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

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

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

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

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

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

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

140 *Ibid*, p 92.

(ii) The Congruence of Liberalism

For many feminists the ultimate goal is not the prohibition of pornography, but the marginalisation of the desire to consume it. New social taboos can be created: attitudes to drink-driving and smoking have shifted immeasurably in the last few years. But it must be acknowledged that, while the dissemination and consumption of pornography is legitimised by association, explicit or implied, with the first human freedom, attrition of the attitude that associates images of women in prone and subordinate positions with human (gender-neutral) freedom, will be problematic.

As I suggested above, in both the US and the UK, the assumption is that speech will naturally be free provided the State does not restrain it. This is a classic example of the liberal's preoccupation with negative liberty.[141] It is assumed that the important issue is the avoidance of restrictions on speech, rather than affirmative access to speech for those to whom it has been denied.[142] Pornography, with its tendency to strip women of credibility, may hinder, rather than promote free speech for women.

Joseph Raz has pointed out that liberty is meaningless without a range of valuable options.[143] True freedom entails the positive provision of resources, not just the protection of that which the subject already possesses. A real concern for freedom of expression then entails providing conditions in which women's speech will not be undermined by their status as objects for sexual consumption. MacKinnon argues that:

> censorship may occur not only through explicit State restriction, but also through the official and unofficial privileging of powerful groups and viewpoints.[144]

Censorship through relative powerlessness is invisible, it does not exist as a legal harm. Instead this is the marketplace of ideas, where those with the most power and confidence inevitably have access to the widest dissemination of their thoughts. The structural powerlessness of women which, according to some feminists is exacerbated by pornography, is a crucial determinant of the degree to which they have access to free expression.

Ronald Dworkin has argued that this argument means that feminists are demanding not just access to speech, but also a sympathetic reception for anything women say.[145] Yet I believe MacKinnon's point is chronologically prior: ending the silencing of women by encouraging any speech is content-neutral and does not imply any particular response to what women say.

So the libertarian slant of the American and British attitude to expression incorporates a very particular type of freedom. A freedom to retain the fruits of an already unequal distribution of power. While liberalism continues to confer legitimacy on negative freedom, the pornography debate will be stifled.

---

141 I Berlin, *Four Essays on Liberty* (Clarendon Press, 1969), pp 118–72; C Fried, *Right and Wrong* (Harvard University Press, 1978). For a lucid critique see C Taylor, *What's Wrong with Negative Liberty in Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, 1985), pp 211–29.

142 CA MacKinnon, *The Sexual Politics of the First Amendment* in *Feminism Unmodified* (Harvard University Press, 1987).

143 J Raz, *The Morality of Freedom* (Clarendon Press, 1986).

144 *Only Words*, *op cit*, p 77.

145 R Dworkin, *op cit*.

The rhetoric of equality is, in practical terms, undermined by the liberal tradition of neutrality. Catharine MacKinnon has argued that the legal commitment to impartiality leads to the 'stupid theory of equality'.[146] Where the legislature and the judiciary are avowedly neutral between groups of people whose positions may be deeply unequal, in treating the powerful in the same way as the powerless, the structural inequality persists and is legitimised by its association with the 'virtue' of neutrality. If equality and neutrality are not smoothly compatible, it may be necessary to clarify our priorities. Currently in the US and in the UK, neutrality effectively trumps the promotion of equality. But in Canada we can see how this could be reversed. The first goal of the Canadian courts is explicitly not neutrality, but equality. Their Constitution contains the familiar protection of free expression, but, crucially, laws which contravene a substantive part of the law can be justified under s 1 Charter of Rights and Freedoms if they '*promote equality and are demonstrably justifiable* in a democratic State' (my emphasis). Restricting pornography is then constitutionally legitimate when it is established that its contents promote inequality. This step has been taken and Canada's Supreme Court has outlawed pornography not because of its lack of decency, but because it is incompatible with the promotion of women's equality. In *R v Butler*[147] the court held that if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material.

C. Feminism

Pornography is understandably of critical concern to feminists. No one who has heard the stories of abuse and desperation which lead women to be forced to perform for the pornographer's camera can fail to be moved and deeply troubled. Furthermore, many women feel instinctively that the message of pornography must have an impact upon its viewers attitudes towards women. Pornography has proved a fruitful area for debate for three reasons:

(a) The anti-pornography position taken by many feminists allows them, for a brief moment, to come closer to achieving their goals than ever before. They can command the weight of establishment support in the form of the moralist lobby. This may be, as I suggested earlier, a rather pernicious partnership. But for women who have lacked power, the clout of the unholy alliance may hold understandable appeal.

(b) I think pornography has also attracted debate because it is a sexy subject. Foucault has shown that the desire to translate sexual experience into discourse is an ahistorical human impulse.[148] Whatever one thinks about Camille Paglia's assertion that 'pornography and art are inseparable because there is voyeurism and voracity in all our sensations as seeing, feeling beings'[149] it is clear that sexuality inspires widespread fascination. Radical feminists, such as MacKinnon, have seized upon sexual norms as the defining moment in female subordination. Regardless of whether or not sexuality does constitute gender relations, it is clear that this assertion has been central to the degree of public and media interest in the radical feminist agenda.

(c) The substantive reason for focusing on pornography is then part of the feminist claim that the cultural construction of sexuality is of central

146 *Only Words*, *op cit*, p 98.

147 [1992] 2 WWR 577.

148 M Foucault, *The History of Sexuality*, Vol 1 (Penguin, 1979).

149 C Paglia, *Sexual Personae* (New York: Vintage Books, 1991), p 35.

importance. Feminists like Dworkin and MacKinnon have claimed that pornography damages all women by equating their sexuality with their abuse.

This last claim requires further investigation. Feminists often start from the supposition that women are harmed by pornography. There is a wealth of scientific evidence which suggests that exposure to pornography increases the likelihood that the average man will force sex on a woman. And there are interminable debates about whether this research documents a mere correlation, or a causal relationship between pornography and rape. Of course there are scientific reports which appear to show the opposite: that relaxation of censorship in Scandinavian countries is associated with a decrease in sexual violence. The latest piece of research in the UK found that it was not possible to prove that pornography caused sexual violence, but that neither was it proven that pornography had any beneficial effects in creating outlets for male aggression.[150]

I think it unhelpful to become entrenched in an unproductive series of claims and counterclaims. Deborah Cameron and Elizabeth Frazer[151] persuasively argue that causal explanations of human action are completely inappropriate. When a man sees a pornographic movie his response to it is not analogous to the behaviour of a heavy object dropped from a great height. Human behaviour is not susceptible to precise causal rules comparable to the laws of gravity. Reaction to pornography is not dictated by natural instinct, instead it consists in the interpretation of images. The meaning pornography has for its consumers is not self-constituting, it is one part of the cultural landscape, and its impact does not exist in isolation from broader experiences of sexuality.

Although we should clearly be concerned about evidence suggesting that men who are violent towards women often use pornography before or during that abuse, the problem with pornography should not be limited to the question of whether any single image is capable of creating an instant rapist.[152]

Indeed, Catharine MacKinnon, a staunch believer that 'porn is the theory, rape is the practice', does also suggest that pornography has an impact beyond that on its direct consumers and victims. In her view it does not simply present distorted images of sex to those who choose to consume it. Instead, it damages all women because it inescapably sets the ground rules for all sexual relations. She argues that pornography has made sex into an unequal encounter between a man who dominates and a woman who submits.[153] This image is reproduced so many times that it becomes inculcated into our consciousness as the way things are. MacKinnon argues that the resulting cultural hegemony is sustained by other media which affirm the values of pornography: the male is the possessor and the woman the possessed.

150 Documented in D Howitt and G Cumberbatch, *Pornography: Impacts and Influences. A Review of the Available Research Evidence on the Effects of Pornography* (London: Home Office Research and Planning Unit, 1990).

151 D Cameron and E Frazer, 'On the Question of Pornography and Sexual Violence: Moving Beyond Cause and Effect', in C Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (Oxford University Press, 1993), pp 359–83.

152 L Segal, *Is the Future Female? Troubled Thoughts on Contemporary Feminism* (Virago, 1987), p 111.

153 CA MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), p 69.

So pornography is one mechanism in the continuing process of gender definition. Pornography is one example, among many, from a cultural tradition that appears to devalue women. There is patently some connection between representations of sex and the sexual values of a community. But the relationship between the two is complicated. It is undeniable that pornography exists as one cultural medium in the ongoing social construction of reality. The gender hierarchy which dictates rigid and debilitating sexual identities is culturally constructed. Pornography presents particularly crude and polarised images of women and men, but it does not, on its own, create sexual inequality. Women can only think about their sexuality and articulate their desires though the filter of a deeply internalised set of patriarchal norms. It may then be true that feminine sexuality outside of its confining cultural representation has, historically, been profoundly silenced. We cannot easily articulate alternative sexual identities because our experience does not transcend our gendered culture. Feminism must struggle against the imposition of rigid sexual norms. This is, nevertheless, a vast project, and its success depends upon recognising the prevalence of pornography as but one link in the chain.

Indeed the fact that pornography is extreme may, according to some women, mean that it has less influence than other, more widely available material. In the UK Clare Short, a Labour MP, introduced a piece of draft legislation which, if implemented, would have prevented the most popular daily newspaper printing a provocative photograph of a topless model on its page three.[154] The inclusion or not of this sort of image under the rubric 'pornography' is controversial. But in being widely available, cheap, and published in the relatively privileged arena of the news media, it could be argued that these images have a profound effect on perceptions of women's sexuality. Not least because each morning *The Sun* will publish a new picture, and yesterday's copy is discarded. This disposability may amplify the objectification process.

Naomi Wolf has argued that images of women in 'legitimate' contexts such as women's magazines, Hollywood movies and pop videos have joined more traditional pornographic formats as means of disseminating dangerous images of women.[155] 'Beauty pornography' involves the use of perfected women's bodies in poses borrowed from soft and hard-core pornography to sell products to women. Women are told that the way to be sexy, desirable and to have self-respect is to be beautiful, skinny, and, increasingly, tied up and submissive. Movies portraying sexual exploitation and abuse have proliferated. Promotional pop videos have featured stylised images of women in danger. The mainstream cliché is thus one of stylish objectification and sado-masochism. Wolf is then not surprised that this has produced a generation that honestly believes that violence against women is sexual. The impact is not just on men, women's attitudes toward themselves are affected; Wolf finds it axiomatic that studies have found that 50% of women have submissive sexual fantasies. Wolf may then be close to MacKinnon in arguing that this has become the reality of sex.

It is irrefutable that current cultural representations of sexuality frequently articulate disempowering stereotype sex roles. Yet outlawing pornography, without altering its current definition would not even begin to deal with images that have become cloaked in respectability. Perhaps more fundamentally,

154 Indecent Displays (Newspapers) Bill, *Hansard*, 12 March 1986, 13 April 1988.

155 N Wolf, *The Beauty Myth* (Vintage, 1991), pp 131–78.

pornography just reinforces sexual identities which are simultaneously created and sustained in other ways.

If pornography is then simply one facet of an infinitely broader process, its legal proscription would not fatally undermine current sexual norms. Indeed, it could be argued that the pre-occupation with law reform may, in fact, be seriously obstructive.

3. The Problem with Law

Law's relationship with pornography is fraught with difficulty. Prohibiting or restraining certain forms of sexual expression is part of their appeal. Pornography is, in part, about the transgression of sexual norms. So to some extent the pornography industry is dependent upon the law to provide the rules which are then flouted in its images.

Within the existing ideological framework of current liberal legal systems, it is a fundamental principle that individuals' freedom should not be restricted unless such restraint is necessary to prevent harm to others.[156] Clearly the definition of harm is not static and is subject to renegotiation in order to encompass newly perceived injuries, recent prohibitions of racist speech are an example. Yet this 'harm principle' has proved peculiarly resistant to pornography.

Strengthening existing obscenity law is problematic. Obscenity means that which should not be publicly staged. Obscenity is a moral issue; its aim is to restrict the indecent. The crucial issue pornography raises for feminists is not its lack of decency, but its impact on female sexuality. The legal definition of obscenity in the US is based upon the 'prurient interest' test; in the UK, obscene publications must have 'a tendency to deprave and corrupt'. Neither test offers clear guidelines as to what will be considered obscene. Furthermore, the content of the law does not take pornography seriously since, in the UK and the US, the court must look at the work 'as a whole', thus allowing publishers to design their pornography so that crude visual images are legitimised by their juxtaposition with serious articles.

Indeed there have been times when it has been accepted that the generality of obscenity legislation is deficient and specific issue statutes have been passed. Detailed zoning restrictions on pornography have tended to be more effectively implemented than the outright proscription of obscenity. For example, in Hungary, feminist groups have organised campaigns to stem the proliferation of pornography, but their success has been limited to a 1991 ruling that pornography should not be displayed in certain newspaper kiosks. In the UK the Local Government (Miscellaneous Provisions) Act 1982 gave local authorities power to licence 'sex shops' and the Act offered a definition of the cinematic material to be controlled. It was that which portrays or is intended to stimulate 'sexual activity' or that which portrays 'genital organs or urinary or excretory functions'. These restrictions presuppose a very particular view of the problem with pornography. It might at first be thought that restricting the siting of pornography outlets is part of the 'moral corruption' view of pornography. But that would mean endorsing public interest litigation to enforce licensing restrictions or to sue for public nuisance. Nonetheless, in the UK it is clear that review of local authority licensing powers can only take place if the litigant has a 'sufficient interest', this would most easily be established if the applicant had a property right which was being harmed by the presence of a pornography

156 JS Mill, 'Essay on Liberty', in M Warnock (ed), *Utilitarianism* (Collins, 1962).

shop.[157] And, while it is clear from *Laws v Florinplace*[158] that a sex shop may be an actionable nuisance, one only has a right of action if one's right to peaceful enjoyment of one's own property is being interfered with. So perhaps the law is astute to protect property interests damaged by pornography, but other sorts of injuries are too diffuse, abstract and novel for public law or the tort system to recognise.

Feminists have tried to mobilise statistical data on the connection between pornography and rape, but, as I have explained, the evidence has remained inconclusive. Moreover, attempts by Catharine MacKinnon and Andrea Dworkin, with the support of the moralist lobby, to fit pornography within the guarantee of equal rights for all citizens do not necessarily provide a complete solution. Their ordinance would only work for women who were able to prove that a specific image interfered with a specific right of theirs. Such women do exist and may need this protection, but if the most wide-reaching effects of pornography consist in the transmission of cultural norms, the ordinance's efficacy is restricted. Before the ordinance could address the general impact of pornography, there would have to be an accompanying shift in the prevailing judicial framework. First, group actions would have to become possible. Second, the definition of harm would have to be amended so that it could include the diffuse effects of a cumulative impact on attitudes. Third, the doctrine of legal causation would need revision: partly because it is notoriously difficult to establish causation where the harm is mediated through the actions of a third party. Furthermore, extremely difficult speculative decisions are necessitated by the test which presently decrees that an act cannot be considered the legal cause of an event if, on the balance of probabilities, that event would have occurred anyway.

Moreover, the moralists have no complaint about other images of oppressive sex roles. They are concerned with the exposure of bodily functions, not exploitation. But for feminists it is the absence of dignity that is at issue. So any coalition between radical feminists and the moralist lobby represents a further obstacle to the potential efficacy of pornography ordinances: their aims are not co-extensive. And this divergence is a significant problem for a legal system which uses legislative purpose as an aid to statutory interpretation.

If feminists want to use the law to protect women, they must be specific about the object of their concern. There are clearly women who are directly harmed by pornography: in addition to the women whose abuse is motivated by pornography's consumption, the industry's workers may be particularly susceptible to exploitation. Some feminists have argued that pornography also harms all women by defining us in terms of our sexual availability. The cumulative interaction between pornography and the definition of male and female sexuality is important. Yet it is hard to see how one piece of statutory reform could intercept the diffuse and ongoing negotiation of sexual norms.

In the US Dworkin and MacKinnon have argued that devising an effective formulaic definition of pornography is relatively straightforward. They suggest that the images lack diversity and lend themselves particularly neatly to formulaic definition. Their ordinance would suppress 'pictures or words portraying the graphic, sexually explicit subordination of women (or men or children in women's place)'. I would suggest that the crucial word here is

157 K Schiemann, 'Locus Standi' [1990] *Public Law* 342.

158 [1981] 1 All ER 659.

'subordination', its dictionary definition is 'to treat or regard as of minor importance': what does this mean? How can we tell if an image treats women as 'of minor importance'? Representations which show women in positions of sexual dominance might, on a literal interpretation, fall outside of this definition. Yet clearly the sexual hierarchy is not dismantled when women are on top. There is the difficulty that an ordinance has to be interpreted and applied, and in that process of interpretation and application, its intent can be manipulated and its impact radically altered. Furthermore, I think that there would be the incipient danger that the ordinance, if enacted, would fall prey to the current practice whereby pornography is designed around obscenity law so that its sexual objectification of women is legalised as well as legitimised.

Simply stated, the problem seems to be that any legal definition will simultaneously be both under and over inclusive. There is a reflexive interaction between representations of sexuality and current sexual norms. Legal regulation of some of those representations cannot offer a complete renegotiation of sex roles. Legal discourse is a relatively autonomous system of communication. Pornography activists may strive to appropriate some of the power of the legal narrative, but in doing so they are forced to try to fit their agenda within the parameters of current legal methodology. Concentrating on prevention of harm has proved counter-productive. In legal discourse harm is narrowly understood and is subject to all the limitations of legal causation and an individualised system of justice.

Robin West has argued that 'women's injuries are often not recognised or compensated as injuries by the legal culture.'[159] And she maintains that translating women's injuries into the current legal framework is impossible because the norms of the legal system itself reflect male rather than female experience. The answer is not to manipulate the way we describe women's experiences in order to fit them into the legal tradition, since this will only perpetuate the silencing of women's real voices. Drucilla Cornell explains further that the adoption of traditional legal discourse, however well intentioned, may mean that 'the harm to women literally disappears because it cannot be represented as a harm within the law'.[160]

I think that the feminist preoccupation with law reform raises two compelling and contradictory arguments. First, feminist attempts to restrict or prohibit pornography are crucially motivated by taking seriously the invisible injury of gender hierarchy. Such efforts and the debate surrounding them have important symbolic significance, notwithstanding their somewhat patchy practical impact. Second, the campaigner's understandable desire to put such restrictions or prohibitions into practice has led to the pragmatic adoption of conventional legal methodology which carries with it inevitable debilitating constraints upon the breadth of the feminist argument.

To regard pornography as a problem is clearly one part of many feminist's agendas. The fact that it is already, albeit in a misguided and muddled way, recognised as such by the law makes expansion and rearticulation of legal restrictions appear both plausible and possible. My point is simply that any success will leave in place a gender hierarchy which will provide the background

159 R West, 'The Difference in Women's Hedonistic Lives: A Phenomenological Critique of Feminist Legal Theory', in M Fineman and N Thomadsen (eds), *At the Boundaries of Law* (Routledge, 1991), pp 115–34.

160 D Cornell, *Transformations* (Routledge, 1993), p 82.

legal framework and ideology informing the implementation of anti-pornography reform. This does not mean that such reforms may not have a valuable role in the gradual erosion of oppressive sexual identities. The danger lies in seeing this reform as a potential cure and glossing over or ignoring, for the sake of expediency, the fundamental obstacles immanent within conventional legal methodology.

4. Conclusion

Finally, I would like to conclude by asking why people produce pornography? I do not believe that most producers of pornography have, as their primary purpose, the inculcation of a value system which subordinates women. This may, or may not be the result of the pornography industry's proliferation and wider influence. The primary motive of pornographers is profit. The pornography industry has expanded and technological advances have not only made its mass production and wide dissemination cheaper, but have also introduced new media for the transmission of pornographic images. Worldwide, pornography is a multi-billion dollar industry, it generates more money than the legitimate film and music industries combined. Why is the pornography industry so profitable? Why is society attracted by images that portray powerlessness as sexy and desirable in women?

The supply of pornography is not the only factor maintaining its demand. Other institutions help sustain gender inequality. And it is this deeply ingrained gender imbalance that makes images of women's inequality sexy. Pornography is not the sole cause of women's sexual subordination, but neither is it simply a symptom. Representations of sexuality do have a reflexive interaction with sexual identities. Prohibiting one narrowly defined category of representations cannot overturn the complex process of construction of sexual desire. Moreover, there are compelling reasons to suppose that outright prohibition would be ineffective and even counter-productive. As I have suggested, the availability of pornography is not the only factor maintaining its appeal. If demand exists independently, preventing its supply will only succeed in pushing the sale of pornography underground. Having a flourishing black market is not necessarily preferable to the existence of a few 'adult' bookstores. It is even arguable that greater regulation is possible where a product is not prohibited absolutely. Anne McClintock argues that 'criminalising porn only drives the business underground, where it remains brutally managed by men'.[161] Clearly protection of women who work in the pornography industry is not best served by the obstinate refusal to believe that it would continue to exist if its production and sale were legally proscribed.

Pornography is a serious issue, but debate has been obfuscated by the repeated tendency to enmesh its discussion within suggested blueprints for legal reform. Perhaps the time has come to admit that the law cannot reverse a cultural obsession with sex by addressing one extreme means through which this obsession is expressed. Pornography will, I believe, continue to exist while the sexual *status quo* persists, but this should not lock us into inertia. Gender inequality and the desire for titillation are integral to current patterns of social interaction. This reality must be renegotiable and open debate about pornography is a valuable channel for the reassessment of our cultural values. Redefining the legitimate and helping to construct the socially unacceptable are

161 A McClintock, 'Gonad the Barbarian and the Venus Flagship', in Segal and McIntosh, *op cit*, p 130.

valuable roles for the law, and perhaps anti-pornography ordinances contain an important normative judgment about the acceptability of female exploitation. The surrounding debate has certainly raised awareness and facilitated discussion, and this in itself may have some transformative effect on attitudes towards pornography. It is, nonetheless, crucial that we should not pin all our hopes on the legal regulation of pornography as a panacea.

A preoccupation with law reform has led to factionalising and a tendency to oversimplify the exceptionally complex relationship between sexual representation and sexual experience. My point is simply that legal discourse sits uneasily with the agendas of those who are actively concerned about the ethos of current sexual imagery. Multiple points of tension make the arguments for reform appear fractured and incoherent. We should be talking about sex and its representation, but to force ourselves to do so in the language of a legal textbook impoverishes the debate.

CHAPTER 11

WOMEN AND MEDICINE

The treatment of women by the medical profession raises important issues for feminism. In the United States of America, for example, the battle has long raged – and continues to rage – over a women's right to abortion. The seminal decision of the Supreme Court of America in *Roe v Wade*[1] which confirmed that a women's right to abortion is a right to be guaranteed under the right to privacy under the American Constitution, has continued to be subjected to attack from those who advocate the right to life for a foetus, or, in their terms, an unborn child. The United Kingdom's more pragmatic attitude towards 'constitutional rights' whereby – subject to the jurisdiction of the European Court of Human Rights under the European Convention on Human Rights and Fundamental Freedoms to which the United Kingdom government is a signatory – citizens enjoy freedoms rather than constitutionally guaranteed rights. Results in the consequence that matters such as abortion rights are regulated – rather than enshrined – under an Act of Parliament which has the constitutional status and importance conferred on it by the prevailing political climate.[2] Accordingly, the Abortion Act 1967 conferred a limited right to abortion, subject to approval on medical grounds (which were loosely framed). Nevertheless, echoes of the American debate were heard in the late 1980s (if indeed they have ever been silent), when the time limit for abortion was reduced to 24 weeks.[3] As a result of the differing constitutional arrangements in the United Kingdom, however, the academic debate has not achieved the level of intensity which it has in the United States of America. While 'pro-life' campaigners fight for the greater protection of the rights of the foetus, thereby seeking to pit foetal rights against women's rights, in the United Kingdom the law has for long denied that a foetus has – prior to the point at which it is capable of being born alive[4] – any 'rights' in law. Nor will English law confer rights on any other person in relation to decisions as to a woman's choice to undergo an abortion.[5]

From a feminist perspective, the right of the individual to determine questions relating to her own body are of fundamental importance. To deny the right to take decisions is to treat the individual as unequal and inferior and to deny the rationality of the woman's decision-making process and her right to autonomy. Scientific and technological advances in reproduction raise a further set of complex questions.[6] In the United Kingdom, for example, the recent

1 93 SCt 705 (1973).

2 See Hilaire Barnett, *Constitutional and Administrative Law* (London: Cavendish Publishing 1995), Chapters II and XIV.

3 Abortion Act 1967, s 1(1)(a), as amended by the Human Fertilisation and Embryology Act 1990.

4 See the Infant Life Preservation Act 1929.

5 See *Paton v British Pregnancy Advisory Services* [1979] QB 276; {1978] 2 All ER 987; *Re F (In Utero)* [1988] 2 All ER 987; *C v S* [1987] 1 All ER 1230.

6 See the *Report of the Committee on Human Fertilisation and Reproduction (the Warnock Report)* (Cmnd 9314) (London: HMSO, 1984).