

OBSCENITY: COMMON LAW AND THE ABUSE OF WOMEN

Turin. June 1990. World Cup soccer game between Scotland and Brazil. Televised around the world. In half an hour the camera leaves the game three times to focus on a female spectator. Suddenly, immediately after a spectacular goal, the camera zooms in on the woman's breasts. The screen fills entirely with her bosom. Planning to watch soccer, millions of viewers have no choice but participate in the camera-man's pornographic savouring of her breasts. How many of the viewers were outraged? How many of us consume women's bodies without realising it? Can you imagine if, instead of the breasts flooding the screen, we had a close up of a man's penis?

Being a woman means having your body appropriated by men. One of the ways women are made into, treated like, and kept in object status is by pornography. Pornography is not the original or sole cause of our status. Violation by pornography is not the worst indignity we have to suffer. But the indignities are all related. And pornography is a constant, serious and highly offensive assault upon women. The law of obscenity was once consistent with the interests of women; it outlawed pornography. But then liberals "reformed" the law.¹ They did it because "no man has the right to tell another man what he may read."²

Traditionally, legally, as popularly, pornography has been linked with the concept of obscenity. But the legal meaning of obscenity was never clearly explained. Although pornography was often found obscene, its obscene nature was never adequately exposed. Nudity and sex were considered by many judges inherently obscene. This fuelled the liberal revolt against obscenity law. Although some of the liberal criticism was well founded, the nexus between pornography and obscenity was improperly attacked because women's interests were never even considered.

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1 By "liberals" I mean those who have a liberal philosophy or ideology. When I refer to particular individuals as liberals I do so only to criticise particular instances or examples of liberalism. Few of us can be pigeonholed accurately. No doubt many liberals also hold inconsistent or non-liberal beliefs. In discussing liberals I do not mean to attack any individual but rather to expose the misogynist nature of liberalism.

2 Coleman, *Obscenity, Blasphemy and Sedition: 100 Years of Censorship in Australia*, (Angus & Robertson, Sydney 1974) foreword.

Throughout Australia in the mid 1970's there was a complete policy change in favour of pornography. The guiding principle, which remains in place today, is that "adults have the right to read what they wish and the public has the right to be protected from unsolicited material".³ The policy of protecting those who do not solicit pornography is mere political and judicial rhetoric. In Australia, as in North America and Britain, pornography is now so widespread and common that nearly all images of women are pornographic.

Pornography is a male institution that subordinates women. This does not mean that men 'naturally' like pornography. If men 'naturally' liked pornography, all of them would like it. But there are men appalled by explicit pornography, some because they are anti-sex moralists, and some because they respect women.⁴ And, while some women recognise the oppressive nature of pornography, others do not.⁵ In feminist analysis 'men' like 'women' are perceived as a gender group characterised by maleness [or femaleness] as socially constructed rather than as individuals or biological beings.⁶ We argue that gender is *entirely* constructed in society - that gender as we know it is not biologically inherent.

When I talk of men producing and using pornography and women being portrayed in pornography, I do not suggest that all men use pornography, that no woman produces pornography or that only women are ever portrayed pornographically. Many 'women's magazines' are produced by women. Their consumers are predominantly women. Yet they are rife with pornographic representations. Similarly, men are increasingly being pornographically portrayed in advertising. Homosexual men as well as children are often the subject of pornography. But the vast bulk of explicit pornography is produced by men for men. In one sense this fact is irrelevant. Were female pornographers as common as male ones, were men

3 *Popow v Samuels* (1973) 4 SASR 594 at 607. Also, s5 *Classification of Publications Act 1973* (SA) sets up a Classification of Publications Board. The Board is given two guiding principles; first, that "adult persons are entitled to read what they wish" and second, that "members of the community are entitled to protection from exposure to unsolicited material that they find offensive"; ss12(2)(a) and (b) respectively. This was "a product of new Federal Government ... policies spelt out by Labor in August 1973 and negotiated with the States"; Fox, "Depravity, Corruption and Community Standards" (1980) 7 *Adel LR* 66 at 76.

4 In America there is even an organisation called Men Against Pornography. Rush, "The Many Faces of Backlash" in Leidhold & Raymond (eds), *The Sexual Liberals and the Attack on Feminism* (Pergamon Press, New York 1990) p169.

5 Although there has not yet been much feminist analysis of inexplicit pornography, the need for such work is recognised: Coward, "What is Pornography?" (1982) *Spare Rib* 52 at 53; Eckersley, "Wither the Feminist Campaign?" (1987) 15 *International Journal of the Sociology of Law* 149 at 164.

6 MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) *Spring Signs* 532. Each time I use the word "men" in this article I use it in this sense.

as frequently the subject of pornography as women, there would still be a problem. *Equal exploitation* is not a desirable goal.⁷

This article sometimes refers to 'me' or 'my body'. Occasionally this literally means myself. At other times it is a philosophical and political identification with women in general. Many women, including women who are not consciously feminist, often feel this way. All women ought feel like this; it is the logical outcome of our sexual subordination.⁸ Women experience so many things in a certain way *because* we are women. Very often our individuality is totally irrelevant or disregarded *because* we are women. Women fear rape not because of anything in our individual personalities, but because we are women in a rapist society.⁹ And every time a woman is sexually harassed or confronted with some other manifestation of sexism it is *only* because she is a woman. Everything that is done to a woman because she is a woman could, for that reason alone, be done to me. Her body could be my body and sometimes is.

MODERN IDEALISM, INDIVIDUALISM AND OBJECTIVITY

Common law obscene libel dates from *R v Curl*.¹⁰ In 1727 Curl published a book called *Venus in the Cloister*.¹¹ The common law court had jurisdiction to preserve public peace. The prosecutor argued that peace included good order and government which could be broken without actual force. Destroying morality, he claimed, is "destroying the peace of the government, for *government is no more than publick order, which is morality*".¹² The prosecutor cited the 1663 *Sir Charles Sedley's Case*¹³ as founding many prosecutions for obscene plays.

Sir Charles went nude onto a balcony overlooking a crowded street in Covent Garden. He urinated on the people below and threw "unmentionably

7 Kappeler, *The Pornography of Representation* (Polity Press, England 1986) pp30 and 50.

8 This is the foundation for feminism. Feminists "organised and started shelters and groups of and for all women: battered women, incest survivors, prostitutes ... because what [is] done to them [is] a systematic act of power against each one of us, although they [are] taking the brunt of it. This [is] not a sentimental identification ... whatever could be done to them could be, was being, would be done to us". MacKinnon, "Liberalism and the Death of Feminism" in Leidhoild & Raymond (eds), *The Sexual Liberals and the Attack on Feminism* p5.

9 The sense in which ours is fundamentally a rapist society is discussed in text at n111.

10 (1727) 93 ER 849.

11 Also called *The Nun in her Smock*.

12 (1727) 93 ER 849 at 850, emphasis added.

13 (1663) 83 ER 1146.

filled" bottles at them.¹⁴ There the court declared itself *custos morum* of the King's subjects. The Appellate Court in *Curl* unanimously declared obscene libel a temporal offence indictable at common law. They held that their jurisdiction arose from their position of *custos morum* and that the publication was an offence "*against the peace* because it tended to *weaken the bonds of civil society, virtue and morality*".¹⁵ And *Curl* was set in the pillory which the reporter said he well deserved.¹⁶

We have here reference to morality but its public aspect is crucial. The prosecutor acknowledged that not all immoral acts were indictable. Lies, he said, were not indictable. *Only immoral acts of a public nature were common law offences*.¹⁷ Immoral acts not of public nature fell within the jurisdiction of the ecclesiastical courts. Thus, we know that the *Curl* Court did not condemn the book for mocking religion or causing 'impure' thoughts. These grounds could not found an action in a temporal court.

The 1763 case, *R v Delaval*,¹⁸ concerned Anne Catley. She had an apprenticeship to study music. Her indentures were then transferred to Sir Francis Delaval, who was not a musician. Thereafter she was kept in his house for his sexual use. The original music master and the lawyer who transferred the papers were knowingly involved in the scheme. They too were prosecuted. The court said this was an offence against public decency and good manners. It reminded Lord Mansfield of an earlier case "in the Court of Chancery, wherein it appeared, that a man had formally assigned his wife over to another man; and Lord Hardwicke directed a prosecution for that transaction as being notoriously and grossly against public decency and good manners".¹⁹ Lord Mansfield said:²⁰

this Court is the *custos morum* of the people ... and upon this ground, both Sir Charles Sedley and *Curl*, who had been guilty of offences *against good manners*, were prosecuted here.

The impugned acts of the accused in *Curl*, *Sedley* and *Delaval* are quite disparate. There was a urinating nudist, a publisher of a pornographic book and a sexual abuser of a girl. The courts found the cases similar. They classified all the acts immoral or ill-mannered because they were all abusive of the public in some way. These courts were not concerned with the thoughts, moral code or ethics of the accused. They were concerned about

14 Bray, "The Juristic Basis of the Law Relating to Offences Against Public Morality and Decency" (1972) 46 *ALJ* 100 at 102.

15 *Curl* at 851, emphasis added.

16 As above.

17 At 850, emphasis added.

18 (1763) 93 ER 913.

19 As above.

20 At 915, emphasis added.

the public impact of the accused's acts. This interpretation is supported by Reynolds J's statement in *Curl* about the publishing of the pornographic book. He said:²¹

This is surely worse than *Sir Charles Sedley's* case, [Sir Charles] only exposed himself to the people then present ... whereas this book goes all over the kingdom.

The Judge's sense of society is apparent. He is saying that the more people who are harmed by an act the worse it is. This contrasts starkly with contemporary attitudes. Modern courts use the social nature of certain harms as a reason to *deny* a remedy. The more people harmed the less harm the courts now see.²² Far from developing their understanding of life in society, modern judges in obscenity cases focus exclusively on ideas, ignoring society altogether.

A major change in the law occurred in 1868 in *R v Hicklin*.²³ *Hicklin* cited *Starkie on Slander and Libel*:²⁴

Ever since the decision in *Curl's* case, it seems to have been settled, that any publication tending to the destruction of the morals of society is punishable by indictment... . Although many vicious and immoral acts are not indictable, yet, if they tend to the destruction of morality in general, *if they do or may affect the mass of society, they become offences of a public nature.*

Only the emphasised words accurately state the law as found in the earlier cases. Lies were considered outside the courts' jurisdiction in *Curl* yet a publication recounting the benefits of lying could easily be seen as tending to corrupt public morals. It was not public morals which the court wanted to protect, that was the jurisdiction of the spiritual courts. Trading in women, whether it was a particular woman as in *Delaval* or women in general as in *Curl* was immoral *and* a threat to society. It was not the morals of society which were to be protected but society itself.

21 *Curl* at 851.

22 The law does not give standing to an individual to sue for defamation suffered through membership of a group. No matter how serious the defamation of Aboriginals, for example, the law says that no individual Aboriginal personally suffers harm because others in the group suffer the same harm. As MacKinnon states: "Doctrines of standing suggest because women's deepest injuries are shared in some way by most or all women, no individual woman is injured enough to be able to sue for women's deepest injuries". MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, Cambridge 1989) pp238-239.

23 (1868) LR 3 QB 360.

24 Vol II, 2nd ed p158. (At 369, emphasis added).

The judges in *Hicklin* took obscene libel for settled common law.²⁵ But their interpretation of the "settled law" actually departs from earlier law. Starkie's statement of the law had been partly accurate. This was not so with the judges. Cockburn CJ was taken by later courts to have provided the common law test for obscenity. He provided the following test:²⁶

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.

It is difficult to see how he could have formulated this test on the basis of the earlier authority. In question in *Hicklin* was a pamphlet entitled "*The Confessional Unmasked; shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession*". Cockburn CJ said that such a work which suggests "*thoughts of a most impure and libidinous character*" was obscene for tending to deprave and corrupt.²⁷ So we have it that a work which makes the reader *think of sex* is obscene. But the earlier courts were patently not concerned with people's minds. How can a thought be a breach of the peace?

Bray notes how this change in the law was accomplished. He identifies an ambiguity in the meaning of *custos morum*.²⁸ *Mos* may mean morality. Alternatively it may mean manners, customs and habits.²⁹ Courts such as the *Hicklin* Court took the claim that the courts were *custos morum* to mean that they were guardians of morality. The *Hicklin* Court was of the Victorian era. Bray suggests this is why that court decided to safeguard morality.³⁰ But the ambiguity was falsely resolved; the interpretation of *custos morum* which sits best with the old cases is "guardians of manners, customs and habits". The judges in the old cases actually talk of bad manners. This language rings oddly in modern ears. Expressed in contemporary language, the judges considered themselves guardians of *social behaviour*.

Developing a social notion of morality, the *Hicklin* Court declared publications which create thoughts of sex obscene. This is the beginning of the very superficial and confused reasoning which characterises the law of

25 *Hicklin* at 370-371, per Cockburn CJ; at 377, per Blackburn J; at 378, per Mellor J; Lush J concurred.

26 At 371.

27 At 371, emphasis added to show that Cockburn CJ concerns himself with thoughts rather than acts.

28 Bray, "The Justice Basis of the Law Relating to Offences Against Public Morality and Decency" (1972) 46 *ALJ* 100 at 103.

29 As above, fn14. "*Custos*" means guardian, while "*morum*" is the genitive plural of the word "*mos*".

30 As above.

obscenity. The test requires examination of thoughts and morals. It ignores the act of publication and its social or political consequences. It ignores the impact of the publication upon women. Attention is directed away from the publication towards the individual readers, to their thoughts of sex. The subsequent debate about obscenity law turns entirely on whether or not it is acceptable for the public to have access to material which might create thoughts of sex.

Although the *Hicklin* Court unanimously found the book obscene, Mellor J confessed to some doubt. His hesitation, though discretely expressed, is instructive:³¹

the subject ... if it may be discussed at all (and I think it undoubtedly may), is such that it cannot be discussed without to a certain extent ... [asserting] that the confessional would be a mischievous thing to be introduced into the Kingdom; and therefore it appears to me very much a question of degree, and if the matter were left to the jury it would depend very much on the opinion which the jury might form of that degree in a publication as the present.

Mellor J is attempting to balance social needs. The public has an interest in discussing and debating issues. It also has an interest in not being subjected to obscene publications. Here he decided that:³²

though one half of the book consists of casuistical and controversial questions, and so on ... yet ... the other half consists of quotations which are detrimental to public morals ... there is a great deal here which there cannot be any necessity for in any legitimate argument

Mellor J is rebelling against the law that anything giving rise to thoughts of sex is obscene. Struggling to distinguish speech from obscenity, he suggests debate or argument is not obscene. The Judge fails to see the simple fact that if you use someone else's body to say something then you are not *merely* speaking.

Reasoning like that of Mellor J supported a decision in *Collins's Case* where the legality of a book advocating and explaining the use of contraceptives was upheld.³³ The Chief Justice, in dissent, considered the book obscene. He was heavily influenced by the English trial of an earlier version of the book. The English court he believed, had found that book obscene because

31 *Hicklin* at 378.

32 As above.

33 (1888) 9 NSW 487.

"it suggested impure thoughts, it was offensive to chastity and delicacy, it expressed or represented to the mind something which delicacy, purity, and decency forbid to be expressed, and ... it was calculated to deprave the public morals".³⁴

In contrast, Windeyer J felt the case involved speech, "the very right of the public discussion of a subject of great importance to civilised society".³⁵ He said the court had to make the following decision:³⁶

whether it is lawful to argue in a decent way with earnestness of thought and sobriety of language the right of married men and women to limit the number of the children to be begotten by them by such means as medical science says are possible and not injurious to health.

The Judge argued that the practical exposition of a topic accepted for philosophical and sociological debate should not be considered obscene.³⁷ He said that no natural function of the human body is obscene in itself.³⁸ This judgement is an attempt to clear the water muddied by the *Hicklin* style of reasoning.

The Judge's decision is good.³⁹ Sadly he did not succeed in clarifying the nature of obscenity law. He wanted the working class public to have access to the book in order to reduce their breeding rate.⁴⁰ Not merely arguing against an obscenity finding, the Judge takes up the book's arguments. He quotes from the book in support of his view that it is immoral to have

34 At 503.

35 At 505. The Judge was influenced by Malthus. Malthus helped inspire Social Darwinists such as Spencer, who wrote that major social problems such as crime, slums, disease and poverty in general were caused by working class over-breeding. Various solutions were advanced. They ranged from arguing that it was good that the poor continue living in squalid conditions, in poor health, exploited, overworked and often starving to death as the fittest would survive, to advocating that workers marry later than the middle classes. The use of contraceptives, supported by Windeyer J, was a nicer 'solution'. Malthusian arguments continue today. For a discussion of these issues see Kropotkin, *Mutual Aid* (Heinemann, London 1902); Bookchin, "Social Ecology versus Deep Ecology: A Challenge for the Ecology Movement" (1987) 3 *The Raven* 219.

36 *Collins* at 506.

37 At 508.

38 At 512.

39 He was in the majority because Stephen J, expressing similar sentiments, also held the book not obscene, at 535.

40 Windeyer J expressly condemned the notion of one class keeping information for its exclusive use, meaning that the working class should have access to information about contraceptives. To this end he stated that "Information cannot be pure, chaste, and legal in morocco at a guinea, but impure, obscene, and indictable in a paper pamphlet at sixpence." At 514-515.

children you cannot or will not adequately provide for.⁴¹ Instead of keeping his analysis on the weakness of the *Hicklin* test for obscenity, Windeyer J attacked the content of the *Hicklin* morality. He stated, "A more robust view of morals teaches that it is puerile to ignore human passions and human physiology".⁴² The Judge laid a foundation for later challenges to obscenity law on behalf of pornography by characterising *Hicklin* as "founded upon a want of confidence in the power of truth and in the right to publish it".⁴³ Strangely enough, after thus characterising *Hicklin*, Windeyer J approved the decision.⁴⁴

*Ex parte Chidley*⁴⁵ tested judicial support for speech about sex; an odd but sincere defendant published a pamphlet titled "The Answer", arguing that "the human race has fallen into a false mode of coition". He advanced various arguments to support his thesis and advocated a mode of coition which was to occur infrequently and be initiated by the woman. Apparently, "The pamphlet referred in plain language to the sexual organs and the sexual act, but otherwise its language was not necessarily indecent".⁴⁶ The Court held 2:1 that it was obscene and that "raising a ridiculous controversy cannot secure immunity for matter which is in itself obscene". In effect the majority said the human body and sexual functions are inherently obscene.

The Chief Justice, however, said the pamphlet did not "conduce towards sensuality".⁴⁷ He could not find obscenity merely because the publication dealt with coition or "because it propounds what existing opinion may consider absurd, or because no one has discussed or even conceived such opinions before".⁴⁸ This eminently sensible reasoning did not persuade the Judge's brothers. Sly J argued that the diagrams would only escape being

41 He promotes his case that the working class ought not breed as much as the middle class with references to children "diseased and rickety", "certain to inherit a taint of insanity", "of drunkard or consumptive or low and vicious parents". At 517 and 523-524.

42 At 527.

43 At 518.

44 He stated at 521: "it was not necessary, as Lord Cockburn suggests, to prevent the English people from becoming Roman Catholics that filthy matter should be sold at the corner of the streets to every boy and girl already of the Protestant faith. Such a course of action rather pointed to the conclusion that the object of the publication was to insult a small number of the religionists in England, and to make money by the sale of filthy matter".

45 (1914) 14 NSW 97.

46 At 97 (headnote).

47 At 103. The Chief Justice's name does not appear in the report.

48 At 104.

obscene if they were available only to medical students.⁴⁹ Pring J was vehemently opposed to the pamphlet:⁵⁰

It is impossible to contend that a publication such as this would not suggest thoughts of a most impure and libidinous character or that it would not present to the mind something which delicacy purity and decency forbid to be exposed. It deals with the performance of that great function of the human body which all human beings - except the most depraved - keep secret.

Such puritan attitudes towards sex, nudity and reproduction remained common in the law until the 1960's. Parliamentarians and some modern judges chaffed under them.⁵¹ Impatience with the thought that the naked human body and sex per se are obscene became common. Judges and lawyers were among the many liberals challenging such ideas.⁵²

The test for obscenity came to be expressed differently. But the law still did not adequately define the nature of pornography. In 1969 in *Crowe v Graham*⁵³ Barwick CJ declared obscene, material which "offends the ordinary modesty of the average man or woman in sexual matters". This was accepted by the other judges.⁵⁴ They are thinking about pornography as if it were mere speech about sex, more idea than substance. They are without any idea of society as anything other than an aggregate of individuals. Nonetheless the new test for obscenity is said to have "won general acceptance in Australia and, indeed, beyond".⁵⁵

In *Popow* material of the following nature was in question:⁵⁶

each film shows a girl (sic) ... alone, naked or near naked, and performing various contortions, either without any aid or with

49 At 108. The Chief Justice did not believe that only medical texts could discuss legally sexual matters, at 103.

50 At 105. This runs together the statements of Cockburn J in *Hicklin* (impure and libidinous) and the Chief Justice in *Collins* (indelicate, impure and indecent).

51 See for example Stable J in *R v Martin Secker and Warburg Ltd* [1954] 2 All ER 683, quoted in Campbell & Whitmore, *Freedom in Australia* (Sydney University Press, Sydney 1976) p250.

52 At p247.

53 (1969) 121 CLR 375 at 379.

54 At 387, per Kitto J. At 394 Windeyer J stated it thus: "Does the publication, by reason of the extent to which and the manner in which it deals with sexual matters, transgress the generally accepted bounds of decency?" Of the test in *Hicklin* Windeyer stated at 392, that it has "only survived really, because, although constantly mentioned, it and its implications have been ignored".

55 *Popow v Samuels* (1973) 4 SASR 594 at 599, per Bray CJ.

56 At 606, per Bray CJ.

the use of such accessories as a rug, a vibrator, a stair-rail or a settee, from which it can be concluded that the act of intercourse is intended to be mimed.

Bray CJ found this portrayal of women crazed with a need to be penetrated by a penis so that they copulate with furniture or other 'substitutes', not obscene.⁵⁷

In support of his decision the Chief Justice stated, "Advertisements, films and literature at the present time notoriously, continuously, clamorously and blatantly appeal to the erotic instincts of men".⁵⁸ He is arguing that pornography is not pornography because it is everywhere. He commented "I do not think that the arousal of erotic feelings in an adult male is in itself an offence".⁵⁹ So it is no longer obscene to make others think of sex. The act of degrading women, from being characterised as speech about sex, is now ignored entirely. That there are basic requirements for life in society, basic social rights and obligations, is ignored. Pornography, according to Bray CJ, is "*indulgence in a reprehensible but excusable peccadillo*".⁶⁰

The most striking aspect of the judicial discussion of obscenity is the utter failure to ever consider the impact of pornography upon women. Pornography, although often the subject-matter of obscenity cases, is never *analysed*. The discussion is vague, superficial and confused.⁶¹ Liberals regard pornography one-dimensionally. They *assume* that if pornography is not what the 'moralists' say it is, if it does not 'deprave and corrupt', then nothing is wrong with it. Bray CJ's point that it is not the court's role to protect the public's morals is well made. But he also stated that, "The law is not designed to make, and is not capable of making, virtuous men. It is concerned with minimum standards of behaviour". Yet pornography makes women sex objects rather than humans. Surely respecting the humanity of women *is* a minimum standard of behaviour? Our social standing determines the way we will be treated in society. Women cannot live in true society with men until we have equal standing. Pornography treats us as inferiors. Pornographic images of women are obscene because they

57 At 610. He was in dissent. The other judges felt they should not disturb the finding of the trial judge.

58 At 610.

59 At 610.

60 At 609, emphasis added.

61 Of this confusion Dworkin & MacKinnon say: "It is the seductiveness of obscenity law to seem potentially effective because its terms are so meaningless they could mean almost anything. As a result they have meant almost nothing, being (actually) dependent upon the viewpoint of the observer. This makes obscenity law less useful the more pornography is a problem, because the more pornography is consumed, the more observers' views are shaped by it, and the more the world it makes confirms that view." Dworkin & MacKinnon, *Pornography and Civil Rights* (Organising Against Pornography, Minnesota 1988) p27.

profoundly demean us. They help construct and maintain it, but modern judges have no inkling of the reality of women's social subordination.

Clearly great changes have occurred in obscenity law over the last three centuries. The change in the way judges think and their changed conception of society has implicitly changed the way they conceive their own role in society. Modern law reflects these changes. With the change to capitalism came a change in ideology.⁶² In law, doctrines reflecting *laissez faire* liberalism, that is, individual liberty or social irresponsibility, slowly began to edge out doctrines of reciprocal social rights and duties.⁶³ In obscene libel law, from looking originally at the *act* of publishing obscenity and the impact of that act upon society, the courts have moved to considering whether particular ideas were obscene.

To separate acts from thoughts or ideas is artificial, but this is precisely what the courts began to do. Once the courts inquired exclusively into thoughts, they naturally became vulnerable to criticisms about infringing personal liberty. When looking at thoughts and ideas it is easy to think solely about an individual or a group of individuals; it is not society that thinks but an individual; not society that responds to an idea but various individuals. We feel extremely uncomfortable holding people responsible for the impact of their thoughts and ideas upon others. We tend to separate the idea from the person having the idea. In our liberal scientific era we deeply respect this highly artificial division. The division is considered important and even necessary. It is called 'objectivity'.

When looking at the impact of acts the inquiry is necessarily wider. We commonly hold people responsible for their acts. It is not easy to separate the act from the individual who acted. Often the very purpose of the inquiry is to determine the respective rights and obligations of the actor and the acted upon. This is inevitably a social question. In obscenity law the courts began seeing defendants' *behaviour* as mere expression of *ideas* and they put the emphasis on the idea rather than the fact of expression. The focus was shifted away from social individuals with reciprocal needs and obligations, to 'autonomous' individuals, their right to think or speak as they wish without reference to others. Because act and thought were conceptually separated, because the individual was conceptually removed from society, the act and society could be ignored.

62 Changes in ideology were not a simple consequence of the change in the economic organisation of society. The relationship was (and remains) dialectical: some changes in ideology preceded changes in organisation and vice versa, with the two types of changes feeding into and enabling changes in each other.

63 An example of this is the movement in mortgage law from prohibiting 'clogging' of the equity of redemption, to permitting it as part of the freedom to contract.

The old common law judges were not idealists. They were informed by a sense of society.⁶⁴ They did not abstract real behaviour into mere ideas. To understand society or ideas a materialist approach is required. Ideas are considered independent of the thinker. But ideas are limited because they reflect, grow from, or are anchored in, our life experiences. Life experiences result in us thinking or not thinking in particular ways - accepting some ideas and rejecting others. Ideas, our own and those of other people, help determine the nature of opportunities open to us. Ideas shape our lives just as our lives shape our ideas.

For one example, people commonly are contemptuous of women who 'choose' to appear in pornography. Such attitudes spring from ideas about individual free will. In reality women do *not* freely choose to appear in pornography.⁶⁵ Often the same women are used in prostitution and pornography. They overwhelmingly cite poverty as their reason for selling themselves. Thus they act under economic compulsion. Sadly, many prostitutes do not even get paid for being used in pornography.⁶⁶ Many of them were sexually abused as children.⁶⁷ Some pornography models are physically coerced into it.⁶⁸ The widespread thought that these women are

64 This does not mean that feudal society was not based on the systematic exploitation of the majority of the people for the benefit of a few. It was. I mean simply that judges were not yet gripped by the capitalist, liberal ideology of individualism.

65 "Pornographers promote an image of free consent because it is good for business. But most women in pornography are poor [and] were sexually abused as children ... some women may 'choose' pornography from a stacked deck of life pursuits (if you call a loaded choice a choice, like the 'choice' of those with brown skins to pick cabbages or the 'choice' of those with black skins to clean toilets)." Dworkin & MacKinnon, *Pornography and Civil Rights* p43.

66 Giobbe, "Confronting the Liberal Lies about Prostitution" in Leidhoild and Raymond (eds), *The Sexual Liberals and the Attack on Feminism* p79.

67 Trudy Peterson who runs a voluntary social service for street children in New York, was once a prostitute. Her mother was a sole parent and as a child Trudy had a great deal of contact with her grandfather whom she adored. He began to sexually abuse her as she entered puberty. Not only was she being assaulted, but it was by some one she had loved and whom she thought loved her. She thought it must be her body's fault for developing and 'making' her grandfather dirty. She ran away from home and became a prostitute, what else could she do when she had such a bad body? Fortunately she eventually decided she "must be more than a receptacle for men's bodily fluids". Documentary shown on SBS on 26 July 1990. Dworkin & MacKinnon state that "65 to 75 percent of the current population of women in prostitution and pornography (overlapping experiences for the same pool of women) have been abused as children, usually in the home." Dworkin & MacKinnon, *Pornography and Civil Rights* p70.

68 Many women and children are physically forced into pornography. For example, "Pimps roam bus stations to entrap young girls who left incestuous homes thinking nothing could be worse". Dworkin & MacKinnon, *Pornography and Civil Rights* at p43. They give more details of the ways many women are forced into pornography. "Why has the female 'star' of 'Deep Throat' [Linda Marchiano] not had the same amount of publicity for her account of how she was 'forced to perform at gun point [as she did for her role in the film]'?" asks Coward. Coward, "What is Pornography?" (1982) *Spare Rib* 52 at 55.

free to act as they will prevents them from actually being free because nothing is done to promote the conditions necessary for their freedom. There is an inevitable, though complex and dialectical, relationship between thought and experiences.⁶⁹

Judges looked only at ideas, and they ignored the dialectic between ideas and society, thus the *social* considerations which were the basis for prohibiting obscene libel became invisible. Consequently some judges no longer wanted to enforce the law, while others felt embarrassed and defensive about doing so. The court, accustomed by now to thinking only of individuals or aggregates of individuals, inevitably had trouble understanding social responsibility. They could not even decide what 'the public' was.⁷⁰ They did decide that children are not in 'the public'.⁷¹ So whether material was obscene came to be judged according only to its impact on the individuals who purchased it.⁷² Legislation protecting pornography also influenced judges. Some judges remained opposed to pornography but the issue was taken out of their hands as prosecutions for obscenity were no longer brought.

To understand a feminist critique of pornography and obscenity law the lawyer must shift paradigms. Law is *profoundly* patriarchal and liberal. Individuals are thought of as if they were men and as if they did not live in society.⁷³ Lawyers are taught to think of issues, but not of the contexts in which the issue arises. And *the way* they will think of an issue is determined, in advance, by law. If they are considering any offence lawyers think of each of the elements which comprise the offence. Argument turns only on whether these elements are established. The validity of the elements are not questioned. The social context of any case is irrelevant. That rape is endemic in our society is not an issue in any rape case.

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- 69 This is the central tenet of Marx's historical materialism. See Marx, "German Ideology and Grundrisse" in McLellan (ed) *Selected Writings* (Oxford University Press, Oxford 1977).
- 70 The *Hicklin* test for obscenity required the court to ask whether the material had a tendency to deprave and corrupt those into whose hands it might fall. Of course this could be anyone in society - the public. Fox discusses various different judicial formulations of 'the public'. Cox, *The Concept of Obscenity* (Law Book Company, Melbourne 1967) pp157-164.
- 71 In *Popow v Samuels* (1973) 4 SASR 594 the court was unanimous that 'the public' did not include children; at 605-606, per Bray CJ; at 613, per Walters J; at 622, per Zelling J.
- 72 For one example see *Popow*. At 605, Bray CJ stated that the court need not speculate as to the people "who might possibly see or acquire the matter at second, third or fourth hand" because "The shopkeeper ... cannot possibly control the subsequent use which the customer might make of the goods".
- 73 This is one of the central points made by Naffine, *Law and The Sexes* (Allen & Unwin, Sydney 1990).

Historically, the way lawyers think, like the law itself, has been developed in the enforced absence of women.⁷⁴ For lawyers now to think or understand a feminist approach they must think in a way foreign to them. They must abandon individualism, liberalism and sexism. The nature of pornography and the failings of obscenity law can only be understood *in context*. Women's position in society and their social relations with men cannot be ignored. Law's role in society must be appreciated. The nature of legal thought needs to be confronted. Worst of all for lawyers, is that to understand or take a feminist approach, they must *consciously* make value judgements. Naffine points out that "By its adherence to particular legal forms, law seeks to secure for itself the intellectual high ground of abstract rationality, of objective thought - that which is uncontaminated by the passions and by personal opinions."⁷⁵

Objectivity, the "I'm not here position" is logically incoherent.⁷⁶ Feminism asks lawyers to abandon this comfortable but irresponsible objectivity and take responsibility for what has *always* been *their* decisions. The history of obscenity law shows how that law, far from being an objective given, has been subjectively determined by lawyers and judges. The alleged objective nature of law protects sexist lawyers and it protects patriarchal law. As Naffine states⁷⁷ "What is worrying about the legal claim to objectivity ... is not just that it is self-deluding - that there is probably no value-free place from which to view the world - but that it tends to subvert any critical assessment of the values which inform legal decision making".

FANTASTIC IDEAS AND REALITY

There are many fantastic ideas about pornography. There are the fantasies about its nature; that it is not real, that *it* is mere fantasy. There is the somewhat contradictory idea that it is just sex. Contradicting these ideas is the idea that pornography is mere speech. Such ideas obscure the nature of pornography because they deny full material reality. They are simplistic. They portray pornography from *only* a limited male perspective.⁷⁸ Most women have different ideas about pornography; whatever else it is, women

74 Scutt, "Sexism in Legal Language" (1985) 59 *ALJ* 163.

75 Naffine, *Law and the Sexes* p27.

76 Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 *Yale LJ* 1373 at 1389.

77 Naffine, *Law and the Sexes* p47.

78 Men have much to learn from women's perspective - "the powerful have less incentive to understand and accommodate the view of the powerless than vice versa and therefore may have a poorer grip on social 'reality'". Naffine, *Law and the Sexes* p98.

know pornography is also a material reality that harms us.⁷⁹ It is not just obviously violent pornography that women reject; a recent attempt to ban pictures of topless women in newspapers in England received massive support from women.⁸⁰

The following is an account given by a women who, as a juror, had to read a number of pornographic books for an obscenity trial. She said that nothing she could say could convey the horror of what she had read, so that "to be liberal about the sort of pornography with which I was confronted is as obscene as expecting a black person to condone apartheid".⁸¹ Those books "felt life-threatening". There was one theme:⁸²

the inextricable association of sex with brutality. Women got fucked, against their will, raped, always raped, repeatedly, screamed with pain and then said "thank you" to their violators. The message was clear; when women say no, they mean yes, the more you hurt them, the more they'll love you ... instruments of torture were part and parcel of the sex act. These books were all united in their profound hatred of women and their urge to humiliate us.

Some women claim that pornography is violence rather than sex.⁸³ This is really a denial that sex may ever legitimately be like *that*. MacKinnon points out this denial begs "the deeper question of the place of pornography in sexuality and of sexuality in the construction of women's definition and status".⁸⁴ Even those women who support sadomasochism argue it is the *fantasy* rather than actual infliction of torture, or the degradation and humiliation of women that is erotic.⁸⁵ Most people agree it is not acceptable

79 Due to space constraints I have omitted a chapter from my thesis which analyses various forms of pornography including some rap music, Mills & Boon style novels and films, explicit pornography and the fashion industry.

80 They repeated certain words in describing their feelings about these images: exploitation, denigration, commodity, stereotype, passive, available, object. Benn, "Page 3 - and the Campaign Against It" in Chester & Dickey (eds), *Feminism and Censorship* (Prism Press, Dorset 1988) p31.

81 Benn, "Page 3 and the Campaign Against It" in Chester & Dickey (eds), *Feminism and Censorship* p15.

82 Schwartz, "A question of Allegiance?" in Chester & Dickey (eds), *Feminism and Censorship* p12.

83 For the same reason it is often claimed that rape is not sex but violence. But it is wrong to force a selection between what are really two characteristics of an act. It is like the now discredited constitutional doctrine that a law about dogs in parks had to be characterised as being about dogs *or* about parks. In fact the law is about dogs and parks just as rape is inherently violent sex.

84 MacKinnon, *Feminism Unmodified* (Harvard University Press, Cambridge 1987) p161.

85 See for example Eckersley, "Wither the Feminist Campaign?" (1987) 15 *International Journal of the Sociology of Law* 149.

to actually do these things to women. But it *is actually done* to women in pornography. And doing it to them has wider consequences:⁸⁶

Sex or sexual practices do not just exist out there, waiting to be represented; rather, there is a dialectical relationship between representational practices which construct sexuality, and actual sexual practices, each informing the other.

Far from being mere fantasy, as is commonly argued, pornography:⁸⁷

puts into circulation images of sexuality that have definite meanings connected with them; sexual pleasure for men is initiation and dominance, and for women submission to men's depersonalised needs ... it contributes to general beliefs about sexuality and also to definitions of sexual activity. *These beliefs are the means by which women are subordinated.*

Left-wing liberals promote the romantic notion that obscenity law was used as a political weapon to stifle their radical critical speech:⁸⁸

Manifest and unfair "political" persecution on spurious grounds of obscenity ... [kept] the liberals ... in a state of militant opposition to censorship.

It is true that law has, historically, often been used to suppress political dissent, but where is the revolutionary message in a picture of a woman with a rat in her vagina?⁸⁹ The *OZ* prosecution is cited as an example of the heinous suppression of youthful radicals by the reactionaries.⁹⁰ Yet the publication *clearly* consisted of pornographic images and texts. One of these was the picture of the woman with the rat's tail protruding from her vagina.⁹¹

86 Kappeler, *The Pornography of Representation* p2.

87 Coward, "What is Pornography?" (1982) *Spare Rib* 52 at 53, emphasis added. For example, "... the concept of frigidity was invented [in the 1920s] to explain women's lack of enthusiasm for having to enjoy sexual intercourse in an unregenerately male-dominated relationship ...". Numbers of frigid women were variously put at 100%, 60% and 40%. These male analysts actually stated that women must be 'cured' in order to accept their subordinate position in society, "To be roused by a man means acknowledging oneself as conquered". Jeffries "Sexology and Anti-Feminism" in Liedhiold & Raymond (eds), *The Sexual Liberals and the Attack on Feminism* p23.

88 Sutherland, *Offensive Literature Decensorship in Britain 1960-1982* (Junction Books, London 1982) p3.

89 See for example chapter 5 of Coleman, *Obscenity, Blasphemy and Sedition: 100 Years of Censorship in Australia*, where he discusses the use of sedition laws to harass and suppress anarchists, socialists and communists.

90 Sutherland, *Offensive Literature Decensorship in Britain*. See also Campbell & Whitmore, *Freedom in Australia* pp252-253.

91 There were also "many illustrations of sexual intercourse, oral sexual intercourse and lesbianism; and advertisements for clubs which catered for 'Voyeurs...Homosexuals,

These 'radicals' were intent on selling us a new type of liberation. "In modern jargon sexuality 'frees' us; it has become part of a discourse of 'liberation' which makes repression, rather than oppression, the enemy of human happiness."⁹² They seem to have convinced each other but the liberals have not convinced feminists. "What is the function of an ideology that keeps everyone looking for the meaning of life up their own or someone else's vagina?" asks Williamson.⁹³ A later question actually provides the answer: "When will they stop searching our bodies for new sources of pleasure ... ?"⁹⁴ This "liberation" is neither liberating nor radical. It is merely the old oppressive sexuality of patriarchal men made more explicit.

An exceptionally absurd thought is that we should ever consider the nature of pornography outside of its social context. Pornography cannot be considered in isolation from the rest of society. Fragmentation is an aspect of masculine 'objectivity'. It results in obscurity rather than objectivity. Pornography exists in our society. It helps determine the nature of that society. Pornography's impact is felt along with the impact of other patriarchal institutions. To ignore other manifestations of male sexual behaviour when considering pornography is to guarantee false understanding. The social context of pornography is one of rampant sexual violence against women.

"All women live in sexual objectification the way fish live in water. Given the statistical realities, all women live all the time under the shadow of the threat of sexual abuse."⁹⁵ In America almost half of all women are targets of rape at least once in their lives.⁹⁶ "Over a third of all women are sexually molested by older trusted male family members or friends or authority figures at an early, perhaps initiatory, interpersonal sexual encounter."⁹⁷ At least a third of American women are battered in their homes by male intimates and about a fifth of American women have been or are known to be prostitutes.⁹⁸ Australian statistics are similar.⁹⁹ This is the real context in which women are surrounded by pornography. Why *should* we ignore it?

Lesbians, Heterosexuals, all Erotic Minorities". Campbell & Whitmore, *Freedom in Australia* p252.

92 Williamson, *Consuming Passions: the Dynamics of Popular Culture* (Marion Boyars, London 1986) p44.

93 At p44.

94 At p45.

95 MacKinnon *Towards a Feminist Theory of the State* p149.

96 At p142.

97 At p142. This means that the first sexual experience for very many women and girls is of sexual abuse.

98 At pp142-143.

99 According to the SBS news service, 2 Sept 1990, 80% of murders occur within the family and domestic violence (men being violent towards their children and wives) occurs in 30% of families. See also Scutt, *Even in the Best of Homes, Violence in the Family* (Penguin Books, Melbourne 1983).

In the defence of pornography the meaning of the word 'fantasy' is stretched to what should be an implausible extent. To express your idea is to create something real. If you tell someone of a fantasy the telling is not fantasy; it is real, though intangible. The specific content of particular pieces of pornography may well derive from the producer's imagination, but the image itself is real. Pornography is a representation made on a concrete medium. It is a book, a magazine, a film, an advertisement. If I am walking down the street and I come across a pornographic advertisement, I cannot make it go away by calling it fantasy. The picture is there in front of me. It is real. I can walk on but I cannot make it disappear.

Some female liberals argue that instead of women against pornography we need female pornographers to "confront misogyny with new images".¹⁰⁰ However they provide "no practical suggestions as to how women should stage this intervention in, or take over of" the pornography industry.¹⁰¹ In any case it is an "untenable and dangerous suggestion that a change in the genitals of the producers of pornography will result in 'positive' images and the extinction of the problem of pornography".¹⁰² The problem is not that there are not enough women portraying women as objects for sexual use. Many women work in the pornographic fashion industry. This is a result of "women's cultural apprenticeship to the male point of view".¹⁰³ We do not need more female acceptance and promotion of the pornographic image, we need less.

The idea that pornography is mere speech is dangerous fantasy; dangerous, because it denies women physical integrity for the sake of male speech; fantasy, because it obscures this reality. The fantasy is also dangerous because it is widely and uncritically believed. Lawyers often advance it:

In liberal legalism, pornography is said to be a form of freedom of speech. It seems that women's inequality is something pornographers want to say, and saying it is protected even if it requires doing it. Being the medium for men's speech supersedes any rights women have. Women become men's speech in this system.¹⁰⁴

100 Stock explains such responses from women: "... battered women sometimes plan when their abuse will occur by intentionally precipitating a battering incident ... it is a given that violence will occur, and by choosing to precipitate when, the woman gains the illusion that she is exercising control over her situation ... When women defend pornography and patriarchally constructed sex and attempt to make it their own, they are 'timing' sexual abuse in the same manner as do some women in battering relationships". Stock, "Towards a Feminist Praxis of Sexuality" in Liedhoild & Raymond (eds), *The Sexual Liberals and the Attack on Feminism* pp150-151.

101 Kappeler, *The Pornography of Representation* p43.

102 At p43.

103 At p47.

104 MacKinnon, *Towards a Feminist Theory of the State* p247.

Men use us to say that we are their sex objects. Men use their law and our bodies to say and ensure we have as much freedom, as much right to be ends in ourselves as any plastic sex doll.

THE 'PROBLEM' OF DEFINITION

Liberals have difficulty defining pornography.¹⁰⁵ This is because they wish to differentiate it from 'erotica'. Pornography, for them, is the *vulgar* depiction of *sex*. Liberals and other non-feminists generally only recognise one type of pornography, explicit pornography. Explicit pornography is often divided into two categories; hard and soft core pornography. Erotica is that which liberals consider a sophisticated, sensuous depiction of sex. It is the up-market end of the pornography trade. These sub-divisions lack substance. Basically, hard-core pornography is that which liberals almost find shocking. Soft-core pornography is that which they find merely tasteless. Erotica is that which liberals like.

From women's perspective pornography is us portrayed as objects for sexual use by men. In pornography the humanity of all women is denied. This results from the particular women being depicted without their subjectivity. The unique individuality of each woman is not acknowledged. There is no indication that it is *her* rather than *a woman*. In fact it is not her. It is not even a woman. It is a sex commodity. The physical differences between different women (black/white, large breasted/small breasted) are inevitably or even deliberately apparent. This is not a recognition of the individuality of each woman. Instead it is a recognition of the superficial variety available within the commodity type. (Would you like a sex aid which has blonde hair on its head or red?)

Pornography denies the distinction between women in general and any particular woman. It denies the connections between a woman's body and the rest of her. It often denies the connection between separate parts of the same woman's body. It creates an image that is applied to all women regardless of any physical, social or other aspect of any one of them. Whatever a woman's age, whatever her occupation, whatever her personality, she is necessarily and often expressly part of the pornographic vision. Children at school, nuns in a convent, pregnant women, retarded women, academics, these are all material for pornography.¹⁰⁶ Pick up any *Playboy* and you are likely to find pornographic stories featuring each of these 'types

105 Yet somehow "No pornographer has any trouble knowing what to make. No distributor has any trouble knowing what to carry. No retailer has any trouble knowing what to order. No consumer has any trouble knowing what to buy." Dworkin & MacKinnon, *Pornography and Civil Rights* p36.

106 As discussed above, nuns were the subject matter of one of the first prosecutions for obscenity. Curl was found guilty of an obscene libel in 1727 when he published *Venus in the Cloister*. *R v Curl* (1727) 93 ER 942.

of women'. Even if a particular group of women has not yet been depicted in pornography, there is no reason why it could not be.

Male epistemology has created a false dichotomy between 'animal' body and 'human soul' or essence. Pornography reduces women to their bodies. Indeed pornography shows only what can be *done to* that body. To enhance male stature philosophers have often fantasized great differences between women and men. Examples throughout most philosophical texts. Aristotle, in *On the Generation of Animals* made the following assertion:

the physical part, the body, comes from the female and the Soul from the male, since the Soul is the essence of a particular body.

Aquinas in *Summa Theologicae* said:

The human group would have lacked the benefit of order had some of its members not been governed by others who were wiser. Such is the subjection in which woman is by nature subordinate to man, because the power of rational discernment is by nature stronger in man.

Pornography is this philosophy in practice. Pornography not only reduces women entirely to their bodies; it often reduces them into mere parts of their bodies. In explicit pornography women are shown animal like, controlled by their bodies and subordinate to men. They are depicted with an insatiable need for whatever it is that is being done to them. Pain does not affect them. Either they do not feel it or they enjoy it. Philosophy tells of an inferior female nature. Pornography shows an inferior female nature. Capitalism sells an inferior female nature. This telling, showing and selling teaches women's subordination. Thanks to legal liberalism, women's subordination is told, shown, sold and taught to large numbers of people. Pornography's apparent legitimacy in society, deriving from its legality, makes its pervasive message of female inferiority particularly powerful.

Because pornography is the portrayal of an image of women, the woman in the pornography is not physically present when the pornography is consumed, only the consumer is important. He is the only subject. Getting *him* aroused is the overt purpose of pornography. A *male* sexual response is the sole objective of the pornographic image. The result is a man who finds contemplating *the representation* of a woman sexually arousing. Since she is not even there none of her subjectivity is present. The result is a man who finds it sexually arousing to see women who are not there. Absent women, women robbed of their humanity, sexually thrill him.

In pornography how *she* feels is irrelevant. What *she* wants, needs, enjoys could not be less important. In some cases she is not even alive.¹⁰⁷ There is no mutual stimulation. There is no mutual expression. This is the pornographic image. It is a woman who exists *solely* for the sexual pleasure of men. She has no physical integrity. You can stick things into any part of her body. If it hurts she still enjoys it. This image of the smiling victim is so pervasive that it no longer seems implausible to many of us. It is so common that she no longer looks like a victim. Her integrity is so violated it is gone. It is so violated its absence is not noticed.

Human sexuality is created in part by pornography. The absent sexuality of women in pornography reflects and constructs the absent sexuality of women in the rest of the world. "A woman is a being who identifies and is identified as one whose sexuality exists for someone else, who is socially male. Women's sexuality is the capacity to arouse desire in that someone".¹⁰⁸ We see that in pornography and in daily life "what is sexual about a woman is what the male point of view requires for excitement". In fact "male requirements have so usurped [women's sexuality] as to have become [it]". So women's sexuality is "its absence".¹⁰⁹ This is why sexual abuse, from rape through to wolf whistles, is so rampant. Sexual harassers are interested only in how they feel at the sight of a woman. How could any man rape a woman unless he totally disregarded her wishes and her right over her own body? The key characteristic of a woman's body in our society is that it is *not hers*. She is absent from it. This is why I said earlier that it is a rapist society.

Our society imposes a role upon women. It makes us spend our time and energy *servicing* others. It directs our effort into undervalued, unpaid or low paid work. A woman's life is shaped more by her genitals than by her ambitions. Indeed her genitals shape her ambitions.¹¹⁰ Our society is and remains pornographic because the ubiquitous pornographic image constantly creates and recreates women as sexual objects and men as sexual subjects. Both men and women are harmed by pornography but they are harmed in different ways. Women are harmed, I am harmed, because we have been turned into objects for use by all.

"Like the value of a commodity, women's sexual desirability is fetishized: it is made to appear a quality of the object itself, spontaneous and inherent, independent of the social relation which creates it, uncontrolled by the force

107 Snuff and necrophiliac pornography.

108 MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) *Spring Signs* 532 at 533.

109 As above.

110 That is, the social treatment she experiences *because* she is female, tends to shape her ambitions.

that requires it."¹¹¹ Women are ipso facto sexually desirable. If the utter absurdity of this is not immediately apparent the fetish has been successfully created in *your* mind. If a woman's sexual desirability is a quality of the woman, she would be sexually desirable even if she ias the only human alive in the world, which is absurd. An observing subject is essential, women are *considered* sexually desirable *by men*. Expressed mathematically; the sexual desirability of women is a function of men.

Pornography makes male desire seem a function or quality of women. All eyes are on the woman. What she is and what she does is what we see. *She* is sexually desirable. *She* sexually arouses men. *She* is responsible. Yet *she* is a mere shell. *Her* subjectivity - her needs, emotions, brain, sensitivity to pain, are all absent. The observer is the only one with any subjectivity. But pornography also hides the observer. *Who* becomes sexually aroused? *Who* sexually desires the woman? *Who* creates this pornographic image of women? Pornography creates the fetish. Pornography hides the men. Pornography absolves men of responsibility for their creation of the pornographic image of women. By directing all eyes at women, pornography creates a mirage of female power which conceals the power men exercise over women.¹¹²

Unlike a man I am not seen as a sexual person whose sexuality exists for myself. I am a living commodity. The only sexuality allowed me is that which men as a group have imposed upon me. I am a human in a pornographic society; my sex will be determinative of my life. Because I am female the most important thing about me is my appearance. Nothing else about women is valued. Why else do we do all the domestic work, for free? Why else are we not equally represented in all fields and occupations? Jobs traditionally filled by women such as nursing, child care and secretarial work are notoriously badly paid. There are only two jobs for which women as a group are paid more than men; prostitution and modelling.¹¹³ Women in pornography and in society are valued only for their bodies.

Both prostitution and modelling are based entirely on women's bodies. Our bodies have commodity value in these fields; our bodies are supplied for the use of others. In pornography women are prostituted models. Each and every pornographic representation of a woman is an assault on the dignity of all women. Pornography is itself violence against women. Pornography creates a pornographic image of women that applies to all women at all times. It does not create a way of seeing the particular woman pictured. The

111 MacKinnon "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) *Spring Signs* 537 at 540.

112 Dworkin, *Pornography: Men Possessing Women*, (Woman's Press Ltd, London 1981) p22.

113 MacKinnon, *Feminism Unmodified* pp24-25.

only distinctive thing about her is that she is a woman. Pornography subordinates all women.

Only 7.8% of American women have not been sexually assaulted in their lifetime.¹¹⁴ Australian statistics must be similar. Women experience sexual abuse constantly. The man who talks to my breasts instead of my face, like me, is a victim of the pornographic image. The motorist who leeringly comments about my appearance does not see my humanity. He does not care whether I want his opinion of my appearance. He does not care about how I feel about his actions. That motorist has no interest in *me* at all. These men do not see it as *my* body; if they did, they would not have any reason to comment upon it. My body, because it happens to be a female one, is a commodity that is for their use. This is why they comment on it. Just as we all feel free to say "nice car" so too do men feel free to say "nice bum (legs, tits, etc)".

The feminist rejection of pornography arises not from sexual prudery but from a refusal to accept sexual oppression. Analysis of different forms of pornography reveals this. As we have seen, 'soft' core pornography is considered somehow less pornographic; 'erotica' somehow pleasant. All these distinctions are fatuous. As if there can be degrees of non-humanness. "I'm OK, I'm only half non-human". Which half, I wonder? (Top/bottom, front/back, inside/outside?) To be portrayed as a sex object is to be portrayed as a non-human. This is true whether you are shown with all your clothes off or only some off *or even with all of them on*. It is true whether it is done in the sordid *Post* or the glossy *Vogue*. It is true whether it is written by a 'great' literary figure such as DH Lawrence or painted by a "grand old master" such as Rubens.

The reduction of women to their bodies or even to parts of their bodies by the fashion industry is a mere variation of the deadly pornographic image. An Australian schoolgirl, Anneliese Seubert, was recently declared 'The Face of the 90's' by a New York modelling agency.¹¹⁵ This 'award' ought seem odd and utterly demeaning but we are accustomed to the exclusive focus on women's bodies. We are so accustomed to the fragmentation and fetishization of women's bodies that the reduction of a young woman to her face does not repulse us.

114 Russell cited in MacKinnon, *Towards a Feminist Theory of the State* p127.

115 *Advertiser*, Adelaide, 25 July 1990.

CAPITALISM AND THE SALE OF WOMEN

The availability and acceptance of all types of pornography has escalated since it has had the open backing of the legal system. Pornography supplies a mass market. Explicit pornography is now big business. During the last two years half a million X-rated videos were sold in Australia.¹¹⁶ "Profits from home video sales exceeded \$130 million in Australia in 1982."¹¹⁷ Organised crime has links with pornography.¹¹⁸ In America in 1982 explicit pornography was annually a \$4.25 billion business; bigger than the record and film industries combined.¹¹⁹ By 1988 the American pornography industry had grown to \$10 billion annually.¹²⁰ But even this is trivial compared to the industry of fashion pornography; the so-called soft manifestation of the pornographic image.

Women are turned into commodities and consumed in our society as a result of patriarchal capitalism. "Marx chose to begin his great study of the capitalist system with the commodity; not because of its economic role alone, but because of what it *means*."¹²¹ A commodity is an object especially produced for exchange.¹²² To make women into commodities is to ensure that they are eventually consumed. A commodity is produced in order to be sold. To make women into commodities is to ensure that they are sold. You only get the value of a purchased object by using it. "Objects exist or are made in order to be used."¹²³ When it is a woman, to use it is to destroy it.

116 This is according to a pornographer on Phillip Satchel's radio program on 5AN, Adelaide, November 1989.

117 Griffin, Shadow Attorney General South Australia, SA, Parl, Debates (1983) Vol II at 1990.

118 "The Costigan ... and other Australian Royal Commissions have all drawn conclusions ... that substantial profits are made both legally and illegally by organised crime from pornography". As above.

119 Itzin, "Sex and Censorship: the Political Implications" in Chester & Dickey (eds), *Feminism and Censorship* p39.

120 At p45.

121 Williamson, *Consuming Passion: the Dynamics of Popular Culture* p230. Marx said: "commodity appears at first sight a very trivial thing, and easily understood. Its analysis shows that it is, in reality, abounding in metaphysical subtleties and theological niceties." Marx, *Capital* Vol 1 in McLellan (ed), *Selected Writings*. We saw at n11 that the imposed sexuality of women is fetishized, that is, made to appear an objective character of the commodity/woman. It is with an analysis of the fetishism of commodities that Marx begins *Capital*, saying: "A commodity is ... a mysterious thing, simply because in it the social character of men's labour appears to them as an objective character stamped upon the product of that labour". At 436.

122 Mandel, *An Introduction to Marxist Economic Theory*, (Pathfinder Press, New York 1969) p10.

123 Dworkin, *Pornography: Men Possessing Women* p112.

Pornography is the production of women as commodities for sexual use by men. Capitalism creates a constant imperative for new markets.¹²⁴ Some people now make enormous amounts of money by turning women into non-humans. Just as sheep are bred for profit, just as cars and computers and cigarettes are produced for profit, so too are women pornographed for profit. The highly profitable pornographing can be for direct sexual use or for indirect sexual use, to sell other commodities. We have all learnt from advertisements that women-sex-commodities are a free accessory available with every sports-car. Similarly, we also learn that women can become more desirable sex-commodities by purchasing hundreds of commodities ranging from make-up to kitchen foil. In fact "The dirty little secret of the ... pornography industry is not sex but commerce".¹²⁵

Capitalists are socially irresponsible.¹²⁶ They produce pornography on a mass scale merely because it is profitable to do so. They produce it and escape all responsibility for the result of their production. Capitalist ideology claims that capitalist production is triggered by demand. In the consumer society the "public's wants, demands and desires are treated as if they were the manifestation of an authentic and unadulterated instinct."¹²⁷ The ideology pretends that the demand for pornography makes it legitimate. That most consumer demand in consumer society is the result of careful manipulation by a massive advertising industry is ignored. That demand may be completely undesirable is also ignored.

No-one argues that because people buy and consume heroin, therefore the nature and value of heroin cannot be questioned. No-one claims that heroin producers have no choice but to produce heroin in light of the demand for it. No-one worries about shopkeepers being unable to sell heroin legally.¹²⁸ No-one suggests that because some people like heroin, stopping its production would be an infringement of those people's rights. These arguments are used to support most capitalist production. They do not wash for heroin. Yet they are sufficient to justify pornography production. The same capitalist ideology which justifies the production and sale of useless inanimate objects is used to justify the pornography with which women are made into objects and consumed. We do not allow the sale of heroin

124 Marx, *Capital* Vol 3 in McLellan (ed), *Selected Writings* pp488-492; Mandel, *An Introduction to Marxist Economic Theory* pp47-53.

125 Dworkin, *Pornography: Men Possessing Women* p208.

126 Kappeler says: "The cultural responsibility which the feminist critic is looking for-responsibility of the author towards the cultural output; responsibility towards the 'subject matter' of the work, instead of irresponsibility - does not seem to exist." Kappeler, *The Pornography of Representation* p131.

127 At p131.

128 Yet we have lawyers and judges worried about shopkeepers being unable to sell pornography. See Fox, "Depravity, Corruption and Community Standards" (1980) 7 *Adel LR* 66 at 75.

because it may harm people. Pornography harms women but we allow its sale anyway.

THE PUBLIC/PRIVATE DISTINCTION

We live in a liberal democracy. The benefits of this are often extolled. It is a tolerant and safe place in which individuals may freely express themselves. We have some fine institutions. Among them are marriage, family, home. In the public sphere we have parliament, courts, judges, law. These are liberal sentiments. Liberals distinguish between public life and private life, but they do not make much of society, even though it is the institution which encompasses all other institutions. Liberals worry that acknowledging the social nature of life might infringe upon individual life.¹²⁹ In our liberal democracy pornography, if it is criticised at all, is criticised for its public presence.¹³⁰ For individuals its private presence is guaranteed.¹³¹

Some liberals find it "offensive" to have pornography displayed openly in public places.¹³² Most of these liberals strenuously defend 'the right' of 'adults' (men), to read or see whatever they like in the privacy of their homes.¹³³ This means that the existence of a magazine devoted, for example, entirely to the graphic depiction of a woman's body being sexually used by ten men, a dog and various implements and instruments, sometimes all at once, is passionately defended, for the home.¹³⁴

129 In fact the nature of "home" is actually constructed by law. On this point, see, for example, Naffine, *Law and the Sexes* pp70-71.

130 Note again that the liberal definition of pornography differs from mine. Liberals define it as sexually explicit material and classify it according to the type of sexual activity portrayed. I define pornography as all representations of humans as sex objects. Primarily women are portrayed as sex objects, sometimes children are, less commonly men are. Any variation on the female victim is just that, a variation. On this point, see MacKinnon, *Towards a Feminist Theory of the State* p144.

131 For example, the English Williams Committee on Obscenity and Film Censorship said pornography was 'totally empty', devoid of social value. They said because pornography "is usually ugly, shallow and obvious trash and for many people not only offensive but deeply offensive, its availability should be restricted." That is, it should be made to *appear* as though its availability is restricted. South Australia has two entire Acts devoted to this purpose; *The Classification of Publications Act 1973 (SA)* and the *Film Classification Act 1971 (SA)*. Very explicit pornography can be freely obtained but it must be sold in an opaque wrapper. McKean calls this a "healthy development of the law". McKean, "Confining the Pornography Dragon" (1980) 39 *Camb LJ* 10 at 11-13.

132 See, for example, Sutherland, *Offensive Literature Decensorship in Britain 1960-1982* p9.

133 See, for example, Coleman, *Obscenity, Blasphemy and Sedition: 100 Years of Censorship in Australia* who, in the foreword, recants his earlier support for pornography but still supports the 'right' of men to read what they like in 'the privacy' of their homes.

134 Giobbe points out another aspect of this: "Contests promoted by pornographers, like *Hustler's* 'Beaver Hunt' ... have resulted in a proliferation of homemade pornography ...

But home, the private, is where women are. Women's very humanity is denied by pornography and we are forced to have it in *our homes*.¹³⁵ Our "situation offers no outside to stand on or gaze at and no inside to escape to."¹³⁶ If the same magazine is on the counter of the local delicatessen, its presence there *might* be criticised. If the law acts at all it will be to send the pornography back to its proper place, the private, the home. Liberalism in the guise of attacking public power (in this case the public power of the censors), imposes a more insidious public power in the private.

We may ignore the inevitably public nature of the production of pornography. And we may think pornography is only viewed in private. But even then pornography is still not private. It is public because it both is, and has, social power. Pornography and the ideas supporting it exist in, and help create, a society in which women are systematically subordinated to men. Some women "have been 'on call' to service someone sexually ever since they were little children".¹³⁷ We also do men's share of the domestic work in addition to our own share. As with sex, usually we do not even get paid for it. In fact our minimal status *hinges* on *not* getting paid for it; what social standing do prostituted women and cleaners have? Women's subordination is systematic because the entire society is organised around the existing sexual division. Pornography both reflects and constructs our publicly private subordination.

Le Guin claims that in sex every woman is alone and must fend for herself.¹³⁸ This is true but she misses the point that this state of affairs is socially *created*. Because it is true a third of all married women are battered by their husbands. Because it is true a massive proportion of children are sexually abused in their homes. One reason it is true is that the liberal legal system ensures it is true. In sex many women and children *are* alone, in homes, with men. But, and this is crucial, they are not quite alone. They are there with the pornography which the legal system has put there with them. Stanley J said that the sale of pornography should not be prohibited *merely*

Hustler offers payment to readers who submit the best 'beaver shots' (pornographic photographs) of wives or girlfriends". Giobbe, "Confronting the Liberal Lies About Prostitution" in Liedhold & Raymond (eds), *The Sexual Liberals and the Attack on Feminism* p77.

135 The American Supreme court said, in *Stanley v Georgia*, "A man's home is his castle, at least where obscenity is concerned." Paraphrased in *Paris Adult Theatre v Slaton* 413 US 49 (1973); Stoltenberg, "What Went Wrong in *Hardwick*" in Liedhold & Raymond (eds), *The Sexual Liberals and the Attack on Feminism* p187.

136 MacKinnon, *Towards a Feminist Theory of the State*.

137 Heller, "Sexual Liberalism and Survivors of Sexual Abuse" in Liedhold & Raymond (eds), *The Sexual Liberals and the Attack on Feminism* p160.

138 Le Guin stated that sex is "a whole other universe, where every man and woman is on their own". Le Guin, *Dancing on the Edge of the World* (Victor Gollancz Ltd, London 1989) p116.

because children or teenagers may be exposed to it.¹³⁹ Women and children are left in their publicly constructed homes with an inequality of power which is created, bolstered and celebrated by the private institutions of our society.

Feminist consciousness raising groups discovered that "the split between public and private, at least in the context of relations between the sexes, made very little sense, except as it functioned ideologically to keep each woman feeling alone, particularly in her experience of sexual violation".¹⁴⁰ The dichotomy between the public and the private is ideological. It empowers men and devastates women. Certain things are defined arbitrarily as either private or public, but the private is no more private than the public. The private is no more natural or safe than the public.¹⁴¹ The private is carefully constructed by a number of forces including common law, legislation and pornography. Legislation and common law have publicly made the private a place for (public) pornography.

We have already discussed some of the many fantasies men have. They have the fantasy about the security and sanctity of the home. They have the fantasy about the neutrality of their legal system. To paraphrase Marx, "law, like morality, embodies many patriarchal prejudices, behind which lurk in ambush just as many patriarchal interests."¹⁴² Patriarchal interests also lurk behind the male pornographic fantasy. Fantasy is not harmless when it is coupled with a power to create the world. Male fantasy is coupled with such power. Male fantasy abstracts from the reality of humanness, their own and especially that of women, thus facilitating the imposition of that fantasy. Men impose fantasy in their images of the world and they impose it in their creation of the world. "Representation of the world, like the world itself, is the work of men; they describe it from their own point of view, which they confuse with the absolute truth."¹⁴³

139 *Literature Board of Review v Invincible Press* [1955] QSR 525 at 542, emphasis added. He calls pornography 'erotica'. As we have seen at fn105 this is the positive label given to pornography by those who accept it.

140 MacKinnon, *Towards a Feminist Theory of the State* p95.

141 Home is the most dangerous place a female can be. In American homes, for example, "a woman is battered every eighteen seconds, a woman is raped every three minutes" and "more women are killed in their homes than anywhere else". Dworkin, "Women-Hating Right and Left" in Liedhiold & Raymond (eds), *The Sexual Liberals and the Attack on Feminism* pp32 and 39.

142 Marx, *The Communist Manifesto* in McLellan (ed), *Selected Writings* p230.

143 Beauvoir quoted by MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) *Spring Signs* 532 at 537. MacKinnon puts it thus: "men create the world from their own point of view, which then becomes the truth to be described ... Power to create the world from one's point of view is power in its male form." MacKinnon also realises that not that all men have male power equally; those with less power than others "find themselves unmanned, castrated, literally or figuratively".

"The male epistemological stance, which corresponds to the world it creates, is objectivity: The ostensibly noninvolved stance, the view from a distance and from no particular perspective The objectively knowable is object. Woman through male eyes is sex object, that by which man knows himself at once as man and as subject."¹⁴⁴ What men know about the world *is* the world. This can be proved by pointing to the world because men have created the world. In an obscenity case an accused's defence was that he was holding a mirror to the world.¹⁴⁵ Scales calls this reasoning the "tyranny of objectivity".¹⁴⁶ It is tyrannical because it appears neutral while masking the fact that in order to portray whores you must create them.

The freedom to hold up a mirror to a world which you have created is the freedom to celebrate your creation. Pornography is a celebration of the abusive sexuality men have created. "With the allegedly anonymous picture of humanity reflecting a picture males have painted of themselves, women are but male subjectivity glorified, elevated to the status of reality."¹⁴⁷ Men control all public and private social institutions. They control the agents of legitimacy. Schools, church, media, family, judicial system, parliament, all these are exclusively or predominantly controlled by men. If all these institution promote and enforce the male view of the world, what other view stands a chance? Any field or point of view which is not controlled by men is trivialised. So it is that "male power extends beneath the representation of reality to its construction".¹⁴⁸

Men exercise their power to create, sell and protect pornography. They have done a good job. Pornography is rampant. Most images of women in our society are pornographic. Pornography is the production of women as sex objects. Woman equals sex object is fantasy; it is not the inevitable consequence of womanhood. Yet woman equals sex object is fantasy imposed because nearly every one thinks we are sex objects, often including us. Treating us as sex objects makes us into sex objects. "Objectification makes sexuality a material reality of women's lives, not just a psychological, attitudinal or ideological one".¹⁴⁹

144 At 538.

145 *R v Close* [1948] VLR 445 at 449, 457 and 460. At 467, Fullagar J said, "unquestionably writers and artists must have full liberty to hold the mirror up to nature". Here however, he believed the author's sole purpose was "the achieving of profit or notoriety".

146 Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) *Yale LJ* 1373 at 1376.

147 At 1378.

148 MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) *Spring Signs* 532 at 539.

149 As above.

Pornography puts a pornographer into our heads. "Men look at women. Women watch themselves being looked at. This determines not only most relations between men and women but also the relation of women to themselves. The surveyor of woman in herself is male: the surveyed female."¹⁵⁰ Men look at women and do not see them looking back.¹⁵¹ It seems clear to me that having turned us into sex objects, men can no longer see us as humans. As a necessary consequence of their denial of our subjectivity, men cannot see us looking at them.¹⁵² They cannot see themselves through our eyes because they cannot imagine anything lies behind our eyes. Only they can see, and judge, and control.

Outside my local delicatessen, like outside many other delicatessens, stand two foot high displays of the covers of magazines and papers. There are often little children playing just in front of these displays. Every week the covers change. On some of the covers every week there is a new picture of a sex object. Last week we saw a beautiful young blonde woman smiling seductively over her shoulder down at the camera which was positioned to best capture the half inch strip of cloth between her buttocks. This week we see a beautiful young brunette woman smiling seductively despite the top so tight that had it not been *underneath* her breasts she would not have been able to breath.

Each week the playing children see a new version of the 'invisible hand' of sexuality as it is created in our society. Every week these children learn the sexuality which we are told exists naturally. It takes such training to make women "walking embodiments of men's projected needs".¹⁵³ It is not mere coincidence that it is primarily men who take these photos, who produce the magazine, who distribute the magazines and the displays, who deliver the magazines to the delicatessens, who take the profits, both in cash and women's bodies. That any person with a female body, such as Ita Buttrose, does the same thing as traditionally done by men does not change the analysis. Male power can itself create women's consciousness.¹⁵⁴

Of course sex is natural. Humans as a group have a biological imperative to reproduce. This means most of us feel sexual desire. Most of us will have

150 Berger, *Ways of Seeing* (Viking Press, New York 1972) p47.

151 Johnson argues we women have our eyes fixed on men and are "deeply servile" to them because we think this protects us and we are wrong: "men have gone berserk anyway. With our eyes fastened unblinkingly on their faces day and night for thousands of years, they have grown increasingly mad. With our attention riveted upon them they are killing us and the world around us daily". Johnson, "Taking Our Eyes off the Guys" in Liedhiold & Raymond (eds), *The Sexual Liberals and the Attack on Feminism* p59.

152 Kappeler says "There remains but one kind of looking: looking at. Men gazing at women, one way." Kappeler, *The Pornography of Representation* p89.

153 At p534.

154 MacKinnon, *Towards a Feminist Theory of the State* pp36-59.

sex. All of this is 'natural' and unobjectionable. Beyond this, how we channel and express our natural sexuality is socially determined. *How, when, with whom* we have sex, is what is socially determined. Sex as we know it, is primarily about men satisfying their desire: how, when and with whom they want. Women have had no input in the creation or expression of male, or even female, desire. "Commonly referred to as 'it', sex is defined in action only by what the male does with his penis".¹⁵⁵ Sex as it has been created in our society is exploitative, whether or not it is enjoyable. Most of us know this; know that MacKinnon is right when she says: "A good fuck is no compensation for getting fucked".¹⁵⁶ Male public power ensures women get fucked; ensures that the public fuck is in the private experience. The public/private distinction is false; publicly created sexuality means even the most intimate enjoyable sex imaginable can never be private.

The law's (public) rules about the sexuality of rape are actually pornographic.¹⁵⁷ In pornography the woman always wants it. The law presumes that most women and children are lying when they say they have been sexually assaulted (that is, the law says they really wanted it). Thus consent in rape is *socially determined*. Many common law rules are based on the dreadful myth that allegations of sexual assault are easily fabricated but terribly difficult to refute.¹⁵⁸ This idea is monstrously untrue.¹⁵⁹ It is the reverse of the truth.¹⁶⁰ It is demonstrably untrue yet it is a basis of

155 At p23.

156 MacKinnon, *Feminism Unmodified* p61.

157 And, as with pornography, they provide for male pleasure at the expense of women. As MacKinnon says: "Men often rape women, it turns out, because they want to and enjoy it. The act, including the domination, is sexually arousing, sexually affirming, and supportive of the perpetrator's masculinity. Many unreported rapists report an increase in self esteem as a result of the rape". MacKinnon, *Towards a Feminist Theory of the State* p145.

158 To safeguard men against rape allegations by women and children, the common law of evidence places sexual victims in a category. If you allege sexual assault you are, *therefore*, an unreliable witness. Your evidence, *therefore* is unsafe, in need of corroboration. If you allege rape and you know the man or have had sex with him or anyone else in the past, you are, *therefore*, lying. "The law of evidence pervasively permits a woman's credibility to be based upon a pornographic standard that what a woman is sexually and does sexually is the relevant measure of her of her word and her worth." Dworkin & MacKinnon, *Pornography and Civil Rights* p28.

159 Freud gave a professional gloss to the male idea that allegations of sexual abuse were the product of hysteria. In a way the men are right but *they* are hysterical; *their beliefs* are the reverse of reality.

160 Allegations of sexual assault are hard to make and easy to refute. Very few women report being raped. If they are foolish, naive or determined enough to do so they will be tormented again, by the police, and in the courts. Calculated percentages of rapes actually reported vary from 5% (Wood, 11 *Am Crim L Rev* 347) to between 30 and 50% (Dr Wilson, *Age*, 9 October 1975). Cited in Law Reform Commission, Working Paper No 4, *Rape Prosecutions* (Melbourne 1976) p9. A Police Study on reported rapes, cited in Law Reform Commission of Victoria, Report No 13, *Rape and Allied Offences* (Melbourne 1988) p13, found only 1.4% of reported rapes not substantiated.

judicial decision making. It is a difference of degree but not of kind to have women always smiling at the raping camera, (the raping pornographer, the raping producer), 'consenting' to their objectification and to have women's 'consent' to undesired sexual intercourse presumed.

And it is always presumed. The Crown has the evidentiary and persuasive burden of proving that the 'complainant' did not consent. This means that her consent is presumed.¹⁶¹ This necessarily means that all raped women are presumed by the law to be liars:

human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.¹⁶²

Whose 'human experience' shows this? Well, we know the answer.

161 On the absurdity of claiming women consent when, inter alia, they are taken to mean yes when they say no, see Pateman, "Women and Consent" in *The Disorder of Women* (Polity Press, Cambridge 1989). See also Pateman *The Sexual Contract* (Polity Press, Cambridge 1989) for a discussion of the way our society is founded upon male sex-right.

162 *R v Henry and Manning* (1968) 53 Cr App R 150 at 153, per Salmon LJ; approved by the Australian High Court in *Kelleher v R* (1974) 131 CLR 534; discussed in *Longman v R* (1989) 89 ALR 161.