interactions characterized by dependence on family, guild, court, and church, the new social universe was typified by men and women meeting as *individuals* rather than members of some traditional corpus (p. 159). Materialist eroticism both reflected and helped construct this new world of autonomy and relative anonymity (p. 159).

To civil and religious authorities, however, pornography was no less dangerous because it reflected society. By making the spiritual realm irrelevant and offering a justification for satisfying the pleasures of the body, pornography and materialism stood as powerful affronts to traditional hierarchy. Not surprisingly, the pornographer and materialist philosopher were censored, arrested, and jailed (p. 162).

Materialism was subversive not only in philosophy and in politics, but also in gender issues. Materialist pornography insisted that all creatures in nature be equally controlled by nature and oriented to the passion of the bodies; in such a world, women had to be sexual equals of men (p. 38). Jacob asserts that within this materialist sexual regime, the "atomized bodies . . . are totally privatized. In the process, they become roughly, perhaps inadvertently, equalized; they are as similar, as equal and metaphysically ungendered as the atoms and planets" (p. 182). This nascent equality norm stood in stark and subversive contrast to the "sexual difference that was increasingly coming into vogue in medical tracts and domestic manuals" (pp. 38-39). As Hunt explains, pornography, which "intentionally transgressed the boundaries establishing difference," directly contradicted the ideology of a private, separate sphere for women (p. 45).

According to Jacob, the abundance of female narrators was emblematic of pornography's insistence on sexual equality. The authors of the works, most of whom were probably male, may have used female narrators because of an unconscious desire "to postulate and advocate a commonplace, domesticated sexuality that could be experienced by everyone, to encourage a private space where fantasy is permitted, even if it is never quite fulfilled" (pp. 182-83).

To be sure, early pornography, like modern pornography, was created primarily by men for men. But Jacob asserts that by establishing a tradition and philosophic basis for female desire, the female

narrator was a subversive and important development. Pornography, in effect, created a sphere in which women could be sexually autonomous and could try out sexual initiation and playfully test sexual variation (pp. 170, 174-75). For their part, men had to "admit female participation and even female activation" in sexual relations (p. 165). By leaving "room for female desire" (p. 218), enlightenment pornography contained kernels of sexual equality that present-day pornography frequently does not.

Between 1740 and 1790, pornography became even more political in form. In France, sexually explicit pamphlets attacked the clergy, the court, and the King. In the 1790s, the French Revolution let loose a "cascade" of pornographic pamphlets directly linked to political conflicts, reaching a wider audience than ever before (pp. 35, 42, 317). Hunt<sup>33</sup> argues that political pornography helped bring about the French Revolution by undermining the authority and legitimacy of the *ancien régime* (p. 301). Queen Marie Antoinette was the focus of a number of obscene works—in one pamphlet she is depicted in an orgy with the King's brother, a count, and a duchess (p. 307). In another, she is depicted in a liaison with a young man from the lower classes (p. 325). The availability of the Queen's body implied that the Queen, indeed the government, was available to every man (p. 325).

According to Hunt, a major turning point in the history of pornography occurred between the 1790s and the 1830s (p. 41). Until the end of the 1790s, explicit sexual expression almost always had qualities that made it expressly politically subversive (p. 42). Toward the end of the 1790s, however, it began to lose its political connotations and instead became much more a commercial, "hard-core" business (p. 42). Hunt hypothesizes that the success of political pornography spelled its own defeat. With the downfall of the *ancien régime*, much of the political energy behind pornography died out. Moreover, as the presses became freer and pornography became more mass produced, it could make money based on its sexual appeal and increasingly needed no other justification (pp. 331-32).

Meanwhile, the writings of the Marquis de Sade showed how pornography could culminate in what Hunt calls the "ultimate *reductio ad absurdum* of pornography"—portrayals of rape, incest, parricide, sacrilege, pedophilia, as well as the pornographic depictions of torture and murder (p. 35). With Sade's influence, pornography

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33. Lynn Hunt, *Pornography and the French Revolution*, in *THE INVENTION OF PORNOGRAPHY*, *supra* note 16, at 301.

came to be identified with a general assault on morality rather than a critique of the injustices of the *ancien régime* (p. 330). So, during the years following the French Revolution, French pornography became less political, more widely disseminated, more focused on sexual arousal as its dominant motivator, and more graphically disturbing (p. 305). Hunt points out the paradox: once political pornography became democratized, it ceased to be political (p. 305).

The danger of pornography began to be seen as moral and social rather than political, and the impetus to regulate pornography for moral reasons gained influence as its role as political critique declined (p. 43). Elsewhere in Europe, the "specter of the French Revolution, with its threat of democratization . . . galvanized the trends toward the regulation of pornography as a distinct category" (p. 302).

The history of pornography as told by *Invention's* essays thus reveals that the regulatory tensions faced by lawmakers today are hardly new. Some explicit sexual expression may have had positive effects. The sexual urge helped spur international trade, adjustments to gender roles, and the overthrow of the *ancien régime*.<sup>34</sup> Yet early pornography also devolved into Sade, presaging the worst of modern pornography.

To a certain extent, the wish to regulate Sade's modern counterparts may have been a defining motivation behind this country's development of the definition of "obscenity" for the purposes of regulation.<sup>35</sup> To be sure, though traditional First Amendment doctrine cannot quite explain why,<sup>36</sup> explicit sexual speech is viewed differently than other expression. For other kinds of speech, the benefits that *Invention* describes are assumed to accompany, and thus have been used by courts to define, the types of so-called "high value" expression that conventionally are beyond regulation but for the most compelling reasons.<sup>37</sup> But in fact, sexual speech, even sexual speech

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34. And possibly technological change. See John Tierney, *Porn, the Low-Slung Engine of Progress*, N.Y. TIMES, Jan. 9, 1994, at H1.

35. See generally HARRY KALVEN, JR., A WORTHY TRADITION 33-53 (1988) (describing development of obscenity definition). In one of the first modern cases in which the Court upheld a conviction for obscenity, the materials in question catered to a sadomasochistic audience. *Mishkin v. New York*, 383 U.S. 502 (1966).

36. See KALVEN, *supra* note 35, at 33-34 (noting that only justification for regulation of obscenity that withstands scrutiny is "evil of exciting the sexual fantasies" and that this justification "may be faint").

37. See *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1508, 1517 (1993) (discussing commercial speech in terms of "high" and "low" First Amendment value, where high-value speech requires compelling reasons for regulation and low-value speech does not); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542-43 (1992) (reiterating fact that "value" of speech determines scope of First Amendment protection).

that does not meet the precise definition of "obscenity," is often relegated to second-class status.<sup>38</sup>

Whether courts can define and defend a principled distinction between harmful sexual expression and valuable sexual expression is an important challenge.<sup>39</sup> *Invention* indicates, however, that the factors currently used to define that distinction<sup>40</sup> are faulty, in that some of the criteria that courts now use to label speech "low value" are in fact associated, at times, with positive effects of the speech. If *Invention* is correct, sexual expression's potential to create positive social and personal effects may come in part from its ability to shock and disturb. The fact that the expression is "offensive" or contrary to community values—part of the *Miller v. California* definition of "obscenity"<sup>41</sup>—may thus be related in some cases to positive, rather than harmful, effects. If *Invention* says anything, therefore, it is that traditional First Amendment doctrine guides us poorly in drawing a line around the Sade among us.

## II.

*Only Words* also questions existing First Amendment doctrine as it relates to sexually explicit speech. Representing MacKinnon's most thorough discussion to date of the First Amendment implications of her fight against pornography, *Words* uses two analytical strategies to argue that restrictions on pornography do not, or should not, offend the First Amendment. Much of what she says rings true, and she certainly is adept at showing how existing First Amendment doctrine contains theoretical inconsistencies. Unfortunately, however, her arguments do not reveal a dedication to any particular theoretical conception of the First Amendment. Professor MacKinnon will be satisfied, *Words* seems to imply, if either of her analytical strategies carries the day. But without an underlying theory to explain coherently the regulatory lines she wishes to draw, the result she desires may contain as many inconsistencies as present doctrine.

Her first strategy fits nicely within existing First Amendment debate, as she argues that pornography is "low value" speech that causes real

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38. See, e.g., *Alexander v. United States*, 113 S. Ct. 2766 (1993); *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); see also GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1146-69 (1986).

39. See *infra* parts III & IV (proposing considerations to be used in drawing line between harmful and valuable sexual expression).

40. See *Miller v. California*, 413 U.S. 15, 24 (1973) (outlining factors of obscenity definition).

41. *Id.*

and serious harms. Pornography has little value in traditional First Amendment terms because it is not reflective—the “message is addressed directly to the penis” (p. 21). Pornography is not speech but rather sex itself: an act rather than speech. “[I]f First Amendment protected thought is what men are doing while masturbating to pornography . . . every mental blip short of a flat EEG is First Amendment protected speech” (pp. 61-62).

Nor is pornography, according to MacKinnon, subject to the usual counteracting forces of reason and counterspeech. Pornography does not act on the conscious mind of a man. Rather, it operates on the physical level and disables thought. “Try arguing with an orgasm sometime,” MacKinnon suggests, “[y]ou will find you are no match for the sexual access and power the materials provide” (p. 17). MacKinnon overstates her point, however, as she notes later in the book that pornography’s physical power is largely contextual and that counterspeech is in fact possible. “Many believe that in settings that encourage critical distance, [the] showing [of pornography] does not damage women as much as it sensitizes viewers to the damage it does to women” (p. 108).

The harm part of the equation—coercion in the production of pornography, violence against women caused by men who read or watch it, and the spread of the lies of inequality and subordination—are almost self-evident to MacKinnon. In effect, she defines pornography in terms of its harm: it is that sexually explicit expression that subordinates women (p. 22). MacKinnon is quite specific with this definition,<sup>42</sup> but she is not so rigorous in explaining how to apply it. She clearly believes that the insipid and relatively tame photos appearing in *Playboy* fit within her definition because these

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42. The so-called Model Ordinance, authored by MacKinnon and Andrea Dworkin, proposes the following definition of “pornography”:

[T]he graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (a) women are presented dehumanized as sexual objects, things, or commodities; or (b) women are presented as sexual objects who enjoy humiliation or pain; or (c) women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or (d) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (e) women are presented in postures or positions of sexual submission, servility, or display; or (f) women’s body parts—including but not limited to vaginas, breasts, or buttocks—are exhibited such that women are reduced to those parts; or (g) women are presented being penetrated by objects or animals; or (h) women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN’S L.J. 1, 25-26 (1985). MacKinnon adds that under this definition, the use of “men, children, or transsexuals in the place of women” is also pornography. CATHERINE MACKINNON, ONLY WORDS 121-22 n.32 (1993).

women "are objectified and presented dehumanized as sexual objects or things for use" (pp. 22-23). She does not make clear, however, why sexual desire necessarily equals sexual objectification. If "pornography" included any representation of a woman as a subject of sexual desire, Professor MacKinnon's broad definition would be coterminous with all heterosexual and lesbian-oriented sexually explicit materials,<sup>43</sup> including many works of art, films, books, and dramatic productions, not to mention much of what appears on cable television as well as advertising aimed at both women and men.<sup>44</sup>

The breadth of MacKinnon's definition, however, is not the problem. The difficulty is that once all these materials are lumped together, MacKinnon describes "pornography" as having incredible power to cause terrible harms, refusing to acknowledge that distinctions might exist (both on the harm and benefit sides of the equation) among the vast array of expression included in her definition. MacKinnon suggests that "pornography makes rapists unaware that their victims are not consenting" (p. 96); her point loses force because she does not distinguish between "snuff" films (pp. 23, 35) and Victoria's Secret catalogues. Films eroticizing rape are one thing. The statue of Venus, even if it portrays the female form as subject to sexual desire,<sup>45</sup> is another.

Both the power and the incompleteness of MacKinnon's argument are evident from an analysis of her first identified harm. As described by MacKinnon, the women involved in making pornography are coerced into joining in its production (pp. 3-7, 20-21). She points to the case of Linda Marchiano, once known as "Linda Lovelace," whose biography tells the ghastly story of being coerced into making the pornographic film *Deep Throat*<sup>46</sup> (p. 21). Everyone who watches that film is said to be watching Marchiano's rape.<sup>47</sup> There can be little doubt that Marchiano's ordeal is not unique. Indeed, especially if

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43. This definition could possibly extend to homoerotic works if the images of men can be interpreted as portraying the subordination of women. See Strossen, *supra* note 3, at 1118-19 (noting that MacKinnon and Dworkin's definition could extend to homoerotic works); *supra* note 42 (setting forth MacKinnon's model pornography ordinance).

44. Her definition might also capture many works seen as valuable to feminists. See Strossen, *supra* note 3, at 1141-42. Strossen asserts that after the Canadian Supreme Court adopted the MacKinnon/Dworkin analysis of "pornography," Canadian customs officials confiscated two books written by Dworkin. *Id.* at 1142 n.171. MacKinnon, however, has suggested that Canadian customs officials have not reviewed their standards since the Canadian Supreme Court ruling. See *The First Amendment, Under Fire from the Left*, *supra* note 23, at 57.

45. See Findlen, *supra* note 30, at 64-65. In the 1550s, the Italian Ludovico Dolce described the effect of gazing on a statue of Venus: the "marble statue could by the stimuli of its beauty so penetrate to the marrow of a young man, that he stained himself . . ." *Id.* at 65.

46. LOVELACE & MCGRADY, *supra* note 25; see also MACKINNON, *supra* note 9, at 10-15.

47. MACKINNON, *supra* note 9, at 182.

one takes into account the international pornography and prostitution markets, MacKinnon's assertion of the pervasiveness of overt coercion in the sex trade may be unassailable.<sup>48</sup>

Moreover, few would oppose her argument that those who assault, rape, or murder women should be subject to tough criminal prosecution and substantial civil claims, and that they should not enjoy First Amendment protection when they are so warped as to film their crime (p. 120 n.29). No one in his or her constitutionally right mind would say that a Peeping Tom can transform his physical and emotional trespass into protected First Amendment activity simply by wearing a camera around his neck. Rape would be no different.<sup>49</sup>

More provocative, and problematic, is MacKinnon's implicit claim that *none* of the women who participate in the making of pornography has truly consented to her participation (pp. 20-21). She is correct to focus on the contortive range of options open to many women who make their livings in the sex markets (pp. 20-21). By anyone's standard, this limitation of options cannot be a good thing—certainly we need to recognize, and do something about, the fact that so many women find themselves in desperate financial, educational, and domestic situations.<sup>50</sup> Also uncontroversial, it seems, is MacKinnon's unstated assumption that people's preferences and choices adjust to their situations, no matter how unfortunate.<sup>51</sup>

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48. See Marliese Simons, *The Littlest Prostitutes*, N.Y. TIMES, Jan. 16, 1994 (Magazine), at 31.

49. Cf. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991) (striking down New York law restricting profits that could be made on books that were products of criminal activity). As MacKinnon correctly points out (pp. 120 n.29, 145-46 n.63), *Simon & Schuster* does not preclude civil claims for victims of rape or assault when those acts are filmed: *Simon & Schuster* did not concern crimes that were committed so that they could be written about, nor did it bar recovery for damages for mental anguish, injury to reputation, or invasion of privacy. Moreover, the Court specifically held that the state's interest in compensating victims was compelling, though the statute in question was not narrowly tailored to advance that objective. *Simon & Schuster*, 112 S. Ct. at 512.

In addition, the Court's decision in *New York v. Ferber*, 458 U.S. 747 (1982), suggests that the government may punish the distribution of materials made through violence, in addition to the underlying conduct. In *Ferber*, the Court upheld a statute prohibiting the distribution of child pornography, primarily on the ground that the government had an interest in preventing the underlying conduct, i.e., the sexual exploitation of children. *Ferber*, 458 U.S. at 759; see also Kagan, *supra* note 3, at 891. The case to be distinguished on this point is *New York Times Co. v. United States*, 403 U.S. 713 (1971) (allowing publication of so-called Pentagon Papers despite fact that papers had been stolen from Pentagon).

50. See Martha Nussbaum, *Aristotle, Feminism, and Needs for Functioning*, 70 TEX. L. REV. 1019, 1028 (1992) (arguing that feminism should be concerned with issues of "poverty, oppression, inequality, and the frustration of capability in the lives of human beings the world over").

51. See Martha Nussbaum & Amartya Sen, *Introduction to THE QUALITY OF LIFE 5* (Martha Nussbaum & Amartya Sen eds., 1993) ("For in most parts of the world women do not have the same opportunities as men. These inequalities—and the deficiencies in education and experience often associated with them—tend to affect women's expectations and desires, since it is difficult to desire what one cannot imagine as a possibility."); see also MARTHA NUSSBAUM, *LOVE'S KNOWLEDGE* 62 (1990) (stating that people "adjust their preferences to what their actual



The tough question is what this all means for First Amendment theory. Some women, certainly, enjoy pornography or choose to participate in its production.<sup>52</sup> Yet, MacKinnon believes that because "all pornography is made" and, she must add, experienced, "under conditions of inequality based on sex" (p. 20), the choices of women who participate in its production and the preferences of women who enjoy reading or watching it are to count for nothing.<sup>53</sup> This may be correct in some cases, but it demands more of an argument than MacKinnon provides.

Indeed, the notion that women should be restricted from making choices that might cause harm to themselves and others appears inconsistent with feminist concerns. Consider the *Johnson Controls* case,<sup>54</sup> where some feminists fought to protect the right of women to hold jobs that involved exposure to levels of lead dangerous to the workers themselves and, if they were pregnant, their fetuses.<sup>55</sup> These feminists argued that the workers themselves should be offered the choice because many of them were in dire economic straits and desperately needed the higher wages the more dangerous jobs offered.<sup>56</sup> In effect, the limited alternatives available to women were

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situation makes possible"); Nussbaum, *supra* note 27, at 213 (suggesting that habits and lifestyles develop in conjunction with desires); cf. WILLIAM A. GALSTON, *LIBERAL PURPOSES* 170 (1991) (noting that state of human good cannot depend merely on internal states of feeling); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 162-64, 185-91 (1993) [hereinafter SUNSTEIN, *THE PARTIAL CONSTITUTION*] (discussing phenomenon of individuals' preferences adjusting to unjust background conditions); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 64-67 (1990) (discussing endogenous preferences).

52. See Strossen, *supra* note 3, at 1138-40 (discussing women who choose to participate in production of pornography); *id.* at 1133-34 (asserting that some women find even violent pornography "liberating" because it allows for fantasies that involve breaking sexual taboos without responsibility).

53. See MACKINNON, *supra* note 9, at 7-8 ("Because the inequality of the sexes is socially defined as the enjoyment of sexuality itself, gender inequality appears consensual. . . . [H]eterosexuality . . . organizes women's pleasure so as to give us a stake in our own subordination.").

54. *Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991).

55. The Supreme Court agreed, saying that even when work may harm the fetus, "the decision . . . to work while being either pregnant or capable of becoming pregnant [is] reserved for each individual woman to make for herself." *Id.* at 206; see also *id.* at 211.

56. See Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1225, 1241 (1986) (noting that fetal vulnerability policies, like historical statutes "protecting" women from certain kinds of work or long work hours, are based in part on belief that women are not competent decisionmakers). This issue of the competency of women to make decisions was indeed a factor in the *Johnson Controls* case. The Seventh Circuit, whose decision the Supreme Court overturned, had noted that the mandatory policy of excluding women from hazardous jobs was necessary because a voluntary program had been unsuccessful. *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 876-78 (7th Cir. 1989) (en banc), *rev'd*, 499 U.S. 187 (1991). Judge Cudahy's dissent pointed out that the woman at risk was the best decisionmaker, given the poor choices available: "What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored?"

offered to the Court as an added reason to *respect*, rather than override, the women's right to choose. After *Johnson Controls*, to decry the fact that women have only a limited range of choices does not mean that a woman should be prevented from choosing the least bad alternative of the available options.

Principled distinctions could be drawn between *Johnson Controls* and the pornography settings, but MacKinnon neither identifies nor addresses them. This goes to a weakness of the book: it is permeated with notions of adaptive preferences and warped consent, but these notions are left vague and undefined. MacKinnon offers no organizing theory to explain when and when not to respect a woman's choices. To implement her First Amendment recommendations in a principled way without such a theory would be quite difficult.

MacKinnon's second strategy for regulating pornography pushes the boundaries of existing First Amendment doctrine, arguing that the Constitution's equality norms should be balanced against its free speech norms. MacKinnon analogizes pornography to speech made actionable as sexual harassment or racial discrimination (pp. 45-68), speech which, she says, has only recently been considered to have First Amendment implications (p. 45). Discrimination law, she points out, considers racist or sexist expression to be evidence of the mental intent necessary to make discrimination a civil rights violation. "[B]ecause of their mental location and content, these words are not only potentially discriminatory in themselves; they are part of the proof that other acts are discriminatory." (p. 51). Indeed, "[u]nder discrimination law, such expression is not political opinion; it is a smoking gun" (p. 50).

MacKinnon argues that the oft-asserted reasons why pornography is protected speech—the autonomy of the speaker, the mental intermediation, the nonneutrality of its regulation—do not explain why pornography is protected and words that constitute sexual and racial discrimination are not (p. 54). Her best explanation for the apparent inconsistency is that equality is "crucially guaranteed" in the workplace and not elsewhere (p. 54). MacKinnon would extend the influence of the equality norm to speech issues in society at large because the harm of sexist and racist speech does not stop at the office door or factory gate. "Racial and sexual harassment," she says, "promote inequality, violate oppressed groups, work to destroy their social standing and reputes, and target them for discrimination from contempt to genocide." (p. 56).

The argument that speech issues should be interpreted in the light of equal protection guarantees is a provocative and valuable development in the debate about free speech doctrine.<sup>57</sup> Yet this contention's persuasiveness is hampered in MacKinnon's account by her apparent disregard for the free speech norms to be balanced against the equality norms. In MacKinnon's view, the equality norms seem not to balance but to dominate: "the current legal distinction between screaming 'go kill that nigger' and advocating the view that African-Americans should be eliminated from parts of the United States needs to be seriously reconsidered . . . ." (p. 108).

With such simple strokes, MacKinnon does away with major First Amendment concepts, among them the important distinction between incitement and advocacy, and the key difference between criminal threats and offensive ideas subject to counterspeech.<sup>58</sup> Having done so, she does not tell the reader with what to replace these concepts. She refuses to explain why she believes the First Amendment is important—if she does so believe—or which First Amendment theory she would adopt.

MacKinnon's genius is to show the disturbing inconsistencies within existing doctrine. She seems correct in pointing out that many of the ostensible reasons for protecting pornography are not applied to other settings. Unfortunately, without an organizing theory of her own, the doctrinal dissonance she highlights could be resolved against her just as easily as in her favor. The fact that there are inconsistencies means only that present doctrine needs adjustment or replacement. If, as MacKinnon cynically predicts, "speech *will* be defined so that men can have their pornography," (p. 90) what makes her think that the doctrine will be adjusted or replaced in the way she suggests?

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57. MacKinnon is not alone in developing this argument. See, e.g., Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151-61 (1992) (applying equal protection arguments to hate-speech debate); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 134 (1982) (advocating civil tort remedy for racial insults as means of protecting citizens' rights to equality); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989) (recommending legal sanctions to remedy racist speech).

58. See *Whitney v. California*, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring). In his famous discussion of the role of counterspeech, Justice Brandeis noted:

But even advocacy of violation [of the law], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.

*Id.*

Witness Justice Scalia's recent opinion in *R.A.V. v. City of St. Paul*.<sup>59</sup> In *R.A.V.*, the Court considered an ordinance that punished the narrow category of so-called "fighting words" that also constituted racist or sexist hate speech.<sup>60</sup> Historically, the fighting-words model has been a narrow one, including direct threats that would provoke a reasonable "man" to start a fight.<sup>61</sup> Traditionally, the Court had held that fighting words were "of such slight social value" that the "prevention and punishment" of them were "never . . . thought to raise any Constitutional problem."<sup>62</sup>

In *R.A.V.*, the Court faced some of the apparent inconsistencies that MacKinnon highlights. On one side stood the traditional rhetoric of heightened scrutiny when statutes regulate speech on the basis of content. The St. Paul ordinance was certainly content based, because the subset of fighting words regulated was selected on the basis of its racist or sexist substance. But as MacKinnon rightly points out, on the other side of the balance, begging reconciliation, were antidiscrimination statutes like title VII of the Civil Rights Act of 1964,<sup>63</sup> which make similar words actionable on the basis of their content.<sup>64</sup> *R.A.V.*, then, was a battle of competing analogies. Would the Court uphold the ordinance on the basis of a comparison with title VII or strike it down on the basis of a comparison with impermissibly content-based statutes, such as the anti-flag-burning statute struck down in *Texas v. Johnson*?<sup>65</sup>

Given MacKinnon's cynicism, the fact that *R.A.V.* resolved the apparent tensions by striking down the ordinance, thereby narrowing the protections for women and minorities,<sup>66</sup> must not have surprised her. The Court held that the ordinance was not only content-based,

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59. 112 S. Ct. 2538 (1992).

60. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2541 (1992).

61. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73 (1942).

62. *Id.* at 571-72.

63. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1988) (providing for equal employment opportunity).

64. *Id.* § 2000e-2 (outlawing employment-related discrimination "because of . . . race, color, religion, sex, or national origin").

65. 491 U.S. 397 (1989).

66. In fact, Scalia's majority opinion hinted that the Court considered most of the words to be regulable under title VII as "fighting words" themselves. *R.A.V.*, 112 S. Ct. at 2546 ("Sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices."). If it were followed, such a suggestion would eviscerate title VII because most of the words regulable under title VII do not easily fall within the fighting words category. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that "stereotyped remarks can certainly be evidence that gender played a part" in employment decision). Comments at issue in *Price Waterhouse* included a partner's comment that the plaintiff should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." *Id.* at 272 (O'Connor, J., concurring). Nothing in title VII's elaborate procedural mechanism, however, required the plaintiff to prove that she felt like hitting her bosses.

but viewpoint-based as well.<sup>67</sup> In the face of these doctrinal touchstones, the analogy with title VII was distinguished away.<sup>68</sup>

MacKinnon presumably would dismiss the worries about content and viewpoint neutrality (p. 138 n.11). Certainly, the harm done by burning a cross in the yard of an African-American family is linked *directly* with the content of that expression, and MacKinnon is certainly correct that the concepts of content and viewpoint neutrality are often applied inconsistently.<sup>69</sup> It is hardly inconceivable that *R.A.V.* might have come out the other way. But MacKinnon must admit that the concepts of content and viewpoint neutrality are embedded in First Amendment doctrine and that they embody a healthy skepticism for government meddling in public debate.<sup>70</sup> They will not likely be jettisoned without powerful reasons, and they will not likely be disregarded in specific cases without a coherent theory to explain the exceptions. In other words, until MacKinnon is prepared to advance a First Amendment doctrine that resolves the tensions and inconsistencies in existing practice rather than simply dismissing them, she runs the risk that *R.A.V.* will be only the first of many debilitating opinions.<sup>71</sup>

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67. *R.A.V.*, 112 S. Ct. at 2547 ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.").

68. See *id.* at 2545-47 (explaining that title VII survives constitutional scrutiny because it regulates entire category of speech for viewpoint-neutral reasons, but that St. Paul ordinance fails because it regulates only certain types of speech based on viewpoint expressed); *id.* at 2557-58 (White, J., concurring) (arguing that majority's asserted rationale to distinguish St. Paul ordinance from title VII "does not hold up under close examination").

69. See, e.g., Kagan, *supra* note 3, at 876 n.13 (citing *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 330-32 (1986), and *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 569-71 (1980), as instances when Court upheld statutes limiting speech notwithstanding viewpoint preferences embedded in statute). Consider also the laws against obscenity, which allow restriction of speech that expresses a particular (offensive) opinion about sexual matters. *Id.*; see MACKINNON, *supra* note 9, at 212.

70. When the government regulates content, there is arguably a greater risk that the restriction in fact stems from an illegitimate motive. See SUNSTEIN, *supra* note 3, at 169-70.

71. This trend may have already begun in the Courts of Appeals. See, e.g., *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993) (en banc), *cert. denied*, 128 L. Ed. 2d 199 (1994). There, the Eighth Circuit read *RAV* to require the use of the strict *Brandenburg v. Ohio* standard of review in a cross burning case involving 18 U.S.C. § 241, a civil rights statute criminalizing conspiracies to prevent citizens from exercising their legal rights. See *Lee*, 6 F.3d at 1300-02 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). Even though the criminalization of conspiracies has long been insulated from First Amendment scrutiny, the court depended on the strict *Brandenburg* test because the government's interest in applying the statute was related to the content of the expression. By the Eighth Circuit's standards, therefore, it appears that civil rights laws can only be applied to punish racist or sexist speech that "is directed to inciting or producing imminent lawless action, and is likely to produce such action." *Id.* at 1302 (quoting *Brandenburg*, 395 U.S. at 447). This, of course, is a much stricter standard than is usually applied to civil rights statutes. Cf. *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993) (applying lesser standard of *United States v. O'Brien*, 391 U.S. 367 (1968) to similar civil rights statute), *cert. denied*, 114 S. Ct. 1369 (1994).

## III.

*Invention of Pornography* and *Only Words* embody many of our conflicting judgments about sexually explicit expression. Both books suggest, moreover, that conventional First Amendment analysis does not help us reason well in resolving these tensions. What is needed is a novel perspective on the First Amendment that might better guide our thinking about pornography and other tough free expression issues. This new view of the Free Speech Clause would hold as its core value the importance of the development of individual human capacity and of individual self-definition.

I provisionally call this view an "aristotelian" First Amendment.<sup>72</sup> To date, this view of the First Amendment is largely undeveloped and finds no defense in legal literature. This Part will explain how an aristotelian First Amendment might work and suggest some of the conflicts within it. In Part IV, I propose how such a view of the First Amendment might aid in the analysis of free speech issues like pornography.

The Free Speech Clause of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech"—is tantalizingly simple. It is easy, therefore, to state the interpretive focus of First Amendment theory: to seek out the proper definition of the key phrase "the freedom of speech." In absolutist analyses, "freedom" is defined broadly, as synonymous with individual free will or autonomous discretion,<sup>73</sup> making the clause appear to provide complete or

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72. The decision to call this view of the First Amendment "Aristotelian" is based more on the writings of Martha Nussbaum, who has written much on Aristotle, *see infra* note 78, than on Aristotle himself. Much work needs to be done to ground this view in Aristotle's writings and in the broader Aristotelian scholarship. In some respects, calling this theory of the First Amendment "Aristotelian" may be a disservice to both the theory and to Aristotelianism because the theory need not be burdened with the flaws of Aristotelianism that do not bear on the First Amendment debate, and vice versa. To be sure, the view that the First Amendment should be seen as containing within it a dedication to a particular concept of the human "good" might not be inconsistent with some liberal accounts. *Cf.* GALSTON, *supra* note 51, at 170-71 (arguing that liberalism presupposes account of human good, and that such account should include theory of conditions, capacities, or functionings). To the extent that the view of the First Amendment presented here may be inconsistent with Aristotelianism, the reader may instead call it "Theory X" and evaluate it on its own terms. Because of the provisional and tentative nature of this label, I refer to it as aristotelian—that is, derived from, but not intimately related to formal Aristotelianism—for the remainder of the essay.

73. *See, e.g.,* MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 11-12 (arguing that free speech serves "only one true value . . . individual self-realization" and that recognition of individual free will is inherent in First Amendment); Charles Fried, *The New First Amendment Jurisprudence: Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (suggesting that free speech doctrine is founded on personal autonomy).

nearly complete protection for "speech."<sup>74</sup> In effect, such a broad definition for the word "freedom" transforms the First Amendment into a guarantee of the "liberty to speak."

The First Amendment absolutist assumption that "freedom" refers to the individual free will of the speaker captures what is certainly a central value underlying modern Free Speech doctrine.<sup>75</sup> Absolutism has much to say in its favor, and a number of variations on the basic theme are beyond the scope of this essay.<sup>76</sup> Generally, however, one could suggest that the absolutist position is flawed in at least one crucial respect: it defers completely to the unchallenged preferences, or what one might call the "simple autonomy," of speakers, and does not acknowledge that preferences can be, for example, based on addictions, derived from unjust background conditions, or founded on grossly unconsidered judgments.<sup>77</sup>

The aristotelian First Amendment would be less deferential to unchallenged, individual preferences, basing its view of "freedom" on a version of autonomy informed by notions of human capacity.<sup>78</sup> In

74. The distinction between speech and conduct then becomes the principal doctrinal question. See, e.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 880-81 (1963) (assuming that "freedom of expression" means that, as general proposition, society may not control individual expression, but that there is "fundamental distinction" between expression and conduct); *id.* at 917 (noting that "whole theory" of freedom of expression depends on this distinction); *id.* at 932 (suggesting that problems with absolutist applications can be solved in most cases by defining offending speech as conduct); see also REDISH, *supra* note 73, at 18 (discussing speech/conduct dichotomy).

75. See SUNSTEIN, *supra* note 3, at 137 (recognizing popular viewpoint that First Amendment primarily, if not exclusively, protects individual autonomy).

76. For a brief overview of this debate, see SUNSTEIN, *supra* note 3, at 137-39.

77. See, e.g., REDISH, *supra* note 73, at 12 (arguing that any "external determination" that certain kinds of expression serve First Amendment values more than others is itself "a violation of the individual's free will"). Cf. NUSSBAUM, *supra* note 51, at 62. Nussbaum writes:

Aristotle does not think that the bare fact that someone prefers something gives us any reason at all for ranking it as preferable. It all depends who the someone is and through what procedures the ranking has been effected. The rankings of the person of practical wisdom will be critical of our norms, both personal and social; what the mad or childish person prefers counts little or nothing. Nor are the judgments of severely deprived people to be trusted: for frequently they will adjust their preferences to what their actual situation makes possible. Value is anthropocentric, not fixed altogether independently of the desires and needs of human beings; but to say this is very far from saying that every preference of every human being counts for evaluative purposes.

*Id.* (footnote omitted); see also GALSTON, *supra* note 51, at 170-71 (arguing that liberal notion of human good does not look only to preference satisfaction).

78. Martha Nussbaum's work is central here. See, e.g., Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in THE QUALITY OF LIFE, *supra* note 51, at 242, 246 (examining Aristotle's list of human "virtues," including courage, moderation, justice, and generosity, and its relation to "human capacity"); Nussbaum, *supra* note 50, at 1022-24 (stating Aristotelian belief that each person's human worth is defined by his or her "own reflection or choice"); Nussbaum, *supra* note 27, at 220-26 (discussing capacities of human mind and body and their relationship to Aristotelian theory); see also GALSTON, *supra* note 51, at 170 ("An account of the human good must be a theory of conditions, capacities, or functionings, not just internal states of feeling.").

other words, an aristotelian description of autonomy would be more full-bodied than that of an absolutist, positing that a person cannot be truly autonomous unless she has developed a "separateness"<sup>79</sup> that includes an individual capacity for choice, thought, reflection, and emotion. The process of developing this capacity is, in a sense, the process of self-definition; it is the act of becoming unique. Without this unique separateness, this autonomy, true freedom is impossible.

The word "freedom" in the First Amendment could therefore be read to refer to this rich, capable, "Aristotelian" autonomy. The First Amendment, then, would be read to protect the freedom that *comes from* speech rather than, or in addition to, the liberty to speak. The constitutional dialogue surrounding an aristotelian First Amendment would focus on the development of a system of expression that respects, builds, and protects this freedom under the Constitution.<sup>80</sup>

More particularly, an aristotelian First Amendment would hold that self-definition is tied inextricably to experiencing the expression of others while developing one's own methods of expression. Expression would be seen as essential to self-actualization; without it, citizens would lack the opportunity and capacity to live a full, robust, and unique life.<sup>81</sup> The First Amendment would guarantee one of the necessary conditions for citizens to develop their capacity to live well—to live, in the words of Henry James, as people "finely aware and richly responsible."<sup>82</sup>

Undoubtedly, most speech and expression, including sexually explicit expression, can be seen as encouraging and cultivating this freedom. Generally, then, the aristotelian First Amendment would be

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79. Nussbaum, *supra* note 27, at 223-25.

80. This is, in effect, what the political speech theorists seek to do—to shift the debate from a consideration of what constitutes "speech" to an examination of what kinds of speech further the "freedom" guaranteed by the First Amendment. Methodologically, then, up to such a point, a political speech theorist and an Aristotelian would be in agreement. They would differ, of course, in holding different views of "freedom." A political speech theorist would seek to protect that expression helpful to a functioning democracy, *see, e.g.*, Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986), while an Aristotelian would seek to protect that expression conducive to individual development and capacity-building. *See supra* note 78.

81. This theory would accept the classical distinction between thought and action in that it would protect discussion and thought pursuant to some actions even if the actions themselves were not free from regulation. A book graphically describing the life of a prostitute, for example, might be protected by an aristotelian First Amendment even if prostitution itself were not. The acceptance of this thought/deed distinction is of course important in all theories of free speech. *See supra* note 74. The distinction is rooted in the text of the First Amendment itself, which protects the freedom that comes from "speech," leaving conduct to be protected under the Fifth Amendment's protection against deprivations of "liberty." *See REDISH, supra* note 73, at 17-18; Emerson, *supra* note 74, at 880-81; *see also* Strossen, *supra* note 3, at 1129 (asserting that MacKinnon and others dismiss thought/deed distinction).

82. Henry James, *The Princess Casamassima* (New York, 1907-09) I.169, *quoted in* NUSSBAUM, *supra* note 51, at 84.



quite protective of expression. In some limited contexts, however, some narrow types of speech are plausibly considered as constrictive of this freedom. The aristotelian First Amendment would therefore hold at its core speech that cultivates this freedom, and allow expression that does not cultivate this freedom to be regulated at a lower level of justification.

Although an aristotelian First Amendment may yet require development, threads of a capacity-based notion of freedom can be found in some of the most influential First Amendment writings. Justice Brandeis' famous concurrence in *Whitney v. California*<sup>83</sup> had such a flavor:

Those who won our independence believed that the final end of the State was to make men *free to develop their faculties*; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and . . . that *the greatest menace to freedom is an inert people* . . . . But they knew that order cannot be secured merely through fear of punishment for its infraction; that *it is hazardous to discourage thought, hope and imagination* . . . .<sup>84</sup>

Professor Alexander Meiklejohn also assumed that an Aristotelian populace attended his famous metaphorical town meeting,<sup>85</sup> though he did not acknowledge them as such. The "success of self-government," Meiklejohn suggested, depends on "cultivating the general intelligence."<sup>86</sup> He argued that the "freedom of mind" that "befits members of a self-governing society" could be established "by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bringing them together in activities of communication and mutual understanding."<sup>87</sup> Meiklejohn even appears to say that the individual's capacity to deliberate, a core value in an aristotelian First Amendment, is all-important: "the attempt to know and to understand has a unique status, a unique authority, to which all other activities are subordinated."<sup>88</sup>

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83. 274 U.S. 357 (1927).

84. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added).

85. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22-25 (1948).

86. *Id.* at 17.

87. *Id.* at 16-17.

88. *Id.* at 69. This description sounds very much like Nussbaum's descriptions of government actions necessary to encourage Aristotelian development. According to Nussbaum, Aristotle saw the purpose of political institutions as making "available to each and every citizen

In one sense, then, an aristotelian theory of the First Amendment would do for self-definition what Meiklejohn<sup>89</sup> and other political speech theorists<sup>90</sup> think the First Amendment does for political self-determination. Under a political theory, the First Amendment establishes a system of expression that protects and facilitates the process of political deliberation and debate,<sup>91</sup> the assumption being that society will advance as it deliberates. In contrast, an aristotelian First Amendment would establish a system of expression that protects and facilitates the process of individual self-definition by encouraging critical reflection, allowing exposure to the ideas of others, and nurturing the development of individual forms of expression. The aristotelian theory assumes that each individual advances toward self-capacity and develops self-identity as she is challenged to be deliberative, unique, and self-aware. Personal autonomy is not a means to an end, or an "instrument of collective self-determination."<sup>92</sup> Autonomy, real autonomy, is the end.

An aristotelian theory of free expression might result in many of the same outcomes as either the political or autonomy-based theories. For example, an aristotelian First Amendment, like a political model of free speech, would value the richness of political deliberation. An Aristotelian, however, would value such expression not for its value to the political process alone, but also because of its usefulness to individuals' intellectual, political, and social self-definition. In

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the material, institutional, and educational circumstances in which good human functioning may be chosen." Nussbaum, *supra* note 27, at 203. Like Meiklejohn, the Aristotelian recognizes the centrality of education to a successful political design. See *id.* at 233 ("[No] part of the political design occupies the Aristotelian as much as education."); Nussbaum, *supra* note 51, at 102 (discussing desirability of providing "universal access to higher education" to promote democracy); cf. MEIKLEJOHN, *supra* note 85, at 102-03 (stating that protection of public discourse is crucial to formation of well-informed and well-educated populace that is capable of effective self-governance).

89. MEIKLEJOHN, *supra* note 85, at 25 (stating that success of system of self-governance is contingent on ability of individual citizens to acquire knowledge and understanding).

90. See, e.g., SUNSTEIN, *supra* note 3, at 243 (recognizing utility of public discussion and deliberation and significant contribution of free expression to improved public decisionmaking); SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 51, at 199-203, 257-70 (contending that primary objective of First Amendment "is to protect democratic politics from government"); Fiss, *supra* note 80, at 1407 (stating that democracy and its assurance of "collective self-determination" is premised on opportunity to engage in vigorous and uninhibited public debate).

91. See Fiss, *supra* note 80, at 1407 (positing that free speech is "one of the essential preconditions of an effective democracy"). The distinction between protecting political speech itself and protecting a system of public debate is not always clear and requires careful thought. Cf. SUNSTEIN, *supra* note 3, at 37 (suggesting that constitutional validity of legal rules should be assessed in terms of whether rules "promote greater attention to public issues"); *id.* at 130 (defining "political speech," and proposing that it is "high value"); Fiss, *supra* note 80, at 1419 (recognizing that in political model of First Amendment, political speech will often be on both sides of equation and therefore might need to be regulated in some cases to further system that maximizes public debate).

92. Fiss, *supra* note 80, at 1410.

addition, because a respect for individual choice is crucial to the process of self-definition,<sup>93</sup> an aristotelian theory would often align with the absolutist theory and defer to private ordering of speech in the absence of strong reasons to question the integrity of citizens' preference formation.

On the other hand, an aristotelian First Amendment would result in different outcomes than either theory in several ways. It would likely result in more protection of nonpolitical speech (including literature, music, art, and film) than would a political theory.<sup>94</sup> At its core it would preserve expression that is important to individuals in their struggle to become more free, even if portions of that freedom were only imperfectly related to politics. Sexually explicit materials that had nothing to do with politics, but were conducive to sexual development and identity, for example, might arguably be central to an aristotelian First Amendment.

In contrast with the absolutist position, an aristotelian stance could acknowledge that not all expression is equally efficacious in developing self-capacity,<sup>95</sup> that some speech crowds out other speech, that some expression undercuts rather than builds capacity, and that the rights of the speaker sometimes encroach on the rights of the listener.<sup>96</sup> These admissions would not create dilemmas within an aristotelian First Amendment framework as it might in an absolutist scheme. Indeed, in an aristotelian system of free expression, it would be extremely surprising if the rule were simply "the more speech the better." As in a political theory that would regulate some speech rights in the interest of overall societal deliberation,<sup>97</sup> the aristotelian theory would allow some regulation of individual preferences when

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93. Nussbaum, *supra* note 27, at 238-39 (discussing importance of choice in Aristotelian social democracy and ways in which citizens can exercise freedom to choose).

94. In fact, an aristotelian First Amendment might be more protective than even a "strong" conception of political speech, which seeks to ensure that the citizenry can develop the requisite intellectual abilities necessary for self-government. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57 ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.").

95. Consider, for example, Redish's claim that "in some sense all communicative activity fosters the same ultimate intellectual values embodied in the first amendment." REDISH, *supra* note 73, at 264 (footnote omitted).

96. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 368-71 (1991) (exploring importance of listener in First Amendment theory).

97. See Fiss, *supra* note 80, at 1419-20 (observing that improvement of public discourse sometimes requires regulation of certain types of expression). Even an occasional absolutist will allow for such a possibility. See Emerson, *supra* note 74, at 948 (admitting that in some cases, speech restrictions designed to "purify the democratic process" may "by limiting the freedom of some, expand the freedom of a greater number.").

necessary to develop a society more conducive to individuals' development of aristotelian capabilities.<sup>98</sup>

Additionally, while the absolutist First Amendment suggests that the government is the enemy of free speech and that citizens should be free of its control,<sup>99</sup> an aristotelian First Amendment would suggest that risks to true autonomy come from societal, as well as governmental, pressures. True autonomy is endangered not only by government meddling, but also by the intellectual and emotional automatism that results when individuals do not have the opportunity to self-define separately from the status quo. To the extent that this status quo is a product of legal structures, the "freedom of speech" would be legitimately concerned with protecting the individual's right to define herself independently of it.<sup>100</sup> Indeed, an Aristotelian's nightmare is a nation in which most of its citizens believe that they live in a free society while, in truth, few of them have the capacity or opportunity to self-define separately from conventional morality and norms. Such a nation would be analogous to a society of two-dimensional creatures unable to imagine a third dimension, and who find themselves shocked and offended by those who tell them that expansion along a third axis would make life more fulfilling and robust.

The aristotelian First Amendment, therefore, would be less confident about the common (pre-New Deal) distinctions in First Amendment law between government inaction and action, or between positive and negative rights.<sup>101</sup> It might be that the primary question for the purposes of First Amendment analysis would be whether the legal structure created by the government imposed constraints on protected expression, that is, expression conducive to individual self-definition and capacity-building. Here, also, a supporter of an aristotelian First Amendment would agree with political speech theorists in being less reluctant to accept positive government action,

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98. This point is analogous to the Supreme Court's reasoning in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), where the Court upheld the "fairness doctrine," which required broadcasters to attend to public issues and allow equal time for opposing viewpoints. *Id.* at 375. The Court held that the fairness doctrine "would enhance rather than abridge the freedoms of speech and press," *id.*, because "[i]t is the right of the viewers and listeners, not the right of the broadcasters which is paramount." *Id.* at 390.

99. See SUNSTEIN, *supra* note 3, at 5.

100. This is similar to the political theorists' argument that First Amendment scrutiny should apply when legal structures give private entities the power to restrict political speech. See, e.g., SUNSTEIN, *supra* note 3, at 43-46 ("The real issues are that public authority creates legal structures that restrict speech, that new exercises of public authority can counter the existing restrictions, and that any restrictions, even those of the common law, should be assessed under constitutional principles because they are restrictions.").

101. See Fiss, *supra* note 80, at 1413-14 (discussing traditional view, which equates "liberty with limited government").

within certain constraints.<sup>102</sup> Just as the police are required to control an angry mob trying to impose a heckler's veto on a controversial speaker, an aristotelian First Amendment might *require* the government to act when necessary to guarantee and safeguard the conditions essential to fulfill the goals of the First Amendment.<sup>103</sup>

Of course, an aristotelian First Amendment doctrine, as all other theories, will face tough intermediate cases. Without a deeper description of the doctrine and a thorough analysis of its implications, the actual impact of such a theory on First Amendment practice is difficult to evaluate. Even with such a description and analysis, the theory's edges might be blurry, raising institutional concerns about judicial competency, predictability of results, and appropriateness of remedies.<sup>104</sup>

Nevertheless, as a preliminary matter, one can identify two salient tensions within the theory. I mention these as problems to be solved; while I suggest some tentative responses, these are indeed tentative—I will not pretend to propose solutions here.

First, if the First Amendment provides some of the institutional prerequisites necessary to give citizens the capacity to choose to function well, allowances must be made for those who choose not to so function.<sup>105</sup> One risk in Aristotelianism generally is to misinterpret a choice *not* to flourish as an *inability* to flourish. In the First Amendment context, one could imagine citizens choosing to watch, read, or listen to expression that constrained or harmed them in certain ways—violent child pornography, or day-long reruns of *Wheel of Fortune*, for example. There may at times be conflict, both real and apparent, between, on the one hand, a respect for choice—central to

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102. SUNSTEIN, *supra* note 3, at 47-48 (discussing instances in which positive government regulation is appropriate to facilitate free expression); FISS, *supra* note 80, at 1415-16 ("Just as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship.").

103. This recognition that the government must sometimes act to ensure the preconditions for free expression is not new. For an explanation from a revered "absolutist" source, see EMERSON, *supra* note 74, at 902-04, 946-54.

104. Here, again, I would agree with Owen Fiss, who states:

The problem of remedies and the limits on institutional competence may, in the last instance cause the Justices . . . to retreat from such an ambitious undertaking, but such a failure of nerve, or exercise in prudence, should be recognized for what it is: a compromise, and not a vindication of the first amendment and its deepest democratic aspirations.

FISS, *supra* note 80, at 1424.

105. See NUSSBAUM, *supra* note 27, at 234-40 (discussing importance to pluralistic society that government permit citizens to make choices based on welfare and virtue and refrain from imposing favored value system on citizens).

Aristotelianism<sup>106</sup> as well as liberalism,<sup>107</sup> and on the other hand, the constitutional interest in building the *capacity* for choice, a primary goal in an aristotelian First Amendment.<sup>108</sup> To be sure, this tension may easily be overstated.<sup>109</sup> But the difficulty that does exist is magnified by the fact that because preferences adapt to poor situations, and the capacity to choose requires certain conditions that may or may not exist, what might seem to be a poor choice is sometimes the inability to choose in disguise.<sup>110</sup> This tension is quite difficult to assess in the abstract. As a preliminary matter, it is evident that the institutional preconditions for building capacity are still quite incomplete in our society. Thus, much work might be done to make aristotelian autonomy more possible for most citizens before this tension with respect for choice becomes a real obstacle. In other words, there is so much work to be done, that some can be done before we need to draw the toughest distinctions.

The second tension within the theory will inevitably arise when certain First Amendment activities promote some individuals' self-development but harm or limit others'. This is the tension that goes unrecognized in most absolutist constructions,<sup>111</sup> but which an aristotelian theory would have to consider and resolve.<sup>112</sup>

One might tentatively suggest three responses. First, an aristotelian First Amendment would be concerned with the construction of a *system* of expression that promoted *individual* capacity-building. Structural or institutional concerns probably would require some regulation of individual expression in some cases. This is no different from any other free speech theory, however. Even in an absolutist's

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106. See Nussbaum, *supra* note 27, at 238-40 (illustrating importance of choice in Aristotelian democracy by providing examples of Aristotelian citizens' decisionmaking processes).

107. See GALSTON, *supra* note 51, at 183-88 (identifying "choice" as one of "three basic liberal claims"); see also Nussbaum, *supra* note 50, at 1027 (discussing "fundamental respect for choice" indicative of both liberal and Aristotelian theories).

108. See Nussbaum, *supra* note 27, at 228 (pointing to Aristotelian goal of creating system for facilitating informed choice over citizen's entire life).

109. Nussbaum, *supra* note 27, at 238-40.

110. See Nussbaum, *supra* note 27, at 238 (explaining difference between passive choice, or decision to remain silent, and lack of ability or opportunity to choose). This, by the way, must be what MacKinnon believes is occurring when women "enjoy" watching or participating in subordinating pornography: society has put them in a position where they are unable to choose wisely. MACKINNON, *supra* note 42, at 5-6.

111. See, e.g., Fried, *supra* note 73, at 233, 236, 242 (noting that although autonomy principle might permit regulation of *acts* that hurt others, it would not allow regulation of *expression* on that basis because right of speaker always prevails).

112. An analogous tension arises in the political model of the First Amendment. If political speech is at the core of First Amendment protection, there will be instances when the political speech of some will crowd out or harm the ability of others to engage in political debate. See Fiss, *supra* note 80, at 1419 (analyzing tension that results when expression of political opinion squelches other points of view).

world, the right of a newspaper to decide whether to publish an op-ed piece limits the writer's ability to express her views in the way she prefers.<sup>113</sup> The absolutist theory requires that the newspaper's desire not to speak trumps the writer's desire to speak. This result may or may not be correct,<sup>114</sup> but the fact that someone's speech has been "sacrificed" by the theory is evident. An aristotelian First Amendment would face similar balancing acts.

A second response would be to note that an individual's aristotelian capacity, i.e., autonomy, includes within it a concern for the flourishing of others. According to Martha Nussbaum, Aristotle was prepared to say that a human being who does not regard his or her life as, in a fundamental way, a life lived with and toward others, would not be regarded as good or capable.<sup>115</sup> Humans are not solitary beings; we are made more capable when we are able to affiliate with others who are definite individuals, each a "separate chooser of a life plan."<sup>116</sup> In this view, in a situation in which one person's expression harmed another in a way cognizable by an aristotelian theory, the harm would be suffered by all those who live with and around the person harmed. In considering the proper reading of the First Amendment, therefore, it would be plausible to argue that the harms should be counted more than once because they would be suffered by more than one individual.<sup>117</sup>

A third response might focus on the fact that within an aristotelian theory, some human capacities might be considered "architectonic" in that they organize and arrange all the others.<sup>118</sup> Nussbaum

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113. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that Florida's "right of reply" statute, which granted politicians equal space to respond to newspaper editorials, violated First Amendment). But see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969) (holding that FCC application of "fairness doctrine" that required broadcasters to grant targets of personal and political attacks "equal time" to respond did not offend First Amendment).

114. See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (arguing that First Amendment should guarantee dissidents right of access to newspapers); Fried, *supra* note 73, at 227-28 (arguing that requiring newspapers to print diverse points of view is "but a short step to suppression pure and simple"); cf. SUNSTEIN, *supra* note 3, at 108 (discussing disparate treatment of print media, which have been subject to only limited government regulation, and broadcasting industry, which is susceptible to broad range of government oversight).

115. Nussbaum, *supra* note 50, at 1023 (citing ARISTOTLE, *POLITICS* I.1253a2-18 (E. Barker trans., 1962)).

116. Nussbaum, *supra* note 50, at 1023-24.

117. Whether the benefits should also be counted more than once is a complex question. One might suggest that the answer would depend on whether the expression in question is capacity-building speech or speech that is "neutral" in Aristotelian terms. Existing free speech doctrine, in contrast, already double-counts benefits, in that it is assumed that society or truth advances when someone speaks. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 259 (1992). The harms are often not counted at all.

118. Nussbaum, *supra* note 27, at 226.

identifies "practical reason," the capacity to plan and organize one's life, and "affiliation," the capacity to recognize and empathize with other beings, as architectonic.<sup>119</sup> In tough First Amendment cases, therefore, one might plausibly concern herself first and foremost with the architectonic functionings. In addition, the concern of an aristotelian First Amendment is related to a *threshold*: the task of aristotelian politics and an aristotelian First Amendment is to ensure the institutional prerequisites whereby all citizens can cross "a threshold into a condition in which good human functioning, at least a minimal level, can be chosen."<sup>120</sup> One might suggest, therefore, that in the First Amendment calculus the interests of those who have already crossed the threshold simply cannot trump the interests of those who have not. At least in the sense of getting as many as possible to cross the threshold of good human functioning, "capability equality" could be seen as a component of First Amendment "freedom."<sup>121</sup>

#### IV.

How, then, can an aristotelian theory help in the debate about sexually explicit speech, erotica, and pornography? More than any other theory, an aristotelian First Amendment would better allow us to balance the harms and benefits of sexually explicit speech. Existing doctrine undervalues sexual expression in significant ways, yet it cannot recognize the harms that flow from it.<sup>122</sup> In a political model, sexually explicit speech lies far from the core of protection unless it has political overtones, an imperfect indicator of either lack of harm or existence of value.

In contrast, an aristotelian First Amendment sees sexuality as an important part of humanity and therefore considers sexually explicit speech to be, plausibly, at the very heart of First Amendment protection. But, importantly, the Aristotelian does not stop there: the harms discussed by MacKinnon, when they exist, are in an important sense First Amendment harms. More work needs to be done here, but it seems reasonable to believe that certain types of pornography make it more difficult to be "finely aware and richly

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119. Nussbaum, *supra* note 27, at 222, 226.

120. Nussbaum, *supra* note 27, at 228.

121. See Nussbaum, *supra* note 50, at 1028 (discussing tension between objective of capability equality and forces that "prevent equality from being realized").

122. Cf. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328-29 (7th Cir. 1985) (accepting harm arising from pornography but finding that First Amendment does not allow regulation on that basis, as harm "simply demonstrates the power of pornography as speech"), *aff'd*, 475 U.S. 1001 (1986).



responsible."<sup>123</sup> If, as MacKinnon suggests, men who watch violent pornography are influenced subconsciously in a way that is not easily counterbalanced by counterspeech or "practical reason" (pp. 16-17), or if women are prevented from flourishing by the pervasiveness of images that shame and denigrate them on the basis of their sex (p. 7),<sup>124</sup> these harms would be cognizable within the First Amendment. These harms are not, as First Amendment tradition would see them, harms that come from without—that is, harms that can be balanced against the value of the words only if the words are first considered "low value." Within an aristotelian First Amendment theory, these harms, cognizable as First Amendment harms, could be considered even when "core speech" is in the balance.<sup>125</sup> In other words, the harms that MacKinnon posits *must* be taken into account in an aristotelian First Amendment doctrine because they are qualitatively equal to the benefits that flow from the expression.<sup>126</sup>

Asking constitutional decisionmakers to balance competing considerations in this context is hardly unproblematic. Such a tactic begs comparison with one of the most famous, and one of the most ridiculed, judicial pronouncements about obscenity—Justice Stewart's statement that he could not pretend to define "hard-core pornography" but that "[he] know[s] it when [he] see[s] it."<sup>127</sup> To be sure, asking judges to balance the harms and benefits of certain kinds of speech does not mean that the law has thrown up its hands in frustration as Justice Stewart seemed to do.<sup>128</sup> In fact, in evaluating judicial decisionmaking (and rationality in general) there is much to

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123. See *supra* text accompanying note 24 (noting effect of pornography on men).

124. See BARTKY, *supra* note 26, at 22-32, 83-98.

125. This is similar to Fiss's point that if the First Amendment contemplates political speech at its core, the tough issues become how to balance free speech values against one another, rather than how to weigh individual free will—traditionally the First Amendment value—against the robustness and balance of public debate (traditionally considered to be something other than free speech values). See Fiss, *supra* note 80, at 1423-25. Fiss quotes the Supreme Court in describing the traditional view: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790-91 (1978) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). A supporter of an aristotelian First Amendment would disagree, as does Fiss.

126. Cf. Fiss, *supra* note 80, at 1420-21 (discussing role of judiciary in balancing benefits and evils of certain types of expression, and suggesting that courts should limit such expression only if intervention "enriches rather than impoverishes public debate").

127. *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Stewart, J., concurring).

128. Even some supporters of a more absolute First Amendment recognize that "belief in some degree of case-by-case judicial flexibility does not imply acceptance of completely unguided, virtually emotive and unprincipled judicial decision-making." REDISH, *supra* note 73, at 261.

be said for an awareness of the particularities of each situation.<sup>129</sup> It is certainly plausible that an aristotelian First Amendment, by relieving the law of "its iron-fisted denial of complexity and ambiguity,"<sup>130</sup> would improve our reasoning about tough issues like pornography.

At the very least, by allowing some type of balancing, the First Amendment would no longer require judges to disregard harms that flowed from speech as long as someone, anyone, prefers to speak.<sup>131</sup> Courts would no longer have to depend solely on intellectually uneasy distinctions of what is and is not "speech," whether a regulation is content or viewpoint "neutral," or whether something is "patently offensive." Instead, it seems to me, the First Amendment would require a commitment on the part of constitutional decisionmakers to do all they possibly could to support and encourage efforts to enrich the lives of the public, to make citizens more free in an Aristotelian sense. This would require them to ask questions about what freedom *is* and what constitutes meaningful choice. These inquiries will be difficult, especially at first. But at least these questions would help guide us to wise decisions, rather than obfuscate the inquiry with false issues and distracting considerations.

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129. NUSSBAUM, *supra* note 51, at 66-75 (emphasizing importance of not being constrained by previously derived general rules and principles to extent that limits ability to adequately address particularized situation).

130. Mary Gaitskill, *On Not Being A Victim*, HARPER'S, Mar. 1994, at 35, 38.

131. See Fried, *supra* note 73, at 242 ("If the audience is the object of the insult, the speaker's interest in expression still supplies half of the privilege, which is enough to prevail.").