Chapter in "The Sexual Liberals and the Attack on Feminism," 1990, D. Leidholdt and J. Raymond, editors.

Abortion and Pornography: The Sexual Liberals' "Gotcha" Against Women's Equality

Twiss Butler

In 1971, Professor Thomas I. Emerson of Yale University produced with women students a paper intended to define the meaning of the Equal Rights Amendment then being considered by Congress. In this paper, Emerson wrote:

> Any plan for eliminating sex discrimination must take into account the large role which generalized belief in the inferiority of women plays in the present scheme of subordination. (Barbara Brown, et al., 1971: p. 883)

Institutional discrimination relies for justification on *gotchas* — the reasons why the discrimination is necessary for the welfare of its victims, the reasons why ending the discrimination would do its victims "more harm than good." Forced pregnancy and maternity is the central gotcha that is used by patriarchal men to defeat legislation for women's equality.

This commentary looks at a new gotcha: Harvard University law professor Alan Dershowitz's claim that women's access to abortion (which is limited) depends upon men's access to pornography (which is unlimited). It argues that men's perception of pregnancy as pornography — that is, the sexually explicit subordination of women — creates a "causal link" between liberal men's cooperation with patriarchal men in the legal control of abortion and their legal defense of pornography.

Copyright © 1990, Twiss Butler.

THE "WOMEN WILL BE HARMED BY SEX EQUALITY" GOTCHAS

Public arguments for preservation of sex discrimination have always flaunted the gotchas of equality. ("You want equality? *We'll* give you equality!") Now that we are supposedly wallowing in the ill-got gains of the women's movement, these self-serving paradoxes are often signalled by a prefatory "ironically." Ironically, economists say, the deterioration of women's economic situation after divorce results from reforms in divorce law demanded by feminists. Ironically, insurers warn, women will have to pay more for auto insurance if feminists win their demand for unisex premiums. Ironically, say spokeswomen for liberal organizations, women's books will be the first to be censored if radical feminists are able to attack pornography under the guise of protecting women's civil rights. And, from an op-ed commentary on "The Baby M Verdict" in *The Washington Post*, "Ironically . . . Whitehead's position was undermined by two cherished and widely accepted feminist principles. The court's verdict represents, in fact, a perverse triumph of feminist ideology" (Charles Krauthammer, 1987).

It seems, then, that the difficulty with feminist remedies is not merely that, as defined by their enemies, they fail to identify the "real" harm to women which, if it is even admitted to exist, has its "root cause" in some non-gender-specific social problem which legal measures are either inadequate or overqualified to address. Rather, the most public-spirited reason to block feminist efforts for the benefit of women is the awful prospect of harm—first to women, then to everyone else—if feminist initiatives are allowed to succeed. Whether malign or well-intentioned, it is agreed, feminists can only do more harm than good when they insist—and they always insist—on trying to open a can of worms, trying to open Pandora's box, or trying to use an atomic bomb (such as the ERA or the antipornography ordinance) to swat flies.

PREGNANCY AS THE ULTIMATE GOTCHA

For those determined to maintain sex discrimination, the ultimate gotcha is pregnancy—a condition impossible to achieve without, as it were, male input, but one which assigns virtually the entire physiological burden to women. Thus, pregnancy discrimination cuts clean, controlling women without penalty to men. "Men can't get pregnant, you know," chuckles an insurance executive, justifying maternity sur-

charges on women's health insurance and easily ignoring the actuarial certainty that every baby has a male parent. As biologist Garrett Hardin said in 1970, when explaining a scheme for sterilizing women, but not men, as a population control measure, "Biology makes women responsible" (Garrett Hardin, 1970).

It is pointless to talk about avoiding entirely that which is generally mandated by nature and society. A subordinated class experiences countless ways of being unable to refuse the demands of the class that dominates it. Moreover, the natural bias toward pregnancy is further culturally enforced by making the best contraceptives, those for men, aesthetically undesirable except when men perceive themselves to be the ones for whom sexual intercourse involves a risk of undesired results.

For some years, an "epidemic" of teen pregnancy has been responded to with journalistic handwringing and slyly pornographic photographs of girl children with downcast eyes and big bellies. When, however, the surgeon general woke up one morning and realized that the AIDS epidemic could kill heterosexual men, condoms became respectable[1] and abortion became a "possibility" to be tactfully mentioned to a pregnant AIDS victim (*Washington Post*, 1987). This strikingly disparate response to sex-related epidemics has passed without public comment, prompting a suspicion that any side benefit to women and girls from this abrupt policy change is supposed to be accepted with silent gratitude and no sense of entitlement whatever.

Pornography is subordination seen as an invasion of privacy. It relies on the existence of an idea of privacy in order to demonstrate power and dominance by violating it. There must be limits so that limits can be overrun. Physically, it uses the most elemental imagery of human vulnerability—the naked body and particularly the naked woman among clothed men. Dominance and the threat of violence are thus made flesh.

It is hard for a pregnant woman to look and feel like a person in full command of her own body and destiny (Twiss Butler, 1976). Preg-

[1] Why was it censorship when the Southland Corporation, responding to public pressure, made a commercial decision not to sell pornography, and yet it was not censorship when broadcasting networks, responding to pressure, made a commercial decision not to sell condoms? Is there really a constitutional difference between being dictated to by religious fundamentalists on the one hand, and by religious traditionalists on the other? Or was it that men who saw pornography as a sexual entitlement for themselves did not want women to see effective male contraceptives as a sexual entitlement for themselves? Yielding to the overwhelming power of the Catholic Church makes a nice excuse for network executives, but it is hardly consistent with indignant denials that networks allow themselves to be censored, with the obvious failure of the Catholic Church to force network compliance with its wishes on any other issue.

nancy is a physical fact which precludes privacy. It "shows." What? That a woman is manifestly not a virgin. Moreover, that she has been invaded by a man and visibly subjugated and colonized (Twiss Butler, 1976). In traditional terms, she is "in a fix," a description which underscores her lack of autonomy. There is, they say, "no such thing as a little bit pregnant."

But suppose that there were a way to be only a little bit pregnant and then not pregnant at all. Women, including little girls, from time to time need, want, and, to a lesser extent because of pressures to the contrary, will have abortions. The only question, as we know, is what kind of abortions they will be able to have.

Thanks to physicians who wanted to be able to engage in this branch of medical business without running afoul of the law, and thanks to population planners who saw a need for limiting reproduction of some populations, and thanks to liberal men who put a higher priority on sexual access to women in general as a method of control and subordination than on patriarchal control of specific women, and thanks hardly at all to the considerable efforts of women, a way was found in *Roe v. Wade* to legalize abortion without acknowledging women's right to autonomy in reproductive decision making.

PRIVACY, NOT EQUALITY

For any woman who has been able to get the abortion she needed, the benefits of the reform are obvious and genuine. Not at all ironically, however, but quite as intended by the men who devised it, granting women a sex-neutral right to privacy in reproductive matters was like granting women expensive, limited, and easily revokable guest privileges at the exclusive men's club called the Constitution. In contrast, men's membership in this club is a birthright, possibly retroactive to conception.

Between the "creation" (Lawyers, 1985), as he termed it, of the constitutional right to privacy in *Griswold v. Connecticut* (1965) and its application to team decisions about abortion in *Roe v. Wade* (1973), Professor Emerson pondered its relationship to the proposed Equal Rights Amendment in the 1971 *Yale Law Journal* article mentioned above (Barbara Brown, et al., 1971: p. 871).

In this article, Emerson criticized earlier efforts to gain congressional approval of an equal rights amendment for yielding to political pressure in failing to uphold an absolute standard of equality between the sexes. In the same article, however, he proceeded for the same reason to replicate the failure by allowing the only exceptions needed to ren-

der the ERA ineffective, those for "compelling social interests, such as the protection of the individual's right to privacy, and the need to take into account objective physical differences between the sexes" (Barbara Brown et al., 1971: p. 887).

Abortion is not mentioned in this article[2] which was intended to guide the legislative history of the ERA. Still, we are to understand that it was not just police searches that were to be handily taken care of elsewhere in the Constitution by the right of privacy, even though it was admitted that "the position of the right of privacy in the overall constitutional scheme was not explicitly developed by the Court" in the 1965 *Griswold* decision (Barbara Brown, et al., 1971: p. 900).

Perhaps this assurance of the vagueness and elasticity of the new abortion-privacy constitutional right, "derived from a combination of various more specific rights embodied in the First, Third, Fourth, Fifth and Ninth Amendments," tempted liberal women to hope that they could get by stealth what they dared not demand as a fundamental right to be secured by the ERA as a requisite for equal treatment under the law. Certainly, liberal men must have been satisfied with the prospect of having abortion legally available, but isolated from any woman's claim to bodily integrity or equal protection, and thoroughly under male control. Then as now, political supporters of the Equal Rights Amendment could be counted on to welcome a solution that simply shunted an awkward issue onto another track. Their instincts could hardly have differed from those of their predecessors of whom Emerson wrote, "The proponents may have wisely refused to be too explicit about the laws and institutions the Amendment would reach" (Barbara Brown et al., 1971: p. 886).

In evident delight at the versatility of his new invention, Emerson speculated on the many ways in which the right of privacy might be applied. His 1971 comments clearly suggest the legal basis for its later use in defending pornography: "This constitutional right of privacy operates to protect the individual against intrusion by the government upon certain areas of thought or conduct, in the same way that the

---

[2]In a 1974 letter, Emerson explained why the article did not address abortion:

> The main reason we did not discuss the abortion problem in the article was that abortion is a unique problem for women and hence does not really raise any question of equal protection. Rather the question is one that is concerned with privacy. (Senate Subcommittee, 1983 & 1984: p. 635)

If abortion is "a unique problem for women," so is pregnancy. Under this standard of equal protection defined by men's needs rather than human needs, women would not be protected from discrimination on the basis of pregnancy, the quintessential form of sex discrimination.

First Amendment prohibits official action that abridges freedom of expression" (Barbara Brown, et al., 1971: p. 900).

Moreover, the right of privacy could be developed to meet new challenges. Although its exact scope conveniently "was not spelled out by the Court in the *Griswold* case," nevertheless "it is clear that one important part of the right of privacy is to be free from official coercion in sexual relations" (Barbara Brown, et al., 1971: p. 901).

Lastly, concerning "the impact of the young, but fully recognized, constitutional right of privacy," Emerson said that its scope "is dependent upon the current mores of the community. Existing attitudes toward relations between the sexes could change over time—are indeed now changing—and in that event, the impact of the right of privacy would change too" (Barbara Brown, et al., 1971: p. 902).

And so it has. In 1983 Catharine MacKinnon observed that, in *Roe v. Wade,* women got a constitutional right to abortion "as a private privilege, not as a public right" (Catharine MacKinnon, 1984: p. 52). In 1985, twelve years after *Roe v. Wade,* Emerson admitted that it had been difficult to argue for a constitutional right unmentioned in the Constitution and "thinks that it is more likely that the right to have an abortion might become so hedged in by bureaucratic regulations that it would be difficult to exercise the right" (Lawyers, 1985).

Professor Laurence Tribe of Harvard Law School mused in 1985 on what he called "the always difficult problem of abortion," and wondered if the "somewhat obscure 'privacy' rationale" of *Roe v. Wade* and its ranking "the rights of the mother categorically over those of the child" did not perhaps mean that the Court "forsook a more cautious sensitivity to the mutual helplessness of the mother and the unborn that could have accented the need for affirmative legislative action to moderate the clash between the two" (Laurence Tribe, 1985: p. 336).

THE RIGHT TO CHOOSE—PORNOGRAPHY

These speculations about an obscure, contested, and sometimes unavailable right which probably cannot claim public entitlement suggest that legal scholars understand it is now open season on "women's constitutional right to abortion."

When the patriarchal use of pregnancy to enforce women's subordination is combined with privacy theory's potential for creating sexual harassment, and both are emotionally associated with pornography's view of a pregnant woman as sex in bondage (Andrea Dworkin, 1970: p. 218), it is hardly surprising that it occurred to Professor Alan Der-

showitz that abortion could be held legal hostage for pornography. The rapidity with which Dershowitz made the connection suggests that he and others envisioned the pornography of pregnancy as well as the sexual accessibility of women when they championed abortion. Its manipulation against the civil rights antipornography ordinance is like a promise redeemed, a latent possibility realized.

Dershowitz's clever idea seems to have appeared first in July, 1984, in a syndicated version of his monthly *Penthouse* column on the law. Commenting on the Indianapolis antipornography ordinance, he said:

> In the end, the issue is one of choice and freedom—much like the debate over abortion. On one side of the scale are practices that some regard as immoral and dangerous (pornography and abortion). On the other side is the right of individuals to choose to engage in such practices. No one would deny either side the right to try to persuade the other that its practices are terrible. The real question is whether we are willing to give one side the prohibitory power of the government to enforce its views against the other. (Alan Dershowitz, 1984: p. 19)

The argument is that, by becoming gatekeepers to women's reproductive rights, Dershowitz, the American Civil Liberties Union, and other civil libertarians also became gatekeepers to women's right to a legal defense against pornography. The more vigorously they defend the "right of privacy" for abortion, the more legitimacy accrues to such other "privacy rights" as unlimited access to pornography and other behavior characterized, however harmful to women, as "sex" and therefore as "private."

But who is that "we" who make decisions about applying the prohibitory power of government? Certainly not women, who have no claim to the constitutional protection of the First Amendment when they are harmed as women. When *Playboy* magazine can sue to suppress testimony given in a U. S. Justice Department hearing, win, and have its censorship hailed as a victory for freedom of speech, there does not seem to be a "real question" any more about which side has already been willingly given the prohibitory power of the government to enforce its views against the other.

Having made his argument, Dershowitz springs his gotcha:

> In the abortion debate, most feminists insist on the right to choose. In the current debate over the Indianapolis statute, some feminists would deny that right to those who choose pornography. (Alan Dershowitz, 1984: p. 19)

Thus, any limitation on pornography would cause the loss of "women's constitutional right to abortion" and feminists would be to blame. This is logic, we are to understand, not retaliation. Although it cer-

tainly assumes a causal link between legal restraints on pornography and a negative effect on abortion, Dershowitz seems to regard himself as exempt from the sexual liberals' requirement, for women at least, that "scientific proof" be provided for assertions of causality in relation to pornography.

If further assurance is needed that women's right to make autonomous decisions about pregnancy is not secured by the right to privacy, recall the New York hearing of the Attorney General's Commission on Pornography in January, 1986. Outside the building, pro-pornography women picketers waved their signs begging "Don't take away our right to choose." And in the hearing room, representing *Penthouse* and with a former *Penthouse* Pet at his side, Alan Dershowitz testified as follows:

> I am not sitting here telling you what my views on pornography are. I am not going to demean myself . . . by telling you I am for or against it any more than I would tell a hearing on abortion whether I was for abortion or against it. I am for choice. Let me add one personal word. It is a disgrace to the memory of *Roe versus Wade* whose thirteenth anniversary we celebrate today and which celebrates choice by women as to how to deal with their bodies, that so many women purported to speak for the women's movement, which they do not speak for, came into this Commission today and urged this Commission on the thirteenth anniversary of *Roe versus Wade* to cut back on freedom of choice as to what women and men shall be able to do with their minds, their eyes, their ears, and their bodies. (Alan Dershowitz, 1986: p. 291)

Ironically, I think that Professor Dershowitz is owed a vote of thanks for making one thing entirely clear. A legal right of privacy that depends on violation of the privacy of those whom it is supposed to protect is not a right at all but a gotcha, a demonstration of what Emerson called "the large role which generalized belief in the inferiority of women plays in the present scheme of subordination" (Barbara Brown et al., 1971: p. 883).

I fully agree with Emerson that no "plan for eliminating sex discrimination" can hope to succeed without directly attacking this belief and every institution that supports it.

End note: Since this paper was presented, the U.S. Supreme Court's 1989 decision in *Webster v. Reproductive Health Services* has reconfirmed the inherent instability of the constitutional right to privacy as applied to a class of persons whose constitutional right to equal protection under the law has repeatedly been denied. The journalistic frenzy anticipating the decision and the legislative and electoral furor following it show the significance of pregnancy as a prime opportunity for harassing and controlling women. Armies of legal scholars, politicians and pundits are pouring through the gap in federal boundaries hacked by

Webster and rushing into the states with the keen excitement of a gang attack in which men test themselves against each other in pursuit of a common enemy. The battle cries are "life" and "choice." The rhetoric on both sides is pornographic, but to speak of sex discrimination is treason.

REFERENCES

Brown, Barbara A., Emerson, Thomas I., Falk, Gail, and Freedman, Ann E. (1971, April). The equal rights amendment: A constitutional basis for equal rights for women. *Yale Law Journal 80*, 5.

Butler, Twiss. (1976, April 22). A few things Frances didn't tell. Letter to *Houston Post* columnist Leon Hale.

Dershowitz, Alan. (1986, January 22). Testimony before the Attorney General's Commission on Pornography.

Dworkin, Andrea. (1979). *Pornography: Men possessing women.* New York: Putnam.

Dershowitz, Alan. (1984, July 8). Feminist fig leaves. *This World.*

Hardin, Garrett. (1970, July 31). Parenthood: Right or privilege. *Science*, 169, p. 3944.

Krauthammer, Charles. (1987, April 3). The Baby M verdict. *Washington Post.*

Lawyers in birth control case honored by NOW. (1985, February 11). *New Haven (Connecticut) Register.*

MacKinnon, Catharine. (1984a). *Roe v. Wade:* A study in male ideology. In Jay L. Garfield and Patricia Hennessey (Eds.). *Abortion.* Amherst, Massachusetts: University of Massachusetts Press.

Senate Subcommittee on the Constitution, Committee on the Judiciary. (1983 & 1984). *The impact of the equal rights amendment: Hearings on S. J. Res. 10.* 98th Cong., 1st & 2nd sess. Serial No. J-98-42. 635.

Tribe, Laurence H. (1985). The abortion funding conundrum: Inalienable rights, affirmative duties, and the dilemma of dependence. *Harvard Law Review*, 99.

Washington Post (United Press International). (1987, March 25).