PORNOGRAPHY AS SOCIAL INJURY

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Introduction: A Feminist Conception of Harm

Over the last two decades, the move towards equality for women has been a powerful impulse in our society. Women have fought to slough off the stigma of inferiority which has traditionally attached to them within the culture of work and intellectual endeavour. Legal reforms, such as antidiscrimination legislation, have facilitated change and have also represented an important symbol of societal acceptance of the principle of equalty between men and women.[1] It is therefore a profound irony that the seeds of the contemporary feminist movement and of the sexual revolution have both germinated within the liberation movement of the 1960s, since the latter has spawned a phenomenal porn industry which has effectively checkmated the feminist movement in its struggles to improve the status of women.

Twenty years ago, we considered the administration of obscenity laws by the police to be insulting and often farcical, involving such curious practices as counting the number of pubic hairs discernible in a work of art or impounding a photograph of Michelangelo's "David" displayed in a shop window. Now I am not for a moment questioning the absurdity of such laws, nor am I suggesting a reversion to them. Therefore, I wish to endeavour to draw a threshold distinction between obscenity, pornography and erotica. In Australia, as in the United States, the United Kingdom and Canada, obscenity has been associated "with the lewd and the dirty, not with the degrading and subjugating."[2] Hence, the essence of obscenity lies in its "immorality". Pornography has been defined as "any materials that eroticize dominance and submission or portray women in a degrading manner as objects to be sexually exploited and manipulated."[3] Erotica is theoretically distinguishable from pornography because it conveys a sense of intimacy and desire between equals.[4] While violent pornography degrades and debases gay men, racial minorities and children of both sexes, the overwhelming preponderance of pornography involves women, whose sole role is to provide instant sexual gratification for men. Women appear either as passive victims or as willing participants who enjoy sado-masochistic and humiliating acts. The subjugation is a manifestation of the social power which men hold over women and it is this theme of male power which feminist writers see

1. For a discussion of the problematic question of sexual equality for women, see Thornton, M, "Feminist Jurisprudence: Illusion or Reality" (1986) 3 **Aust J of L & Soc** 5, 8-15
2. Bakan, J, "Pornography, Law and Moral Theory" (1984) 17 **Ottawa L Rev** 1, 26
3. Jacobs, C, "Patterns of Violence: A Feminist Perspective on the Regulation of Pornography" (1984) 7 **Harvard Women's L J** 5, 24
4. Cf Neil Thornton who identifies the preservation of human dignity as the distinguishing feature of erotica: Thornton, N, "The Politics of Pornography: A Critique of Liberalism and Radical Feminism" (1986) 22 ANRJS 25, 32

as the major theme of the pornographic genre.[5] There is therefore no space for the discourse of equality within the pornographic universe:

> There can be no 'equality' in porn, no female equivalent, no turning of the tables in the name of bawdy fun. Pornography, like rape, is a male invention, designed to dehumanize women, to reduce the female to an object of sexual access, not to free sensuality from moralistic or parental inhibition...Pornography is the undiluted essence of anti-female propaganda.[6]

Now it is true that the depiction of women as passive sex objects through the advertising of consumer goods is also degrading and corrosive of any idea of substantive equality. Indeed, the subtlety and pervasiveness of advertising which objectifies women's bodies might, in one sense, make it more pernicious and insidious, for its very ubiquity renders it an elusive subject for regulation in view of the law's onerous requirements of proof of actual harm. In practice, however, what constitutes obscenity, pornography, erotica or even sexist advertising depends upon highly subjective judgments. The inescapable subjectivity of matters involving affectivity and desire undermines the requirements for both universality and certainty, two essential dimensions of the rule of law. Consequently, liberal legalism has preferred to treat sexual expression, at least in its adult, consensual heterosexual or monosexual manifestations, as beyond the reaches of the law.

Nevertheless, many feminists believe that there is a connection between the constant subjection to images of brutalising sexual acts and their practice, with which the law does purport to deal. The point is nicely encapsulated in the phrase coined by Robin Morgan in the 60s: "Theory and Practice: Pornography and Rape."[7] As a predicate to restriction, much of the social science literature has been devoted to exploring

> whether an unequivocal nexus can in fact be established: The provocation thesis states that if pornography provokes men to behave in such a way as to cause harm to women, either through assault or discrimination, then its restriction is justified in order to protect women.[8]

While individuals convicted of violent crimes against women have frequently confessed the influence of pornography on their actions,[9] or caches of pornography have been discovered in their homes,[10] no scientifically valid nexus has been established. Of course, it can *never* be irrefutably established according to the unrealistic standards which must be met. The concepts of *mens rea* and causation

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5. Eg Dworkin, A, **Pornography: Men Possessing Women** (1979) p 24
6. Brownmiller, S, **Against Our Will: Men, Women and Rape** (1975) p 394
7. Morgan, R, "Theory and Practice: Pornography and Rape" in Lederer, L ed **Take Back the Night: Women on Pornography** (1980) p 125
8. Bakan, op cit 12
9. For example, Theodore Bundy, who had confessed to the killing of more than 20 women, stated that hard-core pornography had shaped his actions: **Sydney Morning Herald** 27 January 1989
10. Eysenck H J & Nias D K B, **Sex, Violence and the Media** (1978) pp 16-17

within the criminal law are of a highly specific and individualistic nature. That is, the focus is on the accused's intention to rape or murder. The influence of indirect causative factors, such as the multifarious cultural influences to which an accused has been exposed, cannot be isolated and assessed.

Experimental social science research has been similarly unconvincing to legislators and policymakers.[11] First of all, testing is conducted under artificial conditions in laboratories and frequently involves an unrepresentative population group, such as university students. Secondly, the very nature of social science, with its manifold human variables, precludes an accurate prognosis of conduct. Nevertheless, current research does suggest "*for some people, some of the time*, exposure to violence will increase the probability of aggressive behavior.[12] However, the aetiological problematic may constitute a convenient smokescreen, for it cannot pass unobserved that pornography is a multi-billion dollar industry. Indeed, pornography is said to exceed the annual value of the record industry and of the general film industry combined in the United States.[13]

The feminist presupposition on which a proposal for a legal proscription is based is that women, as a class, are harmed by pornography. The ready availability of pornography and its recent proliferation through video cassettes, 'X'-rated movies and magazines, means that the flood of material reiterates negative and hateful messages about women which can only serve to degrade and debase in contradistinction to the prevailing public rhetoric of non-discrimination. Nevertheless, legal logic has difficulty grasping any idea of a collectivised, systemic harm:

> To reassert atomistic linear causality as a sine qua non of injury - you cannot be harmed unless you are harmed through this etiology - is to refuse to respond to the true nature of this specific kind of harm.[14]

To accommodate broad-based harms, Adrian Howe exhorts feminist legal scholars to revive the concept of social injury which first appeared in the criminological literature over forty years ago *vis-a-vis* white collar crime.[15] However,

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11. Penrod S & Linz D, "Using Psychological Research on Violent Pornography to inform Legal Change" in Malamuth N M & Donnerstein E eds, **Pornography and Sexual Aggression** (Orlando: Academic Press, 1984) p 265
12. Linz D, Penrod S & Donnerstein E, "Issues Bearing on the Legal Regulation of Violent and Sexually Violent Media" (1986) 42 **J Social Issues** 171, 176
13. **Pornography and Sexual Aggression, op cit** p xv
14. McKinnon C A, **Feminism Unmodified: Discourses on Life and Law** (1987) p 157
15. Howe A, "'Social Injury' Revisited: Towards a Feminist Theory of Social Justice" (1987) 15 **Internat J Sociology L** 423

the concept seems to have floundered with the political shift to the right and the concomitant law and order focus on the individual. Antidiscrimination legislation has made halting steps in the direction of recognising new forms of harm. Its most radical manifestation is found in affirmative action which requires that institutional measures be initiated to foreclose the possibility of future harms. To deal with harms which have occurred, direct discrimination is concerned with the straightforward instance of linear causality, while indirect discrimination seeks to address societal practices which have a disproportionate impact on women or a stigmatised group, even if those practices are facially neutral. That is, the focus is on the harm despite the competing values at stake. A cognate example is incitement to racial hatred, a regulatory proposal in respect of which is currently before the New South Wales Parliament. The proscription recognises the social harm flowing from the vilification of stigmatised racial minorities.[16] The harm therefore outweighs the competing value of freedom of speech. Incitement to racial hatred is most closely analogous to pornography which operates as an incitement to maltreat women.[17] While one may not be able to prove that depictions of sadism trigger real life emulations, gender relations must necessarily be constructed and reinforced through pornography, for the indubitable message is that men dominate and they are entitled to use their power over women to secure sexual satisfaction with ever-increasing gradations of violence. The effect of the increasing perversity of pornography is that "the 'normal' man is depicted as a sadist and the 'healthy' woman as a willing victim."[18]

The American Experience

Feminists throughout the Western world have become increasingly concerned at the proliferation of pornography which emphasises the nexus between sex and aggression, and it would appear that there has been a marked increase in bondage and domination imagery since 1970.[19] Various attempts have been made to

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16. See **Discussion Paper on Racial Vilification and Proposed Amendments to the Anti-Discrimination Act 1977** (NSW GP, 1988). Cf the **Radio Programme Standards 1986** which prohibit the transmission of a programme which vilifies a person or a group on the basis of (**inter alia**) race or gender. A radio personality, Mr Ron Casey, of 2KY is presently the subject of separate complaints arising from his alleged gratuitous vilification of both a racial group and of women: **Sunday Telegraph** 6 November 1988
17. Eysenck, **op cit** p 259
18. Morgan R, "How to run Pornographers out of Town and preserve the First Amendment" Ms, November 1978, 55
19. Eg Malamuth & Donnerstein, **op cit** p 30. It has been suggested that this escalation in violence and misogynism is in order that men might reassert domination over women, that is, the escalation represents a backlash against the women's movement. Russell, D E H with Lederer, L, "Questions We Get Asked Most Often" in **Take Back the Night, op cit** p 14. But see Soble who not only rejects the backlash thesis but also defends pornography, at least of the non-violent kind: "My thesis is that men consume pornography, not to reassert patriarchal power over women in the real world, but to recoup a sense of power in a fantasy world, and that this is a response to their perception that they have lost sexual power." Soble, A, **Pornography: Marxism, Feminism, and the Future of Sexuality** (1986) p 87

reconceptualise the criminalisation of pornography in an attempt to overcome the limitations of obscenity laws which reflect the mores of an earlier era, both in regard to definition and in regard to the status of women.

Probably the most interesting and far-reaching attempt at substantive law reform was the civil ordinance drafted for the City of Minneapolis by Catharine McKinnon and Andrea Dworkin, both of whom are well known for their speeches and writings on pornography.[20] Although the ordinance did not become law in Minneapolis, it was adopted and adapted by Indianoplis in 1984. In a prolegemon, pornography was clearly recognised as a central practice in societal discrimination against women. Pornography was then specifically defined as

> the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
> (4) Women are presented as being penetrated by objects or animals; or
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.[21]

Predictably, the ordinance was soon challenged as a violation of the Constitutional guarantee of freedom of speech by a group of distributors, consumers and others with a vested interest in the pornography industry, and found to be unconstitutional.[22] The decision was affirmed on appeal.[23] In the Court of Appeal, Judge Easterbrook acknowledged that "the association of sexual arousal with the

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20. Eg MacKinnon, C A, **Feminism Unmodified: Discourses on Life and Law** (1987); Dworkin, A, **Pornography: Men Possessing Women** (1979) and "Against the Male Flood: Censorship, Pornography and Equality" (1985) 8 **Harvard Women's L J** 1

21. **Indianopolis & Marion County Ordinance**, 1984. Prohibited conduct included trafficking in pornography, coercing others into performing pornographic works, forcing pornography on anyone or injuring anyone as a result of pornography. Following a preliminary screening by the equal opportunity board, a complaint could be dealt with either by conciliation or by means of a more formal hearing.

22. **American Booksellers Association Inc v Hudnut** 598 F Supp 1316 (DC SD Ind, 1984)

23. 771 F 2d 323 (1985)

subordination of women...may have a substantial effect", but any harm suffered by women was outweighed by the greater value of freedom of speech:

> If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.[24]

Speech is not absolutely free in the United States but any restriction is subject to strict limitations. The likelihood of harm (in the sense of an eruption of actual violence) must be immediate and real.[25] Thus, if the plaintiffs were able to establish the elusive nexus already adverted to, that is, that pornography caused men to go forth and to rape and torture women, state regulation would be justified. As it is, the slippery slope argument prevailed in that there was a fear that the state would use the precedent to restrict other unpopular forms of speech.

Pornography is not protected speech if it falls within the current definition of obscenity in the United States.[26] The current definition was developed by the Supreme Court in *Miller v California*[27] and requires consideration of prurient interests as measured by reference to community standards, the depiction of sexual conduct in an offensive way and an evaluation of the serious literary, artistic, political or scientific value of the material. As Gaze points out, the Indianapolis ordinance went beyond the *Miller* definition in all three limbs of the test.[28] Given the proliferation of violent pornography since *Miller*, it is regrettable that the Supreme court refused the plaintiffs *certiorari*. It may be, however, that most hard-core pornography would be found to be obscene under the *Miller* test. The difficulty lies in enforcement, because of the procedural focus of American obscenity law:

> Every single book, magazine, or film must be proven to be obscene in an individualized judicial proceeding before it may be enjoined. This makes it almost impossible for the government to take any generalized action against businesses that regularly deal in pornography.[29]

Freedom of Speech

Although there is no constitutional guarantee of free speech in Australia, the freedom to articulate one's views with impunity is regarded as an important linchpin of democracy. The theory underlying free speech is that ideas and opinions which constitute one point of view may then be balanced or rendered neutral by the

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24. At p 330
25. **Brandenburg v Ohio** 395 US 444 (1969); NAACP v **Claiborne Hardware** 458 US 886 (1982)
26. **Roth v United States** 354 US 476 (1957)
27. 413 US 15 (1974)
28. Gaze, B, "Pornography and Freedom of Speech: An American Feminist Approach" (1986) 11 **Legal Service Bulletin** 123, 124
29. Kaminer, W, "Pornography and the First Amendment: Prior Restraints and Private Action" in **Take Back the Night op cit** p 241

articulation of critical or competing points of view. The assumption is that all points of view are equally valid within an untrammelled "marketplace of ideas" and that it is not for the state to act as the arbiter of the substance, although speech is always subject to the laws of libel, offensive language and "public interest" constraints which the state may choose to impose from time to time.

The fairness theory is a convenient myth which occludes the fact that speech occurs within the context of particular power relationships which are inherently unequal. Thus, the speech of an Aboriginal person is likely to be significantly less free than that of a white person.[30] Similarly, violent pornography against women is a dramatic reminder to women that they are not equal in our society and the fairness doctrine makes little sense when applied to it. First, for a woman to denounce pornography in a public forum hardly counteracts the negative impact of ten thousand copies of an 'X'-rated video featuring woman-torture. Secondly, the women themselves who are depicted in pornography are unable to speak out since they may be "mastered, bound, silenced, beaten, and even murdered..."[31] Thirdly, the improbability of balancing a multi-billion dollar interest underscores the fact that the scales are tipped against free speech for women: the metaphorical marketplace of ideas is no more neutral than the free market economy so far as women are concerned. "Free speech", therefore, despite its appearance of neutrality, is a malleable construct which can be used by those with power to maintain vested interests to the disadvantage of the powerless.

Even more fundamentally, however, I would want to ask whether pornography should properly be described as speech at all. Freedom of speech is concerned with opinions and ideas. The crudity of most pornography is anything but an intellectual activity and it is a distortion to claim that it is synonymous with, say, someone arguing in favour of pornography.[32] Pornography is manufactured to act as a sexual stimulant and an aid to fantasy; the imagery of violence and dominance are designed to increase physical titillation. Pornography, therefore, is concerned with acts, not ideas. Should the incidental message of misogyny transmute harmful acts into speech and thereby render them worthy of protection? The American Supreme

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30. Anti-Discrimination Board **Study of Street Offences by Aborigines** (ADB, 1982). A recent example is the charging of an Aboriginal youth with offensive conduct under the **Summary Offences Act 1988** (NSW) for wearing a T-shirt with a drawing and the words "Black deaths in police custody." The youth was subsequently acquitted in Walgett Local Court: **Sydney Morning Herald**, 4 February 1989
31. Griffin S, **Pornography and Silence** (1981) p 2
32. The conflation of action and speech was resisted in a Victorian equal opportunity complaint involving discrimination on the ground of political belief in which the complainant was a signatory to a press release in support of the Paedophile Support Group. See **Thorne** v R (1986) EOC 92-182 (EOB, Vic)

Court did not think that acts and speech were synonymous when it prohibited child pornography.[33]

Conclusion: The Ambiguities of Regulation

To maintain its legitimacy, the state must mediate dichotomous and irreconcilable social interests, such as those of feminists and pornographers. In one sense, the regulation of pornography does comport with classical liberal theory; the McKinnon-Dworkin approach does not require a radical framework. John Stuart Mill's basic proposition is that limits may be placed on individual liberty in order to prevent harm to others. The main problem, however, is with the law's obtuseness in comprehending sex specific harms which disproportionately impact on women. Rape is the paradigmatic example for, unless there is actual violence, the psychological harm is likely to be trivialised.[34] Indeed, the male and female experience of the same sexual phenomenon may well be polar opposites. Thus, what is a source of pain to women may be a source of pleasure to men.[35] Nevertheless, it is the male standard which not only prevails within liberal legalism but which masquerades as the universal.[36]

The Mill formulation of harm is also subject to another strand of liberalism which regards sexual expression as preeminently private in that it is not for the state to enter the bedrooms of the nation to regulate sexual practices, other than in respect of specific proscriptions, such as incest. Women also have been traditionally associated with nature, corporeality and desire, characteristics which themselves have been irrevocably associated with the private sphere. This association underscores the contradictory notion of harm to women arising from sexual expression.

The public/private dichotomy, however, as feminists have long noted, is a convenient and manipulable device. The market in which pornographers operate is subject to selective regulation, particularly in the form of import restrictions regarding obscenity, indecency and gratuitous acts of sexual violence.[37] However, by abdicating over-arching responsibility, the state is politically shaping the nature of the

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33. **New York v Ferber** 458 US 747 (1982)
34. Indeed, in common parlance rape is treated as something women actually desire. Men also joke about the pleasures of women raping them. However, as Beatrice Faust percipiently notes, the image of being raped by another man elicits quite a different response. Only then is there an understanding of the invasive nature of the imagery. See Faust, B **Women, Sex & Pornography** (1980) p 122
35. West, R L, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" (1987) 3 **Wisconsin Women's L J** 81
36. Thornton, op cit 8. Cf Grosz, E A, "The In(ter)vention of Feminist Knowledges" in Caine, B, Grosz, E A & de Lepervanche M, eds, **Crossing Boundaries: Feminisms and the Critique of Knowledges** (1988) p 94
37. **Customs Act 1901** (Cth) - **Customs (Cinematograph Films) Regulations** r 13(1) & **Customs (Prohibited) Imports Regulations** r 4A(1A); **Indecent Articles and Classified Publications Act 1975** (NSW) s 13

so-called private sphere. Like freedom of speech in the public realm, the averred privacy of sexual expression in the private realm is a political device which masks and thereby legitimises misogynism through the propagation of pornography.

In opposing pornography, feminists find themselves aligned with the conservatives who are anti-abortion and anti-sex education, and who espouse a package of values antipathetic to the feminist agenda. However, the conservative and the feminist opposition to pornography is based on different premises. The former is concerned with the prurient aspects, while the latter is concerned specifically with the belief that pornography represents hatred of women through the humiliation and degradation of women's bodies. Women are dehumanised and objectified by violent acts, as well as by acts which, although not explicitly physically violent, are psychologically violent in so far as they depend upon the imagery of dominance. I do not wish to adopt a monocausal and essentialist biologist position,[38] for I recognise that pornography is but one manifestation of male power which must be understood in a wider context of political and material inequality. Nevertheless, the propagandist nature of pornography does serve to maintain women in a subordinate position and to serve capitalist interests through the commodification of sexuality. Thus, ideas such as freedom of speech and the privacy of sexual expression prevail because they support male interests. Repugnant though pornography is, attempts to restrain it or to regulate it underscore the powerlessness of women in our society. Indeed, there may be no point in enacting a proscription against pornography unless the societal context of male dominance and female subordination is understood:

> To pin one's hopes for satisfactory political outcomes upon a general, and by and large untheorised and uninvestigated notion of regulation is to substitute faith and dogmatism for social science.[39]

Feminists are therefore confonted with a dilemma. On the one hand, one can stand by and take no action because of the fear that steering one's way through a veritable minefield of ambiguities could redound against women. There is a real fear that over-inclusive regulation will censor erotica, sex education literature, and other *bona fide* areas of endeavour. On the other hand, a legislative proscription constitutes an important symbol of societal disapprobation. To do nothing does represent tacit acceptance and helps to legitimise the continued abuse of women's bodies. The formal recognition of pornography as social injury by our legal system would constitute an important step to enable a discourse between the discrete worlds of law and feminist politics to take place. However, rather than simply forcing the harm emanating from pornography to conform to pre-existing juridical paradigms, such as that of obscenity law, we should seek to transform the discourse so that the focus is on the disproportionate impact on women of a material harm rather than on the elusive and abstract variable of free speech.

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38. Cf Campbell, J, "Pornography: Is it a Feminist Issue?" (1988) 7 & 8 **Aust Fem Studies** 155
39. Duncanson, I, "Some Categories of Civil Libertarian Thought" (1985) 8 UNSW LJ 401, 418