

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

to be completely disinterested in regard to sex or disinterested in regard to heterosexuality, that would be no qualification but the contrary. The objectionability of pornography cannot be assessed in this way; there is no analogue here to the 'average consumer' who might represent the whole community in judging a retailing policy.

The reason that women should be viewed as particularly qualified is their charge that pornography is an offence against them. That charge puts them in a morally authoritative position, just as blacks are in such a position in regard to racial insults and Jews in regard to anti-semitic humiliations. Then we need only to add that a complaint of this kind demands to be addressed somehow. It does not follow what we should do.

What lies behind our invocation of an 'average man' in regard to such issues is a powerful tendency to treat pornography – and other ethically coloured issues – in androgynous terms. But common sense tells us that where sexuality is central, an androgynous point of view, even if there were one, would be irrelevant. Without sexuality and sexual difference, sexual attraction and sexual polarity, no pornography issue would ever arise. Therefore to treat the issue in terms of universal principles that hold objectively – atomistically – for all beings alike is to perpetrate a kind of legal comedy.

Feinberg questions Justice William Brennan's argument in *Roth* by asking, 'What is the alleged State interest that makes the unobtrusive and willing enjoyment of pornographic materials the State's business to control and prevent? What is the positive ground for interference?'

This demand is legitimate, and it needs to be answered in full. Even if a moral argument such as I have outlined can be made for control of pornography, how can the moral argument be translated into constitutional terms? If controls are justified, their justification should answer Feinberg's question. The need to protect respect may be clear, but the means for protecting it are not. Is there an analogy or a precedent to guide us?

I will argue at a common sense level, not meaning to interpret the notion of 'State interest' in its technical legal sense. Given that respect for persons is an important constitutional value, I propose to show a strategy that connects respect with controls on pornography, to show that the means, the logical path, is there already and has no need to be newly cut. The connection between respect and constitutional action has been made already.

What we need here is reasoning somewhat like that in *Brown v Board of Education*. There the court decided that educational facilities – equal 'with respect to buildings, curricula and other tangible factors' – might nevertheless be unequal in an important sense. And one of the reasons they might be counted unequal was (as one summary puts it) that 'to separate [children] from others ... solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone'. Such an institution with the 'sanction of law' which thus produces the sense of inferiority of one race is unconstitutional. Respect is not to be measured in the specifics of equipment or curriculum but in the felt implication of inferiority.

In rejecting the justice of 'separate but equal' facilities, the court specifically rejected the protest that any 'badge of inferiority' supposed to be implied by segregation exist 'not by reason of anything found in the act, but solely because the coloured race chooses to put that construction upon it'.¹³⁰ The insult

130 *Plessey v Ferguson* 163 US 537 (1896).

perceived by blacks has priority over protests of innocence by those charged with offending. It is not crucial that they see the offence in the same way. Thus the court answered by analogy two parallel arguments in the pornography issue, that women shouldn't be so sensitive about pornography, for since no one intends to demean them by it, there is nothing demeaning in it. The parallel answer is that whether there was intent to demean or not is irrelevant.

The argument in *Brown* exemplifies the general form of reasoning we need: an institution that perceptibly demeans some group and represents its members as inferior impugns the claim to equality of those members; in doing so it violates the Constitution's provisions; thus it shouldn't be protected by the federal government. There is no reference here to interpretations of other provisions of the Constitution. Of course the production of pornography isn't an institution, yet in so far as pornography is felt to demean women, its protection by the government under the First Amendment cannot be easily argued.

A *caveat* is needed here. This argument does not imply that if some group feels demeaned – say, by advertising or institutional arrangements – then censorship is automatically justified. Considerations other than the offence taken are often relevant, some of which may also be moral, and these considerations may overbalance the initial concern for respect. Nonetheless, if what is needed is a line of reasoning that can be used to support control of pornographic materials in the face of First Amendment protections, then such a line is clearly available.

In its general conception this approach accords with Ronald Dworkin's view that absolute principles are not what is needed in much legal reasoning. Instead, we often need to balance one kind of claim or principle against others. That's the case here. The First Amendment is terribly important to us as a democracy; there's no dispute about that. But it doesn't give the last word on the question 'What may a printer print, and what may a store sell?'. While this approach shows a way to defeat the absolutist claim of the First Amendment and open the possibility of censorship, I have no desire to insist that this course be taken. Other solutions may be preferable.

A number of features of the pornography issue are illuminated by its analogy with race discrimination. For one thing, it would be irrelevant to argue that the demeaning of blacks causes no 'injury' and therefore is harmless. What it causes is not the issue: the harm and the offence lie in the practices themselves and the felt implications for people's status, the light cast upon them as citizens, and the like. Second, just as it would be bizarre to appeal to a group of whites to determine whether racial inferiority is part of the message of segregation, it is curious to consult only men about the offence of pornography. Third, the protest that not all blacks were offended would be taken as specious. Even if many blacks denied that they felt offended, we might still acknowledge the vigorous complaints of others. The same holds for women; if some are not offended by pornography, it remains true that many are, and that they see the offence as one against women as a group.

But imagine that the Commission on Obscenity were to make the following argument: if we do nothing in the way of controls, we shall at least be doing nothing wrong. And in such a doubtful matter, with something as important as First Amendment protection at issue, it is better to do nothing. The answer to this argument contains a point often overlooked. When a powerful plea for respectful treatment is addressed by some group to the government, no 'neutral' or safe response is possible. Inaction is a kind of action; it signifies toleration of the practice and thus condones it, and in condoning endorses it. Thus to respond to discrimination by arguing that the rights of states and communities are sacred

matters, and that one risks a slide down a 'slippery slope' if one interferes with them, would be hollow and disingenuous and recognised as such. Similarly, I propose that there is also no 'neutral' and safe response against pornography's demeaning of women. The issue demands to be addressed by a government that wants not to give sanction to the message carried by the images. A State that wants to ensure an atmosphere of respect for all persons has to face the issue in more decisive terms than protection of the First Amendment.

The Constitution does not lead us to believe that our first duty is to protect the First Amendment, as if its application needed no justification, as if it stood above other values, including that of respect for all persons. On the contrary, the rights of free speech, religion, and assembly are protected because of the respect due to citizens and their consequent need to be free of government control in certain ways. Freedom of speech is not a fundamental right of a certain kind of enterprise – namely, the press – but stems from a view of humans as morally autonomous.

Therefore it is curious that the court and libertarian writers show such dedication to freedom of the press as an abstraction, as a principle taken by itself. They deal with it, so it seems to me, as with an icon of a faith whose main tenets they have forgotten. In this respect theirs is less than a high moral stand. Remarking the irony of this liberal position, one writer comments that 'women may rightly ask why the Constitution must be read to value the pornographer's First Amendment claim to individual dignity and choice over women's equal rights claim to their own dignity and choice'. It is a curious way of thinking that asks citizens to lay down their claim to respect at the feet of this idol.

Mill warned us about the threat presented by people who think they have the 'right' moral perspective and therefore the only 'right' answers to serious questions. I agree; we need to beware of all sorts of tyranny, however righteous, well meaning, and scholarly. For on its side the protection of pornography also may represent a kind of tyranny of opinion, a libertarian tyranny that treats would-be censors as neurotic, misguided zealots and dismisses the moral complaint altogether.

Looked at from the perspective of women, the tolerance of pornography is hard to understand. Equally hard to understand is a point of view that sees the offence of pornography only in terms of its impact on and significance to men, as if the women of the society were irrelevant or invisible. And a more political point can be added. In the light of women's increasing protests against pornography and the proliferation of defences of it, the issue carries the hazard of generating conflict between two definable groups, roughly between libertarian men on the one hand and outraged women on the other. Given these dimensions, it seems imperative to straighten the arguments and the issue out.

I wish to say something more about the claim that a definition of pornography is needed for the present argument. My argument has followed the tactic of considering certain objections to pornography without a definition of pornography or a criterion as to what objections are valid. While it focuses on objections of a certain kind, those imputing a demeaning character to pornography, it doesn't specify what kinds of things are legitimately objected to or what is really objectionable.

Where could we get a definition of pornography suitable to the role I give it, the role of materials to which a certain vague kind of objection is made? Who should define it authoritatively? Common sense does not endorse the view that legal authority set standards for the rest of the community, should decide about the

inherent rightness or wrongness of certain pictures, for example, for there might be no strong moral objection to pictures the community calls pornographic, and in the absence of such objection the pictures are not, on my view, pornographic at all. My argument says only that the law might justifiably restrict materials that are found insulting in a sexual way, as some materials are by women.

Because the argument is so vague, however, it arouses concern. How will pornographic pictures be distinguished from sexy art, and pornography distinguished from sexy literature – Lawrence's portrayal of Constance Chatterly, for instance? The answer is that the lack of a sharp line is precisely what I allow for, as I allow for changing attitudes. If a public work of art is found insulting by some part of the community that has to look at it, then that is a reason – though only one – for restricting it in some way. If no one objects then a definition that makes it objectionable would be superfluous and really besides the point.

The terms of the issue as I frame it require only the value of individual respect, which is part of our moral heritage, and the perceptions by members how they are respected. They therefore allow for changes in customs and tastes, allow that what is demeaning in one time may not be found so in another. When pornography is defined in terms of what is perceptibly demeaning, not what is permanently and abstractly so, there is no force to the protest that since 'Grandpa was excited even by bare ankles, dad by flesh above the knee, grandson only by flimsy bikinis', no standards can be set. As fashions change, their moral implications change too. So if what was found demeaning once is not found so any longer, any problem regarding it has vanished. It is better not to define pornography for all time, or to define it at all.

One important problem involving the First Amendment still needs to be considered. Suppose we are considering a work that asserts and argues that women are inferior to men, more animal than men, and that they enjoy brutal and sadistic treatment. Imagine such a work: it asserts that there is evidence to show that women enjoy a subservient, animal, victimised role and that this is a correct and proper way to treat women, particularly with regard to sex. Some evidence or other is cited, and it is argued that 'equality' is simply inappropriate for beings of this kind, belonging to an inferior level of sensibility or whatever. To be sure, these ideas run directly against the moral idea that an individual, *qua* individual, has worth. Nonetheless, we believe in free pursuit of all manner of debate, moral, scientific, and political, without government interference. So would such a work, purporting to be a scientific study, come under the protection of the First Amendment, or may it be treated like pornography and restricted on the same grounds? Does it differ from the case of hard pornographic pictures and films, and if so, how?

On this question I side with the libertarians, for the difference between pornographic pictures and such a report is a signal one for us and for the First Amendment. Mill also would recognise the difference, for he based the freedom of circulation of opinion on the possibility of refuting an opinion that is false and criticising one that is poorly founded. In his vision an opinion or argument is at continual risk of being refuted, and so it cannot endanger a community where reason and truth are valued. We can draw the distinction by saying that the materials that say nothing are beyond this risk of refutation and therefore, by protecting them, we give them an immunity to criticism that expressions of opinion do not enjoy. The argument of a work may be objectionable, but like all arguments, it is vulnerable to criticism, while pornography lacks such vulnerability.

This distinction is one I believe the framers of the Constitution would also have recognised. The need for opinions to be circulated freely is part of the respect for citizens which prompted the Bill of Rights. But protection of opinion could be distinguished then as well as now from protection of the press to print what it likes, including offensive pictures.

Defences of pornography have often turned on leaving this distinction obscure, arguing, for example, 'that pornography is intended not as a statement of fact, but as an opinion or fantasy about male and female sexuality'. Taken this way, it cannot be prohibited on the ground of being false. At the same time, however, one hears that 'correction of opinion depends ... on the competition of other ideas'. It is a Catch-22. Critics of pornography who are told that they should 'compete in the marketplace of ideas with their own views of sexuality' while pornography doesn't present ideas are placed in an impossible situation. The pictures don't argue for a demeaning attitude toward women in regard to sex or present a view of sexuality; at the same time they are demeaning. They don't argue that women enjoy being brutally handled; they show brutality and insinuate the victims' pleasure. While an author would be correct in saying that pornography carries an implied message that brutal treatment of women is acceptable, the fact that it is implied rather than explicit is important.

With this argument I believe Mill would concur, for he consistently maintained the need for respect of differences, including different points of view, and here the differences, including different points of view, is one relating to the two sex groups. Respect for persons in all their variety was at the heart of both his libertarianism and his ethical philosophy. However difficult they may be to understand in terms of one's own principles, people are worthy of respect: that was his repeated theme. 'Man is not a machine', he wrote, and he surely did not think women are machines for sex. To demean women in the way pornography does is to treat them as possessions or as servants. So in the end I think that Mill, who argued passionately for women's rights and equal worth and dignity, would find it intolerable to have his views invoked to protect pornography, as they have been.

Although the libertarian case against controls seemed clear-cut and irrefutable, appeal to atomistic ideas cannot solve such a powerfully felt moral issue. If respect for people really exists, it will appear in the way complaints of insult are handled and not only in the propositions used to rebut them. What is needed is not a vision of justice, a simple doctrinaire solution, but a carefully plotted middle way between broad and oppressive controls and reckless liberty. Such an approach will go beyond atomism and deal with injustice in a different and less theoretical way.

THE PROBLEM WITH PORNOGRAPHY: A CRITICAL SURVEY OF THE CURRENT DEBATE¹³¹

Emily Jackson¹³²

There has, in recent years, been a proliferation of feminist debates around the issue of pornography. I do not wish to add to this massive literature by advocating either prohibition of, or free access to pornography. Instead I want to try to explain my agnosticism towards this stark dichotomous choice. There are

131 [1995] *Feminist Legal Studies* 49.

132 At the time of writing, Lecturer in Law, Birkbeck College, University of London.

compelling reasons for feminists to focus on pornography: discussion of pornography may focus on the impotence of rights; the superficiality of equality rhetoric; the construction of sexuality; the significance of representation and so on. It has proved to be a site where many of the most pressing issues facing women intersect. Moreover, few women fail to be moved and disgusted by descriptions of the abhorrent abuse that sometimes masquerades as 'adult' entertainment. So feminist responses to pornography consist in layers of theoretical arguments and emotional reactions. The picture is complicated still further by pornography's place within other non-feminist debates. Pornography has been a focus for a complex matrix of political, social and academic discourses not primarily motivated by the exploitation of women. Those concerned with freedom of the individual and those worried by the perceived moral degeneration of society have also fixed on pornography as a pivotal issue. Since the agendas of liberalism and the moralist right-wing both command weighty establishment support, feminists have frequently found themselves enmeshed in a series of arguments tangential to their central concerns.

At the root of this confusion is the unstated assumption that there are some basic shared understandings about what pornography is; what is wrong with it; and the role of law in its control. In this article I want to unpick these three overlapping questions. A precise definition of pornography is difficult, perhaps even impossible. Acknowledging this does not obviate the possibility of fruitful debate, but it does necessitate a closer look at the various ideological agendas which inform our preconceptions about pornography. I want to attempt to unravel the diversity behind the pornography debate, and examine the impact this diversity has had upon feminist responses. I then want to look closely at the feminist preoccupation with law reform in order to highlight some of the factors which serve to obstruct an indubitably well-intentioned crusade.

1. What is Pornography?

Much of the discourse appears to plunge into discussion about what should be done about pornography without first attempting to elucidate precisely what it is. Pornography is not a self-defining concept; indeed its connection with sexual arousal means that it is, probably, an inherently subjective notion. I am troubled by the possibility that pornography's meaning may be too fluid to serve as an adequate foundation for the layers of argument which rest upon some assumed definitional solidity. For example, does the intention of the consumer or the producer of the image have any impact upon what is categorised as pornography? Our instinct may be to deny emphatically any such suggestion, but there are difficulties with this. First, paedophiles are often attracted to images of children which might in other contexts be wholly innocent. If a paedophile ring traffics in 'holiday snaps' of children, do these images acquire illegitimacy through the purpose to which they are put? Can it become an offence to sell pictures of naked children, when most parents have drawers full of such photos? Second, some feminists write about experiences of sexual abuse and exploitation in a way that might seem to mirror descriptions of such acts in pornographic magazines. For example, in Andrea Dworkin's novel *Mercy*, the heroine is repeatedly humiliated, sexually assaulted and tortured: is this then pornography? It might be argued that Dworkin's heroine does not appear to get pleasure from her abuse; but much hard-core pornography also shows women distressed by the sexual violence used against them. It might then be suggested that it should not be seen as pornography because we can be sure that was not what the author intended. Yet, if 'intention to exploit' becomes a necessary ingredient of the pornographic, we would have a readily manipulable defence which would effectively nullify attempts at regulation.

Furthermore, there are dangers in disallowing any expression which addresses sexual degradation. The paintings of René Magritte feature dehumanised images of women; in one picture, *Le Viol*,¹³³ a woman's face is replaced with a torso: her breasts become her eyes, and her pubic hair becomes a beard. Perhaps this shows women to be reducible to their sexual parts. But is it comment on a society that does this to women, or is it pornography?

It seems clear that any definition of pornography rests upon background assumptions about what, if anything, is wrong with it. If sexual explicitness is the central concern, lesbian erotica is undoubtedly pornography. If, on the other hand, the harm of pornography is perceived to be the exploitation of women, such imagery is relatively unproblematic. So the term 'pornography' would then seem easily manipulable. If its fluidity of meaning is directly related to its appropriation by those with divergent agendas, we should perhaps look more closely at the breadth of the pornography debate.

2. *The Breadth of the Pornography Debate*

Formulating a coherent strategy to deal with pornography depends, in part, on elucidating precise goals. The intersection of multiple political agendas must be acknowledged and understood. We could identify three broad types of perspective: right-wing moralist, liberal and feminist.

This split is plainly an over-simplification, within each category there will obviously be a plurality of different responses. Nevertheless it is clear that crisp analysis of the pornography issue is already seriously problematic. Does pornography threaten the moral fibre of society; or is a part of the individual's right to free expression; or does it exploit women? There will only be agreement on a definition of pornography when there is a coherent understanding about what it is that is problematic about particular types of imagery.

A. *Moralists*

For the moralist right, pornography synthesises all that is rotten in 20th century society. Its explicit representation of non-procreative sex is seized upon as a symbol of the corruption of modern morals. Mary McIntosh argues that this crusade is rooted in the 'paternalist form of patriarchal domination that had its heyday in the Victorian era'.¹³⁴ Immanent in the right-wing moralist criticism of pornography is the notion that sex and women should be protected by being kept within the family. The conservative agenda is to return to traditional religious values where sexuality, and in particular female sexuality is invisible. On this view increased openness about sexual desire is symptomatic of a modern moral decline. The moralist right perceive pornography to be part of a broader trend in which the privacy of procreative sex within the family unit is eroded. Pornography is then attacked in the same terms as the right wing assaults upon access to abortion or the growth in single parenthood.

The right-wing notion of a recent moral decline is in fundamental opposition to the feminist belief in pervasive and ongoing patriarchal values. The suppression of female desire through keeping women under the control of fathers and husbands is precisely what has been resisted by feminists. For example, for the moralist right-wing lobby sex education which does not simply explain reproductive functions is as much a target as conventional pornographic

133 Literally translated, *The Rape*.

134 M McIntosh, 'Liberalism and the Contradictions of Sexual Politics', in L Segal and M McIntosh (eds), *Sex Exposed: Sexuality and the Pornography Debate* (Virago, 1992), p 165.

imagery. In the UK AIDS groups which have produced explicit literature which 'presents an extensive, erotic series of non-penetrative sexual options' have been attacked by the right-wing lobby for promoting perverted practices. For feminists it is deeply troubling that current norms of sex education and information in teenage magazines convey disturbing messages for young girls. Sex, always assumed to be penetrative heterosexual intercourse, is explained in school as a source of pregnancy and disease, and magazines entreat them to 'hold out for love' and wait for 'Mr Right'. Lynne Segal argues that this 'sabotages sexual confidence, connecting girls' desire for love with the ignorance and guilt which will mean they leave the defining of sex up to boys and men'.¹³⁵ Young women need explicit sex education so that they do not feel impelled to tolerate unsatisfactory sexual relationships. Yet information which encourages young women to disengage themselves from traditional notions of female sexuality is precisely that which is routinely targeted and suppressed by the moralist lobby.

While concern about pornography has, for practical purposes, sometimes linked moralists with the feminist critique, it must be understood that their agendas are not simply different, but in fundamental opposition to each other. It is clear then that the same target of pornography can be approached from positions which are not simply disparate, but mutually contradictory.

B. Liberals

For liberals, freedom of expression is one of the fundamental tenets of individual autonomy. It is a basic principle of liberalism that the extreme views of minorities should be permitted in the interests of truth. The free flow of ideas, however unpalatable, is assumed to be conducive to rational argument and informed choice. This argument is regularly applied to pornography; Catharine MacKinnon suggests that putting the pornographers in the posture of the excluded underdog plays on the deep free speech tradition against laws that restrict criticising the government.¹³⁶

Indeed some staunch liberals, such as Ronald Dworkin, have expressed concern that their principled objection to censorship is most often invoked not to protect political dissent, but to defend the free flow of pornography.¹³⁷ The tenacious liberal belief in the sanctity of free expression has exercised a considerable hold over the pornography debate and its suppositions need to be examined closely.

(i) The Constitutional Difference

The existence or not of a written constitution shapes the nature and impact of the discourse of rights. Giving constitutional guarantees of continued access to specific rights means that campaigners, of whatever political persuasion, will attempt to claim the language of rights in order to legitimate their stance, and confer the weight of constitutional machinery behind their crusade.

When the debate is about pornography, the First Amendment in the United States becomes an obvious pole on which to hang the pro-pornography flag. The link between the 'right' to free expression and the production, distribution, sale and use of pornography lends specious authority to the interests of an industry which is not, perhaps, self-evidently valuable. MacKinnon argues that this means that:

135 L Segal, 'Sweet Sorrows, Painful Pleasures', in Segal and McIntosh, *op cit*, p 88.

136 CA MacKinnon, *Only Words* (Harvard University Press, 1993), p 39.

137 R Dworkin, *New York Review of Books*, October 1993.

... the operative definition of censorship accordingly shifts from government silencing what powerless people say, to powerful people violating powerless people into silence and hiding behind State power to do it.¹³⁸

Flowing from this is an even more dangerous phenomenon. The staking out of a position of constitutional legitimacy to some extent forces the hand of groups or individuals who feel some disquiet about the prevalence of pornographic imagery. The terms of the debate have been set: access to pornography is a part of the freedom of expression upon which democratic society rests. In order to challenge this moral high ground, those concerned by pornography are manipulated into appearing to argue against freedom. There would seem to be no continuum here: speech is either free or not free. Those who want to argue that pornography is not an unqualified good are forced into arguing that it is an unqualified evil.

Nevertheless, all free speech clauses in rights-conferring documents allow for some restrictions: sensitive military information and incitement to racial hatred are examples. The difficulty is that any restrictions have to be proved necessary. Article 10 of the European Convention on Human Rights says that expression should be free save insofar as any restrictions are essential to the preservation of democracy. The assumption is, as Catharine MacKinnon has pointed out, that all speech, no matter how degrading or insulting, is a good thing. The burden of proof of harm is shifted to those seeking to restrict expression. The parameters are drawn narrowly and pornography must fit within the ill-defined rubric of obscenity.

If there is a written constitution, conflict between various fundamental rights is inevitable, and the resolution of such conflicts is a routine aspect of the judiciary's role. This makes pornography ordinances which rest on the protection of women's right to equal treatment, at least plausible. Feminists, it appears, have had to make a choice. Either they have to try to fit pornographic imagery within the recognised exception to free expression, ie obscenity. Or they have to mobilise another constitutionally protected right in an attempt to trump the First Amendment logic.

In countries without a written constitution, the debate is, to some extent, different, but it is crucially moulded by the assumptions which underlie the possible justifications for not having a bill of rights. In the UK there are vocal campaigns in favour of the creation of a written constitution. But they have not, as yet, succeeded. Why not? Many in the US regard a series of constitutionally guaranteed rights as self-evidently advantageous. How could another Western society resist the implementation of a solid buttress to their democracy? The answer may, I believe, lie in a peculiarly British phenomenon: that of placing great trust in those with power. In spite of evidence that suggests that power often slips into corruption, the British sometimes appear to believe that the benign exercise of authority is ultimately preferable to the creeping dangers inherent in a commitment to citizens' rights. In fact there would even be those within the UK who would argue that the British are more free as a result of the creativity of the common law tradition which allows incremental and possibly expansive development of autonomy, unhindered by rigid formulations of 'rights'.

In the UK there is no 'right' to produce, distribute, or consume pornography. Instead that which does not contravene the law against obscenity will, by default,

138 *Only Words*, p 10.

be permitted. The underlying assumption being that the law-makers and interpreters will leave a sufficiently wide lacuna such that individual autonomy is respected. It is crucial that those with power are entrusted with striking the correct balance. So the commitment to the pornographer's freedom is perhaps more insidious because it is unstated. It is an unseen assumption which undercuts any efforts to reform the law. While it is not constitutionally guaranteed, this means that it cannot be put into a balancing exercise with the 'rights' of women, as in the binary opposition posited by MacKinnon and Dworkin. Instead it rests as one of the fundamental background principles: free expression is unstated and hence unchallengeable.

Those worried by pornography then have their options limited. They cannot hope to challenge the free expression argument by pointing out its conflict with other 'rights'. Other rights, insofar as they exist, have already been weighed with free speech and, presumably, found to be of relative insignificance. The assumptions which underlie the common law are assumed to be so deeply embedded in that tradition that they cannot be questioned. So concern about pornography leaves only one option: that of strengthening existing obscenity law.

In spite of the constitutional difference it could be argued that Britain and America approach the free speech issue with essentially similar background assumptions. In the US the First Amendment protects expression by preventing its restriction, thus presupposing that the capacity for free speech exists. In the UK the absence of a constitution points even more clearly to an assumption that speech will be free provided the State does not intervene to curb it. This freedom need not be guaranteed because the legislature and the judiciary can be trusted to implement prohibitions on action in order to give maximum respect for individual liberty.

Equating the protection of pornography with the promotion of free speech has led to particular difficulties in Eastern Europe. Since pornography was suppressed by the communist regimes, the liberation of political expression has been accompanied by a celebration of the new ready availability of pornographic material.

In Hungary over 40 pornographic magazines have become available since the lifting of all restrictions on pornography in 1990. (Interestingly, *Playboy* is not considered to be pornographic). Laslo Voros, a self-styled 'King of Porn', claims that his seven sex magazines 'help people to overcome the legacy of communist sexual repression, teaching people about sex and helping those who cannot find partners'.¹³⁹ In Poland the law has not been changed, but pornography is now proliferating. Posters and calendars showing naked women are prevalent, and they are increasingly being used in advertisements. Corrin suggests that, in Poland, 'the general trend implies that freedom means, among other things, free access to women's bodies'.¹⁴⁰

The Western linkage between pornography and freedom is partly to blame. Eastern European liberals have been convinced that access to pornography is a civil liberty and are resistant to any attempt to limit their new-found freedom.

139 'Superwoman and the Double Burden: Women's Experience of Change', in C Corrin (ed), *Central and Eastern Europe and the Former Soviet Union* (Scarlet Press, 1992).

140 *Ibid*, p 92.