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SEX, LIES AND VIDEOTAPE: THE PORNOGRAPHER AS CENSOR

Marianne Wesson*

Abstract: The legal branch of the women's movement, although of one mind on some subjects, is divided on the proper approach to pornography. Some feminists oppose the imposition of any legal burdens on pornography because they fear that feminist speech will be caught in the general suppression, and others believe that any such burdens must violate the first amendment. Professor Wesson suggests that pornography should be defined to include only those materials that equate sexual pleasure with the infliction of violence or pain, and imply approval of conduct that generates the actor's arousal or satisfaction through this infliction. So defined, pornography should be treated like other dangerous consumer products—its creators and disseminators ought to be held liable for the foreseeable harm that flows from its creation, distribution and use. Professor Wesson argues that this proposal does not violate the first amendment, properly construed, and that it also makes good feminist political sense. In particular, she points to the empirical link between pornography and harm to women, to the lies about women embodied in pornography, and to the silencing effect of pornography on women's voices. She suggests that these consequences make pornography resemble other forms of speech that may, under the first amendment, be regulated.

For some years now, the feminist project of transforming law into a phenomenon more consonant with the experiences of women, and more conducive to their welfare, has generated a body of "legal" materials in a variety of forms—including scholarship,¹ judicial deci-

* Professor of Law, University of Colorado. More than most authors, I need to acknowledge the contributions of others to this work. Singly or collectively they shared their ideas and criticisms as I stumbled around in the twilight, they suggested other sources, sent me xeroxes, told me I was crazy, listened to me on the telephone when I was stuck, and individually or collectively had many of the good ideas that follow. For all this they have my gratitude and affection—Carol Glowinsky, Glenn George, Claudia Bayliff, Helen Stone, Elizabeth Hyde, Joan Welsh, Diane Mayer, Marcia Westcott. Thanks also to Emily Cathoun, who had one of the very best ideas during a long and enlightening telephone conversation, to David Mastbaum, who read an early draft and made some helpful suggestions, and to Richard Delgado for his encouragement and insight. A version of this paper was given as the Austin Scott, Jr. Memorial Lecture at the University of Colorado School of Law on April 25, 1990.

1. Cataloguing the universe of feminist scholarship would be impossible in a footnote. A useful bibliography is available in the materials created for the April 1990 conference "Voices of Women in Legal Education" co-sponsored by the Association of American Law Schools and the New York University School of Law. See P. George & S. McGlamery, *Women and Legal Scholarship: A Bibliography* (Working Draft April 3, 1990) [on file with Washington Law Review].

sions,² statutes,³ regulations,⁴ and teaching materials.⁵ Like any social movement, the feminist legal movement has generated its share of internal disagreements. Apart from the question of exactly what it means to be a feminist, no issue has generated more fierce disagreement than the question of pornography. As one woman put it, "Pornography is our Skokie."⁶

The debate about pornography, together with the parallel debate about what the correct "feminist" position should be with regard to it, proceeds today in many forums, not all closely related to the law.⁷ But it is the legal debate about pornography that is haunted by the fourteen words that comprise a central portion of the first amendment of the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."⁸ The first amendment is a formidable obstacle to those who believe that the law ought to prohibit, penalize, or regulate pornographic materials because they cause harm. Many voices, including some self-identified feminist voices, argue that such governmental intrusion is both

2. The question of what constitutes a feminist judicial decision is not easy to answer. Judith Resnick begins to fashion an answer in Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CALIF. L. REV. 1877 (1988). See also Resnick, *Feminism and the Language of Judging*, 22 ARIZ. ST. L.J. 31 (1990); Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507 (1990). One decision that might be identified as feminist in its recognition and treatment of gender difference is *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977) (overturning the conviction of a woman for murder because of male-oriented language used in instructing the jury on self-defense).

3. An excellent example is the Pregnancy Discrimination Act of 1978, 42 U.S.C.A. § 2000e(k) (West 1981), overturning the United States Supreme Court's refusal, in *Gilbert v. General Elec. Co.*, 429 U.S. 125 (1976), to acknowledge that discrimination against "pregnant persons" is a form of discrimination on the basis of sex.

4. See, for example, the regulations of the Equal Employment Opportunity Commission defining sexual harassment and treating it as form of sex discrimination. 29 C.F.R. § 1604.11 (1990). See *infra* notes 64-69 and accompanying text for a discussion of sexual harassment.

5. See, e.g., B. BABCOCK, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975); H. KAY, *TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* (3d ed. 1988).

6. This comment is attributed to Mary Eberts in Callwood, *Feminist Debates/Civil Liberties*, in *WOMEN AGAINST CENSORSHIP* 122 (V. Burstyn ed. 1985). Pornography is not, of course, the only source of dissension among feminists. Even leaving aside countless disputes on issues of theory, there have been differences about the proper outcome of litigation in other areas as well. One of the best-known areas of controversy concerned the so-called *Cal Fed* litigation, regarding whether a state could guarantee unpaid leave from private employment to pregnant women without extending that same benefit to all temporarily disabled employees. Feminist groups filed briefs amicus curiae on both sides of the case. For an account, see Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99, 100-03.

7. See e.g., Kittay, *Pornography and the Erotics of Domination*, in *BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY* (C. Gould ed. 1984); Nead, *The Female Nude: Pornography, Art and Sexuality*, 15 SIGNS 323 (1990); Vogel, *Fine Arts and Feminism: The Awakening Conscience*, 2 FEMINIST STUDIES 3 (1974).

8. U.S. CONST. amend. I.

unwise—in part because it might ultimately turn against other forms of expression, including feminist forms—and unconstitutional, because of the firm and inviolable dictates of the first amendment.

I. A PROPOSAL FOR REGULATING PORNOGRAPHY

Many thoughtful and original thinkers have concluded that the suppression of pornography is too costly and dangerous a project for feminism to undertake. I take exception to that view, and argue that materials that equate sexual pleasure with the infliction of violence or pain, and imply approval of conduct that generates the actor's sexual arousal or satisfaction through this infliction, can and ought to be exempt from the protection of the first amendment. Those who create and disseminate such material should be susceptible to suits for damages by those who believe, and can prove, they have been harmed by the creation and dissemination of pornography. I will refer to these materials as the "new hard core," defined as *depictions, in any medium, of violence directed against, or pain inflicted on, an unconsenting person or a child, for the purpose of anyone's real or apparent sexual arousal or gratification, in a context suggesting endorsement or approval of such behavior, and likely to promote or encourage similar behavior in those exposed to the depiction.*⁹ Although much could be said about the mechanics of how such lawsuits might be litigated, I engage only the possible feminist and civil libertarian objections to such a law.

9. While it incorporates elements of several definitions suggested by others, this definition is not identical to them. It does not at all resemble the definition of "obscenity" created by the United States Supreme Court. See *infra* notes 27–29 and accompanying text. It is less inclusive than the definition contained in the MacKinnon-Dworkin ordinance. See *infra* note 32. It does resemble a definition set forth in Kotash, *Second Thoughts*, in *WOMEN AGAINST CENSORSHIP* 34 (V. Burstyn ed. 1985), attributed to Jillian Ridington:

Pornography is a presentation, whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behavior in which one or more participants are coerced, overtly or *implicitly*, into participation; or are injured or abused physically or *psychologically*; or in which an *imbalance of power* is obvious, or *implied* by virtue of the immature age of any participant or by contextual aspects of the presentation, and in which such behavior can be taken to be advocated or endorsed.

(emphasis in original). This definition, which may well accurately describe certain community usages, is nevertheless too inclusive to survive a challenge under the first amendment.

After this essay was written, I came across a similar definition in Pollard, *Regulating Violent Pornography*, 43 VAND. L. REV. 125 (1990). Pollard's definition of "violent pornography" differs from "new hard core" in some respects, and her proposal differs in its limitation to filmed representations and its employment of criminal sanctions. *Id.* at 155. Pollard would create civil actions as well, but only for intentional torts occurring in the course of producing violent pornographic films. *Id.* Presumably she would not allow recovery for other consequential harms. Her proposal is problematic in many practical and philosophical respects, but close in spirit to the one set forth here.

This proposal does not advocate censorship in the form of prior restraint or criminal prosecution. Nor does it include in the language defining "new hard core" materials terms that might lead to greatly varying interpretations, for example materials in which women are presented "in scenarios of degradation" or "as sexual objects for domination, conquest, or possession."¹⁰ The definition does not include materials that many might find infuriating, humiliating, or degrading to women, for example materials depicting women consenting to receive sexual violence or pain, and in this respect as in others, many would criticize my proposal as not sufficiently inclusive.¹¹

I do not define the susceptible materials, "the new hard core," in terms of the degree of their sexual explicitness, but rather in terms of their depiction and endorsement of sexualized violence toward women.¹² On a more theoretical plane, I do not argue, as have some anti-pornography theorists, that pornography is a form of conduct and not speech at all.¹³ Nor do I assume, as proposed by one constitutional scholar, that pornography, although speech, may be regulated because it is "low-value" speech having little ideological content.¹⁴ It is precisely because pornography, at least the subcategory that concerns me, *is* speech, indeed speech that has a very serious ideological content,¹⁵ that it is dangerous. It is not "low-content" speech, but "high harm" speech. In a formulation that may be only a little overstated, Robin Morgan has said that "[p]ornography is the theory, and rape is the practice."¹⁶ Whatever else they are, theories are certainly speech when expressed. When they concern relations of power and

10. These terms are found in the MacKinnon-Dworkin anti-pornography ordinance, *see infra* note 30, and sparked some of the most serious first amendment objections to it. *See* Feminist Anti-Censorship Task Force (FACT) Brief *Amici Curiae* in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) *reprinted in* Hunter & Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al.*, in *American Booksellers Association v. Hudnut*, 21 U. MICH. J.L. REF. 69 (1988) [hereinafter *FACT Brief*].

11. *See infra* note 32 for an example of a more inclusive statute.

12. In this respect my definition differs from the Supreme Court's definition of obscenity. *See* *Miller v. California*, 413 U.S. 15, 24-25 (1973). It also differs from the definition of "hard-core pornography" advocated in Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255, 272 (1988), which depends almost exclusively on the visible explicitness of the sexual material depicted.

13. *See, e.g.*, Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

14. *See* Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-08.

15. With this point many on both sides of the debate would agree. *See, e.g.*, *FACT Brief*, *supra* note 10, at 119-22; C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 206-13 (1987). *But cf. id.* at 193-94 ("Pornography is more actlike than thoughtlike.").

16. Morgan, *Theory and Practice: Pornography and Rape*, in *TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY* 139 (L. Lederer ed. 1980).

equality between men and women, they generate quintessentially ideological speech.

Yet, when the definition of these "new hard core" materials is limited as proposed here, it becomes very difficult to argue convincingly that the first amendment ought to shelter them, preventing women who have been, and can prove they have been, harmed by them from recovering damages as compensation for that harm. I will argue that in addition to satisfying first amendment objections, the scheme proposed here would satisfy various feminist objections that have been raised about the regulation of pornography. After explaining how lawsuits brought under this proposal might be won, I will briefly set forth the different premises that have contributed to the feminist fission on pornography. I will also seek to persuade the reader that the first amendment questions posed by the existence of a law permitting women harmed by violent pornography to seek damages for those harms are not as simple as the Supreme Court's recent perfunctory treatment makes them appear.¹⁷ Finally, I will argue that rather than subtracting from freedom of speech, the enactment of such a law may well contribute to greater freedom of speech.

II. A NOTE ON LIABILITY AND THE PROBLEM OF PROXIMATE CAUSE

The form of action that I propose against creators and purveyors of pornography that results in harm is that of the ordinary tort or personal injury lawsuit. In such suits, plaintiffs must typically link the alleged wrongful act with the particular harm suffered.

Some may doubt that such a causal link could ever be established between the creation of pornography and harm to an individual plaintiff. Certainly, there will be many cases in which such harm has in fact been caused, but where that causation cannot be proved. In a significant number of cases, however, convincing proof may well be available. An excellent example of a case in which damages might have been collected under the proposal that I set forth concerned a television program in which a particular form of gang rape was inflicted on a juvenile in detention, apparently prompting a group of juveniles watching the program to emulate the rape using one of their peers as the victim.¹⁸

17. See *infra* note 36 and accompanying text.

18. See *Olivia N. v. Nat'l Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981) (dismissing case on first amendment grounds), *cert. denied*, 458 U.S. 1108 (1982).

Surveys illustrate that a very substantial number of women report having been pressured or coerced to emulate pornographic poses or performances depicted in photographs, films, or books.¹⁹ Victims of brutal sexual crimes often seem to be involuntarily cast in their assailant's private reenactment of scenarios they have read or seen in pornographic materials.²⁰ Scholars have documented that prostitutes frequently encounter demands from clients to emulate pornography, and that young women are "trained" for a life of prostitution by exposure to pornography.²¹ Pornography is also reported to be prominent in the sexual abuse of children.²² Given the significant incidence of these instrumental uses of pornography as a tool of coercion, intimidation, and abuse, one might expect to see a large number of successful lawsuits under the proposal presented here.

Nevertheless, this proposal is not sufficiently comprehensive to satisfy Catharine MacKinnon, who has written that requiring proof of a causal link in each case of recovery under an anti-pornography law would confine women to a "mop-up operation."²³ I sympathize with the criticism and, to a large extent, agree with it. However, the proposal set forth here would impose significant costs upon pornographers and their distributors. These economic considerations may consequently diminish the supply, especially of the most violent pornography.

A causation-based right of action is also the anti-pornography proposal most likely to succeed in the courts.²⁴ Many such suits could withstand objections that the real cause of harm to the victim is the intervening act of another (for example, a rapist) rather than the creation or distribution of the pornography inspired or used by him. It is a well-established principle of tort law that one who creates a dangerous situation or produces a dangerous instrumentality may be held liable notwithstanding the intervening act of an autonomous third party.

19. See Russell, *Pornography and Violence: What Does the New Research Say?*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 224 (L. Lederer ed. 1982) (one woman in ten surveyed in random San Francisco households reported having such an experience).

20. See, e.g., *State v. Herberg*, 324 N.W.2d 346 (Minn. 1982). The example is from C. MACKINNON, *supra* note 15, at 186 n.108.

21. Giobbe, *Confronting the Liberal Lies About Prostitution*, in THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 78-79 (D. Leidholdt & J. Raymond eds. 1990).

22. See, e.g., Burgess, Hartman, McCausland & Powers, *Response Patterns in Children and Adolescents Exploited Through Sex Rings and Pornography*, 141 AM. J. PSYCHIATRY 656, 657 (1984).

23. C. MACKINNON, *supra* note 15, at 204.

24. Causation is an important factor in free speech cases. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (anti-war protestor could not be prosecuted for disorderly conduct because the prosecution did not show that his comment was likely to cause imminent disorder).

Tort law is replete with examples of successful litigation pursued against creators of dangerous conditions, even though the intervening act of another contributed to the eventual harm.²⁵ That the intervening act is criminal in nature does not insulate the originator of the danger from incurring liability, if the ultimate harm suffered, though remote, was reasonably foreseeable by the originator.²⁶ Thus, my proposal is compatible with traditional formulations of liability for personal injury.

III. THE FEMINIST TRANSFORMATION OF THE PORNOGRAPHY DEBATE

Although debate about the first amendment and pornography has been taking place for most of the twentieth century, the debate had until recently been surprisingly dull. The law as developed by the Supreme Court permits regulation of what cases term "obscenity," conceived as an implicit exception to the first amendment, and defined in terms so stultifying as to deter repeating them here.²⁷ As Catharine MacKinnon once remarked, to read the Supreme Court's words defining obscenity aloud is to feel like you're giving someone the *Miranda* rights,²⁸ so formulaic, familiar, and impoverished in meaning have they become. The Court's definition of obscenity turns on two factors: "offense" and "merit." If something has much of the former and none of the latter, it is obscenity. The shortcomings of this regime are too obvious and too well-known to require description here.²⁹

The original and transforming contribution of feminist legal thinkers to this debate consisted in shifting the focus of the relevant definition from offense and merit to *harm*. Feminist writers examined who was harmed by pornography, and how, and then suggested that such harms should be preventable, or at least compensable. Any discussion of this subject must credit Catharine MacKinnon and Andrea Dwor-

25. See PROSSER & KEETON ON TORTS 301-306 (5th ed. 1984). Thus for example, in *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975), a radio station was held liable for injuries resulting from its broadcast promotion of a contest in which listeners were encouraged to locate a radio personality who was driving in a conspicuous automobile. Two teenaged listeners, vying for a location near the target vehicle on a freeway ramp, provoked a collision in which the plaintiff's decedent was killed. *Id.* at 45, 123 Cal. Rptr. at 471, 539 P.2d at 39.

26. See PROSSER & KEETON, *supra* note 25, at 305 n. 40.

27. The familiar account of the development of the law of obscenity is well told in L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-16, at 904-19 (2d ed. 1988).

28. C. MACKINNON, *supra* note 15, at 174.

29. See L. TRIBE, *supra* note 27, at 904-19 (discussing the flaws of the Supreme Court obscenity definition).

kin, who drafted and lobbied for the first civil-rights model anti-pornography statutes. Enacted in two American cities, Indianapolis and Minneapolis,³⁰ these ordinances sought to formulate an alternate definition of certain printed, written, or filmed materials to take the place of the hackneyed definitions of "obscenity" that laboriously evolved from the Supreme Court decisions. The ordinances proposed to regulate the distribution and exhibition of pornographic materials—not by criminalizing such activity, but principally by allowing women who believed their interests were harmed by the materials to seek damages from the creators, distributors, and exhibitors. These ordinances were similar to what I propose, but went beyond the "new hard core,"³¹ including in their definition materials that were demeaning or degrading to women, although not depicting sexual violence.³²

The MacKinnon-Dworkin ordinance was vetoed in Minneapolis,³³ but the Mayor of Indianapolis signed it into law. It was immediately challenged on first amendment grounds, and held unconstitutional by both the federal district court³⁴ and a unanimous panel of the Court of Appeals for the Seventh Circuit.³⁵ The Supreme Court, on direct appeal, summarily affirmed the invalidation of the ordinance, without so much as a single line of explanation, justification, or reason.³⁶ One of the most remarkable aspects of these events is that a group of women identifying themselves as feminists, many with long histories and credentials in the women's movement, filed a brief *amicus curiae* in the Seventh Circuit urging the court to strike down the ordinance. This unusual document is known as the FACT brief after its

30. The ordinance was enacted by the City Council of Indianapolis as City-County Ordinance No. 35 on June 11, 1984, and became law there until declared unconstitutional in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). A slightly different version passed the Minneapolis City Council on December 3, 1983 as Ordinance Amending tit. 7, chs. 139 and 141, Minneapolis Code of Ordinances Related to Civil Rights.

31. See *supra* note 9 and accompanying text.

32. Their ordinances included in the definition of pornography, *inter alia*, materials in which "[w]omen 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" and those in which "[w]omen are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use or through postures or positions of servility or submission or display," so long as these depictions constitute "the sexually explicit subordination of women, graphically depicted." INDIANAPOLIS, IND., CODE § 16-3(q) (1984), *reprinted in FACT Brief*, *supra* note 10 at n.1.

33. C. MACKINNON, *supra* note 15, at 146 n.1.

34. *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

35. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

36. *Hudnut v. American Booksellers Ass'n*, 475 U.S. 1001 (1986).

acronymic authors, the Feminist Anti-Censorship Task Force. It documents a profound rift in the ranks of feminists, and argues that the court should find the ordinance in violation of the first amendment on both conventional and feminist grounds.

IV. THE DEBATE AMONG FEMINISTS OVER PORNOGRAPHY

Why would many self-identified feminists, other than for attachment to the first amendment, urge the courts to overturn an attempt to afford women a remedy for harms they attribute to pornography? The FACT brief, authored by Sylvia Law and Nan Hunter, is explicit about some of its proponents' motivations. First, it suggests that the ordinance and its defenders represent a strain of feminist thinking that has elsewhere been called "sexual pessimism": the belief that sex and sexuality are dangerous, even deadly, territory for women and that women would be best advised to avoid them altogether or confine them to safe and well-patrolled territory like monogamous heterosexual marriage. In a published commentary to the brief, Hunter and Law identify this strain of feminism with the "social purity" strain of nineteenth century feminism, which sought the vote for women because it was believed that once empowered with suffrage, women could then enforce temperance, eliminate vice, and generally tame the wild beast of masculinity.³⁷ In contrast to this "pessimistic" view of sexuality, FACT and its allies perceive sexuality as a potentially positive and liberating force that has played and can play a role in the progress of women toward better, less constrained, and more joyful lives.³⁸ Moreover, FACT and other anti-censorship feminists are unsettled by the political company that anti-pornography feminists keep: religious fundamentalists and others whose agendas include restrictions against the availability of abortion and in some cases birth control, campaigns against the rights of gays and lesbians, and even efforts to halt or reverse women's economic progress.³⁹ But most significantly, anti-censorship feminists oppose giving more power to the state, which they fear may use it to censor or hinder sexually explicit speech of value to feminists.⁴⁰ They frequently reiterate that the best

37. *FACT Brief*, *supra* note 10, at 102-05.

38. *Id.* at 118-22.

39. See, e.g., Duggan, Hunter & Vance, *False Promises: Feminist Antipornography Legislation in the United States*, in *WOMEN AGAINST CENSORSHIP* (V. Burstyn ed. 1985); see also D. DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* (1989).

40. The classic example is the well-known and well-loved women's health manual *Our Bodies, Ourselves*, which has been the target of censorship campaigns. Robin Morgan has predicted that

weapon against pornography is education,⁴¹ or to use what is now a first amendment cliché, that the cure for bad speech is more speech.⁴²

Without denying outright that sex and sexuality can be a source of pleasure and connection between individuals, anti-pornography feminists claim that many women would rather espouse this notion in theory than make it real by identifying and attacking the elements of our cultural construction of sexuality that are violent, degrading, and hurtful to women.⁴³ As for the company they keep, anti-pornography feminists observe that the allies of anti-censorship feminists include Bob Guccione, Larry Flynt, and many libertarian groups that are intolerant of any exercise of state power, including some exercises that are helpful to women, such as affirmative action.⁴⁴ Hence the company one keeps can hardly be a reliable index of the merit of one's cause in this area.

Anti-pornography crusaders make some of their most interesting points about issues of power. They observe that anti-censorship feminists sometimes talk as though everyone's speech is utterly free and unconstrained until and unless a governmental censor comes along and constrains it. This formalistic model will not do, they point out, as a realistic description of the experience of women.⁴⁵ It is not just, as A.J. Liebling once observed, that "[f]reedom of the press is guaran-

"our culture is more likely to begin its censorship purges with books on pelvic self-examination for women" than on pornography. Morgan, *supra* note 16, at 137. The Boston Women's Health Book Collective, authors of *Our Bodies, Ourselves*, worked against the passage of an ordinance similar to the Mackinnon-Dworkin ordinance in Cambridge, Massachusetts. *FACT Brief*, *supra* note 10, at 74 n.24.

41. See, e.g., Burstyn, *Beyond Despair: Positive Strategies*, in *WOMEN AGAINST CENSORSHIP* 161-66 (V. Burstyn ed. 1985).

42. The phrase is first found in Justice Brandeis' opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

43. MacKinnon makes this point most poetically when she says that those who ask her to be more optimistic about relations between the sexes are asking her to "dream that the mind were free and could, like Milton, make a heaven of hell or a hell of heaven." C. MACKINNON, *supra* note 15, at 219; see also Leidholdt, *When Women Defend Pornography*, in *THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM* 131 (D. Leidholdt & J. Raymond eds. 1990).

44. See Greschner, Book Review, 13 *RESOURCES FOR FEMINIST RES.* 66 (1985) (reviewing *WOMEN AGAINST CENSORSHIP* (V. Burstyn ed. 1985)); McCormack, *Feminism and the First Amendment*, 2 *JUST. Q.* 271 (1985).

45. Many writers, not all of them lawyers, have made this point. Among them is Andrea Dworkin in *A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN* 17 (1979) ("Men have the power of naming"). Carolyn Heilbrun has described the forces that conspire to keep women silent about their experiences, in C. HEILBRUN, *WRITING A WOMAN'S LIFE* 125 (1988) (It has been "ridicule, misery, and anxiety, . . . patriarchy holds in store for those who express their anger about the enforced destiny of women. . . . Even today, after two decades of feminism, young women shy away from an emphatic statement of anger at the patriarchy."). Tillie Olsen's book, *SILENCES* (1978), creates a sustained and convincing account of the forces that constrain the speech of women.

ted only to those who own one,"⁴⁶ although that is part of the flaw in the formalistic picture. In this age of overwhelming exposure to information, when the capacity of the audience to absorb speech is completely saturated, the loudest and most shocking speech often drowns out the speech of others whose voices are less loud, whose ideas are less simple, or whose delivery is less immediately appealing to the audience.⁴⁷ More importantly, anti-pornography feminists call attention to the silencing or censoring effect that the widespread dissemination of pornography has on women when they seek to speak and be heard on issues of sexuality and sexual ethics.⁴⁸ For these reasons, they argue, the absence of any governmental role in discouraging the pornographer may have the effect of actually promoting the drowning, discrediting, and ultimately the censoring of women's voices on these subjects. Therefore, anti-pornography feminists insist that *more* speech is not and cannot be the answer.

Of course, these disputes about feminist theory and practical politics⁴⁹ are not dispositive of the legal outcome of a challenge to the regulation of pornography. Inevitably these debates are conducted in the shadow of the fourteen words of the first amendment. Feminist schisms aside, any proposal that seeks the regulation of some materials not necessarily within the universe of "obscenity" as recognized by the courts must contend with doctrinal and constitutional objections.

V. THE FIRST AMENDMENT DEBATE OVER PORNOGRAPHY

Any serious debate about the first amendment must begin by acknowledging that the first amendment is simply a collection of words—eloquent, moving, and venerable, but like all words, they require human interpretation and construction before they become useful in the resolution of constitutional disputes. Judges, scholars, students, and ordinary citizens continually grapple with the meaning of the first amendment. Hence to say that the first amendment does or

46. Liebling is so quoted in R. KLUGER, *THE PAPER: THE LIFE AND DEATH OF THE NEW YORK HERALD TRIBUNE* 341 (1986).

47. Others who have made this point, outside the pornography debate, include Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964 (1978), and Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 *DUKE L.J.* 1.

48. See C. MACKINNON, *supra* note 15, at 208–09 ("Pornography is exactly that speech of men that silences the speech of women.").

49. An excellent summary of the differences and similarities between the sides of the pornography debate may be found in Berger, Searle & Cottle, *Ideological Contours of the Contemporary Pornography Debate: Divisions and Alliances*, 11 *FRONTIERS: A JOURNAL OF WOMEN STUDIES* 30 (1990).

does not permit a particular type of governmental action is a rather more complicated assertion than it first appears. Such an assertion combines prediction about what a judge would do if presented with the issue, a comparison of the action in question with others that have or have not been accorded judicial approval, an appeal to a societal view of what the first amendment ought to mean, and a statement of advocacy. The following proposal partakes of all these elements.

It is commonplace to observe that the first amendment, despite the absolutism of its first few words,⁵⁰ has never been interpreted literally. The first amendment, although literally addressed only to Congress, has been applied by an act of interpretation to state legislatures and courts as well.⁵¹ It is also held that certain laws may be made and enforced despite their limiting or prohibitive effect on speech. Despite what defenders of pornography sometimes claim, the first amendment has never been interpreted as an absolute bar to the regulation of speech. Sometimes laws limiting speech are approved by the interpretive sleight-of-hand of denominating the activity regulated as "not speech."⁵² Sometimes they are approved by simply declaring that the first amendment contains some "implicit" exceptions, and that the regulated speech fits into one of them.⁵³ Whatever the explanation, however, it is beyond dispute that courts have long recognized several varieties of speech or quasi-speech as deserving either no, or limited, first amendment protection. Some courts have recently begun to incorporate new varieties of speech into these categories. I suggest that violent pornography, of the sort defined here as "new hard core," has many features in common with four of these recognizably regulable categories of speech. A Supreme Court that allows the regulation of these other varieties of speech must at least explain why violent pornography cannot constitutionally be made the subject of suits for damages.⁵⁴ These four types of speech are discussed below after an exploration of commercial speech, a regulable form of speech that is sometimes elsewhere suggested as a fitting analogy to the regulation of violent pornography. However, I consider commercial speech to be an inapt comparison because its characteristics differ materially from those of violent pornography.

50. "Congress shall make no law . . ." U.S. CONST. amend. I (emphasis added).

51. See, e.g., *Fiske v. Kansas*, 274 U.S. 380 (1927).

52. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). For further discussion of *Chaplinsky*, see *infra* notes 100-07 and accompanying text.

53. This approach best characterizes the Court's historical treatment of the law of defamation. See L. TRIBE, *supra* note 27, § 12-12, at 861-72.

54. In the case of some of the forms of speech discussed, even the severe suppression that accompanies criminalization is allowed.

A. *Commercial Speech: The Flawed Analogy*

It is sometimes suggested that pornography might be compared with commercial speech,⁵⁵ which the Supreme Court has held calls for less first amendment protection than other forms of speech.⁵⁶ The Court also has said that certain commercial speech may be prohibited in the interest of diminishing sex discrimination.⁵⁷ The argument for reduced first amendment protection for commercial speech is sound. Scholars have noted that the origins of the first amendment lie in the impulse to protect the “dignitary speaker”: by the description of one scholar, the “vulnerable speaker of conscience, impelled to speak out by the demands of humanity, yet subject to waves of unnecessarily harsh parochial intolerance.”⁵⁸ Commercial speech, speech indulged in for profit, rather than to satisfy the human need to communicate ideas, seems in many ways a different category altogether. Recognizing this difference, the Court has held that commercial speech, for example lawyer advertising,⁵⁹ or price information about pharmaceuticals,⁶⁰ while not entirely devoid of first amendment protection, enjoys limited shelter: its protection seems in theory to rest more on the interest of the listener or hearer than that of the speaker, and in practice may be overcome by certain governmental interests—for example, in preventing false or misleading speech.⁶¹

Those who recommend regulation of pornography by analogizing it to commercial speech argue that there can be no question that pornography is enormously profitable to its creators and disseminators.⁶² If, by this reasoning, pornography were accepted as a form of “commercial speech,” one might argue that it may be regulated, especially if the content of its message is false or misleading. If one further believes that sexually violent pornography represents the embodiment of an

55. See *New York v. Ferber*, 458 U.S. 747, 772 (1982) (noting that the economic incentives of pornography might make it harder to deter than political speech); see also Strang, “*She Was Just Seventeen . . . and the Way She Looked Was Way Beyond [Her Years]*”: *Child Pornography and Overbreadth*, 90 COLUM. L. REV. 1779, 1795 n. 129 (1990); cf. C. MACKINNON, *supra* note 15, at 177 n.44.

56. The most notable occasion was *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which struck down the regulation at issue but acknowledged significant differences between commercial and political speech.

57. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973).

58. Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOKLYN L. REV. 14 (1989).

59. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1989).

60. *Virginia State Bd. of Pharmacy*, 425 U.S. at 748.

61. See generally, Neuborne, *supra* note 58, at 32–33.

62. The most common estimate of the pornography industry’s sales is approximately eight billion dollars annually. See C. MACKINNON, *supra* note 15, at 179 n.54.

insidious lie about women,⁶³ the parallels to the regulation of commercial speech seem superficially quite persuasive.

The difficulty with this analysis is that, unlike the examples of lawyer advertising or price information, pornography is not an advertisement created to sell a non-speech commodity or service. It is rather speech itself, rendered available for purchase. Pornography is both speech and product; it is itself an advertisement for certain ideas, not for other commercial products. Arguing for the suppression of violent pornography by analogy to commercial speech is therefore neither satisfying nor defensible. Pornography is *real* speech—ideological, political speech, speech very much about ideas. Its creators may not be impelled to speak by the demands of humanity, but their speech is appealing to some precisely for the ideas it assumes, presents and (literally) embodies. It is commercial in the sense that people pay to purchase it, but the same may be said of the collected papers of Oliver Wendell Holmes. Ultimately, the argument for regulating pornography based on an analogy to commercial speech is flawed. Fortunately there are other, more fitting analogies.

B. The Analogy to Sexual Harassment

The first category of regulable speech that provides a useful analogy to pornography is in the law of sexual harassment. Sexual harassment is an especially interesting comparison for several reasons, among them that it was Catherine MacKinnon who proposed what has come to be the accepted law of sexual harassment in the United States,⁶⁴ and that the authors of the FACT brief expressed agreement with the rationales underlying the law of sexual harassment.⁶⁵ As recognized by the United States Supreme Court in a moment of rare unanimity, sexual harassment is illegal as a form of sex discrimination under Title VII of the Civil Rights Act of 1964.⁶⁶ Hence it may be regulated and prohibited, and remedied by compensation. Moreover, sexual harassment includes not only the classic proposition-from-the-boss, but also the much more pervasive practices of creating or tolerating a "hostile or abusive working environment."⁶⁷ It is thus potentially illegal for male workers in an office to affix to bulletin boards or illustrate weekly

63. The lie is that women ask for, enjoy, or deserve violence or pain in sexual encounters. See *infra* note 83.

64. Compare C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 233–38 (1979) with *Sexual Harassment*, 29 C.F.R. § 1604.11 (1990).

65. *FACT Brief*, *supra* note 10, at 134.

66. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

67. *Id.* at 66.

memos with *Playboy* centerfolds or cartoons that demean or insult women—even if the materials are not “obscene” under the prevailing definition of that term.⁶⁸ The law of sexual harassment, on this interpretation, unquestionably constitutes a restriction on speech, enforced by the power of the courts to penalize not only the offender but also in some cases the supervisor or employer.⁶⁹ These decisions interpreting Title VII have generated remarkably little first amendment-based criticism. They are based on a recognition that the effect of such “speech” in the workplace is to make it virtually impossible for women to be treated as equals and to have their work performance judged by the same standards used to evaluate that of males. If sexually harmful materials, some far less insulting and harmful to women than new hard core pornography, may be legitimately banned from the workplace in the interest of equality in employment, then such material should properly be excludable from other public places in the interest of equality in other spheres of life.

C. *The Analogy to “Clear and Present Danger” Speech*

The second category of regulable speech that provides insights useful to the regulation of pornography is “clear-and-present-danger” speech. As every first-year law student knows, speech may be limited if there is a “clear and present danger” that it will provoke a harm that the government is empowered to prevent.⁷⁰ If certain speech, for example words of conspiracy or solicitation, create a danger of bank robbery or arson, the words may be punished—not because they are not speech, but because they are very dangerous speech, *harmful* speech. To premise the regulation of violent pornography on this aspect of first amendment law requires, of course, some empirical reason to believe that its existence creates a danger of cognizable harm to women. That evidence exists in a more than sufficient quantity, although it is controversial.

Rivers of ink have been spilled in the debate about what the empirical evidence demonstrates. Different commentators make diametrically opposing claims based on the same evidence.⁷¹ The best

68. See e.g., Lewin, *Ruling on Pinups as Sexual Harassment: What Does it Mean?*, N.Y. Times, Feb. 8, 1991, at B11, col. 1.

69. See *Meritor*, 477 U.S. at 66.

70. This idea is expressed in many decisions of the Court. The first was *Schenck v. United States*, 249 U.S. 47, 52 (1919). For a useful discussion of the evolution of this idea in the Court, see L. TRIBE, *supra* note 27, § 12–9, at 841–49 (1988).

71. Compare *FACT Brief*, *supra* note 10, at 112–18 (research shows little or no connection between pornography and violence or other harm to women, and those studies that do show a

synthesis of the evidence can be found in the recent work of Donnerstein, Linz, and Penrod.⁷² Donnerstein is a trustworthy guide in an odd way because he has credentials on both sides of the question. He testified before the 1986 Attorney General's Commission on Pornography, and his findings were cited by that Commission as a basis for recommending increased prosecution of creators and purveyors of pornographic materials.⁷³ On the other hand, he has publicly indicated that the Commission and others have exaggerated the link between pornography in general and violent behavior directed toward women.⁷⁴ Although any discussion of the complexities of this issue deserves an article of its own, a quotation from the book provides a fair summary. Focusing on *violent* pornography (of the sort encompassed in my definition of new hard core), Donnerstein, Linz, and Penrod write:

[V]iolent pornography influences attitudes and behaviors Viewers come to cognitively associate sexuality with violence, to endorse the idea that women want to be raped, and to trivialize the injuries suffered by a rape victim. As a result of the attitudinal changes, men may be more willing to abuse women physically (indeed, the laboratory aggression measures suggest such an outcome).⁷⁵

Some critics have derided the effort to premise public policy on studies conducted in the artificial setting of the laboratory, but Donnerstein and his colleagues understand and explain why "better" data is not and cannot be available:

The social scientist would have a difficult time asserting that the *immediate* outcome of exposure to sexual violence is *actual* violence to women because it is not possible to design an experiment in which subjects are exposed to sexually violent materials, then allow those individuals to engage in any behavior that may threaten public safety.⁷⁶

The conclusions of Donnerstein and his partners do not amount to a scientifically absolute statement of cause and effect, but as science, they are certainly as probative as the science that, for example, led the

relationship are seriously flawed) with C. MACKINNON, *supra* note 15, at 147 n.9 & 187 nn.116-18 (studies show significant relationship).

72. E. DONNERSTEIN, D. LINZ & S. PENROD, *THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS* (1987).

73. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, *FINAL REPORT* 299-351, 901-1035 (1986). Donnerstein is cited throughout pages 901-1035. The conclusions of the commission are found at page 299-351.

74. *FACT Brief*, *supra* note 10, at 112-13.

75. E. DONNERSTEIN, D. LINZ & S. PENROD, *supra* note 72, at 20.

76. *Id.*

Supreme Court to conclude that separate-but-equal education causes low self-esteem among blacks.⁷⁷ Donnerstein's data is more convincing than the virtually nonexistent data that led the Supreme Court to conclude that women who work as prison guards suffer a greater likelihood of sexual assault by inmates than do male guards, thereby justifying the exclusion of women from that job category.⁷⁸ In short, if the Supreme Court were disposed to see it (and whether they are will most likely rest on extra-scientific considerations), the evidence of a link between violent pornography and cognizable harm is certainly visible.⁷⁹ What is more, the law proposed here would not permit the recovery of damages unless the plaintiff could convince a jury that the particular materials that are the subject of the suit *in fact* caused the harm suffered.⁸⁰

Moreover, conceiving of violent pornography as potentially harmful to women is not only proper first amendment analysis, but good practical feminist politics. Remember the anti-censorship groups' protest that pornography calls for education,⁸¹ not censorship, and imagine the educational effect of these lawsuits, with their expert testimony about whether or not such a causal link exists, and the press coverage of that testimony. Imagine also the motivation such lawsuits would create for more and better research into the relationship between sexually violent materials and harm. Law has always had an educational effect,⁸² and the positive effect of these cases might well be substantial.

77. See *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954).

78. See *Dothard v. Rawlinson*, 433 U.S. 321, 335-37 (1977).

79. Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) seems to acknowledge the validity of evidence that there is a link between nude dancing and "prostitution, sexual assaults and . . . other criminal activity." *Id.* at 2469 (Souter, J., concurring) (quoting Brief for Petitioners 37). The state also argued that there was a link between nude dancing and the "degradation of women." Reply Brief for Petitioners at 11. Although Souter stops short of concluding that there is a *causal* relationship between the message embodied in nude dancing and the associated crimes, 111 S. Ct. at 2470-71, surely the dissenters are right to chide him that if he does not believe in such a causal link, he ought not go along with the majority's willingness to allow the complete suppression of the activity. *Id.* at 2474 n.2. (White, J., dissenting). It is possible, then, that changes in the Court's membership may alter the recent attitude of skepticism toward claims of harm done to women by pornographic performances, especially since there was no evidence in *Barnes* that the nude dancing in that case was pornographic in the violent sense discussed in this article.

80. For a discussion of the merits and drawbacks of this regime, see *supra* notes 18-26 and accompanying text.

81. See *supra* note 41 and accompanying text.

82. The creation and enforcement of laws has had a substantial educational effect on other subjects, such as domestic violence, rape, the sexual abuse of children, sexual harassment, discrimination in employment, the "right to die," immigration, racism, and countless others. Even the "unsuccessful" MacKinnon-Dworkin ordinances changed substantially and irrefutably the tenor of the discussion of pornography in this country. See generally J, HANDLER, SOCIAL

D. *The Group Libel Analogy*

Pornography represents a lie about women as a class, a form of collective defamation.⁸³ Seen in that light, group libel seems a natural comparison for it. The concept of group libel was recognized by the United States Supreme Court in a 1952 decision that, although it has been questioned and criticized many times since, has not been overruled. Importantly, the decision, *Beauharnais v. Illinois*,⁸⁴ considered the constitutionality of imposing a criminal penalty, not merely civil damages, on the disseminators of the libelous material. In that case an inflammatory leaflet alleged that blacks and civil rights organizations were bent on "mongrelizing the white race" and that blacks as a group were associated with "rapes, robberies, knives, guns, and marijuana"⁸⁵ Moreover, the statute did not recognize truth alone as a defense,⁸⁶ so Mr. Beauharnais was not permitted to present any evidence to establish the truth of the leaflet's claims. The Supreme Court upheld Beauharnais' conviction over his first amendment objections. Justice Frankfurter's opinion for the majority is very direct in its reasoning:

No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana. The precise question before us, then, is whether the . . . Fourteenth Amendment prevents a State from punishing such libels—as criminal libel has been defined, limited, and constitutionally recognized time out of mind—directed at designated collectivities and flagrantly disseminated. . . . We cannot say . . . that the question is concluded by history and practice. But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State.

MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 214-22 (1978).

83. This idea is not original: it is presented in Brigman, *Pornography as Group Libel: [T]he Indianapolis Sex Discrimination Ordinance*, 18 IND. L. REV. 479 (1985); see also C. MACKINNON, *supra* note 15, at 192-93 (suggesting group libel as a partial, but not perfect, precedent for anti-pornography regulation); Kittay, *supra* note 7, at 165-57 (expressing doubt whether the group libel concept is workable); Longino, *Pornography, Oppression, and Freedom: A Closer Look*, in TAKE BACK THE NIGHT 48 (L. Lederer ed. 1980) (asserting that "pornography is the vehicle for the dissemination of a deep and vicious lie about women"); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 691-92 n.69 (1988).

84. 343 U.S. 250 (1952).

85. *Id.* at 252.

86. *Id.* at 254 & n.1. Illinois law did not recognize truth as a defense in any libel action unless the publication was made "with good motives and for justifiable ends." *Id.* at 265.

In the face of . . . history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented. . . .

. . . .

. . . [W]e are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.⁸⁷

Justice Frankfurter's powerful language provides a promising rationale for permitting the much milder sanction of damages against the purveyors of violent pornography.

Of course the law of individual libel, as opposed to group libel, has evolved substantially since 1952. First amendment restrictions on the law of libel are probably more powerful than they were recognized to be at that time. In particular, it appears that at least some forms of libel cannot be punished unless the defendant had some sort of culpable mental state,⁸⁸ that truth may be a "constitutional" defense,⁸⁹ and that the harm must have been somewhat foreseeable to the defendant.⁹⁰ Nevertheless, group libel is a convincing and close analogy to the new hard core pornography. Probable constitutional limitations on group libel are addressed by features of this Article's proposal that call for proof that the materials advocate or endorse sexual violence in a way likely to promote its commission.

My proposal does not, however, include a provision for the defense of truth. Despite plausible arguments that the law of libel has undergone a constitutionalization of the defense of truth,⁹¹ it is not neces-

87. *Id.* at 257-58, 261, 263.

88. *Gertz v. Welch*, 418 U.S. 323, 347-48 (1974) (declining to adopt a constitutional standard of mens rea for libels of private persons, but stating that "strict liability" may not be imposed).

89. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

90. This test was articulated with respect to "clear and present danger" speech in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Although *Brandenburg* is not a defamation case, its treatment of racially offensive speech could be viewed as a limitation on the scope of *Beauharnais*.

91. Certainly this is true in the case of alleged libels of "public figures." *Garrison v. Louisiana*, 379 U.S. 64 (1964). The distinction between "public figures" and other defamation plaintiffs has never been clearly explained or convincingly defended, *see* L. TRIBE, *supra* note 27, § 12-13, at 873-86, and offers no confident answer to the question of whether the victims of group libel—women, or blacks, for example—are to be analyzed as "public" or "private" plaintiffs.

sary, any more than it seemed to Justice Frankfurter of *Beauharnais*,⁹² to permit every pornographer appearing in court to defend the creation or dissemination of materials that present, as the truth, a pernicious and destructive lie about women—that they enjoy, ask for, or deserve sexual violence. To deny the pornographer this opportunity may at first appear shocking. It is not, however, unprecedented in other, analogous circumstances, even aside from *Beauharnais*. In West Germany, for example, it is a crime for a person to espouse, either in writing or in oral speech, the so-called “Auschwitz lie,” the claim that the Holocaust never happened or was a rather trivial historical event, sometimes coupled with the claim that widespread public belief in the Holocaust is a result of Jewish or Israeli propagandizing.⁹³ In prosecutions for this crime, the defendant is not permitted to put on evidence to buttress this claim. The assertion is presumptively and incontrovertibly deemed a lie as a matter of law.⁹⁴ You might say the reality and gravity of the Holocaust are officially beyond debate in West Germany today. That is not shocking; it is reassuring. It would likewise be reassuring if it became a matter of judicial notice in this country that women do not enjoy, request, or deserve to be raped or hurt for anyone’s sexual gratification.⁹⁵

Much of what is argued here about new hard core pornography also applies to speech espousing and advocating racial hatred. Similar arguments have been made about the constitutionality of regulating at least some hateful and destructive racist speech.⁹⁶ In addition to the group libel analogy, opponents of racist speech often resort to the concept of “fighting words” as an argument for the constitutionality of suppressing such speech.⁹⁷ It is “fighting words” that provides the fourth and in many ways most compelling analogy to pornography.

92. 343 U.S. 250, 265–66 (1952).

93. An excellent description of this law and its operation is found in Stein, *History Against Free Speech: The New German Law Against the “Auschwitz”—and Other—“Lies”*, 85 MICH. L. REV. 277 (1986).

94. *Id.* at 287–88.

95. Others have noted the similarity between the treatment of women in violent pornography and the treatment of Jews in Nazi propaganda. See S. GRIFFIN, *PORNOGRAPHY AND SILENCE: CULTURE’S REVENGE AGAINST NATURE* 156–99 (1981).

96. See Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 NW. U.L. REV. 343 (1990) [hereinafter Delgado, *Campus Rules*]; Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 172–79 (1982); Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990).

97. See, e.g., Delgado, *Campus Rules*, *supra* note 96, at 378–80.

E. The “Fighting Words” Analogy

Understanding the relationship between “fighting words” and pornography requires the reader to make a paradigm shift⁹⁸ in thinking about the first amendment, and to embrace what might be called feminist method.⁹⁹ This shift is necessary because conventional explanations for the lack of first amendment protection afforded “fighting words” are either unconvincing or incomplete.

Since *Chaplinsky v. New Hampshire*¹⁰⁰ in 1942, the Supreme Court has recognized that the state may constitutionally regulate speech that has “a direct tendency to cause acts of violence” or “excite the addressee to a breach of the peace.”¹⁰¹ “The test is what men [sic] of common intelligence would understand would be words likely to cause an average addressee to fight.”¹⁰² Yet the Court’s reasoning in *Chaplinsky* is curiously unpersuasive—it says that “[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion.”¹⁰³ But when one examines what Mr. Chaplinsky really said, this explanation is not satisfying. Chaplinsky told a city official that he (the official) was a “damned Fascist,” and that “the whole government of Rochester” were “Fascists or agents of Fascists.”¹⁰⁴ These words seem quite ideological, quite communicative. In fact, it must have been precisely the *idea* conveyed by Chaplinsky’s words that so enraged the listener.¹⁰⁵ The more probable explanation of *Chaplinsky*, and that favored by many contemporary commentators,¹⁰⁶ is that “fighting words” tend to be the *last* words. When fighting words are uttered, the marketplace of ideas, to use a central metaphor of the first amendment,¹⁰⁷ is transformed into a marketplace of fists or bullets, and speech is destroyed. Hence fighting words,

98. The word “paradigm” has been used in many works, most notably throughout T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970).

99. See generally *FEMINISM AND METHODOLOGY* (S. Harding ed. 1987); Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

100. 315 U.S. 568 (1942).

101. *Id.* at 573.

102. *Id.*

103. *Id.* at 572 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

104. *Id.* at 569.

105. If you are not convinced of this, imagine a court agreeing to place a ban on anyone’s calling another a “vegetarian” or an “Oklahoman.” These epithets do not offend because their content is different from that of “Fascist”—or of “kike” or “wop.” Of course, different listeners may be enraged by different epithets. But this difference in sensibility helps make the point. In each case, the listener’s reaction has everything to do with the content of the speech.

106. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 942–43 (3rd ed. 1986).

107. This ubiquitous trope was apparently first articulated in Justice Holmes’s dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

although strictly speaking “speech,” do not contribute to the sum total of speech in the marketplace because they operate to suppress other speech by provoking the next likely speakers to fighting instead of language.

This analysis has appeal, but begs for revision. Leaving aside the male-oriented nouns and pronouns, the world-view reflected when some are protected from having to listen to certain speech because it makes them so angry they are provoked to physical violence is unquestionably male.¹⁰⁸ A feminist version of the “fighting words” exception would protect persons from exposure to speech—and from a marketplace saturated by that speech—if it would prevent the responsive speech of an average, intelligent *woman*. But that is far more likely to happen because she is thrust into silence than because she is provoked into violence. A gender-inclusive first amendment theory that values speech in the way that the “fighting words” exception seems to do would not protect speech that silences the voices of women.

Silence, no less than fists and guns, can entail the end of speech. When one who has something to say is intimidated, derided or defamed into silence, speech is again the victim. Under these circumstances, the marketplace of ideas cannot be enriched by “more speech.” It is my view that certain pornographic materials operate in precisely that fashion, silencing the voices of women, especially when they seek to speak their views pertaining to issues of sexuality and sexual freedom, ethics, and pleasure.

How does pornography accomplish this silencing? As one sympathetic scholar puts it: “[T]he ‘message’ of pornography is communicated indirectly, and not through rational persuasion. The harm it produces cannot easily be countered by more speech because [pornography] bypasses the process of public consideration and debate that underlies the concept of the marketplace of ideas.”¹⁰⁹ This is a thoughtful and logical way of putting it. But there are other persuasive ways of putting it, too. Listen to the voices of a few women who have found the courage to speak, and let them tell you how:

Suppose every gesture one made, every word, every act, signal, motion, a frown, a wave of the hand, a shout, a scream, a kick, a rush of words—each and every expression of one’s psyche were ignored. Suppose that in a company of people, every time one opened one’s mouth to speak, one’s own words were drowned out by other words. Or suppose

108. My colleague Hiroshi Motomura made the thoughtful observation that the interests of men from cultures that, unlike America’s, do not stress macho individualism or confrontational defense of personal privilege, are also unaddressed by this formulation.

109. Sunstein, *supra* note 14, at 616–17.

that if one spoke into the waiting silence, one encountered no response, no dialogue but instead simply a stillness, as if nothing had been said. Along with defamation of being, this is the single most common experience that a woman has of her own real presence in the pornographic culture.¹¹⁰

The writer of the following passage describes the experiences of Linda Marchiano, who was forced by extreme coercion to participate in the film *Deep Throat*. The writer notes that viewers had no difficulty believing that the bizarre and impossible sexual acts she performed in the film were real and pleasurable to her.

Yet when Marchiano now tells that it took kidnapping and death threats and hypnosis to put her there, that is found *difficult to believe*. . . . It is therefore vicious to suggest, as many have, that women like Linda Marchiano should remedy their situations through the exercise of more speech. Pornography makes their speech impossible, and where possible, worthless.¹¹¹

If, because of the interrelationship of male power and men's ability to define and construct knowledge, women's perspectives are not valued—their voices are silenced or not heard, what they think is deemed not “real theory” but mere ideology or emotion or experience, their experiences are viewed as not credible or as too individually subjective to offer any larger learning—then women in reality have little access to the marketplace. . . . Because those who invent pornography have the power to make their visions into reality, pornography helps define women in a way that renders women's contrary assertions mute—or disbelieved precisely because they conflict with the prevailing ideology.¹¹²

[Finally, on the enormous impact of pornography,] [w]e are speaking of the female experience of silence. And now of the silencing of our imaginations. For it is not enough that a false image of what it is to be a woman be taught us . . . the idea of ourselves which our beingness creates by its own nature must be made mute. This is no small task. It is not easy to erase the images which come from the depths of being. To do this is like an attempt to silence dreams Our culture has a terrible fear of women's dreams There have been so many poets lost to us.¹¹³

110. S. GRIFFIN, *supra* note 95, at 242-43.

111. C. MACKINNON, *supra* note 15, at 181. The story of Linda Marchiano's experience as a pornographic film actress is told in L. LOVELACE, *ORDEAL* (1980).

112. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified* (Book Review), 82 NW. U.L. REV. 352, 369 (1988).

113. S. GRIFFIN, *supra* note 95, at 244-45.

If one is moved and persuaded by these voices, one may begin to understand the terrible irony of defending the freedom of the pornographer. Whether the work is called sexual harassment, clear and present danger, group libel, or the feminist equivalent of fighting words, it silences women. The pornographer and his defenders claim they fear censorship, the loss of their freedom to speak and their opportunity to be heard. But for women, the pornographer *is* a censor—he is the thought police, the slayer of words, the silencer, the burner of books, the killer of poets. He leaves in the wake of his creations a vast and terrible silence; he prevents us from saying and hearing important truths that we need to heal our troubled sexual spirits and our equally troubled world.