Commentaries

Not A Moral Issue*

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Pornosec, the subsection of the Fiction Department which turned out cheap pornography for distribution among the proles . . . nicknamed Muck House by the people who worked in it . . . produce[d] booklets in sealed packets with titles like Spanking Stories *or* One Night in a Girls' School, *to be bought furtively by proletarian youths who were under the impression that they were buying something illegal.****

A critique of pornography[1] is to feminism what its defense is to male supremacy. Central to the institutionalization of male dominance, por-

* Prior versions of this commentary were given as speeches to the Morality Colloquium, University of Minnesota, February 17, 1983; Women and the Law Conference, panel on pornography, April 4, 1983; and Conference on Media Violence and Pornography, Ontario Institute for Studies in Education, February 3-5, 1984. The title of this article is a play on the title of the anti-pornography film by the Canadian Film Board, *Not a Love Story* (1983).

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*** G. ORWELL, 1984, at 108-09 (1949).

1. This text as a whole is intended to communicate what I mean by pornography. The key work on the subject is A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981). No definition can convey the meaning of a word as well as its use in context can. However what Andrea Dworkin and I mean by pornography is rather well captured in our legal definition of the term. "Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual." The ordinance also defines "the use of men, children or transsexuals in the place of women" as pornography. Pornography, thus defined, is discrimination on the basis of sex and, as such, a civil rights violation. This definition is a slightly modified version of the one passed by the Minneapolis City Council on December 30, 1983. Minneapolis, Minn., Ordinance amending tit. 7, chs. 139 & 141, Minneapolis Code of Ordinances Relating to Civil Rights. The ordinance was vetoed by the Mayor, reintroduced, passed again, and vetoed again in 1984.

Many of the ideas in this essay were developed and refined in close collaboration with Andrea Dworkin. It is consequently difficult at times to distinguish the contribution of each of us to a body of work that—through shared teaching, writing, speaking, organizing, and political action on every level—has been created together. I have tried to credit specific con-

nography cannot be reformed or suppressed or banned. It can only be changed. The legal doctrine of obscenity, the state's closest approximation to addressing the pornography question, has made the First Amendment[2] into a barrier to this process. This is partly because the pornographers' lawyers have persuasively presented First Amendment absolutism,[3] their advocacy position, as a legal fact, which it never has been. But they have gotten away with this (to the extent they have) in part because the abstractness of obscenity as a concept, situated within an equally abstract approach to freedom of speech embodied in First Amendment doctrine, has made the indistinguishability of the pornographers' speech from everyone else's speech, their freedom from our freedom, appear credible, appealing, necessary, nearly inevitable, *principled*.[4] To expose the absence of a critique of gender[5] in this area of law is to expose both the enforced silence of women and the limits of liberalism.

This brief preliminary commentary focuses on the obscenity standard in order to explore some of the larger implications of a feminist critique of pornography for First Amendment theory. This is the argument. Obscenity law is concerned with morality, specifically morals from the

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tributions that I am aware are distinctly hers. This text is mine; she does not necessarily agree with everything in it.

2. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

3. Justice Black, at times joined by Justice Douglas, took the position that the Bill of Rights, including the First Amendment, was "absolute." Justice Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962). For a discussion, see Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428 (1967). For one exchange in the controversy surrounding the "absolute" approach to the First Amendment, as opposed to the "balancing" approach, see, *e.g.*, Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964). In the pornography context, see, *e.g.*, Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., joined by Black, J., dissenting); Smith v. California, 361 U.S. 147, 155 (1959) (Black, J., concurring); Miller v. California, 413 U.S. 15, 37 (1973) (Douglas, J., dissenting). It is not the purpose of the current article to present a critique of absolutism as such, but rather to identify and criticize some widely and deeply shared implicit beliefs that underlie both the absolutist view and the more mainstream flexible approaches.

4. The history of obscenity law can be read as a failed attempt to make this separation, with the failure becoming ever more apparent from the *Redrup* decision forward. Redrup v. New York, 386 U.S. 767 (1967). For a summary of cases exemplifying such a trend, see the dissent by Justice Brennan, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973).

5. Much has been made of the distinction between sex and gender. Sex is thought the more biological, gender the more social. The relation of sexuality to each varies. *See, e.g.*, R. STOLLER, SEX AND GENDER 9-10 (1974). Since I think that the importance of biology to the condition of women is the social meaning attributed to it, biology *is* its social meaning for purposes of analyzing the inequality of the sexes, a political condition. I therefore tend to use sex and gender relatively interchangeably.

male point of view, meaning the standpoint of male dominance. The feminist critique of pornography is a politics, specifically politics from women's point of view, meaning the standpoint of the subordination of women to men.[6] Morality here means good and evil; politics means power and powerlessness. Obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete. The two concepts represent two entirely different things. Nudity, explicitness, excess of candor, arousal or excitement, prurience, unnaturalness—these qualities bother obscenity law when sex is depicted or portrayed. Abortion or birth control information or treatments for "restoring sexual virility" (whose, do you suppose?) have also been included.[7] Sex forced on real women so that it can be sold at a profit to be forced on other real women; women's bodies trussed and maimed and raped and made into things to be hurt and obtained and accessed and this presented as the nature of women; the coercion that is visible and the coercion that has become invisible—this and more bothers feminists about pornography. Obscenity as such probably does little harm;[8] por-

6. The sense in which I mean women's perspective to differ from men's is like that of Virginia Woolf's reference to "the difference of view, the difference of standard" in her V. WOOLF, *George Elliot*, in 1 COLLECTED ESSAYS 204 (1966). Neither of us uses the notion of a gender difference to refer to something biological or natural or transcendental or existential. Perspective parallels standards because the social experience of gender is distinctive. *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 107-141 (1979), and articles referenced at note 11, *infra*; V. WOOLF, THREE GUINEAS (1938); *see also* A. DWORKIN, *The Root Cause*, in OUR BLOOD: ESSAYS AND DISCOURSES ON SEXUAL POLITICS 96 (1976). I do not refer to the gender difference here descriptively, leaving its roots and implications unspecified, so they could be biological, existential, transcendental, in any sense inherent, or social but necessary. I mean "point of view" as a view, hence a standard, that is imposed on women by force of sex inequality, which is a political condition. "Male" is an adjective here, a social and political concept, not a biological attribute; it is a status socially conferred upon a person because of a condition of birth. As I use it, it has nothing whatever to do with inherency, preexistence, nature, inevitability, or body as such. Because it is in the interest of men to be male in the system we live under (male being powerful as well as human), they seldom question its rewards or even see it as a status at all.

7. Criminal Code, CAN. REV. STAT. ch. c-34, § 159(2)(c) and (d) (1970). People v. Sanger, 222 N.Y. 192, 118 N.E. 637 (1918).

8. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970) (majority report). The accuracy of the Commission's findings is called into question by:

(a) widespread criticism of the Commission's methodology from a variety of perspectives, e.g., SUTHERLAND, OBSCENITY—THE COURT, THE CONGRESS AND THE PRESIDENT'S COMMISSION (1975); Donnerstein, *Pornography Commission Revisited: Aggression—Erotica and Violence Against Women*, 39 J. OF PERSONALITY & SOC. PSYCHOLOGY 269 (1980); Garry, *Pornography and Respect for Women*, SOC. THEORY & PRACTICE 4 (Summer 1978); Diamond, *Pornography and Repression*, 5 SIGNS: J. OF WOMEN IN CULTURE & SOC. 686 (1980); Cline, *Another View: Pornography Affects the State of the Art*, in WHERE DO YOU DRAW THE LINE? (V.B. Cline ed. 1974); Bart & Jozsa, *Dirty Books, Dirty Films, and Dirty Data*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 204 (L. Lederer ed. 1982);

(b) the Commission's tendency to minimize the significance of its own findings, e.g., those by Mosher on the differential effects of exposure by gender;

(c) the design of the Commission's research. The Commission did not focus questions about gender, did its best to eliminate "violence" from its materials (so as not to overlap with

nography causes attitudes and behaviors of violence and discrimination which define the treatment and status of half of the population.[9] To make the legal and philosophical consequences of this distinction clear, I will describe the feminist critique of pornography (I); then criticize the law of obscenity in terms of it (II); then discuss the criticism that pornography "dehumanizes" women (III) to distinguish the male morality of liberalism and obscenity law from a feminist political critique of pornography.[10]

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the Violence Commission), and propounded unscientific theories such as Puritan guilt to explain women's negative responses to the materials.

It should further be noted that it is unclear that scientific causality is what legally validates even an obscenity regulation:

> But, it is argued, there is no scientific data which conclusively demonstrate that exposure to obscene materials adversely affects men and women or their society. It is [urged] that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. . . Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973) (Burger, J., for the majority); *see also* Roth v. U.S., 354 U.S. 476, 501 (1956).

9. Some of the harm of pornography to women, as defined *supra* at note 1 and as discussed in this article, has been documented in empirical studies. The findings of recent studies are that exposure to pornography increases normal men's willingness to aggress against women under laboratory conditions; makes both women and men substantially less able to perceive accounts of rape as accounts of rape; makes normal men more closely resemble convicted rapists psychologically; increases attitudinal measures that are known to correlate with rape, such as hostility toward women, propensity to rape, condoning rape, and predicting that one would rape or force sex on a woman if one knew one would not get caught; and produces other attitude changes in men such as increasing the extent of their trivialization, dehumanization, and objectification of women. Russell, *Pornography and Violence: What Does the New Research Say?*, in TAKE BACK THE NIGHT, *supra* note 8, at 216; N. MALAMUTH & E. DONNERSTEIN, PORNOGRAPHY AND SEXUAL AGGRESSION (1984); Z. VILLMAN, THE CONNECTION BETWEEN SEX AND AGGRESSION (1984): J.V.P. Check, N. Malamuth & R. Stille, Hostility to Women Scale (1983) (unpublished manuscript); Donnerstein, *Pornography: Its Effects on Violence Against Women*, in N. MALAMUTH & E. DONNERSTEIN, *supra*; Malamuth and Check, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment*, 15 J. OF RESEARCH IN PERSONALITY 436 (1981); Malamuth, *Rape Proclivities Among Males*, 37 J. OF SOCIAL ISSUES 138 (1981); Malamuth and Spinner, *A Longitudinal Content Analysis of Sexual Violence in the Best-Selling Erotica Magazines*, 16 J. OF SEX RESEARCH 226 (1980); Mosher, *Sex Callousness Towards Women*, in 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 313 (1971); Zillman & Bryant, *Effects of Massive Exposure to Pornography*, in N. MALAMUTH & E. DONNERSTEIN, *supra*.

10. The following are illustrative, not exhaustive, of the body of work I term the "feminist critique of pornography." A. DWORKIN, *supra* note 1; Leidholdt, *Where Pornography Meets Fascism*, WIN 18 (March 15, 1983); Steiner, *Night Words*, in THE CASE AGAINST PORNOGRAPHY 227 (D. Holbrook ed. 1973); S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 394 (1975); R. Morgan, *Pornography and Rape: Theory and Practice*, in GOING TOO FAR 165 (R. Morgan ed. 1977); K. BARRY, FEMALE SEXUAL SLAVERY (1979); AGAINST SADO-MASOCHISM: A RADICAL FEMINIST ANALYSIS (R.R. Linden, D.R. Pagano, D.E.H. Russell & S.L. Star eds. 1982), especially articles by Ti-Grace Atkinson, Judy Butler, Andrea Dworkin, Alice Walker, John Stoltenberg, Audre Lorde, and Susan Leigh Star; Walker, *Coming Apart*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 8, and other articles in that

This inquiry is part of a larger project that attempts to account for gender inequality in the socially constructed relationship between power—the political—on the one hand and knowledge of truth and reality—the epistemological—on the other.[11] For example, the candid description Justice Stewart once offered of his obscenity standard, "I know it when I see it,"[12] becomes even more revealing than it is usually understood to be, if taken as a statement that connects epistemology with power. If I ask, from the point of view of women's experience, does he know what I know when I see what I see, I find that I doubt it, given what's on the newsstands. How does his point of view keep what is there, there? To liberal critics, his admission exposed the obscenity standard's relativity, its partiality, its insufficient abstractness. Not to be emptily universal, to leave your concreteness showing, is a sin among men. Their problem with Justice Stewart's formulation is that it implies that anything, capriciously, could be suppressed. They are only right by half. My problem is more the other half: the meaning of what his view permits, which, as it turns out, is anything but capricious. In fact, it is entirely systematic and determinate. To me, his statement is precisely descriptively accurate; its candor is why it has drawn so much criticism.[13] Justice Stewart got in so much trouble because he said out loud what is actually done all the time; in so doing, he both *did it* and gave it the stature of doctrine, even if only dictum. That is, the obscenity standard—in this it is not unique—*is* built on what the male standpoint sees. My point will be: *so is pornography.* In this way, the law of obscenity reproduces the pornographic point of view on women on the level of Constitutional jurisprudence.

I

Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspec-

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volume with the exception of the legal ones; G. VIDAL, *Women's Liberation Meets the Miller-Mailer-Manson Man,* HOMAGE TO DANIEL SHAYS: COLLECTED ESSAYS 1952-1972, 389 (1969); L. LOVELACE, ORDEAL (1980); K. MILLETT, SEXUAL POLITICS (1969); F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN (1980). *Violent Pornography: Degradation of Women versus Right of Free Speech,* 8 N.Y.U. REV. L. SOC. CHANGE 181 (1978-79) contains both feminist and non-feminist arguments.

11. For more extensive discussions of this subject, see my prior work, especially *Feminism, Marxism, Method and the State: An Agenda for Theory,* 7 SIGNS: J. OF WOMEN IN CULTURE & SOC. 515 (1982) [hereinafter cited as SIGNS I]; *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence,* 8 SIGNS: J. OF WOMEN IN CULTURE & SOC. 635 (1983) [hereinafter cited as SIGNS II].

12. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

13. Justice Stewart has been said to have complained that this single line was more quoted and remembered than anything else he ever said.

tive, pornography is not harmless fantasy or a corrupt and confused misrepresentation of an otherwise natural and healthy sexuality. With the rape and prostitution in which it participates, pornography institutionalizes the sexuality of male supremacy, which fuses the erotization of dominance and submission with the social construction of male and female.[14] Gender is sexual. Pornography constitutes 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.

In pornography, women desire dispossession and cruelty. Men, permitted to put words (and other things) in women's mouths, create scenes in which women desperately want to be bound, battered, tortured, humiliated, and killed. Or, 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 them, either on screen or by camera or pen, on behalf of the viewer.

One can be for or against this pornography without getting beyond liberalism. The critical yet formally liberal view of Susan Griffin, for example, conceptualizes eroticism as natural and healthy but corrupted and confused by "the pornographic mind."[15] Pornography distorts Eros, which preexists and persists, despite male culture's pornographic "revenge" upon it. Eros is, unaccountably, *still there.* Pornography mistakes it, mis-images it, mis-represents it. There is no critique of *reality* here, only objections to how it is seen; no critique of that reality that pornography imposes on women's real lives, those lives that are so seamlessly *consistent* with the pornography that pornography can be credibly defended by saying it is only a mirror of reality.

Contrast this view with the feminist analysis of Andrea Dworkin, in which sexuality itself is a social construct, gendered to the ground. Male dominance here is not an artificial overlay upon an underlying inalterable substratum of uncorrupted essential sexual being. Sexuality free of male dominance will require *change*, not reconceptualization, transcendence or excavation. Pornography is not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, projection, expression, fantasy, representation or symbol either. It is sexual

14. *See*, SIGNS I, *supra* note 11.

15. S. GRIFFIN, PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE 2-4, 251-65 (1981).

reality. Dworkin's *Pornography: Men Possessing Women*[16] presents a sexual theory of gender inequality of which pornography is a core constitutive practice. The way pornography produces its meaning constructs and defines men and women as such. Gender is what gender means.[17] It has no basis in anything other than the social reality its hegemony constructs. The process that gives sexuality its male supremacist meaning is therefore the process through which gender inequality becomes socially real.

In this analysis, the liberal defense of pornography as human sexual liberation, as de-repression—whether by feminists, lawyers, or neo-Freudians[18]—is a defense not only of force and sexual terrorism, but of the subordination of women. Sexual liberation in the liberal sense frees male sexual aggression in the feminist sense. What in the liberal view looks like love and romance looks a lot 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: asking to be acted upon—is victimization. Play conforms to scripted roles, fantasy expresses ideology—is not exempt from it—and admiration of natural physical beauty becomes objectification.

The experience of the (overwhelmingly) male audiences who consume pornography[19] is therefore not fantasy or simulation or catharsis[20] but

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16. A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN, *supra* note 1.

17. *See also*, A. DWORKIN, *The Root Cause*, in OUR BLOOD, *supra* note 6.

18. The position that pornography is sex—that whatever you think of sex you think of pornography—underlies nearly every treatment of the subject. In particular, nearly every non-feminist treatment proceeds on the implicit or explicit assumption, argument, criticism, or suspicion that pornography is sexually liberating in some way, a position unifying an otherwise diverse literature. *See, e.g.*, D.H. LAWRENCE, *Pornography and Obscenity*, in SEX, LITERATURE AND CENSORSHIP 64 (1959); Hefner, *The Playboy Philosophy*, PLAYBOY, Dec. 1962, at 73, and PLAYBOY Feb. 1963, at 43; HENRY MILLER, *Obscenity and the Law of Reflection*, in REMEMBER TO REMEMBER 274, 286 (1947); English, *The Politics of Porn: Can Feminists Walk the Line?*, MOTHER JONES, April 1980, at 20; Elshtain, *The Victim Syndrome: A Troubling Turn in Feminism*, THE PROGRESSIVE, June 1982, at 42. To choose an example at random:

> In opposition to the Victorian view that narrowly defines proper sexual function in a rigid way that is analogous to ideas of excremental regularity and moderation, pornography builds a model of plastic variety and joyful excess in sexuality. In opposition to the sorrowing Catholic dismissal of sexuality as an unfortunate and spiritually superficial concomitant of propagation, pornography affords the alternative idea of the independent status of sexuality as a profound and shattering ecstasy.

Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 81 (1974) (footnotes omitted). *See also* F. Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 616 (1979).

19. Spending time around adult bookstores, attending pornographic movies and talking with pornographers (who, like all smart pimps, do some form of market research), as well as analyzing the pornography itself in sex/gender terms, all confirm that pornography is for men. That women may attend or otherwise consume it does not make it any less for men, any more than the observation that mostly men consume pornography means that pornography

sexual reality: the level of reality on which sex itself largely operates. To understand this does not require noticing that pornography models are real women to whom something real is being done,[21] nor does it even require inquiring into the systematic infliction of pornographic sexuality upon women,[22] although it helps. The aesthetic of pornography itself, the *way* it provides what those who consume it want, is itself the evidence. When uncensored explicit—i.e. the most pornographic—pornography tells all, all means what a distanced detached observer would report about who did what to whom. This is the turn-on. Why does observing sex objectively presented cause the male viewer to experience his own sexuality? Because his eroticism is, socially, a watched thing.

If objectivity is the epistemological stance of which objectification is the social process,[23] the way a perceptual posture is embodied as a social form of power, the most sexually potent depictions and descriptions *would* be the most objective blow-by-blow re-presentations. Pornography participates in its audience's eroticism because it creates an accessible sexual object, the possession and consumption of which *is* male sexuality, to be consumed and possessed as which *is* female sexuality. In this sense, sex in life is no less mediated than it is in art. Men *have sex* with their *image* of a woman. Escalating explicitness, "exceeding the bounds of candor,"[24] is the aesthetic of pornography not because the

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does not harm women. *See* Lagelan, *The Political Economy of Pornography*, AEGIS: MAGAZINE ON ENDING VIOLENCE AGAINST WOMEN, Autumn 1981, at 5; Cook, *The X-Rated Economy*, FORBES, Sept. 18, 1978, at 60. Personal observation reveals that women tend to avoid pornography as much as possible—which is not very much, as it turns out.

20. The "fantasy" and "catharsis" hypotheses, together, assert that pornography cathects sexuality on the level of fantasy fulfillment. The work of Donnerstein, particularly, shows that the opposite is true. The more pornography is viewed, the *more* pornography—and the more brutal pornography—is both wanted and required for sexual arousal. What occurs is not catharsis, but desensitization, requiring progressively more potent stimulation. *See* works cited *supra* at note 9; Straus, *Leveling, Civility, and Violence in the Family*, 36 J. OF MARRIAGE & FAMILY 13 (1974).

21. L. LOVELACE, *supra* note 10, provides an account by one coerced pornography model. *See also* Dworkin, *Pornography's "Exquisite Volunteers,"* MS., March 1981, at 65.

22. However, for one such inquiry, see Russell, *supra* note 9, at 228 (random sample of 900 San Francisco households found that 10 percent of women had at least once "been upset by anyone trying to get you to do what they'd seen in pornographic pictures, movies or books.") Obviously, this figure could only include those who knew that the pornography was the source of the sex, which makes its findings conservative. *See also* D. RUSSELL, RAPE IN MARRIAGE 27-41 (1983) (discussing the data base). The hearings Andrea Dworkin and I held for the Minneapolis City Council on the ordinance, cited in note 1, produced many accounts of the use of pornography to force sex on women and children. *Public Hearings on Ordinances to Add Pornography as Discrimination Against Women*, Committee on Government Operations, City Council, Minneapolis, Minn., Dec. 12-13, 1983. (Hereinafter *Hearings*).

23. *See* SIGNS I, *supra* note 11. *See also* Sontag, *The Pornographic Imagination*, 34 PARTISAN REVIEW 181 (1977).

24. "Explicitness" of accounts is a central issue in both obscenity adjudications and audience access standards adopted voluntarily by self-regulated industries or by boards of censor. *See, e.g.*, Grove Press v. Christenberry, 175 F. Supp. 488, 489 (S.D.N.Y. 1959) (discussion of

materials depict objectified sex but because they create the experience of a sexuality which is itself objectified. It is not that life and art imitate each other; in sexuality, they *are* each other.

II

The law of obscenity,[25] the state's primary approach[26] to its version of the pornography question, has literally nothing in common with this feminist critique. Their obscenity is not our pornography. One commentator has said, "Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the 'community.' Obscenity, at bottom, is not a crime. Obscenity is a sin."[27] This is, on one level, literally accurate. Men are turned on by obscenity, including its suppression, the same way they are by sin. Animated by morality from the male standpoint, in which violation—of women and rules—is eroticized, obscenity law can be seen to proceed according to the interest of male power, robed in gender-neutral good and evil.

Morality in its specifically liberal form (although, as with most dimensions of male dominance, the distinction between left and right is more formal than substantive) revolves around a set of parallel distinctions which can be consistently traced through obscenity law. Even though the approach this law takes to the problem it envisions has

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"candor" and "realism"); Grove Press v. Christenberry, 276 F. 2d 433, 438 (2d Cir. 1960) ("directness"); Mitchum v. State, 251 So. 2d 298, 302 (Fla. Dist. Ct. App. 1971) ("show it all"); Kaplan v. California, 413 U.S. 115, 118 (1973). How *much* sex the depiction shows is implicitly thereby correlated with how *sexual* (i.e., how sexually arousing to the male) the material is. *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413, 460 (1966) (White, J., dissenting); Heffner, *What G, PG, R and X Really Means* 126, CONG. REC. 172 (daily ed. Dec. 8, 1980); *Report of the Committee on Obscenity and Film Censorship* (the Williams Report) (1981). Andrea Dworkin brilliantly gives the reader the experience of this aesthetic in her account of the pornography. A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN, *supra* note 1, at 25-47.

25. To the body of law ably encompassed and footnoted by Lockhart & McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954) and *Censorship of Obscenity*, 45 MINN. L REV. 5 (1960), I add only the most important cases since then: Stanley v. Georgia, 394 U.S. 557 (1969); U.S. v. Reidel, 402 U.S. 351 (1970); Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Hamling v. U.S., 418 U.S. 87 (1973); Jenkins v. Georgia, 418 U.S. 153 (1973); U.S. v. 12 200-Ft. Reels of Super 8MM Film, 413 U.S. 123 (1973); Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975); Splawn v. California, 431 U.S. 595 (1976); Ward v. Illinois, 431 U.S. 767 (1976); Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976). New York v. Ferber, 458 U.S. 747 (1982).

26. For a discussion of the role of the law of privacy in supporting the existence of pornography, see Colker, *Pornography and Privacy: Towards the Development of a Group Based Theory for Sex Based Intrusions of Privacy*, 1 LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 191 (1983).

27. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COL. L. REV. 391, 395 (1963).

shifted over time, its fundamental norms remain consistent: public is opposed to private, in parallel with ethics and morality, and factual is opposed to valued determinations. These distinctions are gender-based: female is private, moral, valued, subjective; male is public, ethical, factual, objective.[28] If such gendered concepts are constructs of the male experience, imposed from the male standpoint on society as a whole, liberal morality expresses male supremacist politics. That is, discourse conducted in terms of good and evil which does not expose the gendered foundations of these concepts proceeds oblivious to—and serves to disguise the presence and interest of—the position of power that underlies, and is furthered by, that discourse.

For example, obscenity law proposes to control what and how sex can be publicly shown. In practice, its standard centers upon the same features feminism identifies as key to male sexuality: the erect penis and penetration.[29] Historically, obscenity law was vexed by restricting such portrayals while protecting great literature. (Nobody considered protecting women.) Having solved this by exempting works of perceived value from obscenity restrictions,[30] the subsequent relaxation—some might say collapse—of obscenity restrictions in the last decade reveals a significant shift. The old private rules have become the new public rules. The old law governing pornography was that it would be publicly repudiated while being privately consumed and actualized: do anything to women with impunity in private behind a veil of public denial and civility. Now pornography is publicly celebrated.[31] This victory for

28. These parallels are discussed more fully in SIGNS II, *supra* note 11. It may seem odd to denominate "moral" as *female* here, since this article discusses male morality. Under male supremacy, men define things; I am describing that. Men define women *as* "moral." This is the male view of women. My analysis, a feminist critique of the male standpoint, terms "moral" the concept that pornography is about good and evil. This is *my* analysis of *them*, as contrasted with their attributions of women.

29. A reading of case law supports the reports in R. WOODWARD & S. ARMSTRONG, THE BRETHREN 194 (1979), to the effect that this is a "bottom line" criterion for at least some justices. The interesting question becomes why the tactics of male supremacy would change from keeping the penis hidden, covertly glorified, to having it everywhere on display, overtly glorified. This suggests at least that a major shift from private terrorism to public terrorism has occurred. What used to be perceived as a danger to male power, the exposure of the penis, has now become a strategy in maintaining it.

30. One possible reading of McClure & Lockhart, *supra* note 25, is that this was their agenda, and that their approach was substantially adopted in the third prong of the *Miller* doctrine. For the law's leading attempt to grapple with this issue, see A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966), *overruled in part*, Miller v. California, 413 U.S. 15 (1973). *See also* U.S. v. One Book Entitled "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd* 72 F.2d 705 (2d Cir. 1934).

31. Andrea Dworkin and I developed this analysis in our class, "Pornography," at the University of Minnesota Law School, Fall 1983. *See also* Dworkin, *Why So-Called Radical Men Love and Need Pornography*, in TAKE BACK THE NIGHT, *supra* note 8, at 141 (the issue of pornography is an issue of sexual access to women, hence involves a fight among men).

Freudian derepression theory probably did not alter women's actual treatment all that much. Women were sex and still are sex. Greater efforts of brutality have become necessary to eroticize the taboo—each taboo being a hierarchy in disguise—since the frontier of the taboo keeps vanishing as one crosses it. Put another way, more and more violence has become necessary to keep the progressively desensitized consumer aroused to the illusion that sex is (and he is) daring and dangerous. Making sex with the powerless "not allowed" is a way of keeping "getting it" defined as an act of power, an assertion of hierarchy. In addition, pornography has become ubiquitous. Sexual terrorism has become democratized. Crucially, pornography has become truly available to women for the first time in history. Show me an atrocity to women, I'll show it to you eroticized in the pornography. This central mechanism of sexual subordination, this means of systematizing the definition of women as a sexual class, has now become available to its victims for scrutiny and analysis as an open public system, not just as a private secret abuse.[32] Hopefully, this was a mistake.

Re-examining the law of obscenity in light of the feminist critique of pornography that has become possible, it becomes clear that male morality sees that which maintains its power as good, that which undermines or qualifies it or questions its absoluteness as evil. Differences in the law over time—such as the liberalization of obscenity doctrine—reflect either changes in which group of men have power or shifts in perceptions of the best strategy for maintaining male supremacy—probably some of both. But it must be made to work. The outcome, descriptively analyzed, is that obscenity law prohibits what it sees as immoral, which from a feminist standpoint tends to be relatively harmless, while protecting what it sees as moral, which from a feminist standpoint is often that which is damaging to women. So it, too, is a politics, only covertly so. What male morality finds evil, meaning threatening to its power, feminist politics tends to find comparatively harmless. What feminist politics identifies as central in our subordination—i.e. the eroticization of dominance and submission—male morality will tend to find

32. Those termed "fathers" and "sons" in Andrea Dworkin's article, *supra* note 31, we came to term "the old boys," whose strategy for male dominance involves keeping pornography and the abuse of women private, and "the new boys," whose strategy for male dominance involves making pornography and the abuse of women public. In my view, Freud, and the popularization of his derepression hypothesis, figures centrally in "the new boys" approach and success. To conclude, as some have, that women have benefitted from the public availability of pornography, hence should be grateful for its continuing availability, is to say that the merits of open condoned oppression relative to covert condoned oppression warrant its continuation. This reasoning obscures the possibility of *ending* the oppression. The benefit of pornography's open availability, it seems to me, is that women can know who and what we are dealing with in order to end it. How, is the question.

comparatively harmless or defend as affirmatively valuable, hence protected speech.

In 1973, obscenity under law came to mean that which " 'the average person applying contemporary community standards' would find that, . . . taken as a whole, appeals to the prurient interest . . . [which] depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [which], taken as a whole, lacks serious literary, artistic, political, or scientific value."[33] Feminism doubts whether the average person, gender neutral, exists; has more questions about the content and process of definition of community standards than deviations from them; wonders why prurience counts but powerlessness doesn't; why sensibilities are better protected from offense than women are from exploitation; defines sexuality, hence its violation and expropriation, more broadly than does any state law and wonders why a body of law which can't in practice tell rape from intercourse should be entrusted with telling pornography from anything less. In feminist perspective, one notices that although the law of obscenity says that fucking on streetcorners is not supposed to be legitimized by the fact that the persons are "simultaneously engaged in a valid political dialogue,"[34] the requirement that the work be considered "as a whole" legitimizes something very like that on the level of publications like *Playboy*,[35] even though experimental evidence is beginning to support what its victims have long known: legitimate settings diminish the injury perceived as done to the women whose trivialization and objectification it contextualizes.[36] Besides, if a woman is subjected, why should it matter that the work has other value?[37] Perhaps what redeems

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

34. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973). *See also* Miller v. California, 413 U.S. 15, 25 n.7 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.") (quoting Kois v. Wisconsin, 408 U.S. 229, 231 (1972)).

35. Penthouse International v. McAuliffe, 610 F.2d 1353, 1362-73 (5th Cir. 1980). For a study in enforcement, see Coble v. City of Birmingham, 389 So. 2d 527 (Ala. Ct. App. 1980).

36. Malamuth and Spinner, *supra* note 9 (". . .the portrayal of sexual aggression within such 'legitimate' magazines as PLAYBOY and PENTHOUSE may have a greater impact than similar portrayals in hard-core pornography.") Malamuth and Donnerstein, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, in 15 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 103, 130 (1982).

37. Some courts, under the obscenity rubric, seem to have understood that the quality of artistry does not undo the damage. People v. Mature Enterprises, 343 N.Y.S.2d 911, 925 n. 14 (1973)("This court will not adopt a rule of law which states that obscenity is suppressible but that well-written or technically well produced obscenity is not.") (quoting, in part, People v. Fritch, 13 N.Y.2d 119, 126, 243 N.Y.S.2d 1, 7, 192 N.E.2d 713 (1963)). More to the point of my argument here is Justice O'Connor's observation that "[t]he compelling interests identified in today's opinion . . . suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photo-

a work's value among men *enhances* its injury to women. Existing standards of literature, art, science and politics are, in feminist light, remarkably consonant with pornography's mode, meaning and message. Finally and foremost, a feminist approach reveals that although the content and dynamic of pornography are about women—about the sexuality of women, about women as sexuality—in the same way that the vast majority of "obscenities" refer specifically to women's bodies, our invisibility has been such that the law of obscenity has *never even considered pornography a women's issue.*[38]

To appeal to "prurient interest"[39] means, I believe, to give a man an erection. Men are scared to make it possible for some men to tell other men what they can and cannot have sexual access to because men have power. If you don't let them have theirs, they might not let you have yours. This is why the *indefinability* of pornography, "all the one man's this is another man's that,"[40] is so central to pronography's *definition.* It is not because they are such great liberals, but because those other men might be able to do to them whatever they can do to those other men, and this is more why the liberal principle is what it is. What this obscures, because the fought-over are invisible in it, is that the fight over a definition of obscenity is a fight among men over the best means to guarantee male power as a system. The question is, whose sexual prac-

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graphed while masturbating surely suffers the same psychological harm whether the community labels the photography 'edifying' or 'tasteless.' The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm." New York v. Ferber, 458 U.S. 747, 774-75 (1982) (concurring). Put another way, how does it make a harmed child *not harmed* that what was produced by harming him is great art?

38. Women typically get mentioned in obscenity law only in the phrase, "women and men," used as a synonym for "people." At the same time, exactly who the victim of pornography is, has long been a great mystery. The few references to "exploitation" in obscenity litigation clarify the issue in at least one respect: the victim is not female. For example, one reference to "a system of commercial exploitation of people with sadomasochistic sexual aberrations" concerned the customers of women dominatrixes, all of whom were male. State v. Von Cleef, 102 N.J. Super. 104, 245, A.2d 495, 505 (1968). The children at issue in *Ferber* were male. Justice Frankfurter invoked the "sordid exploitation of man's nature and impulses" in discussing his conception of pornography in Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 692 (1958).

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

40. *See, e.g.*, Miller v. California, *id.*, at 40-41 (Douglas, J., dissenting) ("What shocks me may be sustenance for my neighbors."); U.S. v. 12 200-Ft. Reels of Film, 413 U.S. 123, 137 (1972) (Douglas, J., dissenting) ("[W]hat may be trash to me may be prized by others."). Cohen v. California, 403 U.S. 15, 25 (1970) (Harlan, J.,) ("One man's vulgarity is another's lyric"). Winters v. New York, 333 U.S. 507, 510 (1947) ("What is one man's amusement, teaches another's doctrine."); D.H. Lawrence, PORNOGRAPHIC AND OBSCENITY 5 (1929). As put by Chuck Traynor, the pimp who forced Linda Lovelace into pornography, "I don't tell you how to write your column. Don't tell me how to treat my broads," quoted in G. STEINEM, *The Real Linda Lovelace*, in OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 243, 252 (1983).

tices threaten this that can afford to be sacrificed to its maintenance for the rest? Public sexual access by men to anything other than women is less likely to be protected speech. This is not to say that male sexual access to anything—children, other men, women with women, objects, animals—is not the real system. The issue is *how public* that system will be, which the obscenity laws, their definition and patterns of enforcement, are major in regulating. The bind of the "prurient interest" standard here is that, to find it as a fact, someone has to admit that they are sexually aroused by the materials[41] but male sexual arousal signals the importance of protecting them. They put themselves in this bind and then wonder why they cannot agree. Sometimes I think that what is ultimately found obscene is what does *not* turn on the Supreme Court, or what revolts them more, which is rare, since revulsion is eroticized; sometimes I think that what is obscene is what turns on those men that the men in power think they can afford to ignore; sometimes I think that part of it is that what looks obscene to them is what makes them see themselves as potential targets of male sexual aggression, even if only momentarily; sometimes I think that the real issue is how male sexuality is presented, so that anything can be done to a woman but obscenity is that sex that makes male sexuality look bad.[42]

Courts' difficulties framing workable standards to separate "prurient" from other sexual interest, commercial exploitation from art or advertising, sexual speech from sexual conduct, and obscenity from great literature make the feminist point. These lines have proven elusive in law because they do not exist in life. Commercial sex resembles art because both exploit women's sexuality. The liberal's slippery slope is the feminist totality. Whatever obscenity may do, pornography converges with more conventionally acceptable depictions and descriptions like rape does with intercourse because both express the same power relation. Just as it is difficult to distinguish literature or art against a background, a standard, of objectification, it is difficult to discern sexual freedom

41. For the resolution of this issue for non-standard sexuality, see Mishkin v. New York, 383 U.S. 502, 508 (1966).

42. None of this is intended as a comment about the personal sexuality or principles of any judicial individual, but rather as a series of analytic observations that emerge from a feminist attempt to interpret the deep social structure of a vast body of case law on the basis of a critique of gender. Further research should systematically analyze the contents of the pornography involved in the cases. For instance, with respect to the last hypothesis in the text above, is it just chance that the first film to be found obscene by a state supreme court depicts male masturbation? Landau v. Fording, 245 C.A.2d 820, 54 Cal. Rptr. 177 (1966). Given the ubiquity of the infantilization of women and the sexualization of little girls, would *Ferber* have been decided the same way if it had shown 12-year-old girls masturbating? Is the depiction of male sexuality in a way that men think is dangerous for women and children to see, the reason that works like LADY CHATTERLEY'S LOVER and TROPIC OF CANCER got in trouble?

against a background, a standard, of sexual coercion. This does not mean it cannot be done. It means that legal standards will be practically unenforceable, will reproduce this problem rather than solve it, until they address its fundamental issue—gender inequality—directly.

To define the pornographic as the "patently offensive" further misconstrues its harm. Pornography is not bad manners or poor choice of audience; obscenity is. Pornography is also not an idea; obscenity is. The legal fiction whereby the obscene is "not speech"[43] has deceived few; it *has* effectively avoided the need to adjudicate pornography's social etiology. But obscenity law got one thing right: pornography is more act-like than thought-like. The fact that pornography, in a feminist view, furthers the idea of the sexual inferiority of women, a political idea, does not make the pornography itself a political idea. That one can express the idea a practice embodies does not make that practice into an idea. Pornography is not an idea any more than segregation is an idea, although both institutionalize the idea of the inferiority of one group to another. The law considers obscenity deviant, anti-social. If it causes harm, it causes anti-social acts, acts against the social order.[44] In a feminist perspective, pornography is the essence of a sexist social order, its quintessential social act.

If pornography is an act of male supremacy, its harm is the harm of male supremacy made difficult to see because of its pervasiveness, potency, and success in making the world a pornographic place. Specifically, the harm cannot be discerned from the objective standpoint because it *is* so much of "what is." Women live in the world pornography creates. We live its lie as reality. As Naomi Scheman has said, "lies are what we have lived, not just what we have told, and no story about correspondence to what is real will enable us to distinguish the truth from the lie."[45] So the issue is not what the harm of pornography is, but how the harm of pornography is to become visible. As compared with what? To the extent pornography succeeds in constructing social reality, it becomes *invisible as harm.* Any perception of the success, therefore the harm, of pornography, I will next argue, is precluded by liberalism

43. Roth v. U.S., 354 U.S. 476 (1957), *but cf.* Stanley v. Georgia, 394 U.S. 557 (1969) in which the right to private possession of obscene materials is protected as a First Amendment *speech* right. *See* 67 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 850 (P. Kurland & G. Casper eds. 1975).

44. *See, e.g.*, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY, *supra* note 8, at 1 (charging the Commission to study "[t]he effect of obscenity and pornography upon the public and particularly minors and its relation to crime and other antisocial behavior.").

45. N. Scheman, "Making it All Up," (transcript of speech, Jan. 1982, available from the author).

and so has been defined out of the customary approach taken to, and dominant values underlying, the First Amendment.

The theory of the First Amendment under which most pornography is protected from governmental restriction proceeds from liberal assumptions[46] which do not apply to the situation of women. First Amendment theory, like virtually all liberal legal theory, presumes the validity of the distinction between public and private: the "role of law [is] to mark and guard the line between the sphere of social power, organized in the form of the state, and the area of private right."[47] On this basis, courts distinguish between obscenity in public (which can be regulated, even if attempts founder, some seemingly in part *because* the presentations are public)[48] and the private possession of obscenity in the home.[49] The problem is that not only the public but also the private *is* a "sphere of social power" of sexism. On paper and in life pornography is thrust upon unwilling women in their homes.[50] The distinction between public and private does not cut the same for women as for men.[51] It is men's right to inflict pornography upon women in private that is protected.

The liberal theory underlying First Amendment law further believes that free speech, including pornography, helps discover truth. Censorship restricts society to partial truths. So why are we now—with more pornography available than ever before—buried in all these lies? *Laissez faire* might be an adequate theory of the social preconditions for knowledge in a nonhierarchical society. But in a society of gender inequality the speech of the powerful impresses its view upon the world, concealing

46. For the general body of work to which I refer, which is usually taken to be diverse, see T. I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1967); T. I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); A. MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring, joined by Holmes, J.); Scanlon, *A Theory of Free Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 245 (1948). This literature is ably summarized and anatomized by Ed Baker, who proposes an interpretative theory that goes far toward responding to my objections here, without really altering the basic assumptions I criticize. *See* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) and *The Process of Change and the Liberty Theory of the First Amendment*, 55 SO. CAL. L. REV. 293 (1982).

47. T.I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 28 (1966).

48. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Bread v. Alexandria, 341 U.S. 622, 641-45 (1951); Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949).

49. Stanley v. Georgia, 394 U.S. 557 (1969).

50. *See* A. Walker, *Coming Apart*, in TAKE BACK THE NIGHT, *supra* note 8, at 95; D. Russell *supra* note 9; *Hearings* (Minneapolis) *supra* note 22. *Cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting) ("[In] a life that has not been short, I have yet to be trapped into seeing or reading something that would offend me."). He probably hadn't.

51. *See* my *The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion*, RADICAL AMERICA, Feb. 1984, at 23-35, for a fuller discussion of this point.

the truth of powerlessness under that despairing acquiescence which provides the appearance of consent and makes protest inaudible as well as rare. Pornography can invent women because it has the power to make its vision into reality, which then passes, objectively, for truth. So while the First Amendment supports pornography believing that consensus and progress is facilitated by allowing all views, however divergent and unorthodox, it fails to notice that pornography (like the racism, in which I include anti-Semitism, of the Nazis and the Klan) is not at all divergent or unorthodox. It is the ruling ideology. Feminism, the dissenting view, is suppressed by pornography. Thus, while defenders of pornography argue that allowing all speech, including pornography, frees the mind to fulfill itself, pornography freely enslaves women's minds and bodies inseparably, normalizing the terror that enforces silence from women's point of view.

To liberals, speech must never be sacrificed for other social goals.[52] But liberalism has never understood that the free speech of men silences the free speech of women. It is the same social goal, just other *people.* This is what a real inequality, a real conflict, a real disparity in social power looks like. The law of the First Amendment comprehends that freedom of expression, in the abstract, is a system but fails to comprehend that sexism (and racism), *in the concrete,* are also systems. That pornography chills women's expression is difficult to demonstrate empirically because silence is not eloquent. Yet on no more of the same kind of evidence, the argument that suppressing pornography might chill legitimate speech has supported its protection.

First Amendment logic, like nearly all legal reasoning, has difficulty grasping harm that is not linearly caused in the "John hit Mary" sense. The idea is that words or pictures can only be harmful if they produce harm in a form that is considered an action. Words work in the province of attitudes, actions in the realm of behavior. Words cannot constitute harm in themselves—never mind libel, invasion of privacy, blackmail, bribery, conspiracy or most sexual harassment. But which is saying "kill" to a trained guard dog, a word or an act? Which is its training? How about a sign that reads "Whites only"? Is that the idea or the practice of segregation? Is a woman raped by an attitude or a behavior? Which is sexual arousal? It is difficult to avoid noticing that the ascendancy of the specific idea of causality used in obscenity law dates from around the time that it was first believed to be proved that it

52. T. I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 16-25 (1967). *See also* T. I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970).

is impossible to prove that pornography causes harm.[53] Instead of the more complex causality implicit in the above examples, the view became that pornography must cause harm like negligence causes car accidents or its effects are not cognizable as harm. The trouble with this individuated, atomistic, linear, isolated, tort-like—in a word, positivistic—conception of injury is that the way pornography targets and defines women for abuse and discrimination does not work like this. It does hurt individuals, just not *as* individuals in a one-at-a-time sense, but as members of the group "women." Harm is caused to one individual woman rather than another essentially like one number rather than another is caused in roulette. But on a group basis, as women, the selection process is absolutely selective and systematic. Its causality is essentially collective and totalistic and contextual. To reassert atomistic linear causality as a *sine qua non* of injury—you cannot be harmed unless you are harmed through this etiology—is to refuse to respond to the true nature of this specific kind of harm. Such refusals call for explanation. Morton Horowitz says that the issue of causality in tort law is "one of the pivotal ideas in a system of legal thought that sought to separate private law from politics and to insulate the legal system from the threat of redistribution."[54] Perhaps causality in the pornography issue is an

53. The essentially scientific notion of causality did not *first* appear in this law at this time, however. See, e.g., U.S. v. Roth, 237 F.2d 796, 812-17, 826 n. 70 (1957) (Frank, J., concurring) ("According to Judge Bok, an obscenity statute may be validly enforced when there is proof of a causal relation between a particular book and undesirable conduct. Almost surely, such proof cannot ever be adduced.").

Werner Heisenberg, criticizing old ideas of atomic physic, in light of Einstein's theory of relativity, states the conditions that must exist for a causal relation to make sense: "To coordinate a definite cause to a definite effect has sense only when both can be observed without introducing a foreign element disturbing their interrelation. The law of causality, because of its very nature, can only be defined for isolated systems. . ." W. HEISENBERG, THE PHYSICAL PRINCIPLES OF THE QUANTUM THEORY 63 (1930). Among the influences that disturb the isolation of systems are observors. Underlying the adoption of a causality standard in obscenity law is a rather hasty analogy between the regularities of physical and social systems, an analogy which has seldom been explicitly justified or even updated as the physical sciences have altered their epistemological foundations. This kind of causality may not be readily susceptible to measurement for the simple reason that social systems are not isolated systems; experimental research (which is where it has been shown that pornography causes harm) can only minimize what will always be "foreign elements." Pornography and harm may not be two definite events anyway; perhaps pornography *is* a harm. Moreover, if the effects of pornography are systematic, they may not be isolable from the system in which they exist. This would not mean that no harm exists; rather, because the harm is so pervasive, it cannot be sufficiently isolated to be *perceived* as existing according to this causality model. In other words, if pornography is only seen as harmful if it causes harm by this model, and if it exists socially only in ways that cannot be isolated from society itself, that means that its harm will not be perceived to exist. I think this describes the conceptual situation in which we find ourselves.

54. Horowitz, *The Doctrine of Objective Causation*, in THE POLITICS OF LAW 201 (D. Kairys ed. 1982). The pervasiveness of the objectification of women has been considered as a reason why pandering should not be Constitutionally restricted: "The advertisements of our best

attempt to privatize the injury pornography does to women in order to insulate the same system from the threat of gender equality, also a form of redistribution.

Women are known to be brutally coerced into pornographic performances.[55] But so far it is only with children, usually male children, that courts consider that the speech of pornographers was once someone else's *life*.[56] Courts and commissions and legislatures and researchers have searched largely in vain for the injury of pornography in the mind of the (male) consumer or in "society," or in empirical correlations between variations in levels of "anti-social" acts and liberalization in obscenity laws.[57] Speech can be regulated "in the interests of unwilling viewers, captive audiences, young children, and beleaguered neighbor-

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magazines are chock-full of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyer's attention to lotions, tires, food, liquor, clothing, autos, and even insurance policies." Ginzburg v. U.S., 383 U.S. 463, 482 (1966) (Douglas, J., dissenting). Justice Douglas thereby illustrated, apparently without noticing, that *somebody* knows that associating sex, i.e., women's bodies, with things causes people to *act* on that association.

55. L. LOVELACE, *supra* note 10.

56. Two boys masturbating with no showing of explicit force demonstrates the harm of child pornography in New York v. Ferber, 458 U.S. 747 (1982), while shoving money up a woman's vagina, among other acts, raises serious questions of "regulation of 'conduct' having a communicative element" in live sex adjudications, California v. LaRue, 409 U.S. 109, 113 (1972) (live sex can be regulated by a state in connection with serving alcoholic beverages). "Snuff" films, in which a woman is actually murdered to produce a film for sexual entertainment, are known to exist. People v. Douglas and Hernandez, Felony Complaint #NF8300382, Municipal Court, Judicial District, Orange County, California, August 5, 1983, alleges the murder of two young girls to make a pornographic film.

57. Both Susan Griffin (PORNOGRAPHY AND SILENCE, *supra* note 15) and the oldest Anglo-Saxon obscenity cases locate the harm of pornography in the mind of the consumer. *See, e.g.*, Regina v. Hicklin, 3 Q.B. 360, 371 (1868) ("tendency . . . to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall"). The data of Court and of Kutchinsky, both correlational, reach contrary conclusions on the issue of the relation of pornography's availability to crime statistics. Kutchinsky, *Towards an Explanation of the Decrease in Registered Sex Crimes in Copenhagen*, 7 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 263 (1971); Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience*, 29 J. OF SOC. ISSUES 163 (1973); *cf.* Court, *Pornography and Sex Crimes: A Re-Evaluation in the Light of Recent Trends Around the World*, 5 INT'L J. OF CRIMINOLOGY AND PENOLOGY 129 (1977). More recent investigations into correlations focused on rape in the United States have reached still other conclusions. L. Baron and M. Straus have found a strong correlation between state-to-state variations in the rate of reported rape and the aggregate circulation rate of popular men's sex magazines, including PLAYBOY and HUSTLER. "Sexual Stratification, Pornography, and Rape," Family Research Laboratory and Department of Sociology, University of New Hampshire, Durham, New Hampshire, Nov. 18, 1983 (manuscript). The authors conclude, at page 16, that "the findings suggest that the combination of a society which is characterized by a struggle to secure equal rights for women, by a high readership of sex magazines which depict women in ways which may legitimize violence, and by a context in which there is a high level of non-sexual violence, constitutes a mix of societal characteristics which precipitate rape." *See also* the *Williams Report* (1981), *supra* note 24, and the opinions of Justice Harlan on the injury to "society" as a permissible basis for legislative judgments in this area. Roth v. U.S., 354 U.S. 476, 501-2 (1956) (concurring in companion case, Alberts v. California).

hoods,"[58] but the normal level of sexual force—force that is not seen as force because it is inflicted on women and called sex—has never been a policy issue. Until the last few years experimental research never approached the question of whether pornographic stimuli might support *sexual* aggression against women[59] or whether violence might be sexually stimulating or have sexual sequelae.[60] Only in the last few months are we beginning to learn the consequences for women of so-called consensual sexual depictions that show normal dominance and submission.[61] We still don't know the impact of female-only nudity or of depictions of specific acts like penetration or of even mutual sex in a social context of gender inequality.

The most basic assumption underlying First Amendment adjudication is that, socially, speech is free. The First Amendment says, "Congress shall not abridge *the freedom of speech.*" Free speech exists. The problem for government is to avoid constraining that which, if unconstrained by government, *is* free. This tends to presuppose that whole segments of the population are not systematically silenced *socially*, prior to government action. The place of pornography in the inequality of the sexes makes such a presupposition untenable and makes any approach to *our* freedom of expression so based worse than useless. For women, the urgent issue of freedom of speech is not primarily the avoidance of state intervention as such, but finding an affirmative means to get access to speech for those to whom it has been denied.

III

Beyond offensiveness or prurience, to say that pornography is "dehumanizing" is an attempt to articulate its harm. But "human being" is a social concept with many possible meanings. Here I will criticize some liberal moral meanings of personhood through a feminist political anal-

58. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 662 (1978).

59. I am conceiving rape as *sexual* aggression. The work of Neil Malamuth is the leading research in this area. *See Rape Proclivity Among Men*, 37 J. OF SOC. ISSUES 138 (1981); *Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli*, 10 ARCHIVES OF SEXUAL BEHAVIOR 33 (1981); Haber & Feshbach, *Testing Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Differences, and the "Normality" of Rapists*, 14 J. OF RESEARCH IN PERSONALITY 121 (1980); Heim & Feshbach, *Sexual Responsiveness of College Students to Rape Depictions: Inhibitory and Disinhibitory Effects*, 38 J. OF PERSONALITY AND SOC. PSYCHOLOGY 399 (1980). *See also* work by Malamuth, *supra* note 9. Of course, there are difficulties in measuring rape as a direct consequence of laboratory experiments, difficulties which have led researchers to substitute other measures for willingness to aggress.

60. Apparently, it may be impossible to *make* a film for experimental purposes that portrays violence or aggression by a man against a woman that a substantial number of male experimental subjects do not perceive as sexual. *See Hearings*, *supra* note 22, at 31 (testimony of E. Donnerstein).

61. *See* works of D. Zillman, *supra* note 9.

ysis of what pornography does to women, showing how the inadequacy of the liberal dehumanization critique reflects the inadequacy of its concept of person. In a feminist perspective, pornography is seen to dehumanize women in a culturally specific and empirically descriptive—not liberal moral—sense, dispossessing women of the power of which, in the same act, it possesses men: the power of sexual, hence gender, definition. Perhaps a human being, for gender purposes, is someone who controls the social definition of sexuality.

A person, in one Kantian view, is a free and rational agent whose existence is an end in itself, as opposed to instrumental.[62] In pornography, women exist to the *end* of male pleasure. Kant sees human as characterized by universal abstract rationality, with no component of individual or group differences, and as a "bundle of rights."[63] Pornography purports to define what a woman *is*. It does this on a group basis, including when it raises individual qualities to sexual stereotypes, as in the strategy of *Playboy's* "Playmate of the Month." I also think that pornography derives much of its sexual power, as well as part of its justification, from the implicit assumption that the Kantian notion of person actually describes the condition of women in this society, so that if we are there, we are freely and rationally there, when the fact is that women—in pornography and in part because of pornography—have no such rights.

Other views of the person include one of Wittgenstein's, who says that the best picture of the human soul is the human body.[64] I guess this depends upon what picture of the human body you have in mind. Marx's work offers various concepts of personhood deducible from his critique of various forms of productive organization. Whatever material conditions the society values, define person there, so that in a bourgeois society, a person might be a property-owner.[65] The problem here is that women *are* the property that constitutes the personhood, the masculinity, of men under capitalism. Thinking further in Marxian theoretical terms, I have wondered whether women in pornography are more prop-

62. I. KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS (T. Abbott trans. 1969); Danto, *Persons*, in 6 ENCYCLOPEDIA OF PHILOSOPHY 10 (P. Edwards ed. 1967); Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

63. *See* KANT, *supra* note 62; Danto, *supra* note 62; Radin, *supra* note 62. *See also* the "original position" of JOHN RAWLS, A THEORY OF JUSTICE (1971), and Rawls, *Kantian Constructivism in Moral Theory*, 9 J. PHIL. 515, 533-35 (1980).

64. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 178 (G. Anscombe trans. 3d ed. 1958).

65. Karl Marx's critique of capitalist society is epitomized in K. MARX, CAPITAL, ch. 1 (1970). His concept of the "fetishism of commodities" in which "relations between men [assume], *in their eyes*, the fantastic form of a relation between things" (emphasis added) is also presented therein. *Id.* at 72.

erly conceived as fetishes or objects. Does pornography more attribute life-likeness to that which is dead—as in fetishism—or make death-like that which is alive—as in objectification? I guess it depends upon whether, socially speaking, women are more dead than alive.

In Hume's concept of a person as a bundle or collection of sense perceptions, such that the feeling of self-identity over time is a persistent illusion,[66] we finally have a view of the human that coincides with the view of women in pornography. That is, the empiricist view of person is the pornographic view of women. No critique of dominance or subjection, certainly not of objectification, can be grounded in a vision of reality in which all sense perceptions are just sense perceptions. This is one way an objectivist epistemology supports the unequal holding and wielding of power in a society in which the persistent illusion of selfhood of one half of the population is materially supported and maintained at the expense of the other half. What I'm saying is that those who are socially allowed a self are also allowed the luxury of postulating its illusoriness and having that called a philosophical position. Whatever self they ineluctably have, they don't lose by saying it is an illusion. Even if it is not particularly explanatory, such male ideology, if taken as such, is often highly descriptive. Thus Hume defines the human in the same terms feminism uses to define women's dehumanization: for women in pornography, the self is, precisely, a persistent illusion.

Contemporary ordinary language philosopher Bernard Williams says "person" ordinarily means things like valuing self-respect and feeling pain.[67] How self is defined, what respect attaches to, stimuli of pleasure and to an extent stimuli and threshholds of pain, are cultural variables. Women in pornography are turned on by being put down and feel pain as pleasure. We want it; we beg for it; we get it. To argue that this is dehumanizing need not mean to take respect as an ahistorical absolute or to treat the social meaning of pain as invariant or uniformly negative. Rather, it is to argue that it is the acceptance of the social definition of these values—the acceptance of self-respect and the avoidance of pain as values—that permits the erotization of their negative—debasement and torture—in pornography. It is only to the extent that each of these values is *accepted as human* that their negation becomes a quality of, and is

66. D. HUME, *Of Personal Identity*, in A TREATISE OF HUMAN NATURE, bk. I, pt. IV, Sec. VI (1888).

67. B. WILLIAMS, *Are Persons Bodies?, Personal Identity and Individualization*, and *Bodily Continuity and Personal Identity* in PROBLEMS OF THE SELF 1, 64 (1973). Bernard Williams was principal author of the *Williams Report*, *supra* note 22, Britain's equivalent to the U.S. Commission on Obscenity and Pornography, in which none of his values of "persons" were noticed lacking in, or women deprived of them by, pornography.

eroticized in and as, woman. Only when self-respect is accepted as human does debasement become sexy and female; only when the avoidance of pain is accepted as human does torture become sexy and female. In this way, women's sexuality as expressed in pornography precisely negatives her status as human. But there is more: exactly what is defined as degrading to a human being, *however* that is socially defined, is exactly what is sexually arousing to the male point of view in the pornography, just as the one to whom it is done is the girl regardless of sex. In this way, it is specifically women whom pornography identifies with and by sexuality, as the erotic is equated with the dehumanizing.

To define the pornographic as that which is violent, not sexual, as liberal moral analyses tend to, is to trivialize and evade the essence of this critique, while seeming to express it. As with rape, where the issue is not the presence or absence of force but what sex *is* as distinct from coercion,[68] the question for pornography is what eroticism *is* as distinct from the subordination of women. This is not a rhetorical question. Under male dominance, whatever sexually arouses a man is sex. In pornography, the violence *is* the sex. The inequality is sex. Pornography does not work, sexually, without hierarchy. If there is no inequality, no violation, no dominance, no force, there is no sexual arousal.[69] Obscenity law does the pornographers a real favor by clouding this, pornography's central dynamic, under the coy gender-neutral abstraction of "prurient interest." Obscenity law also adds the dominance interest of state prohibition to whatever the law of obscenity is seen to encompass.

Calling rape and pornography violent not sexual, the banner of much anti-rape and anti-pornography organizing,[70] is an attempt to protest that women do not find rape pleasurable or pornography stimulating while avoiding claiming this rejection as *women's* point of view. The concession to the objective stance, the attempt to achieve credibility by covering up the specificity of one's viewpoint, not only abstracts from our experience, it lies about it. Women and men know men find rape sexual and pornography erotic. It therefore *is*. We also know that sexuality is commonly violent without being any the less sexual. To deny this sets up the situation so that when women are aroused by sexual violation,

68. *See* the articles cited *supra* note 11.

69. This statement is a conclusion from my analysis of all the empirical data available to date, the pornography itself, and personal observations.

70. Susan Brownmiller's book AGAINST OUR WILL: MEN, WOMEN AND RAPE, *supra* note 10, is widely considered to present the view that rape is an act of violence, not sex. Women Against Pornography, a New York based anti-pornography group, has argued that pornography is violence against women, not sex. This has been almost universally taken as *the* feminist position on the issue. For an indication of possible change, see 4 NCASA News 19-21 (May 1984).

meaning we experience it *as* our sexuality, the feminist analysis is seen to be contradicted. But it is not contradicted, it is *proved.* The male supremacist definition of female sexuality as lust for self-annihilation has won. It would be surprising, feminist analysis would be wrong, and sexism would be trivial, if this were merely exceptional. (One might ask at this point, not why some women embrace explicit sado-masochism, but why any women do not.) To reject forced sex in the name of women's point of view requires an account of women's experience of being violated by the same acts both sexes have learned as natural and fulfilling and erotic when no critique, no alternatives and few transgressions have been permitted.

The depersonalization critique, with the "violence not sex" critique, exposes pornography's double standard, but does not attack the masculinity of the standards for personhood and for sex that pornography sets. The critiques are thus useful, to some extent deconstructive, but beg the deeper questions of the place of pornography in sexuality and of sexuality in the construction of women's definition and status, because they act as if women can be "persons" by interpretation, as if the concept is not, in every socially real way, defined by and in terms of and reserved for men and as if sexuality is not itself a construct of male power. To do this is to act as if pornography did not exist or were impotent. Deeper than the personhood question or the violence question is the question of the mechanism of social causation by which pornography *constructs* women and sex, defines what "woman" means and what sexuality is, in terms of each other.

The law of obscenity at times says that sexual expression is only talk, therefore cannot be intrinsically harmful. Yet somehow pornographic talk is vital to protect. If pornography is a practice of the ideology[71] of gender inequality, and gender *is an ideology*, if pornography is sex and gender is sexual, the question of the relation between pornography and life is nothing less than the question of the dynamic of the subordination of women to men. If "objectification . . . is never trivial,"[72] girls *are* ruined by books.[73] To comprehend this process will require an entirely new theory of social causality—of ideology in life, of the dynamic of mind and body in social power—that connects point of view with poli-

71. This, again, does not mean that it is an *idea.* A new theory of ideology, prefigured in Andrea Dworkin's PORNOGRAPHY, *supra* note 1, will be needed to conceptualize the role of pornography in constructing the condition of women.

72. A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN, *supra* note 1, 115.

73. "Echoing Macaulay, 'Jimmy' Walker remarked that he had never heard of a woman seduced by a book." U.S. v. Roth, 237 F.2d 796, 812 (1957) (appendix to concurrence of Frank, J.) What is classically called seduction, I expect feminists would interpret as rape or forced sex.

tics. The development of such an analysis has been equally stymied by fear of repressive state use of any critique of any form of expression, by the power of pornography to create women in its image of use, and by the power of pornographers to create a climate hostile to inquiry into their power and profits.

IV

I said all that in order to say this: the law of obscenity has the same surface theme and the same underlying theme as pornography itself. Superficially both involve morality: rules made and transgressed for purposes of sexual arousal. Actually, both are about power, about the equation between the erotic and the control of women by men: *women* made and transgressed for purposes of sexual arousal. It seems essential to the kick of pornography that it be to some degree against the rules; but it is never truly unavailable or truly illegitimate. Thus obscenity law, like the law of rape, preserves the value without restricting the ability to get, that which it purports to both devalue and to prohibit. Obscenity law helps keep pornography sexy by putting state power—force, hierarchy—behind its purported prohibition on what men can have sexual access to. The law of obscenity is to pornography as pornography is to sex: a map that purports to be a mirror, a legitimization and authorization and set of directions and guiding controls that project themselves onto social reality, while purporting merely to reflect the image of what is already there. Pornography presents itself as fantasy or illusion or idea, which can be good or bad as it is accurate or inaccurate, while it actually, *hence accurately*, distributes power. Liberal morality cannot deal with illusions that *constitute* reality because its theory of reality, lacking a substantive critique of the distribution of social power, cannot get behind the empirical world, truth by correspondence. On the surface, both pornography and the law of obscenity are about sex. In fact, it is the status of women that is at stake.