Pornography And Privacy: Towards The Development Of A Group Based Theory For Sex Based Intrusions Of Privacy

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Joyce Martin, a "hat check girl" at the Knoxville Senators Club, permitted her picture to be taken for an internal club bulletin. The club, however, used Martin's picture in an advertising campaign designed to attract new members.[1] *A photograph of Martin checking hats appeared in the* Knoxville News Sentinel *accompanied by the following words:*

> *Hello Sport! Tired of sitting at home looking at Mom all night . . . Live a little . . . let us check your hat as a member of the Senators Club. Membership drive in progress. NO INITIATION FEE. Family Club Membership $40.00 a year. Single Club Membership $25.00 a year. Call 577-5591 for details or better still ask a member. P.S.—Mom—BETTER COME ALONG AND WATCH HIM.*[2]

This seemingly harmless photograph became a widely disseminated picture of Martin checking hats for men's sexual pleasure, helping men "live a little."[3]

Mary Jane Russell, a highly successful professional model, agreed to be photographed reading an educational book in bed. A male model was to be pictured in an adjoining bed. Russell believed the photograph would be used solely to advertise educational material. The photograph, however, was altered.[4] *Russell was portrayed as a high-priced call girl in the company of an elderly man who was pictured*

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1. Martin v. Senators, Inc., 220 Tenn. 465, 418 S.W.2d 660 (1967) (alleging that defendants invaded her privacy by displaying a photograph of her publicly; Martin sought compensatory damages for infliction of great mental pain, humiliation, mortification, and exposure to public ridicule and disgrace).
2. *Id.* at 468, 418 S.W.2d at 662.
3. Martin alleged:

   > [S]he had become the common talk of people in the community; . . . it was generally understood in the community that she had for hire permitted her picture to be taken and used as public advertisement, consenting to the language used in the advertisement.

   Id. at 469, 418 S.W.2d at 662.
4. Russell v. Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959). Russell

reading Clothes Make the Man, *an obscene book.*[5] *The altered photograph was used in a nationwide advertising campaign for bed sheets. The text accompanying the picture stated:*

> *We bought this picture to advertise Spring Maid Sheets, but we can't write the caption. Elliott Springs tried, but all he came up with was* Lost Weekend, Knight Errant, Lost Between the Covers *and* You Can't Go Wrong With On *[sic]* a Spring Maid Sheet.[6]

As part of the advertising campaign, Springs sold copies of Clothes Make the Man *for fifty cents each.*[7]

Carole Vitale posed for semi-nude and nude photographs in Playboy, *including a centerfold. The* National Lampoon *used her centerfold as part of a parody of* Playboy *advertisements which featured a man behind the door of a closed bathroom stall.*[8] *The man's sneakers and pulled-down pants could be seen under the stall door; a* Playboy, *opened to the Vitale centerfold, was lying near his feet. The text of the parody read:*

> *A young man in touch with himself and his own imagination. Self-reliant, and with an appreciation for his personal privacy, he keeps his hand close to his chest and an eye out for unexpected interruptions of his daily routines. With confidence in his ability to handle himself in tense situations, the PL*YB*Y reader wrings every last drop of satisfaction from his private pursuits. Helping him stand up to that challenge is his favorite magazine. Fact: PL*YB*Y is read by nearly half of all young men who eventually excell [sic] at tennis, handball, or arm wrestling, and spent at least $12 on fine spurting goods last year alone. To reach that young man, put yourself in PL*YB*Y. He does (Source: 1973 TGIF).*[9]

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claimed that she had not consented to the use of the photographs because several blanks in the modeling contract were not filled in at the time of signing and that, in any case, trade usage and oral communications could show that the contract was limited to a specific use of the photograph. She brought common law libel and statutory invasion of privacy claims for the alleged use of her picture for advertising purposes without the proper, required consent. She allegedly had not consented to the use of the picture that was published; instead she had allegedly consented to the publication of another picture. Her husband brought a loss of consortium claim.

5. *Id.* at 171, 183 N.Y.S.2d at 17 ("This book had for some years been nationally advertised to contain reading matter and illustrations so vulgar in content that publication thereof had been refused by editors.").

6. *Id.* at 183, 183 N.Y.S.2d at 28.

7. *Id.*

8. Vitale v. National Lampoon, Inc., 449 F.Supp. 442 (E.D. Pa. 1978) (alleging that the use of the photograph with the accompanying comment "was defamatory and libelous in that it depicted her as a tramp and a lady of perverted morals," *id.* at 444, and that it was published libelously with reckless disregard for the truth and with malice).

9. *Id.* at 448 app. B. *See also id.* at 447 app. A (reprinting a typical *Playboy* advertisement).

"Miss Wyoming," Kimerli Jayne Pring, performed a baton twirling act in a Miss America pageant.[10] Penthouse Magazine *subsequently published a parody on the Miss America pageant. Charlene, the woman featured in the parody, appears as "Miss Wyoming" in a Miss America contest. During the pageant, Charlene performs a fellatio-like act on her baton that stops the orchestra. She also is described as thinking she might save the world by similar conduct with high international officials. The* Penthouse *story ends with Miss Wyoming performing fellatio and levitating her coach while the television cameras focus on them rather than on the new Miss America.*[11]

Ann-Margret starred in the widely acclaimed motion picture, Magic. *In one of the film's scenes, for the second time in her screen career, she appeared unclothed from the waist up.*[12] *Ann-Margret carefully limited the number of persons present when the studio filmed the semi-nude scene. She refused to allow still photographs to be made from the film of her performance.*[13] High Society Celebrity Skin, *a magazine which specializes in printing photographs of well-known people caught in the most revealing situations, featured Ann-Margret in one of its issues. Her photograph appeared on its cover. Additional photographs appeared inside the magazine. Among them was a still photograph of her nude scene in the movie,* Magic, *in which one of her breasts was visible.*[14]

Linda Lovelace has engaged in group sex for profit, appeared in pornographic underground films,[15] *and starred in the movie,* Deep Throat.[16] *Lovelace agreed to take part in these activities after enduring*

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10. Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982).

11. Pring alleged that publication of the article created the following consequences:

> The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite (male companion) and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest.

Id. at 441.

12. Ann-Margret v. High Soc'y Magazine, Inc., 498 F.Supp. 401 (S.D.N.Y. 1980). Plaintiff sought to enjoin defendants from using a photograph which depicted her nude from the waist up. She claimed violation of the right of privacy through the publication of the photograph, and invasion of her right of publicity through the publication of all the pictures used in the magazine.

13. *Id.* at 403 n.2.

14. *Id.* at 404.

15. In one film Lovelace had sex with a dog, in the other she made love to another woman. L. Lovelace, Ordeal 99-113 (Berkeley paperback ed. 1980).

16. In the movie Lovelace portrayed a woman with a clitoris in her throat, who enjoyed what, without hypnotism, would have been gag-inducing oral sex.

beatings, rapes, threats, enslavement, and a coerced marriage to Chuck Traynor. Lovelace was never paid for her participation in these activities. Instead, under forged contracts or contracts of adhesion which she was forced to sign, the profits went to Traynor and to a corporation he formed—Linda Lovelace Enterprises.[17]

Victoria Price Street[18] *was the leading prosecution witness in the "Scottsboro rape trial," a trial famous for its racism.*[19] *The nine Black men accused of raping Street, a white woman, were denied the right to counsel, denied a jury of their peers, and convicted upon insufficient evidence.*[20] *More than forty years later, NBC televised a privately produced historical drama about the trial. The drama contained many inaccuracies about Street, including the statement she was dead. It portrayed her as a "loose woman," principally through the defense attorneys' undocumented descriptions of her as a whore.*[21] *At the time of the broadcast, Street was "chopping and picking cotton, working in the mills, working as a tenant farmer, living in what most people would call a shack not 40 miles from Scottsboro with few reminders of what happened in another era."*[22]

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17. L. Lovelace, *supra* note 15, at 238.

18. Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981).

19. *See generally* A. Davis, Women, Race and Class 198-99 (1981).

20. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932) (establishing right to effective counsel); Norris v. Alabama, 294 U.S. 587 (1935) and Patterson v. Alabama, 294 U.S. 600 (1935) (finding invidious discrimination in the selection of the jury); Street v. National Broadcasting Co., 645 F.2d at 1230 (discussing trial judge's reversal of a conviction of one of the Scottsboro defendants because of insufficient evidence).

21. According to the court:

> The effect of the drama as a whole is to create a character, Victoria Price. She is portrayed as a loose woman who falsely accuses the Scottsboro boys (sic) of raping her. This image of her character is created throughout the play by her own words and actions in the flashbacks and in the witness chair and by what others say about her.

Street, 645 F.2d at 1232-33.

She was called a "bum" and a "hustle." For example, the film portrayed a pre-trial conversation between the two lawyers representing the Scottsboro defendants in which one lawyer advises the other to display restraint in the cross-examination. He says, " 'The Scottsboro transcripts are really clear. . . . The defense at the last trial made one thing very clear, Victoria was a *whore*, and they got it in the neck for it. . . . ' " (emphasis added) *Id.* at 1231 (quoting *Judge Horton and the Scottsboro Boys*, NBC TV (date unknown)). That conversation was allegedly completely fabricated; it did not even appear in the book on which the historical drama was based.

22. Barbash, *Victoria Price: Accuser of the Scottsboro Boys* [sic] *Fights for 40 Years of Forgetting*, Wash. Post, Jan. 4, 1982, at A1, col. 5, A2, col. 1 (also reporting that NBC settled the suit out of court).

As the *Post* explained:

Each of these women felt she had been portrayed as a whore.[23] Each objected to that portrayal and all but Linda Lovelace sought legal relief for invasion of privacy or defamation.[24] None obtained full legal relief. Most obtained no relief at all.[25] This article will examine that failure and suggest

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> Street hasn't read the [accounts of the "Scottsboro Boys" case in the] encyclopedias. The only reading materials visible in her house are the yellowed newspapers she uses as cushions to protect her from the metal wires that once held her couch together but now protrude from it. For her, the curtain went down with the last of the Scottsboro trials in 1940 and didn't rise again until the night of the television program.

Id. at A2, col. 1.

These comments are meant to suggest that Street, alone, was not responsible for the racist treatment that the Scottsboro youths received. *She* did not deny them effective counsel or a jury of their peers.

These comments are *not*, however, meant to absolve Street, or any women, of racism. As Angela Davis has noted:

> No one can deny that the women [in the Scottsboro trials] were manipulated by Alabama racists. However, it is wrong to portray the women as innocent pawns, absolved of the responsibility of having collaborated with the forces of racism.

A. Davis, *supra* note 19, at 198.

The extent of racism within the criminal justice system cannot be underestimated. Of the 455 men executed between 1930 and 1967 on the basis of rape convictions, 405 were Black. *Id.* at 172.

This article focuses on the *Street* defamation case only to show how the media chooses to portray a woman as a whore for sensationalism. This article presumes that NBC could have effectively shown the racism of the American judicial system without falsely portraying Street as a whore. The racism of the rape charge is beyond the scope of this article.

23. *See supra* notes 1-22 and *infra* note 26.

24. Many of these women also brought a closely related action for defamation. Because defamation law is closely interrelated with privacy actions, this article will also consider defamation law in some detail. *See generally* W. Prosser, Handbook of the Law of Torts § 117, at 813-14 (4th ed. 1971) (commenting on the overlap between defamation and invasion of privacy; suggesting that any defamation action could be conceptualized as an invasion of privacy action).

25. *Martin*, 220 Tenn. at 469, 473, 418 S.W. at 662, 664 (demurrer sustained); *Russell*, 18 Misc. 2d at 182, 191, 183 N.Y.S.2d at 27-28, 36 (dismissing all of plaintiff's counts but granting leave to replead those dealing with alteration of her photograph); *Vitale*, 449 F.Supp. at 446 (granting defendant's motion for summary judgment); *Pring*, 695 F.2d at 443 (judgment for plaintiff reversed); *Ann-Margret*, 498 F.Supp. at 408 (action dismissed); *Street*, 645 F.2d at 1229, 1237 (directed verdict for defendant affirmed).

But in other cases female plaintiffs have been more successful. *See* Clark v. American Broadcasting Co., 684 F.2d 1208 (6th Cir. 1982) (reversing and remanding a summary judgment motion that the district court had granted for the defendant in a defamation action involving defendant's alleged portrayal of Clark as a street prostitute); Lerman v. Chuckleberry Publishing, Inc., 544 F.Supp. 966 (S.D.N.Y. 1982); 521 F.Supp. 228 (S.D.N.Y. 1981); 496 F.Supp. 1105 (S.D.N.Y 1980) (Plaintiff prevailed on summary judgment on claims of right to publicity and invasion of privacy involving defendant's use of plaintiff's name in bold lettering accompanying photographs of a naked woman and an orgy

a new approach to the problem of sex-based intrusions, an approach that reflects both historical concerns associated with an amorphous doctrine of privacy and a woman-centered persective.

This article labels the portrayal of these seven women "pornography," because they involve the graphic depiction of women as whores, the original meaning of pornography.[26] Recognizing the connection between these portrayals, and the definition of pornography, serves two purposes. First, it emphasizes the widespread and injurious[27] depiction of women as whores in our society outside the traditional sphere commonly recognized as pornography. Second, it facilitates challenging some of the assumptions that underlie the traditional consideration of pornography as only a question of free speech.[28]

Many commentators view pornography as solely a free speech issue. That approach assumes pornography is harmless and must be

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scene in a magazine and in advertisements for the magazine.); Geisler v. Petrocelli, 616 F.2d 636 (2nd Cir. 1980) (vacating and remanding judgment dismissing diversity action against publisher who had published book in which a woman with plaintiff's name was lured into "untoward sexual conduct which is graphically portrayed").

By contrast, men who bring similar actions are often successful. *See, e.g.*, Ali v. Playgirl, Inc., 447 F.Supp. 723 (S.D.N.Y. 1978) (obtaining a preliminary injunction to restrain publisher from distributing all copies of the magazine in England and New York that contained a drawing of a nude Black man seated in the corner of a boxing ring with a caption describing him as 'the Greatest'); Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1982) (men alleging injury for description of them as "faggots" and "fairies"); Carson v. Here's Johnny Portable, 698 F.2d 831 (6th Cir. 1983). *See also* note 32 *infra*.

26. 7 Oxford English Dictionary 1131 (1933). Courts and feminist scholars have recognized this literal definition. *See, e.g.*, Miller v. California, 413 U.S. 15, 18-19 n.2 (1973); A. Dworkin, Pornography: Men Possessing Women 9 (1981); Steinem, *Erotica and Pornography: A Clear and Present Difference* in Take Back the Night: Women on Pornography 37(L. Lederer ed. 1980) [hereinafter cited as Take Back the Night]. United States v. Thevis, 484 F.2d 1149, 1152, n.3 (5th Cir. 1973).

27. The injury from pornography is two-fold. First, the women being depicted are injured through the exploitation and objectification of their sexuality. Second, all women are injured through the perpetuation of a culture of sexual objectification which can only comprehend women as sex objects. *See infra* note 55 and text accompanying note 50. *See also* A. Dworkin, *supra* note 26. *Cf.* Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) (discussing injury of racial epithets).

28. Pornography pervades society, whether it be hard-core, soft-core, art, or advertising. Hard-core pornography depicts women as willing, ready prey for men's sexual pleasures; art often exhibits women's bodies to entice male viewers; advertising often displays women to help sell a product. "Pornography becomes difficult to distinguish from art and ads once it is clear that what is degrading to women is compelling to the consumer." MacKinnon, *Feminism, Marxism, Method, and the State*, 7 Signs 515, 532 (1982). Pornography's success depends upon its many pervasive forms going unmentioned, even unnoticed, and the oppression of the women portrayed remaining unrecognized. *See generally* P. Freire, Pedagogy of the Oppressed (1970); All the Women are White, All the Blacks are Men, But Some of Us are Brave (G. Hull, P. Scott & B. Smith eds. 1982) [hereinafter cited as But

protected to safeguard representative democracy.[29] Women's lack of participation and representation in our purportedly democratic institutions, and specifically women's lack of freedom within the pornography industry, have never entered the free speech debate.[30] This article brings those issues to the forefront.

Some of Us are Brave]; A. Rich, On Lies, Secrets, and Silence (1979); T. Olsen, Silences (1978); Nice Jewish Girls (E. Beck ed. 1982) (documenting various aspects of Western methodology and the silence of oppressed groups).

Methodologically, Adrienne Rich attributes women's invisibility to the fact that the questions raised are:

> inevitably male questions, posed in a worldview and an ethical system which has persistently denied moral and ethical value to women, viewing us always as marginal, dubious, or dangerous, and in need of special controls.

A. Rich, *supra* at 16. *See also* M. Daly, Beyond God the Father 11-16 (1973) (challenging women to ask what patriarchy considers to be "nonquestions").

Women's studies attempts to help women escape invisibility. Nevertheless, this body of scholarly work has been criticized for ignoring the lives of ordinary women, particularly ordinary women of color. *See, e.g.*, Hull & Smith, *Introduction: The Politics of Black Women's Studies*, in But Some of Us Are Brave, *supra* at xxi.

29. The first amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . .

U.S. Const., amend. I. The question in cases involving any regulation of pornography is whether the phrase "no law" must be interpreted literally or whether a balancing test would be more appropriate. Although courts and commentators disagree as to the exact test that should be imposed, *see infra* note 30, they generally agree that the first amendment's protection of free speech should be the primary focus of concern. Because the purpose of the first amendment is said to be protection of the lively debate necessary to a representative democracy, commentators and courts tie the protection of pornography to the protection of representative democracy. *See, e.g.*, Fahringer, *Obscenity Law: Who Will Guard the Guards?*, Trial, Aug. 1980, at 20 (arguing that free speech must be a universal concept to maintain a representative form of government).

30. The legal standard for determining whether pornography is protected under the first amendment was set forth in Miller v. California, 413 U.S. 15, 24 (1973):

> (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.

Material that satisfies each part of the *Miller* test is considered to be "obscene" and thereby unprotected by the first amendment.

The focus of the *Miller* criteria is the community's standards for morality rather than the potential danger of pornography to society. In all of its pornography decisions the Supreme Court has assumed that the argument that "exposure to obscene materials adversely affects men and women" is an unprovable assumption. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973). That view derives, in large part, from the Report of the Commission on Obscenity and Pornography (1970). *But see* Russell, *Pornography and Violence: What Does the New Research Say?* in Take Back the Night, *supra* note 26, at 218-38 (presenting evidence of the harm of pornography).

I. Privacy Doctrine

Historically, privacy doctrine[31] evolved to protect people from offensive intrusions, particularly intrusions that affected their interpersonal relationships. But in fact, this article will show that it has served to protect existing forms of interrelations such as the family and traditional heterosexuality, including women's oppression within those relations. Privacy doctrine has confined women[32] to the private sphere, beyond the reach of public law, beyond protection from offensive intrusions. Specifically, privacy doctrine has failed to aid the victims of

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See also Fahringer, *supra* note 29; Rosen, *Changing Standards of Obscenity in Texas*, 34 Sw. L.J. 1201-27 (1981); Stone, *Obscenity Law Reform: Some Practical Problems*, 130 New L.J. 872 (1980); Yaffe, *The Law Relating to Pornography: A Psychological Overview*, 20 Med. Sci. & Law 20-27 (1980); Note, *Texas' New Obscenity Laws: Redefining Taste*, 17 Hous. L. Rev. 835 (1980); Comment, *Obscenity Law In Ohio*, 13 Akron L. Rev. 520 (1980); Comment, *Pennsylvania Obscenity Law: A Pornographer's Delight*, 41 U. Pitt. L. Rev. 251 (1980) (assuming that pornography is not harmful and should be protected as a part of protecting free speech). *But see* Bryant, *Sexual Display of Women's Bodies—A Violation of Privacy*, 10 Golden Gate U. L. Rev. 1211 (1980) (privacy analysis); Gerety, *Pornograpy and Violence*, 40 U. Pitt. L. Rev. 627 (1979) (violence analysis).

31. "Privacy doctrine" refers to the various doctrines that have emerged from law's consideration of privacy-related issues. Its existence encompasses both formal (*e.g.* jurisprudential rules) and informal (*e.g.* social rules) uses of law because law penetrates all aspects of society.

32. "Women" refers to all women although each woman's individual experience may differ. *See, e.g.*, But Some of Us are Brave, *supra* note 28; A. Davis, *supra* note 19; Murray, *The Liberation of Black Women*, in Voices of the New Feminism (M. Thompson ed. 1975) (documenting the specific experience of women).

As Catharine MacKinnon has noted, the use of the word "woman" in feminist theory must include all women "in some way, without violating the particularity of any woman's experience. Whenever this fails, the statement is simply wrong and will have to be qualified or the aspiration (or the theory) abandoned." MacKinnon, *supra* note 28, at 520 n.7.

"Woman" is a gender, not a biological classification. It therefore only refers to female-born, not transsexual, women. *See generally* J. Raymond, The Transsexual Empire (1979) (arguing that the phenomenon of transsexuality is a product of patriarchy).

This article does *not* claim that its theory could apply to men who are portrayed pornographically, because men, traditionally, have not been and are not now sex objects in our society. Interestingly, in the only closely analogous case involving a man, a pornographic portrayal and a privacy action, Ali v. Playgirl, Inc., 447 F.Supp. 723 (S.D.N.Y. 1978), Mohammed Ali was successful in obtaining a preliminary injunction to restrain a publisher from distributing all copies of the offensive magazine in England as well as New York. (*Playgirl Magazine* had printed a drawing of a nude Black man seated in the corner of a boxing ring with an accompanying verse which described him as "the Greatest.") The court granted Ali the desired injunction finding that he was likely to succeed on the merits because: (1) he was not a public figure in the context of the portrayal, and (2) his right of publicity or privacy was invaded by the offensive depiction. *Id.* at 727-28. As we will see, courts systematically draw the opposite conclusion for female plaintiffs.

sex-based intrusions.[33] The seven cases highlighted in this article exemplify that failure.

Privacy doctrine pervades many areas of law: legal theory, tort law, and constitutional law. It also pervades women's oppression under patriarchy.[34] It preserves, protects, strengthens, masks, hides, distorts, and reflects women's sexual abuse. Its central role—control of women's sexuality, of intimate, sensitive spheres of interaction—has gone unrecognized.

This article examines that role in the context of women's complaints for invasion of privacy for sex-based intrusions. It traces how privacy doctrine has failed to respond to flagrant abuses of women's sexuality.[35]

Four major themes emerge from this analysis. First, a false public/private distinction pervades privacy doctrine. That distinction pretends that women share men's public power and men's privilege of choosing privacy.

Second, law fails to recognize that privacy is compulsory for women while a privilege for men. Compulsory privacy makes women invisible[36] while mythicizing,[37] distorting, and obscuring them.[38] It imposes powerlessness on women throughout society including within the public

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33. *See infra* section II of this article.

34. "Patriarchy" refers to a society in which males control females. That control relegates women to a position of powerlessness, in both the private and public spheres. Adrienne Rich has defined patriarchy in its relationship to the false privatization of women's lives.

> By [patriarchy] I mean to imply not simply the tracing of descent through the father, which anthropologists seem to agree is a relatively late phenomenon, but any kind of group organization in which males hold dominant power and determine which part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms. (It is characteristic of patriarchal thinking that these realms are regarded as separate and mutually exclusive.)

A. Rich, *supra* note 28, at 78.

Both men and women contribute to the survival of patriarchy by transmitting male values throughout society and from one generation to another. *See, e.g.*, M. Daly, *supra* note 28, at 125 (referring to lesbians' transmission of traditional sex role values through role playing); Hull & Smith, *Introduction: The Politics of Black Women's Studies*, in But Some of Us are Brave, *supra* note 28 (referring to patriarchal values within women's studies).

35. "Privacy doctrine" is a legal term. It is *not* what feminists mean when they refer to the private or personal in the statement, "the personal is political." Feminists challenge the distinction between the private and the public, whereas law perpetuates it. Feminists, gays, and lesbians, however, have not always understood that privacy doctrine is alien to their notion of privacy; instead, they have often sought to use privacy doctrine to free themselves from oppression. Those attempts are, at best, misguided. *See, e.g., infra* section II.

36. *See supra* note 28.

37. *See generally* M. Daly, Gyn/Ecology 151-52 (1978) (exploring the relationship between the story of Cinderella and a foot-binding ideology); A. Dworkin, Woman Hating

sphere, which it defines by distinction. It confines women to a sphere beyond the protection of law, even beyond the protection of privacy doctrine.

Third, privacy doctrine is premised on an individual-based perspective. That perspective cannot comprehend that women's inability to gain public power or to choose privacy is an aspect of their powerlessness *as women*. It cannot comprehend the existence of an action by a woman, as a member of the group—women. Privacy doctrine, like all of law,[39] uses an individual-based perspective that denies the existence or importance of group-based theory. Only group-based theory can help women escape from compulsory privacy.[40]

Fourth, compulsory privacy supports the norms of male power. It imposes the norms of heterosexuality on women while making the women who complain of sexual abuse seem either undeserving or supersensitive.[41] It precludes both traditional and untraditional women from obtaining legal relief for invasion of privacy, while preserving the norms which make their oppression possible.

This article first examines the historical emergence of privacy doctrine by looking at four diverse influences on the doctrine: (1) Samuel Warren and Louis Brandeis' theoretical work; (2) Herbert Hart, Albert Sacks, and Lon Fuller's theoretical work; (3) William Prosser's doctrinal work; and (4) constitutional case law. It then examines the doctrine's application to women's complaints for invasion of privacy. Finally, the

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29-49 (1974) (exploring the woman-hating symbols within Sleeping Beauty, Cinderella, and Snow White, and other fairy tales; connecting those images to pornography); M. Daly, *supra* note 28, at 44-68 (1973) (exploring the story of Eve). *But see* Merseyside Women's Literature Collective, *Snow White*, in Hard Feelings 27-35 (A. Fell ed. 1979) (re-writing fairy tale with more positive female images). *Compare* Z. Budapest, The Holy Book of Women's Mysteries Part II, 197 (1980) (creating a feminist spirituality yet blaming Jews for killing the goddess), *with* Beck, *Why Is This Book Different From All Other Books?*, in Nice Jewish Girls *supra* note 28, at xix-xx (criticizing Budapest's work for its anti-Semitism).

38. I thank Vicky Bergvall for helping me to realize that mythification does not necessarily include distortion.

39. Even the fourteenth amendment to the United States Constitution is basically concerned with fairness to individuals rather than fairness to groups. The only sources of group-based theory within the Constitution, as will be discussed later, are the thirteenth and nineteenth amendments. Both amendments recognize that certain groups have a history of servitude or partial citizenship. *See infra* text accompanying notes 186-91. The right to treatment as an equal is often characterized as the right of "each individual" to receive "equal regard as a person." L. Tribe, American Constitutional Law § 16-1, at 993 (1978).

40. This article argues for a group-based privacy doctrine. This idea of "group privacy" is not original to me, although no one else has analyzed it in the way I have in this article. I first heard of the concept in a Harvard Law School class taught by Professor Catharine MacKinnon. MacKinnon first mentioned the phrase and it was further developed by class members, particularly William Fleming. *See also* Bryant, *supra* note 30, at 1211.

41. *See infra* text accompanying notes 149-69.

article suggests a new approach to those complaints—one that uses a group-based perspective.

A. Warren and Brandeis

Modern privacy doctrine derives from Samuel Warren and Louis Brandeis' pioneering work, *The Right to Privacy*, which expanded a property-based doctrine into a person-based doctrine encompassing thoughts, emotions, and sensations.[42] Warren and Brandeis sought to maintain a minimum level of decency in a society threatened by developing mass technology. They thought a person-based right of privacy could help protect civilization against the onslaught of modern enterprise and invention.[43]

Warren and Brandeis recognized the media as a very powerful force in society, influencing basic moral standards. They understood that individuals portrayed by the media needed protection from that powerful institution. Their basic concerns and conceptualizations parallel many feminists' descriptions of female sexual objectification through pornography. Nevertheless, their work is bound by certain assumptions which have limited its usefulness to the victims of sexual abuse, particularly of pornography.

Warren and Brandeis believed a right to privacy would help protect society from the spread of "personal gossip" by the modern media. They felt such gossip was destroying the moral fabric of society.

> Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. . . . [M]odern enterprise and invention have, through invasions upon [a person's] privacy, subjected him [sic] to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a

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42. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). They argued that the "right to life" doctrine had:

> come to mean the right to enjoy life, —the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Id. at 193.

43. *Id.* at 195-96.

> lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts.[44]

Although Warren and Brandeis labeled the problem "personal gossip," they clearly had in mind the problems of female sexual abuse which this article terms pornography. To demonstrate the need for a right to privacy, they cited the case of *Marion Manola v. Stevens & Myers*.[45] Manola, an actress, had been photographed surreptitiously while appearing on Broadway playing a role which required her to wear tights. She brought an action to enjoin the photographer's use of the photograph. Warren and Brandeis mentioned the case to show that privacy issues, related to the recent advent of "numerous mechanical devices,"[46] were emerging in the courts.

The harm of these recent inventions, according to Warren and Brandeis, was the "inva[sion of] the sacred precincts of private and domestic life. . . . " They labeled the problem "personal gossip" because it "threaten[ed] to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' "[47]

The harm, according to Warren and Brandeis, extended to both the individual portrayed and society at large. "[M]odern enterprise and invention have, through invasions upon [the portrayed individual's] privacy, subjected him [sic] to mental pain and distress, far greater than could be inflicted by mere bodily injury."[48] They considered the injury to society at large to be even more devastating.

> [Gossip] belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. . . . Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.[49]

Although Warren and Brandeis recognized a harm to both the individual portrayed and society as a whole, they created a cause of action only for the individual portrayed. A tension concerning the significance of the injury to society as a whole underlies their work. On the one hand, they labeled the problem "personal gossip" and created only a right of "privacy" for the individual portrayed. On the other hand, they recognized both the public implications of the injury and the way that

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44. *Id.* at 196.
45. N.Y. Times, June 15, 18, 21, 1890.
46. Warren & Brandeis, *supra* note 42, at 195 n.7.
47. *Id.* at 195.
48. *Id.* at 196.
49. *Id.*

privacy and publicity can be intertwined (for example, the public portrayal of Manola's private sexuality). As we shall see, however, privacy doctrine case law has developed in complete isolation from Warren and Brandeis' recognition of the harm to society as a whole. The modern doctrine codifies a very strong, although artificial, distinction between the public and private, and fails to recognize how these arenas are often intertwined. It has helped protect pornography rather than destroy it.

Many feminists agree with Warren and Brandeis that depictions like Manola's (which this article recognizes to be pornography) harm both the individual portrayed and society as a whole. Pornography treats the individual portrayed as a nonperson or an object and helps create and perpetuate a sexually objectifying and sadistic culture.

> [I]t is claimed that no one is being violated, that no one's rights are being abrogated; therefore the one who is the object of cultural sadism (the ideology of pornography) does not exist as a person. With its objects or victims defined as nonpersons, cultural sadism is a sanctioned right.[50]

Despite these parallels with radical feminist concerns, two aspects of Warren and Brandeis' work limit its usefulness. First, Warren and Brandeis only recognized one-half of the interconnection between the public and the private. They described how private matters can enter the public sphere without consent.[51] But they failed to recognize that movement can also occur in the other direction. Public power can also enter the private sphere, injuring the person acted upon.[52] For instance,

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50. K. Barry, Female Sexual Slavery 211 (1979).

51. Warren & Brandeis, *supra* note 42, at 195.

52. The feminist expression, "the personal is political," challenging the public/private distinction, is commonly used in feminist circles, but has rarely been explained. Catharine MacKinnon has offered the following explanation:

> Relinquishing all instinctual, natural, transcendental, and divine authority, this concept grounds women's sexuality on purely relational terrain, anchoring women's power and accounting for women's discontent in the same world they stand against. The personal as political is not a simile, not a metaphor, and not an analogy. . . . It means that women's distinctive experience as women occurs within that sphere that has been socially lived as the personal—private, emotional, interiorized, particular, individuated, intimate—so that what it is to *know* the *politics* of woman's situation is to know women's personal lives.
>
> The substantive principle governing the authentic politics of women's personal lives is pervasive powerlessness to men, expressed and reconstituted daily *as* sexuality. To say that the personal is political means that gender as a division of power is discoverable and verifiable through women's intimate experience of sexual objectification, which is definitive of and synonymous with women's lives as gender female. Thus, to feminism, the personal is epistemologically the political, and its epistemology is its

victims of wife battery, incest, and rape are victims of men's use of public power within the private sphere. Understanding this two-directional movement is critical to understanding how women are systematically disempowered within both the public and private spheres. By contrast, Warren and Brandeis' exclusive focus on only one half of the problem has served to further romanticize the safety of the private sphere. They assumed that Manola had a privacy to lose. An examination of the private sphere within which she lived as a woman would reveal that she did not.[53]

Second, Warren and Brandeis assumed that less powerful groups would want to maintain the current social standards and norms of morality. The harm of gossip, in their view, was its *lowering* of social standards and morality.[54]

Radical feminists argue, by contrast, that pornography reflects the *norms* of sexuality and morality. They view the sexually objectifying message of pornography—"that women are natural sexual prey to men and love it"—as a reflection of male control over sexuality within traditional heterosexuality.[55] They seek to expose the congruence

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politics.

MacKinnon, *supra* note 28, at 534-35.

See also Rich, *Compulsory Heterosexuality and Lesbian Existence* in Women—Sex and Sexuality 62 (C. Stimpson & E. Person eds. 1980) ("By the same token, we can say that there is a *nascent* feminist political content in the act of choosing a woman lover or life partner in the face of institutionalized heterosexuality.").

The feminist critique of the public/private distinction is basic to the feminist attempt to criticize the norms of sexuality and relate those norms to women's oppression in all spheres (*e.g.*, the workplace via sexual harassment or the bedroom via wife battery). A sharp public-private distinction prevents the argument that sexuality, a supposedly personal or private concept, is a part of women's existence everywhere, an argument central to this article.

53. *E.g.*, Rich, *supra* at note 28; A. Rich, Of Woman Born (1976).

54. Warren & Brandeis, *supra* note 42, at 196.

55. Rich, *supra* note 52, at 62. In context, Rich's full statement is as follows:

> The most pernicious message relayed by pornography is that women are natural sexual prey to men and love it; that sexuality and violence are congruent; and that for women sex is essentially masochistic, humiliation pleasurable, physical abuse erotic. But along with this message comes another, not always recognized: that enforced submission and the use of cruelty, if played out in heterosexual pairing, is sexually "normal," while sensuality between women, including erotic mutuality and respect, is "queer," "sick," and either pornographic in itself or not very exciting compared with the sexuality of whips and bondage. Pornography does not simply create a climate in which sex and violence are interchangeable; *it widens the range of behavior considered acceptable from men in heterosexual intercourse*—behavior which reiteratively strips women of their autonomy, dignity, and sexual potential, including the potential of loving

between normal sexuality, power, and violence; and they believe society's norms should be changed rather than protected. Warren and Brandeis sought to return to an earlier morality whereas feminists look forward to the creation of a new morality.[56]

B. Hart, Sacks, and Fuller

The works of Herbert Hart, Albert Sacks,[57] and Lon Fuller[58] introduced a strong concern for rational, individual-based decision making into modern privacy doctrine, further limiting the doctrine's ability to provide an effective remedy for women. An outgrowth of their work has been the development of a strong public/private distinction defining where law should intrude, with the domestic sphere of human relationships falling outside the concern of the law. This public/private distinction places interpersonal relationships on a pedestal while considering them too trivial for the law's intrusion. This distinction precludes women from using law to escape interpersonal forms of oppression.

Fuller explained the rationale behind this sharp public/private distinction within jurisprudence.

> Adjudication is not a proper form of social ordering where the effectiveness of human association would be destroyed if it were organized about formally defined "rights" and "wrongs." Courts have, for example, rather regularly refused to enforce agreements between husband and wife affecting the internal organization of

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and being loved by women in mutuality and integrity.

Id. at 72.

This article accepts Rich's premise that pornographic interactions are the norm of sexuality. This article does not presume that erotic mutuality and respect is yet possible, even among women. *See generally* MacKinnon, *supra* note 28 (questioning the existence of an authentic female sexuality).

56. This article uses the phrase "moral arguments" to refer to any argument based on moral considerations including unorthodox arguments that seek to change society fundamentally. Feminists often shun moral arguments for fear of being labeled moralistic. To be moralistic is to attempt to preserve the status quo. For instance, Tom Gerety has often criticized the radical feminist attempt to cast the pornography debate in moral terms, assuming that moral arguments must be moralistic, i.e., try to preserve traditional values. *See, e.g.*, Gerety, *supra* note 30, at 639-40. He, like Warren and Brandeis, has made a false assumption that moral arguments can only be used to maintain the status quo. Moral arguments that criticize the norms of conventional morality and sexuality must be the first step in women's liberation rather than a step to be avoided out of fear of being labeled moralistic. Only by recognizing that power and morality are interconnected, can feminists hope to succeed in attacking the patriarchal power structure, of which pornography is but one pernicious example.

57. H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tentative ed. 1957). *See also* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959) (defining "principled decisions").

58. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).

> family life. . . . Wherever successful human association depends upon spontaneous and informal collaboration, shifting its forms with the task at hand, there adjudication is out of place except as it may declare certain ground rules applicable to a wide variety of activities.
>
> These are vague and perhaps trite observations. . . . [At their root] lies the fundamental truth that certain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument.[59]

This sharp public/private distinction rejects the view that interpersonal relationships can be a public problem, especially when society's basic moral standards are at stake. Such a sharp distinction narrows the application of Warren and Brandeis' theory. Specifically, it undercuts Warren and Brandeis' recognition that issues of privacy can enter the public sphere. It also reinforces the failure of Warren and Brandeis to recognize that public power can enter the private sphere. In challenging the public/private distinction, this article considers both the public influences on the private and the private influences on the public.

Further, it assumes that a husband and wife have equal power within the domestic sphere, ignoring the sharp differences in power between them. That assumption is an implicit part of an individual-based perspective because it fails to see that the power of a husband is partly due to his membership in the group of men. Similarly, the wife's powerlessness is linked to her membership in the group of women. An individual-based perspective denies the significance of that group membership.

The public/private distinction has also led to the courts' refusal to enforce agreements between husbands and wives, contributing to the acceptance and enforcement of the status quo. This preservation of the status quo deters feminist attempts to change societal norms.

C. Prosser

William Prosser's work narrowed privacy doctrine as a remedy for women injured by pornographic intrusions.[60] Prosser divided privacy doctrine into four distinct invasions of four different interests: (1) appropriation of plaintiff's name or likeness for defendant's benefit or advantage; (2) intrusion upon plaintiff's physical solitude or seclusion;

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59. *Id.* at 370-71. *See also* H. Hart & A. Sacks, *supra* note 57, at 5 (defining as appropriate questions for law—"every kind of question affecting the group's internal relations, and every kind of question affecting its external relations which the group can establish competence to deal with").

60. W. Prosser, *supra* note 24, § 117.

(3) public disclosure of private facts about plaintiff; and (4) publicity which places plaintiff in a false light in the public eye.[61] Prosser believed these four specific intrusions had little in common except for a relation to Warren and Brandeis' concept of "the right to be left alone."[62] This highly particularized development of modern privacy doctrine has no social or historical underpinnings. As such, it articulates an individual-based perspective. It has taken the doctrine even further from Warren and Brandeis' basic concerns about the problems of powerful institutions. It has erected barriers to relief at the initial stages of a lawsuit when a women tries to explain her injury from pornography, and at the final stages when she tries to recover a full damage award.

D. Constitutional Case Law

Constitutional case law has also made privacy doctrine an ineffective tool for redressing women's injuries. Although the right to privacy does not explicitly appear in the Constitution, seemingly unrelated court decisions have recognized that doctrine. Constitutional case law, in its desire to protect traditional norms, has also adopted an artificially sharp public/private distinction which severely limits its usefulness to women. Similarly, that sharp distinction also exists in defamation actions.

1. Roe v. Wade

A constitutional right of privacy first annuciated in *Griswold v. Connecticut*[63] developed in *Roe v. Wade*.[64] In *Roe*, the Court found the right of privacy to be broad enough to encompass a woman's decision to terminate her pregnancy.

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61. The four causes of action differ considerably:

> The first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest.

Id. § 117, at 814.

There are also some similarities. The plaintiff's right is always a personal one, it is not assignable, and there is no comon law right of action for a publication concerning one who is already dead.

62. *Id.* § 117.

63. 381 U.S. 479 (1965).

64. 410 U.S. 113 (1973); *see also Roe's* progeny: Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Moore v. East Cleveland, 431 U.S. 494 (1977); Carey v. Population Sevices Int'l, 431 U.S. 678 (1977); Harris v. McRae, 448 U.S. 297 (1980); City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983); Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcraft, 103 S. Ct. 2517 (1982); Simopoulos v. Va., 103 S. Ct. 2532 (1983).

Extrapolating from several different sources within the Constitution, the Supreme Court found a constitutional right of privacy that protects the traditional areas of marriage, procreation, contraception, family relationships, child rearing, and education.[65] The concept of traditional norms was crucial to the Court's decision. The Court preceded its *Roe* holding with a lengthy examination of the rules proscribing abortion and concluded they were not of ancient or common law origin.[66] Traditionally, the Court claimed, abortion was the prerogative of the family: state proscription of abortion was untraditional. It therefore held that privacy doctrine, in preserving traditional norms, protects a woman's decision regarding pregnancy.

The traditional basis of the Court's decision reinforces the artificially sharp public/private distinction and fails to benefit women who do not fit within the accepted norms of society.[67] The Court reiterated Fuller's rationale for defining the boundaries of law. It assumed the traditional family deserved absolute protection from state intrusion. Left outside those boundaries are women oppressed within the traditional family, for example, women who must endure wife battery,[68] marital rape,[69] incest,[70] and involuntary sterilization.[71] Left outside also are women who need abortions but do not belong to the white, middle-class family, and cannot afford to purchase them.[72] Left outside are the contours of women's group-based oppression—the traditional roles that are imposed on women.

The right to privacy developed in *Roe* differs considerably from the

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65. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

66. *Id.* at 133-52.

67. *See, e.g.*, H. L. v. Matheson, 450 U.S. 398 (1981) (restricting minor's right to have an abortion); Harris v. McRae, 448 U.S. 297 (1980) (restricting poor women's opportunity to have an abortion). *See also* A. Davis, *supra* note 19 (criticizing abortion movement's failure to aid poor women and women of color).

68. Note, *Domestic Violence: Legislative and Judicial Remedies*, 2 Harv. Women's L. J. 167 (1979).

69. *Id.*

70. *See generally* Comment, *Iowa's Inadequate Protection Against Child Molesting*, 66 Iowa L. Rev. 623 (1981); D. Finkelhor, Sexually Victimized Children (1979); F. Rush, The Best Kept Secret: Sexual Abuse of Children (1981); Rush, *Child Pornography*, in Take Back the Night, *supra* note 26. *See also* State v. Baldwin, 291 N.W.2d 337 (Iowa 1980) (fondling of breasts of a twelve year old girl not coming within statutory definition of proscribed "sex act"); Bolin v. State, 505 S.W.2d 912 (Tex. Crim. 1974) (father forcing daughter to have sexual intercourse with him in exchange for grocery money for her and her two brothers; not constituting statutory rape because daughter's testimony, alone, insufficient); Merrick v. Sutterlin, 93 Wash. 2d 411 (1980) (providing historical discussion of sanctity of home being more important than rape or incest convictions). *C.f.* A. Dworkin, *supra* note 26, at 56 (discussing why society ignores sexual abuse of female children).

71. *See generally* A. Davis, *supra* note 19, at 215-21.

72. *See supra* note 67.

invasion of privacy doctrine developed by Warren and Brandeis, and specifically conceptualized by Prosser. Both, however, focus on traditional, moral and social norms. The *Roe* decision makes Warren and Brandeis' underlying concern for traditional social norms quite explicit. This concern is one reason why women's claims of privacy for pornographic intrusions have failed.

2. Stanley v. Georgia

A similar right to privacy had been recognized previously in *Stanley v. Georgia*.[73] Holding that the first and fourteenth Amendments prohibited making the mere private possession of obscene material a crime, the Supreme Court said:

> It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession [in] the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[74]

The Court distinguished *Roth v. United States*,[75] an earlier case sustaining the validity of Federal and state obscenity laws which outlawed the selling of obscene material. In *Roth*, the Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of anti-social conduct or would probably induce its recipients to engage in such conduct.[76] It found sufficient justification in the assertion that the material might fall into the hands of children or that it might intrude upon the sensibilities or privacy of the general public.[77] Its concern about social harm could be considered a group-based concern. It certainly recognized the dangers children face as a group.

By contrast, the Court in *Stanley* rejected the idea that the

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73. 394 U.S. 557, 568 (1969).

74. *Id.* at 564-65.

75. 354 U.S. 476 (1957).

76. *Id.* at 486.

77. *Id.* at 490, at 510 (Douglas, J., dissenting). *See also* New York v. Ferber, 102 S. Ct. 3348, 3353 (1982).

possibility of social harm or injury to a certain group could justify regulation. It found that private possession of pornography posed none of the potential harms present in *Roth*, including the possibility that obscene material might fall into the hands of children.[78] It rejected the significance of *Roth*'s group-based concerns.

Since *Stanley*, the Court has been quite clear that the Constitution only protects pornography within the private sanctuary of the home. Outside the home, the state may regulate material that is obscene under a standard set forth by the Court in *Miller v. California*.[79] The Court in *Stanley*, as in *Roe*, assumed that the home is a sanctuary free from the need for societal protection.[80] *Stanley* provides a powerful example of the courts permitting men to bring their public power into the purportedly private sphere, under the guise of privacy doctrine.[81]

3. Defamation Law

A public/private distinction has also developed in defamation law.[82] In the landmark case of *N.Y. Times v. Sullivan*,[83] the Supreme Court held that a public official must prove actual malice before liability will ensue in a defamation action against critics of his or her official conduct.

Sullivan, an Alabama police commissioner, objected to his portrayal in a *New York Times* advertisement soliciting funds to defend Martin Luther King and the civil rights movement in the South. The advertisement contained several minor inaccuracies. While Sullivan was not specifically named in the advertisement, the Alabama police were accused of racial harassment and brutality. Sullivan sought general and punitive damages for libel. The case was part of the controversy between the Alabama "white establishment" and the Black opposition to racial

78. Stanley v. Georgia, 394 U.S. 557, 567-68 (1969).

79. *See generally supra* note 30 (*Miller* obscenity standard). 413 U.S. 15 (1973). *See, e.g.*, United States v. Reidel, 402 U.S. 351 (1971) (upholding federal law that prohibited the mailing of obscene material).

80. Acceptance of that false assumption in *Stanley* led to an equally incorrect one: there is no danger that obscene material might fall into the hands of children within the home. In fact, it is probably at least as easy (or maybe easier) for a child to steal pornography from his or her parent(s)' bedroom than to purchase pornography in the marketplace. Some parents may even freely give their children obscene material.

81. This article will explore that concept in more detail in Section II. It is central to understanding that women, by contrast, bring powerlessness into the public sphere.

82. "Defamation is. . . . that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which plaintiff is held or to excite adverse, derogatory or unpleasant feelings or opinions against him." Prosser, *supra* note 24, at § 111, 739 (footnotes omitted).

83. 376 U.S. 254 (1964).

segregation and police brutality.[84] The *New York Times* served as a forum for the controversy.

Under Alabama state law, the statements in the advertisement were libelous *per se* and were not privileged. General damages therefore could be awarded without proof of actual injury, because the law presumed legal injury from the act of publication itself. The jury awarded Sullivan a half-million dollar judgment.

The Supreme Court reversed the judgment of the trial court, relying heavily on freedom of speech. The majority opinion stated that letting the judgment stand would "threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials."[85]

Subsequently, the Court applied the *New York Times* actual malice standard to "public figures." The Court included in that category a retired Army general,[86] a university athletic director,[87] a court clerk,[88] a state representative and real estate developer,[89] a defeated candidate for tax assessor,[90] and a candidate for United States Senate.[91]

In *Rosenbloom v. Metromedia*,[92] a sharply divided Court extended the *New York Times* standard to private individuals involved in an event of public or general interest.[93] Four years later in *Gertz v. Robert Welch, Inc.*,[94] *Rosenbloom* was overruled.

Gertz, a liberal lawyer, had served as the attorney for the family of a youth allegedly murdered by the Chicago police. He represented the family in a civil action against the police. *American Opinion*, a monthly publication of the John Birch Society, printed an article entitled, "FRAME-UP: Richard Nuccio And The War on Police."[95] The article

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84. [T]he inescapable conclusion was that Alabama's 'white establishment' had taken the opportunity to punish the New York Times for its support of civil rights activists: the South was prepared to use the law of libel to stifle black opposition to racial segregation.

L. Tribe, *supra* note 39, § 12-12, at 633 (citing Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 Sup. Ct. Rev. 191, 200).

85. New York Times v. Sullivan, 376 U.S. 254, 294 (1964).

86. Association Press v. Walker, 388 U.S. 130 (1967).

87. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

88. Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967).

89. Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970).

90. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

91. Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

92. 403 U.S. 29 (1971).

93. *Id.* at 47 ("If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.").

94. 418 U.S. 323 (1974).

95. *Id.* at 325, 326.

described Gertz as an architect of the frameup. It inaccurately stated that he had a lengthy criminal record, was a member of a revolutionary Marxist league, a Leninist and a Communist fronter.

Under Illinois law, the statements constituted libel *per se* relieving Gertz of the obligation of proving special damages. Although the jury awarded Gertz $50,000, the district court entered judgment for defendant notwithstanding the jury's verdict, in light of *New York Times v. Sullivan*.

The Supreme Court held that the *New York Times* actual malice standard did not apply to Gertz as a private individual. Hence, it created a public/private distinction. Two factors influenced the Court's decision. First, the Court found that private individuals were "more vulnerable to injury, and the state interest in protecting them was correspondingly greater"[96] than the state interest in protecting public officials.[97] Second, the Court concluded that there was less societal interest in protecting free speech when the individuals defamed have not voluntarily thrust themselves into the reported controversies. The private individual, the Court concluded, "has relinquished no part of his [or her] interest in the protection of his [or her] own good name, and consequently he [or she] has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."[98]

Gertz emphasized the concepts of voluntariness and the opportunity for effective rebuttal in its constitutional analysis of defamation law.[99] Nevertheless, courts have not adequately considered these con-

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96. *Id.* at 344.

97. *Compare Rosenbloom*'s plurality opinion:

> In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproved, and highly improbable, generalization that an as yet undefined class of "public figures" involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction.

Rosenbloom v. Metromedia, 403 U.S. 29, 46-47 (1970).

98. *Gertz*, 418 U.S. at 345. *Compare Rosenbloom*'s plurality opinion:

> We have recognized that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). Voluntarily or not, we are all "public" men [sic] to some degree. . . . Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction.

Rosenbloom, 403 U.S. at 47-48.

99. *See, e.g.*, L. Tribe, *supra* note 39, § 12-12.

cepts when deciding defamation cases brought by women who have been the victims of sexual abuse.

The public/private distinction that emerges in *New York Times* and *Gertz* is problematic based on the facts of those cases. Both the police commissioner in *New York Times* and the lawyer in *Gertz* were acting in capacities of public power, as well as private powerlessness. Although the police commissioner was a public official, he probably lacked the resources to rebut effectively an advertisement in the *New York Times*. The lawyer in *Gertz* was licensed by the state to practice law in a public forum yet he probably lacked the resources to rebut effectively an article in *American Opinion*. Both men may have entered the controversies out of a sense of duty rather than choice. Despite those similarities, the Court considered the police commissioner to be a public official and Gertz to be a private individual.

When women are plaintiffs in defamation actions, this public/private distinction becomes even more problematic[100]. Courts frequently find that women are public figures when they bring defamation actions even though women have frequently not injected themselves voluntarily into the controversy and do not have the resources to rebut effectively the sex-based defamation. The sharp public/private distinction fails to recognize that women remain powerless in the public sphere, even when they are involved in a public controversy.

This article proposes that the courts analyze the parties' relative powers rather than make a sharp and inaccurate public/private distinction. This focus on relative power is consistent with Warren and Brandeis' concern about intrusions on less powerful groups, as well as some group libel case law.

II. Invasion of Privacy Actions For Pornographic Intrusions

The historical discussion of invasion of privacy action has shown that a false public/private distinction, a false assumption that women share men's power, the preservation of traditional values, and an individual-based perspective pervade privacy doctrine. This section of the article will illustrate how those factors render court responses to women's invasions of privacy actions wholly inadequate. The first factor will not be considered separately.

A. False Assumption That Women Share Men's Power

This erroneous assumption is part of two specific doctrines that

100. The falseness of that distinction, however, is quite different than Justice Brennan claimed in *Rosenbloom*. *See supra* note 97. Brennan thought the public/private distinction was false because private individuals may have sufficient resources to rebut defamation, and public individuals may not. He was not challenging the distinction itself; instead, he was challenging its relationship to the concept of effective rebuttal.

often emerge in women's invasion of privacy actions for pornographic intrusions: (1) consent/waiver doctrine, and (2) public figure doctrine.

1. Consent/Waiver Doctrine

The consent/waiver doctrine is a contractually-related theory that often appears in invasion of privacy cases. Defendants in these cases often argue that the women consented to the portrayals or waived their right to object. Two assumptions underlie legal consideration of this issue: (1) women have the power to choose freely not to be portrayed pornographically, and (2) women's consent precludes injury. This article will argue that so long as women only have injurious options from which to choose, the fact of choice is irrelevant to the injury. Women's lack of choice is an aspect of their group-based powerlessness.

a. Existence of Choice

Joyce Martin, the "hat check girl," whose story is told at the beginning of this article, argued that the defendants had the duty to obtain her consent before using her photograph and the accompanying language in its *Knoxville News Sentinel*[101] advertisement. She also alleged that the community's assumption that she had consented to the portrayal "had caused her great mental pain, humiliation and mortification and tended to expose her to public ridicule and disgrace. . . ." [102] The court denied Martin's claim, finding that by consenting to have her picture taken for an internal club bulletin, she had implicitly consented to have the picture and accompanying text shown to the public at large.[103]

Similarly, Mary Jane Russell argued that the defendants should have obtained her consent before using her retouched photograph to advertise Springs bedsheets. She alleged she was harmed by the

101. Martin v. Senators, Inc., 220 Tenn. 465, 418 S.W.2d 660 (1967).

102. *Id.* at 469, 418 S.W.2d at 662.

103. Since it is clear from the declaration the photographs were taken with plaintiff's consent for publication in a bulletin published by the Senators Club to be distributed to its members, and since it appears from the face of the declaration that this is a public club in the sense that membership therein is open to all who will pay the small amount charged for annual membership, and there is no suggestion the bulletin was exclusively for the eyes of the members, we think the subsequent use by the Senators Club of one of these photographs in an advertisement which depicted plaintiff as a hat check girl, implicitly referring to her as such in the statement, "Let us check your hat," was not an actionable invasion of plaintiff's privacy. Her prior consent for her photographs to be circulated freely among that segment of the public comprising the membership of the Senators Club, and implicitly to be shown by them to anyone else interested, was a waiver of her right of privacy with respect to these photographs.

Id. at 472, 418 S.W.2d at 664.

community's assumption that she had consented to her portrayal.[104] Her complaint stated:

> [Russell's] high professional standing and concomitant earning power have been achieved by meticulous adherence to the highest standards of professional . . . conduct and good taste for herself and for her clients. The plaintiff's professional services and photographs have never been available for purposes of advertising or trade to anyone who resorts to bad taste, immodesty, *double entendre* or similar techniques in his appeals for public attention. The use of a photograph of the plaintiff by an advertiser known to be an adherent of such techniques connotes that the plaintiff had consented to such use. Such consent, if given by the plaintiff, would ruin her professional standing and earning power and cause her to be shunned by family and friends and in the community in which she lives and works.[105]

Because Russell had signed a standard "model release" waiving the right to inspect or approve the completed portraits,[106] the court found that the defendants had not breached the contract. Nevertheless, the court found Russell had stated a limited cause of action for a statutory invasion of privacy because the picture was altered.[107] That cause of action, however, would not exist when the defendant changed the purpose or extent of the picture's use.[108] Thus, Joyce Martin, who was harmed by an unintended, although unaltered use of her photograph, would be excluded from the theory adopted by the *Russell* court.

In *Ann-Margret v. High Society Magazine, Inc.*,[109] the court also presumed consent.

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104. Russell v. Marboro Books, 18 Misc.2d 166, 183 N.Y.S.2d 8 (N.Y. Sup. Ct. 1959).

105. *Id.* at 169-70. 183 N.Y.S.2d at 15-16.

106. The model release stated:

> The undersigned hereby irrevocably consents to the unrestricted use by Richard Avedon, advertisers, customers, successors and assigns, of my name, portrait or picture, for advertising purposes or purposes of trade and I waive the right to inspect or approve such completed portraits, pictures, or advertising matter used in connection herewith.

Id. at 173, 183 N.Y.S.2d at 18-19.

107. According to the court, "it does not follow that the consent signed by the plaintiff goes beyond its wording so as to exculpate, as a matter of law, the dissemination of all type of altered pictures or of libelous material." *Id.* at 182, 183 N.Y.S.2d at 28.

108. According to the court:

> If, for instance, Springs had used the original picture for its advertising of bedsheets, without the attendant objectionable writing or references, the fact that the purpose of the advertisement was not to interest readers in books would not negate the effect of the release.

Id. at 182, 183 N.Y.S.2d at 27.

109. Ann-Margret v. High Soc'y Magazine, Inc., 498 F.Supp. 401 (S.D.N.Y. 1980).

> The plaintiff in the instant action chose to appear partially nude during one scene in a major motion picture which she knew was to be widely distributed. Upon release, that film, which was highly successful, was seen by millions of persons. It has been held that where an individual consents to be viewed in a certain manner during the course of a public performance, such as in a movie, it cannot then be argued that a subsequent faithful reproduction (no allegation has been made that the picture has been altered) of that appearance constitutes an invasion of privacy.[110]

Unlike Russell, Ann-Margret had no statutory invasion of privacy claim because her picture was not altered. Evidence that her "decision to disrobe was an 'artistic' one, made in light of the script necessities" and that she carefully limited the portrayal itself, was of no avail in arguing that her consent did not include the magazine's unauthorized use of the photograph.[111]

In all three cases, the courts resolved the consent issue against the plaintiffs by assuming they were free, equal, powerful actors in the public sphere. The courts did not consider the powerless, feminized occupations these three women held. The *Martin* court found that the plaintiff hat checker had "implicitly" consented to her portrayal, including its widespread dissemination, by allowing the defendant to take her picture.[112] The *Russell* court assumed that the plaintiff model consented to the unaltered use of her picture by another advertiser because she supposedly could have easily negotiated a contract that would have made each portrayal subject to her approval.[113] Similarly, the *Ann-Margret* court assumed that by consenting to appear partially nude in one movie scene, the plaintiff actress consented to the magazine's publication of her partially nude photograph. The courts assumed the plaintiffs had a real choice—they could have refused to have their sexuality exploited. This illustrates women's public powerlessness and male eagerness to deny such inequality. As long as the courts found consent, no invasion of privacy action could exist.

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110. *Id.* at 405 (footnote and citations omitted).

111. *Id.* at 403 n.2.

112. *See supra* note 103.

113. Those "who wish to do business in accordance with the trade usage must [merely] expressly incorporate this desire into their contracts" (70 Harv. L. Rev. 553, 555, commenting upon Avedon v. Exstein, 141 F.Supp. 278, which suit also arose out of the transaction involved in the instant action). Those who desire to do so may, and if they take care can, execute or accept effective releases consenting to use only by the immediate prospective client.

Russell, 18 Misc. at 178, 183 N.Y.S. 2d at 24. This article challenges the assumption that it is a "mere" or simple matter for a woman within the pornography industry to get her desires expressed in the contract.

The plaintiffs, however, had no real choice. As women, their work was feminized. An implicit part of their work was to be objects for men's sexual pleasures. They consented only in the sense that they chose occupations within the narrow range available to women. Russell, for example, knew she had contracted as a professional model. The contract implied that her sexuality could be used to promote her employer's business. She consented to the implied provision only in the sense that she accepted the conditions of employment that employers typically require of women, particularly women in sex-segregated jobs. Even Russell's high community and professional stature could not give her the economic and political leverage to negotiate different terms. Similarly, Ann-Margret could not avoid appearing partially nude in the film, despite her professional standing.

The inevitable and unauthorized nature of the sexualization of women's work occurs in all contexts of women's sexual oppression.[114] The sexualization of the labor market makes women victims of sexual objectification as part of their work.

> The feminization of whole sectors of the labor force is well documented. Not recognized is that this gender-definition includes sexualization of the women worker as part of the job. Until it is changed, this makes sexual harassment systematically inevitable for the masses of women who must take the only jobs society opens to them.[115]

This sexualization means that when women enter any job, and particularly a traditionally female job, men will sexualize their work. Similarly, when women are photographed—whether as a hat checker, high class model, or actress—they are photographed as sexual objects.

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114. C. MacKinnon, Sexual Harassment of Working Women 18 (1979). *See also* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. Mich. J.L. Ref. 397 (1979); Committee on Pay Equity, Manual on Pay Equity: Raising Wages for Women's Work (1980). It was not until 1973 that sex-segregated advertisements were held to be illegal. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

The Supreme Court has begun to recognize some of the wage disparities that can accompany segregated work and has permitted a limited remedy in the case of intentional discrimination (although, of course, it has never connected the problem to sexual objectification). County of Washington v. Gunther, 452 U.S. 161 (1981). *See also* International Union of Electrical Workers v. Westinghouse Electric Corp., 631 F.2d 1094 (3rd Cir. 1980) (permitting comparable worth claim).

115. C. MacKinnon, *supra* note 114, at 18. For an example of how pornography and sexual harassment can interact on the job, *see* Brown v. City of Guthrie, 22 Fair Emp. Prac. Cas. (BNA) 1627 (W.D. Okla. 1980) (plaintiff police officer videotaped while strip searching female prisoner; videotape shown repeatedly to harass her; plaintiff continually teased about photographs of nude women that her co-workers looked at while on the job).

Women's powerlessness to prevent sexualization of their work illustrates women's particular susceptibility to abuse by the media and need for legal protection.[116] It also demonstrates that women are involuntary participants in their public portrayals and lack the resources to rebut the images presented.[117]

b. Irrelevance of Consent

The focus on consent in these privacy cases presumes that women who do consent are not injured. Because all women's work is sexualized, however, all women's choices result in injury. The fact that women must accept injury to survive should not preclude women from objecting to their injury. By focusing on consent, courts preclude women—regardless of what choices they make—from objecting to the norms of sexuality that are a part of invasions of privacy.

Women who work within the pornography industry have described their daily injury, despite their compensation and supposed consent.

> Let us go back to those who let themselves be photographed. Yes, I am one of them. I believed that I was so liberated that nothing could touch me. Nobody could exploit me. Why did I do it? I had to get a lot of money fast and that was the easiest way. It paid well. But how I felt doing it was something else! I felt it as a violence against my body to be exhibited like a piece of meat, and a violence against all women. All women suffered because I supported the pornography industry.
>
> The many women I talked to during my three months as a pornography model often hated themselves. But it was very often of bitter necessity that they did it. They had to. Their husbands drank, or they were single mothers. Others felt they had to compete by wearing smarter clothes. For some it was just to be the one time, because they wanted to buy this or that. But for me it was many times. For me too it was almost impossible to get out again. The money is good and for many women it is easy to get into drinking during the photography session.
>
> . . . I learned quickly to hate my body and myself for supporting capitalists and their easy money, and for supporting this society's decay. And I learned too that it is men who have the upper hand in this situation.[118]

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116. Compare this observation with Warren and Brandeis' concern about the possibility of media abuse. *See supra* text accompanying note 42.

117. Compare this observation with the *Gertz/New York Times* doctrine's concern about voluntariness. *See supra* text accompanying notes 82-110. Women, on average, have less than 60% of the earning power of men. *See generally supra* note 114.

118. *Testimony Against Pornography: Witness from Denmark*, in Take Back the Night, *supra* note 26, at 84-85.

Linda Lovelace provides a specific example of injury, despite apparent consent. Chuck Traynor introduced Lovelace to the world of pornography. Through hypnotism, beatings, and threats, Traynor forced Lovelace to "consent" to model for underground pornography, engage in prostitution and star in the movie "Deep Throat." Lovelace describes the world in which Traynor kept her:

> . . . Chuck didn't let me out of his sight. Instead of asking me to do things, he told me. And as if to back up his words, he was always playing with his guns. . . . Every day, while he played with his guns, we went through the same sequence. He would tell me he was going to resume his prostitution business and I was going to be his new madam. I would tell him no. He would hit me. Before too long, I learned to keep my opinions to myself, I didn't change them but I no longer bothered expressing them.[119]

Lovelace's silence became consent. She consented to survive. Each act of survival, however, caused Lovelace injury.

> Every new degradation made me weaker and more docile. Now I felt totally defeated. There were no greater humiliations left for me. The memory of that day and that dog [from an underground film in which Lovelace had sex with a dog] does not fade the way other memories do. The overwhelming sadness that I felt on that day is with me at this moment, stronger than ever.[120]

Lovelace's injury continues to this day, in part, because of the notoriety she received from her portrayal in the movie "Deep Throat." "[T]he world won't let Linda Lovelace rest in peace. Today I still can't go to a supermarket or a bus station or a high school basketball game without the risk—the whispers, the pointed fingers, the stampedes."[121] Lovelace, however, cannot bring a lawsuit to remedy her continuing injury, in part, because of her supposed consent.[122]

Cabaniss v. Hipsley also illustrates the problem of focusing on consent.[123] Hipsley, an exotic dancer, had appeared at two Atlanta night spots, the Club Peachtree and the Gypsy Room. Her advertising picture depicted her "as a luscious lithesome, bosomy brunette clad only in two tantalizing tassels and a scanty G-string."[124] Although she had never

119. L. Lovelace, *supra* note 15, at 28-29.

120. *Id.* at 113.

121. *Id.* at 1.

122. Although Lovelace has sought legal assistance to recover damages and obtain injunctive relief from the showing of "Deep Throat," she has brought no legal action. Her lawyers have concluded that she probably has no cognizable legal claim, for a multitude of reasons. The group privacy theory, however, that this article develops, could aid Lovelace. In fact, helping women like Lovelace is one of the major purposes of this article.

123. Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496 (1966).

124. *Id.* at 369, 151 S.E.2d at 499.

appeared at the Atlanta Playboy Club, the Club used her picture in its advertisement. It billed her as "Dawn Darling—Provocative and Exciting Exotic Dancer" with the underlying caption, "She's terrific."[125] Hipsley brought an action for invasion of privacy. Although the court allowed her appropriation claim,[126] it denied recovery under any other right to privacy action, finding that the defendant had not portrayed Hipsley in a context materially different from the one in which she frequently portrayed herself.[127] She was an exotic dancer and had been so portrayed by the defendant.[128] The court perceived no difference between Hipsley choosing to portray herself as an exotic dancer for her own profit and the Playboy Club's decision to portray her as an exotic dancer for its profit.[129]

The underlying assumption in *Hipsley* that the plaintiff could not be injured because she commonly portrayed herself in a similar role[130] was even more explicit in *Ann-Margret v. High Society Magazine, Inc.*, the case involving the woman who was pictured partially nude in "Magic." One reason the court denied Ann-Margret recovery was that such injury happens all the time. The defendant magazine *specialized* in printing photographs of well-known women "caught in the most revealing situations and positions that the defendants are able to obtain."[131] According to the court, the magazine had similarly portrayed Brigitte Bardot, Greta Garbo, and Caroline Kennedy.[132] Because films like "Magic" and magazines such as *Playboy* frequently use such photographs for commercial purposes, the court could not conceive of the possibility that substantial injury could accompany such a portrayal. The

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125. *Id.*

126. *Id.* at 379, 151 S.E.2d at 504-05.

127. *Id.* at 380, 151 S.E.2d at 505.

128. *Id.* at 376-77, 151 S.E.2d at 503.

> The only falsity or fiction revealed by this evidence is that plaintiff was falsely pictured as appearing at the Atlanta Playboy Club under the stage name of "Dawn Darling." This evidence does not authorize a verdict for general damages for injury to plaintiff's reputation or to her sensibilities. There is no evidence to indicate that the stage name "Dawn Darling" is in a category materially different from that which would include the stage names "Melanie Lark" and "Charming Charmaine De Aire," which plaintiff used, nor is there evidence to indicate that the Atlanta Playboy Club was in any material respect different from the types of clubs plaintiff customarily played, such as Club Peachtree or the Gypsy Room. She was not presented in a false light; she was revealed as an exotic strip-tease, which she was.

129. *See supra* note 128.

130. "Plaintiff was what is commonly referred to as a strip-tease, and, by the very nature of her occupation, the facts disclosed were neither private nor embarassing to her." *Cabaniss*, 114 Ga. App. at 374, 151 S.E.2d at 502.

131. *Ann-Margret*, 498 F. Supp. at 403.

132. *Id.* at 404 n.6. Brigitte Bardot was apparently photographed surreptitiously by telephoto lens; Caroline Kennedy's photograph was apparently altered. *Id.*

court characterized the press as, "at times, . . . trivial, and even obnoxious" but protected the magazine "because of the important part it [the press] plays in protecting our liberty."[133] The underlying assumption was not so much that Ann-Margret consented but that all of society consented on her behalf in order to protect its liberty.

Similarly, in *Vitale*, the court presumed that plaintiff was not injured by the *National Lampoon* parody because she consented to the *Playboy* centerfold.[134] It did not consider the possibility that *Playboy*'s portrayal may also have injured Vitale. *Playboy Magazine*, the Club Peachtree, and the film "Magic" at least paid Vitale, Hipsley and Ann-Margret for their injuries. *National Lampoon*, the Playboy Club, and *High Society Magazine* did not.

The concept of consent presumes that by agreeing to a portrayal, a woman avoids all injury. The appropriate question in *Hipsley*, *Vitale*, and *Ann-Margret* should have been whether the Playboy Club's, *National Lampoon*'s, and *High Society Magazine*'s portrayals caused injury, not whether the plaintiffs normally consented to injury to survive.

A false presumption of political power also underlies the emphasis that courts place on the consent issue. Political power is an aspect of privilege. The focus on consent emphasizes the degree to which women may be privileged to avoid having only injurious options. More privileged women (for example, women who can afford to be unemployed) can choose to avoid sexual abuse through pornographic portrayals; however, they will still be subject to sexual abuse in other aspects of their lives, *e.g.*, wife battery, rape, incest, the myth of the vaginal orgasm, the denial of lesbian existence, and social and legal rules about women's clothing.[135]

A woman's consent does not lessen her injury. In fact, evidence of consent is evidence of women's oppression as women—the injurious options to which women are limited. Control over women's sexuality

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133. *Id.* at 406 n.12.

134. *Vitale*, 449 F. Supp. at 445.

135. *See generally* MacKinnon, *supra* note 28, at 532 (exploring women's sexual oppression through sexual harassment, rape, incest, pornography and prostitution); K. Barry, *supra* note 50 (prostitution, marriage, and pornography); S. Brownmiller, Against Our Will (1975) (rape); A. Davis, *supra* note 19 (slavery, sterilization, and housework); A. Dworkin, Woman Hating (1974) (pornography, gynocide, and fairy tales); Koedt, *The Myth of the Vaginal Orgasm*, in Voices From Women's Liberation (L. Tanner ed. 1970); Schulman, *Sex and Power: Sexual Bases of Radical Feminism*, in Women—Sex and Sexuality, *supra* note 52, at 21-35; A. Rich, *Compulsory Heterosexuality & Lesbian Existence*, in Women—Sex, and Sexuality, *supra* note 52, at 62 (denial of lesbian existence); A. Rich, *supra*, note 53 (birthing and child-rearing); Whisner, *Gender Specific Clothing Regulation: A Study in Patriarchy*, 5 Harv. Women's L.J. 75 (1981) (rules about clothing); Note, *Domestic Violence: Legislative and Judicial Remedies*, 2 Harv. Women's L.J. 167 (1979) (domestic violence).

exists regardless of whether women actually "consent" to it. Women's political powerlessness reflects their lack of control over their sexuality.

The courts, when focusing on consent, presume that consent is an all or nothing concept. That false presumption contributes to the problems caused by the traditional formulation of consent. Courts fail to see that women may consent to sell some but not all of their sexuality. As a hat checker, model, actress, or dancer, a woman may make the choice to sell some of her sexuality. She has probably rationalized that she could sell some of her sexuality without entirely losing her sexual integrity. Hence, she may distinguish between the Gypsy Room and the Playboy Club, although an outside observer may perceive no difference. Similarly, she may distinguish between an internal club bulletin and the *Knoxville Sentinel*. Nevertheless, in each case, men failed to respect that choice and male jurisprudence upheld their right to do so. Men robbed these women of their last vestiges of control over their sexuality.

2. Public Figure Doctrine

Courts' analyses of public figure doctrine in defamation law in some of these cases further illustrates the courts' false assumption of women's power.

Carol Vitale, the object of the *National Lampoon* parody, alleged that the "use of her photograph, together with the accompanying comment, was defamatory and libelous in that it depicted her as a tramp and a lady of perverted morals."[136] The court granted *National Lampoon*'s motion for summary judgment, finding that plaintiff was a public figure. (She had not asserted proof of actual malice).

> Plaintiff voluntarily posed for the nude and semi-nude photographs published by *Playboy* magazine on this and other occasions, and both consented to and received payment for their publication. She obviously sought international circulation of her photographs and her expectations were fulfilled.[137]

The court, however, found that Vitale was a public figure only with respect to her role in *Playboy* magazine. Plaintiff would not be a public figure, and would not have to prove actual malice, under other factual configurations.

> If, for example, defendant had stated that plaintiff was a Communist, the normal standards for recovery would apply, since plaintiff is not a public figure for purposes of her political affiliations.[138]

136. *Vitale*, 449 F. Supp. at 445.
137. *Id.* at 445.
138. *Id.* at 445 n.8.

The premise underlying this distinction was that Vitale had voluntarily placed herself in the public domain in the role of a *Playboy* model, inviting attention and comment, but had not done so for other roles. The premise assumes generally that sexuality can be separated from a woman's essence in some roles and specifically that sexuality can never be political.

Victoria Price Street brought both libel and invasion of privacy actions against NBC for its broadcast of a historical drama based on the Scottsboro rape trials. Street alleged the drama portrayed her in a derogatory light. She was described as a "bum," "hustle," and "whore."[139]

The court found that the common law privilege of fair and accurate reporting of judicial proceedings did not apply because the historical drama did not present a balanced or neutral view.[140] The drama emphasized the portions of the original trial that showed Street as a perjurer and promiscuous woman. Nevertheless the court found that the plaintiff was a public figure and denied recovery.

In reaching that conclusion, the court extensively analyzed the specific factors articulated in *Gertz* and its progeny for defining public figures. One factor was whether plaintiff had "access to the channels of effective communication and hence . . . a . . . realistic opportunity to counteract false statements."[141] The court resolved that factor against plaintiff, finding she "had access to the media and was able to broadcast her view of the events."[142]

The *Street* court also recognized that *Gertz* required a finding that the plaintiff had voluntarily thrust herself to the forefront of a public controversy. The resolution of that issue, according to the court, depended on whether Street had falsely accused the defendants of rape. Nevertheless, instead of resolving the voluntariness issue, the court eliminated it from the *Gertz* test.

> When the issue of truth and the issue of voluntariness are the same, it is necessary to determine the public figure status of the individual without regard to whether she "voluntarily" thrust herself in the

139. *Street*, 645 F. 2d at 1231-32, *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981). I find *Street* to be the most troubling of all the cases in this article because it presents a tension between racial and sexual oppression. It is all too easy to downplay either the racial or sexual aspects of the case in analyzing and describing it. I have tried to look at both aspects equally but recognize that the context of this article, sexual oppression, may have overemphasized the sexual aspects of the case. For an excellent discussion of the racial and sexual tensions in rape cases, see Note, *Rape, Racism and the Law*, 6 Harv. Women's L.J. 103 (1983). *See also supra* notes 18-22.

140. *Street*, 645 F.2d at 1233.

141. *Id.* at 1234 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 [1974]).

142. *Id.*

> forefront of the public controversy. . . . In such a case, the other factors, —prominence and access to media—alone would determine public figure status.[143]

Although the court claimed to eliminate one aspect of the public figure test, it really created an irrebuttable presumption of voluntariness. The court's reformulation precluded Street from showing that she was an involuntary participant, not a public figure.

The resolution of the public figure issue in *Street* presents the same problem the consent issue raised in *Martin*, *Russell*, and *Ann-Margret*. The *Street* court assumed plaintiff had the power to both rebut the sexual message and not participate in the public controversy. The false presumption of effective rebuttal is especially apparent in Street's case. At the time of NBC's broadcast, Street was living in obscure poverty.[144] Even at the time of the original trial, she was a victim of both class-based and sex-based oppression. As a poor woman who accused men of rape, she, like most women, was characterized as a whore by the defense. When NBC portrayed the trial it emphasized that aspect of the case.

Street also demonstrates how women and people of color can be pawns for the news media.[145] At the time of the original rape trial, the media interviewed Street extensively. Presumably, it preferred to portray the Black youths as rapists rather than report the racism of a judicial system that failed to give them a fair trial. Forty years later, it may have become more fashionable or profitable for the media to comment on the racism of the Scottsboro trials. Nevertheless, it could not depict those trials without exaggerating the issue of whether Street was a whore, an issue irrelevant to whether the American judicial system is racist.[146] The purpose of the invasion of privacy action, as articulated by Warren and Brandeis, was to hold the media accountable for such false characterizations of powerless people. The courts' erroneous assumption that female plaintiffs have the power to rebut their false portrayals undermines the effectiveness of both defamation and invasion of privacy actions.[147]

The falseness of the courts' assumption that female plaintiffs have the power to rebut their portrayals is particularly evident in Linda

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143. *Id.* at 1234-35.

144. *See supra* note 22.

145. *Cf.* A. Rich, *supra* note 28, at 224 (exploring how women are often the scapegoats for societal abuses).

146. Consider also the unfairness of the portrayal in terms of the lapse of time. No one claims Street is a whore today, yet the racism of the judicial system unfortunately remains an all too timely issue.

147. *See also* Ann-Margret v. High Soc'y Magazine, 498 F.Supp. 401 (S.D.N.Y. 1980) (considering plaintiff to be a public figure despite her acknowledged attempts to limit her public portrayal).

Lovelace's case. Lovelace's image has been projected upon the movie screen throughout the United States yet she has never had the power to tell her story—the story of a woman imprisoned and forced to become a prostitute and a pornographic movie star.

Lovelace tried to tell reporters the truth of her enslavement when her husband and manager, Chuck Traynor, allowed her to be interviewed. But they didn't want to hear it. The tape recorders and cameras were shut off when she tried to tell the truth.[148] After escaping from Traynor, Lovelace wrote a book, *Ordeal*, that described her captivity. Its publication has made Lovelace the defendant in a lawsuit for defamation brought by Traynor's lawyer. (Lovelace accuses the lawyer of creating contracts of adhesion in the book.) Lovelace did not have the power to state her case publicly in a lawsuit; however, Traynor and his lawyer do.

B. Preservation of Traditional Values

Privacy doctrine helps preserve traditional values through the doctrine of offensiveness or reasonability that often emerges in women's invasion of privacy actions. Rejecting Warren and Brandeis' assumption that technological intrusions into a woman's sexuality are necessarily unreasonable, many courts try to determine whether the plaintiff responded to the alleged invasion of privacy in a reasonable or supersensitive manner. This investigation preserves traditional values and precludes the traditional (*i.e.*, sensitive) woman from obtaining relief.

The *Martin* court, for instance, resolved the supersensitivity issue against the plaintiff. It found the defendant's conduct *not* to be "such that a defendant should have realized it would be offensive to persons of ordinary sensibilities . . . . "[149] The court felt Martin was supersensitive in complaining about the advertisement because her "photographs . . . [were] not exhibited . . . to humiliate or embarrass her."[150]

In *Pring v. Penthouse International Ltd.*, the case involving Miss Wyoming's portrayal by *Penthouse Magazine*, the court applied a reasonability standard. The court asked "whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated."[151] The court presumed liability could not ensue if the article would be considered fictional. It rejected the testimony of plaintiff's expert witness "that some individuals might attach a broader subliminal meaning of sexual

148. L. Lovelace, *supra* note 15, at 247.
149. *Martin*, 220 Tenn. at 473, 418 S.W. 2d at 664.
150. *Id.* at 468, 418 S.W.2d at 662.
151. *Pring*, 695 F. 2d at 442.

permissiveness"[152] to the article, because all the lay witnesses testified that the article was not about the plaintiff. The court characterized the story as "a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants," with "no redeeming features whatever."[153] Nevertheless, the court rejected plaintiff's claims for defamation, presentation in a false light, and outrageous conduct, because it found the article to be "obviously a complete fantasy."[154]

The dissent criticized the court's application of the "reasonably understood" test.[155] It found that "[t]he descriptions of the conduct of Miss Wyoming would make even the most careless reader aware of sexual deviation and perversion."[156]

The *Pring* court's application of the "reasonably understood" test illustrates the extreme positions courts have taken to avoid recognizing the harm of pornography to the woman portrayed and all of society. The court assumed that a fictional account of an identifiable person could cause no harm, even though an expert had contradicted that assumption and the jury had drawn the opposite conclusion. It implicitly rejected the observation made by many critics of pornography that fantasy and reality are inextricably connected.[157] On the one hand, the reader may "know" that the story is about a fictional character; on the other hand, the story

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152. *Id.* at 443.

153. *Id.*

154. *Id.*

155. *See supra* text accompanying note 151. The *Pring* majority derived the "reasonably understood" test from two Supreme Court decisions, Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), and Old Dominion Branch No. 496 Ass'n v. Austin, 418 U.S. 264 (1974). Both cases involved plaintiffs found to be public figures. In both cases the Court applied the "reasonably understood" test and found the alleged defamatory articles essentially accurate and truthful reports of a public event. In *Greenbelt*, a newspaper report accurately stated that the plaintiffs were described at a city council meeting as having engaged in blackmail. In *Old Dominion*, a union newsletter which described the plaintiffs as "scabs" was found to be literally and factually accurate. Although the Court in *Greenbelt* admitted that the label of "blackmail" might connote the commission of a criminal offense, it found that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." 398 U.S. at 14. Similarly, in *Old Dominion*, the Court found that the use of the word, "scab," although it has negative connotations was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." 418 U.S. at 286.

156. *Pring*, 695 F.2d at 444 (Breitenstien, J., dissenting). The *Pring* dissent objected to the use of the "reasonably understood" test, because *Penthouse* did not claim that the act of fellatio by Miss Wyoming was true. The word "fellatio," according to the dissent, "was not used as an hyperbole or epithet. It was used to describe a physical act." *Id.* Another problem with the use of the test, which the dissent did not mention, was the assumption that the plaintiff was a public figure even though she did not have the power to avoid being portrayed by *Penthouse* nor did she profit by the depiction. *Greenbelt* and *Old Dominion* justified their analysis with the public figure doctrine for newsreporting.

157. *See, e.g.*, K. Barry, *supra* note 50, at 205-19.

reinforces and shapes the reader's views of what women are, and what women are for.

> There is usually no reality check available or desired in the pornographic experience. Fantasy and reality are blurred and experienced with sexual stimulation in isolation. Distortions presented in pornography stimulate a sexual response which in turn reinforces the enjoyment of distortions. When it is over, the consumer may then choose what to believe and interpret as reality, what to attribute to fantasy, and what to act out.[158]

Baton twirling can become subliminally synonymous with the act of fellatio, as described in the *Penthouse* Miss Wyoming story, despite the seeming unrelatedness of those activities. The *Pring* court chose to deny the existence of that connection.

One way the reasonableness standard harms women is by defining sensitivity from a male point of view. The *Martin* court, for instance, only explored whether the male defendant should have realized that the *Knoxville News Sentinel* advertisement would be offensive.[159] The court found Martin's employer not liable for invasion of privacy because he only intended to profit commercially, rather than offend Martin. The defendant's financially exploitative purpose, however, does not necessarily lessen the offense to Martin. If degrading women sells, advertising can degrade women without the advertiser intending to do so. He need only intend to make money. The extent of the injury only becomes evident when viewed from a female perspective. The courts refuse to look at the injurious conduct from that perspective.

Insisting on exploring the supersensitivity issue from the male defendant's point of view precludes privacy claimants from challenging the male norms of society.[160] Supersensitivity may be necessary to liberate women from male sexuality, because what is supersensitive from a male point of view is simply injury from a feminist perspective. Insisting that female plaintiffs restrict themselves to male standards of sensitivity makes challenging male norms of sensitivity impossible.

Viewing sensitivity from a male point of view also precludes recovery for the most vulnerable and most commonly abused women—those who have a traditionally feminine, naive, or virgin image. Russell,

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158. *Id.* at 178-79.

159. *Martin*, 220 Tenn. at 473, 418 S.W.2d at 664.

160. Criticizing pornography requires confronting morality and the norms of sexuality, because pornography depicts these norms. Exposing the sexually objectifying message of pornography, "that women are natural sexual prey to men and love it," Rich, *Compulsory Heterosexuality and Lesbian Existence*, in Women—Sex and Sexuality, *supra* note 52, at 72, exposes the male control over sexuality within heterosexuality. It exposes the congruence between sexuality, power, and violence.

the professional model, exemplifies this problem. Springs, the bedsheet advertiser, retouched her photograph because he had "been unable to obtain for [his] bedsheet advertising photographic illustrations created and participated in by persons of the professional stature and talents of the plaintiff and of Avedon [the photographer]."[161] Similarly, Martin's innocent or "virgin" image was part of the appeal of her photograph as a "hat check girl." Thus although men take special pleasure in objectifying and abusing apparently sexually inexperienced women and girls,[162] courts consider women who typify femininity supersensitive.

Lovelace also was subjected to abuse because of her naivete. Explaining her first beating and rape at the hands of Traynor, she stated:

> Why me? Why would he come down so hard on me? Why didn't he just use one of his hookers? Now I can guess at the answer: it's because an experienced hooker would have been too smart for him. It's because a streetwalker would not have been stupid and naive and gullible and scared.[163]

Lovelace's stupidity, naivity, and gullibility made her both attractive to Traynor as well as an easy victim. Those traits made her stereotypically feminine. Those same traits, however, viewed from a male perspective, make her unreasonable and supersensitive. A male perspective penalizes Lovelace for not having the personal or political resources to escape from subjugation.

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161. *Russell*, 18 Misc. at 171, 183 N.Y.S. 2d at 16 & 17. The plaintiff elaborated on her excellent reputation.

> The plaintiff (a college graduate, the wife of the co-plaintiff and the mother of their young sons) is a well-known professional high-fashion photographic model, portraying before the cameras of the leading fashion photographers the intelligent, refined, well-bred, pulchritudinous, ideal young wife and young mother, in artistic settings and socially-approved situations. Her earnings are among the highest in her vocation. Her high professional standing and concomitant earning power have been achieved by meticulous adherence to the highest standards of professional conduct and good taste for herself and for her clients. The plaintiff's professional services and photographs have never been available for purposes of advertising or trade to anyone who resorts to bad taste, immodesty, *double entendre* or similar techniques in his appeals for public attention. The use of a photograph of the plaintiff by an advertiser known to be an adherent of such techniques, connotes that the plaintiff had consented to such use. Such consent, if given by the plaintiff, would ruin her professional standing and earning power and cause her to be shunned by family and friends and in the community in which she lives and works.

Id. at 15-16 (quoting from plaintiff's complaint).

162. A. Dworkin, *supra* note 26.

163. L. Lovelace, *supra* note 15, at 27.

A Second Circuit opinion, *Geisler v. Petrocelli*,[164] recognized the unfairness of creating a rule of law which precludes the most traditionally virtuous women from recovering in an invasion of privacy action. Plaintiff, Melanie Geisler, worked as a publicity assistant for a company where the defendant, Petrocelli, had also been employed. After leaving the company, Petrocelli wrote a "potboiler" describing the "odyssey of a female transsexual athlete through the allegedly corrupt and corrupting world of the women's professional tennis circuit."[165] Petrocelli named his central character "Melanie Geisler" and gave her the plaintiff's physical characteristics. Geisler sued.

Petrocelli moved for dismissal, alleging the pleaded facts "were insufficient to establish that the behavior of a character in a self-proclaimed fictional book was 'of and concerning' appellant."[166] The court rejected defendant's argument, finding the law required only

> that plaintiff must demonstrate that third parties apprehend the similarity between the real person and her literary cognate as something more than amusing coincidence or even conscious parallelism on a superficial plane. Rather, it is required that the reasonable reader must rationally suspect that the protagonist is in fact the plaintiff, notwithstanding the author's and publisher's assurances that the work is fictional.[167]

According to the court, plaintiff was "noticeably unconventional in neither conduct nor appearance."[168] Defendant argued that it was inconceivable that people could mistake the plaintiff for the character in the story. Under that rule, a man could easily defame a conventional woman without fear of reprisal.[169]

Ironically, the supersensitivity issue also exaggerates the injustice of the consent/waiver issue. A woman who is *not* supersensitive, for

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164. 616 F.2d 636 (2nd Cir. 1980).

165. *Id.* at 638.

166. *Id.* at 639

167. *Id.*

168. *Id.* at 638.

169. The court disapproved of such a result and refused to grant defendant's motion as a matter of law. Nevertheless, it did submit the matter to the jury. *Id* at 639.

This reveals a disturbing irony inherent in the law: the more virtuous the victim of the pornographic intrusion, the less likely it will be that she will be able to establish the essential confusion in the mind of the third party. Thus, the more deserving the plaintiff of recompense for the tarnishing of a spotless reputation, the less likely will be any actual recovery. *Id.*

The *Geisler* court's understanding of the problem was quite probative. Such an understanding could help the most "common" woman such as Joyce Martin, the "hatcheck girl," who was abused because of her highly naive or traditional image. For further discussion of the libel as fiction theory, see Wilson, *The Law of Libel and the Art of Fiction*, 44 Law & Contemp. Probs., Autumn 1981, at 27.

example, a women like Vitale who explicitly works within the pornography industry, will be considered to have consented to her portrayal. Hence, a woman either consents or is supersensitive; there is rarely a middle ground. She always loses—whether "virtuous" or not.

C. Individual-Based Perspective

This article has continually asserted that law precedes from an individual-based rather than group-based perspective. In privacy doctrine this perspective has become quite explicit in the rejection of a group-based cause of action. A few examples can reveal the existence and significance of that failure. Part Three of this article will try to develop a group based perspective in privacy actions.

In *Neiman-Marcus v. Lait*,[170] Neiman-Marcus models and salespeople sued the authors of a book entitled *U.S.A. Confidential* for libel. The book described the models and saleswomen as prostitutes.

> [S]ome Neiman models are call girls—the top babes in the town. The guy who escorts one feels in the same league with the playboys who took out Ziegfield's glorified. Price, a hundred bucks a night.
>
> The salesgirls are good, too—pretty, and often much cheaper—twenty bucks on the average. They're much fun, too, not as snooty as the models. We got this confidential, from a Dallas wolf.
>
> Neiman-Marcus also contributes to the improvement of the local breed when it imports New York models to make a flash at style shows. These girls are the cream of the crop. Old millionaires toss around thousand-dollar bills for a chance to take them out.[171]

The individual-based perspective precluded the plaintiff saleswomen from recovering damages. The allegedly libelous description had said that Neiman salesgirls and "some" Neiman models were call girls. It also described the salesmen as "fairies."[172] At the time of the publication, Neiman-Marcus employed nine female models (all of whom brought suit), twenty-five salesmen (fifteen of whom brought suit), and 382 saleswomen (thirty of whom brought suit).

The defendant sought to dismiss the complaint as to the salesmen and saleswomen, because no ascertainable person was identified by the words complained of. The court applied the following two rules of law to the situation, considering both rules to be widely accepted:

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170. 13 F.R.D. 311 (S.D.N.Y. 1952).
171. *Id.* at 313.
172. *Id.*

> Where the group or class libelled is large, none can sue even though the language used is inclusive. . . . Where the group or class libelled is small, and each and every member of the group or class is referred to, than any individual member can sue.[173]

Although the court found some disagreement among the circuits, it also accepted the rule that suit is authorized "by each member of a small group where the defamatory publication refers to but a portion of the group."[174]

Applying those three principles, the court dismissed the claim by the individual saleswomen. Presumably, 382 saleswomen was too large a group for defendant to libel whereas a group of twenty-five salesmen was not. The court discounted the fact that the defendant had not limited its statement to "some salesgirls."[175] [The word, "some," had only qualified the models.] The rules that the court applied precluded the possibility that a statement could defame all the members of a large group. In particular, that rule precludes the possibility of making the feminist argument that pornography simultaneously degrades both the specific women portrayed as well as all women, as it also contributes to the maintenance of a pornographic culture which considers all women as sex objects.

The individual-based perspective was also quite evident in *Girl Scouts of the United States of America v. Personality Posters Manufacturing Co.*,[176] a case involving the distribution of a poster of a smiling girl dressed in the Girl Scout uniform, with her hands clasped above her protruding, clearly pregnant abdomen. The caveat, "Be Prepared," appeared next to her hands. Plaintiff alleged, *inter alia*, defamation:

> It contends that defendant's poster is intended to impute unchastity and moral turpitude to members of plaintiff, to hold plaintiff up to ridicule and contempt, and to suggest that plaintiff's motto "BE PREPARED" encourages the practice of contraception.[177]

The court denied plaintiff's allegations finding the record "bare of any evidence that plaintiff's reputation has been or is likely to be affected in any way by the wry, perhaps unmannerly, behavior of the defendant."[178]

The court's denial of plaintiff's allegation, however, did not even properly restate the allegation. Plaintiff had alleged that its *members*,

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173. *Id.* at 315.

174. *Id.*

175. *Id.* at 316.

176. 304 F.Supp. 1228 (S.D.N.Y 1969) (plaintiffs sought a preliminary injunction against publication and distribution of the poster).

177. *Id.* at 1234.

178. *Id.*

rather than itself, a corporate entity, was injured by the portrayal. Instead of considering the content of plaintiff's actual allegation of injury to the group of Girl Scouts, the court transformed the allegation into an individual-based allegation of injury to the Girl Scouts corporation.

Courts of nearly every jurisdiction fail to comprehend the existence of group-based injury and the significance of their failure to comprehend it.

III. Developing An Alternative Theory

Neither Warren and Brandeis' general concern for protecting society from offensive intrusions, nor *Gertz*'s recognition of the problem of public powerlessness has been able to protect women from pornographic exploitation. Three major reasons for that failure are the legal disrepute of group-based theory, the lack of recognition that women are a group lacking private and public power, and the preservation of traditional sexual values.

Although Warren and Brandeis recognized the problem of group powerlessness, they formulated their theory in terms of protecting the integrity of the *individual* from the public eye. Similarly, the *Gertz* doctrine sought to aid the lone individual, removed from the structure of political or social power, who happened to come into the public eye.

Privacy doctrine's lack of a group-based component has made it a poor tool for freeing women from oppression. For instance, the *Roe* decision protected the individual within the privacy of the family; the individual's sex or class was considered irrelevant. Poor women have been unable to extend that decision to include a right to control their own bodies by receiving state aid for abortions. Similarly, Black women have not been able to use that decision to protect themselves from sterilization abuse. As an individual-based theory, privacy doctrine cannot help the less privileged members of society, be they female, Black, or poor. At most, it will preclude the state from intervening so that the traditional family can control a woman's life. It then pretends that no oppression exists within that traditional unit, because women are supposedly free individuals within the family. Hence, the few times privacy doctrine has recognized women's injury through pornography it has limited recovery to the nonpersonal or nonsexual aspects of the injury. It has avoided understanding the injury to women *as women*.

A group-based perspective would have revealed to Warren and Brandeis that certain groups are more susceptible to the intrusions of mass technology. It would have made the *Gertz* decision a treatise on the history of political disenfranchisement in our country. The *Roe* decision would have comprehended the physical enslavement that women are forced to undergo in having no control over their bodies, in being forced to

serve as incubators for nine months, and in having to be child raisers for the child's ensuing lifetime. Rather than being heralded as a brillant theory, Fuller's search for scientific neutrality or objectivity would have been received as a deceptive rationalization for maintaining male bias in law. A group-based perspective would bring the inevitable bias of any decision to the forefront. Adopting a group-based perspective could transform privacy doctrine into an effective remedy for pornographic intrusions. That doctrine has some legal basis.

The Supreme Court in *Beauharnais v. Illinois*[179] upheld the right of the state to outlaw group libel. Beauharnais had published a leaflet generally deprecating Blacks. The leaflet contained statements like the following: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro [sic] will not unite us, the aggression . . . rapes, robberies, knives, guns and marijuana of the negro [sic], surely will."[180] Beauharnais was convicted under an Illinois statute which stated:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots . . . .[181]

In *Beauharnais*, the Court explicitly recognized that individuals may need group protection.

> Such group-protection on behalf of the individual may, for all we know, be a need not confined to the part that a trade union plays in effectuating rights abstractly recognized as belonging to its members. It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. . . . [T]he Illinois legislature may warrantly believe that a man's [sic] job and his [sic] educational opportunities and the dignity accorded him [sic] may depend as much on the reputation of the racial and religious group to which he [sic] willy-nilly belongs, as on his [sic] own merits.[182]

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179. 343 U.S. 250 (1952).
180. *Id.* at 252.
181. *Id.* at 251.
182. *Id.* at 262-63.

The Court justified the need for the Illinois statute by tracing the state's history of racial tension.[183] Although the Court was not convinced that a group-based libel statute would necessarily eliminate such racial tensions, it concluded that the legislature had the option of making that policy choice.[184]

The *Beauharnais* decision, although it did not mention Warren and Brandeis' work, paralleled their concern about the powerlessness of certain groups against the power of the printed media. *Beauharnais*, however, did not confine the problem to technological advances; it realized that problems also grow out of other economic and social conditions. It therefore introduced into group libel law a recognition of the importance of understanding the social, political, and economic history that may make group libel laws necessary. Such a recognition could aid women injured by pornographic invasions of privacy.[185]

Before courts can use the group libel theory to redress women's injuries, however, they must find that women as a group have faced a history of oppression or servitude.[186] The only source of such a theory in the Constitution is the thirteenth amendment. Courts have generally denied women's attempts to apply the thirteenth amendment to claims of discrimination because women supposedly have no history of servitude.[187] Nevertheless, courts have sometimes recognized women's

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183. *Id.* at 258-61.

184. *Id.* at 267.

185. Until recently, commentators considered *Beauharnais* to have limited precedential value due to the Court's decisions in *New York Times v. Sullivan* and its progeny. *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978) (finding three village ordinances unconstitutional which were enacted to prohibit demonstrations by the Nazi party); Sambo's Restaurant, Inc. v. City of Ann Arbor, 663 F.2d 686 (6th Cir. 1981) (restaurant's right to use name "Sambo's Restaurant," protected by first amendment despite its racial offensiveness); Tollett v. United States, 485 F.2d 1087, 1094 (8th Cir. 1973) (vacating conviction for mailing obscene postcards); Anti-Defamation League of B'Nai B'Rith Pacific Southwest Regional Office v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969) (upholding commission decision to grant license renewal to station that had broadcast anti-Semitic programs). *See also* Garrison v. Louisiana, 379 U.S. 64, 67-68 n.3 (1964) (narrowing *Beauharnais* decision).

The recent Supreme Court decision, New York v. Ferber, 102 S. Ct. 3348 (1982), however, has renewed the vitality of *Beauharnais*. In *Ferber*, the Court cited *Beauharnais* with approval when public officials are not the target of a libelous publication. *Id.* at 3358. Further, it extended group protection to children visually depicted performing sexual acts or lewdly exhibiting their genitals. The Court labeled such depictions "child pornography."

186. *Beauharnais* had to conclude that blacks faced a history of racial tension before developing a group-based theory for blacks. *See supra* note 179.

187. *Cf.* Great American Savings & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) (male plaintiff failing in attempt to use §1985(3) in a sex discrimination suit). *But see* Weise v. Syracuse Univ., 522 F.2d 397, 408-09 n.16 (2d Cir. 1975); Reichardt v. Payne, 396 F.Supp. 1010, 1018 (N.D. Calif. 1975); Pendrell v. Chaatam College, 386 F.Supp. 341, 347 (W.D. Pa. 1974); Stern v. Massachusetts Indem. & Life Insur. Co., 365 F.Supp. 433,

group-based oppression. The Supreme Court in its plurality opinion in *Frontiero v. Richardson*[188] stated:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage . . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of [B]lacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And although [B]lacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights"—until adoption of the Nineteenth Amendment half a century later.[189]

Additionally, some courts have acknowledged women's sex-based oppression in the context of sexual harassment at the workplace.[190]

The nineteenth amendment, which only in 1920 made women voting citizens,[191] might also serve as source for that recognition. The nineteenth amendment is particularly appropriate in light of the *Gertz* decision's focus on effective free speech and the importance of a representative democracy. So long as women systematically fail to get elected to public office, a group-based *Gertz* doctrine could recognize women's lack of effective free speech.

In order to succeed under a group libel theory, female plaintiffs must also overcome the tendency of courts to uphold traditional values. Recently in *New York v. Ferber*,[192] the Court extended group protection

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442-43 (E.D. Pa. 1973); *See generally* Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 Minn. L. Rev. 313 (1977).

188. 411 U.S. 677 (1973).

189. *Id.* at 684-85.

190. *See, e.g.*, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Continental Can Co., Inc. v. State, 297 N.W.2d 241 (Minn. 1980); Hayden v. Atlanta Newspapers, 534 F.Supp. 1166 (N.D. Ga. 1982).

191. U.S. Const. amend. XIX:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress shall have power to enforce this article by appropriate legislation.

192. New York v. Ferber, 102 S. Ct. 3348 (1982).

to children depicted engaging in sexual activity or lewdly exhibiting their genitals. The Court was willing to apply a group protection rationale to children within the pornography industry because of society's traditional, special protection of children. It could reach that decision without challenging the traditional notion of what is "obscene" or "morally objectionable." In fact, it carefully limited its decision to child pornography.[193]

The radical feminist critique of pornography, however, does not allow such an easy accommodation; radical feminists use pornography and all examples of women's sexual abuse as an opportunity to critique the norms of sexuality themselves.[194] Because the pervasive use of women as sex objects is consistent with the norms of sexuality, courts refuse to recognize women's abuse. Male jurisprudence defines the problem of female sexual abuse narrowly and is indifferent to women's oppression. Hence, it maintains the objectifying norms of sexuality.

Law is ill equipped to question traditional values. By definition, one cannot look to past legal decisions or textual sources to question those norms because the past embodies that tradition. Women, therefore, need to assert the right to question traditional values, rather than pretend that the source of a new value system can be found within tradition. That hurdle may require legal changes to follow rather than lead a change in norms, because it is practically impossible to get law to act outside of established norms.

IV. Afterword

By focusing on how privacy doctrine could be transformed to aid women in litigation, this article does not suggest that such efforts should be the focus of the women's movement. Litigation, a coercive and competitive tool, cannot replace more broad-based grassroots efforts to change fundamentally the conditions which make pornography possible.

This article explores privacy doctrine to show the pervasive ways that male norms of sexuality enter and control women's lives. Feminists may understand that the personal is political; law remains adverse to such an understanding. In particular, feminists often unthinkingly value privacy, not recognizing that the current legal conception of privacy helps maintain women's oppression. This article challenges that unquestioned assumption.

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193. *Id.* at 3358.

194. *See, e.g.*, A. Dworkin, *supra* note 26; Rich, *Compulsory Heterosexuality and Lesbian Existence*, *supra* note 52; MacKinnon, *supra* note 28.

The subject matter of this article is not related to the responsibilities, program or operations of the Department of Justice. This article does not represent the opinions and legal conclusions of the Department.

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