The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory

Jeanne L. Schroeder†

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INTRODUCTION

Medicine concentrates on preventing viral infection through inoculation. In inoculation, a tamed virus—a weakened, distorted, or dead variant—is introduced to the body. As the body fights off this impotent impostor, it develops antibodies that enable it to resist a future assault by the true virus.

† Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. My thanks to my colleagues David Gray Carlson, Marci Hamilton, and Marty Slaughter.

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Cass Sunstein adopts the inoculation approach towards radical feminism. Sunstein, perhaps unconsciously, recognizes the disruptive power of Catharine MacKinnon’s analysis of pornography, which not only expressly questions male dominance and heterosexuality but also, implicitly, challenges mainstream Constitutional legal scholarship and the academic status quo. Like a good doctor, Sunstein introduces a tamed impostor theory, a “weak sister,” to invigorate masculinism so that it can virilely resist a virulently fatal disease. In the name of embracing and explicating MacKinnon’s critique of pornography, Sunstein rewrites and distorts it in such a way as to leave only a surface similarity, while excising its essential nature. A call for political and sexual revolution becomes an anticrime, antismut bill. As such, variations on MacKinnon’s proposed antipornography legislation might be passed or defeated based on arguments having little to do with MacKinnon’s founding analysis. Meanwhile, the feminist critique underlying the original proposal will lack virulence because society has been inured to it, has become tired of the conversation. Sunstein tries to prevent radical feminism by introducing a “neutered” feminism.

In this article I will argue first that Sunstein tries to “tame the shrew” by inverting MacKinnon’s analysis and fixating on relatively minor aspects of her argument which might, in fact, be inconsistent with her main analysis. I start by examining Sunstein’s account of MacKinnon’s theory of pornography because his is an extremely eloquent expression of what I believe is a common misreading of MacKinnon’s views. It is also a misreading which I believe MacKinnon actively promotes. And so, I am not accusing Sunstein of being disingenuous in his interpretation. I presume that he sincerely wants to be simultaneously both a feminist sympathizer and a good liberal working within

1. Although the Indiana and Minneapolis ordinances drafted by MacKinnon and Andrea Dworkin were subsequently invalidated, antipornography bills that seek to eliminate the objectionable portions of the ordinances were introduced in the 102d Congress and the Massachusetts legislature last year. See infra note 29.

2. It is a misreading accepted by many proponents of antipornography legislation of the type proposed by MacKinnon and Andrea Dworkin. For example, Wisconsin State Senator Walter Chilsen, who sponsored antipornography legislation in Wisconsin, stated that “[h]ard-core pornography is what we’re after. . . . [M]ost issues of such magazines as Playboy, Penthouse, and Hustler would not be found obscene under the bill.” Janet Bass, Both Sides Air Views on Bill to Define Obscenity, UPI, Oct. 29, 1985, available in LEXIS, Nexis Library, UPI File.

Even Drucilla Cornell focused her critique of MacKinnon’s theory on the issue of physically violent pornography. Cornell, however, explicitly states that the definition of pornography as sex plus violence is Sunstein’s, and not MacKinnon’s. She defends her decision to use a definition substantially narrower than MacKinnon’s actual definition on the grounds that it is the more defensible position (in that it allows for the protection of feminist artists who choose to deal in erotic themes). Drucilla Cornell, Sexual Difference, the Feminine and Equivalency: A Critique of MacKinnon’s Toward a Feminist Theory of the State, 100 YALE L.J. 2247, 2269 (1991) [hereinafter Cornell, Sexual Difference].

3. In her speeches in favor of the proposed legislation, MacKinnon often dwells on descriptions of the most lurid violent pornography, and mentions in passing that more mainstream dirty books (such as Playboy magazine) might also be covered by her legislation. See, e.g., Catharine A. MacKinnon, Pornography as Defamation and Discrimination, 71 B.U. LAW REV. 793, 797 (1991) [hereinafter MacKinnon, Defamation and Discrimination]. In other speeches, however, she is more candid about the reach of her proposal. See, e.g., CATHARINE A. MACKINNON, "More Than Simply a Magazine": Playboy’s Money, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 134, 135-36 (1987).
respectable, mainstream jurisprudence. Consequently, he is drawn to those openings MacKinnon has placed in her work that allow her supposedly radical "unmodified" feminism to be modified and domesticated.

Second, I will turn to MacKinnon's theory and argue that Sunstein might have saved himself the effort. MacKinnon herself turns her back on the radical transformative potential of her own insights and embraces a deeply reactionary theory of the flesh—the very approach to sexuality which has been the underpinning of American gender roles. What at first blush appears to be a postmodern sociological theory, can be seen upon closer scrutiny to include a modern liberal theory of the individual sutured onto a premodern Christian concept of the body. MacKinnon's theory of pornography functions as a necessary mechanism to link these three very different ways of thinking about human nature. Her analysis of pornography ultimately devolves into a conservative paean to the potency of masculinity as traditionally conceived.

Consequently, Sunstein did not need to modify MacKinnon's feminism to inoculate masculinism against an epidemic of female emancipation because MacKinnon's "feminism unmodified" turns out not to be as ravaging as initially suspected. And so, ironically, even as I criticize Sunstein for mischaracterizing MacKinnon's antipornography argument, I come very close to agreeing with the bottom line of his argument purportedly in support of her proposal: it probably won't make much difference.

I. SUNSTEIN'S PORNOGRAPHY ANALYSIS

A. Sexualized Violence

Sunstein's argument can be quite simply stated. We are all against violence. Women are particularly subject to sexual violence in the forms of

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4. What is or is not "postmodernist" is a matter of debate. I do not purport to develop a comprehensive or noncontroversial definition of that term in this essay. When I say that MacKinnon's sociological approach is seemingly "postmodern," I mean that it purports to be antiessentialist and antiobjective in its concentration on the social construction of reality.

But is it postmodern? At least one writer has recently questioned whether "feminism [can] survive the postmodern critique of reason." Dennis Patterson, Postmodernism/Feminism/Law, 77 CORNELL L. REV. 254, 255 (1992). Patterson's choice of words is unfortunate—especially if you define feminism, as I do, as the demand of women for dignity and membership in society. He is correct, however, in that many contemporary legal feminists (including MacKinnon) have not yet internalized postmodern theory, although they sometimes ostensibly adopt postmodern terminology.

In this essay I use the term "modern" to include political philosophies emphasizing reason and individual autonomy starting from the various forms of liberalism during the Enlightenment, continuing through Marxism, and into the twentieth century.

5. See Cass R. Sunstein, Feminism and Legal Theory, 101 HARV. L. REV. 826 (1988) (book review) [hereinafter Sunstein, Legal Theory]. This book review of MacKinnon's FEMINISM UNMODIFIED starts with a relatively accurate, although necessarily sketchy and underdeveloped, description of MacKinnon's dominance thesis. Sunstein suggests that "MacKinnon's approach, because it expands and recasts the prohibition on sex discrimination, is radically different from much of current law." Id. at 835. The balance of the review, however, is an attempt to explicate, and I would say rewrite, MacKinnon's pornography analysis.
rape, incest and sexually related torture and death. There is a growing body of empirical evidence that violent pornography causes sexual violence. Sunstein accurately identifies the difference between traditional obscenity law and the MacKinnon/Dworkin antipornography proposal: the former concentrates on the moral effect of obscenity on reader and society, while the latter concentrates on the harmful effects of pornography on women. Sunstein errs, however, in his narrow definition of the materials the proposal would regulate and the harms it seeks to prevent. According to Sunstein, the MacKinnon/Dworkin antipornography proposal makes “violent pornography.”

6. Sunstein describes MacKinnon’s argument as follows:

First, she suggests that severe harms are done to women in the production of pornography and that regulation of the resulting material is necessary to prevent those harms. Second, MacKinnon contends that pornography has a causal connection to acts of sexual violence against women. Third, and most generally, MacKinnon claims that pornography influences the attitudes of both men and women in gender relations, attitudes that help produce unlawful discrimination and foster gender inequality.

Id. at 841.

These statements are accurate in the sense that MacKinnon does, at times, state these views. See infra notes 57-67 and accompanying text. However, as I will argue, they are misleading as presented. By emphasizing physical violence in and of itself, rather than as an extreme and paradigmatic case of sexual subordination, Sunstein inverts MacKinnon’s analysis and priority. His tentative language that pornography “influences” attitudes and “help[s] produce” discrimination and inequality does not give the sense of the primacy pornography has in MacKinnon’s theory. What is more, Sunstein describes the harm to be combatted as “unlawful discrimination,” when the radical feminist analysis concludes that the most damaging form of discrimination against women is not only lawful, it is legally protected.

In another article defending antipornography legislation, Sunstein is more careful in identifying violent pornography as his, rather than MacKinnon’s, definition of pornography. Cass R. Sunstein, Pornography and the First Amendment, 1986 DUKE L. J. 589, 592 [hereinafter Sunstein, Pornography].

7. “There is mounting evidence that sexual violence occurs both in and as a result of pornography. Abuses within the pornography industry appear widespread. Considerable evidence from laboratory experiments and the real world also suggests a link between pornography and sexual violence.” Sunstein, Legal Theory, supra note 5, at 843 (footnotes omitted). For discussions of studies supporting a relationship between pornography and sexual violence, see Edward Donnerstein, Cheryl A. Champion, Cass R. Sunstein & Catharine A. MacKinnon, Pornography: Social Science, Legal, and Clinical Perspectives 4 LAW & INEQ. J. 17 (1986).

Sunstein discusses both the various studies attempting to show a link between sexual violence and pornography, and the problems with these studies, in Sunstein, Pornography, supra note 6, at 598-601. He concludes that these studies are suggestive, yet far from dispositive. Indeed, in his attempt to present honestly the weaknesses as well as the strengths of such studies, Sunstein (unintentionally, I’m sure) comes close to suggesting that the expected effect of antipornography legislation is uncertain and at most, marginal. He argues, however, that many of our laws (criminal as well as civil) are based on much less credible evidence of causality.


9. “MacKinnon’s principal application of the dominance approach is in the area of pornography—defined not as sexually explicit materials but as those that associate sex with violence.” Sunstein, Legal Theory, supra note 5, at 840 (footnoted omitted). Also, after quoting the language of the Dworkin-MacKinnon legislative proposal, Sunstein states that “[t]he ordinance is not aimed at sexually explicit materials in themselves. Its principal target is sexually explicit materials that also involve violence, either in their making or their use.” Id. at 842.

Elsewhere, Sunstein ascribes to MacKinnon the view that pornography merges sex with violence: On this view, the problem of pornography does not stem from offense, from free access to sexually explicit materials, from an unregulated erotic life, or from the violation of community standards. Instead, it is a result of tangible real-world harms, produced by the portrayal of women and children as objects for the control and use of others, most prominently through sexual violence.

Sunstein, Neutrality, supra note 8, at 20-21 (footnote omitted).
actionable and seeks to prevent sexual violence against women.

Sunstein argues that the proposed legislation would not violate first amendment freedom of speech. The First Amendment should be read to protect only high-level speech, such as political speech. Pornography is not political, it is sexy. It appeals to the hormones not the head. It deeply

Further, he states that "under the antipornography approach [towards the regulation of sexually explicit materials, as opposed to the obscenity approach], depictions of sexuality that involve rape and violence against women may be subject to regulation, whereas depictions that do not are uncontrolled." Id. at 27.

Sunstein does admit that his definition limiting pornography to sexually explicit materials that sexualize violence against women is somewhat narrower than the version in the MacKinnon/Dworkin ordinance adopted by the City of Indianapolis, which also included the subordination of women as sexual objects. Sunstein, Pornography, supra note 6, at 592.

10. Sunstein contrasts the Dworkin-MacKinnon pornography approach to sexually explicit materials to the two dominant antiobscenity approaches, both of which he believes are based on a belief that sex is "natural and neutral." Sunstein, Neutrality, supra note 8, at 19. The first, which he describes as "neo-Freudian," opposes antiobscenity legislation because of a belief in the "need to liberate [sexual] drives from the constraining arm of the state." The second, which he considers religiously based, accepts limited antiobscenity legislation on the grounds that, although sex in the state of nature is pure, it can be polluted by obscenity. Id.

This latter view may or may not be characteristic of contemporary American religious thinking. Insofar as it purports to be a statement of the traditional Christian view of sexuality (the various sects of Christianity still being the dominant religions in the United States), it is incorrect. As I have discussed elsewhere, Jeanne L. Schroeder, Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence, 75 IOWA L. REV. 1135 (1990) [hereinafter Schroeder, Feminism Historicized], and as I will discuss more thoroughly below in the text accompanying notes 165-97, traditional Christian theology hold that post-lapsarian human sexuality generally is the mark of our shame for Original Sin. The permissible institutions for women's sexuality, in particular (i.e. marriage and legitimate motherhood) are humiliating punishments for Eve's role in instigating the Fall. Consequently, MacKinnon's broadly inclusive analysis of pornography (encompassing more than overtly violent pornography) is much more in keeping with traditional religious principles than Sunstein's comparison implies.

11. Sunstein develops his Constitutional argument more fully in Sunstein, Pornography, supra note 6. The debate over whether the First Amendment can, or should, be interpreted as permitting or prohibiting antipornography legislation is beyond the scope of this article. I refer to the arguments Sunstein and MacKinnon make on this point solely insofar as they reveal their analyses of pornography. As Sunstein cogently argues, the more one thinks that pornography is a serious issue, the less one is likely to think that antipornography legislation is beyond the scope of this article. I refer to the arguments Sunstein and MacKinnon make on this point solely insofar as they reveal their analyses of pornography. As Sunstein cogently argues, the more one thinks that pornography is a serious issue, the less one is likely to think that antipornography legislation is beyond the scope of this article.

Sunstein, Legal Theory, supra note 5, at 844-45 (footnotes omitted). Sunstein identifies low-level speech by four factors:

First, the speech must be far afield from the central concern of the First Amendment, which, broadly speaking, is effective popular control of public affairs. Speech that concerns governmental processes is entitled to the highest level of protection; speech that has little or nothing to do with public affairs may be accorded less protection. Second, a distinction is drawn between cognitive and noncognitive aspects of speech. Speech that has purely noncognitive appeal will be entitled to less constitutional protection. Third, the purpose of the speaker is relevant: if the speaker is seeking to communicate a message, he will be treated more favorably than if he is not. Fourth, the various classes of low-value speech reflect judgments that in certain areas, government is unlikely to be acting for constitutionally impermissible reasons or producing constitutionally troublesome harms.

Sunstein, Pornography, supra note 6, at 603-604 (footnotes omitted).

13. Based on Sunstein's definitions, pornography does not qualify as high-level speech. "First, most of the speech at issue is far afield from the central purposes of the first amendment under almost any view." Sunstein, Legal Theory, supra note 5, at 844. Elsewhere Sunstein states: "The first point, made by traditional obscenity law as well, is that much pornographic material lies far from the center of the First
moves us to the depths of our hearts, in the pit of our stomachs, in the involuntary twitching of our loins. It speaks to our sexual identities, our sense of self and our relationship with others. That is, we care passionately about pornography and what it shows so, by definition, it cannot be important.\footnote{\(15\)}

Amendment concern. We might think of the First Amendment as, generally, speaking and first and foremost, a safeguard against government suppression of views with respect to public affairs." Sunstein, Neutrality, supra note 8, at 22. Note that Sunstein's political/non-political distinction is expressly based on the liberal public/private distinction, a distinction many feminists reject as one of the bulwarks of masculinist legal discourse.

In a footnote to his Neutrality essay, Sunstein does raise the concern (also expressed by Judge Easterbrook in American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1985)) that "pornography affects social attitudes, and is in a deep sense political." He denies, however, that it is "high level" or "political" speech. Sunstein, Neutrality, supra note 8, at 22 n.88. Sunstein criticizes Judge Easterbrook for recognizing antipornography legislation as viewpoint-based, without recognizing that traditional antib ASCEN DENCY legislation standards is equally viewpoint-based. That is, community standards of obscenity only seem neutral. Id. at 27. This point is well-taken, but might be misdirected insofar as Judge Easterbrook merely struck down antipornography legislation and did not also uphold obscenity legislation.

Sunstein attacks the Easterbrook challenge that the antipornography ordinance, which expressly viewed pornography as communicating the ideology of male supremacy, is an impermissible viewpoint-based restriction of speech (i.e. a form of thought control). Sunstein's first argument is that the fact that pornography implicitly incorporates a political ideology does not transform it into an intentional political statement which cannot be regulated, just as the fact that securities prospectuses implicitly incorporate a free market political ideology does not make the Securities Act of 1933 unconstitutional. Second, not all forms of viewpoint-based restrictions on speech are unconstitutional under current Supreme Court precedents. See Sunstein, Pornography, supra note 6, at 613-15. "The harms of pornography, canvassed above, are sufficient to justify regulation under the standards applied to low level speech." Sunstein, Legal Theory, supra note 5, at 845.

Sunstein tries to distinguish between speech which has political consequences—a category that would include most forms of speech—and speech that is:

intended and received as a contribution to social deliberation. . . . Commercial speech, criminal speech, and pornography do not qualify under this test. The argument to the contrary proceeds by trading on an ambiguity in the word 'political.' It is unpersuasive because it uses the term both as a statement about the social consequences of pornography (as to which it is quite plausible) and as a statement about the notion of political in First Amendment law (as to which it is quite implausible).

Sunstein, Neutrality, supra note 8, at 22 n.88. As discussed below in the text accompanying notes 116-17, MacKinnon makes a second-level argument defending her statute against First Amendment attacks on the ground of distinguishing pornography as a political act, rather than political speech. But, she hardly thinks that the characterization of pornography as "political" is a non-serious trading over the ambiguity of the term. Rather, it is political through and through, in the sense that radical feminism views sex as politics. See infra note 35.

As discussed in notes 14-15 below, Sunstein does, at times, more carefully, and more (but not entirely) successfully, describe the distinctions he is trying to make, between cognitive and non-cognitive speech.

14. Sunstein discusses both a political—nonpolitical distinction and a distinction between cognitive and noncognitive speech. The former deserves protection as "speech" under the First Amendment, while the latter may be more strictly regulated. He defines "cognitive" speech as "material [that] is intended to or does in fact impart knowledge in any sense." Sunstein, Pornography, supra note 6, at 603 n.87 (relying on John M. Finnis, "Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity, 116 U. PA. L. REV. 222, 227 (1960)). He notes that this distinction is similar to the current definition of obscenity as lacking social utility. That is, obscenity, like pornography, is noncognitive because it appeals to the realm of passion rather than to realm of intellect. Sunstein, Pornography, supra note 6, at 603.

15. Sunstein recognizes the power of this line of attack and admits that "distinctions between cognitive and emotive aspects of speech are thin and in some respects pernicious." Sunstein, Pornography, supra note 6, at 604. Much high-level symbolic speech, such as flag burning, appeals to the viscera. The distinction he tries to make is based upon the intent of the speaker to communicate. Flag burning, for instance, is intended not merely to raise our emotions, but also to cause us to re-examine our values and beliefs. Id. at 604 n.94.

In contradistinction, even though pornography may have a sexual political effect, Sunstein believes
But then why does Sunstein think pornography plays such a central role in MacKinnon's theoretical and political writings? Sunstein notes that MacKinnon herself does not analyze pornography in a vacuum, but characterizes as "highly controversial" her claim "that pornography is [not] a perversion of sexuality; it is instead that pornography helps to constitute sexuality."\(^6\) He states that although MacKinnon's argument against pornography "bears on sexuality quite generally, . . . it is possible to generate a defense of antipornography legislation that does not go so deep."\(^5\) He states that:

the critique of sexuality is distinct from the dominance approach to sex discrimination, although in MacKinnon's formulation the
two are merged. One might, for example, believe that issues of sex discrimination should be approached in terms of dominance rather than irrational differentiation without believing that sexuality itself is the source of the problem.  

The way Sunstein distinguishes between generalized pornography analysis and sexuality analysis and MacKinnon's dominance approach is by pointing out:

First, the connections among sexuality, nature, law, and culture are extraordinarily complex . . . . Second, the relationship between sex discrimination and sexual sadism is hardly simple and clear cut. . . . Moreover, sexual inequality is sometimes rooted in things other than sexual sadism; economic, domestic, and other advantages . . . . Third, the claim that sexuality is based on male dominance is in some tension with the presence of affirmative descriptions of sexuality from some women . . .  

That is, Sunstein shows how masculinism can cross-dress in the trappings of feminism by ostensibly adopting an antipornography position, and yet remain virile.

First, by concentrating on sexualized violence, and violence alone, Sunstein has narrowed the scope of the proposed legislation so that it would leave untouched "mainstream advertising, television, and popular culture—all of which sexualize violence." What is more, Sunstein argues that it might be appropriate to limit antipornography legislation so that it applies to work "taken as a whole" or at the very least protects "isolated passages" in longer works. . . . In such circumstances the low-value argument is more difficult to make. . . . and such materials are less likely to have a

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18. *Id.* at 847.  
19. *Id.* at 847.  
20. This is not the cross-dressing of drag queens, which seeks to be subversive of gender roles. Rather it is in the tradition of Hasty Pudding revues, Monty Python, Charley's Aunt and the Pantomime Dame, which reinstate gender roles. When we are expected to laugh at a man in a dress, using an obvious falsetto voice, it is because the very possibility of transcending the sexual status quo is presented as ridiculous per se.  
21. *Id.* at 845. Elsewhere Sunstein states that antipornography legislation would involve "depictions of sexuality that involve rape and violence against women . . . whereas depictions that do not" would not be controlled. Sunstein, *Neutrality, supra* note 8, at 27. Once again, Sunstein could be describing the antipornography legislation he might support, rather than the proposal made by Dworkin and MacKinnon. Yet this is belied by the fact that this statement is made in connection with his analysis of the decision in American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1985), which invalidated the Dworkin-MacKinnon proposal as adopted by the city of Indianapolis. It would seem, therefore, that this is how he characterizes MacKinnon's definition of pornography.
pernicious conditioning effect. They are thus less likely to produce sexual violence.\textsuperscript{22}

Second, Sunstein argues that pornography (as he narrowly defines it) is not political,\textsuperscript{23} and thus is not important. He thereby unintentionally undermines one of the most fundamental feminist challenge to masculinism—that the personal is the political.\textsuperscript{24} In the name of defending one specific feminist legislative proposal, he risks trivializing the more general feminist critique. This reestablishes and protects the traditional masculinist interpretation of the Constitution.

Finally, he argues that an antipornography position can be divorced from its initial justificatory theory (pornography constructs sex as domination) and can be supported by an alternative justificatory theory (pornography, if defined in a sufficiently limited way, might be causally related to physical violence

\begin{itemize}
\item \textsuperscript{22} Sunstein, \textit{Pornography}, \textit{supra} note 6, at 624. MacKinnon has expressly rejected this approach. Indeed, her critique of PLAYBOY magazine is precisely that it is designed to meet the “taken as a whole” test of current obscenity law. \textsc{Catharine A. MacKinnon}, \textit{“More Than Simply A Magazine”: Playboy’s Money, in Feminism Unmodified, supra note 3, at 134, 139.}

\item \textsuperscript{23} Sunstein does recognize that Judge Easterbrook invalidated the Indianapolis antipornography legislation as suppressing political speech. It would “constitute impermissible ‘thought control,’ since it would ‘establish an “approved” view of women, of how they may react to sexual encounters, [and] of how the sexes may relate to each other.” Sunstein, \textit{Neutrality, supra} note 8, at 27 (quoting American Booksellers Assn v. Hudnut, 771 F.2d at 328). Sunstein attacks this insistence on neutrality as wrongheaded. The main thrust of his article is that sometimes in the area of sex discrimination the government must take a seemingly partisan approach, as opposed to a facially neutral one. Sunstein, \textit{Neutrality, supra} note 8, at 29.

\item \textsuperscript{24} Sunstein states that “[in some circles, moreover, the antipornography movement has served as a powerful spur to changed attitudes on the part of both men and women.” Sunstein, \textit{Legal Theory, supra} note 5, at 846. However, as I have stated and as I will develop more thoroughly, Sunstein rejects the principle behind the antipornography movement: that pornography constructs sex, and that sex as so constructed is a form of domination, so that pornography is intimately interconnected with the analysis of the dominance theory of sexual discrimination. The attitudes he is discussing, presumably, refer to attitudes related to his definition of pornography as violence.

At one point, Sunstein does partially recognize the issue of the legitimacy of the legal distinction between the public and the private. He states that “[in this regard [that sexuality is sometimes a vehicle for sex discrimination and violent pornography can be sex discrimination], the existing private sphere is sometimes the problem rather than the solution. Legal controls aimed at pornography containing violence against women, draw attention to and help counter that fact. They are permissible for that very reason.” Sunstein, \textit{Neutrality, supra} note 8, at 21.
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against women).

B. Mechanics

It is initially hard to understand what Sunstein believes will be the result of recognizing a right of action similar to that proposed by MacKinnon and Dworkin. He states that "[i]t would be absurd to suggest that most sexual violence is a result of pornography or that sexual violence would disappear if pornography were eliminated." He later states that "[t]he fact that control of pornography would not bring about sexual equality by itself is hardly a persuasive reason not to initiate a measure that might do considerable good." Indeed, how could it be expected to have such an effect since, as I have stated, according to Sunstein the proposal would not affect mainstream cultural manifestations of sexualized violence? "Of course," he states, the pornography industry is

more symptom than cause [of sex inequality]; but it is cause as well. One need not believe that the elimination of violent pornography would bring about sexual equality, eliminate sexual violence, or change social attitudes in a fundamental way, in order to agree that a regulatory effort would have some effect in reducing violence and in diminishing views that contribute to existing inequalities.

Having rejected the argument that the control of pornography would help eliminate a substantial amount of sexual violence, or that it will be particularly effective in eliminating inequality, and having rejected MacKinnon's analysis of sexuality which underlies her analysis of pornography, what good does Sunstein think controlling pornography would do?

Sunstein does not focus on how the Dworkin-MacKinnon proposal is supposed to work, although I can guess by stopping here and examining its mechanics. The direct effect Sunstein seems to expect from the anti-pornography legislation he describes appears to be based on a traditional law and economics argument typical of the University of Chicago. If sexual

25. Sunstein, Legal Theory, supra note 5, at 843.
26. Id. at 846.
27. Sunstein, Neutrality, supra note 8, at 25-26. Elsewhere he writes, To say that there is such a connection [between violent pornography and sexual violence] is not to say that pornography lies at the root of most sexual violence. Nor is it to say that most or even a significant percentage of men will perpetrate acts of sexual violence as a result of exposure to pornography. But it is to say that the existence of pornography increases the aggregate level of sexual violence. Pornography is at least as much a symptom as a cause; but it is a cause as well.
Sunstein, Pornography, supra note 6, at 597.
28. If Sunstein does not expressly set forth this economic efficiency argument, he does hint at it. He states that one of the harms caused by the pornography industry is the coercion of models and actresses into pornography, as well as the abuse and mistreatment of these women. Making pornography actionable is, in Sunstein's opinion, preferable to the more restrictive alternative of making these acts criminal (as
violence is causally related to pornography, then sexual violence can be analyzed as an externality of the pornography industry. That is, part of the cost of pornography (i.e. sexual violence) is born not by the producer or the consumer but by third parties—its predominantly female victims. This results in the production of a greater amount of sexual violence than our society currently thinks is appropriate. The proposed antipornography legislation would make pornographers internalize these costs by subjecting them to the risk of suit. That is, the proposal does not purport to ban pornography or even to subject it to direct government control. Rather, it establishes a cause of action for damages (and, in some cases, injunctive relief) by certain persons injured by the creation, sale, or use of, or trafficking in pornography. The risk of being sued can be expected to increase the marginal cost to a pornographer of producing an additional unit of violent pornography, thus shifting the supply curve upwards. Assuming the demand curve for pornography to be relatively elastic, the equilibrium point at which the supply and demand curves intersect will shift to the northwest. That is, fewer units of pornography will be

they already are in current law) because "[t]he only realistically effective way to eliminate the practice is to eliminate or reduce the financial benefits." Sunstein, Neutrality, supra note 8, at 24.

Elsewhere he states, "[b]anning the unlawful conduct, however, is unlikely to eliminate it in light of the enormous profits to be made from pornography and the difficulty and cost of ferreting out and punishing particular abuses. The case for a ban on these materials depends on a conclusion that abusive practices are widespread and that elimination of financial incentives is the only way to control those practices." Sunstein, Pornography, supra note 6, at 596. Sunstein notes that such an economic analysis was adopted by the Supreme Court in the case of child pornography in New York v. Ferber, 458 U.S. 747 (1982). Sunstein, Pornography, supra note 8, at 596; see also Sunstein, Neutrality, supra note 8, at 24.

29. See MINNEAPOLIS, MINK., ORDINANCE AMENDING tit. 7, chs. 139 and 141, MINNEAPOLIS CODE OF ORDINANCES RELATED TO CIVIL RIGHTS (1983) and INDIANAPOLIS, IND., CITY-COUNTY GENERAL ORDINANCE 35 (1984) (adding, inter alia, ch. 16, § 16-3 (Q)(6) to the CODE OF INDIANAPOLIS AND MARION COUNTY).

More recent attempts to pass antipornography legislation narrow the scope of actionable behavior. For example, legislation proposed in the Commonwealth of Massachusetts, which contains a definition of pornography similar to that used in the Minneapolis and Indianapolis, would not make trafficking in pornography actionable. Mass. House Bill No. 5194, 1992.

A bill considered in the U.S. Senate last year would have permitted the victim of a rape, sexual assault or sexual crime to bring a civil action against a producer, distributor, exhibitor or seller of sexually explicit material if, among other elements, the material was a proximate cause of the offense. The definition of sexually explicit materials was significantly different from the MacKinnon proposal in that it concentrated on the depiction of specific physical acts (i.e. sexual intercourse, bestiality, lascivious exhibition of the genitals, sadistic or masochistic abuse, etc.) and did not specifically mention the hierarchical aspects of MacKinnon's definition of pornography (i.e. depictions of women as submissive and servile, etc.). The preamble of the bill emphasized the relationship between pornography and sexual aggression, child abuse and serial murderers and the psychological injury caused by child abuse but did not mention any relationship between pornography and the subordination of women generally. Reflecting the traditional "taken as a whole approach" of obscenity jurisprudence, material would not be considered sexually explicit if the offending description were an isolated passage in material not otherwise sexually explicit. The issue of whether the material was violent or promoted violent sexual behavior would be relevant for the purposes of establishing proximate cause. The definition of violence was more in keeping with the spirit of the MacKinnon proposal in that it includes depictions of victims "tortured, dismembered, confined, bound, beaten, or injured, in a context that makes these experiences sexual or indicates that the victims derive sexual pleasure from such experiences." S. 983, 102d. Cong., 1st. Sess. (1991).

A bill before the U.S. House of Representatives was much narrower, only covering one aspect of the creation of visual (but not written) pornography—the coercion, intimidation or fraudulent inducement of an individual to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct to be transported in interstate commerce. H.R. 1768, 102d. Cong., 1st Sess. (1991).
produced and consumed at any given price. The lowered production of violent pornography should be expected to result in a lower level of sexual violence. This should be true even if violent pornography is not the sole cause, or even the primary cause, of sexual violence so long as there is some causal linkage.

The result of internalizing the costs (i.e. insuring that the supplier bears the total cost of production) will enable the sexual economy more efficiently to determine the optimum mix of sexual titillation and sexual violence, while leaving (as Sunstein implicitly, but probably not consciously, suggests) the system of male domination and female subordination largely intact.30

On the other hand, if the demand curve for violent pornography is inelastic—if consumers will still consume it even at a higher price—then Sunstein’s proposal will have little effect on the amount of pornography produced or on the amount of violence perpetrated on women. However, men who read violent pornography will be forced to pay a premium for the privilege of violence. Hence, given an inelastic demand curve, violence is commodified and becomes the subject of market exchange.

However, if the causal connection between pornography and violence is weak (as Sunstein suggests), and since the screening costs of distinguishing between violent and non-violent consumers of violent pornography are impossibly high, both violent and non-violent consumers will pay a greater price for the privilege of consuming violent pornography. That is, the entire costs of violent pornography will not be internalized by the violent consumers, but will be spread over all consumers. This means that non-violent consumers of violent pornography will subsidize the violence of the other, violent, consumers.

C. Net Effect

The answer to the question of how Sunstein thinks masculinism can easily and safely adopt antipornography should by now be obvious. Sunstein has defined away pornography to an almost infinitesimally narrow epiphenomenon. He then relates it causally to acts almost universally recognized as heinous and seriously criminal: violent stranger rape, forced bestiality, torture and murder.

30. Insofar as the definition of actionable pornography is very narrowly defined (being much narrower than the definition of obscenity and permitting violent pornographic interludes in works which, taken as a whole, are not violently pornographic), the total increase in the costs to pornographers, and the resulting decrease in the production of violent pornography, can be expected to be small. Whether or not the increase will materially affect the consumption of violent pornography will depend on the price elasticity of the demand for violent pornography—that is, if the demand curve for pornography is elastic, the increase in price can be expected to substantially decrease consumption, but if the demand curve for pornography is relatively inelastic, an increase in price will have a relatively minor effect upon consumption. In turn, whether or not any decrease in the consumption of violent pornography will have a material effect on the amount of sexual violence against women will depend on the strength of the causal link between the former and the latter. In other words, although the question is an empirical one, under this analysis the effect which antipornography legislation can be expected to have on sexual violence is uncertain but would probably be extremely marginal.
What is more, he denies its material relation to the fundamental structures of sexual dominance. Finally, he suggests that eliminating pornography probably will not have any significant effect even on sexualized violence. Consequently, masculinism can permit pornography to be actionable because: i) it would at most make certain categories of sexual esoterica somewhat more expensive, and this inconvenience can be justified by reference to the prevention of acts which are already considered serious crimes; ii) it would not have any effect on the sexual status quo of male dominance; and, perhaps most importantly, iii) it won’t really prevent rape anyway. That is, give the girls their statute—it won’t make any difference. We can convince ourselves that we honestly and vigorously support feminism without risking our status as liberal, legal academicians. We can recognize that women are oppressed without having to question, as MacKinnon does, the very nature of masculine sexuality.

And so Sunstein introduces us to an accurate description of MacKinnon’s theory but then subtly distorts it. He emphasizes the non-controversial aspects—its opposition to smut and violence as traditionally conceived—while de-emphasizing its disturbing aspects—the analysis of the masculinist construction of sex as domination. But, being too careful and honest a scholar to ignore the latter totally, he argues that one can accept the former without the latter. In doing so he is, perhaps, only gratefully accepting an invitation which MacKinnon herself has graciously extended—Sunstein’s interpretation is, after all, scrupulously based on her text. He thereby introduces into masculinism a weakened and non-fatal modification of feminism which retains the form of the virus, but which does not contain its virulent, radical, and vital driving force. Consequently, he can conclude: “My suspicion . . . is that a decade from now, the central insights of Feminism Unmodified, and of MacKinnon’s work generally, will be taken as substantially correct in the legal culture. If they are not, the fault will lie with the legal culture, not with the insights themselves.” 31 If Sunstein is successful, masculinist legal culture will have internalized the weakened form of feminism which he has introduced. Having been inoculated against the stronger form, the masculinist legal culture will remain. If the stronger form of feminism is successfully resisted by legal culture it will be because of the strength of inoculated masculinism, rather than merely the innate weakness of feminism.

II. MacKINNON’S PORNOGRAPHY ANALYSIS

A. Sex, Not Violence

Catharine MacKinnon’s central analysis of pornography is a critique of sexuality, not violence, violent sex or sexualized violence. 32 In a passage that

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31. Sunstein, Legal Theory, supra note 5, at 848.
32. MacKinnon insists that so-called sexual violence, or violent sex, must be analyzed, first and
could have been addressed directly to Sunstein, she states:

To define the pornographic as that which is violent, not sexual, as liberal moral analyses tend to, is to trivialize and evade the essence of this critique, while seeming to express it. As with rape, where the issue is not the presence or absence of force but what sex is as distinct from coercion, the question for pornography is what eroticism is as distinct from the subordination of women. This is not a rhetorical question. Under male dominance, whatever sexually arouses a man is sex. In pornography the violence is the sex. The inequality is the sex. Pornography does not work sexually without hierarchy. If there is no inequality, no violation, no dominance, no force, there is no sexual arousal.33

Sexuality, to MacKinnon, is not a matter of biology,34 but of politics.35

33. CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 160 (footnote omitted). Elsewhere, MacKinnon continues: "In pornography, the violence is the sex. The inequality is sex. The humiliation is sex. The debasement is sex. Pornography does not work sexually without gender hierarchy. If there is no inequality, no violation, no dominance, no force, there is no sexual arousal." CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 211 (1989) [hereinafter MACKINNON, THEORY OF THE STATE].

Discussing the presumptions underlying studies that attempt to show that there is no causal link between pornography and violence, and that do not consider sex as violence, MacKinnon states: "They don't ask whether sexuality is itself violating or even whether it is itself violent; they are premised instead on the view that sexuality and violence are distinct; hence pornography is distinct from erotica. . . . But they don't test for whether sexual excitement means they will express violent sex . . . ." CATHARINE A. MACKINNON, Linda's Life and Andrea's Work, in FEMINISM UNMODIFIED, supra note 3, at 127, 130.

MacKinnon argues that pornography tends to increase the physically violent aspect of heterosexuality, as well as the demand for more violent forms of pornography. "[T]he more pornography men see, the more abusive and violent they want it to be. The more abusive and violent it becomes, the more they enjoy it and the more aroused they get. The more abusive and violent it becomes, the less harm they see in what they are seeing and doing." MacKinnon, Defamation and Discrimination, supra note 3, at 799.

34. "If this differential [between the sexes] were biological, maybe biological intervention would have to be considered. If it were evolutionary, perhaps men would have to evolve differently. Because I think it is political, I think its politics construct the deep structure of society." CATHARINE A. MACKINNON, Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED, supra note 3, at 32, 41. See id. at 52, ("the analysis of sex is social, not biological."); see also MACKINNON, THEORY OF THE STATE, supra note 33, at xiii, 57.

35. "Gender is an inequality of power, a social status based on who is permitted to do what to whom." CATHARINE A. MACKINNON, The Art of the Impossible, in FEMINISM UNMODIFIED, supra note 3, at 1, 8. MacKinnon elaborates on this point, explaining that "[b]y political, I mean here questions of power. The feminist theory of power is that sexuality is gendered as gender is sexualized. . . . In other words, feminism is a theory of how the eroticization of dominance and submission creates gender, creates woman and man in the social form in which we know them." CATHARINE A. MACKINNON, Desire and Power, in FEMINISM UNMODIFIED, supra note 3, at 46, 50 (footnote omitted).

Thus, "[t]o explain gender inequality in terms of 'sexual politics' is to advance not only a political theory of the sexual that defines gender but also a sexual theory of the political to which gender is fundamental." MACKINNON, THEORY OF THE STATE, supra note 33, at 131 (footnote omitted).
Men's power to make the world here is their power to make us make the world of their sexual interaction with us the way they want it. Now I want to say something about the use of the verb "to be" in feminist theory. If the analysis I have given is right, to be realistic about sexuality socially is to see it from the male point of view. Because male power has created in reality the world to which feminist insights, when they are accurate, refer, many of our statements will capture that reality, simply exposing it as specifically male for the first time. For example, men say all women are whores. We say men have the power to make this our fundamental condition. So feminism stresses the indistinguishability of prostitution, marriage, and sexual harassment. See: what a woman "is" is what you have made women "be." That "is" women, as men make women mean. They have the power to; they do—otherwise power means nothing.36

That is, in what appears to be typical postmodernist social theory, MacKinnon insists that there is no "reality" external to human society, there are only social constructs. She also takes the corollary of this seriously and literally. What society constructs is "real" not in an objectivist and essentialist matter, but in the sense that this is the only meaning which the word "real" can have in a postmodern world.37 In addition, actual empirical women "really" live their lives in accordance with this constructed reality. Rape is real, not a false charge.38 She has described her project in part as asking not only what is

_id. at iii, 3, 41, 113, 242; and generally, _id. 215-234._

36. _CATHARINE A. MACKINNON, Desire and Power, in FEMINISM UNMODIFIED, supra note 3, at 46, 58-59 (footnotes omitted)._ MacKinnon often emphasizes the way in which men construct sexual reality. "Male dominance here is not an artificial overlay upon an underlying inalterable substratum of uncorrupted essential sexual being. . . . Pornography is not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, projection, expression, fantasy, representation or symbol either. It is sexual reality." _CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 149._

Because male power creates the reality of the world to which feminist insights, when accurate, refer, feminist theory will simply capture that reality but expose it as specifically male for the first time. For example, men say all women are whores; feminism observes that men have the power to make prostitution women's definitive condition. Men define women as sexual beings; feminism comprehends that femininity is sexual. Men see rape as intercourse; feminism observes that men make much intercourse rape. Men say women desire to be degraded; feminism sees female masochism as the ultimate success of male supremacy and puzzle (and marvel) over its failures. The feminist use of the verb "to be" is this kind of "is." _MACKINNON, THEORY OF THE STATE, supra note 33, at 125 (footnote omitted)._ "Male power is a myth that makes itself true." _Id. at 104._

37._ "Then there are the interpretation people, for whom social reality has no fixed, determinate reality. Society is all mental. Pornography, too, is just a fantasy. But if it is only mental, in a world in which everything is only mental, why isn't it as real as anything else?" _CATHARINE A. MACKINNON, Afterword, in FEMINISM UNMODIFIED, supra note 3, at 215, 223._

38._ Feminist theory "participates in reality: the reality of a fist in the face, not the concept of a fist in the face." _Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1285 (1991) [hereinafter MacKinnon, Reflections]._ The facts have to do with the rate of rape and attempted rape of American women, which is 44 percent. If you ask a random group of women, "Have you ever been raped or been the victim
constructed, but who is doing the constructing.\textsuperscript{39} As human beings are all constructed, we can only experience sex in terms of how specific societies organize sexual relationships\textsuperscript{40} and the status attributed to sexual identities.\textsuperscript{41} That is, whether or not there could be a theoretical distinction between purely biological sex and social gender, such a distinction is at best meaningless as a practical political matter, and at worst, misleading in that it gives an aura of naturalism to the status quo.\textsuperscript{42}

\[\text{of an attempted rape?}\] and do not exclude marital rape, that is the figure. Some 4.5\% percent of all women are victims of incest by their fathers, an additional 12 percent by other male family members, rising to a total of 43 percent of all girls before they reach the age of eighteen, if sexual abuse within and outside the family is included. These data, by the way, are predicated on believing women, which Freud had a problem with. \ldots If you ask women whether they've been sexually harassed in the last two years, about 15 percent report very serious or physical assaults; about 85 percent of all working women report sexual harassment at some time in their working lives. Between a quarter and a third of all women are battered by men in the family. If you look at homicide data, between 60 percent and 70 percent of murdered women have been killed by a husband, lover, or ex-lover. The same is not true for murdered men. \ldots About 12 percent of American women are or have been prostitutes. \ldots The pornography industry, an exemplary synthesis of the erotization of dominance and submission with capitalism's profit motive, is put at eight billion dollars a year, with three to four times as many outlets as McDonald's restaurants.

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\textsc{Catharine A. MacKinnon, Desire and Power, in Feminism Unmodified, supra note 3, at 46, 51-52.}
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\textsuperscript{39} Post-Foucault, actually post-Foucault, it has become customary to affirm that sexuality is socially constructed. Seldom specified is what, socially, it is constructed of, far less who does the constructing or how, when, or where.” \textsc{MacKinnon, Theory of the State, supra note 33, at 131 (footnote omitted).}

As I will explain below, the questions “who” is doing the constructing and “of what” is sexuality constructed, presuppose a liberal essentialist theory of the subject and the body that was expressly rejected by Foucault and Lacan. “How?,” “when?,” and “where?” are hardly unasked questions. \textit{See infra} text accompanying notes 206-229. One can disagree as to their success, but Foucault and Lacan's works revolved primarily on proposing answers for these questions.

\textsuperscript{40} That is, even if pornography is a fantasy, human beings live their lives in accordance with this fantasy. Fantasy is, therefore, reality. “Pornography is not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, projection, expression, fantasy, representation, or symbol either. It is sexual reality. \ldots Gender is what gender means.” \textsc{MacKinnon, Theory of the State, supra note 33, at 198 (footnote omitted).}

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\textit{Women live in the world pornography creates, live its lies as reality.” Id. at 205. “Pornography can invent women because it has the power to make its vision into reality, which then passes, objectively, for truth.” Id. at 205.}
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\textit{See also Catharine A. MacKinnon, Not a Moral Issue, in Feminism Unmodified, supra note 3, at 146, 148-55 and Catharine A. MacKinnon, Francis Biddle's Sister, in Feminism Unmodified, supra note 3, at 163, 171-73. “The experience of the (overwhelmingly) male audiences who consume pornography is therefore not fantasy or simulation or catharsis but sexual reality: the level of reality on which sex itself largely operates.” MacKinnon, Theory of the State, supra note 33, at 198 (footnote omitted).}

\textit{See also supra note 39. “I define sexuality as whatever a given society eroticizes. That is, sexual is what sexual means in a particular society. Sexuality is what sexuality means.” Catharine A. MacKinnon, Desire and Power, in Feminism Unmodified, supra note 3, at 46, 53.}

\textsuperscript{41} “Because sexuality arises in relations under male dominance, women are not the principal authors of its meanings. In the society we currently live in, the content we want to claim for sexuality is the gaze that constructs women as objects for male pleasure.” \textsc{Catharine A. MacKinnon, Desire and Power, in Feminism Unmodified, supra note 3, at 46, 53. “I think that sexual desire in women, at least in this culture, is socially constructed as that by which we come to want our own self-annihilation.” Id. at 54.}

\begin{quote}
“A theory of sexuality becomes feminist methodologically, meaning feminist in the post-marxist sense, to the extent it treats sexuality as a social construct of male power: defined by men, forced on women, and constitutive of the meaning of gender.” \textsc{MacKinnon, Theory of the State, supra note 33, at 128.}
\end{quote}

\textsuperscript{42} Critiquing the strand of feminist theory according to which gender inequality revolves around gender differentiation, MacKinnon states:

\begin{quote}
The view is that there are real differences between the sexes, usually biological or natural. Upon these differences, society has created some distorted, inaccurate, irrational, and arbitrary distinctions: sex stereotypes or sex roles. To eliminate sex inequality, in this view, is to eliminate
MacKinnon's approach is that, in order to understand the norm, one should look at the exception.43 The exception should not be seen as an aberration in the sense of a break from the norm, but as a continuation and exaggeration of the norm.44 Extreme behavior clears out the underbrush and leaves the

these wrong and irrational distinctions. The evil and dynamic of sexism here is the twisting of biological males and females into masculine and feminine sex roles.

CATHARINE A. MACKINNON, Women, Self-Possession, and Sport, in FEMINISM UNMODIFIED, supra note 3, at 117, 117. "That is, the equality of women to men will not be scientifically provable until it is no longer necessary to do so." MACKINNON, THEORY OF THE STATE, supra note 33, at 117.

As I have argued elsewhere, MacKinnon's approach has great superficial similarities to the psychoanalytic theory of sexuality associated with Jacques Lacan. Lacanians also do not generally distinguish between gender and sexuality because, they claim, our conscious selves can only experience our anatomical reality mediated through language and the unconscious. See Jeanne L. Schroeder, That Obscure Object of Desire: Property and the Feminine in Law and Psychoanalysis (Oct. 15, 1992) (unpublished manuscript on file with author); Jeanne L. Schroeder, Subject:Object, 47 MIAMI L. REV. (forthcoming 1992) [hereinafter Schroeder, Subject:Object].

43. To this extent, MacKinnon's approach, with which I largely agree, may be compared to the approach of Carl Schmitt. Schmitt turns Thomas Hobbes on his head by arguing that one can best understand the political concept of sovereignty not by looking at government in normal times, but at crisis. "Sovereign is he who decides on the exception." CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., 1985).

44. "In a feminist perspective, pornography is the essence of a sexist order, its quintessential social act." CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 154.

[W]hatever goes on in the minds of women hurt through pornography, or even all women, who live knowing what will, sooner or later, happen to them, and then it happens—that is trivial and does not matter at all. Understand, these are people who claim to understand what Derrida means when he says that speech is "always already" writing, but claim not to be able to grasp how sexuality could be always already pornography.

CATHARINE A. MACKINNON, Afterword, in FEMINISM UNMODIFIED, supra note 3, at 215, 223.

This is why MacKinnon insists that one cannot draw a line between erotica and pornography, rape and intercourse, sexual violence and sexual hierarchy. For example, in Linda's Life and Andrea's Work, MacKinnon states,

Pornography is thought to be a divergent and unorthodox view. Andrea [Dworkin]'s analysis reveals that the views in pornography are conventional; they are the consensus. This is why legal line-drawing is so difficult in this area. That difficulty was implicit in all Mr. Joseph said to make us afraid of the consequences of trying to do anything about pornography: the inability to draw a line between pornography and everything else. To me that exposes the pervasiveness of the value system Andrea analyzes, its presence in literature, in advertising, in daily life. If I have any difficulty distinguishing those areas from pornography, it is not because I don't think some things are worse than others, because they are, but because the same values pervade them all.


Additionally, in Sex and Violence: A Perspective, MacKinnon notes,

The point of view of men up to this time, called objective, has been to distinguish sharply between rape on the one hand and intercourse on the other; sexual harassment on the one hand and normal, ordinary sexual initiation on the other; pornography or obscenity on the one hand and eroticism on the other. The male point of view defines them by distinction. What women experience does not so clearly distinguish the normal, everyday things from those abuses from which they have been defined by distinction. . . . What we are saying is that sexuality in exactly these normal forms often does violate us. So long as we say that those things are abuses of violence, not sex, we fail to criticize what has been made of sex, what has been done to us through sex, because we leave the line between rape and intercourse, sexual harassment and sex roles, pornography and eroticism, right where it is.

CATHARINE A. MACKINNON, Sex and Violence, in FEMINISM UNMODIFIED, supra note 3, at 85, 86-87. Furthermore:

Whatever obscenity may do, pornography converges with more conventionally acceptable depictions and descriptions just as rape converges with intercourse because both express the same power relation. Just as it is difficult to distinguish literature or art against a background, a
characteristic elements of society bare to be seen. Like a caricature, it exaggerates features in a way as to make them more easily recognizable. Consequently, in order to analyze the political nature of sex, we need to look at our society's starkest and most undiluted depictions of sex, i.e., pornography. Pornography describes sex as sex; not sex as art, sex as love, sex as violence or sex as anything else. What pornography depicts is the subordination of women by men. That is, to MacKinnon, not only is the

standard, of objectification, it is difficult to discern sexual freedom against a background, a standard, of sexual coercion.

CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 154.

45. In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the unspeakable abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them. More generally, it eroticizes the dominance and submission that is the dynamic common to them all. It makes hierarchy sexy and calls that "the truth about sex" or just a mirror of reality.

CATHARINE A. MACKINNON, Francis Biddle's Sister: Pornography, Civil Rights, and Speech, in FEMINISM UNMODIFIED, supra note 3, at 163, 171 (footnote omitted).

As to gender, what is sexual about pornography is what is unequal about social life. To say that pornography sexualizes gender and genders sexuality means that it provides a concrete social process through which gender and sexuality become functions of each other. Gender and sexuality, in this view, become two different shapes taken by the single social equation of male dominance and female subjection. Inequality is what is sexualized through pornography; it is what is sexual about it. The more unequal, the more sexual. The violence against women in pornography is an expression of gender hierarchy, the extremity of the hierarchy expressed and created through the extremity of the abuse, producing the extremity of the male sexual response.

MACKINNON, THEORY OF THE STATE, supra note 33, at 143-44.

"When men use pornography, they experience in their bodies, not just their minds, that one-sided sex—sex between a person (hem) and a thing (it)—is sex, that sexual use is sex, sexual abuse is sex, sexual domination is sex. . . . Pornography works by making sexism sexy." MacKinnon, Defamation and Discrimination, supra note 3, at 802.

MacKinnon similarly looks at rape as an exemplar, not an aberration, of normal sex. In THEORY OF THE STATE, MacKinnon states: "Politically speaking, whatever obscenity may do, pornography converges with more conventionally acceptable depictions and descriptions just as rape does with intercourse, because both are acts within the same power relation." MACKINNON, THEORY OF THE STATE, supra note 33, at 203.

If sexuality is central to women's definition and forced sex is central to sexuality, rape is indigenous, not exceptional, to women's social condition. In feminist analysis, a rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systematic context of group subjection, like lynching.

Id. at 172. "Here the victims' perspective grasps what liberalism applied to women denies: that forced sex as sexuality is not exceptional in relations between the sexes but constitutes the social meaning of gender." Id. at 178. Consequently, MacKinnon calls for the recognition of a civil cause of action for rape as an act of sexual discrimination. Catharine A. MacKinnon, The Palm Beach Hanging, N.Y. TIMES, Dec. 15, 1991, § 4, at 15.

46. That is, men possessing women, as Andrea Dworkin describes pornography in the title of her book. ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981). In other words, "pornographic meaning that the woman is defined as to be acted upon, a sexual object, a sexual thing—the viewing is an act, an act of male supremacy." CATHARINE A. MACKINNON, Linda's Life and Andrea's Work, in FEMINISM UNMODIFIED, supra note 3, at 127, 130.

"In pornography, women desire dispossession and cruelty. . . . Subjection itself, with self-determination ecstatically relinquished, is the content of women's sexual desire and desirability. Women are there to be violated and possessed, men to violate and possess them . . . ." Id. at 148.

Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography, with the rape and prostitution
subordination of women sexual, but sexuality is the subordination of women. 47

The harm of pornography, first and foremost, is that it is one of the primary vehicles by which sexuality is constructed. 48 Specifically, in masculinist society, sexuality does not exist separate from the gender hierarchy, it is the gender hierarchy. 49 Pornography is the eroticization of domination and submission. 50 In pornography, woman’s sexuality is her violation: to be a woman is to be rapable. 51 Pornography is, therefore, one of the primary bases of sexual discrimination, of sexual inequality. It is, in this sense, a “form of forced sex.” 52 Pornography is itself always already a form of violence: a violent act. 53

MacKinnon also argues that pornography has a causal link to sexualized violent (or, perhaps more accurately, violently sexual, or just sexual) acts
against women and children.\textsuperscript{54} Not only are the women who are pornographed in the production process violated, but women are beaten, raped, tortured, and even murdered as sex acts.\textsuperscript{55} But once again, she argues that we must not overly concentrate on the violent aspects of these acts in the sense of trying to separate the violence from the sex.\textsuperscript{56} Although we should not belittle the reality of physical violence, we should also recognize that physical violence epitomizes the overall violence—social and psychic as well as physical—of the masculinist system.\textsuperscript{57} We should concentrate, therefore, on how the physical

\begin{enumerate}
\item[54.] Recent experimental research on pornography shows that the materials covered by our definition cause measurable harm to women through increasing men's attitudes and behaviors of discrimination in both violent and nonviolent forms. \ldots On this latter measure [if men knew they would not be caught], by the way, about a third of all men predict that they would rape, and half would force sex on a woman. \textit{Catharine A. MacKinnon, Francis Biddle’s Sister, in Feminism Unmodified, supra note 3, at 163, 187. See also, MacKinnon, Theory of the State, supra note 33, at 144-45, 208-09.}

Some researchers believe that their laboratory experiments show the opposite. \textit{See, e.g., Daniel Goleman, New Research Maps the Mind of the Rapist, N.Y. Times, December 10, 1991, at C1, C10. As Sunstein discusses, the conclusions that can be drawn from laboratory tests are extremely problematic. Sunstein, Pornography, supra note 6, at 398.}

Adequate alternative ways of performing empirical studies are not readily available. Studying convicted rapists is unsatisfactory because "the percentage of rapes that are reported and convicted is very small" so that studies of apprehended rapists "are probably quite unrepresentative." N.M. Malamuth, \textit{Aggression Against Women: Cultural and Individual Causes, in Pornography and Sexual Aggression 23} (N. Malamuth & E. Donnerstein eds., 1984) [hereinafter Malamuth, \textit{Aggression Against Women}]. The distinction the law makes between rape and intercourse serves the social function of making most violent sex permissible. That is, rape is defined as that which psychopaths do. Men can tell themselves, if I am not a psychopath, by definition I am not a rapist. "The law of rape is designed so that rape is what somebody else does and what almost never happens: so that what is done all the time, presumably including by those who design and interpret and enforce the laws, can be done." MacKinnon, Reflections, supra note 38, at 1300.

At most, studies of convicted rapists might give us some insight as to the type of persons who so precisely fit our stereotypes of rapists that they can be successfully prosecuted.

One study tried to locate unconvicted rapists by running advertisements in Los Angeles newspapers asking "Are you a rapist? If so, call me." Malamuth, \textit{Aggression Against Women, supra}, at 23. Once again, this study might tell us something about the type of men who would answer such an outrageous ad, but do we have any reason to think that this sample is representative of rapists generally?

Consequently, many of the authors in the Malamuth and Donnerstein collection concentrate on cross-cultural and cross-historical comparisons of incidences of sexual violence and the availability of various forms of pornography. Given the seemingly infinite differences between the cultures of different countries and historical periods and the impossibility of introducing a control group, these studies have their own difficulties, as their authors are keenly aware.

\item[55.] \textit{See supra, note 47. See also Catharine A. MacKinnon, Francis Biddle’s Sister, in Feminism Unmodified, supra note 3, at 171, and MacKinnon, Theory of the State, supra note 33, at 208. "To be clear: what is sexual is what gives a man an erection. \ldots Whatever else does this, fear does, hostility does, hatred does, the helplessness of a child or a student or an infantilized or restrained or vulnerable woman does, revulsion does, death does." Id. at 137.}

\item[56.] \textit{See supra text accompanying note 33.}

\item[57.] \textit{The point of defining rape as ‘violence not sex’ has been to claim an ungendered and nonsexual ground for affirming sex (heterosexuality) while rejecting violence (rape). The problem remains what it has always been: telling the difference. The convergence of sexuality with violence, long used at law to deny the reality of women’s violation, is recognized by rape survivors with a difference: where the legal system has seen the intercourse in rape, victims see the rape in intercourse. The uncoerced context for sexual expression becomes as elusive as the physical acts come to feel indistinguishable. Instead of asking what is the violation of rape, their experience suggests that the more relevant question is, what is the nonviolation of intercourse? To know what is wrong with rape, know what is right about sex. MacKinnon, Theory of the State, supra note 33, at 173-74.}

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violent aspect of sexuality serves to reinforce the sexual hierarchy.\textsuperscript{58} Unfortunately, despite the fact that she insists that she is using sexualized physical violence not as the definition of the harm of pornography, but merely as an extreme and important example of that harm, her concentration on violent examples in her writings and speeches serves as an invitation to liberals like Sunstein, who are uncomfortable with the implications of her critique of sexuality, to see only the critique of violence.

In pornography, women are deprived of their individuality and are collectivized as non-persons.\textsuperscript{59} Consequently, to be treated as a woman is to be recognized as not human.\textsuperscript{60} MacKinnon states that all pornography is violent, but this is based on a very broad definition of violence to include all forms of coercion: social, psychic, emotional, as well as physical.\textsuperscript{61} Not all

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\textsuperscript{58} "Sexual violation symbolizes and actualizes women's subordinate social status to men. It is both an indication and a practice of inequality between the sexes, specifically of the low status of women relative to men." MacKinnon, Reflections, supra note 38, at 1302.

Sexual abuse works as a form of terror in creating and maintaining this arrangement. It is a terror so perfectly motivated and systematically concerted that it never need be intentionally organized—an arrangement that, as long as it lasted, would seal the immortality of any totalitarianism. I have come to think that the unique effectiveness of terrorism, like that against Jews in Argentina, is that it is at once absolutely systematic and absolutely random: systematic because one group is its target and lives knowing it; random because there is no way of telling who is next on the list. Just to get through another day, women must spend an incredible amount of time, life, and energy cowed, fearful, and colonized, trying to figure out how not to be next on the list.

CATHARINE A. MACKINNON, The Art of the Impossible, in FEMINISM UNMODIFIED, supra note 3, at 1, 7.

\textsuperscript{59} The trouble with this [liberal] individuated, atomistic, linear, isolated, tortlike—in a word, positivistic—conception of injury is that the way pornography targets and defines women for abuse and discrimination does not work like this. It does hurt individuals, not as individuals in a one-at-a-time sense, but as members of the group 'women.'

CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 156. MacKinnon makes this point again, in virtually the same language in MACKINNON, THEORY OF THE STATE, supra note 33, at 208. See also id. at 209-11. I discuss this aspect of MacKinnon's thought in Jeanne L. Schroeder, Abduction From the Seraglio: The Logic of Imagination and Feminist Methodologies, 85 TEX. L. REV. 109, 194-96. (1991) [hereinafter Schroeder, Abduction From the Seraglio].

\textsuperscript{60} MacKinnon supports her proposition by quoting Richard Rorty paraphrasing MacKinnon:

To be treated like a women [sic] is to be disadvantaged in these ways as an incident of being assigned to the female sex. To speak of social treatment "as a woman" is thus not to invoke any universal essence or homogeneous generic or ideal type, but to refer to this diverse material reality of social meanings and practices such that to be a woman "is not yet the name of a way of being human."

MacKinnon, Reflections, supra note 38, at 1299.

\textsuperscript{61} Her discussion as to the continuity of rape and "normal" intercourse illustrates this point:

We also get many women who believe they have never been raped, although a lot of force was involved. . . . In other words, in all these situations, there was not enough violence against them to take it beyond the category of 'sex'; they were not coerced enough. Maybe they were forced-fucked for years and put up with it, maybe they tried to get it over with, maybe they were coerced by something other than battery, something like economics, maybe even something like love.

CATHARINE A. MACKINNON, Sex and Violence, in FEMINISM UNMODIFIED, supra note 3, at 85, 88. The violence of pornography consists in its construction of sexuality, the eroticization of the subordination of women. Pornography is a form of "forced sex" in that it forcibly creates our sexuality. Id. at 148, 172.

Crucially, all pornography by our definition acts dynamically over time to diminish the consumer's ability to distinguish sex from violence. . . . The so-called sex-only materials, those in which subjects perceive no force, also increase perceptions that a rape victim is worthless and decrease the perception that she was harmed. The overall direction of current research suggests
pornography depicts physical violence. But the physical violence of some modes of pornography—most significantly, of “snuff” films in which women are actually murdered—epitomizes the function of the gender hierarchy. Masculine personhood is established by the destruction of feminine personhood. This is done psychologically and socially in the case of “normal” heterosexual relationships even as it is done literally and physically in the case of snuff. For MacKinnon, the psychoanalytic twinning of the desires for life (Eros) and death (Thanatos) becomes literal, not symbolic.

Pornography is not, therefore, to be defined by violent pornography, as Sunstein implies. Accordingly, in the proposed legislation MacKinnon drafted with Andrea Dworkin, MacKinnon defines pornography as the “graphic sexually explicit subordination of women through pictures or words” that also

that the more express violent materials accomplish with less exposure what the less overtly violent—that is, the so-called sex-only materials—accomplish over the longer term. Women are rendered fit for use and targeted for abuse.”

Id. at 187.

Quoting a woman who testified at hearings before the Minneapolis city council in favor of antipornography legislation: “Porn is already a violent act against women. It is our mothers, our daughters, our sisters, and our wives that are for sale for pocket change at the newsstands in this country.” Id. at 192. She compares pornography to fighting words which inflict harm by their very utterance. Id. 

62. “Women in pornography are bound, battered, tortured, humiliated, and killed. Or to be fair to the soft core, merely taken and used.” CATHARINE A. MACKINNON, On Collaboration, in FEMINISM UNMODIFIED, supra note 3, at 198, 199. MacKinnon makes this point again in similar language in MACKINNON, THEORY OF THE STATE, supra note 33, at 138, and in MacKinnon, Defamation and Discrimination, supra note 3, at 706-797.

See in particular MacKinnon’s analysis of Playboy magazine in which she refuses to distinguish its sexual depictions from other more expressly violent forms of pornography. “As if passion is never violent.” MACKINNON, THEORY OF THE STATE, supra note 33, at 139. She also includes in her definition of force “the more covert forms of socialization, pressure, and inculcation to passivity and femininity, some in the more overt forms of poverty and sexual violence.” MacKinnon, Defamation and Discrimination, supra note 3, at 796.

63. You may think snuff is one thing, Playboy another. Our law [i.e. the Dworkin-MacKinnon antipornography ordinance] says something very simple: a woman is not a thing to be used, any more than to be abused, and her sexuality isn’t either. Why do woman lawyers who identify as feminists buy and defend the pornographers’ view of what a woman is for, what a woman’s sexuality is? Why, when they look in the mirror, do they see the images of themselves the pornographers put there?


Some dispute the existence of snuff films. MacKinnon insists that they exist and is reportedly gathering evidence on the subject because she believes that the message of snuff—the annihilation of women—is the ultimate message of sex. Fred Strebeigh, Defining Law on the Feminist Frontier, N. Y. TIMES MAG., Oct. 6, 1991, at 28, 56.

64. “Pornography dispossess women of the power of which, in the same act, it possesses men: the power of sexual, hence gender, definition. Perhaps a human being, for gender purposes is someone who controls the social definition of sexuality.” CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 158.

It is only to the extent that each of these values is accepted as human that their negation becomes a quality of, and is eroticized in and as, woman. Only when self-respect is accepted as human does debasement become sexy and female; only when the avoidance of pain is accepted as human does torture become sexy and female. In this way, women's sexuality as expressed in pornography precisely negates her status as human.

CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 160.

“Woman through male eyes is sex object, that by which man knows himself at once as man and as subject.” MACKINNON, THEORY OF THE STATE, supra note 33, at 122. “The eroticism that corresponds to the male side of this epistemology . . . its sexual ontology, is the use of things to experience self. Women are the things and men are the self.” Id. at 123 (footnote omitted).
include another element. The proposed legislation's list of possible additional elements does include acts of express physical violence—such as torture and mutilation. But it also includes elements which are not necessarily physically violent—such as depictions of woman as submissive or servile.

MacKinnon at one point—and at only one point—distinguishes between her defined term "pornography" and a potential definition of "erotica" as "sexually explicit materials premised on equality." This seems to be intended as an opening to liberals. But any reliance on it in order to equate pornography and violence is misplaced. MacKinnon in every other place in her works critiques attempts at distinguishing violent pornography from other forms of erotica.

This can be seen in her analysis of *Deep Throat*, an example of hard core pornography within MacKinnon's definition. Although the making of the film was itself an act of violence in which pornography actress Linda

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65. CATHARINE A. MACKINNON, Francis Biddle's Sister: Pornography, Civil Rights, and Speech, in FEMINISM UNMODIFIED, supra note 3, at 163, 176. "Our law defines pornography as graphic sexually explicit pictures or words that subordinate women and also include one or more of a number of specified scenarios which typify pornography." MacKinnon, Defamation and Discrimination, supra note 3, at 801.

66. "[I]ncludes women . . . enjoying pain . . . or rape; being tied up, cut up, mutilated, bruised, or physically hurt; . . . penetrated by objects or animals, or presented in scenarios of . . . injury, torture; . . . bleeding, bruised, or hurt in a context which makes these conditions sexual." CATHARINE A. MACKINNON, Francis Biddle's Sister, in FEMINISM UNMODIFIED, supra note 3, at 163, 176.

67. Woman dehumanized as sexual objects, things or commodities . . . enjoying . . . humiliation . . . in postures of sexual submission or servility or display . . . women's body parts . . . are exhibited such that women are reduced to such parts . . . women are presented as whores by nature . . . shown as filthy or inferior . . . in a context that makes these conditions sexual." CATHARINE A. MACKINNON, Francis Biddle's Sister, in FEMINISM UNMODIFIED, supra note 3, at 163, 176. (Not all aspects of pornography are subject to all of the statutory remedies, however. The cause of action for "trafficking" in pornography, for example, is limited to a subset of pornography and was omitted altogether from the bill being considered in Massachusetts. See also supra note 29).

68. CATHARINE A. MACKINNON, Francis Biddle's Sister: Pornography, Civil Rights, and Speech, in FEMINISM UNMODIFIED, supra note 3, at 163, 176. To my knowledge, this is the only place in her published writings in which MacKinnon has made this distinction. The essays in FEMINISM UNMODIFIED are, of course, texts of speeches which MacKinnon has delivered elsewhere. MacKinnon may very well have made this point orally on other occasions.

On at least one occasion, however, MacKinnon attributes this proposed distinction between pornography and erotica to Gloria Steinem. The New York Newsday Interview with Catharine MacKinnon: Private Acts Are Public Affairs, N. Y. NEWSDAY, June 12, 1989, at 57. As I discuss below in note 92, read in context, it is not clear whether MacKinnon agrees that this could be a meaningful distinction in our society.

69. See, e.g., CATHARINE A. MACKINNON, Not A Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 160.

70. CATHARINE A. MACKINNON, Linda's Life and Andrea's Work, in FEMINISM UNMODIFIED, supra note 3, at 127.
Marchiano was tortured and terrorized in its production, the film does not depict physical “violence” in the conventional way Sunstein uses the term. Rather, the point of the movie was that Marchiano portrayed a sweet young woman who loved giving oral sex to men. “As [Marchiano] says, what people remember is the smile on my face.” Once again, however, MacKinnon invites liberals like Sunstein to see only her critique of the violent nature of sexuality by concentrating in her description of the movie on the violence of its creation, and de-emphasizing the lack of violence depicted in the finished work.

MacKinnon repeatedly emphasizes everywhere else in her writings that she sees an unbroken continuity between violent pornography, other forms of hard core pornography, soft core pornography, Playboy magazine type “girlie” pictures, romance, sexually oriented advertising, art, and

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71. Marchiano (better known by her stage name, Linda Lovelace) told her story in her book Ordeal. See generally Linda Lovelace (with Mike McGrady), Ordeal (1980).

72. Sunstein does at times include in his discussion of pornography the violence not only in the depiction, but in the production. See, e.g., Sunstein, Legal Theory, supra note 5, at 841. But, this latter category seems to disappear entirely in his discussion of what type of pornography will be legally actionable (i.e. depictions of sexual violence).

73. See also her description of pornography, as opposed to obscenity, as “sex forced on real women so that it can be sold at a profit to be forced on other real women; women’s bodies trussed and maimed and raped and made into things to be hurt and obtained and accessed, and this presented as the nature of women; the coercion that is visible and the coercion that has become invisible—this and more bothers feminists about pornography.” Id. at 147 (emphasis added).

74. Sexual liberation in the liberal sense frees male sexual aggression in the feminist sense. What looks like love and romance in the liberal view looks a lot like hatred and torture in the feminist view. Pleasure and eroticism become violation. Desire appears as lust for dominance and submission. The vulnerability of women’s projected sexual availability—that acting we are allowed: asking to be acted upon—is victimization. Play conforms to scripted roles, fantasy expresses ideology—is not exempt from it—and admiration of natural physical beauty becomes objectification.

75. See, Catharine A. MacKinnon, More than Simply a Magazine: Playboy’s Money, in Feminism Unmodified, supra note 3, at 134. “I think that... pornography eroticizes and thereby legitimizes forced sex, and that Playboy is pornography and makes pornography legitimate.” Id. at 137. “You may think snuff is one thing, Playboy another.” Catharine A. MacKinnon, On Collaboration, in Feminism Unmodified, supra note 3, at 198, 200.

76. See, e.g., MacKinnon, Theory of the State, supra note 33, at xiii.

77. “This makes me wonder, if taking Playboy’s money is okay, is anybody’s money too damaging to take? . . . How about cosmetic companies? Is there a difference—say the famous difference between
perhaps even mainstream political discussion of the proper role of women and so-called family values.79 Are Jacques Lacan's psychoanalytical writings which describe the process by which women seek their own objectification in intercourse also pornography?80 At her most frank, she admits that her legislation might result in successful litigation based on Playboy magazine, and certain "traditionally" artistic works.81 But, she insists, to concentrate on such

cause and effect—between those who create the system and those who pander to it?" MacKinnon, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 145. Of course, in this citation MacKinnon is emphasizing the functional difference between pornography and advertising in the construction of sexuality. However, she is also recognizing the continuum between sexuality as constructed by pornography and sexuality as reflected by advertising: See also MACKINNON, THEORY OF THE STATE, supra note 33, at 203.

78. Courts' difficulties in framing workable standards to separate 'prurient' from other sexual interest, commercial exploitation from art or advertising, sexual speech from sexual conduct, and obscenity from great literature make the feminist point. These lines have proved elusive in law because they do not exist in life. Commercial sex resembles art because both exploit women's sexuality.

MACKINNON, THEORY OF THE STATE, supra note 33, at 203. "Pornography becomes difficult to distinguish from art and ads once it is clear that what is degrading to women is the same as what is compelling to the consumer." Id. at 113.

79. "Feminist theory sees the family as a unit of male dominance, a locale of male violence and reproductive exploitation, hence a primary locus of the oppression of women." MACKINNON, THEORY OF THE STATE, supra note 33, at 61. See generally, her discussion of the "wages for housework" analysis of family organization, id. at 68-80.

"Existing standards of literature, art, science, and politics are, in feminist light, remarkably consonant with pornography's mode, meaning, and message." CATHARINE A. MACKINNON, Not A Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 153. "Commercial sex resembles art because both exploit women's sexuality." Id. at 154.

Some of her opponents have accused MacKinnon of actually and actively seeking to ban a wide range of popular culture through this legislation. For example, "The [Minneapolis] ordinance's author, Catharine MacKinnon, . . . sought to use the ordinance to ban French and Italian art films, avant-garde art and even Rolling Stones album covers." Portrait of the New Puritanism, WASH. POST, Feb. 2, 1992, at C8.

In contradistinction, I am not trying to suggest that all of these representations would fall necessarily within MacKinnon's statutory definition of pornography which requires graphic sexual explicitness. Nor am I suggesting that, even if it were held that these materials are pornographic, a jury would necessarily award damages or a judge would order injunctive relief in these cases. Rather, I am emphasizing that MacKinnon sees these works as part and parcel of the pornographic vision of female sexuality.

80. Indeed, MacKinnon finds substantial parallels between psychoanalytic theory and pornography. "Behind psychotherapy's guise of treatment, just as surely as beneath pornography's protestations of liberation, lies the sexual sadism that is at the core of misogyny, here in its medical form." Catharine A. MacKinnon, Preface to JEFFREY M. MASSON, A DARK SCIENCE: WOMEN, SEXUALITY, AND PSYCHIATRY IN THE NINETEENTH CENTURY xi (Jeffrey M. Masson & Marianne Loring trans., 1986). Although the book to which MacKinnon wrote this preface is a collection of shocking nineteenth century medical articles describing medical theories concerning, and treatment of, women (recommending such medical treatments as cauterizing little girls' genitals with red hot irons to prevent masturbation), she does not limit her comments to the horrors of the past. "Today, pornography is legitimized in the same way psychoanalysis is legitimized: it is all in her mind. Psychoanalysis, of which these articles are precursors, has been used to legitimize pornography, calling it fantasy; and pornography has been used to legitimize psychoanalysis, to show what women really are. Pornography presents itself as the answer to Freud's query: this is what women want." Id. at xv.

In answer to my specific question as to psychoanalytic literature, I do not believe that Lacan's virtually impenetrable analysis of the role of the phallus would be considered graphically sexually explicit.

81. See supra notes 75-76. As I have pointed out, MacKinnon does not suggest that the slippery slope/line drawing problem does not exist. Rather, she believes that its very existence strengthens her argument that the extremes of pornography are continuous with, not a perversion of, mainstream sexuality.

In American Booksellers Assn. v. Hudnut, Judge Easterbrook suggests that the legislation might make "Leda and the Swan" actionable as pornography. 771 F.2d 323, 327 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1985)). Certainly, this classical depiction of a woman who, after being raped by a bird, lays eggs can be interpreted as reflecting a degraded view of women consistent with the pornographic image. Some pictorial depictions of this myth show the swan between the legs of the naked Leda, apparently in the act of coitus,
considerations is precisely to engage in the pornographic mind set the legislation is trying to destroy. That is, by concentrating on the speech, art or pleasure that might be lost, rather than on the prevention of harm to women, one is admitting that women are ranked below things—that women are not considered persons. 82 “The liberal slippery slope is the feminist totality.” 83

and may meet the graphic explicitness test of the statute. Others are more coy, and may escape. But what of William Butler Yeats’ poetic description which not only explicitly describes the rape, but explicitly equates the violence of the act of rape with the violence which subsequently resulted from it (i.e. the Trojan War and the murder of Agamemnon which were caused by Helen and Clytemnestra, respectively, the two daughters hatched by Leda)?

A sudden blow: the great wings beating still
Above the staggering girl, her thighs caressed
By the dark webs, her nape caught in his bill,
He holds her helpless breast upon his breast.

How can those terrified vague fingers push
The feathered glory from her loosening thighs?

A shudder in the loins engenders there
The broken wall, the burning roof and tower
And Agamemnon dead . . . .
William B. Yeats, Leda and The Swan, in THE NORTON ANTHOLOGY OF POETRY 888 (Alexander W. Allison et al. eds., 1983). I can distinctly remember my shock when my high school English teacher held up this grotesque depiction of sexual violence as a romantically beautiful, rather than a repugnantly powerful, example of poetic allusion.

Of course, this analysis ignores alternative mythological interpretations which can be imagined. Perhaps Leda is a distant memory of the myth of the Great Mother of prehistoric matriarchy who, in her aspect as bird goddess, hatched the Cosmic World Egg? This avian creatrix of the ancient Near East can be glimpsed in the book of Genesis as the Spirit of God who broods upon the waters before the creation of the world. In ancient Greece Leda was also identified with the Titaness Latona and the great goddess Nemesis who led Zeus in a series of metamorphoses culminating in the swan. ROBERT GRAVES, THE GREEK MYTHS 62 (1981). Knowing these myths, one might retell Leda’s story in terms of feminine power rather than abjection.

82. This is precisely why MacKinnon rejects judging works “as a whole.” For example, see her discussion of how Playboy magazine’s format is carefully designed to comply with the “taken as a whole” test of obscenity law. CATHARINE A. MACKINNON, "More Than Simply A Magazine": Playboy’s Money in FEMINISM UNMODIFIED, supra note 3, at 134, 139 (footnote omitted).

Her critique of the Seventh Circuit Court of Appeals decision in American Bookseller Assn. Inc. v. Hudnut, 771 F.2d. 323 (7th Cir. 1985), aff’d, 475 U.S. 1001 (1985)), relates to this. “[T]he courts were confronted with the real damage pornography does to women’s status and treatment as the basis for making [pornography] civilly actionable to its victims. The courts accepted the harm but held the pornography more important than those it harms—hence protected it as speech.” MACKINNON, THEORY OF THE STATE, supra note 33, at 213.

83. MACKINNON, THEORY OF THE STATE, supra note 33, at 203. MacKinnon continues: Just as it is difficult to distinguish literature or art against a background, a standard, of objectification, it is difficult to discern sexual freedom against a background, a standard, of sexual coercion. This does not mean that it cannot be done. It means that legal standards will be practically unenforceable, will reproduce this problem rather than solve it, until they address its fundamental issue—gender inequality—directly.

Id. at 203-04. In this passage, MacKinnon is arguing that the liberal obscenity approach to sexually explicit materials will be incapable of making meaningful distinctions, and holds out that her pornography approach will be more successful because it more accurately identifies the harm to be prevented, i.e., the subordination of women.

Sunstein, a careful reader, notes MacKinnon’s insistence on the continuity between pornography and other forms of sexual discourse (e.g., “It is in this view that pornography, sexual harassment, rape, and prostitution are not marginal issues but instead at the core of the problem.” Sunstein, Legal Theory, supra note 5, at 846); the interrelationship between pornography and sexuality (“Pornography is a participant
And yet, despite MacKinnon's constant repetition of her thesis, she once again gives prominence, both in vividness of rhetoric and in length, to her discussions of the most disturbing forms of violent hard core pornography. This enables Sunstein understandably to concentrate on only that aspect.

I presume that Sunstein sincerely, if ingenuously, believes that he views women from a position of equality. As he does not subjectively experience himself as wanting to oppress women, he resists accepting MacKinnon's suggestion that his very masculine sexuality—and thereby his very selfhood—is oppressive of women. Accordingly, he assumes that he can discern the difference between subordinating pornography and equality-preserving erotica.

The radical presupposition of MacKinnon's whole argument is that our self-serving descriptions of own own intentionality can be illusory or delusional. The declaration by a liberal man of a belief in sexual equality does not become true just because the declarant experiences himself as sincere. Women as a class are not today equal to men socially, politically, economically, psychically, physically, or any other way. Heterosexuality is, in our society, the structure of inequality. The feelings of pleasure in sexuality which we women occasionally feel are not evidence of equality, but are understandable internalizations of the construction of our sexuality as the eroticization of our subordination.

For MacKinnon, individual women sometimes attain moments of freedom, a "rare and valuable and contradictory event" in our society. How else
could she explain herself? But these rare moments should not be confused with the norm or the predictably attainable. \textsuperscript{87} To pretend that we can achieve equality in this society is the “magical approach”\textsuperscript{88} to sexual equality—wishing it were so. \textsuperscript{89} Rather, we must radically change society so that equality is attainable. \textsuperscript{90} Consequently, although incidences of “erotica” in the sense of a conjunction of explicit sex with sexual equality might occasionally occur, they can be expected to be rare and wondrous. Indeed, insofar as masculinism has constructed sex as sexual hierarchy and has eroticized inequality, it is not clear that, given the current social structure, we could even conceptualize what sexual equality might be,\textsuperscript{91} let alone experience a depiction of sexual equality as erotic.\textsuperscript{92} 

\textsuperscript{87} Many women in this country believe gender is a crushing reality from which no woman is exempt. They also believe, or rather act out a belief on a daily basis, that they are or can be exempt. If every tacit ‘present company excluded’ exception I encountered on the road were excluded from this analysis, an analysis would remain that everyone accepts as generally true, but that almost no one—meaning nearly everyone—acknowledges applies to them in particular. 

\textsuperscript{88} “In this conception of politics as fantasy and entertainment, the speaker speaks as though what she wishes were true \textit{is true} as a strategy for making it so. Speak as though women are not victimized and we will not be any more.” \textit{Id.} at 221. \textit{See also} \textsc{MacKinnon, Theory of the State, supra} note 33, at 50. 

\textsuperscript{89} “Male dominance here is not an artificial overlay upon an underlying inalterable substratum of uncorrupted essential sexual being. Sexuality free of male dominance will require \textit{change}, not reconceptualization, transcendence, or excavation.” \textsc{Catharine A. MacKinnon, Not a Moral Issue, in Feminism Unmodified, supra} note 3, at 146, 149. “Central to the institutionalization of male dominance, pornography cannot be reformed or suppressed or banned. It can only be changed.” \textit{Id.} at 146. 

\textsuperscript{90} “Women are not permitted fully to know what sex equality would look like, because they have never lived it. It is idealist, hence elitist, to hold that they do.” \textsc{MacKinnon, Theory of the State, supra} note 33, at 241. Because sex equality does not presently exist for us to observe, it can only exist in our imagination. “Given the pervasiveness of inequality, imagination is the faculty required to think in sex equality terms.” \textsc{MacKinnon, Reflections, supra} note 38, at 1327. 

\textsuperscript{91} “Maybe feminists are considered castrating because equality is not sexy.” \textsc{MacKinnon, Theory of the State, supra} note 33, at 145. 

\textsuperscript{92} In answer to a question by a reporter for \textit{New York Newsday}, MacKinnon discusses Gloria Steinem’s definition of erotica (as opposed to pornography) as sexual depictions premised on relations of mutuality and equality. She continued, however, to question whether heterosexuality can be experienced in a position of equality in our society.

\textsc{A.} If that's true [i.e., that the depictions are premised on relations of mutuality], then that's fine and our law would be indifferent to it. But what we have found is what the pornographers have found: the key to getting men [aroused] is abusing women in a way that's sexually explicit. 

\textsc{Q.} You believe all relationships between the sexes, even the most intimate, are structured by inequality. Doesn’t that challenge the way most people perceive their personal lives? \textsc{A.} It does. The presumption about intimacy is that the issue is sex and not power, that when people are intimate they are on a terrain of equality. But I don’t see how women and men who are not equal in society can have relationships in which the norms are presumptively ones of equality.

\textit{The New York Newsday Interview With Catharine MacKinnon; Private Acts Are Public Affairs, supra} note 68, at 57. 

The anxiety of the pornography/erotica question is: What can we still have? The anxiety in that question is: If everything that abuses women and gets men hard is pornography, then what’s left that can be sexually arousing? And the anxiety in that question is: If you don’t abuse women, maybe you don’t get hard. . . . Men getting hard is not my problem. Women getting abused is
B. Mechanics

If pornography is the focus of MacKinnon's analysis because it not only reflects, but epitomizes, the gender hierarchy, why should we expect that making pornography legally actionable would change the status quo? MacKinnon has several answers.

First, and most importantly, MacKinnon goes further than merely suggesting that pornography epitomizes the gender hierarchy. In our society pornography is a primary means by which men construct sexuality. By making pornography actionable, and thereby more difficult to produce, we will, if not eliminate, substantially cripple, an important mechanism which produces sexuality. The antipornography legislation would interfere with the constructive aspect of pornography by serving as a public declaration by our society that the values epitomized in pornography are unacceptable. The legislation would reveal (by legal recognition) the harms of pornography which are otherwise invisible. By using a civil rights approach, the legislation seeks to "expose the atrocities to women." It is a social declaration that women are subordinated, that sex equality is a goal which must be actively sought and that pornography is a practice of sex discrimination. Litigation under the legislation would result in a public condemnation and disgrace of people who promulgate the values inherent in pornography and would thereby delegitimate the pornographic vision.

Second, the proposed antipornography legislation gives individual women (rather than the state) the primary role of instituting actions. This empowerment of women would be a social recognition of women as acting subjects. This denies the truth of pornography, and thereby interferes with pornography's ability to realize its program of hierarchial domination.

Pornography defines woman as non-human, and states that women want their own pain. Antipornography legislation would recognize that pornography, the speech of men, silences the speech of women by denying my problem.


93. "So the issue is not what the harm of pornography is, but how the harm of pornography is to become visible. As compared with what? To the extent pornography succeeds in constructing social reality, it becomes invisible as harm." MACKINNON, THEORY OF THE STATE, supra note 33, at 204.

94. MacKinnon, testifying in favor of the proposed legislation in Wisconsin, quoted in Bass, supra note 2.

95. CATHARINE A. MACKINNON, "More Than Simply a Magazine": Playboy's Money, in FEMINISM UNMODIFIED, supra note 3, at 134, 140.

96. MACKINNON, THEORY OF THE STATE, supra note 33, at 161.


98. MACKINNON, THEORY OF THE STATE, supra note 33, at 210. "Pornography increases men's perception that women want rape and are not injured by rape, that women are worthless, trivial, non-human, object-like, and unequal to men." MacKinnon, Defamation and Discrimination, supra note 3, at 799.

women's status as persons and denying the sounds which issue from the mouths of women the status of speech.\textsuperscript{100} It would give voice to women's viewpoint by denying the "truth" of pornography: that women want what men want them to want.\textsuperscript{101} Permitting women to bring a legal action gives them a legal voice, thereby recognizing them as members of the legally recognizable class of creatures called human beings.\textsuperscript{102}

Third, MacKinnon attempts to show that pornography is causally related to sexualized violence.\textsuperscript{103} Although she does not spell out the mechanism

\textsuperscript{100} "But the evidence shows that the use of pornography makes it impossible for men to tell when sex is forced, that women are human, and that rape is rape. Pornography makes men hostile and aggressive toward women, and it makes women silent." MacKinnon, \textit{Defamation and Discrimination}, supra note 3, at 801.


Such a conception of humanity, which goes beyond the liberal notion of autonomous subjects acting in narrow self-interest, would have great interest to those feminists who privilege relationality and community.

The violence and violation of the pornographic mindset (and perhaps also of many aspects of Lacan's theory) does not lie in the recognition of man's desire to be desired, but in its attempt to force women to act as though they actually \textit{do} already desire what men desire, so that women become the object of men's subjective desire, rather than exploring and seeking to become the object of women's desire.


\textsuperscript{102} "[An alternate law] is a criminal approach that puts the power in the hands of the state. Our approach puts power in the hands of the people who were hurt. . . . Women are indeed human beings and the rights of pornographers, pimps, do not matter more. . . ." MacKinnon, testifying in favor of proposed anti-pornography legislation in Wisconsin, \textit{quoted in Bass, supra note 2}.

In her writings, MacKinnon generally highlights the fact that, under her proposal, women would have a private right of action to address the harms of pornography, but the government would not have the right to censor pornography. Elsewhere she suggests that this choice is also at least partly the result of political expediency given the current state of First Amendment jurisprudence. For example, on a radio talk show MacKinnon discussed a decision of the Canadian Supreme Court which found that the infringement of expression caused by Canadian obscenity law was outweighed by the harm caused by pornography. MacKinnon had helped write the winning brief in the case and generally praised the decision. She tried to reassure a caller who expressed concern against government censorship. She pointed out that the Canadian constitutional provision that is most closely analogous to our First Amendment permits a greater degree of censorship than our Constitution. Consequently, she is not proposing that Canadian-type censorship of pornography be adopted in the United States. "What's been proposed for the United States and the origin of this approach is not that the government be permitted to censor materials through the criminal law, but rather that women be able to sue civilly for sex discrimination." Transcript of Interview with Professor Catherine [sic] MacKinnon, On The Line, WNYC Public Radio, March 9, 1992. The implication, of course, is that if censorship were permitted by the First Amendment, MacKinnon's American anti-pornography proposal might also include criminal censorship.

\textsuperscript{103} \textit{See text accompanying note 136; infra}, MacKinnon does not base her theory on the proposal that any specific piece of pornography can be shown to be the proximate cause of any specific event of physical violence. MacKinnon, \textit{Theory of the State}, supra note 33, at 207-08. This is why the "harm" recognized by her proposed legislation is "the harm of civil inequality." \textit{Catharine A. MacKinnon, Francis Biddle's Sister: Pornography, Civil Rights, and Speech, in Feminism Unmodified, supra note 3, at 163, 178}. MacKinnon's proposed legislation does, however, give a cause of action to victims of "physical attack, or injury ... directly caused by specific pornography" against producers and sellers.
precisely, presumably the legislation would make it more expensive for pornographers to operate and thus would decrease the output of pornography. Consequently, the legislation would also be expected to reduce the amount of sexualized violence as traditionally conceived (i.e., physically violent rape, torture and murder).\textsuperscript{104} This, of course, is the aspect of MacKinnon’s proposal which Sunstein embraces.

Lastly, MacKinnon argues that it does not follow that because pornography is not the only form of misogyny that regulating pornography is not one way to fight misogyny.\textsuperscript{105} This argument, which depicts pornography as merely a form of misogyny,\textsuperscript{106} is arguably inconsistent with other aspects of MacKinnon’s theory of pornography which insists both that pornography is not different in kind from other forms of misogyny, but is the extreme exemplar of misogyny, and that pornography is the fundamental mechanism by which sex is constructed. This last argument should, consequently, be seen merely as one of political expediency to assuage the fears of those, such as Sunstein, who do not accept her more basic analysis, rather than a statement of MacKinnon’s own view.

MacKinnon’s proposal against pornography is not merely an anti-crime bill to rein in sexual violence—although it does have that aspect. Her critique goes to all heterosexual relationships and the gender hierarchy. It is part and parcel of the strategy which has recognized sexual harassment as an actionable form of sexual discrimination, which seeks to make rape similarly civilly actionable as discrimination and which seeks to have the law analyze abortion rights in terms of equality, rather than the right to privacy.\textsuperscript{107} The articulated goal of the legislation is to subvert the heterosexual status quo.\textsuperscript{108}

One of the important results of this should be to ameliorate sexual violence.

\textsuperscript{104} The First Amendment guarantee of “speech against abridgment by government, recognizes exceptions. It is also at times outweighed by other interests. The most common reason is harm: the harm done by the materials outweighs their expressive value, if any.” CATHARINE A. MACKINNON, \textit{On Collaboration, in Feminism Unmodified}, supra note 3, at 198, 203.

This phrase implies that the legislation would reduce the amount of pornography, in addition to counteracting its effect. The harm to be prevented is great, and the remedy rather mild in that the ordinance would not constitute prior restraint, \textit{id.}

\textsuperscript{105} CATHARINE A. MACKINNON, \textit{Afterword, in Feminism Unmodified}, supra note 3, at 215, 222.

\textsuperscript{106} [P]ornography, they say, is effect and not cause because the oppression of women predates pornography, so anything done about pornography will do nothing about the oppression of women. It does not matter that racism happens in specific forms all over the world without ceasing to be racist . . . . They do not say apartheid should be ignored as effect rather than cause because white racism predates it and happens elsewhere in different forms.

CATHARINE A. MACKINNON, \textit{Afterword, in Feminism Unmodified}, supra note 3, at 215, 222.

\textsuperscript{107} See generally MacKinnon, \textit{Reflections}, supra note 38.

\textsuperscript{108} Consequently, MacKinnon argues that pornography is discrimination and cannot adequately be addressed as group defamation. MacKinnon, \textit{Defamation and Discrimination}, supra note 3.
But this is not because, as Sunstein suggests, violence is the primary violation. Even most conservative and misogynist masculinists probably believe they are horrified by the murder and torture of women. Rather, sexuality, the system of the subordination of women, is the violation of which violence is only one aspect (albeit an extremely important and characteristic one). By focusing on violence alone Sunstein domesticates feminism and tries to trivialize the tremendous power and potential radicalism of MacKinnon's insights.

C. First Amendment

Similarly, MacKinnon's response to First Amendment challenges to her proposal is not, as Sunstein suggests, that pornography is "low-level" speech in the sense of non-political. MacKinnon specifically wishes to avoid the high/low-level distinction because it suggests that the status of women is a low-level subject. She believes that there is nothing more political than the gender hierarchy. Her approach is more radical.

First and foremost, as a political matter, she challenges the very suggestion that we should weigh the elimination of the subjugation of women against the loss of speech (or even art). Such an approach, in MacKinnon's view, is an admission to masculinism that women are not persons in our society—they are less than things or ideas.  

109. In discussing the concept of "high-value" and "low-value" speech, MacKinnon states, "But at least it is now clear that whatever the value of pornography is—and it is universally conceded to be low—the value of women is lower." MACKINNON, Sexual Politics of the First Amendment, in FEMINISM UNMODIFIED, supra note 3, at 211.

One might be inclined to reply to MacKinnon that in traditional Western thought we often consider ideas and things of higher value than individuals such that sometimes we consider the greatest and most human act to be precisely to die for ideas. Christians believe that Christ died for our sins. We regularly send young men (and now also young women) to die for their country. I believe that the distinction MacKinnon would make is in these noble cases the victim offers up his life for something he considers to be a higher value. In pornography, MacKinnon sees men as sacrificing women's lives for the base purpose of men's sensual pleasure.

110. Probably her strongest language in this regard is:

I must also say that the First Amendment has become a sexual fetish through years of absolutist writing in the melodrama mode in Playboy in particular. You know those superheated articles where freedom of speech is extolled and its imminent repression is invoked. Behaviorally, Playboy's consumers are reading about the First Amendment, masturbating to the women, reading about the First Amendment, masturbating to the women, reading about the First Amendment, masturbating to the women. It makes subliminal seduction look subtle. What is conveyed is not only that using women is as legitimate as thinking about the Constitution, but also that if you don't support these views about the Constitution, you won't be able to use these women. MACKINNON, Id. at 209. See also CATHARINE A. MACKINNON, "More Than Simply a Magazine": Playboy's Money, in FEMINISM UNMODIFIED, supra note 3, at 134, 138; CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 152-54.

She uses similar rhetoric elsewhere to suggest a cause and effect approach between pornography and misogynist theories of women:

Pornography was the exclusive possession of the elite until mass media democratized it. In the nineteenth century, men were looking at pornography, writing theology; looking at pornography, writing literature; looking at pornography, writing laws and designing our political institutions. Who is to say they were not also looking at pornography and writing and practicing science and medicine? The world of Freudian psychology, in which everyday objects are infused with sexual meanings, is very like the world of pornography, in which everyday life is transformed into an
Whether or not there should be a First Amendment to our Constitution which seems to value ideas over people, we are currently stuck with a First Amendment and we need to deal with it. MacKinnon therefore suggests that we reinterpret the First Amendment to require the government affirmatively to promote the speech of the disempowered, rather than merely negatively to refrain from prohibiting speech. Adopting the “hate speech” or “paradox of tolerance” argument which has become fairly familiar, MacKinnon argues that sometimes the only way to promote speech by one group is to inhibit the speech of another. She argues that it is not acceptable to tell women that they must allow pornographers to speak when the pornographer’s message is that “women may not speak.” What is more, pornographers (epitomizing the masculinist status quo) have the power to make their message reality. The usual remedy of “more speech” for “bad speech” does not work in the case of pornography where the pornographer’s speech is by definition women’s silence. As I have argued elsewhere, insofar as pornography defines women as non-persons, and women’s speech as non-speech, pornography defines women’s speech away. In pornography, women’s speech is like the barking of dogs. Feminists are whining bitches.

MacKinnon believes that her ordinance is consistent with, and will further the policy behind the First Amendment so reconceptualized, because it will guarantee women’s rights . . . by making visible a conflict of rights between the equality guaranteed to all women and what, in some legal sense, is now the freedom of the pornographers to make and sell, and their consumers to have access to, the materials this ordinance defines. Judicial resolution of this conflict, if the judges do for women what they have done for others, is likely to entail a balancing of the rights of women arguing that our lives and opportunities, including our freedom of speech and action, are constrained by—and in many cases flatly precluded by, in, and through—pornography . . . .

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111. Sunstein has developed a similar argument. See Sunstein, Pornography, supra note 6, and Sunstein, Neutrality, supra note 8.


113. See, eg., CATHARINE A. MACKINNON, Francis Biddle’s Sister: Pornography, Civil Rights, and Speech, in FEMINISM UNMODIFIED, supra note 3, at 163, 193-95, and On Collaboration, in FEMINISM UNMODIFIED, supra note 3, at 198, 204-05.

114. See Schroeder, Subject:Object, supra note 42.

115. CATHARINE A. MACKINNON, Francis Biddle’s Sister: Pornography, Civil Rights, and Speech, in FEMINISM UNMODIFIED, supra note 3, at 163, 177.
MacKinnon's third interrelated argument leads from this. She is arguing that pornography can be regulated under the First Amendment not because it is low-level non-political speech, but because it is political non-speech. Contemporary First Amendment theory recognizes that acts can be regulated while speech cannot, but sometimes the distinction between what is speech and what are acts is not clear. For example, sometimes we recognize that acts (e.g. burning the American flag) should be considered speech for First Amendment purposes. MacKinnon turns this argument on its head: if sometimes acts might be speech, then sometimes speech might be acts. She argues that pornography, which defines women's speech as non-speech and thereby silences women, should be recognized as an "act", not speech. Unlike other forms of speech which affect behavior through the content of the words spoken, the effect of pornography flows from its very existence. Pornography does not persuade people to adopt a specific political view of sexual relations, it creates sexuality. Perhaps the appropriate analogy is that pornography is like hypnosis, bio-feedback, subliminal suggestion and other forms of behavior modification rather than like speech. This approach is similar to, but goes much farther than, Sunstein's distinction between cognitive and noncognitive speech.

Finally, MacKinnon reluctantly argues that even if pornography is considered speech for First Amendment purposes, it should not be considered political speech. The fact that pornography has political consequences (the oppression of women) does not mean that its content is political.

116. See, e.g., CATHARINE A. MACKINNON, On Collaboration, in FEMINISM UNMODIFIED, supra note 3, at 198, 200-03; MACKINNON, THEORY OF THE STATE, supra note 33, at 204.

Judge Easterbrook, while finding the Indianapolis legislation to be unconstitutional, in a peculiar way may have understood this aspect of MacKinnon's reasoning better than her purported supporter, Sunstein. Easterbrook recognized that in MacKinnon's analysis pornography was political and that the purpose of the legislation was political transformation, not suppression of crime. Easterbrook recognized both that on its own terms the legislation was not aimed primarily at sexual violence but at sexual subordination and also that pornography is not an aberration, but the epitome, of the heterosexual status quo. That is, much of traditional Western high art would constitute actionable sexually explicit depictions of sexual subordination within the meaning of the statute. He even recognized the tolerance dilemma in which allowing pornographers to speak might have the result of creating less, not more, speech.

What he rejected is the speech/act dichotomy. Easterbrook correctly surmised that MacKinnon asserted the speech/act dichotomy precisely because she does not accept mainstream First Amendment theory. The argument, in Easterbrook's view, proves too much.

It seems unlikely that the present U.S. Supreme Court would adopt the speech/act dichotomy. Indeed, in R.A.V. v. City of St. Paul, Minnesota,—U.S.—, 112 S.Ct. 2538 (1992), Justice Scalia stated those who characterize "obscenity as not being speech at all" do not mean this literally. Id. at 2543. Rather, he believes such statements are shorthand for the view "that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." Id. Justice Scalia in this passage specifically refers to Sunstein's views as expressed in Sunstein, Pornography, supra note 6. Whether or not this accurately reflects Sunstein's analysis of the speech/act dichotomy, I do not believe that it accurately reflects MacKinnon's.

117. See supra notes 12-14.

118. CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED, supra note 3, at 146, 154; CATHARINE A. MACKINNON, Francis Biddle's Sister: Pornography, Civil Rights, and Speech, in FEMINISM UNMODIFIED, supra note 3, at 163, 193.
argument is the one which Sunstein adopts in his low-level, high-level speech distinction.119

III. KISS ME KATE: MACKINNON AND SUNSTEIN RECONCILED

How could a scholar as careful as Sunstein so misread MacKinnon? First, as I have already suggested, Sunstein might be attempting to bring her thought into the mainstream by removing the seemingly radical attack on heterosexuality itself and substituting a relatively noncontroversial attack on violence qua violence. Second, as I have already suggested, MacKinnon's own writings contain mutually inconsistent threads, including the one which Sunstein adopts. I shall explore this more thoroughly in this section and will argue that these inconsistent strands ultimately dissolve into tautologies. Third, as I shall explore in the final section of this essay, MacKinnon's conclusions about sexuality, which she draws from her analysis of pornography, are radical but not progressive. They are radical in their return to the reactionary, flesh-fearing Christian roots (radices) of Western culture and are, therefore, deeply conservative and potentially supportive of the status quo.

A. Narrow and Broad Definitions

One potentially confusing aspect of MacKinnon's writings is that she uses the word “pornography” in at least two related but different ways.120 The narrower use is the technical definition used in her statute—sexually explicit depictions of the subordination of women.121 This definition is intentionally narrow so that the legislation would pass First Amendment criticism based on a “slippery slope” argument.122 The narrow definition is the sole focus of Sunstein's analysis. Furthermore, as I have shown, he limits his definition to those portions which expressly deal with depictions of sexualized violence to women. By doing so he ostensibly supports her specific legal proposal while weakening the true radicalness of the political theory of sexuality upon which her anti-pornography legislation and her broader definition of pornography is based.

We have seen that MacKinnon's mode of analysis concentrates on pornography as the eroticization of sexual hierarchy and, therefore, as one of

119. See supra note 13.
120. The two definitions I am identifying are examples of a definitional spectrum which she travels along. MacKinnon states that her statutory and analytical definitions of pornography are close. "No definition can convey the meaning of a word as well as its use in context can. However, what Andrea Dworkin and I mean by pornography is rather well-captured in our legal definition." MACKINNON, FEMINISM UNMODIFIED, supra note 3, at 262 n.1. I will suggest that the scope of the two are quite different.
121. See supra text accompanying notes 65-81.
the central mechanisms by which the sexual hierarchy is codified and maintained. The pornographic image is seen to be continuous with the "normal" image of sexuality. Consequently, she insists that a bright line cannot be drawn between pornography and other writings, depictions, and discourse about sexuality. According to MacKinnon this demonstrates the truth value of her argument. Alternately, it shows that her argument dissolves into an analytically useless tautology.

B. Tautologies

Let us go through the argument again, this time more slowly. First, MacKinnon makes what seems to be a typical postmodern argument that our sexuality is socially constructed—sexuality is nothing other than what we think, say, and do about it. Second, she eloquently argues that in this view sexuality is a socio-political system of male dominance and female subordination. Third, she defines pornography as the eroticization of the subordination of women. Fourth, she argues that this indicates that pornography, as so defined, is not an aberration but the epitome of normal sexuality so that pornographic works are part of an unbroken continuum with all other forms of sexual discourse and practice. That is, there is no meaningful line that can be drawn between rape and normal intercourse; prostitution and marriage; hard core violent pornography and soft core erotica or even romance. Fifth, she asserts that pornography is a primary mechanism in which our society constructs sexuality as dominance and subordination.

She powerfully and convincingly argues for the proposition that pornography narrowly defined (in the sense of the sexual subordination of women, sexualized violence, etc.) is continuous with "normal sex" and therefore is a form of sex, not violence. This implies that an exploration of pornography will give us insights into sexuality. She goes further, however and claims that sexuality is the pornographic image of sexuality. If pornography becomes analytically equivalent with all sex discourse and practice in our society, and sexuality is what we say, think, and do about sexuality, then by definition "pornography," so broadly defined, becomes a primary means of constructing sexuality. Her definition of pornography risks becoming equivalent to "that which constructs sexuality" and her argument risks degenerating into "that which constructs sexuality, constructs sexuality."

A typical criticism of MacKinnon's pornography analysis is exemplified by Zillah Eisenstein's reproach that pornography may not be universally

123. See supra text accompanying notes 45-53.
124. See supra text accompanying notes 43-47, 73-79.
125. See supra text accompanying note 83.
126. This is rather like arguing that since purple light is continuous with green light—i.e. they are both parts of the electromagnetic spectrum of visible light—we can conclude that this proposition in and of itself proves the converse, i.e. all light is purple.
victimizing. "'Pornography carries many messages other than woman-hating . . .' If pornography is not universally victimizing, then a sweeping indictment of it can create a new problem—denial of the freedom to engage in multiple sexual practices."127 That is, if there is no reality other than our understanding of reality, and some women feel that they experience equality and emancipation in heterosexuality, why is their experience less socially real than MacKinnon’s account of sexual oppression? Eisenstein presumes, as many do, that MacKinnon is accusing other women of false consciousness, when a false consciousness approach is arguably inconsistent with a postmodern social theory.128 This argument falls on deaf ears, however, because it can only function as an external critique based upon a prior rejection of MacKinnon’s definitions.129

If one accepts MacKinnon’s definitions, she is entitled to claim that she is not accusing women who enjoy pornography of false consciousness. If sexuality is a social system of dominance and subordination, and this is codified in pornography, pleasure in pornography is a perfectly appropriate and sexually healthy response for women.130 That is, under MacKinnon’s internal analysis, the actual imagery of any individual piece of erotica and the actual empirical subjective experiences of joy, love, or liberation individual women might find in heterosexual sex are not false, they are simply irrelevant to the question of whether or not heterosexuality is oppressive.

This is because sexuality is defined as the system of the subordination of women and pornography is defined as the depiction of the subordination of women. Pornography thus becomes so expansively defined that it includes all sexual discourse in our society. MacKinnon is correct to say that under her analysis, the issue is whether or not heterosexuality is the structure of oppression.131 Once one decides that heterosexuality is to be defined as the


Eisenstein notes that MacKinnon and Dworkin, like the new right, assume a traditional view where pornography is something liked by men and disliked by women. Although men are still the overwhelming consumers of pornography, women make up an increasing percentage of the market.


129. EISENSTEIN, supra note 127, at 173. I must give Eisenstein credit for at least implicitly recognizing that the way MacKinnon uses the word “pornography” in her writings is not the same as the definition she uses in her statute. But her failure to explicitly do so undermines her legal critique of MacKinnon’s proposed anti-pornography legislation which is based on the narrow definition. If the anti-pornography legislation were intended to regulate pornography as broadly defined, then Eisenstein’s external critique that some women find pornography (broadly defined) liberating would be stronger.

130. See supra notes 86-87, and MACKINNON, THEORY OF THE STATE, supra note 35, at 115-16.

131. See CATHARINE A. MACKINNON, Desire and Power, in FEMINISM UNMODIFIED, supra note 3,
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structure of sexual inequality, all heterosexual pleasure by women is automatically defined away as the internalization of our oppression.

To suggest otherwise would be to suggest that there might be ambiguity in psychology, that socially men may not be in total control of themselves, let alone us. It would be to challenge the concept of human subjectivity which, I believe, is the heart of MacKinnon’s essentialism. I will return to this argument.

C. Efficacy of Legislation

Eisenstein’s argument goes to MacKinnon’s broader political project. Eisenstein is challenging MacKinnon’s assertion that pornography broadly defined is always the eroticization of the subordination of women, by showing that some forms of erotica depict, and are experienced as, feminine emancipation. To rewrite Eisenstein’s argument within the language of my analysis, even if one accepts (as I do) that pornography is continuous with normal sex, this does not necessitate concluding that sexuality can only be analyzed as gender hierarchy. Eisenstein, for example, suggests interpretations of pornography’s message other than subordination. To put it yet another way, if pornography is continuous with all sex, it is logically acceptable either to analyze pornography as a subset of other forms of sexuality (such as erotic feminine emancipation or romantic love) or to analyze sexuality as a subset of pornography.

MacKinnon’s political “theory of the state” and of pornography broadly defined serve as her primary justification for regulating pornography. MacKinnon argues that the regulation of pornography narrowly defined is part of a larger project of eliminating pornography broadly defined leading to the emancipation of biologically female persons. But then why should we regulate only pornography narrowly defined?

When challenged on this point, MacKinnon changes tack and argues that pornography narrowly defined should be subject to legislation because it is one manifestation of misogyny, even if it is not the exclusive form of misogyny, just as apartheid should be prohibited even though it is only one manifestation of racism. The lessening of certain specific acts of violence against women can function as a free-standing, fully sufficient, secondary argument for regulating narrow pornography. It is this secondary argument which Sunstein adopts.

But this argument, which MacKinnon gives in defense of her proposal, is

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132. Drucilla Cornell raises another possible alternate reading. MacKinnon concludes from the fact that much violent pornography shows men oppressing women that men in fact have the power to oppress women. Cornell (without in any way belittling the harm which violent pornography can have on women) suggests that pornography can also reveal men as weak and castrated. “Who but a ‘wimp’ would fantasize about sex with a woman in chains, tied, bound, and gagged, so he would, in the most profound sense, not have to face her, let alone hear her?” Drucilla Cornell, Sexual Difference, supra note 2, at 2273.
1992] Taming of the Shrew

a denial of the very heart of her powerful theoretical argument which dwells on the primacy of pornography in our society. This is why, of course, Sunstein focuses on it.

If pornography narrowly defined is only the top of the pyramid of sexual exploitation, MacKinnon must address directly how it is that merely making it slightly more expensive to produce will substantially weaken the foundation of pornography broadly defined. It is only relatively recently that pornography narrowly defined has been readily available, yet misogyny (including sexualized violence and violent sex) is embedded in Western civilization.133 The printing press, which allows written and other printed sexual material to be widely distributed, is a relatively recent invention. Other forms of mass communication, particularly the broadcast, video, and computer media, are of course twentieth century developments. Doesn't this suggest that pornography, narrowly defined, is historically a relatively small aspect of the construction of sexuality? Why does MacKinnon believe that in contemporary times pornography has displaced whatever mechanisms (perhaps infantile psychological development in a patriarchal society? or religion?) have historically been more significant? Why does she think that the fact that pornography can be analyzed as the eroticization of dominance means that this eroticization causes dominance as opposed to reflecting dominance constructed by other mechanisms?134

133. This point has been noted by some researchers on the effect of pornography. For example: It is important, furthermore, to note that studies of sex crimes up to 1970 were conducted in settings where porno-violence was relatively unusual. Hence it was too soon for evidence from sex crime rates to be attributable to porno-violence . . . . It is only in the more recent past that porno-violence has become generally accessible and found its way into more widely distributed magazines such as Playboy and Penthouse . . . as well as pervading general release films. Hence, evidence relating to pornography from the 1970s is much more pertinent than that derived from the 1960s.

John H. Court, Sex and Violence: A Ripple Effect, in PORNOGRAPHY AND SEXUAL AGGRESSION, supra note 54, at 143, 149 (citations omitted). MacKinnon, in her critique of Marxism, notes that sexual violence remains unchanged despite changes in economic relations. See MACKINNON, THEORY OF THE STATE, supra note 33, at 11. By referring to Western civilization, I do not mean to imply either that other cultures are not misogynist or that American culture is particularly misogynist. As a Westerner I am speaking solely about my own culture.

134. As I have written elsewhere, and as I shall continue to develop below, there is remarkable resemblance between MacKinnon's analysis of pornography and the Christian analysis of sexuality. I would suggest that in Western society, religion has a significant relationship with our sexual imagery—but it is not clear, once again, whether this relationship is one of cause, effect, reflection, or all, or none of the above.

One might be able to form an argument that Christian religious imagery in the Middle Ages and Renaissance performed much of the function of eroticization of the hierarchy of violence which pornography performs in our more secular age. The iconography of the cult of the saints, as reflected in the sculptures and windows of medieval churches (which were so decorated specifically to serve as the Bible of the illiterate masses), was dominated by imagery of ecstasy through torture.

Catholic churches (particularly in Europe) are still filled with reliquaries in which teeth, bones, blood and occasionally entire cadavers of saints are displayed to be venerated. If these grotesque icons have become less common today (reliquaries are now frequently displayed in museums for artistic or historic appreciation rather than in churches for veneration), most Christian churches are still dominated by the image of a bleeding, dead or dying, largely naked torture victim—the Crucifixion.

Christian imagery is associated, not only with violence, but with sexuality as well. Many of the virgin saints (male as well as female) so hideously martyred were resisting rape or marriage. What is more,
MacKinnon’s argument is not one based on proximate causation between any specific work of pornography with any specific act of sexual violence. To understand the centrality of pornography, and indeed the definition and role of pornography in MacKinnon’s analysis, one must delve deeper into her theory of personhood and sexuality. This theory identifies subjectivity in a modern liberal way with autonomous, unconstrained individuality, and, in a premodern Christian way, identifies sexuality with both loss of selfhood and femininity. This leads inexorably to the rejection of sexuality in the form of the disparagement of the feminine.

The power of MacKinnon’s analysis, for me, flows precisely from the fact that it accurately explicates the misogyny of traditional Western theories of sexuality which underlie our legal system. The corresponding fundamental weakness of her theory, however, may lie in her failure to recognize the traditional nature of much of her analysis. Consequently, she risks merely replicating, rather than critiquing, the very oppression she so desperately wants to prevent.

IV. MACKINNON AND AUGUSTINE

A. Sexuality as Loss of Subjectivity in MacKinnon

Psychoanalytic theory tries to account for the observation that both men and women tend to define the subject with the masculine, and negativity and the object with the feminine. Many feminists have emphasized this theory.
In her analyses of pornography and abortion, however, MacKinnon does not emphasize heterosexuality primarily as a psychoanalytic structure underlying social systems. Rather, she expressly purports to approach the role of heterosexual intercourse from a sociological or political standpoint, which emphasizes group experience. She does not expressly address psychoanalysis in the sense of individual experience. But she does so in a way which is strikingly similar to traditional Christian teachings on the role of sexuality, particularly as explicated in the writings of St. Augustine of Hippo.

When I say that MacKinnon's theory of sexuality is deeply Christian, I am not accusing her of attacking pornography or sexuality as morally repugnant. Rather, as I shall explain, I mean that she adopts a theory similar to that strain of traditional Christian theology that holds that involuntary sexuality and subjectivity are mutually inconsistent in this society and that identifies sexuality with the feminine.

I am also not suggesting that MacKinnon has studied and consciously adopted the theories of the Fathers of the Church. I am suggesting, rather, that there are striking parallels between her theory and Christian theology. This should not be so surprising. MacKinnon is trying to analyze the sociology of sexuality in contemporary America. I believe that it is self-evident that, to date, Western Christianity has been the single greatest factor in the development of American sexual behavior and attitudes. MacKinnon should be congratulated, therefore, because her examination of American sexuality has resulted in a description similar to that of the Christian theology which underlies it. I would criticise her, however, for not recognizing the similarity. Consequently, she risks embracing and reinstating, rather than rejecting, the very theory which has arguably been the bulwark of the religious right.

137. I interpret Drucilla Cornell's critique of the attempt of some feminists to draw legal conclusions from different voice theory as an unsuccessful, and perhaps naive, attempt to move directly and unproblematically from psychological theory, which deals with individual experience, to sociology, which deals with group experience. Accordingly, in her most recent work she has tried to integrate Niklas Luhmann's theory of social systems with Lacanian psychoanalytic theory and Jacques Derrida's deconstruction (which she has renamed the "philosophy of the limit"). See, e.g., Drucilla Cornell, The Relevance of Time to the Relationship Between the Philosophy of the Limit and Systems Theory, 13 CARDOZO L. REV. 1579 (1992), and DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT (1992).

138. MacKinnon repeatedly defends her theories against charges of moralism. See, e.g., CATHARINE A. MACKINNON, Afterword, in FEMINISM UNMODIFIED, supra note 3, at 147, 225. Rather, her similarity to Augustine is that neither is concerned with the sinful nature of the sexual acts, but in the meaning of sexuality.

Consequently, the reason why the religious right insisted on including an anti-pornography plank in the Republican Party platform in 1992 may be based, not merely on moral approval, but on similarities between the traditional Christian theology of sexuality and the theory underlying the regulation.

139. I state this as an empirical matter. It is not intended to denigrate other non-European and non-Christian factors in American culture or to suggest that this state of affairs is good, bad, or indifferent. I am merely stating that, rightly or wrongly, American culture has been dominated by Christianity and Euro-centrism. The only way we can intelligently analyse American culture is to become more, not less, familiar with the intellectual antecedents in Western culture so that we can recognize their unconscious influence on us.
oppression of women.140

As I have stated elsewhere,141 although MacKinnon refuses to describe clearly the positive vision of subjectivity which she believes women lack, this vision can, however, be dimly glimpsed through her negative descriptions of what is objectionable about the objectification of women. What MacKinnon seems to be seeking is choice.142 But MacKinnon does not seek choice as mere voluntarism (in the sense of the ability or necessity of choosing between two or more alternatives, albeit under constraints). Rather, she seems to seek choice in the sense of “will.”143 That is, she seeks pure unfettered autonomy free from any and all restrictions, social, psychological or biological. Mere voluntarism differs from the concept of will, in that if I act voluntarily, nobody else makes me do something. In an act of will, even I do not make myself do something. Rather I act autonomously, and perhaps even arbitrarily.144

Sexuality is central to MacKinnon’s theory of subordination. This is not because the physical, biological act of intercourse has any particular significance. Rather, sexuality must be conceptualized in terms of the social meaning given to it.145 In this light, feminine sexuality can be seen as the ultimate sign of women’s lack of will: the lack of feminine subjectivity. This is precisely because feminine sexuality is compelled and non-voluntary as a social matter. The problem with heterosexuality for women is that it is not chosen by us.146 Not only is heterosexuality mandatory in our society,147

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140. I make a similar argument in Schroeder, Feminism Historicized, supra note 10, at 1187-89.
141. Schroeder, Abduction From the Seraglio, supra note 59, at 193-200.
142. Id. at 194-96, 269-72.
143. Probably the best description of this ultra-liberal concept of “free will” is contained in the introduction to HEGEL’S, The Philosophy of Right. Hegel, of course, argues that this concept of free will (which is similar to the conception of the autonomous individual who is the essential human being of liberal philosophy) contains its own contradictions and must eventually be sublated into a richer and more complex conception of human subjectivity which contains both moments of autonomous individuality and communitarianism. See generally GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT (T. Know trans., 1967).
144. I thank my colleague Arthur Jacobson for this characterization.
145. See supra notes 34-42.
146. Realizing that women largely recognize themselves in sex-stereotyped terms, really do feel the needs they have been encouraged to feel, do feel fulfilled in the expected ways, often actually choose what has been prescribed, makes possible the realization that women at the same time do not recognize themselves in, do not feel, and have not chosen this place.
MACKINNON, THEORY OF THE STATE, supra note 33, at 102. “The point is not how well women conform to this standard but that there is such a standard and women do not create it.” Id. at 92. “Women, who are not given a choice, are objectified; or rather, ‘the object is allowed to desire, if she desires to be an object.’” Id. at 140. “To be sexually objectified means having a social meaning imposed on your being that defines you as to be sexually used, according to your desired uses, and then using you that way. Doing this is sex in the male system.” Id. at 140. “Women’s complicity in their condition does not contradict its fundamental unacceptability if women have little choice but to become persons who then freely choose women’s roles.” Id. at 124. “Sexuality is to feminism what work is to marxism: that which is most one’s own, yet most taken away.” Id. at 3. “To be deprived of control over work relations in marxism, over sexual relations in feminism, defines each theory’s conception of lack of power, per se.” Id. at 4.
If one looks at liberal meanings of personhood through a feminist political analysis of what pornography does to women, the inadequacy of the liberal dehumanization critique becomes clear. In a feminist perspective, pornography dehumanizes women . . . . In the same act, pornography dispossesses women of the same power of which it possesses men: the power of sexual, hence gender, definition. The power to tell one who one is and the power to treat one accordingly.
but women do not have effective control over specific individual acts of heterosexual intercourse. Heterosexuality is figuratively thrust upon us, just as men are literally thrust into us during heterosexual intercourse. Not only can we not say no even if we want to, but also when we say yes, we are not choosing; we are merely acquiescing to the inevitable.

Biologically female persons do not have “feminine” sexuality even as social constructs; rather they become objects of male sexuality. That is, MacKinnon imagines involuntary sexuality to be the antithesis of subjectivity. As men are subjects, women as men’s alterity must also be men’s sexuality. As described in Lacanian psychoanalytical terms, only men can have the Phallus (be the desiring subject), women can merely be the Phallus (be the object of desire of the desiring subject)

Consequently, in this society women need abortion not so that we can gain control over our bodies, but because in this society we have no control over our sexuality. Or, more accurately, our sexuality is by definition not our own. If women are permitted to have abortions so that we may engage in

Perhaps a human being, for gender purposes, is someone who controls the social definition of sexuality.

Id. at 209.

147. “What is it reasonable for a man to believe concerning a woman’s desire for sex when heterosexuality is compulsory?” Id. at 183. “Heterosexuality is its social structure, desire its internal dynamic, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.” Id. at 3-4; see also id. at 178-79. Even homosexuality, in a masculinist-heterosexual society, is seen to be a reaction to, and perhaps reflection of, heterosexuality.

Id. at 141-42.

148. See supra notes 57 and 61, and accompanying text, infra notes 159-63.

149. “Faced with no alternatives, the strategy to acquire self-respect and pride is: I chose it.”

MACKINNON, THEORY OF THE STATE, supra note 33, at 150.

150. As in Christianity, women are seen as sex, made into sex. See Schroeder, Feminism Historicized, supra note 10, at 1191-93. "Men define women as sexual beings; feminism comprehends that femininity is sexual." MACKINNON, THEORY OF THE STATE, supra note 33, at 125. However, this does not mean that there is such a thing as female sexuality. Rather, female sexuality is male sexuality objectified and forced onto women. "Sexuality is to feminism what work is to marxism: that which is most one’s own, yet most taken away." Id. at 3. "[A] women [sic] is identified as a being who identifies and is identified as one whose sexuality exists for someone else, who is socially male . . . . Considering women’s sexuality in this way forces confrontation with whether there is, in the possessive sense of ‘women’s, any such thing. Is women’s sexuality its absence?” Id. at 118. “Specifically, ‘woman’ is defined by what male desire requires for arousal and satisfaction and is socially tautologous with ‘female sexuality’ and ‘the female sex.’” Id. at 131. “Women’s sexuality is, socially, a thing to be stolen, sold, bought, bartered, or exchanged by others. But women never own or possess it, and men never treat it, in law or in life, with the solicitude with which they treat property . . . . The moment women ‘have’ it—’have sex’ in the dual gender/sexuality sense—it is lost as theirs.” Id. at 172.

151. As I have argued elsewhere, and will return to below, traditional Roman Catholicism also teaches that men symbolize the spirit and women the flesh, so that women are men’s sexuality. Schroeder, Feminism Historicized, supra note 10, at 1191-93.

152. GROSZ, supra note 101, at 118 (1990). In psychoanalytic theory the terms “man” and “woman” are sexual positions individuals take up and are not synonymous with biologically male and female human beings, respectively.

153. Sex does not look a lot like freedom when it appears normatively less costly for women to risk an undesired, often painful, traumatic, dangerous, sometimes illegal, and potentially life-threatening procedure than to protect oneself in advance. Yet abortion policy has never been explicitly approached in the context of how women get pregnant; that is, as consequence of intercourse under conditions of gender inequality; that is, as an issue of forced sex.

MACKINNON, THEORY OF THE STATE, supra note 33, at 185-86. See also id. at 112-13, and CATHARINE
more heterosexual intercourse, we would not be controlling our bodies. Rather, we would be submitting to a sexuality which is not ours but which has been constructed by others and forced upon us. Women need abortion as a remedy because sexuality—our understanding of and relationship to our bodies—is involuntarily thrust upon us. Abortion, therefore, restores choice by permitting women to reject the consequences of heterosexuality. It is a rejection of sexuality as lack of choice. By restoring choice, abortion helps to construct subjectivity—make women into persons. The issue of whether abortion would be necessary, or ethically acceptable, in a society in which there were sexual equality cannot be known at this time, and is irrelevant to the issue of abortion in this society.

MacKinnon’s critique of the legal definition of rape, and indeed most areas of liberal sex law, is similarly based on her analysis of women’s lack of control over sexuality. Criminal law distinguishes between rape and

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154. Even before Roe v. Wade, arguments for abortion under the rubric of feminism have rested upon the right to control one’s own body, gender neutral. This argument has been appealing for the same reasons it is inadequate: socially, women’s bodies have not been theirs; women have not controlled their meanings and destinies. Feminists have tried to assert that control without risking pursuit of the idea that something more than women’s bodies might be at stake, something closer to a net of relations in which women are gendered and unequal. MACKINNON, THEORY OF THE STATE, supra note 33, at 189 (footnote omitted). Consequently, men often support abortion rights because it makes women more available to men. Id. at 190.

155. “Similarly, when convenient to do away with the consequences of sexual intercourse (meaning children), women get abortion rights. Women can have abortions so men can have sex.” MacKinnon, Reflections, supra note 38, at 1300.

156. “Abortion’s proponents and opponents share a tacit assumption that women significantly control sex. Feminist investigations suggest otherwise. Sexual intercourse, still the most common cause of pregnancy, cannot simply be presumed coequally determined.” MACKINNON, THEORY OF THE STATE, supra note 33, at 184. “The abortion choice should be available and must be women’s, but not because the fetus is not a form of life. Why should women not make life-or-death decisions? The problem has been that if the fetus has any standing in the debate, it has more weight than women do.” Id. at 186.

157. “Now place the legal status of the fetus against the backdrop of women’s tenuous to nonexistent equality. Women have not been considered ‘persons’ by law very long; the law of persons arguably does not recognize the requisites of female personhood yet.” MacKinnon, Reflections, supra note 38, at 1315. Short of achieving sexual and social equality—short of changing the context—abortion has offered the only way out. However difficult an abortion decision may be for an individual woman, it provides a moment of power in a life otherwise led under unequal conditions which preclude choice in ways she cannot control. In this context, abortion provides a window of relief in an unequal situation from which there is no exit.

Id. at 1317.

158. If authority were already just and body already autonomous, having an abortion would lose any dimension of resistance to unjust authority or reclamation of bodily autonomy. Under conditions of sex equality, I would personally be more interested in taking the man’s view into account. . . . The privacy approach might make more sense.

Id. at 1327.

159. The law on women’s situation produced in this way views women’s situation from the standpoint of male dominance. It assumes that the conditions that pertain among men on the basis of sex—consent to sex, comparative privacy, voice in moral discourse, and political equality on the basis of gender—apply to women. It assumes on the epistemic level that sex inequality in society is not real. Rape law takes women’s usual response to coercion—acquiescence, the despairing response to hopelessness to unequal odds—and calls that consent. Men coerce women; women “consent.”

MACKINNON, THEORY OF THE STATE, supra note 33, at 168.
intercourse on the basis of consent.160 But this incorrectly assumes that women are ever capable of meaningful consent to heterosexual intercourse.161 The legal definition of consent in rape is designed so that most sexual assaults do not fit within the definition.162

For MacKinnon, meaningful consent is identified with the exercise of will by a totally free and autonomous individual subject. Insofar as will is constrained, voluntary action is, by definition, not consent. I would agree with MacKinnon that women's lives and sexuality are extremely constrained in masculinist society.163 I would question, however, MacKinnon's implication that constrained consent does not reflect sufficient voluntarism to make the consent meaningful—that is, that it imposes no responsibility on the person consenting. Indeed, if we are all socially constructed, how could any human being ever be capable of the type of act of will which MacKinnon seeks? As I have discussed elsewhere,164 and as I will return to shortly, despite MacKinnon's ostensible rejection of objective truth, a liberal strain—an essentialist conception of the subject—underlies her writings.

B. Sexuality as Loss of Subjectivity in Augustine

Sexuality plays as central a role in Augustine's theory of sin as it does in MacKinnon's theory of subordination. It is the involuntariness of sex which

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160. "Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The adjudicated line between rape and intercourse commonly centers on some assessment of the woman's 'will.'" Id. at 177. "The law, speaking generally, defines rape as intercourse with force or coercion and without consent.... In a critique of male supremacy, the elements 'with force and without consent' appear redundant. Force is present because consent is absent." Id. at 172 (footnote omitted).

161. "If sexuality is relational, specifically if it is a power relation of gender, consent is a communication under conditions of inequality." MACKINNON, THEORY OF THE STATE, supra note 33, at 182.

When sex is violent, women may have lost control over what is done to them, but absence of force does not ensure the presence of that control. Nor under conditions of male dominance, does the presence of force make an interaction nonsexual. If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept. Id. at 178. "Measuring consent from the socially reasonable, meaning objective man's, point of view reproduces the same problem under a more elevated label." Id. at 181.

162. "The notion of consent here, the law's line between intercourse and rape, is so passive that a dead body could satisfy it." MacKinnon, Reflections, supra note 38, at 1300.

163. Unlike MacKinnon, however, I also believe that men are constrained in masculinist society and are not the free, willed, acting subjects described by MacKinnon. This is not to imply in any way that men are not relatively more empowered than women in our society, that our legal system does not recognize accurately either the relative difference in the degree of constraint imposed on men and women in our society or the degree of constraint which exists in the average sexual encounter, or that our laws do not need to be changed accordingly.

Specifically, I agree that it is bizarre to analyze abortion in terms of whether or not a woman, by engaging in intercourse, is consenting to pregnancy, because such an analysis probably does not reflect the conscious mental state of the women involved. In many, if not most, cases, such "consent" could only be deemed "constructive consent," a legal fiction designed to justify a pre-existing conclusion, rather than a finding of fact.

164. Schroeder, Abduction from the Seraglio, supra note 59, at 193-200; See generally Schroeder, Subject:Object, supra note 42.
concerns him. Sexuality is the ultimate sign of our lack of integrity—the symbol of our imperfection.

As Peter Brown brilliantly explains in The Body and Society: Men, Women and Sexual Renunciation in Early Christianity, St. Augustine’s contribution to the Christian theology of sexuality was his reconceptualization of the theological meaning of post-lapsarian sexuality. Unlike many of the other Church Fathers who emphasized sexuality in theology, Augustine did not see a necessary rift between the spirit and the flesh. Earlier theologians taught either that Adam and Eve did not have sexuality before the Fall, or that, perhaps, their sexuality was different in that they did not experience sexual love or pleasure. In the Garden, these theologians speculated, Adam and Eve lived together in an entirely rational, non-emotional, individualistic way like angels.

In contrast, Augustine believed that humankind was created by God to be social. Marriage and childbearing are a necessary part of society. Consequently, social love in the form of intimate friendship between Adam and Eve, as well as physical pleasure in reproduction, were parts of the

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166. Brown’s book traces the development of the Christian concept of sexuality from its origins in Jewish and Roman cultures, which accepted sexuality and emphasized the importance of the family in religious life, to the Christian preoccupation with virginity. Augustine synthesized the theories of previous theologians and created a theory that became the orthodox Christian theology of sexuality, which combined both the Christian concept of celibacy and the Roman concept of society. Brown, The Body and Society, supra note 165, at 387-427.


169. Since every man is a part of the human race, and human nature is something social and possesses the capacity for friendship as a great and natural good, for this reason God wished to create all men from one, so that they might be held together in their society . . . . And so it is that the first natural tie of human society is man and wife.

Augustine, The Good of Marriage, in Saint Augustine: Treatises on Marriage and Other Subjects, in The Fathers of the Church 9 (Charles T. Wilcox et. al. trans., & Roy J. Deferrari ed., 1955) [hereinafter Augustine, Good of Marriage]. See also Brown, The Body and Society, supra note 165, at 400. As opposed to the early Christian ideal of the ascetic hermit who in solitude tried to achieve individual spiritual perfection, Augustine’s ideal was expressed in the title of his greatest work The City of God, a holy community.

170. “A consequence is the union of society in the children who are the only worthy fruit, not of the joining of male and female, but of sexual intercourse.” Augustine, Good of Marriage, supra note 169, at 9. Brown, The Body and Society, supra note 165, at 400-01.

171. Brown, The Body and Society, supra note 165, at 403. As I have argued elsewhere, Augustine believed that reproduction, rather than friendship, was the primary reason for the creation of woman. He thought it was self-evident that if God had intended to provide a companion for Adam primarily for friendship or to help him work, He would have created a second man. Schroeder, Feminism Historicized, supra note 10, at 1191-92.

Nevertheless, the friendship between husband and wife was, to Augustine, more significant than their sexual relationship. “[B]ecause he came to the marriage when invited, there is merit in inquiring why it is a good. This does not seem to me to be a good solely because of the procreation of children, but also
original Creation, and therefore good. Pre-lapsarian life in the Garden differed from post-lapsarian life not in that the former was spiritual and the latter fleshy, but that the former was one of unity and the latter of conflict.

In Eden, Adam and Eve’s wills were totally in harmony with God’s will, they were totally in harmony with each other, and their flesh was totally in harmony with their spirits. Spirit and flesh, like man and woman, (which, Christian theology taught, symbolize the spirit and the flesh, respectively) were created to live in an unending harmonious conjugal embrace. It is true that this harmony, like the harmony of marriage, was one of hierarchy, with spirit/man governing flesh/woman. But this hierarchy was based on mutual love, devotion and complementarity, not on domination and subordination.

“For there could have been in both sexes, even without such intercourse, a kind of friendly and genuine union of the one ruling and the other because of the natural companionship between the two sexes.” Augustine, Good of Marriage, supra note 169, at 12 (footnotes omitted) (Referring to Christ's recognition of marriage through attendance at the wedding at Cana).

172. As man was created with both spirit and flesh, he was intended to experience both mental and physical pleasure. “For neither was it a paradise only physical for the advantage of the body, and not also spiritual for the advantage of the mind; nor was it only spiritual to afford enjoyment to man by his internal sensations, and not also physical to afford him enjoyment through his external senses. But obviously it was for both ends.” AUGUSTINE, THE CITY OF GOD, supra note 165, at 458.

“But it is quite clear that they were created male and female, with bodies of different sexes, for the very purpose of begetting offspring... and it is great folly to oppose so plain a fact.” Id. at 469. “And it is by this original example, which God Himself instituted, that the apostle admonishes all husbands to love their own wives in particular.” Id. at 470.

Augustine argued that Adam and Eve “had been placed in Paradise for a probationary period, so that they should learn to experience and to accept, with unwavering obedience and with open-hearted gratitude, the full range of the joys of fully physical, fully social and... fully sexual beings.” BROWN, THE BODY AND SOCIETY, supra note 165, at 400-01 (footnote omitted). Augustine, however, did think that Adam and Eve would only be sexually active during the younger portion of their lives in order to have children. Having performed this function, they would remain together in continent friendship when they were older. That is, although Augustine thought that Adam and Eve felt sexual desire and this was proper, like other Christian theorists, he was incapable of “articulating the possibility that sexual pleasure might, in itself, enrich the relations between husband and wife.” Id. at 402. See also id. at 400-02, 407, 417.

173. Augustine asks, and answers in the negative, the question “[I]f our first parents had not sinned, they would have had children in some other way, without physical coition, out of the munificence of the almighty Creator, who was able to create them without parents...” Augustine, Good of Marriage, supra note 169, at 10.

BROWN, THE BODY AND SOCIETY, supra note 165, at 405, 407. “Their love to God was unclouded, and their mutual affection was that of faithful and sincere marriage; and from this love flowed a wonderful delight, because they always enjoyed what was loved.” AUGUSTINE, THE CITY OF GOD, supra note 165, at 456.

174. “Adam and Eve had originally enjoyed a harmonious unity of body and soul. Their bodies had followed the dictates of their wills with the same loving and familiar concord as they themselves had followed the will of God.” BROWN, THE BODY AND SOCIETY, supra note 165, at 405. He described the relationship between body and soul as a “sweet marriage-bond.” Id.

As happy, then, as were these our first parents, who were agitated by no mental perturbations, and annoyed by no bodily discomforts, so happy should the whole human race have been, had they not introduced that evil which they have transmitted to their posterity, and had none of their descendants committed iniquity worthy of damnation; but this original blessedness continuing until, in virtue of that benediction which said, “Increase and multiply,” the number of the predestined saints should have been completed, there would then have been bestowed that higher felicity which is enjoyed by the most blessed angels... AUGUSTINE, THE CITY OF GOD, supra note 165, at 457.
obeying.” The movements of Adam and Eve’s sexual organs were subject to the voluntary control of their spirits, just as the movements of our arms and legs are today. Their spirits were created to rejoice innocently in the excellence and pleasure of their flesh acting in accordance with their will.

The Fall was the moment of irreparable rift. Adam and Eve separated from God by turning their wills away from God’s will. This resulted in disharmony not merely between God and man, but between man and man, man and woman, and spirit and flesh.

Sexuality and death are linked because they are the two ways in which the rift between spirit and flesh (symbolizing as well the rift between God and man, and between man and woman) are physically manifest: in death the spirit is involuntarily deprived of its beloved spouse, flesh; in sex, the spirit loses its harmonious governance over the rebellious flesh. Death comes

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175. Augustine, Good of Marriage, supra note 169, at 9. See also, Schroeder, Feminism Historicized, supra note 10, at 1151-52, 1163-64. (Hierarchy between men and women was a part of the original creation, but the existing post-lapsarian hierarchy, whereby woman is subordinated to man against her will, is a result of the Fall).

176. Do we now move our feet and hand when we will to do the things we would by means of these members? do we meet with no resistance in them, but perceive that they are ready servants of the will . . . and shall we not believe that, like as all those members obediently serve the will, so also should the members have discharged the function of generation, though lust, the award of disobedience, had been a wanting? AUGUSTINE, THE CITY OF GOD, supra note 165, at 470-471. “The man, then, would have sown the seed, and the woman received it, as need required, the generative organs being moved by the will, not excited by lust.” Id. at 472.

In such happy circumstances and general human well-being we should be far from suspecting that offspring could not have been begotten without the disease of lust, but those parts, like all the rest, would be set in motion at the command of the will; and without the seductive stimulus of passion, with calmness and with no corrupting of the integrity of the body, the husband would lie upon the bosom of his wife. Id. at 475.

177. “No sadness of any kind was there, nor any foolish joy; true gladness ceaselessly flowed from the presence of God, who was loved ‘out of pure heart, and a good conscience, and faith unfeigned.’ The honest love of husband and wife made a sure harmony between them. Body and spirit worked harmoniously together, and the commandment was kept without labour.” AUGUSTINE, THE CITY OF GOD, supra note 165, at 474-75. “[T]he married intercourse of Adam and Eve, had this occurred before the Fall, would have been an object lesson in the balanced rapture with which human beings might have used the physical joys showered upon all by their creator.” BROWN, THE BODY AND SOCIETY, supra note 165, at 407.

178. Or, more accurately, a rift which was irreparable by man alone, but Redeemable by Christ. BROWN, THE BODY AND SOCIETY, supra note 165, at 416.

179. AUGUSTINE, THE CITY OF GOD, supra note 165, at 413-14, 416. “But now the soul is ashamed that the body, which by nature is inferior and subject to it, should resist its authority.” AUGUSTINE, THE CITY OF GOD, supra note 165, at 471. “For the soul, reveling in
to us at the end of our lives and we can try not to think about it. Sexuality, on the other hand, is always with us.

Upon eating the fruit of the Tree of Knowledge of Good and Evil, Adam and Eve “knew that they were naked.”\textsuperscript{183} Augustine interpreted this not merely as a recognition of their sexuality, but as a recognition of their sexuality as something other than themselves.\textsuperscript{184} That is, immediately upon his disobedience, Adam experienced an involuntary erection.\textsuperscript{185} The primordial parents saw this and felt sexual shame.\textsuperscript{186} The measured, sober emotion of social love in accordance with will, was replaced with uncontrollable lust. The significance of sex was no longer merely biology, it was its religious and social meaning.\textsuperscript{187}

Involuntary sexual events such as erections, vaginal secretions, menstruation, and wet dreams (not to mention spontaneous sexual desire and erotic fantasies) continually attack both the young and the old—even the most holy and chaste hermits and consecrated virgins.\textsuperscript{188} The horror of sex is precisely that we do not choose it—our bodies constantly mock us with their obscene humor.\textsuperscript{189} God made post-lapsarian sex serve as a constant reminder

its own liberty, and scorning to serve God, was itself deprived of the command it had formerly maintained over the body. And because it had wilfully deserted its superior Lord, it no longer held its own inferior servant; neither could it hold the flesh subject, as it would always have been able to do had it remained itself subject to God.” \textit{Id.} at 422. BROWN, \textit{THE BODY AND SOCIETY}, supra note 165, at 407, 416-17.

\textsuperscript{183} \textit{Genesis} 3:7.

\textsuperscript{184} Before the Fall, “[T]hey were naked and were not ashamed;’—not that their nakedness was unknown to them, but because nakedness was not yet shameful, because not yet did lust move those members without will’s consent; not yet did the flesh by its disobedience testify against the disobedience of man.” A\textit{UGUSTINE, THE CITY OF GOD, supra} note 165, at 465.

\textsuperscript{185} BROWN, \textit{THE BODY AND SOCIETY, supra} note 165, at 416. “They experienced a new motion of their flesh, which had become disobedient to them, in strict retribution of their own disobedience to God.” A\textit{UGUSTINE, THE CITY OF GOD, supra} note 165, at 422. “If the motion of concupiscence in the unruly members of our first parents arose out of their sin, and only when the divine grace deserted them; and if it was on that occasion that their eyes were opened to see, or, more exactly, notice their nakedness, and that they covered their shame because the shameless motion of their members was not subject to their will . . . .” \textit{Id.} at 440.

\textsuperscript{186} BROWN, \textit{THE BODY AND SOCIETY, supra} note 165, at 416. “For, as soon as our first parents had transgressed the commandment, divine grace forsook them, and they were confounded at their own wickedness; and therefore they took fig leaves . . . and covered their shame; for though their members remained the same, they had shame now where they had none before.” A\textit{UGUSTINE, THE CITY OF GOD, supra} note 165, at 422.

\textsuperscript{187} “For the corruption of the body, which weighs down the soul, is not the cause but the punishment of the first sin; and it was not the corruptible flesh that made the soul sinful, but the sinful soul that made the flesh corruptible.” A\textit{UGUSTINE, THE CITY OF GOD, supra} note 165, at 444.

\textsuperscript{188} BROWN, \textit{THE BODY AND SOCIETY, supra} note 165, at 406. Augustine was particularly tormented by his personal inability to control his erections and nocturnal omissions after years of a celibate holy life. A\textit{UGUSTINE, CONFESSIONS, supra} note 165, at 234.

\textsuperscript{189} Not only lust, but impotence, is a mark of our lack of control:

But even those who delight in this pleasure are not moved to it at their own will, whether they confine themselves to lawful or transgress to unlawful pleasures; but sometimes this lust importunes them in spite of themselves, and sometimes fails them when they desire to feel it, so that though lust rages in the mind, it stirs not in the body. Thus strangely enough, this emotion not only fails to obey the legitimate desire to beget offspring, but also refuses to serve lascivious lust: . . . it is divided against itself . . . .

of our shame in our turning away from God.  

Post-lapsarian sexuality serves even more specifically as the Christian symbol of woman’s degradation. This is appropriate insofar as Catholic teaching is that although woman, as human being, is spiritual in that she was created in the image of God, woman, as woman, symbolizes the flesh. The status of sexuality, therefore, is also always the status of woman.

As I have stated, before the Fall, Eve was inferior to Adam, but not subjugated. She loved Adam through her free will and enjoyed her own excellence, as a complement to his. Eve, whose role was to follow, led Adam in the Fall, thereby doubly sinning in her dual nature as both human soul and female body. As a result, women were doubly cursed in our dual sexuality as both lover and mother. We bear children in pain. We are

190. So that even “conjugal intercourse, sanctioned as it is by law for the propagation of children, legitimate and honourable though it be” is always experienced as shameful:

Before the bridegroom fondles his bride, does he not exclude the attendants, and even the paranymphs, and such friends as the closest ties have admitted to the bridal chamber? . . . All right actions wish to be set in the light, i.e. desire to be known. This right action, however, has such a desire to be known, that yet it blushing to be seen . . . . And why so, if not because that which is by nature fitting and decent is so done as to be accompanied with a shame-begetter penalty of sin?


191. Augustine called sexuality the poena reciproca. The human body served as a “tiny mirror, in which men and women could catch a glimpse of themselves.” BROWN, THE BODY AND SOCIETY, supra note 165, at 418.

192. I discuss early Catholic theology of women more thoroughly in Schroeder, Feminism Historicized, supra note 10. A brief, but excellent, introduction to this subject is Eleanor Commo MacLauglin, Equality of Soul, Inequality of Sexes: Women in Medieval Theology, in RELIGION AND SEXISM: IMAGES OF WOMAN IN THE JEWISH AND CHRISTIAN TRADITION, 213 (Rosemary R. Reuther ed., 1974). A controversial account of the same is UTA RANKE-HEINEMANN, EUNUCHS FOR THE KINGDOM OF GOD: WOMEN, SEXUALITY, AND THE CATHOLIC CHURCH (1990). This book received the gift of extraordinary pre-publication publicity when John Cardinal O’Connor (without having read the book) condemned the book as “dirty” and “preposterous.” See Josh Getlin, Clashing with her Church, L.A. TIMES, Feb. 11, 1991, at E1. With regard to the latter work, I would note that I have frequently defended Ranke-Heinemann’s work in conversation from the charge that she is too angry with the Catholic Church with the “witticism” that it is impossible for a woman to be too angry with the Church. However, the polemical tone of her writing is off-putting and detracts from its persuasiveness.

193. Consequently, Augustine insisted on the dignity of the originally created female body and insisted that the female saints would retain their femininity after the resurrection and would not, as some theologians had suggested, be “rewarded” in heaven by being turned into men:

For my part, they seem to be wiser who make no doubt that both sexes shall rise. For there shall be no lust, which is now the cause of confusion. For before they sinned, the man and the woman were naked and were not ashamed . . . . And the sex of woman is not a vice, but nature. It shall then indeed be superior to carnal intercourse and child-bearing; nevertheless the female members shall remain adapted not to the old uses, but to a new beauty, which, so far from provoking lust, now extinct, shall excite praise to the wisdom and clemency of God, who both made what was not and delivered from corruption what He made.

AUGUSTINE, THE CITY OF GOD, supra note 165, at 839.

194. That is, Eve sinned both in her capacity as a human being by turning away from God, and in her capacity as woman, by taking the active role by leading the man in the Fall.

Satan, through the serpent, chose to tempt Eve rather than Adam, because he realized that the superior man could not be deceived, but the weaker woman could be. Adam was not even deceived by Eve. Rather, he loved her so much, he knowingly chose to follow her to perdition, rather than being parted from her.
now forcibly dominated by man, even as we are damned to desire man and his domination. Both of these sexual roles were institutionalized as marriage: the only permissible outlet for woman's sexuality. Postlapsarian marriage was, consequently, conceptualized by the Church as being intentionally degrading to women. It is the holy instrument of God's curse of Eve.

MacKinnon's focus on sexuality, and her identification of sexuality with the elimination of the personhood of women, is ultimately within this Christian tradition. She identifies subjectivity with unconstrained will. She sees the involuntariness of sexuality as thwarting of will. If sex is involuntary, then we have no will, and we can not be the free standing individuals which we seek to be. Sexuality, is therefore, a form of death—an involuntary destruction of our personhood. To be a true person, one must make sex voluntary—freely chosen at the deepest level.

C. How Sexuality Became Alienation

Of course, even if MacKinnon's conclusion that the involuntariness of sex results in the loss of subjectivity is within the Christian tradition, MacKinnon and Augustine explain the cause of this process differently.

Augustine was a theologian. He taught that we lost our true selves by turning away from God. Our true will, our true selves, can only be achieved by returning to God, by submitting our wills to God's will in order to re-establish prelapsarian harmony. Mankind, with stunted wills, can not do this alone. The harmony of God and man can only be established through Christ, true man and true God.

He sinned in doing this because he was following his own will, and that of Eve's (and the serpent's) rather than the will of God.

And Adam was not deceived, but the woman being deceived was in the transgression;" but he speaks thus, because the woman accepted as true what the serpent told her, but the man could not bear to be severed from his only companion, even though this involved a partnership in sin. He was not on this account less culpable, but sinned with his eyes open.

Augustine, City of God, supra note 165, at 459 (quoting St. Paul). See also, Schroeder, Feminism Historicized, supra note 10, at 1156.

In contradistinction, some theologians suggested that because of Eve's inferior nature, her action in the Fall was not as heinous as Adam's. That is, if Adam had not followed Eve, woman might have been punished, but mankind might not have been damned. Id. at 1193 n.217.

196. "[Y]et your desire shall be for you husband, and he shall rule over you." Genesis 3:16.
197. Schroeder, Feminism Historicized, supra note 10, at 1163-64. The Catholic Church has recently rejected the traditional view that the subordination of woman is the divinely ordained curse of Eve. God's words in Genesis are now interpreted not as a curse but as God's prediction of the debased nature of human life in the state of sin. The subordination of woman is an evil which humans should fight to overcome in the same way as we fight to overcome the other evils predicted in this passage (which include snakebite, hard labor and death). See Peter Steinfels, Anger and Praise, Follow Pope's Letter on Women, N.Y. TIMES, Oct. 2, 1988, § 1, at 8 (referring to John Paul II's Apostolic Letter "On the Dignity of Women").

198. Of course, in the Christian story, free will, unconstrained by sin, would always be in perfect accord with God's will.
reestablishment of the harmony between flesh and spirit in the bodily resurrection of the Last Judgment.200

MacKinnon would, of course, substitute societal structures for divine Creation. She believes that her social construction theory shows that biological determinism is a misconception.201 Rather than sexuality being our religious understanding of the flesh, however, it is our social understanding of biology and gender.202 As a human invention, therefore, sexuality is by definition artificial.

D. Male Subjectivity

MacKinnon takes a further step which is not necessitated by her analysis, and, indeed, might be antithetical to her expressed theory of social construction. She seems to suggest from her observation that the biological aspect of the flesh does not pre-ordain any specific social order of sex, that the flesh cannot serve as any meaningful constraint on sex in this society. How then can she account for the involuntariness (i.e. constraining aspect) of sex, without God or nature and at the same time preserving the concept of human will?

She does this by distinguishing between the personhood and effective will of man and woman, and by adopting what seems to be an instrumental conception of psychology which leaves no room for the unconscious.203 That is, her concept of subjectivity and will requires some human being to experience and wield will. She concludes that men, as a social class, have will. She then can explain women's lack of will as the result of men's will to power. Women's involuntary sexuality is voluntarily imposed by men acting as a class. MacKinnon can be seen, therefore, to overlay a postmodern concept of the subject as a social construct upon a combination of a premodern conception of the flesh and a "merely" modern concept of an autonomous acting subject.

MacKinnon's discovery that there is no inherent feminine sexuality is not based merely on the post-modernist cliche that there is no objective reality "out there." Rather, she not only notes that sexuality is socially constructed, she finds it necessary, and meaningful, to ask who does the constructing and of what sexuality is constructed.204

By asking these questions, however, MacKinnon reveals that she is rejecting, rather than accepting, a postmodern theory of the social construction

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200. Only Jesus and the Virgin Mary embodied harmony between the flesh and the Spirit. As her titles "The Immaculate Conception" and "Alone of All Her Sex" imply, Mary alone was free from Original Sin from the moment of her conception. Consequently she never experienced the disjunction of body and soul which plagues all other mortals. Brown, The Body and Society, supra note 165, at 407. See generally Marina Warner, Alone of All Her Sex: The Myth and Cult of the Virgin Mary (1976).

201. See note 34, supra.

202. See notes 34-42, supra.

203. See text at notes 136-37 and 150-52, supra.

204. See note 39, supra. Mackinnon, Theory of the State, supra note 33, at 131.
of sexuality. That is, MacKinnon's theory, like liberalism and marxism, presupposes a pre-existing acting subject. But Michel Foucault's theory is precisely that no one constructs sexuality—power lacks an acting subject. Similarly, asking what sex is constructed from presupposes a pre-existing authentic sexuality which can be distorted. Foucault, consequently, argued, as I do, that combining concepts of power being wielded by an active subject (whether conceived in the liberal concept of individuals, the marxist concept of classes or the feminist concept of genders) with authentic sexuality inevitably leads to a liberal Romantic/Christian theory of sexuality.

MacKinnon's concept of will, a modern theory of the subject, requires that someone be doing the constructing. Consequently, to MacKinnon, her observation that men are socially advantaged by the sexual hierarchy is demonstration that men are in control of sexuality and are imposing sexuality on women.

One of the interesting things about MacKinnon is that even though she gives no account of the unconscious she seems, at first blush, to come to the same conclusion as Lacan: The Woman doesn’t exist. That is, the subject is always psychologically identified with the masculine, and the feminine with the absence of subjectivity. Women are the object of male subjectivity.

205. That is, Foucault argued that the modern (i.e. liberal or marxist) concept of the subject was dead. While there can be victims of domination, there are no perpetrators. Charles Taylor, Foucault on Freedom and Truth, in FOUCAULT: A CRITICAL READER 69, 75-76, 83-84, and 90-91 (David C. Hoy ed., 1986). Foucault's targets particularly included marxism. Id. at 78.

206. Id. at 77-79 and 83-84.

207. Id. at 78.

208. See text accompanying notes 146-51, supra.

209. That is Woman with a capital "W," the Feminine: If women are socially defined such that female sexuality cannot be lived or spoken or felt or even somatically sensed apart from its enforced definition, so that it is its own lack, then there is no such thing as a woman as such; there are only walking embodiments of men's projected needs. Under male supremacy, asking whether there is, socially, a female sexuality is the same as asking whether women exist.

MACKINNON, THEORY OF THE STATE, supra note 33, at 119.


210. And so, Grosz describes Lacan's analysis of what it might mean when a woman says "I" when subjectivity is associated in the symbolic of our consciousness with the masculine.

In so far as she speaks and says 'I', she too must take up a place as a subject of the symbolic; yet, in another, in so far as she is positioned as castrated, passive, an object of desire for men rather than a subject who desires, her position within the symbolic must be marginal or tenuous: when she speaks as an 'I' it is never clear that she speaks (of or as) herself. She speaks in a mode of masquerade, in imitation of the masculine, phallic subject. Her 'I', then, ambiguously...
On second look, however, one can see that her lack of a sophisticated psychological theory and loyalty to classical liberal conceptions of individuality cause her to interpret this in a literal-minded way.

MacKinnon argues not merely that society has the power to make ideas into reality, but that our ideas are our reality. When Jacques Lacan said that psychologically we imagine the subject as masculine and the feminine as lack, he is talking about the myths that inhabit our psyches. He meant that all human beings experience the "castration experience" as infants when we realize that we are not one with the Phallic Mother. The "Phallus" is the term for the symbolic object of desire. Psychologically we conflate the fact that male human beings have penises with the idea that men possess the Phallus—i.e. have subjectivity. In contrast, women can only symbolically be the Phallus—the object of desire. But, to Lacan no human being can ever regain the Phallic Mother who is lost in the Infantile Imaginary. No man ever achieves his desire, no woman can ever satisfy his desire. The more a woman seeks to satisfy male desire, to become the object of desire, the more she is objectified and loses her individualized subjectivity. She is seen, and experiences herself, as lack.

This psychoanalytic and linguistic error has tragic psychological consequences for both men and women. Feminists influenced directly by

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her position as a (pale reflection of the) masculine subject; or it refers to a 'you', the (linguistic) counterpart of the masculine 'I'.

GROSZ, supra note 101, at 71-72.

Lacan's concept of the subject is not the autonomous freestanding individual of liberal philosophy. Rather it is the psychoanalytical concept of the ego, which only exists in symbolic relation to the other. That is, subjectivity is always intersubjectivity. The development of the subject is one of the primary topics of Lacan's first seminar. See generally LACAN, FREUD'S PAPERS ON TECHNIQUE, supra note 101, and JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS (Jacque-Alain Miller ed. & Alan Sheridan trans., 1977).

211. See text at note 47, supra. MACKINNON, THEORY OF THE STATE, supra note 33, at 125. Consequently, one of the reasons why she thinks that group defamation is an inadequate way of analyzing pornography is that truth is a defense to defamation. The power of pornography is that it can make its lies empirically true; it says women are non-human, and then dehumanizes them. MacKinnon, Defamation and Discrimination, supra note 3.


214. The feminine, which is psychologically identified with the lost Phallic Mother, can only be experienced as lack. Consequently, "Woman" (i.e. the feminine) "does not exist" (i.e. is experienced as lack).


216. This specifically describes the "narcissistic" woman. Lacan's theory tries to explain why men and women so often love out of phase—they are both fighting over the same "thing." As men seek to acquire the woman-phallus, they are always disappointed. Insofar as the loving man tries to fill his woman's lack and give her the Phallus by giving her the penis in intercourse, he experiences lack and the symbolic loss of his penis. He turns from the woman. In turn, intercourse is always also a disappointment to women because it makes apparent that the penis is no substitute for the Phallus. Her lack will never be filled and she desires even more. Grosz gives a brief synopsis of the Lacanian analysis of typical sexual relations at GROSZ, supra note 101, at 115-46.

217. Especially insofar as psychoanalytic theory, which sees sexuality as a linguistic construct which is constructed in infancy in the mirror and oedipal stages and which is incorporated in our very ability to speak and understand language, risks seeming to be inevitable (if not biological). However, as Elizabeth Grosz explains, at closer reading Lacan's theory does not explain the origin of patriarchy. It presupposes
Lacan, such as Judith Butler, Drucilla Cornell, Elizabeth Grosz, Luce Irigaray and Julia Kristeva, explore what it could mean to write an affirmative myth of the feminine as subject, as something other than lack, from this psycholinguistic starting point.\textsuperscript{218}

MacKinnon, in contradistinction, does not see male subjectivity as psychoanalytical myth-making. Masculinity has the power to make its myth into reality.\textsuperscript{219} Men really do have the Phallus, and Women really are the Phallic Mother. She says that in masculinist society, only men can become true human beings.\textsuperscript{220} Women are not merely treated as unequal, they are actually made into non-persons.\textsuperscript{221}

As we have seen, the ultimate symbol of personhood (as in Augustinian theory) is control over sexuality; the ultimate symbol of non-personhood is to be controlled by sexuality. MacKinnon says so expressly. "Perhaps a human being, for gender purposes, is someone who controls the social definition of it as an existing social system and at most tries to explain its reproduction. Consequently, Lacanian theory suggests the possibility of change. Grosz, \textit{supra} note 101, at 69. I read Grosz's analysis (developed through her reading of Irigaray) as saying, in effect, that Lacanian theory is a theory of language and psychoanalysis and not a theory of anatomy which can be empirically verified. It is a story we tell about ourselves. Its "truth" resides in its explanatory power. But, it is a story told by men, and is not necessarily the only possible "true" story which can be told.

\textsuperscript{218} This is the concern of those feminists who have been influenced by Continental psycho-linguistic theory including \textit{JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY} (1990), Cornell, \textit{Sexual Difference, supra} note 2, \textit{CORNELL, THE PHILOSOPHY OF THE LIMIT, supra} note 137, Cornell, \textit{Beyond Accommodation, supra}, note 209, Cornell, \textit{Doubly-Prized World, supra}, note 209, Grosz, \textit{supra} note 101, and Irigaray, \textit{supra} note 209.

\textsuperscript{219} \textit{See} note 36, 40 and 64, \textit{supra}. "Women's sexualness, like male prowess, is no less real for being mythic. It is embodied." \textit{Id.} at 103.

\textsuperscript{220} "[W]omen are in fact not full people in the sense men are allowed to become." \textit{Id.} at 103.

\textsuperscript{221} It becomes clear, from one horror story after another, that men's position of power over women is a major part of what defines men as men to themselves, and women as women to themselves. Challenge to that power is taken as a threat to male identity and self-definition. Men's reaction of threat is also a challenge to women's self-definition, which has included supporting men, making men feel masculine, and episodically being treated better as a reward.

\textit{Id.} at 92.

"[W]omen are systematically deprived of a self and . . . that process of deprivation constitutes socialization to femininity." \textit{Id.} at 89.

"It is only to the extent that each of these values [i.e. self-respect and avoidance of pain] is socially accepted as human within a given culture that their negation becomes a quality of sex and is eroticized in and as 'woman'. . . . In this way, women's sexuality as expressed in pornography precisely negatives her status as human." \textit{Id.} at 210-11.
sexuality." Women, MacKinnon argues, are involuntarily subjected to heterosexuality and are dehumanized. Insofar as men are benefited by the sexual hierarchy, and insofar as society is a construction of human subjectivity, men as subjects must be creating sexuality to continue their own status.

Perhaps the most pervasive realization of consciousness raising was that men as a group benefit from these same arrangements by which women are deprived. Women see that men derive many advantages from women's roles . . . . But the major advantage men derive, dubious though it may seem to some, is the process, the value, the mechanism by which their interest itself is enforced and perpetuated and sustained: power. Power in its social male form. It is not only that men treat women badly, although often they do, but that it is their choice whether or not to do so.

Consequently, if men are subjects, they must control sex. Sexuality is, therefore, seen to be voluntary to men, and imposed by men upon women.

A theory of sexuality becomes feminist methodologically, meaning feminist in the post-marxist sense, to the extent it treats sexuality as a social construct of male power: defined by men, forced on women, and constitutive of the meaning of gender.

By voluntarily imposing their sexual will upon women, men constitute their subjectivity by objectifying women. As MacKinnon so eloquently explains, "Man fucks woman; subject verb object."

Having conceptualized feminine sexuality as objectification through imposition of masculine sexuality by male subjects, MacKinnon needs a mechanism to perform this function. As we have seen, she does not explore psychoanalytic theory which traces this process to early childhood, probably because such a theory does not recognize any consciously acting agent. Rather, her theory of pornography serves this purpose. Pornography is defined as the eroticization of gender hierarchy, and therefore the means of construction of

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222. The context of this quote is:
[T]o say that pornography is "dehumanizing" is an attempt to articulate its harm. But "human being" is a social concept with many possible meanings . . . In a feminist perspective, pornography dehumanizes women in a culturally specific and empirically descriptive—not liberal moral—sense. In the same act, pornography dispossesses women of the same power of which it possesses men: the power of sexual, hence gender, definition. The power to tell one who one is and the power to treat one accordingly. Perhaps a human being, for gender purposes, is someone who controls the social definition of sexuality.

Id. at 209.
223. Id. at 93-94.
224. Id. at 128.
225. Id. at 121-25.
226. Id. at 124.
sexuality; i.e. the sexuality constructed is defined as the dominance of men and the subordination of women. If we wish to maintain a belief that some humans have subjectivity in the sense that sex must be voluntary, and if men are advantaged by the sexual status quo, it seems to follow that pornography must be the masculine will to power. For women to achieve subjectivity, therefore, they must destroy the mechanism of the masculine will to power—they must gain control of, and destroy, pornography.

V. REWRITING THE FEMININE

And so we see, MacKinnon’s theory of pornography is based on a premodern (Christian) concept of sexuality as the symbol of our lack of subjectivity, combined with a modern concept of the subject as the autonomous, freely-acting individual capable of exercising will, and a postmodern concept of the self as a social construct. That is, the flesh robs us of our selfhood because it is involuntary, but humans are self-actuating individuals who act according to free will, but we are all social constructs. Pornography is seen as the necessary linchpin which connects these three very different dimensions: men, acting as free subjects use pornography to construct and impose sexuality upon women, thereby robbing women of their subjectivity. This necessitates a tautologous notion of pornography and sexuality which conflates all sexual discourse and acts with the annihilation of the personhood of woman. All intercourse must be rape, all love must be hate, all erotica and romance must be pornography. Eros and Thanatos are seen not merely as twins, but as one and the same. The personhood of woman can, therefore, only be conceived as the political act of the destruction of sexuality through the control of its constructing mechanism—pornography.

The lack of a potential positive image of the female self and the stark bi-polar duality of masculine subjectivity and feminine objectification make the possibility of an affirmative feminist program problematic, to say the least. Because she sees politics totally as power of one group over the other, her program often seems to devolve into reversing the structure of gender hierarchy. Drucilla Cornell has very tellingly referred to MacKinnon’s theory as the “politics of revenge.”

It is very hard to see how this reversal and revenge is to be achieved. If pornography is continuous with all sexual discourse in masculinist society, if rape is continuous with all heterosexual intercourse, such a strategy risks devolving into total silence. Without a positive conception of the feminine,

227. As I have written elsewhere, I believe that MacKinnon does implicitly have an affirmative liberal agenda, despite her repeated denials. But she does not rely on an essentialist concept of “the feminine.” Rather, she has an essentialist concept of “the human,” which seems to correspond to the liberal concept of the human, (i.e. autonomous individuality) which is also the current stereotype of the masculine. Schroeder, Abduction From The Seraglio, supra note 59, at 193-200.

228. CORNELL, BEYOND ACCOMMODATION, supra note 209, at 11.
MacKinnon’s unmodified feminism degenerates into total annihilation. It is an annihilation of the feminine as well as the masculine, as the feminine is seen as merely a creation of the masculine. What is more, the politics of revenge, without a politics of creation, is merely a recognition of the power of the status quo.

In this view, MacK innon’s very critique of pornography is a constant reaffirmation of its power; an unending rewriting of the myth of male subjectivity. A negative program reconstitutes the status quo by denying it without offering alternatives. MacKinnon’s program reconstructs masculinity as dominance and femininity as subordination by playing express homage to the awesome and terrifying power of the penis. In the words of Zillah Eisenstein, “To equate sex and gender in [MacKinnon’s] fashion . . . is to let the phallus win.”229 A deconstruction of masculinism and reconstruction of sexuality requires more than MacKinnon’s recognition of the power of masculinity, and the denial of sexuality. It requires the positive, contradictory, and impossible task of rewriting the feminine—and with it, the masculine.

Consequently, while MacKinnon starts as one of the most powerful prophetesses of the cycle of the oppression of women, she is ultimately unable to break out of that cycle. She has defined away her own feminine voice as silence.

And so, Cass Sunstein did not need to inoculate masculinism against “feminism unmodified,” because it is not a deadly virus like AIDS or small pox—it is merely the common cold. He cannot congratulate himself for taming the shrew.

229. EISENSTEIN, supra note 127, at 172.