FEMINISM, PORNOGRAPHY, AND LAW

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Since *Roth v. United States*,¹ the Supreme Court has maintained that "obscenity is not protected by the freedoms of speech and press."² This means that, consistent with the usual procedural constraints,³ state and federal governments can regulate obscene books, photographs, and movies.⁴ At the same time, the Court has developed a restrictive definition of obscenity that, in effect, limits obscenity regulation to hardcore pornography.⁵

First amendment theorists have widely criticized obscenity law.⁶ Their arguments tend to focus on the problem of defining obscenity, and some criticize any attempt to define or regulate obscenity.⁷ The theorists' legal arguments are informed by their perceptions of pornography and its social significance; these perceptions may be broadly categorized as either conservative or liberal.⁸ The Court's current position represents a compromise between the conservative and liberal positions, a position that satisfies neither side.⁹

Recently, a new voice entered the obscenity law debate. Feminists have begun to articulate their opposition to pornography,¹⁰ to organize

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¹ 354 U.S. 476 (1957).

² *Id.* at 481.

³ See F. SCHAUER, *THE LAW OF OBSCENITY* 206-27 (1976).

⁴ Most states regulate obscenity. For a categorization of obscenity statutes, see *New York v. Ferber*, 458 U.S. 747, 755 n.7 (1982). Federal regulation in the area includes provisions regulating the use of the mails, see 18 U.S.C. § 1461 (1982); 39 U.S.C. §§ 3001, 3008, 3010 (1982), common carriers, see 18 U.S.C. § 1462 (1982), interstate transportation, see 18 U.S.C. § 1465 (1982), and importation into the United States, see 18 U.S.C. § 1462 (1982); 19 U.S.C. § 1305 (1982). For a discussion of the history of federal obscenity regulation and a description of current federal law in the area, see F. SCHAUER, *supra* note 3, at 169-91.

⁵ See *infra* notes 32-36 and accompanying text.

⁶ See *infra* notes 66-71 and accompanying text (discussing views of liberal theorists).

⁷ See *infra* notes 40-44 and accompanying text.

⁸ See *infra* notes 45-59 and accompanying text.

⁹ See *infra* notes 60-64 and accompanying text.

¹⁰ See, e.g., A. DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); S. GRIFFIN, *PORNOGRAPHY AND SILENCE* (1981); TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY (L. Lederer ed. 1980).

and demonstrate,¹¹ and to secure the passage of antipornography laws.¹² Not all feminists oppose pornography or view it as an important issue,¹³ but those who do have advanced arguments informed by a perspective that differs fundamentally from both the conservative and the liberal positions.¹⁴

Feminist arguments against pornography focus on its role in reinforcing sexist views and attitudes, which, on one level, simply fail to treat women as serious human beings and, on another level, sanction and perhaps promote violence against women.¹⁵ These arguments reflect and are part of a broader attack on the character of sexual relationships in sexist societies. The arguments do not presuppose that sex

¹¹ Several feminist antipornography groups, including Women Against Pornography, formed in 1979 in New York, and Women Against Violence in Pornography and Media, formed in 1976 in San Francisco, have appeared in recent years. These groups have organized demonstrations, conferences, and workshops. Occasionally, these groups have taken direct action against particular films, theaters, and bookstores. See Boler, Lake & Wynne, *We Sisters Join Together . . .*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 19; Gever & Hall, *Fighting Pornography*, in *id.* at 261-85; LaBelle, *Snuff—The Ultimate in Women-Hating*, in *id.* at 272; Lederer, *Introduction*, in *id.* at 15; Lederer, *Women Have Seized the Executive Offices of Grove Press . . .*, in *id.* at 267.

¹² The first such effort took place in Minneapolis, Minnesota. See Ordinance Amending Title 7 of Minneapolis Code of Ordinances Relating to Civil Rights, (Dec. 30, 1983) (vetoed Jan. 5, 1984). Despite the veto of the Minneapolis ordinance, the City-County Council of Indianapolis, Indiana passed a similar measure. See City of Indianapolis and Marion County City-County General Ordinance 24, 1984 (passed April 23, 1984) (copy on file at University of Pennsylvania Law Review); City of Indianapolis and Marion County City-County Ordinance 35, 1984 (passed June 11, 1984) (copy on file at University of Pennsylvania Law Review). A federal district court declared this ordinance unconstitutional in November 1984. See *American Booksellers Ass'n, Inc. v. Hudnut*, No. IP 84-791C (S.D. Ind. Nov. 19, 1984).

¹³ See, e.g., Willis, *Feminism, Moralism, and Pornography*, in BEGINNING TO SEE THE LIGHT: PIECES OF A DECADE 219 (1981); Ellis, *I'm Black and Blue from the Rolling Stones and I'm Not Sure How I Feel About It: Pornography and the Feminist Imagination*, SOCIALIST REV., May-Aug., 1984, at 103; English, Hollibaugh & Rubin, *Talking Sex: A Conversation on Sexuality and Feminism*, SOCIALIST REV., July-Aug. 1981, at 43, 56-62. Philipson, *Beyond the Virgin and the Whore*, SOCIALIST REV., May-Aug. 1984, at 127; Weir & Casey, *Subverting Power in Sexuality*, SOCIALIST REV., May-Aug., 1984, at 139, 146; cf. B. FAUST, WOMEN, SEX, AND PORNOGRAPHY (1980) (agreeing that pornography is an important issue but criticizing feminist analysis).

¹⁴ The issue of censorship tends to dominate discussions of pornography. Feminists, however, are concerned primarily with encouraging people to think differently about what pornography means. See, e.g., A. DWORKIN, *supra* note 10, at 9; Russell, *Pornography and the Women's Liberation Movement*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 303-04.

¹⁵ Insensitivity to feminist concerns also implicates a general critique of prevailing legal theory. Conservative legal theory perceives the harm of pornography to be in its effects upon morality rather than in its other effects on women. Liberal legal theory moves too quickly from the conclusion that pornography should not be censored to a relativism in morality and aesthetics that sets a taste for pornography beyond the scope of rational criticism.

itself is necessarily degrading or dehumanizing. Feminist criticisms of pornography instead focus upon its ideological role in maintaining gender relations that harm the status of women generally as well as the individual women victimized by the violence that is sanctioned and encouraged by pornographic materials.¹⁶

This Comment evaluates the feminist argument and considers whether it can or should be used to justify the legal regulation of pornography. Parts I and II contrast the liberal and conservative perspectives represented in judicial opinions and scholarly analysis with the emerging feminist perspective. Part III articulates the legal proposals generated by the feminist perspective, and Part IV evaluates these proposals.

Evaluation of feminist arguments does not lead to a simple acceptance or rejection of feminist proposals. Feminist arguments against pornography push very hard in the direction of legal regulation; in some instances, efforts to shape the law in accordance with feminist concerns have already been made.¹⁷ This Comment argues that insofar as the law plays a role in defining and shaping social values, pursuit of feminist antipornography laws may well have some value. From a political perspective, however, feminists should probably avoid endorsing state regulation of pornography. Feminists have reasons for being suspicious of the power of the state, which has historically been, and seems likely to remain, male-dominated. Thus the potential value of feminist anti-pornography laws may well be offset by considerations of political strategy as well as first amendment principles.

I. OBSCENITY LAW

A. *Legal Doctrine and First Amendment Theory*

The first amendment protects freedom of speech primarily to foster two values: truth, which is supposed to be served by free exchange in the "marketplace of ideas," and political participation, which re-

¹⁶ A well-known formulation of the feminist position argues that "[p]ornography is the theory, and rape the practice." Morgan, *Theory and Practice: Pornography and Rape*, in GOING TOO FAR 163, 169 (1977). For more extensive discussions of this thesis, see S. GRIFFIN, *supra* note 10, at 111-19 (discussing both general and individual harms); Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5, 9-23 (1984) (discussing both general and individual harms); LaBelle, *The Propaganda of Misogyny*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 174 (pornography functions as propaganda against all women); Russell, *Pornography and Violence: What Does the New Research Say?*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10 at 218 (recent studies have revealed harms to individual women).

¹⁷ See *supra* note 12.

quires a public forum for the speech of citizens.¹⁸ Some scholars argue that these values, and therefore the scope of protected speech, should be narrowly construed; others argue for a broad construction on the grounds that first amendment values can be fully served only by more extensive protection of free expression.¹⁹

The linchpin of obscenity law since *Roth v. United States*²⁰ has been its holding that "obscenity is not protected speech."²¹ Although the definition of obscenity has changed somewhat since *Roth*, characterization of a work as obscene has consistently meant that it is not protected by the first amendment, with the consequence that the government has authority to regulate its distribution.²²

The legitimacy of this authority is grounded primarily in the idea that pornography is harmful, or at least that it is reasonable for legislatures to believe that it is harmful.²³ The Court's opinions also possess a strain emphasizing dignity, decency, order, and virtue, suggesting that, even if pornography causes no direct harm, its corrupting influence harms both the quality of life and the quality of the democratic

¹⁸ Considerable debate has been focused on identifying the basic values that freedom of speech is meant to promote. See Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591-93 (1982). The values of truth, emphasized in J.S. MILL ON LIBERTY (1859) and of political participation, emphasized in A. MEIKLEJOHN, POLITICAL FREEDOM (1960), appear uncontroversial, although there remains disagreement about how they are to be defined, see, e.g., Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982); Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982), and whether these values are the proper focus for first amendment analysis, see, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-91 (1978) [hereinafter cited as Baker, *Scope of the First Amendment*].

¹⁹ Compare, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly [sic] political.") with T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970) (arguing that freedom of expression is essential for assuring individual self-fulfillment, advancing knowledge, allowing participation in decision-making, and achieving a more adaptable, and hence, more stable community).

²⁰ 354 U.S. 476 (1957).

²¹ *Id.* at 486. See also *Miller v. California*, 413 U.S. 15, 23 (1973) (reaffirming that obscene material is unprotected under the first amendment).

²² A distributor may increase her chances of prosecution by pandering; that is, marketing materials openly advertised to appeal to a customer's prurient interest. See *Ginzburg v. United States*, 383 U.S. 463, 470-71 (1966). And the Supreme Court recently held that distribution of certain nonobscene films and other visual representations involving children may be restricted to discourage production of such materials. See *New York v. Ferber*, 458 U.S. 747, 760-61 (1982).

²³ See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 61 (1973) (stating that legislature may act "to protect 'the social interest in order and morality'" (quoting *Roth*, 354 U.S. at 485, which had quoted *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))) (footnote omitted and emphasis supplied in *Roth*).

citizenry.²⁴

A doctrinal defense of *Roth's* exclusion of obscenity from first amendment protection must rely on an interpretation of obscenity that explains why it should not be considered speech within the meaning of the first amendment.²⁵ Writing for the Court in *Roth*, Justice Brennan argued that the history of the first amendment implicitly rejects protection for obscenity because it is "utterly without redeeming social importance."²⁶ This conclusion was largely premised upon the Court's judgment, made in *Chaplinsky v. New Hampshire*,²⁷ that obscene utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."²⁸ Because the aim of the first amendment is to protect the marketplace of ideas, it follows that obscenity cannot be protected speech.²⁹

Assuming that obscenity justifiably may be excluded from the pro-

²⁴ See, e.g., *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 58-63 (1973).

²⁵ It could be argued that, even if obscenity is speech, the balance of interests favors its suppression. In contrast to the Court's more formalistic approach, this argument would have to rely on some empirical proof that pornography is harmful. Findings of fact based upon empirical data are not unknown to constitutional adjudication, see, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494 & n.11 (1954), but the Court has tended to avoid confronting the empirical issues implicated by obscenity cases. *But see* *New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982) (citing studies of harms caused by use of children as subjects in pornography).

²⁶ *Roth*, 354 U.S. at 484. *But cf.* *Miller v. California*, 413 U.S. 15, 24 (1973) ("We do not adopt as a constitutional standard the 'utterly without redeeming social value' test.") (quoting plurality opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 419 (1966)) (emphasis supplied in *Miller*).

²⁷ 315 U.S. 568 (1942).

²⁸ *Id.* at 572 (footnote omitted), *quoted in Roth*, 354 U.S. at 485 (emphasis supplied in *Roth*).

²⁹ Professor Schauer forcefully articulates the premises of this argument. According to Schauer, "Sex in and of itself is not protected by the first amendment. . . . Underlying all of the words of [the Supreme Court's obscenity cases] is the assumption that hardcore pornography is sex." Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 926 (1979) [hereinafter cited as Schauer, *Speech*]. Because conduct in and of itself is not protected by the first amendment, his identification of pornography as conduct rather than speech removes it from the amendment's protection. The scope of the argument is limited, however, by its reliance upon a narrow construction of obscenity. Only hard-core pornography, most of which is pictorial, can plausibly be thought to have solely a physical effect and no cognitive content. It also does not follow that obscenity ought to be suppressed, but only that its suppression would not violate anyone's right to freedom of speech. See *id.* at 933; see also Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 242 (1967); Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 617 n.47 (1979). Another interpretation of the *Roth* argument is that pornography expresses ideas—but not ideas having any social importance.

tection of the first amendment, the crucial problem is to distinguish the obscene from the nonobscene. The evolution of the definition of obscenity culminated in *Miller v. California*,³⁰ which held that material is obscene if,

(a) . . . 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary artistic, political, or scientific value.³¹

For the most part this definition classifies as legally obscene only what might intuitively be thought of as hard-core pornography.³² Its narrow scope can be demonstrated by contrasting four of its features with alternative formulations that would permit more extensive government regulation of obscene materials. First, the definition refers to the "average person" rather than to children or to the easily corrupted.³³ Second, the definition requires that the work be "taken as a whole" and does not permit parts to be evaluated out of context.³⁴ Third, the definition requires that the depictions be "patently offensive," which means that not all sexually explicit material will be obscene.³⁵ Fourth, the work itself must be relatively worthless; "serious" work is protected.³⁶

Although the *Miller* standard is relatively narrow in scope, it requires courts and juries confronting obscenity questions to evaluate the content of the work at issue. They must decide whether a work "appeals to the prurient interest," whether it depicts sexual conduct "in a patently offensive way," and whether it "lacks serious literary, artistic, political, or scientific value." These inquiries are aesthetic because their resolution requires analysis and judgment of the content of images and its effect on an audience.³⁷ Liberal Justices and commentators tend to

³⁰ 413 U.S. 15 (1973).

³¹ *Id.* at 24 (citation omitted) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1979), which had quoted *Roth*, 354 U.S. at 489).

³² Although the *Miller* standard appears to be tailored towards hard-core materials, it ultimately relies upon the application of *local* community standards. See *Miller*, 413 U.S. at 30-34. This reliance on community standards can be seen as a conservative element of the definition, tending to restrict the availability of materials, although it also has been argued that a national standard would have inhibitory effects. See *id.* at 32 n.13.

³³ See F. SCHAUER, *supra* note 3, at 69-95.

³⁴ *Id.* at 27-28, 105-09.

³⁵ *Id.* at 102-05.

³⁶ *Id.* at 136-53.

³⁷ Kaplan, *Obscenity as an Esthetic Category*, 20 LAW & CONTEMP. PROBS. 544

place aesthetic judgments beyond the scope of the judiciary's proper role in the determination of first amendment issues.³⁸ Yet, there is little doubt that judges consciously make such judgments in the realm of obscenity law.³⁹

Many commentators believe that obscene works should not be excluded from first amendment protection.⁴⁰ Some believe that the first amendment protects expressive nonverbal conduct as well as verbal speech.⁴¹ Others argue that even hard-core pornography has sufficient cognitive content to be considered speech within the meaning of the first amendment.⁴² Underlying all of these objections is the notion that ob-

(1955), provides a discussion of aesthetic considerations of obscenity. Kaplan argues that pornography cannot really be subjected to an aesthetic analysis because such analysis requires "distance," and pornography is "not itself the *object* of an experience, . . . but rather a stimulus to an experience." *Id.* at 548. *But see* S. SONTAG, *The Pornographic Imagination*, in *STYLES OF RADICAL WILL* 35, 38-48 (1969) (arguing that literary pornographic works do exist but critics' view of literature by definition excludes pornography).

³⁸ See, e.g., Schauer, *Speech*, *supra* note 29, at 927. See also *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Attorney General, 383 U.S. 413, 427 (1966) (Douglas, J., concurring) ("We are judges, not literary experts."); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 96-97 (1973) (Brennan, J., dissenting) (arguing that state suppression should be limited to materials utterly lacking in social value).

³⁹ Indeed, *Miller* states that the trier of fact should consider "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." See *Miller*, 413 U.S. at 24. See also, *New York v. Ferber*, 458 U.S. 747, 762 (1982) ("We consider it unlikely that visual depictions of children performing sexual acts would often constitute an important and necessary part of a literary performance . . ."); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Attorney General, 383 U.S. 413, 450 (1966) (Clark, J., dissenting) (finding *Fanny Hill* to be "utterly without redeeming social importance"); *Roth*, 354 U.S. at 498 (1957) (Harlan, J., concurring in part) (obscenity judgments involve judicial evaluation of the works in question).

⁴⁰ Most commentators seem to accept a broad enough conception of first amendment values to encompass protection for obscenity. See, e.g., Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 73, 91 (1974).

⁴¹ Professor Baker is perhaps clearest in advocating first amendment protection for a "broad realm of nonviolent, noncoercive activity." Baker, *Scope of the First Amendment*, *supra* note 18, at 990. See also Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567, 576 (1979) (arguing that regulation of expressive conduct may contravene first amendment guarantees).

⁴² See Richards, *supra* note 40, at 81 (pornography advocates "pornotopia"—a vision of society and social relationships); Gerety, *Pornography and Violence*, 40 U. PITT. L. REV. 627, 649-51 (1979) (supporting obscenity regulation but advocating pornographic works that "agitat[e] for social, political, economic, cultural or artistic change.") *But see supra* note 29 (outlining arguments against protecting pornography). Ironically, the feminist analysis of pornography gives it a claim to cognitive content and even to status as political speech. See, e.g., S. BROWNMILLER, *AGAINST OUR WILL: MEN WOMEN AND RAPE* 443 (1975) ("Pornography is the undiluted essence of anti-female propaganda."). Some pornographers view themselves as advancing a form of "porn liberation." See, e.g., Schipper, *Filthy Lucre: A Tour of America's Most Profita-*

scenity law's two-tier approach, which distinguishes valued or protected speech from worthless or unprotected speech,⁴³ is inconsistent with the principle that government should refrain from evaluating speech.⁴⁴

B. *Conservative and Liberal Approaches to Pornography*

Liberal and conservative positions on pornography can be distinguished by their responses to three issues.⁴⁵ The first issue is the nature and meaning of sex. The second is the function of sexual imagery, and the third is the proper role of law in the regulation of sexually-oriented materials.

Characterization of the conservative position on pornography begins with its reliance on a traditional view of sexuality.⁴⁶ In this view sex is legitimate, proper, and moral only within marriage and, even then, only for the purpose of procreation.⁴⁷ This account of sexuality derives from a fundamentally religious strand of Western culture that generally denigrates the corporeal in favor of the spiritual⁴⁸ and that until recently strongly influenced social mores. Current mores perhaps embody less extreme versions of this account, but the notion that sex is somehow wrong, dirty, or sinful unless it is redeemed by some legitimating circumstance like marriage or love remains a force in our cul-

ble Frontier, MOTHER JONES, April 1980, at 31, 60.

⁴³ The two-tier terminology was first used by Kalven. See Schauer, *supra* note 32, at 899 n.3 (citing Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10). However, the analysis itself can be seen in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73 (1942) ("fighting words"), and *Beauharnais v. Illinois*, 343 U.S. 250, 255-58 (1950) (group libel).

⁴⁴ See, e.g., Richards, *supra*, note 40, at 79-80.

⁴⁵ Although it is clearly an oversimplification to define only two positions on the issue of pornography, this simplification imposes some order on an otherwise bewildering array of opinions. For the purposes of this Comment, the simplification is not misleading; most of the nonfeminist analyses fall within the parameters of the conservative and liberal positions here delineated.

For examples of the conservative and liberal positions and the contrast between them, see UNITED STATES COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT OF THE UNITED STATES COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970) (liberal) [hereinafter cited as COMMISSION REPORT]. Compare *id.* at 379 (statements of Morris A. Lipton and Edward B. Greenwood) (liberal) with *id.* at 383 (statements of Morton A. Hill and Winfrey C. Link) (conservative). For a more vitriolic statement of the conservative position, see *id.* at 511 (statement of Charles E. Keating, Jr.).

⁴⁶ See, e.g., L. ZURCHER & R. KIRKPATRICK, CITIZENS FOR DECENCY 113 (1976); Berns, *Beyond the (Garbage) Pale or Democracy, Censorship and the Arts*, in CENSORSHIP AND FREEDOM OF EXPRESSION 49, 58-59 (H. Clor ed. 1971); Christenson, *It's Time to Excise the Pornographic Cancer*, 25 CHRISTIANITY TODAY, Jan. 2, 1981, at 20, 22.

⁴⁷ For a description of the traditional view, see *Introduction*, PHILOSOPHY AND SEX 1-7 (R. Baker & F. Elliston eds. 1975).

⁴⁸ *Id.*

ture. This notion is part of a larger conservative emphasis on virtue, self-control, and dignity as the basic elements of a moral and social perspective.⁴⁹

In the conservative view, images of sex are inevitably isolated from the context of love, commitment, and decency that legitimate sexuality. Thus the tendency of such images is to arouse a nonspecific desire for sex rather than a desire for sexual interaction with a specific person and to degrade a private activity by making it public.⁵⁰ The consequence of allowing sexually arousing images to become a part of public life is the corruption of community values. Ultimately, virtue is sacrificed, and the quality of social life declines.⁵¹

The scope of the conservative view may sweep beyond what is normally thought of as pornography. With respect to literature and other media, the conservative critique may extend to materials that use strong language or approve of indecent activities. Conservative opposition to pornography may be politically related to the opposition to sex education, birth control, civil rights for homosexuals, or abortion. The unifying theme is virtue expressed in terms of sexual restraint and maintenance of the family as an institution.⁵²

Finally, the conservative perspective is generally sympathetic to the use of law, as an expression of collective morality, to reflect and enforce fundamental values.⁵³ In the conservative view the law is a

⁴⁹ See L. ZURCHER & R. KIRKPATRICK, *supra* note 46, at 20-23; Berns, *supra* note 46, at 60-62; Kristol, *Pornography, Obscenity and the Case for Censorship*, in PHILOSOPHY OF LAW 165, 169-70 (J. Feinberg & H. Gross eds. 1975). See generally T. WILLIAMS, *SEE NO EVIL: CHRISTIAN ATTITUDES TOWARD SEX IN ART AND ENTERTAINMENT* (1976) (discussing popular arguments against pornography usually invoke the necessity for decency and virtue in the face of licentiousness, vice, and corruption).

⁵⁰ Berns, *supra* note 46, at 58; Clor, *Obscenity and Freedom of Expression*, in CENSORSHIP AND FREEDOM OF EXPRESSION, *supra* note 46, at 97, 102-05; Williams, *Offensiveness, Pornography, and Art*, in PORNOGRAPHY AND CENSORSHIP 185, 188-89 (D. Copp & S. Wendell eds. 1983) ("Pornography crosses the line between private and public . . .").

⁵¹ See Berns, *supra* note 46, at 63-69; Kristol, *supra* note 49, at 169-70; Williams, *supra* note 50, at 189-90; see also Bickel, *On Pornography II: Dissenting and Concurring Opinions*, 22 THE PUB. INTEREST 25, 25-26 (Winter 1971), quoted in *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 59 n.9 (1973); *Smut, Pornography, Obscenity—Signs the Tide is Turning*, U.S. NEWS & WORLD REP., May 7, 1973, at 39-44.

⁵² It would be very important, in other contexts, to distinguish among conservatives adopting stronger or weaker versions of the sexual philosophy described in the text. Some would limit their opposition to a narrowly confined class of materials whereas others would oppose a broader class. See, e.g., Christenson, *supra* note 46, at 20-21.

⁵³ See, e.g., P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965). Empirical studies have found a significant correlation between approval of strong law enforcement procedures and disapproval of pornography. See, e.g., Birkelbach & Zurcher, *Some*

means of protecting social decency and the quality of life. Conservatives would conclude that pornography is not something that ought to be protected by the first amendment because it depraves and corrupts its audience, indirectly causes widespread social decay, and particularly harms the family.

In contrast the liberal view tolerates, and sometimes even approves of, a wide variety of sexual activity. The desire to have sex is seen as healthy rather than as shameful or sinful. Liberals thus argue that the only legitimate restraint on sexual activity is the informed consent of the participants;⁵⁴ any further restriction is an exercise in moralism and paternalism. In fact liberals argue that the very constraints approved by conservatives are the cause of the "perversions" that conservatives condemn.⁵⁵

For the liberal, images of sex may serve a variety of important social functions, but they reveal an individual's fundamental taste.⁵⁶ The fact that a variety of legitimate tastes exist is confirmed by the existence of a market for a variety of sexually-oriented materials.⁵⁷ Thus, although some liberals may believe that some sexually-oriented materials are disgusting and offensive, the problem is seen as an issue of taste, not morality.

Once this conclusion is reached, it seems illegitimate to prefer one

Socio-Political Characteristics of Anti-Pornography Campaigners, 4 SOC. SYMP. 13, 13-22 (1970); Peek & Brown, *Pornography as a Political Symbol: Attitudes Toward Commercial Nudity and Attitudes Toward Political Organizations*, 58 SOC. SCI. Q. 717, 717-23 (1978).

⁵⁴ See, e.g., Baumrin, *Sexual Immorality Delineated*, in PHILOSOPHY AND SEX, *supra* note 48, at 116, 119-20; Elliston, *In Defense of Promiscuity*, in *id.* at 222, 232-240.

⁵⁵ These views are primarily attributable to the influence of Freud and psychoanalysis. See, e.g., Freud, *The Sexual Life of Human Beings*, in INTRODUCTORY LECTURES ON PSYCHOANALYSIS 303, 310 (J. Strachey ed. 1966); see also Gaylin, *Obscenity is More than a Four-Letter Word*, in CENSORSHIP AND FREEDOM OF EXPRESSION, *supra* note 46, at 153, 160-62.

⁵⁶ See, e.g., *Ginzburg v. United States*, 383 U.S. 463, 491 (1966) (Douglas, J., dissenting); see also Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567, 568 (1979) (arguing that although pornography may be offensive, it is not harmful). But cf. Clark, *Liberalism and Pornography*, in PORNOGRAPHY AND CENSORSHIP, *supra* note 50, at 45, 51-58 (arguing for reconceptualization of what is "harmful"); Gerety, *Pornography and Violence*, 40 U. PITT. L. REV. 627, 632-34, 652-60 (1979) (insisting that violent pornography is harmful, even to "bystanders").

⁵⁷ See, e.g., Baier, *Response: The Liberal Approach to Pornography*, 40 U. PITT. L. REV. 619, 624-25 (1979) (arguing that obscenity is protected by the first amendment, which "guarantees the freedom to express, advocate, extol, and defend alternative ideals and standards of purity"). This does not necessarily mean that all liberals approve of any and all sexually-oriented materials or of their unrestricted distribution. See, e.g., COMMISSION REPORT, *supra* note 45 at 51-60 (Although the Commission recommended the abolition of obscenity laws, it approved restrictions on young persons' access to sexually explicit materials.).

set of tastes to another. It then follows that pornography, however defined, should be protected by the first amendment.⁵⁸ Thus, just as liberals argue that the law should not restrain the sexual activities of consenting adults, they also argue that the law should protect consenting adults who produce and consume sexually-oriented materials.⁵⁹

C. *Conservative and Liberal Elements in Obscenity Law*

Obscenity law is fundamentally conservative, but its details represent a compromise with liberalism. This conservatism is primarily evident in the denial of first amendment protection to obscenity. The Supreme Court has premised its obscenity holdings on its concern for maintaining public decency and avoiding obscenity's perceived harms.⁶⁰ Despite its conservative premises, the Court has made concessions to liberalism by employing a relatively narrow definition of obscenity.⁶¹ This definition nonetheless embodies conservative assumptions. The conservative bias is evident in the Court's concern with "prurience," which, despite some attempts to limit its meaning,⁶² seems to refer simply to a work's intent to produce sexual arousal.⁶³ Use of the capacity for sexual arousal as the main test for obscenity expresses the conservatives' basic disapproval of sex. The Court's requirement that a work have some serious value further amplifies this bias. This requirement

⁵⁸ See *Miller*, 413 U.S. at 40-41 (Douglas, J., dissenting) (obscenity involves questions of taste). "Neutrality" is central to many versions of liberalism. See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10-12 (1980) (authority cannot be vindicated by reference to "a privileged insight into the moral universe"); Feinberg, *supra* note 56, at 568 (liberalism permits regulation only for the purpose of preventing harm or nuisance to others); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The feminist argument takes issue with the liberal stance of neutrality. See *infra* notes 186-87 and accompanying text.

⁵⁹ This does not mean that pornography may not be regulated to avoid unnecessary offense or exposure of children but that regulation would have to meet the familiar time, place, and manner constraints of the first amendment. Consistent with its tolerance of the activities of *consenting* adults, the COMMISSION REPORT, *supra* note 45, at 51-56, recommends the abolition of all obscenity laws but would restrict the access of "explicit sexual materials to young persons," *id.* at 66. See also *id.* at 56-60. In the same vein, the report sanctions restrictions on the public display and unsolicited mailing of explicit materials. See *id.* at 60-62. Liberal concerns for the protection of unwilling audiences are considered by Feinberg, *supra* note 56, at 567-72, and Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 542-50 (1979).

⁶⁰ See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973).

⁶¹ See *supra* text accompanying notes 33-36.

⁶² See, e.g., *Roth*, 354 U.S. at 487 n.20; F. SCHAUER, *supra* note 3, at 96-102.

⁶³ For a pre-*Roth* defense of this element of the definition, see F. SCHAUER, *supra* note 3, at 98; see also Gardiner, *Moral Principles Toward a Definition of the Obscene*, 20 LAW & CONTEMP. PROBS. 560, 562-71 (1955).

implies that a work that produces sexual arousal can be redeemed⁶⁴ if it, as a whole, contains some serious value that encourages the reader's detachment from any sexual response. Finally, the "patently offensive" requirement seems to presume a set of shared values that define clearly what should offend any decent person.

The legal standards distinguishing the obscene from the nonobscene therefore reflect a conservative bias by preferring the tastes of those who are offended by sexually-arousing materials to the tastes of those who enjoy them. In contrast liberals would consider legitimate, even socially important, a work having sexual arousal as its primary purpose.⁶⁵ A distinction may be drawn between works that serve this purpose well or badly, but erotica itself is not inherently suspect. Thus, evaluating these works is a job for cultural critics, not judges.

The specific elements of the Court's definition of obscenity, and the concerns underlying them, have long been the object of a liberal attack.⁶⁶ With respect to the Court's worries about corruption, liberals emphasize the right of citizens in a free society to corrupt themselves. They also emphasize the inappropriateness of any government efforts to define corruption in the area of consensual sexual relations.⁶⁷ Expanding on these arguments, liberals submit that pornography is produced, distributed, and consumed by willing participants, none of whom feel harmed. Liberals further believe that there is little evidence that pornography causes any actual harm.⁶⁸ In their view pornography

⁶⁴ The phrase "utterly without redeeming social importance" was first used in *Roth*. See *Roth*, 354 U.S. at 484. It was relied upon most directly in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 418-21 (1966); see also *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964). *Miller* replaced the test with a formulation exempting works without "serious literary, artistic, political or scientific value" from first amendment protection. See *Miller*, 413 U.S. at 24-25.

⁶⁵ See, e.g., E. KRONHAUSEN & P. KRONHAUSEN, *PORNOGRAPHY AND THE LAW* (1959); S. SONTAG, *The Pornographic Imagination*, in *STYLES OF RADICAL WILL* 38-48 (1969); Richards, *supra* note 40, at 79-80.

⁶⁶ The liberal attack on the Court's position has been mounted perhaps most authoritatively by the Commission on Obscenity and Pornography. See COMMISSION REPORT, *supra* note 45; UNITED STATES COMM'N ON OBSCENITY AND PORNOGRAPHY, *TECHNICAL REPORTS OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY* (1971) (five volumes of empirical research) [hereinafter cited as *TECHNICAL REPORTS*].

⁶⁷ Liberal responses to the Court's concerns are traceable to John Stuart Mill's philosophy granting the government authority to restrict individual freedoms only to prevent harm to others. See J.S. MILL, *supra* note 18; Feinberg, *supra* note 56, at 567-68; Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213 (1972); Scanlon, *supra* note 59, at 528-37. Chief Justice Burger has explicitly rejected Mill's principle. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63-69 (1973).

⁶⁸ This is the most often cited conclusion of the COMMISSION REPORT, *supra* note 45, at 27 ("The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency."). For a survey of empirical

seems as likely to have beneficial as harmful effects given its educational, cathartic, and liberating functions.⁶⁹ Liberals would put the burden of proof upon those who would restrict the liberty of those who desire to produce and consume sexually-oriented materials.⁷⁰ Finally, liberals argue that even if the Court believes pornography's participants *are* being harmed, by sacrificing their dignity for money or by weakening the self-control required for virtuous citizenship, its decision to "protect" the participants through obscenity regulation is plainly paternalistic.⁷¹ The liberal position therefore concludes that the most sound course is to defend liberty against moralism and paternalism.

Liberal accusations of paternalism are met with conservative accusations of anarchy and license.⁷² Conservatives defend the Court's underlying moral position by arguing that liberty divorced from virtue is not worthy of political commitment. Conservatives also dispute the empirical issues, arguing that there is evidence showing pornography to be harmful.⁷³ Although the evidence may be inconclusive, they point out that while long-term and indirect effects are difficult to verify experimentally. Yet, such effects may be crucial to the argument.⁷⁴ Finally, conservatives are incredulous that anyone could believe that sexually-oriented materials have no effect. "If you believe that no one was ever corrupted by a book," writes Irving Kristol, "you also have to believe that no one was ever improved by a book . . . and that, consequently, all education is morally irrelevant."⁷⁵

Liberals and conservatives do agree on the parameters of their disagreement. Both believe that people's varying reactions to sexually-ori-

research since the COMMISSION REPORT, see Daniels, *The Supreme Court and Obscenity: An Exercise in Empirical Constitutional Policy-Making*, 17 SAN DIEGO L. REV. 757 (1980). See also *infra* note 97.

⁶⁹ Support for the liberal view that pornographic materials serve a cathartic function is usually drawn from the research performed for the Commission on Obscenity and Pornography. See TECHNICAL REPORTS, *supra* note 66. For criticism of the liberal view, see, for example, Clark, *Liberalism and Pornography*, in PORNOGRAPHY AND CENSORSHIP, *supra* note 50, at 45, 56-58; Griffin, *Sadism and Catharsis: The Treatment is the Disease*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 141.

⁷⁰ See, e.g., Berger, *Pornography, Sex, and Censorship*, in PORNOGRAPHY AND CENSORSHIP, *supra* note 50, at 83, 99.

⁷¹ See Dworkin, *Paternalism*, in PHILOSOPHY OF LAW, *supra* note 49, at 174-84 (discussing types of government interference that can be considered paternalistic).

⁷² See, e.g., Kristol, *supra* note 49, at 168-69.

⁷³ See L.V. SUNDERLAND, OBSCENITY: THE COURT, THE CONGRESS AND THE PRESIDENT'S COMMISSION 71-84 (1974); Hill-Link Minority Report, *supra* note 45, at 390-412.

⁷⁴ See L.V. SUNDERLAND, *supra* note 73, at 84; Hill-Link Minority Report, *supra* note 45, at 390-412.

⁷⁵ Kristol, *supra* note 49, at 165.

ented material are informed by the observer's underlying philosophy of sexuality. Liberals and conservatives also agree that the legal treatment of sexually-oriented materials depends on aspects of social philosophy as well as on empirical research into the effects of pornography. Because feminists question these assumptions, their views challenge the comfortable dialogue that has determined the parameters of obscenity law. The starting point for understanding the feminist challenge is an examination of the feminist account of pornography.

II. THE FEMINIST ACCOUNT OF PORNOGRAPHY

Feminists⁷⁶ differ considerably from both conservatives and liberals in their responses to all three of the issues delineating political positions on pornography. These differences are largely attributable to the fact that the focal point of the feminist view is neither virtue nor liberty but, instead, equality. This different focus produces a crucial insight: only from a male perspective, whether liberal or conservative, does pornography seem to be primarily about sex. Feminists emphasize equality in sexual relations and evaluate sexually-oriented materials in that light. Pornography, so viewed, is not so much about sex as it is about power.⁷⁷

This distinction between sex and power is complicated, however, by the existence of issues of power throughout the realm of sexuality. Sexuality has long been a means by which men have expressed and

⁷⁶ It should not be assumed that all feminists would agree on the importance of pornography as a women's issue or on specific elements of the feminist account as it is described here. See *supra* note 13 and accompanying text. There is, however, a significant body of feminist literature that comprises a relatively unified account of pornography; this work provides the basis for the feminist arguments presented in this Comment. It should be further noted that this Comment assumes that feminists are expressing the interests of women generally. Hence no distinction will be drawn between feminists' interests and women's interests. Needless to say, this is a controversial assumption. See, e.g., B. EHRENREICH, *THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT* 144-68 (1983) (describing women's antifeminist movements); Ehrenreich, *The Women's Movements: Feminist and Antifeminist*, 15 *RADICAL AM.* 93, 99-100 (1981) (same).

⁷⁷ "The major theme of pornography as a genre is male power, its nature, its magnitude, its use, its meaning." A. DWORKIN, *supra* note 10, at 24. See Diamond, *Pornography and Repression: A Reconsideration of "Who" and "What,"* in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 187-92 (arguing that pornography expresses norms about male power and domination).

The feminist identification of pornography as a problem of power rather than sexuality parallels feminists' identification of rape as a crime of violence rather than an act of lust. See S. BROWNMILLER, *supra* note 42. This insight clarifies Robin Morgan's assertion that pornography is the theory and rape the practice. See R. MORGAN, *supra* note 16, at 163.

exercised power over women.⁷⁸ Historically, sexual repression has been disproportionately enforced upon women, while male "sinfulness" and "indiscretion" have been legally and socially tolerated.⁷⁹ The feminist commitment to sexual equality extends further than a simple desire for expanded opportunities for women's sexual expression, however. Many feminists sense that sexuality itself has been so distorted by male dominance that women cannot participate equally unless eroticism is redefined.⁸⁰

This emphasis on equality is an important aspect of feminist perceptions of sexual images. Feminists distinguish between liberating, egalitarian images and degrading images; images within the first category are erotic, whereas images within the second category are pornographic.⁸¹ Pornography thus "objectifies, degrades and brutalizes a person in the name of sexual stimulation or entertainment."⁸²

Feminist suspicions that sexuality has been distorted by male dominance are confirmed by their finding that the vast majority of sexually-oriented materials produced in this society are pornographic rather than erotic.⁸³ The sexual imagery of the pornography industry, an in-

⁷⁸ See S. BROWNMILLER, *supra* note 42; Foa, *What's Wrong With Rape*, in FEMINISM AND PHILOSOPHY 347, 347-51 (M. Vetterling-Braggin, F. Elliston, & J. English eds. 1977); Peterson, *Coercion and Rape: The State as a Male Protection Racket*, in *id.* at 360, 360-67.

⁷⁹ The inequitable distribution of sexual repression is perhaps best seen in the double standard that has long been applied to male and female sexual behavior. Because it is based on the notion that men's sexual drives are greater than women's, the double standard creates the need for "bad" women with whom men can have sex. The result is a distinction between "good" and "bad" women, for which the criterion is sexual activity; this distinction is unique to women's struggles. See, e.g., D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* 38-75 (1976); A. DWORKIN, *supra* note 10, at 203-209; S. GRIFFIN, *supra* note 10, at 20-24.

⁸⁰ See S. HITE, *THE HITE REPORT* 304-57 (1976); E. Willis, *Hard To Swallow: "Deep Throat,"* in BEGINNING TO SEE THE LIGHT: PIECES OF A DECADE 68-70, 73-75 (1981); Willis, *Feminism, Moralism, and Pornography*, in *id.* at 219.

⁸¹ See Steinem, *Erotica and Pornography: A Clear and Present Difference*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 37-38; Tong, *Feminism, Pornography and Censorship*, 8 SOC. THEORY & PRAC. 1, 2-4 (1982) (distinguishing "erotica" from "thanatica"). But see A. DWORKIN, *supra* note 10, at preface (erotica is currently merely a subcategory of pornography); GRIFFIN, *supra* note 10, at 11 (speaking of "two social movements . . . [one] reclaiming [the] erotic life as a part of human nature" and the other expressing fear and hatred of eros); cf. Willis, *supra* note 13, at 222-23.

⁸² Women Against Pornography flyer (undated) (on file at University of Pennsylvania Law Review).

⁸³ This is clearly the assumption of most antipornography feminists, and thus it is not surprising that they find it to be the case. The seeming circularity of the analysis does not undermine its validity, however; rather, it reflects the interrelationship between pornography and sexuality. The distinction between egalitarian and degrading sexual imagery is unique to feminist theory and has not often been used as a basis for scientific experiment; it is therefore difficult to offer empirical support for the feminists'

dustry in which men produce images of women for other men,⁸⁴ objectifies and degrades women. It portrays them as requiring some coaxing, after which they always become eager for sexual submission—even for violence and torture. Pornography approves male domination of women by portraying it as pleasurable both to men and women. Feminists argue that pornography thereby increases the probability and social acceptability of violence against, and exploitation of, women. Ultimately, this pornographic ideology tends to make both men and women discount women's perspective, interests, and will.⁸⁵

The effects of pornography can be understood only in light of the history of gender inequality and exploitation. In general, women have been excluded from culture and relegated to the private sphere of domesticity from which they have been permitted to escape only on the condition that they accept male-defined terms. Women's perspectives have thus been systematically neglected, distorted, and undervalued.⁸⁶ Hence, an insistence on the value of women's experience is the bedrock of any feminist analysis.⁸⁷ And sensitivity to male power and female powerlessness is characteristic of a developed feminist perspective.⁸⁸

conclusions that most of what is produced by the pornography industry is degrading to women. At the very least, studies have indicated that a substantial share of pornography depicts violence against women, necessarily involving domination of them. *See infra* note 114 and accompanying text.

⁸⁴ The exception—gay male pornography—is produced by men for men. These materials account for approximately 10% of the adult book market and a similar percentage of the film market. COMMISSION REPORT, *supra* note 45, at 15-17. For information on the business of pornography, see *id.* at 73-137; Schipper, *supra* note 42, at 31; Smith, *All-American Sex*, Phila. Inquirer, Jan. 15, 1984 (Magazine), at 17.

⁸⁵ *See, e.g.,* S. GRIFFIN, *supra* note 10, at 89-93; *cf.* Lederer, *Then and Now: An Interview With A Former Pornography Model*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 57 (pornography industry ignores the interests and personhood of models); Russell, *Pornography and Violence: What Does the New Research Say?*, in *id.* at 220-21 (discussing pornographic article purporting to substantiate the notion that women enjoy rape). The argument that pornography is related to the discounting of women's interests is reinforced by the feminist account of liberals' refusal to acknowledge the oppressive aspects of the pornographer's liberty. *See infra* note 186-87 and accompanying text.

⁸⁶ *See, e.g.,* S. GRIFFIN, *supra* note 10, at 243-49; Markovic, *Women's Liberation and Human Emancipation*, in WOMEN AND PHILOSOPHY 145, 154-64 (C. Gould & M. Wartofsky eds. 1976); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 967-69 (1984).

⁸⁷ Although there may be widespread endorsement of the abstract principle that men and women are equal, this is a far cry from actually accepting women's experience to be as equally valuable as men's experience. *See* D. DINNERSTEIN, *supra* note 79; W. FARRELL, *THE LIBERATED MAN: BEYOND MASCULINITY* 256-57 (1974) (discussing housework of male consciousness-raising group); Frye, *Male Chauvinism: A Conceptual Analysis*, in PHILOSOPHY AND SEX, *supra* note 48, at 65.

⁸⁸ This does not mean that male power is the only element in the feminist perspective of power. In the process of feminist consciousness-raising, awareness of women's victimization is a prelude to empowerment. *See* Bartky, *Toward a Phenome-*

These principles suggest that the feminist attempt to define an aesthetic that does not suffer from the one-sidedness of the dominant male view requires the articulation of women's experience of pornography.⁸⁹ However, taking such a perspective on pornography would mean feeling oneself imaginatively to *be* the women portrayed by a medium that "begins by annihilating the real female self and replacing this self with a false self."⁹⁰ This annihilation is achieved both by the very existence of pornography and by its actual content.

In form, pornography is the marketing of images of women by men for men. This objectifies women; they are manipulated and are thereby robbed of their subjectivity and their capacity to define reality in their own terms.⁹¹ This formal characterization is reinforced by the anonymity of pornography,⁹² its emphasis on parts of the women's body,⁹³ its thematic focus on fetishism,⁹⁴ and its general lack of feeling.⁹⁵

nology of Feminist Consciousness, in FEMINISM AND PHILOSOPHY, *supra* note 78, at 22, 27; see also MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC. 515, 535-44 (1982) ("Consciousness-raising is [feminism's] quintessential expression.").

⁸⁹ As a matter of empirical fact, however, men and women appear to differ in their responses to pornography. This difference is only partly explicable in terms of differences in the amount of exposure men and women have had to pornography. See, e.g., COMMISSION REPORT, *supra* note 45, at 163-215; H. EYSENCK & D. NIAS, SEX, VIOLENCE AND THE MEDIA 221-25 (1978). But see Fisher & Byrne, *Sex Differences in Response to Erotica?*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 117, 123-24 (1978) (suggesting that men and women respond similarly but that women perceived movies to be more pornographic than did men).

In the feminist perspective, measured responses to pornography are not central to an evaluation of pornography because responses may be influenced by socialized moral and sexual attitudes. This does not mean that empirical research is irrelevant but that its results must be weighed in light of the forces that may shape responses. Thus the crucial question is how pornography would be viewed by a developed feminist consciousness.

⁹⁰ S. GRIFFIN, *supra* note 10, at 217. See also *id.* at 204-17. Examination of pornography with a feminist consciousness is exemplified by Dworkin's analysis of individual pornographic works. See A. DWORKIN, *supra* note 10, at 27-30 (describing photograph in which a woman is tied naked to the roof of a car, as if she had been hunted); *id.* at 138-43 (describing *Playboy* photographs of a woman bound to a pole and held stationary by lasers; the accompanying text calls her a "volunteer").

The effect of this analysis upon the consciousness of the observer is described by Dworkin: "If a woman has any sense of her own intrinsic worth, seeing pornography in small bits and pieces can bring her to a useful rage. Studying pornography in quantity and depth . . . will turn that same woman into a mourner." Dworkin, *Pornography and Grief*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 286.

⁹¹ See, e.g., A. DWORKIN, *supra* note 10, at 101-28; S. GRIFFIN, *supra* note 10, at 36-46.

⁹² This anonymity is part of what makes it plausible to see pornography as being about women per se.

⁹³ See, e.g., Ordinance Amending Title 7 of Minneapolis Code of Ordinances Relating to Civil Rights § 3 (Dec. 30, 1983) (vetoed Jan. 5, 1984).

⁹⁴ See A. DWORKIN, *supra* note 10, at 123-27.

⁹⁵ See S. GRIFFIN, *supra* note 10, at 56-59.

The subjectivity that women do express in pornographic images is predominantly one of pleasure in being objectified. Women are portrayed as desiring fulfillment by serving as an object that perfectly inspires, responds to, and fulfills male sexual desires.⁹⁶ Pornography's most brutal forms portray women as enjoying being beaten, raped, bound, or otherwise abused.⁹⁷

Women *do* resist in pornography, but their resistance is of two basic stereotyped kinds. First, there is false, moralistic resistance. Once this resistance is overcome, whether by force or seduction, the woman often adopts a nymphomaniacal attitude.⁹⁸ Second, there is more serious

⁹⁶ See, e.g., A. DWORKIN, *supra* note 10, at 115, 129-32. The perpetuation of this view of women's sexual fulfillment is a basis of feminists' objections to even the "milder" pornographic publications.

⁹⁷ There is some disagreement about how much of pornography is violent. Few studies have focused on quantifying the amount of violence in pornography. One study examined 428 adult books easily accessible to the general public and found that in approximately one-third of the sex episodes force was used to obtain women's participation. See Smith, *The Social Content of Pornography*, 26 J. COM., 16 (1976). Another studied cartoons and pictures in *Playboy* and *Penthouse* magazines from 1973 to 1977. It found a "clear and consistent" increase in violence with respect to pictorials over the five-year period. Overall, ten percent of the cartoons and five percent of the pictures appearing in 1977 were considered violent. Malamuth & Spinner, *A Longitudinal Content Analysis of Sexual Violence in the Best-Selling Erotic Magazines*, 16 J. SEX RESEARCH 226 (1980). This low figure is not surprising given that the two magazines chosen are among the mildest forms of pornography available.

A consistent flaw in the numerous experiments designed to test the sociological and psychological effects of pornography is the lack of control over the content of films used in experiments. See, e.g., Sapolsky & Zillmann, *The Effect of Soft-Core and Hard-Core Erotica on Provoked and Unprovoked Hostile Behavior*, 17 J. SEX RESEARCH 319 (1981) (criticizing lack of content control in prior pornography research). A distinction between hard-core and soft-core pornography usually is maintained, but the effect of such factors as violence, coercion of women, and mutuality of desire among participants is rarely isolated or controlled. *Id.* For discussions of other biases and flaws in pornography studies, see generally Bart & Jozsa, *Dirty Books, Dirty Films, and Dirty Data*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 204; Copp, *Introductory Essay*, in PORNOGRAPHY AND CENSORSHIP, *supra* note 50, at 15, 34-38; Diamond, *Pornography and Repression: A Reconsideration of "Who" and "What,"* in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 187-203; McCormack, *Machismo in Media Research: A Critical Review of Research on Violence and Pornography*, 25 SOC. PROBS. 544 (1978); Russell, *Pornography and Violence: What Does the New Research Say?*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 218-39. For a critique of the use of social science research to determine public policy, see, for example, Wilson, *Violence, Pornography and Social Science*, in THE PORNOGRAPHY CONTROVERSY 225 (R. Rist ed. 1975).

⁹⁸ See, e.g., E. KRONHAUSEN & P. KRONHAUSEN, *supra* note 65, at 195-200. Although the authors do not emphasize the points that feminists do—the book was written in 1959—their analysis can provide support for feminist arguments. Compare *id.* at 203-06 (discussing the rape of virgins) with S. GRIFFIN, *supra* note 10, at 20-24 (discussing male power through money and sex) and S. BROWNMILLER, *supra* note 42, at 389-404 (discussing characteristics of rapists and rape victims). The false moralism

resistance generated by a desire for independence or control. This resistance tends to mark the woman as a "bitch," "feminist," or "lesbian"; in any case, she is not a "real woman." Her fate is often grisly.⁹⁹

Once women's experience is taken seriously, pornography appears as neither perversion nor entertainment, but as a genre expressing threats and hostility aimed at the maintenance of male power over women. It portrays for men the pleasures of power and the dangers of losing control; it reveals to women the dangers of any attempt independently to explore their own sexuality.¹⁰⁰

The pornography industry, rather than simply catering to a tiny minority of our society, sells a product that is widely desired and socially significant. The industry is larger than the legitimate film and record industries combined, and the combined circulation of *Playboy* and *Penthouse* exceeds that of *Time* and *Newsweek*.¹⁰¹ Assuming that the feminist account of pornography is correct and recognizing that

theme in pornography is often explicitly antireligious, even sacrilegious. See, e.g., S. GRIFFIN, *supra* note 10, at 69-80; E. KRONHAUSEN & P. KRONHAUSEN, *supra* note 65, at 216-19. This tendency allies pornographers with one dimension of liberalism.

⁹⁹ See A. DWORKIN, *supra* note 10, at 30-36. When the "feminist" emerges victorious, Dworkin argues, the outcome stands as a clear reminder to male readers that it is very dangerous to let women out of their control. The growth of this theme in recent years, together with the general increase in explicit violence in pornography, is taken by feminists to be part of a backlash against feminism. See, e.g., Russell & Lederer, *Questions We Get Asked Most Often*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 27-28.

¹⁰⁰ Pornography, as a product of the male imagination, may be analyzed by drawing on psychoanalytic sources. Some feminists, who have so examined pornography, conclude that it betrays a deep fear of women's power, particularly of women's sexual power. Its basis lies in resentment against the mother, generalized to all women, and layered over with a socialization to the prerogatives of masculinity. This fear is expressed in a desperate need to control women's sexuality and in anger against any hint of genuine independence. See, e.g., A. DWORKIN, *supra* note 10; S. GRIFFIN, *supra* note 10; Chesler, *Men and Pornography: Why They Use It*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 155; Lurie, *Pornography and the Dread of Women*, in *id.* at 159; see also N. CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); D. DINNERSTEIN, *supra* note 79, 91-114.

¹⁰¹ Average circulation per issue for the last six months of 1982 totalled 7,556,206 for *Time* and *Newsweek*; 8,873,397 for *Playboy* and *Penthouse*. IMS, IMS '83 AYER DIRECTORY OF PUBLICATIONS, at 1130, 1133 (1983). Sales of records, tapes, and legitimate movie box office receipts totalled \$6,596,000,000 in 1981. *Leisure Time: Basic Analysis*, 150 STANDARD & POOR'S INDUS. SURV. §§ 2, L22, L31 (Sept. 16, 1982). Estimates of the sales volume of legal pornography vary considerably. The recent demand for pornographic home video cassettes alone has increased sales by several billion dollars. It is estimated that half of all video cassettes sold are pornographic. Serrin, *Sex Is A Growing Multibillion Dollar Business*, N.Y. Times, Feb. 9, 1981, at B6, col. 2. The New York Times estimated that total pornography sales in 1980 were \$5,000,000,000, primarily generated by over 20,000 adult bookstores around the country. See *id.* at col 1. More recent estimates put the total volume at \$10,000,000,000 for 1983. See Smith, *All-American Sex*, Phila. Inquirer, Jan. 15, 1984 (Magazine), at 18, col. 1. See generally Schipper, *supra* note 42.

pornography has a wide audience, we are led to conclude that pornography is an integral part of an ideological system that advocates and legitimates male domination of women. In both instrumental and symbolic ways, feminists argue, pornography affirms male sexual rights over women and female sexual duties (sometimes disguised as rights or desires) to men. Feminists therefore conclude that pornography should be regulated because it violates women's rights to equality.

This focus on equality differentiates feminists from conservatives, who focus on virtue. Feminists charge that pornography helps to stabilize the male-dominated social order, whereas conservatives charge that it corrupts the citizenry and thereby destabilizes social order.¹⁰² The feminists' connection of pornography with equality places the problem in a context of changeable social circumstances and thereby leaves open the possibility of nonpornographic erotic materials.¹⁰³ Conservatives base their opposition on principles they assume to be common to all decent societies, thus placing pornography in a context of an unchangeable order of virtues that does not allow for any possibility of nonpornographic erotic materials.

Although feminist and liberal positions on the issue of regulation tend to differ, their overall differences are fewer and more subtle than those between feminists and conservatives. Historically, feminism has been connected with liberal or progressive movements,¹⁰⁴ and feminists and liberals are often allies in other causes.¹⁰⁵ The compatibility between liberals and feminists breaks down, however, with liberals' willingness to subordinate women's sexual equality to the pornographer's individual liberty. Feminists—particularly radical feminists—perceive this difference as evidence of a profound male bias or insensitivity in liberalism.¹⁰⁶

¹⁰² To the extent that the social order defended by conservatives is male-dominated, these two views are direct opposites. Feminists view pornography as defending traditional values, *see, e.g.*, S. GRIFFIN, *supra* note 10, at 1-35, whereas conservatives view it as undermining them, *see, e.g.*, Berns, *Beyond the (Garbage) Pale, or Democracy, Censorship and the Arts*, in *THE PORNOGRAPHY CONTROVERSY*, *supra* note 97, at 40.

¹⁰³ *See, e.g.*, B. FAUST, *supra* note 13, at 21-24, 189-94; Garry, *Pornography and Respect for Women*, 4 *SOC. THEORY & PRAC.* 395, 413-16 (1978).

¹⁰⁴ *See, e.g.*, S. EVANS, *PERSONAL POLITICS* (1980); J. FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION* (1975).

¹⁰⁵ *See* Clark, *Liberalism and Pornography*, in *PORNOGRAPHY AND CENSORSHIP*, *supra* note 50, at 45 ("Since at least the mid-nineteenth century, the fight for women's rights has largely been fought under the banner of liberalism."). *But see id.*, at 45, 46-52 (liberal emphasis on negative liberties is inconsistent with aspects of women's equality). *See generally* L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1973).

¹⁰⁶ *See, e.g.*, S. BROWNMILLER, *supra* note 42, at 438, 441-45; A. DWORKIN, *supra* note 10, at 207-09; Clark, *Liberalism and Pornography*, in *PORNOGRAPHY AND*

This bias may reflect a fundamental difference between female and male moral frameworks, such as that suggested by Carol Gilligan.¹⁰⁷ Gilligan characterizes the moral framework of women in terms of care and responsibility rather than in terms of rights and rules. This suggests that a feminist moral evaluation of pornography will emphasize the kind of community it helps to create. In contrast, a male evaluation of pornography, whether conservative or liberal, will tend to emphasize abstract principles.¹⁰⁸

III. FEMINIST APPROACHES TO THE LEGAL REGULATION OF PORNOGRAPHY

A. *Arguments in Support of Regulation*

Feminist arguments posit three interests in the regulation of pornography. First, women participate in the pornography industry itself, primarily as models and performers. By some criteria, their participation is voluntary.¹⁰⁹ Yet, strong social forces such as poverty, responsibility for childcare, and a general socialization to "femininity," may well motivate women's participation, and the presence of these forces suggests that the participation of women is less voluntary than may first appear. Considering these forces together with the personal and commercial exploitation common in the pornography industry, it seems

CENSORSHIP, *supra* note 50.

¹⁰⁷ See C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan's work is in part a response to Lawrence Kohlberg's theory of moral development, *see id.* at 18-23; it is also responsive to a long tradition in psychology and social theory that views women as morally inferior to men. *See, e.g.,* Freud, *Femininity*, in NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS, 112, 134 (1965) ("The fact that women must be regarded as having little sense of justice is no doubt related to the predominance of envy in their mental life . . ."); Weisstein, *Psychology Constructs the Female*, in RADICAL FEMINISM 178 (A. Koedt, E. Levine & A. Rapone ed. 1973); *see also* S. OKIN, WOMEN IN WESTERN SOCIAL AND POLITICAL THOUGHT (1980); Gould, *The Woman Question: Philosophy of Liberation and the Liberation of Philosophy*, in WOMEN AND PHILOSOPHY, *supra* note 86, at 5.

¹⁰⁸ See C. GILLIGAN, *supra* note 107, at 19 ("This [female] conception of morality . . . centers moral development around the understanding of responsibility and relationships, just as the [male] conception of morality . . . ties moral development to the understanding of rights and rules.")

Although many conservative arguments on pornography refer to its impact on the community, the feminist position relies on a different conception of community. Conservatives tend to rely on abstract principles about community, for example ideas about *a priori* structures such as male dominance. *See* B. EHRENREICH, *supra* note 80, at 180-82; C. GILLIGAN, *supra* note 107, at 173-74.

¹⁰⁹ Pornographer Robert Guccione believes that women have an exhibitionistic drive that is satisfied by appearing in pornographic works. *See* Polman, *Guccione*, Philadelphia Inquirer, Oct. 9, 1984, at 4-E, cols. 1-3 ("[V]ery few women won't take their clothes off. They *luuuuhv* doing it . . .").

reasonable to view women as harmed by their participation in the production of pornography.¹¹⁰ At the least it would seem necessary to guarantee better wages, working conditions, and job security; more ambitiously, it seems important to eliminate the social and economic forces that motivate women to participate in pornography.¹¹¹

Second, pornography indirectly functions as an influential form of propaganda vividly advocating male domination of women.¹¹² This propaganda is all the more effective because its ideological nature is generally denied; the popular view that pornography is primarily about sex rather than power conceals its male supremacist ideology and provides a basis for its social acceptance. In this respect pornography differs from explicit racist, or even sexist, propaganda, which is more likely to be viewed as socially unacceptable.¹¹³ This propaganda works to shape and maintain attitudes and behaviors that stabilize structures of male domination and increase the likelihood that society will tolerate violence against women.¹¹⁴

¹¹⁰ See K. BARRY, *FEMALE SEXUAL SLAVERY* (1979). For an insight into the lives of pornography models, see L. LOVELACE, *ORDEAL* (1980); Lederer, *Then and Now: An Interview with a Former Pornography Model*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 57; Weene, *Venus*, HERESIES: A FEMINIST PUBLICATION ON ART & POLITICS #12, 1981, at 36 (Sex Issue); Schipper, *supra* note 42, at 32-33.

The Minneapolis ordinance creates a cause of action against producers, sellers, exhibitors, and distributors for "any person who is coerced . . . into performing for pornography." Ordinance Amending Title 7 of Minneapolis Code of Ordinances Relating to Civil Rights, § 4 (Dec. 30, 1983) (vetoed Jan. 5, 1984) The Ordinance makes it extremely difficult to negate a finding of coercion. See *id.* § 4(m).

¹¹¹ This analysis parallels the feminist treatment of prostitution. See K. BARRY, *supra* note 110; Millett, *Prostitution: A Quartet for Female Voices*, in WOMEN IN SEXIST SOCIETY 60 (V. Gornick & B. Moran eds. 1971); see also, Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, 90 ETHICS 335, 348-55 (1980) (arguing that attitudes against prostitution ought to be abandoned or modified because they are damaging and are based on beliefs prejudiced against women); Wendell, *Pornography and Freedom of Expression*, in PORNOGRAPHY AND CENSORSHIP, *supra* note 50, at 167 (assessing the extent to which coercion in production can justify regulation).

¹¹² See LaBelle, *The Propaganda of Mysogyny*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 174.

¹¹³ See S. BROWNMILLER, *supra* note 42, at 442-45.

¹¹⁴ See *id.* at 395-96; Morgan, *Theory and Practice: Pornography and Rape*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 134. Some feminists have incorporated empirical findings into their formulations of this argument. See, e.g., Bart & Jozsa, *Dirty Books, Dirty Films, and Dirty Data*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 204; Diamond, *Pornography and Repression*, in *id.*, at 187; Russell, *Pornography and Violence: What Does the New Research Say?*, in *id.*, at 218; see also McCormack, *supra* note 97. For empirical studies regarding this issue, see Donnerstein, *Pornography and Violence Against Women: Experimental Studies*, in PORNOGRAPHY AND CENSORSHIP *supra* note 50, at 219; Donnerstein & Berkowitz, *Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women*, in *id.* at 233; Kutchinsky, *The Effect of Easy Avail-*

The third concern, related to the second, is that pornographic images of women tend to damage women's reputation as women.¹¹⁵ The reputation of women can be damaged in ways that men's cannot. Images of individual women who emerge from the private sphere generalize easily to all women; the token woman represents her gender. In contrast, the actions and qualities of individual men are not so easily generalized. Men are persons, whereas women are women.¹¹⁶ Pornographic portrayals of individual women thus harm all women.

Feminists argue that if these considerations about women's interests in pornography are taken more seriously than conventional male-biased moral theory would take them, a strong and unambiguous condemnation of pornography is justified.

B. *Feminist Theories for the Regulation of Obscenity and Pornography*

1. Defining Pornography

Pornography is currently regulated by excluding obscenity from first amendment protection. The legal definition of obscenity makes it clear that regulation is oriented towards conservative concerns.¹¹⁷ The use of a feminist definition of pornography would make the regulation of pornography more sensitive to feminist concerns.

By choice, feminists define pornography rather than obscenity. Obscenity is a relatively subjective term, connoting an offense to decency, whereas pornography denotes a relatively specific and popularly identified class of materials.¹¹⁸ Because the feminist argument emphasizes the role of such materials in maintaining male domination, rather

bility of Pornography on the Incidence of Sex Crimes: The Danish Experience, in *id.* at 295; Malamuth & Check, *Penile Tumescence and Perceptual Responses to Rape as a Function of Victim's Perceived Reactions*, in *id.* at 257; Russell, *Research on How Women Experience the Impact of Pornography*, in *id.* at 213; Zillman, Bryant, Comisky & Medoff, *Excitation and Hedonic Violence in the Effect of Erotica on Motivated Intermale Aggression*, in *id.* at 275; see also H. EYSENCK & D. NIAS, *supra* note 89; Gray, *Exposure to Pornography and Aggression Toward Women: The Case of the Angry Male*, 29 SOC. PROBS. 387 (1982). See generally G. BYERLY & R. RUBIN, *PORNOGRAPHY: THE CONFLICT OVER SEXUALLY EXPLICIT MATERIALS IN THE UNITED STATES: AN ANNOTATED BIBLIOGRAPHY* (1980); C. WILSON, *VIOLENCE AGAINST WOMEN: AN ANNOTATED BIBLIOGRAPHY* 85-99 (1981).

¹¹⁵ S. GRIFFIN, *supra* note 10, 111-19; Tong, *supra* note 81, at 10-12.

¹¹⁶ See Garry, *supra* note 103, at 407-10.

¹¹⁷ See *supra* notes 60-64 and accompanying text.

¹¹⁸ Richards, *supra* note 40, at 47-51, 55-56. Richards discusses the etymology of the words "obscene" and "pornography" and concludes that to label something obscene is to condemn it, whereas to label it as pornographic is, to a greater extent, merely to describe it. See *id.* at 47-51, 55-56.

than its offensiveness, the term pornography is preferred.

One feminist attempting to redefine pornography advocates defining pornography as "verbal or pictorial material which represents or describes sexual behavior that is degrading or abusive to one or more of the participants *in such a way as to endorse the degradation*."¹¹⁹ Although this definition undoubtedly requires some clarification, particularly as to the meaning of "endorse" and "degradation," it is arguably no more vague than the current legal definition of obscenity. From a feminist perspective its virtue is that it directs attention to the endorsement of degradation and the approval of male domination, rather than to the arousal of prurient interest. It thus reflects the feminist argument that pornography concerns power rather than sex.

Some municipalities have recently considered antipornography laws incorporating a feminist sense of the obscene. These proposals define pornography in terms of the manner in which women are presented by the materials.¹²⁰ However, much of the material within

¹¹⁹ Longino, *Pornography, Oppression, and Freedom: A Closer Look*, in TAKE BACK THE NIGHT: WOMEN AND PORNOGRAPHY, *supra* note 10, at 43. Some feminists use far looser definitions. See, e.g., Yeamans, *A Political-Legal Analysis of Pornography*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 248 (defining pornography as "any use of the media which equates sex and violence"). There are some suggestions that feminist objections to pornography are partly based on the fact that it is *sold* for the sake of sexual stimulation. This parallels the pandering idea elaborated in *Ginzberg v. United States*, 383 U.S. 463, 467-71 (1966). See, e.g., Ordinance Amending Title 7 of Minneapolis Code of Ordinances Relating to Civil Rights § 4 (Dec. 30, 1983) (Jan. 5, 1984); Russell & Lederer, *supra* note 99, at 27 ("Pornography is not made to educate but to sell, and . . . what sells in a sexist society is a bunch of lies about women and sex.") Some criticism from within the feminist movement can be found in English, Hollibaugh & Rubin, *supra* note 13, at 56-57.

¹²⁰ See *supra* note 12. The Minneapolis ordinance begins by defining pornography as "the sexually explicit subordination of women, graphically depicted, whether in pictures or in words." Ordinance Amending Title 7 of Minneapolis Code of Ordinances Relating to Civil Rights § 3(gg)(1) (Dec. 30, 1983) (Jan. 5, 1984). The definition is complicated, however, by the statute's delineation of nine components, of which one or more must be present in pornographic works:

- (i) women are presented as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission; or (vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

this definition is protected under current laws.¹²¹ The question thus posed by feminist arguments is whether there are persuasive reasons to prefer this definition to the now-prevailing *Miller* standard.

2. Feminist Theories Supporting Legal Regulation of Pornography

Feminist concerns regarding pornography generate three theories supporting regulation: that pornography causes failures of the marketplace of ideas, that it causes harms, and that it libels women as a group.¹²² Feminists argue that women have generally been excluded from the marketplace of ideas, which the first amendment is designed to protect.¹²³ Men dominate the sphere of public speech, often with the aid of law.¹²⁴ The marketplace of ideas cannot promote truth or democracy when historical injustices handicap half the population.¹²⁵ Based upon this theory, women may legitimately demand some special consideration aimed at promoting their participation in the marketplace of ideas or at protecting them from the abuse and exploitation permitted by a marketplace that ignores their concerns.

This failure of the marketplace may justify state regulation of pornography. Feminists argue that pornography is a male preserve, a criticism no less valid because it can be applied to almost all aspects of

¹²¹ Compare the feminist definitions with the standard delineated by the Supreme Court in *Miller v. California*, 413 U.S. 15, 24-25 (1973).

¹²² It should be noted that these three theories are interrelated in their reliance upon the feminist account of the silencing of women and their concerns, particularly in the sphere of sexuality. See generally A. DWORKIN, *supra* note 10; S. GRIFFIN, *supra* note 10. To the extent that this account is the basis of the argument that the marketplace of ideas has failed, that theory underlies the other two.

¹²³ See *supra* note 86 and accompanying text; Dworkin, *For Men, Freedom of Speech; for Women, Silence Please*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 256-58. See generally J. ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN (1981); S. GRIFFIN, *supra* note 10.

¹²⁴ See, e.g., L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 4-5 (1969). Although there are no direct legal prohibitions of women's participation in the public sphere, disproportionate burdens in the private sphere make it impossible for women to participate equally; housework, childcare, and the emotional maintenance of personal relationships is work done almost entirely by women. See A. OAKLEY, THE SOCIOLOGY OF HOUSEWORK (1974); MOTHERING: ESSAYS IN FEMINIST THEORY 135-65 (J. Trebilcock ed. 1984); Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, 6 SIGNS: J. WOMEN CULTURE & SOC. 366, 377-86 (1981).

¹²⁵ Karst articulates a theoretical justification for treating equality as a value served by the first amendment. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23-26 (1975). He construes the principle to undermine "content discrimination" and obscenity laws in particular. See *id.* at 19-32. But see Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 135-139 (1981).

culture.¹²⁶ In fact, recognizing that pornography is a part of sexist society actually strengthens the feminist argument that the marketplace of ideas truly has failed. Sexism is articulated, expressed, and endorsed by the cultural phenomenon of pornography. This male preserve in which women are abused and exploited plays a crucial role in the silencing of women. Certainly discussion of sexuality is dominated and distorted by pornographic images that bar the articulation of a genuine female sexuality.¹²⁷ The feminist argument thus leads to the conclusion that the suppression of pornography would remove a barrier to women's participation in the marketplace of ideas.

A second doctrinal argument in support of regulation is that pornography harms women. This argument differs from the usual harm-oriented conservative justification for regulation in that it emphasizes different harms and different mechanisms by which the harms occur. Thus far, liberals and conservatives have ignored women's interests in pornography. When these interests are systematically considered in light of the evidence regarding pornography's harms, it is plausible that the government's interest in suppressing pornography is strong enough to override any first amendment values served by the pornographer's freedom of expression.¹²⁸

Although feminists should be reluctant to accept a two-tier or multitier theory of the first amendment or a narrow construction of what kind of speech the first amendment protects, if these arguments are accepted, feminist considerations add weight to the view that pornography is harmful. At the least, if the feminist account of pornography is more plausible than the conservative account, there is greater reason than is now offered to deny pornography the protection of the first amendment. In fact, the feminist emphasis on violence as the causal link between pornography and harm may well be more plausible than the conservative emphasis on prurience.¹²⁹

¹²⁶ See, e.g., S. GRIFFIN, *WOMAN AND NATURE: THE ROARING INSIDE HER* (1978); Rich, *Afterword*, in *TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY*, *supra* note 10, at 313.

¹²⁷ Bonnie Klein, the director of the feminist antipornography movie, *Not A Love Story: A Film About Pornography*, originally set out to make an erotic film but found that "woman's sexual imagery had been co-opted by the 'male entertainment' industry." This discovery prompted her to make the documentary. *Off Our Backs*, April 1982, at 20. Dworkin, *supra* note 10, at 178-98.

¹²⁸ This is especially true if a "positive" conception of freedom is adopted, as feminists urge. S. GRIFFIN, *supra* note 10, at 1; Longino, *supra* note 119, at 51-53; Russell, *supra* note 99, at 29; see also Clark, *Liberalism and Pornography*, in *PORNOGRAPHY AND CENSORSHIP*, *supra* note 50, at 45.

¹²⁹ The link between media violence and behavior is far better substantiated than any link between media sexuality and behavior. See H. EYSENCK & D. NIAS, *supra*

Feminist criticism of pornography leads to a third theory of regulation: that pornography libels women as a group. In *Beauharnais v. Illinois*¹³⁰ the Supreme Court upheld a group libel law against a first amendment challenge. The challenged law made it unlawful to publish or exhibit a portrayal of "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" that would expose that group to "contempt, derision, or obloquy."¹³¹ The Court held that instances of group libel affect the reputation of the groups defamed and thereby harm individual members of the group.¹³² Thus it was permissible for the Illinois legislature to enact the law as part of its attempt to deal with problems fostered by racial and religious tensions and violence.¹³³

Beauharnais has not been explicitly overruled, but most commentators¹³⁴ and some lower courts¹³⁵ have questioned its continued validity. Some recent work, however, has argued that group libel doctrine is not, or should not be, dead.¹³⁶ Group libel theory justifies the regulation of vilifying speech that is aimed at vulnerable, historically oppressed groups on the theory that such speech operates "nonrationally" and therefore cannot be effectively counteracted by opposing speech,¹³⁷ particularly speech by or on behalf of the vilified group.¹³⁸ This theory

note 89.

¹³⁰ 343 U.S. 250 (1952).

¹³¹ *Id.* at 251 (quoting ILL. ANN. STAT. ch. 38, § 471 (Smith-Hurd 1949) (repealed 1961)).

¹³² See *Beauharnais*, 343 U.S. at 262.

¹³³ *Id.* at 259-62.

¹³⁴ See, e.g., F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 90-99 (1981). Haiman argues that *Beauharnais* found group libel theory to be valid by relying upon analogies to individual libel and fighting words. These doctrines, he reasons, have since been undermined by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel), *Cohen v. California*, 403 U.S. 15 (1971) (fighting words), and *Gooding v. Wilson*, 405 U.S. 518 (1972) (fighting words). But cf. Smolla, *Let The Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 11 (1983) (arguing that doctrinal confusion is one of the causes of the recent rejuvenation of American libel law).

¹³⁵ See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir.) (discussing abrogation of *Beauharnais* and holding that that case does not make first amendment inapplicable to prohibition of Nazi march), *cert. denied*, 439 U.S. 916 (1978).

¹³⁶ E.g., Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979) (distinguishing group libel from group vilification by relying primarily on Meiklejohn's narrow first amendment theory); cf. Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (endorsing tort action over first amendment objections).

¹³⁷ See Delgado, *supra* note 136, at 135-49; Note, *supra* note 136, at 317-22.

¹³⁸ Paradoxically, in cases involving a group in particular need of protection, because of the listener's tendency to believe that the group is somehow inferior, this belief also prevents the listener from taking the group's views seriously. For a discussion of women's experience in this area, see Frye, *supra* note 87, at 74-79.

depends on controversial, but plausible, psychological assumptions and suggests that the law should countenance civil or criminal sanctions against the dissemination of hate literature aimed at disadvantaged groups.¹³⁹

Feminist arguments characterize pornography as a species of hate literature, parallel to pamphlets vilifying blacks or Jews. It falsely portrays women as finding self-fulfillment in sexual submission to the violent will of men and conveys this image in a manner that bypasses the critical faculties of its audience. By portraying women as whores,¹⁴⁰ it thereby encourages both men and women to take women's interests less seriously than men's.¹⁴¹ This is a denial of women's humanity, dignity, and self-respect.¹⁴²

3. Forms of Legal Regulation

There are many ways in which the law could regulate pornography. To the extent that pornography is not protected by the first amendment, outright suppression through criminal laws is the most obvious possibility.¹⁴³ Some sort of regulatory scheme, involving licensing or taxes, is also possible.¹⁴⁴ The direct involvement of the state in any regulatory scheme would involve first amendment problems similar to those posed by criminalization, but, to the extent that regulatory schemes may be viewed as time, place, or manner restrictions, their permissible scope may be somewhat wider than that of criminal statutes.¹⁴⁵ First amendment procedural requirements¹⁴⁶ are likely to make such regulatory schemes unworkable, however.

In terms of feasibility and political strategy, civil actions may pro-

¹³⁹ This nonneutral principle, as articulated here, depends in part on the market failure argument. See *supra* notes 123-27 and accompanying text.

¹⁴⁰ See A. DWORKIN, *supra* note 10 (especially chapters 6 and 7. The word pornography derives from Greek in which it meant the "depiction of the lowest whores." *Id.* at 200. See also Ordinance Amending Title 7 of Minneapolis Code of Ordinances Relating to Civil Rights § 3 (Dec. 30, 1983) (vetoed Jan. 5, 1984).

¹⁴¹ Tong, *supra* note 81, at 4; see Garry, *supra* note 103, at 397-405, 413-16.

¹⁴² See Hill, *Servility and Self-Respect*, 57 THE MONIST 87 (1973).

¹⁴³ This is the form of most present-day obscenity laws. See *supra* note 4; see also Feinberg, *supra* note 56, at 567-68.

¹⁴⁴ It might even be possible to compel the pornography industry to support shelters for battered women or rape crisis centers by some sort of tax transfer scheme. It appears that no one has ever proposed such a plan.

¹⁴⁵ See e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (upholding statute prohibiting promotion of sexual performances by minors); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding statute forbidding broadcasters from using "any obscene, indecent, or profane language" on radio); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (upholding portions of zoning ordinance regulating "adult" movie theaters).

¹⁴⁶ See F. SCHAUER, *supra* note 3, at 206-227.

vide a preferable approach. The strength of legislatively designed tort actions, such as the Minneapolis ordinance,¹⁴⁷ lies in their form as amendments to municipal civil rights laws. They treat pornography as "a form of discrimination based on sex."¹⁴⁸ The state role is confined to adjudication, and the factual presentation of the cases is left to those who claim to be harmed. This allows feminist plaintiffs to exercise some control over the development of claims under the statutes.

IV. AN EVALUATION OF THE FEMINIST APPROACH

A. *Questions About the Feminist Account of Pornography*

Three challenges can be made to the feminist interpretation of pornography. The first is a challenge to the feminists' universalization of "men" and "women." Proponents of this challenge deemphasize gender and instead emphasize that responses to pornography vary according to the individual and that many women respond positively to pornography whereas some men respond negatively.¹⁴⁹ This argument misses the feminists' point, however. Gender-conscious analysis is appropriate for a number of reasons. First, there appear to be empirical differences in male and female responses to pornography.¹⁵⁰ Moreover, because individual perceptions of pornography may depend on psychological predispositions, it is important to view empirical data critically.¹⁵¹

A defense of the feminist analysis leads to more serious challenges

¹⁴⁷ See Ordinance Amending Title 7 of Minneapolis Ordinances Relating to Civil Rights (Dec. 30, 1983) (vetoed Jan. 5, 1984) The Minneapolis ordinance would have created a cause of action for any person coerced into pornographic performances, for any person who has pornography forced upon him or her, and for any person assaulted in a way directly caused by pornography. See *id.* §§ 5-7. The Ordinance would have also created a cause of action for any woman "as a woman acting against the subordination of women." *Id.* § 4.

¹⁴⁸ *Id.* § 3. The doctrinal justification offered in support of this treatment of pornography is similar to that usually given for affirmative action or for legislation under section five of the fourteenth amendment. Such an argument would begin by positing that we face a conflict between two constitutional values—equality and liberty. The argument would then propose that the conflict be resolved in favor of equality because the alleviation of women's oppression must take precedence over the rights of pornographers.

¹⁴⁹ This raises the issue of whether women's participation in the pornography industry is truly voluntary. See, e.g., *supra* note 111 and accompanying text.

¹⁵⁰ See *supra* note 89 and accompanying text.

¹⁵¹ The point here is not simply that perspective influences experience, but that some perspectives may be better than others. Although there will always be disputes about the relative superiority or inferiority of perspectives, this argument does not imply that all perspectives are equal. It necessarily entails that the issue cannot be settled only by reference to data on people's experience.

concerning feminist assumptions about sexuality. The feminist account assumes that sex can be divorced from violence and domination, yet this may not be true. A conservative analysis of this issue would link male sexuality to aggression and dominance by arguing that a man's potency depends on feelings of power and control, perhaps even hostility.¹⁵² Female sexuality is correspondingly passive and submissive; hardly considered to be a sex drive at all.¹⁵³ Thus the conservative argument concludes that pornography depicts sex as it is and has to be for men. Applying this conclusion to the issue of regulation, the conservative would then argue that sexuality and sexually-oriented materials must be controlled because the liberation of male sexuality is the liberation of hostility and antisocial feelings, particularly feelings against women. Conservative opposition to sexuality and sexually-oriented materials can therefore be seen as motivated by a form of respect for women.¹⁵⁴ In contrast, a liberal analysis of the claim that there is a necessary connection between aggression and sexuality would point to the intensity of the desires aroused in sex.¹⁵⁵ Thus this view also argues that sexual activity must have a tinge of aggression. Similarly, this account of the matter concludes by charging that feminists merely want sex to be sensuous cuddling, devoid of passion.¹⁵⁶

Although a full answer to this criticism would require consideration of sexological research beyond the scope of this paper, suffice it to say that feminists flatly deny that male and female sexuality are necessarily dominant and submissive,¹⁵⁷ and they attribute any sadomasochistic elements of sex¹⁵⁸ to socialization rather than genetics. Feminists

¹⁵² This theory is at least partially embodied in the language. See generally *SEXIST LANGUAGE: A MODERN PHILOSOPHICAL ANALYSIS* (Vetterling-Bruggin ed. 1981) (examining sexist language and its relation to male domination and female subordination); R. LAKOFF, *LANGUAGE AND WOMAN'S PLACE* (1975) (analyzing sexist language as indicative of the speaker's true feelings regarding women); Baker, "Pricks" and "Chicks": A Plea for "Persons", in *PHILOSOPHY & SEX*, *supra* note 48, at 45.

¹⁵³ This view of sexuality was certainly the dominant one before Kinsey; perhaps it still is. See B. FAUST, *supra* note 13, at 6.

¹⁵⁴ See Garry, *supra* note 103, at 396-97 (distinguishing the respect for women that conservatives support from that urged by feminists).

¹⁵⁵ See, e.g., Mitzel, *The District Attorney is a Girl's Best Friend: Feminists and the Anti-Porn Crusade*, *GAY NEWS*, Aug. 7, 1981, at 17.

¹⁵⁶ See B. FAUST, *supra* note 13, at 49 (discussing Kinsey); E. Willis, *Feminism, Moralism, and Pornography*, in *BEGINNING TO SEE THE LIGHT: PIECES OF A DECADE* 223-25 (1981).

¹⁵⁷ See, e.g., S. HITE, *THE HITE REPORT: A NATIONWIDE STUDY OF FEMALE SEXUALITY* (1976) (especially 465-770); *POWERS OF DESIRE* (A. Snitow, C. Stansell & S. Thompson eds. 1983); 3 *HERESIES: A FEMINIST PUBLICATION ON ART & POLITICS* #12, 1981 (Sex Issue); 5 *SIGNS: J. WOMEN CULTURE & SOC.* 569 (special issue); 6 *SIGNS: J. WOMEN CULTURE & SOC.* 1 (1980).

¹⁵⁸ The view that sex is inevitably sadomasochistic is sometimes attributed to Sartre, although the sadomasochism is not inevitably male-female. See Collins & Pierce,

may acknowledge that sex has a passionate dimension, particularly for men as they have been socialized. Yet, they would further argue that to the extent that sex may be intrinsically "violent" the violence ought to be equally distributed among men and women, in contrast to current pornography.¹⁵⁹

A final challenge to the feminist account of pornography builds on the doubts raised by the preceding challenge.¹⁶⁰ The argument is that men and women do indeed have different sexual styles.¹⁶¹ These styles are in part genetic, but they are reinforced and amplified by a culture that is undeniably biased in favor of men. Pornography is a genre of male fantasy in which women are portrayed as having a male sexuality; that is, they are aroused by what arouses men. Male fantasies *are* somewhat aggressive and degrading to women, and this is unfortunate, but pornography is nonetheless part of a legitimate masculine style, a style which is more visual, less tactile, more instrumental, less expressive, more lustful, less loving. These differences are ultimately irreducible, although some women have masculine styles, and vice versa. The difference in sexual styles may be illustrated by comparing pornography to what is often considered the parallel phenomenon for women: romance.¹⁶² Romance differs from pornography in that its eroticism is emotional, diffuse, and inexplicit rather than functional, pointed, and explicit. Yet, what excites women's fantasies in romance is the very same male power that pornography glorifies. Here, too, no attractive image of sexual equality is either portrayed or sought.¹⁶³ This analysis therefore concludes that a greater equality between men and women must be achieved if we are to overcome the sense that the masculine style is the only style. With greater equality, masculine and feminine sexual styles will remain different but will be equal.¹⁶⁴

This interpretation of pornography undermines the feminist position. It acknowledges that current pornography is too violent and degrading to women but suggests that pornography is a fantasy genre

Holes and Slime: Sexism in Sartre's Psychoanalysis, in *WOMEN AND PHILOSOPHY*, *supra* note 107, at 112; Oaklander, *Sartre on Sex*, in *PHILOSOPHY OF SEX* 190 (A. Soble ed. 1980).

¹⁵⁹ See *supra* note 97. But see English, Hollibaugh, & Rubin, *supra* note 13, at 57-58.

¹⁶⁰ This argument follows that of B. FAUST, *supra* note 13.

¹⁶¹ *Id.* at 45-59.

¹⁶² B. FAUST, *supra* note 13, at 98.

¹⁶³ See English, Hollibaugh & Rubin, *supra* note 13, at 54-55.

¹⁶⁴ Faust and Safilios-Rothschild express concern about whether men and women are fundamentally incompatible. See B. FAUST, *supra* note 13, at 187-204; C. SAFILIOS-ROTHSCHILD, *supra* note 161; see also Rapaport, *On the Future of Love: Rousseau and the Radical Feminists*, in *WOMEN AND PHILOSOPHY*, *supra* note 107, at 185.

tailored to a legitimate erotic style. In response to this challenge, many feminists may be willing to modify their positions.¹⁶⁵ Many others, however, will argue that although masculine and feminine sexual styles do exist, they are a product of male-dominated society rather than of genetics.

B. *Questions About the Use of Law to Regulate Pornography*

1. The Liberal Critique of the Feminist Position

Although it is not absolute, first amendment protection is broad in scope.¹⁶⁶ The courts have not, however, wholly refrained from limiting speech. Regulation must be pursued in the least restrictive manner possible,¹⁶⁷ but some inhibitions of first amendment freedoms have been permitted.¹⁶⁸ The strongest doctrinal criticisms of the feminist position therefore flow from the work of liberal commentators rather than the courts.¹⁶⁹ These criticisms are all traceable to the liberal position that regulations on speech should be minimal, if they are legitimate.¹⁷⁰ As a result, liberal evaluations of specific feminist proposals all tend to generate the criticism that they necessitate government evaluation of the content of works.

The liberals' main problem with the feminist argument, then, is that it interprets pornography as political speech, and hence, inadvertently implies that it must be given full first amendment protection.¹⁷¹ In addition, it is settled law that the advocacy of what some legislature

¹⁶⁵ See, e.g., English, Hollibaugh, & Rubin, *supra* note 13, at 54-55 (more female pornographers would break down harmful pornographic gender hierarchy).

¹⁶⁶ See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (employees' right to refuse to associate sufficient to prevent union from spending dues on political activities unrelated to collective bargaining); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-58 (1975) (holding unconstitutional denial of use of municipal auditorium based on content of program); *NAACP v. Button*, 371 U.S. 415, 429 (1963) (litigation by NAACP to further objectives of racial equality is protected political expression). But see Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 140, 141 (D. Kairys ed. 1982) (broad right of free speech is a relatively recent development).

¹⁶⁷ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

¹⁶⁸ See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 869-72 (1982) (plurality opinion) (partially limiting school board's discretion to remove books from library); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (speech intended to incite or produce imminent lawless action and likely to incite or produce such may be restricted).

¹⁶⁹ See, e.g., *Baker*, *supra* note 19. But see *Roth v. United States*, 354 U.S. 476, 508-14 (1957) (Douglas, J., dissenting) (arguing that freedom of speech and press be given broadest possible application).

¹⁷⁰ See *supra* notes 40-41.

¹⁷¹ See Kaminer, *Pornography and the First Amendment: Prior Restraints and Private Action*, in *TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY*, *supra* note 10, at 246.

believes is a dangerous ideology cannot be made illegal.¹⁷² Furthermore, it is difficult to argue that individual pieces of pornography, however much they implicitly endorse the degradation of the women portrayed, advocate clearly that all women should be or are degraded. Thus feminists would have to grant the government the power to interpret the message expressed in a wide range of materials in order to identify materials that advocate harm to women.¹⁷³

Feminists justify government intervention primarily by reference to the market failure theory, arguing that something needs to be done to help end the silencing of women and equalize the voices of men and women in the marketplace of ideas. A preliminary response to this theory might attack its factual premises by denying that pornography dominates and distorts the articulation of women's sexual sensibility. One can point to the romance industry¹⁷⁴ and to publications that study and discuss women's sexual perspective as evidence that the marketplace has not failed to accommodate women's voices.¹⁷⁵ Another response might be to point out the degree to which other aspects of culture are male monopolies. Feminists must explain what distinguishes pornography from other expressions of male dominance.¹⁷⁶

Even accepting the feminist account of pornography as a market failure, the theory is problematic because it justifies government intervention to assure equal or adequate access to the marketplace of ideas.¹⁷⁷ Equality and adequacy, however, remain vague; specification of their meaning will usually presuppose some conception of what a properly functioning marketplace would look like. Market failure theory therefore grants the government authority to decide how the marketplace of ideas should look.

This criticism of the feminist account of the market failure theory also applies to the feminist argument that the harms of pornography justify its suppression. If pornography is viewed as an expression of

¹⁷² See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *Yates v. United States*, 354 U.S. 298, 312-27 (1957).

¹⁷³ See *infra* notes 188-96 and accompanying text.

¹⁷⁴ B. FAUST, *supra* note 13, at 146-56 (discussing romantic fiction directed at women readers).

¹⁷⁵ See, e.g., L. BARBACH, *FOR YOURSELF: THE FULFILLMENT OF FEMALE SEXUALITY* (1975); B. DODSON, *LIBERATING MASTURBATION* (1974); N. FRIDAY, *MY SECRET GARDEN: WOMEN'S SEXUAL FANTASIES* (1973); S. HITE, *THE HITE REPORT* (1976); S. KITZINGER, *WOMEN'S EXPERIENCE OF SEXUALITY* (1984); 3 *HERESIES: A FEMINIST PUBLICATION ON ART & POLITICS* #12, 1981 (Sex Issue). Sex also seems to have become a legitimate subject in women's magazines in recent years. See B. FAUST, *supra* note 13, at 157-69.

¹⁷⁶ See, e.g., English, Hollibaugh & Rubin, *supra* note 13, at 55, 60-61.

¹⁷⁷ Professor Baker distinguishes four versions of market failure models. See Baker, *supra* note 19, at 981-85. The argument that follows repeats Baker's analysis.

political ideology,¹⁷⁸ its regulation should be subject to the "clear and present danger" test. Because the harms of pornography are still disputed and its consequences, even by the feminist account, are indirect, pornography does not pose a "clear and present danger" under the standards that the courts have thus far established. If pornography is nonetheless suppressed by reason of its harms, the standards governing such regulations will have been diluted. The danger of political expression will no longer have to be clear or present in order for its suppression to be justified, and the government will be able to identify other dangerous ideologies to be suppressed.

Feminists might respond, at this point, that if pornography is political speech, its politics are implicit, not explicit.¹⁷⁹ Only when it is analyzed and understood, which it almost never is, can its women-hating message be seen. This response, however, puts feminists in a dilemma by forcing them to choose between this view and the group libel theory. Furthermore, the materials to which a group libel law could be applied would have to clearly vilify the group in question,¹⁸⁰ yet pornography does not meet this standard of clarity. Attempts to identify individual pieces of pornography that do meet this standard of clarity would again engage the government in evaluating the content of speech.

2. Alternate Conceptions of Regulation

The crux of the liberal critique of feminist theories is that by advocating regulation of pornography feminists condone the use of government to evaluate speech. Feminists may respond by arguing nonneutrally that pornography should be subject to legal restriction because it really is dangerous, whereas advocacy of socialism, for example, is not. This kind of argument has some attraction, particularly for feminists who are conscious of the extent of private coercion that has been exercised against women under the legal regime of public neutrality.¹⁸¹

Feminists would replace this regime of public neutrality with a

¹⁷⁸ Although feminists certainly want to claim that pornography expresses an ideology, it is not clear whether it is properly characterized as a *political* ideology. This is a general problem with "women's issues"; hence the feminist slogan, "the personal is political." See Nicholson, *"The Personal Is Political": An Analysis in Retrospect*, 7 SOC. THEORY & PRAC. 85 (1981); cf. J. ELSHTAIN, *supra* note 123, at 320-23 (arguing for preservation of a purely personal sphere).

¹⁷⁹ This is part of the basis for arguing that it "bypasses the conscious faculties of its hearer." Note, *supra* note 136, at 317-18.

¹⁸⁰ See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 750-51 (4th ed. 1971) (limitations on tort of group libel include requirement of showing "some reasonable personal application of the words" to the specific persons claiming injury).

¹⁸¹ Dworkin is particularly outspoken in her analysis of the hypocrisy of those who neutrally defend freedom of speech. See A. DWORKIN, *supra* note 10.

regime oriented towards their vision of true neutrality, expressed in terms of equality. Feminists, like conservatives, are willing to subordinate individual liberty to a particular vision of the good community. As has been noted,¹⁸² however, the feminist vision of community differs from the conservative vision. Not all nonliberal theories are conservative.¹⁸³ Although feminists and conservatives both argue that liberty can be realized only in a community that socializes its members to share certain values,¹⁸⁴ conservatives argue that liberty entails virtue while feminists argue that it entails equality.¹⁸⁵

In the feminist account current noninterference with individual liberties is not really neutral; rather, it is an endorsement of the status quo. The status quo thus endorsed is more than a failed marketplace of ideas; culture itself is a male construct that inhibits the equality of women.¹⁸⁶ Feminists therefore challenge the neutrality that protects the sex industry by linking their use of legal regulation to a conception of social change. In the feminist vision regulation of pornography is part of a larger goal of actively promoting women's participation in culture and protecting women from being perpetually silenced.

Thus, the feminist argument is not that the government should determine whether or not a given book is presenting women as whores by nature; rather, it is that the government should be helping to eradicate the view that women are whores by nature by regulating works that present this view.¹⁸⁷ The result of such regulation would be the transformation of culture into a sphere sufficiently shared by men and women that the neutral principle of noninterference would truly be effective. However, this argument for the legal regulation of pornography is open to some serious objections regarding the wisdom of its underlying political assumptions.

¹⁸² See *supra* note 102 and accompanying text.

¹⁸³ See, e.g., R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

¹⁸⁴ Longino, *Pornography, Oppression, and Freedom: A Closer Look*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, *supra* note 10, at 50-53; see also S. GRIFFIN, *supra* note 10, at 88-93 (discussing pornographer's definition of liberty).

¹⁸⁵ For the classical argument against such conceptions of positive liberty, see Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969); see also Karst, *supra* note 125.

¹⁸⁶ See, e.g., S. GRIFFIN, *supra* note 11; Ortner, *Is Female to Male as Nature Is to Culture?*, in *WOMEN, CULTURE & SOCIETY* 67 (M. Rosaldo & L. Lamphere eds. 1974).

¹⁸⁷ For an example of such a regulation, see Ordinance Amending Title 7 of Minneapolis Code of Ordinances Relating to Civil Rights § 3 (Dec. 30, 1983) (vetoed Jan. 5, 1984).

3. Strategic Considerations Regarding the Use of Law

Invoking the law to suppress the dissemination of pornographic images raises difficult political issues for feminists. Freedom of expression, particularly freedom of sexual and political expression, is crucial to any feminist program of social reform.¹⁸⁸ Furthermore, the state has long been an instrument of male domination.¹⁸⁹ Thus an evaluation of the use of legal regulation cannot focus simply on traditional doctrinal arguments but must also consider broader questions of political strategy.

Strategic considerations regarding feminist opposition to pornography begin with the decision of whether the issue should be addressed at all. Pornography may not be as important as feminists claim; perhaps it is more an effect than a cause of male domination. If this is the case, then feminists should turn their attention to basic causes of pornography, such as inequality in family and work. Their elimination may cause pornographic expressions of male domination to wither away. In the meantime, emphasizing pornography diverts energy away from more important issues and alienates liberal allies of feminism. This argument merits consideration by feminists as an important strategic issue, but it does not threaten their basic moral argument. Even if pornography is primarily a cultural symptom, it nonetheless plays a role in reproducing male dominance and merits condemnation on that account.

Strategic objections to the feminists' legal arguments have considerably more force than objections to their account of pornography and its social role. The first strategic objection is that male-dominated legal institutions are unlikely to be sensitive to the feminist perspective on pornography and are certain to be sensitive to what they perceive to be first amendment values. Furthermore, even if the law can be made attentive to feminist concerns, the legal principles on which feminists need to rely are dangerously vague or overbroad and tend to approve exercises of government power that may be more dangerous to women's liberation than pornography.¹⁹⁰ If feminists argue that the dangerous

¹⁸⁸ In fact obscenity laws have often been used against materials feminists would endorse, such as those of birth control advocate Margaret Sanger. See Alschuler, *Origins of the Law of Obscenity*, 2 TECHNICAL REPORTS, *supra* note 66, at 65, 79 (anti-obscenity laws historically connected with legal sanctions against other sexual conduct).

¹⁸⁹ See MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC. 635 (1983); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC. 515 (1982); MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 717-19, 723-37 (1982).

¹⁹⁰ Legislative or judicial control of pornography is simply not possible without breaking down the legal principles and procedures that are essen-

ideas expressed in pornography justify suppression of it, they must accept the possibility that the government's notion of dangerousness will differ from theirs. In fact, viewed in historical context, a relaxation of constitutional protection for "dangerous ideas" is far more likely to open feminists and their allies to legal harassment than to promote their political success.

Such harassment seems particularly likely given that, in our society, feminists do not generally express widely shared values, particularly on pornography. Enduring nonneutral principles must rest on a community's shared values.¹⁹¹ Feminists may argue, along lines similar to traditional "Marxist" ones,¹⁹² that their values may become shared once the government enforces them. After a period of such enforcement, the argument goes, other members of the community would become enlightened and would see pornography as feminists do.

There may be circumstances in which the end justifies the means in the way that this argument requires, but these do not seem to obtain in the case of pornography. It is more plausible when, as Marx imagined, the entire working class—the majority of society—actively participates in the exercise of state power. Moreover, Marx advocated total change, change for which it may be necessary to employ drastic means. In cases of one isolated cultural phenomenon, such as pornography, the Marxist argument loses force. It therefore seems wiser to think that pornography will wither away as feminist values somehow become more widely shared than to think that governmental enforcement of feminist values in the form of anti-pornography laws will cause them to be more widely shared.¹⁹³

Does this mean, especially given the nagging question of how to facilitate the sharing of feminist values, that feminists should eschew legal regulation completely? The arguments considered above may take the law too seriously as an instrument of certain ends and not seriously

tial to our own right to speak We must continue to organize against pornography . . . , but we must not ask the government to take up our struggle for us. The power it will assume to do so will be far more dangerous to us all than the "power" of pornography.

Kaminer, *Pornography and the First Amendment*, in TAKE BACK THE NIGHT, *supra* note 10, at 247. See also Willis, *Feminism, Moralism, and Pornography*, in BEGINNING TO SEE THE LIGHT: PIECES OF A DECADE, *supra* note 13, at 226.

¹⁹¹ See R. UNGER, *supra* note 183.

¹⁹² See, e.g., Marx, *Critique of the Gotha Program*, in THE MARX-ENGELS READER 382 (1972). It is debatable whether Marx would have endorsed the theory outlined in the text.

¹⁹³ But see Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982). Professor Baker insightfully explores this underdeveloped area in first amendment theory and concludes that arguments like that made in the text generally should be rejected.

enough as a symbolic expression of social values. Thus there may be some value in the symbolic and educational effect of compelling the government to grapple with the feminist analysis as it is presented through statutory proposals and litigious discourse.¹⁹⁴ The Minneapolis ordinance made headlines and caused people to consider why a City Council found it plausible to think that pornography is a form of sex discrimination. The law does not simply stand outside controversies over basic values; it is inevitably a participant.

Justice Brandeis once observed that "[f]ear of serious injury alone cannot justify suppression of free speech . . . Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."¹⁹⁵ The long silence about the concerns that animate feminist opposition to pornography is evidence that neither men nor women are yet free from the bondage of irrational fears expressed in pornography. As Brandeis suggested, use of the law to debate our basic values may be a crucial strategy¹⁹⁶ by which feminists can make their voices heard.

¹⁹⁴ See Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515, 1520-28 (1984) (discussing relationship between government legitimacy and process of entertaining legal claims).

¹⁹⁵ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

¹⁹⁶ Although feminists do not necessarily agree on the strategy that should be adopted to address the issues raised by pornography, see *supra* note 13 and accompanying text, a host of strategies have been suggested. See, e.g., S. BROWNMILLER, *supra* note 42, at 438-45; Garry, *Pornography and Respect for Women*, in *PORNOGRAPHY AND CENSORSHIP*, *supra* note 50, at 61; Gever & Hall, *Fighting Pornography*, in *TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY*, *supra* note 10, at 279; Morgan, *How to Run the Pornographers Out of Town (And Preserve the First Amendment)*, Ms. Nov. 1978, at 55.