> ... the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.[25]

However, in *United States v One Book Called Ulysses*[26] the courts rejected the *Hicklin* test and included in its assessment of the material, the author's intention, the literary merit of the matter and the effect of the material on the average person. An early constitutional challenge to pornographic material arose in *Roth v United States*[27] in 1957, wherein the Supreme Court considered the issue of obscenity law within the context of the First Amendment. For the majority, Justice Brennan argued that obscenity was not protected by the First Amendment on the basis that it is 'utterly without redeeming social importance'.[28] The test to be adopted as to whether or not material was obscene and therefore capable of prohibition is stringent. According to Chief Justice Burger in *Miller v California*,[29] material is obscene, if '(a) the average person, applying contemporary community standards, would find that the work, taken as whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable State law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (the LAPS test)'. The test was modified in *Pope v Illinois*,[30] in which the Court ruled that the test to be applied was not linked to the relevant 'community standards' but rather to the 'reasonable' person.

The Canadian Supreme Court has takes a more robust approach to restricting pornography than has the United States' Supreme Court, and has found legitimate means by which to limit the range and availability of pornography. In *R v Butler*,[31] the Canadian Supreme Court held that whilst restrictions[32] on pornography were *prima facie* a violation of section 2 of the Charter, restrictions could be justified under section 1 as a necessary restraint in the interests of a free and democratic society. In *Butler,* the Court ruled that 'harm' was to be construed in terms of predisposing people to act in an 'anti-social manner', and that it was the 'community standards'[33] test which was to decide what is, and is not, harmful. The forms of pornography which are liable to restriction, according to the Supreme Court, are those which represent either explicit sex with violence, horror, or cruelty, or explicit sex in

25 *R v Hicklin* (1868) LR 3 QB 360, *per* Lord Cockburn, p 371.
26 5 F Supp 182 (SDNY, 1933).
27 354 US 476 (1957).
28 354 US 476 (1957), p 484.
29 413 US 15 (1973).
30 481 US 497 (1987).
31 [1992] 1 SCR 452.
32 In that case, the Criminal Code, s 163(8).
33 Lord Devlin's 12 jury persons.

which one or more of the participants is degraded or dehumanised. Explicit sex without violence, on the other hand, that is neither degrading nor dehumanising was not vulnerable to restriction.

Empirical evidence concerning pornography[34]

In 1979, the Williams Committee on Obscenity and Pornography reached the pithy conclusion that 'research [into the effects of pornography and violence on human behaviour] tends, over and over again, to be inconclusive'.[35] Not only was the evidence taken as a whole 'inconclusive', but much of the empirical data was contradictory, and in the case of evidence submitted by one witness, criticised for the inaccuracy of its conclusions. Harms which the Committee considered included the alleged increase in rape and other sexual crimes; the exploitation of workers in the pornography industry; general 'cultural pollution'; the effect on human relationships; the effect of engendering hate and aggression; risking 'the normal development of the young'; causing 'desensitisation' and callousness. The issue of the degradation of women through pornography, played a comparatively minor part in the Committee's deliberations, although reference was made to evidence submitted which turned on 'aspects of pornography which degrade women in that much material is not only offensive, but encourages a view of women as subservient and as properly the object of, or even desirous of, sexual subjugation or assault'.[36]

Among the Committee's general proposals – despite the ambivalence in the empirical evidence as to 'harms' – the Committee stated that the law 'should rest partly on the basis of harms caused by or involved in the existence of the materials: these alone can justify prohibitions; and partly on the basis of the public's legitimate interest in not being offended by the display and availability of the material ...'.[37] Further, 'the principal object of the law should be to prevent certain kinds of material causing offence to reasonable people or being made available to young people',[38] and restrictions should apply on the basis that participants appeared to be under the age of 16, or on the basis that 'the materials give reason to believe that

34 See, *inter alia*, Einsiedel, E, 'The experimental research evidence: effect on pornography on the "average individual"'; Russell, D, 'Pornography and rape: a causal model'; Check, J, 'The effects of violent pornography, non-violent dehumanising pornography, and erotica: some legal implications from a Canadian perspective', all repr in Itzin, *op cit*, fn 10.

35 *Op cit*, *Report*, fn 4, para 1.10

36 *Op cit*, *Report*, fn 4, para 5.29. The Committee's membership was 13, of whom three were women.

37 *Op cit*, *Report*, fn 4, para 13.4.3.

38 *Op cit*, *Report*, fn 4, para 13.4.4.

actual physical harm was inflicted on the [participant] person'.[39] The status of women in society, their equality and the effects of pornography on women in general did not receive in depth consideration and represents a shortcoming in the whole, otherwise well measured and authoritative, report. This perceived deficiency, may, however, be explained by the sheer complexity of the evidence and the difficulty of conclusively establishing the nature of the harm caused 'beyond all reasonable doubt' which was the Committee's required standard of proof. The Committee was, overall, primarily concerned with freedom from censorship: censorship being harm in itself. Accordingly, without the clearest of proof regarding harm, the Committee was unprepared to depart from the priority of freedom. A 'hands-off' approach towards the regulation of pornography was also adopted by the United States' Attorney General's Commission on Pornography.[40]

The evidence of the harm caused by pornography itself, as the terms of the debate and related research is currently formulated, is equivocal and provides no clear basis on which to draw conclusions.[41] Thus, for example, the United States Commission on Obscenity and Pornography concluded (by a majority), in 1970, that the evidence was insufficient to establish that 'pornography is a central causal factor in acts of sexual violence'.[42] Conversely, the Canadian Attorney General's Commission on Pornography, reporting in 1986, concluded that:

> The available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to anti-social acts of violence and, for some subgroups, possibly to unlawful acts of sexual violence.[43]

To become embroiled in arguments about evidence concerning the cause and effect relationships between pornography and sexual violence, given the ambivalence of that evidence, is an exercise in futility. Moreover, research method strategies have been criticised for manipulation of data, and for the construction of research projects designed to prove the researcher's own beliefs about cause and effect.[44] Cause and effect is also a debate which misses much about the feminist arguments concerning pornography which form the core of the radical feminist approach. A consideration of differing types of harm which may be involved here reveals the complexity of the issue.

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39 *Op cit*, *Report,* fn 4, para 10.6(a) and (b).

40 The Meese Commission 1986, Washington: US Department of Justice.

41 See Howitt, D and Cumberbatch, G, *Pornography: Impacts and influences,* 1990, London: Home Office.

42 See 'Legal appendix' in Dwyer, *op cit*, fn 11, p 241.

43 *Op cit*, Dwyer, fn 11, p 245.

44 For a critique of research methods, see King, A, 'Mystery and imagination: the case of pornography effects studies', in Assiter, A and Carol, A (eds), *Bad Girls and Dirty Pictures: The Challenge to Radical Feminism,* 1993, London: Pluto, p 88.

Moreover, as Deborah Cameron and Elizabeth Frazer have argued, even though the causal link between sexual violence and pornography cannot be conclusively established, that does not mean that there *is* no causal link. Neither does it mean that pornography does not play a significant role in forming attitudes and 'certain forms of desire'.[45] Pornography, in Cameron and Frazer's view, is characterised not only by its explicit sexual representations, but also by the attractiveness it generates for certain consumers by virtue of its illicitness; its secretness. This aspect of pornography, the authors state, results in pornography having a 'normative aspect' to it – it tells the viewer 'how to do sex', and 'because it purports to be describing the forbidden, the normative model it presents is much more appealing and powerful than something presented overtly as normative ...'.[46] Pornography thus creates meaning, reinforced by its illicit and transgressive nature, and that meaning – the construction of forms of desire based on violent gratification – in the hands of those predisposed to violence, can have a particularly potent and damaging effect.[47]

From a feminist perspective, however, in addition to understanding pornography's meaning, irrespective of the empirical evidence concerning a causal connection between pornography and physical and sexual violence against women, the appropriate focus of enquiry is the effect of pornography on women's equality and status in society, and pornography's role in reinforcing traditional economic, political and social inequalities.[48]

Reformulating pornography from a feminist perspective

It will be apparent from the above brief overview of contemporary legal approaches to pornography that legal definitions focus on the effect which pornography has on the consumer(s) of the material. Accordingly, in Australia, the United Kingdom and the United States of America – but not in

45 Cameron, D and Frazer, E, 'Moving beyond cause and effect', in Itzin, *op cit*, fn 10, pp 359, 376.

46 *Ibid*, Cameron and Frazer, p 377.

47 The most recent British research into the linkage between violent videos and violent behaviour (albeit non-sexual), conducted on behalf of the Home Office, also proved inconclusive. Dr Kevin Browne, of the University of Birmingham, and Amanda Pennell undertook research into the effects of film and video violence on young offenders. The research involved 122 males aged 15–21, 54 violent offenders, 28 non-violent criminals and 40 non-offenders. The research concluded that offenders brought up in a violent family background are most likely to choose to watch violent films, and identify with violent figures, although that did not lead to crime. However, once the taste for violent videos was established, it was more likely that that diet would 'nurture increasingly anti-social behaviour'. The British Board of Film Classification's response was that some 'violent and potentially dangerous young people' could be influenced: *The Effect of Video Violence on Young Offenders,* 1998, London: Home Office.

48 For a feminist evaluation of the ambivalent evidence on pornography, see *op cit*, Itzin, fn 10.

Canada[49] – the impact which pornography has on women, whether individual workers in the pornography industry, or women as a class, is ignored. Thus, from a legal standpoint, women, who are the central focus of most pornographic materials, do not exist in the determination of whether or not the material in question is in fact pornographic as defined by law. Were the legal focus to be altered so that the central question became not whether or not the (principally male) consumer was 'depraved or corrupted', but whether *women* are injured by pornography, then women victims of pornography would be included, rather than excluded, from the law. Legal approaches to pornography, with the notable exception of the Supreme Court of Canada, have hitherto been masculine approaches: does this material 'deprave and corrupt' the male consumer. If the question is reformulated from a feminist, legally inclusive rather than exclusive, perspective, the central question becomes: does this material 'harm' women.[50] Such a reformulation would act as a lodestar for sociological and psychological research with an entirely different focus from that which has been conducted to date. To date, the primary research foci have been the measurable effects of pornography on its male consumers, as if such consumers were themselves the 'victims' of pornography, whereas from a feminist perspective, it is women who are the true victims of pornography – both individually and collectively. Such an approach radically alters perceptions about the value of the empirical research which has been undertaken to date.

Alternative theoretical approaches to pornography

A number of theoretical arguments are advanced in relation to the issue of 'what to do about pornography'? Several approaches may be taken, among which the dominant approaches are:

(a) Pornography represents violence and discrimination against women and accordingly should be actionable under civil law on the basis that it offends against women's right to economic, political and social equality and reinforces male supremacist attitudes (the radical feminist approach advanced by Andrea Dworkin and Catharine MacKinnon).

(b) Pornography is an aspect of free speech. In the absence of clear evidence of 'harm', pornography cannot be restricted (the extreme liberal approach).

(c) Pornography is an aspect of free speech. Access to pornography may be restricted, however, provided that the restrictions are 'reasonable' (the moderated liberal approach).

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49 Under the authority of *R v Butler,* discussed above.

50 Harm here is intended to encompass both women directly and physically harmed by pornography and the imagery, equality and status of women collectively.

(d) Pornography offends society's morality. Accordingly, the law must protect society against pornography (the conservative approach).

(e) Pornography has no single meaning or message, but many. Furthermore, the feminist focus on pornography damages the quest for women's equality, in emphasising woman as 'victim'. Accordingly, there is no justification for regulation other than for laws protecting children and those on whom unlawful violence is afflicted in the making of pornography (the postmodern approach).

FEMINIST APPROACHES TO PORNOGRAPHY

Radical feminism[51]

From a radical feminist perspective, the issue of the harm caused by pornography is less whether, and the extent to which, there can be proven to be a specific cause and effect relationship between pornography and sexual violence against women, but rather that pornography, in its often sadistic depiction of women being generally degraded, hurt and violated, and always submitting to male domination, is itself – without more – the harm caused. The harm from this perspective, as argued by Andrea Dworkin and Catharine MacKinnon, is caused to all women, the *image* of all women, the *equality* of all women and not only those participating in the acts portrayed.

Feminist author Andrea Dworkin in *Pornography: Men Possessing Women*[52] presents a powerful radical feminist critique of the meaning of and evils of pornography.[53] For Dworkin, pornography is the portrayal, in words, on film, of whores. Men retain – as they always have retained – the power[54] of physical possession of women, and this power is most graphically depicted in pornography which reduces all women to the status of a whore: '[I]n the male system, women are sex; sex is the whore.'[55] Male sexual domination over women exhibits itself through the institutions of 'law, marriage, prostitution, pornography, health care, the economy, organised religion, and the systematised physical aggression against women (for instance, in rape and battery)'.[56] All women's lives are defined by male power which finds its most violent and damaging expression in pornography. Pornography is a political issue, and used by both Left and Right to legitimise the subordination of

51 See Chapter 8.

52 *Op cit*, Dworkin, fn 3.

53 See now, also, Dworkin, A, *Life and Death: Unapologetic Writings on the Continuing War Against Women*, 1997, London: Virago.

54 On Andrea Dworkin's analysis of power, see, further, Chapter 2.

55 *Op cit*, Dworkin, fn 3, p 202.

56 *Op cit*, Dworkin, fn 3, p 203.

women. The 'men of the Right' regard prostitution – 'real whores' – as a dirty trade to be engaged in secret. The 'men of the Left' regard and use prostitution while proclaiming the equality of women, the joy of sex, the liberality of prostitution and pornography as an industry: '[F]reedom is the mass-marketing of woman as whore.'[57]

Professor Catharine MacKinnon endorses much of Andrea Dworkin's writing on pornography and presents powerful legal arguments against pornography. Like Dworkin, for MacKinnon pornography is a representation of male power and domination and the correlative subordination of women. Pornography is sexual discrimination: maintaining and reinforcing women's inequality in society by representing women as sexual objects, whose primary function in life is portrayed as being sexually available for men's use. MacKinnon's feminism is a theory of 'power and its unequal distribution'.[58] The difference gender makes is a difference in power, and the difference is demonstrated in the statistics on rape, attempted rape, incest, the sexual abuse of women and children and sexual harassment.[59] Male power enables men to define women: women are defined as sexual beings. Rape and sexual violence is an exercise in power. Pornography is an expression of that power:

> [P]ornography not only teaches the reality of male dominance. It is one way its reality is imposed as well as experienced. It is a way of seeing and using women.[60]

Pornography is an institution of the inequality which women suffer as a result of their gender: pornography identifies, defines and constructs women's gender. Women are what pornography portrays.[61] And the law – in the United States, under the First Amendment to the Constitution – protects and endorses pornography as freedom of speech. Freedom of men's free speech: not women's free equal speech, for that is taken away from them by pornographic representations.[62] In 'Francis Biddle's sister: pornography, civil rights, and speech',[63] Catharine MacKinnon draws the analogy between racial discrimination and pornography.[64]

57 *Op cit*, Dworkin, fn 3, p 209.

58 MacKinnon, C, 'Desire and power', in *Feminism Unmodified: Discourses on Life and Law*, 1987, Cambridge, Mass: Harvard UP, p 49.

59 MacKinnon presents the following statistics: the rate of rape and attempted rape being 44 per cent of all women; the rate of incest and sexual abuse within the family being 43 per cent of all girls under the age of 18; the rate of sexual harassment at work 'about 85 per cent': see *ibid*, p 49.

60 'Linda's life and Andrea's work', in MacKinnon, *ibid*, p 130.

61 See MacKinnon, C, 'Not a moral issue', in MacKinnon, *ibid*, p 148.

62 *Ibid*, pp 157–58.

63 MacKinnon, C, 'Francis Biddle's sister: pornography, civil rights and speech' in MacKinnon, *ibid*, 1987, Chapter 14.

64 See, also, Catharine MacKinnon's analysis of racial and sexual discrimination law and pornography and the 'collision course' between women's equality and free speech, in MacKinnon, C, *Only Words*, 1994, London: HarperCollins, Part II. (See *Sourcebook*, pp 460–63.)

Racial discrimination and pornography

In both the United States and the United Kingdom, racial and sexual discrimination is prohibited by law.[65] In the United States, the seminal case of *Brown v Board of Education of Topeka*[66] overturned the United States Supreme Court decision in *Plessey v Ferguson*[67] in which 'separate but equal treatment' of black people was held to be constitutional. In the United Kingdom, the Race Relations Act 1976 was enacted to prohibit racial discrimination in employment and the provision of public services and the Public Order Act 1986[68] makes it a criminal offence to publish material 'intended or likely to stir up racial hatred'. Thus, English law goes further than American law in infringing 'free speech' in relation to racial matters. There has been little heartsearching in the United Kingdom over the justification for such a restriction on freedom of expression; no tortured arguments over the need for a 'free market place of ideas' or 'slippery slopes' (what next will be prohibited?). Indeed to voice such views within the context of the need to protect minority groups from racially offensive expression – whether verbal or written – would be considered, in contemporary parlance, 'politically incorrect' and offensive. Neither has there been an exhaustive inquiry into the effects of racial hatred speech: no scientifically proven data on which such speech is prohibited; no analysis of precisely – in Millian terms – the 'harm' caused which justifies the restrictions. The justification for such restrictions in the United Kingdom lies purely in the political perception of the need to protect, on the basis of equality under the law, those who are, or may be, 'harmed' (howsoever analysed) by such expression.

In the United States, however, there has developed substantial case law which demonstrates that the use of graphic sexual depictions and words in the workplace have been construed as racial and/or sexual harassment, thus removing such actions and words from the protection of the First Amendment. In relation to pornography, however, there is no sign of official realisation or recognition of the need to protect women as a whole against the deleterious effect of pornography. So entrenched, it would appear, is the inferiority of women in the minds of men – and hence society – that the issue of the achievement of real equality – the issue of protecting half of the population from both the direct and insidious effects of being constantly violated and demeaned – is simply not considered; not on the formal political agenda. Which brings us back to the power base in society: the governance of man for man, the male controlled pornography and media industry which continues to portray women as inferior sexual objects.

65 But see, further, below for discussion of the limits of this protection.

66 347 US 483 (1954).

67 163 US 537 (1896).

68 Section 19. As amended by the Criminal Justice and Public Order Act 1994, s 155.

From a radical feminist perspective, pornography is a form of sexual harassment, a form of sexual discrimination, a means of reinforcing sexual inequality and should be recognised for what it is – a freedom not of expression, but to dominate and subordinate and exploit. Pornography presents images of women which reach far beyond the individual consumer of pornography: the portrayal of women as sexual objects sends a very fundamental message to society: this – sexual violence and abuse – this is what women are, what women are for. From television advertisements which reduce women to domestic workers or sexually desirable adornments for cars, through page three of *The Sun* newspaper to sadistic hard core pornography, the industry shrieks its message, and yet the message is not heard at a political level, although it is absorbed subliminally by those exposed to its pervasive influence. And when the real message is heard and a serious attempt to generate change is made, the messenger is treated with ridicule, derision or contempt as if even to question the existence of pornography, and its effects on women, is a question only a fool (or a killjoy, a bore, a woman) would ask.

In *Only Words,*[69] MacKinnon opens the chapter entitled 'Equality and speech' by stating that '[T]he law of equality and the law of freedom of speech are on a collision course'. So intoxicated are the American courts with the need to protect free speech that the need to protect equality – ostensibly protected under the Fourteenth Amendment to the Constitution – goes unnoticed when in potential or actual conflict with freedom of expression. The First Amendment, originally designed to protect free political argument from governmental suppression, has become the protector of race hate speech and pornographers. So mindful is the law of the dangers of suppressing 'speech' that the protection of freedom of expression has grown to encompass all forms of expression, however abhorrent. As MacKinnon ironically comments: '... [y]ou can tell you are being principled by the degree to which you abhor what you allow. The worse the speech protected, the more principled the result.'[70]

There is, for MacKinnon, a direct link between racial hatred expression and pornography. Both are designed to denigrate their victims; to affirm and maintain the inferiority of a despised group; to instil fear; to enhance the power of the already powerful. From a radical feminist perspective, pornography has all of these effects. Pornography, through its depiction of women as sexual objects for the consumption of man, expresses power over all women. Pornography affirms women's inferiority and inequality. Pornography instils fear in women – all women, for this is what 'a woman is', an object, a thing to be used by the all-powerful, superior male. If equality of women – rather than freedom of expression – were the goal to be achieved by law, then what amounts to legitimate freedom of expression, the exchange of ideas, would require redefinition.

69 *Op cit*, MacKinnon, fn 64, p 51.

70 *Op cit*, MacKinnon, fn 64, p 54.

As discussed above, the problem, in part, is the law's reliance on the concept of obscenity. Obscenity, by setting tests of material having the effect of depraving and corrupting the average consumer, has nothing to do with the equality of those who are depicted in the materials concerned. Moreover, by introducing the 'contemporary community standards test',[71] the inevitable result ensures that the more pornography there is, and the worse it is, the more desensitised community standards in relation to pornography will be. By focusing on obscenity and the standard of tolerance in the community, the law loses sight totally of the equality issue and fails completely to consider the harm perpetrated on women.[72]

The Dworkin (Andrea) and MacKinnon Indianapolis and Minneapolis Civil Rights Ordinances

In 1983, in an attempt to provide legal remedies for the harm caused by pornography, Catharine MacKinnon and Andrea Dworkin drafted an amendment to the Minneapolis Civil Rights Ordinance.[73] The amendment both defined what is to be regarded as pornography and also defined pornography as 'a form of discrimination on the basis of sex' which would be actionable in law. In 1984, the Indianapolis City and County Council adopted a modified version of the Dworkin-MacKinnon Model Anti-Pornography Ordinance. The Indianapolis Ordinance prohibited any 'production, sale, exhibition, or distribution' of the material defined as pornographic. Pornography is defined in the Minneapolis Civil Rights Ordinance as the portrayal – whether in words or pictures – of the 'explicit subordination of women', where women are, *inter alia*, portrayed as 'dehumanised as sexual objects', as sexual objects who enjoy pain or humiliation, or who experience sexual pleasure from being raped, or as sexual objects tied up or mutilated or physically hurt; in postures of sexual submission, or the portrayal of women's body parts such that women are reduced to those parts; or being penetrated by objects or animals, or presented in scenarios of 'degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes those conditions sexual'. The Ordinances did not represent an attempt at censorship – to which both Dworkin and MacKinnon are opposed – but rather made provision for civil actions for damages to be available to individuals or groups harmed by pornographic representations.

71 See *Miller v California* 413 US 15 (1973); *Dominion News and Gifts (1962) Ltd v R* [1964] SCR 251.

72 The United States' position in relation to child pornography is different: restrictions are based on the assumption of harm to children through participation in pornography. See *New York v Ferber* 458 US 747 (1982); *Osborne v Ohio* 495 US 103 (1990).

73 On which see, further, below.

The draft Ordinances thus provided for civil, as opposed to criminal, remedies. The 1983 Minneapolis Civil Rights Ordinance was framed in sex discrimination language and made four practices actionable: (a) discrimination by trafficking in pornography; (b) coercion into pornographic performances; (c) forcing pornography on a person; and (d) assault or attack due to pornography. The first head would have made actionable the production, sale, exhibition or distribution of pornography, not on the basis of obscenity, but on the basis of its discriminatory effects on women. 'Coercion into pornography' was designed to provide a remedy for victims of pornography such as Linda Marchiano who, in the course of making the film *Deep Throat*, was imprisoned, beaten, constantly watched, tortured and threatened.[74] 'Forcing pornography on a person' was designed to prevent children and adults from the effects of having pornographic materials thrust upon them, whether at home, in the work place or in public. 'Action for assault or attack due to pornography' would have involved all the problems associated with the cause and effect debate.

Challenges to the Ordinances came rapidly, with challengers basing their claims on the constitutionality of the Ordinances. The result was that the Ordinances were declared unconstitutional on the basis of violating the First Amendment to the United States Constitution: the right to freedom of speech.[75] The Circuit Court for the Seventh Circuit upheld the District Court's ruling and the Supreme Court refused to review that decision. Judge Easterbrook, accepting the premises of the anti-pornography Ordinances, nevertheless in the Circuit Court ruled that nothing must be censored 'because the message it seeks to deliver is a bad one, or because it expresses ideas that should not be heard at all'.[76] The failing of the courts, in relation to the Ordinances, lies in the traditional and intransigent 'liberal' American approach which insists on aligning pornography with 'speech'. Only if pornography were reconceptualised as sexual hatred and/or sexual discrimination, or if pornography were to be reclassified as action against women rather than representation of women, would a way forward be achieved leading out of the constitutional and conceptual clutches of First Amendment protection.

As Catharine MacKinnon documents, the American courts have accepted for some years that racial or sexual harassment in the workplace does not, irrespective of its expression, attract the protection of the First Amendment of the Constitution. Sexual harassment, accordingly, is treated differently from

74 See Lovelace, L and McGrady, M, *Ordeal*, 1980; see Catharine MacKinnon's account in MacKinnon, *op cit*, fn 63, pp 179–83.

75 *American Booksellers Association Inc v Hudnut* 771 F2d aff'd S Ct 1172 [1986].

76 Cited in Dworkin, A, 'Liberty and pornography' (1993) *The New York Review of Books*, 21 October, p 117, repr in Dwyer, *op cit*, fn 11.

other forms of expression and is thus legally actionable.[77] The juridical basis for this distinction is the conceptual distinction, accepted by the American courts, between *action* and *words.* Sexual harassment is judicially interpreted and understood to be a form of sexual discrimination. Thus, the legal test of obscenity does not apply to sexually discriminatory acts. However, an issue which has caused fierce debate and much litigation in the United States, and which produces a very different legal result, is that of racially inflammatory or insulting policies, practices and expressions on university and other academic campuses. In this context, the courts have determinedly struck down as unconstitutional any attempted prohibition of free expression on racial grounds, notwithstanding the similar content and effect of both racial and sexual harassment. What is significant here, within the pornography context, is not so much the complex reasoning (right or wrong) involved in this curious distinction, but rather the importance, from the United States constitutional perspective, which lies in what does and does not amount to 'speech' which is constitutionally protected, and 'actions' which may be actionable at law. For as Catharine MacKinnon demonstrates in her analysis of racial and sexual harassment under American law,[78] the two phenomena, which bear more than a superficial resemblance to each other, will be treated differently under law according to whether they are classified as either 'speech' or 'acts'.

Several conceptual issues need to be considered within this context. These may be identified in the form of the following two principal headings:

(a) the meaning of the right to freedom of expression;

(b) whether, and under what conditions, 'speech', or 'expression', may be regarded as conterminous with 'acts' (speech act theory).

Freedom of expression reconsidered

From the time of John Stuart Mill to Ronald Dworkin, liberal philosophers have asserted by primacy of the right to freedom of expression as a core constitutional element of democracy and participation in the democratic process. Under English law, however, this 'right' has no constitutional protection, and is hedged in by limitations deemed to be necessary for the working of a healthy democracy which accords equal respect to citizens irrespective of class or race, and irrespective of sex, other than in the regulation of pornographic materials.[79] In the United States, however, the

77 See *op cit*, MacKinnon, fn 64, Part II.

78 'Racial and sexual harassment', in MacKinnon, *op cit,* fn 64, Part II.

79 European Convention on Human Rights and Individual Freedoms, Art 10, guarantees freedom of expression, subject to such limits as 'are prescribed by law and are necessary in a democratic society'. The Human Rights Act 1998 incorporates the Convention into English law.

First Amendment of the Constitution has produced a situation where under the law, both racial and sexual hatred, other than where sexual hatred is formulated as a form of sexual discrimination in the workplace, is protected. On what justification does this protection lie? From Ronald Dworkin's standpoint, freedom of expression – however vile or morally reprehensible – is justified on the basis that, '... the speech we hate is as much entitled to protection as any other'.[80]

There are, however, other, alternative, arguments which must be considered. The principal argument which will be introduced here is that pursued so effectively by Stanley Fish.[81] In *There's No Such Thing as Free Speech, and It's a Good Thing, Too,*[82] Fish argues that the First Amendment dilemma, namely its use in protecting pornography, sexist language and campus hate speech, lies in a misunderstanding of the meaning of and context within which 'speech' lies. 'Free speech' he tells us, and all the rhetoric which surrounds it in the United States, has no substantive content whatsoever, but is a means of verbal expression which is used to pursue whatever political purpose an individual chooses. Speech is thus contextual: nothing of itself, but a means to an end – an end which for the most part, is political in context. According to the jurisprudence of the Supreme Court, only where 'speech' may be interpreted as 'acts' – as in sexual discrimination law – or where speech is interpreted not purely as speech on the grounds that it acts as incitement to forms of public disorder – can the trap of constitutional protection be avoided. What courts do, when interpreting whether or not 'speech' is 'speech', or 'speech' is 'action', is to classify forms of 'speech' according to their own political agenda: a balancing of what should, or should not, be protected. While courts refuse to articulate the political underpinnings of their judgments and continue to affirm the juristic justifications for the primacy of First Amendment guarantees, those political underpinnings are in fact central to judges' reasoning.

Freedom of speech, being devoid of substantive content and contextually dependent, Fish argues, should not be accorded the blanket primacy which it attracts. Rather, freedom of speech, and its protection, should lie within the context of consideration of the specific forum in which it operates, and be balanced against competing principles – such as equality – in order to determine the appropriate extent and limits of the protection:

> ... the thesis that there is no such thing as free speech, [which] is not, after all, a thesis as startling or corrosive as may first have seemed. It merely says that there is no class of utterances separable from the world of conduct and that therefore the identification of some utterances as members of that non-existent

80 *Op cit*, Dworkin, fn 76, p 12.

81 Professor of English and Professor of Law, Duke University.

82 Fish, S, *There's No Such Thing as Free Speech, and It's a Good Thing, Too,* 1993, Oxford: OUP.

class will always be evidence that a political line has been drawn rather than a line that denies politics entry into the forum of public discourse.

'Speech act' theory

Speech act theory derives from linguistic philosophy, and most particularly from the work of JL Austin.[83] The principal thrust of the theory is expressed in Austin's slogan, 'to say something is to *do* something'. Speech act theory is utilised by Catharine MacKinnon when she argues that pornography is an act of subordination, and an act of silencing women's voices. In order to understand the efficacy of speech act theory in advancing the argument against pornography, it is necessary briefly to outline the constituent elements of the theory.

First, the terminology. Speech act theory entails three principal forms of words which effect differing acts: the locutionary, the perlocutionary and the illocutionary. To make a *locutionary* statement is to describe a state of affairs: 'the economy is in recession', for example. Such a statement has no effect or meaning or consequence, other than as a statement. A *perlocutionary* form of speech, or *perlocutionary act,* is more than purely descriptive, but is persuasive, or frightening; the action it performs is causative, or contributory to the action which the listener then takes: 'enter the London marathon, you can easily do it'; 'if you don't see the doctor about that rash soon, it will cover your entire face'. The statement is thus *more than* a 'mere' statement, for it has a causal relationship with the action which follows. The statement is therefore 'acting upon' the listener. An *illocutionary* statement, or *illocutionary act,* is one which, by its very utterance, is indistinguishable from the statement itself. Statements, commands, promises comprise illocutionary acts. If a police officer on traffic duty directs a driver to 'move on', or 'pull over' that is a command from one in authority to one not in authority, and is an illocutionary act. Also, by way of example, when John says to Mary, in a ceremony of marriage, valid according to the relative law, the words 'I do', John is performing an illocutionary act – that of marrying Mary. When Andrea Dworkin and Catharine MacKinnon state 'Pornography ... *is* the graphic sexually explicit subordination of women ...', as they do in the Ordinances, they are claiming that pornography – in its many manifestations – is an *illocutionary act* – it subordinates, and silences women.

For speech to be conceptualised as an act, whether locutionary, perlocutionary or illocutionary, there are certain conditions which must be fulfilled. These conditions are labelled, *felicity conditions.* First, there must be a direct form of communication between the speaker and the listener: if the locutionary, perlocutionary or illocutionary words are not understood by the

83 Austin, JL, *How To Do Things With Words,* 1962, Oxford: OUP.

person to whom they are directed, they cannot assume the status of a speech act. Thus, if, for example, one party thinks that he is getting married, and the other thinks that it is a religious conversion ceremony, the words 'I do' will not be an illocutionary act since there is a mismatch between the parties understanding of the effect of the words.[84] Secondly, in relation to the marriage example, there are certain legal requirements surrounding the ceremony which must be complied with in order for the words 'I do' to have illocutionary effect: the formalities must be adhered to, the parties respectively male and female and single, etc. Also, for a illocutionary act, such as an order or command, to be performed, the person uttering the words must be in a position of authority or superiority for the words to take effect as an act: if the words are simply ignored, they have failed in their primary purpose – to effect a consequential outcome. Thus, for example, if an employer says to an employee 'you are dismissed', it is an illocutionary act; whereas if a fellow employee says to another, 'you are fired', this has no illocutionary effect since the fellow employee lacks the authority to make such a statement meaningfully.

When the anti-pornography Ordinances were challenged in court, one of the arguments put forward was that it was philosophically incorrect to assert that 'pornography ... is the ... subordination of women': it was a philosophical and linguistic 'sleight of hand'[85] – a movement from the argument that pornography causes the insubordination of women (a perlocutionary act), to the argument that pornography is the subordination of women (an illocutionary act).

Catharine MacKinnon argues that speech act theory is central to the legal response to pornography. If pornography remains classified as speech, as it is by the US Supreme Court, it continues to attract the First Amendment protection. If, however, it is reclassified as *action* it loses this protection. In 'Pornography: on morality and politics',[86] MacKinnon asks: '[W]hat is saying "yes" in Congress – a word or an act? What is saying "kill" to a trained guard dog? What is its training? What is saying "you're fired" ... What is a sign that reads "Whites Only"?' Each, correctly classified, is an illocutionary act. So too with pornography: '[P]ornography is not an idea any more than segregation or lynching are ideas, although both institutionalise the idea of the inferiority of one group to another ... In a feminist perspective, pornography is the essence of a sexist social order, its quintessential social act.'[87] This reconceptualisation of pornography is central to MacKinnon's quest to free

84 See *Mehta v Mehta* [1945] 2 All ER 690.

85 *Per* Judge Barker, *American Booksellers Inc v Hudnut* 598 F Supp (SD Ind 1984), 1316. See Parent, W, 'A second look at pornography and the subordination of women' (1990) 87 Journal of Philosophy 205.

86 'Pornography: on morality and politics', in MacKinnon, *op cit*, fn 58.

87 *Ibid*, MacKinnon, p 204.

pornography from First Amendment protection, and forms the core of her argument in *Only Words*.[88] Pornography *is the act which it performs*: that of subordinating women and denying women an effective right to speak. By its message, pornography constructs women as inferior sexual beings, and by so doing classifies women as unequal. Within the speech act context, pornography is an illocutionary act which subordinates. Consider this analogy, one drawn by MacKinnon herself: the act of lynching a black man, by the Ku Klux Klan, is action. It is not action alone though, because the action it performs – the killing – conveys a message of threat and terror to all black people. For MacKinnon, pornography has this same effect. Thus, by breaking down the distinction between acts and words, actions and ideas, pornography may be reconceptualised in a manner which would enable the United States courts to escape from 'First Amendment logic',[89] and to place constitutional restrictions on its production, distribution and use and to provide remedies for those harmed by pornography.

THE LIBERAL APPROACH: ABSOLUTE AND MODIFIED

From the liberal Millian perspective, the question is whether restrictions on freedom of expression should be allowed on the basis that the material in question causes 'harm' to others. As noted above, this 'harm' principle was adopted by the Williams' Committee in its review of obscenity and censorship.[90] The problem with the 'harm' principle in relation to pornography lies in establishing whether harm is caused, and to whom – and as has been seen, the evidence to date – focusing on the depravity and corruption test, rather than the effect on women – is equivocal.

John Stuart Mill, writing in 1859, argued for the sovereignty of the free individual exercising freedom of conscience, thought and expression 'without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish perverse, or wrong'.[91] On this basis, without clear proof of harm, there could be no justified legal restriction. Without proof of harm we are free to educate, to criticise, but not to infringe another's liberty by legislating. The inescapable difficulty in relation to pornography is evaluating the harm it causes in a meaningful manner.

Liberal philosopher Ronald Dworkin has considered the question of pornography and 'what to do about it'. Dworkin tackles the problem of

88 *Op cit*, MacKinnon, fn 64.
89 *Op cit*, MacKinnon, fn 86, p 206.
90 *Op cit*, *Report*, fn 4.
91 Mill, JS, *On Liberty* (1859), 1989, Cambridge: CUP, p 15.

pornography, starting with the statement that: '[I]t is an old problem for liberal theory how far people should have the right to do the wrong thing.'[92] It is Dworkin's contention that an individual's right to moral independence 'requires a permissive legal attitude toward the consumption of pornography in private', but that that right may be circumscribed by a scheme of regulation which guards against those not wishing to be confronted by pornography to be protected from it, provided that the restrictions do not amount to undue hardship or embarrassment for the consumer: a curious trivialisation of the problem of pornography from a feminist perspective.

In 'Liberty and pornography',[93] a review of Catharine MacKinnon's *Only Words*, Dworkin directly assesses radical feminist claims concerning pornography. Dworkin adopts the distinction between *negative liberty* and *positive liberty* advanced by Sir Isiah Berlin.[94] Negative liberty is defined as: 'not being obstructed by others in doing what one might wish to do.' Freedom of speech – without censorship – is a negative liberty. A positive liberty is defined as being:

> ... the power to control or participate in public decisions, including the decision how far to curtail negative liberty. In an ideal democracy – whatever it is – the people govern themselves.

Censorship of pornography[95] – as opposed to restrictions on access – is not justified, Dworkin tells us. His view is best expressed in the following passage:

> Pornography is often grotesquely offensive; it is insulting, not only to women but to men as well. But we cannot consider that a sufficient reason for banning it without destroying the principle that the speech we hate is as much entitled to protection as any other. The essence of negative liberty is freedom to offend, and that applies to the tawdry as well as to the heroic.

Dworkin also rejects the claim that pornography causes measurable harm to women. The evidence he says does not support the claim that there is a link between pornography and sexual violence. Dworkin also rejects the claim that pornography causes 'a more general and endemic subordination of women', or, in other words, that 'pornography makes for inequality'. He further rejects the claim that pornography 'leads to women's *political* as well as economic or social subordination. His interpretation of this claim to political subordination – the idea that pornography is both a consequence of, and cause of, the construction of women's identity – is that the claim 'seems strikingly

92 Dworkin, R, 'Do we have a right to pornography?' (1981) 1 OJLS 177.

93 *Op cit*, Dworkin, fn 76, pp 12–15; repr in Dwyer, *op cit*, fn 11, pp 113–21.

94 See Berlin, I, *Four Essays on Liberty*, 1968, Oxford: OUP, p lvi.

95 As noted above, 'censorship' was not the motivation behind the Ordinances. Rather, the Ordinances sought to prohibit the production and sale of certain materials and to provide civil remedies for those harmed by pornography.

implausible'. Dworkin argues that other forces – such as media advertising – are far more important in defining women than hard core pornography and concludes that, whilst sadistic pornography is 'revolting', it has less importance – given its relative inaccessibility – than the 'subtle and ubiquitous' portrayal of women in the domestic sphere, and that in terms of importance, sadistic pornography 'is greatly overshadowed by these dismal cultural influences' as a causal force.[96] The idea that pornography 'silences' women[97] is dismissed with little analysis. Instead the 'pre-eminent place' of free speech under the Constitution must be defended against all attack.

A number of objections can be raised against Dworkin's approach. First and foremost, the idea of absolute freedom of speech must be set within the United States' constitutional arrangements which have few echoes in the United Kingdom. Whilst the First Amendment to the Constitution ensures a free and vigorous media with the capacity to unravel corruption in government in a manner unparalleled in the United Kingdom, the First Amendment also provides protection for those who espouse racist and sexist views. As Ronald Dworkin comments, the Ku Klux Klan are free to disseminate ideas in the United States whereas under the British Race Relations Act 1976 such 'speech' would incur legal liability. Banging the First Amendment drum may create a superficially impressive noise, but in fact does little to evaluate whether, in a particular context, such as racial and sexual hatred and discrimination, the noise has a firm moral base. Furthermore, Dworkin glosses over the alleged dangers of pornography which are perceived by radical feminists, such as Catharine MacKinnon and Andrea Dworkin, whose work Ronald Dworkin criticises. Dworkin tells us, as seen above, that pornography's arguable damaging effects are overshadowed by the 'dismal cultural influences' of breakfast time television and the advertising industry. It is difficult to argue against Dworkin in relation to advertising: persistent pictures of women showing pride in their cleaning and cooking perpetuates images of women confined to the private sphere of life more appropriate to Victorian times than to the late twentieth century, and Ronald Dworkin is probably correct in arguing that were research to be undertaken into these 'forces', the damage to women's image as equal partners in society would be substantiated. However, to equate pornography, whether hard or soft, with the advertising of washing-up liquid and other domestic aids, it may be argued, is to confuse the insidious and relatively

96 *Op cit*, Dwyer, fn 11, p 118.

97 An idea propounded by, among others, Michelman, F, 'Conceptions of democracy in American constitutional argument: the case of pornography regulation' (1989) 56 Tennessee L Rev 303, which is cited and opposed by Dworkin in 'Liberty and pornography', *op cit,* fn 76. On silencing women through pornography, see, further, below.

trivial with the overtly damaging.[98]

An alternative interpretation of John Stuart Mill's 'harm' principle[99]

Mill, it will be recalled, cautioned against any restriction on any person's conduct unless that conduct could prove to be harmful to another. Citizens are free to try to educate, to warn, to encourage, but not to prohibit non-harmful-to-others conduct. Mill was particularly concerned with freedom of expression. Consider the following passage:

> This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.[100]

The priority of liberty over censorship or restriction[101] derives from the potential dangers of the imposition of moral standards by the majority over the minority, a consequence which would harm all members of society. Each individual must be free to determine his or her own morality – nothing could be more dangerous than to have the morality of the majority imposed upon the individual, for that would stultify thought and expression and could turn society into a mindless mass to be manipulated by those with power. Mill makes it clear that he is primarily concerned with liberty of thought and opinion, the exchange of ideas. Central to these are a free press and the English law relating to which Mill described as 'as servile to this day as it was in the time of the Tudors',[102] in order that individuals be free of tyrannical government. In relation to freedom of thought and conscience, Mill writes of Socrates, Jesus Christ and others who were put to death for teaching the new, the unorthodox, the *inconvenient.* Mill argues cogently for the need for

98 For a more extensive analysis of Ronald Dworkin's views, see Langton, R, 'Whose right? Ronald Dworkin, women, and pornographers' (1990) 194 Philosophy and Public Affairs 311.

99 For an in-depth analysis of Mill and pornography, see Wolgast, E, 'Pornography and the tyranny of the majority', in *The Grammar of Justice*, 1987, New York: Cornell UP. (See *Sourcebook*, pp 463–76.)

100 *Op cit*, Mill, fn 91, p 15.

101 Censorship is here defined as legal prohibition; restriction as regulation to access to pornography.

102 *Op cit,* Mill, fn 91, p 19.

religious toleration, for the toleration of another person's beliefs which may be different from those of the majority. Oppression – such as that suffered by the early Christians – did not prevent the growth of Christianity. Thus, no one person or group, be it a minority or majority, and no one age, can dictate to society what 'is right'.

This priority of freedom of expression so passionately argued for by Mill is that accorded to the press under the First Amendment of the United States Constitution, and which has been used by liberals to advance the argument that freedom of expression encompasses the right to produce and consume pornography. However, Mill was primarily discussing the need for freedom in political debate and freedom of conscience and religion: rights and freedoms fundamental to a healthy democratic society. Freedom of expression and opinion form the basis of 'the mental well being of mankind (on which all their other well being depends)'.[103] Freedom of expression, from the Millian perspective, is the essence of democracy and political life.

The question which immediately needs to be addressed here is whether – and on what grounds – it is justifiable to employ John Stuart Mill's strictures on the primacy of freedom of expression in political and religious life in relation to the production, distribution and consumption of pornography. In considering this question, it is useful to turn to John Stuart Mill's views on women in society. In 1869 Mill's *The Subjection of Women* was published.[104] *The Subjection of Women* represents one of the most powerful pieces of feminist writing of the Victorian, and indeed any, era. Mill writes that the subordination of woman to the power of man has traditionally been one of 'universal custom' with women originally being taken by force and later imprisoned in the family, sold by the father as a chattel to a husband and kept by that husband subject to his total physical, sexual and economic power. Mill states:

> All women are brought up from the very earliest years in the belief that their ideal of character is the very opposite to that of men; not self-will, and government by self-control, but submission, and yielding to the control of others.[105]

Since the abolition of slavery, the position of women in society remained 'an isolated fact' representing a 'relic' of former times. Women had become the slaves of men. Men operate under the fear that if women are educated and trained and allowed to enter the 'public world' of employment and participation in the process of government, women would choose not to marry into such a condition of slavery. Whether Mill is writing of women's subordination within the family, or women's exclusion from public life, or

103 *Op cit*, Mill, fn 91, p 53.
104 Mill, JS, *The Subjection of Women* (1869), 1989, Cambridge: CUP.
105 *Ibid*, p 132.

their underrepresentation in the arts, Mill's demand for women's equality shines through. On the basis of the 'abstract right' for equality, Mill demanded nothing less than a social revolution.[106] On this basis, it is submitted that it is inconceivable to argue that Mill would tolerate the subjection of women in pornographic representation on the basis of freedom of expression which he interprets to mean the exchange and development of ideas at an intellectual (rather than base) level. To accept, therefore, Mill's insistence on freedom of expression as one of the most powerful ingredients in a free democracy does not compel us to admit that pornography falls within its ambit and should be given equal protection under the law as political and other debate. From this angle, it could be argued that pornography is not speech, it is not expression within the Millian interpretation of that phrase, and on this basis the Millian harm principle need not be invoked to justify differing treatment of pornography from other instruments of free expression. To reach this conclusion, however, does not necessarily impel us toward the conclusion that the *law* should be utilised to suppress pornography. Whether or not the law should intervene is a necessarily related but separate issue of some complexity which will be given further consideration below.

Whatever the merits of the liberal position, it is not one which has been consistently followed by governments, although governments are not notably consistent in their inconsistencies. Thus, in the United Kingdom certain drugs are proscribed, on the harm principle, whereas others are proscribed in the absence of clear and convincing evidence as to their harmful effects and others are permitted irrespective of the clear evidence that they cause harm.[107] Censorship of television, film and theatre and literature is provided for under English law. There exists also inconsistency and ambivalence in relation to freedom of expression and freedom of association. Taking the latter first, on the grounds of the 'interests of the State', membership and support of proscribed organisations is a criminal offence.[108] In relation to freedom of expression, in addition to the controls provided over film, television and theatre, legal controls exists to restrain bodies or individuals from causing racial hatred.[109] Freedoms are further curtailed in the sphere of employment and public service where employers and service providers are not free to discriminate on the basis of race or sex.[110]

That there are numerous exceptions to the principle of respect for

106 *Op cit*, Mill, fn 104, p 194.

107 Eg, alcohol and tobacco.

108 See the Prevention of Terrorism Acts 1974–96.

109 See the Race Relations Act 1976, Public Order and Criminal Justice Act 1994. Contrast this position with that in the United States where such restrictions would be ruled unconstitutional as being contrary to the First Amendment of the Constitution.

110 See Race Relations Act 1976; Sex Discrimination Act 1975; Equal Pay Act 1976; Treaty of Rome, Art 119, and Directives thereunder.

individual autonomy does not, *per se,* provide justification for such exceptions. If such apparent legal anomalies are justified, the basis for that justification must be sought. One justification offered by Right-wing conservative moralists lies in the protection of the 'moral health' of the nation, which represents an alternative approach to the problem of pornography.

THE CONSERVATIVE APPROACH TO PORNOGRAPHY

The classical conservative stance was advanced in the United Kingdom by Sir (later Lord) Patrick Devlin.[111] Lord Devlin's views were aired after the Wolfenden Committee had reported on the relaxation of the legal regulation of homosexuality.[112] The majority of that Committee's members had endorsed the views expressed nearly a century earlier by the liberal philosopher John Stuart Mill,[113] namely that:

> ... the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[114]

To Lord Devlin such a liberal approach lacked a necessary dimension, namely that society had an interest over and above that of the individual's personal freedom in the protection of the moral fabric of society. Society, according to Devlin, is held together by an invisible, intangible but nevertheless real, shared morality. Contrary to Mill, therefore, Devlin argued that not only was the law justified in intervening in personal liberty, but it had a *duty* so to do in order to protect society's unifying bonds. The duty of the State to protect its moral fibre, for Devlin, was analogous to the duty of the State to protect against subversion. This demand, however, is not without qualification. For Devlin, the maximum toleration of others should be encouraged: restriction should be justified on the grounds of 'disgust or approbation', not on the mere disapproval of others towards the conduct in question. The issue as to whether or not the limits of society have been reached – in which case legal limitations may be imposed – is to be judged not by some philosopher-king, or the government of the day, but by 'ordinary men and women who represent society in the jurybox'.

111 See Devlin, P, *The Enforcement of Morals,* 1965, Oxford: OUP.

112 See *The Report of the Committee on Homosexual Offences and Prostitution,* Cmnd 247, 1957, London: HMSO.

113 On whom see below.

114 *Op cit*, Mill, fn 91, p 13.

This conservative stance on pornography is adopted by the vocal Moral Right, particularly in the United States of America. From this radical conservative perspective, pornography should be subject to strict censorship laws – a stance in direct conflict with either the classical liberal approach or the radical feminist approach discussed above.

The moral health of the nation, from this perspective, is to be protected from forces which are perceived (even if not proven) to be harmful to the 'moral fabric' of society. In Devlin's view, society – and government as the representative of that society – has as much a duty to protect the moral fabric of society as it does to protect the physical integrity of the nation from subversion or attack.[115]

Devlin's views, however, have been subjected to trenchant criticism. First and foremost, there is the critique of the conservative view from Professor Herbert Hart.[116] In *Law, Liberty and Morality*,[117] Professor Hart responded to Patrick Devlin's thesis. Central to Hart's objection is Devlin's insistence that morality acts as some form of bonding in society – a 'seamless web' – which holds society together and without which, society would 'disintegrate'. Hart concedes the importance of morality, but not a stagnant morality which would ensue from Devlin's approach to its protection. Society, and its morality, change and adapt: it cannot be constrained within the boundaries of a particular time, but rather must be allowed to grow and adapt as time passes. Accordingly, there can be no generalised attempt by the State to freeze society's morality at any point in time. This, however, does not imply that the State has no role to play in the protection of morality. Hart's approach may be understood as liberal but moderately paternalistic. Hart distinguishes between conduct which is carried out in private and conduct which is, at least in part, in the public domain. Members of society have no right, Hart tells us, to be protected from any harm which they may experience through knowing that another person is taking part in some act or practice which is abhorred. However, should that same conduct be indulged in public, where the action in question may be witnessed by others, then restriction on that conduct is justified. In this manner, Hart argues, society may find a middle way between overly intruding upon individual privacy, and protecting 'society' from directly witnessing that conduct.

This approach is in large measure the approach endorsed by the Williams Committee on Obscenity and Film Censorship whose report was published in 1979.[118] This *via media* is subjected to attack on two fronts, at least: the Moral

115 *Op cit*, Devlin, fn 111.

116 Professor of Jurisprudence, University of Oxford.

117 Hart, HLA, *Law, Liberty and Morality*, 1965, Oxford: OUP.

118 *Op cit*, *Report*, fn 4.

Right calling for complete censorship; radical feminists arguing that it misses the central focus of the problem, namely the equality of women in society.

ALTERNATIVE AND POSTMODERN PERCEPTIONS CONCERNING PORNOGRAPHY

The feminist anti-pornography quest has not been universally welcomed by feminists. Before judgment can be passed on the way forward in relation to pornography, there are a number of considerations which must be taken into account. The first difficulty to be overcome, if law is to be used in the quest to eradicate the harms caused by pornography, is that of definition. Feminist scholars discern a clear distinction between the 'erotic' and the 'pornographic', and it is essential that this distinction be maintained if a movement towards the eradication of non-pornographic representations is to be avoided. The borderline between erotica and pornography is by no means unproblematic. Erotica to Gloria Steinem[119] and Catharine MacKinnon involves the portrayal of intimate relationships within the context of equality (as opposed to domination and submission which is represented in pornography). Diana Russell defines erotica as being 'sexual representations that aim to be sexually arousing, but that are non-abusive and non-sexist'.[120] There remain, however, logical and conceptual difficulties in the analysis of pornography and erotica and the consequent justification for the restriction of the former but not the latter, and the point is of crucial importance if the movement for legal regulation is not to descend down a very slippery slope to the suppression of all forms of sexually explicit materials in a manner which the Moral Right, but not radical feminists against pornography, would advocate.

A further difficulty lies in the argument that radical anti-pornography feminist theory exaggerates pornography's role in the maintenance of women's inequality. This critique, implicit in the traditional liberal insistence on the American First Amendment protection for pornography, entails two differing arguments. The first concern revolves around the differing representations of women which, whilst not pornographic, or even erotic, nevertheless continue to portray women in their stereotypical roles within the private sphere of the family, or as stereotypically sexual beings.[121] The second concern is the charge levelled at radical feminism by other feminists, namely that the radical feminist anti-pornography campaign is one characterised by essentialism, in so far as the radical critique focuses exclusively on heterosexual patriarchal pornographic representation.

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119 *Op cit*, Steinem, fn 11, p 29.

120 Russell, D, 'Pornography and rape: a causal model', in Itzin, *op cit*, fn 10, p 317.

121 The argument advanced by Dworkin, R, above.

In relation to the first issue, it is undeniable that pornography is by no means the only medium in which women are represented as inferior, submissive, subject. Romantic fiction, 'soap operas', domestic television comedies, television, magazine and billboard advertising and the press all play a role in perpetuating the portrayal of women as little more than domestic, sexual objects. The fashion and beauty industry is also implicated in the myth of femininity and the promotion of heterosexual desirability.[122] Nevertheless, damaging as such representations may be to women's equality in society, none of them carry the power and violence which pornography conveys. Pornography has a defining quality which transcends other representations of women – with its explicit message that women exist for violent sexual abuse imposed by men.

The charge of essentialism – that the anti-pornography campaign is characterised as the concern of white, middle-class, heterosexual women – is levelled by feminists whose focus on women and the law is informed by different criteria. Thus, for example, liberal feminists are opposed to the restriction on freedom of expression. Socialist feminists oppose the campaign as a divergence from the campaign for a society where economic and social conditions respect not just the elite in society. Others, whilst sympathetic to the rationale for the campaign, object on the basis that it distorts feminism through its emphasis on women as sexual objects alone, thus making biological sex the focus of all discrimination in society.

Some lesbian feminists, on the other hand, oppose the anti-pornography campaign for its emphasis on heterosexual relationships, and the apparent exclusion of homosexual relationships. From this perspective, lesbian feminists argue that they are not demeaned or subordinated by heterosexual pornographic representations, and that accordingly the debate concerning pornography is too narrowly constructed, in so far as it fails both to include lesbian sexuality and to encompass possible alternative interpretations of pornography.[123]

While the radical feminist quest to raise the profile of pornography as a matter of urgent political significance and action is both powerful and intuitively appealing, its resonance falls on unreceptive ears in relation to those who hold alternative perspectives about the meaning and significance of pornography. One argument centres on the diversity of pornographic representation. Pornography is not, it is argued, solely the representation of the sexual availability of woman for heterosexual man. Rather, pornographic representations extend to both female and male homosexual representations,

122 See Wolf, N, *The Beauty Myth,* 1991, London: Vintage; Faludi, S, *Backlash: The Undeclared War Against Women*, 1992, London: Vintage.

123 For a discussion of lesbian pornography, see Rodgerson, G, 'Lesbian erotic exploration', in Segal, L and McIntosh, M (eds), *Sex Exposed: Sexuality and the Pornography Debate,* 1992, London: Virago, p 275.

and thus the arguments about the centrality of portraying women as the victims of, and subordinate to men, cannot be sustained.

Another argument concerns the radical feminist interpretation of pornography. It is argued, against radical feminists, that not all pornography is violent, that not all pornography depicts women in a position of inferiority: pornography has many differing meanings; meanings which are attached to the 'message' by the consumer, and which cannot be categorised in such a limited manner. To portray pornography as depicting (solely) violence, and to argue that these depictions represent and valorise the hatred of women is, from this alternative perspective, misleading. Gayle Rubin, for example, discusses sado-masochist materials. It is Rubin's contention that sado-masochist representations have less to do with violence than with the depiction of 'of ritual and contractual sex play whose *aficionados* go to great lengths in order to do it and to ensure the safety and enjoyment of one another'.[124] If this perception is accurate, the focus on pornography as the primary site of women's degradation, by violent men, appears misguided. Furthermore, it is argued by some lesbian feminists that the radical feminist argument against pornography is essentialist in that it centres on the heterosexual, male dominant/woman subordinate, conceptualisation of women to the exclusion of those with different gender orientations for whom the issue of dominance and subordination does not arise. Anti-anti-pornography theorists also argue, among other things, that pornography can be a means by which women themselves explore their sexuality, and thus pornography becomes not a force for subordination but for sexual experimentation and liberation. Thus, to conceptualise pornography as harm, and no more, is to deny women the right to identify their own sexuality, and to force women to accept the male pornographic representation of woman's sexuality. Moreover, if viewed in this constructive light and if pornography can have positive and liberating effects for women, the conceptualisation of women as the victims of pornography becomes problematic.

In 'Desire and power'[125] Catharine MacKinnon addressed the question whether 'all women are oppressed by heterosexuality'?[126] Her answer is that 'heterosexuality is the dominant gendered form of sexuality in a society where gender oppresses women through sex, sexuality and heterosexuality are essentially the same thing'.[127] Thus, heterosexual sex is an act of dominance

124 Rubin, G, 'Misguided, dangerous and wrong: an analysis of anti-pornography politics', in Assiter, A and Carol, A (eds), *Bad Girls and Dirty Pictures: The Challenge to Radical Feminism*, 1993, London: Pluto Press, p 22. Gayle Rubin's essay was originally submitted as testimony to a hearing on pornography held by the National Organisation for Women in California in 1986.

125 From MacKinnon, *op cit*, fn 58, p 46.

126 *Op cit*, MacKinnon, fn 58, p 60.

127 *Op cit*, MacKinnon, fn 58.

(male) and submission (female).[128] If this is the case, the 'approval', or tolerance, of erotic depictions of sexuality would appear to meet with precisely the same objections that pornography meets: namely depictions of dominance and submission. John Stoltenberg's analysis supports the radical feminist thesis. In Stoltenberg's analysis, pornography, whether heterosexual or homosexual, is deeply homophobic: 'Homophobia is totally rooted in the woman-hating that male supremacy thrives on.'[129] Male supremacy over women is maintained in the stories pornography tells: woman as the unequal other to be used by the dominant male. Pornography constructs masculinity and femininity as power disparity. In gay pornography, the message is the same in Stoltenberg's analysis, for heterosexual masculinity must preserve its virility and through pornographic representations of the gay male in the role of woman, the denigration of woman persists. Thus '... pornography *institutionalises* the sexuality that both embodies and enacts male supremacy'.[130] From this standpoint, if it is accepted that pornography is a powerful means of perpetuating damaging perceptions about women, reinforcing women's inequality, prolonging the emphasis on women as sexual objects, then all women – irrespective of race, class or sexual orientation – are damaged by pornography. The consumers of pornography see one central figure defined in their miserable product: woman – old, young, black, white, poor, rich, heterosexual or lesbian.

Arguments for and against the legal regulation of pornography

Radical feminists have advanced powerful arguments for the regulation of pornography on the basis of the political and social damage to woman's equality. Pornography not only defines women as sexual objects for the use of men but also has a (although not conclusively established or quantified) relationship with sexual crimes against women. Pornography emphasises male sexual and other dominance and thus maintains and supports gender inequality. Pornography, as analysed by Catharine MacKinnon, is a form of sexual harassment, sexual discrimination and sexual hatred directed against women in a manner which is no longer permissible against minority groups in society. Pornography denies women an equal voice in society: by the constant portrayal of women as inferior, as objects, women are denied respect and their claims to equality are silenced under a blanket of disrespect which, in the name of freedom of expression, the law condones. On these bases, the harm is demonstrable, if not scientifically assessable, and there exist strong grounds

128 MacKinnon does not ignore homosexuality here, and points out that such relationships may nevertheless be as gendered as heterosexual relationships.

129 Stoltenberg, J, 'Pornography, homophobia and male supremacy', in Itzin, *op cit*, fn 10, pp 145, 158.

130 *Ibid*, p 150.

for pornography's restriction. Indeed, given the strength of the arguments put forward, the onus should not be on women to justify their claim for action under law, but rather on pornographers and pornographic consumers to justify their continued 'right' to produce and consume pornography. If sexual harassment and denigration is for the moment, and for these purposes, considered analogous to racial harassment and denigration, it would be strange (unthinkable) to demand that victims of racial harassment and oppression justify their case, adducing scientific evidence, against such treatment. Why, then, are women in a less favoured position than racial groups in society?

Despite the strength and obviousness of the case for the regulation of pornography, and the intuitive appeal of providing legal remedies for those harmed by pornography, there are arguments against the use of *law* to regulate it. The radical feminist demand, not for censorship, but for the provision of civil remedies for those harmed by pornography, meets with a number of objections. In relation to the Dworkin/MacKinnon Ordinances, Emily Jackson[131] argues that by providing civil remedies for those alleging harm by pornography would require changes in legal thinking. Jackson argues that, first, group actions would have to be facilitated; secondly, that 'harm' would have to be redefined to accommodate the more 'diffuse' type of harm suffered; thirdly, that the doctrine of causation would need revision to include harm caused by a third party, and to accommodate 'speculative decisions' as to the cause of the injury suffered.[132] Nicola Lacey[133] also questions whether law is the appropriate medium for protecting against the harm pornography causes to women. Feminist lawyers, she suggests, are lawyers first, feminists second, by which she means that feminist lawyers – perhaps wrongly or inappropriately – seek a *legal* remedy for the many harms which feminism identifies.[134]

Without denying the rationale for the MacKinnon/Dworkin Ordinances both Jackson and Lacey have accordingly questioned the efficacy of using law as the means of effecting reform. In Emily Jackson's analysis, for example, pornographic representations of women are, as discussed above, but a part of the many forms of stereotypical representations – in the media, advertising, art and literature – which create and sustain sexual inequality. The use of law to prohibit pornography, in one sense, could prove damaging to sexual equality in so far as it leaves the surrounding, the more pervasive and

131 Birkbeck College, University of London.

132 See Jackson, E, 'The problem with pornography' [1995] Feminist Legal Studies 49. (See *Sourcebook*, pp 476–90.)

133 Birkbeck College, University of London.

134 See Lacey, N, 'Theory into practice? Pornography and the public/private dichotomy' in Bottomley, A and Conaghan, J, *Feminist Theory and Legal Strategy*, 1993, Oxford: Basil Blackwell, p 93.

insidious, representations intact, thus suggesting that these are acceptable. In Nicola Lacey's view, while anti-pornography feminist lawyers are credited with having elevated the issue of pornography into the political arena and establishing pornography as a political public – as opposed to private – issue, the emphasis on law as the remedial mechanism for pornography's harms is misplaced and 'the implications of the legislative strategy seem at best, uncertain and at worst, damaging'. Lacey cites several reasons for her opposition to the use of law in this area. First, there is the pragmatic problem of bringing legal action against pornography: the costs involved, the degree of commitment required to undertake the task. Secondly, there is the perceived danger of the Moral Right using such an ordinance to advance its own claims to censorship of sexually explicit literature and art. Thirdly, the likelihood of successful litigation is viewed as slim: the problems of proof and definition again loom large. Fourthly, even if litigation were to succeed how would damages be assessed, how would injunctions be enforced? Fifthly, the position of women working in the pornography industry – outside of coercion which is expressly covered in the MacKinnon/Dworkin Ordinance – would remain unchanged. Turning to the symbolic effects of such a law, Lacey argues that were the practical limitations of the law to prove to be well founded, the law would be perceived as devoid of meaning and significance, or as a 'sop to political sentiment and a way of avoiding the need for more effective political action'. Further, the falsely assumed alliance with the Moral Right forged by anti-pornography feminists might be perceived as movement in favour of repression, to the detriment of feminism. For Lacey, the emphasis on law exaggerates the potential utility of law, as opposed to political debate and pressure. As she puts it, feminist lawyers are prone to thinking that for every problem there must be a legal – as opposed to another – form of redress.[135]

CONCLUSION

As has been seen, pornography, from the standpoint of radical feminists, is a political issue. Co-existing with its ugly relatives – sexual harassment, sexual discrimination, sexual hatred and violence and prostitution – pornography represents a powerful image of man as politically and sexually dominant and woman as politically and sexually inferior. On this analysis, a society

135 *Op cit*, Lacey, fn 134, p 93. See, also, Mary Joe Frug's critique of the Ordinance campaign: 'The political of postmodern feminism: lessons from the anti-pornography campaign', in Frug, M, *Postmodern Legal Feminism*, 1991, London: Routledge, Chapman and Hall. See, also, Smart, C, 'The problem of pornography', in *Feminism and the Power of Law*, 1989, London: Routledge and Kegan Paul; for Catharine MacKinnon's (1985) response to feminist lawyers' opposition to legal action on pornography, see 'On collaboration', in MacKinnon, *op cit*, fn 58, Chapter 15.

committed to genuine gender equality would find no room for pornography. Whether, however, law is the appropriate instrument for changing social mores, has been revealed as a far more questionable issue. It may be that the limits of law in terms of effecting changed social mores are reached when the law condemns and restricts the production and availability of pornography through regulation: social not legal change is, from this perspective, a prerequisite for changing the meaning and effects of pornography. However, if 'the problem of pornography' is not conceptualised as an issue of woman's status, woman's equality, but regarded as an aspect of the expression and representation of human sexuality, in all its many manifestations, the argument for any form of regulation – other than for the protection of children or sex workers against unlawful violence – falls away. On either interpretation, pornography represents intractable difficulties for feminism. Too great a focus on pornography, and too great an emphasis on law as the solution to the problem howsoever defined, not only invites failure, but also reinforces the notion of women as victim, women as unequal. Moreover, the intense feminist debate concerning pornography, on which no consensus is likely to prove forthcoming, detracts important energies from alternative analyses of women's remaining inequalities in society.

PROSTITUTION AND LAW: AN OUTLINE

> [P]rostitution is part of the exercise of the law of male sex-right, one of the ways in which men are ensured access to women's bodies.[136]

Conceptually, prostitution is closely allied to pornography. Both involve the core idea of women as nothing more than sexual objects for use by men, and thus uphold the patriarchal power of man over subordinate woman. Both industries prey on weak and economically vulnerable women. Both pornography and prostitution debase and demean women in the eyes of society. And yet, neither pornography nor prostitution are amenable to regulation by law which would successfully eradicate the dangerous message which they convey, without involving repression and censorship, which no-one – other than those on the conservative Moral Right – would countenance. Both thus exist as conundrums for feminist scholars who seek an end to the discrimination and inequality against women which pornography and prostitution promote and protect.

A brief introduction to prostitution is included in this chapter on the basis that prostitution may be conceptualised as violence and discrimination against women and thus analogous to pornographic representations. Whilst the United Nations Declaration on the Elimination of All Forms of

136 Pateman, C, *The Sexual Contract*, 1988, London: Polity, p 194.

Discrimination Against Women 1983, extracted in Chapter 11, clearly includes forcible prostitution in its definition of prohibited violence against women, it may be contended that any form of prostitution – 'voluntary' or forcible – is a representation of violence against women and the image of women in society, and a further manifestation of patriarchy.

Prostitution is juridically conceived in the United Kingdom, as in other jurisdictions, as a contractual matter between the commissioning man and the freely consenting woman. The official standpoint, adopted by the Wolfenden Committee of 1957, was that prostitution, being a matter of private morality, was 'not the law's business'.[137] Thus prostitution is not an offence under law. It does not follow, however, that the law does not regulate prostitution. It is a criminal offence, under English law, for a woman to solicit for the purposes of prostitution,[138] or for a man to solicit a woman for the purpose of prostitution,[139] from a motor vehicle while it is in a street of public place; or in a street while in the immediate vicinity of a motor vehicle that he has just got out of.[140] Any known prostitute is thus liable to be arrested merely for being on the street. Where the woman is carrying condoms these may be used as evidence of prostitution. If a prostitute shares accommodation with another prostitute, she can be charged with brothel-keeping.[141] Furthermore, it is a criminal offence for a man or woman to live on immoral earnings.[142] Thus, while prostitution is not unlawful in England and Wales, almost every activity associated with it is unlawful.

In the United Kingdom, licensed brothels, escort agencies and massage parlours proliferate in large cities. In addition, organised crime and individual opportunistic pimps control women prostitutes. Drug addiction[143] and single motherhood force women, and increasingly young homeless girls, into prostitution, selling their sexual services to maintain a drug habit, their children, or both. Requiring no qualifications, immunity from the tax system, and flexible hours, make the option of prostitution a viable means of earning a living, with the attendant risks of violence and the risk to health.

137 *Report of the Committee on Homosexuality and Prostitution*, 1957, London: HMSO.

138 Street Offences Act 1959, s 1(1).

139 See Cohen, M, 'Soliciting by men' [1982] Crim LR 349.

140 Sexual Offences Act 1985, s 1. The Act has proved unsuccessful, principally due to the evidential burden. See Edwards, S, 'The kerb-crawling fiasco' (1987) 137 NLJ 1209.

141 Sexual Offences Act 1956, s 33.

142 Sexual Offences Act 1956, s 30. The offence applies to both men and women: *R v Puckerin* (1990) 12 Cr App R (S) 602. Any person knowingly entering into a contract with a prostitute, eg, a taxi-driver driving a prostitute to visit a client, may be found guilty (see *R v Ferrugia* (1979) 69 Cr App R 108), as could a landlord renting property to a prostitute.

143 In 1994, a survey conducted at a Glasgow Drop-in Centre for female prostitutes, 44 of the 51 respondents were injecting drug users: (1994) 308 BMJ 538.

Alternative legal responses to prostitution

As seen above, while prostitution is not unlawful in England and Wales, a number of associated criminal offences exist. Debate about prostitution, and the appropriate State response to it, revolves primarily around the issue of State regulation. In Holland, and in Vancouver, there are designated 'toleration zones' in which prostitutes may ply their trade. However, wherever such zoning is attempted, it is attended by problems. On the one hand, it enables the authorities to designate areas in which prostitution would create least public nuisance and complaint. On the other hand, evidence reveals that designation of 'strolls', while allowing some prostitutes to be self-employed, has the effect that other prostitutes, because of potential overcrowding and competition, set up patrols in other, non-designated, areas where they were vulnerable to control by pimps.[144] In West Germany, Nevada and Melbourne,[145] among other places, legalised brothels have been introduced. From the point of view of the authorities, legalising brothels brings prostitution under greater official control; enables the State to enforce strict health check requirements; and to collect revenue from prostitution through licensing fees and taxation of earnings. However, while the case for State-licensed brothels may be argued from the point of view of control to reduce the nuisance of prostitution on the streets, and on the basis of ensuring the health of prostitutes, there exist counter-arguments. Nina Lopez-Jones, for example, argues that State-regulated brothels, 'have increased police powers and institutionalised pimping by the State, making it harder for women to keep their earnings or to bargain to determine their working conditions'.[146] State brothels also control the number of officially 'recognised' prostitutes, increasing competition, and permitting State control over those who may be permitted to work in the brothel, thus discriminating against those deemed to be 'unsuitable'. Where, as in Melbourne, the introduction of licensed brothels is combined with making street prostitution illegal, the effect is to force the most vulnerable prostitutes who cannot gain admission to licenced brothels into criminal activity on the streets, or into illegal brothels.

Competing arguments concerning prostitution

Prostitution may be conceptualised in a number of differing ways, as indeed it has been by feminists. On the one hand, the freedom of contract approach

144 See Lowman, J, 'Street prostitution control: some Canadian reflections on the Finsbury Park experience' (1992) 32 Br J Crim 1; see in reply, Matthews, R, 'Regulating street prostitution and kerb-crawling: a reply to John Lowman' (1992) 32 Br J Crim 18.

145 Street prostitution in Melbourne is illegal, although evidence shows that that has not eradicated street prostitution.

146 Lopez-Jones, N, 'Legalising brothels' (1992) 142 NLJ 594.

may be preferred as allowing women autonomy and free choice in their lifestyles and occupations. The law's limited approach to prostitution, especially allied with enforcement problems associated with the limited regulation of prostitution, appeals to those advancing this approach. For many prostitutes, their trade in their bodies represents the only means of escaping from the poverty trap of unemployment, or low employment. That such 'sex workers' are more vulnerable to violence and exploitation – whether by clients or pimps – is the principal cause for concern, but one which could be remedied not by increasing legal regulation, let alone prohibition, but by legitimising the industry and providing formal State support for sex workers, through the provision of licensed safe premises designated for prostitution, complete with health checks for sex workers.

This liberal, rights-based, contractual conceptualisation of prostitution carries with it a number of difficulties.[147] To view a woman's 'right' to lease her body as a right to enter into a contract of employment, or contract for the provision of services, confuses a woman's right to physical integrity with the provision of a commercial product, as if submitting to paid sex is the same as supplying soap powder in a supermarket. Soap powders do not have personalities, individuality, intellectual capacity, rights to autonomy, freedom and respect: women do. Conceptualising woman as a product, on sale and for sale, conceals the true nature of the contract in question: that of the purchase of a woman by a man, a capitalist transaction in the 'free' marketplace. Given that the practice of wife-sale, discussed in Chapter 2, was eradicated by the nineteenth century, prostitution represents the last blatant vestige of the power of money, in the hands of man, to purchase a woman, her body, her self. Defenders of the contractarian model of prostitution, argue that this argument is flawed. What is on offer, they argue, is not the woman, or even her body, but the use of her sexual services. Moreover, the woman in question enters this contract voluntarily: there is no coercion and she may contract out.[148] To take the argument further, the woman has a *right* to offer and to sell her services in this way. To argue in any other manner concerning prostitution, is to argue against an individual's right to freedom.[149] However, as Carole Pateman's analysis makes clear, the prostitute's work is unlike other

147 As a matter of law, the prostitution contract is unlawful: 'It is well settled that a contract which is made upon a sexually immoral consideration or for a sexually immoral purpose is against public policy and is illegal and unenforceable. The fact that it does not involve or may not involve the commission of a criminal offence in no way prevents the contract being illegal, being against public policy and therefore being unenforceable.' Ackner LJ in *Register of Companies ex p Attorney General* [1991] BCLC 476. See, also, *Inland Revenue Commissioners v Aken* [1990] 1 WLR 1374.

148 This argument is much weakened when a woman is controlled by a pimp who exerts a patriarchal control over her time and activities.

149 See Ericcson, L, 'Charges against prostitution: an attempt at a philosophical assessment' (1980) 90 Ethics 335.

workers' employment. Prostitution, Pateman argues, is part of the age-old sexual contract:

> Once the story of the sexual contract has been told, prostitution can be seen as a problem about *men.* The problem of prostitution then becomes encapsulated in the question why men demand that women's bodies are sold as commodities in the capitalist market. The story of the sexual contract also supplies the answer; prostitution is part of the exercise of the law of male sex-right, one of the ways in which men are ensured access to women's bodies.[150]

An alternative to the rights-based, contractarian, human rights based argument also invokes human rights. The human right to contract is here pitted against the human right not to be degraded and sexually violated, and the more general right of women not to be subordinated or discriminated against, but to be accorded equality and respect. However, there are problems with this line of argument: evidence suggests that for many women prostitutes, despite the economic coercion which leads them into prostitution, and despite the inherent risks of their trade, prostitution represents the only available means by which to support themselves (and their children). From the perspective of the prostitute, therefore, the right which assumes priority over the right to physical integrity, is the right to act as an independent economic agent, in order to preserve her own economic viability. To assert, therefore, that prostitution is wrong – from a moral perspective situated on perceptions about women's rights to physical integrity – is to assume a moral, and conservative, high-ground which would be interpreted as unwanted and unnecessary 'paternalism'. Furthermore, defining prostitution and its consequences; combining definition, effect and moral argument, in order to come to a conclusion about the appropriate response to prostitution, from a postmodern perspective, is redolent of essentialism and universalism. It is for reasons such as these that prostitution, as with pornography, represents such an intractable problem for feminist analysis.

150 *Op cit*, Pateman, fn 136, pp 193–94.

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