Pornography and the First Amendment: A Reply to Professor MacKinnon

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Professor Catharine MacKinnon, in a recent article in this journal, powerfully and perceptively developed her thesis that pornography is "[c]entral to the institutionalization of male dominance."[1] Pornography, she urges, is "a political practice" that "causes attitudes and behaviors of violence and discrimination which define the treatment and status of half of the population." I am not sure that I would draw the line between Eros and dehumanization at the same point as Professor MacKinnon appears to. Moreover, all the evidence is not yet in as to the actual impact of pornography, and Professor MacKinnon may overstate its role in the subordination of women.[2] Nevertheless, generally speaking, I accept Professor MacKinnon's basic position and proceed upon the premise that pornography plays a major part in establishing and maintaining male supremacy in our society.

My concern arises not from Professor MacKinnon's statement of the problem but from her proposals for a solution. Despite her opening remark that "pornography cannot be reformed or suppressed or banned," but "can only be changed," it is clear that Professor MacKinnon would deal with the problem by invoking the power of the government to suppress pornography. Her specific proposals are embodied in the Minneapolis and Indianapolis Ordinances, which she and Andrea Dworkin drafted and persuaded the city councils of those cities to adopt. The Minneapolis Ordinance was vetoed by the Mayor as a violation of the first amendment, but

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1. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

2. *See* Affidavit of Richard Green, American Booksellers Ass'n. Inc. v. Hudnut, Cause No. IP 84-791C, slip op., (S.D.Ind. 1984). This psychiatrist concludes: "The relationship between the availability of pornography to the public and the incidence of sex crimes does not support the view that pornography leads to sexual assault. Indeed, the data suggest the reverse effect." *Id.* at 5. *See also* PORNOGRAPHY AND CENSORSHIP (D. Copp & S. Wendell eds. 1983). This book contains essays from a number of social scientists who have attempted to ascertain whether the wide availability of pornography has produced harmful consequences. The editors conclude that "the question cannot yet be given a definitive answer." *Id.* at 12.

the Indianapolis ordinance was signed into law and is now the subject of litigation in the federal courts. I will take the Indianapolis Ordinance as showing, in concrete terms, what an attempted suppression of pornography by government mandate would entail.[3]

The Indianapolis Ordinance is based upon the theory that "pornography is a discriminatory practice based on sex which denies women equal opportunities in society." It creates administrative and judicial machinery empowering any woman to bring civil proceedings for a cease and desist order (that is, an injunction) to prohibit the "production, sale, exhibition, or distribution of pornography," and require the offender "to take further affirmative action as will effectuate the purposes" of the Ordinance.

The key provision of the Ordinance is the definition of pornography: "Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words," that also includes one or more ways in which "women are presented." The features that make material pornographic include not only presentations of women being subjected to violence, but also presentation of women as "sexual objects who enjoy pain or humiliation"; women as "sexual objects who experience sexual pleasure in being raped"; women "being penetrated by objects or animals"; women "in scenarios of degradation, injury, abasement, . . . shown as filthy or inferior, . . . or hurt in a context that makes these conditions sexual"; and women "presented as sexual objects for domination, conquest . . . exploitation, possession, or use, or through postures or positions of servility or submission or display."[4]

The sweep of the Indianapolis Ordinance is breathtaking. It would subject to governmental ban virtually all depictions of rape,

3. The proposed Minneapolis ordinance, amending MINNEAPOLIS, MINN., CODE OF ORDINANCES RELATING TO CIVIL RIGHTS, tit. 7, chs. 139, 141, was approved by the City Council on December 30, 1983, and subsequently vetoed by Mayor Donald Fraser. The measure was again introduced, passed and vetoed in 1984. The Indianapolis provisions are Indianapolis, Ind., Ordinance No. 24 (May 1, 1984) and Ordinance No. 35 (June 15, 1984), amending the INDIANAPOLIS AND MARION COUNTY, IND., CODE, ch. 16. These measures are collectively referred to as the "Indianapolis Ordinance." On November 19, 1984, a federal district court in Indianapolis declared the ordinance unconstitutional in American Booksellers Ass'n, Inc. v. Hudnut, Cause No. IP 84-791C, slip op., (S.D.Ind.). Judge Sarah Evans Barker held that "pornography," as defined and regulated by the Ordinance, "is constitutionally protected speech under the First Amendment." *Id.* at 46.

4. For an even broader definition of pornography, taken from the first Minneapolis Ordinance, see MacKinnon, *supra* note 1 at 321 n.1 (1984). "Pornography," as defined by Professor MacKinnon, encompasses a far wider range of material than does "obscenity," as defined by the Supreme Court. *See infra* text accompanying notes 7-8. Professor MacKinnon's definition of pornography is accepted for purposes of this article.

verbal or pictorial, and a substantial proportion of other presentations of sexual encounters. More specifically, it would outlaw such works of literature as the *Arabian Nights*, John Cleland's *Fanny Hill*, Henry Miller's *Tropic of Cancer*, William Faulkner's *Sanctuary*, and Norman Mailer's *Ancient Evenings*, to name but a few. The ban would extend from Greek mythology and Shakespeare to the millions of copies of "romance novels" now being sold in the supermarkets. It would embrace much of the world's art, from ancient carvings to Picasso, well-known films too numerous to mention, and a large amount of commercial advertising.

The scope of the Indianapolis Ordinance is not accidental. Nor could it be limited by more precise drafting without defeating the purpose of its authors. As Professor MacKinnon emphasizes, male domination has deep, pervasive and ancient roots in our society, so it is not surprising that our literature, art, entertainment and commercial practices are permeated by attitudes and behavior that create and reflect the inferior status of women. If the answer to the problem, as Professor MacKinnon describes it, is government suppression of sexual expression that contributes to female subordination, then the net of restraint has to be cast on a nearly limitless scale. Even narrowing the proscribed area to depictions of sexual activities involving violence would outlaw a large segment of the world's literature and art.

I. *The Ban on Pornography and Traditional First Amendment Doctrine*

If we test Professor MacKinnon's proposals against traditional first amendment doctrine, there is no way that her solution of the pornography problem can be sustained. Obviously, the founding fathers, whatever restrictions they might have found constitutionally permissible with respect to sexually explicit speech, could not have intended the first amendment to allow the government to prohibit all speech that supported male domination. On Professor MacKinnon's own analysis, the very idea could not have occurred to them as members of the dominant male hierarchy. Insofar as "original intention" is a guide to constitutional interpretation, then, it runs squarely counter to the position taken by the proponents of the Indianapolis Ordinance.

Nor can government suppression of pornography be justified under current first amendment doctrine. The core element in first amendment theory is that the impact of speech—whether considered good, bad or indifferent—cannot be invoked as a basis for gov-

ernment control of speech. Speech, or more generally expression, occupies a specially protected place in a democratic society. As Justice Holmes remarked long ago: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[5]

The reason for the supremacy of freedom of expression in our constitutional hierarchy is that it is essential to the operation of the democratic process. The values served by a system of free expression—individual self-fulfillment, advancement of knowledge, participation in self-government, and promotion of consensus by nonviolent means—form the bedrock of our democratic existence.[6]

It follows that, as a general proposition, speech cannot be prohibited, curtailed or interfered with by government authorities. The state must seek to achieve its social goals by methods other than the suppression of expression. Were it otherwise, the government could readily outlaw or regulate expression that hampered the effectiveness of government operations, urged basic reform in our society, opposed government policies abroad, or cast aspersions on fellow citizens. Clearly the suppression of pornographic speech, on the ground that it causes or reflects discrimination against women, would run afoul of this basic mandate of the first amendment.

The Supreme Court has, of course, made some exceptions to the constitutional protection afforded freedom of expression. But it has never countenanced any degree of control that would create as gaping a hole in our system of freedom of expression as would the attempted suppression of "pornography."

The exception that bears the closest resemblance to the proposed ban on pornography is found in the law concerning obscenity. In its obscenity decisions, the Supreme Court has ruled that the government may prohibit the dissemination of materials "which taken as a whole, appeal to the prurient interest in sex, which portray sexual

5. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929).

6. It is for this reason that Ku Klux Klansmen may assemble peacefully to burn their crosses, that adherents of religious cults may prosletyze at public airports, and that members of the American Nazi Party may march through a predominantly Jewish community. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (overturning conviction for speech made at Ku Klux Klan rally); Int'l Soc'y for Krishna Consciousness v. Rochford, 585 F.2d 263 (7th Cir. 1978) (invalidating restrictions on religious solicitation at airport); Nat'l Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) (per curiam); Smith v. Collin, 578 F.2d 1197 (1978), *cert. denied* 436 U.S. 953 (1978); Village of Skokie v. Nat'l Socialist Party, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (thwarting attempts to interfere with Nazi demonstrations). For a more extensive exposition of first amendment theory, see EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, ch. I (1970).

conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[7] The theory upon which the Supreme Court permits the suppression of obscenity, as thus defined, is the legal fiction that "obscenity is not within the area of constitutionally protected speech," in other words, that obscenity is not covered by the first amendment at all.[8]

Since obscenity law thus rests upon a totally irrational premise—that obscene materials are not speech—it is difficult to make a rational projection as to how far the obscenity exception extends. As a practical matter, however, it is inconceivable that the Supreme Court would hold that the far broader area of "pornography" is simply outside the scope of first amendment protection. More importantly, as Professor MacKinnon points out, the social goals sought by the obscenity laws are essentially moral in nature; they do not extend to what Professor MacKinnon describes as a political process—discrimination against the female sex. The likelihood that the Supreme Court would permit the government to embark upon a venture to control speech in this area of politics, free from the restraints of the first amendment, is most remote.[9]

A second exception to the general rule that expression is entitled to the full protection of the first amendment occurs in the case of expression by, or directed to, children. Thus in *New York v. Ferber*,[10] the Supreme Court upheld a New York statute that prohibited the use of children in "a sexual performance" and in aid of that provision prohibited dissemination of materials depicting sexual performances by children. The validity of such a measure rests upon the proposition that children are not and cannot be full participants in the system of freedom of expression. That system presupposes a maturity of understanding and judgment that children do not possess. As a result, the Supreme Court has consistently applied different rules, in the area of expression and elsewhere, to children than to adults.[11] It explicitly did so in the *Ferber* case, making it clear that

7. Miller v. California, 413 U.S. 15, 24 (1973).

8. Roth v. United States, 354 U.S. 476, 485 (1957).

9. For a more complete critique of the obscenity doctrine, see EMERSON *supra* note 6, at ch. XIII (1970).

10. 458 U.S. 747 (1982).

11. Cases that have applied a different first amendment standard to children than to adults include Ginsberg v. New York, 390 U.S. 629 (1968) (state could prohibit sales to minors of sexually explicit materials that were "not obscene for adults") and Prince v. Massachusetts, 321 U.S. 158 (1944) (state could prohibit use of children to distribute literature on streets). Cases that have applied a different constitutional standard outside the first amendment context include Schall v. Martin, 468 U.S. —, 104 S. Ct. 2403 (1984) (state could confine juveniles accused of criminal offenses under circumstances

the result would have been different were the statute not "limited to works that *visually* depict sexual conduct by children."[12] Moreover, the Supreme Court has made it plain that the special rules pertaining to children cannot operate to infringe the first amendment rights of adults.[13]

Other exceptions to full protection under the first amendment are based on doctrines pertaining to libel, clear and present danger, and regulation of the time, place and manner of expression. None of these theories justifies the relaxation of the traditional guarantees of the first amendment in the case of pornographic materials. Libel laws deal exclusively with the protection of reputation against false statements and are narrowly circumscribed.[14] The clear and present danger exception is applicable only to advocacy that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[15] Pornography is not "directed" toward producing "imminent lawless action," nor is there persuasive evidence that it is "likely" to do so, except possibly in a most aberrational case. Time, place and manner regulations are sanctioned primarily in situations where exercise of the right to freedom of expression creates a physical conflict with the exercise of other rights, such as the use of a public street for a demonstration in a way that interferes with normal traffic.[16] In any event, anti-pornography

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where it could not confine adults), and McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (plurality opinion) (state was not obligated to provide for jury trial in juvenile proceedings). *See also* Carey v. Population Services Int'l, 431 U.S. 678, 693 n.15 (1977) (observing in dictum that lesser scrutiny is appropriate in evaluating state restrictions on distribution of contraceptives to minors as opposed to adults "both because of the State's greater latitude to regulate the conduct of children and because . . . the law has generally regarded minors as having a lesser capability for making important decisions.") (citations omitted).

12. 458 U.S. at 764 (emphasis in original).

13. *See* Butler v. Michigan, 352 U.S. 380, 383 (1957) (overturning obscenity statute that, by prohibiting distribution to general public of materials "tending to the corruption of the morals of youth," would have "reduce[d] the adult population of Michigan to reading only what is fit for children").

14. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official cannot recover damages for defamatory falsehood without proving statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (states cannot impose liability without fault for defamatory falsehoods injurious to individuals who are neither public officials nor public figures).

15. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

16. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. —, 104 S.Ct. 3065 (1984) (government did not violate first amendment by prohibiting groups from camping overnight in park near White House); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (state could limit to fixed locations solicitation of visitors to state fair); Kovacs v. Cooper, 336 U.S. 77 (1949) (city could regulate use of sound trucks); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding narrowly drawn

measures are not concerned with time, place and manner but with content. In all these areas, first amendment theory requires that the exceptions be confined to narrow and concrete categories that have the least inhibiting effect upon the system of freedom of expression. Creation of a vast new exception that would remove from the protection of the first amendment all sexually explicit expression that tended to promote the subordination of women would, to the contrary, leave the system a shadow of its former self.

The nearest analogy to what is proposed in the Indianapolis Ordinance would be an official enactment prohibiting all expression that promoted or encouraged racism in our society. The laws, constitutional and statutory, that attempt to eradicate racism in our national life have never been carried to such a point. They deal with discriminatory acts, not the expression of discriminatory beliefs, opinions, ideas or attitudes. And it is hard to believe that the Supreme Court would permit their extension into such areas. One is not likely to find the Supreme Court enjoining performance of the *Merchant of Venice* or banning William B. Shockley from expounding his views on the inferiority of the Negro race. It is true that in *Beauharnais v. Illinois*,[17] decided in 1952 by a five to four vote, the Supreme Court upheld a group libel law. At that time, however, first amendment doctrine was in its infancy and received scant attention in the majority opinion. In any event the major premise of *Beauharnais*—that libel laws are not within the coverage of the first amendment—was overruled in *New York Times v. Sullivan*.[18] While *Beauharnais* was cited in Justice White's opinion in the *Ferber* case, somewhat ambiguously, the prevailing view is that group libel laws cannot be reconciled with modern first amendment doctrine.[19] Nor, in practice, have such measures come to be relied upon as a solution to the problems of racism.

The Indianapolis Ordinance's banning of pornography not only

parade-permit statute). *Cf.* Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) (invalidating ordinance that prohibited demonstrations on streets abutting schools during class hours because, by excluding labor picketing from its proscription, the ordinance discriminated among classes of protected expression based on their subject matter).

17. 343 U.S. 250 (1952).

18. 376 U.S. 254 (1964).

19. *See, e.g.*, Collin v. Smith, 578 F.2d 1197 (7th Cir. 1979), *aff'g* 447 F. Supp. 676 (N.D. Ill. 1978), *cert. denied* 439 U.S. 916 (1979). The opinion of the Seventh Circuit questioned the continuing precedential vitality of *Beauharnais* in holding that the town could not prohibit a Nazi demonstration merely because it would portray or promote racial or religious hatred. For reference to the legal literature, see Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308, 308-309 (1979).

fails to fit within any of the exceptions to protection under the first amendment, but also relies heavily upon the injunctive powers of the courts. This is a crippling form of "prior restraint" that seeks to suppress expression in advance of its publication or dissemination. As the Supreme Court has repeatedly held, "prior restraints on speech and publication are the most serious and least tolerable infringement on first amendment rights."[20] Few prior restraints have been upheld by the Supreme Court, and none on the scale contemplated by the Indianapolis Ordinance.[21]

Finally, it should be noted that the attempt to avoid first amendment difficulties in the Indianapolis Ordinance by asserting that pornography "is a discriminatory practice" cannot succeed. This device, which has been hailed as a new approach to the problem, is no more than a play on words. Pornography is speech or expression, as those terms are used in first amendment theory, and like most expression has an impact upon attitudes and behavior. The question is whether, because of this impact, pornography can be proscribed. It does not help to eliminate the intermediate step in the legal analysis and declare that pornography "is" discrimination.

II. *The Dynamics of Suppressing Pornography*

Professor MacKinnon argues the case for the suppression of pornography at a high level of abstraction. One must also take into account the dynamics at work in implementing a program such as she contemplates. The hazards to our system of freedom of expression are manifest.

Most important is the inhibiting atmosphere inevitably created by subjecting a broad area of expression to governmental intervention.

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20. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (judge could not prohibit publication of confession of accused murderer until jury had been impaneled in his trial).

21. *Compare* New York Times v. United States, 403 U.S. 713 (1971) (per curiam) (government could not enjoin publication of Pentagon Papers); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (overturning statute that prohibited unlicensed exhibition of motion pictures and authorized denial of license for films found to be sacrilegious). and Near v. Minnesota, 283 U.S. 697 (1931) (invalidating state law providing for judicial abatement as public nuisance of "malicious, scandalous and defamatory" publications), *with* Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) (city could require that films be submitted prior to commercial exhibition to local officials who could censor those found obscene or in violation of other specified criteria) and Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (state could authorize local authorities to seek temporary *ex parte* orders against distribution of obscene materials as well as orders for seizure and destruction of materials determined to be obscene in judicial proceedings). For a discussion of the rationale underlying the prior restraint doctrine, see Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

Persons engaging in any form of communication touching on sexual matters face the prospect of being haled before a censorship board, involved in prolonged litigation, saddled with back-breaking legal fees, compelled to justify their exercise of first amendment rights to government officials, threatened with damage awards and subjected to other forms of "affirmative action" such as confiscation of earnings—all of this occurring at countless locations scattered across the country. It is true that the Indianapolis Ordinance does not provide for criminal penalties, apart from the possibility of criminal contempt. There is nothing in the legal theory underlying the Ordinance, however, that would preclude the censorship of sexual materials through the apparatus of police investigations, criminal prosecutions and prison sentences. One can hardly expect a system of freedom of expression to flourish under these conditions.

Moreover, there is a strong likelihood that the powers conferred by the Indianapolis Ordinance would be diverted to reactionary political ends. It is often difficult to separate the pornographic elements of a communication from other ingredients. It is entirely possible that the more powerful interests in our society, possessing the requisite funds, could utilize the machinery of government censorship of pornography to harass or silence unwanted points of view. One can readily imagine the Moral Majority or similar groups invoking anti-pornography laws against feminist authors who seek to make male domination "graphic" and "sexually explicit." Such a development has taken place in the operation of the libel laws; more and more, the right to sue for libel has provided the basis for litigation designed to weaken or eliminate criticism from less powerful political opponents.[22] Thus, censorship of pornography, far from being a liberating force, could become a tool with which to harass feminist or other progressive movements.

Along the same lines, the suppression of pornography through governmental intervention encourages the intolerance syndrome throughout a society. Civil liberties are, as is often said, indivisible. The legal doctrines, governmental machinery and attitudes that suppress speech in one area also promote suppression in other areas. The censorship of pornography thus gives comfort to the forces of

22. *See* Glasser, *The Punitive Libel Trials*, N.Y. Times, Dec. 10, 1984, at A23, col. 1. This commentator observes, for example, that the mayor of a Texas town had brought a libel suit against THE NATION magazine because of allegations of police abuse and voter intimidation in an article on the rights of farmworkers. "The suit was preposterous, but the Nation could not afford to defend itself," writes Glasser. "The mayor, knowing that, sued, clearly to suppress public criticism of his performance as a public official."

reaction and advances the cause of those who seek a closed society. The movement for gender equality has little to gain from such a climate of opinion.

One additional, overriding consideration must be faced: The elimination of pornography by governmental censorship is simply not workable, at least by any democratic process. The area of prohibition is so vast, the machinery of civil litigation so cumbersome, the hope of changing attitudes by government decree so quixotic, that nothing positive is likely to be accomplished. Rather, the results, in terms of selective enforcement, underground circulation of "violative materials," encouragement of organized crime, and the general discrediting of law enforcement, would be entirely negative. In the ensuing confusion, the original problem would remain unsolved.

III. *The Rejection of Traditional First Amendment Theory*

Professor MacKinnon, as I read her, rests her case not primarily on traditional first amendment theory but rather on an attack upon first amendment theory. Her position is that "[t]he theory of the first amendment under which most pornography is protected from governmental restriction proceeds from liberal assumptions which do not apply to the situation of women." Indeed, she goes beyond this and argues that the traditional approach is "worse than useless." She would, in other words, discard the first amendment, at least until it was modified to reflect "non-liberal" assumptions. Since there is no chance the Supreme Court is going to reject traditional first amendment theory, this seems to leave Professor MacKinnon without any remedy short of constitutional amendment — or revolution. In my judgment, Professor MacKinnon seriously overstates the case against traditional first amendment doctrine and thereby grossly underestimates, in fact neglects altogether, the role that the system of freedom of expression can play in dealing with the issue of pornography and gender equality.

Professor MacKinnon's critique of the "liberal assumptions" underlying first amendment theory rests upon four propositions. The first is that the first amendment "presumes the validity of the distinction between public and private," the former being "the sphere of social power" and the latter "the area of private right." She contends that this distinction "does not cut the same for women as for men" because the exercise of male power that results in the subordination of women, as in the case of pornography, often takes place in the home, and that women may therefore need a higher degree of

governmental, or social, intervention in the "private" than in the "public" sphere.

The private-public distinction is not one between governmental controls of conduct inside or outside the home, but one between individual right and collective power. The making of this distinction is a basic problem in any society, liberal or otherwise. The first amendment, generally speaking, places speech within the realm of individual right and action within the realm of collective power. This does preclude governmental control of pornographic speech, but it also leaves open a vast area of governmental control over male domination in the form of action. And this control can be directed against conduct inside the home as well as outside. Legislation imposing penalties for spousal rape, now being enacted in a number of states, illustrates that no liberal public-private assumptions foreclose such governmental attempts to achieve equality between the sexes.[23]

Professor MacKinnon's second criticism of liberal first amendment theory deals with the assumption that freedom of expression "helps discover truth," promotes "consensus," facilitates "progress," and "frees the mind to fulfill itself." She argues that, although securing these values may justify freedom of expression "in a non-hierarchial society," the theory is not adequate "in a society of gender inequality." In such a society, she urges, "the speech of the powerful impresses its view upon the world," providing "the appearance of consent" but making "protest inaudible as well as rare."

There can be little doubt that, in any society, the more powerful forces will engage in a greater volume of speech, on a more pervasive scale, and with a deeper impact than the less powerful groups. A fully balanced equality of speech among all groups and individuals is probably unattainable, at least without a degree of governmental intervention that would destroy the freedom of the system. What the system does guarantee is that the unorthodox, minority, dissenting and submerged elements of the society have a constitutional right to express their views and endeavor to gain adherents. The system is not designed only for a "non-hierarchal society," assuming such a social order exists. It is designed precisely to give a

23. *See New Laws Recognizing Marital Rape as a Crime*, N.Y. Times, Dec. 29, 1984, at A5, col. 1 (observing that 26 states had, by the end of 1984, enacted laws allowing prosecution of husbands for raping their wives).

subordinated group, such as women, a way out of their "powerlessness" by some method other than force.

It should be added that Professor MacKinnon has surely overdrawn the picture in contending that, under the first amendment today, protest against the status of women is "inaudible as well as rare." Her own work, and that of the whole feminist movement, can scarcely be so described.

Professor MacKinnon's third criticism of traditional first amendment doctrine is that it fails to recognize the harm that can be caused by speech. She asserts that first amendment logic "has difficulty grasping harm that is not linearly caused in the 'John hit Mary' sense," and that first amendment doctrine assumes that "words and pictures can only be harmful if they produce harm in a form that is considered action." This is not correct; first amendment theory does recognize that speech may cause harm, as well as good, and it is quite capable of recognizing the kind of harm that Professor MacKinnon describes. The theory rests upon the proposition, however, that the values served by freedom of expression are so essential to a free society that speech requires special, near absolute, protection against government interference regardless of any harm that may be caused. It also rests upon the premise, as noted above, that the government possesses sufficient powers to deal with such harms through means other than the suppression of speech. Thus, again, a vast area is open for government measures to promote gender equality. But the superficially easy out—passing a law to prohibit speech—is not available under first amendment theory.

It is admittedly difficult to draw the line between speech and action in some situations. But obviously the whole concept of the first amendment—that speech is entitled to special protection—requires that it be done. Of course, in the overwhelming proportion of cases, including pornography, the classification of the conduct involved as speech is not open to question.

Professor MacKinnon's fourth criticism, which is closely related to the second, challenges the first amendment assumption that "socially, speech is free," and that the problem is to prevent the government from constraining it. In actuality, she contends, "whole segments of the population" are "systematically silenced *socially*, prior to government action." "For women," she concludes, "the urgent issue of freedom of speech is not primarily the avoidance of state intervention as such, but finding an affirmative means to get access to speech for those to whom it has been denied."

Insofar as the argument is that the speech of the most powerful forces in society "impresses its view upon the world," the answer is the same as above: Freedom of speech does not protect individuals or groups from being persuaded, even against their own interests, but it does guarantee that every individual or group has a right to try to persuade others. Granted the right exists, the question of actually obtaining access to the means of communication becomes a crucial one. There is nothing in the first amendment, however, that precludes "finding an affirmative means to get access" for the less powerful, and indeed the failure to do so is one of the major weaknesses in our system of freedom of expression.[24] But that does not sanction government intervention to restrict the free speech rights of others or to take any similar form of action that would undermine the system as a whole. Nor can it be said, as a factual matter, that those who have wished to speak out for women's rights have been denied access to do so.

Taking all these factors into consideration, it would seem that proponents of equality for women in our society have more to gain from participating in the traditional system of freedom of expression than from abandoning it in favor of a form of relief that would destroy it.

IV. *Conclusion*

Any attempt to deal with the problem of pornography through governmental suppression would involve a dangerous evisceration of the first amendment. The damage to our system of free expression would extend far beyond the area of pornography. Moreover, such an effort would almost certainly prove unworkable.

This does not mean that nothing can be done to achieve gender equality. One course of action is to utilize the system of freedom of expression, as Professor MacKinnon has so eloquently done, and thereby raise the American level of consciousness. Another is to expand the right of access to the media of communication through measures that utilize the opportunities afforded by cable television, satellites, video-cassette recorders and other advances in the technology of communication. A third is to mobilize non-governmental economic power through organization, picketing, demonstrations, boycotts and other forms of pressure. Surely opponents of pornog-

24. For a discussion of the use of the first amendment as an affirmative force to promote the system of freedom of expression, see Emerson, *The Affirmative Side of the First Amendment*, 15 GEO. L. REV. 795 (1981).

raphy would receive sympathy and support from broad sections of the public in such endeavors. Ultimately, as Professor MacKinnon has emphasized, the issue is one of increasing the economic, political and social power of women. There are many ways to do so—through enactment of anti-discrimination laws, litigation to assure pay equity, ratification of the Equal Rights Amendment, and numerous other measures that do not impair the operation of the first amendment.

The difficulties in turning around centuries of male supremacy are manifest. But progress has been made and, one hopes, will continue.