

PORNOGRAPHY, MORALITY, AND HARM: WHY
MILLER SHOULD SURVIVE *LAWRENCE*

*Elizabeth Harmer Dionne**

INTRODUCTION

In 2003, a divided Supreme Court in *Lawrence v. Texas*¹ declared that morality, absent third-party harm, is an insufficient basis for criminal legislation that restricts private, consensual sexual conduct.² In a strongly worded dissent, Justice Scalia declared that this “called into question” state laws against obscenity (among others), as such laws are “based on moral choices.”³ Justice Scalia does not specifically reference *Miller v. California*,⁴ the last case in which the Supreme Court directly addressed the issue of whether the government may suppress obscenity. However, if, as Justice Scalia suggests, obscenity laws have their primary basis in private morality, the governing case that permits such laws must countenance such a moral basis. The logical conclusion is that *Lawrence* calls *Miller*, which provides the legal test for determining obscenity, into question.⁵

* John M. Olin Fellow in Law, Harvard Law School. Wellesley College (B.A.), University of Cambridge (M. Phil., Marshall Scholar), Stanford Law School (J.D.). The author thanks Professors Frederick Schauer, Thomas Grey, and Daryl Levinson for their helpful comments on this Article. She also thanks the editorial staff of GEORGE MASON LAW REVIEW for their able assistance in bringing this Article to fruition.

¹ 539 U.S. 558 (2003).

² *Id.* at 571 (“The issue is whether the majority may use the power of the state to enforce these views on the whole society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992))). *Lawrence* held that states could no longer criminalize homosexual sodomy, overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held to the contrary. *Id.* at 578-79. For a discussion of *Lawrence*’s substantive requirements, see *infra* note 164.

³ *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting). Scalia’s full statement is as follows: “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.” *Id.*

⁴ 413 U.S. 15 (1973). *Miller* held that obscenity is the narrow category of speech that falls outside the protection of the First Amendment, and thus states may regulate obscene material. *Id.* at 36-37. For a fuller discussion of *Miller* and its obscenity test, see *infra* Part III.B.

⁵ This is not a straw man. In *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005), Judge Lancaster dismissed a criminal indictment for violation of federal obscenity statutes, stating that “after *Lawrence*, the government can no longer rely on the advancement of a moral code[,] i.e., preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest.” *Id.* at 587. However, the Third Circuit reversed and remanded, because this

Justice Scalia certainly supports the government's right to regulate obscenity.⁶ Nonetheless, his dissent in *Lawrence* is not particularly helpful to the cause of so-called decency.⁷ Justice Scalia's dissent suggests that the primary justification for obscenity regulation is a socially conservative set of sexual mores, akin to the sexual mores that inspired the holding in *Bowers v. Hardwick*.⁸ There are certainly rational, and even compelling, arguments to support conservative notions of both private and public morality and enforcement of the civic norms that will promote such a society.⁹ There are also those whose primary objection to pornography stems from conservative sexual mores. Nonetheless, to define *Miller* as a morality holding effectively ignores the social science research that for three and a half decades has provided troubling evidence of pornography's negative social consequences, particularly for women. It also ignores the important efforts of the radical feminists¹⁰ who have memorialized pornography's deleterious effects on large and varied classes of women. Both social science and radical feminism provide important, practical reasons for upholding *Miller* and the state laws that rely upon it.

Pornography is a complicated story with a large cast of characters. Men consume it and, in turn, are affected by it. Some women are used (or

decision conflicted with other Supreme Court precedent. *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 161 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006).

⁶ See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (Scalia, J., dissenting). Scalia's dissent focuses on the commercial nature of Playboy's enterprise, which Scalia calls the "sordid business of pandering" and therefore unworthy of First Amendment protection. *Id.* at 831-32 (citing *Ginzburg v. United States*, 383 U.S. 463, 467, 472 (1966)).

⁷ Decency does not pertain merely to sexual ethics. "Decent" is defined as "marked by moral integrity, kindness, and goodwill." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 321 (11th ed. 2003). Harry Clor has defined the term as follows:

The word 'decency' is meant to suggest a set of rather modest ethical demands, not classical virtue at its noblest or biblical goodness at its highest. What is envisioned is an intermediate ethic demanding of us something less than nobility but aiming higher than a mere set of minimal rules (abstention from violence, theft, and fraud) instrumental to life, liberty, and prosperity.

Harry M. Clor, *Forum on Public Morality: The Death of Public Morality?*, 45 AM. J. JURIS. 33, 36 (2000).

⁸ See *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

⁹ This Article does not attempt to address the arguments of moral philosophy in favor of ascetic sexual ethics. However, for further discussion of such arguments, see HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY (1996).

¹⁰ The term "radical feminist" is not a pejorative, although some consider it to be a label of disapprobation. Radical feminists embrace the term: "[F]eminists use the definition of radical as a means of getting to the root of an issue—seeking fundamental rather than superficial change." Christine Stark, *Girls to Boys: Sex Radical Women Promoting Pornography and Prostitution*, in NOT FOR SALE: FEMINISTS RESISTING PROSTITUTION AND PORNOGRAPHY 278, 279 (Christine Stark & Rebecca Whisnant eds., 2004) [hereinafter NOT FOR SALE]. However, radical feminists are painfully aware of the term's negative connotations. See, e.g., Adriene Sere, *Sex and Feminism: Who Is Being Silenced?*, in NOT FOR SALE, *supra*, at 269. See also *infra* note 221 (discussing the Left's treatment of radical feminists).

abused) to produce it, and all women must live in a society whose attitudes have been consciously and unconsciously shaped by it. Hence, despite the questions raised both by *Lawrence* and free-speech absolutists,¹¹ we must grapple with the regulatory questions raised by pornography's social consequences, particularly when it crosses the line from mere erotica into overt porno-violence.¹² Part I provides some working definitions of pornography and briefly discusses the relationship between concerns about pornography and various conceptions of morality. Part II reviews the social science analysis of the evidence of pornography's harm to the individual and society. It also incorporates some of the work done by radical feminists to highlight real harms perpetrated outside the laboratory setting. Part III then applies the information reviewed in Part II to demonstrate that the *Miller* test can and should survive the questions raised by *Lawrence*. Part III acknowledges the various First Amendment arguments made by pornography apologists, but this Article accepts the premise that obscenity is not protected speech, and hence does not make new First Amendment claims. Part III addresses the step that follows such a premise: whether or not there is a rationale beyond conservative sexual mores for adopting, upholding, and enforcing obscenity legislation. This Article ultimately concludes that the production and consumption of pornography raises sufficient social concerns to insulate *Miller* from the prohibitions contained in *Lawrence* against laws criminalizing private, consensual conduct.

I. THE PARAMETERS OF THE DEBATE: SOME PRELIMINARY DEFINITIONS

A. *Morality: Distinguishing Between Private Morality and Objective Harms*

Sexuality and its appropriate expression in both private spheres and the public square are the subjects of heated cultural debates that will not be resolved easily or soon. Scholars on both sides of the issue confront preconceived opinions about pornography and the motivations of those who produce it, defend it, consume it, critique it, or attempt to regulate it.¹³ Nonetheless, one may reasonably conclude that pornography consumption has negative impacts. As noted feminist Naomi Wolf writes:

¹¹ See *infra* Part III.A (discussing pornography and the First Amendment).

¹² See *infra* text accompanying notes 41-45.

¹³ For example, pornography apologists frequently suggest that pornography critics use their work to cloak their private sexual predilections. See *infra* note 141 (discussing the motives of pornography critics).

The reason to turn off the porn might become, to thoughtful people, not a moral one but, in a way, a physical- and emotional-health one; you might want to rethink your constant access to porn in the same way that, if you want to be an athlete, you rethink your smoking.¹⁴

Social science has consistently demonstrated that some forms of pornography (including that which does not sink to the level of obscenity) cause perceptible changes in the attitudes of its consumers towards the women with whom they subsequently interact. Pornography consumption may cause changes in behavior as well.¹⁵ According to Professor John H. Court: “Evidence is accumulating from therapists and sex offenders that offenses often relate closely to the use of pornographic materials, and this is repeatedly confirmed in legal evidence coming to the courts.”¹⁶ A significant majority of men typically avoid pornography for various ethical and/or practical reasons. Nonetheless, the minority who do consume pornography

¹⁴ Naomi Wolf, *The Porn Myth*, N.Y. MAG., Oct. 20, 2003, at 36, available at http://nymag.com/nymetro/news/trends/n_9437/. Wolf disagrees with the radical feminist position that pornography causes direct violence against women. *Id.* See also *infra* notes 27-28.

¹⁵ Although younger women have become more accepting of male pornography use, they still do not use it themselves. See, e.g., Jason Carroll et al., *Generation XXX: Pornography Acceptance and Use Among Emerging Adults*, 28 J. ADOL. RES. 6 (2008) (finding that only 3% of college-age women use pornography, but 49% of them consider it an acceptable sexual outlet for men, as contrasted with 37% of their fathers and 20% of their mothers who consider it acceptable). This Article does not address homosexual pornography, as social science research has focused on heterosexual pornography and this Article relies heavily on such social science. However, the issues of violence and degradation are likely to be similar in either context. Some members of the homosexual community do critique homosexual pornography. See, e.g., Rus Ervin Funk, *What Does Pornography Say About Me(n)?: How I Became an Anti-Pornography Activist*, in NOT FOR SALE, *supra* note 10, at 331; Christopher N. Kendall, *The Gay “Male” Syndrome: Gay Male Pornography and the Eroticization of Masculine Identity*, in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 141 (Laura J. Lederer & Richard Delgado eds., 1995) [hereinafter THE PRICE WE PAY].

¹⁶ John H. Court, *Sex and Violence: A Ripple Effect*, in PORNOGRAPHY AND SEXUAL AGGRESSION 143, 145 (Neil M. Malamuth & Edward Donnerstein eds., 1984). Court is always careful to note that correlation is not causation. See *infra* text accompanying notes 125-129. See also *United States v. Grinbergs*, 470 F.3d 758, 760 (8th Cir. 2006), *petition for cert. filed* (U.S. Mar. 8, 2007) (No. 06-10045) (expert testimony that defendant not a typical pedophile, but a victim of the Internet); *United States v. Caro*, 309 F.3d 1348, 1353 (11th Cir. 2002) (defendant’s pornography addiction was not a causal factor in his distribution of child pornography); *United States v. Tanasi*, No. 02 CR.0096, 2004 WL 406724, at *3-4 (S.D.N.Y. Mar. 3, 2004) (defendant’s pornography addiction and hypersexual arousal patterns may or may not have contributed to his dealing in child pornography); *People v. Price*, No. MA024561, 2004 WL 2211911, at *6 n.4 (Cal. App. 2d Sept. 15, 2004) (testimony regarding use of pornography by batterers to control victims); *State v. Simons*, No. A05-2121, 2007 WL 329137, at *2 (Minn. Ct. App. Feb. 6, 2007) (expert testimony that defendant’s adult pornography addiction impaired his ability to resist child pornography); *H.R.C. v. Mojica*, No. 90-2058, 1991 WL 178321, at *1 (Wis. Ct. App. June 12, 1991) (expert testimony that defendant’s pornography addiction impaired his judgment).

is sufficiently large,¹⁷ such that the consequences for individual consumers and society generally merit consideration.

The immediate counter to any statement that pornography is harmful is that the very conclusion of harm itself involves a moral judgment about the actions and attitudes that pervade pornography. This states the obvious, as the notion of harm (in any context) inevitably invokes a moral and ethical framework. However, concluding that pornography is harmful does not necessarily implicate the objections raised by the *Lawrence* Court. The term “morality” is laden with layers of both inherent and attributed meaning. One can read *Lawrence* as deregulating private morality—a set of norms that (1) have no apparent impact on anyone but the subjects of the particular action or (2) are not appropriately the subject of governmental regulation.¹⁸ However, that interpretation may be overly simplistic (and not necessarily what the *Lawrence* Court intended). While an individual obviously may hold whatever moral views she pleases, the actions that proceed from that framework are very appropriately a matter of public concern. It is difficult to demarcate a precise line between private morality and public concern. Arguably, society should not entirely disregard private morality, as who the individual is and what she does privately frequently impacts spheres beyond herself. Voluntarily selling one’s own body parts or entering sexual or physical servitude may seem like private matters, but many societies consider the prohibition of such exchanges to be imperative (and moral) governmental actions.¹⁹

This Article does not contest the premise that private morality is an inappropriate basis for criminal legislation. At the same time, this Article adamantly rejects the notion that morality in any form is an inappropriate basis for legislation, as much of our jurisprudence is based on what we collectively consider to be fair, just, or moral vis-à-vis our actions towards others, both individually and collectively. This Article refers to such third-party morality as “objective morality.”²⁰ As used herein, the term “objective

¹⁷ See *infra* text accompanying notes 54-56. A recent study indicates that a significant number (48%) of college-age men consume pornography on a weekly basis and that one in five consumes it almost daily. Carroll et al., *supra* note 15, at 16.

¹⁸ See Robert P. George, *Forum on Public Morality: The Concept of Public Morality*, 45 AM. J. JURIS. 17, 24 (2000).

¹⁹ See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996). Radin explores the appropriate limits of human commodification, but to set limits on what may be commodified inevitably involves moral judgments. See generally *RETHINKING COMMODIFICATION* (Martha M. Ertman & Joan C. Williams eds., 2005).

²⁰ I deliberately avoid the term “public morality” because of its connection to private morality. Christopher Wolfe defines “public morality” as

a delimiting term that excludes other kinds of morality, such as the moral principles implicit in legal prohibitions of murder, theft, rape, and libel. These latter wrongs are considered to be crimes or offenses against other individuals and their rights. . . . Public morality . . . concerns laws and public actions focused on the moral conduct and especially the stable patterns

morality” makes no metaphysical claims to universal truth. It merely incorporates the norms of appropriate conduct towards others (the potential “objects” of one’s actions) that are broadly reflected in our jurisprudence.²¹

Pornography apologists side-step discussions of objective morality, dismissing pornography critics as susceptible to social pathology or sexual repression. Pornography apologists likewise ignore pornography’s negative effects, focusing instead on a general defense of freedom of speech. In the rare instances when they acknowledge pornography’s harms, they emphasize that regulation will not free women from discrimination and abuse.²² This again states the obvious. No one, not even radical feminists, claims that regulating pornography will engender utopia.²³ Acknowledging the harms caused by the pornography industry and attempting to enforce some measure of accountability is one small arrow in a quiver full of possible policy responses to the endemic problems of violence against, and inequality of, women. Education and employment ultimately have more to do with a woman’s range of choices than what her employer, colleague, husband, boyfriend, or son may be viewing on the Internet. Nonetheless, it is important to recognize that pornography constrains a woman’s range of choices as the attitudes of its producers and consumers permeate the environment in which she conducts her personal and professional life.²⁴

of conduct (character) of individual citizens. The question of what role the political community should take in promoting norms of morality for citizens is at the heart of public morality. Christopher Wolfe, *Forum on Public Morality: Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 65 (2000). Because my argument focuses on third-party harms, “public morality” is not a particularly useful term here, although pornography’s misogynist attitudes should invoke concerns about public morality.

²¹ “Morality” has a larger meaning than conservative sexual mores. “Morality” is defined as “conformity to ideals of right human conduct,” including decency. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 807 (11th ed. 2003). *See also supra* note 7 (defining “decency”).

²² *See, e.g.*, F.M. Christensen, *Elicitation of Violence: The Evidence*, in PORNOGRAPHY: PRIVATE RIGHT OR PUBLIC MENACE? 221, 239 (Robert M. Baird & Stuart E. Rosenbaum eds., 1998) [hereinafter PORNOGRAPHY: PRIVATE RIGHT] (“It would be a serious mistake, however, to become so concerned about portrayed violence that we lose sight of the really important sources of social violence.”). Gayle Markels, counsel for the Motion Picture Association of America, similarly stated: “You could ban all motion pictures, you could close every book store and every video store tomorrow, and crime wouldn’t go away.” *The Massachusetts Hearing*, in IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 361, 394 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter IN HARM’S WAY].

²³ *See, e.g.*, DIANA E. H. RUSSELL, AGAINST PORNOGRAPHY: THE EVIDENCE OF HARM, at x (1993) (“Just as smoking is not the only cause of lung cancer, so pornography is not the only cause of rape.”).

²⁴ *See, e.g.*, Letter from Louise Armstrong to the Government Operations Committee (Dec. 8, 1983), in IN HARM’S WAY, *supra* note 22, at 242, 247 (“When you abolish slavery, give blacks the vote, provide equal employment opportunity, give them access to the courts when they are depicted in gross ways, or slurred or slandered, you do not eliminate racism. You do however publicly and societally disavow it as socially acceptable.”). Armstrong suggests that anti-pornography laws that provide relief to women would accomplish a similar purpose. *Id.* at 247-48.

Pornography apologists ignore the objective morality of pornography's harms to women, but they are quite willing to raise the specter of feminists' supposed harms to men. The least persuasive argument of pornography apologists is that pornography critiques are inherently anti-male and constitute a particularly virulent form of "male-bashing" by feminists.²⁵ This diverts attention from the specific work feminists have done in highlighting the human tragedy of the pornography industry. Fringe feminists may be anti-male, but the vast majority of radical feminists adhere to an inherently moral code of substantive justice in which the violence and misanthropy of contemporary pornography has no place.²⁶ In feminists' view, men will ultimately be more fully realized beings if they are liberated from pornography's bizarre stereotypes.²⁷ Feminists argue that men are poorly served by compulsive use of a cynical product that undermines the ability of its consumers to engage in meaningful human relationships.²⁸ Most men are not endowed with preternaturally large and hyper-active genitalia, nor do they delight in torturing and otherwise degrading women. They have emotional needs that transcend stimulation and ejaculation.²⁹ Women are not devoid of discrimination when selecting partners, purpose in life beyond satisfying the sexual predilections of the nearest male, or human integrity.³⁰ One does not have to be a radical feminist in order to appreciate the validity of their critiques of pornography.³¹

²⁵ See, e.g., Christensen, *supra* note 22, at 239 ("The feminists and traditionalists who complain only about portrayals of violence against women plainly do not care as much about the welfare of men."). Author Jackson Katz notes the irony of the term "male-bashing," as the overwhelming number of acts of physical bashing consist of men harming women. JACKSON KATZ, *THE MACHO PARADOX: WHY SOME MEN HURT WOMEN AND HOW ALL MEN CAN HELP* 106 (2006) ("[M]ale-bashing' is a classic Orwellian phrase, like 'freedom is slavery' or 'war is peace.'").

²⁶ See *infra* text accompanying notes 253-56, 280-86.

²⁷ See, e.g., Wolf, *supra* note 14 ("Mostly, when I ask about loneliness, a deep, sad silence descends on audiences of young men and young women alike. They know they are lonely together, even when conjoined, and that this imagery is a big part of that loneliness."). See also *infra* text accompanying note 285.

²⁸ See Wolf, *supra* note 14 ("So Dworkin was right that pornography is compulsive, but she was wrong in thinking it would make men more rapacious. A whole generation of men are less able to connect erotically to women—and ultimately less libidinous.").

²⁹ This is the current stereotype. Psychotherapist Rollo May describes the stereotype that existed prior to the advent of porno-violence: "An image of a type of American male is being presented—a suave, detached, self-assured bachelor, who regards the girl as a 'Playboy accessory' like items in his fashionable dress." Rollo May, *Paradoxes of Sex and Love in Modern Society*, in *THE CASE AGAINST PORNOGRAPHY* 13, 30 (David Holbrook ed., 1973).

³⁰ The term "integrity" refers not to the woman's moral decisions but to her status as a whole being, sufficient in herself to merit and claim individual human rights.

³¹ Robert Jensen identifies the following elements of the radical feminist agenda: resistance to patriarchy, heterosexism, racism, class privilege, and colonialism. Robert Jensen, *Introduction: Pornographic Dodges and Distortions*, in *PORNOGRAPHY: THE PRODUCTION AND CONSUMPTION OF INEQUALITY* 1, 3 (Gail Dines et al. eds., 1998).

The United States of America was founded upon the moral premise that all men are created equal.³² It has taken several centuries of American history for ethnic minorities (particularly those of African descent) and women to be included in this premise, but we are haltingly stumbling towards that ideal. Pornography is a notable exception to the moral objective of formal and substantive equality. Segments of the pornography industry race far beyond mere exploitation of gender and racial stereotypes, brazenly celebrating vicious (and fundamentally immoral) acts of misogyny, misanthropy, and racism.

B. *Defining Pornography*

Preconceived notions about pornography are the first barrier to meaningful discussion of the subject. The *Miller* test does not restrict erotica, nor would it restrict the milder forms of pornography (i.e., sexually explicit media that does not offend the standards of the community, as determined by a jury that is representative of that community) that many assume is the most prevalent type of material.³³ This Article specifically addresses *Miller's* ongoing validity, hence I do not argue for the suppression of non-obscenity (i.e., pornography that does not meet all of the requirements of the *Miller* test). I will nonetheless address the general harms caused by pornography, because it is important to understand that obscenity is at the far end of a continuum of products that are deeply problematic. Obscenity does not include (and this Article will not address) journalism, history books, the Bible, artistic masterpieces, or contemporary erotica.³⁴ Despite the parade of horrors routinely presented by pornography apologists, none of these items has ever been restricted under the *Miller* test. This Article likewise does not address child pornography, which the government regulates under Supreme Court jurisprudence that is related to, but nonetheless distinct from, obscenity law.³⁵ Finally, this Article addresses only visual pornogra-

³² “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³³ This assumption is probably mistaken, as much readily available pornography may qualify as obscenity. Pornography has become increasingly violent and degrading, but the majority who do not consume pornography are typically unaware of its content. See *infra* text accompanying notes 52-53. See also Gloria Cowan & Wendy Stock, *The Costs of Denial: Self-Censorship of Research on Degrading/Dehumanizing Pornography*, in THE PRICE WE PAY, *supra* note 15, at 104, 104-08.

³⁴ See NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 55-56, 258-59 (1995); *The Massachusetts Hearing*, *supra* note 22, at 395 (testimony of Gayle Markels); *The Minneapolis Hearings*, in IN HARM'S WAY, *supra* note 22, at 39, 188 (testimony of Dick Marple).

³⁵ Child pornography has a completely different status than adult porn, but this is only because of Supreme Court jurisprudence. It wasn't clear that the government could treat child porn differently until

phy that uses live subjects in its production. It is questionable whether any form of writing or non-photographic visual media would qualify as obscenity under contemporary standards.³⁶

The second barrier to discussion is reaching a common definition of pornography. Providing a factual description of the content of a pornographic product is a straightforward endeavor. The difficulty lies in the value judgments individuals and communities make about that content. D.H. Lawrence famously wrote: “What is pornography to one man is the laughter of genius to another,”³⁷ a sentiment that nicely encapsulates the gulf between feminists and Lawrence’s own notorious disregard for women.³⁸

Pornography apologists and critics typically debate apples and oranges. William F. Buckley, Jr. offers a neat summation of pornography’s various iterations:

By way of background, what sometimes is lumped in under obscenity is three categories of material. One is erotica: Literature or art intended to arouse sexual desire. A second is pornography: Pictures, writing, or other material that is sexually explicit. A third is perversity. This is the stuff of the Marquis de Sade.³⁹

When pornography apologists refer to “pornography,” they are typically referring to erotica, which can be simultaneously sexually explicit and aesthetically pleasing. In *Defending Pornography*, American Civil Liberties Union (“ACLU”) President Nadine Strossen reproduces several quite lovely examples of erotica that she claims would be suppressed by vigorous enforcement of anti-pornography laws.⁴⁰ This assertion is specious. As art

Ginsberg v. New York, 390 U.S. 629 (1968). A more recent case is *New York v. Ferber*, 458 U.S. 747 (1982).

³⁶ See, e.g., JOSEPH W. SLADE, *PORNOGRAPHY IN AMERICA: A REFERENCE HANDBOOK* 9 (2000) (“Although they have not always thought so, Americans now assume that the training essential to processing written messages arms the reader against seduction by printed erotica, whereas televised sexual messages menace viewers because processing them requires no tutoring.”).

³⁷ D.H. LAWRENCE, *Pornography and Obscenity*, in *SEX, LITERATURE, AND CENSORSHIP* 69, 69 (Harry T. Moore ed., 1953) [hereinafter *SEX, LITERATURE*].

³⁸ See THEODORE DALRYMPLE, *OUR CULTURE, WHAT’S LEFT OF IT* 55-61 (2005). Of women’s inaptitude for civic participation, Lawrence infamously wrote: “They find, so often, that instead of having laid an egg, they have laid a vote, or an empty ink-bottle, or some other absolutely unhatchable object, which means nothing to them.” D.H. LAWRENCE, *Cocksure Women and Hensure Men*, in *SEX, LITERATURE*, *supra* note 37, at 47, 49.

³⁹ William F. Buckley, Jr., *You Figure It Out*, *NAT’L REV.*, Mar. 25, 1996, at 67 (citations omitted). For a disturbing account of the academy’s embrace of Sade, despite his multiple, well-documented crimes of torture and rape, see ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 70-71, 80-88 (1989).

⁴⁰ STROSSEN, *supra* note 34, at 160 figs.1-5. It is highly unlikely that any of these images would qualify as obscenity under the multi-pronged *Miller* test, which contains an exclusion for artistic merit. This is not to say that these photographs are neither troubling nor subversive, as may be any art form.

historian Peter Webb shows by comparing and contrasting examples of erotica and pornography, “to confuse eroticism with pornography vitiates against our ability to appreciate some of art’s most rewarding experiences.”⁴¹

In contrast, when radical feminists refer to “pornography,” they are referring to the kind of porno-violence that shows women bound, gagged, slashed, burned, and raped.⁴² Professor Diana Russell reproduces graphic examples of this type of pornography in her disturbing book, *Against Pornography*.⁴³ Conflating erotica and pornography obscures the feminist critiques of the oppression inherent in the production and distribution of porno-violence.⁴⁴ Gloria Steinem suggests that one can distinguish between erotica and porno-violence based on the use of the product: “Perhaps one could simply say that erotica is about sexuality, but pornography is about power and sex-as-weapon—in the same way we have come to understand that rape is about violence, and not really about sexuality at all.”⁴⁵ Andrea Dworkin cuts to the heart of the matter, noting that the difference between erotica and pornography is the literal exploitation of sentient beings: “The pornographers actually use our bodies as their language. We are their speech Their rights of speech require our inferiority: and that we be powerless in relation to them.”⁴⁶

⁴¹ Peter Webb, *Erotic Art and Pornography*, in THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOUR 81, 90-91 figs.1-14 (Maurice Yaffe & Edward C. Nelson eds., 1982) [hereinafter INFLUENCE OF PORNOGRAPHY]. Mr. Webb defines pornography as “any material whose *sole* purpose is to excite sexual appetite with no concern for aesthetic response.” *Id.* at 81. *But see* LAURA KIPNIS, BOUND AND GAGGED: PORNOGRAPHY AND THE POLITICS OF FANTASY IN AMERICA 62-64, 81-86 (1996) (asserting that pornography is an “art form” that is “complex, coded, and loaded with meaning”).

⁴² Unless otherwise noted, the term “pornography” as used in this Article means either porno-violence, as defined by sociologists and radical feminists, or pornography that is degrading but not necessarily physically violent. (Feminists agree with this definition, but some sociologists focus strictly on pornography that includes overt physical violence.) I include degrading pornography in the term “porno-violence” because it involves psychological violence.

⁴³ RUSSELL, *supra* note 23, at 24-109.

⁴⁴ Ann Russo, *Feminists Confront Pornography’s Subordinating Practices*, in PORNOGRAPHY: THE PRODUCTION, *supra* note 31, at 9, 16.

⁴⁵ Gloria Steinem, *Erotica and Pornography: A Clear and Present Difference*, MS., Nov. 1978, at 53, 54. Peter Bogdanovich characterizes conversations about sex at the Playboy mansion as follows: “What they extolled wasn’t pleasure for both men and women, but men’s exercise of power over women.” PETER BOGDANOVICH, THE KILLING OF THE UNICORN: DOROTHY STRATTEN 1960-1980, at 20 (1984).

⁴⁶ ANDREA DWORKIN, *Against the Male Flood: Censorship, Pornography, and Equality*, in LETTERS FROM A WAR ZONE 253, 269 (1988).

II. THE SCOPE OF THE PORNOGRAPHY PROBLEM AND ITS ATTENDANT HARMS

A. *Sexualized Commerce and Compulsive Use*

Contemporary markets have commodified sexuality in order to sell products and services.⁴⁷ Sexual images are ubiquitous, customary, and nearly impossible to escape. Sex pervades the popular culture, where it sells movies, magazines, pop music, video games, and even law review articles.⁴⁸ Like any profit-driven industry, pornography producers are constantly looking for ways to increase consumption. The conventional wisdom is that the industry must entice customers with escalating fare. As pornography becomes more extreme, it also becomes more expensive.⁴⁹ Internet guru Wendy Seltzer notes the use of free product as a teaser: “People always want this stuff. Seeing some of it just whets their appetite for more. Once they get through what’s available for free, they’ll move into the paid services.”⁵⁰ The articles in *Adult Video News*, the trade journal for the pornography industry, focus on generating revenues and maximizing profits. One article advises pornographers to pay close attention to compulsive users, as “[t]hese consumers are particularly important because of the significant financial resources that they pour into the online erotica industry”⁵¹ and are therefore the most profitable consumers.

Pornography consumption has changed in ways that may not be immediately obvious to policy makers.⁵² Prior to the Internet, there was a dis-

⁴⁷ Timothy Beneke argues that the pervasive sexuality in advertising keeps men in an unconscious state of semi-arousal, resulting in a “vague, amorphously directed sexual resentment of women and resentment of sexual desire itself. Men feel sexually stimulated against their will, hence powerless, distracted, and resentful.” Timothy Beneke, *Intrusive Images and Subjectified Bodies: Notes on Visual Heterosexual Porn*, in *MEN CONFRONT PORNOGRAPHY* 168, 171 (Michael S. Kimmel ed., 1990).

⁴⁸ See Tom Reichert et al., *Cheesecake and Beefcake: No Matter How You Slice It, Sexual Explicitness in Advertising Continues to Increase*, 76 *JOURNALISM & MASS COMM. Q.* 76, 7-20 (1999) (finding a significant increase in implied intercourse and provocative dress, particularly for women, in issues of *Newsweek*, *Time*, *Cosmopolitan*, *Redbook*, and *Esquire* for the ten years between 1983 and 1993).

⁴⁹ PAMELA PAUL, *PORNIFIED: HOW PORNOGRAPHY IS TRANSFORMING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES* 55 (2005).

⁵⁰ John Schwartz, *The Pornography Industry vs. Digital Pirates*, *N.Y. TIMES*, Feb. 8, 2004, at B1.

⁵¹ Jack Morrison, *The Distracted Porn Consumer: You Never Knew Your Online Customers So Well*, *ADULT VIDEO NEWS ONLINE*, June 1, 2005, <http://www.avn.com/index.cfm?objectID=ED9F067F-1372-4B41-C479CA1C3C158C01&slid=230480>. Mr. Morrison claims that Professor Al Cooper of Stanford University gave him permission to use statistics from Professor Cooper’s research on pornography consumers, a troubling ethical situation if true, as Professor Cooper would be assisting in the commercial exploitation of addicted consumers.

⁵² See Sir Martin Roth, *Pornography and Society: A Psychiatric View*, in *INFLUENCE OF PORNOGRAPHY*, *supra* note 41, at 4 (noting that pornography has existed “in all ages and epochs,” but that contemporary pornography is obviously different, focusing on “the subjugation, humiliation, and

inction between the soft-core pornography that appeared in glossy magazines and the hard-core content offered by adult video stores. The Internet changed all that, providing immediate access to the most disturbing forms of porno-violence. According to journalist Pamela Paul, we have failed to grasp the “infinite possibilities offered by online pornography and the intoxicating effects of the anonymity, accessibility, and affordability of the Internet.”⁵³

Ironically, the Internet may prove to be a boon to the Cassandras⁵⁴ who have long decried the deleterious effects of porno-violence. When bricks and mortar constrained pornography’s excesses, society could delineate and ignore it. Now its ubiquity concerns parents, educators, employers, law-enforcement officers, and proponents of social justice. In October of 2003, Nielsen Net//Ratings reported that one in four Internet users accessed an adult website each month, probably an under-count, because Nielsen does not capture information on amateur websites.⁵⁵ The numbers shift dramatically for younger demographics. Internet tracking services report that a whopping seventy percent of eighteen- to twenty-four-year-old men visit pornographic sites in a typical month.⁵⁶ Porno-violence has gone far beyond sexual liberation to a point where reasonable people must question its power and impact.

There is no typical profile of a pornography consumer, but a growing number of clinicians recognize that compulsive use is both an avoidant and a self-destructive behavior.⁵⁷ David Marcus, a psychologist in San Jose, California, treats men with compulsive pornography habits.⁵⁸ He notes that men use pornography to release the stress they experience both at work and

torture rather than the love of women.”). See also Hans-Bernd Brosius et al., *Exploring the Social and Sexual “Reality” of Contemporary Pornography*, 30 J. SEX RES. 161, 169 (1993); Dan Brown & Jennings Bryant, *The Manifest Content of Pornography*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS* 18-19 (Dolf Zillman & Jennings Bryant eds., 1989).

⁵³ PAUL, *supra* note 49, at 8. Anonymity, accessibility, and affordability are known as the “three A’s” of pornography. In writing her book, Paul combined quantitative and qualitative research techniques. She conducted over 100 in-depth interviews (80% male, 20% female) with consumers about their pornography-viewing habits. *Id.* at 10. She also commissioned Harris Interactive to construct and conduct a nationwide poll about contemporary pornography use. *Id.* at 11.

⁵⁴ Cassandra was the daughter of King Priam and Queen Hecuba of Troy. She had the gift of prophecy and foretold the fall of Troy, but her family thought she was insane. See EDITH HAMILTON, *MYTHOLOGY* 202 (1969).

⁵⁵ PAUL, *supra* note 49, at 15.

⁵⁶ *Id.* at 15. If one assumes that men constitute approximately half the population, then 70% of men equates to 35% of all people, a statistic that is within spitting distance of the Zogby and Nielsen numbers. It is not clear whether consumers are visiting sites that are merely erotic or that purvey porno-violence.

⁵⁷ *Id.* at 11.

⁵⁸ *Id.* at 35.

at home.⁵⁹ Pornography is a world in which men retain power and control. Male pornography performers are notoriously unattractive, hence they represent “everyman” in a world populated by attractive, indiscriminating women, a world “free of exclusion, discomfort, stressful competition, and rejection.”⁶⁰ Joe Parker, a psychiatric nurse and deputy sheriff, describes another attraction for consumers: “They like the power involved in buying a human being who can be made to do almost anything.”⁶¹ While “[t]here are plenty of adults of both sexes who are willing to have sex if someone treats them well,”⁶² pornography frees men from the most minimal obligations of real-world relationships.

Pornography may not be addictive in the strictly clinical sense.⁶³ There are ongoing debates about whether particular behaviors constitute addiction, chemical dependency, or merely compulsions. Some psychologists distinguish between physical dependence and psychological addiction, but increasingly practitioners believe that certain compulsive activities (e.g., gambling, sex, pornography, shopping) release endorphins that mimic a drug-induced high.⁶⁴ For most pornography consumers, pornography is a masturbatory aid.⁶⁵ Sexual release is accompanied by a cocktail of adrena-

⁵⁹ *Id.* See also Morrison, *supra* note 51 (“In fact, the vast majority of people who see the Web as a vehicle for sexual gratification are simply looking to be distracted from the various stresses of their daily lives.”).

⁶⁰ PAUL, *supra* note 49, at 32-33. See also SLADE, *supra* note 36, at 101 (“Male performers are the second-class citizens of the video industry, valued almost exclusively for their ability to maintain erections amidst chaos on a set.”); Scott MacDonald, *Confessions of a Feminist Porn Watcher*, in MEN CONFRONT PORNOGRAPHY, *supra* note 47, at 34, 37.

⁶¹ Joe Parker, *How Prostitution Works*, in NOT FOR SALE, *supra* note 10, at 3.

⁶² *Id.* Parker is actually referring to prostitution, but prostitution and pornography production occur along a spectrum. Cf. MacDonald, *supra* note 60, at 38 (“For one thing, direct sexual experience with a conventionally attractive woman is, or seems, out of the question for many men; and yet it’s come to be one of the definers of a life worth living.”).

⁶³ See generally *The Brain Science Behind Pornography Addiction and the Effects of Addiction on Families and Communities: Hearing Before the S. Subcomm. on Sci., Tech., and Space of the S. Comm. on Commerce, Sci., and Transp.*, 108th Cong. (2004). Cf. *The Science Behind Pornography Addiction: Response to the Testimony Before the S. Subcomm. on Sci., Tech., and Space of the S. Comm. on Commerce, Sci., and Transp.*, 108th Cong. (2004) (statement of Daniel Linz, Professor, University of California, Santa Barbara), available at http://www.freespeechcoalition.com/dan_linz.htm (stating that “sexual addiction may be nothing more than learned behavior that can be unlearned”).

⁶⁴ See THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

⁶⁵ David Steinberg, *The Root of Pornography*, in MEN CONFRONT PORNOGRAPHY, *supra* note 45, at 54, 54. See also Morrison, *supra* note 51 (stating that “approximately four out five men who view online sexual material have masturbated while doing so”). Professor Frederick Schauer makes the point that pornography is a functional equivalent (albeit visual) of “rubber, plastic, or leather sex aids,” hence a product and not speech that merits First Amendment protection. Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”*: An Exercise in the Interpretation of Constitutional Language, 67 GEO. L. J. 899, 923 (1979). Martin Redish, however, disagrees with Professor Schauer, arguing that “there exists no logical basis for either excluding pornography from the first amendment or equating the

line in the veins, a testosterone surge, and a heady mix of dopamine, serotonin, and oxytocin in the brain, the neurotransmitters associated with pleasure.⁶⁶

The lay person's definition of "addiction" may be a compulsion, a behavior in which one persists, despite a rational understanding that the behavior has significant, negative effects. Pornography use may well constitute a compulsive behavior, as people persist in using it, despite its negative consequences.⁶⁷ Internet pornography addiction, or "Online Sexual Problems" ("OSP") involve "negative financial, legal, occupational, relationship, and personal repercussions" from the online sexual activity.⁶⁸ OSP can turn into "Online Sexual Compulsivity" which can "interfere with the work, social, and/or recreational dimensions of the person's life."⁶⁹ For example, some employees know their online habits are being monitored and nonetheless indulge during working hours on company equipment, risking termination.⁷⁰ Women increasingly report that pornography use by a spouse was a contributing, even primary, factor in the dissolution of their marriages and relationships.⁷¹

The various justifications for pornography consumption are not particularly convincing, nor do they seem to have any basis in serious social science investigations. Pornography apologists assert that pornography is merely a form of harmless entertainment.⁷² Consumers justify their behavior with convoluted narratives of evolutionary psychology: biological imperatives prompt them to spread their seed, hence they need variety and

viewing of pornography with purely physical means of sexual gratification." MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 75 (1984).

⁶⁶ PAUL, *supra* note 49, at 75.

⁶⁷ See *The Minneapolis Hearings*, *supra* note 34, at 172 (testimony of Charlotte Kasl) ("It has been my experience that pornography is an integral part of sexual addiction And as these are addictions, they follow a course of escalation.").

⁶⁸ SEX AND THE INTERNET: A GUIDEBOOK FOR CLINICIANS 3 (Al Cooper ed., 2002).

⁶⁹ *Id.* at 4. See also PAUL, *supra* note 49, at 166-68, 213-36 (discussing the negative impact internet pornography has had on the lives of those addicted).

⁷⁰ In Kentucky, employees of the state's transportation department used 212 computers to view pornography during a twenty-four day period. Associated Press, *State Ousts 23 Employees for Using Computers to Look at Porn*, WHAS11.COM, May 22, 2004, <http://www.whas11.com/topstories/stories/052204cckkWHAS11porn.1ea2fb6bb.html>. The Virginia Department of Transportation fired fifteen employees who accessed pornography for two or more hours daily. Peter Bacque, *VDOT Computer Abuse Reported*, RICHMOND TIMES DISPATCH, Feb. 4, 2004, at B1. The University of Texas Health Science Center fired four employees after learning they were visiting teen porn sites and then seeing child patients. Associated Press, *FBI Reviewing Claims of Porn Web Site Viewing at UTHSC*, USATODAY.COM, Feb. 3, 2004, http://www.usatoday.com/tech/news/2004-02-03-texas-clinic-problem_x.htm. A 2004 survey conducted by the Employment Law Alliance found that 25% of employees visit pornographic websites on work computers during office hours. PAUL, *supra* note 49, at 29-30.

⁷¹ PAUL, *supra* note 49, at 166.

⁷² *Id.* at 72.

constant stimulation.⁷³ Heavy consumers typically deny any connection between the objectification of women in porno-violence and their attitudes towards real women.⁷⁴ Both apologists and consumers claim porno-violence has a cathartic effect. By slaking their taste for violence in “fantasy” situations (that nonetheless typically use real women in their production), consumers of porno-violence will not perpetrate further violence on other victims.⁷⁵ Most scholars discount the catharsis theory of violence, but even those who accept it express concerns about its impact on the consumer’s ability to relate to real people. Pornography is a shortcut to sexual release, devoid of the emotional commitment necessary to engage a real-life partner.⁷⁶

Most consumers probably do not transfer the overt violence and degradation they embrace in pornography to real-life situations, but some clearly do. Sociologists, psychologists, and criminologists who work in the field have long reported strong correlations between pornography and sex crimes.⁷⁷ They adamantly contradict the claims of neutralists that pornography is cathartic and that it has no negative impact. During civil rights hear-

⁷³ Alfred Kinsey’s theories of male sexuality support this argument: “There seems to be no question but that the human male would be promiscuous in his choice of sexual partners throughout the whole of his life if there were no social restrictions . . . this is the history of unrestrained human males everywhere.” ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 589 (1948). Kinsey chastises women for attempting to restrain male sexuality: “It is obviously impossible for a majority of these women to understand the problem that the boy faces in being constantly aroused and regularly involved with his normal biologic reactions.” *Id.* at 223. See also RANDY THORNHILL & CRAIG T. PALMER, *A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION* (2001). Cf. David Mura, *A Male Grief: Notes on Pornography and Addiction*, in *MEN CONFRONT PORNOGRAPHY*, *supra* note 47, at 123, 138 (“Given the mutability of human culture and society, calling something ‘natural’ is a buzz word: a command is being given not to think.”). John Macmurray, a professor of moral philosophy, attributes this argument to a hyper-sexualized culture that causes us to “greatly overestimate the strength and violence of natural sexuality.” John Macmurray, *The Virtue of Chastity*, in *THE CASE AGAINST PORNOGRAPHY*, *supra* note 29, at 68, 80.

⁷⁴ See, e.g., PAUL, *supra* note 49, at 79 (discussing an interview with “Zach,” a young unemployed Web site developer who believes pornography has no effect on the way he views women in real life).

⁷⁵ Cf. *The Minneapolis Hearings*, *supra* note 34, at 169 (testimony of Nancy Steele) (“[T]he net result showed the opposite of what I had predicted, and was [in]consistent with all the other literature and research I had read for my dissertation, that the angry fantasies increased anger in the offenders.” (second alteration in original)).

⁷⁶ See *supra* text accompanying notes 14, 28. Rollo May theorizes that emotional apathy, the detachment inherent in most pornography, may lead to violence as men seek some form of connection. Rollo May, *Sex in a Schizoid Society*, in *THE CASE AGAINST PORNOGRAPHY*, *supra* note 29, at 137, 140 (“To inflict pain and torture at least proves that one can affect somebody.”).

⁷⁷ See, e.g., *The Minneapolis Hearings*, *supra* note 34, at 70 (testimony of Dr. Pauline Bart) (discussing the high correlation between sales of sex magazines and reported rapes).

ings conducted in Minneapolis in 1983,⁷⁸ Dr. Pauline Bart made the following observation:

There were two [reports] that came out the same time, one on violence and one on pornography. The one on violence was based on ordinary learning theory, which is a substantial theoretical perspective inside psychology. And the theory is, the more you see, the more you do. The one on pornography, however, came out with a different explanation, the catharsis model, which was, the more you see, the less you do [T]here is absolutely no data for the last analysis.⁷⁹

Psychologist Gary Kaplan offered further perspective from his ten years of experience working with sex offenders: “[T]here is absolutely no doubt in my mind that masturbation to deviant sexual fantasies reinforces and increases the probability that that behavior will recur, as opposed to decreasing, as it would [if it] became an outlet.”⁸⁰ During similar hearings conducted in Indianapolis in 1984, a local prosecutor offered the following statement from a counselor who worked with victimized women: “It would seem that the need to be violent, to get retribution for whatever pain and anguish is going on in these men’s lives, is often enhanced by pornographic literature.”⁸¹

B. *The Quantitative Analysis Offered by Social Science*

1. The Validity of Social Science Research

Pornography critics have offered volumes of qualitative analysis and anecdotal evidence regarding pornography’s harmful effects. Both the pornography industry and pornography apologists consistently deny the validity of such analysis and evidence. Reasonable people may disagree, but the

⁷⁸ For an additional description of the civil rights hearings, see *infra* text accompanying notes 185-88.

⁷⁹ *Id.* at 74. Dr. Bart is referring to the report of the 1970 Commission. See *infra* note 92 and accompanying text. In an interview with MacKinnon, Dr. Edward Donnerstein stated: “I think the whole idea of catharsis really has to be put aside.” Telephone Interview of Dr. Edward Donnerstein by Catherine A. MacKinnon (Jan. 10, 1984), in *IN HARM’S WAY*, *supra* 22, at 290, 300 [hereinafter Interview of Dr. Edward Donnerstein]. He categorizes it as a dated, theoretical notion with absolutely no empirical support. *Id.* Dr. Bart may also be referring to the catharsis theory of media violence put forward by S. Feshbach and R. Singer. See SEYMOUR FESHBACH & ROBERT D. SINGER, *TELEVISION AND AGGRESSION* 39, 47 (1971). Subsequent research contradicts Feshbach and Singer, indicating that exposure to violent media predisposes viewers to subsequent aggression. Edward C. Nelson, *Pornography and Sexual Aggression*, in *INFLUENCE OF PORNOGRAPHY*, *supra* note 41, at 171, 191.

⁸⁰ *The Minneapolis Hearings*, *supra* note 34, at 167 (testimony of Gary Kaplan).

⁸¹ *The Indianapolis Hearing*, in *IN HARM’S WAY*, *supra* note 22, at 269, 281. See also DINES ET AL., *supra* note 31, at 121-33 (comparing and contrasting the pornography use of men who commit sex crimes and those who do not).

depth of disagreement over the nature and effects of pornography goes far beyond rational differences in interpretation. Instead, the disagreement reflects an extreme divergence between the world views of pornography apologists and critics. Hans Eysenck described such a phenomenon when he restated Thouless' 1935 principle of certainty in 1954:

When, in a group of persons, there are influences acting both in the direction of acceptance and rejection of the belief, the result is not to make the majority adopt a lower degree of conviction, but to make some hold the belief with a high degree of conviction, while others reject it also with a high degree of conviction.⁸²

This phenomenon is also known as the "Simmelweis Reflex," in which one rejects new information without further thought, inspection, or experimentation.⁸³ One overcomes these biases in either direction only with the passage of time and the gradual accumulation of human experience and interpretation. With the prevalence of Internet pornography (and particularly given concerns about children's access to it), public opinion may be shifting against unfettered access to pornography.⁸⁴ Professor Neil Boyd blames radical feminist chicanery for increasing public acceptance of the premise that pornography harms both its consumers and women.⁸⁵ However, radical feminism does not appear to have popular appeal or financial

⁸² H.J. Eysenck, *Afterword: Sex, Violence, and the Media: Where Do We Stand Now?*, in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 16, at 305, 305-06. See also Edward C. Nelson, *Introduction* to INFLUENCE OF PORNOGRAPHY, *supra* note 41, at ii, ix-xi. Bertrand Russell famously stated:

If a man is offered a fact which goes against his instincts, he will scrutinize it closely, and unless the evidence is overwhelming, he will refuse to believe it. If, on the other hand, he is offered something which affords a reason for acting in accordance to his instincts, he will accept it even on the slenderest evidence.

BERTRAND RUSSELL, PROPOSED ROADS TO FREEDOM 147 (1919).

⁸³ In 1847, Dr. Ignác P. Semmelweis advised his Viennese students to wash their hands after assisting in childbirth in order to prevent the spread of puerperal fever, which killed up to 35% of women who delivered their babies in hospitals. Because his hunch preceded the germ theory of disease (and because doctors hesitated to acknowledge their own role in spreading disease), other Viennese doctors refused to implement his protocols for washing hands and instruments. SHERWIN B. NULAND, *THE DOCTORS' PLAGUE: GERMS, CHILDBED FEVER, AND THE STRANGE STORY OF IGNÁC SEMMELWEIS* (2003). Puerperal fever has particular resonance for feminists, as it killed Mary Wollstonecraft in 1797. CLAIRE TOMALIN, *THE LIFE AND DEATH OF MARY WOLLSTONECRAFT* 281 (1992).

⁸⁴ See *supra* text accompanying note 69.

⁸⁵ NEIL BOYD, *BIG SISTER: HOW EXTREME FEMINISM HAS BETRAYED THE FIGHT FOR SEXUAL EQUALITY* 17, 21-25 (2004). Boyd claims that studies show that "there is no relationship between viewing pornography and committing sex offenses." *Id.* at 29. Boyd simplifies scientific results to the point of misstatement. There are no studies that can definitively demonstrate the connection between pornography consumption and sex offenses, because ethical considerations prohibit inciting anyone to sexual violence. See *infra* text accompanying notes 123-30.

clout.⁸⁶ It seems equally likely that the evidence of the harms caused by porno-violence has become sufficiently compelling to shift public opinion.

A key aspect of the *Miller* doctrine (as set forth in *Paris Adult Theater I*, its companion case) is that the states do not need to demonstrate harm in order to restrict obscenity.⁸⁷ This assertion putatively places *Miller* in the realm of private morality, thus making it suspect in a post-*Lawrence* world. However, the *Miller* Court did not base its decision on private morality. Rather, it stated that governments could reasonably conclude that pornography harms the fundamental human relationships on which civil society depends, a concern that implicates both public and objective morality.⁸⁸ The *Miller* Court issued its decision a mere three years after a federal commission concluded that pornography consumption caused no discernible harm and well before the accumulation of a body of social science research that refuted that conclusion.⁸⁹ The Court may well have believed that pornography had negative secondary effects, but it lacked the social science to support such a conclusion. Rather than eviscerating the states' already limited ability to regulate obscenity, the Court chose to avoid any requirement that the states provide compelling evidence of pornography's third-party harms.

One ought to be reticent about enacting legislation without a compelling reason, especially when the First Amendment is implicated. However, the work of the past three-and-a-half decades provides ample evidence of the harmful effects of porno-violence. Recent meta-analyses have reviewed pornography research conducted through scores of studies on thousands of subjects.⁹⁰ Nonetheless, the pornography industry has successfully framed the pornography debate in terms of the First Amendment and sexual liberation, thus pre-empting discussion of the sociological reasons for regulating porno-violence.⁹¹

Prior to congressional authorization of the Presidential Commission on Obscenity and Pornography in 1967 (the "1970 Commission"),⁹² there was

⁸⁶ See *infra* text accompanying note 221.

⁸⁷ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-61 (1973) ("Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could reasonably determine that such connection does or might exist.").

⁸⁸ *Miller v. California*, 413 U.S. 15, 25-26 (1973).

⁸⁹ See *infra* text accompanying note 93.

⁹⁰ See, e.g., Mike Allen et al., *A Meta-Analysis Summarizing the Effects of Pornography II: Aggression After Exposure*, 22 HUM. COMM. RES. 258 (1995) (reviewing 30 studies conducted prior to 1984 with a total sample of 2,040 people); Elizabeth Oddone-Paolucci et al., *A Meta-Analysis of the Published Research on the Effects of Pornography*, in *THE CHANGING FAMILY AND CHILD DEVELOPMENT* 48 (Claudio Violato et al. eds., 2000) (reviewing 46 studies published in various academic journals with a total sample of 12,323 people).

⁹¹ See THOMAS C. MACKAY, *PORNOGRAPHY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS* 83, 91 (2002).

⁹² The Commission issued its report in 1970, hence I refer to it by that year. REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970) [hereinafter REPORT ON OBSCENITY].

very little systematic research on the nature and effects of pornography. Social scientists have criticized both the research methodology employed by the 1970 Commission and its conclusion that pornography's impact was either neutral or positive and that all obscenity laws should be abolished.⁹³ The remarkable advances in video technology since 1967 are enough to render obsolete the 1970 Commission's report.⁹⁴ However, the most cogent criticism of the 1970 Commission is that it examined erotica that has no relevance to the porno-violence churned out by the contemporary pornography industry. Its studies "almost without exception did not include stimuli that involved rape or other forms of coercive sexuality."⁹⁵ Eysenck notes that the 1970 Commission was not staffed by experts and that strong commercial interests typically exclude scientists from serving on such commissions.⁹⁶ This results in the "allegation (repeatedly found in the reports of the Williams committee and the Commission on Obscenity and Pornography) that experimental laboratory studies are in some way untrustworthy and unlikely to give correct information on human reactions."⁹⁷ Eysenck further notes that social science critics provide no evidence for this allegation, merely pronouncing it "as a self-evident truth."⁹⁸ Nonetheless, the 1970 Commission served an important purpose by initiating the quantitative and qualitative methods social scientists use to analyze and critique pornography.⁹⁹ Moreover, it galvanized the research of social scientists who funda-

⁹³ Barry S. Sapolsky, *Arousal, Affect, and the Aggression-Moderating Effect of Erotica*, in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 16, at 85, 85-86. See also MACKAY, *supra* note 91, at 66 (noting that the 1970 Commission's limitations rendered it "a historical relic of 1960s liberalism"). Upon reviewing the research and literature that responded to the 1970 Commission's Report, Australian psychologist John Court concluded: "[T]here is now a strong case for postulating a positive enhancement of sexually aggressive behavior after exposure to porno-violence without adequate evidence for a decline in such behavior. The possibility of a negative correlation was widely held during the 1970s but now lacks experimental support." Court, *supra* note 16, at 144.

⁹⁴ See ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 225-26 (1986) [hereinafter FINAL REPORT].

⁹⁵ Neil M. Malamuth, *Aggression Against Women: Cultural and Individual Causes*, in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 16, at 19, 30. Malamuth notes that widespread violence in pornography did not emerge until the 1970s, hence the 1970 Commission cannot be faulted for failing to examine it. *Id.* Barry Sapolsky seconds this view: "In the years since the commission report research was conducted, there has been an increase in sexually violent themes in the mass media, in particular, portrayals of sadomasochism and rape." Sapolsky, *supra* note 93, at 95.

⁹⁶ Eysenck, *supra* note 82, at 306.

⁹⁷ *Id.* at 306-07. The Williams committee is named for Professor Sir Bernard Williams, who chaired Great Britain's Committee on Obscenity and Film Censorship. *Professor Sir Bernard Williams*, TELEGRAPH.CO.UK., June 13, 2006, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/06/14/db1401.xml&page=5>. The committee's report, released in 1979, concluded that "the role of pornography in influencing society is not very important . . ." *Id.* Mrs. Thatcher shelved the report, but it greatly influenced British law. *Id.*

⁹⁸ Eysenck, *supra* note 82, at 308.

⁹⁹ See FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 62-64 (1976).

mentally disagreed with the methodology and findings of the nascent pornography research on which the 1970 Commission based its conclusions.¹⁰⁰

2. The Specific Findings of Social Science Investigations into Porno-Violence

Many social scientists have raised the moral and ethical questions invoked by the observable effects of pornography consumption. There are hundreds of peer-reviewed, social science studies published in reputable academic journals that outline the negative impacts of pornography on attitudes and behavior. Slogging through these studies is impractical for non-experts, but some social scientists have composed useful reviews of their own and others' literature. Neil M. Malamuth and Edward Donnerstein compiled a number of these reviews in *Pornography and Sexual Aggression*. The contributors are a veritable "who's who" in sociology and psychology. Their studies are somewhat dated, but their conclusions remain valid and are the foundation of much of the work that has followed.¹⁰¹ These social scientists reached largely consistent conclusions—an important point, because they conducted their research studies independently of one another. Sexually explicit media results in sexual arousal, as determined both by physiological measurements and self-reporting.¹⁰² Social scientists have demonstrated that ongoing exposure to various media causes viewers to model subsequent behavior on what they view. Some are skeptical that "sexual behavior constitutes a unique exception to this pattern of findings."¹⁰³

Neil Malamuth's research focuses on the connection between violent pornography and proclivity to rape by examining pornography's influence on men's acceptance of rape myths. Malamuth and his colleagues measured proclivity to rape among college-age males who "could be assured of not being caught and punished."¹⁰⁴ Thirty-five percent of such males reported some likelihood to rape ("LR"), while twenty percent reported a strong LR under such circumstances.¹⁰⁵ Men with high LR ratings reported use of force in past sexual situations and a likelihood of repeating such force in the

¹⁰⁰ Neil M. Malamuth & Edward Donnerstein, *Preface* to PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 16, at xv, xvi-xvii. *See also* Donn Byrne & Kathryn Kelley, *Introduction: Pornography and Sex Research*, in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 16, at 1.

¹⁰¹ *See The Minneapolis Hearings*, *supra* note 34, at 80 (testimony of Richard Alberta).

¹⁰² Byrne & Kelley, *supra* note 100, at 4.

¹⁰³ *Id.* at 5-6.

¹⁰⁴ Malamuth, *supra* note 95, at 22. Malamuth deliberately studied college students, because they are more able to commit rapes that go either unreported or undetected, hence they are a more accurate research pool in terms of determining attitudes toward a "risk-free" rape. *Id.*

¹⁰⁵ *Id.*

future.¹⁰⁶ Potential rapists “are more likely than other males (1) to hold callous attitudes about rape and to believe in rape myths and (2) to show relatively high levels of sexual arousal to depictions of rape.” Therefore, it matters whether or not pornography increases a man’s acceptance of rape myths.¹⁰⁷ High LR scores also correlate with (1) “identification with rapists,” (2) “perceptions that rape victims cause such assaults and derive pleasure from them,” and (3) the belief that women “secretly desire and enjoy such victimization.”¹⁰⁸ Men with high LR scores are more aroused by depictions of rape than by scenes of consensual sex.¹⁰⁹ In conducting laboratory experiments to measure men’s aggression against women, Malamuth found that rape myth acceptance and acceptance of interpersonal violence were the most accurate predictors of whether or not men would aggress against women.¹¹⁰ Finally, he notes that aggressive men not only accept “rape myths to a relatively high degree but may also be particularly susceptible to the influence of media depictions of such myths.”¹¹¹ Malamuth expresses deep concern about the fusion of sexuality and aggression. Even if men understand the rape is fiction (or “fantasy”), cognitive psychology predicts ongoing exposure to such material will inevitably shape their perception of women and the necessary conditions for men’s own sexual arousal.¹¹²

Edward Donnerstein’s pornography research focuses on all forms of physical violence, not just rape. Nonetheless, his findings are consistent with those of Malamuth. For subjects who are already angry, pornography increases their aggression, as measured by the subjects’ administration of electric shocks to other study participants.¹¹³ Levels of aggression correlated positively to cumulative exposure to pornography over time. Sexually explicit material that did not depict aggression or unequal power relationships (i.e., “erotica” according to Donnerstein) did not increase male-on-

¹⁰⁶ *Id.* at 27.

¹⁰⁷ *Id.* at 23.

¹⁰⁸ *Id.* at 24.

¹⁰⁹ Malamuth, *supra* note 95, at 25.

¹¹⁰ *Id.* at 37-38. Aggression includes a range of behaviors, not just a consummated rape. Malamuth notes men’s tendency to punish women (but not other men) in laboratory settings involving violent pornography. *Id.* at 27.

¹¹¹ *Id.* at 40. Such depictions are ubiquitous. According to Edward Donnerstein:

[W]hen we had to do research on negative reactions of women to being raped in films, we had to create that film, too, because we couldn’t find a standard ten-minute loop in an adult bookstore which didn’t show a woman being sexually attacked or assaulted without her being turned on.

Interview of Dr. Edward Donnerstein, *supra* note 79, at 306.

¹¹² Malamuth, *supra* note 95, at 31-32.

¹¹³ Edward Donnerstein, *Pornography: Its Effect on Violence Against Women*, MALAMUTH & DONNERSTEIN, *supra* note 16, at 53, 67.

female aggression.¹¹⁴ Donnerstein concludes that “there is a direct causal relationship between exposure to aggressive pornography and violence against women.”¹¹⁵ He notes that:

Results from both parts of this study indicate that aggressive pornography can directly influence aggression against women. While depictions that emphasized the pain and suffering of the victim only affected male subjects who were predisposed toward aggression, the more common story line in aggressive pornography of a willing and positive-reacting victim influenced all subjects.¹¹⁶

Donnerstein also found that exposure to pornography changed men’s attitudes about women who are the victims of aggression. Such attitudinal shifts have less immediate impact than rape or battery, but over time they profoundly affect women’s access to justice and other forms of equality. After viewing five porno-violent films over the course of one week:

[S]ubjects became less bothered by this type of material, felt less anxious and depressed, and began to change their perceptions of the violence in the films by the end of the week period. Subjects saw less overall violence, less violence against women, fewer scenes of rape, and less graphic violence at the end of the week. More important, when subjects were asked to evaluate a rape victim after viewing a reenactment of a rape trial, they saw less injury, more responsibility, and more worthlessness on the part of the victim in comparison to a control group who had not seen the five films.¹¹⁷

Professor Barry Sapolsky challenged the 1970 Commission’s conclusion that pornography has a beneficial effect on its consumers because they find it soothing. In teasing out the subtleties of male responses to erotic stimuli, he reached some interesting conclusions. Non-arousing, positive erotica did indeed reduce men’s aggressive behavior.¹¹⁸ However, such erotica did not reduce their *retaliatory* behavior, possibly because they

¹¹⁴ *Id.* at 61-62. It is important to remember that “erotica” includes much of what falls under an “R” rating for movies. In 1984, Donnerstein and Daniel Linz found that massive exposure to “R” movies with similar combinations of violence and sex can produce similarly negative results. *Id.* at 71. A little-known fact is that Donnerstein and his colleagues had to *create* nonviolent erotica to use in their research, because they could not find commercial pornographic material that was sexually explicit but that did not show power disparities between males and females. Interview of Dr. Edward Donnerstein, *supra* note 79, at 291-92, 299.

¹¹⁵ Donnerstein, *supra* note 113, at 78.

¹¹⁶ *Id.* at 69. Dolf Zillman and Jennings Bryant found that pornography’s depiction of women as “eager to accommodate seemingly any and every sexual request” convinced even their female subjects “of the hyper-promiscuous, accepting nature of women.” Dolf Zillman & Jennings Bryant, *Effects of Massive Exposure to Pornography*, in *PORNOGRAPHY AND SEXUAL AGGRESSION*, *supra* note 16, at 115, 134. Women likewise came to view rape as a lesser offense and recommended shorter prison sentences for rapists. *Id.* at 132-33.

¹¹⁷ Donnerstein, *supra* note 113, at 72.

¹¹⁸ Sapolsky, *supra* note 93, at 89.

judged the erotica to be boring.¹¹⁹ Sapolsky also found that overexposure to pornography leads to boredom, not with sexually explicit materials in general (for which humans have an apparently insatiable appetite) but with pornography in its milder or positive forms. As consumers become desensitized, they demand “novel” (i.e., more graphic and violent) representations to achieve a similarly satisfactory state of arousal:

An immunity to the shocking and disturbing qualities of certain erotic content can then lead the user to search for newer, even stronger materials. The pornography industry is well aware of the potential for dulling the consumer’s arousal and affective responses and, as a result, provides ever more novel erotic stimuli. The habituation to tame sex themes may, in part, explain the current increase in aggressive pornography (e.g., rape and sadomasochism).¹²⁰

Dolf Zillman and Jennings Bryant challenged the 1970 Commission’s failure to conduct long-term studies involving massive exposure to pornography. They conducted such a study themselves and found the same desensitization effects described above.¹²¹ As consumers became desensitized, their immediate aggression decreases, presumably because they no longer find the pornography to be stimulating. Before pornography apologists pounce on this conclusion, it is important to note that that Zillman’s and Bryant’s conclusions relate solely to pornography that consumers now find boring. They have no bearing on the increasingly violent or aggressive pornography that such consumers are likely to procure. Moreover, such massive exposure still leads to a “loss of respect” from men to women and a considerable increase in “sex callousness.”¹²²

Pornography apologists frequently reference the work of Berl Kutchinsky, which figured prominently in the conclusions of the 1970 Commission. Kutchinsky famously reported that the liberalization of pornography laws in Copenhagen corresponded with a decrease in reported sex crimes.¹²³ After conducting an extensive analysis of international sex crimes statistics, Professor John H. Court took issue with Kutchinsky’s study, noting that pornography was not prevalent in Denmark at the time.¹²⁴ Kutchinsky himself

¹¹⁹ *Id.* at 89-92.

¹²⁰ *Id.* at 100. For another detailed discussion of desensitization, see Zillman & Bryant, *supra* note 116, at 118-20. See also Michael Barron & Michael S. Kimmel, *Sexual Violence in Three Pornographic Media: Toward a Sociological Explanation*, 37 J. SEX RES. 161, 165 (2000) (“The more pornography is consumed at one level, the less arousing this material becomes, as the consumer becomes used to—satiated with—the material. This satiation leads the consumer to seek out newer, more explicit, and more violent forms of sexual material that will again arouse him/her.”).

¹²¹ They termed this phenomenon “habituation” and found that the effects were “nontransitory and potentially long lasting.” Zillman & Bryant, *supra* note 116, at 129.

¹²² *Id.* at 134.

¹²³ Berl Kutchinsky, *Towards an Exploration of the Decrease in Registered Sex Crimes in Copenhagen*, in 7 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 263, 296 (1971).

¹²⁴ See Court, *supra* note 16, at 149.

admitted that the increasing acceptance of pornography and the concomitant liberalization of sexual attitudes may have depressed the reporting of minor sex crimes, such as exhibitionism.¹²⁵ Once Court separated the statistics on these minor crimes from more aggressive sexual crimes (such as rape and attempted rape) he found that Denmark experienced no decrease in serious sex crimes during the period that Kutchinsky studied.¹²⁶ Because the trends of major and minor sex offenses do not correlate, combining the two provides misleading data.¹²⁷ Court pleads for nuanced interpretation of sex crime data, insisting there is no such thing as a simple causal link between the increased dissemination of pornography and rising sex crime statistics.¹²⁸ Nonetheless, Court concludes that areas that regulate porno-violence have not experienced similar increases in sex crimes, and rape reports have increased in areas that have liberalized their pornography laws.¹²⁹

Law professor Anthony D'Amato has recently suggested that freely available pornography has caused recent declines in reported rape.¹³⁰ This is precisely the facile correlation-as-causation that responsible social scientists decry, including those who note positive correlations between pornography and crime. Also, some criminologists and sociologists believe the decline in rape statistics results from increased incarceration rates, under-reporting by victims themselves, or under-reporting by police departments anxious to improve their numbers.¹³¹

3. The Attorney General's Commission on Pornography

In 1985, in response to both new social science research and the increasingly aggressive tactics of the pornography industry, the federal government revisited the pornography issue. Attorney General William French

¹²⁵ *See id.* at 152.

¹²⁶ *Id.* at 147.

¹²⁷ *Id.* at 148.

¹²⁸ *Id.* at 167-68.

¹²⁹ *Id.* at 157-59. Court rejects the claim that increased rape statistics merely reflect increased reporting, as the level of effective prosecution falls when the level of offenses are high, thus leading to decreased incentive to report such crimes. Court, *supra* note 16, at 153. Barron and Strauss note a similar correlation between circulation of sex magazines and the incidence of rape. Larry Barron and Murray A. Strauss, *Sexual Stratification, Pornography, and Rape in the United States*, in *PORNOGRAPHY AND SEXUAL AGGRESSION*, *supra* note 16, at 185, 206-07.

¹³⁰ Anthony D'Amato, *Porn Up, Rape Down* (Northwestern Law Sch. Pub. Law, Research Paper No. 913013, 2006), available at <http://ssrn.com/abstract=913013> (finding a correlation between a decrease in rape by 85% during the past 25 years while access to pornography has expanded, suggesting pornography has reduced social violence).

¹³¹ *See* Katz, *supra* note 25, at 156 (discussing FBI statistics on the massive under-reporting of rape); Nelson, *supra* note 79, at 224 (discussing massive under-reporting and under-prosecution of rape crimes in England); James D. Ponzzi, *Compstat or Compscam?*, AM. POLICE BEAT, May 2005 (discussing the underreporting of major crimes by police departments in several large U.S. cities).

Smith convened the Attorney General's Commission on Pornography (the "1986 Commission") on February 22, 1985.¹³² The Commission was bipartisan, and the Commissioners were prominent professionals in their respective fields, including psychology, medicine, law, journalism, and social work. Due to budgetary and time constraints, the 1986 Commission did not sponsor new research.¹³³ However, in contrast to the 1970 Commission, which did not hear from any pornography victims, the 1986 Commission took extensive witness testimony.¹³⁴ It also reviewed the significant body of social science research generated subsequent to the 1970 Commission. Each Commissioner published a personal statement, contained at the beginning of the Final Report. The Commissioners expressed many points of disagreement, particularly about the long-term effects of erotica.¹³⁵ However, the Commissioners unanimously agreed that porno-violence harms women and that the government should take appropriate legal and regulatory measures to minimize such harm.¹³⁶ The Final Report was exhaustive, nuanced, and circumspect in its final conclusions.¹³⁷

Pornography apologists disparage the 1986 Commission and completely discount its conclusions. This is due, in large part, to a highly effective public relations campaign funded by the pornography industry. Upon release of the Final Report, *Playboy* and *Penthouse*, fronted by the "Media Coalition," immediately hired the prominent Washington, D.C. public relations firm of Gray and Company to discredit the 1986 Commission. Robert Gray, head of the company, drafted the following proposal:

Quiet efforts should be undertaken to persuade the Attorney General, the White House, and the leaders of both political parties that the forthcoming report of work of the Commission is so flawed, so controversial, so contested and so biased that they should shy away from publicly endorsing the document. The more doubts that can be created about the objectivity and validity of the Commission's findings and recommendations, the more difficult it will be for anti-pornography crusaders to use the reports as an effective tool for achieving their objectives.¹³⁸

¹³² FINAL REPORT, *supra* note 94, at 215; IN HARM'S WAY, *supra* note 22, at 14. Scholars typically refer to the 1986 Commission as the "Meese Commission," but Attorney General Meese did not convene the 1986 Commission, and he actively distanced himself from its conclusions. See *infra* text accompanying notes 139-140.

¹³³ FINAL REPORT, *supra* note 94, at 218. The 1970 Commission had a budget sixteen times larger than that of the 1986 Commission and an additional year in which to complete its work. *Id.* at 225.

¹³⁴ See *id.* at 767-72 (discussing the testimony of thirty witnesses who believed they were harmed by pornography).

¹³⁵ See *id.* at 27-212.

¹³⁶ *Id.* at 322-351.

¹³⁷ It did recommend, however, that the government take decisive action in multiple, specified areas. See *id.* at 433-58.

¹³⁸ SUSAN B. TRENTO, THE POWER HOUSE: ROBERT KEITH GRAY AND THE SELLING OF ACCESS AND INFLUENCE IN WASHINGTON 197 (1992). See also IN HARM'S WAY, *supra* note 22, at 21. The new

He further recommended use of “advertorials,” planting spokespersons on radio and television, and a series of news conferences. According to company insiders, Gray personally persuaded the new Attorney General, Edwin Meese, to distance himself from the report.¹³⁹

In an ironic turn of events, the 1986 Commission became known as the “Meese Commission.”¹⁴⁰ Meese had to address ongoing questions about his involvement in the Iran-Contra Affair and various questionable business transactions. By associating the 1986 Commission’s work with his name, the pornography industry further tainted the Commission’s reputation. According to another Gray and Company executive:

We attempted to call into question the motives, motivations, the values of the people on the Commission, raise questions about their own backgrounds. Tried to shoot holes in the report, itself, and in the hearing process.¹⁴¹

Penthouse even published its own refutation of the Final Report. The public relations campaign and various rebuttals were very effective. Noted First Amendment scholar Frederick Schauer drafted the Final Report, but critics who have likely never opened its pages nonetheless dismiss it as the insane ruminations of anti-pornography conspiracy theorists.¹⁴²

After the controversy surrounding the 1986 Commission’s Final Report, researchers could no longer obtain federal or private grant money for research that would confirm the harms caused by pornography.¹⁴³ The social scientists who continued to investigate pornography’s harms did so only in the context of overt violence, ignoring the effects of sexually ex-

account was quite lucrative for Gray and Company, bringing in revenues between \$50,000 and \$75,000 per month. TRENTO, *supra*, at 197. Robert Gray is a controversial figure, known for playing both sides of the political fence. *Id.* at 199.

¹³⁹ TRENTO, *supra* note 138, at 198.

¹⁴⁰ STROSSEN, *supra* note 34, at 157.

¹⁴¹ TRENTO, *supra* note 138, at 198. Kipnis has questioned the motives of the members of the Meese Commission specifically and pornography critics generally: “[W]aging a fight against pornography means, in effect, spending most of your time looking at it and talking about it, while projecting the dirty interest onto others.” KIPNIS, *supra* note 41, at 149. Strossen similarly dismisses feminist pornography critics: “Probably very few men have examined the volume of violent, misogynistic pornography with the attention that Dworkin, MacKinnon, and other pro-censorship advocates have lavished upon it.” STROSSEN, *supra* note 34, at 155.

¹⁴² Communications Professor William A. Linsley fulminates that the 1986 Commission gave “equal credence to fundamentalist preachers, anti-porn zealots, and porn victims” as to scientific research. Linsley, *supra* note 13, at 183. Frederick S. Lane inaccurately claims that Meese carefully selected the 1986 Commission witnesses and dismisses the Final Report as “outrageous” and “preordained.” FREDERICK S. LANE III, *OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE* 107 (2000).

¹⁴³ Cowan & Stock, *supra* note 166, at 104.

PLICIT material that degrades and dehumanizes women.¹⁴⁴ Scientists divided into two camps: those who focused on violence as the primary cause of harm from pornography (Edward Donnerstein, Daniel Linz, and Steven Penrod), and those who focused on harmful attitudes about women as sexually insatiable and hyper-erotic (Dolf Zillman, Jennings Bryant, and James Weaver).¹⁴⁵

4. The Ongoing Social Science Debate

Pornography apologists have killed countless trees (but hopefully no women) in dismissing the foundational sociological research on which pornography critics base their claims of individual and social harm. For example, Professor F.M. Christensen states that exercise and comedy are just as likely to promote aggression as porno-violence.¹⁴⁶ At the same time, few scholars are willing to argue that pornography consumption benefits either society or the individual consumer. There is simply no social science supporting this position.¹⁴⁷ In 2004, Dolf Zillman noted that “no rigorous research demonstrations of desirable effects can be reported and beneficial effects of pornography consumption remain a matter of contention and conjecture.”¹⁴⁸ In 2005, clinical psychologist Dr. Jill C. Manning noted that she tried to find research that demonstrated benefits of Internet pornography but could find none.¹⁴⁹

Some have certainly tried to extol the benefits of pornography consumption, but apart from freedom of speech claims, their apologias are weak. Bernie Zilbergeld advocates the use of pornography to enhance marital sex, as the use of pornography “leads to more frequent and more intense

¹⁴⁴ *Id.* at 104-05. *See also* IN HARM’S WAY, *supra* note 22, at 20 (describing the intimidation experienced by both academics and professionals).

¹⁴⁵ Professors Cowan and Stock take issue with the conclusions of a 1988 study by Linz, Donnerstein, and Penrod, which concluded that there were no negative attitudinal changes from pornography that degraded women. Cowan & Stock, *supra* note 166, at 106. The researchers analyzed movies that were atypical of pornography because they portrayed strong women (*Debbie Does Dallas*) and emotional intimacy (*Indecent Exposure*). *Id.* at 106-07.

¹⁴⁶ Christensen, *supra* note 22, at 270.

¹⁴⁷ The individual may enjoy the freedom to be vicariously vicious via porno-violence, but this is a subjective “good,” not an objectively quantifiable benefit that counteracts third-party harms. Byrne and Kelley discuss both the pleasure principle and the disputed claim that masturbation to pornography has a cathartic effect. Byrne & Kelley, *supra* note 100, at 4-5.

¹⁴⁸ PAUL, *supra* note 49, at 73 (quoting Dolf Zillman, *Pornografie*, in LEHRBUCH DER MEDIENPSYCHOLOGIE 565-85 (Roland Mangold et al. eds., 2004)).

¹⁴⁹ JILL D. MANNING, THE HERITAGE FOUNDATION, THE IMPACT OF INTERNET PORNOGRAPHY ON MARRIAGE AND THE FAMILY: A REVIEW OF THE RESEARCH 52 (2005), *available at* http://www.heritage.org/Research/Family/upload/85273_1.pdf.

sex.”¹⁵⁰ Many women report precisely the opposite effect: the frequency and satisfaction of their sexual encounters decrease as their partner’s pornography consumption increases.¹⁵¹ Attorney Peter Johnson has argued that Internet pornography improves family relationships and child development. Internet pornography encourages parents to engage in sexually explicit conversations with their children. (In their supposed naïveté, parents might prefer to postpone such discussions to a later developmental stage.) Johnson further notes that Internet pornography is “interactive and socializing,” therefore much better than the “passive, solitary” sex a child might encounter with television.¹⁵²

Pornography apologists correctly note that ethical constraints prevent social scientists from conducting the types of direct experiments that would demonstrate whether pornography provokes men to commit violence against women. Consequently, no experiment can definitively prove a causal link between pornography and actual violence, because no scientist may conduct such an experiment. The early studies of pornography’s negative effects were so compelling that academic review boards strictly limit ongoing studies.¹⁵³ They insist that researchers select their subjects with great care. Professor Donnerstein notes that extensive screening for “normalcy” actually results in a subject population that is below the mean for aggressive traits:

[T]he National Institute of Mental Health and the National Science Foundation and our own subjects committee will not allow us to take hostile males and expose them to this type of material because of the risk to the community. They obviously know something some of us do not.¹⁵⁴

Nonetheless, the fact that one cannot incite actual aggression does not invalidate using scientific methods to extrapolate the likely results of certain behavioral patterns.

¹⁵⁰ Bernie Zilbergeld, *Porn as Therapy*, in *MEN CONFRONT PORNOGRAPHY*, *supra* note 45, at 120-21.

¹⁵¹ PAUL, *supra* note 49, at 143-44, 150-54, 232-33.

¹⁵² Peter Johnson, *Pornography Drives Technology: Why Not to Censor the Internet*, 49 *FED. COMM. L.J.* 217, 224 (1996). Others have claimed that Internet sex work is family friendly, because it allows performers to “work less and spend more time on other activities, including their families and children.” LANE, *supra* note 142, at 112.

¹⁵³ PAUL, *supra* note 49, at 90.

¹⁵⁴ *The Minneapolis Hearings*, *supra* note 34, at 53-54 (testimony of Edward Donnerstein). It is important to remember that the vast majority (approximately 80%) of rapes involve “normal” men who are acquainted with their victims. Many men who commit rape do not acknowledge that they have done so, as their behavior falls within bounds they consider to be as-of-right. See KATZ, *supra* note 25, at 28, 114, 149-50. See also Katharine Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 *HARV. L. REV.* 563, 576-578 (1997).

One cannot, for obvious reasons, experimentally examine the relationship between pornography and *actual* sexual aggression. One can, however, examine various aspects of this relationship through attitudes, arousal patterns, and aggressive behavior in the laboratory.¹⁵⁵

Pornography apologists reject the validity of such studies, because they reject the premise that laboratory behaviors will translate in any meaningful way to the real world.¹⁵⁶ According to Professor Christensen, “It seems unlikely that a few books or movies could have much effect on a person’s thinking compared to all the other influences of a lifetime of socialization.”¹⁵⁷ Professor Christensen concludes that consumers of large quantities of porno-violence are “disturbed,” a view that indicts a substantial minority of men.¹⁵⁸ Professor Donnerstein puts the numbers into realistic perspective, concluding that the estimated thirty percent of men who are susceptible to porno-violence are a significant minority who “are becoming sexually aroused to the trivialization, the degradation, and the use of women.”¹⁵⁹

Pornography apologists reject the evidence of pornography’s harm without corresponding proof that porno-violence is a deterministic cause (i.e., that it is a necessary and constant factor in sexual aggression). For them, pornography’s probable role in aggressive behavior is insufficient evidence to justify the regulation of porno-violence.¹⁶⁰ Professor Frederick Schauer is the first to admit that porno-violence is not deterministic, calling such a claim “preposterous.”¹⁶¹ He suggests that *probable* cause is a more realistic way to evaluate porno-violence and that interpretation of available evidence is the appropriate way to determine probable cause:

[T]he identification of a causal relationship under a probabilistic account does not entail the conclusion that the identified cause produces the effect in all, a majority, or even a very large proportion of cases. It only entails the conclusion that the identified cause increases the inci-

¹⁵⁵ Donnerstein, *supra* note 113, at 53.

¹⁵⁶ For a discussion of pornography apologists’ rejection of social scientific research into behavior, see *supra* Part B.1.

¹⁵⁷ Christensen, *supra* note 22, at 236.

¹⁵⁸ *Id.* at 236-37. Jonathan Miller is likewise oblivious to the siren song of porno-violence:

I cannot fear the harmful effects of pornography, since anyone normal who has been exposed to pornography, hard or soft, far from falling under the sway of its pornotopian spell loses interest after a while and returns with pleasure and gusto to the varieties of experience of the world at large.

Jonathan Miller, *Censorship and the Limits of Permission*, in INFLUENCE OF PORNOGRAPHY, *supra* note 41, at 27, 41. See also Antony Grey, *Pornography and Free Speech*, in INFLUENCE OF PORNOGRAPHY, *supra* note 41, at 47, 55. Grey states that, rather than being progressive and compulsive, “it is much more likely that ‘hard core’ pornography is far more aversive to people with a reasonably healthy psyche than it is addictive.” *Id.* at 55-56.

¹⁵⁹ *The Minneapolis Hearings*, *supra* note 34, at 57 (testimony of Edward Donnerstein).

¹⁶⁰ See Linsley, *supra* note 13, at 184-85.

¹⁶¹ Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737, 743.

dence of the effect for a population and increases the likelihood of the effect in an individual case.¹⁶²

The conclusions of social science could have a significant impact on the future of obscenity law. *Miller's* ongoing validity may well hinge on whether the Supreme Court takes a deterministic or probabilistic view of pornography's harms. If states must provide deterministic evidence of harm, then *Miller* fails to meet *Lawrence's* requirement of a showing of societal or third-party harm.¹⁶³ Social science is too imprecise and neurological science is too nascent to ferret out pornography's effects in any given instance and on any particular individual.¹⁶⁴ On the other hand, the weight of accumulated evidence and coalescing public opinion may well cause the Supreme Court to conclude that the probable harm from pornography is sufficient to justify the ongoing right of states to suppress obscenity.

Sociologists who examine the effects of pornography typically are not socially conservative, nor do they necessarily endorse increased government regulation of pornography.¹⁶⁵ They tend to be sympathetic to radical feminism's claims about pornography's pernicious effects on the social and professional environment for women. At the same time, they become nervous when politicians use their research to advocate for or against particular policies relating to pornography.¹⁶⁶ They are primarily academics, con-

¹⁶² *Id.* at 753. See also KATZ, *supra* note 25, at 30 ("You do not need to argue that legal porn causes illegal activity in order to assert that it contributes significantly to a culture where continuously younger girls are cast as the objects of adult men's sexual desires and pathologies.").

¹⁶³ *Lawrence* does not explicitly require evidence of third-party harm. However, such a requirement is strongly implied by the statement that "ethical and moral principles" are an insufficient justification for the majority "to use the power of the State to enforce [its] views on the whole society through operation of the criminal law." *Lawrence v. Texas*, 539 U.S. 558, 571. *Lawrence* further indicates that laws without "substantive validity" serve only to stigmatize disfavored conduct. *Id.* at 575. Finally, *Lawrence* cites favorably Justice Stevens's *Bowers* dissent: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . ." *Id.* at 578.

¹⁶⁴ A fascinating field of pornography research has opened with the advent of functional magnetic resonance imagery ("fMRI") of the brain as subjects view pornography. Eric Racine et al., *fMRI in the Public Eye*, 6 NATURE REV. NEUROSCIENCE 159 (2005). Such imaging may also help scientists better understand the effects of media violence and image-based marketing. See Press Release, Stanford Law School to Advance "NeuroLaw" as Part of \$10 Million Grant (Oct. 31, 2007), available at <http://www.law.stanford.edu/news/> (follow hyperlink under "Press Releases and Statements").

¹⁶⁵ See, e.g., Byrne & Kelley, *supra* note 100, at 10 ("First . . . legal bans are never totally effective. Second, there is reason to believe that the very act of censorship can induce aggressive responses while at the same time altering perceptions of the restricted material so that it appears to be even more desirable and more exciting than before the barriers were raised.").

¹⁶⁶ See Eysenck, *supra* note 82, at 307. For example, Edward Donnerstein reversed positions between 1983 and 1985 as to whether or not sexually explicit material that is non-violent (but still degrading) has any negative impact. Gloria Cowan & Wendy Stock, *The Costs of Denial: Self-Censorship of Research on Degrading/Dehumanizing Pornography*, in THE PRICE WE PAY, *supra* note

cerned about what will happen to their work once the political mud-slinging commences.¹⁶⁷ They uniformly acknowledge that pornography's effects occur in a complex interplay of culture, commerce, media violence, and the individual's own situation.¹⁶⁸ Moreover, they have a somewhat fatalistic view that their research, no matter how compelling its results, is unlikely to carry much weight against the "strong economic and structural-institutional factors" that reap massive economic benefits from the sex trades.¹⁶⁹

Nonetheless, legal conclusions based on the demonstrable effects of porno-violence ultimately depend on the credibility of social science. If one accepts the scientific methods that undergird sociological and psychological research, then by extension one must accept that both pornography and porno-violence have at least some negative effects for both the individual and the larger society. To reject this conclusion is to reject the entire endeavor of social science: the formulation and experimental testing of theories and subsequent adjustments of them according to the resulting evidence. Hans Eysenck nicely sums up the consequent analytical dilemma:

In a sense this whole field is a testing ground for social science. We have been challenged by government and the legal profession to contribute factual clarification in a field in which confusion has been made worse, confounded by partisan attitudes of various persuasions. After a shaky start, I think it may be said that psychology has come up with the goods. Psychologists have shown considerable ingenuity in setting up experimental laboratory situations, in quantifying real-life situations, and in combining the two in ingenious paradigms that have given meaningful answers to important social questions. There is now, I think, very little doubt (1) that the portrayal of sex and violence in the media does have important effects on at least some people; (2) that it is possible to formulate general theories that explain the findings, and that indeed have predicted most of them; and (3) that these results present problems for society that go far beyond the realm of social psychology and involve sociologists,

15, at 104, 107. Professors Cowan and Stock suggest this has to do with the political controversy that accompanied the hearings conducted in 1985 by the 1986 Commission. *Id.*

¹⁶⁷ At the hearing held in Minneapolis on December 12, 1983, Donnerstein illustrated this point:

The data—I think it speaks for itself. I am not a lawyer. I am not an advocate. I am unfortunately an ivory tower professor that does his research. I think the data is a little too clear, not only from myself but dozens of professors across the country. I doubt that anybody disputes the data. There are effects.

The Minneapolis Hearings, *supra* note 34, at 57 (testimony of Edward Donnerstein).

¹⁶⁸ Malamuth & Donnerstein, *supra* note 100, at xvi-xvii. See also Murray Cox, *Dynamic Psychotherapy with Sex-Offenders*, in *SEXUAL DEVIATION* 300, 305 (Ismond Rosen ed., 3d ed. 1996). Cox asserts:

Such complex phenomena as sex offences are always over-determined, and personality characteristics, organic factors, modified inhibition due to drugs or fatigue, the detailed circumstances of the offence (including the specificity of the victim), together with the patient's previous life-experience, may all contribute to the . . . particular moment when he assaulted his victim.

Id.

¹⁶⁹ Malamuth, *supra* note 95, at 41.

philosophers, law-givers and politicians in general, as well of course as the community at large, whose voices cannot in this context be disregarded.¹⁷⁰

Eysenck gives the academic legal community a charge we have largely ignored. Social science has identified real and negative results from pornography consumption. Rather than take these results seriously, the typical reaction has been to denigrate the results or to jump immediately to a defense of pornography as free speech. Given the ubiquity of Internet pornography, the time is far past for a thoughtful discussion of an appropriate response to a social problem that shows no sign of resolving itself any time soon.

C. *Juvenile Consumption of Adult Pornography*

Juvenile pornography consumption is not the focus of this Article, but increasing juvenile consumption bolsters the argument that pornography causes harm. Professor James Check has conducted extensive surveys of adolescent exposure to adult pornography. Of 275 teenagers with an average age of fourteen, thirty percent of the boys watched pornography at least once a month.

Not surprisingly, in our study, many young boys indicated that they learned from pornography to connect the use of force during sex with excitement, with feeling stimulated. They also learned that force was justified if the female was at all active, i.e., if she took the initiative.¹⁷¹

Check concludes that the ready availability of pornography makes it nearly impossible for bona fide sex educators to compete for attention.¹⁷² Schools have failed to address the pornography problem, exacerbating this challenge.¹⁷³ Children absorb and process information differently than adults. They are quite literal, rendering them more susceptible to the influences of mass marketing and visual imagery.¹⁷⁴ Pornography has a greater impact on younger children and its effects intensify as it becomes more

¹⁷⁰ Eysenck, *supra* note 82, at 317. In response to criticism that laboratory studies are “unrealistic” and “invalid in the real world,” Nelson asserts that those criticisms are not “justified by the bulk of the data.” Nelson, *supra* note 79, at 236.

¹⁷¹ James Check, *Teenage Training: The Effects of Pornography on Adolescent Males*, in *THE PRICE WE PAY*, *supra* note 15, at 89, 89-90. See also D.A. Clarke, *Prostitution for Everyone: Feminism, Globalization, and the “Sex” Industry*, in *NOT FOR SALE*, *supra* note 10, at 149, 151-52 (“The ‘sex education’ offered to contemporary youth via these commercial media is generally an education in contempt and even hatred towards women.”).

¹⁷² Check, *supra* note 171, at 91.

¹⁷³ See PAUL, *supra* note 49, at 186. See also Malamuth, *supra* note 95, at 45-56.

¹⁷⁴ PAUL, *supra* note 49, at 186.

explicit and violent. The conclusions of social science and of feminism are magnified when the pornography industry targets children as its next generation of consumers.¹⁷⁵

Children, prior to recent advancements in technology, presumably encountered pornography exclusively through neighbors' or family members' *Playboy* magazines. Now they encounter it on cable television, video, and particularly on the Internet. Over fifty percent of eighteen- to twenty-four-year-olds indicate that it is difficult to surf online *without* encountering pornography.¹⁷⁶ It may seem counter-intuitive that this same demographic is *most* likely to support measures to regulate pornography, but they have some of the most direct experience with its intrusive nature and problematic effects.¹⁷⁷ Judith Coché, a practicing clinical psychologist and professor at the University of Pennsylvania, treats boys for pornography addiction.¹⁷⁸ She believes that society has an epidemic on its hands.¹⁷⁹ Preadolescents and teenagers are becoming highly sexualized without their parents' knowledge or consent, but no one is addressing the issue of juvenile pornography consumption.¹⁸⁰ Adolescent males "who are exposed to a great deal of erotica before the age of 14 are more sexually active and engage in more varied sexual behaviors as adults than is true for males not so exposed."¹⁸¹ At the extremes, this leads to sex offenses by juvenile offenders.¹⁸²

D. *The Feminist Critique of Pornography*

1. Testimony of Female Victims: Further Evidence of Harm

Radical feminists have done yeoman's work in highlighting the human cost of the pornography industry.¹⁸³ In *Paris Adult Theatre I*, the Supreme Court noted pornography's possible harm to "family life, community wel-

¹⁷⁵ *Id.* at 186-88. See generally BENJAMIN R. BARBER, CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE 305 (2007) (discussing marketing of sex to kids via the Internet); SUSAN LINN, CONSUMING KIDS: PROTECTING OUR CHILDREN FROM THE ONSLAUGHT OF MARKETING & ADVERTISING 139 (2005) (discussing Hollywood's efforts in "making pornography chic").

¹⁷⁶ PAUL, *supra* note 49, at 173-75.

¹⁷⁷ *Id.* at 203-07. See also Check, *supra* note 171, at 90-91.

¹⁷⁸ PAUL, *supra* note 49, at 180.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* See also Janis Wolak et al., *Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users*, 119 PEDIATRICS 247, 254-55 (2007).

¹⁸¹ Byrne & Kelley, *supra* note 100, at 7.

¹⁸² *The Minneapolis Hearings*, *supra* note 34, at 161-62 (testimony of Cheryl Champion) (testifying about her experience as a member of the Minnesota-based Washington County Human Services, Inc., Sexual Abuse Unit).

¹⁸³ For various definitions of "radical feminist," see Stark, *supra* note 10, at 279.

fare, and the development of human personality,”¹⁸⁴ but the feminists shifted attention to (1) the impact on women whose male relatives and partners used it, (2) the women exploited by the industry, and (3) the challenges women face in achieving social justice in a sexualized culture. Much of the witness testimony considered by the 1986 Commission had its foundation in the work of Catharine MacKinnon and Andrea Dworkin.¹⁸⁵ In 1983 and 1984, radical feminists and pornography victims participated in a series of government hearings in Minneapolis, Indianapolis, and Los Angeles that authenticated the claims of women victimized by the pornography industry.¹⁸⁶

Unless one engages in crimes against humanity as a recreational sport, the victims’ accounts are harrowing. Woman after woman recounted her experience of sexual abuse and rape that was modeled on pornographic images and motivated by pornography-induced sexual arousal.¹⁸⁷ The patterns of abuse bore strong similarities. Pornography was a constant as a training manual and motivating factor for the aggressor.¹⁸⁸ Professor Pauline Bart conducted in-depth interviews of forty-three rape victims. The victims revealed a surprising similarity in the attitudes of rapists: Rapists told their victims that the sex was not rape, that the victims would enjoy the sex, and that the men were doing their victims a favor. According to Dr. Bart: “Now, men aren’t born believing this. They have to learn it someplace, and I maintain that one of the ways they learn it is through pornography.”¹⁸⁹ Wanda Richardson, of the Harriet Tubman Women’s Shelter, noted

¹⁸⁴ See *infra* note 374.

¹⁸⁵ Hugh Hefner understood the potential impact of the civil rights hearings. In a memorandum to the *Playboy* staff, he wrote, “These chicks are our natural enemy It is time we do battle with them What I want is a devastating piece that takes the militant feminists apart.” Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulations of Pornography*, 7 HARV. WOMEN’S L.J. 5, 31 n.140 (1984) (quoting Susan Braudy, *The Article I Wrote on Women That Playboy Wouldn’t Publish*, GLAMOUR, May 10, 1979, at 202, 202).

¹⁸⁶ Catherine A. MacKinnon, *The Roar on the Other Side of Silence*, in IN HARM’S WAY, *supra* note 22, at 3, 4. In subsequent decades, Lisa Lederer, Richard Delgado, Christine Stark, and Rebecca Whisnant have compiled similar testimonials in order to demonstrate that porno-violence remains a chronic problem. See generally NOT FOR SALE, *supra* note 10; THE PRICE WE PAY, *supra* note 15.

¹⁸⁷ See *The Minneapolis Hearings*, *supra* note 34, at 101-114. See also RUSSELL, *supra* note 23, at 110 (“Rape, battery, and murder are criminal offenses in the United States and elsewhere. Yet the portrayal of these crimes against women is a popular form of entertainment for U.S. males.”).

¹⁸⁸ See *The Minneapolis Hearings*, *supra* note 34, at 101-114.

¹⁸⁹ *Id.* at 72-73 (testimony of Dr. Pauline Bart). See also Rus Ervin Funk, *What Does Pornography Say About Me(n)?: How I Became an Anti-Pornography Activist*, in NOT FOR SALE, *supra* note 10, at 331, 340. Funk asserts:

Men who sexually offend generally differentiate themselves from ‘rapists’ or ‘sex offenders,’ indicating that what they did is not the same thing, because (they think) the women or children they assaulted liked what happened

This belief is identical to the fantasies in so much hard-core pornography—pornography that depicts women being forced to do sexual things and ‘liking it.’

Id.

how often the women who came to the shelter listed pornography as a factor in their abuse. Pornography was not a specific question on the shelter's intake forms—battered women raised the issue without prompting.¹⁹⁰

Prostitutes are another group of women victimized through pornography. The sex trades occur along a spectrum, with trafficking, prostitution, pornography production, and sexual abuse melding into one another.¹⁹¹ The personal profiles of the women involved in the sex trades are strongly similar, and they frequently participate in multiple areas of the industry. However, pornography plays a specific role in prostitution in that it provides the blueprint for some of the more egregious behaviors of the johns who purchase sex. During the Minneapolis Hearings, one prostitute (“T.S.”) spoke on behalf of a group of former prostitutes.¹⁹² She noted two commonalities: first, pornography both normalized and legitimized the abuse they experienced as prostitutes, including branding, binding, and torture; and second, without exception, pornography was their introduction to prostitution, used to groom and train them.¹⁹³

While some law enforcement officials hesitate to link pornography and sex crimes, others insist that the two are connected.¹⁹⁴ They report often finding pornography in sex crime investigations.¹⁹⁵ Investigators typically do not look for pornography (because possession does not constitute part of the criminal offense), so the prevalence of such pornography is probably

¹⁹⁰ *The Minneapolis Hearings*, *supra* note 34, at 149-51 (testimony of Wanda Richardson).

¹⁹¹ Many international scholars have focused on the particular harms of trafficking in both pornography and prostitution. A 2003 Europap report indicated that over 50% of European Union prostitutes are foreign to the country in which they work. Sheila Jeffreys, *Prostitution as a Harmful Cultural Practice*, in NOT FOR SALE, *supra* note 10, at 386, 386. See also Sherry Lee Short, *Making Hay While the Sun Shines: The Dynamics of Rural Strip Clubs in the American Upper Midwest, and the Community Response*, in NOT FOR SALE, *supra* note 10, at 306, 311 (discussing women trafficked in the Netherlands, Toronto, and the American Midwest); *infra* note 244 (discussing international groups dedicated to researching sex trafficking).

¹⁹² *The Minneapolis Hearings*, *supra* note 34, at 114 (testimony of T.S.).

¹⁹³ *Id.* at 114-20. See also *Minneapolis: Press Conference*, in IN HARM'S WAY, *supra* note 22, at 260, 265 (statement of Ms. P.) (recounting horrific sexual abuse at the hands of her father, a pornography producer); Written Submission of Julie White to Massachusetts State Legislature (Mar. 16, 1992), in IN HARM'S WAY, *supra* note 22, at 417, 417-18 (discussing how pornography negatively affected her work as a prostitute and nude model).

¹⁹⁴ See *The Minneapolis Hearings*, *supra* note 34, at 144 (testimony of Bill Neiman) (testifying as an Assistant County Attorney for the Hennepin County Attorney's Office that, in his opinion, there is a relationship between sexual assault and pornography and that he has “simply seen too many cases to believe otherwise”).

¹⁹⁵ *Id.* at 143-44. In e-mail correspondence with the author, Professor David Finkelhor of the Department of Sociology at the University of New Hampshire noted: “We have not addressed the question in a thorough way. There is really a tremendous vacuum on this topic.” Professor Finkelhor is referring to the lack of data on both correlation and causation, although he considers the latter to be the more important question. E-mail from David Finkelhor, University of New Hampshire, to Elizabeth Harmer Dionne (Dec. 3, 2007, 11:53:17 EST) (on file with author).

under-reported.¹⁹⁶ Detective Terry Hall, a sex crimes investigator with the Indianapolis Police Department, recounted instances of rape victims being forced to watch pornography while the rape was occurring.¹⁹⁷ He also discussed the use of pornography in pedophilia, where it is used to “school and indoctrinate” juvenile victims.¹⁹⁸

Pornography’s less vicious uses are nonetheless real. Pornography is a well-documented tool in sexual harassment at work sites, particularly in the construction industry.¹⁹⁹ However, white collar professionals are not immune. Olivia Young recounts a traumatic viewing of *Deep Throat* that took place during a business meeting at Saint Louis University Hospital.²⁰⁰ She sued, but over half the jurors had already seen the movie as entertainment and did not feel that the episode constituted sexual harassment.²⁰¹ Others find that their spouses or partners ask them to engage in painful sexual behaviors that mirror trends prevalent in the pornography industry, including sadomasochism.²⁰² Reverend Susan Wilhelm shared the following experience: “I came across a picture of a position . . . my ex-husband had insisted we try. When we did, I hemorrhaged for three days. My bruised cervix is still a problem after 10 years.”²⁰³ On a more subtle level, pornography silences women. After viewing pornography, women tend to speak less, and men stop listening to their already reduced speech.²⁰⁴ Men who consume

¹⁹⁶ *The Minneapolis Hearings*, *supra* note 34, at 143-45 (testimony of Bill Neiman). This is an area ripe for investigation, as there appears to be no reliable data. A related area of possible research is the factors that play into prosecutorial discretion, such as expense, uncertainty of outcome, and the prosecutor’s own attitudes towards pornography.

¹⁹⁷ *The Indianapolis Hearing*, *supra* note 81, at 279 (testimony of Terry Hall).

¹⁹⁸ *Id.* at 280.

¹⁹⁹ See *The Minneapolis Hearings*, *supra* note 34, at 121-24 (testimony of Ms. B.) (testifying about the sexual harassment she faced working as a plumber at a construction site where pornography was prevalent). See also Barbara Trees, *Like a Smack in the Face: Pornography in the Trades*, in *THE PRICE WE PAY*, *supra* note 15, at 32, 32-34. Ann Russo and Jean Moran both presented testimony to the Massachusetts legislature of being harassed for opposing public use of pornography at M.I.T. *The Massachusetts Hearing*, *supra* note 22, at 408-413.

²⁰⁰ Olivia Young, *A Weapon to Weaken: Pornography in the Workplace*, in *THE PRICE WE PAY*, *supra* note 15, at 18, 18-19.

²⁰¹ *Id.* at 20-22.

²⁰² Joseph Slade defines “sadomasochism” as “the derivation of pleasure from the infliction of pain—mental or physical—on oneself or others.” SLADE, *supra* note 36, at 316. Linda Lovelace describes the term as follows: “It was like an altar set up in front of the parishioners. And me, I was the human sacrifice.” LINDA LOVELACE & MIKE MCGRADY, *ORDEAL* 160 (1980).

²⁰³ *Minneapolis: Press Conference*, *supra* note 193, at 263 (statement of Rev. Susan Wilhelm). See also Jensen & Dines, *supra* note 31, at 80-82 (discussing the appeal of anal sex to consumers of pornography and the pain and fear it causes for the women in the films). Said one director of the “reverse cowgirl,” a position often depicted in pornography: “Very unnatural position. The girls hate it. It kills their legs, you know. But it shoots beautifully . . . It’s very convenient.” ROBERT J. STOLLER & I.S. LEVINE, *COMING ATTRACTIONS: THE MAKING OF AN X-RATED VIDEO* 133 (1993).

²⁰⁴ Michelle J. Anderson, *Silencing Women’s Speech*, in *THE PRICE WE PAY*, *supra* note 15, at 122, 125 (citing Doug McKenzie-Mohr & Mark P. Zanna, *Treating Women as Sexual Objects: Look to the*

pornography focus on a woman's body and ignore her speech, enhancing the silencing effect.²⁰⁵

Pornography consumers objectify women, becoming highly critical of their bodies and thinking about them in more sexual ways.²⁰⁶ Men claim to distinguish between fantasy and reality, and yet they fail to acknowledge that the actions in pornography are happening to a real woman, who is experiencing actual pain, degradation, or humiliation.²⁰⁷ Pornography subjects women to inaccurate stereotypes: "Each and every sexual act portrayed in pornography is treated as an exemplar of sexuality Thus, to the extent that pornography shows almost all women screaming ecstatically when anally penetrated, for instance, exemplification theory projects the generalization that almost all women outside of pornography will do likewise."²⁰⁸ Women who express reservations about pornography are labeled insecure, uptight, and sexually repressed. They are told that they must engage with pornography if they are to be attractive and forward-thinking.²⁰⁹ Sociologist Michael Kimmel, a professor of sexuality at Stony Brook University, has noticed a change in his students that he calls a "masculinization of sex," where "women's fantasies are more likely today to include violence, rough sex, strangers, and descriptions of male physical attributes."²¹⁰

2. The Divide Between Liberals and Radical Feminists

Liberals and radical feminists have starkly different views as to whether pornography liberates or harms women. Radical feminists describe liberals' embrace of pornography with a palpable sense of betrayal. Andrea Dworkin writes:

It has been a devastation to me to see the U.S. Left's disregard for women and women's rights over the last twenty-five years On the Left women were used as menial labor, and our sexual availability was taken for granted. Fighting for others, some of us learned to fight for ourselves. Radical feminism emerged from the Left and brought left-wing values of equality to women. The Left opposed feminists every step of the way—and not just because

(*Gender Schematic*) *Male Who Has Viewed Pornography*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 296, 304 (1990)).

²⁰⁵ *Id.*

²⁰⁶ See PAUL, *supra* note 49, at 38, 47 (describing the criticisms several interview subjects had regarding the bodies of women appearing in pornography).

²⁰⁷ See *id.* at 45-47 (describing the de-sensitization of pornography consumers to the pain and degradation experienced by women appearing in pornography experience).

²⁰⁸ *Id.* at 18 (quoting Zillman, *supra* note 148, at 565-85).

²⁰⁹ *Id.* at 109, 127-35.

²¹⁰ *Id.* at 113. Kelly Holland, a Playgirl TV executive, discounts the degree to which women really want explicit programming: "It's like those rowdy women you see at a male strip club—it's almost like they're acting out some male construct of what sexual desire is supposed to look like." *Id.* at 111 (citing Susan Dominus, *What Women Want to Watch*, N.Y. TIMES, Aug. 29, 2004, § 2, at 21).

the boys were losing cheap labor and cheap lays. They were blind to injustice against women: injustice that had their names on it.²¹¹

D.A. Clarke notes that men “of good will,” “progressive and liberal men,” nonetheless “fantasise [sic] about unlimited access to women; to consume access to women in the form of pornography, and/or to imagine that they have ‘rights’ of some kind to sexual services from a particular woman or all women.”²¹² She recounts the liberal tradition of justice, civil rights, and resistance to commercial exploitation of the worker. “We expect the Left to take a stand against the unfettered pursuit of profit at any human cost”²¹³ Instead, “traditional Leftist journals such as *The Nation* continue to support pornographers as some kind of heroes of free speech and secular liberation.”²¹⁴ Many pornography apologists candidly admit that pornography objectifies women.²¹⁵ Fred Small describes pornography as follows:

The critics of pornography are right. Pornography is relentlessly sexist, displaying women as objects for men’s sexual gratification. It wrenches sex from any human context of affection, understanding, or commitment. It depicts intercourse without reference to either contraception or conception. It generally presents a viciously narrow and rigid physical stereotype of women Often it associates sex with violence. It is patriarchal, produced by a multimillion-dollar, male-dominated industry in which women are exploited and frequently mistreated.²¹⁶

²¹¹ Andrea Dworkin, *Suffering and Speech*, in *IN HARM’S WAY*, *supra* note 22, at 25, 26-27. Pamela Paul conducted a poll on attitudes of self-identified liberals and conservatives. Only thirty percent of liberals (versus fifty-four percent of conservatives) felt that pornography harmed male/female relations. PAUL, *supra* note 49, at 246.

²¹² Clarke, *supra* note 171, at 152. Most liberals have now accepted the validity of sex crimes, but part of sexual liberation did involve efforts to decriminalize sexual offenses. *See, e.g.*, ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 410-11 (1953) (asserting that women’s claims of “rape” typically are an excuse to hide an affair with another man in order to mollify one’s husband or parents).

²¹³ Clarke, *supra* note 171, at 155.

²¹⁴ *Id.* at 153. *Cf.* SLADE, *supra* note 36, at 18-19 (“Conservatives and liberals may agree that marketing sexual expression like any other product leads to deplorable consequences Liberals add pornography to soft political campaign funds, unregulated health management organizations (HMOs), and rapacious corporate mergers as toxic fallout from a market-driven economy.”).

²¹⁵ PAUL, *supra* note 49, at 80. *See also* STROSSEN, *supra* note 34, at 67; Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1647-51 (2005).

²¹⁶ Fred Small, *Pornography and Censorship*, in *MEN CONFRONT PORNOGRAPHY*, *supra* note 45, at 72, 75. *See also* Joel Kovel, *The Antidialectic of Pornography*, in *MEN CONFRONT PORNOGRAPHY*, *supra* note 45, at 153, 160. Kovel states:

Pornography is no problem for the sexual Right, which simply sees it as the work of the devil, or for the hygienic center, for whom it functions as a stimulant. However, it poses an acute dilemma for sexual liberationists, since it constitutes an assault on right-wing sexual morality, on the one hand, while being manifestly sleazy and oppressive on the other.

Id.

Nonetheless, Small defends men's need for pornography and their right for unfettered access to it. Radical feminists are left scratching their heads as to why anyone on the Left would defend such a product.

In turn, liberals accuse radical feminists of manufacturing a crisis, casting doubt on the testimony of pornography victims and claims that pornography creates a hostile environment for women. Pornography apologists insist victim testimony is merely anecdotal.²¹⁷ In an uncanny echo of the American slave experience, the stories of prostituted women are "treated as politically interested fabrications" and are "dismissed according to one of the most durable paradoxes of white [male] supremacy—the idea that those who are closest to an experience of oppression . . . are its least credible witnesses."²¹⁸ Pornography apologists fear that radical feminists are winning the cultural battle in defining pornography as an objective wrong, both anti-female and inherently harmful.²¹⁹ Tim Campbell has urged men to resist:

Men are going to have to stand up and own their use of pornography [T]he Brown-millers of the world have got a lot of women convinced that dirty, rotten, awful things pass through straight men's minds when they look at pornography. There will be no peace over this issue until that lie is quashed. If it not a lie, then maybe the "radical feminists" should win.²²⁰

Given radical feminists' relative lack of financial resources, it is unlikely they exercise inordinate cultural power. To the contrary, radical feminists feel that the industry, media, and academia have effectively slandered and stigmatized their work.²²¹

It takes a fair degree of courage to testify about sexual abuse, particularly as it relates to pornography, because pornography apologists may greet such testimony with skepticism and even derision.²²² Many women who testify are identified only by their initials or by assumed names because of the ramifications of publicly admitting their involvement in the sex trades. Catharine MacKinnon identifies the risk these women took, exposing themselves to possible shame and skepticism:

²¹⁷ See BOYD, *supra* note 85, at 9, 168-69.

²¹⁸ WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 9 (1999).

²¹⁹ BOYD, *supra* note 85, at 24, 41, 166. See also KIPNIS, *supra* note 41, at 64-65.

²²⁰ Philip Weiss, *Forbidden Pleasures: A Taste for Porn in a City of Women*, HARPER'S MAG., Mar. 1986, at 68, 72.

²²¹ MacKinnon, *supra* note 186, at 20. See also Sere, *supra* note 10, at 273. Sere notes that leftist publications have excluded radical feminists, while simultaneously accusing the feminists of censorship and being anti-sex. *Id.* She contrasts this with the Left's treatment of other social justice movements: "Meat-eaters, for instance, would never be characterized as cutting-edge liberators, just because they enjoy eating meat and are rebelling against rigid vegetarians. Critics of the meat industry and meat consumerism would never be slandered for their positions, portrayed as 'anti-appetite,' and denied a voice in the leftist media." *Id.*

²²² DWORKIN, *supra* note 39, at xxv.

Public, available, effectively legal, pornography has stature: it is visible, credible, and legitimated. At the same time, its influence and damaging effects are denied as nonexistent, indeterminate, or merely academic, contrary to all the evidence. Its victims had no stature at all.²²³

Women who tell their stories may encounter a combination of disbelief and indifference. Once Linda Lovelace escaped from Chuck Traynor, she tried to tell what really happened to her during the years he forced her to make *Deep Throat* and other pornographic flicks. Reporters were not interested:

The minute I started telling it, the reporters would turn off their tape recorders. They'd explain to me about the laws of libel. And then they'd point out that the true story would really be a downer for their readers.²²⁴

Liberals make multiple, specific critiques of radical feminists. They accuse them of name-calling at the expense of substantive argument in order to silence their critics: "When Big Sister is at her least tolerant she labels her opponents in the most egregious terms . . ."²²⁵ Catharine MacKinnon has been accused of calling her opponents "Uncle Toms."²²⁶ This claim is dubious, but Professor MacKinnon has accused pro-porn feminists of being "elites" who "talk past and disregard" the women victimized by pornography.²²⁷ According to Gloria Steinem, female apologists for

²²³ MacKinnon, *supra* note 186, at 3. These women gave live testimony and were identified to the elected officials who heard from them. *Id.* at 12. See also KATZ, *supra* note 25, at 71 (echoing MacKinnon's concerns about credibility by stating that "[u]ltimately decisions about who gets listened to come back to questions of social power; the more you have, the more your voice is heard").

²²⁴ LOVELACE & MCGRADY, *supra* note 202, at 237. Chuck Traynor scripted Lovelace's prior media interviews in which she extolled her life as a pornography star. *Id.* at 175. He refused to allow her to have private conversations with others or even use the ladies' room without his permission. *Id.* at 88. Frederick Lane provides a succinct example of the skepticism that greeted Lovelace, referring to the abuse she "allegedly suffered" at the hands of her "alleged abuser Chuck Trainor [sic]." LANE, *supra* note 142, at 107.

²²⁵ BOYD, *supra* note 85, at 13. Calling radical feminists "Big Sister" is a rather obvious reference to George Orwell's "Big Brother." But see *The Minneapolis Hearings*, *supra* note 32, at 201 (showing that everyone who requested an opportunity to speak at the Minneapolis civil rights hearings was allowed to do so). The transcripts of the Indianapolis, Los Angeles, and Massachusetts hearings likewise contain extensive testimony from pornography apologists. See, e.g., *The Indianapolis Hearing*, *supra* note 81, at 285-88; *The Los Angeles Hearing*, in *IN HARM'S WAY*, *supra* note 22, at 333, 333-36, 338-40, 344-47; *The Massachusetts Hearings*, *supra* note 22, at 366-72, 378-83, 394-96, 398-99, 403-04, 407-08.

²²⁶ See Pete Hamill, *Woman on the Verge of a Legal Breakdown*, *PLAYBOY*, Jan. 1993, at 138, 186 (quoting MacKinnon as stating, "The labor movement had its scabs, the slavery movement had its Uncle Toms and Oreo cookies, and we have FACT."). Playboy has consistently attacked MacKinnon, so the veracity of this quotation merits some caution.

²²⁷ MacKinnon, *supra* note 186, at 11.

pornography are masochists who mistake pain for love.²²⁸ Professor Judith Hill is more measured in her criticism, but she nonetheless insists that failing to stand up for one's gender when one has the ability to do so without fear of punishment is moral cowardice.²²⁹

Liberals are themselves fully capable of hurtling caustic epithets. The term "Big Sister" is a fine example.²³⁰ Nadine Strossen has added MacDworkinites, McDworthodoxy, MacCarthyite, "draconian Dworkinian hyperbole," "feminist-fundamentalist axis," and "pornophobic feminists" to the lexicon.²³¹ Comparisons between Catharine MacKinnon and Senator Joseph McCarthy are passé and even banal.²³² Anne Rice has called MacKinnon and Dworkin "absolute fools" who "got away with their non-sensical arguments because they were feminists, and because they confused well-meaning liberals everywhere."²³³ *Hustler* has featured Gloria Steinem, Catharine MacKinnon, Susan Brownmiller, and Andrea Dworkin in its "Asshole of the Month," in which it not only branded these women as "assholes" but made pornography of them.²³⁴

Liberals claim that radical feminists turn prostituted women (including those used in pornography) into victims. According to the liberal account, identifying the sex trades as abusive involves a negative moral judgment that creates harm where none previously existed: "If you think you are a victim, you are. If you think sexualized imagery stands for hatred toward women, it does."²³⁵ The liberal account of what happens to women in the pornography industry inverts what it means either to exploit or to be exploited: "Feminists against pornography have done a sad and awful thing: They have made women into objects."²³⁶

Feminists respond by distinguishing between subjective self-identification and actual events that happen to sentient women. Philosopher Rebecca Whisnant notes there is a substantive difference between being

²²⁸ Steinem, *supra* note 45, at 75.

²²⁹ Judith M. Hill, *Pornography and Degradation*, in *PORNOGRAPHY: PRIVATE RIGHT*, *supra* note 22, at 100, 104.

²³⁰ George Orwell might have approved of the feminist effort to raise our level of discourse. In reviewing James Hadley Chase's *No Orchids for Miss Blandish*, Orwell wrote that, after perusing the book's violence and sadomasochism, "one is driven to feel that snobbishness, like hypocrisy, is a check upon behaviour whose value from a social point of view has been underrated." GEORGE ORWELL, *Raffles and Miss Blandish*, in *A COLLECTION OF ESSAYS* 139, 154 (1954).

²³¹ STROSSEN, *supra* note 34, at xxx, xxxix, xlii, 13, 20.

²³² BOYD, *supra* note 85, at 22. Antony Grey feels "personally violated" by the "bluenose brigade" who seek to censor him. Grey, *supra* note 158, at 55.

²³³ Digby Diehl, *Anne Rice: The Playboy Interview*, *PLAYBOY*, Mar. 1993, at 56, 56.

²³⁴ MacKinnon, *supra* note 186, at 22 n.67. Al Goldstein, publisher of *Screw*, published a particularly disturbing picture of bloodied women biting the genitals of another woman impersonating Gloria Steinem. RUSSELL, *supra* note 23, at 69.

²³⁵ BOYD, *supra* note 85, at 29.

²³⁶ Sallie Tisdale, *Talk Dirty to Me: A Woman's Taste for Pornography*, *HARPER'S MAG.*, Feb. 1992, at 37, 45.

offended (subjective victimization) and being harmed (objective victimization):

[Harm] is an objective condition, not a way of feeling; to be harmed is to have one's interests set back, to be made worse off, to have one's circumstances made worse than they were or than they would be in the absence of the thing that's doing the harm.²³⁷

Philosopher Judith Hill suggests that harm that is publicly inflicted goes beyond individual harm and rises to the level of degradation, particularly when the public tolerates or even endorses that harm.²³⁸ Men involved in porno-violence assume not only that women are worthless but that the public shares a similar view that justifies such treatment. "In short, the more public the display of contempt, the stronger is the imputation of moral worthlessness."²³⁹

Liberals claim that the sex trades, including pornography, are a venue in which women may exercise sexual autonomy and reap economic benefits.²⁴⁰ They maintain that the only harm caused by the sex trades is the harm of reactionary moral judgment imposed by a disapproving public. To oppose the sex trades is to be anti-feminist, to deny "the agency and choice exercised by this 'liberated' female, the 'good sport' who is 'tough enough to take it' and needs no sympathy or interference from well-meaning nannies."²⁴¹

Radical feminists have multiple responses to this argument. The first is that women with viable alternatives do not choose to work in the sex trades and that real harms, such as poverty, abuse, disease, and death, result from

²³⁷ Rebecca Whisnant, *Confronting Pornography: Some Conceptual Basics*, in NOT FOR SALE, *supra* note 10, at 22. See also Andrea Dworkin, *Woman-Hating Right and Left*, in THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 28, 38 (Dorchen Leidholdt & Janice G. Raymond eds., 1990) ("It's a true word. If you were raped, you were victimized . . . It doesn't mean that you are a victim in the metaphysical sense, in your state of being, as an intrinsic part of your essence and existence. It means somebody hurt you.")

²³⁸ Hill, *supra* note 229, at 64-71. The law's view of degradation has changed over time. Compare *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (noting that segregation harms blacks "solely because the colored race chooses to put that construction upon it") with *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (noting that segregation "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").

²³⁹ Hill, *supra* note 229, at 103.

²⁴⁰ See Clarke, *supra* note 171, at 151. Clarke notes that liberals have included pornography and prostitution in the cloak of sexual liberation. *Id.* It is unclear how much money the average pornography performer makes. Joseph Slade reports that men make \$500 per sex scene, while women make three to five times that amount. SLADE, *supra* note 36, at 236-37. Major stars may make \$5,000 per scene. *Id.* Performers make more than at entry level jobs, but careers are brief and attended by high personal costs of drugs, disease, and negative emotional impacts. See *id.* But see Ann Simonton, *Who are women in pornography?: A Conversation*, in NOT FOR SALE, *supra* note 10, at 353 (noting that one woman made only \$200-300 per scene in the 1990s).

²⁴¹ Clarke, *supra* note 171, at 171.

their involvement in the industry.²⁴² Feminists do not criticize individual women, whose circumstances may not leave them any viable alternatives to prostitution, whether in film or on the streets; rather, they are criticizing an industry and society that justifies such use and celebrates such circumstances as liberating for women.²⁴³ If the sex trades represented such a promising source of economic opportunity, then women would not have to be trafficked into it.²⁴⁴ Sherry Lee Short insists female poverty is a necessary condition for the sex industry to survive.²⁴⁵ She further notes that prostitution (co-extant with human history) has never represented sexual or economic liberation for women: “Indeed, the exchange of bodies for money or other payment is a very old and un-revolutionary practice. Prior to sex industry rhetoric, this was referred to as bondage, slavery, or indentured servitude.”²⁴⁶

In a further effort to discredit the radical feminists, liberals have linked them with the religious right.²⁴⁷ On the subject of pornography, social conservatives sometimes sound like radical feminists and vice versa. Consider the following statement from Maggie Gallagher, a noted conservative commentator: “[A] pornographic culture is not one in which pornographic materials are published and distributed. A pornographic culture is one which accepts the ideas about sex on which pornography is based.”²⁴⁸ When feminists like Helen Longino admit that some sexual behavior is “morally

²⁴² See *supra* note 240. Similarly, D.A. Clarke stated:

Regardless of how liberals depict the sex trades, particularly prostitution, they still involve hardship, danger, violence, hunger, drug addiction, official contempt, low wages: every kind of violation of human rights and dignity . . .

Inconvenient statistics, feral facts like the average life expectancy of prostitutes, the average age of induction into prostitution, the average income of prostitutes, and so forth—hard demographics—have never disturbed those who defined the sex business as a force of liberation.

Clarke, *supra* note 171, at 152, 169.

²⁴³ See Russo, *supra* note 44, at 22-27.

²⁴⁴ Trafficking is a euphemism for women and children held in slavery in the sex trades. International groups have done more systematic work than Americans in documenting human trafficking. See, e.g., Asian Research Ctr. for Migration, *The Migration of Thai Women to Germany* (2001); Int’l Org. for Migration, *Data and Research on Human Trafficking* (2005).

²⁴⁵ Short, *supra* note 191, at 307.

²⁴⁶ *Id.* at 310.

²⁴⁷ Radical feminists are “in the trenches with the evangelicals who want paintings and sculptures of naked women or men removed from the workplace and from all forms of advertising.” BOYD, *supra* note 85, at 24. “The MacKinnon-Dworkin view is, itself, fundamentally ‘right-wing’: punitive, myopic, distrustful, and violent.” *Id.* at 38. According to Nina Hartley, a pornography star: “These prudes are nothing less than the lap dogs of the right wing, which had calculatingly employed the sex-negs as willing pawns who blindly act, in a stunning example of mutual exploitation, as tools for repression in the religious fundamentalists’ anti-liberation master plan.” LANE, *supra* note 142, at 105 (quoting Nina Hartley, *Frustrations of a Feminist Porn Star*, <http://www.nina.com/gauntletfin.html>).

²⁴⁸ MAGGIE GALLAGHER, ENEMIES OF EROS: HOW THE SEXUAL REVOLUTION IS KILLING FAMILY, MARRIAGE, AND SEX AND WHAT WE CAN DO ABOUT IT 252 (1989).

objectionable,”²⁴⁹ it is easy to assume that radical feminists and social conservatives have jumped into the fray as allies.

This assumes both too much and too little. Radical feminists regard social conservatives with a gimlet eye and go to great lengths to emphasize their differences.²⁵⁰ Feminist theologians warn that any alliance between evangelicals and feminists is “unwise on the basis of irreconcilable theological assumptions.”²⁵¹ In fact, radical feminists condemn traditional Christianity, because they believe its inherent sexism provides a religious justification for the power disparities inherent in pornography.²⁵² Feminists acknowledge they take a moral position but are careful to distinguish this position from “conventional sexual mores” and quick to insist that they are neither “prudish” nor “anti-sex.”²⁵³

On the other hand, religious conservatives and feminists share common concerns about the ethical requirements of a moral framework that mandates social justice.²⁵⁴ Feminists and Christians share a long history of dedication to social reform, including fighting poverty and providing housing; improving working conditions, health, and sanitation; reform of the penal code and prison conditions; and prevention of cruelty to animals. Their most important joint effort was the abolition of the slave trade and ultimately slavery. Within the pornography debate, there are points on which Christians and feminists (and hopefully most people of goodwill) can agree: “Sadistic, abusive, or forced sex is immoral because it injures and

²⁴⁹ Helen E. Longino, *Pornography, Oppression, and Freedom: A Closer Look*, in PORNOGRAPHY: PRIVATE RIGHT, *supra* note 22, at 122, 123.

²⁵⁰ See MacKinnon, *supra* note 186, at 10.

²⁵¹ Mary Jo Weaver, *Pornography and the Religious Imagination*, in PORNOGRAPHY: PRIVATE RIGHT, *supra* note 22, at 191, 191.

²⁵² *Id.* at 231. See also Short, *supra* note 191, at 314 (“Traditional values—values which confine the roles of women and children to that of servers—provide the fundamental belief system on which all sex industry practice is based.”). *But see* Jennifer Finlayson-Fife, *Female Sexual Agency in Patriarchal Culture: The Case of Mormon Women* (May, Mar. 22, 2002) (unpublished Ph.D. dissertation, Boston College) (on file with Boston College Libraries) (noting that many women embrace patriarchal religions because they domesticate men’s sexual behavior and suggesting that feminist models may need to reexamine their accounts of religion to accommodate religious women).

²⁵³ Jensen, *supra* note 31, at 6.

²⁵⁴ See GERTRUDE HIMMELFARB, *THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES* 6-7, 88 (1995); see also KATZ, *supra* note 25, at 43 (asserting that, just as a white person in South Africa had a moral obligation to oppose apartheid, men have an obligation to oppose pornography and violence against women). Steven Deyle quotes William Lloyd Garrison, who declared that those who ignored the slave trade must be “morally dead—dead—dead.” Steven Deyle, *The Domestic Slave Trade in America: The Lifeblood of the Southern Slave System*, in *THE CHATTEL PRINCIPLE: INTERNAL SLAVE TRADES IN THE AMERICAS* 91, 96 (Walter Johnson ed., 2004). Deyle further quotes Garrison as stating, “I know that their bodies and spirits (which are God’s) are daily sold under the hammer of the Auctioneer as articles of merchandize; I need no nice adjustment of abstractions, no metaphysical reasonings, to convince me, that such scenes are dreadful, and such practices impious.” *Id.* at 99-100. It is no coincidence that both feminists and Christians see echoes of the attitudes and conditions endemic to slavery in the sex trades.

violates another.”²⁵⁵ Victims of the sex trades have a very practical notion of morality—one that is firmly entrenched in their own experience of the problems the sex trades entail.²⁵⁶ According to “Mary,” “They keep saying that you can’t legislate morality. Well, I don’t know why not, because they have been legislating immorality for years and look where it’s got us.”²⁵⁷ Linda Lovelace, one of the most notorious women in pornography, considered herself “a real prude, more of a prude than anyone I know. Whenever I hear someone talking about the sexual revolution or the new sexual freedom, I don’t look on that as progress.”²⁵⁸

Discussing morality makes liberals nervous: “[W]e are suspicious of the very idea of morality. Moral principles, still more moral judgments, are thought to be at best an intellectual embarrassment, at worst evidence of an illiberal and repressive disposition.”²⁵⁹ At the same time, most liberals would accept the moral framework offered by radical feminists, regardless of its application: “A person does not have to earn the right to be treated as an end in himself, to be treated with fairness and consideration; and a person does not forfeit these rights by failing to insist that they be respected.”²⁶⁰

Liberals claim pornography provides women with economic options and the opportunity to express their innate sexuality. Arlene Carmen and Howard Moody, who have investigated the sex trades, admit that some women are “forced into prostitution by evil and manipulative pimps.”²⁶¹ Nonetheless, they side with liberals in viewing the sex industries as a choice and thus inherently liberating: “[T]he truth is that most women

²⁵⁵ Longino, *supra* note 249, at 123. Feminism and the sexual revolution have caused some Christians to revisit issues of sexuality, particularly healthy ways to enjoy it and efforts to recognize sexual pathologies. See Thomas Parker, *The Impact of Pornography on Marriage*, in PORNOGRAPHY: PRIVATE RIGHT, *supra* note 22, at 228; Weaver, *supra* note 251, at 232-33; see also *Matthew* 18:6 (King James) (“But whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea.”).

²⁵⁶ See LIZ KELLY, *SURVIVING SEXUAL VIOLENCE* 116-17 (1988). Kelly describes the effects of pornography on her interview subjects as follows:

The many statements women made in their discussion of experiences of pressurized sex, coercive sex and sexual assault which implicated pornography cannot be ignored . . . Whilst many feminists were engaging in academic debates about the definition and meaning of pornography, many of the heterosexual women I interviewed were having to cope with its unwelcome presence in their lives. Their feelings about this did not reflect a ‘prudery’ about sex but were grounded in feeling upset at the objectification (and at times abuse) of the women appearing in porn, and by implication themselves, and the reality that their partner expected them to engage in the sexual practices represented.

Id.

²⁵⁷ *The Indianapolis Hearing*, *supra* note 81, at 279 (testimony of Mary). See also *supra* text accompanying note 223 (discussing women using assumed names during public testimony).

²⁵⁸ LOVELACE & MCGRADY, *supra* note 202, at 138.

²⁵⁹ HIMMELFARB, *supra* note 254, at 240.

²⁶⁰ Hill, *supra* note 229, at 103.

²⁶¹ ARLENE CARMEN & HOWARD MOODY, *WORKING WOMEN: THE SUBTERRANEAN WORLD OF STREET PROSTITUTION* 41 (1985).

freely—and here it's important to bear in mind limited opportunities—choose to enter the profession.”²⁶²

Radical feminists resist the notion that every form of sexual activity is, by definition, liberating, particularly sexual activity that occurs within the context of social inequality.²⁶³ To compare pornography and prostitution with waitressing or a white-collar job demonstrates an awful (and offensive) ignorance of the working conditions in the sex trades.²⁶⁴ Liberal assertions of the liberating nature of the sex trades do not match the testimonials published by the radical feminists. The women who have escaped the sex industries typically describe a bleak reality, in which they internalize a myth of liberation in order to survive:

What I saw were women just like myself who were desperate, addicted to drugs, homeless and I'm sure probably at least 80 percent of them suffered from sexual abuse as children. I saw them re-living their childhood experiences by getting into that industry. They were looking for attention, pleasing men, and being abused. And that's all they know. They think it's great. They think it's wonderful. I could've looked you in the eye ten years ago and told you that I loved being in pornography, was proud of what I was doing and that I was having a great time.²⁶⁵

Linda Lovelace discusses the deep-seated assumption among law enforcement, juries, and the press that her involvement in pornography represented a career choice she (or any woman) could have escaped at any time, a belief she once shared.²⁶⁶ After experiencing the sex trades first-hand, she completely revised her views, stating that freedom of choice in the sex trades is “about as meaningful as saying I won't allow an earthquake or I won't permit an avalanche.”²⁶⁷

The very nature of the sex trades challenges the notion of individual liberation. Prostitutes become emotionally dependent on their pimps, who use that dependence to manipulate their “stables” into acts of prostitution

²⁶² *Id.* at 86. See also Phillip Lopate, *Renewing Sodom and Gomorrah*, in *MEN CONFRONT PORNOGRAPHY*, *supra* note 43, at 25, 29 (discussing whether pornography actually exploits women).

²⁶³ The notion of liberation in the sex trades feels one-sided, as (depending on the context) the aggressor or purchaser bases his action or transaction on an assumption of his own superiority. See, e.g., Robert Jensen, *Using Pornography*, in *PORNOGRAPHY: THE PRODUCTION*, *supra* note 31, at 101, 121 (discussing sex offenders and how the cultural ideology of sexual freedom has shaped their views); KATZ, *supra* note 25, at 126-127 (noting that men treat women in the sex industries with contempt, thus challenging the notion that the sex industries liberate women).

²⁶⁴ See, e.g., KIPNIS, *supra* note 41, at xi (“Who's to say whether performing sexual labor is a worse or more dehumanizing job than manual labor or service-industry labor or working on an assembly line or waitressing, other than the person doing it?”). Nadine Strossen offers this kernel of wisdom: “From a corporate manager in a gray flannel suit to a porn star in her birthday suit, most working people do things they probably would not do were they independently wealthy.” STROSSEN, *supra* note 34, at 189.

²⁶⁵ Simonton, *supra* note 240, at 354.

²⁶⁶ LOVELACE & MCGRADY, *supra* note 202, at 69.

²⁶⁷ *Id.*

and pornography.²⁶⁸ Radical feminists characterize women's association with men in the sex trades as a form of slave identity or Stockholm Syndrome.²⁶⁹ According to one prostitute: "If you are lonely for love, and you're not getting it, you'll settle for abuse. At least someone is paying attention to you."²⁷⁰ Even Carmen and Moody, who support the sex trades, acknowledge their stark reality:

[I]n this subculture of prostitution the man is still king of the hill while the woman is a submissive servant, albeit for the most part a *willing* one. It is still the most male chauvinist, sexist occupation and life-style extant in our society In no other place in American life is the chauvinism so up-front and unambiguous: to keep women down, subjugated and inferior.²⁷¹

Jennifer Saginor, who literally grew up in the Playboy mansion, writes of her subconscious identification with the pornographic Playboy culture: "Women were viewed as lesser people and for years I believed them. The admiration I had for the men I was surrounded by began with my seeking their approval and identifying as one of them."²⁷²

Women's groups have stood uneasily in the breach between liberals and radical feminists. In June of 1984, the National Organization for Women ("NOW") adopted a national resolution that pornography violates the civil rights of women and children, but it did little to act on that resolution.²⁷³ With the passage of time and the increasing problem of pornography, women's groups have taken stronger stands against pornography. According to Eleanor Smeal, former president of NOW: "Pornography is hate for women and no movement worth its salt would endure this assault of pornographic images without taking it on."²⁷⁴ Many feminists believe pornography represents a backlash against the educational, professional, and legal progress made by women in education and industry during the

²⁶⁸ See CARMEN & MOODY, *supra* note 261, at 101-116 (discussing stories about why women choose to work for certain pimps).

²⁶⁹ See *infra* note 272.

²⁷⁰ CARMEN & MOODY, *supra* note 261, at 118.

²⁷¹ *Id.* at 126-27.

²⁷² JENNIFER SAGINOR, PLAYGROUND: A CHILDHOOD LOST INSIDE THE PLAYBOY MANSION 52 (2005); see also KATZ, *supra* note 25, at 73 (describing how women who are trained to care for men's feelings denounce women who expect more). Stockholm Syndrome is defined as:

a psychological response sometimes seen in an abducted hostage, in which the hostage [exhibits] loyalty to the hostage-taker, [in spite] of the danger (or at least risk) in which the hostage has been placed. Stockholm syndrome is also sometimes discussed in reference to other situations with similar tensions, such as battered person syndrome.

Wikipedia, *Stockholm Syndrome*, http://en.wikipedia.org/wiki/Stockholm_syndrome (last visited Jan. 3, 2008). See also Parker, *supra* note 61, at 13 ("When the victim cannot successfully fight or flee, she may try to form a protective relationship with her captor.").

²⁷³ MacKinnon, *supra* note 186, at 13 n.40.

²⁷⁴ Eleanor Smeal, *Speech and Violence: Why Feminists Must Speak Out Against Pornography*, in THE PRICE WE PAY, *supra* note 15, at 199, 199.

past forty years, a view confirmed by some social scientists.²⁷⁵ Professor Helen Longino optimistically opines that men's use of pornography will decline as they "accord women their status as fully human."²⁷⁶ Unfortunately, current trends do not support her projection.

Pornography producer and actor Bill Margold provides a troubling insight into some men's deep resentment of women (thus confirming feminist concerns about the motivation behind pornography production and consumption):

I'd like to really show what I believe the men want to see: violence against women The most violent we can get is the cum shot in the face. Men get off behind that, because they get even with the women they can't have.²⁷⁷

Professor Neil Boyd writes with more circumspection, but his resentment is equally palpable. Adopting Nadine Strossen's term for radical feminists, Boyd defines "Big Sister" as "a powerful voice at the margins of feminism, promoting division, deception, and bad science."²⁷⁸ He claims that radical feminists have "little to do with research and scholarship, and everything to do with political power and the politics of guilt."²⁷⁹

²⁷⁵ Barron and Strauss have found some correlation between the advancing status of women and negative reactions to their advancement. Barron & Strauss, *supra* note 129, at 205-06. They assert: [T]he multiple regression analysis showed that, when various other factors are controlled, there is a significant tendency for rape to increase as the status of women increases. This finding is opposite to our hypothesis but consistent with the 'backlash' theory put forward by authors such as [Diana] Russell (1975).

Id. Similarly, Richard Goldstein, discussing the lyrics of the musician Eminem, states:

At its hard core, Eminem's poetics is pornography, and it's accorded the same privileges. Just as we've declared the XXX zone exempt from social thinking, we refuse to subject sexist rap to moral scrutiny. We crave a space free from the demands of equity, especially when it comes to women, whose rise has inspired much more ambivalence than most men are willing to admit.

Richard Goldstein, *The Eminem Schtick: What Makes a Bigot a Genius? Presiding Over Guilty Pleasures*, VILLAGE VOICE, June 12-18, 2002. See also Michael S. Kimmel, *Introduction: Guilty Pleasures-Pornography in Men's Lives*, in MEN CONFRONT PORNOGRAPHY, *supra* note 45, at 1, 20 ("As women advance in real life, they are pushed back in men's fantasies.").

²⁷⁶ Longino, *supra* note 249, at 132. Scott MacDonald opines that porn will "disappear" as men gain "self-acceptance and respect." Macdonald, *supra* note 60, at 42. Sir Martin Roth expresses a similar hope, noting that sexually explicit Japanese Ukiyo-e prints became much more violent during the mid-nineteenth century but then faded away. Roth, *supra* note 52, at 23. Unfortunately, current trends in Japanese pornography and crime statistics point towards more violence, not less. Seiya Morita, *Pornography, Prostitution, and Women's Human Rights in Japan*, in NOT FOR SALE, *supra* note 10, at 64, 68-81.

²⁷⁷ STOLLER & LEVINE, *supra* note 203, at 22. Pornography showcases multiple forms of physical violence against women, so perhaps Margold is referring here to emotional violence.

²⁷⁸ BOYD, *supra* note 85, at 4.

²⁷⁹ *Id.* at 5. Boyd calls for abolishing women's studies departments. *Id.* at 5-6, 12. He also calls for a reevaluation of laws and policies governing sexual harassment and sexual assault, because "narcissistic, calculated, and vindictive" women use them to entrap clueless males. *Id.* at 6-7, 9.

Liberals have accused radical feminists of being anti-male and blaming men for life's vicissitudes.²⁸⁰ It is true that survivors of the sex trades (both male and female) "usually develop a tremendous hatred of men,"²⁸¹ but a minority of prostituted women hardly represents the entire radical feminist movement. A more specious charge is that "humorless" feminists wish to deprive guys of their harmless good times.²⁸² Apparently one may torture and rape without moral culpability, provided that one elicits suitable merriment while doing so. Author Nora Ephron initially judged *Deep Throat* to be "one of the most unpleasant, disturbing films I have ever seen," both "anti-female" and "antisexual."²⁸³ However, after interviewing Linda Lovelace, Ephron changed her mind, characterizing herself as a "a hung-up, uptight, middle-class, inhibited, puritanical, feminist who lost her sense of humor at a skin flick."²⁸⁴ Feminists are relentlessly earnest about exposing and addressing pornography's harms, but they are not anti-male. They oppose constructs of sexuality that are violent and objectified, and they oppose the notion that such constructs are either inherently male or beneficial for men. In fact, they assert that the objectification of women in pornography prevents its consumers from connecting emotionally with other human beings.²⁸⁵

Some male scholars have embraced feminist critiques of pornography. Jackson Katz notes the role of "enlightened self-interest" in persuading men that pornography has deleterious effects: "[I]f they can be shown that porn hinders rather than facilitates a healthy sex life for *men*, there is at least a chance that enough men will reject it to truly make a difference."²⁸⁶ According to psychologist Floyd Winecoff, "[P]ornography not only does not liberate men, but on the contrary becomes a source of bondage. Men masturbate to pornography only to become addicted to the fantasy."²⁸⁷ Pornogra-

²⁸⁰ See *id.* at 105 ("Life must never be unpleasant and if it is, someone (usually a male) is to blame and must be punished.").

²⁸¹ Parker, *supra* note 61, at 13.

²⁸² BOYD, *supra* note 85, at 31. Boyd describes a "temperamental artist" who was voted "most humorous" at his communications company's annual Christmas party. *Id.* at 81-82. The artist's humor apparently excuses the sexual harassment of which he was accused. *Id.* Pornographers use cartoons to normalize pedophilia, rape, torture, sexual servitude, racism, and sexual harassment. See RUSSELL, *supra* note 23, at 23-42. Kipnis suggests that women need to get over their hang-ups: "The motive for (men's) dirty jokes is that women are incapable of tolerating undisguised sexuality, and this incapacity increases correspondingly as your educational and social level rise." KIPNIS, *supra* note 41, at 144.

²⁸³ LANE, *supra* note 142, at 103 (quoting Nora Ephron, *Women*, *ESQUIRE*, Feb. 1973, at 22).

²⁸⁴ *Id.* After her escape from Chuck Traynor, Lovelace stated that he forced her to speak positively to reporters about her experience in the pornography industry. This was presumably the case in Lovelace's interview with Ephron. See *supra* note 224 and accompanying text.

²⁸⁵ See PAUL, *supra* note 49, at 85 ("While the absence of a real woman in pornography may be welcome, it also eliminates the presence of a real man.").

²⁸⁶ KATZ, *supra* note 25, at 192.

²⁸⁷ *The Minneapolis Hearings*, *supra* note 34, at 182 (testimony of Michael Laslett); see also Roth, *supra* note 52, at 5 ("In the role enacted by the male in much contemporary pornography, we seem to

phy divorces men from love, defined by Viktor Frankl as “living the experience of another person in all his [or her] uniqueness and singularity.”²⁸⁸ Men who accept pornography’s premises about women, whether as fantasy or reality, lose their ability to know any woman. As one looks at women in pornography, “You discover that they are not ‘sexy’ at all but that *Playboy* has only shifted the fig leaf from the genitals to the face.”²⁸⁹

A secondary strain that runs through the feminist critiques of pornography is its endemic racism, which is particularly harmful in its depictions of both men and women of African descent. Liberals who defend pornography surely would condemn racist films, and yet they ignore racism in contemporary pornography, which amplifies stereotypes and exaggerates sex roles. Black women suffer more extreme violence and domination, and black men are portrayed as more violent and libidinous.²⁹⁰ At the same time that pornography perpetuates racist stereotypes, it directly reflects attitudes inherited from the American slave tradition:

White males attended slave auctions to inspect male and female slaves displayed nude on the block. Such practices shaped both racism and eroticism in the United States, helped establish American preferences for sexual expression as objectification and spectacle, associated nudity with vulnerability, and fostered sexual exploitation of weaker members of society.²⁹¹

Van F. White, the first African American elected to the Minneapolis City Council, chaired the civil rights hearings conducted in Minneapolis in December 1983.²⁹² As he learned about the indignities that women experienced in the production of pornography and its aftermath, his thoughts reverted to American slavery:

have traveled a very long way from the Casanovas and Don Juans who for all their vainglorious boasting, their conquest, and their scalp-hunting, loved women in their own fashion.”)

²⁸⁸ Viktor Frankl, *The Meaning of Love*, in THE CASE AGAINST PORNOGRAPHY, *supra* note 29, at 36, 36.

²⁸⁹ May, *supra* note 29, at 30. Playmate Dorothy Stratten once remarked that hatred of men was the only thing that got her through her nude *Playboy* photo shoots. BOGDANOVICH, *supra* note 45, at 106.

²⁹⁰ See generally RUSSELL, *supra* note 21, at 45-55; Vednita Carter, *Prostitution and the New Slavery*, in NOT FOR SALE, *supra* note 10, at 85; Gloria Cowan, *Racism and Sexism in Pornography*, in THE PRICE WE PAY, *supra* note 15, at 92; Gail Dines, *King Kong and the White Woman: Hustler Magazine and the Demonization of Black Masculinity*, in NOT FOR SALE, *supra* note 10, at 89. Asian women are typically portrayed as being more submissive and compliant than either white or African women. See Carter, *supra*, at 86-87. Susan Brownmiller notes that Jewish women are sometimes subject to the same stereotype of promiscuity as black women. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 124 (1975).

²⁹¹ SLADE, *supra* note 36, at 82 (footnotes omitted). See also JOHNSON, *supra* note 218, at 121.

²⁹² Van F. White, *Pornography and Pride*, *ESSENCE*, Sept. 1984, reprinted in MEN CONFRONT PORNOGRAPHY, *supra* note 45, at 290, 291.

I thought about how during the time of slavery, black women would have their bodies examined, their teeth and limbs examined, their bodies checked out for breeding, checked out as you would check out an animal—and I thought: We’ve come a long way, haven’t we?²⁹³

Assessing the pornography critique offered by the radical feminists is somewhat more challenging than assessing social science evidence in light of *Lawrence*. Radical feminists certainly provide abundant evidence of objective, third-party harms to women, but some of those harms implicate public (rather than objective) morality. Outright abuse, exploitation, and harassment easily qualify as third-party harms. The subtler effects of silencing, objectification, discrimination, and damaged interpersonal connections are clearly negative, but addressing them is problematic in a liberal society that struggles to identify clear moral standards. Nonetheless, the qualitative radical feminist critique ultimately bolsters and completes the quantitative social science analysis of pornography. Both provide important reasons to uphold *Miller*.

III. THIRTY-FIVE YEARS LATER: REREADING *MILLER*

A. *The First Amendment: Acknowledging the Elephant in the Room*

This Article ultimately is not about First Amendment speech rights. It accepts *Miller*’s fundamental premise that obscenity is not speech worthy of First Amendment protection and then analyzes whether or not *Miller*’s stated concerns violate *Lawrence*. Nonetheless, this premise is the subject of vigorous, ongoing debate, and one cannot proceed very far without acknowledging that fact.

Not surprisingly, pornography apologists embrace an absolutist view of the First Amendment. Nadine Strossen, President of the American Civil Liberties Union, expresses this view in its most reduced form: “The First Amendment’s free speech clause refers unqualifiedly to ‘the freedom of speech,’ indicating that *all* speech should be protected equally.”²⁹⁴ Strossen notes (perhaps superfluously) that the First Amendment contains no exception for sexual expression.²⁹⁵

Practically speaking, an absolutist interpretation of the First Amendment is historically suspect and incorrect as a factual matter. The Supreme Court has consistently countenanced restrictions on all kinds of speech, not merely speech that poses the threat of “clear and present danger,” as acknowledged by the Supreme Court in *Schenck*,²⁹⁶ or the more pressing

²⁹³ *Id.*

²⁹⁴ STROSSEN, *supra* note 34, at 56.

²⁹⁵ *Id.* at 37-38.

²⁹⁶ *Schenck v. United States*, 249 U.S. 47 (1919).

“imminent danger” raised by Justice Holmes in his *Abrams* dissent.²⁹⁷ In *Chaplinsky*, Justice Murphy flatly stated that “the right to free speech is not absolute at all times and under all circumstances.”²⁹⁸ The government may regulate “well-defined and narrowly limited classes of speech” that include “the lewd and obscene, . . . the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”²⁹⁹ Words that inflict injury include so-called performatives, “words that are legally treated as the acts they constitute,” such as inciting attack, bribery, antitrust violations, segregation, and other forms of unlawful discrimination.³⁰⁰

Perhaps more importantly, First Amendment absolutism is both circular and hollow. To say that obscenity enjoys First Amendment protection because the First Amendment says so (or says nothing to the contrary) is not particularly helpful in reaching an understanding of what freedom of speech means and why it matters. First Amendment absolutism has the distinct advantage of being clear and consistent, but ultimately it is neither very interesting nor very relevant, as it has nothing to do with the nitty-gritty of free speech jurisprudence or the myriad choices government and society make about regulating speech. A rare absolutist on the Court, Justice Douglas consistently opined that the government has no constitutional authority to regulate pornography of any kind.³⁰¹ However, he said little more than that. Consequently, his opinions do not offer particularly useful analytical tools with which to address the current pornography problem. In contrast, the *Miller* Court explicitly rejected “a convenient ‘institutional’ rationale—an absolutist, ‘anything goes’ view of the First Amendment,” insisting that the Court’s job was to remain in the thick of the fray of Constitutional interpretation.³⁰²

The most significant problem with First Amendment absolutism is that it prioritizes free speech as the most important right, trumping all other liberties or values. Ultimately this is an untenable position, as we value many

²⁹⁷ *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). Shiffrin and Choper note the court has historically approached First Amendment limitations without particular attention to the intent of the Founders or a commitment to any general theory of free speech jurisprudence. STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT* 3 (3d ed. 2001). Rather, the Court seems to have responded to the needs and standards of its time. *Id.*

²⁹⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

²⁹⁹ *Id.* at 571-72.

³⁰⁰ Catharine A. MacKinnon, *Speech, Equality, and Harm: The Case Against Pornography*, in *THE PRICE WE PAY*, *supra* note 15, at 301, 307.

³⁰¹ *See, e.g., Miller v. California*, 413 U.S. 15, 46 (1973) (Douglas, J., dissenting) (“If there are to be restraints on what is obscene, then a constitutional amendment should be the way of achieving the end.”).

³⁰² *Miller*, 413 U.S. at 29. The Court also noted that “[t]he First and Fourteenth Amendments have never been treated as absolutes.” *Id.* at 23 (quoting *Breard v. Alexandria*, 341 U.S. 622, 642 (1951) (footnote omitted)).

things besides the unfettered exchange of ideas. Free speech is critically important, both for moral and practical reasons, and suppression of speech indeed represents a serious encroachment on civil liberties. Nonetheless, there are times and circumstances that weigh against unfettered expression, particularly expression that has clear and consistent correlation with observable harms. First Amendment absolutists are sufficiently sophisticated to understand this dilemma, so their arguments typically go well beyond defenses of free speech for its own sake.³⁰³ The first argument is that freedom of speech is a fundamental freedom that contributes significantly to individual well-being.³⁰⁴ The second argument is that freedom of speech is a necessary tool in winnowing out the good from the bad in the marketplace of ideas, a critical component of democracy.³⁰⁵ However, as soon as First Amendment absolutists acknowledge the role of utility in justifying freedom of speech, they open themselves to counter-claims of alternative utilities. They then face the dilemma of balancing freedom of speech against other, equally or even more beneficial, human rights.

Radical feminists have seized the notion of human well-being and run with it. Pornographers' abuses of free speech rights have created significant hardships for at least some women.³⁰⁶ Free speech absolutists rapidly lose the moral high ground when they deliberately ignore the troubling consequences of harmful expression. Libertarian Wendy Kaminer proudly proclaims that a "commitment to liberty" trumps any concerns about "speech deemed hateful, sick, or pornographic."³⁰⁷ Philosopher Rebecca Whisnant has a fairly withering response for those who discount the consequences of speech and their own culpability in defending harmful speech, regardless of its content or effects:

To confront pornography and listen to the women hurt in it and by it, and still to cast pornography as merely a free speech issue, or as merely a matter of who feels offended by what, requires a stunning exercise of deliberate blindness, an extraordinary numbing of one's basic capacities of sympathy, moral identification, and outrage. It indicates that privilege is being defended with all the perceptual and conceptual resources at one's disposal—the privilege of being a man, yes, but also the relative comfort of being a woman who believes it cannot and will not happen to her.³⁰⁸

Even pornography apologists acknowledge the problem of defending free speech when such speech perpetrates harmful acts, unjust outcomes, or

³⁰³ See, e.g., MORRIS L. ERNST, *THE FIRST FREEDOM* at xi (1946) ("The peace of the world depends on human understanding and human understanding depends on the free flow, through-out the planet, of movies, radio, and the printed word.").

³⁰⁴ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 787-88 (2d ed. 1988).

³⁰⁵ See *id.* at 785-86.

³⁰⁶ See *infra* Part II.

³⁰⁷ Wendy Kaminer, *Foreword to the New Edition of STROSSEN*, *supra* note 34, at xi.

³⁰⁸ Whisnant, *supra* note 237, at 25.

merely misogynist attitudes.³⁰⁹ Professor Richard Delgado gives stark form to the dilemma faced by civil libertarians who fail to account for the very real consequences of speech: “Unless the ACLU adjusts its thinking to take account of the more nuanced, skeptical view now emerging, its program, counsels, and pronouncements will seem more and more the futile products of a backwater of legal thought.”³¹⁰

With regard to the marketplace of ideas, pornography critics have effectively argued that no such marketplace exists when there is unequal access to channels of expression. Radical feminists and other pornography critics face an industry that is wealthy, powerful, and influential. It is specious to argue that the answer to harmful speech is more speech when, as Gresham’s Law³¹¹ predicts, debased speech in a maverick marketplace will drive out the good. Disparities in wealth and power tend to exclude the disenfranchised from opportunities to speak with any meaningful impact.³¹² Frank Michelman has noted that the “loss or weakening of voices in public exchange must register as a harm of the first order.”³¹³ If civil libertarians truly value the autonomy represented by freedom of speech, then the potential loss of speech by women who are silenced, subordinated, or actively harmed by pornography “ought to make conscientious civil libertarians squirm.”³¹⁴ Steven Shiffrin notes the power of constant bombardment by mass media that obliterates the messages of those who are at an economic

³⁰⁹ See Weiss, *supra* note 220, at 93. In describing Matthew Stark, head of the Minnesota Civil Liberties Union, Weiss writes: “He spoke with a bullish eloquence about the difference between word and act, and about the First Amendment. He didn’t talk about pornography really.” *Id.*

³¹⁰ Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, in *THE PRICE WE PAY*, *supra* note 15, at 327, 331. See also, John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, in *THE PRICE WE PAY*, *supra* note 15, at 332, 337 (“Those who emphasize the free speech narrative, like Strossen, are extremely reluctant to concede that racist speech is ever any more than offensive, while those speaking from an equality narrative are more likely to speak of racist speech as an injury or wound.”) Powell was formerly National Legal Director of the ACLU. *Id.* at 379. Representatives of the ACLU appeared in each of the hearings held in Indianapolis, Los Angeles, and Boston to oppose the radical feminists’ attempt to pass civil rights legislation to protect women victimized by the pornography industry. See *The Indianapolis Hearing*, *supra* note 81, at 285 (testimony of Bill Marsh); *The Los Angeles Hearing*, *supra* note 225, at 350 (testimony of Carol Soble); *The Massachusetts Hearing*, *supra* note 22, at 382 (testimony Karen Hunder).

³¹¹ Gresham’s Law states that a debased currency will drive out good currency. *THE COLUMBIA ENCYCLOPEDIA* 1190 (6th ed. 2000). Some legal scholars posit that a similar situation occurs with speech. See SLADE, *supra* note 36, at 19.

³¹² See TRIBE, *supra* note 304, at 786 (“Especially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that ‘free trade in ideas’ is likely to generate truth?”).

³¹³ Frank I. Michelman, *Civil Liberties, Silencing, and Subordination*, in *THE PRICE WE PAY*, *supra* note 15, at 272, 273.

³¹⁴ *Id.*

disadvantage: “Any confidence that we will know what is truth by seeing what emerges from such combat is ill placed.”³¹⁵

First Amendment discussions inevitably tend towards an analysis of what it means to be free. Isaiah Berlin famously outlined two concepts of liberty in his lecture of the same title.³¹⁶ Negative liberty is the right to act without interference from others. Positive liberty is the power to participate in the processes that determine one’s destiny, whether these be political, economic, or personal. The moral challenge posed by negative liberty is that it countenances a certain degree of inequality, provided that such inequality is the result of one’s individual efforts.³¹⁷ The moral challenge posed by positive liberty is that some external power may determine the content of freedom and impose it on everyone, in essence forcing people to be “free,” regardless of their personal preferences (and typically with blithe disregard for alternative standards of truth or fairness).³¹⁸ At first glance, freedom of speech falls squarely in the category of negative freedom. After all, freedom of speech depends on one’s ability to speak free from external suppression. However, feminists assert that pornography (the corporal embodiment of the pornography industry’s freedom to speak) actually denies them positive liberty, an equal place in a world that is not shackled by false stereotypes, violence, and other impediments to full participation.³¹⁹ In short, radical feminists assert that their positive freedom to speak cannot co-exist with the pornography industry’s negative freedom to broadcast images of actual female oppression. Berlin recognized this quandary; that conceptions and realizations of liberty compete with one another, jostling for position in an ever-shifting matrix:

One freedom may abort another; one freedom may obstruct or fail to create conditions which make other freedoms, or a larger degree of freedom, or freedom for more persons, possible; positive and negative freedom may collide; the freedom of the individual or the group may not be fully compatible with a full degree of participation in a common life, with its demands for cooperation, solidarity, fraternity. But beyond all these there is an acuter issue: the paramount need to satisfy the claims of other, no less ultimate values: justice, happiness, love, the realization of capacities to create new things and experiences and ideas, the discovery of the truth.³²⁰

Competing notions of liberty have implications for the type of polity one creates and whether or not that polity can survive the tug-of-war among the competing demands of negative versus positive liberty or individual

³¹⁵ Steven H. Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1281 (1983).

³¹⁶ ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 5 (1969).

³¹⁷ *Id.* at 8.

³¹⁸ *Id.* at 17.

³¹⁹ See Ronald Dworkin, *Liberty and Pornography*, in *PORNOGRAPHY: PRIVATE RIGHT*, *supra* note 22, at 202, 202-211.

³²⁰ ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY*, at 1 vi (1969).

freedom versus substantive justice. John Stuart Mill became the godfather of civil libertarians when he stated: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”³²¹ However, Mill assumed that enlightened individuals would exercise self-restraint in adhering to strict moral codes, thus guarding against abuse of negative liberty. Of sex, Mill said: “I think it most probable that this particular passion will become with men, as it is already with a large number of women, completely under the control of the reason.”³²² John Milton, whose *Areopagitica* makes him a godfather of freedom of speech, acknowledged some expression was, in fact, harmful.³²³ He advised the state to “have a vigilant eye how books demean themselves as well as men; and thereafter to confine, imprison, and to do sharpest justice on them as malefactors.”³²⁴ Thus, two paragons of freedom of speech nonetheless recognized that any freedom may be excessive. Each freedom exists within a complicated web of other freedoms and values.

A chronic imbalance between license and justice may ultimately have dire consequences. Judge Robert Bork has opined that, unless we find a way to manage pornography through both social and legal sanctions, “the prospects are for a chaotic and unhappy society, followed, perhaps, by an authoritarian and unhappy society.”³²⁵ One might dismiss Judge Bork’s observation as the fulminations of an irascible conservative. However, Professor Gail Dines, a radical feminist, recently made a similar public statement, saying that she fears for civil society if we fail to address the roots and effects of porno-violence.³²⁶ Judge Bork and Professor Dines inhabit disparate ideological spheres. They likely regard one another as emissaries of their respective dark sides, and yet they agree on this key point. Rather than dismissing both as alarmists, it behooves us to consider their warnings seriously. If pornography truly threatens our social fabric, perhaps it is time to consider reasonable measures to regulate it so that other forms of liberty can maintain their tenuous balance. Justice Stevens stated this point succinctly: “As is true of many other aspects of liberty, some forms of orderly regulation actually promote freedom more than would a state of total anarchy.”³²⁷

³²¹ JOHN STUART MILL, ON LIBERTY 13 (Stefan Collini ed., 1989).

³²² Letter from John Stuart Mill to Lord Amberley (Feb. 2, 1870), in 4 THE LATER LETTERS OF JOHN STUART MILL, 1849-1873, at 1693 (Francis E. Mineka & Dwight N. Lindley eds., 1972).

³²³ JOHN MILTON, AREOPAGITICA (1644), available at <http://www.uoregon.edu/~rbear/areopagitica.html>.

³²⁴ *Id.*

³²⁵ ROBERT H. BORK, SLOUCHING TOWARDS GOMORROH 139 (1996).

³²⁶ Gail Dines, Pornography and Pop Culture: Putting the Text in Context, Address at the Wheelock College Conference: Pornography and Pop Culture: Reaffirming Theory, Rethinking Activism (Mar. 24, 2007) (notes of address on file with author).

³²⁷ *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring).

The decision in *American Booksellers Association, Inc. v. Hudnut*³²⁸ inadvertently illustrates the tension between negative and positive liberty when freedom of speech becomes the overriding freedom. *Hudnut* was a heart-breaking defeat for radical feminists, who sought to revolutionize pornography jurisprudence. Judge Easterbrook correctly noted that the proposed civil rights ordinance violated established jurisprudence regarding free speech, particularly with regard to viewpoint discrimination.³²⁹ However, he chose two very unfortunate examples to illustrate the glories of freedom of speech:

Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions.³³⁰

Once an idea results in the death or repression of millions, perhaps the time has come to regulate the vehicle of that idea. Is absolute freedom of speech truly worth more than the lives and freedoms of millions of fellow human beings? Speech has tremendous value both as a tool and as a fundamental freedom, but does that value outweigh positive liberties, such as life and liberty, in every instance? We assume that freedom of speech will protect the life and liberty of millions, but these are utilitarian justifications that demand that we consider their alternatives.

These are dangerous questions, with potentially dangerous answers, but not asking these questions may be equally dangerous. Pornography is a too-frequent vehicle for hatred of and violence against women (and children and minorities). The narrow world of obscenity law leaves the larger worlds of pornography and erotica largely untouched. Nonetheless, obscenity law seems to be a valid (if not particularly effective) counter-balance to the pernicious actions perpetrated through the production and consumption of pornography.

B. Miller: *Distinguishing Obscenity from Speech*

During the first half of the twentieth century, the Supreme Court gradually restricted the powers of the federal and state governments to

³²⁸ 771 F.2d 323 (7th Cir. 1985) (overturning the Indianapolis ordinance defining "pornography" as a discriminatory practice, because the definition of "pornography" differed from "obscenity" and regulated speech rather than conduct), *aff'd*, 475 U.S. 1001 (1986). The ordinance in question resulted from the civil rights hearings in which MacKinnon and Dworkin participated. *The Indianapolis Hearing*, *supra* note 81, at 269.

³²⁹ The feminists could have revised their proposed ordinance to accomplish many of their goals without running quite so far afield of current First Amendment jurisprudence, but that is a subject for another article.

³³⁰ *Hudnut*, 771 F.2d at 327.

regulate pornography. The year 1957 marked the beginning of a dramatic and controversial sixteen-year period during which the Warren Court eviscerated the remaining constraints imposed by anti-obscenity laws.³³¹ Between 1957 and 1967, a deeply divided Supreme Court ruled on thirteen obscenity cases, producing fifty-five separate opinions. Between 1967 and 1973, the Supreme Court reversed thirty-one obscenity convictions, putting the Court at odds with state legislators, local prosecutors, and juries.³³² The Court was not particularly candid about its obscenity decisions. In the eighteen months following its decision in *Redrup v. New York*³³³ the Court reversed thirty-five state and federal obscenity convictions without issuing an opinion.³³⁴

The drive against obscenity laws began with *Roth v. United States*,³³⁵ a challenge to the 1876 Comstock Act which prohibited sending obscene, lewd, lascivious, filthy, or indecent material through the mails. In writing the opinion, Associate Justice Brennan attempted to distinguish materials that were merely sexually explicit from obscene materials that did not merit First Amendment protection. *Miller* ultimately overturned *Roth*, but the test the later *Miller* Court ultimately adopted contains echoes of Brennan's obscenity test.³³⁶ He determined that sex alone does not render a work obscene.³³⁷ In contrast, "[o]bscene material is material that deals with sex in a manner appealing to the prurient interest."³³⁸ Brennan further noted that: "Implicit in the history of the First Amendment is the rejection of obscenity as *utterly without redeeming social importance*."³³⁹ Brennan's five-part test for obscenity boiled down to "whether (1) to the average person, (2) applying contemporary community standards, (3) the dominant theme of the material (4) taken as a whole appeals to (5) prurient interest."³⁴⁰ *Roth*'s "utterly without redeeming social importance" test was a windfall for the pornogra-

³³¹ RICHARD F. HIXSON, PORNOGRAPHY AND THE JUSTICES: THE SUPREME COURT AND THE INTRACTABLE OBSCENITY PROBLEM 20 (1996).

³³² *Id.* Scholars have attributed this to the rise of 1960s political radicalism and a sea of change in popular sexual mores. Social historian Loren Baritz named the 1960s a "culture war" and claimed that a permanent change in morality (and not political radicalism) was the dominant effect of the era. LOREN BARITZ, THE GOOD LIFE: THE MEANING OF SUCCESS FOR THE AMERICAN MIDDLE CLASS 228 (1989).

³³³ 386 U.S. 767 (1967).

³³⁴ See Dwight L. Teeter & Don R. Pember, *The Retreat from Obscenity: Redrup v. New York*, 21 HASTINGS L.J. 175, 188 (1969). Justices Burger, Harlan, and Blackmun expressed concern about "Redrapping," the Court's use of summary per curiam methods to overrule lower courts. HIXSON, *supra* note 331, at 102, 106. See also LANE, *supra* note 142, at 28. The Court discontinued the practice with *Miller*. HIXSON, *supra* note 331, at 106.

³³⁵ 354 U.S. 476 (1957).

³³⁶ *Miller v. California*, 413 U.S. 15, 20 n.2 (1973).

³³⁷ *Roth*, 354 U.S. at 487 ("The portrayal of sex, e.g., in art, literature and scientific work is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.")

³³⁸ *Id.*

³³⁹ *Id.* (emphasis added).

³⁴⁰ *Id.* at 489 (numbering added).

phy industry.³⁴¹ It was such a permissive standard that any pornographer could demonstrate some modicum of artistic, literary, or scientific merit.³⁴² In *Manual Enterprises, Inc. v. Day*,³⁴³ a fractured Court added another dimension to the *Roth* standard, declaring that material must be “patently offensive” to be adjudged obscene.³⁴⁴

With the appointment of Chief Justice Burger in 1969, the Supreme Court moderated its obscenity stance.³⁴⁵ In 1973 five of the nine Justices would once again adopt an obscenity standard, the first time since *Roth* that a majority of Justices had joined a single obscenity opinion. In *Miller*, Chief Justice Burger unequivocally stated that obscenity is not protected speech under the First Amendment.³⁴⁶ The new obscenity standard incorporated elements which the Court had considered during the prior sixteen years. A work is obscene if:

- (1) The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest;
- (2) The work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (3) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³⁴⁷

The Court relieved the States of the impossible burden of proving that pornographic material was “*utterly without redeeming social value*” (the lenient *Roth/Memoirs* standard) before it could be declared obscene.³⁴⁸

³⁴¹ In his dissent to *Roth*, Justice Harlan predicted as much: “The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted.” *Id.* at 507 (Harlan, J., dissenting).

³⁴² For example, in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Supreme Court reversed the Massachusetts Supreme Judicial Court, which had found the novel *Fanny Hill* to be obscene. *Id.* at 421. In the majority opinion, Justice Brennan wrote that “a book need not be ‘unqualifiedly worthless’ before it can be deemed obscene” and that even a “modicum of social value” will save the work. *Id.* at 419-20. Social “value” is an easier standard than social “importance,” hence *Memoirs* further diminished the already lax *Roth* test. Justice Clark, weary of the endless stream of obscenity crossing his desk, adamantly disagreed with Brennan: “Though I am not known to be a purist—or a shrinking violet—this book is too much even for me.” *Id.* at 442 (Clark, J., dissenting).

³⁴³ 370 U.S. 478 (1962).

³⁴⁴ *Id.* at 486.

³⁴⁵ Warren Burger replaced Earl Warren. Nixon’s subsequent appointments (Harry Blackmun in 1970, Lewis Powell and William Rehnquist in 1972) gave the Supreme Court the votes it needed to retrench the *Roth* standard. LANE, *supra* note 142, at 30-31.

³⁴⁶ *Miller v. California*, 413 U.S. 15, 36 (1973).

³⁴⁷ *Id.* at 24.

³⁴⁸ *Id.* at 24-25. Brennan’s dissent (contained in *Miller*’s companion case) specifically stated that the *Miller* test represented a “far more sweeping suppression of sexually oriented expression, including

Despite Justice Brennan's fears that *Miller* would chill sexually explicit expression, subsequent Supreme Court jurisprudence and the explosion of commercial pornography hardly confirm that conclusion. The Supreme Court has been sympathetic to attempts to regulate sexual commerce through zoning restrictions, holding that time, place, and manner restrictions that apply to a particular place do not unduly burden protected sex speech.³⁴⁹ It has likewise allowed time restrictions (another type of zoning) on sexually explicit communications that are harmful to children and offensive to the general public.³⁵⁰ However, it has been much less sympathetic to attempts to regulate newer broadcast technologies, such as cable television and the Internet.³⁵¹ It also has retreated from earlier efforts to protect children from the most invidious effects of the pornography industry.³⁵²

Feminist critiques inform this defense of *Miller*, but many radical feminists despise the very notion of obscenity. Catharine MacKinnon dismisses obscenity laws as "moralistic, antisex, homophobic, criminal, in the hands of the police, and, for over a decade now, in the hands of the right."³⁵³ According to John Stoltenberg, "[o]bscenity laws have perpetuated a belief in the vileness of women's bodies"³⁵⁴ Andrea Dworkin wrote that defining something as "obscenity" is a value judgment of filth stemming from conservative sexual mores.³⁵⁵ Radical feminists sought a sweeping revision of obscenity law, turning from criminal sanctions to civil remedies, from notions of communal offense to individual harm.³⁵⁶ Instead

expression that would surely be held protected under our current formulation." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 96 (1973) (Brennan, J., dissenting).

³⁴⁹ See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986) (holding that the city's ordinance banning the operation of pornographic movie theaters, bookstores and other similar establishments within 1,000 feet of any residential zone, church, park, or school did not violate the First Amendment); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976) (holding that the city's ordinance prohibiting pornographic movie theaters, bookstores and similar establishments from operating within 1,000 feet of any other such similar establishment did not violate the First Amendment).

³⁵⁰ See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). This case famously (or infamously) involved George Carlin and the twelve dirty words that apparently comprise the most impressive portion of his vocabulary.

³⁵¹ See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

³⁵² In *Reno v. ACLU*, 521 U.S. 844 (1997), the Supreme Court struck sections of the Communications Decency Act that would have made it a federal crime to send to anyone under 18 years of age "communications that, in context, depict or describe, in terms 'patently offensive' as measured by contemporary community standards, sexual or excretory activities or organs." *Id.* at 860.

³⁵³ MacKinnon, *supra* note 300, at 313.

³⁵⁴ John Stoltenberg, *Pornography and Freedom*, in *MEN CONFRONT PORNOGRAPHY*, *supra* note 45, at 60, 67.

³⁵⁵ DWORKIN, *supra* note 36, *Preface*.

³⁵⁶ See generally Catharine A. MacKinnon & Andrea Dworkin, *Memo on Proposed Ordinance on Pornography*, in *IN HARM'S WAY*, *supra* note 22, at 253. See also *The Ordinances*, in *IN HARM'S WAY*,

of legal restrictions proceeding from violations of community standards of decency, feminists want substantive redress for pornography's violations of women's civil rights.

The law is conservative, in the sense that it typically resists radical departures from precedent. The feminists proposed sweeping revisions to how we conceptualize pornography and its impact on women's civil rights, and they suffered a painful defeat.³⁵⁷ With the passage of time, our collective understanding of the nature of speech may coalesce with the radical feminist vision, but in the meantime we are left with somewhat archaic means to address a contemporary problem. *Miller* and current obscenity laws are weak tools with which to challenge the pornography industry, but they are all we have to work with as we put new wine into old casks. Nonetheless, this is not a quixotic task. A key element in determining whether or not particular expression constitutes obscenity is whether or not it is "patently offensive."³⁵⁸ Offensiveness and misogyny have begun to coalesce, thanks in part to feminist arguments.³⁵⁹ Pornographic images that show graphic violence against or degradation of women in the context of ultimate sexual acts should offend contemporary community standards.³⁶⁰ Jackson Katz notes that pragmatic feminists have embraced patriotism and paternalism in combating domestic violence in the military.³⁶¹ Obscenity and offensiveness may be similarly useful tools in challenging pornography if radical feminists are willing to co-opt them as possible solutions to the problem.

Miller has not stemmed the tide of pornography. The *Miller* standard is permissive, not prescriptive, and both the federal government and state governments have complete discretion in determining whether or not to adopt or enforce obscenity laws.³⁶² In the immediate aftermath of *Miller*, pornographers temporarily retrenched their excesses.³⁶³ Magazine covers and content became less explicit, and adult movie distributors limited their geographic scope. However, obscenity laws are expensive to prosecute, and

supra note 22, at 426, 426-61 (describing the civil rights ordinances proposed in Minneapolis, Indianapolis, and Boston).

³⁵⁷ See *Am. Booksellers Ass'n, Inc., v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985) (holding that the Indianapolis ordinance defining pornography as a practice that discriminates against women is unconstitutional because it constitutes viewpoint discrimination).

³⁵⁸ See *Manual Enters. v. Day*, 370 U.S. 478, 486 (1962).

³⁵⁹ See generally Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993).

³⁶⁰ See *id.* at 894-95.

³⁶¹ See Katz, *supra* note 25, at 223-24.

³⁶² See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973) ("The States, of course, may follow such a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction.").

³⁶³ See LANE, *supra* note 142, at 30-32.

some prosecutors may personally support liberalization of the sex trades.³⁶⁴ The pornography industry hires sophisticated attorneys, and it is difficult to predict whether or not juries will find particular material obscene. Hence, the outcomes of obscenity prosecutions are notoriously uncertain. Advances in technology have limited the ability of local communities to identify and target pornography producers and distributors. Also, by shifting the point of sale to the individual's home, the industry has become less publicly obtrusive and thus has a less obvious external impact on local communities.³⁶⁵

Pornography apologists attack *Miller* for two reasons. First, they claim that *Miller* is in effect a morality test, allowing the "government to restrict sexually-oriented expression on the basis of mere assertions or assumptions about its alleged lack of importance or the purported harms associated with it."³⁶⁶ It is true that the *Miller* Court cited morality in upholding the conclusion that obscenity does not enjoy First Amendment protection:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*³⁶⁷

This sounds like a morality test, but *Miller* generally does not read like a morality opinion, particularly when informed by its companion case, *Paris Adult Theatre I*.³⁶⁸ Both cases focus on the states' abilities to regulate commerce and enact laws necessary for civic and consumer protection rather than on pornography's effects on individual sexual mores. *Miller* praises the sexual revolution for striking "layers of prudery from a subject long irrationally kept from needed ventilation."³⁶⁹ However, it denies that an open society requires the abnegation of all standards of civility and order. *Miller* also denies that pornography has a role in the definition and attainment of liberty:

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene mate-

³⁶⁴ See Short, *supra* note 191, at 313 ("A thriving sex industry may also be tied to corruption within local government and law enforcement, which seek in various ways to benefit from the exploitation of women and children.").

³⁶⁵ See LANE, *supra* note 142, at xx-xxi, 33. The industry has simultaneously become more intrusive, with far greater access to individuals.

³⁶⁶ STROSSEN, *supra* note 34, at 51.

³⁶⁷ *Miller v. California*, 413 U.S. 15, 20-21 (1973) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

³⁶⁸ Compare *id.*, with *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

³⁶⁹ *Miller*, 413 U.S. at 36.

rial demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.³⁷⁰

Paris Adult Theatre I makes explicit the Justices' concern with the states' ability to regulate commercial sex. The opinion notes the states' "long-recognized legitimate interest in regulating the use of obscene material in local commerce," in "stemming the tide of commercialized obscenity," and in preventing the "crass commercial exploitation of sex."³⁷¹ It then catalogues various other "unprovable assumptions" that "underlie much lawful state regulation of commercial and business affairs," particularly in the areas of antitrust regulations (which impinge upon freedom of association) and securities regulation (which limits the speech of those who offer securities to the public).³⁷² The Court mocks the double standard of those who support regulation in some commercial markets but not in others:

Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography.³⁷³

Paris Adult Theatre I acknowledges that pornography regulation implicates moral questions, but it focuses on the rights of states to determine what is necessary for good social order under the legitimate exercise of their police powers:

But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "the social interest in order and morality."³⁷⁴

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State

³⁷⁰ *Id.* at 34.

³⁷¹ *Paris Adult Theatre I*, 413 U.S. at 57, 63. Frederick Lane notes that the pornography industry enjoyed a certain cachet in the 1950s and 1960s, but the media opinion turned against the industry in the 1970s "as people grew increasingly concerned about the widespread availability of hardcore sexual materials." LANE, *supra* note 142, at 122.

³⁷² *Paris Adult Theatre I*, 413 U.S. at 61.

³⁷³ *Id.* at 62.

³⁷⁴ *Id.* at 60-61 (citation omitted).

from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.³⁷⁵

It is important to remember that the Court wrote its *Miller* and *Paris Adult Theatre I* opinions in the aftermath of the 1970 Commission, which concluded that pornography had no harmful effects and that obscenity laws should be abolished.³⁷⁶ As noted above, these conclusions were controversial even at the time, and many social scientists roundly rejected the Commission's work.³⁷⁷ However, it would be years and even decades before social scientists and radical feminists accumulated sufficient data to refute the 1970 Commission's conclusions. In *Miller*, a majority of the Court rejected the 1970 Commission's conclusions, and yet the Justices lacked the subsequent data and analysis that would have bolstered their opinion. Their only resort was to fall back on legal precedent and the centuries-old rights of the states to exercise their police power in regulating obscenity.

The Court will continue to encounter situations where social science either lags or leapfrogs the law. In such circumstances, it may well foster the orderly administration of justice to defer to the states, who are better equipped to bring the law into conformity with the best consensus of what the law should be. The states may perform this task imperfectly, but they almost certainly will perform it more effectively than would the Court. In *Miller*, the Court protected speech by imposing a narrow definition on obscenity.³⁷⁸ At the same time, it acknowledged the police power of the states and deferred to their respective choices to limit or deregulate obscenity.³⁷⁹

The second criticism pornography apologists make of *Miller* is that it is too vague, a complaint made about all obscenity law. If the law is to provide fair notice of unprotected expression, then pornographers need to know when their wares have crossed the line from protected pornography to unprotected obscenity. The *Miller* Court declined to "propose regulatory schemes for the States."³⁸⁰ However, the Court did note that: "State statutes designed to regulate obscene materials must be carefully limited."³⁸¹ It further stated that obscene sexual conduct "must be specifically defined by the applicable state law . . ."³⁸² The Court provided "a few plain examples" of possible obscenity:

³⁷⁵ *Id.* at 63. This is likely a direct response to the conclusions of the 1970 President's Commission on Obscenity, which held that pornography had no negative impact and recommended liberalization of anti-obscenity laws.

³⁷⁶ REPORT ON OBSCENITY, *supra* note 92.

³⁷⁷ See *supra* text accompanying notes 92-100.

³⁷⁸ See *Miller v. California*, 413 U.S. 15, 25 (1973).

³⁷⁹ See *id.* at 34.

³⁸⁰ *Id.* at 25.

³⁸¹ *Id.* at 23-24.

³⁸² *Id.* at 24.

(1) Patently offensive representations or descriptions of ultimate sexual acts, normal and perverted, actual or simulated;

(2) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.³⁸³

It is not necessary to review every prong of the *Miller* test, as others have previously performed thorough analyses of how one interprets and applies the test.³⁸⁴ Suffice it to say that reasonable people disagree with pornographers' complaints that they do not know when they have violated the law.³⁸⁵ *Miller* establishes clear boundaries of what states may define and prosecute as obscenity. Whether or not states choose to prohibit various forms of obscenity or enforce those prohibitions once enacted, pornography producers and distributors are on notice that their actions may violate the law.³⁸⁶

Miller's significance is more symbolic than real. In practical terms, it has had little long-term impact, as the *Miller* test is quite restrictive. In the event that pornographers are prosecuted, *Miller* provides them with multiple affirmative defenses.³⁸⁷ Given the current flood of porno-violence, readily available to anyone who has Internet access, pornographers apparently violate any existing obscenity laws with impunity. The alleged vagueness of obscenity law has had little perceptible chilling effect on pornographic speech.³⁸⁸

CONCLUSION

Towards the end of his life, Justice John Marshall Harlan wrote a letter to a friend in which he expressed two sentiments that encapsulate the dilemma faced by pornography critics. Ever an advocate for states' rights to regulate obscenity, Harlan asserted that "the preservation and assertion of state authority [held] the best promise for effective legal measures" against

³⁸³ *Id.* at 25.

³⁸⁴ See, e.g., GEORGE M. WEAVER, HANDBOOK ON THE PROSECUTION OF OBSCENITY CASES 7-36 (1985). Mr. Weaver was previously an assistant prosecutor in Atlanta, Georgia. *Id.* at iii. See also Jensen, *supra* note 31, at 3-4 (noting that defining pornography is no more difficult than defining any other term addressed by the law).

³⁸⁵ See WEAVER, *supra* note 385, at 7-13.

³⁸⁶ See generally John Fee, *Obscenity and the World Wide Web*, 2007 BYU L. REV. (forthcoming 2008).

³⁸⁷ For example, the third prong of the *Miller* test provides an exemption for any work that has literary, artistic, political, or scientific merit. See *supra* text accompanying note 349.

³⁸⁸ LANE, *supra* note 142, at 31-35 (noting that pornography producers did retrench in the aftermath of the *Miller* decision, but that effect quickly waned with the advent of new technologies).

obscenity.³⁸⁹ On the other hand, obscenity remained an “intractable” problem, and “its ultimate solution must be found in a renaissance of societal values.”³⁹⁰ In other words, the onus is on us as a society to determine who we will be and how we will achieve that aspiration.

“Societal values” is a code term for moral values. This is a dangerous admission in the midst of an argument that obscenity laws do not primarily rely on private morality and subjective moral justifications. However, as discussed above, the ways in which we prioritize human rights and treat one another ultimately do rest on common notions of morality, the ethical code that informs our behavior.³⁹¹ There are many areas in which we either coax or force one another to behave in certain ways for the good of the larger community. Recycling, riding bicycles, avoiding veal and blood diamonds, fidelity in marriage, and refraining from the use of racial epithets represent voluntary conformity to a common moral code. Prohibitions against public smoking, child pornography, physical abuse of one’s spouse, racial segregation, and certain types of discrimination represent statutory impositions of a common moral code. Our voluntary actions and our legal prohibitions represent our collective notions of the good society and the tenuous balance we have reached between negative and positive liberties.

This Article has acknowledged the weakness of obscenity law as a tool for social justice. Hence, it is fair to ask why such laws matter. James Madison once wrote: “As there are cases where the public opinion must be obeyed by the government; so there are cases, where not being fixed, it may be influenced by the government.”³⁹² In other words, the law is a moral instructor. Whether or not obscenity laws are effective, their very existence is a statement of our values, even if we honor them only in the breach. Overturning obscenity laws as relicts of private morality would certainly ignore the accumulated social science of recent decades. However, it would also be an indictment of our commitment to civil society, as it would indicate that the harms that occur in and through pornography are no longer a matter for public concern. Overturning obscenity laws would be a statement that we no longer consider that the violence, misogyny, racism, and degradation endemic to much pornography is socially, morally, or objectively problematic.

Social science again offers us some understanding of the interplay between the law and behavior. Sexual assault occurs when cultural and social attitudes legitimize sexual coercion. One may claim that the law addresses

³⁸⁹ TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 222 (1992).

³⁹⁰ *Id.* at 220.

³⁹¹ Jonathan Miller calls this “moral materialism” (i.e., the use of “prudential justifications” and “utilitarian principles” to defend what is, at root, a moral judgment). Miller, *supra* note 158, at 42.

³⁹² James Madison, Public Opinion (Dec. 19, 1971), in 14 THE PAPERS OF JAMES MADISON 170 (Robert A. Rutland & Thomas A. Mason eds., 1983).

such behavior, but the law is an effective inhibitor only when other social cues corroborate the law's intent. In other words, the law loses its impact in preventing other forms of violence against women when the law simultaneously defends porno-violence. Once previously normal individuals become disinhibited, counter social cues, such as the law or social stigma, lose their impact.³⁹³ If we overturn obscenity laws, it is unclear that we can ever reclaim even the limited inhibitory power they currently have.

In *Roth*, Justice Brennan described sex as "a great and mysterious motive force in human life" and "one of the vital problems of human interest and public concern."³⁹⁴ In dissent, Justice Douglas wrote that any form of community censorship, including suppression of obscenity, "creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win."³⁹⁵ Contemporary porno-violence has proved both Justices wrong. There is little mystery left in sex, and the Philistines hold the keys to the city. Consider this computer gaming advertisement: "Fall in love, get married, and then pimp your spouse for a little extra chump-change. Hey, it's a dark and dangerous world."³⁹⁶ One can argue that this is only a game, but it mirrors the reality experienced by women who quietly drift among us. It is a searing indictment of our frayed social contract that distributors obviously considered this advertisement to be not only commercially effective but also morally acceptable.

In the *Roth* dissent, Douglas also asserted that: "Government should be concerned with antisocial conduct, not with utterances."³⁹⁷ Pornography goes far beyond mere utterances, recording violent and/or degrading conduct that is eminently antisocial. In some instances, viewing the video record of such acts leads to further antisocial conduct. Whether or not viewing the video record itself causes moral harm to the viewer is the subject of considerable and ongoing debate.³⁹⁸ Nonetheless, social science and public consensus seem to be coalescing in the conclusion that porno-violence does harm the viewer by damaging his capacities for human sympathy.³⁹⁹ Such emotional damage in turn may have negative effects for the women whom he subsequently encounters. Pornography apologists insist that we must provide irrefutable, scientific proof that porno-violence is a determining causal factor in discrimination and violence against women. Given the complexity and multiplicity of causal factors, we cannot answer that question without reference to our notions of good and evil:

³⁹³ See Nelson, *supra* note 79, at 225-29.

³⁹⁴ *Roth v. United States*, 354 U.S. 476, 487 (1957).

³⁹⁵ *Id.* at 512 (Douglas, J., dissenting).

³⁹⁶ LANE, *supra* note 142, at 60 (quoting Advertisement, Interplay Productions, COMPUTER GAMING WORLD, July 1998, at 212-13).

³⁹⁷ *Roth*, 354 U.S. at 512-13 (Douglas, J., dissenting).

³⁹⁸ See Koppelman, *supra* note 215, at 1672-79.

³⁹⁹ See Roth, *supra* note 52, at 20-21.

What is the best way of dealing with evil is a more difficult question that social scientists are not capable of answering by themselves; their task is to present society with the facts. It is up to society to take the facts seriously and to debate how best to deal with them.⁴⁰⁰

Dealing with such facts will require unflinching self-examination by a portion of the population that wields significant social and economic power. Pornography victims and critics readily accept the evidence of pornography's harm, because it accords with their belief (fundamentally moral) that actual harm looks like what pornography produces and portrays. Pornography's producers, consumers, and apologists cling to the claim that pornography is fantasy, with no material reference to the circumstances of its production or the after-effects of its consumption. In testimony before the Massachusetts legislature, Frederick Schauer made the following observation:

I find it a constant source of astonishment that a society that so easily and correctly accepts the possibility that a cute drawing of a camel can have such an effect on the number of people who take up smoking, has such difficulty accepting the proposition that endorsing images of rape or other forms of sexual violence can have an effect on the number of people who take up rape.⁴⁰¹

This Article makes a modest claim: While obscenity laws may reflect both private and public morality, social science and feminist analysis provide external justifications for these laws that are rational, important, and even compelling. Accordingly, we should not read *Lawrence* as an indictment of *Miller* in particular or obscenity laws in general.

In contrast, the ramifications of how we think about pornography and how we choose to address it are vast, cutting to the heart of the social contract and what it means to be a sentient being who relates to other human beings. Obscenity law is one tool for addressing this quandary. It is not the most effective tool, but it is nonetheless an important one in its role as moral instructor and enforcer of social norms. Given the enormity of the pornography problem, maintaining current obscenity laws is the least we can and should do. There is significant room to expand the civil rights of victims abused in the production and consumption of pornography. The radical feminists tried to enact such legislation in the early 1980s but failed when the courts overturned their efforts. With the passage of two decades and the ongoing encroachment of the pornography industry, the time may

⁴⁰⁰ Eysenck, *supra* note 82, at 317.

⁴⁰¹ *The Massachusetts Hearing*, *supra* note 22, at 396 (testimony of Frederick Schauer). *See also* Mura, *supra* note 73, at 137. Mura asserts:

Assuming that human beings have only a limited amount of energy, it is obvious that the more images there are, the harder it will be for the individual to resist them The greater the frequency of such images, the greater the likelihood that they will overwhelm people's resistance. This fact is known, of course, by all those involved in advertising and the media, and is readily accepted by most consumers—except when it comes to pornography.

Id.

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once again be ripe for similar legislation. How we address this problem, and whether we choose to address it at all, will say much about our values and what we aspire to be. One can only hope that the outcome of this process ultimately reflects a due regard for civility, justice, and the fundamental dignity of all humankind.