Anti-Pornography Laws As A Claim For Equal Respect:
Feminism, Liberalism & Community

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INTRODUCTION

In 1983, Catharine MacKinnon and Andrea Dworkin drafted an ordinance for the City of Minneapolis which defined pornography as a violation of women's civil rights. The controversial ordinance was passed by the City Council but vetoed by the Mayor who believed it to be unconstitutional.1 In 1985, a similar ordinance adopted by the Indianapolis City Council was held unconstitutional by the U.S. Court of Appeals for the Seventh Circuit.2

Although the Seventh Circuit's decision and the Supreme Court's summary affirmance have created a significant obstacle to the passage of similar ordinances in the future, the debate over the ordinances has left a lasting impression on our political consciousness. The MacKinnon-Dworkin analysis has dramatically altered the public's view of pornography. Recognition of the misogynistic themes of pornography has forced us to confront the connection between sex and violence in our perceptions of sexuality; and to question the connection between pornography and the real sexual violence which women experience with disturbing frequency.

Beyond its consciousness-raising role, the civil rights approach to pornography has posed a significant challenge to traditional first amendment doctrine. The challenge is more profound than most civil libertari-

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1 See Brest & Vandenberg, Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis, 39 STAN. L. REV. 607, 644-45 (1987). Similar ordinances were also introduced in Los Angeles, Cambridge, and Indianapolis. The Indianapolis ordinance was the only one ultimately to be adopted.

Anti-Pornography laws have been willing to acknowledge: it strikes at the heart of the political theory underlying the civil libertarian position. The very depth of the feminist challenge makes it invisible to those who are bound by a traditional first amendment framework. The challenge should not be allowed to die because the Indianapolis version of the ordinance has been held unconstitutional. The questions raised by the debate are precisely about the appropriate parameters of the constitutional protection of speech.

In order to begin to answer those questions, however, it is necessary to expand upon the feminist argument in favor of the ordinances. Thus, this Article does not evaluate the feminist anti-pornography ordinances in terms of present first amendment doctrine. Rather, this Article demystifies the premises of the particular theory of the first amendment that has most often been invoked against the ordinances. I argue that the privileged form of justification that underpins the arguments of first amendment absolutists prevents us from addressing directly the conflict between values of equality and free speech. Drawing on feminist, liberal, and communitarian political theory, I suggest that this conflict should not be resolved automatically in favor of speech rights.

Although it may be argued that the tools of traditional political theory are themselves too co-opted to be useful for feminist analysis, I proceed from the view that if those concepts are examined through a feminist lens, it is possible to find useful threads of argument in traditional political theory. Indeed, for feminists to begin the task of conceptualizing how political institutions, including law, would look were feminist analysis to be taken seriously, we must evaluate existing concepts, determine to what extent they are still valid, and seek to reshape them to take account of a feminist vision.

My argument is premised on the epistemological claim that doctrine is shaped by ways of knowing and perceiving reality. To make the transition from theoretical analysis to political action, an additional bridge is needed: an account of feminist as social critic. Finally, we have the foundation from which to articulate the claim inherent in the anti-pornography ordinances.

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3 Any such effort necessarily fails to take seriously the analysis underlying the ordinances, because the feminist critique of pornography extends to the very root of first amendment theory and doctrine. Commentary on the ordinances tends to illustrate this problem. It generally toes the civil libertarian line, and seems to miss the point of the feminist critique. See, e.g., Emerson, Pornography and the First Amendment: A Reply to Professor MacKinnon, 3 YALE L. & POL'Y REV. 130 (1984); Brigman, Pornography as Group Libel: The Indianapolis Sex Discrimination Ordinance, 18 IND. L. REV. 479 (1985); Lynn, "Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation, 21 HARV. C.R.-C.L. L. REV. 27 (1986); Stone, Anti-Pornography Legislation as Viewpoint Discrimination, 9 HARV. J.L. & PUB. POL'Y 461 (1986). Or, it simply echoes MacKinnon. See, e.g., Jacobs, Patterns of Violence: A Feminist Perspective on the Regulation of Pornography, 7 HARV. WOMEN'S L.J. 5 (1984); Klausner, Redefining Pornography as Sex Discrimination, 20 NEW ENG. L. REV. 721 (1984-85) (Note). At this level of discourse, the debate has reached a stalemate.
nography ordinances: a claim for equal membership in society, based upon equal respect.

The epistemological theory provides the tools to "deconstruct" present first amendment doctrine. The theory of feminist as social critic will help to reconstruct it by explaining how and why the underlying theory can be used to reinterpret and reshape present doctrine, building from its theoretical foundations up.

Part I discusses the fate of the ordinances at the hands of a theory of the first amendment premised on deontological liberalism. Part II explains that the epistemological analysis that underlies the ordinances cannot be addressed within the present framework of first amendment doctrine. This section also elaborates upon the centrality of sexuality to feminist theory and the focus of feminist criticism on pornography. Part III suggests a theory of feminist as social critic as a foundation for reconstructing doctrine. Part IV applies this feminist analysis to the theoretical basis of the absolutist position and drawing on liberal, communitarian, and feminist theory, proposes a broader notion of equal respect as membership.

I. THE FEMINIST ANALYSIS OF PORNOGRAPHY

A. The Ordinances

The civil rights approach developed by MacKinnon and Dworkin treats pornography as a form of sex discrimination. The Minneapolis ordinance, which took the form of an amendment to the city's civil rights ordinance, provided four causes of action: (1) anyone coerced into performing for pornography could seek damages and injunctions against distribution of the photographs or films; (2) a person could sue for violation of a right not to have pornography forced upon him or her in "any place of employment, in education, in a home, or in any public place;" (3) a person could seek damages for injury "that is directly caused by specific pornography;" and (4) women could bring suit against anyone trafficking in pornography. The Minneapolis ordinance defined pornography as:

the graphic sexually explicit subordination of women through pictures and/or words that also includes one of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of submission, servility or display; or (vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or (vii) women

4 Brest & Vandenberg, supra note 1, at 619-20.
ANTI-PORNOGRAHY LAWS

are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.\(^5\)

The radical theoretical foundation of the ordinance was evident in the findings set forth at the beginning of the proposed amendment:

Pornography is central in creating and maintaining the civil inequality of the sexes. Pornography is a systemic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women’s opportunities for equality of rights in employment, education, property rights, public accomodations and public services; create public harassment and private denigration; promote injury and degradation such as rape, battery and prostitution and inhibit just enforcement of laws against these acts; contribute significantly to restricting women from full exercise of citizenship and participation in public life, including in neighborhoods; damage relations between the sexes; and undermine women’s equal exercise of rights to speech and action guaranteed to all citizens. . . .\(^6\)

The civil rights ordinances challenge the current framework of first amendment doctrine. They necessarily regulate speech because of its communicative impact; that is, what the speech says about women and how its message affects our view of women in society. Under current first amendment doctrine, the ordinances could only pass constitutional muster if construed to fall within one of the existing exceptions to first amendment protections, or if construed as sufficiently similar to the existing exceptions to justify the creation of a wholly new exception.

B. Doctrinal Arguments for the Ordinances

The civil rights ordinances have been analogized to three existing categories of speech that enjoy only limited first amendment protection: obscenity, incitement to lawless activity, and libel.\(^7\)

1. Obscenity

Although the definition of obscenity has changed over time, it has long been held to fall outside the realm of first amendment protection. “Obscenity” law protects the moral sensibility of the community. The present standard for determining whether material is obscene is set forth in \textit{Miller v. California}.\(^8\) Under the \textit{Miller} test, the Court inquires:

\begin{quote}
6 Brest & Vandenberg, \textit{supra} note 1, at 619.
\end{quote}
(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.\(^9\)

The use of language such as "prurient"\(^10\) and "patently offensive" illustrates that the primary purpose of the \textit{Miller} test is to protect the sensibilities of citizens exposed to pornography.\(^11\)

Pornography, if defined as sexually explicit material, has generally fallen under the rubric of obscenity. However the civil rights ordinances focus on "pornography" precisely to emphasize that it is not the same thing as "obscenity." The etymology of "pornography" relates directly to women, and has been roughly translated by feminists as the depiction of whores.\(^12\) Thus "pornography" captures the elements of power and degradation that are the focus of the feminist critique.

The feminist definition of pornography is therefore not coextensive with the legal definition of obscenity.\(^13\) The only overlap, in fact, is in the sexually explicit nature of the regulated materials.\(^14\) There is no language in the Court's definition of obscenity that could readily be extended to include the harm to women that the civil rights approach addresses.\(^15\)

2. Incitement to Lawless Action and Fighting Words

MacKinnon and Dworkin have drawn parallels between pornography's influence on violence against women and incitement to engage in illegal activity.\(^16\) While social science research has suggested some link

\(^9\) \textit{Id.} at 24 (citations omitted).
\(^10\) \textsc{Webster's Third New International Dictionary} defines prurient as "marked by restless craving," or "itching with curiosity," or "having or easily susceptible to lascivious thoughts or desires."
\(^12\) A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 199 (1979).
\(^13\) Note, \textit{supra} note 7, at 466.
\(^14\) \textit{The Meese Commission Report} has employed feminist rhetoric while continuing to echo more traditional arguments against pornography. \textsc{U. S. Dep't of Justice, Attorney General's Commission on Pornography: Final Report} (1986). For example, commissioner Diane Cusack invokes Aristotle to argue that pornography is at odds with the state's goal of fostering virtue in its citizens. \textit{Id.} at 36. Implicit in this notion of virtue is a particular view of sex as heterosexual, monogamous and within marriage. Thus, the Commission's recommendations ultimately build on the existing definition of obscenity, despite its use of feminist rhetoric.
\(^15\) \textit{See Ferber}, 458 U.S. at 747. The Court addressed concerns similar to those raised by the feminist argument. The Court upheld a New York law prohibiting the production and distribution of child pornography, focusing on the state's special interest in protecting children from sexual exploitation and abuse. However, the case is probably confined to its factual context since the production of child pornography necessarily requires an act of child sexual abuse whereas a woman who participates in pornography is assumed to have consented.
\(^16\) MacKinnon, \textit{supra} note 5, at 28-31.
between pornography and violence toward women,\textsuperscript{17} researchers are generally reluctant to draw conclusions sufficient to meet the immediacy standard of \textit{Brandenburg v. Ohio}.\textsuperscript{18} \textit{Brandenburg} requires that to move outside the realm of first amendment protection, speech must amount to incitement to imminent lawless action rather than mere advocacy.\textsuperscript{19} The feminist analysis, on the other hand, views the “thought” of pornography as inseparable from the “action” of violence against women. In many cases, pornography is used as a textbook for committing sexual violence;\textsuperscript{20} in other cases, the misogyny of pornography simply provides the cultural context in which violence against women is erotic, justifiable, and even acceptable. The first case almost certainly would fail to pass the \textit{Brandenburg} standard and the second case clearly would not pass.

A closely related category of speech which also falls outside the protection of the first amendment is “fighting words.” Fighting words are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”\textsuperscript{21} Speech of this kind, like obscenity and libel, was considered to lie outside the purposes of free speech in protecting the communication of information and opinion.\textsuperscript{22} Analyses of this area of speech following \textit{Chaplinsky} have tended to focus on the breach of peace portion of the Court’s language rather than on the notion of speech injurious in itself.\textsuperscript{23} This latter element of the Court’s analysis would be promising for the feminist argument, which clearly defines pornography as directly injurious speech. However, the Court’s emphasis on the incitement element of “fighting words” confines \textit{Chaplinsky} within the same narrow parameters of causation articulated in \textit{Brandenburg}.

3. Group Libel

The MacKinnon-Dworkin definition of pornography probably resembles group libel more closely than any other established category of unprotected speech. In \textit{Beauharnais v. Illinois},\textsuperscript{24} the Court upheld a criminal statute prohibiting the sale, publication, or distribution of material “which exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the

\textsuperscript{18} 395 U.S. 444 (1969).
\textsuperscript{19} \textit{Id.} at 449.
\textsuperscript{20} Brest & Vandenber, \textit{supra} note 1, at 624-28.
\textsuperscript{22} \textit{Id.} at 572-73.
\textsuperscript{24} 343 U.S. 250 (1952).
peace or riots . . ." The Court concluded that if a state could punish libels against individuals by criminal sanction, it could similarly choose to punish libels directed against groups.

The Court further emphasized the threat of racial violence and argued that "wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community." The Beauharnais Court's recognition of the legitimate state interest in fostering tolerance in a pluralist community stands in marked contrast to the Seventh Circuit's much more recent decision in Collin v. Smith.

In Collin, the Seventh Circuit invalidated an ordinance which prohibited the "dissemination of any materials . . . which promotes [sic] and incites [sic] hatred against persons by reason of their race, national origin, or religion . . . ." The Village of Skokie, where a number of Holocaust survivors resided, had attempted to use the ordinance to prevent demonstrations by the American Nazi party.

The Seventh Circuit construed Beauharnais narrowly, arguing that following more recent Supreme Court decisions, a group libel statute such as that at issue in Beauharnais would be upheld only in the event of a strong tendency to induce public disorder or violence. The Seventh Circuit also rejected the Village's asserted interest in protecting its citizens from the infliction of psychic trauma.

Although commentators have speculated that Beauharnais is no longer good law following the Court's extension of first amendment protection in the libel context, the Court has thus far declined to overrule the case outright. Therefore, group libel too has been confined to the stringent standards of causation required by Brandenburg, and pornography, even if linked to violence against women, would not pose the imminent danger required by that standard.

B. The Hudnut Decision

The limitations of existing doctrinal categories became explicit in American Booksellers Ass'n, Inc. v. Hudnut, the Seventh Circuit deci-
sion invalidating the Indianapolis civil rights ordinance. The court accurately perceived that the definition of “pornography” contained in the ordinance “is considerably different from ‘obscenity.’” The court held that the ordinance discriminated impermissibly on the basis of viewpoint because the definition of pornography turned on how the speech at issue treats women, rather than on the sexual explicitness of the material, its “offensiveness” to community norms, or its literary or artistic value.

Therefore, although the court explicitly accepted the premise of the ordinance that pornography perpetuates the subordination of women, and is a factor in widespread violence against women, it concluded that “this simply demonstrates the power of pornography as speech.” Because the “unhappy effects” of pornography “depend on mental inter-mediation,” pornography must be protected by the first amendment. The court reasoned that even hateful speech must be protected or “the government [will be] in control of all of the institutions of culture.” For the same reasons, the court rejected the claim that pornography as defined in the ordinance was a form of “low value” speech.

Finally, the court held that the provisions of the ordinance creating causes of action for injury caused by pornography would have to be interpreted to meet the requirement of “immediate injury.” While the court said “it is not beyond the realm of possibility” that the ordinance could be construed so narrowly, it found the provisions invalid when tied to the unconstitutional definition of pornography.

C. The Limits of Doctrine

The Hudnut decision crystallizes the limits of doctrine. While the court purports to understand the harm in pornography, it perceives the state as necessarily powerless to address that harm because the state may not endorse a particular point of view—it cannot choose sides in the battle between the producers and consumers of pornography and the women who claim to be injured by it.

As in Collin, the court adopted the classic absolutist view of the first

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35 Id. at 324.
36 Id. at 325.
37 Id. at 329.
38 Id.
39 Id. at 330.
40 Id. at 331.
41 Id. at 333.
42 Id.
43 “The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters ‘premised on equality’—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution prohibits the state to declare one perspective right and silence opponents.” Id. at 325 (citation omitted).
amendment: "Under the first amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."\(^\text{44}\)

This absolutist approach to first amendment doctrine gives precisely the right response to the ordinance—from a doctrinal structure that is grounded in deontological liberalism: that is, from a political theory that purports to presuppose no substantive notion of the good. On this theory, the state itself must be neutral with respect to conceptions of the good: political institutions must be arranged so that individuals or groups of individuals will be able to pursue their own notions of the good, and so that the ability of any one notion of the good to govern will be limited by the right of other citizens similarly to pursue their notions of the good. Thus, while feminists are free to pursue their view that pornography is degrading to women, they may not translate that view into law. The conflict between feminists and the producers, sellers, and consumers of pornography is over different conceptions of the good.\(^\text{45}\) If the state were to choose between competing views, it would upset the arrangement of political institutions that allows all groups and individuals to pursue their own notions of the good.

First amendment doctrine, however, is not always absolutist; the law does not always adhere to deontological premises. The very existence of categories of speech that do not enjoy first amendment protection indicates that the Supreme Court is often willing to balance the interests implicated by the regulation of speech and to conclude that certain speech is of such limited value that it does not warrant first amendment protection,\(^\text{46}\) or that certain interests are so compelling that they outweigh speech rights.

The question then becomes: why isn't equality a sufficiently strong interest to justify the abridgement of certain kinds of speech. Why may


\(^{45}\) Easterbrook does not rely in Hudnut on the "free market of ideas" theory. See Hudnut, 771 F.2d at 327-28. The free market of ideas is a utilitarian justification of free speech, advanced by John Stuart Mill, and claims that only through the open exchange of ideas will truth emerge. Easterbrook's rationale is more classically Rawlsian: the feminist ordinances attempt to impose a particular view of the good which is incompatible with the basic liberties of other groups. On this view, it is immaterial whether the debate will lead to truth. Speech must be protected because to do otherwise would not equally respect the capacity of individuals to choose their ends.


On the other hand, because they are exceptions to the absolutist paradigm, the categories of speech that enjoy little or no first amendment protection are narrow in scope, and often justified by tortured reasoning. See, e.g., Renton v. Playtime Theaters, 475 U.S. 41 (1986). One commentator sought to defend the constitutionality of the anti-pornography ordinances by employing the rather disingenuous analysis of the Renton decision that regulation directed at the secondary effects of speech was permissible, even though the harmful effects flowed directly from the content of the speech. Sunstein, supra, at 612.
the state endorse the view that “sex should not look like this” when “this” is obscene, but not when “this” is degrading and violent toward women? The strongest response, within the present doctrinal framework, is that “hateful” speech directed at groups, or at individuals because of their membership in certain groups, is at the core of first amendment protections. Even if our society prohibits discrimination against certain groups, on the premise that traditional stereotypes or biases are illegitimate, the protection of those groups does not extend to punishing speech that articulates those negative stereotypes. In fact, it is precisely because certain groups are protected by anti-discrimination laws that speech implicitly challenging the premises of those laws must be allowed.

This is again the appropriate response from deontological premises. While the state is free to mandate equality within certain parameters, it cannot, on the deontological view, implement equality by restricting speech about equality.

This analysis, however, necessarily ignores the most powerful element of the feminist analysis that underpins the ordinances, for the challenge is not directed simply against pornography, it is directed against the very foundations of the absolutist theory of the first amendment and against the assumptions of deontological liberalism itself. As will be illustrated more fully below, the ordinances are grounded in a broader epistemological claim about the way in which the harm of pornography is obscured by the power of male dominance to create the world—including legal doctrine and political theory—in its own image.

II. PORNOPHROGRAPHY AND FEMINIST SOCIAL CRITICISM

The ordinances present a radical claim for equality directed at the ideological framework within which the oppression of women occurs. This section attempts to elucidate that claim in order to demonstrate why

47 The notion of a “core” of protected speech stems from Alexander Meiklejohn’s theory that political speech is at the heart of first amendment values and warrants absolute protection. A. MEIKLEJOHN, FREE SPEECH 93-94 (1948).

48 See D. RICHARDS, TOLERATION AND THE CONSTITUTION 191 (1986) (“These state judgments about the nature and effect of communicative utterances place group libel laws at the heart of the values of free speech.”). Richards also argues that group libel laws are not analagous to individual libels because the latter generally involve false statements while the former are conscientious statements of opinion. Id. However distasteful those opinions are, they are at the core of protected speech precisely because our government assumes, to some degree, that they are not true. Id. at 192.

49 Of course the state does not always adhere to deontological premises in this regard either. While certain private acts of discrimination were once considered to fall within the realm of individual rights—thus limiting the state’s ability to address discrimination—that view has clearly eroded. Although it could be argued that speech rights are more fundamental than, for example, the freedom of association, it is clear that liberal principles have in practice evolved in response to social criticism. My argument here is not, therefore, that liberal principles are inherently inflexible, but rather that we must get beyond rigid theoretical justifications in order to make those principles flexible.
it is fundamentally incompatible with the political theory that is at the basis of present doctrinal categories.

MacKinnon and Dworkin did not target pornography for political action simply because it presents a disturbing view of women and of sexuality. Rather, pornography is, in their view, the ideology of misogyny. To understand that claim, it is necessary to understand more fully the role of sexuality, not only in MacKinnon and Dworkin’s analysis, but in feminist theory in general.

A. Sexuality in Feminist Theory

Every form of oppression has at its base the notion that the oppressor is superior to the oppressed based on some difference between them. The oppressor may express his dominance—his sense of superiority—in a variety of ways. Violence, exclusion from at least some spheres of social privilege, and economic exploitation are all common expressions of dominance.

While women experience oppression in a number of other ways that are similar, for example, to racism, sex is a peculiar ingredient in our oppression. Women experience not only “ordinary” violence, but sexual violence—i.e. rape and sexual abuse. Women are excluded from spheres of social privilege by acts of discrimination that may be sexual in nature—i.e. sexual harassment. Women are exploited economically in explicitly sexual ways—i.e. prostitution.

Thus, MacKinnon’s claim that “the situation of women is not really like anything else” is grounded in the fact that sex, significantly, has two meanings: it describes not only biological sex, but also sexual relations. To understand why the oppression of women is not only organized around the “difference” of biological sex, but also maintained through sex, we must understand the relationship between these two different meanings of sex.

50 While this assertion invites the rejoinder that pornography does not itself create misogyny, but simply reflects the misogyny that exists in our society, I do not believe that it is necessary to resolve the question of which comes first. It is enough that pornography both reflects and reinforces a particular notion of sexuality and that that view of sexuality is central to the oppression of women in our society.

51 Cass Sunstein, in a review of MacKinnon’s Feminism Unmodified, argues that the relationship between sexuality and sex discrimination must be explored more fully for MacKinnon’s theory to be persuasive. Sunstein, Feminism and Legal Theory, 101 Harv. L. Rev. 827, 846-48 (1988).


53 MacKinnon, supra note 5, at 8.

54 Feminist theorists have taken widely divergent approaches in their efforts to explain the social superstructure built around biological sex. Rather than exploring these different approaches in detail, I have endeavored to sketch a simple explanation which reflects some fairly broad areas of agreement among feminist scholars.

While MacKinnon has endeavored to focus solely on dominance—to the point of dis-
Sex, in the sense of reproduction, is at once the central difference between men and women and a uniquely intimate bond that will inevitably connect men and women as long as heterosexual sex remains the primary means of reproduction. While I do not intend here to take the essentialist view that all inequality between the sexes stems from the sexual division of labor in reproduction, the simple fact that women bear children is the difference between men and women from which a complex web of social inequalities is spun.

Men and women are assigned different social roles, based on their different roles in reproduction. The social institutions built around these roles—the process of courtship, marriage, and the traditional structure of family, including childrearing and economic support—involves a further set of norms governing the interaction of the sexes.

These social roles and accompanying norms constitute gender—the social significance attached to biological sex: they define what it means to be male and female in a particular society. Thus, the very definition of male and female, which governs in all social spheres, is constructed around a paradigm of heterosexual interaction between men and

claiming that there is any significance to the "difference" of biological sex—it is rather difficult to understand why sexuality is so important without the basic groundwork set out in this section. It is important to note the extent to which feminist scholars would agree on some of the theoretical premises of the anti-pornography ordinances, while disagreeing with the strategy of enacting anti-pornography legislation.

I assume that sex is pre-social only to the extent that heterosexual sex remains the dominant method of reproduction (which I expect to be true for quite some time, "advances" in reproductive technology aside). The notion that reproduction is an inevitable connection between men and women becomes weaker as sex is increasingly separated from reproduction. This process of separation only highlights the social content of sexuality, including the shaping of sexual preferences.

Some feminist theorists do find the roots of women's oppression explicitly in women's role in reproduction. See, e.g., M. O'BRIEN, THE POLITICS OF REPRODUCTION (1981) (arguing that male dominance is a response to men's alienation from the process of reproduction and a need to control it); S. FIRESTONE, THE DIALECTIC OF SEX (1970) (arguing that equality between the sexes can not be achieved if women continue to bear children, and proposing that equality will depend on developments in reproductive technology that will "free" women from childbearing); M. PIERCY, WOMAN ON THE EDGE OF TIME (1976) (Feminist science fiction that discusses a utopian, egalitarian society in which the separation of reproduction from sex was considered necessary to achieve equality between the sexes).

I do not take the view that male dominance is an inevitable outgrowth of the fact that women physically bear children. I mean simply to emphasize that men and women in our society interact within a complex web of norms that is spun out from that biological difference. While many of those interactions have little to do with reproduction per se, they are often sexual. For example, although the workplace is in theory a non-sexual environment, sexuality structures the interactions of men and women even in these "public" settings. Thus, sexual attractiveness is considered to be a desirable trait in women occupying traditionally female jobs that involve contact with male customers or clients. See C. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN (1979); L. FARLEY, SEXUAL SHAKEDOWN (1978). One root cause of sexual harassment, in whatever context it occurs, is men's inability to perceive women as anything other than sexual objects. See, e.g., Spaulding, Sexual Harassment at Harvard, in HOW HARVARD RULES (forthcoming Southend Press) (discussing the results of a study of sexual harassment conducted at Harvard University).

women. The content of that paradigm is necessarily of central importance to an understanding of women’s oppression.

The ordinances are based on the view that sexuality is the organizing principle that creates the social categories male and female. MacKinnon has argued that “[s]exuality is to feminism what work is to marxism: that which is most one’s own, yet most taken away.” The social category “woman” is defined as a being that exists sexually for “man”:

[T]he molding, direction, and expression of sexuality organizes society into two sexes—women and men—which division underlies the totality of social relations. Sexuality is the social process which creates, organizes, and expresses and directs desire, creating the social beings we know as women and men, as their relations create society. As the organized expropriation of the work of some for the benefit of others defines the class—workers—the organized expropriation of the sexuality of some for the use of others defines the sex, woman.

More explicitly, “[m]ale and female are created through the erotization of dominance and submission. The man/woman difference and

58 See MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, in FEMINIST THEORY 1, 19 (N. Keohane, M. Rosaldo & B. Gelpi eds. 1982) (“Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission.”).

My point here is not meant to be heterosexist, indeed heterosexism itself is partly a product of these same factors. The lives of gay men and lesbians are also shaped by the heterosexual paradigm: women who are lesbian experience the same inequalities as all women but are also stigmatized for their “deviation” from the heterosexual paradigm; similarly, the privileges of being male in our society are reduced or outweighed for gay men by the stigma of nonconformity to the heterosexual paradigm. See Rubin, supra note 57, at 180 (arguing that because gender socialization that creates male and female also creates them heterosexual, it suppresses the homosexual component of human sexuality).

59 MacKinnon, supra note 58, at 17 (“[I]t is sexuality that determines gender, not the other way around.”).

Cass Sunstein claims that in positing sexuality as central, MacKinnon is in agreement with Freud. Sunstein, supra note 51, at 846. MacKinnon herself, however, has explicitly rejected that comparison. MacKinnon, supra, at 15 (“The centrality of sexuality emerges not from Freudian conceptions, but from feminist practice on diverse issues.”).


The psychoanalytic approach takes Freud’s insights into the process of sex role acquisition and turns them inside out. Chodorow’s theory is consistent with Freud’s on the empirical point that the process of psychological separation from a primary caretaker who is almost always female is necessarily different for male and female children. Boys differentiate themselves from their mothers with respect to gender while girls do not.

Feminist scholars part ways with Freud not on his view that the process of sex role acquisition turns on a dynamic of superiority and inferiority, but on the source of that dynamic. Where Freud has been interpreted as characterizing this psychological process in terms of the biological superiority of males, unmediated by culture, feminists see the process as determined by culture. Rubin, supra note 57, at 187. Thus girls’ psychological development is not shaped by having to accept their biological inferiority, but by having to accept their social and cultural inferiority.

60 MacKinnon, supra note 58, at 1.

61 Id. at 2.
the dominance/submission dynamic define each other."\textsuperscript{62}

While feminist theorists may disagree on the precise nature of the relationship between gender and the erotization [sic] of dominance and submission, MacKinnon and Dworkin are far from alone in asserting that male dominance is maintained through the social construction of heterosexuality.\textsuperscript{63}

Feminist critics have argued that women are pervasively commodified, that we have traditionally earned our livings by ceding ourselves to men—as prostitutes, mistresses, or wives; that our bodies are objects that men consume, visually, verbally, and actually; and that we have learned, necessarily, that our own most important asset is our capacity to be attractive to and to please men.\textsuperscript{64} They have argued that sex and domi-
nation are so closely linked in our society that rape itself is a "supermasculine" act—an over-conformity with the male sex role.\textsuperscript{65}

In other words, heterosexuality is socially constructed as a relationship of dominance and submission; of consumer and commodity; of male subject and female object.\textsuperscript{66} Male dominance then cannot be eliminated without a radical restructuring of gender—of sexuality itself.

This is the claim that underlies the pornography ordinances. Whether or not one agrees with the ordinances as the appropriate response to pornography, the criticism of pornography cannot be dismissed as a useless diversion of feminist energies, for pornography captures the relationship between sexuality and male dominance in its most explicit form. The harm of pornography lies, however, not in its deviation from the norm, but in its role in maintaining the "normal" construction of heterosexuality. The problem MacKinnon (and others) argue, is that the domination, humiliation, and violence toward women that is eroticized in pornography is \textit{not} an aberration. Rather, it is the very pervasiveness of these themes that makes it difficult to tell the difference between rape and abuse and "normal" sex.\textsuperscript{67}

The real harm in pornography is tied then to a broader epistemological claim: a claim about power and knowledge—about the ability of male dominance to make itself invisible through its apparent normalcy.

\section*{B. The Epistemology of Male Dominance}

MacKinnon argues that the invisibility of male dominance is itself a

\textsuperscript{65} D. \textsc{Russell}, \textsc{The Politics of Rape: The Victim's Perspective} 260 (1975).

\textsuperscript{66} The subject/object distinction may trace its roots to Simone deBeauvoir's characterization of woman as "the Other." S. \textsc{DeBeauvoir}, \textsc{The Second Sex} xix (1952).

\textsuperscript{67} See, e.g., K. \textsc{Barry}, \textsc{Female Sexual Slavery} 174-75 (1979) (describing "cultural sadism"—"a distinct social form that consists of practices which encourage and support sexual violence, defining it as normal behavior"); T. \textsc{Beneke}, \textsc{Men on Rape} 20 (1982) (connecting rape to men's "normal" equation of sex with achievement); Griffin, \textsc{Rape: The All American Crime}, in \textsc{Feminism and Philosophy} 313, 316 (M. Vetterling-Braggin ed. 1977) ("[O]ur interpretation of rape is a product of our conception of male sexuality."); D. \textsc{Russell}, \textsc{supra} note 65; \textsc{New York Radical Feminists, Rape: The First Sourcebook for Women} 84 (1974) (The difference between "predatory criminal rape" and "normal" sexual behavior "is essentially one of degree.").
function of power, because power is the ability to define reality—to present one particular point of view as the objective viewpoint—the point of view from "nowhere in particular":

*Power to create the world from one's own point of view is power in its male form.* The male epistemological stance, which corresponds to the world it creates, is objectivity: the ostensibly noninvolved stance, the view from a distance and from no particular perspective, apparently transparent to its reality. It does not comprehend its own perspectivity . . . .

MacKinnon's epistemological argument is similar to Antonio Gramsci's theory of cultural hegemony—"the control of the intellectual life of society by purely cultural means." Gramsci recognized that political power is exercised not only by coercion, but also by shaping the "opinions, values, and standards acknowledged by the bulk of society." Hegemony obtains the "consent" of the oppressed to the present economic, social, and political order by defining the very terms of political discourse.

Male dominance is hegemonic because its very pervasiveness obscures its "perspectivity" and thus defines the status quo as "natural and correct"—the only way that things can be.

A useful illustration of MacKinnon's view is the issue of rape. Its relative invisibility can be explained in terms of a number of related social constructs: First, aggressive sexual behavior was and is considered "normal" in men; second, women are thought to "provoke" rape by seductive dress or conduct, are widely assumed to mean "yes" when they say "no," and are considered to fabricate charges of rape, or even to unconsciously desire rape. Given these social constructs and the fact

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Martha Minow explores similar epistemological issues, *supra* note 52, discussing the problem of unstated norms against which "difference" is measured.


70 Gramsci believed that hegemony was a necessary condition for achieving and wielding political power. L. Kolakowski, *supra* note 33, at 242. The implications of this view for feminist theory are discussed *infra* at notes 81-97 and accompanying text (discussing the problems of objectivity and false consciousness).

71 Ibid. at 242.

72 *See* Minow, *supra* note 52, at 67 ("[A] conception of reality, when it triumphs, convinces even those injured by it of its actuality."); K. Millett, *Sexual Politics* 25 (1971) (the real power of patriarchy lies in its "successful habit of passing itself off as nature"); *see also* C. Gilligan, *In A Different Voice* 173 (1982) ("The failure to see the different reality of women's lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation.").

73 *See* S. Brownmiller, *Against Our Will* 312-13 (1975).

74 *Id.* at 311, 344, 386-87.

This point was advanced quite seriously by legal commentators writing before feminist efforts to reform rape law had begun:

In a society which demands that the male be initiator and aggressor in the sex relationship, and that the female, be she ever so willing, at first resist, and then succumb with seeming reluctance, the judge in a significant proportion of these cases would need the
that the legal definition of rape turns on whether a man has perceived the woman as consenting, consider the likely effect of these factors on a jury's determination of the issue.\textsuperscript{75}

Pornography as ideology expresses the "male" view of rape which very nearly defines the concept of rape out of existence. In pornography, women not only signal consent in remarkably subtle ways, but consent becomes irrelevant because women are portrayed as enjoying rape. Alternatively, pornography may tell us that rape is an acceptable way to put a woman in her place—thus a woman may "ask for it" not by consent (even broadly construed), but by her very refusal.\textsuperscript{76}

Pornography "eroticizes . . . dominance and submission. . . . It makes hierarchy sexy and calls that 'the truth about sex'. . . . Through this process, pornography constructs what a woman is as what men want from sex."\textsuperscript{77}

The analysis underlying the anti-pornography ordinances reveals the ways in which male dominance is hegemonic, creating as unequal the social constructs of male and female—and then declaring them equal before the law.\textsuperscript{78} The harm in pornography cannot be comprehended within the present legal framework because the harm lies not in a discrete act of discrimination between otherwise equal categories, but in the social construction of gender itself.\textsuperscript{79}

III. FEMINIST AS "SOCIAL CRITIC"

The epistemological critique is a forceful account of the pervasive-ness of male dominance. However, in positing male dominance as hegemonic, it poses two problems for feminist theory as a form of social
criticism. On one hand, if we purport to speak the "truth" of women's experience, we may be accused ourselves of attempting to monopolize reality. On the other hand, if we reject objectivity altogether, we may become bound by a paralyzing relativism that sees every perspective as simply another point of view. To go too far in the direction of subjectivity is to lose the ability to examine different points of view critically.

This section proposes that the feminist method of consciousness raising provides an epistemological stance from which we can both criticize male dominance and begin to imagine a world without it—a position that is grounded in experience but not mired in relativism.

A. Objectivity and The False Consciousness Dilemma

The first problem has revolved around the notion of false consciousness and what role it plays in feminist theory and politics. False consciousness is the notion that some members of an oppressed group may be so shaped by the (hegemonic) ideologies of the dominant group that they are unable to perceive the true nature of their oppression. However, to label any one aspect of women's experience the product of false consciousness necessarily involves a claim that there is one accurate reading of women's experience, and that those who "accurately" perceive women's position in society should be able to speak for all women. This concept is antithetical to feminist politics to the extent that feminist theory has rejected objectivity and sought its own roots in experience.

The dilemma, and its solution, is illuminated by the debate between two schools of feminist thought—the "cultural feminism" or "difference approach" that has drawn largely on the work of Carol Gilligan and the "radical feminism" or "dominance approach" represented by the work of

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81 The problem of relativism is implicit in Martha Minow's discussion of the need to embrace multiple perspectives, but she never directly resolves the issue. Minow, supra note 52, at 74-82.
82 See Minow, supra note 52, at 73 & n.290 (discussing the problem of false consciousness).
83 See id. at 62-63 ("Claims to speak from women's point of view, or to use women as a reference point, threaten to obscure [the] multiplicity of women's experience and install a particular view to stand for the views of all.").
84 The tone of the anti-pornography debate has led some to criticize MacKinnon and Dworkin for presuming to speak for all women. See Brest & Vandenberg, supra note 1, at 636-40. Some critics have gone so far as to accuse them of taking a Leninist approach to feminist politics.
85 MacKinnon rejects the notion of false consciousness in her theoretical writings for precisely the reasons stated in the text: false consciousness itself assumes that there is a "true" perception of women's experience. On the other hand, she dismisses the alternative view that "embrace[s] any version of women's experience that a biological female claims as her own." MacKinnon, supra note 62, at 637 n.5. MacKinnon recognizes that this issue—the struggle to represent the view of all women on the one hand, while retaining the ability to criticize antifeminism—is "methodologically complex and politically crucial." Id. Yet the answer that we cannot adhere to the objective/subjective split that these two views follow is not sufficient.
MacKinnon and Dworkin.⁸⁵ Cultural feminism has sought to reclaim as "women's voice," a world view that is based on an ethic of interdependence and care rather than individualism.⁸⁶ MacKinnon has criticized Carol Gilligan's "different voice" theory, arguing that we cannot know in what voice women really speak until men take their feet off our necks.⁸⁷ She asserts that women's different voice in moral reasoning is a product of sexism: that women think in relational terms because we are defined by our relationships to men, and that we seem to follow an ethic of care because it has been our job to care for men. By dismissing the values that cultural feminism has attempted to reclaim for women on the ground that they are the product of male dominance, MacKinnon in effect dismisses "cultural feminism" as a product of false consciousness.⁸⁸

MacKinnon asserts that to claim as our own a voice that is the product of male dominance "reifies" the damage of sexism and "is an insult to our possibilities."⁸⁹ However, to accept that male hegemony is so complete that we cannot claim a single piece of our identities as our own reifies the damage of sexism to an even greater extent. It is more insulting to our possibilities to imply that we are completely plastic and have not created some positive places to be, and ways of being, in the face of our oppression (and in response to it).⁹⁰

Moreover, MacKinnon's argument, if taken too far, is paralyzing: If women are entirely constructed by male dominance, then we have no reality to claim as our own, and no tools for reconstructing a world in which we have an equal place. We are left, ironically, with nothing but male dominance.⁹¹ While the dominance approach offers an effective criticism of male power, it fails us, to the extent that all it reclaims for

⁸⁶ See generally Menkel-Meadow, Portia in a Different Voice: Speculation on a Women's Lawyering Process, 1 BERK. WOMEN'S L.J. 39 (1985); Coombs, Shared Privacy and the Fourth Amendment, or the Rights of Relationships, 75 CALIF. L. REV. 1593 (1987).
⁸⁸ Id. at 39. The implications of MacKinnon's rejection of cultural feminism illustrate the danger to feminism of using the false consciousness label.
⁸⁹ Id.
⁹⁰ Women have traditionally created spaces in our lives to be with one another, and have forged strong friendships in the face of oppression, and arguably as a response to it. See Smith-Rosenberg, The Female World of Love and Ritual, in A HERITAGE OF HER OWN 311 (N. Cott & E. Pleck eds. 1979); L. FADERMAN, SURPASSING THE LOVE OF MEN (1981). Thus the lesser degree of individualism that Gilligan identifies in women's "different voice" has been, in at least some respects, a positive attribute.

I take Kenneth L. Karst's assertion that "[d]uring the civil rights era, the black community became something more than a passive reflection of white racism" to be equally offensive. Equality and Community: Lessons From the Civil Rights Era, 56 NOTRE DAME L. 183, 189 (1980). While the experience of oppression, and the struggle against it, has been constitutive of Blacks' identity in this country, it is insulting to imply that Blacks have no identity other than that constructed by racism.

⁹¹ MacKinnon argues, on the one hand, that we can discover, through consciousness raising, that male power is not the only reality. MacKinnon, supra note 58, at 28. On the other hand, she argues that there is no "interior ground . . . free of male power." MacKinnon, supra note 62, at 638. After the latter claim, we do not seem to be able to reclaim anything but the reality of our oppression.
women is our victimization. The process of naming that victimization is empowering, but if that is all there *is* to us, we have nothing with which to begin imagining the way the world would look without male dominance.

Effective social criticism requires both a critique of power and the beginnings (at least) of a positive set of values that will inform our social criticism, and take us beyond criticism to structuring alternatives. The question then is how we can reconcile the two—preserving the insights of MacKinnon's critique of male power while developing a more positive social criticism.

Although the "different voice" perspective may in some respects be a dangerous one, it is a reclaiming of women's positive reality from the obscurity and devaluation of male dominance. We cannot hope, however, to distinguish clearly (i.e. objectively) between those aspects of women's voice that are truly our own and those that have been created by male dominance.

Historically, the advancement of a particularly "feminine" set of sensibilities has backfired, largely because complementary gender roles were themselves a construct of male dominance and could not be separated from the power differentials attached to those roles. However, the willingness of liberal feminism to abandon "female" traits, and to effectively adopt male norms has also not proved satisfactory. Thus, feminists must pursue a middle course—we cannot claim objectivity for ourselves, or necessarily accept all "female" norms as positive, but we also cannot adopt male norms as our own, or become paralyzed by the power of male dominance.

The answer to this problem—the process of consciousness raising—

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92 Gilligan herself notes that woman's "different voice" in moral reasoning has been silenced and devalued by male theorists who developed models of moral development from a male perspective, using only male subjects. The male model is the "neutral" norm against which women are measured and fail. C. Gilligan, *supra* note 72, at 18-19.

93 The riskiness of the "different voice" strand of feminist theory may be illustrated by drawing a historical analogy to the 19th century "domestic" feminism movement. The movement emphasized women's "higher" spiritual nature and translated values drawn from women's role in the private sphere to the public sphere. While the movement relied on an essentially "separate but equal" theory of equality, it also propelled women into significant roles in the social reform movements—including both temperance and abolitionism—of the early 19th century and may have been able to strike a common chord with more women than did the liberal feminism represented by Susan B. Anthony and Elizabeth Cady Stanton. See Rosenberg, *Beauty, the Beast, and the Militant Woman*, in A *HERITAGE OF HER OWN*, *supra* note 90 at 197, 216 (discussing women's involvement in moral reform movements); see also Smith, *Family Limitation, Sexual Control, and Domestic Feminism*, id. at 222, 238 (discussing connection between domestic feminism and "social purity" movements). As the historical analogy illustrates, the exaltation of uniquely "feminine" traits walks a narrow line between a potentially radical feminism and reactionary politics.

94 Betty Friedan's *The Feminine Mystique* is a particularly striking example of the apparent willingness of some liberal feminists to adopt male norms. Friedan advances a powerful critique of the ways in which various social institutions create and perpetuate the "feminine mystique," but never questions the underlying male norm. B. Friedan, *THE FEMININE MYSTIQUE* (1963). See also Minow, *supra* note 52, at 39-40.
can perhaps best be perceived as a dialectic: we cannot hope to gain enough distance, at any given historical point, to understand fully our own situation, but we can gain enough perspective to critique existing institutions by attempting to understand how they have affected our lives.\footnote{Martha Minow argues powerfully for a jurisprudence that recognizes different perspectives and concludes by arguing that we must each recognize the partiality of our perspective. The complexity of "colliding realities . . . constitutes our reciprocal realities." Minow, supra note 52, at 76. Minow's image of colliding realities implies a dialectic of sorts as well, although I hope to make a stronger case for asserting the validity of a particular perspective without making a claim to objectivity.} Similarly, though we cannot understand fully from our present historical situation which values, if any, are truly our own (or sufficiently our own), we can gain enough perspective to try to reclaim some voice that has been devalued and silenced by male dominance. We cannot predict the end result of the process, but we can try to shape our future by thinking critically in the present.\footnote{Gramsci again provides a useful reference point. Gramsci too rejected the possibility of objectivity: "[W]e do not know social processes by 'observing' them from the outside; there is in fact no such observation." On the other hand, "[i]f do not follow . . . that people's thoughts are simply a perfect, unblemished reflection of their social position and practical activity." L. Kolakowski, supra note 69, at 234. Although Gramsci's belief that "true" consciousness is expressed through action has no obvious analog in feminist theory (and may itself be a deeply flawed theory), it seems to be a similar attempt to explain that cultural hegemony is not absolute in its power to shape values and beliefs.}

Assuming that MacKinnon is right, as I think she is, about the pervasiveness of male dominance, we are drawing on something, namely women's experience, to criticize it. Cultural feminism—whatever its risks—also draws on women's experience and also questions the construction of the world from the male point of view. The "different voice" does not become reified and insulting to our possibilities unless we abandon the ongoing task of thinking critically about the world in which we live and how it has shaped our identities. The process of constructing and articulating our own reality—the experience of oppression and some vision of a world without it—takes place in the context of power. Cultural feminists cannot (and mostly do not) ignore that point. If we undertake the task of identifying women's reality through the process of consciousness raising, aware of the context of male power, it is possible to begin to identify positive values that we can use to shape a vision of equality.

This Article draws on both strands of feminist thought. It locates the harm of pornography, as MacKinnon does, in the social construction of gender itself. I take the ultimate aim of the ordinances to be a part of the larger task of creating a world in which women are not defined in terms of male dominance. In order to get there, however, we need a fuller account of persons. That comes in part from MacKinnon's insight that gender is definitively constitutive of women's identities, but it also comes from the insights of cultural feminism which provide an additional
ANTIPORNOGRAPHY LAWS

basis for criticizing the putatively neutral viewpoint from which most traditional political theory is articulated.\textsuperscript{97} In rejecting male individualism as the only valid mode of political discourse, and reclaiming instead the value of connection and interdependence, cultural feminism helps to give us a broader understanding of what "equal respect" requires.

B. The "Connected Social Critic"\textsuperscript{98}

The second, related concern raised by an epistemological critique is that by rejecting objectivity, feminism lacks the tools to challenge effectively the status quo. This assumes that normative arguments are valid only if advanced from some disembodied, objective perspective, divorced from experience. To reject objectivity, however, does not necessarily require that one embrace subjectivity. The former denies the reality of experience and the latter denies the possibility of criticism. In seeking to gain perspective through experience, feminism is neither a view from outside, nor a view that is entirely from inside. Rather, feminist social criticism is articulated from an intermediate perspective—between subjective and objective.

Consciousness raising, the feminist response to male dominance, \textit{does} assume that women are shaped by the dominant ideologies of society. However, it is not premised on a belief that there is an \textit{objective} stance from which to perceive and criticize women's position in society.\textsuperscript{99} Rather, consciousness raising is an epistemological tool that relies on the sharing of experience to reclaim women's own reality.\textsuperscript{100} It seeks to achieve \textit{enough} distance from our social context to recognize at least some of the ways in which our perceptions of reality have been shaped by the ideology of male dominance. The crucial distinction lies in achieving \textit{enough} distance, \textit{some} distance, without claiming to have achieved the omnipotent distance of the view from "nowhere."\textsuperscript{101}

\textsuperscript{97} See Benhabib, \textit{The Generalized and The Concrete Other}, in \textit{Feminism as Critique} 77 (S. Benhabib & D. Cornell eds. 1987).

\textsuperscript{98} Both the term and the idea of a "connected social critic" as used in this section come from M. Walzer, \textit{Interpretation and Social Criticism} (1987).

\textsuperscript{99} See MacKinnon, supra note 62, at 638 ("Feminism does not begin with the premise that it is unpremised.").

\textsuperscript{100} See MacKinnon, supra note 58, at 22.

\textsuperscript{101} While there can be no guarantee that women will achieve a consensus on the existence or nature of their oppression, there may be issues on which there is sufficient agreement to justify political action in the name of women. Rape and sexual harassment are two areas in which political change has been achieved because women recognized and validated one another's experienced violation, and worked together to reclaim that reality.

Before the 1970s, sexual harassment was a common experience of women that did not have a name, much less a legal remedy. Feminist activists and scholars provided a voice for women's experiences, and a conceptual framework for legal remedies for sexual harassment. See, e.g., L. Farley, supra note 56; C. Mackinnon, supra note 56; Alliance Against Sexual Coercion, \textit{Organizing Against Sexual Harassment}, 15 \textit{Radical America} 17 (July-August 1981).

Similarly, feminist activists and scholars were instrumental in giving voice to women's
Effective social criticism requires some connection with the society which it criticizes. To make an effective claim against the status quo, the social critic must share a common vocabulary both with those on whose behalf the claim is advanced, and with those against whom the claim is made.

The feminist social critic is quintessentially a “connected” social critic. Although marginalized in the society we criticize, women do not stand outside it. At least to some extent, we share and have been shaped by this society’s political history and traditions. Our vocabulary is bound by the limits of shared experience and cannot transcend those limits altogether. Thus, the process of social change is necessarily a process of reinterpretation, no matter how radical the underlying critique of the status quo. Feminists seek to effect social change by revealing the “perspectivity” of the dominant modes of social and political discourse. In challenging the very way we think and talk about concepts like equality, or privacy, feminism may stretch the boundaries of common vocabulary.

The feminist anti-pornography movement itself exhibits, to some extent, the persuasive possibilities of a feminist social criticism that is grounded in experience. Even if few people were convinced that the theory underlying the ordinances was correct in its entirety, the debate surrounding the ordinances—the process of articulating the feminist claim—did succeed in rendering women visible. Before the civil rights approach was advanced, pornography was not discussed in terms of the harm it does to women—what it says about how women are viewed in our society. While there may have been no real victories, the process
of reinterpretation may have begun.

The next task for the feminist critic is to consider how the claim can be elaborated upon and made more effective. A more persuasive justification for the ordinances therefore requires an argument made at the level of first principles. The epistemological justification that MacKinnon provides is essential to beginning the task of rethinking first principles, but not sufficient in itself. The following section will begin that task.

IV. TOWARD A PRINCIPLE OF EQUAL RESPECT

This section begins the reconstructive task by arguing for a broader notion of equal respect that will allow us to move beyond the constraints of a first amendment doctrine grounded in deontological liberalism to a more meaningful dialogue about the parameters of equality and speech rights. The persuasive force of the absolutist position, premised in deontological liberalism, comes not simply from admittedly legitimate concerns regarding the appropriate scope of the state's power to regulate speech, but also from its apparent objectivity. Deontological liberalism is the political theory articulated from the objective, “viewpointless” position that does not presuppose any substantive notion of the good. Only when first amendment doctrine is severed from its pretense to neutrality will a real dialogue be possible.

Liberal theorists posit equal respect as a fundamental principle of liberal political thought. Equal respect, as defined in deontological liberal theory, translates into “equal citizenship.” However, the definition of equal respect in liberal thought is ultimately too narrow if it remains anchored to deontological foundations. Meaningful equality requires a broader notion of equal respect—as full membership in the community.

obscenity decision, and the Seventh Circuit's claim to take the feminist analysis seriously may have been a rhetorical device. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328-29 (1985), aff'd, 475 U.S. 1001 (1986) (accepting the premises of the legislation, but arguing that because “these unhappy effects depend on mental intermediation” the ordinance violates the first amendment). Similarly, the use of feminist language in the report of the Attorney General's Commission on Pornography may have been a cynical effort at co-optation. U.S. DEP'T OF JUSTICE, supra note 14. Nonetheless, the shape of our discussions about pornography has been significantly changed by feminist social criticism.

MacKinnon argues that the point of view “from nowhere in particular” that is the methodological foundation of deontological liberalism, and of first amendment doctrine, is in fact a very particular point of view—the point of view of those who are privileged by present social arrangements.

She argues that by protecting speech rights only from infringements by the state, vast realms of life are excluded from the political sphere and existing social arrangements are in effect frozen and legitimized. The first amendment protects the speech only of those who already have speech; it provides no right to speak to those who have no speech to be recognized and protected in the legal sphere. C. MACKINNON, supra note 87, at 207. In other words, our present conception of speech rights obscures the reality of silence, experienced by those who had no voice that could be silenced by the state. The silencing occurs within, and because of, the very social arrangements that are frozen by our dominant political theory.

The claim to neutrality—to “point-of-viewlessness”—cloaks that political theory in an air of infallibility which only further obscures the experienced reality of silence and inequality.
Membership implies *belonging*, while citizenship describes a formal political status, conferred by the state.\(^\text{109}\) Citizenship thus relates to the rights that people have in the public, political sphere while membership transcends the public/private distinction and depends ultimately on how citizens treat one another.\(^\text{110}\) Groups that have full rights of citizenship may still be excluded from membership, from belonging, if they are subordinated or discriminated against in other spheres of social life. Thus "equal citizenship" is by no means equivalent to "full membership."

Women have the formal equality of equal citizenship, but the claim inherent in the anti-pornography ordinances is that formal equality is not enough. The systemic degradation of women in and through pornography—and more importantly, the social construction of gender itself—denies women equal respect and therefore full membership in the community. Equal respect, as I will define it, is a *condition* of membership, while speech is a *right* of membership. Thus, equal respect would "trump" speech rights in certain situations.

I will first examine the notion of equal respect as it is used in John Rawls' *A Theory of Justice*,\(^\text{111}\) and then consider the communitarian critique of that theory.\(^\text{112}\) I will draw upon communitarian thought to sketch the rough outlines of a broader notion of equal respect, while also using feminist analysis to explore the limitations of communitarianism as an alternative to liberal theory. Finally, I will look to manifestations of the equal respect principle in present law and suggest ways in which the notion could be expanded.

A. Equal Respect in Liberal Theory

Equal respect, as the principle has been developed by most liberal thinkers, is a profoundly individualistic concept. It presupposes, in effect, the equality of persons as moral actors and envisions equal respect as respect for the moral capacity of individuals to choose their ends. This vision of equal respect does not go far enough to support a broad notion of membership.

The roots of a principle of equal respect in liberal theory can be


\(^{110}\) Hirsch, *supra* note 109, at 425. Hirsch argues that only citizenship can be legislated while membership "can be created and sustained only through a process that is both personal . . . and social—but not necessarily political." *Id.* Following a feminist analysis, I would question the assertion that the personal and social can be readily distinguished from the political.


\(^{112}\) I do not mean to suggest that first amendment doctrine is explicitly premised on Rawlsian theory. Rather, the purpose of analyzing Rawls is to elucidate the deontological foundation of equal respect in liberal theory.
traced back to the Kantian imperative: the notion that individuals must be treated as ends in themselves, and not as mere means\textsuperscript{113} is a duty of mutual respect for the autonomy and value of individual persons.

The strongest modern statement of the same principle is found in John Rawls’ *A Theory of Justice*. Rawls proposes that self-respect is “perhaps the most important primary good.”\textsuperscript{114} Rawls separates self-respect into two aspects: (1) “a person’s sense of his [sic] own value, his secure conviction that his conception of the good, his plan of life, is worth carrying out,” and (2) “a confidence in one’s ability, so far as it is within one’s power, to fulfill one’s intentions.”\textsuperscript{115}

Because individuals will not believe that their own ends are worth advancing if others do not respect them, Rawls argues that individuals in the original position would accept a “natural duty of mutual respect.”\textsuperscript{116} Thus Rawls views self-respect as flowing from an individual’s ability to choose a conception of the good and to act on it.\textsuperscript{117} Mutual respect then means a respect for others and their ends.\textsuperscript{118}

The force of such deontological premises is evident in our political culture,\textsuperscript{119} and in our legal doctrine.\textsuperscript{120} Equal respect translates into equal political rights; that is, equal citizenship. When “equality” requires more, we begin to see the state as overstepping its role. Equal respect in this sense requires neutrality even toward hateful speech that communicates the most violent form of disrespect toward fellow citizens.

This narrow notion of equal respect follows from the thin conception of persons upon which first amendment absolutism and deontologi-
cal liberalism are premised. This presumptive equality, and the deontological politics that flow from it, constrain our ability or obligation to address inequalities in the real world because they obscure the reality of power—of the social construction of individuals as unequal in the first instance.\(^{121}\)

Drawing on communitarian critiques of deontological liberalism, I will argue that the conception of persons as beings able to choose ends is not adequate; and that by having a richer conception of persons, we would be able to develop a correspondingly richer conception of equality.

**B. The Communitarian Critique of Deontological Liberalism**

One of the most forceful critiques of liberalism has come most recently from communitarian theorists. The central communitarian criticism is that liberal thought has left us with a politics devoid of purpose, and with citizens who are alienated from political life and from one another.\(^{122}\) The communitarian argues that the individualistic social and political ethos of liberal politics lacks moral content and direction, and a sense of community and connection.

Communitarian theory provides some useful parallels for the feminist task of developing the concepts of membership and equal respect. It does not, however, provide a fully viable alternative to the limitations of liberal thought. In many respects, communitarianism foreshadows a political world that is the opposite of the liberal political world. This communitarian world carries its own dangerous implications for women, and illustrates, to some extent, the risks of abandoning liberal principles altogether.

**1. The Epistemological Critique**

Michael Sandel directs his critique of liberalism most forcefully against the "thin" conception of the self that underpins deontological liberalism from Kant to Rawls.\(^{123}\) The Rawlsian self is a moral actor capable of choosing ends, but existing prior to any ends it might choose, and prior to all experience.\(^{124}\) In Rawls’ view, what matters about per-

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\(^{121}\) Rawls’ second principle of justice states that “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.” J. Rawls, supra note 111, at 60. However, the principles are ordered so that the first principle, relating to basic liberties, is prior to the second: “[A] departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages.” Id. at 61.

\(^{122}\) See generally A. MacIntyre, *After Virtue* (2d ed. 1984); M. Sandel, supra note 119.

\(^{123}\) Rawls’ conception of the person is a compromise between Kant’s purely “transcendental” self and the alternative, “radically situated” self. M. Sandel, supra note 119, at 23-25.

\(^{124}\) *Id.* at 9.
sons is their capacity to choose, rather than the ends they choose: The “core” self exists prior to ends and experience.

This notion of self is not a claim about human psychology, i.e., that a person will choose individualistic ends, but rather “an epistemological claim about the forms of self-knowledge of which we are capable.” The flaw in Rawls’ theory lies in his assumption that there is any core self that exists prior to ends and experience, defined by its capacity to choose, rather than by the ends it chooses.

The Rawlsian self, that core, is the “self” that participates in the original position, in the drafting (as it were) of the social contract that sets the principles by which our real lives will be governed. But no experience or end is sufficiently a part of ourselves that it will shape those principles. Rather, the ends that we choose in the real world must be pursued within the parameters of the principles constructed in the original position.

This self should be familiar: it is the self capable of objectivity—of viewing the world “from nowhere in particular.” The conception of persons that underpins Rawls’ theory provides a privileged form of justification for deontological liberalism precisely because it does not purport to be based on any specific assumption about human psychology, but instead on a “self” entirely devoid of concrete experience. The resulting political principles are therefore presented as being free of the taint of “real world” concerns and immune from criticism grounded in those concerns.

Sandel proceeds to argue that the deontological self is too frail to support Rawls’ two principles of justice. But his evocation of a politics enriched by a more expansive account of persons and their identities is more persuasive than the parsing of Rawls’ theory, and it is on this first aspect of his work that I wish to draw.

Sandel’s critique demonstrates not only why liberal society fails to

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125 Id. at 54. Sandel is careful to distinguish his critique from “sociological” and “empiricist” critiques of Rawls which argue that Rawls theory is flawed because it contains an individualistic bias or rests on false assumptions about human psychology. Id. at 11-13, 54. Rawls’ theory is not flawed simply because it is psychologically inaccurate: the disembodied self of the original position is not meant to correspond to actual human psychology. Id. at 61. Rawls does not claim that individuals in the world will choose ends that are individualistic. Id. at 60-61. They may choose ends that are either egoistic or communitarian. Id.

In criticizing Rawls on epistemological, rather than psychological grounds, Sandel’s critique parallels more closely MacKinnon’s critique of male dominance than it does the critiques of “cultural feminists” who have drawn on Carol Gilligan’s work to criticize Rawls on psychological grounds. See, e.g., Benhabib, supra note 97.

126 M. SANDEL, supra note 119, at 62 (“One consequence of this doctrine is to put the self beyond the reach of experience, to make it invulnerable, to fix its identity once and for all.”).

127 Id. at 64 (“[C]ommunity must find its virtue as one contender among others within the framework defined by justice, not as a rival account of the framework itself.”).

128 Id. at 122-23.

129 See Benhabib, supra note 97, at 88.

130 M. SANDEL, supra note 119, at 178.
foster a sense of common purpose, but also that a liberal society that
remains anchored to deontological foundations cannot guarantee a broad
form of equality that takes account of its citizens' full identities. It can
guarantee equality to its citizens only in the narrow sense described
above because the only part of our identities that can be treated equally is
the "core" deontological self capable of choice, but devoid of ideals or
experience. Any attempt to do more would be defeated by the require-
ment of "neutrality."

A liberal society can thus grant Blacks or women the rights of citi-
zenship but it cannot adequately address the full experience of their his-
torical oppression. To allow the state to tackle the cultural constructs of
their inequality would vest it with power beyond the narrow limits
imposed by its deontological foundations.

2. The Danger of Communitarian Politics

One common criticism of Sandel's work parallels a concern raised
above with regard to the feminist epistemological critique—namely, that
jettisoning a notion of justice that is external to the community (i.e.,
objective) leaves us without the tools necessary to criticize the commu-
nity.\(^{131}\) It is well and good to evoke idyllic images of a community uni-
fied in the pursuit of a common good,\(^{132}\) but we do not live in Aristotle's
polis, we live in a complex, pluralistic nation-state. Moreover, if we did
live in Aristotle's polis, we might not agree that a notion of the common
good that included slavery and regarded women as inferior was a partic-
ularly positive vision of politics.\(^{133}\) A community may define itself in
terms of hierarchy, or exclusion of outsiders; alternatively, it may
attempt to foster a sense of the common good by indoctrinating its citi-
zens—raising the spectre of totalitarianism.\(^{134}\)

This criticism essentially assumes that Sandel has left us too rad-
cially situated to be capable of social criticism. Sandel does not claim,
however, that we are epistemologically incapable of the detachment nec-
essary for social criticism. Rather, he argues that our capacity to detach
ourselves is not the essence of who we are.\(^{135}\) Therefore, Sandel's theory
does not altogether preclude a notion of justice—it simply precludes a
notion of justice that claims to be derived from "nowhere in

\(^{131}\) See, e.g., Hirsch, supra note 109, at 429.
\(^{132}\) See M. Sandel, supra note 119, at 150.
\(^{134}\) Hirsch, supra note 109, at 435. It may be noted against Hirsch's position that hierarchy,
 exclusion and oppression have all occurred, and continue to occur, in political communities
governed by liberal principles. However, liberal principles, at least, give us the tools with
which to criticize these actions. If we abandon any conception of "justice" as untenable, we
also abandon the tools of social criticism.
\(^{135}\) M. Sandel, supra note 119, at 182.
C. Communitarian Politics and Feminist Critiques

While Sandel’s theory does not preclude social criticism, neither does it suggest a means of transforming its insights into a method of social criticism. The theory of feminist social criticism advanced above suggests how these insights can be translated into a claim for a broader notion of equality as equal respect.

Sandel concludes that deontological liberalism fails because its “thin” conception of persons cannot support its own principles of justice—the deontological self is a mythical being without character or content. Like the critiques of liberalism advanced by cultural feminists, Sandel attacks liberalism by invoking a richer notion of persons, constituted by connections to others, and by the ends shared in common with them.137

Similarly, Sandel’s critique of liberalism, like the feminist critique of male dominance, divests deontological liberalism of its privileged form of justification by denying the possibility that political theory can be constructed from “nowhere in particular.”

The feminist critique, however, contains an element essential to social criticism which Sandel’s critique lacks—a theory of power. The feminist critique attempts to demonstrate that the ability to define reality from no apparent perspective is a function of power—the means by which male dominance makes itself invisible. Only from within the framework of a theory of male power can feminist social critics transform the idea of “thickly” constituted individuals into a claim for equal respect, for the claim is necessarily made against male power and for the ability of women to create an identity and a reality that is free from male dominance.

The process of demystifying deontological liberalism and first amendment absolutism does not answer the ultimate question of whether a measure like the anti-pornography ordinances is desirable. It does, however, leave liberalism more open to the claims of “connected” social critics in a way that makes it possible to discuss in a more meaningful fashion the age-old tension between liberty and equality. A liberalism that is divorced from deontological roots may be capable of compre-

136 I do not mean to imply that Sandel himself suggests that we develop a more contextual notion of justice. It is unclear where he proposes to take his communitarian theory following the “deconstruction” of Rawls’ theory.

137 Compare M. SANDEL, supra note 119, at 179 with Benhabib, supra note 97, at 80.

Robin West makes the crucial point that while communitarian thought appears to be similar to cultural feminism in this regard, the two theories are still articulated from very different positions. The communitarianism of male theorists embodies a longing for connection articulated from a standpoint of separation, while cultural feminists already speak from the standpoint of connection. West, supra note 85, at 2-3.
hending a richer notion of persons, of perceiving domination, and reaching toward a more meaningful equality.\textsuperscript{138}

D. Toward A Meaningful Conception of Equal Respect

The communitarian critique does not necessarily prevent us from perceiving liberal principles as appropriate responses to particular historical situations. It does not mean that all of the liberal principles that govern our present political life are illegitimate; it means simply that they are deprived of their privileged justification. If we view liberal principles in this fashion, then the claim for a broader notion of equal respect cannot be dismissed simply by the rejoinder that such a notion infringes liberty interests that must be protected by the neutral state.\textsuperscript{139} We can instead evaluate those liberty interests more critically against claims for fuller equality.\textsuperscript{140}

If speech rights are deprived of their talismanic force, we can consider whether certain forms of hateful speech are so inconsistent with the value of equal respect that their regulation should be permissible. This involves two claims that will seem alien to our present legal framework: First, it requires that we recognize the real harms of ideologies of racism and sexism, and second, that we make a substantive decision that equality is a sufficiently important interest that speech can be regulated in its name. In other words, we must be willing to decide that racism and misogyny are not simply alternative conceptions of the good that deserve the full protection of the state when they happen to take the form of speech rather than the form of discrete acts of discrimination.

\textsuperscript{138} For a criticism of abstract justifications of political theory, see D. Herzog, \textit{Without Foundations: Justification in Political Theory} (1985) and for a defense of liberalism that is grounded in social and historical context, see Herzog, \textit{As Many as Six Impossible Things Before Breakfast}, 75 CALIF. L. REV. 609 (1987) (a defense of liberalism against the attacks of Critical Legal Scholars).

\textsuperscript{139} To the extent that Rawls recognizes that equal respect turns in the first instance on a person's sense of his or her own value, his theory is not at all inconsistent with the notion of equal respect advanced here. If gender itself is structured in terms that deprive women of self respect, then the problem is at least arguably prior to the political rights that are thought to be necessary to maintain mutual respect.

\textsuperscript{140} See Riesman, \textit{Democracy and Defamation: Control of Group Libel}, 42 COLUM. L. REV. 727 (1942). Riesman, writing before the extension of first amendment protection to libel law, proceeds from a similar conception:

I am inclined ... to suspect that it is the American heritage of middle-class individualistic liberalism, rather than ... technical difficulties, which has so far impeded our creation of a vigorous public policy for the handling of group libels. Only if we resolutely re-examine the liberal pre-conceptions, and discard them where they may be invalid, can we really find out what those technical difficulties are.

\textit{Id.} at 734; see also Post, \textit{Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment}, 76 CALIF. L. REV. 297 (1988). Professor Post analyzes the anti-pornography ordinances as a pluralist claim that does not require us "to abandon the first amendment, but rather to foresake the individualist assumptions underlying contemporary first amendment law." \textit{Id.} at 334.
1. Equal Respect as Membership

If we are in fact richer persons than Rawls assumes, if what matters about us is *not only* our ability to choose ends, then equal respect may require more than respect for that capacity. If there are aspects of our identity that are *prior* to our ability to choose ends, which are constitutive of our identity, then a principle of equal respect for persons must take account of identity in this fuller sense.

Group identity is at least in part constitutive of individual identity;¹⁴¹ that is, aspects of group identity may determine our ability to function as equal moral actors in social and political life. Social systems of subordination based on group identity persist even where those groups possess the basic rights of citizenship: such systems are inconsistent with the notion that individuals belonging to such groups are equal moral actors.¹⁴² What it *takes* to function as an equal moral actor, then, is not simply the basic rights of citizenship, but something broader—membership in the sense of belonging and acceptance.¹⁴³

The principle of equal respect as used here may appear to be a form of pluralist theory,¹⁴⁴ but it is pluralist in a complex sense. Some commentators have argued for membership based on the narrow view that pluralism will eliminate the stigma attached to group identity¹⁴⁵ and allow individuals to participate fully in the dominant culture.¹⁴⁶

The feminist analysis, however, suggests a more radical aim. The

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¹⁴² See Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 181 (1982) (calling for an independent tort action for racial slurs based on sociological evidence that such insults seriously infringe on “the interests of personality and equal citizenship that are part of our higher political traditions and moral values”).

¹⁴³ Membership and citizenship are used in different senses by different commentators. Hirsch distinguishes membership from citizenship, arguing that the former notion conflates the public and private spheres. Hirsch, supra note 109, at 425. Kenneth Karst, on the other hand, argues that “the essence of equal citizenship is the dignity of full membership in the society,” including the sense of belonging. Karst, supra note 109, at 5. Karst thus uses the term “equal citizenship” in a broader sense than I have used it in the text. My use of the term corresponds more closely to his use of the term “equality of legal status.” Id.

¹⁴⁴ Pluralism is the respect for disparate identities and values. Post considers the pornography ordinances in light of the complex relationship between assimilationism, pluralism, and individualism as legal responses to cultural heterogeneity. See Post, supra note 140.

¹⁴⁵ Karst suggests that respect for different values ultimately serves the interests of individualism. Karst, supra note 109, at 8 (“the main energies released by the equal citizenship principle are individualistic”). He also suggests that as stigma is removed, group identity will begin to decline in importance, thereby strengthening individual identity. Id. at 11.

¹⁴⁶ See Karst, supra note 109, at 11 (“What the principle of equal citizenship offers is not the end of hierarchy, but increased individual mobility within and between hierarchies.”).

Feminist theorists have sought to apply the values originating in women’s “separate sphere” to the broader, public sphere. See, e.g., Coombs, *Shared Privacy and the Fourth Amendment*, 75 Calif. L. Rev. 1593 (1987) (using feminist theory to argue for a broader conception of privacy in fourth amendment jurisprudence); E. Klein, *Gender Politics* (1984) (noting that the phenomenon of the “gender gap” in voting patterns is due in part to women applying relational values to their political decisions).
feminist epistemological critique argues that male dominance is itself the perspective from which we define "difference" (difference from whom?) and determine the social significance to be attached to it.\(^{147}\) Equal respect then requires a recognition of the perspectivity of the values of the dominant culture and the possibility of transforming those values rather than simply freeing people to participate within their framework.

The broader notion of equal respect provides a better foundation from which to argue that equality itself must be a fluid concept: it must be defined, to a significant degree, by the experience of those who are not equal.\(^{148}\)

The concept of membership need not be as indeterminate as it initially appears. While a claim for fuller membership could be advanced by groups who are not now protected from discrimination by constitutional law or statute, the claim is most immediately relevant to those groups that are so protected.\(^ {149}\) The claim for a fuller notion of equality is in effect articulated by "connected" social critics who argue, from the experience of oppression, that formal equality is not enough. These critics attempt to give content to existing laws that protect their equality, and to argue for new measures.\(^ {150}\)

Equal respect cannot be given content by the "thin" selves of deontological liberalism. Rather, it must be given content from the perspective of real people living in a complex and not always harmonious society. If equal respect is reformulated to take account of persons in this richer sense, then it will reach beyond the formal equality of equal citizenship, and will comprehend the ways in which systems of subordination bar full membership in society. We may not be able to legislate membership, in the sense of belonging, but we can use our political institutions to address injuries that prevent full membership.


\(^{148}\) It is "[t]he experience of subordination . . . [that] lies behind the vision of equality." M. WALZER, SPHERES OF JUSTICE xiii (1983) (emphasis added).

\(^{149}\) Although the concept can be limited, by defining it with reference to our present constitutional and statutory framework, some commentators oppose the expansion of pluralist values on the grounds that group membership is itself too indeterminate. Post, supra note 140, at 332. While it is true that there may be gray areas in group identity even with respect to race (and possibly with respect to gender as well), I proceed from the view that the "core" areas of group identity are sufficiently strong with respect to groups that are already protected from discrimination, that pluralist principles are administrable.

\(^{150}\) The revolution of Brown v. Board of Education, 347 U.S. 483 (1954), can be understood as a victory for connected social critics: by articulating the stigma of segregation, they finally persuaded the Supreme Court that separate could not be equal.

Richard Delgado's argument for the creation of a separate tort for racial insult undertakes a similar task, by marshalling a formidable body of social science literature on the effects of racism. Delgado, supra note 142.
2. Membership and Speech

Equal respect as full membership presents a sufficiently strong foundation upon which to reexamine the primacy of speech interests over equality. The individualistic assumptions underlying first amendment absolutism cannot be perceived as inviolate if they are deprived of their privileged justification. If our conception of selves, and the respect they are due, is expanded beyond our capacity to choose ends, then we can recognize that other aspects of identity exist prior to our possession of the liberties of citizenship. Liberties of citizenship, including speech rights, are then subject to the limitation necessary to guarantee full membership to others.

This proposal by no means requires a radical limitation of speech rights. In particular, equal respect does not require that we abandon the "core" of first amendment speech. Rather, it causes us to reevaluate whether absolute speech rights advance self-government where they require the toleration of "hateful" speech that perpetuates the subordination, and indeed the silence, of groups of citizens.

The priority of "respect" over speech rights is not unprecedented even in present doctrine. Our legal system already recognizes certain dignity interests that are injured by speech, and the Supreme Court has declined to extend absolute first amendment protection to such speech. The broader notion of equal respect outlined above provides a

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151 For the classic articulation of the "core" of first amendment law, see A. Meiklejohn, supra note 47. I am assuming here that justifications of "core" political speech are sufficiently powerful, without deontological roots, to remain central to our conception of first amendment law.

The argument for equal respect would not, however, consider "hateful" speech to be at the core of first amendment protections. Cf. text accompanying notes 47-49 (on the deontological view, hateful speech may be considered at the core of first amendment values). Rather, it would tend to support a more classic definition of core speech that would protect political speech about equality, but not speech that is simply "hateful." In other words, a statement that "the E.R.A. should not be adopted because women are inferior" would be protected. One commentator suggests that these types of speech can be distinguished as false statements of fact on the one hand and statements of opinion on the other. Note, Group Vilification Reconsidered, 89 Yale L.J. 308, 329-32 (1979). This argument is not without its difficulties. It could lead, for example, to a phenomenon similar to the attachment of political messages to advertising fliers.

Arguments for absolutism tend to rest upon the same "thin" view of persons criticized above; they do not recognize the constitutive nature of group identity, or the extent of injury caused by "hateful" speech. See generally L. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America (1986); D. Richards, supra note 48.

152 The tort of defamation, for example, is a cause of action for injury to reputation. W. Prosser & W. Keeton, Handbook of the Law of Torts 771 (5th ed. 1985). Reputation can be construed as a proprietary interest, an interest in honor or, most importantly for this analysis, it can be an interest in dignity in the sense of self-worth and worth in the eyes of the community. Post, The Social Foundations of Defamation Law: Reputation and the Constitution, 74 Calif. L. Rev. 691, 707-10 (1986).

153 See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In Gertz, the Court held that states could set any standard of liability above the level of absolute liability in defamation cases. Id. at 347. Justice Powell spoke of the individual's interest in reputation in particularly glowing terms: "[T]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the
basis from which to expand those dignity interests to include the harm inherent in racism and misogyny.\textsuperscript{155}

If membership is a primary interest, then the state has a particularly important interest in protecting norms of civility as applied to groups which have historically been oppressed (and which may therefore receive explicit protection under the constitution or by statute). The state’s interest should not be confined to preventing physical disorder, but must also include protection of individual dignity to the extent it is necessary for full membership in society.\textsuperscript{156}

A number of commentators have argued for common law or statutory protections against group vilification of racial and ethnic minorities.\textsuperscript{157} The feminist anti-pornography ordinances represent a similar attempt to protect a dignity interest by arguing that the systematic degradation of women that characterizes pornography is incompatible with women’s full membership in society.\textsuperscript{158} Pornography and racial insult accomplish the same result of systematic degradation through a cultural medium rather than through discrete acts of discrimination.

While women do not comprise a “discrete and insular” minority, feminist theorists have argued persuasively that gender is \textit{by definition} constitutive of identity.\textsuperscript{159} Since gender itself is constructed around a dynamic of dominance and submission,\textsuperscript{160} women should have an equally

\textsuperscript{155} Richard Delgado has expanded on the notion of reputation as self-worth to argue for a cause of action in tort for racial insult. Delgado, \textit{supra} note 142. Such an action has already been allowed in at least one state. In Contreras v. Crown Zellerbach, 88 Wash. 2d 735, 565 P.2d 1173 (1977), the Washington Supreme Court held that a plaintiff alleging that he was subjected to continuous humiliation and embarrassment by his co-workers’ racial jokes, slurs and comments stated a cause of action for the tort of outrage. \textit{Id.} at 742.

\textsuperscript{156} While such provisions seem at first to be a radical departure from liberal principles, they are not as alien as they seem. Many Western European nations have laws against “incitement to race hatred,” and it is not plausible to claim that the fabric of democracy would be irreparably damaged by the adoption of similar measures in this country. See \textit{Post, supra} note 140, at 313-14, 334-35. Indeed, equality interests are not only of a higher order than many interests that now justify the suppression of speech, they are also more determinant than some.

Post examines the use of blasphemy law in Great Britain to protect pluralist values, and by comparing American blasphemy law, concludes that the greatest obstacle to acceptance of the pornography ordinances is not freedom of expression as such, but the individualist assumptions underlying first amendment doctrine: “To elect the pluralist option is not to abandon the first amendment, but rather to foresake the individualist assumptions underlying contemporary first amendment law.” \textit{Id.} at 334-35.


\textsuperscript{158} See \textit{supra} text accompanying note 6 (findings stated at the beginning of the ordinance adopted by the Minneapolis City Council).

\textsuperscript{159} See \textit{supra} text accompanying notes 68-79. The analogy to race or ethnicity need not be complete to support the feminist claim. Women are not stigmatized by their separation from the dominant group; rather they are stigmatized by the social constructs attached to the most intimate relationships with the dominant group.

\textsuperscript{160} See \textit{supra} text accompanying notes 62-67.
strong claim to protection against harms to group identity.

The claim that pornography is an injury to group identity may appear initially to be weaker than the claim that racial insult injures group identity. However, the difference between the two is not one of degree but of form. Misogyny often expresses itself most powerfully in sexual terms.\textsuperscript{161} For example, although sexual harassment is most commonly understood as the abuse of power to coerce sexual relations, it frequently takes the form of the use of sexual behavior to intimidate or express hostility toward women.\textsuperscript{162} Thus, it is common for men to convey to a woman that she is an unwelcome addition to the workplace by creating an atmosphere of sexual intimidation through joking, innuendo, and (significantly) the posting of pornography.\textsuperscript{163} The effect on women of this type of harassment is similar to that of a racial insult.\textsuperscript{164} The harassment conveys to her that she is, in the eyes of her co-workers, less than fully human—a sexual object that exists for the use of men.\textsuperscript{165} Pornography, like racial vilification, is a tangible expression of a pervasive ideology of oppression.

The ordinances themselves could be drafted more precisely to address the concern, for example, that they do not distinguish between the relative artistic or social value of the work at issue. But the task of developing such limitations is not impossible, and is one that the courts have undertaken in the area of obscenity.

Ultimately, the ordinances have failed to gain acceptance not because they are unadministrable, but because we have been unwilling to decide that the equality of women (or other groups) is a sufficiently strong interest to justify the abridgement of individual speech rights.\textsuperscript{166} I have argued in this section that opponents of the ordinances cannot wrap themselves in a privileged justification of speech rights that rests on deontological liberalism. I have also tried to avoid the nihilism that is frequently the product of critiques of liberalism.\textsuperscript{167} Instead I have tried to

\begin{footnotes}
\footnote{See supra text accompanying notes 53-61 (centrality of sexuality to feminist theory).}
\footnote{See L. FARLEY, supra note 56; Spaulding, supra note 56 (discussing results of study of sexual harassment at Harvard University).}
\footnote{Indeed, the creation of "a hostile or offensive work environment" has been held to be a form of sexual harassment under Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-67 (1986) (citing Henson v. Dundee, 682 F.2d 897, 902 (1982)); C.F.R. § 1604.11(a)(3) (EEOC guidelines defining sexual harassment); see also Rogers v. EEOC, 454 F.2d 234, 240 (5th Cir. 1971) (racially discriminatory atmosphere could constitute an unlawful employment practice); 29 C.F.R. § 1606.8(b) (EEOC guidelines defining ethnic harassment).

A discriminatory atmosphere could be created solely by pervasive hostile speech. The viability of a first amendment defense to a Title VII claim stating such facts has not been determined.}
\footnote{See Delgado, supra note 142, at 144-45, n.65 (discussing the injury of racial insults).}
\footnote{C. MACKINNON, supra note 56, at 43; L. FARLEY, supra note 56, at 33; Spaulding, supra note 56.}
\footnote{See Post, supra note 140, at 334-35.}
\footnote{See Herzog, supra note 138.}
\end{footnotes}
show how liberal principles themselves could be made richer by taking account of persons in a fuller sense.

The principle of equal respect which is at the heart of liberal theory provides the basis for reconceptualizing the relationship between the speech and equality interests of citizens. The resulting balance, it turns out, is not entirely alien to our present legal system which already protects *individual* dignity interests. The feminist claim requires simply that we expand our notion of dignity to include an interest against subordination that is systematic rather than one-at-a-time.

**IV. CONCLUSION**

The critical task is always easier than the task of reconstruction. This paper attempts to reconstruct only a small piece of political theory. It does not advocate that the notion of free speech be discarded altogether—that “rights” must be abandoned because they reify inequality.168 Rather, it focuses on a specific claim: that pornography is an injury to the right to equal respect of women as a group, and to individual women as members of the group “women”; that equal respect is necessary to full membership in the community; and that speech should not enjoy absolute protection where it is inconsistent with membership. As critics have frequently reminded Dworkin and MacKinnon, the abolition of speech rights would not be desirable for feminists.

Although this Article is critical of liberalism, it does not propose that we abandon liberal principles altogether. It is not the task of feminist theory to construct an abstract political theory of its own. Such an undertaking would simply emulate the “male” obsession with articulating broad principles from the abstract position of “nowhere in particular.” The task of constructing a political theory that takes feminism seriously is necessarily an internal task—rooted in the context of women’s experience.

If liberalism is wedded to deontological foundations, it cannot take account of feminist social criticism, grounded in the experience of male dominance. However, the feminist critique of liberalism is directed most forcefully at the pretense that political theory can be articulated from the objective standpoint of “nowhere in particular.” To the extent that liberalism as the dominant political ideology in our society cloaks itself in objectivity, its “neutral principles” begin to obscure the legitimate claims of social critics, and to ossify the status quo.

To the extent, however, that liberal principles can be divorced from their claim to a privileged form of justification, and indeed, from the

fetish for abstract justification altogether, they may be valuable tools for constructing a more just political order—one that takes feminism seriously.