The claim that pornography 'is speech' is taken up with reluctance. This position conflates pornography with political, educational, artistic and literary expression, as if the two cannot be distinguished, so that if one is threatened, the other is threatened. The fact is, pornography, accurately defined, is readily distinguishable – on its face, in its making, in its use and in the effects of its use – from protected expression. To take the claim seriously enough even to rebut it, ie that this practice of sexual violation and inequality, this medium of slave traffic, is an opinion or a discussion is to collaborate, to some degree, in the legal and intellectual fraudulence of its position. It is to treat this position as what it pretends to be, one side in a *bona fide* discussion, rather than as what it is, a legitimising smokescreen for sexual exploitation. But, like pornography's lie that women want and choose to be used and hurt for sex, the lie that pornography 'is speech' has very real clout, in Anglo-American legal systems in particular.

Inequality based on sex and race is imposed through expressive means in England as well as in the United States. Accountability for it is almost equally rare. Both systems value freedom of speech, England without a written constitution, America with one. Both purport to hold equality as a legal and social norm, yet both are firmly hierarchical societies of inequality based on sex, race and class. British law permits restriction of hate speech (and libel) far more readily than does US law – showing less fetishism about speech and a greater sensitivity to its human consequences.[108]

In both nations, pornography is nominally criminal under obscenity law and is approached as a matter of morality. Both bodies of obscenity law have been equally useless in stemming the rising tide of pornography and equally blind to its material injuries. These failures are connected. Neither country has comprehended hate speech or pornography as matters of social inequality or legal equality, although scholarly dialogue in both countries, much of it drawing upon principles of international law, has more broadly speaking, neither country's law comprehends equality substantively.[109] Although there are exceptions, the legal definition of equality in both places tends to be a superficially mechanistic but deeply invidious abstraction that will never, and can never, produce social parity. One exception is sexual harassment, which both US and UK law recognise as sex discrimination, although it is pursued with greater vigour in the United States. So far, sexual harassment is not even arguably protected speech in either country. So while the case names differ, the social and legal issues are shared. And the failure to address the harm speech does to equality is virtually identical.

The fact that obscenity regulations in the United States parallels England is not surprising. American obscenity law (as much else legal) builds on English foundations. British obscenity law has centred its solicitude on the mind of the consumer, specifically on whether the materials have a tendency to 'deprave and

108 Public Order Act 1986. See also Geoffrey Bindman, 'Incitement to Racial Hatred in the UK: Have We Got the Law We Need?', S Coliver (ed), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (London and Human Rights Centre, University of Essex, 1992), pp 258–62. See also RG Schneider, 'Hate Speech in the United States: Recent Legal Developments', in Coliver, *supra*, pp 269-83.

109 See Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberle Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder and Oxford: Westview Press, 1993); Catherine Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (Oxford University Press, 1993).

corrupt'[110] his morals. While one might well worry about what pornography does to those who use it, this test makes invisible those who are violated in making the materials, as well as those who are injured and subordinated by consumers acting on them. A substantive equality approach would make these harms visible.

Although activism and some scholarship in Britain has exposed pornography's harms, there has been little governmental response. The mainstream British policy debate has not yet integrated the empirical findings and conceptual advances of the last 15 years, and continues to rely largely upon the outdated *Williams Report*, which in 1979 found no clear consequential harms from exposure to pornography.[111] In the intervening period, more sophisticated, focused, reality-based, and less biased investigations, asking more of the right questions, have produced overwhelming scientific and experiential evidence of this connection. Parliament's attempt to update policy was frustrated by the biased Home Office report of December 1990, which ignored or misrepresented this newer research.[112]

The *Williams Report* did make clear that the widely reported drop in sex crimes in Denmark supposed to have attended the elimination of restrictions on pornography was an urban myth.[113] It also hypothesised harms of production, including 'the exploitation of children' and 'the infliction of physical harm'. Although it found no violated or exploited adults,[114] it concluded that both such acts and 'the material depicting them' should be prohibited when they occur.[115] Its legal approach did not keep the possibility of these harms in view, however, relying instead on the traditional, moralistic idea that 'the objective of law should be to prevent offence to the public at large and to protect young people from exposure to unsuitable material'. The profound lack of fit between harms of 'production and offensiveness to the community has gone mostly ummarked'[116] and wholly unaddressed by law.

Of course, the abandonment of those muted through expression is not limited to pornography or to the UK. As pornography has spread, at the same time and in the same places, racial and ethnic vilification have erupted. Following the break-up of the Soviet Union and Yugoslavia, hate speech, and organisations and activities which promote it have exploded into public view, escalating into genocide in Croatia, Bosnia-Herzegovina and Kosova. Just prior to the Serbian war of aggression in Bosnia and Herzegovina, pornography was everywhere; signs also appeared stating 'No Muslims or Croatians Allowed'. Both pornography and hate speech have been construed as expressions of freedom in formerly repressed and repressive states, but closer scrutiny shows them to be continuous expressions of social inequalities formerly carried out under

110 *R v Hicklin* (1868) LR 3 QB 371. See also *DPP v Whyte* [1972] 2 All ER 12 and '*Lady Chatterly's Lover*' [1961] *Crim LR* 177. This was the common law rule, embraced in the Obscene Publications Act 1959.

111 *Report of the Committee on Obscenity and Film Censorship* (London: HMSO, 1979).

112 Dennis Howitt and Guy Cumberbatch, *Pornography Impacts and Influence (*London: Home Office Research and Planning Unit, 1990). For discussion, see Itzin, pp 561–62.

113 *Williams*, *op cit*, para 81.

114 *Ibid*, para 91, see Itzin's commentary on this, pp 1–2.

115 *Williams op cit*, para 131.

116 Many authors in Itzin are exceptions.

centralised dominance in less visible ways. The 'gathering storm' of racial and ethnic incitement of which Edouard Shevardnaze warned Europe in 1990 has received some worried international attention. The escalating sexual hatred and incitement to sexual aggression against women and children, through pornography is denied, the flood of pornography itself celebrated as sign and substance of democracy and liberation.

The inter-connections between sexual issues on the one hand, and racial and ethnic issues on the other, have been little examined. Much pornography sexualises racial and ethnic hostility; it also desensitises the user to violence against powerless others by making aggression pleasurable. The Nazi propaganda machine sexualised hostility against Jews as preparation for their extermination. Under communism in what was Yugoslavia, visible pornography was a State monopoly. With the State's collapse just prior to the conflagration there, its pornography market, according to Yugoslav critic Bogdan Tirnanic, became 'the freest in the world'. In that war, pornography pervades the rape/death camps in which Serbian fascist forces have interned Muslim and Croatian women to rape and kill them. Women in those camps report that what they see done to women in pornography is also done to them.[117] They also report pornography being made of sexual atrocities committed against them. Ethnic epithets of sexual contempt, like 'ustasa whore', are routinely screamed at them as they are raped. Are the expressive tools of genocide also protected speech?

The sexuality of dominance and subordination that pornography engenders is also expressed in the often rabid hostility and irrationality of its public defenders. The materials create a visceral sexual attachment, a distinctive misogyny which impels and underlies its defence at any cost. Given that the commitment to pornography is through pleasure rather than through reason, it is worth asking: can any words be enough? Pornography is a problem that many people, including some with the power of the press and the law in their hands, do not want solved. This is also why no amount of evidence of the harm it does – of rape, battery, sexual abuse of children murder, sexual harassment, sex discrimination and denigration, necessary to its production and inevitable from its use, or its role in genocide – has been enough. In their way, its public defenders cheer the rapists and killers on. Pornography is not just the artefact, symbol, symptom its apologists say it is. This makes stopping it almost impossible – and, if freedom and equality are to be real, necessary.

PORNOGRAPHY AND THE TYRANNY OF THE MAJORITY[118]

Elizabeth Wolgast

The respect that atomism accords individuals justifies the maximum degree of freedom of expression, and that freedom protects pornography from public control. But many objectors to pornography, righteously indignant, also emphasise individual respect, particularly the respect due to women as sexual partners. Thus conflicting views, on both sides fervent and moralistic, draw their support from a single atomistic root. Where does this conflict lead us?

'If all mankind minus one were of one opinion', John Stuart Mill wrote, 'mankind would be no more justified in silencing that one person than he, if he had the

117 This is documented in CA MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, MS (July-August 1993).

118 *The Grammar of Justice* (Ithica: Cornell, 1987).

power, would be justified in silencing mankind'. No matter how great the majority, the very power to control opinion and expression is illegitimate, he argued. Worse, such power 'is robbing the human race' of the chance to hear different sides of a question whether right or wrong, and thus does injury to the whole community'.[119]

Society has no right to demand conformity to a set of beliefs, to 'maim by compression, like a Chinese lady's foot, every part of human nature which stands out prominently, and tends to make the person markedly dissimilar in outline to common place humanity'. A person needs opportunity to live as he chooses, to take up causes passionately, make mistakes, change his or her mind. Only in this way can anyone develop to the fullest potential. 'Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.'[120] Society will itself benefit when people have liberty to experiment in ideas and ways of living, Mill believed, for it is innovators, not conformists, who advance culture.

Truth also is advanced when people are allowed to express all opinions and to debate every question. And who is it argues against a popular view but a minority of dissenters? They are the ones, then, who need the most protection: 'On any of the great open questions … if either of the two opinions has a better claim than the other, not merely to be tolerated but to be encouraged … it is the one which happens at the particular time and place to be in a minority. That is the one which for the time being represents the neglected interests, the side of human wellbeing which is in danger of obtaining less than its share.'[121] Even in the gentler form of custom, majority tyranny is as much to be feared as political tyranny, Mill believes, and maybe more. His criterion for interference is that if only harm or injury to someone results should people be restrained from acting and living as they please. There is a presumption that in the absence of proof of injury, the individual should be left alone.

I quote extensively from Mill because his language is echoed in modern discussions of free speech, particularly those related to control of pornography. Control is seen as a simple case of the majority forcing others into conformity with their (puritanical) moral standard without argument. It appears a clear case of social compression, what Mill would call a 'Calvanistic' demand for 'Christian self-denial', aimed at at stifling the virtue of 'pagan self-assertion'. Similarly, Joel Feinberg refers to control as 'moralistic paternalism'. Other writers echo Mill's attitude.

For Americans this is a powerful and seductive argument against restrictions on any published material, including pornography. All the libertarian or the non-conformist minority asks of the majority is tolerance of its curious ways. What problem is there in that? Others don't have to look or buy; one person should be free to enjoy pornography even though others prefer not to, just as they are free to accept or reject escargots or dandelion wine. Passionate tastes are not a bad thing, Mill argued; they are the very 'raw material of human nature', capable of both more good and more evil than ordinary feelings. 'Strong impulses are but another name for energy. A person whose desires and impulses are his own – are

119 John Stuart Mill, *On Liberty*, p 76.

120 *Ibid*, p 135.

121 *Ibid*, p 123.

the expression of his own nature – is said to have a character.'[122] And society needs people of strong character: that is the romantic message.

To understand the role of Mill's argument, it is important to recognise that he wrote long after the Bill of Rights became law and that his view of freedom was not the one that prompted the First Amendment, or even one shared by the early Americans. The idea that truth depends on a 'marketplace of ideas', that freedom of expression advances the universal search for truth, that self-expression is an essential part of a person's self-development, that – most important – the only restriction rightly placed on a person's freedom is the injunction not to injure others – such ideas are those of Mill's time, not of Jefferson's. They originated with romantic philosophers of the 19th century, not with the political and moral thinkers of 17th century England and 18th century America, who stressed individual responsibility, restraint, and self-governance. Such virtues Mill would probably find much too straightlaced. It is therefore a wild anachronism to use Mill's *On Liberty* as a gloss on the First Amendment. But my argument does not turn on this point. I will argue that one kind of moral issue raised by pornography overshadows and requires us to reevaluate the free speech issue. Further, once the argument against protecting pornography is spelled out, I believe Mill can be rallied to its support instead of to the libertarian side.

Two points about 'harm' should be made. First, the language of injury and harm are no part of the First Amendment. The framers of that amendment did not suggest that if someone's practice of religion, for example, were to cause injury in some vague sense, the right of religious practice is restrictable. One might conclude from their terse statement that on the contrary, the right to practice religion should be very difficult to restrict. The 'injury' proviso, which may originate with utilitarians, is therefore a gauntlet I do not propose to pick up. Second, Mill's single proviso that a person's exercise of freedom should not harm others places a heavy burden of proof on anyone defending pornography's restriction and sets the presumption that freedom should prevail. How can injury be shown? How can it even be understood here? Who is injured when pornography is aimed at adult customers, free to decide whether they are interested in it?

To answer these questions we appear to need both a specific conception of harm and persuasive evidence of a causal connection, both of which various critics have shown to be problematic. I will argue, on the contrary, that to accept this burden of proof – that harm or injury to an individual has been caused – is an error of strategy. It is to accept a difficult or even impossible challenge when a more direct and powerful moral argument is available.

Freedom of speech and the press are commonly connected with democratic government and seen as essential to it. Tocqueville, for instance, wrote: 'In the countries in which the doctrine of the sovereignty of the people ostensibly prevails, the censorship of the press is not only dangerous, but it is absurd.' It was a connection not lost on the framers of the Constitution, who were on their guard against the danger that government might seek to impose its will on reluctant citizens. We don't need to doubt the connection here. The question is: does protection of free expression legitimately protect pornography?

A reasonable statement on this point is made by Ronald Dworkin, who argues that the right to have an equal voice in the political process is not denied when a person 'is forbidden to circulate photographs of genitals to the public at large, or

122 *Ibid*, pp 124–25.

denied his right to listen to argument when he is forbidden to consider these photographs at his leisure'.[123] Some other basis for protection is needed, according to him.

The Supreme Court argued along similar lines in *Roth v United States*.[124] What the amendment protects, it says, is the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people. And pornography is 'no essential part of any exposition of ideas'.

In my view the distinction set forth in *Roth* is important and should have been developed. But instead of developing it, the court went on to give another reason not to protect pornography, namely, that a 'social interest in order and morality' clearly 'outweighed' pornography's right to protection. Such a move was plainly hazardous: if other 'social interests' can 'outweigh' the right to free expression, then the protection of the First Amendment has been greatly diluted. The better argument would follow along the original lines, saying that pornography isn't in the category of 'expression' meant to be protected.

A knotty problem arises, however, when pornography is excluded from protection: the amendment speaks of freedom of the press. So from one angle it looks as if the amendment was meant to protect not citizens who want to read but publishers in the business of selling printed matter of whatever kind. And pornography certainly belongs in this large domain.

Were the framers trying to protect one kind of business while refusing to protect others? We are helped here by remembering that the First Amendment also dealt with freedom of worship and the right to congregate. The rights to worship and congregate in public rest on the respect of one's need to commune with God on the one hand and with one's fellow citizens on the other. The latter right has something to do with the role citizens in the whole process of government, their sense that the government is there to serve them and it is their job to monitor it. None of this suggests why publishers should protected by a fundamental constitutional right, rather than cobblers or hotel keepers. The more plausible connection is that between protecting the press and protecting citizens from oppression through censorship. The citizens have a need to know and hear printed opinions, just as they have a need to get together and talk, if they are to do their civic duty and live by their consciences. However, this ambiguity in the language of the First Amendment, this way of speaking of the press as if publishers *per se* are protected and not the free exchange of opinion, seems never to have been cogently dealt with by the courts, and it perennially causes problems, as it does in the present case.

The main point here is that if the amendment is understood to protect publishers as a special form of business protection, then it has no particular moral weight; business protections and trade restrictions may change with the times and do, and a business may seek protection for some political reason or other without invoking the First Amendment or any basic constitutional values.

Another problem with the *Roth* argument is that it invites the comparison of pornography with art, thereby suggesting that good art is more entitled to protection than bad. Good art presumably should survive lack of social value; bad art shouldn't. But what validity is there in this idea? It invites the comment

123 Ronald Dworkin, 'Do We Have a Right to Pornography?', in *A Matter of Choice* (Harvard University Press, 1985), p 336.

124 354 US 481.

that the degree of badness is relative, and may well be a matter of taste, that history has shown ... and so on. A more important point is that bad literature – bad essays on politics, appealing to weak and unworthy motives of a reader – are surely protected by the First Amendment. And bad political art too. Then why not the poor-quality stuff called pornography? The case made in *Roth* for restricting pornography is worse than unconvincing. It provides ground for a kind of moral repression that both the Constitution's framers and Mill would abhor. We still have to explain what is bad about pornography that is not bad about bad literature and bad art in general.

Joel Feinberg's use of pornography, he says, is 'purely descriptive'; he uses the term to refer to 'sexually explicit writing and pictures designed entirely and plausibly to induce sexual excitement in the reader or observer'.[125] According to this definition, pornography is a genre of materials of an erotic sort, some of which may be objectionable while the rest is not. Some Japanese prints or Indian murals could be described as pornographic and still appreciated as art by this characterisation, for 'pornography' is used in a morally neutral way. But since we are not concerned at the moment with erotic materials that are not offensive, I propose to use pornography as a pejorative term, which is to say in the way Feinberg would speak of offensive pornography. In response to the objection that the word is (most) commonly used in a descriptive and neutral way, I suggest that many ordinary people, including many feminists, commonly use it in a pejorative way and that in much ordinary speech to call something pornographic is to say that it is offensive. That is sufficient justification for using the term in this way.

It needs to be pointed out that to say that pornography is objectionable is not to demonstrate that it should be controlled. Many things that people do and say are acknowledged to be bad, including being unfaithful to one's spouse, misusing and deceiving friends, neglecting elderly parents, and lying. But we don't have laws against these things. As Feinberg says, in many respects 'the court has interpreted [the Constitution] to permit responsible adults to go to Hell morally in their own way provided only they don't drag others unwillingly along with them'. Such interpretations constitute a formidable defence against controls.

Though pornography may be objectionable in various dimensions (and I believe it is) I will focus on only one kind of objection that I claim to have moral weight. I will substantiate the claim that there is such an objection by citing expressions of it. Then I will defend the claim that this kind of objection should carry enough legal weight to justify the control of the objectionable materials. Last, I will argue that such control is quite compatible with the Constitution and the First Amendment and, finally, John Stuart Mill.

The objections I focus on are those expressed by women against certain representations of women in sexual situations: objections against representations of women 'being beaten or killed for sexual stimulation' and women enjoying brutal sexual treatment, usually at the hands of men. One pornography model demands censorship of 'all pornography which portrays torture, murder, and bondage for erotic stimulation and pleasure'.[126] What is objectionable is not just the representations but the lack of a context in which they are understood to be

125 J Feinberg, 'Pornography and the Criminal Law', in Copp and Wendell (eds), *Pornography and Censorship*, p 110.

126 Diana Russell with Laura Lederer, 'Questions We Get Asked Most Often', in L Lederer (ed), *Take Back the Night* (New York: Bantam, 1980), p 25.

reprehensible and condemnable. Without some such context. The representations carry the message that such treatment of women is all right. This is one kind of objection.

Another model protests against the circulation of any representation 'that reduces women to passive objects to be abused, degraded, and used in violence against women, because now every woman is for sale to the lowest bidder and to all men'.[127] She adds that a government that protects this kind of image making expresses 'an ideology of women as sexual objects and nothing else'. A related criticism was made by Gloria Steinem: '[Pornography's] message is violence, dominance, and conquest … If we are to feel anything, we must identify with conqueror or victim.' It is a poor choice for women: 'We can only experience pleasure through the adoption of some degree of sadism or masochism … We may feel diminished by the role of conqueror, or enraged, humiliated, and vengeful by sharing identity with the victim.'[128]

These quotations illustrate one general kind of objection made to pornography. That it is objectionable in these respects is an inference I make from the facts that (1) people do make vehement objections to it and (2) they see the offence as a moral one, concerning respect due any individual.

I emphasise that although I take it for granted that pornography deals with human sexuality, I am not defining it, although many writers consider a definition crucial for a coherent argument. There is a variety of erotic material that could be called pornographic, and whether we call something pornographic or not will depend in part on whether people find it seriously objectionable. But my argument isn't meant to fit all varieties of such material. I am testing only one dimension of objectionability against the First Amendment defence with the claim that it has moral weight.

My partial characterisation is this: some pornography is objectionable because it is perceived as seriously degrading and demeaning to women as a group. This characterisation draws on the fact that the materials are perceived by women as representing them as inferior or less-than-human beings to be used by others in sexual and sadistic ways.

Now, why should we take this complaint seriously, so seriously as to control a class of printed and pictorial materials? I hold that such complaints are the stuff of a serious moral issue.

Let us see how the reasoning works. Where is the moral problem? Who is to blame that the speaker was a pornography model? Presumably she chose to be one, and her choice – *volenti*, as Feinberg argues – applies to her as well as to the consumers. But this answer is not clearly adequate. The complaint is against the role in which women are portrayed, not against the working conditions, as it were.

The perception that one is being demeaned and that sanction is given to one's mistreatment as a means to sexual satisfaction here – is a complaint that touches an important moral nerve. It offends basic moral ideas, in particular the Kantian one that everyone should be treated with dignity and respect and not used as a means to another's end. The complaint or objection needs therefore to be taken seriously. That it is the first inference.

127 'Testimony against Pornography: Witness from Denmark', Diana Russell (ed), in *Take Back the Night*, Lederer (ed), pp 84–85.

128 'Erotica and Pornography', in *Take Back the Night*, *supra*.

But several questions leap to mind. First, what determines that this complaint justifies – or lays the foundation for justifying – control of the objectionable materials? Does just any group have the licence to insist that laws be changed to improve that group's image? How is the line to be drawn so as to prevent censuring of political caricatures, for instance?

The answer to this question is complicated but contains a general point. If respect for individuals is an important community value, then complaints by any group that their members are demeaned by some vehicle or other must have some weight. Such complaints must be addressed by the community seriously, for otherwise the value of respect is immediately and automatically undermined. The message conveyed that it doesn't matter if these people – members of this group – are demeaned suggests that some people are less important than others.

Therefore the answer to the question whose complaints count is that any complaint by any group that its members are not treated with respect deserves and needs to be treated seriously. To treat such complaints seriously isn't to concede automatically that the complainers are treated with disrespect or that the changes they want should be made. But at issue is not which is the right and which the wrong side of the question, justice doesn't have to be conceived in this way. The issue is the need to deal seriously with the complaint, the need to discuss it in a serious way and then either answer it or act upon it. Ignoring it, laughing at it, and dismissing it are self-incriminating responses that tend to undermine the trust that the emphasis on respect helps to guard.

An underlying theme here is that if respect is valued and presumed to prevail in the society, then the respect given one group cannot be casually evaluated by the perception of other groups. What respect for all others amounts to cannot be defined by a single authoritative group, say the group of the majority; the relation of this point to the pornography issue is explored below. Therefore if a number of members of some group perceive their treatment as demeaning, that is *prima facie* evidence that there is a problem. And given the seriousness of the matter, the rest of the community must take it seriously either by answering it or by making changes.

I conclude that although there may be different ways of responding to pornography and alternatives to control of such materials, this kind of complaint cannot be lightly dismissed. It needs to be handled in terms of the respect felt to be accorded the complainants by the rest of the community. One way the complaint against pornography by women is not addressed is by reference to the First Amendment and the possible 'slippery slope' to censorship.

Granted that there is a *prima facie* reason to think women are demeaned by pornographic materials, how does censorship become justified? Isn't some other means to deal with it available, and wouldn't that be preferable? The answer is that of course it's possible and other means may be preferable, for there certainly are dangers in permitting one group to control what others may read or see. It is not my thesis that censorship of pornography is the only answer to the moral complaint or that it should be invoked lightly. In fact, it might be invoked as a last resort when such moral protests are raised. But censorship is one answer, and my aim is to show that the justification for using it is not rebutted by an appeal to the First Amendment. Whatever answer is given, that answer needs to address the moral objection to the way treatment of women is represented. The establishment of guidelines for sexual representations might be a solution. Must we decide in general which kind of response is best? I propose rather that there is no theoretical and final answer but that an acceptable response will take serious account of the perceptions of the objecting group.

One has to ask, however, whether there isn't a danger in appealing to the moral standards of any one group when laws are formulated. As Mill suggests, shouldn't anyone have the right to live anyway he wishes? Isn't experimentation generally a good and not a bad thing?

One kind of answer to the libertarian would relate a society to a 'moral community', showing that morals and laws must be joined together. Harry Clor and Patrick Devlin each defend such views, the former defending a restrained use of censorship, the latter a freer use.[129] The problem with such views is that they are too broad. What is the 'moral community', and where is it to be found? Is it represented by the majority? If so, then surely moral constraints are worse than paternalistic: they are downright tyrannical, as Mill said.

Even though the complaint of women against pornography cannot be dismissed by appeals to freedom of the press, why shouldn't Mill's argument for freedom apply here? Why shouldn't the objection still hold that if women don't want to look at pornographic pictures or film, they shouldn't look? So long as there is 'reasonable avoidability' and people can avoid pornography if they want to, where, as Feinberg argues, is the offence? When the 'obscene' book sits on a shelf, who is there to be offended? If pornography lies between 'decorous covers', no one need look at it who doesn't want to. It is only when pornography produces an offence on a par with 'shame, or disgust, or noisome stenches' (however, they would translate in this case) that the law may justifiably interfere. That is to say, pornography should be restricted only when it becomes a nuisance difficult to avoid. To restrict it on other grounds would be to engage in moral paternalism. It would be to set standards for those who enjoy pornography in order to save them from themselves.

This protest, however, misses the point. The felt insult and indignity that women protest is not like a noise or bad odour, for these are group neutral and may offend anyone, while pornography is felt to single women out as objects of insulting attention. There is a clear division in the community here, unlike the division between people who mind an odour very much and others who can ignore it. The question of how the rest of the community should respond to the perceived debasement that women feel is not analogous to the way the community should treat people particularly sensitive to and offended by certain smells. There is a democracy with respect to smells, but with pornography there is felt hostile discrimination. One way to deal with objections to pornography has been to appeal to a typical member of the community, an 'average man' who can judge as a representative of the rest whether some material is sufficiently objectionable to warrant restrictions.

But there is an internal logical difficulty in this appeal. The 'average man' is understood not to be a woman, as is clear from the way the perceptions of the average man are viewed. *Roth*, for instance, speaks of the 'appeal to prurient interests', but such interests are surely interests predominantly of men, not of women. Feinberg, too, speaks to public nudity in terms of 'the conflict between these attracting and repressing forces, between allure and disgust', and again leaves the impression that he is speaking of general human reactions, while those he describes are characteristically male reactions. Other writers refer carelessly to the 'effects' of pornography – sexual arousal or even criminal behaviour – in such a way as to suggest that all people are included when in fact the effects referred to are specifically effects that pornography has on men.

129 H Clor, *Obscenity and Public Morality* (Chicago University Press, 1969); P Devlin, *The Enforcement of Morals* (Oxford University Press, 1965).

The premise is essential to my argument that pornographic materials may be seen differently by one group than by another. They may be felt as insulting by one group but inoffensive to another, as seriously demeaning by one and silly by another. An analogy can be drawn with the different perceptions of blacks and whites, or of Jews and Gentiles regarding certain materials: blacks may find demeaning an image that others think innocuous. It is crucial for my argument that such differences in perception be acknowledged as a social reality and that our understanding of what it is to treat everyone with respect allow for such differences in the perception of respect. It is important, in short, that we do not assume that there is one 'Everyman view', with the only question being which view that is. Only by respecting different perceptions about what is demeaning will we see that there may be a reason to limit materials that some group – even the largest – finds unobjectionable.

There is a further curious twist in the idea that there is an 'average man' who can judge whether some materials are offensive and obscene, a man such as the 'rational man' of English law or the 'man in the jury box', as Devlin calls him, someone who expresses 'the view' of the society. For presumably when such a person is called upon to judge the offending material, he is to judge it from his own character and conscience. And of course his character will influence what he finds: a man of very strong character may find pornography only mildly or not at all objectionable; a man of weaker character will find it has an influence on him but not in consequence call it objectionable; an 'average man' will fall somewhere in between. So sound judgment is difficult to come by.

But not only does a man's character influence his perception: the perception he expresses – his judgment as to the offensiveness of lewd materials – reflects back upon his character. Suppose he says that some materials are very provocative and could lead a viewer to do wicked things. He is testifying not only against the materials but also about his own susceptibility, and thus indirectly incriminating himself. We are told something about his own weakness if he sees pornography as dangerous. He is testifying about his character.

The result is that a bias is built into the testimony of the 'average man' and particularly of the 'right-minded man' regarding the offensiveness of pornography. A man – even a right-minded one – cannot judge that materials are 'corrupting' without revealing his own corruptibility. And so there is pressure both on men who are strong and on men who are not so strong to find pornography harmless. On the other side, a person who objects to it is likely to be characterised as 'often … emotionally disturbed', 'propelled by [his] own neurosis', or a 'Comstock'.

Given that there is a connection between a man's testimony about pornography and his character, should men who are weak and susceptible be consulted? That would be paradoxical: such people can hardly be counted on to give any reliable testimony. But a particularly upright and conscientious man (say a respected judge) is not qualified either, for he may be unable to see any problem. And the ordinarily upright but susceptible man may be reluctant to reveal his weakness. Then whose judgment should be given weight? Given the lack of any 'objective' or authoritative spokesman for the whole society, there's only one sensible answer.

If blacks are in a position to say what is demeaning to them, why shouldn't women's voices be heard on the pornography issue? Not because they are truly 'disinterested' parties and therefore qualified as authorities. On the contrary, I have been arguing that there are no disinterested authorities, no 'objective' representatives of the moral community. And if one group were acknowledged