called credibility. When that person is believed over another speaker, what was said becomes proof. Speaking socially, the beliefs of the powerful become proof, in part because the world actually arranges itself to affirm what the powerful want to see. If you perceive this as a process, you might call it force, or at least pressure or socialisation or what money can buy. If it is imperceptible as a process, you may consider it voluntary or consensual or free will or human nature, or just the way things are. Beneath this, though, the world is not entirely the way the powerful say it is or want to believe it is. If it appears to be, it is because power constructs the appearance of reality by silencing the voices of the powerless, by excluding them from access to authoritative discourse. Powerlessness means that when you say 'this is how it is', it is not taken as being that way. This makes articulating silence, perceiving the presence of absence, believing those who have been socially stripped of credibility, critically contextualising what passes for simple fact, necessary to the epistemology of a politics of the powerless.

My second thematic concern is jurisprudential. It is directed toward identifying, in order to change, one dimension of liberalism as it is embodied in law: the definition of justice as neutrality between abstract categories. The liberal view is that abstract categories – like speech or equality – define systems. Every time you strengthen free speech in one place, you strengthen it everywhere. Strengthening the free speech of the Klan strengthens the free speech of blacks. Getting things for men strengthens equality for women. Getting men access to women's schools strengthens women's access to education. What I will be exploring is the way in which substantive systems, made up of real people with social labels attached, are also systems. You can reverse racism abstractly, but white supremacy is unfudgeably substantive. Sexism can be an equal abstraction, but male supremacy says who is where. Substantive systems like white supremacy do substantively different things to people of colour than they do to white people. To say they are also systems is to say that every time you score one for white supremacy in one place, it is strengthened every place else. In this view, the problem with neutrality as the definition of principle in constitutional adjudications is that it equates substantive powerlessness with substantive power and calls treating these the same, 'equality.' The neutrality approach understands that abstract systems are systems, but it seems not to understand that substantive systems are also systems …[85]

... The *Lochner* line of cases[86] created concern about the evils of their substance, which, as women were erased, came to stand for the evils of substantivity as such. There has been correspondingly little discussion, with the partial exception of the debate on affirmative action,[87] on the drawbacks of abstraction as such. Granted, trying to do anything on a substantive basis is a real problem in a legal system that immediately turns everything into an abstraction. I do hope to identify this as something of a syndrome, as a risk of abuse. Considering it the definition of principle itself ensures that nothing will ever basically change, at least not by law.

85 *Francis Biddle's Sister*, p 164.

86 See *Lochner v New York* 198 US 45 (1905); *Allgeyer v Louisiana* 165 US 578 (1897) (invalidating maximum hours restrictions on the ground of liberty to freely contract).

87 See eg *Regents of the University of California v Bakke* 438 US 265 (1978); John Ely, *Democracy and Distrust: A Theory of Judicial Review* (1981), pp 54–55. But see Laurence Tribe, 'Speech as Power: Swastikas, Spending, and the Mask of Neutral Principles', in *Constitutional Choices* (1985).

When these two frames converge – epistemology and politics on the one hand with the critique of neutrality on the other – they form a third frame: one of political philosophy. Here is how they converge. Once power constructs social reality, as I will show pornography constructs the social reality of gender, the force behind sexism, the subordination in gender inequality, is made invisible; dissent from it becomes inaudible as well as rare. What a woman is, is defined in pornographic terms; this is what pornography does. If the law then looks neutrally on the reality of gender so produced, the harm that has been done will not be perceptible as harm. It becomes just the way things are. Refusing to look at what has been done substantively institutionalises inequality in law and makes it look just like principle.

In the philosophical terms of classical liberalism, an equality-freedom dilemma is produced: freedom to make or consume pornography weighs against the equality of the sexes. Some people's freedom hurts other people's equality. There is something to this, but my formulation, as you might guess, comes out a little differently. If one asks whose freedom pornography represents, a tension emerges that is not a dilemma among abstractions so much as it is a conflict between groups. Substantive interests are at stake on both sides of the abstract issues, and women are allowed to matter in neither. If women's freedom is as incompatible with pornography's construction of our freedom as our equality is incompatible with pornography's construction of our equality, we get neither freedom nor equality under the liberal calculus. Equality for women is incompatible with a definition of men's freedom that is at our expense. What can freedom for women mean, so long as we remain unequal? Why should men's freedom to use us in this way be purchased with our second-class civil status?

Substantively considered, the situation of women is not really like anything else. Its specificity is not just the result of our numbers – we are half the human race – and our diversity, which at times has obscured that we are a group with an interest at all. It is, in part, that our status as a group relative to men has almost never, if ever, been much changed from what it is. Women's roles do vary enough that gender, the social form sex takes, cannot be said to be biologically determined. Different things are valued in different cultures, but whatever is valued, women are not that. If bottom is bottom, look across time and space, and women are who you will find there. Together with this, you will find, in as varied forms as there are cultures, the belief that women's social inferiority to men is not that at all but is merely the sex difference.

Doing something legal about a situation that is not really like anything else is hard enough in a legal system that prides itself methodologically on reasoning by analogy. Add to this the specific exclusion or absence of women and women's concerns from the definition and design of this legal system since its founding, combined with its determined adherence to precedent, and you have a problem of systemic dimension. The best attempt at grasping women's situation in order to change it by law has centred on an analogy between sex and race in the discrimination context. This gets a lot, since inequalities are alike on some levels, but it also misses a lot. It gets the stigmatisation and exploitation and denigration of a group of people on the basis of a condition of birth. It gets that difference, made an issue of, is an excuse for dominance, and that if forced separation is allowed to mean equality in a society where the line of separation also divides top from bottom in a hierarchy, the harm of that separation is thereby made invisible. It also gets that defining neutrality as principle, when reality is not neutral, prevents change in the guise of promoting it. But segregation is not the central practice of the inequality of the sexes. Women are as often forcibly

integrated with men, if not on an equal basis. And it did help the struggle against white supremacy that blacks had not always been in bondage to white people.

Most important, I think it never was a central part of the ideology of racism that the system of chattel slavery of Africans really was designed for their enjoyment and benefit. The system was defended as an expression of their true nature and worth. They were told to be grateful for good treatment and kind masters. Their successful struggle to organise resistance and avoid complicity while still surviving is instructive to all of us. But although racism has been defended by institutionalising it in law, and then calling that legal; although it has been cherished not just as a system of exploitation of labour but as a way of life; and although it is based on force, changes in its practices are opposed by implying that they are really only a matter of choice of personal values. For instance: 'you can't legislate morality.'[88] And slave owners did say they couldn't be racist – they loved their slaves. Nonetheless, few people pretended that the entire system existed because of its basis in love and mutual respect and veneration, that white supremacy really treated blacks in many cases better than whites, and that the primary intent and effect of their special status was and is their protection, pleasure, fulfilment, and liberation. Crucially, many have believed, and some actually still do, that Black people were not the equals of whites. But at least since *Brown v Board of Education*,[89] few have pretended, much less authoritatively, that the social system, as it was, was equality for them.[90]

Looking at the world from this point of view, a whole shadow world of previously invisible silent abuse has been discerned. Rape, battery, sexual harassment, forced prostitution, and the sexual abuse of children emerge as common and systematic. We find that rape happens to women in all contexts, from the family, including rape of girls and babies, to students and women in the workplace, on the streets, at home, in their own bedrooms by men they do not know and by men they do know, by men they are married to, men they have had a social conversation with, and, least often, men they have never seen before. Overwhelmingly, rape is something that men do or attempt to do to women (44% of American women according to a recent study)[91] at some point in our lives. Sexual harassment of women by men is common in workplaces and educational institutions. Based on reports in one study of the federal workforce, up to 85% of women will experience it, many in physical forms.[92] Between a quarter and a third of women are battered in their homes by men. Thirty-five per cent of little girls are sexually molested inside or outside the family. Until women listened to women, this world of sexual abuse was not spoken of. It was the unspeakable. What I am saying is, if you are the tree falling in the epistemological forest, your demise doesn't make a sound if no one is listening. Women did not 'report' these events, and overwhelmingly do not today, because no one is listening, because no one believes us. This silence does not mean nothing happened, and it does not mean consent. It is the silence of women of which Adrienne Rich has written, 'Do not confuse it with any kind of absence'.[93]

88 See eg Derrick Bell, *Race, Racism and American Law* (1972), pp 1–85.

89 347 US 483 (1954).

90 *Francis Biddle's Sister*, p 168.

91 See Diana Russell, 'The Prevalence of Rape in United States Revisited' (1983) 8 *Signs: Journal of Women in Culture and Society* 689.

92 *US Merit Systems Protections Board, Sexual Harassment in the Federal Workplace: is it a Problem?* (US Government Printing Office, 1981).

93 Adrienne Rich, 'Cartographies of Silence', in *The Dream of a Common Language* (1978).

Believing women who say we are sexually violated has been a radical departure, both methodologically and legally. The extent and nature of rape, marital rape, and sexual harassment itself, were discovered in this way. Domestic battery as a syndrome, almost a habit, was discovered through refusing to believe that when a woman is assaulted by a man to whom she is connected, that it is not an assault. The sexual abuse of children was uncovered, Freud notwithstanding, by believing that children were not making up all this sexual abuse.[94] Now what is striking is that when each discovery is made, and somehow made real in the world, the response has been: it happens to men too. If women are hurt, men are hurt. If women are raped, men are raped. If women are sexually harassed, men are sexually harassed. If women are battered, men are battered. Symmetry must be reasserted. Neutrality must be reclaimed. Equality must be re-established ...[95]

... Men are damaged by sexism (by men I mean the status of masculinity that is accorded to males on the basis of their biology but is not itself biological). But whatever the damage of sexism to men, the condition of being a man is not defined as subordinate to women by force. Looking at the facts of the abuses of women all at once, you see that a woman is socially defined as a person who, whether or not she is or has been, can be treated in these ways by men at any time, and little, if anything, will be done about it. This is what it means when feminists say that maleness is a form of power and femaleness is a form of powerlessness.

In this context, all of this 'men too' stuff means that people don't really believe that the things I have just said are true, though there really is little question about their empirical accuracy. The data are extremely simple, like women's pay figure of 59 cents on the dollar. People don't really seem to believe that either. Yet there is no question of its empirical validity. This is the workplace story: what women do is seen as not worth much, or what is not worth much is seen as something for women to do. Women are seen as not worth much, is the thing. Now why are these basic realities of the subordination of women to men, for example, that only 7.8% of women have never been sexually assaulted, not effectively believed, not perceived as real in the face of all this evidence? Why don't women believe our own experiences? In the face of all this evidence, especially of systematic sexual abuse – subjection to violence with impunity is one extreme expression, although not the only expression, of a degraded status – the view that basically the sexes are equal in this society remains unchallenged and unchanged. The day I got this was the day I understood its real message, its real coherence: this is equality for us.

I could describe this, but I couldn't explain it until I started studying a lot of pornography. In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the unspeakable abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualises rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorises, and legitimises them. More generally, it eroticises the dominance and submission that is the dynamic common to them all. It makes hierarchy sexy and

94 See Florence Rush, *The Best-Kept Secret: Sexual Abuse of Children* (1980). See also Jeffrey Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (1983).

95 *Francis Biddle's Sister*, p 170.

calls that 'the truth about sex'[96] or just a mirror of reality. Through this process pornography constructs what a woman is as what men want from sex. This is what the pornography means.

Pornography constructs what a woman is in terms of its view of what men want sexually, such that acts of rape, battery, sexual harassment, prostitution, and sexual abuse of children become acts of sexual equality. Pornography's world of equality is a harmonious and balanced place. Men and women are perfectly complementary and perfectly bipolar. Women's desire to be fucked by men is equal to men's desire to fuck women. All the ways men love to take and violate women, women love to be taken and violated. The women who most love this are most men's equals, the most liberated; the most participatory child is the most grown-up, the most equal to an adult. Their consent merely expresses or ratifies these pre-existing facts.

The content of pornography is one thing. There, women substantively desire dispossession and cruelty. We desperately want to be bound, battered, tortured, humiliated, and killed. Or, to be fair to the soft core, merely taken and used. This is erotic to the male point of view. Subjection itself, with self-determination ecstatically relinquished, is the content of women's sexual desire and desirability. Women are there to be violated and possessed, men to violate and possess us, either on screen or by camera or pen on behalf of the consumer. On a simple descriptive level, the inequality of hierarchy, of which gender is the primary one, seems necessary for sexual arousal to work. Other added inequalities identify various pornographic genres or subthemes, although they are always added through gender: age, disability, homosexuality, animals, objects, race (including anti-semitism) and so on. Gender is never irrelevant.

What pornography does goes beyond its content: it eroticises hierarchy, it sexualises inequality. It makes dominance and submission into sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its working. Perhaps because this is a bourgeois culture, the victim must look free, appear to be freely acting. Choice is how she got there. Willing is what she is when she is being equal. It seems equally important that then and there she actually be forced and that forcing be communicated on some level, even if only through still photos of her in postures of receptivity and access, available for penetration. Pornography in this view is a form of forced sex, a practice of sexual politics, an institution of gender inequality.

From this perspective, pornography is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise natural and healthy sexual situation. It institutionalises the sexuality of male supremacy, fusing the erotisation of dominance and submission with the social construction of male and female. To the extent that gender is sexual, pornography is part of constituting the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way. Pornography is not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, projection, expression, fantasy, representation, or symbol either. It is a sexual reality.

In Andrea Dworkin's definitive work, *Pornography: Men Possessing Women*, sexuality itself is a social construct gendered to the ground. Male dominance here

96 Foucault, 'The West and the Truth of Sex' (1978) 20 *Substance* 5.

is not an artificial overlay upon an underlying inalterable substratum of uncorrupted essential sexual being. Dworkin presents a sexual theory of gender inequality of which pornography is a constitutive practice. The way pornography produces its meaning constructs and defines men and women as such. Gender has no basis in anything other than the social reality its hegemony constructs. Gender is what gender means. The process that gives sexuality its male supremacist meaning is the same process through which gender inequality becomes socially real.

In this approach, the experience of the (overwhelmingly) male audiences who consume pornography is therefore not fantasy or simulation or catharsis but sexual reality, the level of reality on which sex itself largely operates. Understanding this dimension of the problem does not require noticing that pornography models are real women to whom, in most cases, something real is being done. Nor does it even require enquiring into the systematic infliction of pornography and its sexuality upon women, although it helps. What matters is the way in which the pornography itself provides what those who consume it want. Pornography *participates* in its audience's eroticism through creating an accessible sexual object, the possession and consumption of which is male sexuality, as socially constructed; to be consumed and possessed as which, *is* female sexuality, as socially constructed; pornography is a process that constructs it that way.

The object world is constructed according to how it looks with respect to its possible uses. Pornography defines women by how we look according to how we can be sexually used. Pornography codes how to look at women, so you know what you can do with one when you see one. Gender is an assignment made visually, both originally and in everyday life. A sex object is defined on the basis of its looks, in terms of its usability for sexual pleasure, such that both the looking – the quality of the gaze, including its point of view – and the definition according to use become eroticised as part of the sex itself. This is what the feminist concept 'sex object' means. In this sense, sex in life is no less mediated than it is in art. Men have sex with their image of a woman. It is not that life and art imitate each other; in this sexuality, they are each other.

To give a set of rough epistemological translations, to defend pornography as consistent with the equality of the sexes is to defend the subordination of women to men as sexual equality. What in the pornographic view is love and romance looks a great deal like hatred and torture to the feminist. Pleasure and eroticism become violation. Desire appears as lust for dominance and submission. The vulnerability of women's projected sexual availability, that acting we are allowed (that is, asking to be acted upon) is victimisation. Play conforms to scripted roles. Fantasy expresses ideology and is not exempt from it. Admiration of natural physical beauty becomes objectification. Harmlessness becomes harm. Pornography is a harm of male supremacy made difficult to see because of its pervasiveness, potency, and, principally, because of its success in making the world a pornographic place. Specifically, its harm cannot be discerned, and will not be addressed, if viewed and approached neutrally, because it is so much of 'what is'. In other words, to the extent pornography succeeds in constructing social reality, it becomes invisible as harm. If we live in a world that pornography creates through the power of men in a male-dominated situation, the issue is not what the harm of pornography is, but how that harm is to become visible.

Obscenity law provides a very different analysis and conception of the problem of pornography. In 1973 the legal definition of obscenity became that which the average person, applying contemporary community standards, would find that, taken as a whole, appeals to the prurient interest. That is, that which depicts or describes in a patently offensive way – you feel like you're a cop reading someone's *Miranda* rights – sexual conduct specifically defined by the applicable State law; and that which, taken as a whole, lacks serious literary, artistic, political or scientific value.[97] Feminism doubts whether the average person gender-neutral exists; has more questions about the content and process of defining what community standards are than it does about deviations from them; wonders why prurience counts but powerlessness does not and why sensibilities are better protected from offence than women are from exploitation. It defines sexuality, and thus its violation and expropriation, more broadly than does State law; and questions why a body of law that has not in practice been able to tell rape from intercourse should be entrusted, without further guidance, with telling pornography from anything less.

Taking the work 'as a whole' ignores that which the victims of pornography have long known: legitimate settings diminish the perception of injury done to those whose trivialisation and objectification they contextualise. Besides, and this is a heavy one, if a woman is subjected, why should it matter that the work has other value? Maybe what redeems the work's value is what enhances its injury to women, not to mention that existing standards of literature, art, science, and politics, examined in a feminist light, are remarkably consonant with pornography's mode, meaning, and message. And finally – first foremost, actually – although the subject of these materials is overwhelmingly women, their contents almost entirely made up of women's bodies, our invisibility has been such, our equation as a sex with sex has been such, that the law of obscenity has never even considered pornography a women's issue.

Obscenity, in this light, is a moral idea, an idea about judgments of good and bad. Pornography, by contrast, is a political practice, a practice of power and powerlessness. Obscenity is ideational and abstract; pornography is concrete and substantive. The two concepts represent two entirely different things. Nudity, excess of candour, arousal or excitement, prurient appeal, illegality of the acts depicted, and unnaturalness or perversion are all qualities that bother obscenity law when sex is depicted or portrayed. Sex forced on real women so that it can be sold at a profit and forced on other real women; women's bodies trussed and maimed and raped and made into things to be hurt and obtained and accessed, and this presented as the nature of women in a way that is acted on and acted out, over and over; the coercion that is visible and the coercion that has become invisible – this and more bothers feminists about pornography. Obscenity as such probably does little harm. Pornography is integral to attitudes and behaviours of violence and discrimination that define the treatment and status of half the population.

At the request of the city of Minneapolis, Andrea Dworkin and I conceived and designed a local human rights ordinance in accordance with our approach to the pornography issue. We define pornography as a practice of sex discrimination, a violation of women's civil rights, the opposite of sexual equality. Its point is to hold those who profit from and benefit from that injury accountable to those who are injured. It means that women's injury – our damage, our pain, our enforced

97 *Miller v California* 413 US 15 at 24 (1973).

inferiority – should outweigh their pleasure and their profits, or sexual equality is meaningless.

We define pornography as the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanised as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised, or hurt in a context that makes these conditions sexual. Erotica, defined by distinction as not this, might be sexually explicit materials premised on equality.[98] We also provide that the use of men, children, or transsexuals in the place of women is pornography. The definition is substantive in that it is sex-specific, but it covers everyone in a sex-specific way, so is gender-neutral in overall design.

There is a buried issue within sex discrimination law about what sex, ie gender, is. If sex is a difference, social or biological, one looks to see if a challenged practice occurs along the same lines; if it does, or if it is done to both sexes, the practice is not discrimination, not inequality. If, by contrast, sex has been a matter of dominance, the issue is not the gender difference but the difference gender makes. In this more substantive, less abstract approach, the concern with inequality is whether a practice subordinates on the basis of sex. The first approach implies that marginal correction is needed; the second requires social change. Equality, in the first view, centres on abstract symmetry between equivalent categories; the asymmetry that occurs when categories are not equivalent is not inequality, it is treated unlikes differently. In the second approach, inequality centres on the substantive, cumulative disadvantagement of social hierarchy. Equality for the first is non-differentiation; for the second, non-subordination.[99] Although it is consonant with both approaches, our anti-pornography statute emerges largely from an analysis of the problem under the second approach.

To define pornography as a practice of sex discrimination combines a mode of portrayal that has a legal history – the sexually explicit – with an active term that is central to the inequality of the sexes – subordination. Among other things, subordination means to be in a position of inferiority or loss of power, or to be demeaned or denigrated.[100] To be someone's subordinate is the opposite of being their equal. The definition does not include all sexually explicit depictions of the subordination of women. That is not what it says. It says, this which does that: the sexually explicit that subordinates women. To these active terms to capture what the pornography does, the definition adds a list of what it must also contain. This list, from our analysis, is an exhaustive description of what must be in the pornography for it to do what it does behaviourally. Each item in the definition is supported by experimental, testimonial, social, and clinical evidence. We made a legislative choice to be exhaustive and specific and concrete rather than conceptual and general, to minimise problems of chilling effect, making it hard to guess wrong, thus making self-censorship less likely, but encouraging (to use a phrase from discrimination law) voluntary compliance,

98 See eg Gloria Steinem, *Erotica v Pornography in Outrageous Acts and Everday Rebellions* (1983).

99 See Catharine A MacKinnon, *Sexual Harassment of Working Women* (1979), pp 101–41.

100 See Andrea Dworkin, 'Against the Male Flood: Censorship, Pornography and Equality' (1985) 8 *Harvard Women's Law Journal* 1.

knowing that if something turns up that is not on the list, the law will not be expansively interpreted.

The list in the definition, by itself, would be a content regulation. But together with the first part, the definition is not simply a content regulation. It is a medium-message combination that resembles many other such exceptions to First Amendment guarantees ...[101]

... This law aspires to guarantee women's rights consistent with the First Amendment by making visible a conflict of rights between the equality guaranteed to all women and what, in some legal sense, is now the freedom of the pornographers to make and sell, and their consumers to have access to, the materials this ordinance defines. Judicial resolution of this conflict, if the judges do for women what they have done for others, is likely to entail a balancing of the rights of women arguing that our lives and opportunities, including our freedom of speech and action, are constrained by, and in many cases flatly precluded by, in, and through, pornography, against those who argue that the pornography is harmless, or harmful only in part but not in the whole of the definition; or that it is more important to preserve the pornography than it is to prevent or remedy whatever harm it does ...[102]

... This ordinance enunciates a new form of the previously recognised governmental interest in sex equality. Many laws make sex equality a governmental interest. Our law is designed to further the equality of the sexes, to help make sex equality real. Pornography is a practice of discrimination on the basis of sex, on one level because of its role in creating and maintaining sex as a basis for discrimination. It harms many women one at a time and helps keep all women in an inferior status by defining our subordination as our sexuality and equating that with our gender. It is also sex discrimination because its victims, including men, are selected for victimisation on the basis of their gender. But for their sex, they would not be so treated.

The harm of pornography, broadly speaking, is the harm of the civil inequality of the sexes made invisible as harm because it has become accepted, as the sex difference. Consider this analogy with race: if you see black people as different, there is no harm to segregation; it is merely a recognition of difference. To neutral principles, separate but equal was equal. The injury of racial separation to blacks arises 'solely because [they] choose to put that construction upon it'.[103] Epistemologically translated is: how you see it is not the way it is. Similarly, if you see women as just different, even or especially if you don't know that you do, subordination will not look like subordination at all, much less like harm. It will merely look like an appropriate recognition of the sex difference.

Pornography does treat the sexes differently, so the case for sex differentiation can be made here. But men as a group do not tend to be (although some individuals may be) treated the way women are treated in pornography. As a social group, men are not hurt by pornography the way women as a social group are. Their social status is not defined as less by it. So the major argument does not turn on mistaken differentiation, particularly since the treatment of women according to pornography's dictates makes it all too often accurate. The salient quality of a distinction between the top and the bottom in a hierarchy is not

101 *Francis Biddle's Sister*, p 177.

102 *Francis Biddle's Sister*, p 178.

103 See *Plessey v Ferguson* 163 US 551.

difference, although top is certainly different from bottom; it is power. So the major argument is: subordinate but equal is not equal.[104]

ONLY WORDS[105]

Catharine MacKinnon

Preface[106]

On 17 August 1992, a small article in the *New York Times*, 'Police Seek People Who Cheered Killer On' reported this:

> A dozen people who chanted 'Kill her! Kill her!' as a woman was stabbed to death last Wednesday are being sought and could face charges of aiding and abetting a murder, the police say … 'Usually, you hear of people who stand by and watch and do nothing,' said Sgt John McKenna of the Oakland Police Department. 'But this is the other end of things, where the people watched and participated.'

'Kill her! Kill her!' are only words, but the Oakland Police Department saw what they did: participation in a criminal act. Suppose, instead of a murder, the bystanders were watching a rape. Would chanting 'Rape her! Rape her!' not be participation? Suppose pictures were taken of the rape, and sold to people, some of whom chanted 'Rape her! Rape her!' as they watched.

The onlookers in Oakland just happened on a murder already in progress. Suppose they had paid to watch and chant during an arranged one? Imagine that a whole industry creates and sells pictures of women and children sexually violated and sometimes killed. Isn't this also participation? And those millions who create the market for those films, who watch them and chant 'Rape her! Rape her! and 'Kill her! Kill her'!' do they not also participate?

In the United States, this industry is not legally regarded as aiding and abetting violence against women. It is called protected speech. In this context, the chanters in Oakland could be considered to be expressing an idea; as could those in the extended examples. Will the United States continue to adhere to this view, which sounds so improbable in a British context? Canada has rejected its absolute priority on expression as a barrier to women's equality.[107] Will the rest of the world adopt it, in ever more absolute ways, along with the pornography with which it travels as a principled cover? This is an open question – but not for long.

This book attempts to move people to face the reality of harm done through what is called speech: what it does to women, children, the possibility of equality for oppressed groups and women's human rights, in particular. All reality of injury is entered through the experience of women used in pornography, as they have described it, over years of activism and research. Moving from this point, the discussion attempts to define and explore the legal and social terrain of inequality through expression, including through hate propaganda, racial harassment, sexual harassment and libel. It seeks to understand the role of speech in inequality and to expand the role of equality in speech. The point is to stop the harm and open a space for subordinated voices, those shut down and shut out through the expressive forms inequality takes.

104 *Francis Biddle's Sister*, p 179.

105 Harper Collins, 1995.

106 Footnotes edited.

107 *Butler v Regina* [1992] 2 WWR 577 (Can).

The claim that pornography 'is speech' is taken up with reluctance. This position conflates pornography with political, educational, artistic and literary expression, as if the two cannot be distinguished, so that if one is threatened, the other is threatened. The fact is, pornography, accurately defined, is readily distinguishable – on its face, in its making, in its use and in the effects of its use – from protected expression. To take the claim seriously enough even to rebut it, ie that this practice of sexual violation and inequality, this medium of slave traffic, is an opinion or a discussion is to collaborate, to some degree, in the legal and intellectual fraudulence of its position. It is to treat this position as what it pretends to be, one side in a *bona fide* discussion, rather than as what it is, a legitimising smokescreen for sexual exploitation. But, like pornography's lie that women want and choose to be used and hurt for sex, the lie that pornography 'is speech' has very real clout, in Anglo-American legal systems in particular.

Inequality based on sex and race is imposed through expressive means in England as well as in the United States. Accountability for it is almost equally rare. Both systems value freedom of speech, England without a written constitution, America with one. Both purport to hold equality as a legal and social norm, yet both are firmly hierarchical societies of inequality based on sex, race and class. British law permits restriction of hate speech (and libel) far more readily than does US law – showing less fetishism about speech and a greater sensitivity to its human consequences.[108]

In both nations, pornography is nominally criminal under obscenity law and is approached as a matter of morality. Both bodies of obscenity law have been equally useless in stemming the rising tide of pornography and equally blind to its material injuries. These failures are connected. Neither country has comprehended hate speech or pornography as matters of social inequality or legal equality, although scholarly dialogue in both countries, much of it drawing upon principles of international law, has more broadly speaking, neither country's law comprehends equality substantively.[109] Although there are exceptions, the legal definition of equality in both places tends to be a superficially mechanistic but deeply invidious abstraction that will never, and can never, produce social parity. One exception is sexual harassment, which both US and UK law recognise as sex discrimination, although it is pursued with greater vigour in the United States. So far, sexual harassment is not even arguably protected speech in either country. So while the case names differ, the social and legal issues are shared. And the failure to address the harm speech does to equality is virtually identical.

The fact that obscenity regulations in the United States parallels England is not surprising. American obscenity law (as much else legal) builds on English foundations. British obscenity law has centred its solicitude on the mind of the consumer, specifically on whether the materials have a tendency to 'deprave and

108 Public Order Act 1986. See also Geoffrey Bindman, 'Incitement to Racial Hatred in the UK: Have We Got the Law We Need?', S Coliver (ed), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (London and Human Rights Centre, University of Essex, 1992), pp 258–62. See also RG Schneider, 'Hate Speech in the United States: Recent Legal Developments', in Coliver, *supra*, pp 269-83.

109 See Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberle Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder and Oxford: Westview Press, 1993); Catherine Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (Oxford University Press, 1993).