Modern culture has been deeply impressed by the extent to which we ourselves are the makers. Even Rousseau, who accepted the traditional view that nature provides authoritative standards, knew that nature is not necessity. A constant question has been what limits there are, if any, to what we can make. An intermittent question has been, "Who's this "we," paleface?" Just as Tonto may not share the Lone Ranger's vulnerability to the attacking tribe, "we" are not all equally responsible for what our culture has made. This challenge has been posed not only in the context of race, but also of class, and increasingly, of gender and sexual preference. Even apart from these questions, the practical question is, "What can be changed and what should be?"

PART I: SHAPING SEX, PREFERENCE, AND FAMILY

The first part of this book concerns "shaping" or "construction" in the context of sex, preference, and family. Many of the chapters in the book, including each of the essays in the first part, could as well have been placed in a different one of the four parts. Their collection under the heading "Shaping" is intended to call attention to a theme they have in common, encouraging the reader to isolate that theme for consideration and allowing the editors in their commentary to address that theme directly.

The essays by Moody-Adams, Nussbaum, and Okin share a concern with the initial conception of the problems of sex, preference, and family. In some sense, every chapter in the book is concerned with how we conceive these problems, but in this part we call special attention not to the intellectual merits of alternative ways of conceiving things but also to what might be called the metaphysics of the conception of these issues and the political significance of those metaphysical questions. The following are at least partly metaphysical questions, as that branch of philosophical inquiry is usually understood:

Is the very category "family" constituted partly by assumptions about the locus of certain social responsibilities, such as responsibility for the well-being of children? How could the family be responsible for the welfare of children when the state has such an overriding impact on what the family can do and be? (This is among the questions considered by Moody-Adams.)

Are sexual desire and related emotions natural, pre-cultural categories of human experience, or are they culturally produced and perhaps even susceptible to intentional change? (Nussbaum investigates this.)

Is gender a natural division, or is it culturally produced and changeable? What sort of social world would be required for the eradication of gender? (Okin treats these questions.)

Moody-Adams

Michele Moody-Adams asks us to think of the prevailing concept of family (which she criticizes) as a moral concept, one that locates the final responsibility for the welfare of children in the head-of-household. If this is what a family is then that implies that the state, in the form of its collectively sovereign citizens, has at most a secondary responsibility for children's welfare. She argues that this is unfortunately close to the conception of the family in mainstream U.S. debates. If we treat this concept of family as "socially constructed," then we can choose to reconceive it. Thus we can directly face the question how much responsibility for children's well-being ought to be assumed publicly. A great deal, argues Moody-Adams.

Many will argue against Moody-Adams that if we emphasize public responsibility this will lead parents to neglect their responsibilities. As a result, the public will become overburdened with the care of other people's kids. The state will have neither the competence nor the political will nor, as a result, the financial resources to perform the task well. There are several difficulties with this objection.

First, even if publicly emphasizing the state's responsibility would have bad consequences, this would be no argument that it does not bear that responsibility. Still, of course, the state's capacity to care for children is certainly to the point. So, second, the charge that the state could not competently do it must be addressed. But that charge cannot be either defended or answered just as it stands. The evaluation must be case by case, policy by policy. There are many things the state can do to benefit children, some that it already does, and some that it could do but does not. Despite its rhetorical value, there is no simple answer to the question, Who is better at raising children, the state or the family?

Third, pessimistic predictions about the political will of the public to help children are both premature and partly beside the point. The public debate about what
moral responsibility the public has is one of the major arenas in which the political will gets formed. It is a confused contribution to a will-forming political discussion to point out that there isn’t the will for a proposed policy. The question under discussion is whether there should be, and many citizens will support it if they are solidly convinced that they morally should.

Fourth, the question of financial wherewithal is, in a wealthy society like ours, almost entirely determined by the question of political will. And political will is determined to an important extent by the merits of the moral case as the citizenry judges those merits. What are the merits of the assignment of great moral responsibility for child welfare to the public in its political role? Some might object that the state could not be finally responsible since, of course, the parents are. But the idea of “final responsibility” ought to be questioned. If the state has the ability to help children whose parents are negligent, who has final responsibility? Are the parents exonerated if the state is morally blamed for inaction? Obviously not. The negligent parents have no legitimate claim to public help in that case, but the child might have a claim to assistance against both the parent and the state.

Having said that, I want to turn to a context in which public negligence might actually exonerate otherwise blameworthy parents: abortion. Consider a public policy that denies a poor woman any additional welfare payment for the care of an additional child. Moody-Adams cites Mary Ann Glendon’s question of “why pregnant women in the United States should be asked to make significant sacrifices (whether they abort or bear children), if absent fathers and the community as a whole are not asked to sacrifice too” (16). This is posed as a question of fairness. How is it fair to ask just the mother to bear the burden of carrying the fetus to term when it would be possible to share this burden socially?

Of course, some burdens that could be publicly shared might not be the public’s responsibility. The question is how this is determined. If I voluntarily venture into an unsafe neighborhood, the public accepts some responsibility for my safety. If a woman voluntarily engages in sexual intercourse, then, no matter how carefully she is to avoid pregnancy, under the policy described above, the public refuses to accept any responsibility for her child’s care. Can we tell just by looking that she is “finally” responsible for that child’s welfare, but that I am not “finally” responsible for my own safety? The public has a great capacity to help in both cases. Its obligations cannot be read off some antecedently fixed obligations of the private citizens involved. Of course, this is not yet an argument that the public is responsible in either case.

Moody-Adams employs the language of “social constructionism” in her title, and at some points in her argument (p. 6), arguing both to and from the claim that the family is partly socially constructed. She is, however, directly addressing what forms the family might take (for that, see Eskridge and Minow, Part IV). Rather, her topic is the shape and place of the concept of family in the apparatus of moral responsibility for others. If this apparatus is itself socially constructed, as she also seems to believe, that language might suggest that there is no right or wrong way to do it. The thesis of social constructionism applied to normative concepts like responsibility in some ways recapitulates the older thesis of the “essential contestedness” of normative or political concepts, in which political discourse is no more than a power struggle. Moody-Adams plainly does not intend to subscribe to that form of social constructionism. Apparently, the value of that terminology for her purposes is its connotation that what is socially constructed can be socially reconstructed if we decide that it should be.

The idea of social constructionism arises in many essays in the book. Martha Nussbaum’s essay employs the idea in a way that allows us to distinguish and critically consider several of its many different meanings.

### Nussbaum

When it is claimed that something is socially constructed, there are a number of things that might be meant. The one thing that is almost never meant is the thing the words most naturally suggest, that some structure or entity (e.g., a barn) is created intentionally (e.g., raised) by some social group of people (e.g., farmers and their neighbors). In this sense of “socially constructed,” here are some things that are certainly socially constructed: some barns, written legal codes, political parties, NATO, Woodstock, Earth Day, and this book. In that first sense, here are some things that are certainly not socially constructed: your sex, your sexual preference, your experience of sexual desire, your sexual organs. So when these are said to be socially constructed, something else must be intended.

Consider the meaning of a word, “leg.” We might say that the meaning of the word “leg” is socially constructed when we reflect on the fact that the symbol or utterance has no meaning apart from the conventions of a linguistic community. Here “constructed” would mean something like “a product of human convention.” The meaning of a word is not just constructed in this sense, but socially constructed, in that it is the product of the conventions of a particular social group.

“Social” may seem to be redundant since convention already either depends on or actually constitutes a form of sociality. But there is some value in emphasizing the social source of the construction, to distinguish the thesis of social construction from theses of construction that have nothing to do with convention. For example, even though truths of logic (“If all As are Bs and x is an A, then x is a B”) or of mathematics (“The sum of even numbers is always even”) are apparently not subject to human or social convention, it might be argued that they are facts about any possible faculty of reasoning or understanding and have no truth or existence independently of such faculties. Some philosophers hold this sort of view about especially math, logic, and morality. Kant held a version of this view about everything we could ever know or experience, and some philosophers follow him today. Nussbaum declares her sympathy for the views of one such philosopher, Hilary Putnam (p. 41, n.72). Never mind whether any of this is correct; it might be called a form of constructionism or constructivism. Still, this would not be (nor is it any support for) a meaning of social construction since society and sociality are entirely absent from the account.

The claim that something is socially constructed, then, might mean that it is the product of social convention. The meaning of the word “leg” is socially constructed in this sense, as is the meaning of every word. Legs, however, are clearly not socially constructed in either this sense or (usually) in the barn-raising sense of “socially constructed.” Even if you think “leg” is a contingent, conventional, conceptual category,
you should allow that iguanadons would have had legs whether or not any culture had ever devised that category. Later categorical schemes cannot affect what dinosaurs were like, and either they had legs or they did not. Their legs are not constructed even if the category “leg” is. If this argument works for dinosaur legs, it works for human legs.

It is jarring, then, to hear it even asked, as Martha Nussbaum does, whether the sexual organs are socially constructed. This jolt is really only a different degree from the rhetorical impact of her claim that human love, desire, and sexuality are socially constructed. A product of some social convention would not exist but for the existence of either that social convention or some certain alternative conventions. Sexual organs, legs, love, desire, and sexuality do not apparently depend on any particular social convention for their existence.

Even if their existence does not depend on social convention, however, perhaps their nature or constitution does. It seems very likely that sexual desire will be different in many ways—feel different, involve different associated beliefs and desires, lead to different behaviors, and so on—depending on the cultural significance of sex in the subject’s society. But if that is the meaning of the claim that sexual desire or other emotions are socially constructed, or are “social and historical artifacts” (p. 45), then neither phrase can be used univocally to apply to both emotions and to sexual organs. There is no claim in Nussbaum’s essay that the sexual organs are different in different cultural settings, though that is apparently her claim about emotions. Sexual organs and emotions alike are categorized and individuated differently in different cultures. Emotions, unlike body parts, are actually affected and changed by these cultural differences.

Recall that the meaning of the word “leg” is plainly a product of social convention. What about the proposition that legs are among the parts of a normal human body? Does the truth of this claim depend on social convention, or does it express a fact that is utterly independent of social convention? Let’s start with what is certain: no social convention of language or meaning or categorization changes the human body, certainly not enough to determine the truth or falsity of the proposition that human bodies normally include legs. If there is social construction going on in the area of this proposition, it is not the construction of bodies but of something else.

Perhaps what is socially optional is not what the body will be like but whether to put into its own conceptual category the part of the body we think of as a leg. Perhaps categories, unlike the human body, are entirely up to us, to build and shape as we might (if not exactly as we will or wish). Legs are not socially constructed but perhaps the category “leg,” much like the meaning of the word “leg,” is socially constructed in the sense of being the product of social convention. The choice of categories is not just the same thing as the choice of meanings for words since two different societies could choose the same categories and give them entirely different names. But much as we can see how word meaning might be conventional, we can see how categorization might be.

However, the fact that categorization is something societies can do in different ways says nothing about whether all categories depend on social convention, with none being real or presocial. The former is obvious, the latter is deeply contested. There is no inconsistency in holding that, while societies can categorize as they might, some category schemes are objectively incorrect, others are objectively correct. Again, never mind for now whether this is true. The point is that it is not refuted by noting that different societies can categorize things in different ways. That would be possible even if there were objectively correct or incorrect categorical choices.

Realizing this, it looks as if Nussbaum’s thesis that the emotions are socially constructed is apparently not as strong a claim as the language suggests. Here is a skeleton of the argument as I see it:

1. Different societies categorize and value things differently (leave aside whether objective correctness is possible).
2. Individuals apply, with only limited variation, the categories and values of their own cultural situation or nexus.
3. An individual’s emotions are constituted by value judgments that are culturally learned.
4. Therefore, emotions will vary significantly across cultures, both varying within recognizable similar categories and falling into some different categories altogether.
5. Therefore, both the nature of some emotions (weaker conclusion) and the very existence of some emotions (stronger conclusion) are products of culture or social convention.

So how should we understand Nussbaum when she says, for example, that erotic love is socially constructed? She wants to draw the stronger conclusion, that “Plato and John Updike are not describing the same passion” (23). However, her argument requires that we identify erotic love in ancient Greece and erotic love in contemporary America, and then ask how different they might be. It is inconsistent to conclude that they are not both forms of the same emotion, erotic love. If they are both forms of the same passion, though different in important ways, the conclusion is the weaker one: erotic love does not owe its existence to culture or social convention; rather, the forms that erotic love can take are to a great extent culturally produced. This is probably correct, and her essay goes a long way toward establishing it. There is some question, though, whether it bears much relation to the thesis of social constructionism. She writes, “What we have to get rid of here is the idea that there is some one thing beneath the surface that is simply being described in different language” (24). But this is ambiguous. First, there is the different language. Second, there are the cultural variations in the form erotic love takes. But, third, there is the thing that takes those different forms, what she calls “erotic love.” If it is not erotic love in both cases, if it is so different in ancient Greece that we cannot accurately call it by any emotion name we have, then we have no argument that erotic love takes different forms, for we have not found erotic love in the ancient Greeks and probably cannot understand their sex lives at all.

At best, then, we should wink at the claim that the human body, or the sexual organs, are socially constructed, are social and historical artifacts. Either it is a vivid and dramatic characterization (which we could accept with a wink) of an important but moderate claim about cultural variation in conceptual frameworks, or it is a more
problematic metaphysical claim that all reality is, in one way or another, made by mind. I believe Nussbaum’s main conclusions in this essay depend only on the former, less radical view.

For Nussbaum, “the payoff of the position that emotions are not given in nature but are socially constructed is that emotions become a part of the domain of moral effort, so construed” (p. 25-26). It is important to distinguish two theses that are central to the idea of social constructionism. The first thesis is that whatever entity, category, or phenomenon is said to be culturally constructed is variant across cultures and in that sense not universal. The second thesis, which is supposed to be supported by the first, is that the entity, category, or phenomenon is (comparatively) subject to intentional change and in that sense not necessary. The fact that something is universal in all known cultures past and present does not imply that it is not subject to intentional change. Cancer and sexism are (as far as I know) present in every known culture, even though it may well be possible to eradicate them in the future. The fact that something is not universal does not imply that it is more subject to intentional change. Tay-Sachs disease is especially prevalent in Jewish culture and selfishness is more prevalent in some cultures than others, but neither of these facts strikes me as good evidence that either condition could be intentionally eradicated. Maybe either or both of them could be, but their cultural variability does not seem to offer any special reason to think so.

The question, then, is whether something’s not being universal is any reason at all to think that it is more subject to intentional change than we should otherwise think it is. This depends on the entity, category, or phenomenon in question and on many other circumstances. Sometimes it is little or no reason (as in the cases of Tay-Sachs and selfishness), and sometimes it is some reason. Sometimes, for example, the cultural variability of a phenomenon may, in the circumstances, strongly suggest that it is not only culturally produced but intentionally and optionally culturally produced. Suppose we discover that something that happens to favor people who have greater influence over the content of the culture (say, men or capitalists or whites) turns out not to be present in cultures where the power structure is different. That kind of cultural variability is some reason, though far from conclusive reason, to suspect that the phenomenon is intentionally produced by the powerful in their own interests. Even this, the intentional and optional cultural production of something, does not generally imply that it can be intentionally changed. Some forces can, like toothpaste, be more easily released than recovered.

A similar point still applies to Nussbaum, who emphasizes the cognitive effects of emotions as the root of their social construction. A cognitive or belief-like dimension of emotion is behind the cultural production of emotion on her view, and she takes it to support both alterability and cultural variability. But it does not support a claim of greater alterability. Beliefs are not obviously easier to change than other features of people. Which beliefs? Which other features? Does your depression become more tractable if we know that it depends on your mistaken belief that you are dying of cancer than it would be if it were produced by a dietary deficiency? I see no general reason to think so. Still, in some circumstances the intentional production of a phenomenon, especially where it seems to require constant intentional maintenance, can be good evidence that it could be intentionally changed. The possibility of change seems to be what is at stake in social constructionism. If so, the social constructionist project (if it has that much unity) may rest on a mistake. The claim that something is socially constructed is an effort to put a bridge between the claim that it varies across cultures and the claim that it can be intentionally changed. The bridge is the claim that it varies socially because it is intentionally constructed by culture or convention. This bridge does not quite span the distance since what is intentionally produced might be beyond intentional change. But more importantly, deciding to put so much effort into this bridge makes the vital mistake of conceiving that if something is not intentionally produced, or even also not culturally variant, then it probably cannot be intentionally changed. In Nussbaum, the concession takes the form of holding that emotions are more changeable because they are culturally taught than they would be if they were produced entirely by nature. That should not be conceded. If the point is alterability, then social constructionism is a distraction. The important question is whether the male/female dichotomy, the homosexual/heterosexual dichotomy, sexual desire or its forms, and so on, can be changed through human effort to change them. If they can, this is of enormous importance since it gives birth to a new question for human societies: whether these things ought to be changed. Their being socially constructed or not is only a very uncertain guide to their susceptibility to change.

Okin

Susan Okin quite properly puts the emphasis on change. Without toiling over whether gender is socially constructed, or exactly what that would mean, she argues that gender can be done away with—and ought to be. Difference in biological sex ought to have “no more social relevance than one’s eye color or the length of one’s toes” (p. 44, and in her book, Justice, Gender, and the Family). In a gender-free society, “no assumptions would be made about ‘male’ and ‘female’ roles, and men and women would participate in more or less equal numbers in every sphere of life” (p. 45). This would extend to the structure of the family, where she advocates not only the absence of gender roles, but the absence of different parental or household roles even apart from gender. Thus, her main proposal in this essay is to look to homosexual couples as a model for the household and family of the gender-free society. One does not need to find any fault in the role-free distributions of labor and responsibility that may be more common in homosexual households in order to wonder why this ought to be held out by Okin as an ideal toward which we ought to try to move our whole society. Similarly, while there is nothing wrong with an approximately equal distribution of males and females across the many “spheres of life” outside the family, we might ask why this is an ideal toward which we should move.

The easiest part to agree with is that there should be no strong social pressures, “expectations,” or “assumptions” (2) on men or women to adopt certain social or family roles simply because of their biological sex. Okin’s goal is more than this, namely, that the sexes should be about equally represented in every sphere of social life. Which of these should we count as an absence of “gender roles”? I believe there are just two different proposals here: call the first the absence of normative gender roles, or the absence of gender rules; call the second the absence of de-facto or de-
scriptive gender roles, or the absence of gender patterns. Okin advocates both absences, which means that she advocates the absence of gender patterns even if these are not produced by social pressures, assumptions, or expectations based on sex. It is easy to understand why she disapproves of gender rules, but it is less clear what is wrong with gender patterns that are not produced by gender rules.

It is possible that if there were no gender rules then this would eradicate gender patterns. Okin, however, does not mean just this. She values the absence of patterns separately, in addition to the absence of rules. This is clear from her very ideal of a gender-free society. If a person's sex is to be utterly without social relevance, then there could not be any significant correlation between sex and social role. If, for example, teachers, pediatricians, and social workers tended to be predominantly women even after sex-based social pressures were removed, then we could not expect our conceptions of female sex to be entirely unaffected by this fact. Elsewhere Okin argues (following Amy Gutmann) that “sex should be regarded as a relevant qualification in the hiring of both teachers and administrators until these proportions have become much more equal.”

This may be the reason Okin values the absence of gender patterns even if they were not caused by gender rules. She may believe that patterns produce rules. If women freely choose to settle into certain role patterns, then over time there will come to be expectations and even pressures on future women to adopt those same patterns. After all, there is always social pressure not to be different. There is also a powerful tendency to follow role models one identifies with. We might hope that women would not feel different for choosing a role that is uncommon for women, so long as it is not uncommon for people. And we could hope that women would not have any special affinity for female role models. That is, we could hope that gender was socially insignificant in these ways. But if there are distinctive patterns in the way genders occupy social roles, even if these are, at first, freely chosen, gender may become far from socially insignificant. Women may well come to identify themselves as women again, with all the social expectations and assumptions this would entail.

If that is the problem with gender patterns, then the root value is women’s freedom to choose their social roles; this would be lost over time as patterns produced rules. The problem is how to let women choose as they will, but also to make sure that they do not choose any gender-specific patterns. Maybe women’s free role choices (those in the absence of gender rules, social antipattern efforts, or prejudice) would produce no differential gender patterns; that would be perfect. Is something Okin is prepared to predict, and with what evidence? How can we know in advance that equal opportunity for members of gender (or racial) groups will produce anything near equal representation of those groups in every social role? If this is not a prediction but a prescription, then we ought to keep close track of the individual freedom that might have to be traded off for this group-based criterion of equality.

The choice between diminished occupational freedom and oppressive gender rules may be one we have to face, or it may not. It is important to consider first what could be done to allow free choice and the gender patterns this may produce without permitting the development of strong sex-based pressures toward certain social roles.

Under what circumstances can differential role patterns exist for certain groups without producing strong social norms that tend to reproduce those patterns? Consider the category of gay men in America. It is widely said that gay men are disproportionately represented in certain professions; they make up a larger fraction of those professions than their fraction of the general population (or, in male-dominated professions, greater than their fraction of the general male population). Many professions in the arts are apparently disproportionately gay in that sense. No doubt this produces a certain cultural association between the ideas of male homosexuality and the social role of artist, thus shaping the very idea of male homosexuality in our culture to some extent. However this pattern came about, whether it depended on different patterns of discrimination across different professions or not, it is not clear to me that these patterns have created additional repressive assumptions and expectations pressuring gay men to choose professions in the arts. Certainly a pattern like this leads to stereotyping, but that is not the same thing as social pressure to conform to the stereotype. The stereotype might yet reproduce the pattern even without creating pressure to conform if people’s simple expectations make it emotionally more difficult for a gay man to be very unlike the stereotypical gay man. Ignoring the other sources of discrimination against gays, has the stereotype of gay men significantly obstructed their entry into non-arts careers?

I do not have good evidence about which of these social pressures this professional pattern has produced or whether they are very strong and repressive. There is an important point either way. If those pressures do not exist or are not very repressive, then we might ask whether gender patterns could also exist without excessive role-restricting pressures. On the other hand, if the pressures on gay men that are caused by these professional patterns are fairly strong, we need to appreciate the dilemma this produces. It may be that those undesirable social pressures could only be avoided if, somehow, gay men were dislodged from this professional pattern. But how should this be done? And is this really preferable to the original situation? It would certainly be preferable if we could know that the pattern were largely the product of stereotyping and other undue social pressures, but that is far from clear. Since the pattern might be one that would survive in conditions of relatively free occupational choice, is it clear that we should strive for a society in which this pattern is destroyed, in which members of groups defined by sexual preference are approximately equally represented in all social roles?

Reflection on this example about gay men should increase our willingness to consider the possibility that women (and, of course, men) might freely choose occupations and roles in a pattern that involves gender-based differences. I believe that there can be no good reason to deny that this would happen (or to assert it) from a situation in which choices are far from free. And once we acknowledge that it might happen, Okin’s goal of a gender-free society, with equal gender representation across all social roles, looks like a mixed blessing at best.

If we turn to the structure of a gender-free family, the same problem appears. Unless we have good reason to deny that women would freely choose roles at home in a gender-patterned way, then the social goal of no gender patterns in the family threatens its own form of oppression: intentional social stigmatization of individuals who adopt gender-typical roles, designed to discourage that choice. There is a cer-
tain amount of this already, even though it coexists with an opposing stigmatization of deviance from traditional gender roles. It is impossible to say which of these is stronger.

One last question about Okin’s ideal of the gender-free family concerns her ideas about just distribution of labor in the home. One can distinguish several different possible positions on adult roles in the family:

1. Avoid forced or pressured roles of any kind;
2. Avoid unfair distributions of domestic labor;
3. Avoid genders in their traditional roles;
4. Avoid the traditional roles, regardless of which genders occupy them.

(1) and (2) are pretty uncontroversial. Okin advocates (3) and (4) as well. She believes that traditional gender roles are both pressured and unfair—so the uncontroversial (1) would imply (3); and (2), also uncontroversial, would imply both (3) and (4). It is not clear, however, whether traditional roles are to be avoided just because they tend to be unfair and pressured. We can try to imagine the closest possible thing to those traditional roles without the pressure or the unfairness. Here is a try: one role involves primary responsibility for the care of the children and the general management of the household. The other role involves primary income-producing responsibilities, where these are met by work outside the home. To avoid unfairness, suppose that, apart from work time outside the home, the second partner does about as much domestic work as the first partner does during the time spent at home (not overall).

Also, assume some version of shared legal rights to wealth and assets, including cases of death and divorce. However, to keep it traditional, suppose that the income-producing partner’s work at home is mostly of a traditionally male kind: building, repair, car work, yard work, and so on. Adjust the arrangement further if necessary to make it both fair and recognizably traditional. Each role has great advantages and great disadvantages for its inhabitant. But fairness does not require an arrangement that is as good for each person in every respect. It is sufficient (though probably not even necessary) for fairness that the arrangement be freely chosen and approximately equally advantageous for each person overall.

Uncontroversial positions (1) and (2) are no longer any support for avoiding the roles this thought experiment produces. (I will call them “free, fair, traditional roles”) so long as there is also no gender-based social pressure on either partner to choose one rather than the other. This is already true for gay and lesbian led families. Okin celebrates the lower incidence of the traditional (she calls them “gendered”) roles in homosexual households, despite the obvious absence of gender-based social pressure that would taint those roles. Perhaps she is assuming that those roles must be unfair (and if so, it would not matter which gender occupied which role in a heterosexual partnership). But as the above thought experiment suggests, this is either a failure of imagination or only a criticism of a narrow range of possibilities within a traditional division of domestic labor: the ones that would be unfair even if freely chosen. That would not be a general critique of the traditional gender roles more broadly conceived, just a critique of unfairness itself in that subset of cases where it is present.

If straight partners could arrange free, fair, traditional roles, one might still worry about whether a pattern of this kind would, over time, produce expectations incompatible with genuine freedom. If so, we’re back to the dilemma discussed above. Here as there, and for the same reasons, this may not count decisively against a traditional pattern of domestic roles. In the case of gay and lesbian partners, the acceptance of traditional roles could not possibly produce gender-based role patterns and, so, could not produce gender-based conservative pressures. It is hard to see, then, why free, fair, traditional roles for homosexual partners should be avoided at all.

Okin’s main point is not to praise gay couples for avoiding traditional roles, but rather to argue that, insofar as they happen to avoid those roles, they are worthy models for heterosexual families: “The reason gay and lesbian families may be, at least in one important respect, a model to be followed, is that they are far less likely than heterosexual families to practice anything resembling a gendered division of labor” (54–55). Does this mean that a “gendered” or traditional arrangement could never be free and fair? I have explained why I doubt that. A slightly different reason Okin gives several times is that traditional gender roles provide “far the best kind of environment in which children can learn . . . to develop the sense justicen” (55). But that obviously depends on whether traditional gender roles are always unjust. If they can be free and fair, then they can be a fine model for children.

**PART II: SEX**

Sex is a perennial social problem. Sexual desires may be greatly shaped by social conventions and circumstances, but that does not mean that they readily conform to any intentionally imposed social standards. Although success has been mixed, prostitution, homosexuality, adultery, promiscuity, premarital sex, pornography, and masturbation have been relatively resistant to social efforts to eradicate them. Are there good reasons for socially encouraging some forms of sexual activity and expression, and discouraging others? Are the reasons ever sufficient to justify putting these standards into law?

Part II groups together several essays that bear on legal regulation of sexual activity. Rosenblum and Macedo discuss how the problem of regulating continuing sexual relationships looks from liberal, democratic, and communitarian points of view. Rosenblum uses the case of polygamy to test theories that promote congruence between sexual relationships and political forms. Macedo presses liberalism toward its limits, advocating the use of state prestige and power to encourage valuable forms of sexual life, concentrating on the homosexual case. MacKinnon and Estlund each discuss the constitutional legal issue of how or whether to regulate certain kinds of sexually explicit expressive materials. MacKinnor discusses books by Richard Posner and Edward DeGraeza, arguing that the similarities between the left and right are more telling than their differences when it comes to their complicity with pornography’s subordination of women. Estlund argues that the idea of publication allows us to see why there should be more constitutional difficulty
about regulating a sexually explicit video than there is about regulating a voyeuristic visit to a prostitute.

Rosenblum

Feminist writers have long argued that traditional gender roles within the family are unjust, but that does not always get them in the door politically. Liberal political theory has a strong tendency to protect the internal affairs of families from state interference much as other nonpublic associations are relatively free to arrange their own collective rules and activities. Not everything that takes place in a family home is a family matter, of course. Parents are legally required to see that their children get a state-approved education. Drug use, violence, criminal conspiracy, and many other possible family activities are nevertheless treated as public business. Why aren't all the economic, authority, and work arrangements between the adult partners also public business? It is difficult to think of a justification for excluding these that also justifies making the sexual arrangement a matter of public concern, which is how it is treated in much of the United States today in certain respects—anal and oral sex, polygamy, and other things are prohibited by law even when they are consensual. If those things are not too private for the law to regulate, then why think the state should take no position on whether traditional gender roles in the family are permitted by justice?

One way to press the charge of internal family injustice across the liberal threshold of family privacy is to show that what is going on in there matters for the well-being of the political community as a whole. If some family form were sufficiently popular and destabilizing of social or legal order, or destructive of social justice in the larger community, then even many liberal theorists would think the state is permitted to intervene in certain ways. Rosenblum wonders just where the threshold is.

She considers the case of polygamy. Few Americans object to its legal proscription, yet it is difficult to see how such intolerance can be justified in a liberal framework. In Mormon communities, polygamous marriage was severely patriarchal, but that may be avoidable in other contexts. Rosenblum studies the history of U.S. courts confronting Mormon polygamy and other unorthodox marital arrangements preferred by insular and voluntary communities. On one hand, there is a deep liberal reticence about reaching a legal hand into family or marital choices, except to prevent direct harm to individuals. On the other hand, what goes on there may be of the first importance for politics if it influences the capacities and aspects of character that a successful political order requires. Thus, the state's legitimate interest in a certain measure of congruence between private and public forms of life is sometimes offered as a reason for interference in family and sexual relations. To the liberal privacy approach Rosenblum opposes the “democratic sex” approach, which finds citizen building to favor public intervention in those relations. She uses the tension she finds between liberal family privacy and democratic sex to raise important questions about contemporary feminist (as in Okin) and communitarian appeals to the value of congruence between the moral order within the home and that of the larger political community. Is the democratic sex (or congruence) approach a recipe for shoring up faltering private moral foundations of democratic citizenship, or is it a pretext for asserting some people's preferred ideals of family life through an ill-guarded crack in the liberal political door? Rosenblum does not offer an answer, but raises the question in a compelling form.

How could it be a legitimate reason for state action that certain arrangements of the family are corrosive of the moral fabric of our citizenry? The congruence theorists may answer that it is not just any part of the moral fabric that is threatened, but certain key threads of citizen character that make a just, liberal democracy possible. This can easily look like a truck-sized loophole in contemporary liberalism. It would allow moralism to reach into any area of life so long as it is based on the understanding that a certain kind of (private) life or activity will tend to produce worse (or better) citizens (by publicly acceptable standards of a good citizen). The clause requiring "publicly acceptable standard of a good citizen” would at least be an advantage over more unbridled attempts to put moralism in statesman’s clothing. Still, I cannot help wondering if the face-to-face community of the missionary position has salutary effects on citizen empathy, and whether there might be some ingenious way to discourage other sexual positions through public policy. The argument from character is not easily contained.

That sobering question cannot refute the congruence theorists by itself, of course. What if certain forms of relatively private life do produce citizens without the kind of character a just, liberal democracy requires? Is a citizen who notices this morally bound by liberal principles to stand back? That would be one committed liberal. Most contemporary liberal philosophers would doubt that such a commitment could be required by any adequate theory of the justification of political authority. In the dominant contractualist strand of theory, for example, liberal limits on state power are secondary to the overriding interest every citizen has in maintaining an effective order of political authority. If liberal limits undermine the state’s ability to stave off chaos, then the limits cannot be justified to individuals interested in some measure of security and cooperation. Liberals will either deny that a given device of state intrusion is required to maintain political order or, failing that, become a little less liberal. The latter would not be an abandonment of principle in favor of pragmatism or any such thing. Principle itself requires the modern liberal to prefer viable government to individual privacy if they conflict. (Which do you prefer?)

So the question whether certain forms of family life can undermine the political order is not a question that even most liberals can place outside of legitimate political concern, despite its menacing sound to liberal ears. Nevertheless, many inquiries into whether certain family forms produce better citizens than other forms may be inappropriate as reasons for state action. If the very viability of a stable political order is not at stake, then a liberal will balance the prospect of producing better citizens against the threat to an individual’s scope to make many important decisions about the form of her life and family herself, without the pressure of coercively backed, majority-supported inducements to become more what the state would like her to be. (Of course, it is hard to say exactly where this balance lies.) Even if there is no necessary conflict between being an ideal citizen and having profound control over the shape of one’s life, there is a conflict between having that sort of control and being shaped, by state devices, into an ideal citizen.

Unless limitless improvement of citizens, as citizens, is required to avoid the
collapse of political life altogether (and this is a serious question), then a liberal political philosophy will be led, on principle, to prefer something like privacy to most opportunities for making better citizens. Congruence between sexual and family arrangements on the one hand, and the imperatives of politics on the other, is not ordinarily a liberally permissible reason for state action. There is much in private life that is within the grasp of legitimate legal power, however, including physical and psychological protection of certain kinds and enforcement of civil and human rights. These public prerogatives do not leave such things as family forms and marital arrangement untouched, though much scope for choice remains.

Macedo

Stephen Macedo argues that even a robust political liberalism permits the use of law to encourage "the valuable forms of sexuality." The valuable form he concentrates on is marriage. Paying special attention to the case of gay couples, Macedo wonders whether liberalism so prevents us from being judgmental that we cannot even use public power "gently and unobtrusively" (97) to encourage monogamous homosexual marriage. His arguments, however, are meant to extend to encouraging marriage more generally. He argues that evaluative judgments are unavoidable and appropriate. Moreover, he argues that these evaluative judgments may legitimately be put into law.

The question is not whether gay marriage should be legally allowed. Macedo assumes, and I agree, that of course it should. Nor, I think, is the central question in his essay whether some kinds of sexuality are more valuable than others. Assume that some are. We can leave aside the question whether there are reasons other than their value that might justify legal measures designed to encourage or discourage certain forms of sexuality (e.g., economic considerations, population needs, civil rights enforcement, crime reduction). The question is just whether the following is a legitimate reason for encouraging one form of sexuality (such as monogamous marriage) through the law: it is a more valuable form of sexuality.

A legal measure might either legally require the preferred form, or prohibit it, or provide moderate incentives to adopt it. Macedo is not defending legal requirements or prohibitions here, only other incentives provided by law: and he plainly thinks this makes all the difference in a liberal framework. Liberals have traditionally argued especially against the legitimacy of legally prohibiting behavior that harms no one else. Such arguments do not yet show anything wrong with more indirect legal measures to influence such behavior. Consider, for example, tax breaks for married individuals. They do not legally proscribe the harmless personal choice of staying single. Perhaps, then, no liberal should object to these measures, whatever the reason behind them.

Notice, however, that a tax break is just a tax differential. You pay more if you are not married than if you are married; other things equal. And you are legally required to pay under threat of jail and/or legally imposed fines. The state requires that you either get married, or be legally forced to pay higher taxes than married people. If you are unmarried, you might well ask what justifies the use of coercive state power to require you to pay more than your married neighbor. Could this tax differential be justified by the superiority of married life?

Perhaps Macedo has in mind legal measures to provide incentives in a manner even more "gently and unobtrusively" than through tax incentives. Consider a public education campaign with the slogan, "Get married; it's good for you." I turn to the role of this kind of value judgment in law shortly, but first let us look for the coercion this still involves. On one hand, no one is legally coerced to get married by this campaign. On the other hand, every tax payer is legally required to pay her share of the cost of this campaign, even someone who does not believe marriage would be good for her, given her circumstances and options. What is the point of this campaign? Surely, a slogan or a ten-second ad will not convince anyone that marriage is good for them. The point of such a campaign would be publicly to express the government's official desire for more people to marry, and to stimulate and endorse more effective persuasive activity by citizens (e.g., your mother, your neighbors, the Republican party) who already believe this. Even without deciding whether or not such a campaign could be justified, there are at least two things about it that call for liberal scrutiny. First, the taxation to support this family values campaign is coercive, as is all taxation. Second, the social pressure that is the goal of such a campaign is mobilized against those who make the harmless personal choice to stay single. I repeat that neither of these is meant to show that the campaign could not be justified, nor have I said that it could.

Consider now the reason for the legal measures encouraging marriage: that married life is more valuable than unmarried life. This might mean marriage is valuable for the married person, or it might mean marriage is valuable for the larger community, or it might mean some more objective kind of value, or some combination. Macedo's "argument for marriage claims that more stable commitments promote public as well as private welfare" (94). If the value claim is about what is good for the person, then it is unclear why one citizen (or many) should be able to impose this judgment on another (unless there is some pressing public impact at stake). The point is not whether someone would have to be unreasonable to reject, say, a scientific finding that marriage improves life expectancy. The point is rather that, unless life expectancy is at the center of some urgent problem that fundamentally threatens the political order, it should be up to the individual, in light of whatever advice or evidence she chooses to credit, whether to choose (as she might conceive it) a longer expected life with less flexibility and independence, or a shorter expected life of a more independent kind. To say it should be up to her is not to say that there is no correct or incorrect choice in the circumstances. It is rather a point about the proper and improper uses of our political power over other people. It is hard to see how I could have the authority to employ coercive public power I share equally with others, to legally institute the views of some of us about what is good for others. If we put the problem this way, it is no answer for Macedo to point out that the coercion employed does not actually coerce anyone to get married.

If the claim about the value of married life is about what is good for the polity in someone's living a certain way, then as I said above (in discussing Rosenblum), we must trade this value for the polity against the loss of individual scope in which to
shape and live one's own life in accordance with one's own reasonable convictions. The result of this balancing act is that just any claim that some way of living, such as marriage, would make people better for the community is not a liberally permissible reason for legal measures to encourage it. Such considerations are put out of bounds by the interest people have in retaining that scope for their own and others' free conscience choices, so long as their having this scope is compatible with a stable and mutually beneficial political order. Where that very order is in question, the liberally protected space finds its boundary.

Macedo's work, here and elsewhere, shows a deeper appreciation of the arguments for contemporary liberalism than do most communitarian critics. And there is much to learn by asking, with Macedo (as I understand him), how much communitarian thought could be accommodated without leaving the liberal paradigm. And it does not matter at all whether he should be counted as a liberal or as a communitarian, or as both at once. What should be understood, though, is that, for better or worse, Macedo's view is really not very liberal as these things go. In his other writings, Macedo associates himself with the "political liberalism" of John Rawls, who insists that, at least in the most important matters, only considerations that are acceptable to all reasonable and conscientious citizens count as reasons for coercive state action. Here, however, Macedo's reasons for state action are simply the value of the form of life the action would encourage, just the sort of reasoning political liberalism seems to repudiate. Perhaps Macedo subscribes to political liberalism only insofar as it would block partisan reasons for legally requiring marriage, for example. However, he gives no reason for blocking such reasons only there, while endorsing their use to support indirect legal (but still coercive) measures to institute controversial value judgments through, say, tax incentives.

Perhaps Macedo believes that political liberalism should only constrain the reasons we can use in the limited range of questions that Rawls himself concentrates on: what Rawls calls constitutional essentials and matters of basic justice. Rawls neither endorses nor (more importantly) argues for such a limitation. Even if political liberalism's strictures applied only in that limited way, however, it would still need to be shown that the matter at hand—legal encouragement of marriage solely on the ground that it is a more valuable way of life—is neither a threat to constitutional essentials (such as freedom of thought or association) or to basic justice.

Perhaps Macedo believes that the conceptions of meaning and value that he would use in legal efforts to make people better could not be rejected by any reasonable citizen. Formally, that is the political liberal's tracemacy, though substantively, one is less liberal in this framework as one counts fewer possible positions reasonable. (I do not suggest the absurd idea that the most adequate view is the most liberal.) Of course, it may be that liberalism is indefensible just where it departs from Macedo. However, there is no new argument in Macedo against the more neutral, more liberal, liberalism I have sketched, and which he apparently rejects.

**MacKinnon**

Left-leaning critics of Catharine MacKinnon's efforts to establish legal mechanisms for regulating pornography often try to discredit her by showing that her efforts are supported by many on the right. But if MacKinnon's guilt is established by this kind of association, then these critics can themselves be assumed to be in bed with the many right-wing critics of MacKinnon's work. If she is "in bed" with the right, and her left-wing critics are also in bed with the right, it follows that they are in bed with MacKinnon, something that will certainly be denied on all sides. In this critique of Posner and De Grazia, MacKinnon turns the bedfellows argument against her critics and modifies it, arguing that her leftist and rightist critics are not even relevantly different from each other.

If there is a question for those on the left about the political valence of MacKinnon's writings and legal work, it should be whether her work tends to promote the very aims of conservatives that are leftists' reasons for opposing conservatives. Even this is a bit silly since what really matters is how good the reasons are, not whether they count as leftist or rightist. However, it is sometimes a clue to the flaws in a position to see that it is characteristic of a larger point of view that one has reasons for opposing. So what is supposed to be conservative about MacKinnon's antipornography project?

Some seem to think that her project is conservative by virtue of its willingness to regulate speech through law. One answer to this is that almost any remotely sensible person, including leftists, would advocate regulating lots of speech (even in viewpoint-discriminatory ways): consider perjury, criminal conspiracy, defamation, false advertising. This is correct as far as it goes, but it does not settle the issue. In American history, at least, there is a decent case for seeing the proregulation forces as largely conservative, the two major battlefields being sexually explicit material and radical political dissent. In both cases, it has been mainly the defenders of orthodoxy and status quo who have sought to ban and punish speech. If so, this does not prove that contemporary proregulation efforts are conservative, but it raises a legitimate question. For several reasons, the answer to that legitimate question, however, is that MacKinnon's work is not conservative.

Pornography is argued by some to have important value as social and political dissent. If it does, that is certainly a strong reason against regulating it, though it would not be conclusive if pornography nevertheless harms women in a sufficiently direct way. Is there an antidissent dimension to the motives of the antipornography movement today? Here is where we must know our left from our right. Many religiously motivated conservative opponents of pornography plainly fear the challenge that much of pornography represents to the orthodox and highly gender-regimented conception of marriage and family. Virtually all pornography implies a value for sexual activity outside of long-term emotional commitments and apart from procreation. Insofar as this challenges traditional ideas of marriage, it challenges one of the strongholds of gender hierarchy in the society at large. The right certainly opposes pornography partly for this reason. MacKinnon clearly does not oppose pornography for this reason; no one is a more energetic opponent of the existing power relations between the genders. She would, however, deny that pornography has much power as dissent: it might not celebrate exactly what the right wants as compared with the left, but it celebrates precisely what men want, she argues, whatever the consequences might be for women, and that is entirely orthodox. Whoever is correct about the dissident power of pornography, feminist critics of pornography are seek-
ing neither to protect the status quo nor to return to some previous and preferable arrangement between the sexes. They are not conservative or reactionary in the way that opponents of social and political dissent have often been.

The second way in which regulation of speech (beyond the patently necessary regulations) has usually been conservative is in efforts to constrain the forms of sexual life, activity, and expression that are socially accepted. Existing obscenity laws are a testament to the political power of this socially conservative point of view. There is often a connection between the antidissident and the anti-sexual freedom sentiments, but they are also separable in principle. Feminist opponents of pornography are not antidissident, but are they, in a word, antisex?

MacKinnon addresses this charge here, though in a puzzling and ineffective way. She considers the charge, which can be found coming from both the left and the right, that she has argued that all sex is rape. If that were true, then, since she deprecates rape she would plainly be antisex. While it might not be clear from her piece in this volume, the charges by Playboy magazine, Rush Limbaugh, and others that MacKinnon thinks all sex is rape are not made from whole cloth. Since many readers are likely to think Playboy and Limbaugh are pretty handy with whole cloth—a likelihood not lost on MacKinnon when she concentrates on those two sources—it is worth looking more closely at the basis for the charge. MacKinnon calls it a "libel" (103) and a "lie, rather than a mistake, on the assumption that they have both read my work, which may be giving them too much" (102). She suggests that it is a part of "an escalating litany of increasingly defamatory names" (102), and another case of someone being "slandered" for simply asking "whether sex equality has been achieved" (102).

The question whether the accusers might actually believe their charge (in which case it would not be a lie), and if so, what basis, is made more interesting by MacKinnon’s second footnote. In addition to Playboy and Limbaugh, the charge that MacKinnon thinks all sex is rape has also come from Wendy Kaminer and Susan Estrich, legal scholars widely regarded as feminists. Of course, the charge may still be false, but for the moment, what about MacKinnon’s charge that it must be a lie in the mouth of anyone who has read her works? Even after noting that the same charge has come from feminists Kaminer and Estrich, MacKinnon writes, “The line between those who wield this libel and those against whom it is wielded cuts across left and right. It divides those who want to maintain and advance under male supremacy from those who want to end it. It draws a line of sexual politics” (103). If Playboy and Limbaugh could not really believe the charge if they had read her work, then surely Kaminer and Estrich could not believe it. If you start with the premise that Playboy and Limbaugh are lying, then you are led to the conclusion (and MacKinnon apparently embraces it) that these noted feminists are lying, too. On the other hand, if Kaminer and Estrich could really think that MacKinnon argues that all sex is rape (and it seems clear to me that they could), then surely Playboy and Limbaugh could also think so. Then there would be no reason to suppose any of them were lying.

Rather than trying, on the basis of her own text, to explain how someone might have come to this interpretation and explaining how the interpretation does not hold up, MacKinnon writes: “It is, of course difficult to provide citations to pages on which something is not said (145, n. 2).” While “[women] do say [that] sexuality occurs in a context of gender inequality” (102), how could that possibly be mistaken for the view that all sex is rape? It is easy, as I hope to show, to find parts of MacKinnon’s work that many honest readers believe amount to the argument that all sex is rape. If this, so this disposers of MacKinnon’s charge that those critics are lying. It still leaves the question whether their interpretation is correct.

MacKinnon, like many other feminists, will sensibly allow a distinction between rape and what is legally regarded as rape (since the law might get it wrong). How does MacKinnon understand the category of rape outside of its fallible legal definition? “Politically,” she writes in Feminism Unmodified, “I call it rape whenever a woman has sex and feels violated.” Now consider this political conception of rape along with MacKinnon’s view: “What is understood as violation, unconventional penetration and intercourse, defines the paradigmatic sexual encounter.” And, “the degradation and violation and domination of women . . . defines the social meaning of female sexuality in societies of sex inequality.”

One can plausibly infer from these views that ordinary sex is, and is understood as, violation. When women experience sex as violating, that is rape (though not legally); therefore, ordinary sex is rape. There are at least two ways in which “all sex is rape,” understood in one natural way, is too simple an interpretation. First, her critique of the “paradigmatic sexual encounter” may be limited to heterosexual intercourse and perhaps not to every case of that, even in an unequal society. Where she extends the critique to female sexuality as a whole under gender inequality, it is apparently a consequence of intercourse’s being paradigmatic of that sexuality. Second, her view is explicitly about sex in conditions of sex inequality, and so not, in a stronger sense, about all sex.

Of course, the critics who accuse her of arguing that all sex is rape may well understand all this. First, “sex” is often used to refer to intercourse, and it is usually understood to mean intercourse unless specifically qualified (because, as MacKinnon emphasizes, intercourse is paradigmatic sex in present conditions). There is usually no ambiguity when it is said simply that two people had sex. Furthermore, it is absolutely clear that none of the critics in question were suggesting that MacKinnon believes that even nonintercourse sex acts are rape. No one would understand the proposition that all sex is rape, by itself, in that way. Second, since “all sex” does not unambiguously mean sex under all possible social conditions, when she is charged with holding that all sex (intercourse) is rape, she has not necessarily been charged with holding that intercourse would be rape even under different social conditions. “All sex,” if limited to intercourse, is literally unclear as between all sex in present conditions, all sex past and present; all actual sex, past, present, and future; and all possible sex. It is certainly possible that the view attributed to MacKinnon under the phrase “all sex is rape” is the view that all intercourse under present conditions is rape. And that is pretty close to her view. (It is somewhat unclear in her work whether homosexual intercourse is exempted from this critique.)

While the resulting view does not include all sex, in its strongest possible sense, as rape, the view is radical enough to suggest an explanation for her otherwise odd refusal in this essay to try to clear up just what she does think. After persuasively arguing that the all-sex-is-rape view is pinned to her because it would so effectively
discredit her views, it would hardly save her reputation to point out that her actual view is only that in our society ordinary heterosexual intercourse is rape.\textsuperscript{17} It is surprising (and fortunate) that her actual views have not made her more of an intellectual outcast than they have. And it is no wonder that sometimes, as in this piece, she soft-pedals those views. It is serious soft-pedaling to suggest that there is no more truth to the all-sex-is-rape attribution than this:

For allegedly saying this, or what is said to amount to this, women are vilified, shunned, unemployed, unpublished, scorned, trivialized, stigmatized, marginalized, threatened, ignored, personally hated by people we have never met, and unread. All this for what we do say: sexuality occurs in a context of gender inequality, a fact no one who has tried to rebut. (102)

Is MacKinnon's critique of ordinary heterosexual intercourse under gender inequality antisex? It is not antisex any more than a Marxist critique of labor as it exists under capitalism is antilabor.\textsuperscript{18} It is not just another in a long line of efforts to suppress sexuality through censorship. It is not antidissent, it is not antisex, it seeks neither to preserve the status quo nor to return to a better time. I conclude that there is nothing conservative (in the present sense) about MacKinnon's critique of existing sexual relations nor in her motive, which is based on that critique, for legally regulating pornography. The critique of existing sexual relations is certainly discomfiting. Even if it is accurate, however, there is reason for wondering whether regulation of pornography is an effective means of reform and whether it is likely, in its effects, to be liberating for women or not.

\textbf{Estlund}

Catharine MacKinnon is one of several writers who argue that pornography is sex. She writes, "Pornography is masturbatory material. It is used as sex. It therefore is sex."\textsuperscript{19} Sex itself is not generally protected by the First Amendment, so why should pornography be? MacKinnon asks us to see the viewer of pornographic pictures as in a sexual relationship with the model in those pictures. The women depicted really do the things that are documented in pictorial pornography. Men "experience this being done by watching it being done. What is real here is . . . that the materials . . . are a part of a sex act."\textsuperscript{20}

This raises a good question: why should it make a legal difference whether the model and the man are in the same room with nothing but space between them, in different rooms separated by a glass partition,\textsuperscript{21} far away with a real-time video connection,\textsuperscript{22} or with the time-shifted video connection of a videotape?\textsuperscript{23} If a visit to a prostitute for voyeuristic sexual purposes is not (or should not be) protected speech, why should we think a videotape of the same performance, and used for the same purposes, is (or should be) protected? Frederick Schauer posed precisely this question in 1979,\textsuperscript{24} and its power has been neglected by critics. David Estlund\textsuperscript{25} explains the importance of this argument and the inadequacy of certain answers to it. He also proposes a constitutional argument that would support a difference in law between the voyeuristic visit, on the one hand, and the pornographic video, on the other. (As the author of the article, I shall limit myself to brief introductory comments here.)

The proposal for distinguishing the visit from the video involves interpreting the freedom of the press in the First Amendment as extending coverage to all published material regardless of whether it is speech. The video is typically published, and the visit is typically not. Material is published if it is (1) publishable in principle, which requires that it be expressive material, and (2) widely enough disseminated. Material that is covered may not all be protected since there may be narrow grounds for regulation of even covered material. But apart from those narrow exceptions, if any, published material ought to be protected as if it were speech, whether it is or not. There are historical and textual arguments for this reading of the press clause, as well as another rationale for such a protection: if one of the main reasons speech is protected is that there is a significant amount of speech that bears on matters of public or political concern, then that is exactly as good a reason for equally protecting the class of material that is intentionally published whether or not it is speech.

An interesting dichotomy between material that is tailored to the individual viewer and material that is repeated or disseminated in such a way that it is not tailored is also a source of difficulty for this analysis. Sexual uses of electronic technologies, for example, provide a number of borderline cases. Consider, for example, the service available on the Internet in which a paying customer at his computer directs a video camera at a remote location to "capture" desired images of a nude model in real time.\textsuperscript{26} Estlund's analysis can treat a given episode as too tailored to count as a publication. But suppose the pictures that result from this process are available not just to the person directing the camera but also to anyone who chooses to link into this service at that time. Any distinction in law must face borderline cases, but sometimes they are so numerous and so central to the aims of the theory that the theory cannot survive them. These particular examples will be problems for lots of theories, of course, since they are bound not to fit neatly into our existing categories of commercial and private sexual activity and expression. Sexual use of computer technology is just one way in which our current concept of sexuality is changing, and law and legal theory are struggling to keep up.

\textbf{Notes}

1. I take this second question from the title of a paper given by Naomi Schanman at University of Wisconsin, Philosophy Department Colloquium, circa 1985. She takes it from a story in which Tonto queries the Lone Ranger's suggestion, at the sight of some charging Native Americans, that "we're in trouble."


3. Nussbaum never shows sympathy for the kind of social constructionism associated with Michel Foucault, in which interperson power is the central cause. On Nussbaum's view of the social construction of emotions, the central point is the cognitive dimension of emotions, which allows them to be culturally produced through teaching and learning.

4. Culture is relevant because insular marriage and reproductive practices are part of the cause.

5. Justice, Gender, and the Family, p. 177.

6. Posner discusses the evidence on this question, and cites some literature, in Sex and Reason (Harvard University Press, 1992), pp. 303-305.
Part III

PREFERENCE