VIOLENT PORNOGRAPHY AND THE FIRST AMENDMENT: A DIALOGUE

The issues explored in our colloquium on pornography and the first amendment lend themselves to extreme positions and strongly held opinions. Because of the polarization in views concerning pornography and its regulation, we have chosen to discuss these issues in the form of a dialogue between two imaginary individuals, a feminist and an attorney. Ms. Anthony is a feminist looking for ways to limit the sale and distribution of violent pornography. Ms. Darrow is an attorney, sympathetic to the feminist cause but cognizant of the first amendment problems that arise when either government or private regulation impinges on any individual's right to free expression.

Ms. Anthony will discuss the harms stemming from the exhibition and sale of pornography, harms that many feminists feel warrant limiting or restricting the sale of such materials. Ms. Darrow, after a brief discussion of the Supreme Court's attempts to define obscenity, will propose alternative means of regulation and possible remedies available to those seeking to limit the sale and distribution of pornography. She will present possible judicial causes of action under present obscenity law and tort law, and will canvass legislative solutions. Finally, Ms. Darrow will suggest the problems inherent in any of the proposed solutions, and the inevitable conflict between these solutions and the guarantees of the first amendment.

Ms. ANTHONY: Ms. Darrow, the feminist group to which I belong has become increasingly concerned over the proliferation of pornography and its detrimental effects, both upon those who willingly purchase it and upon those who are unwillingly subjected to it. I am interested in finding ways in which the sale and distribution of pornographic materials can be limited or regulated, either through government regulation or private action.

Ms. DARROW: While I can outline methods which may be used to regulate the sale of pornography, various problems are inherent in these methods of regulation. Not the least of these problems is an inevitable conflict between any attempt to limit certain publications or written materials, and the protection accorded written and spoken expression by the first amendment.[1] The amendment protects all types of expression, and does not make moral judgements. I am sure you are aware of the importance attached to the first amendment by society and by the courts and would not belittle the amendment's importance. Additionally, you should be aware that pornography laws have been misused in the past to harass people attempting to mail or import birth control material,[2]

1. The first amendment reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

2. Until 1971, 19 U.S.C. § 1305(a), under the heading, "Immoral articles, prohibition of impor-

and to stop the sale of literary works like *Lady Chatterley's Lover*[3] because they did not conform to the social norms of the times. Are you sure you want to advocate the suppression or regulation of certain materials?

Ms. ANTHONY: I feel it is a necessary solution to an otherwise intractable problem. This country has never accorded complete protection to all types of written and spoken expression. Words posing a "clear and present danger" to the public welfare are not accorded first amendment protection.[4] Obscenity is not protected by the first amendment,[5] nor is language that is abusive or threatening.[6] To me, violent pornography poses a clear and present danger to the health and safety of women, is obscene, and constitutes an abusive threat to women. For these reasons, I think that violent pornography may be prohibited without infringing on first amendment rights.

Ms. DARROW: You have correctly identified three types of speech which the Constitution does not protect. The case law, however, is complex, and requires that certain elements must be present to place spoken or written expressions outside the protection of the first amendment. First, for speech to pose a clear and present danger, it must be "directed to inciting or producing imminent lawless action *and* be likely to incite or produce such action."[7] Second, the clear and present danger exception to first amendment protection has been developed in cases dealing with political advocacy of unlawful conduct. Neither the requisite elements nor the surrounding fact situation necessary to constitute a clear and present danger are present in cases dealing with pornography. Pornography does not involve the advocacy of unlawful political action. Moreover, while some have argued that pornography is an incitement to rape or other aggressive acts against women,[8] you would have great difficulty in making out a definite causal connection.[9]

Pornography also does not encompass the elements which would qualify it

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tation," prohibited the importation of "any obscene . . . material . . ., or any drug or medicine or any article whatever for the prevention of conception. . . ." 38 Stat. 194 (1913) (current version at 19 U.S.C. § 1305(a) (1976)).

Until 1971, 18 U.S.C. § 1461, under the heading, "Mailing obscene or crime-inciting matter," prohibited the mailing of "information describing how or by what means conception may be prevented. . . ." 36 Stat. 1339 (1911) (current version at 18 U.S.C. § 1461 (1976)).

3. Commonwealth v. DeLacey, 271 Mass. 327 (1930). The defendant, manager of a bookstore, was convicted under a Massachusetts statute which read, "Whoever . . . prints, publishes, sells or distributes a book . . . containing obscene, indecent or impure language, . . . shall be punished by imprisonment . . . and by a fine. . . ." *Id.* at 328. Although the title of the book in question was not mentioned in the case, Leo M. Alpert, on information from counsel in the case, determined that the book was *Lady Chatterly's Lover*. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 55 n.42 (1939).

4. Schenck v. United States, 249 U.S. 47, 52 (1919).

5. Miller v. California, 413 U.S. 15, 23, 24-25 (1973).

6. Those classes of speech "which by their very utterance inflict injury" and "are no essential part of any exposition of ideas," are not protected by the first amendment. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

7. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

8. *See* note 15 *infra*.

9. *See* text accompanying notes 15-22 *infra*.

as threatening or abusive speech. In defining abusive speech, *Chaplinsky v. New Hampshire*[10] set forth the requirement that the words uttered be addressed to another person in a public place.[11] *Cohen v. California*[12] refined this requirement, mandating that the speech be directed at a particular person, rather than at some third person not present.[13] This requirement of particularity may foreclose any action by women to have violent pornography deemed threatening or abusive language, since it would be impossible for a woman to show that the insults found in pornography were directed at her personally. While in certain instances abusive or threatening language may be prohibited, vulgar, lewd, or profane language cannot be regulated for its abusive or threatening nature alone, because of the danger that ideas will be suppressed during the process of prohibiting offensive speech.[14]

Thus, violent pornography does not pose a clear and present danger and is not threatening or abusive speech. It may, however, be obscene speech; I will outline the Supreme Court decisions on obscenity later. Right now, though, I would like to pursue something you said earlier: that regulation or limitation of the sale of pornographic materials was, to use your words, "a necessary solution to an otherwise intractable problem." What is the problem?

Ms. ANTHONY: Violent pornography[15] is the problem. It portrays women as victims and depicts violence against women as permissible or entertaining. Robin Morgan has written that today's pornography is "promulgating rape, mutilation, and even murder as average sexual acts, depicting the 'normal' man as a sadist and the 'healthy' woman as a willing victim."[16] As the surrounding environment becomes inundated with violent pornography, our society comes to accept the view that women are objects to be brutalized. Popular record albums, magazine advertisements, and "bondage books" portray women as victims. They are posed in submissive positions, on the receiving end of sadomasochistic acts of all varieties. Sex and aggression have become inextricably intermingled in our society. The exhibition of erotic material elicits aggressive acts.

In sum, pornography promotes violence against women through rape and

10. 315 U.S. 568 (1942).
11. *Id.* at 573.
12. 403 U.S. 15 (1971).
13. *Id.* at 26.
14. *See* Cohen v. California, 403 U.S. 15, 21 (1971).
15. Violent pornography refers to materials which depict sexual acts accompanied by physical torture and violence against women. Ms. Anthony, along with other concerned women, feels that violent pornography poses a significant threat to women. *See* Fritz, *Pornography as Gynocidal Propaganda*, at 219 *infra*. Many women's groups advocate regulation of this type of material. It should be noted that some feminists feel pornography is, by definition, violent; the term "violent pornography" would therefore be redundant. According to Gloria Steinem, "The word pornography in its very origins means 'writing about women captives or slaves' . . . . Erotica is something quite different, portraying love as something chosen. Pornography is not sex, and sex need not be violent or aggressive at all. It is violence and domination that are pornographic." N.Y. Times, Sept. 17, 1979, § B, at 10, col. 1.
16. Morgan, *How to Run the Pornographers Out of Town (And Preserve the First Amendment)* MS. MAGAZINE, Nov. 1978, at 55.

sexual harassment. It also fosters the degradation of women by portraying them as dominated and manipulated at the whim of men.

Ms. DARROW: While what you are saying may be true, it rests upon the supposition that there is a causal connection between violent pornography and violence against women. There has been no conclusive proof of such a connection.

Ms. ANTHONY: I will agree that there is no definite scientific proof that such a causal link exists. Although there is a need for more research on the subject of pornography and aggression, at least two researchers suggest that men who view pornography "tend to be more stimulated than others by the idea of rape and less sympathetic to the victims."[17] Moreover, the assumption that a connection exists between sexually explicit publications and behavior which the state has a duty to prevent and punish is an assumption which underlies all obscenity law.[18] If there were no harmful effects associated with obscene materials there would be no reason to regulate them.

Ms. DARROW: That is not at all clear. The courts' prohibition of obscene materials does not necessarily reflect a belief that such materials may cause harm to others; the prohibition may be a reflection of societal mores with regard to sexual expression. Also, consider regulations against nude bathing or against indecent exposure. Such regulations stem from an ill-defined but undeniable sense of propriety and modesty that pervades our society, and not from a belief in the harmful effects of an individual appearing in the nude.

Ms. ANTHONY: Okay, then under your line of reasoning, there is a societal interest in preserving propriety by preventing the revolting displays found in pornography, whether or not violence results from such publications. That to me is a valid reason for regulating and limiting the sale of pornography. I'd like, however, to return for a moment to the subject of causal connections between pornography and violence. The mere fact that there is no statistical data to back up the common sense notion that pornography leads to violence against women should not logically lead to the conclusion that there is no relation between the two. There is no denying that there are certain commonly recognized "predispositive causes" of antisocial conduct.[19] Poverty is a prime example of this. All poor people are not criminals nor are all criminals poor people, and

17. Feshbach and Malamuth, *Sex and Aggression: Proving the Link*, PSYCHOLOGY TODAY, Nov. 1978, at 111 [hereinafter cited as *Sex and Aggression*].

18. Note, *Violence and Obscenity-Chaplinsky Revisited*, 42 FORD. L. REV. 141, 143-44 (1973).

19. Stanmeyer, *Obscene Evils v. Obscure Truths: Some Notes on First Principles*, 7 CAP. U. L. REV. 647, 664 (1978). This article goes on to discuss the causation issue:

> [T]he main evil of pornography is its general influence on attitudes, feelings, inclinations, emotional stability, and moral standards. The flow of causality is *not*: (a) Pornography (causes) anti-social or criminal conduct (always) but rather: (b) Pornography (causes) deviant moral/psychological attitudes (usually) (which in turn cause or predispose to) anti-social or criminal conduct (more often than such conduct would occur had attitudes not been predisposed to tolerate and even enjoy such conduct).

Id.

even though the cause and effect relationship between poverty and crime is attenuated, poverty has been recognized by some people as a source of crime.[20] Similarly, it is apparent to many feminists that there is a causal connection between pornography and the degradation of women.[21]

Ms. DARROW: What you say has a lot of intuitive appeal, but our courts have not accepted the argument that viewing violence inexorably leads to committing violence, and that the former is a defense to the latter. For example, in *Olivia N. v. National Broadcasting Co., Inc.*,[22] the court refused to recognize plaintiff's argument that a televised movie had incited defendants to rape her. Similarly, in *Zamora v. State*[23] the court refused to recognize defendant's insanity defense based on the subliminal effect television viewing had had on him as a child.

Ms. ANTHONY: Obviously, the judges in the cases you describe were reluctant to acknowledge the link between viewing violence and committing aggressive acts. In the past, however, both judges and legislators have acted on unprovable assumptions,[24] and should not hesitate to do so in confronting the problem of pornography.

Ms. DARROW: I doubt that they have done so when the result would be to weaken the protection of the first amendment. Regarding your discussion of the harmful effects of pornography, I would like to ask whether you believe this harm is inflicted only on women.

Ms. ANTHONY: No. Violent pornography is also harmful to men and lessens the quality of community life.[25] The most disturbing aspect of violent pornogra-

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20. *Id.*

21. Gloria Steinem, *Erotica and Pornography—Clear and Present Difference*, MS. MAGAZINE, Nov. 1978, at 54.

22. 74 Cal. App. 3d 383, 141 Cal. Rptr. 511, *cert. denied*, 435 U.S. 1000 (1977).

23. 361 So. 2d 776 (Fla. App. 1978).

24. From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs . . . .

On the basis of these assumptions both Congress and state legislatures have . . . drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expressions by issuers of and dealers in securities, profit sharing, "coupons" and "trading stamps," commanding what they must and must not publish and announce . . . .

Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61-62 (1973).

25. [T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests "other than those of the advocate are involved." These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 (1973) (footnotes and citations omitted). *Quoted*

phy is that it serves to reinforce and mold adult behavior. Men come to feel that it is perfectly acceptable to victimize or brutalize women. It is dangerous for men to have the dehumanized view of sex which results from viewing pornography. It distorts their image of women and debases them as well. This type of propaganda portrayed in pornography is equally harmful to men and women.

Children as a group are also adversely affected by the proliferation of violent pornography. The pervasiveness of violent pornography has subtle but detrimental effects on children in their formative years. Not only does pornography have a negative effect on children's character and ego-formation, but it also influences their intuitive feelings of right and wrong. Growing up in an environment inundated with violent pornography can make children less sensitive to other people's suffering, and can lessen their respect for women. They are used to seeing women portrayed as sex objects or prizes to be fought over and consequently accept this view of women.[26]

Ms. DARROW: Again, there may be a great deal of validity to what you say, but I'm not sure you can prove it.

Ms. ANTHONY: Ms. Darrow, the connection between pornography and harmful societal attitudes and actions is crystal clear, whether or not the connection is susceptible to documentation. Is it necessary, however, in order to regulate or limit pornography that the connection we have been discussing be shown?

Ms. DARROW: Many methods of restriction probably would not require such a showing. I think this might be a good time to outline the methods of restriction available to you. Before discussing these methods of regulation, remember the three types of unprotected speech we discussed earlier. As I said, I do not feel it is possible to characterize pornography as either "fighting words" or as posing a clear and present danger.[27] However, it may be possible to regulate or prohibit the sale of pornography if it can be characterized as obscene.

With regard to materials relating to sexuality, the Supreme Court has had great difficulty balancing first amendment freedom of expression with the restriction of obscene material perceived as necessary by the general public. The necessity for such restriction probably stems more from a societal sense of de-

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in, Note, *Miller v. California and Paris Adult Theatre I v. Slaton: The Obscenity Doctrine Reformulated*, 6 COLUM. HUMAN RIGHTS L. REV. 219, 226 (1974-75).

26. Stanmeyer, *supra* note 19, at 644-65, *referring to* H. CLOR, OBSCENITY AND PUBLIC MORALITY at 163-64 (1969) *quoting* F. WERTHAM, SEDUCTION OF THE INNOCENT 90-91 (1954).

A related detrimental aspect of violent pornography is the "sex-ploitation" of children. Although child pornography only began to appear regularly in 1960, by 1976 it had become a featured item among obscenity dealers. Presently there are twenty-five magazines devoted exclusively to "kiddie porn." Children of ages three to sixteen are depicted in every conceivable sexual pose and act, heterosexual and homosexual. The activities featured ranged from intercourse to fellatio, cunnilingus, masturbation, rape, incest, and sado-masochism.

Several authorities have found a close relationship between child pornography and the practice of child prostitution. The vast amount of child pornography seized by police officers at the time of child molestation arrests have convinced many law enforcement agencies that a direct relationship exists between pornography and child molestation. Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809, 814-17 (1978).

27. *See* text accompanying notes 3-11 *supra*.

cency than from proven connections between pornography and harm to women. If material is labelled obscene, it falls outside the protection accorded by the first amendment, and therefore its sale can be prohibited or regulated.

The difficulty faced by the Court has been in devising tests to determine what constitutes obscenity. Early tests proved inadequate.[28] In 1973, the Supreme Court decided *Miller v. California*.[29] This case articulated the new test by which to judge whether or not certain material was obscene. Under the tripartite *Miller* test, the court must consider (1) whether an average person, applying "contemporary community standards,"[30] would find that the work in question appeals to prurient interests; (2) whether the work describes in a "patently offensive"[31] manner sexual conduct specifically proscribed by state law; and, (3) whether the work, taken as a whole, "lacks serious literary, artistic, political or scientific value."[32]

The Court said that this test was intended to reach material depicting "hard core sexual conduct."[33] While the Court had a great deal of difficulty in devising a test for obscenity, and continues to have difficulty in applying the *Miller* test, you may be able to use the test to your advantage. You and your group might attempt in a test case to get any one piece of violent pornography judged obscene. For example, if you objected to an issue of a sex magazine, you could seek to have a court judge it obscene under *Miller*. If you were successful, the sale of the magazine could constitutionally be prohibited. In a state action brought against Larry Flynt, the publisher of *Hustler*, for example, the defendant was found guilty of pandering obscenity.[34]

In order to have a magazine or other pornographic material judged obscene, all three aspects of the *Miller* test must be met. The first part of the test requires that the material appeal to the prurient interest, as defined by "contemporary community standards."[35] In *Hamling v. United States*,[36] the Court held that contemporary community standards were to be defined not on a statewide or nationwide basis,[37] but rather in terms of a particular locality.[38]

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28. The test adopted in Roth v. United States, 354 U.S. 476 (1957), judged material obscene when "the average person applying contemporary community standards, [finds that] the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Atty. General*, 383 U.S. 413 (1966), the Court added the requirement that for material to be judged obscene, it must be "utterly without redeeming social value." *Id.* at 418.

29. 413 U.S. 15 (1973).

30. *Id.* at 24.

31. *Id.*

32. *Id.*

33. *Id.* at 27.

34. NEWSWEEK, Feb. 21, 1977 at 34. The only reported decision concerning the Flynt case involved the action by the defendant's out-of-state counsel to try the case in Ohio. Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978), *rev'd* 99 S. Ct. 698 (1979).

35. 413 U.S. at 30-34.

36. 418 U.S. 87 (1974).

37. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept the public depiction of conduct found tolerable in Las Vegas or New York City." 413 U.S. at 32.

38. 418 U.S. at 103-10. *Accord*, Jenkins v. Georgia, 418 U.S. 153, 157 (1974). *See generally*,

Conceptually, there are two problems with defining contemporary community standards in this way. First, you run the risk that a single prosecutor or a small town will be able to impose its own moral judgment with respect to whether certain material is or is not publishable.[39] Second, if standards are defined in terms of localities, these standards will vary greatly throughout the country. Certain material may be constitutionally permitted in New York while the same material may be prohibited or even form the basis for criminal prosecution in Maine.[40] In sum, these two problems point up the imprecision inherent in defining contemporary community standards with reference to localities. This imprecision, however, can be used to your benefit. You can bring an action to have certain publications found obscene in towns or localities that you feel would find pornographic publications particularly objectionable. For example, an action might succeed in Cincinnati, where Larry Flynt was prosecuted,[41] while the same action might fail in New York City.

The second part of the *Miller* test attempts to deal with the vagueness of the prior obscenity standards, and requires that states specifically describe the depictions of sexual conduct that will be deemed patently offensive.[42] One reason for requiring this specificity is to give notice to pornography dealers of what constitutes obscenity.[43] To obtain such specificity women may want to consider lobbying their state legislators to enact stricter statutes which specifically define and prohibit those depictions of sexual conduct they find offensive. The lobbyists would have to work closely with their legislators so that the ultimate legislative description of patently offensive sexual material would match feminists' definitions.

The third part of the *Miller* test reflects the Court's desire to avoid

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Kassner, *Obscenity Leads to Perversion*, 20 N.Y.L.F. 551, 561 (1975). In *Hamling*, community was defined as the entity from which the jurors were selected. Hamling v. United States, 418 U.S. 87, 106 (1974). For criticism of the local community standards test, *see Hamling*, 418 U.S. at 142-45. (Brennan, J., dissenting). *See also* Gellhorn, *Dirty Books, Disgusting Pictures, and Dreadful Laws*, 8 GA. L. REV. 291, 299-310 (1974); Kassner, *supra*, at 559-62 (1975).

39. As Harvard constitutional law professor Alan Dershowitz has noted, "If a local prosecutor doesn't like a magazine or a film, he can set himself up as a national censor." NEWSWEEK, Feb. 21, 1977, at 34, col. 2. *See also* Kretchmer, "Justice for 'Hustler,' "NEWSWEEK, Feb. 28, 1977, at 13. ("[I]n this era of hand-picked juror rolls, prosecutors can weigh the jury. Selection process according to ethnic, economic and political backgrounds and literally hunt down any publisher on charges of obscenity.") *See generally* Note, *First Amendment Rights*, 1976 ANN. SURV. OF AM. LAW 501, 524 (1976).

40. In his dissenting opinion in *Hamling*, Justice Brennan remarked that "the guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the chancy course of transit or place of delivery of the materials." 418 U.S. at 144 (Brennan, J., dissenting). See Pinkus v. United States, 436 U.S. 293 (1977) for a discussion of subjective community standards.

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

42. In *Miller*, the Court gave as an explanatory example a hypothetical state statute proscribing: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals." 413 U.S. at 25.

43. Such specificity is necessary because of the geographic inconsistency in standards caused by the contemporary community standards rule.

"thought prohibition"[44] and the imposition of judicial and legislative censorship. In attempting to balance the prohibition of obscene material against the first amendment guarantees of free speech and press, the Court has laid down the requirement that a work must be shown to lack serious literary, artistic, political, or scientific value before being found obscene.[45] This requirement was drafted in broad language to extend first amendment protection to all works with some conceivable social value.[46] Thus, in bringing an obscenity action, the most difficult problem you will face will be showing that the material in question is absolutely without merit.

Ms. ANTHONY: It might be worthwhile to bring a test case against certain publications seeking to have them defined as obscene under the *Miller* standard and thus constitutionally subject to prohibition. I think such an action might meet with success, especially if we are careful in selecting the jurisdiction where the action is to be brought. There may, however, be problems with such an action, such as the one you just mentioned with respect to the third part of the *Miller* test. What other methods of regulation are available to us?

Ms. DARROW: One course of action would be to lobby for a comprehensive national obscenity statute that would prohibit violent pornography. This type of statute would specifically define the prohibited types of publications and would not be subject to the vagaries of interpretation evidenced by court decisions following *Miller*.[47] The statute would proscribe public presentation of sexual conduct and outline specifically what is meant by that term.[48]

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44. Kassner, *Obscenity Leads to Perversion*, 20 N.Y.L.F. at 568.

45. 413 U.S. at 24.

46. *See* People v. Heller, 33 N.Y.2d 314, 332, 307 N.E.2d 805, 809 (1973). In *Heller*, the court interpreted the third part of the *Miller* test to mean that a work must make a "valid statement," as determined by the trier of fact, in order for it not to be judged obscene.

47. In Jenkins v. Georgia, 418 U.S. 153 (1974), the Court acknowledged that the *Miller* standard had not extricated the Court from the necessity of case-by-case review when faced with the question whether certain materials were obscene. In *Jenkins*, the material in question was the film "Carnal Knowledge," which the Court found not to be obscene. *Id.* at 161. In Hamling v. United States, 418 U.S. 87 (1974), the Court found an advertising brochure with sexually explicit material obscene under local standards differing from those employed in *Jenkins*.

48. The following is an example of a model statute:

§ 101. Public presentations of actual sexual conduct; punishment

(a) Any person participating in an act of sexual conduct as defined in subsection (b), when said act is recorded on film and said person has knowledge that said act is being recorded on still or motion picture, film, or in a theatre, if part of a theatrical production presented for an admission fee, is guilty of a misdemeanor.

(b) For purposes of this section, "sexual conduct" includes any or all of the following acts:
(1) sexual intercourse between two or more persons;
(2) oral-genital contact between two or more persons;
(3) oral-anal contact between two or more persons;
(4) anal-genital contact between two or more persons;
(5) any of the above acts between one or more persons and an animal, or the dead body of a human being;
(6) acts of masturbation, self or other induced, manually, or with the aid of an artificial device.

(c) Any person who displays for an admission fee a theatrical production depicting any of the

Another weapon against the pornography problem can be found in zoning statutes. Zoning statutes have historically been used to protect neighborhoods in a variety of ways. Such statutes have been used to protect the physical development of a neighborhood by limiting the scale of buildings or by prohibiting further expansion of an area when essential public services were found to be unavailable.[49] Such statutes have also been used to zone into specific areas activities which are incompatible with the general nature of a neighborhood or town.[50] Zoning statutes can be used to confine the sale of pornography to certain areas within a city.[51] Some of these statutes have been successful in curbing pornography and the attendant crime rate in those cities which have used them.[52]

Ms. ANTHONY: I have never considered zoning to be a comprehensive solution. Zoning statutes do not ban pronography; they merely contain it.

Ms. DARROW: You must remember, however, that containment is a form of censorship, but it is not as drastic as an outright ban. Also, zoning statutes protect those who do not wish to view pornography from having their senses assaulted on every street corner by obscene materials. Zoning statutes reduce the amount of pornography shown to the public by restricting the areas in which pornography can be displayed. Those who are offended by pornography do not have to frequent the areas where this material is allowed to be sold, but the material will still be available to those who want to purchase it. Recall that courts traditionally do not like to interfere with individuals' rights to purchase and use materials in the privacy of their own homes.[53]

While you may feel that zoning is not a radical enough solution, it is the approach most likely to succeed. It is also the solution that is most compatible

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acts described in subsection (b) or who records such acts on film, or who sells or displays for an admission fee such acts recorded on film is guilty of a misdemeanor.

(d) Every person who, with knowledge that a person is a minor under the age of 18 years, employs such minor to commit any of the acts described in subsection (b) is punishable by imprisonment in the state prison for one to five years or a fine of no more than $10,000, or both.

Every person who otherwise employs any other person to commit the acts described in subsection (b) is guilty of a misdemeanor.

Hunsaker, *The 1973 Obscenity-Pornography Decisions: Analysis, Impact and Legislative Alternatives*, 11 SAN DIEGO L. REV. 906, 943-44 (1974). This proposed statute may require modification to cover those types of pornography feminists find most objectionable. The statute reproduced above is modeled on actual statutes proscribing sexual conduct in public. To prove that a violation of the statute has occurred, it is necessary to prove that actual sexual conduct took place. *Id.* at 945. Moreover, the statute does not proscribe what some feminists find most objectionable: depictions of women as the object of torture, brutality, or bondage.

49. Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 BUFF. L. REV. 1, 29 (Fall 1978).

50. *Id.* at 1-3.

51. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), Justice Burger articulated certain state interests in restricting pornography and obscenity, including "the interest of the public in the quality of life and the total community environment." *Id.* at 58.

52. *See* discussion of Boston and Detroit zoning statutes, in Marcus, *supra* note 49, at 2-8.

53. *See* Stanley v. Georgia, 394 U.S. 557 (1969), which permitted the use of obscene materials in the privacy of one's own home.

with the first amendment's protection of written material. In *Young v. American Mini Theatres, Inc.*,[54] the Court approved of the zoning statute at issue, which restricted the location of adult motion picture theaters in Detroit. In sustaining the zoning statute, the Court noted that it was not persuaded that the ordinance would have a significant deterrent effect on the exhibition of films protected by the first amendment.[55]

Ms. ANTHONY: Isn't there a method of restricting pornography that is more far-reaching than zoning?

Ms. DARROW: Well, another possible means of dealing with the problem of violent pornography would be to seek extension and enforcement of public nuisance statutes to control the display and dissemination of pornographic material.[56] A public nuisance action is not concerned with the suppression of an idea, but rather with the abatement of a condition which causes injury to the general public.[57] Public nuisance statutes typically define a nuisance as a criminal offense.[58] Conduct covered by such statutes includes behavior that is harmful to the public health,[59] interferes with the public safety,[60] adversely affects the public morals,[61] or prevents the public from the peaceful use of land or public ways.[62]

Several states have attempted to deal with the pornography problem through public nuisance statutes.[63] Usually those statutes make the exhibition

54. 427 U.S. 50 (1976).

55. *Id.* at 60.

56. *See* Note, *Can an Adult Theater or Bookstore be Abated as a Public Nuisance in California?* 10 U.S.F. L. REV. 115 (1975). *See also* N.Y. Times, Sept. 17, 1979, § B, at 10, col. 4.

57. *See* Note, *supra* note 56, at 125.

58. *See, e.g.*, N.Y. PENAL LAW § 240.45 (McKinney):

> A person is guilty of criminal nuisance when:
>
> 1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or
>
> 2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.

59. Seigle v. Bromley, 22 Colo. App. 189, 124 P. 191 (1912) (housing a hogpen); Durand v. Dyson, 271 Ill. 382, 111 N.E. 143 (1915) (housing diseased animals).

60. State v. Excelsior Power Mfg. Co., 259 Mo. 254, 169 S.W. 267 (1914) (storage of explosives); Landau v. City of New York, 180 N.Y. 48, 72 N.E. 631 (1904) (exploding of fireworks in public place).

61. Black v. Circuit Court of Eighth Judicial Circuit, 78 S.D. 302, 101 N.W.2d 520 (1960) (house of prostitution); Weis v. Superior Court of the County of San Diego, 30 Cal. App. 730, 159 P. 464 (1916) (indecent exhibitions); Wilson v. Parent, 228 Or. 354, 365 P.2d 72 (1961) (public profanity).

62. Lamereaux v. Tula, 312 Mass. 359, 44 N.E.2d 789 (1942) (ice on the sidewalk).

63. *See, e.g.*, OHIO REV. CODE ANN. § 3767.01(C) (Page), which reads in pertinent part: "Nuisance means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness . . . is conducted . . . or any place, in or upon which lewd, indecent, lascivious, or obscene films . . . are . . . exhibited . . . ."

MISS. CODE ANN. § 95-3-1 (1972) reads, in pertinent part: "Nuisance shall mean any place . . . in or upon which lewdness, assignation or prostitution is conducted, permitted, continued or exists . . . ."

of obscene materials a misdemeanor, subjecting the perpetrator to criminal penalties. Public nuisance statutes may be used to prevent the exhibition of violent pornography on newsstands if it can be shown that such exhibition harms the general public. These statutes cannot, however, be used to prohibit the publication or exhibition of pornographic materials,[64] because prohibitions on the future dissemination of such material constitute a prior restraint of free expression.[65] Historically, courts have refused to approve of prior restraints on publication.[66]

As well as seeking the passage of public nuisance statutes prohibiting the exhibition and dissemination of violent pornography, you may want to consider bringing actions against pornography vendors in states or towns which already have such statutes.[67] You should be aware, however, that in attempting to bring such actions, you may be met with a standing problem. Actions under public nuisance statutes must be brought by public officials,[68] or by individuals alleging special injury or damages.[69] This requirement precludes actions by individuals unless they can sustain the burden of proving that they suffered some private, direct, and material damage beyond that suffered by the public at large.[70] To prove special damages in this instance, a woman would have to show that specific pornographic material had an effect upon her that was more damaging and more adverse than it was upon the general public. This would be a very difficult burden to sustain. A recently raped woman might attempt to prove that the rapist had read certain pornographic materials depicting scenes of violent acts against women, and that this was the impetus for his act against the woman. If the woman can prove this, she could bring a public nuisance ac-

64. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

65. *See* Near v. Minnesota, 283 U.S. 697 (1931), in which a state statute permitting the suppression by injunction of a business publishing malicious, scandalous, or defamatory newspapers or periodicals was held void. The state statute was found unconstitutional under the fourteenth amendment due process clause which protects the liberty of the press from state intervention.

66. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), which held prior restraints on motion pictures violated first amendment freedom of speech and press unless the issue of obscenity was determined first. *See also* Kingsley Books v. Brown, 354 U.S. 436 (1957), where appellant was enjoined from selling obscene material after process was served in a pending trial on the issue of obscenity. The court held that there was no prior restraint involved because the material in question had already been published. These cases do not involve public nuisance statutes, but discuss the issue of prior restraint.

67. *See* note 58, *supra*.

68. *See* Busch v. Projection Room Theatre, 17 Cal.3d 42, 550 P.2d 600 (1976), *cert. denied*, 429 U.S. 922 (1976), where, in an action by public officials, the court ruled that the exhibition of obscene films or magazines offensive to the moral sensibilities of the community was subject to civil constraint under public nuisance statutes.

69. Mississippi & M.R.R. Co. v. Ward, 67 U.S. 485 (1862). *See* Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute*, 44 U. CHI. L. REV. 509, 530 (1977).

70. Irwin v. Dixion, 50 U.S. 10 (1850); Carolina Power & L. Co. v. South Carolina Pub. Serv. Auth., 94 F.2d 520, 524 (4th Cir. 1938). These cases recognize that there may exist private direct damage beyond damage suffered by the public at large.

At least one state statutorily provides for the award of money damage in a private nuisance action: MASS. GEN. LAWS ANN. ch. 243, § 1 (West 1959). "If the plaintiff prevails in tort for a nuisance, the court may, in addition to the judgment for damages and costs, enter judgment that the nuisance be abated and removed and may issue execution for the damages and costs . . . ."

tion against the publishers and exhibitors of such material. As we discussed earlier, however, it might be very difficult to link a rapist's actions to the influence of pornographic material.[71]

It is interesting to note that a neighborhood may be able to show that it is an injured individual for the purposes of bringing a public nuisance action against pornographers. In demonstrating the extent of its injury, a neighborhood might point to its character and condition prior to the invasion of pornographic establishments, and to the type and frequency of pornographic exhibitions displayed by such establishments.[72]

If a successful public nuisance action is brought by a public official, a neighborhood, or an individual woman, the most likely remedy to be granted by a court is injunctive relief.[73] If the public nuisance under attack is pornography, an injunction could be tailored to prohibit further distribution or exhibition of those materials deemed offensive or obscene.

Ms. ANTHONY: Bringing actions under public nuisance statutes seems like a good way to stem the dissemination of violent pornography. I am also interested, however, in ways women can obtain damages for the injuries they incur in being subjected to this material.

Ms. DARROW: There are two proposed causes of action that might permit the award of damages. I must caution you that these proposals are my variations on generally accepted causes of action which have been used to redress certain injuries but which have never been invoked to address the pornography problem. It is uncertain whether courts would recognize these actions or accept the arguments raised in the pornography context. For example, an alternative to the public nuisance action we have discussed would be a variation on the traditional private nuisance action.

Private nuisance actions have commonly been brought in situations involving interferences with the use and the enjoyment of land. Traditionally, absent an interference with land, the fact that a personal injury occurred or that an interference with some purely personal right took place would not be enough to sustain a private nuisance action.[74] A variation on the private nuisance action would involve the recognition of a "new tort" which would eliminate the requirement of an interference with land, and focus instead on the element of personal injury. Even if a court were to recognize a "new tort," the three traditional elements of a private nuisance action would probably have to be shown.[75] The plaintiff would have to show: (1) that there was an unreason-

71. *See* text accompanying notes 15-23, *supra*.

72. *See* Rendleman, *supra* note 69, at 530.

73. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 90, at 602 (4th ed. 1971). *But see* Wilson v. Parent, 228 Or. 354, 365 P.2d 72 (1961), where damages were granted instead of injunction where the nuisance alleged was obscene words and gestures directed at the plaintiff.

74. Baltimore & Potomac R.R. v. Fifth Baptist Church, 108 U.S. 317 (1883). *See* PROSSER, *supra* note 73, § 89.

75. Since there is no case law on this hypothetical tort, analogies must be made to present private nuisance laws.

able invasion of a private interest,[76] (2) that the intrusion offended or disturbed a person of average sensibilities,[77] and (3) that there was some degree of permanence to the nuisance.[78]

There are certain advantages in using a private nuisance action to combat pornography. First, since a private nuisance action does not involve state action, the constitutional issue of first amendment freedom of expression is not reached.[79] If certain pornographic material is found to constitute a private nuisance, a civil rather than a criminal injunction could be drawn, precisely enumerating the material to be restricted, thereby avoiding many of the first amendment problems inherent in a broad public nuisance statute that completely prohibits pornographic material. Second, plaintiffs would have a better chance of success with private nuisance actions than with public nuisance actions because in a private action the burden of proof would be on the publisher to prove that his or her publications are not offensive or harmful to the average person.[80] Third, courts and juries may be more willing to find a nuisance in a private action, where civil remedies are appropriate, than in a public nuisance action, where criminal penalties might ensue. Finally, if the three elements constituting private nuisance are shown to be present, it may be possible for a woman injured by pornography to recover money damages. Such damages are more frequently awarded in private nuisance cases than in public nuisance cases.[81]

While at first glance my suggestions may have appeal, I must hasten to add that I do have reservations about utilizing nuisance law to combat pornog-

76. *See* PROSSER, *supra* note 73, § 89. *See, e.g.*, Miller v. Coleman, 213 Ga. 125, 97 S.E.2d 313 (1957) (dog kennel interfered with the private enjoyment of plaintiffs' land). Brill v. Flagler, 23 Wend. 354 (1840) (howling dog interfered with enjoyment of land). The argument that the exhibition and sale of pornography constitutes an unreasonable invasion of a private interest has been used successfully in zoning actions brought against newsstands exhibiting pornographic material in or close to residential areas. Gribbs v. American Mini Theatres, Inc., 423 U.S. 911 (1975).

77. *See* PROSSER, *supra* note 73, § 87. In considering the extent of the intrusion, relevant considerations are: (1) the gravity, extent, and duration of the harm, and (2) the reasonable precautions that could have been taken by the complaining individual, such as an averting of the eyes.

78. *See* Ford v. Grand Union Co., 240 App. Div. 294, 296, 270 N.Y.S. 162, 165 (3d Dept. 1934).

79. *See* Note, *supra* note 53; Note, *Restricting the Public Display of Offensive Materials: The Use and Effectiveness of Public and Private Nuisance Actions*, 10 U.S.F. L. REV. 232 (1975).

80. *See* Milligan, *Obscenity: Malum In Se Or Only In Context? The Supreme Court's Long Ordeal*, 7 CAP. U. L. REV. 631 (1978). The author writes:

> Applying the indicia of a constitutional strict liability offense to the issue at hand we see that (1) obscenity is an offense against the authority of the state, (2) the injury is the same regardless of the defendant's intent, (3) the defendant is in a position to prevent the injury through the exercise of reasonable care.

Id. at 645 (footnotes omitted).

81. Money damages usually awarded in nuisance actions are determined in relation to the depreciation in value or use of the land. Spaulding v. Cameron, 38 Cal.2d 365, 239 P.2d 625 (1952). This article however, poses nuisance law as a remedy for something other than the traditional interference with land; case law provides very little guidance for determining this type of damage. The amount of damage is peculiarly a jury question. Flanigan v. City of Springfield, 360 S.W.2d 700 (Mo. 1962).

raphy. Private nuisance law has never been used in this fashion, but has been employed only when the health or safety of an individual was at stake.

Ms. ANTHONY: Let me remind you that we are talking about the health and safety of women.

Ms. DARROW: Perhaps, but as I said earlier, nuisance law has traditionally been employed in instances where there was an interference with the use and occupancy of land. Moreover, courts have traditionally been hesitant to recognize "new torts."[82]

Ms. ANTHONY: You mentioned that there was another possible tort action that women could bring against pornographers that also would allow for the recovery of damages. What was it?

Ms. DARROW: You might want to consider bringing a tort action against pornographers for the intentional infliction of mental distress. If a plaintiff can prove the infliction of such distress he or she may be entitled to damages. To have a cause of action for mental distress one must prove that the defendant acted with intent or recklessness, that the defendant produced mental distress in the plaintiff, and that the defendant's behavior was outrageous. These elements are judged by a subjective standard. Cases involving the intentional infliction of mental distress are troublesome because it is difficult accurately to determine the amount of damages which should be awarded.[83]

Ms. ANTHONY: It is not difficult for courts to determine damage awards in accident cases for pain and suffering.

Ms. DARROW: That is true, but in those cases the courts are more comfortable because there is a physical injury which at least gives the court a rational standard for valuation. It is much more difficult to arrive at a dollar amount for mental anguish absent a physical injury.

Ms. ANTHONY: That is a feeble excuse not to redress an individual injury.

Ms. DARROW: Perhaps it is, but most of the cases deal with the infliction of mental distress through some type of physical action,[84] and not merely through words[85] or expressions.

Another problem with this tort is that it might be difficult to prove that the infliction of mental distress upon women was an intentional act. While it is possible to sue for the negligent infliction of mental distress, this tort has generally been recognized in only two types of cases: those in which the plaintiff suf-

82. The most recently recognized "new tort" is that of invasion of privacy. This tort was suggested in a law review article, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The tort was first recognized by the courts fifteen years later in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

83. *E.g.*, Lynch v. Knight, 11 Eng. Rep. 854 (1861).

84. *See, e.g.*, Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930). *See also* PROSSER, *supra* note 73, § 12.

85. *E.g.*, State v. Daniel, 136 N.C. 571, 48 S.E. 544 (1904).

fered injury due to the mishandling of a relative's dead body[86] and those in which an incorrect telegraph message was sent.[87] It is not clear that courts would be willing to expand the tort so as to allow actions against pornographers who had unwittingly inflicted distress upon others.

I think we have exhausted all the possible methods of regulation open to you. I have tried to present modes of prohibition and regulation that are more likely to succeed and those that are more theoretical and not yet generally accepted by the courts. In our discussion, I have tried to suggest some of the drawbacks to each of the methods of regulation I have outlined. At this point, I think you should be aware of some general objections that might be raised against any attempt to regulate pornography.

First, you said earlier that you want to regulate violent pornography. Can you define that term more specifically?

Ms. ANTHONY: Violent pornography includes those materials that depict women being brutalized.

Ms. DARROW: I am not sure how you are defining "brutalized." Would a magazine picture showing a naked woman being whipped be violent pornography?

Ms. ANTHONY: Absolutely.

Ms. DARROW: Would a photograph of a naked woman be violent pornography?

Ms. ANTHONY: Probably not.

Ms. DARROW: What about a record album entitled "Captive," with a cover showing a clothed woman tied to a chair?

Ms. ANTHONY: While I would have to see the picture to be sure, I think that would be violent pornography.

Ms. DARROW: What about a picture showing a scantily clad man and woman struggling on a bed?

Ms. ANTHONY: Again, I would have to see the picture. I am not really sure about that.

Ms. DARROW: I can see that you are not clear about your definition of violent pornography.

Ms. ANTHONY: I may not be able to define it precisely but I know it when I see it.

Ms. DARROW: You will be interested to know that the "I know it when I see

86. Torres v. State, 34 Misc. 2d 433, 228 N.Y.S.2d 1005 (Ct. Cl. 1962) (autopsy and unauthorized burial); Weingast v. State, 44 Misc. 2d 824, 254 N.Y.S.2d 952 (Ct. Cl. 1964) (confusion of bodies).

87. *E.g.*, Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930).

it" test was used by Justice Stewart[88] in his determination that the motion picture involved in *Jacobellis v. Ohio*[89] was not obscene. This shows that even a test like the one outlined in *Miller*, which attempts to define obscenity very specifically, can degenerate into a standardless standard. It is highly questionable whether we want a high degree of subjectivity to operate in a system purportedly based on rationality. Under a subjective standard the guilt or innocence of a person and the question whether certain material may be found to be pornographic would turn on the views of a small number of people.

Do you want to set the standard for what is violently pornographic? The Supreme Court has certainly had difficulty setting a standard for obscenity.

Ms. ANTHONY: I am not as hesitant as you are to set definitions or standards and I would probably operate with more certainty than did the Supreme Court.

Ms. DARROW: Would you personally set the standard for what is pornographic, and make determinations with respect to each specific publication dealing with sexuality? Would you become the country's pornography czar?

Ms. ANTHONY: I do not think decisions with regard to pornography could be made by one person, but I would be willing to serve on a committee formed to regulate pornography and set the standard for what is pornographic. Assume, however, that I would be loathe to set such standards and would want neither to bring court actions to seek to have certain materials defined obscene nor would want to lobby for a national obscenity statute. Wouldn't I still be perfectly justified in bringing a private nuisance action or an action for the intentional infliction of mental distress? Wouldn't concerned groups of citizens be justified in picketing in front of movie houses and bookstores which exhibited or sold objectionable material in an attempt to persuade the public to boycott such establishments?[90]

Ms. DARROW: Do not underestimate the power of private regulation. In bringing tort actions, and in picketing and boycotting establishments, you are attempting to choose and determine the material to which the public is being exposed. You and those sympathetic to your cause would be setting yourselves up as private censorship committees setting the moral standards for the country. While I am sympathetic to your objections to pornography and concerned with the effect that such material may have on our society, I must warn you that I feel any concerted effort you may make to regulate pornographic material could undermine free speech, encourage the suppression of ideas, and ultimately even lead to book burnings.[91] A leading Harvard constitutional law professor, Alan M. Dershowitz, has noted, "Women who would have the government ban sexist material are the new McCarthyites. It's the same old censorship in radical garb."[92]

88. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
89. 378 U.S. 184 (1964).
90. *See* N.Y. Times, Sept. 17, 1979, § B, at 10, cols. 3-4.
91. *Cf. Women's War on Porn*, TIME, August 27, 1979, at 64.
92. *Id.*

Ms. ANTHONY: But he is missing the point. The issue is violence against women, not free speech.

Ms. DARROW: The issue *is* free speech. You must be careful when private groups attempt to restrict the freedom of expression of others. It is one thing to acknowledge that an evil such as violent pornography exists. It is quite another to attack it by impinging on constitutional rights.

CONCLUSION

The widespread proliferation of pornography depicting violence against women is a cause for concern. Such pornography may be a strong influence in shaping woman's view of herself, man's view of woman, and a child's view of the interaction between the sexes.

To acknowledge an evil such as violent pornography, however, is not to sanction every conceivable remedy. In bringing obscenity actions against publications, in passing statutes banning pornographic publications, in bringing tort and nuisance actions against pornographers, and in using civil disobedience to interfere with the patronage of porn shops and theaters, one is attempting to prevent the public from gaining access to certain materials. Such actions often run counter to the spirit, if not the letter, of the first amendment, and constitute private censorship. A concerted effort to educate the public on pornography's dangers, and to raise "public awareness so that consumption of pornography is socially ostracized,[92] may be more effective than isolated actions against certain publications and pornographers. Ultimately, it may be more productive to help shape attitudes, enabling people to choose intelligently what materials they wish to purchase, than to limit the material available to the public.

ELLYN J. STEUER

93. *Conference Examines Pornography as a Feminist Issue*, N.Y. Times, Sept. 17, 1979, § B, at 10, col. 4.