



NORTHWESTERN  
UNIVERSITY  
SCHOOL OF LAW  
PUBLIC LAW AND  
LEGAL THEORY SERIES  
No. 07-07

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(But She's Wrong) About Pornography

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Draft: Feb. 27, 2007  
Forthcoming, Harvard J. Law & Public Policy (2007).

Why Phyllis Schlafly is Right  
(But She's Wrong) About Pornography

Andrew Koppelman\*

Phyllis Schlafly is wrong about the regulation of pornography, but her views need to be taken more seriously than they typically are in the overwhelmingly liberal academy. She represents an important tradition in thinking about gender issues, and she has pressed it vigorously and articulately.

Schlafly's preeminent concern is to preserve a pattern of gender-specific roles and relations that, she thinks, have helped protect women and children from desertion and abuse. She wants to suppress pornography because it helps to reinforce a vernacular masculine culture that is indifferent or hostile to the needs of women and children. Schlafly's worries about this culture are legitimate and valid. But the suppression of pornography, I will conclude, is the wrong solution to the problem.

1. *Schlafly on pornography*

Pornography, Schlafly has argued, can be best defined as the degradation of woman. It exploits women individually and as a group in the most offensive, degrading, and cruel way. In the modern jargon, pornography is the most 'sexist' activity of all.

The women's liberationists prove their hypocrisy by their nonattitude toward pornography. They profess outrage at the role-concept fostered by school textbooks that include pictures of women in the home as wives and mothers, but they raise no protest about the role-concept fostered by obscene pictures of women

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as playthings for male lust and sadism in obscene and "bondage" books, magazines, and movies.<sup>1</sup> Schlafly wants to suppress pornography precisely because of the way in which it socializes men. "Pornography cannot be victimless because its very essence demands that a victim be subordinate. One cannot be an abuser unless there is an abused. Pornography portrays the past abuse, and pornography is a tool to facilitate future abuse."<sup>2</sup> The testimony of women abused either in the making of pornography or by men who have consumed pornography - testimony that Schlafly collected in an edited volume - "prove that pornography is addictive, and that those who become addicted crave more bizarre and more perverted pornography, and become more callous toward their victims."<sup>3</sup> The basic problem is the effect of pornography on the way that men think. "Pornography changes the perceptions and attitudes of men toward women, individually and collectively," she writes, "and desensitizes men so that what was once repulsive and unthinkable eventually becomes not only acceptable but desirable. What was once mere fantasy becomes reality. Thus conditioned and stimulated by pornography, the user seeks a victim."<sup>4</sup> Pornography, she argues, should be regarded as a "public nuisance."<sup>5</sup>

The claims I have just quoted are wildly overstated. Schlafly suggests that pornography provokes sexual violence. Except for a very small subset of already pathological men - fewer than 1% of all men - consumption of pornography is not associated at all with violence against women.<sup>6</sup> In the aggregate, it appears that the availability of pornography reduces the frequency of sexual

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<sup>1</sup> Phyllis Schlafly, *The Power of the Positive Woman* 158 (1977). This obviously is no longer true, but Schlafly was writing before the feminist critique of pornography was made prominent in Andrea Dworkin, *Pornography: Men Possessing Women* (1981), Laura Lederer, ed., *Take Back the Night: Women on Pornography* (1981), and the essays eventually collected in Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987).

<sup>2</sup> Phyllis Schlafly, *Introduction*, in *Pornography's Victims* 15 (Schlafly ed. 1987).

<sup>3</sup> *Id.* at 16.

<sup>4</sup> *Id.* at 16. See also Phyllis Schlafly, *The Supremacists: The Tyranny of Judges and How to Stop It* 57-64 (2004); Phyllis Schlafly, *Supreme Court Sides With Pornographers Again*, <http://www.eagleforum.org/column/2004/july04/04-07-14.html>.

<sup>5</sup> *Power of the Positive Woman* at 156; *Pornography's Victims* at 9.

<sup>6</sup> Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 *Colum. L. Rev.* 1635, 1663-72 (2005).

assault.<sup>7</sup> It is true that women have often been abused during the production of pornography, but abuses of this kind are ubiquitous in illegal markets, and appear to have become relatively rare now that producers are permitted to operate openly in some parts of the country. There is anecdotal evidence that some readers of pornography become so transfixed by it as to lose all interest in relationships with actual people.<sup>8</sup> But there is no good data on the proportion of consumers of whom this is true, no principled distinction can be made between this and other socially isolating behavior (such as too many hours spent in front of network TV), and "addiction" is not a helpful metaphor for the problem.<sup>9</sup>

Yet there is a deeper concern here that is worth investigating. Violence is hardly the only way in which men victimize women. A lot of American men behave very badly, and that behavior has something to do with the way in which they are socialized in the culture in which they are raised. The real and important concern raised by Schlafly is not the effects of pornography, but the meaning of pornography.

Schlafly has a story, a frightening and pessimistic story, to tell about the relations between the sexes. That story lies historically at the confluence of two major strands of thought about the social meaning of gender. Together they are the basis of a critique of both sex equality and pornography. The story Schlafly tells is a caricature. But it has the virtues of caricature. It makes salient features of reality that are indeed there, and that we might not have noticed in the same way before.

## 2. *The foundations of Schlafly's antifeminism*

### A. Rousseau

The roots of Schlafly's antifeminist philosophy lie, surprisingly, in the thought of Jean-Jacques Rousseau.<sup>10</sup>

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<sup>7</sup> See Todd Kendall, *Pornography, Rape, and the Internet*, [http://www.law.stanford.edu/display/images/dynamic/events\\_media/Kendall%20cover%20+%20paper.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Kendall%20cover%20+%20paper.pdf); Anthony D'Amato, *Porn Up, Rape Down*, 2 Original L. Rev. (2006).

<sup>8</sup> See M. Douglas Reed, *Pornography Addiction and Compulsive Sexual Behavior*, in Dolf Zillmann et al., *Media, Children, and the Family: Social Scientific, Psychodynamic, and Clinical Perspectives* 249 (1994).

<sup>9</sup> See Martin P. Levine & Richard R. Troiden, *The Myth of Sexual Compulsivity*, 26 J. Sex Res. 347 (1988).

<sup>10</sup> Schlafly is one of those who is surprised. At the conference where this paper was first delivered, she emphatically distanced herself from

Rousseau is generally remembered as the patron saint of the French Revolution, but he is also the wellspring of modern secular conservative thought about gender. Rousseau began, like other Enlightenment thinkers, by endorsing sex equality.<sup>11</sup> On reflection, however, he changed his mind. He became the wellspring of modern antifeminist thought.<sup>12</sup>

Rousseau thought that most human desires provide no basis for enduring social ties. Even sexual appetite can be satisfied by a momentary coming together and then parting. The only desire that does provide such a basis is *amour-propre*, which can be loosely translated as pride or vanity. Unlike the bodily appetites that the savage felt, and which were easily satisfied, *amour-propre* is "a relative sentiment, born in society, which inclines each individual to have a greater esteem for himself than for anyone else" and "inspires in men all the harm they do to one another."<sup>13</sup> This sentiment is quite distinct from the natural self-love of the savage, who does not compare himself with anyone and who is indifferent to the opinions of others. The natural man was dependent upon things, not upon men.<sup>14</sup> With the early development of society, people

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Rousseau, whose behavior toward his mistress and children, she said, made him "a jerk of the first magnitude." Her judgment is sound: he dispatched all five of his children to the Foundling Hospital as soon as they were born, and never saw them again. He describes his conduct in language dripping with self-justification and self-pity in Jean-Jacques Rousseau, *The Confessions* 322, 332-34 (J.M. Cohen trans. 1953). He reports that he "had the greatest difficulty in the world in persuading [his mistress] to accept this sole means of saving her honour." *Id.* at 322. Rousseau's philosophical argument depends heavily on the assumption of male selfishness and callousness. He was in a position to know what he was talking about.

I leave it to the reader to judge whether all the elements of his case against sex equality are not reproduced in Schlafly's arguments, described below. There has been a long tradition of repeating these arguments, and Schlafly may not have known who first formulated them. Their maculate provenance is not, of course, evidence that they are unsound. Quite the contrary: those who casually dismiss Schlafly are likely to be less cavalier with Rousseau. Rousseau was a horrible father but a great philosopher, and his ideas about gender have enduring importance.

<sup>11</sup> Susan Moller Okin, *Women in Western Political Thought* 104 (1979).

<sup>12</sup> On the debt of other modern antifeminist writers, such as Allan Bloom and George Gilder, to Rousseau, see Andrew Koppelman, *Sex Equality and/or the Family: From Bloom vs. Okin to Rousseau vs. Hegel*, 4 *Yale J. L. & Hum.* 399, 413 n.62 (1992).

<sup>13</sup> Jean-Jacques Rousseau, *Discourse on the Origins of Inequality Among Men*, in *The First and Second Discourses* 222 (Roger D. & Judith R. Masters trans., St. Martin's 1964).

<sup>14</sup> Jean-Jacques Rousseau, *Emile or On Education* 85 (Allan Bloom trans., Basic Books 1979).

became aware that other people were looking at them. "Each one began to look at the others and to want to be looked at himself, and public esteem had a value."<sup>15</sup> This was the origin of all conflict.

As soon as men had begun to appreciate one another, and the idea of consideration was formed in their minds, each one claimed a right to it, and it was no longer possible to be disrespectful toward anyone with impunity. From this came the first duties of civility, even among savages; and from this any voluntary wrong became an outrage, because along with the harm that resulted from the injury, the offended man saw in it contempt for his person which was often more unbearable than the harm itself. Thus, everyone punishing the contempt shown him by another in a manner proportionate to the importance he accorded himself, vengeance became terrible, and men bloodthirsty and cruel.<sup>16</sup>

The problem that any society must address, then, is how to make it possible for men maddened by *amour-propre*, each of whom could be content only if he could be "the sole master of the universe,"<sup>17</sup> to live together peacefully and without tyrannizing over one another. An important part of the solution, Rousseau believed, lay in the family. It is "by means of the small fatherland which is the family that the heart attaches itself to the large one," and it is "the good son, the good husband, and the good father who make the good citizen."<sup>18</sup>

The only social tie in which *amour-propre* can find harmless and enduring satisfaction is the tie between man and woman. This is so because women can use their charms and wiles to pander to men's *amour-propre* and, by thus manipulating them, satisfy their own as well. It is women who bear the burden of doing this, because they need the family more than men do.

Woman and man are made for each other, but their mutual dependence is not equal. Men depend on women because of their desires; women depend on men because of both their desires and their needs. We [men] would survive more easily without them than they would without us.<sup>19</sup>

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<sup>15</sup> Rousseau, *Inequality* at 149.

<sup>16</sup> *Id.* at 149-50.

<sup>17</sup> *Id.* at 179.

<sup>18</sup> Rousseau, *Emile* at 363.

<sup>19</sup> *Id.* at 364.

Women bear children, and would raise them with difficulty without the help of the father. Material necessity thus impels a woman to induce a man to love his children.<sup>20</sup> Rousseau thought that there exist powerful reasons why she can only do this by submitting to her husband's absolute authority. First of all, the husband must feel confident that the children are indeed his.<sup>21</sup> Second, because a man's natural sexual desires can be satisfied by any woman at all, his desire for any particular woman is sporadic and weak.<sup>22</sup> It is therefore necessary for a woman to inflame her man's desire by catering to his vanity, as Joel Schwartz explains:

The male desires not his partner, but his partner's esteem (and his own self-esteem) as the stronger. He desires to be desired more than he truly desires. Because of its psychological basis, the sexual relationship must appear to the male to be a political relationship; one in which his physical strength gives him title to rule the female. Because his desire is weaker, the male must seem to be the stronger. Female modesty, the resistance to male sexual advances which is then overcome, give the male the desired appearance of strength.<sup>23</sup>

A wife therefore must pretend to be weaker than she is; she must cloister herself in her house; she must be seductive toward her husband and chaste toward all other men. By allowing him the appearance of rule over her, she achieves real rule over him. Because he thinks he's the boss, and she knows she's the boss, the *amour-propre* of both is satisfied. "Woman, who is weak, and who sees nothing outside the house, estimates and judges the forces she can put to work to make up for her weakness, and those forces are men's passions."<sup>24</sup>

Rousseau thought that the alternative of dropping the pretense and frankly asserting their equality would be a disaster for women, because then they would lose their seductive appearance of weakness, while the burden of childrearing would continue to impair their ability to provide for themselves. "The more women want to resemble

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<sup>20</sup> *Id.* at 361.

<sup>21</sup> *Id.*

<sup>22</sup> See Joel Schwartz, *The Sexual Politics of Jean-Jacques Rousseau* 17 (1984).

<sup>23</sup> *Id.* at 35.

<sup>24</sup> Rousseau, *Emile* at 387; *cf. id.* at 371-72, 385; Rousseau, *Inequality* at 134-35.

[men], the less women will govern them, and then men will truly be the masters."<sup>25</sup>

## B. Domesticity

The other notable source of Schlafly's thought is the nineteenth-century ideal of "separate spheres" for the sexes. Throughout much of the 19th century, that ideal improved the social status of middle class white women considerably. (It exacerbated the stigmatization of working-class white women and of most women who were not white, because these women were unable to conform to the domestic ideal.) The ideology of domesticity recognizes women's vulnerability, which Rousseau had emphasized, and notes that the degree of that vulnerability is highly contingent on culture.

In the 18th century, nothing about women or their social role was particularly admired, and their husbands' authority over them in all things was taken for granted. By 1850, as Glenna Matthews observes in her valuable study, *Just a Housewife*, "all of this had changed. The home was so much at the center of the culture that historians speak of a 'cult' of domesticity in the early to mid-nineteenth century. Women in their homes were the locus of moral authority in society."<sup>26</sup> Greater material prosperity and a widespread concern for how to socialize the citizens of the new American republic created the possibility and inclination for a sentimental valorizing of both domestic life and the one who presided over it. Middle class white women continued to be confined to the home, but their role there came to be understood to be, and to make them, uniquely valuable. Domesticity, Carl Degler writes, "was an alternative to patriarchy, both in intention and in fact. By asserting a companionate role for women, it implicitly denied patriarchy."<sup>27</sup> The ideology of separate spheres eventually became a basis for women's claim to political influence as women reformers began to attack aspects of male culture, such as slavery, prostitution, and

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<sup>25</sup> Rousseau, *Emile* at 363.

<sup>26</sup> Glenna Matthews, *"Just a Housewife": The Rise and Fall of Domesticity in America* 6 (1987).

<sup>27</sup> Carl N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* 28 (1980). See also Nancy F. Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835* (1977).

the consumption of alcohol, in the name of their own higher virtue.<sup>28</sup>

Some of the activities of the domesticity-based women's movement were largely altruistic. Northern white women had nothing substantial to gain from the abolition of slavery, for example. But some of what women reformers sought was pursued out of pure self-defense. Most pertinent was the crusade against alcohol, and specifically against the saloon.

In the late 1800s, the saloon was a distinctive kind of institution, with little in common with the modern bar. Saloons were usually owned by local brewers, and openly encouraged heavy drinking. They were often connected with prostitution: an 1876 survey in Philadelphia found that nearly half the drinking establishments in the city had formal or informal connections with "houses of ill fame." They encouraged the practice of "treating," in which a patron bought a round of drinks for a large group of patrons in order to show to his friends that he could "keep his end up." The practice created a valued sense of camaraderie among the men, but it had destructive consequences for their dependents. "Treating" was particularly common on paydays. The saloons frequently provided free drinks to new patrons, and also to boys, an investment that would pay off when these children became habitual drinkers. In short, as historians Mark Edward Lender and James Kirby Martin observe, saloons were a major threat to families.

They introduced children to drunkenness and vice and drove husbands to alcoholism; they also caused squandering of wages, wife beating, and child abuse; and, with the patron's inhibitions lowered through drink, the saloon led many men into the arms of prostitutes (and, not incidentally, contributed to the alarming spread of syphilis). If any of these disasters occurred, a displaced homemaker had no social welfare system to cushion the blow.<sup>29</sup>

Prohibition destroyed saloons. In some places, of course, they were replaced by speakeasies, which had distinctive dangers of their own. But the speakeasy was far less common and pervasive, and unlike the saloon, its

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<sup>28</sup> See Matthews, pp. 66-91; Degler, pp. 279-327. On the limitations and ultimate decline of the ideal of domesticity, see Andrew Koppelman, *Antidiscrimination Law and Social Equality* 124-27 (1996).

<sup>29</sup> Mark Edward Lender and James Kirby Martin, *Drinking in America: A History* 107 (rev. ed. 1987). Thanks to Nancy Koppelman for directing my attention to this volume.

ability to recruit children was hamstrung by its inability to operate openly. Prohibition is often regarded as a failure, but it did reduce drinking in the United States by somewhere between a third and a half.<sup>30</sup> After the repeal of Prohibition, the saloon never returned in its previous form. Alcohol producers consciously avoided the excesses that had ruined their public image in the past, and today they spend millions to promote "responsible drinking."<sup>31</sup>

In short, the women's campaign against alcohol was, in many ways, a real victory. The saloon did house a toxic masculine culture, and the temperance campaign brought that culture to a close. But note the qualified nature of this statement: the real target was not alcohol as such, but the culture that had grown up around it.

Alcohol, of course, is merely a chemical, and its effects when consumed by persons vary wildly in different cultures.<sup>32</sup> Consumption of alcohol was not generally regarded as a social problem at all at the beginning of the 19<sup>th</sup> century, when Americans consumed each year more than 7 gallons of absolute alcohol per capita, but it became increasingly regarded as a severe problem in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, when consumption was approximately 2 gallons of absolute alcohol annually per capita.<sup>33</sup> It became so because social norms had changed. At the time of the founding, much drinking took place in the context of family and community activities, or in small doses throughout hard workdays on the farm. Drunkenness was heavily stigmatized and liable to severe criminal punishment.<sup>34</sup> Alcohol itself was never the problem.

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<sup>30</sup> Id. at 136-47; Norman H. Clark, *Deliver Us From Evil: An Interpretation of American Prohibition* 146-48 (1976).

<sup>31</sup> Lender & Martin at 173-75.

<sup>32</sup> Alcohol use leads to aggression and sexual arousal in some cultures but not others. CRAIG McANDREW & ROBERT EDGERTON, *DRUNKEN COMPORTMENT* (1969). Ethan Nadelmann observes that

while certain types of drugs are more difficult to use in moderation than others, the principal determinants of destructive drug use patterns involve not the pharmacology of the drug but the set and setting in which the drug is consumed. That is why alcohol consumption among conquered aboriginal groups and cocaine consumption among some inner-city populations have more in common with one another than either does with patterns of alcohol or cocaine consumption among less vulnerable sectors of the population.

Ethan A. Nadelmann, *Thinking Seriously About Alternatives to Drug Prohibition*, 121 *DAEDALUS* 85, 102 (1992).

<sup>33</sup> See Lender & Martin, *passim*.

<sup>34</sup> Id. at 9-21.

## B. Schlafly's synthesis

Schlafly's views, lucidly laid out in her 1977 book, *The Power of the Positive Woman*, draws on both Rousseau's concern about the female predicament and the nineteenth-century concern about male cultural formations that are hostile to women's needs.

She begins by positing innate differences between the sexes. Perhaps the most salient is "woman's innate maternal instinct."<sup>35</sup> Men, on the other hand, cannot be induced to display the same degree of care for children.<sup>36</sup> In order to protect women's maternal role, Schlafly thinks, it is necessary to maintain social mores that reinforce appropriate gender roles. "Our Judeo-Christian civilization has developed laws and customs that, since women must bear the physical consequences of the sex act, require men to assume other consequences. These laws and customs decree that a man must carry his share by physical protection and financial support of his children and of the woman who bears his children, and also by a code of behavior that benefits and protects both the woman and the children."<sup>37</sup> But women's situation also requires them to manipulate men into marriage. Sexuality is a powerful tool in this enterprise:

The sexual drive of men is much stronger than that of women. This is how the human race was designed in order that it might perpetuate itself. The other side of the coin is that it is easier for women to control their sexual appetites. A Positive Woman cannot defeat a man in a wrestling or boxing match, but she can motivate him, inspire him, encourage him, teach him, restrain him, reward him, and have power over him that he can never achieve over her with all his muscle.<sup>38</sup>

Schlafly is as attentive to *amour-propre* as Rousseau. The most important foundation of a happy marriage "is that a wife must appreciate and admire her husband."<sup>39</sup> This is because, "[w]hereas a woman's chief emotional need is active (i.e., to love), a man's primary emotional need is passive (i.e., to be appreciated and admired)."<sup>40</sup> A woman should have "enough self-confidence that she [can] accord

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<sup>35</sup> *Power of the Positive Woman* at 17; see also *id.* at 51-52.

<sup>36</sup> *Id.* at 42-43; 223.

<sup>37</sup> *Id.* at 33.

<sup>38</sup> *Id.* at 17.

<sup>39</sup> *Id.* at 54.

<sup>40</sup> *Id.*

to her man a preeminence in their personal relationship."<sup>41</sup> The law can help here by reinforcing men's sense of their authority:

If marriage is to be a successful institution, it must likewise have an ultimate decision maker, and that is the husband. Seen in this light, the laws that give the husband the right to establish the domicile of the marriage and to give his surname to his children are good laws designed to keep the family together. They are not anachronisms from a bygone era from which wives should be liberated in the name of equality. If a woman does not want to live in her husband's home, she is not entitled to the legal rights of a wife.<sup>42</sup>

Sexual liberation is a cheat for women. "It robs the woman of her virtue, her youth, her beauty, and her love - for nothing, just nothing."<sup>43</sup> And the ideology of gender equality deprives women of powerful cultural tools, ultimately leaving men to desert their wives<sup>44</sup> for younger women.<sup>45</sup> "A woman who goes into marriage thinking she can make it a mathematically equal fifty-fifty partnership in every decision and activity will come out on the short end every time."<sup>46</sup> For women, Schlafly thinks, sex equality is a recipe for loneliness and poverty. Home, for the "liberated" woman, is "a cold, lonely apartment whose silence is broken only by the occasional visits of men who size her up as one with a liberated view of sex, societal restraints, and the institution of marriage, and therefore an easy mark for sexual favors for which they will neither have to pay nor assume responsibility."<sup>47</sup>

### 3. *The limits of Schlafly's critique*

Schlafly's vision will strike many as a strange collection of crude sexist stereotypes, but it resonated with many women, and fueled the mobilization against the Equal Rights Amendment, which she fought successfully to

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<sup>41</sup> Id. at 55.

<sup>42</sup> Id. at 50. The deference to male authority that she contemplates sometimes reaches astonishing lengths, as when she condemns the law reforms that denied husbands the right to rape their wives with impunity. See Phyllis Schlafly, *Twenty Years in Prison for Having Sex With His Wife*, Feb. 6, 2006, <http://www.eagleforum.org/column/2006/feb06/06-02-08.html>.

<sup>43</sup> Power of the Positive Woman at 16.

<sup>44</sup> Id. at 53, 59, 95.

<sup>45</sup> Id. at 27, 76, 80.

<sup>46</sup> Id. at 57.

<sup>47</sup> Id. at 63.

keep out of the Constitution. In this she won the battle but lost the war: the ERA was defeated, but its rule against sex discrimination was incorporated into Constitutional law anyway, by judicial interpretation of the Fourteenth Amendment.<sup>48</sup>

In retrospect, the fight over the ERA didn't make much difference. The feminists won, but it turned out that they were fighting the wrong war. Despite their judicial victory, women's economic disadvantages persist, partly because of their disproportionate responsibility for child-rearing and partly because the structure of workplaces disadvantages those who have such responsibilities. Most high-paying jobs are designed with the expectation that the worker has someone at home taking care of the children. Sex-based classification was never the heart of the problem.<sup>49</sup>

What has really worked to diminish male authority has been the increasing importance of women's wages in the economies of households, which makes women less economically vulnerable than they once were.<sup>50</sup> This has often produced, not abdication, but a renegotiation of the male role, with more consensual decisionmaking and greater involvement by fathers in the lives of their children. The structure that Schlafly was so eager to preserve turns out to have blocked access to real goods, for men, women, and children alike. The bonds that hold contemporary families together are very different from those contemplated by the Rousseauian vision, and show the limits of that vision.<sup>51</sup>

But Rousseau and Schlafly are not anachronisms. The modern two-earner family is very different from the structure of dependency that Schlafly contemplated. Yet

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<sup>48</sup> See *United States v. Virginia*, 518 U.S. 515, 531 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>49</sup> See Koppelman, *Antidiscrimination Law and Social Equality*, at 115-45; Andrew Koppelman, *Feminism and Libertarianism: A Response to Richard Epstein*, 1999 U. of Chicago Legal Forum 115.

<sup>50</sup> Barbara Ehrenreich points out that the appeal of Schlafly's vision was "class specific: directed to the woman who is a member of the middle or upper-middle class and whose membership depends on a contractual relationship with a man of that class." Barbara Ehrenreich, *The Hearts of Men: American Dreams and the Flight from Commitment* 161 (1983). Working-class families usually did not have the luxury of managing on a single paycheck.

<sup>51</sup> The historical malleability of the role of father in the United States is documented in detail in Robert L. Griswold, *Fatherhood in America: A History* (1993). Griswold finds enormous variation in the ways fathers understood and lived out their roles. These almost always were considerably more complex than the Rousseauian formula.

divorce continues to hurt women financially, much more than men. Rational women need to continue to worry about that, and doubtless many of them do. Women have benefited, in huge numbers, from the movement for sex equality. Yet that movement has also disrupted Rousseauian strategies, and there have been losers.<sup>52</sup> Schlafly's activism and writing is centrally animated by an admirable and humane concern for those women. She has given them a voice.<sup>53</sup>

Contemporary feminists are vividly aware of these concerns. They typically respond by calling for legal intervention to improve women's status.<sup>54</sup> But the persistence of these critiques reveals the precarious status of too many women in today's nominally egalitarian world. It is too soon to forget the older formulas for protecting women. Those formulas have obvious limitations: they bear little relation to the actual dynamics of increasing numbers of families, and sometimes they are counterproductive. The stay-at-home lesbian mother is vulnerable in exactly the ways that Schlafly worries about, and insistence on traditional gender patterns is worse than no help to her. Many women, however, still depend on Rousseauian strategies.

Schlafly's views of gender relations are troubling, and I suspect one reason they arouse so much hostility is because they are so pessimistic. They do not flatter our *amour-propre*. In this she invites comparison with other pessimistic political theorists, such as Augustine and Hobbes. Augustine was eventually supplanted by the sunnier Christianity of Aquinas: even in this fallen world, the state can do more than contain men's sinful tendencies; it can deliver real goods. Hobbes, too, was displaced by the sunnier contractarianisms of Locke and Rawls, who pointed

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<sup>52</sup> The Rousseau model is, of course, an ideal type, reflected to different degrees in different families.

<sup>53</sup> Her principal failing is that of treating the part as if it were the whole: neglecting the needs of all the people who do not follow the script that she does. The *Power of the Positive Woman* is particularly egregious in its treatment of gay people, who function as a kind of bogeyman in the argument. Thus, she denounces laws that would ban the firing of gay schoolteachers: "Surely the right of parents to control the education of their children is a right of a higher order than any alleged right of, say, the two college-educated lesbian members of the Symbionese Liberation Army [a 1970s terrorist cell!] to teach our young people." *The Power of the Positive Woman* at 90.

<sup>54</sup> See, e.g., Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (2004); Susan Moller Okin, *Justice, Gender and the Family* 176-83 (1989); Deborah L. Rhode, *Justice and Gender* (1989); Carole Pateman, *The Sexual Contract* (1988); R.W. Connell, *Gender and Power* (1987); Ehrenreich; MacKinnon. NEED MORE CITATIONS HERE.

out that we can contract for more than the avoidance of violent death. Schlafly is vulnerable in the same way. Perhaps we can hope for more from gender relations than a stable pattern of (unilateral or mutual) domination and deception.<sup>55</sup> But Augustine and Hobbes have never been conclusively refuted. In contemporary Iraq, many are doubtless nostalgic for the old Leviathan, who was at least competent to keep the peace.

A world in which women never needed to pursue Rousseauian strategies, and in which their own safety did not impel them to intervene in the cultural formations that develop among men, would be a better world. We need to work to build that world. But Schlafly is correct that this is not our world.

In the realm of sexuality, there can be no doubt that one of the things that makes so many men act like louts is a male culture of camaraderie in which women are of interest primarily as trophies with which to impress other men. And the cold, performance-driven vision of sexuality that pervades so much pornography is a part of that. Schlafly's concern, essentially, is that pornography will function in the same way as the saloon: as an institution that socializes men into a world that is destructively indifferent or even hostile to the well-being of their wives and children.

However, there is an important disanalogy between the saloon and pornography. The saloon was a well-organized set of customs attached to a specific set of destructive behaviors: drunkenness, sex with prostitutes, depleting the family's assets. The only behavior that specifically attaches to pornography is solitary masturbation. Masturbation doesn't spread disease, and it doesn't get women pregnant. Of course, Schlafly is right that this activity can be connected with the internalization of attitudes that are damaging to women. But the connection is more contingent and tenuous than she claims. Pornography is less like the institution of the saloon and more like the chemical alcohol, the social meaning and effect of which is extremely variable.

#### 4. *Pornography and moral harm*

The real issue is the message that pornography imparts to its readers. Does pornography treat women as

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<sup>55</sup> This argument is developed further in Koppelman, *Sex Equality and/or the Family*.

"playthings for male lust and sadism," desensitizing men so that they are willing to abuse women?

Here I find the reflections of the late Wayne Booth, who did important work on the moral effects of literature, to be particularly enlightening. In his book, *The Company We Keep: An Ethics of Fiction*, Booth developed a sophisticated account of the moral effects of literature. As we read, "a large part of our thought-stream is *taken over*, at least for the duration of the telling, by the story we are taking in."<sup>56</sup> The reader is invited to view the world in the same way that the narrative does. Literature is good for us when it teaches us to view the world, and particularly human interaction, subtly and sensitively. The "facts" that we take in when we read a narrative are of two kinds, Booth argues. One is "nonce beliefs," which the reader embraces only for the duration of the story: "Once upon a time there was a farmer who had the good fortune to possess a goose that laid a golden egg every day . . ." But any story will also depend for its effect on "fixed norms," which are "beliefs on which the narrative depends for its effect but which also are by implication applicable in the 'real' world."<sup>57</sup> When Aesop concludes the goose story with the claim that "overweening greed loses all," you are meant to keep thinking that once the story is over. And the point applies to all fiction, whether or not it has overt moral lessons as Aesop's does.

Morally bad literature is literature that promulgates morally bad fixed norms. Just as good literature invites us to perceive the world subtly and empathetically, it is possible - indeed, it is common - for novels or films or television shows to view the world crudely and insensitively, and to spin out self-aggrandizing fantasies that invite self-centeredness and cruelty. There is a lot of that stuff in our culture. It is a huge problem. Pornography is the tip of the iceberg.

Will censorship make matters better?

It's unlikely. First, even the most evil ideas are protected by the First Amendment. Government can't stop Nazis from publishing Hitler's *Mein Kampf*. Defenders of obscenity law try to get around this difficulty by regarding sexual arousal as entirely unrelated to ideas, and so insidious that it short-circuits the normal process

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<sup>56</sup> Wayne C. Booth, *The Company We Keep: An Ethics of Fiction* 141 (1988).

<sup>57</sup> *Id.* at 142-43.

of rational assessment of texts. But the argument doesn't work. Sexuality is not disconnected from the mind.<sup>58</sup>

The legal standard for determining obscenity also focuses rather determinedly on irrelevancies. The present test for determining whether a publication is obscene, laid down in 1973 in *Miller v. California*,<sup>59</sup> is

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

The concern about corrupt fixed norms is not identical with, and only fortuitously overlaps with, concern about the dissemination of any particular image or subject matter. The *Miller* test addresses problems of vagueness by declaring that any obscenity statute must specifically define the conduct that may not be depicted, and offers as examples "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."<sup>60</sup> Justice William J. Brennan, Jr. reportedly relied on what his clerks called the "limp dick" standard, according to which a work was obscene if and only if it showed an erect penis.<sup>61</sup>

If one wanted a litmus test for morally bad pornography, however, it would be this: *the text's fixed norms regard people as mere objects of sexual interest, whose feelings and desires do not matter.* Identifying this idea as a fixed norm in any particular text is a tricky business.<sup>62</sup> The content of any photo or film has no necessary relation to the fixed norms it propounds. The

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<sup>58</sup> See Andrew Koppelman, *Free speech and pornography: A response to James Weinstein*, 31 N.Y.U. Rev. of Law & Social Change (forthcoming 2007); Andrew Koppelman, *Is Pornography "Speech"?*, unpublished ms.

<sup>59</sup> 413 U.S. 15, 24 (1973).

<sup>60</sup> *Id.* at 25.

<sup>61</sup> See Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* 229 (Avon 1981).

<sup>62</sup> Linda Williams's survey of various types of sadomasochistic pornography finds that in all the films she surveyed, "violence invariably arises out of an agreement between dominator and dominated." Linda Williams, *Hard Core: Power, Pleasure, and the "Frenzy of the Visible"* 212 (rev. ed. 1999).

most problematic type of pornography is that which portrays violent sex in an arousing way. It is the type that has been shown in laboratory experiments to make viewers more willing to aggress against women and more tolerant of rape. If one were to be concerned merely about *portrayals* of sexual violence, however, then one would be required, absurdly, to ban feminist films such as *Boys Don't Cry*.

Moreover, even if a text does have bad fixed norms, nothing follows about its effects on its readers. The function of sexual fantasies, in particular, is complex. One of Sigmund Freud's key insights is that the overt and latent content of fantasies (sexual or otherwise) are likely to be very different from each other. Sexual fantasies operate at a quasi-infantile level of consciousness, where the superego cannot operate and where moral judgment is misplaced. Of course it is not only men who consume pornography. Nancy Friday's studies of women's sexual fantasies found that rape scenarios are exceedingly common. (Friday thinks that the fantasy served to absolve the women of guilt, since the sex that occurred was not their fault.)<sup>63</sup> The disproportionate importance of latent content in pornographic texts complicates the effort to discern the fixed norms in those texts.

The tendency to generalize from single instances to some large undifferentiated mass of "pornography," Laura Kipnis observes, relies on the unexamined assumption that low cultural forms are devoid of complexity, and that its consumers are stupid and easily brainwashed. The dangerous fantasy that is at work here is a "projection of upper-class fears about lower-class men: brutish, animal-like, sexually voracious."<sup>64</sup> A film is not like a drug. It is infinitely more complex, and its effects are similarly complex. Different narratives have different meanings to different people. We don't know enough about the consumers of pornography to intelligently censor what they get to think about, nor do we have any basis to feel confident that the readers deserve to be treated as if they were children in this way.

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<sup>63</sup> Nancy Friday, *Women on Top* 4-5 (1991); Michael J. Bader, *Arousal: The Secret Logic of Sexual Fantasies* 51-55 (2002). The benefits of pornography for many readers are examined at length in Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* 141-78 (1995), although Strossen overstates her case by refusing to acknowledge any countervailing harms.

<sup>64</sup> Laura Kipnis, *Bound and Gagged: Pornography and the Politics of Fantasy in America* 175 (1999).

We have come to some old free speech themes: state incompetence and the right to be free from thought control. The power to regulate pornography has been persistently abused, not only to suppress great works of literature, but also to suppress frank discussions of sexual ethics and to deprive women of information about birth control. The old Comstock laws would have banned the sex articles in *Cosmopolitan*, which is essentially a Rousseauian trade publication for women, full of advice on how to use sex to get your boyfriend to marry you. These are, of course, the very women whom Schlafly wants to help, and who are using precisely the strategies she describes.

Schlafly offers no safeguards against these abuses. She proposes a remarkably cramped vision of free speech: she would like to "restore full rights to local juries to make the final determination as to what is obscene."<sup>65</sup> Even Robert Bork, whose denunciation of "the suffocating vulgarity of popular culture" she quotes with approval,<sup>66</sup> does not go so far. At the hearings on his ultimately ill-fated nomination to the Supreme Court, Bork said that "[a] community's definition or characterization of a particular magazine or book or movie as 'pornographic' cannot be taken as final," because then a state could censor any speech it likes by calling it pornographic.<sup>67</sup> Schlafly's view of the appropriate scope of free speech protection is unclear.

But if censorship is a bad idea, moral criticism of pornography is an urgent necessity. And here I'd like to end with a lament about the state of discourse on this subject. It's no coincidence that you are reading this in a law journal. Too many of the serious discussions about the moral import of pornography take place in the context of proposals to criminalize it. Criminalization is a mistake. But discussion of pornography's moral import is urgently needed.

And not only the moral import of pornography. There are other narratives ubiquitous in our culture that need examination even more urgently. One story that dominates American popular culture, from R-rated movies to Disney cartoons, is a struggle between good guys and bad guys, in which the problem is solved in the end by the death of the bad guy.<sup>68</sup> The reader is invited into a world in which

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<sup>65</sup> Power of the Positive Woman at 157.

<sup>66</sup> The Supremacists at 57.

<sup>67</sup> Norman Vieira and Leonard Gross, Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations 102 (1998).

<sup>68</sup> The animator Hayao Miyazaki, whose work has sometimes been criticized as too sophisticated for American children, understands the problem

violence is the answer to all our problems, and the only question is whether the evil ones will in fact be wiped out. It is a tale that bears a striking resemblance to the world view of the September 11 terrorists. Under some circumstances, such narratives are accurate, preeminently during World War II, which still dominates the American imagination. (Even then, a more ambivalent view of our ally Stalin would have served us better.) But that narrative is a dangerous paradigm with which to approach the world, which is usually much more complicated. At Abu Ghraib, for example, it seems to have made it harder for the jailers to notice that the overwhelming majority of their prisoners were innocent people who were merely picked up on the basis of suspicions that proved groundless.<sup>69</sup>

The same narrative appears to have played a large role in the biggest foreign policy disaster since Viet Nam: the failure to plan adequately for the occupation of Iraq. President Bush and his advisers desperately wanted to prevail there. They doubtless feared above all that Americans would die unnecessarily if they did not properly prepare for the war. Yet somehow none of them could get their minds around the idea that their difficulties might not be conclusively solved by the defeat of Saddam Hussein. Chalk another one up to the corrupting effects of bad literature.

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well. "The concept of portraying evil and then destroying it - I know this is considered mainstream, but I think it's rotten," he said, explaining why his films have no clearcut villains. "This idea that whenever something evil happens someone particular can be blamed and punished for it, in life and in politics, it's hopeless." A.O. Scott, *Where the Wild Things Are*, N.Y. Times, June 12, 2005, sec. 2, at 15.

<sup>69</sup> See Andrew Koppelman, *Reading Lolita at Guantanamo*, 53 *Dissent* 64 (Spring, 2006). More recently, the television series *24*, which routinely shows the country saved by the fictitious hero's willingness to torture suspects, has been directly linked to copycat abuses by American troops in Iraq. The dean of West Point and a group of top military interrogators have met with the show's creators to implore them to change the show's treatment of torture. This evidently was to no avail; the series is making too much money as it is. Jane Mayer, *Whatever It Takes*, *New Yorker*, Feb. 19 & 26, 2007, at 66.