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No Harm, No Foul: Pornography (Violent and Otherwise)

Victoria M. Mather

St. Mary's University School of Law, vmather@stmarytx.edu

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Victoria Mather, No Harm, No Foul: Pornography (Violent and Otherwise), 14 UALR L.J. 455 (1992).

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NO HARM, NO FOUL: PORNOGRAPHY (VIOLENT AND OTHERWISE)

*Victoria Mikesell Mather**

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I. INTRODUCTION

The motivation to write this essay derives from a chapter I wrote for Matthew Bender on adult entertainment zoning law.¹ The subject sounded interesting, and it was, but in the course of my research, I was pulled into the debate (intellectually and emotionally) between the radical feminists, the First Amendment liberals, and others on the issue of pornography.² I read articles on all sides, and it was fascinating read-

* Associate Professor of Law, St. Mary's University, San Antonio, Texas. B.S., 1978; J.D., 1981; LL.M., 1987; University of Illinois, Urbana-Champaign. With special thanks to Professors Michael Ariens and John Schmolesky for their insights and to Luis Garcia for his research assistance.

1. See 2 PATRICK J. ROHAN, ZONING AND LAND USE CONTROL § 11 (1988).

2. It has been said that Susan K. Brownmiller's comments on pornography in her book *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975), initially opened the debate between feminists and liberals on a solution to the "pornography problem." See *TAKE BACK THE NIGHT*, 30-34

ing, but I still was not sure then and am not sure now where I come out on this subject, except that I am inclined to favor a feminist point of view. I believe, however, that this is a fundamental and important issue, and that the discussion can help illuminate the debate in other areas involving civil liberties, such as hate speech. And so, I write this essay, which is about the confusion and the conflict between two ideals that I value, and my efforts to resolve them.

As a child (quite literally) of the 1960s and the early 1970s, I was well trained in the classic liberal philosophy that the marketplace of ideas is the best way to test and ultimately to eliminate or defeat those ideas that are wrong, evil, or simply misconceived. In many ways I agreed with the author who said that “[p]ornography seeks out society’s rawest nerve, and then presses on it,” and then went on to argue that this was a valuable and perhaps even necessary enterprise.³ I also understood, at least on an intellectual level, the argument of an ACLU lawyer that pornography is “speech that needs and *deserves* protection.”⁴ On the other hand, I consider myself to be an ardent feminist of a certain type. When I read parts of the 1986 Attorney General’s Commission Report on Pornography, I felt sick. I was disgusted by the graphic descriptions of sexually explicit pictures, movies, and books found in the report and in some of the feminist literature. I argued with my husband (normally a man who is sympathetic to feminist issues) about the harmlessness of so-called mainstream or softcore pornography magazines and about the legitimacy of the existence of strip shows in “gentlemen’s clubs” here in San Antonio.

At the heart of this entire debate is the lack of understanding or agreement of what it is that we are attempting to regulate. We as a society do not agree about what pornography means, what is hardcore or softcore, what is obscene, or what is “adult.” The terms themselves send different messages to the audience that is evaluating them. For example, one author cites a study where people were asked whether they would support a law banning sexually explicit or X-rated videocassettes. They were also asked if they would support a ban on pornographic videocassettes. Almost twice as many of those polled would opt to ban “pornographic” materials, since the term appears to have a vio-

(Laura Lederer ed., 1980).

3. See Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1628 (1988).

4. See Barry W. Lynn, “Civil Rights” Ordinances and the Attorney General’s Commission: *New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. L. REV. 27, 48 (1986).

lent connotation.⁵

My ultimate conclusions are two-fold. First, I think that we have the ability, under current law, to limit or prohibit the most potentially harmful forms of pornography (e.g., kiddie porn, violent porn, "snuff" films). We can use current obscenity standards, or enact zoning regulations or new ordinances and statutes, to deal with specific "problem" areas. However, I do not believe that current available solutions are sufficient to deal with the problem of pornography. Debate about sexually explicit speech tends to break down—along gender lines. While this is not always true, it is true so often that we should consider whether there is something about the nature of the "beast" (pornography) that makes it a lightning rod for feminist anger and liberal male defensiveness. I conclude that we, as a society, need to question our standards and our methods of evaluating pornography. We need to specifically include the female perspective of sexually explicit speech, in a way that has not been done in the past.

In this article, I present an analysis and critique of both the current constitutional standard on obscenity and a sampling of the proposed liberal modifications of the standard. I then describe and critique the radical feminist view of pornography, particularly with respect to the proposed "pornography as a violation of civil rights" ordinance. Part IV is a description of what the current pornography market is like—what is out there. Part V presents some proposed solutions to the problems posed by the more deviant forms of pornography, particularly violent pornography. In that section, I also argue that the ultimate answer to many of the issues that pornography raises lies in a thoughtful consideration and implementation of a feminist view in analysis of the "rights" associated with sexually explicit speech.

II. WHAT THE LIBERAL VIEW IS AND WHY IT FAILS

I consider the "liberal" view to take one of two basic forms. One is the current system, which allows pornography to be produced, exhibited, and sold, (with a few notable limitations, which will be discussed below) except when it crosses over the line into obscenity. The other is

5. See John B. McConahay, *Pornography: The Symbolic Politics of Fantasy*, 51 *LAW & CONTEMP. PROBS.* 31, 35-36 (1988). In the survey, 32% would ban "x-rated video cassettes for home viewing." However, 60% would ban "pornographic cassettes for home viewing." Also, 62% and 56% would ban cassettes featuring "violent pornography" and "sexual violence" respectively. See also Gloria Steinem, *Erotica and Pornography: A Clear and Present Difference* reprinted in *TAKE BACK THE NIGHT* 35 (Laura Lederer ed., 1980).

a more open system, and these advocates argue that *all* sexually oriented speech should be subject to the protection of the First Amendment. In this section, I will describe these systems in more detail and explain why I believe that they fail us as a society.

A. The Current System

The present legal rules for dealing with issues of obscenity have their roots in *Roth v. United States*.⁶ In *Roth*, a 1957 case, the United States Supreme Court held that obscenity is without "redeeming social importance" and thus is not within the protection of the First Amendment. The decision in *Roth* was foreshadowed fifteen years earlier in *Chaplinsky v. New Hampshire*,⁷ when the Court stated in dicta that obscenity played "no essential part" in the marketplace of ideas and that it was of "slight" social value.⁸ The *Roth* decision was groundbreaking, since it established two fundamental concepts for the future of obscenity law (and First Amendment jurisprudence in general): one, that obscenity, although a type of speech, was not *protected* speech; two, that the Court was willing to make value judgments about the morality, and thus the inherent worth, of speech.⁹

In the wake of *Roth*, the Court struggled with several obscenity cases. Justice Stewart wrote one of the truest statements ever penned about this issue when he indicated that he could not define obscenity, but "I know it when I see it."¹⁰ The problem had indeed become one of defining obscenity. The Court finally established a test in 1973, in *Miller v. California*.¹¹ This rather cumbersome test provides that a work is obscene if the following factors are present:

(1) the average person, applying contemporary community standards, finds that the work, taken as a whole, appeals to the prurient interest; and

(2) the work depicts or describes, in a patently offensive way,

6. 354 U.S. 476, 484-85 (1957). The *Roth* decision was subsequently modified. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966). In *Memoirs*, the Court rules that sexually explicit material was not obscene unless it was "utterly without redeeming social value." *Id.* at 419.

7. 315 U.S. 568 (1942).

8. *Id.* at 571-72.

9. See Simon Roberts, *The Obscenity Exception: Abusing the First Amendment*, 10 CARDOZA L. REV. 677, 681-83 (1989). See also Bruce A. Taylor, *Hard Core Pornography: A Proposal For a Per Se Rule*, 21 U. MICH. J.L. REF. 255, 256-60 (1987-88).

10. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring).

11. 413 U.S. 15 (1973).

sexual conduct specifically defined by applicable state law; and

(3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹²

The present rules have been roundly criticized in a variety of ways. The *Miller* test can be attacked on the very practical ground that it requires case by case determinations of obscenity. Each item, whether a book, a video, a magazine, or some other media form, must be evaluated separately under the traditional standard.¹³ This can be time consuming, expensive, and cumbersome. Others argue that the current standard is deficient because there is no real, discernible, or justifiable difference between obscene and nonobscene pornography.¹⁴ The test establishes an either-or proposition: either sexually explicit material is completely protected and may be sold, distributed, or exhibited without significant limitation, or it is obscene and may be completely prohibited. An item may be "saved" from obscenity status if we can find any sort of serious artistic, literary, political, or scientific value.¹⁵ Moreover, what is obscene in one place may not be obscene in another. This is not rational First Amendment jurisprudence, at least in the traditional sense of constitutional law.¹⁶

The liberal camp finds fault with the *Miller* test on a more fundamental level. They fail to see any legitimate justification for the exclusion of obscenity from the protection of the First Amendment. Their scholarship tends to start by attacking some of the asserted legal, theoretical, and historical bases supporting the current exception for obscenity.

One of the basic principles that the Supreme Court obviously adhered to in *Roth*, *Chaplinski*, and *Miller* is that the law may act to suppress speech that is immoral, and that the "judiciary is properly concerned with protecting society's particular notions of morality."¹⁷ This principle is itself challenged. It is argued that the current test gives the majority or the dominant societal group the right to impose their views of what is or is not obscene on the minority.¹⁸ Also, the

12. *Id.*, at 24.

13. See Wendy Kaminer, *Pornography and the First Amendment: Prior Restraints and Private Action*, in TAKE BACK THE NIGHT 241, 243-44 (Laura Lederer ed., 1980).

14. See, e.g., Roberts, *supra* note 9, at 722-23.

15. See, e.g., Andrea Dworkin, *Pornography is a Civil Rights Issue for Women*, 21 U. MICH. J.L. REF. 55, 63 (1987-88).

16. See Gey, *supra* note 3, at 1579.

17. Gey, *supra* note 3, at 1568.

18. See Gey, *supra* note 3, at 1568-70.

principle is based in history and in common law, at a time when religion, morals, and legal rules were in fact closely intertwined.¹⁹ However, in more recent decisions in the First Amendment and other areas, the Court appears to recognize this truth and to try to make decisions based on more modern and secular principles.²⁰

Professor Frederick Schauer, Chairman of the 1986 Meese Commission on Pornography, is a leading proponent of the view that the obscenity exception can be justified by drawing a distinction between reason or intellect on the one hand and passion or feeling on the other. According to his theory, only communication designed to reach the human intellect is protected under the First Amendment, and this is in accord with the fundamental underlying purpose of the First Amendment.²¹ As one author put it, "Because pornography goes straight to the genitals without passing through the intellectual processes it is better characterized as sex than speech."²² In Schauer's view, pornography lacks the communicative aspect necessary for speech to enter the realm of protected speech. This approach is criticized as creating an

19. See Gey, *supra* note 3, at 1566-70 for a discussion of the history of obscenity law; Roberts, *supra* note 9, at 684-87; and McConahay, *supra* note 5, at 51-53.

20. Barry Lynn, an ACLU lawyer, cites Supreme Court decisions both protecting nude dancing, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), and the wearing of a jacket with the words "Fuck the Draft" written on it, *Cohen v. California*, 403 U.S. 15 (1970). He also cites lower court cases protecting other types of "speech." Lynn, *supra* note 4, at 57-58. The Court's decision in the area of family, marital, and individual privacy seemed to move away from historical notions of morality. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state may not prohibit prescription of contraceptives to married persons); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (state may not prohibit distribution of contraceptives to unmarried persons); *Roe v. Wade*, 410 U.S. 113 (1973) (state may not prohibit woman's right to an abortion); *Bellotti v. Baird*, 443 U.S. 622 (1979) (state may not limit minor's right to abortion to parental consultation or consent). *But see Bowers v. Hardwick*, 478 U.S. 186 (1986) (state may prohibit homosexual sodomy). Another area where the Court has, in a series of decisions, moved away from history and traditional morality to modern, secular policies is in the gender-based discrimination cases. Compare *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (state may deny woman a license to practice law because of divine ordination of male-female roles) with *Reed v. Reed*, 404 U.S. 71 (1971) (state could not arbitrarily prefer male as administrator of intestate estate); *Craig v. Boren*, 429 U.S. 190 (1976) (state could not permit higher age requirement for sale of beer to males than to females).

21. See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979). Schauer's thesis has roots in scholarship by John Finnis, who drew a line between reason and passion. Reason, which was important to the Framers, would be protected, but passion would not. See John M. Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967).

22. Deana Pollard, *Regulating Violent Pornography*, 43 VAND. L. REV. 125, 135-36 (1990).

artificial distinction between emotion and intellect, one that is impossible to accurately draw. The mind-body link is so strong that it cannot be said that the intellect is not involved in the sexual stimulation resulting from pornography.²³

Moreover, both the civil libertarians and the feminists would argue that pornography is certainly speech, since it (at a minimum) attempts to transmit ideas about sexual pleasure and excitement. In fact, most commentators would argue that pornography is not only communicative in nature, but that it is also inherently political. I will return to this point shortly.

Another foundational pillar of the *Roth-Miller* test is the idea that speech can be structured into a hierarchy and that political speech, at the top of the pyramid, is all that the First Amendment is designed to protect. According to this theory, obscenity is not excluded from constitutional protection on moral grounds, but because it is not political in nature.²⁴ This theory is sometimes attacked as an overly narrow reading of what the First Amendment is, or should be, about. The concept of free speech, although perhaps originally intended to protect against prior restraint of political speech, should not be so limited today. This is really just a version of the "original intent of the Framers" versus "present political and social reality" argument in jurisprudential and constitutional analysis.²⁵ I am not sure that the Court was actually using this theory when it developed the current obscenity test, but it is certainly implicit in the language of these and other First Amendment decisions that there are indeed certain levels of speech and that some types of speech are "higher" or more "worthy" of complete protection than others.²⁶

As indicated earlier, many commentators would disagree that por-

23. See *id.*; Lynn, *supra* note 4, at 58-62; Roberts, *supra* note 9, at 710-16.

24. The two leading political speech theorists are Alexander Meiklejohn, who conceived the theory, and Robert Bork, who carried it to an extreme. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

25. For some criticisms of the political speech argument, see Roberts, *supra* note 9, at 704-08. Richard Posner wrote an entertaining essay about originalism in *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

26. The typical example is commercial speech. The Court has held that many types of commercial speech are excluded from the protection of the First Amendment. The doctrine was created in *Valentine v. Chrestensen*, 316 U.S. 52 (1942) and most recently reaffirmed in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986). For a discussion of the commercial speech doctrine see J. NOWAK, R. ROTUNDA & J.M. YOUNG, *CONSTITUTIONAL LAW* 16.26 *et. seq.* (1986, 1988 Supp.).

nography is not political in nature. The entire radical feminist argument against pornography is that it constructs the reality of the way men and women relate to each other, and more specifically, defines the parameters of their power relationship. They argue that pornography is an ideology and an act of male domination, leading to female subordination.²⁷ Other feminists adopt the "liberal" view and argue that sexually explicit speech is in fact political speech.²⁸ For example, such speech can be self-affirming for sexual minorities and can communicate ideas of sexual rebellion or exploration.²⁹ Other political ideas attributed to pornography include the endorsement of sex for pleasure, the release (in an acceptable manner) of male hostility toward women, a release of sexual tension generally, the advocacy of changes in lifestyles or attitudes, and political or social parody.³⁰

Those who would defend the current system might argue that when the obscenity laws are enforced, or racketeering statutes are used, to impound adult materials or when zoning powers are used effectively to contain or disperse adult entertainment, then pornography is in fact controlled.³¹ Some evidence supports this proposition.³² However, this satisfies neither the liberals nor the feminists as a legal resolution of the problem, although it may well satisfy local residents and civic leaders. From the liberal viewpoint, the scattered elimination of adult materials from the marketplace is an unconstitutional deprivation of the right of those who wish to obtain and enjoy them. From the feminist viewpoint,

27. See generally, Dworkin, *supra* note 15; ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979); Catharine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Catharine A. MacKinnon, *Not at Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); TAKE BACK THE NIGHT (Laura Lederer ed., 1980).

28. See, e.g., Hunter & Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et. al., in American Booksellers Assn v. Hudnut*, 21 U.MICH. J.L. REF. 69 (1987-88).

29. *Id.* at 120-21.

30. See Gey, *supra* note 3, at 1628-30; Lynn, *supra* note 4, at 48-56. For cases upholding "parody" of a sexually explicit nature see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir. 1989); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (9th Cir. 1988).

31. See McConahay, *supra* note 5, at 66-69; see generally *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. 916 (1989) (RICO case); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (upholding nuisance closure statute as applied to adult bookstores); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (zoning cases); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Young v. American Mini Theatres, Inc.* 427 U.S. 50 (1976). See also ROHAN, *supra* note 1.

32. See Lynn, *supra* note 3, at 42-43, nn 58-60; Taylor, *supra* note 9, at 257, n. 7. Both articles cite success in eliminating or reducing the availability of pornographic materials in a few cities including Arlington, Atlanta, Boston, Buffalo, Cincinnati, Cleveland, Norfolk, and Omaha.

such limited measures just push the pornography outside the city limits, or into an adjoining state. The existence and availability of pornography does not change; it is simply moved to a new location. The evil of pornography, in the feminist view, is that it is available at all, since it warps society's view of the way men see women (and perhaps the way women see themselves).

B. Liberal Modifications and a Critique

The classic liberal solution to the problems created by the present system is to abolish all (or nearly all) restrictions on sexually explicit speech. The scholars proposing such a remedy usually attack the current obscenity exception as being unjustified and unjustifiable under First Amendment analysis. The arguments for that position are outlined above.³³

One author suggests the adoption of what he calls a "radical skepticism" model for dealing with pornography.³⁴ Unlike many other "liberal" authors, he concedes that pornography has its own vision of the world—a basically negative one. He characterizes pornography as anti-social, hostile, narcissistic, and libidinous.³⁵ Why protect it then? Because, in his view, censorship is a dangerous concept. Radical skepticism posits that absolute knowledge is unknowable, that truth is hypothetical, and that all theories or ideas are subject to revision. The only way to make sure that such revision and modification take place is to prohibit suppression of speech in any form.³⁶

Another author complains that *Stanley v. Georgia*³⁷ contains the only reasonable discussion of obscenity law in recent Supreme Court history.³⁸ He argues that a principle of neutrality needs to be the guiding light and that all speech, including pornography, should be protected absolutely and equally.³⁹ *Stanley* held that a person could not be criminally prosecuted for the possession of obscene materials in his or her own home. The Court found that the defendant had a privacy right in his own home, that the government should not attempt to control the

33. See *supra* notes 13-32 and accompanying text.

34. See Gey, *supra* note 3.

35. Gey, *supra* note 3, at 1628, 1630.

36. See Gey, *supra* note 3, at 1622-23 for an explanation of radical skepticism and 1626-34 for an explanation of how the theory applies to pornography.

37. 394 U.S. 557 (1969).

38. See Roberts, *supra* note 9, at 723-28.

39. Roberts, *supra* note 9, at 727-28.

moral content of a person's thoughts, that it was not possible to draw a line between ideas and entertainment, and that restriction of First Amendment rights was not the way to control crime, but rather the state must use education and enforcement of the criminal law.⁴⁰ The author argues that *Stanley* is consistent with the *Miller-Roth* line of reasoning. The Court held in *Stanley* that the state was engaged in impermissible thought control. This at least implies that obscene speech does have some communicative aspects. The Court attempted to draw a distinction between public and private distribution and use of the material, but the author finds that distinction to be indefensible.⁴¹

A third author approaches the problem from a completely different perspective and defends pornography itself.⁴² He points out that the large market for pornography shows that millions of people do enjoy it.⁴³ He argues that it has some of the benefits outlined above: release of hostility, education, self-fulfillment, and legitimation of one's own sexual experience.⁴⁴ This author believes that much of the political, social, and legal debate about pornography excludes many of those most affected—the “hard-core” consumers of the “hard-core” stuff. The elimination of pornography will not deal with the people whose problems or socioeconomic status make them antisocial, lonely or hostile, and possibly big users of pornography.⁴⁵

The rhetoric is different, but the song remains the same:⁴⁶ let all ideas, media, depictions, et cetera, into the marketplace, and in the end, the ultimate truth will win out, whether that “truth” is the expansion of the use and enjoyment of sexually explicit materials or a public outcry of horror at the content of the material and the subsequent use of other legitimate law- and market-based means to deal with the issue.

I think whether you agree with this line of reasoning at least partially depends on whether you believe that the making of and the very existence of pornography is seriously harmful to all of those involved in

40. *Stanley v. Georgia*, 394 U.S. 557, 564-68 (1969).

41. Roberts, *supra* note 9, at 724-27.

42. See Lynn, *supra* note 4, at 48-56.

43. Lynn, *supra* note 4, at 30-31. See also, Catharine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 31 (1985); Note, *The Civil Rights Pornography Ordinances—An Examination Under the First Amendment*, 73 Ky. L.J. 1081 (1984-85) (estimate of seven billion dollar a year industry).

44. Lynn, *supra* note 4, at 48-65.

45. *Id.* at 118-25.

46. THE SONG REMAINS THE SAME is the title of a concert film made by Led Zeppelin in the 1970s.

observing or in making it and to society in general. Many people believe that much of the "hoopla" surrounding pornography (*i.e.*, child pornography, snuff films, violent pornography, the role of pornography in crime, etc.) is greatly exaggerated. However, this is where I think the liberal view fails us. Pornography is no different than any other type of speech and should be subject to the same protections, *unless* it is true that it causes direct and serious harm to certain members of society. There is certainly some evidence that women and children are exploited and abused through the pornographic mill. This issue is discussed below in more detail.⁴⁷

The "pure" liberal or classic liberal view is, in any event, a white, middle or upper middle class, overwhelmingly male view.⁴⁸ If men were depicted in the same way as women and children are depicted in most of the available pornography, I cannot help but believe that there would be a different attitude about this issue.

III. WHAT THE RADICAL FEMINIST VIEW IS AND WHY IT FAILS

In this section, I will present a discussion of the now infamous civil rights ordinance that was the subject of the *Hudnut* case and will also discuss some of the other radical feminist ideas about pornography. This section will also outline some of the major criticisms that have been leveled at the radical feminist view.

A. The Civil Rights Ordinance

The foundational concept of this ordinance is that pornography is itself a violation of every woman's civil rights.

The ordinance has been controversial since its creation. It was drafted in 1983 by two women: Catharine MacKinnon, a professor at the University of Minnesota Law School, and Andrea Dworkin, a very

47. See *infra* notes 110-17.

48. In one study cited in an article, those most opposed to a ban on pornography were nonreligious men with postcollege education. McConahay, *supra* note 5, at 62. Women are over-represented in the scholarship criticizing the current system of obscenity law. In fact, the only "article" written by women that I came across supporting the "pure" liberal view was the FACT brief. See Hunter & Law, *supra* note 28. See also Laura Lederer, "Playboy Isn't Playing," *An Interview with Judith Bat-Ada*; Robin Morgan, *Theory and Practice: Pornography and Rape*; Susan Griffin, *Sadism and Catharsis: The Treatment Is the Disease*, Andrea Dworkin, *Why So-Called Radical Men Love and Need Pornography*; Susan Lurie, *Pornography and the Dread of Women: The Male Sexual Dilemma*; Beverly LaBelle, *The Propaganda of Misogyny*; all in TAKE BACK THE NIGHT 121-78 (Laura Lederer ed., 1980) (all discussing the misogynist nature of pornography).

prolific feminist writer, teacher, and speaker.⁴⁹

The ideology behind the ordinance is explained well by MacKinnon in her articles and speeches. Basically, the theory is that pornography is a political, not a moral, issue.⁵⁰ Pornography is not an idea; it is an ideology and an act of male domination, resulting in female subordination. Pornography constructs the way we see ourselves in society, and women "live its [pornography's] lie as reality."⁵¹ In the feminist perspective, gender inequality is, in large part, the result of the way men see women. In MacKinnon's writings, pornography is the way men see women: as objects, as desirous of being used, violated, and possessed. Since this is the way men see women, this is all that women are permitted to be by the dominant male culture. It is crucial to this perspective that, because this view created by pornography is so pervasive, the ordinance *cannot* be viewpoint-neutral.⁵² As MacKinnon states:

Pornography is a harm of male supremacy made difficult to see because of its pervasiveness, potency, and, principally, because of its success in making the world a pornographic place. Specifically, its harm cannot be discerned, and will not be addressed, if viewed and approached neutrally, because it *is* so much of "what is." In other words, to the extent pornography succeeds in constructing social reality, it becomes invisible as harm. If we live in a world that pornography creates through the power of men in a male dominated situation the issue is not what the harm of pornography is, but how that harm is to become visible.⁵³

Thus, the general theory was that pornography violates the civil rights of all women, since it promotes a harmful view of women. The ordinance makes four "harms" or injuries actionable. First, the ordinance made "trafficking" in pornography actionable. This included the production, sale, distribution, or exhibition of pornographic materials. This is perhaps the heart of the ordinance, since it has a very broad sweep. It defined trafficking in pornography as discrimination against women. Second, if the pornography models are coerced into participating in pornographic productions, then the resulting materials may be

49. See David Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 CONST. COMMENTARY 147, 148 (1985). Dworkin is the author of *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979).

50. See Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

51. *Id.* at 335.

52. See MacKinnon, *supra* note 43.

53. MacKinnon, *supra* note 43, at 20.

removed from public view. Third, those persons who have pornography forced on them in employment, education, a home, or any public place may file a complaint against the person who did the forcing. Fourth, it provides that if any person is attacked or assaulted as a result of pornography, that person has a claim against the attacker, as well as the maker, seller, distributor, and exhibitor of the pornography.⁵⁴

54. The text of the proposed Minneapolis ordinance can be found in Bryden, *supra* note 49, at 181-89. The four actionable injuries were:

A. *Discrimination by trafficking in pornography.* The production, sale, exhibition, or distribution of pornography is discrimination against women by means of trafficking in pornography:

(1) City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography but special display presentation of pornography in said places is sex discrimination.

(2) The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.

(3) Any woman has a cause of action hereunder as a woman acting against the subordination of women. Any man or transsexual who alleges injury by pornography in the way women are injured by it shall also have a cause of action.

B. *Coercion into pornographic performances.* Any person, including transsexual, who is coerced, intimidated, or fraudulently induced (hereafter, "coerced") into performing for pornography shall have a cause of action against the maker(s), seller(s), exhibitor(s) or distributor(s) of said pornography for damages and for the elimination of the products of the performance(s) from the public view.

(1) *Limitation of action.* This claim shall not expire before five years have elapsed from the date of the coerced performance(s) or from the last appearance or sale of any product of the performance(s), whichever date is later;

(2) Proof of one or more of the following facts or conditions shall not, without more, negate a finding of coercion:

(a) that the person is a woman; or

(b) that the person is or has been a prostitute; or

(c) that the person has attained the age of majority; or

(d) that the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or

(e) that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or

(f) that the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue; or

(g) that anyone else, including a spouse or other relative, has given permission on the person's behalf; or

(h) that the person actually consented to a use of the performance that is changed into pornography; or

(i) that the person knew that the purpose of the acts or events in

The ordinance drew an odd combination of support from feminists and conservative religious groups.⁵⁵ The city of Indianapolis passed the ordinance, but as discussed below, it was struck down by the Seventh Circuit. The Minneapolis City Council twice passed the ordinance, but it was twice vetoed by the mayor. Similar versions of the ordinance have been considered in Los Angeles, Detroit, and other municipalities. The city of Cambridge, Massachusetts rejected such an ordinance by referendum.⁵⁶

In 1985 the Seventh Circuit decided *American Booksellers Ass'n v. Hudnut*.⁵⁷ The Supreme Court summarily affirmed, with some Justices dissenting.⁵⁸ In *Hudnut* the city of Indianapolis enacted the civil rights ordinance, which defines pornography as the "graphic sexually explicit subordination of women."⁵⁹ The court held that this definition

question was to make pornography; or

(j) that the person showed no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or

(k) that the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or

(l) that no physical force, threats, or weapons were used in the making of the pornography; or

(m) that the person was paid or otherwise compensated.

C. *Forcing pornography on a person.* Any woman, man, child, or transsexual who has pornography forced on him/her in any place of employment, in education, in a home, or in any public place has a cause of action against the perpetrator and/or institution.

D. *Assault or physical attack due to pornography.* Any woman, man, child, or transsexual who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography has a claim for damages against the perpetrator, the maker(s), distributor(s), seller(s) and/or exhibitor(s), and for an injunction against the specific pornography's further exhibition, distribution, or sale. No damages shall be assessed (1) against maker(s) for pornography made, (2) against distributor(s) for pornography distributed, (3) against seller(s) for pornography sold, or (4) against exhibitors for pornography exhibited prior to the enforcement date of this act.

Bryden, *supra* note 49, at 184.

55. See, e.g., Lynn, *supra* note 4, at 27.

56. Lynn, *supra* note 4, at 28 n.5; Rebecca Benson, Note, *Pornography and the First Amendment: American Booksellers v. Hudnut*, 9 HARV. WOMEN'S L.J. 153, 154-55 n.6.

57. 771 F.2d 323 (7th Cir. 1985).

58. *Hudnut v. American Booksellers Ass'n*, 475 U.S. 1001 (1986). Chief Justice Burger and Justices Rehnquist and O'Connor would have noted probable jurisdiction and set the case for oral argument.

59. *Hudnut*, 771 F.2d at 324. The Indianapolis ordinance defined pornography as: the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

A. Women are presented as sexual objects who enjoy pain or humiliation; or

B. Women are presented as sexual objects who experience sexual pleasure in being raped; or

in this ordinance violated the First Amendment because pornography is protected speech, even if unpleasant to some in society. The court analogized pornography to other controversial types of speech: seditious libel,⁶⁰ racist publications of the Ku Klux Klan,⁶¹ and the Nazi march through Skokie, Illinois.⁶² Judge Easterbrook's opinion accepted the city's primary justification for the ordinance as a fact: pornography affects thoughts, and the subordination of women in pornography leads to subordination of women generally in society. However, the opinion indicates that this simply illustrates the power of pornography as speech.⁶³

The court rejected the city's other arguments for upholding the ordinance. First, there was no evidence that models or actors were actually injured in the process of producing pornographic films or pictures. Second, the argument that pornography as speech is "unanswerable" (*i.e.*, cannot be debated in an effective way so the "truth" cannot emerge) was irrelevant in First Amendment terms. The courts have never permitted the government to define truth as to a particular issue and then to cut off all further debate about the issue. Third, the court

C. Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

D. Women are presented as being penetrated by objects or animals; or

E. Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

F. Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility of submission or display.

Indianapolis Code § 16-3(q). The statute also provided that the "use of men, children, or transsexuals in the place of women in paragraphs (A) through (F) above shall also constitute pornography under this section.

Id.

The Minneapolis ordinance had a similar definition, but added some provisions to the general definition, including:

(i) women are presented dehumanized as sexual objects, things or commodities; or

....

(v) 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.

Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 13-14 (1985).

60. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

61. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

62. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

63. *Hudnut*, 771 F.2d at 329.

found that even if pornography were low-value speech and thus subject to more stringent regulation, this ordinance attempts to define pornography by the viewpoint of the speech, not by creating a more general category of impermissible speech. In other words, the city might be able to achieve its goals, but not through the implementation of viewpoint-based regulation of speech.⁶⁴

Easterbrook's opinion is interesting in two ways: first, he frequently cites to scholarly and policy-oriented law review articles in considering the First Amendment issues; second, he includes a section in the opinion discussing ways that an ordinance such as the one in the case could be rewritten to be constitutional.⁶⁵ For example, one suggestion is that the offense of coercion to engage in a pornographic performance (by force or fraud) could be constitutional if made viewpoint-neutral. The offense of forcing pornography on unwilling recipients could be acceptable if the government were not acting as a censor. The section creating remedies for injuries or assaults attributable to pornography is salvageable, according to the opinion, since speech that is dangerous in and of itself can be controlled.⁶⁶ However, the ordinance, as it exists, ties the action to viewpoint-specific harms and is still unconstitutional.

Not surprisingly, the ordinance has many critics, all arguing that the ordinance is unconstitutional. Most of the attacks focus on First Amendment law, arguing that the ordinance goes too far in prohibiting speech, that it prohibits the dissemination of ideas, and that it is vague, overbroad, or a prior restraint.⁶⁷ Others argue that it was not within the original intent of the framers to prohibit this type of speech,⁶⁸ that alternative remedies to the perceived harms are available through ex-

64. *Id.* at 330-32.

65. *Id.* at 332-34. In fact, the concurring justice objected to the gratuitous commentary in the opinion. *Id.* at 334.

66. For example, see the "fighting words" doctrine established by *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942).

67. See, e.g., Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & PUB. POL'Y REV. 130 (1984); Gey, *supra* note 3; Lynn, *supra* note 4; Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J. OF L. & PUB. POL'Y. 461 (1986); Randall D. B. Tigue, *Civil Rights and Censorship—Incompatible Bedfellows*, 11 WM. MITCHELL L. REV. 81 (1985). But see Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (agreeing that antipornography legislation may be constitutional under traditional analysis).

68. This argument is made by Emerson, *supra* note 67, at 132. MacKinnon would respond by saying that the framers didn't intend anything about women's speech, since women didn't cross their minds. MacKinnon, *supra* note 43, at 68.

isting tort and contract law doctrines,⁶⁹ and that it violates equal protection.⁷⁰

In fact, some very vocal opponents of the MacKinnon ordinance are also feminists. Their view is highly critical of the ordinance because it totally denies that women, as well as men, may actually enjoy sexually explicit entertainment.⁷¹ Some of these individuals are very prominent in the women's movement: Betty Freidan, Susan Estrich, Del Martin, and Elizabeth Schneider all cosigned the amicus brief submitted by the Feminist Anti-Censorship Taskforce (FACT) in the *Hudnut* case.⁷²

In defending the ordinance, MacKinnon makes several arguments. First, she criticizes the existing system for evaluation of sexually explicit speech:

Feminism doubts whether the average gender-neutral person exists; has more questions about the content and process of defining what community standards are than it does about deviations from them; wonders why prurience counts but powerlessness does not, and why sensibilities are better protected from offense than women are from exploitation; defines sexuality, and thus its violation and expropriation, more broadly than does state law; and questions why a body of law which has not in practice been able to tell rape from intercourse should, without further guidance, be entrusted with telling pornography from anything less.⁷³

In other words, MacKinnon questions whether the current system is competent to evaluate the complex issue of whether sexually explicit speech should be banned. Moreover, she is troubled by the fact that the present system reflects the existing pornography market and (if the radical feminist vision of pornography is correct) that pornography shapes the way men see women. Since this is reflected in the legal system, then the current legal system must certainly "buy into" the porno-

69. Gey, *supra* note 3, at 1600; Lynn *supra* note 4, at 103.

70. Tigue, *supra* note 67, at 101. Tigue argues that since the ordinance would exempt certain libraries, it violates equal protection.

71. See, e.g., McConahay, *supra* note 5, at 40-42; Benson, *supra* note 56, at 155 n.7.

72. See Hunter & Law, *supra* note 28, at 77-78. Estrich is the author of *REAL RAPE* (1987). Del Martin and Elizabeth Schneider have both done writing in the area of battered women and the law. See DEL MARTIN, *BATTERED WIVES* (1976), Elizabeth Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980).

73. MacKinnon, *supra* note 43, at 21.

graphic vision of women, at least at some level.⁷⁴

MacKinnon also attempts to distinguish obscenity from pornography. She claims that obscenity is an idea, a thought, an abstract concept of law. On the other hand pornography is more active; it is a political practice and a concrete manifestation of reality. As a result of this distinction, she believes that the theoretical "law" of obscenity cannot deal with the real-world consequences of pornography. It is simply incapable of making that leap from idea to action, from concept to political and social reality.⁷⁵

On the other hand, she also defends the proposed civil rights ordinance as being constitutional under existing law.⁷⁶ She argues that the proposed ordinance is simply a new version of an old, and legitimate, legal theme of establishing sexual equality.⁷⁷ The harms of pornography directly affect women, not men, and any societal benefits arising from pornography are far outweighed by these harms.⁷⁸ She points out that this is in line with current First Amendment jurisprudence: fighting words⁷⁹ and group libel,⁸⁰ for example, may be restricted because of the dangers associated with such speech. The same should be true here, in her view, because this is an area where *more* speech is not necessarily better, nor does it bring us closer to some idea of "truth" since pornography's perhaps greatest harm is the silencing of women's speech.⁸¹

The radical feminist view goes beyond the civil rights issue. The radical feminists of today attack the entire modern male-female sexual relationship as being violative of women. As Robin West points out, in

74. See, e.g., MacKinnon, *supra* note 43, at 20; MacKinnon, *supra* note 50, at 335-37.

75. MacKinnon *supra* note 43, at 20-22, 65-67; MacKinnon, *supra* note 50, at 321-23. This is the main point of the article in *Yale Law and Policy Review*—pornography is a political, not a moral, issue.

76. See MacKinnon, *supra* note 43, at 26. "[I]t is important to understand that this ordinance cannot now be said to be either conclusively legal or illegal under existing law or precedent, although I think the weight of authority is on our side." *Id.*

77. MacKinnon, *supra* note 43, at 25-27.

78. She identifies four "harms" resulting from pornography: harm to the performers (objectification and silence); harm to those who are the unwilling recipients of pornographic messages (sexual harassment and psychological damage); harm to those who are physically assaulted (*i.e.* raped) as a direct result of male exposure to pornography; and the harm to society as a whole resulting from the negative attitudes about women that are created and reinforced through exposure to pornographic imagery. MacKinnon, *supra* note 43, at 32-60. This issue of harm is discussed in more detail in section IV, *infra*.

79. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941).

80. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

81. MacKinnon, *supra* note 43, at 63-68.

the 1960s radical feminists concentrated on pregnancy, which was seen as invasive, oppressive, and as an assault on the integrity of the female body. Radical feminists of the 1990s see heterosexual intercourse in the same way.⁸² For example, Andrea Dworkin considers every single act of heterosexual intercourse to be coercive and intrusive.⁸³

B. A Critique of the Radical View

In this section, I will not discuss the traditional First Amendment critiques of the civil rights ordinance, which tend to focus on such issues as the original intent of the framers, or whether the ordinance is vague, overbroad, and so forth.⁸⁴ Instead, I will discuss the larger policy questions that the radical feminist view raises.

First, I think the authors of the ordinance engaged in a valuable enterprise just by raising the issue of pornography as a civil rights question.⁸⁵ The ordinance cannot be dismissed out of hand. The *Hudnut* case has been incorporated into standard textbooks and casebooks on constitutional law.⁸⁶ Many leading scholars have written articles criticizing the ordinance.⁸⁷ People now know and talk about the issue. Also, I personally agree with many of MacKinnon's ideas about the nature of our law as a male-dominated structure (at least in practice) and the differences between obscenity as an idea and pornography as reality.

82. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 29-35 (1988).

83. See, e.g., ANDREA DWORKIN *PORNOGRAPHY: MEN POSSESSING WOMEN* 22-24 (1981). In the chapter on power, she indicates that the connotation of the very word "sex" has been narrowed so that it means only "what the male does with his penis," rather than all of what it could conceivably encompass.

84. For authorities raising these arguments, see *supra* notes 67-72. See also Pollard, *supra* note 22.

85. This point is made in Christina Spaulding, *Anti-Pornography Laws As A Claim For Equal Respect: Feminism, Liberalism & Community*, 4 BERKELEY WOMEN'S L.J. 128, 150 (1988-89).

86. *American Bookseller's Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) *aff'd without opin.*, 475 U.S. 1001 (1986). Texts and casebooks include the following: BARRETT & COHEN, *CONSTITUTIONAL LAW* (1988 Supp. 347); BARRON, DIENES, McCORMACK & REDISH, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 1039-40 (1987); BRAVEMAN & BANKS, *CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM* 1169 (1987); GUNTHER, *CONSTITUTIONAL LAW* 1127 (12th ed. 1991); LOCKHART, KAMISAR, CHAPER & SHIFFRIN, *CONSTITUTIONAL LAW* 784 (7th ed. 1991), (1990 Supp. 209); NOWAK, ROTUNDA, *CONSTITUTIONAL LAW* 1156 n.82 (4th ed. 1986); STONE, SEIDMAN, SUNSTEIN & TUSHNET, *CONSTITUTIONAL LAW* 1138f (1986), (1989 Supp. 198, 204); TRIBE, *AMERICAN CONSTITUTIONAL LAW* 861, 921, 1028, 1058 (2d ed. 1988).

87. See the articles cited *supra* notes 67-72.

The radical feminist view is vulnerable to several significant criticisms, however. First, as one colleague at least implicitly said to me, it may not be wise to put all of our feminist "eggs" into one basket. Pornography, I will state, is a serious and important issue for the feminist movement. On the other hand, the civil rights ordinance (and radical feminism generally) tends to paint with too broad a brush. Much of what the ordinance prohibits would encompass well-known and classic works of art and literature, for example.⁸⁸ There is little or no chance of accomplishing the goal of eliminating the distribution or exhibition of such works. I do not think the political price, in terms of both credibility and energy, is worth the effort. There is no chance that people will stop having heterosexual intercourse or that women will stop having babies until we get these dominance, equality, social, cultural and legal issues worked out.⁸⁹ Again the price is not worth it.

Second, (and this is also basically a political argument) I think it should give feminists of all sorts, but particularly the radical feminists, pause to consider which other groups in society supported the civil rights ordinance—fundamentalist, conservative groups.⁹⁰ These people usually have no interest in supporting (and usually oppose) feminist approaches to other crucial women's issues, and the fact that they do advocate this aspect of the feminist agenda should direct us to re-examine it. Are they advocating what is in actuality a misogynist view? Is the civil rights ordinance a return to a paternalistic protectionist view of women? I will return to this point below.

In a related vein, it may be unwise to pit the feminist agenda concerning pornography directly against the standard, traditionally liberal voices since it splits apart the coalition of those who do usually support, advocate, and work for feminist causes. As mentioned previously, this issue not only separates liberal men from the feminists, but it also divides the feminists themselves.⁹¹ To the extent that one hopes to actually accomplish social and legal changes such political concerns should not be irrelevant.

Third, one author raises what she calls the "false consciousness

88. See the authorities cited *supra* note 67.

89. See the summary of the radical feminist view of pregnancy and intercourse in West, *supra* note 82, at 29-36 (1988).

90. See, e.g., Lynn, *supra* note 4, at 27-29, 37-48.

91. See *supra* note 72. As Professor McConahay points out, one study found that those most opposed to a ban on pornography were nonreligious men with some postcollege education. See McConahay, *supra* note 5, at 62. These are *likely* to be men who are "liberal" and somewhat sympathetic to feminist causes, in my view.

dilemma."⁹² The dilemma is that some members of the oppressed group may be so enmeshed in the ideology of the dominant group that they fail to see that they are in fact oppressed. Thus, some women (or all women) may be so caught up in the male dominance that they cannot speak with their own unique voices—each voice is only part of (or heavily influenced by) the dominant culture. On the other hand, if you take this view too far, all *any* woman has to say is part of the male culture, and there is nothing else to work with.⁹³ For example, many women defend pornography, arguing that women will learn to enjoy it and to use it to fully experience their own sexuality when given a chance to do so.⁹⁴ A radical feminist might answer this by saying that such women are just buying into the values and ideas of the dominant (male) culture and are not thinking independently, or from the "true" woman's perspective.⁹⁵ I think that the radical feminists are frequently guilty of arguing in this logically infinite loop.

Finally, the most important concern, in my opinion, about the radical feminist view is its almost inherent misogyny. In a thoughtful and well-written article, Professor Jeanne Schroeder points out, "Although it is surely not their intent, by disparaging heterosexuality and pregnancy in patriarchal society without the development of a positive alternative, they run the risk of elevating the rare radical . . . feminist at the expense of further belittling the vast majority of women who will engage in marriage and in motherhood."⁹⁶ Her article is an interesting and unusual one, in that it relates medieval stereotypes of women to modern feminist ideas. Her main thesis is that historically, characteristics that are valued in society are attributed to men, or are considered masculine; qualities that are considered to be inferior are attributed to women, or are considered feminine in nature. She points out that in medieval times, connectedness and a sense of community were male values in a hierarchical, male dominated society. *Women* were thought to be "individualistic, selfish, cunning, and sexually voracious."⁹⁷ These words sound remarkably like the mirror image of Carol Gilligan's ideas

92. See Spaulding, *supra* note 85, at 145-49.

93. Spaulding, *supra* note 85, at 145-49. Spaulding presents some other authors who have discussed the idea of false consciousness. The lightning rod for her criticism is Catherine MacKinnon, as the leading scholar in dominance theory.

94. See, e.g., the FACT brief, Hunter & Law, *supra* note 28.

95. See Spaulding, *supra* note 85, at 145-49.

96. See Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1213 (1990).

97. *Id.* at 1155.

about men and women. In her vision, women are concerned with connectedness and community; men are the individualistic, selfish ones.⁹⁸

Schroeder also discusses the medieval development of the concept of a virginal feminist or a virago, a surrogate man. This was a heroically virtuous woman, one who rejected sex, marriage, and childrearing — all of which were considered to be degrading to women. The idealized virginal woman was elevated above other women, and she was used “to justify the degradation and the humiliation of the vast majority of women who could not become viragos.”⁹⁹

If all of this sounds familiar, I think that it is. Although Schroeder admits that her analysis has its limits, I find the connection to modern radical feminism to be striking. It is frightening and grossly unfair to ask the majority of women to do what the radical feminists are, in a sense, asking them to do. As Schroeder points out, even mainstream feminism is somewhat unfair to the majority of women, who cannot or will not forego marriage and childrearing in our present society in the interest of career, academics, or general principles.¹⁰⁰

Moreover, the radical feminist view is basically a man-hating position. The radical feminists, in the same breath, will accuse men of hating women and of failing to account for the interests, thoughts, feelings, and desires of one-half of the population in our legal and cultural systems and will then advocate a theory of sexual and social relations between men and women that promotes a similarly negative view of men.

IV. MYTHS AND REALITIES OF PORNOGRAPHY—HOW BAD IS IT?

In 1970, the Commission on Obscenity and Pornography, appointed by President Lyndon B. Johnson, found that exposure to pornography was basically harmless and may in fact have some positive effects on sexuality.¹⁰¹ Sixteen years later, the Meese Commission came

98. See generally, CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) and West, *supra* note 96, at 15-28 (explaining and critiquing difference theory or “cultural” feminism).

99. See Schroeder, *supra* note 96, at 1208. This concept arose from orthodox Catholic dogma glorifying the Virgin Mary. *Id.* at 1208-13.

100. *Id.* at 1213.

101. See James Magee, *Book Reviews*, 6 CONST. COMM. 507, 508 (1989); McConahay, *supra* note 5, at 56-57. See also Irene Diamond, *Pornography and Repression: A Reconsideration of “Who” and “What,”* in TAKE BACK THE NIGHT 187, 192-93 (Laura Lederer ed., 1980). Diamond points out that the 1970 Commission appeared to ignore a finding by a 1969 President’s Commission on the Causes and Prevention of Violence that media violence does tend to increase aggressive behavior.

to some very different conclusions about pornography, particularly violent pornography, and its effects. The 1986 Commission, officially established by Attorney General Edwin Meese, found that exposure to violent sexually explicit materials led to more aggressive attitudes towards women and thus increased sexual violence.¹⁰²

Many explanations for the differences in the reports have been advanced. The political climate (and feminist attitude) of 1970 was very different from that of 1986. The political orientations of the members of each committee and of the men appointing the committees were at opposite ends of the spectrum. The budget for the 1970 report was two million dollars, while the budget for the 1986 report was only four hundred thousand dollars, making it virtually impossible for the Commission to do independent research.¹⁰³

However, one of the most fundamental debates about the disparities in the reports and subsequent recommendations is whether the sexually explicit material of 1986 was intrinsically *different* from that of 1970. It is clear that sexually explicit material of all forms is more available today than it was twenty years ago, largely because of the growth and progress in technology. The advent of the video recorder has revolutionized the market for "adult" movies, and the variety of cable television programming makes "adult" channels economically viable.¹⁰⁴ What is more questionable is whether these programs are more violent and more "hard-core" in addition to being more available.¹⁰⁵

102. See U.S. ATTORNEY GENERAL, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY FINAL REPORT 322-47 (1986) (*hereinafter* cited as FINAL REPORT).

103. Magee, *supra* note 101, at 513. The members of the 1970 Commission were appointed by President Lyndon B. Johnson. They were William B. Lockhard, Chair, Frederick H. Wagman, Edward E. Elson, Thomas D. Gill, Edward D. Greenwood, Morton A. Hill, G. William Jones, Charles H. Keating, Jr., Kenneth Keating (resigned June 1969), Joseph T. Klapper, Otto N. Larsen, Irving Lehrman, Freeman Lewis, Winfrey C. Link, Morris A. Lipton, Thomas C. Lynch, Barbara Scott, Cathryn A. Spelts, and Marvin E. Wolfgang. See Diamond, *supra* note 101, at 193.

The 1986 Commission was originally formed in 1985 by then Attorney General William French Smith during the Reagan administration. It was publicly announced by Edwin Meese. The members of the Commission were Henry E. Hudson, Chair, Judith Veronica Becker, Diane Cusack, Park Elliott Dietz, James C. Dobson, Edward Garcia, Ellen Levine, Tex Lezar, Bruce Ritter, Frederick Schauer, Deane Tilton, and Alan E. Sears, Executive Director. See FINAL REPORT, *supra* note 102, at 3-21.

104. Magee, *supra* note 101, at 512; McConahay, *supra* note 5, at 51; FINAL REPORT, *supra* note 102, at 284-86.

105. See, e.g., Park E. Dietz & Alan E. Sears, *Pornography and Obscenity Sold in "Adult" Bookstores: A Survey of 5132 Books, Magazines and Films in Four American Cities*, 21 U. MICH. J.L. REF. 7, 41-43 (1987-88). "Assuming that sexual violence, sexual degradation and sexual humiliation are everywhere regarded as unwholesome and unhealthy, we conclude that a large

This is further complicated by the fact that much of what we now consider to be normal or standard entertainment fare is violent, but is not pornographic or necessarily sexually explicit. For example, some authors cite the popular "slasher" films as representing this phenomenon.¹⁰⁶ Scholars also debate whether "snuff" films (depicting the actual torture and death of women for the viewer's sexual pleasure) actually exist¹⁰⁷ and whether the amount and availability of child pornography is really on the rise.¹⁰⁸

The Meese Commission did conduct a study of materials found in adult bookstores in four major American cities. According to the results, approximately 13% of the materials depicted violence.¹⁰⁹ The number is not significant in and of itself, and no similar figure is available for 1970. The actual amount and level of violence in such materials is basically unimportant when we turn to slightly different issues and ask what harm results from exposure to violent pornography, and if harm does result, what should we as a society do about it?

Some specific harms are alleged to be directly associated with pornography. First, women (and perhaps children) may be coerced, either implicitly or more explicitly, into participating in the creation of pornographic films and photographs.¹¹⁰ The Meese Commission report contains some painful evidence of this type of coercion.¹¹¹ Snuff films, if

proportion of the 'adults-only' pornography market consists of unwholesome and unhealthy merchandise according to any reasonable standard." *Id.* at 41. See also Taylor, *supra* note 9, at 259 ("Today's adult videos are the same hard-core films previously available only in the industry's own bookstores and theaters."); McConahay, *supra* note 5, at 62 (arguing that pornography is not more violent).

106. Magee, *supra* note 101, at 512.

107. Apparently the term "snuff" film comes from a movie of the same name. The film purportedly shows a young woman actually being stabbed to death and dismembered. The film is described and discussed in Beverly LaBelle, *Snuff—The Ultimate in Woman-Hating*; Martha Gever & Marg Hall, *Fighting Pornography*, both in TAKE BACK THE NIGHT 272-85 (Laura Lederer ed., 1980). But see, McConahay, *supra* note 5, at 63-64 (arguing that snuff films "are the Loch Ness Monsters of contemporary pornography" and do not exist).

108. Compare Jeffrey J. Kent & Scott D. Truesdell, *Spare the Child: The Constitutionality of Criminalizing Possession of Child Pornography*, 68 ORE. L. REV. 363 (1989); Florence Rush, *Child Pornography*, in TAKE BACK THE NIGHT 71-81 (Laura Lederer ed., 1980) (both arguing that child pornography is a serious problem); with Lawrence A. Stanley, *The child Porn Myth*, 7 CARDOZO ARTS & ENT. J. 295 (1989); Lynn, *supra* note 4 at 106-08; McConahay, *supra* note 5 at 64-65 (arguing that it is not a significant issue).

109. Dietz & Sears, *supra* note 105, at 39-40.

110. See MacKinnon, *supra* note 50, at 32-37; Pollard, *supra* note 22, at 133; Sunstein, *supra* note 67 at 595-97; Laura Lederer, *Then and Now: An Interview With a Former Pornography Model*, in TAKE BACK THE NIGHT 57-70 (Laura Lederer ed., 1980).

111. See FINAL REPORT, *supra* note 102, at 767-95 (general victim reports).

they do exist, would also fall into this category of harm.

Second, there is some evidence that exposure to pornography leads to sexually violent and abusive behavior.¹¹² Third, exposure to pornography, particularly violent pornography, affects the attitudes of both men and women about sexuality and gender roles.¹¹³ This third harm is the essence of the MacKinnon and Dworkin position, that pornography itself entirely shapes the way men and women see each other in society.¹¹⁴

It is, of course, difficult or impossible to prove a direct link between the harms alleged and exposure to violent pornography. On the other hand, the body of evidence supporting some sort of harm resulting from the existence of and the exposure to pornography is not insubstantial. Professor Sunstein, in writing on this issue, points out that the evidence comes from three distinct sources—laboratory studies, victim testimony, and statistics compiled by various states and other countries on sex crimes and the variations associated with changes in the laws.¹¹⁵ Studies show that exposure to pornography changes attitudes toward rape (whether the victim deserves, encourages, or enjoys the experience; whether it is acceptable; and whether and how the crime should be punished), and can result in more aggressive male-to-female conduct generally.¹¹⁶ Victim testimony dominated the hearings by the Meese Commission. Victims came forward with very painful, horrific stories about coercion to participate in pornographic works, as well as testimony tending to establish a direct link between reading or viewing pornographic material and then committing crimes of sex and violence.¹¹⁷ Some of this same evidence linking action to pornography is seen in the

112. See Pollard, *supra* note 22, at 131-33; Sunstein, *supra* note 67, at 597-99.

113. See Katharine T. Bartlett, *Porno-Symbolism: A Response to Professor McConahay*, 51 LAW & CONTEMP. PROBS. 71, 74-76. Bartlett raises excellent points about the hidden aspects of pervasive pornography: if women see something often enough, they will not think of it as unusual or unacceptable. See also Pollard, *supra* note 22, at 130-31; Sunstein, *supra* note 67, at 601-02; FINAL REPORT, *supra* note 102, at 799-835 (psychological and social harms of pornography).

114. See *supra* notes 73-75, 82-83.

115. Sunstein, *supra* note 67, at 597-600.

116. In addition to the Sunstein article, such studies are discussed in Pollard, *supra* note 22, at 127-32; FINAL REPORT, *supra* note 102, at 901-1035 (discussing several studies of many different aspects of harm); Pauline B. Bart & Margaret Jozsa, *Dirty Books, Dirty Films and Dirty Data*, and Diana E.H. Russell, *Pornography and Violence: What Does the New Research Say?*, in TAKE BACK THE NIGHT 204-17, 218-38 (Laura Lederer ed., 1980).

117. See FINAL REPORT, *supra* note 102, at 773-95.

victim testimony of battered women.¹¹⁸ As to statistics from states and from other countries, Sunstein cites studies establishing a link between an increase in reported rapes and the liberalization of pornography laws, or the availability of pornography generally.¹¹⁹

This evidence is criticized, however. It is argued that the link between exposure to sexually explicit materials and criminal conduct is tenuous at best.¹²⁰ Critics of the Meese Commission argue that only the testimony of victims was heard, not the viewpoint of those who enjoy pornography in a peaceful manner.¹²¹

On the other hand, Professor Sunstein makes the excellent point that we, as a society, often choose regulation over free enterprise in areas where there is uncertainty, even in areas where fundamental liberties are involved. He cites the example of the death penalty. Even though we are uncertain as to the deterrent effect of this ultimate sanction, we nonetheless choose to employ it in certain cases.¹²² On a more mundane level, environmental regulations may require very low levels of suspected carcinogen (or another dangerous substance) emissions, even though such restrictions may have significant societal costs in terms of jobs or product price.¹²³

V. SOLUTIONS? VIOLENCE AND FEMINISM

A. Introduction

As I was writing this article, I was discussing it with a colleague. At one point he said, "The whole thing [the issue of pornography] is a

118. See, e.g., Ann Jones, *A Little Knowledge*, in TAKE BACK THE NIGHT 179-84 (Laura Lederer ed., 1980); L. Walker, TERRIFYING LOVE, 124-35 (1989).

119. See Sunstein, *supra* note 67, at 599.

120. See, e.g., Anthony D'Amato, *A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence*, 31 WM. & MARY L. REV. 575 (1990); Hunter & Law, *supra* note 28, at 112-18 (FACT Brief); Lynn, *supra* note 4, at 65-71; Tigue, *supra* note 67, at 112-13. All authors basically argue that reliance on such studies is misplaced.

121. See, e.g., Lynn, *supra* note 4, at 73-86.

122. See Sunstein, *supra* note 67, at 601 n.78.

123. See Sunstein, *supra* note 67, at 601 n.77. Environmental Law is constantly dealing with this issue. See, e.g., Talbot Pate, *A Generic View of Toxic Chemicals and Similar Risks*, 7 ECOLOGY L.Q. 207 (1978-79); William H. Rodgers, *Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENVTL. L. REV. 191 (1980); William D. Ruckelshaus, *Risk in a Free Society*, 14 ENVTL. L. REP. 10190 (1984); Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1980) (occupational exposure to benzene); National Resource Defense Fund v. United States EPA, 824 F.2d 1146 (D.C. Cir. 1987) (vinyl chloride emissions in air); Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) (asbestos ingestion via water).

dead end. The liberal view is a dead end, the feminist view is a dead end. I guess I'm just not that interested in it." The complacency and the arrogance of the comment took me by surprise, although I'm not sure why. We, like all academic institutions, certainly have more than our share of arrogance and complacency. But it struck me that this is indeed what is so frustrating about the whole issue. The bulk of the American public does not care deeply about this issue and why should they? As far as they can tell, pornography certainly doesn't affect them. It probably does not directly affect my white, upper-middle class colleague or his wife, mother, sisters, or children. On the other hand, I do believe that pornography (violent or not) indirectly affects all of us, whether we realize it or not, and so I feel compelled to propose some sort of solution.

My solution is two-fold, one part more easily justified than the other. First, I agree with other scholars that violent pornography can be defined, and should be controlled, and I believe that this can be done under current First Amendment jurisprudence. Second, this is an area that I think (at least in part) is uniquely a woman's issue. This is the tough argument, but I think it is worth making. There are some legal questions that, in my view, are so closely and irrevocably bound to women—their minds, bodies, and hearts—that only women, or those embracing female values, can fully grapple with the issues. In this view, we need to revamp at least some portions of the legal system to accommodate the need for the feminine perspective in resolving these fundamental issues.

B. Violence and Specific Solutions

It has never been disputed that certain types of speech are dangerous and need to be regulated. Pornography, particularly violent pornography, may well be in that class. It has been suggested that we attempt to deal with this issue by taking a compromise liberal position—use the existing *Brandenburg*¹²⁴ test, under which the government may regulate speech that advocates lawless action where there is intent to produce such action and there is an imminent threat of harm.¹²⁵ It was stated above that there is some evidence that violent pornography has been clearly linked to specific and particular harms, which result di-

124. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). See also *Schenck v. United States*, 249 U.S. 47 (1919) (establishing a "clear and present danger" test).

125. 395 U.S. at 447.

rectly from the exposure to such materials.¹²⁶ The argument is that a reasonable person would foresee that reading or viewing violent pornography could lead the reader or viewer to engage in similar violent sexual acts, and the threat that such conduct will occur is imminent. As one author states, "Violent pornography, like speeding, is intrinsically dangerous, and legislatures may regulate it on the basis of its known propensity for harm without a showing of particular harm."¹²⁷

Although this argument appears to be rational on at least some level, I do not believe that the courts would use the *Brandenburg* test in this fashion. The threat of sexual violence against women, resulting from reading or viewing violent sexually explicit materials, was not the type of issue that the test was designed to resolve. The Court seems to require harm that is imminent and dangerous. Public anger or disquiet would not be sufficient.¹²⁸

Another suggested solution is the creation of a new test or rule, explicitly designed to deal with violent or hard-core pornography, outside of the obscenity law altogether. This would be justified under reasoning similar to that used by the Supreme Court to create a special exception for child pornography in *New York v. Ferber*.¹²⁹ In that case, the Court characterized child pornography as an "evil" and found that when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."¹³⁰ It is argued that violent or hard-core pornography could be similarly restricted or prohibited, if defined in a narrow and specific manner.¹³¹

This suggestion certainly has possibilities. The current Supreme Court might be agreeable to such a limitation on rights of expression if narrowly tailored.¹³² The problem that some feminists would see is that

126. See *supra* notes 112-19.

127. Pollard, *supra* note 22, at 141.

128. See Tigue, *supra* note 67, at 111-13. Tigue cites *Hess v. Indiana*, 414 U.S. 105 (1973) and *Terminello v. City of Chicago*, 337 U.S. 1 (1949) in support of his proposition.

129. 458 U.S. 747 (1982).

130. *Id.* at 763-64. The court also gave other reasons for its decision: the State interest in protecting children; the existence of kiddie porn is inherently related to child sexual abuse (in its manufacture, if nothing else); the promotion and sale of child pornography encourages its production; and it is unlikely, in the Court's opinion, that kiddie porn would pass muster under the *Miller* obscenity standard. *Id.* at 756-63. See *Miller v. California*, 413 U.S. 15, 24 (1973) (kiddie porn would tend to lack serious literary, artistic, political, or scientific value).

131. See Pollard, *supra* note 22, at 154-59 (proposing new ordinance).

132. The current Court has shown *some* willingness to limit First Amendment rights regarding speech. See, e.g., *Barnes v. Glen Theatre, Inc.* 111 S. Ct. 2456 (1991) (upholding state

most tests one could develop would be too narrow. For example, one author suggests that we draw the line at depiction of "ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus, analingus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible."¹³³

Although this might eliminate some of the more hard-core material, it does nothing to remedy the more widespread and perhaps more serious problem of the sexual humiliation and degradation of women in pornographic materials. MacKinnon also makes the rather cynical observation that the reason the Court reacted so strongly in the *Ferber* case is due to the fact that the sexually explicit material in that case depicted homosexual acts between two young boys, rather than heterosexual or lesbian conduct involving women (or more specifically in this case, girls).¹³⁴ Another author proposes an ordinance to directly address the issue of violent pornography,¹³⁵ but the same limitations apply

restrictions on nude dancing); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding restriction on commercial speech); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding zoning ordinance regulating location of adult theatres).

133. See Taylor, *supra* note 9, at 272, proposing a new hard core pornography statute or ordinance:

No person with knowledge of the character of the material shall knowingly distribute or exhibit, to the public or for commercial purposes, any hard-core pornography.

Hard-core pornography means any material or performance that explicitly depicts ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus, analingus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible.

Id.

134. See MacKinnon, *supra* note 50, at 339 & n.56. "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." [emphasis in original] "Two boys masturbating with no showing of explicit force demonstrates the harm of child pornography . . . while shoving money up a woman's vagina, among other acts, raises serious questions of 'regulation of "conduct" having communicative element' . . ." *Id.* (citations omitted)

135. See Pollard, *supra* note 22, at 155. The proposed ordinance reads as follows:

I. Definitions.

(a) Violent pornography shall mean a film that concurrently depicts both sexual explicitness and physically violent acts between or among those engaged in the sexual activity.

(b) Sexual explicitness shall mean:

- 1) human genitals in a state of sexual stimulation or arousal,
- 2) acts of human masturbation, sexual intercourse, or sodomy, or
- 3) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast;

(c) Physically violent acts shall mean:

- 1) assault,
- 2) battery,

to this solution as well. While such a law would certainly reduce the availability of some of the most troubling material, it does not reach the more fundamental questions of what pornography in its other forms does to the self-image of women and to men's vision of women.

C. Feminism

As indicated below, I do believe that women are uniquely qualified, if not essentially required, to decide certain types of legal issues. I will describe two areas where I think this is true, and then I will proceed to discuss why I believe it applies to pornography.

Although I do not consider myself to be a feminist in the "difference" mode, I find the ideas proposed by Carol Gilligan and the differ-

- 3) murder,
- 4) rape,
- 5) torture, or
- 6) coercion by physical force.

II. Violations. The following acts will be violations of this ordinance:

(a) Production. It shall be a violation to participate in any capacity in the production of violent pornography. Participation means:

- 1) filming,
- 2) directing,
- 3) acting (playing a role in the film),
- 4) coercing another to play a role in the film,
- 5) creating manuscripts for production,
- 6) editing films,
- 7) knowingly supplying the financial backing for producing the film,*
- 8) knowingly supplying the studio or other place where the film is to be made,* or
- 9) knowingly supplying actors for such films, such as an agent, or parent or relative of a minor;*

(*The standard for knowledge shall be the "reasonable person" standard, *i.e.*, the defendant knew or should have known.)

(b) Trafficking. It shall be a violation to deal in violent pornography. Dealing means:

- 1) selling films,
- 2) buying films,
- 3) exhibiting films, or
- 4) distributing films.

III. Sanctions. The following criminal and civil actions apply to the foregoing violations:

(a) Criminal sanctions. It shall be a crime to violate this ordinance. Penalties shall be determined by the appropriate legislative bodies.

(b) Civil actions. A civil action is created and treble damages shall be awarded for torts such as assault, and false imprisonment that occur in production of the film.

Id.

ence or social feminists intriguing.¹³⁶ I do believe that in current Western culture, women (as a group) about a variety of issues. I also agree with the general proposition that what we currently identify as the more feminine way of thinking about issues is a more moral one, the higher ethical road. That is, "feminine" values are identified with community, connectedness, and with attempting to find a compromise solution that will be fair to all parties. "Masculine" values are associated with individuality, competition, and with finding solutions that tend to result in a clear winner and a clear loser.¹³⁷

As an example, consider the subject of abortion. I will not presume to try to resolve the basically unresolvable debate in this discussion. I think reasonable minds can differ about the fundamental question. I can respect both the argument that abortion is part of the mother's basic right to privacy, and the argument that a fetus is a living human being so that a decision to terminate that life involves more essential issues than simply the mother's right to privacy. I can also respect the intermediate position taken by Mary Ann Glendon that the Europeans have the right idea: maybe we should permit abortion, but should be careful about how and when and why we permit it, and about what kind of "message" we are sending with that decision.¹³⁸

In any event, I believe that the ultimate decision about what we do about abortion should be made by women, or more accurately, with an eye toward the feminine perspective. Personally, I agree with Gloria

136. To the contrary, I consider myself to be a feminist of both the "sameness/assimilationist" school and the "fem-crit" dominance/power deconstruction school.

Carol Gilligan's book, *IN A DIFFERENT VOICE* (1982) is credited with creating or inspiring a new type of feminism, sometimes called "difference," "cultural" or "social" feminism. Gilligan is a psychologist, not a lawyer or law professor, but her ideas that men and women are intrinsically different, that they should be treated differently and the differences show female moral superiority received a good deal of attention in the legal scholarship community. Gilligan did not invent the idea of "difference," but her study gave it a push into the public eye. For discussions of feminism, see Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); West, *supra* note 82; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

137. Robin West explains the concept very thoroughly in her article. See West, *supra* note 82, at 13-28.

138. See MARY A. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987). "The mores, not the law, are the best protection of the weak and dependent. A law which communicates that abortion is a serious moral issue and that the fetus is entitled to protection will have a more beneficial influence on behavior and opinion, even though it permits abortion under some—even many—circumstances, than a law that holds fetal life to be of little or no value and abortion to be a fundamental right." *Id.* at 61.

Steinem's often-quoted source that if men could get pregnant, abortion would be a sacrament.¹³⁹ Although the opinions of men need to be incorporated into the decision, men are simply not competent to be the final arbiters in this area. Men do not get pregnant and give birth to children—women do—and there is no changing that truth now or in the (near) future.¹⁴⁰ The fact that five old men could make the recent irrational decision that, although the right to an abortion is a constitutionally protected right, the federal government may refuse to allow recipients of federal aid to discuss it with pregnant women,¹⁴¹ is at once ludicrous and sad.

A second example has arisen in the context of the use of the battered women's syndrome as part of a self-defense claim in a murder case. Many other authors and I myself have proposed that the woman who is abused by her mate and who later strikes back at him with deadly force should have her actions evaluated under a reasonable woman standard.¹⁴² The question the jury should decide is what would a reasonable woman (rather than a reasonable person) do under these circumstances? The reasonable man or reasonable person standard is arguably so inherently a male standard that it cannot be fairly applied to a female in the situation of a battered woman. For example, women are usually smaller and physically weaker than men. In our culture, women are often financially dependent on men. Many women are emotionally dependent on their male mate. As a result of these feminine characteristics, some actions allegedly taken in self-defense may not

139. The quote is attributed to a female taxi-cab driver in Steinem's book, GLORIA STEINEM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 8 (1983). See also her essay in the same book, *If Men Could Menstruate*, 337-40.

140. See Ann C. Scales, *Towards A Feminist Jurisprudence*, 56 *IND. L.J.* 375 (1980-81). "The need for a feminist jurisprudence is focused most sharply by the issue of pregnancy. In the words of one commentator, pregnancy is 'the final and decisive battleground' in the struggle for just treatment of both sexes." I also found Susan Moller Okin's comments on "false-gender neutrality" to be pertinent here. See SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* 10-13, 101-09 (1989). "[M]uch of the real experience of 'persons,' so long as they live in gender-structured societies, does in fact depend on what sex they are." *Id.* at 11.

141. See *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). See also, *Int'l Union, United Automobile Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991). This case was decided two months before *Rust v. Sullivan* and holds that an employer may not exclude fertile female employees from certain jobs because of its concern for the health of a potential fetus.

142. See Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense and Expert Testimony*, 39 *MERCER L. REV.* 545 (1988). See also Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 *HARV. WOMEN'S L.J.* 121 (1985).

seem to be objectively reasonable in the traditional (male) sense, but may be perfectly reasonable when viewed from the female point of view.

Other examples come to mind: the crime of rape (and any defenses), the problem of sexual harassment, and issues surrounding childbearing and the workplace. Courts have often dealt with these issues from the traditional (read masculine) viewpoint. I think that all of these legal problems are uniquely women's problems, and again, should be evaluated and hopefully resolved with a woman's view in mind.

I do not mean to overstate my position, it is not my point that men should be totally excluded from the process. Besides, I do not think it would be possible to do so in any case. But I do believe that it is necessary to attempt to look at these issues from a viewpoint that is completely different from where we, as lawyers, tend to look. Law school changes one's way of reasoning, but in teaching students to think like lawyers, we ultimately teach them to think like *men* lawyers. As a law professor, I am aware of this, and to a certain extent it cannot be helped since we are, after all, training people to enter the existing world of law and the legal system. However, we also teach students with an eye to the future, and hopefully are able also to instill a sense of flexibility in their patterns of reasoning. In these areas, for these uniquely female issues and concerns, I am calling on that flexibility.

In short, I believe (although I do not know) that the average woman would find hard-core and violent pornography to be evil, reprehensible, and would think that it should be subject to regulation (*particularly* in light of the uncertainty of the evidence concerning coercion to participate in the making of pornographic materials, as well as the link between violent pornography and similar conduct). I think that she would find this to be true, regardless of whether the material would be considered to be legally obscene. Using some of the social feminists' analysis, it is possible to arrive at solutions to problems such as pornography that do not necessarily result in a "winner-take-all" situation. It is difficult, but not impossible, to get beyond our traditional notions of what is absolutely protected speech, and what is not. In a way, speech issues are easier than other constitutional questions because the Court has already made significant exception to the blanket prohibition of any restriction on speech or expressive conduct.¹⁴³

At least one other feminist author has taken a similar position.

143. See the cases cited *supra* note 132.

She argues that we adopt a "communitarian" approach to the problem of pornography and embrace the concept of equal respect. The communitarian's theory of law strives toward a group or social ideal of solidarity. Rather than advance individualistic goals, broader community objectives are stressed. The idea of equal respect is that we should protect individual membership in the group and protect individual dignity. She argues that some forms of pornography are so hateful and so extreme that they violate the concepts of equal respect, and should be restricted.¹⁴⁴ As she so effectively points out, the problem is that "[m]isogyny often expresses itself most powerfully in sexual terms."¹⁴⁵ However, any communitarian approach has at least one of the problems of the liberal view. As one author cautioned about feminism and communitarianism: "Theories of justice that depend on traditions or on shared meanings—even if their intent is to be critical—cannot deal adequately with the problem of domination."¹⁴⁶

I do not propose that the test for resolving these questions be a "reasonable" woman or an "average" woman standard. I do propose that we look at issues that typically affect women more seriously than men in a different light. I suggest that we try to come up with ways of resolving conflicts that neither pit women against men, nor take unfair advantage of women. In order to see how women would respond to these significant questions, we have to ask them, and we have to listen to the answers. That means getting women involved in a meaningful way in decision-making at all levels of our society. I would paraphrase MacKinnon and argue most of our current legal constructs are "gendered to the ground,"¹⁴⁷ but it is not realistic to throw the entire system out the window. What I think is realistic is to look at changing legal rules, (and thus gender perceptions and traditional sex roles) area by area, issue by issue, rule by rule.

I think it would be premature to propose a specific statute, rule or solution at this juncture. We need to strive to incorporate women's viewpoints into the decision-making process and at a stage that is early enough to be meaningful. We then need to pay attention to what we find and to try to devise new legal rules, and, if necessary, new legal

144. See Spaulding, *supra* note 85, at 150-58. In addition to the Spaulding article, see Richard Posner's brief discussion in his book *THE PROBLEMS OF JURISPRUDENCE*, 414-19 (1990).

145. See Spaulding, *supra* note 85, at 163.

146. See Okin, *supra* note 140, at 72.

147. See MacKinnon, *supra* note 50, at 326. "[S]exuality itself is a social construct, gendered to the ground." *Id.*

systems to implement ideas and solutions that incorporate the unique perspective of women.