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Barbara S. Bryant

SEXUAL DISPLAY OF WOMEN'S BODIES—A VIOLATION OF PRIVACY

Barbara S. Bryant*

> As for porn, we've tried laughing it off or averting our eyes. But even at its most inane, pornography's basic message is domination, not reciprocity. It defines sex as male aggression and the female body as a target for conquest—attitudes which were never laughable. Besides, where do we avert our eyes *to,* these days? The billboards, marquees, and massage-parlor ads are omnipresent. The simple act of buying a paper at my corner newsstand surrounds me with publications proclaiming contempt for my womanhood. Our political analyses may aptly label such material as "sexist propaganda," but meanwhile my nausea rises to it in humiliation. It hurts.
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> —*Robin Morgan,* 1978
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> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.
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> —CAL. CONST. art. I, § 1

The Constitution of the State of California thus guarantees privacy to every person within its jurisdiction. A "right of privacy" is found in the penumbras of the Bill of Rights.[1] The right of privacy has been claimed as a right "older than the Bill of Rights,"[2] as "one of the truly profound values for a civilized society."[3] Although courts and commentators cannot agree on precisely what it is (or whether it is a single right or constellation of many), they do agree that privacy is an evolving concept—one

* Third Year Student, Golden Gate University School of Law; M.S.W., California State University, Sacramento, 1975. This paper was originally written for a seminar on Privacy and Government.

1. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

2. *Id.* at 486.

3. Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?,* 31 L. CONTEMP. PROBS. 326, 326 (1966).

capable of adaptation to changing social and political sensibilities.[4]

This paper examines the concept of a right of privacy in relation to the sexual display of women's bodies. From the covers of men's magazines and newspaper ads, to pornographic theaters, women's bodies are treated as commodities to undress and exhibit. Women as a class are faced with daily images of their nakedness and vulnerability. Many of these images do not fall within the constitutional definition of obscenity[5] and are thus treated as protected speech.[6]

While important first amendment questions are raised whenever regulation or prohibition of any sexually explicit material is considered, those questions should only begin the inquiry. Certain regulation and limitations on speech are generally accepted as worthwhile because of competing social interests, e.g. libelous speech, false advertising. As with the right of privacy, the right of free speech is a multi-tiered concept—speech may occur with a voluntary or captive audience, in a commercial or symbolic setting, and is necessarily susceptible to time, place, and manner restrictions.[7] Developing law in each of these areas has required a weighing of conflicting interests and values.[8]

The interest that women have as a class in the public display of female sexuality has been ignored by courts and legal writers. This paper posits that women's interest is a serious one—akin to a right to bodily privacy or liberty—and that

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4. *See* § I *infra* for a discussion of significant commentators and cases that have shaped this evolution.

5. The basic guidelines for defining obscenity are

> (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.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

6. Serious legal thought is needed about the violence and abuse against women taking place in much of pornography and about the inadequacy of obscenity law to deal with it.

7. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1040-259 (1975).

8. *See id.* at 1040-54.

courts must begin to accommodate this interest in any balance of competing social concerns.[9]

I. DEFINING THE RIGHT OF PRIVACY

A. CONSTITUTIONAL SOURCE

Prior to 1965, privacy as a constitutionally protected interest was discussed most often in regards to fourth amendment questions of 'search and seizure'. Until the second half of the 1900's, a government search conducted in violation of the fourth amendment was denounced as one offending property rights, and was analogized to laws against physical trespass on private property.[10] In his dissent in *Olmstead v. United States*,[11] Justice Brandeis argued for broader constitutional protection:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[12]

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9. We live in an environment in which the sexual subordination of women is institutionalized. From laws denying women equal status in marriage, to unequal enforcement of prostitution laws, our legal system serves to solidify and enshroud women's social inequality. But the ideology of the culture goes far deeper than its laws and redress through the legal system is rarely sufficient to effect fundamental change in social relations. Although challenging the law is a necessary component of the struggle for an egalitarian society, it is not sufficient. "Whether or not we can achieve narrow and strict laws, laws which do not threaten our speech, our work is deeper; we must change not only what is legal or not legal, but what is acceptable." *On Pornography*, 4 CHRYSALIS 11, 17 (1979) (statement of Susan Griffin).

10. *See* Katz v. United States, 389 U.S. 347 (1967); Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928); P. DIONISOPOULOS & C. DUCAT, THE RIGHT TO PRIVACY 15-19 (1976).

11. 277 U.S. 438 (1928).

12. *Id.* at 478 (Brandeis, J., dissenting).

Justice Brandeis' rejection of the 'trespass doctrine' and support for a fourth amendment privacy interest of individuals, was substantially vindicated in 1967 by the United States Supreme Court in *Katz v. United States*.[13]

> We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.[14]

The concept of a reasonable expectation of privacy was expanded by federal and state courts.[15]

In 1965, the Supreme Court decided *Griswold v. Connecticut*,[16] holding that a state cannot prohibit the use of contraceptives in a marital relationship. In writing for the Court, Justice Douglas argued that guarantees found in the first, third, fourth, fifth and ninth amendments of the Bill of Rights create zones of privacy and secure penumbral rights which give meaning and substance to the specific guarantees.[17] In a concurring opinion, Justice Goldberg reasoned that the concept of liberty embodied in the fourteenth amendment protects fundamental personal rights including rights not express in the Bill of Rights yet re-

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13. 389 U.S. 347 (1967).

14. *Id.* at 353.

15. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Ravin v. Alaska, 537 P.2d 494 (Alaska 1975) (individual's right of privacy encompasses personal use and possession of marijuana in the home); People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969) (defendant has a reasonable expectation of privacy in contents of garbage-can within a few feet of his house). *But cf.* Smayda v. United States, 352 F.2d 251 (9th Cir. 1965) (person's right to privacy in a toilet stall of a public bathroom subordinate to interest of law enforcement in detecting possible homosexual activity); Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952) (right to privacy of passenger on public vehicle substantially less than that of an individual at home).

16. 381 U.S. 479 (1965).

17. *Id.* at 484.

served to the people by virtue of the ninth amendment.[18] A majority of the Court agreed that marital privacy is a fundamental right entitled to specific constitutional protection.[19]

Although *Griswold* was initially interpreted as upholding a right to privacy based solely on the marital relationship,[20] the marital-nonmarital distinction soon was replaced with a recognition of an individual's right to privacy (and choice) in sexual and procreative matters.[21] In *Roe v. Wade*[22] and subsequent cases,[23] a woman's decision whether or not to have an abortion was held to fall within the parameters of a personal right of privacy in matters of intimate concern and to be protected against unwarranted governmental intrusion.[24]

Constitutional privacy cases are premised on an individual's right to be free from unnecessary governmental intrusion, however, court opinions often reflect a recognition of the concomitant necessity for preserving individual choice, autonomy, and

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18. *Id.* at 492 (Goldberg, J., concurring).

19. *Id.* at 485, 495 (Goldberg, J., concurring), *id.* at 502 (White, J., concurring).

20. *E.g.*, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1200-01 (E.D. Va. 1975); Buchanan v. Batchelor, 308 F. Supp. 729, 732-33 (N.D. Tex. 1970); Travers v. Paton, 261 F. Supp. 110, 113 (D.C. Conn. 1966).

21. *E.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (adults have right to receive contraceptives without going through a licensed pharmacist); Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972) (right of unmarried persons to birth control devices and information); Population Servs. Int'l v. Wilson, 398 F. Supp. 321, 330-31 (S.D.N.Y. 1975) (right of minors to birth control devices and information). *Contra*, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1200-01 (E.D. Va. 1975) (denying challenge to enforcement of sodomy statute against private homosexual relations).

22. 410 U.S. 113 (1973).

23. *E.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973).

24. In Roe v. Wade, 410 U.S. 113 (1973), the Court heavily qualified a woman's right to choose abortion without governmental interference. A state's interest is sufficiently compelling to allow for regulation of the abortion process after the first trimester, and for complete prohibition after the second trimester except when "necessary . . . for the preservation of the life or health of the mother." *Id.* at 165.

For Supreme Court decisions allowing states to withdraw public funds from Medicaid clients exercising their right to choose abortion, see Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977). The Court has recently granted certiorari in McRae v. HEW, *sub. nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) and may decide the constitutionality of the "Hyde Amendment," prohibiting the use of federal money for abortions (except when necessary to preserve a woman's life, prevent severe and long-lasting physical health damage, or terminate pregnancy caused by rape or incest.

dignity[25] in an increasingly mass-produced and regulated society. Whether classified as a 'right to privacy' or as an extension of the right to liberty,[26] this recognition exists as a unifying theme in cases concerning divergent interests, circumstances, and settings. Such a right has been noted with approval in connection with an individual's right to choose death over a vegetative existence,[27] to wear hair at school in accordance with personal preference,[28] and to read obscene material in the privacy of one's home,[29] as well as in fourth amendment search and seizure cases, and those involving sex, procreation, and marriage.

In recognizing the amorphous nature of a right to privacy, two authors, Dionisopoulos and Ducat, attempted to introduce clarity by conceptualizing a three-part doctrine, rather than a single abstract principle.[30] They argue that privacy may be understood best in terms of place-oriented privacy, person-oriented privacy, and privacy attached to certain relationships.[31] Although this categorization begins to make sense of a fragmented body of law, it becomes apparent that many privacy cases do not

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25. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy . . . is a powerful deterrent to any one who would control men's minds.

Public Utils. Comm'n v. Pollak, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting).

An individual's personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing his attitude and lifestyle. In taking control over a citizen's personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well. To say that the liberty guarantee of the Fourteenth Amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self-identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect.

Kelley v. Johnson, 425 U.S. 238, 250-51 (1976) (Marshall, J., dissenting).

26. *See, e.g.*, Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting); Roe v. Wade, 410 U.S. 113, 153 (1973); Breese v. Smith, 501 P.2d 159, 168 (Alaska 1972).

27. In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

28. Breese v. Smith, 501 P.2d 159 (Alaska 1972).

29. Stanley v. Georgia, 394 U.S. 557 (1969).

30. P. DIONISOPOULOS & C. DUCAT, *supra* note 10, at 29-30.

31. *Id. passim.*

lend themselves to such a neat trichotomization.[32] One particularly useful aspect of this approach, however, is that the authors further organize their discussion of privacy inhering in the person according to Prosser's four-part typology of privacy torts—intrusion, disclosure, "false light", and appropriation,[33] thus accentuating the commonality of privacy principles whether at issue between an individual and the state, or between two or more private parties.[34] An understanding of the relationship between public and private intrusions, and of the constitutional protection against privacy violations by individuals, is essential to any attempt to explicate the nature of the violation against women posed by sexual commercialization of female nudity.

B. Privacy in Tort Law

One of the first attempts by an American legal scholar to articulate what has come to be referred to as a right of privacy, was by Judge Cooley in 1888.

> The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone.[35]

This "right to be let alone" was noted with approval and further developed in an 1890 article by Samuel Warren and Louis Brandeis.[36] The authors traced the development of the common law from its early recognition of tangible property rights to the expanding concept of harm to an individual implicit in the law of nuisance and defamation and in the increasing protection af-

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32. For instance, Griswold v. Connecticut, 381 U.S. 479 (1965) is analyzed by the authors in terms of privacy inhering in a relationship although it has come to represent the right of the individual to autonomy in private (sexual) matters. *See* note 21 *supra* and accompanying text.

33. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960).

34. P. Dionisopoulos & C. Ducat, *supra* note 10, at 101-07.

35. Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68, 78 (1905) citing T. Cooley, Torts 29 (2d ed. 1888).

36. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

forded to a person's intellectual and emotional life as reflected in the law of copyright.[37] The authors then borrowed from Judge Cooley's "right to be let alone" and from the common law protection of intangible property rights and brought forth a conceptual framework for a new tort—the invasion of privacy.

Although the circumstances that propelled Warren and Brandeis to their burst of creativity may not seem of great import today,[38] the underpinnings of their privacy theory have had a profound influence on the legal thinking of the twentieth century. The essence of their theory was the principle of an inviolate personality—that in every individual there is a range of feelings, thoughts, and sensitivities that is assaulted as surely as by a physical assault when intimate affairs of the individual are exposed to the world.[39] Warren and Brandeis astutely recognized the quality of being owned or possessed by another when an individual is physically assaulted, defamed, or is subjected to publication of the intimate details of his or her life.[40] To Warren and Brandeis, the invasion of privacy constituted a tort in itself "because it impaired the individual's sense of his own uniqueness, trammeled his independence, impaired his integrity, and assaulted his dignity."[41]

Warren and Brandeis set forth remedial guidelines for their new tort.[42] They recognized the necessity for balancing the dignity and convenience of the individual against public needs, and suggested limits, borrowing heavily from the law of defamation and artistic property. According to the authors, the right to privacy would not prohibit publication of information of general interest,[43] communications privileged under defamation law,[44] oral

37. *Id.* at 193-95.

38. The authors were immediately concerned with newspaper accounts of the social activities of the prominent Warren family. Prosser, *supra* note 33, at 383. "To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle." Warren & Brandeis, *supra* note 36, at 196.

39. *Id.* at 205.

40. *Id.*

41. P. DIONISOPOULOS & C. DUCAT, *supra* note 10, at 20.

42. Warren & Brandeis, *supra* note 36, at 219-20.

43. *Id.* at 214-16.

44. *Id.* at 216-17.

publication absent special damage,[45] or information published with an individual's consent.[46] The truth of the matter published and the absence of malice in the publisher would not be defenses to an otherwise tortious invasion.[47]

Warren and Brandeis' scheme for a right to privacy was examined by Dean Prosser in 1960.[48] While expressing general agreement with their position,[49] Prosser argued that an invasion of privacy is not one generic tort, but rather four distinct invasions of four different interests: 1) intrusion upon an individual's solitude or private affairs; 2) public disclosure of embarrassing private facts; 3) publicity placing an individual in a false light in the public eye; and 4) appropriation of an individual's name or likeness.[50] Prosser defined the legal injury as harm to an intangible property interest, i.e. loss of reputation or standing in the community, or lack of compensation for the use of an individual's likeness.[51] But Prosser rejected by implication the essential underlying nature of the complaint in privacy cases—that an invasion of privacy per se is demeaning to individuality and an affront to personal dignity—as an injury separate from lost opportunity or community standing and emotional distress following from other tortious behavior.[52]

An eloquent argument for recognition of this unitary right to privacy principle is presented by Professor Bloustein.[53] In re-

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45. *Id.* at 217.
46. *Id.* at 218.
47. *Id.*
48. Prosser, *supra* note 33.
49. *Id.* at 422-23.
50. *Id.* at 389.
51. *Id.* at 422-23.
52. P. DIONISOPOULOS & C. DUCAT, *supra* note 10, at 27-28. *See* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

> A woman's legal right to bear children without unwanted onlookers does not turn on the desire to protect her emotional equanimity, but rather on a desire to enhance her individuality and human dignity. When the right is violated she suffers outrage or affront, not necessarily mental trauma or distress. And, even where she does undergo anxiety or other symptoms of mental illness as a result, these consequences themselves flow from the indignity which has been done to her.

Id. at 973.
53. Bloustein, *supra* note 52.

jecting Dean Prosser's categorization of four distinct interests, Bloustein posits that in every type of privacy case, the injury lies in demeaning and humiliating an individual's dignity and sense of self—whether the means utilized are intrusion into private affairs, publication of facts, or "commercialization of an aspect of personality."[54] Bloustein reiterates the Warren and Brandeis theme that intrusion into another's privacy is an intolerable act of possession.

> No man wants to be "used" by another against his will, and it is for this reason that commercial use of a personal photograph is obnoxious. Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interest of others. In a community at all sensitive to the commercialization of human values, it is degrading to thus make a man part of commerce against his will.[55]

More importantly, Bloustein argues that violations of personal privacy threaten our liberty as individuals just as do the dignitary torts of assault, battery, and false imprisonment.[56]

> The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversation may be overheard at

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54. *Id.* at 987.
55. *Id.* at 988.
56. *Id.* at 1002.

> And just as we may regard [assault, battery, and false imprisonment] as offenses 'to the reasonable sense of personal dignity', as offensive to our concept of individualism and the liberty it entails, so too should we regard privacy as a dignitary tort. Unlike many other torts, the harm caused is not one which may be repaired and the loss suffered is not one which may be made good by an award of damages. The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.

Id. at 1002-03 (citations omitted).

> the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.[57]

When a right to privacy is conceptualized in tort law as a unifying principle, protection against an invasion of that privacy is more clearly understood as a defense of values similar to those defended in our Constitution against encroachment by government.[58]

C. Privacy Rights of a Group

The evolving law of privacy has yet to confront the question of whether a violation of privacy is a harm capable of being committed against a whole group or class of people. Likewise this evolution has yet to consider whether an individual's right to privacy may be invaded by virtue of membership in a group whose privacy is being violated in a way that would be considered tortious if directed at an individual.

Although the common law of tort is capable of continual expansion to meet the legal needs of a changing society,[59] it is premised on the redress of legally recognized harm to identifiable individuals.[60] While tort law imposes a standard of conduct on members of society in their dealings with one another, and this standard may be owed to a class of people (i.e. passengers on a common carrier), a cause of action arises only when a specific

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57. *Id.* at 973-74 (citation omitted).

58. "A democratic state which values individual liberty can no more tolerate an intrusion on privacy by a private person than by an officer of government and the protections afforded in tort law, like those afforded under the Constitution, are designed to protect this same value." *Id.* at 994. Bloustein mentions "peeping tom" and eavesdropping statutes as examples of governmental recognition of and defense against individual intrusion into another's privacy. *Id.* at 995-96.

59. "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Warren & Brandeis, *supra* note 36, at 193.

60. "[Tort law] is directed toward the compensation of individuals, rather than the public, for losses which they have suffered in respect of all their legally recognized interests. . . . The purpose . . . is . . . to afford compensation for injuries sustained by one person as the result of the conduct of another." W. Prosser, Handbook of the Law of Torts 6 (4th ed. 1971).

injury is done to an individual or member of a class.[61]

In the law of privacy, under either Prosser's four categories or Warren and Brandeis' 'inviolate personality' theory, the violation of privacy consists of some publication or intrusion relating to an identifiable individual, that is done without that person's consent.[62] The assault on personal dignity was seen as flowing from public exposure to intimate details of the aggrieved individual's life or person. An assault on personal dignity flowing from public exposure to private characteristics of a group of which an individual is a member, has not been considered.

While tort law is directly concerned with compensating individuals for harm they have suffered, criminal law is primarily concerned with protecting the interests of the public as a whole by punishing wrong-doers.[63] By its nature, criminal law is better suited to address injury to a group. However, laws rarely have been passed that make it a crime to insult, demean, or otherwise violate a particular class of people.[64] One notable exception was

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61. *Id.* at 5. An exception to the requirement of injury to an identifiable individual exists in the law of defamation. If a defamatory statement is directed at a small group, plaintiff member may have a cause of action by way of colloquium—by establishing that the defamatory statement has some reasonable personal application. Courts have rarely allowed a finding of personal reference to plaintiff when the defamed group consisted of more than five or ten people. *Id.* at 749-51.

62. *See* notes 43-51 *supra* and accompanying text.

63. For a discussion of the relative goals and purposes of criminal and tort law, see W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 10-14 (1972); W. PROSSER, *supra* note 60, at 7-14.

64. Constitutional law in theory protects group interests through prohibiting laws that are inequitable or otherwise unjust under a due process or equal protection analysis.

The right of groups to be free from hostility and insult is recognized in the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly, Dec. 16, 1966 (signed by President Carter Oct. 5, 1977, pending ratification by Senate). U.S. DEP'T OF STATE, No. 5 (REVISED), SELECTED DOCUMENTS, HUMAN RIGHTS 19 (1978).

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> *Recognizing* that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. . .
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> ARTICLE 19
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> 1. Everyone shall have the right to hold opinions without interference.
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> 2. Everyone shall have the right to freedom of expres-

a 1952 Illinois statute challenged in *Beauharnais v. Illinois*.[65] The statute made it a crime to publish, sell or distribute any form of communication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion [or which] 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. . . ."[66]

In upholding the statute as a form of criminal libel law against a first amendment challenge, the Supreme Court held that a state legislature

> may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.[67]

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sion; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

ARTICLE 20

1. Any propaganda for war shall be prohibited by law.

2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. . . .*

Id. at 19, 23 (emphasis added).

65. 343 U.S. 250 (1952).

66. *Id.* at 251.

67. *Id.* at 263. The four dissenting opinions specifically objected to the lack of a required finding of injury to the person, *id.* at 302 (Jackson, J., dissenting); the expansion of libel law to protect "huge groups", *id.* at 271-72 (Black, J., dissenting); the vagueness of the defined harm, *id.* at 283-84 (Reed, J., dissenting); and the lack of a requirement of clear and present danger, *id.* at 284 (Douglas, J., dissenting).

While the Court's holding in *Beauharnais* likely would not be reaffirmed today,[68] the case is instructive for its recognition of possible injury to an individual whose dignity, sense of worth, and economic opportunity are diminished by actions that insult and disparage the group of which s/he is a member.

II. THE PRIVACY INTEREST OF WOMEN

During the last hundred years, the law increasingly has recognized rights of the individual. Protection of property is no longer the only or most esteemed function of our legal system.[69] The evolving law of privacy reflects the common law's expansion of protectible interests beyond those based solely on property rights. The status of women has been undergoing a parallel transformation. From an early position as chattel, women have beeen acquiring increasing legal recognition as human beings.[70] Expanded rights and opportunities have been won by a relentless struggle for equality.[71] The societal attitude of woman-as-appendage-to-a-man is beginning to lose favor, but the legal system is still ambivalent as to the extent of women's autonomy.[72]

One persistent vestige of women's appendage status is in the

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68. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (challenge by Nazi party to Skokie ordinances). The suit was brought to enjoin enforcement of local ordinances restricting assembly and the dissemination of material under conditions similar to those proscribed in Beauharnais v. Illinois, 343 U.S. 250 (1952). In affirming the decision of the lower court striking down the ordinances, the court of appeal questioned the present vitality of *Beauharnais* in light of court decisions from the last quarter century. *Id.* at 1204-05.

69. *See generally* Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 L. CONTEMP. PROBS. 272 (1966).

70. For a discussion of the respective rights of single and married women at common law, see L. KANOWITZ, WOMEN AND THE LAW 35-99 (1969).

71. *See generally* E. FLEXNER, CENTURY OF STRUGGLE (1972); J. HOLE & E. LEVINE, REBIRTH OF FEMINISM (1971).

72. A poignant example of this ambivalence is found in the Court's opinion(s) in Roe v. Wade, 410 U.S. 113 (1973). While the case was lauded as a landmark decision for women's right of choice, and did declare a constitutionally-protected right to abortion, it at the same time wrested control over her pregnancy from the woman during the second and third trimesters. The decision speaks as much to the physician's right to practice medicine as to the woman's right to control her reproductive capacity. As the period of pregnancy lengthens, the state's interest begins to outweigh that of the mother. She may in fact be forced to bear an unwanted child. In Doe v. Bolton, 410 U.S. 179 (1973), Chief Justice Burger underscores the partial nature of the victory: "Plainly, the Court today rejects any claim that the Constitution requires abortions on demand." *Id.* at 208 (Burger, C.J., concurring).

realm of sexuality. Women often still are depicted and treated as objects whose purpose is to service male sexuality.[73] Whether the focus is on sexual commercialization of female nudity, or on the portrayal of legally obscene material, the theme still centers on domination by the male and victimization of the female;[74] "eroticism is defined in terms of female powerlessness, dependency, and submission."[75] Underlying this theme is the fear, mistrust, and hostility that marks relations between the sexes.

> Since the abatement of censorship, masculine hostility (psychological or physical) in specifically *sexual* contexts has become far more apparent. Yet as masculine hostility has been fairly continuous, one deals here probably less with a matter of increase than with a new frankness in expressing hostility in specifically sexual contexts. It is a matter of release and freedom to express what was once forbidden expression outside of pornography or other "underground" productions, such as those of De Sade. As one recalls both the euphemism and the idealism of descriptions of coitus in the Romantic poets . . ., or the Victorian novelists . . . and contrasts it with Miller or William Burroughs, one has an idea of how contemporary literature has absorbed not only the truthful explicitness of pornography, but its anti-social character as well. Since this tendency to hurt or insult has been given free expression, it has become far easier to assess sexual antagonism in the male.[76]

It is important to understand the societal conditions that allow the sexual commercialization of female nudity to flourish. It is only in relating this phenomenon to the larger context of

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73. "[W]omen are required to market sexual attractiveness to men, who tend to hold the economic power and position to enforce their predilections." C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 21 (1979). "The fact is that the role of women in sex, as in every other aspect of life, has been to serve the needs of others—men and children." S. HITE, THE HITE REPORT 419 (1976). For the role patriarchal socialization plays in male sexual domination see K. MILLETT, SEXUAL POLITICS 23-58 (1970). "However muted its present appearance may be, sexual dominion obtains nevertheless as perhaps the most pervasive ideology of our culture and provides its most fundamental concept of power." *Id.* at 25.

74. *See* K. MILLETT, *supra* note 73, at 44-45.

75. Phelps, *Female Sexual Alienation*, in WOMEN: A FEMINIST PERSPECTIVE 17, 19 (J. Freeman ed. 1975).

76. K. MILLETT, *supra* note 73, at 45-46.

sexual power,[77] that one can fully realize the quality of intrusion and control that is being exercised by such media portrayals. The reader is referred once again to a telling statement by Bloustein on the nature of privacy:

> The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. . . . *He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.*[78]

Certainly there are different forms of privacy and different means for its intrusion. But whether under a constitutional analysis or the common law, matters pertaining to our bodies, our sexuality, our sexual lives, are considered fundamental areas of intimacy and of personhood.[79] The essence of the outrage, lost dignity, and sense of self resulting from public exposure of intimate details, is in the reaction to feeling "naked before the world."[80] In the case of sexual commercialization of female nudity, being 'naked before the world' is not only the psychological result but is the subject and objective of the intrusion itself.[81] The human need for self-concealment in its most literal

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77. We have a sexual situation in which the humanity and personhood of the woman, which make her seek autonomy and action and expression and self-respect, are at odds with her socially organized sexuality. We have a situation in which the dominant male sexual culture aggrandizes the male ego whereas the subordinate female style damages the female ego. Sex means different things to women and men by this time.

Morgan, *The Erotization of Male Dominance/Female Subordination,* UNIVERSITY OF MICHIGAN PAPERS IN WOMEN'S STUDIES (1975) cited in C. MACKINNON, *supra* note 73, at 157.

78. Bloustein, *supra* note 52, at 973-74 (emphasis added).

79. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person. . . ." Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) quoted in Breese v. Smith, 501 P.2d 159, 168 (Alaska 1972).

80. *See* Bloustein, *supra* note 52, at 1006.

81. In a discussion of connections between pornography and rape, Susan Brownmiller describes the psychological assault many women feel when viewing pornographic treatment of women.

> The gut distaste that a majority of women feel when we look

form is denied women as a class by exploitation of female nakedness.[82]

The concept of privacy in tort law has been shaped around protection of the individual from unwarranted intrusion or public identification. Applied literally to our set of facts, the only possible plaintiffs would be those individuals who are depicted in photographs or other media—and the majority of them have consented to the exposure.[83] But it is at precisely this point that conceptualization of a right to privacy must expand to recognize the injury to all women from public display of individual women's bodies.[84] Against a background of sexual politics, public sexual display of individual—usually anonymous—women becomes a group phenomenon and a group wrong.[85] As long as the sexes are divided by unequal status, and women as a class are

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> at pornography, a distaste that, incredibly, it is no longer fashionable to admit, comes, I think, from the gut knowledge that we and our bodies are being stripped, exposed and contorted for the purpose of ridicule to bolster that "masculine esteem" which gets its kick and sense of power from viewing females as anonymous, panting playthings, adult toys, dehumanized objects to be used, abused, broken and discarded.

S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 394 (1975).

82. *See* generally Jourard, *Some Psychological Aspects of Privacy*, 31 L. CONTEMP. PROBS. 307 (1966). It is significant that public sexual images of male nudity are rare. It has been reported that in a policy meeting of publishers of "male magazines," one participant refused to expand his line of products to include male nudity because he was not willing to "subject men to that kind of humiliation." Conversation with Dr. Judith Reisman, Cleveland, Ohio (Nov. 1978) (researcher on the influence of sexual media on the female identity).

83. Instances increasingly are coming to light of women who have been physically or psychologically coerced into posing for pornographic movies and pictures. *See* K. BARRY, FEMALE SEXUAL SLAVERY (1979); L. LOVELACE, ORDEAL (1980).

84. [O]ur bodies have too often been the objects of pornography and the woman-hating, violent practice that it preaches. Consider also our spirits that break a little each time we see ourselves in chains or full labial display for the conquering male viewer, bruised or on our knees, screaming a real or pretended pain to delight the sadist, pretending to enjoy what we don't enjoy, to be blind to the images of our sisters that really haunt us—humiliated often enough ourselves by the truly obscene idea that sex and the domination of women must be combined.

Steinem, *Erotica and Pornography: A Clear and Present Difference*, Ms., Nov. 1978, 53, at 78.

85. Magazines exist that present pictures of male nudes, ostensibly for a female audience. However, the exceptional nature of these undertakings (in addition to the fact that the magazines reach an audience consisting of large numbers of gay men) underscores the reality of unequal power and sexual exploitation of women as a social problem.

defined first and primarily by our sexuality, the sexual commercialization of female nudity will be an insult to the dignity and liberty of all women.

III. COMPETING SOCIAL INTERESTS

Women's struggle to achieve and preserve individual identity and self-respect has been a long one. Courts at times have advanced this endeavor[86] and at times have held it back.[87] As the ultimate arbiter of social control and social relations, our legal system is faced with the contradictory role of protecting the property interests of the powerful[88] and the individual rights of the weak. This contradiction often results in a balancing process whereby competing social interests are weighed. This balancing process is nowhere more evident than in the law of torts where the interests of individuals and groups are measured against each other and against the good of society as a whole.[89] Constitutional analysis as well has evolved into a continual weighing of interests between the individual and the state, and between conflicting constitutional rights.[90]

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86. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677 (1973); Rosenfeld v. Southern Pac. Ry., 444 F.2d 1219 (9th Cir. 1971). It is not easy to locate cases in which a favorable ruling was obtained solely to further the cause of women's equality. Often a progressive attitude is espoused while leading to a result less than helpful. For example, in United States v. Dege, 364 U.S. 51 (1960), the common law attitude that a wife acts only under the influence of her husband was rejected, resulting in the defendant wife's conviction for criminal conspiracy. In several 1970's cases, the Court adopted language supportive of women's increasing autonomy, yet tended to discard most readily laws that had a negative impact on men. *Compare* Caban v. Mohammed, 441 U.S. 380 (1979) (fathers must be given the same right to veto an adoption as the mother) *and* Orr v. Orr, 440 U.S. 268 (1979) (state law may not restrict alimony obligations to men only) *with* Dothard v. Rawlinson, 433 U.S. 321 (1977) (upholding the exclusion of women as guards from the Alabama prison system finding 'maleness' to be a bona fide occupational qualification) *and* Geduldig v. Aiello, 417 U.S. 484 (1974) (no sex-based denial of equal protection to exclude pregnancy from disabilities covered by worker's compensation because disparate treatment is between pregnant women and nonpregnant persons rather than between women and men).

87. *E.g.,* Massachusetts v. Feeney, 442 U.S. 256 (1979) (veterans' preference points no sex-based denial of equal protection); Goesaert v. Cleary, 335 U.S. 464 (1948) (excluding women from bartending unless they are the wives or daughters of male bar owners no sex-based denial of equal protection); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (excluding women from practicing law no denial of privileges and immunities of citizenship).

88. *See generally* LAW AGAINST THE PEOPLE (R. Lefcourt ed. 1971) [hereinafter cited as LAW AGAINST THE PEOPLE].

89. W. PROSSER, *supra* note 60, at 14-15.

90. A good example is found in Brown v. Board of Education, 347 U.S. 483 (1954),

Whenever a balancing process occurs, the weight given competing interests will be influenced by social values and attitudes. Our political and economic system dictates that certain groups and certain interests will enjoy greater solicitude than others.[91] The evolving concept of privacy typifies the efforts of individuals and groups to use the legal system as one means of prescribing acceptable and unacceptable societal interaction.

> Since all of law and all "rights" in law represent authoritative efforts to define and influence the relationship of one or more persons or classes of persons to other individuals, groups, or classes, we must examine privacy as a series of legal claims with respect to desired or unwanted relationships with others, some of which have received protection in law while many others are pressing for but have not yet achieved legal recognition.[92]

The job of the legal system is to determine whether a measurable, actionable injury to one or all women is occurring in a particular instance and if so, then to weigh in the balance countervailing public policy or other social interests.[93] But behind an ostensible legal neutrality lies deeply ingrained cultural attitudes that shape the threshhold determination of the serious-

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in which the state was denied power to segregate schools because such segregation was held to deny Blacks the equal protection of the laws under the fourteenth amendment. At that time, the primacy of the claim of Blacks to equal protection was not clear in the minds of many. A noted legal scholar argued that court-ordered desegregation might be a violation of the first amendment right of all people (including whites) to associate with those of their choosing. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

91. Choices are made as to which laws will be enforced against which people, and law enforcement officials necessarily use guidelines to make these choices. . . . The enforcement of criminal sanctions is dictated by the necessities of the economic and political system in which the profit motive is central. For example, it is not surprising that no law prevents industrial managers from laying off thousands of workers, or from moving plants to new locations in order to maximize profits. The people whose lives and communities may be shattered have no recourse in the legal system. No law requires institutions which control and profit from the materials and means of production to share their wealth equally among the people who produce and need it.

LAW AGAINST THE PEOPLE, *supra* note 88, at 22-24.

92. Beaney, *The Right to Privacy and American Law*, 31 L. CONTEMP. PROBS. 253, 253-54 (1966).

93. *See* Bloustein, *supra* note 52, at 1006.

ness of the harm. A major hurdle in gaining legal recognition of the nature and extent of the dignitary assault on women is the prevalent ideology that commercialization of female sexuality is a legitimate exercise of male prerogative in a patriarchal profit-centered society.

But the effects of this public commercialization go beyond the realm of sexuality. Women are breaking out of old role restrictions and are asserting the right to equal opportunity and influence in society. Women's entry into the public sphere has been met with a barrage of sexual images of female nudity and subordination[94]—reminding us (and perhaps warning us) that regardless of progress in combatting sex discrimination, our role as sexual pacifier and object will not be as readily overcome. This duality is displayed strikingly in the prevalence of sexual harassment of women in the workforce.[95] Restrictions on employment discrimination against women have been implemented,[96] yet many women enter the labor market only to face intolerable work conditions and little job security because of male exploitation of women's sexual status.

> Work is critical to women's survival and independence. Sexual harassment exemplifies and promotes employment practices which disadvantage women in work (especially occupational segregation) and sexual practices which intimately degrade and objectify women. In this broader perspective, sexual harassment at work undercuts woman's potential for social equality in two interpenetrated ways: by using her employment position to coerce her sexually, while using her sexual position to coerce her economically. Legal recognition that sexual harassment is sex discrimination in employment would help women break the bond between material survival and sexual exploitation. It would support and legitimize women's economic equality and sexual self-determi-

94. Morgan, *How to Run the Pornographers Out of Town and Preserve the First Amendment*, Ms., Nov. 1978, at 55.

95. For a discussion of research into the prevalence of sexual harassment in employment and report of women's experiences, see C. MACKINNON, *supra* note 73, at 25-55.

96. Title VII of the Civil Rights Act of 1964, as amended 1972, prohibits employment discrimination on account of race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e-2017 (1976).

nation at a point at which the two are linked.[97]

The "relegation to inferiority"[98] implicit for women in sexual media may have its largest impact on the newly-forming identity of young females who are exposed to commercialization of female sexuality and who incorporate its message. Media images have been shown to have a strong and direct influence on our self-image and expectations.[99] Commercializing female sexuality goes beyond the advertising practice of using female sexuality to sell a product; at this stage, the body *becomes* the product, and its use and exposure becomes the message.[100]

Protection of young people against social experience that

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97. C. MACKINNON, *supra* note 73, at 7.

98. This term is borrowed from a comparison of sexual harassment with racial insults as acts that go beyond personal injury and are systematically connected to social phenomena that harm individuals as members of a class. *See id.* at 173.

99. *See* HEARTH & HOME: IMAGES OF WOMEN IN THE MASS MEDIA *passim* (G. Tuchman, A. Daniels & J. Benet eds. 1978). In the preliminary findings of her doctoral dissertation at Case Western University, Dr. Judith Reisman, *supra* note 82, found that women learn to view themselves in a negative manner by comparing themselves to pictures in pornographic magazines. Newspage, July 1980, at 3, col. 1 (newsletter of Women Against Violence in Pornography & Media, P.O. Box 14614, San Francisco, CA. 94114).

For an example of a recent study of media effects on children, see O'Bryant & Corder-Bolz, *The Effect of TV on Children's Stereotyping of Women's Work Roles*, 12 J. VOCATIONAL BEHAVIOR 233 (1978) (children's attitudes of sex-appropriate work roles influenced by television portrayals; girls more frequently expressed preference for traditionally male jobs upon exposure to images of women in those jobs). The authors concluded that media portrayals can have an important impact on the development of occupational aspirations. *Id.* at 243. *See also* Pingree, *The Effects of Nonsexist Television Commercials and Perceptions of Reality on Children's Attitudes About Women* 2 PSYCH. WOMEN Q. 262 (1978) (reviews research demonstrating the effects of television on viewers' attitudes, intellectual development and social behavior, and reports findings of author's study that television commercials have the power to influence children's attitudes about sex-role stereotypes).

100. In a study of the possible connections between the depiction of violence in pornography and attitudes towards women, the authors were led to conclude:

> [W]e share the belief that the depiction of violence in erotica and pornography could be harmful. Unlike the typical violent episodes on television, pornographic violence is, typically, not an integral part of a larger dramatic theme. Rather, the erotic violence itself is the theme. The erotic presentation sometimes even approximates a how-to-do-it instructional film. Further, the juxtaposition of violence with sexual excitement and satisfaction provides an unusual opportunity for conditioning of violent responses to erotic stimuli. The message that pain and humiliation can be "fun" encourages the relaxation of inhibitions against rape.

Feshback & Malamuth, *Sex and Aggression: Proving the Link*, PSYCH. TODAY, Nov. 1978, 111, at 117.

stigmatizes them as members of an aggrieved class has been lauded as a valuable goal by the Supreme Court. In *Brown v. Board of Education*,[101] the Court found that separating Black children from white solely because of their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[102] The potentially lasting sense of humiliation and inferiority experienced by young women living in an environment of female sexual exposure and subordination also must be recognized for the serious impediment it presents to women's full autonomy and dignity.

IV. CONCLUSION

Respect for the individual and preserving conditions for maximum human development are highly desired objectives of our Western culture. But the ideology of sexual hierarchy perpetuated by the dominant male culture[103] is inimical to that growth for women.

> Man's position of power does not only assure his relative superiority over the woman, but it assures that his standards become generalized as generically human standards that are to govern behavior of men and women alike. . . . Almost all discussions of women deal only with what they are in relation to men in terms of real, ideal, or value criteria. Nobody asks what they are for themselves.[104]

The legal system has often institutionalized oppressive so-

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101. 347 U.S. 483 (1954).

102. *Id.* at 494.

103. Whoever defines and controls the institutions of a society controls that society. Males define and control all the institutions of all 'national' cultures. . .

> Because the male culture is dominant and in control in every nation, the 'national' culture becomes synonymous with, and in fact is, the male culture. The female culture exists 'invisibly', in subjection to the male-defined 'national' culture.

Burris, *The Fourth World Manifesto*, in RADICAL FEMINISM 322, 342 (Koedt, A., Levine E. & Rapone, A. eds. 1973).

104. Georg Simmel, PHILOSOPISCHE KULTER (1911), quoted in L. Coser, *Georg Simmel's Neglected Contributions to the Sociology of Women*, 2 SIGNS: J. WOMEN CULTURE SOC'Y 872, 873 (1977).

cial theories rather than challenged them.[105] One such case from 1896 is instructive for the distinction drawn between civil and political rights on the one hand, and social relations on the other. In upholding a law requiring "separate but equal" accommodations for Black and white railroad passengers, the Court in *Plessy v. Ferguson*[106] reasoned

> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.[107]

In an unparalleled piece of sophistry the Court added

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anyting found in the act, but solely because the colored race chooses to put that construction upon it.[108]

As with many cases that seem incredulous by today's standards, the reasoning in *Plessy* was rejected by the Supreme

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105. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948)

> The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic.

Id. at 466; Dred Scott v. Sandford, 60 U.S. (19 How.) 691 (1857) (struck down the Missouri Compromise barring slavery from new territories for to implement it would be depriving citizens of their property [slaves] without due process of law); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (right of married adults to choice in sexual matters does not extend to homosexuals).

106. 163 U.S. 537 (1896).

107. *Id.* at 551-52.

108. *Id.* at 551. Additionally, plaintiff made the interesting argument that in any mixed community, the reputation of belonging to the dominant race is *property*. While conceding this to be so for that case only, the Court reasoned that a white man might have an action for damages, but a Black man would not, because a Black man "is not lawfully entitled to the reputation of being a white man." *Id.* at 549.

Court—but not until 1954.[109] Our legal system, premised as it is on the principle of stare decisis, responds slowly to social evolution.[110] In a sense, the legal system presently is at a developmental stage with regard to the sexes, that is similar to where it was in Plessy's time with regard to the races. Courts have been compelled to recognize certain civil and political rights of women, yet have avoided addressing the social (/sexual) interaction between women and men which is the sine qua non for meaningful enjoyment of other rights.[111]

The basis of this social interaction is fundamentally a sexual one,[112] and it is precisely within this sphere that the lingering inequality of women takes its most virulent form. Men's position of power vis-a-vis women's sexuality is poignantly demonstrated by commercial sexual display of women's bodies. The commercialization and exposure of our most private sexual characteristics for the gratification of the opposite sex, is a grievous example of an assault on liberty and privacy, and insult to a class of people.

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Gaining legal recognition of a serious privacy violation only begins the inquiry. What this paper has attempted to provide is consideration of factors commonly excluded from the inquiry altogether. Application of these factors to actual circumstances and development of specific legal challenges must await subsequent effort. But whatever form these challenges take—whether they be attempts to regulate the visibility of exploitative sexual images, to influence constitutonal definitions of privacy and/or obscenity, or civil disobedience calculated to interrupt the merchandising of female sexuality—it is the duty of courts to ensure that women do not have to wait another sixty years for legal

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109. Reasoning rejected in Brown v. Board of Educ., 347 U.S. 483 (1954).

110. "[L]aw merely follows social evolution, becomes purely defensive, and is only capable of acting when society has changed to the degree that previously unacceptable controversies are capable of moderate solution." Cloke, *The Economic Basis of Law and State*, in LAW AGAINST THE PEOPLE, *supra* note 88, at 71.

111. One notable exception is in the burgeoning area of sexual harassment in employment. *See* notes 95-97 *supra* and accompanying text.

112. "Most males all over the world perceive and compare females as a caste group. A male of any culture perceives a woman as a woman first and only secondly as 'representing' a national or ethnic culture." Burris, *supra* note 103, at 342.

remedies granting us the privacy and dignity guaranteed to all citizens by our Constitution and common law heritage.