PORNOGRAPHY LEGISLATION: THE POLITICS OF REPRESSION

by

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ABSTRACT

Given the general liberalization of the criminal law and the highly articulate and visible presence of feminism, it is generally assumed that there have been significant changes in both statutory and case law in the area of pornography which has historically been subsumed under the rubric of obscenity law. This thesis traces the intellectual, statutory and judicial developments in this area. The core of this work is the thesis that ideological conservatism is still firmly entrenched both in the statutes and judicial dispositions. However, recent debates and scholarly works have provided law makers and judges with the necessary intellectual apparatus to effect change.

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I would like to thank my wife Kirsten for all her love, patience (and occasionally impatience), support and understanding during the completion of this project. I would also like to thank my parents Petro and Halyna for being there whenever I needed them. Furthermore, I would like to thank Professors B. Sneiderman (Law) and K. McVicar (Political Studies) for their input as members of my Thesis Committee. Last but not least I would like to thank my adviser Professor Marek Debicki for instilling in me an interest in legal and constitutional issues which has reached fruition in this thesis.

Chapter I

INTRODUCTION

It is not at all clear what is meant by the word 'pornography'. The New Lexicon Webster's Encyclopedic Dictionary of the English Language (Canadian Edition) defines 'pornography' as "obscene literature . . . intended to cause sexual excitement".[1] The etymology of pornography can be traced to the Greek words 'porne' which means prostitute and 'graphos' which means to write. Andrea Dworkin's etymological analysis is somewhat more explicit. She states that not only does pornography mean "writing about whores" but that 'porne' means "specifically and exclusively the lowest class of whore, which in ancient Greece was the brothel slut available to all male citizens".[2] The porne was the cheapest, least regarded and least protected woman; hence, pornography means the graphic depiction of women as vile whores or sluts or cunts.[3]

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[1] New Lexicon Webster's Encyclopedic Dictionary of the English Language (Canadian Edition), New York: Lexicon Publications Inc., 1988, p. 782

[2] Andrea Dworkin, Pornography: Men Possessing Women New York: Putnam, 1981, pp. 199-200

[3] ibid.

Despite this rather graphic definition, there is little consensus as to what constitutes the pornographic. The term has been loosely applied to different forms of explicit and nonexplicit depictions of human sexual activity,[4] both 'normal' and 'atypical'. For some, mere nudity may be construed as 'pornographic', while others consider only violent degrading representations as truly 'pornographic'. Definitions appear to depend on the political and religious orientation of those who use them.[5] Justice Potter Stewart could not define pornography although 'he knew it when he saw it'.[6] Law professor and radical feminist Catharine MacKinnon wondered if Justice Stewart knew what she knows when she sees what she sees.[7] An element of 'subjectivity' is thus inherent in any attempt to define pornography. To further complicate the issue, even though pornography and obscenity are neither conceptually nor factually identical,[8] the former has historically been subsumed under the rubric

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[4] E. Donnerstein, D. Linz and S. Penrod, The Question of Pornography: Research Findings and Policy Implications New York: The Free Press, 1987, p. 1

[5] ibid.

[6] Jacobelli v. Ohio, 84 S. Ct. 1676, at 1683 (1964)

[7] Catharine MacKinnon, "Pornography, Civil Rights and Speech" in Harvard Civil Rights-Civil Liberties Law Review Vol. 20, 1985, p. 3

[8] David A. J. Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment" in University of Pennsylvania Law Review, Vol. 123, p. 56; Joel Feinberg, "Pornography and the Criminal Law", University of Pittsburg Law Review, Vol. 40, 1979, pp. 572-574

of the latter.[9]

Obscenity comes from the Latin ob cenum which means 'about filth' and generally denotes material which is offensive to modesty or decency[10] within temporal and cultural dimensions. The earliest obscenity conviction in English law was for an obscene act. Sir Charles Sedley was convicted for standing naked on a balcony and throwing bottles full of 'piss' down upon a crowd.[11]

More important for the purpose of the following analysis was the case of Regina versus Hicklin[12] in which Chief Justice Cockburn declared that

> The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to

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[9] Feinberg, "Pornography and the Criminal Law", at 572-573 relates how the United States Supreme Court, in **Cohen v. California,** (403 U.S. 15, 1971), construed the 'obscene' as the 'pornographic': Paul Cohen had been convicted of disturbing the peace by wearing a jacket with the words "Fuck the Draft" on the back. Justice Harlan of the Supreme Court, in considering Cohen's appeal, wrote:

> This is not . . . an obscenity case. Whatever else may be necessary to give rise to the State's broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket. (emphasis added)

[10] Jillian Ridington, Freedom From Harm Or Freedom Of Speech Ottawa: NAWAL, 1983, p. 1; cf. Richards "Free Speech and Obscenity Law" p. 48

[11] See Richards, "Free Speech and Obscenity Law" p. 48 and P. R. MacMillan, Censorship and Public Morality Aldershot: Gower House, 1983, p. 2

> such immoral influences and into whose hands a publication of this sort may fall (emphasis added).[13]

In Canada, the Hicklin test became the basis for the criminal offense of obscenity until 1959 when it was replaced with the current provisions under Section 159 Subsection (8) of the Criminal Code which read:

> For the purpose of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene (emphasis added).[14]

Both the Hicklin test and Section 159(8) have been criticized for being subjective, vague, paternalistic and moralistic.[15]

On May 4, 1987, then Justice Minister Ray Hnatyshyn introduced Bill C-54, the Conservative government's proposed anti-pornography bill. Hnatyshyn's predecessor, John

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[12] R. v. Hicklin (1868), 3 Q. B. D. 360

[13] ibid. p. 371

[14] Criminal Code, S. C. 1959, c. 41, s. 159(8)

[15] See generally C. S. Barnett, "Obscenity and S. 150(8) of the Criminal Code", Criminal Law Quarterly, Vol. 12, 1969-70; Kathleen E. Mahoney, "Obscenity and Public Policy: Conflicting Values-Conflicting Statutes", Saskatchewan Law Review, Vol. 50, NO. 1, 1985-86; Ridington, Freedom From Harm; A. M. K. Curtis, "Notes: Criminal Law: Obscenity: Test of Obscenity: Whether Hicklin Test Superceded: Whether Criminal Code Test Exhaustive: Whether Devices and Articles Constitute Publications: Whether Criminal Code Definition Applicable to Such Devices and Articles", in Ottawa Law Review, Vol. 11, 1979, pp. 505-506; F. L. Sharp, "Obscenity: Prurient Interest and the Law", University of Toronto Faculty of Law Review, Vol. 34, 1976, pp. 244-247

Crosbie, had introduced a similar anti-pornography bill (C-114) in June of 1986. However, this bill died at the end of the parliamentary session. Similarly, when Brian Mulroney called an election for Nov. 21, 1988, Bill C-54 died on the order paper. Despite the fact that Bill C-54 appears dead, it is unclear whether the new Justice Minister Kim Campbell will reintroduce this bill or a similar one in its place.

Bill C-54 put forth a six-part definition of pornography: the first five categories deal with harmful sex, violent sex, degrading sex, sex with children, beastiality, incest and necrophilia, whereas the sixth category deals with depictions of oral, vaginal or anal sex. Although there are problems with the first five categories[16] the sixth category had provided the basis for vehement opposition to Bill C-54. Opposition has come from civil rights groups (Canadian Civil Liberites Association, Manitoba Association for Rights and Liberties), cultural groups (Canada Council, Association of Canadian Television and Radio Artists - ACTRA), art galleries, libraries, women's groups (eg. Canadian Advisory Council on the Status of Women, Alberta Coalition Against Pornography), and even the United Church of Canada. Similarly, an Angus Reid Poll conducted on May 7, 1987,

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[16] Varda Burstyn, "Porn Again: Feeling the Heat of Censorship" in Fuse, Spring, 1987, points out the problem in lumping consensual teen-age sex in the same category as coerced child-adult relations; cf. Neil Boyd, "Sexuality and the State: A Comment on Moral Boundaries in the Physical Realm", Canadian Journal of Family Law, Vol. 7, 1989, pp. 353-366

found that only 37 percent of adult Canadians approve of the inclusion of sexual intercourse between consenting adults in the definition.[17] Why did the Conservative government include this category as part of the definition of pornography and why are the above groups opposed to this legislation? The answer to the former question lies in the underlying philosophy of conservative thought and provides the basis for the thesis that obscenity legislation has historically reflected a conservative bias. Other idealogies, liberalism and feminism, have entered the debate and provided potent arguments for change. However, even though some of these concerns have been addressed, their overall impact has been subsumed within the dominant ideology of conservatism, an ideology that is heterosexist, sexist, homophobic, patriarchal, paternalistic and moralistic.

Chapters 1 and 2 will examine the three competing philosophies which have addressed the issue of obscenity. Each philosophy protects different values and hence each is potentially in conflict with the others. These three political philosophies have been labelled conservatism, liberalism and feminism (with marxism being implicit in most feminist critiques). The conservative philosophy stresses the importance of protecting the organizational structure of society and its moral fibre; the liberal philosophy espouses freedom of expression and individual liberty while

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[17] Calgary Herald, May 20, 1987, p. A3

feminism is concerned with egalitarian values in a collective sense.[18] Chapter 1 will articulate the conservative and liberal views in greater detail. Implicit in this analysis is the Hart-Devlin debate which examines the role of law in the enforcement of morality. It becomes clear that the conservative view, with its emphasis on Christian morality and values, is unjustified according to liberals who place greater emphasis on freedom of expression and individual liberty.

Chapter 2 will examine the emergence of the feminist critique of pornography. This critique represents a significant shift in perspective away from 'sexual prurience' to the threat to equality which pornography is alleged to cause. In this sense, the issue of pornography is seen as an issue of the asymmetry of power and domination, therefore, a political issue rather than one of sexual immorality. Although there are a number of different types of feminism, the main goal is equality for women. The different categories include liberal, marxist, radical and socialist feminists. The strategies for the attainment of equality differ amongst these feminists which has led to polarization into pro-censorship and anti-censorship feminists. Still, the overall critique of both conservatism and liberalism has provided some definitional clarity with respect to pornography. However, there is still some

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[18] Mahoney, "Obscenity and Public Policy", p. 75; cf. E. Hoffman, "Feminism, Pornography, and Law", University of Pennsylvania Law Review, Vol. 133, pp. 498-499

question as to the alleged harms that pornography causes.

Chapter 3 will deal with the alleged social harms of pornographic materials. This will include a review of the empirical studies in the social sciences, along with a discussion of the inherent methodological problems. Furthermore, if we are to place any credence in the studies relating to sex and violence, it also becomes necessary to include studies dealing with violence, whether in a sexually explicit context or not. There is little evidence that sexually explicit materials (what feminists and liberals call 'erotica') causes any tangible harm. Therefore conservative attempts to 'censor' this type of material on this basis are unwarranted.

In Chapter 4 the findings of the Fraser Commission on Pornography and Prostitution will be examined in an attempt to place them within the context of the developing debate over socio-legal policy. By implication, this will involve an examination of the various interest groups which presented briefs to the committee. It will be evident that these briefs fit the philosophical typology presented in the first two chapters.

Chapter 5 will review the developing jurisprudence with respect to pornography since the inception of the current Criminal Code provisions. Parallels will be drawn from American case law. Constitutional considerations become

paramount at this point as the question of fundamental rights and reasonable limits is addressed. It will be demonstrated that liberal and feminist analyses provided some clarity in the developing jurisprudence. However, these interests have now been subsumed within the dominant ideology of conservatism, both in attempts at legislative reform (Bill C-54) and in the case law. There is hope that the rationale provided by Justice Wright in **Regina v. Avenue Video Boutique,** provides a basis for the legitimate use of Section 1 of the **Charter of Rights and Freedoms.**

In the conclusion a synthesis of the arguments will be advanced. The liberal and feminist analyses provide strong arguments that the inclusion of sexually explicit materials in a definition of pornography, whether in legislative reform or in case law, is unwarranted by the evidence and is in fact at odds with the **Charter.** Such an attempt represents unreasonable limits that cannot be demonstrably justified in a democratic society, despite the arguments propounded by the dominant conservative ideology.

1.1 PREDOMINANT PHILOSOPHIES: CONSERVATISM AND LIBERALISM

The conservative philosophy (also called legal moralism)[19] is based on two fundamental assumptions. The first assumption is that societies are not merely collections of individuals; rather, they are communities with shared ideas, values and moralities.[20] The second assumption is that the law should enforce a common morality comprised of traditional moral values because if a society loses its 'moral cement' it will disintegrate.[21] Expression is judged by its potential impact on societal institutions whether or not such expression causes direct harm to individuals. This allows the state to proscribe behaviour which it deems 'immoral'.[22]

For the conservative, obscenity must be banned because it promotes radical sexuality as described by Ernst and Seagle:

> It is important to understand that sex radicalism in modern life is the best general index of radicalism in other spheres. The man who publicly upholds birth control, the single standard, free love, companionate marriage, easy divorce, and legitimization, is a man prone to play with subversive ideas on private property, to be

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[19] Joel Bakan, "Pornography, Law and Moral Theory", Ottawa Law Review, Vol. 17, 1984 p. 1

[20] Mahoney, "Obscenity and Public Policy", p. 76; Canada, Special Committee on Pornography and Prostitution: Final Report (hereinafter cited as Fraser Report), Ottawa: Government of Canada, 1985, p. 17

[21] ibid.

[22] Patrick B. Devlin, The Enforcement of Morals, London: Oxford University Press, 1965, pp. 12-18

> attracted to criminal syndicalism, to be dubious about the House of Lords, or about the fitness of the republican party to govern, and to question the general efficacy of prayer. When such an individual is attacked under sex censorships it is assumed that no very great tenderness for his rights need be shown.[23]

The traditional view of sexuality, espoused by conservative thought, which is derived from religious elements in Western culture, embodies the notion that sex is dirty, wrong or sinful unless it is legitimated by marriage and love.[24] Catholic Canon Law holds that:

> As a basic and cardinal fact, that complete sexual activity and pleasure is licit and moral only in a naturally completed act in valid marriage. All acts which, of their psychological and physical nature, are designed to be preparatory to the complete act, take their licitness and their morality from the complete act. If, therefore, they are entirely divorced from the complete act, they are distorted, warped, meaningless, and hence immoral. (emphasis added).[25]

For the Catholic, the 'proper' function of the "primordial forces that move in the depths of our nature",[26] is the reproduction of the species. Only 'natural' forms of intercourse within a marital relationship are 'moral'.

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[23] M. Ernst and W. Seagal, To The Pure-A Study of Obscenity and the Censor, New York: The Viking Press, 1928 cited in Mahoney, "Obscenity and Public Policy", pp. 76-77; also cited in MacMillan, Censorship and Public Morality, p. 3

[24] Hoffman, "Feminism, Pornography and Law", pp. 504-505

[25] H. C. Gardiner, "Moral Principles Toward a Definition of the Obscene", Law and Contemporary Problems, Vol. 20, 1955, p. 564; also cited in Richards, "Free Speech and Obscenity Law", p. 57

[26] E. Mirsch, Love, Marriage and Chastity, 1939, 19, cited in Gardiner, "Moral Principles", p. 565

Extramarital intercourse as well as homosexual intercourse are 'unnatural'; hence they are 'immoral'.

> Pornography is obscene not only in itself, because it displays intercourse not within marriage, but also because it tempts to intercourse outside marriage or to masturbation, which are independently obscene acts because they are forms of sexual conduct that violate minimum standards of proper bodily function and thus cause disgust.[27]

Conservatives also emphasize the connection between self-restraint and shame which are considered prerequisites of a democratic polity.

> To live together requires rules and a governing of the passions, and those who are without shame will be unruly and unrulable; having lost the ability to restrain themselves by observing the rules they collectively give themselves, they will have to be ruled by others. Tyranny is the mode of government for the shameless and self-indulgent who have carried liberty beyond any restraint, natural and conventional.[28]

The conservative view concerning masturbation is in part based on the Victorian medical view that connected both masturbation and sexual excess in general to insanity.[29]

> The basic psychological fact about pornography and obscenity is that it appeals to and provokes a kind of sexual regression. The sexual pleasure one gets from pornography and obscenity is autoerotic and infantile; put bluntly, it is a masturbatory exercise of the imagination, when it is not masturbation pure and simple . . . . Infantile sexuality is not only a permanent temptation for the adolescent or even the

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[27] Richards, "Free Speech and Obscenity Law", p. 57

[28] Walter Berns, "Beyond the (Garbage) Pale or Democracy, Censorship and the Arts", in H. Clor, (ed.) Censorship and Freedom of Expression, Chicago: Rand McNally, 1970, pp. 60-62

[29] See Richards, "Free Speech and Obscenity Law", pp. 57-58

> adult--it can quite easily become a permanent, self-reinforcing neurosis. It is because of an awareness of this possibility of regression toward the infantile condition, a regression which is always open to us, that all the codes of sexual conduct ever devised by the human race take such a dim view of autoerotic activities and try to discourage autoerotic fantasies. Masturbation is indeed a perfectly natural autoerotic activity . . . . And it is precisely because it is so perfectly natural that it can be so dangerous to the mature or maturing person, if it is not controlled or sublimated in some way.[30]

In a democracy, these arguments purport, there are certain demonstrable moral virtues and traits, such as self restraint and shame, without which society cannot survive. In order to preserve society, it becomes necessary to use the law to enforce morality by coercing people into being virtuous[31] or else shamed into repression of such behaviour.

The classic exponent of this view in the twentieth century is Patrick Devlin, who delivered the Maccabaean Lecture in Jurisprudence to the British Academy in 1958. Devlin argued that society was justified in using the law to prohibit actions or speech which invoke feelings of intolerance, indignation, and disgust[32] and that there are no theoretical limits to the power of the state to

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[30] Irving Kristol, "Pornography, Obscenity and the Case for Censorship", New York Times Magazine, March 28, 1971, p. 24; cf. D. H. Lawrence, Pornography and Obscenity, London: Faber and Faber Ltd., 1929, pp. 19-31

[31] See R. C. Rist, "Pornography as a Social Problem: Reflections on the Relation of Morality and the Law" in Rist, R. C. (ed.) The Pornography Controversy, New Brunswick, New Jersey: Transaction, Inc., 1975, pp. 1-15

[32] Devlin, The Enforcement of Morals, p. 17

legislate against immorality,[33] which for the purpose of the law, is "what every right-minded person is presumed to consider to be immoral".[34] This 'right-mindedness' is based on Christian morals[35] and the belief in external absolutes of right and wrong, good and evil. Not only does Devlin disapprove of homosexuality, he also disapproves of birth control and abortion.[36] The quintessence of 'legal moralism' as expressed by Devlin is as follows:

> . . . a recognized morality is as necessary to society as, say, a recognized government, . . . society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.[37]

Devlin was responding to certain recommendations of the Wolfendon Committee,[38] which was also concerned with the nature and function of the law. The Wolfendon Committee adopted the view that the law should not be concerned with private moral conduct unless it affected the public good. Furthermore,

> there remains one additional counter-argument . . . namely, the importance which society and the law ought to give to individual freedom of choice

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[33] ibid., p. 14

[34] ibid., p. 15

[35] ibid., p. 25

[36] ibid., pp. 22-24

[37] ibid., p. 11

[38] John Wolfendon, Report of the Committee on Homosexual Offences and Prostitution, London: Her Majesty's Stationary Office, 1957: Although the Report did not deal with pornography per se, it made statements with regard to morality and the law which are pertinent to this analysis.

> and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, **there must remain a realm of private morality or immorality which is, in brief and crude terms, not the law's business.** To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to emphasize the private and personal responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law. (emphasis added).[39]

Implicit in this recommendation is the presumption that "state interest and majoritarian societal interests are not co-extensive"[40] and that there is a distinction between public morality and private morality, a distinction that conservatives like Devlin are unwilling to acknowledge.

Devlin's views were a response to the 'liberal' views of the Wolfendon Committee that recommended "that homosexual behaviour between consenting adults in private should no longer be a criminal offense."[41] Devlin sparked a further response from Professor Hart and the ensuing exchange became known as the Hart - Devlin Debate.

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[39] ibid., para. 61; cf. the comment of then Justice Minister (Canada) in 1968, P. E. Trudeau that "The state has no business in the bedrooms of the nation". cf. The Law Reform Commission of Canada, The Limits of Criminal Law: Obscenity: A Test Case, Ottawa: Information Canada, 1975, pp. 15-16, "Everyone is entitled to go to Hell in his own fashion so long as he does no harm to others".

[40] Clare F. Beckton, "Obscenity and Censorship Re-Examined Under the Charter of Rights", Manitoba Law Journal, Vol. 13, No. 3, 1983, p. 354

[41] Wolfendon Report, para. 62

Professor Hart's view that immorality as such is not a crime is based on the work of John Stuart Mill, specifically On Liberty, which is invariably invoked as the classic liberal position on the relation of the individual to the state.[42] Before examining Professor Hart's rebuttal to Devlin, a closer examination of Mill's work is necessary.

Mill's stated purpose in writing On Liberty was to examine " . . . the nature and limits of the power which can be legitimately exercised by society over the individual".[43] Mill was concerned with the repressive tendencies of human nature, consequently, his fundamental principle for liberty, which is central to the sexual morality debate is that:

> The sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. His own good either physical or moral is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else . . . .Over himself,

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[42] This does not mean that Mill is the only 'father of liberalism'. However, it is Mill who is most frequently cited and hence this analysis is based on his writings, principally On Liberty.

[43] John Stuart Mill, On Liberty, Indianapolis: Bobbs Meril, 1956, p. 4

> over his own body and mind, the individual is sovereign.[44]

Mill maintained that the 'truth' could only reveal itself within a 'marketplace of ideas' wherein " . . . the clearer perception and livelier impression of truth produced by its collision with error".[45] Only by allowing individuals to choose amongst different ideas will the truth win out as bad ideas are rejected and good ideas are accepted. To stifle any expression is to assume infallibility and we are all fallible. Even to stifle a false opinion would still be an evil.[46] Congruently, " . . . on every subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons".[47] From these writings it becomes clear that **freedom of expression** and the **right to individual liberty** are among the most fundamental principles of liberal ideology. The democratic paramountcy of these two principles is evident in the constitutions of both Canada and the United States.[48]

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[44] ibid., p. 13

[45] ibid., p. 21

[46] ibid.

[47] ibid., p. 44

[48] For Canada:
Constitution Act: Section 2(b) which states

> Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

In his criticism of the conservative view espoused by Devlin, Professor Hart, drawing on Mill's 'harm to others' principle, questions whether the enforcement of morality is morally justified.[49] Rather than using Devlin's concept of the 'reasonable man' or 'the man in the Clapham omnibus'[50] as the test of morality, Hart argues that demonstrable harm to others must be the test upon which legal action against any individual is justified. Hart is critical of Devlin's assumption that 'sexual morality' and the 'morality that forbids acts injurious to others such as killing, stealing, and dishonesty -- forms a seamless web', in which a deviation from any part is likely to cause a deviation from the whole.[51] Furthermore, Hart rejects Devlin's argument that any deviance from a society's common morality will

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Section 7:

> Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

For the United States:

American Bill of Rights: First Amendment:

> 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; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment: Section 1:

> Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[49] H. L. A. Hart, Law, Liberty and Morality, Stanford,

dissolve its 'moral cement' and result in disintegration. The conservative's denial of private morality (or immorality in the words of the Wolfendon Commission) is particularly problematic at this point:

> [N]o evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society.[52]

Liberals maintain that there is a distinction between public and private morality[53] and the only legitimate restraint with respect to the latter in matters of sexual activity is the consent of the participants.[54]

Hart also argues that with respect to sexual morality, the invocation of universal or absolute truths is misplaced, "It is perhaps least plausible in relation to sexual morals, determined as these so obviously are by variable tastes and conventions."[55] The use of the law to enforce a common morality, based on universal or absolute truths, which in turn are based on Christian values, causes human misery and interferes with individual liberty which are evils in

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Calif.: Stanford University Press, 1963, p. 17

[50] Devlin, The Enforcement of Morals, p. 15

[51] cf. the earlier quote about 'radical sexuality'.

[52] Hart, Law, Liberty and Morality, p. 50

[53] See Mill, On Liberty, p. 114, "[T]he individual is not accountable to society for his actions in so far as these concern the interests of no person but himself."

[54] Participants are meant to be 'adults'.

[55] ibid., p. 73

themselves. Hence, any use of the law to enforce morality requires moral justification. By requiring this justification, the distinction between "positive morality" and "critical morality" is introduced[56] into the debate. The former refers to the 'morality actually accepted and shared by a given social group' while the latter may be defined as 'the general moral principles used in the criticism of actual societal institutions including positive morality'.[57] The question then becomes one of the usage of critical morality for the purpose of legaly enforced positive morality.[58] In other words, which values should we value? Herein lies the distinction between Hart and Devlin, between the liberal and the conservative; "Hart's primary concern goes to the individual, whereas Devlin's preoccupation is for society".[59] For the liberal the social order is seen as a means to achieve individual freedom and security while the conservative sees the social order as a valued end in itself. Liberals emphasize individual liberty and freedom of expression while the legal moralists (conservatives) emphasize the integrity of a 'moral' society as the primary concern.

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[56] Hart uses 19th. Century utilitarianism as a source of this distinction.

[57] ibid., p. 20

[58] ibid.

[59] Y. Caron, "The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy", McGill Law Journal, Vol. 15, 1969, p. 21

Legal moralism is the philosophical basis of the 'new right', the 'moral majority' and other similar ideologies.[60] A more recent enunciation of legal moralism can be found in the Hill - Link Minority Report and the Keating Minority Report in The Report of the Commission on Obscenity and Pornography.[61] It is relevant to note that the authors of these minority reports are, respectively, Rev. Morton A. Hill, S. J., president of Morality in Media, New York, Rev. Winfrey C. Link, administrator of the McKendree Manor Methodist Retirement Home, Hermitage, Tennessee, and Charles H. Keating, Jr., founder of Citizens for Decent Literature, Cincinnati. The views expressed by these individuals closely parallel those of Devlin, for instance: "The government interest in regulating pornography has always related primarily to the prevention of moral corruption and **not** to prevention of overt criminal acts and conduct, or the protection of persons from being shocked and/or offended" (emphasis in original).[62] And further, "We believe that pornography has an eroding effect on society, on public morality, on respect for human worth, on attitudes toward family love, on culture."[63] With respect

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[60] Bakan, "Pornography, Law and Moral Theory", p. 6

[61] The Report of the Commission on Obscenity and Pornography, New York: Bantam Books, 1970, pp. 456-577 and pp.578-700 respectively.

[62] ibid., p. 457

[63] ibid., p.458; cf. D. A. Scott, Pornography - Its Effects on the Family, Community, and Culture, The Free Congress Foundation, Inc., 1985

to sexuality and all its manifestations, whether these take the form of homosexuality, masturbation, contraception, explicit sexuality, pornography and even sex education, the underlying conservative philosophy with respect to these issues is to actively **repress** them. This use of the law to enforce[64] morality without a demonstration that society would be harmed without such enforcement is contested by liberals who require more than mere feelings of 'intolerance, indignation and disgust'.[65] These criteria are rejected by liberals as being unsatisfactory:

> It is not enough to say merely that moral standards are offended by the proliferation of obscene material, without demonstrating that harm is caused by the dissemination of objectionable material. If freedom of expression is to be a valuable right, a moral sense of indignity is not sufficient reason for prohibiting access to allegedly obscene material.[66]

Values such as freedom of expression and individual liberty, which have been written into the Canadian Constitution, must take precedence over the emotional pleas of the legal moralists.

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[64] cf. R. D. Birkelbach and L. A. Zurcher, Jr. "Some Socio-Political Characteristics of Anti-Pornography Campaigners", Sociological Symposium, Vol. 4, 1970, in which a strong correlation was found to exist between approval of strong law enforcement procedures, authoritarianism, religiosity and disapproval of pornography.

[65] Devlin, The Enforcement of Morals, p. 17

[66] Clare F. Beckton, "Freedom of Expression", in The Canadian Charter of Rights and Freedoms: Commentary, W. Tarnopolsky and G. Beaudoin (eds.), Toronto: Carswell, 1982, p. 107

In Canada, even though 'freedom of expression' is a fundamental right it is by no means an absolute right, but rather a 'qualified right' subject to possible limitations derived from Section 1 of the **Charter of Rights and Freedoms** and also Section 33. An individual may well ask[67] how a right is in any sense 'fundamental' if it is subject to a parliamentary or legislative 'override'. This will require jurisprudential clarity in the further evolution of constitutional case law. Even though the American First Amendment is written in 'absolutist' terms (ie. there were no limitations on freedom of expression written into the Constitution), American jurisprudence has not treated it as such.[68] Consequently, the American Supreme Court had to,

> " . . . elicit principles of restraint from the reservoirs of its own jurisprudence without reference to express constitutional authorization thereby setting its own precedents for judicial activism".[69]

This has resulted in the lack of a coherent theory of freedom of expression, although obscenity has traditionally been denied official 'speech' status in the United States. Expectedly, this has caused much criticism from liberals who think that obscenity should at the very least be subject

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[67] Clare F. Beckton, "Freedom of Expression in Canada - How Free?", Manitoba Law Journal, Vol. 13, No. 4, 1983, p. 583

[68] However, Justices Douglas and Black have argued that the right is absolute, Konisberg v. State Bar of California, United States Reports, 36, 1961

[69] Stefan Braun, "Freedom of Expression v. Obscenity Censorship: The Developing Canadian Jurisprudence", Saskatchewan Law Review, Vol. 50, 1985-86, p. 40 at fn. 6

to Mill's harm condition; conditions which liberals[70] feel obscenity does not meet.

The very existence of obscenity laws reflects a conservative bias, evidenced by the Courts concern with 'prurient interest'[71] which seems to refer to the ability to produce sexual arousal or as law professor Catharine MacKinnon states "to give a man an erection".[72] As Hoffman[73] points out, the ability to produce sexual arousal, as the basis for a definition of obscenity, expresses the conservatives' basic disapproval of sex.

In contrast, liberals argue that the conservative view of sex, as described above, is an "idealized, romanticized, unreal (perhaps even infantile) depiction of what really happens in sex"[74] and that this view represents sham and hypocrisy.[75] The conservative position presupposes 'norms' of sexuality that are rejected by many people who see sex as

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[70] For instance Joel Feinberg and Clare F. Beckton

[71] Roth v. United States, United States Reports, 354, 1957, developed the concept of 'prurient interest' (based on proposals in the 1954 American Law Institute's **Model Penal Code**).

[72] Catharine A. MacKinnon, "Not A Moral Issue", Yale Law and Policy Review, Vol. 20, 1985, p. 333

[73] Hoffman, "Feminism, Pornography and the Law", p. 507

[74] Fred R. Berger, "Pornography, Sex and Censorship", in Pornography and Censorship, D. Copp and S. Wendell (eds.), Buffalo, N. Y.: Prometheus Books, 1983, p. 89

[75] The 'fall from grace' of tele-evangelists Jim Bakker and Jimmy Swaggart for their sexual indiscretions (amongst other things) provides a caustic example.

healthy not shameful. The conservative contention that homosexuality is a 'perversion' rather than an alternative lifestyle is clearly homophobic and heterosexist. The emphasis on traditional values based on the nuclear family ascribes to women a traditional and subserviant role which is both patriarchal and sexist. The use of the law to enforce morality is moralistic in a sense that is unacceptable to liberals. Freedom of expression and individual liberty must take precedence in the absence of demonstrable harm.

The feminist view challenges the wisdom of both traditional liberal and conservative philosophies. Feminists consider equality to be the most important value in a democratic society; pornography undermines the equal status of women. Consequently, there has emerged a powerful feminist critique of pornography that differs in focus from both the conservative and liberal perspectives.

Chapter II

THE EMERGENCE OF A FEMINIST CRITIQUE

> Man in his lust has regulated long enough this whole question of sexual intercourse. Now let the mother of mankind, whose prerogative it is to set bounds to his indulgence, rouse up and give this whole matter a thorough, fearless examination.[1]

A. Jaggar[2] divided feminist theories into four categories: liberal feminism, traditional marxism, radical feminism and socialist feminism. Although all feminist theories are concerned with the attainment of equality for women, the focus and strategies to be employed differ. In this respect the radical feminist perspective has provided the most vocal opposition to pornography. Socialist feminists, on the other hand, argue that by focusing on pornography, the greater structural inequality in society is downplayed. Because of these differences, a polarization amongst feminists has occured: liberal and radical feminsts

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[1] Elizabeth Cady Stanton, letter to Susan B. Antony, 1853, cited in Take Back the Night: Women on Pornography, L. Lederer (ed.), New York: Morrow, 1980, p. 21

[2] A. Jaggar, Feminist Politics and Human Nature, 1983 (cited in D. Lacombe, Ideology and Public Policy, Toronto: Garamond Press, 1988, at pp. 17-31)

have looked toward the state to help solve the 'problem' of pornography; hence they can be termed the pro-censorship feminists. Socialist feminists who oppose the use of the state in censoring pornography can be described as anti-censorship feminists. Marxist theory has been subsumed under feminism more generally. As law professor Catharine MacKinnon states, "[N]o feminism worthy of the name is **not** methodologically post-marxist (emphasis in original).[3]

The focus of the feminist critique differs substantially from both the conservatives and the liberals. Just as there are differences in the moral values of the conservative in relation to the liberal, so too, it is argued, are there differences between men and women.[4] The female conception of morality is characterized in terms of care and responsibility while the male conception is characterized in terms of rights and rules, which tend to emphasize abstract principles.

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[3] Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law, Cambridge, Mass.: Harvard University Press, 1987, p. 60

[4] Carol Gilligan, In A Different Voice, Psychological Theory and Women's Development, 1982, cited in K. E. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique", Ottawa Law Review, Vol. 17, 1984, p. 35; also cited in Hoffman, "Feminism, Pornography and the Law", p. 517; see K. A. Lahey, "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality", New England Law Review, Vol. 20, 1984/85, p. 659

Historically, laws relating to marriage, marital property, divorce, control over children, illigitimacy, abortion, contraception, prostitution and rape, have been made, interpreted and enforced by men.[5] As Professor K. Mahoney points out:

> Many laws dealing with morality set one standard for men and another for women. For example, the law has treated prostitutes as deviant, labelling them criminals, but has considered male customers of female prostitutes to be 'normal', indulging in a natural urge. Similarly, the law has treated adultery as a serious offence when committed by women, yet not when committed by men. Under Victorian divorce laws, men could sue their wives for divorce on the ground of adultery alone, but women were required to prove adultery along with bigamy, cruelty, desertion, incest or other 'unnatural' offences if they were to get a divorce.[6]

It is because of this historical inequality that feminists have developed a perspective of their own. Feminists, who are concerned with egalitarian values in a collective sense,[7] state that pornography is about **power** and not about sex, as the conservative and liberal philosophies, which are dominated by men, would have us believe. Examples of this thesis are pervasive in feminist literature. For instance, Andrea Dworkin, in Pornography: Men Possessing Women, says, "The major theme of pornography as a genre is male power, its nature, its magnitude, its use, its meaning."[8] Catharine MacKinnon, in "Not A Moral Issue",

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[5] Mahoney, "Obscenity, Morals and the Law", p. 33

[6] ibid.

[7] Mahoney, "Obscenity and Public Policy", p. 75

states, "A critique of pornography is to feminism what its defense is to male supremacy."[9] Irene Diamond views pornography "[P]rimarily as a medium for expressing norms about male power and domination which functions as a social control mechanism for keeping women in a subordinate status..."[10] Lorenne Clark states "...it [pornography] both reflects and reinforces the patterns of socialization appropriate to a system based on the unequal status of the sexes, in which women are consistently regarded and treated as the inferiors, and the sexual property, of men."[11]

By emphasising equality as the determinant criterion, many feminists are able to distinguish between liberating egalitarian images, which are defined as 'erotica', and those that involve degradation. Erotica is defined as "a mutually pleasurable, sexual expression between people who have enough power to be there by positive choice" whereas "its [pornography's] message is violence, dominance, and conquest. It is sex being used to reinforce some inequality, or to create one, or to tell us that pain and humiliation (ours or someone else's) are really the same as pleasure."[12] Pornography is defined as:

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[8] Dworkin, Pornography: Men Possessing Women, p. 24

[9] MacKinnon, "Not A Moral Issue", p. 321

[10] Irene Diamond, "Pornography and Repression: A Reconsideration", Signs: Journal of Women in Culture and Society, Summer 1980, p. 686

[11] Lorenne M. G. Clark, "Liberalism and Pornography", Pornography and Censorship, p. 55

> . . . verbal or pictorial material which represents or describes sexual behaviour that is degrading or abusive to one or more of the participants **in such a way as to endorse the degradation.** (emphasis in original)[13]

or

> Pornography is a presentation, whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the representation, and in which such behaviour can be taken to be advocated or endorsed.[14]

Distinctions are also made between pornography and sex education, which would include information on reproduction, contraception, abortion and masturbation; and between pornography and moral realism. Moral realism is the use of materials which, although they may contain aspects of the above definitions, because of the context within which they are shown are meant to be educational. An example would be

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[12] Gloria Steinam, "Erotica and Pornography: A Clear and Present Difference", in Take Back the Night, pp. 35-39; but cf. Dworkin, Pornography: Men Possessing Women, at preface, "In the male system, erotica is a subcategory of pornography"; see also M. Kostash, "Second Thoughts" in Women Against Censorship, Varda Burstyn, (ed.), Toronto: Douglas and McIntyre, 1985, "The erotic, in feminist terms, does not exist. What does exist . . . is the difference between the more and the less pornographic: at one end, "snuff" films, at the other, **Cosmopolitan** magazine covers, and somewhere between, crotch shots from **Penthouse.**"

[13] H. Longino, "Pornography, Oppression and Freedom: A Closer Look", in Take Back The Night, p. 43

[14] Ridington, Freedom From Harm, p. 9: this definition evolved from Longino's definition.

the National Film Board production Not A Love Story: A Film About Pornography, which was banned in Ontario even though it provided "a powerful medium for a highly moral film affirming women's dignity and worth."[15] The reason the film was banned was because the provincial censor board does not consider the context within which explicit sexual depictions take place.

Pornography which reduces women to sexual objects perpetuates and reinforces existing stereotypes. This in itself is an affront to the dignity and equality of women. However, many liberal and radical feminists also make the claim that pornography is an incitement to violence.

Eysenck and Nias, in their book, Sex, Violence and the Media, conclude:

> Where the context is hostile to women, as most pornographic films are, we feel that such films should fall under the category of 'incitement to violence towards minority groups' - even though women are not a minority group. Nevertheless such films do constitute a clear case of incitement to maltreat women, downgrade them to a lower status, regard them as mere sex objects, and elevate male **machismo** to a superior position in the scale of values.[16]

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[15] Mahoney, "Obscenity and Public Policy", p. 82

[16] H. J. Eysenck and D. K. B. Nias, Sex, Violence, and the Media, London: Spector, 1978: similar allegations will be dealt with more completely in the next chapter.

[17] Bakan, "Pornography, Law and Moral Theory"

Joel Bakan[17] argues that in addition to the liberal notion of 'offence' as articulated by Hart and Feinberg, there are two feminist theses, that contend that pornography causes harm to individual women, which are consistent with liberalism. The 'offense' thesis, as articulated by liberals like Hart and Feinberg, regards pornography as a 'nuisance' when forced upon unwilling individuals:

> Sexual intercourse between husband and wife is not immoral, but if it takes place in public, it is an affront to public decency. Homosexual intercourse between consenting adults is immoral according to conventional [conservative] morality, but not an affront to public decency, though it would be if it took place in public.[18]

Similarly, Feinberg argues that the only justifiable reason for restricting allegedly obscene materials is to protect unwilling individuals from exposure to 'expression' or activities which they find offensive or irritating:

> [P]ornography, at its worst, is not so much a menace as a nuisance, and that the moral right of legislatures to restrict it derives from, and is limited by, the same principles that morally entitle the state to command owners of howling dogs to stop their racket, to punish owners of fertilizing plants for letting odors escape over a whole town, to prohibit indecent exposure and public defecation, and so on.[19]

The two feminist theses articulated by Bakan are the provocation thesis and the direct harm thesis. The provocation thesis deals with the harm that may result by the potential of pornography to provoke misogynist behaviour

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[18] Hart, Law, Liberty and Morality, p. 45

[19] Joel Feinberg, "Pornography and the Criminal Law", University of Pittsburgh Law Review, Vol. 40, 1979, p. 568

in men.[20] Catharine Mackinnon notes that "specific pornography does directly cause some assualts. Some rapes **are** performed by men with paperback books in their pockets".[21] Further, " . . . pornography doesn't just drop out of the sky, go into his head and stop there. Specifically, men rape, batter, prostitute, molest and sexually harrass women".[22] The provocation thesis insists that pornography encourages and incites men to acts of sexist violence against women.[23] On this basis, it is argued, pornography meets the liberal criteria for harm and therefore its restriction is justified.

The direct harm thesis is concerned with the psychological harm that individual women may suffer "by virtue of their awareness of a societal practice that systematically degrades women as a group.[24]" It alleges that "the mere existence of certain types of pornography is an affront to the dignity and integrity of women as a group".[25]

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[20] Bakan, "Pornography, Law and Moral Theory", p. 11

[21] Catharine A. MacKinnon, "Pornography, Civil Rights, and Speech", Harvard Civil Rights - Civil Liberties Law Review, Vol. 20, 1985, p. 43; article reprinted as chapter entitled "Francis Biddle's Sister" in Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law, Cambridge, Massachusetts: Harvard University Press, 1987, p. 184. Anecdotal evidence is used to support this assertion.

[22] ibid., p. 51 and p. 186 respectively.

[23] Bakan, "Pornography, Law and Moral Theory", p. 12

[24] ibid.

[25] Bakan, "Pornography, Law and Moral Theory", p. 16; cf. comment on back cover of Dworkin, Pornography: Men

The mere knowledge and awareness that pornography exists is seen as 'psychological harm'. Liberal and radical feminists are concerned that women will adopt images of themselves that are portrayed in pornography:

> Violent pornography extols male dominance and female submissiveness in a world where many women are trying to overcome these erroneous beliefs and practices. Brutal depictions, if allowed to flourish, may finally lead women to **accept** the idea that male-female relationships are premised on terror, violence, and cruelty (emphasis in original).[26]

The argument here is that pornography is a type of hate literature, because it promotes hatred and potentially threatens violence against an identifiable group.[27] Feminists are especially critical of civil libertarians (whether male or female) for their failure to recognize the similarity between degradation of minorities in general to that of women in pornographic movies in particular:

> Civil libertarians do not recognize that pornography is hate literature, that it does not provide harmless titillation but is, in itself an institution which defines and sells woman-hatred. Therefore civil libertarians have long opposed degrading depictions of racial and minority groups, but recoil from taking a position against

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Possessing Women, "The question is not: Does pornography **cause** violence against women? Pornography **is** violence against women, violence which pervades and distorts every aspect of culture." (emphasis in original)

[26] Mona Vivar, "The New Anti-Female Violent Pornography: Is Moral Condemnation the Only Justifiable Response?", Law and Psychology Review, Vol. 7, 1982, p. 63 cited in Bakan, "Pornography, Law and Moral Theory", p. 18; cf. Longino, "Pornography, Oppression and Freedom", p. 46 "Women, too, are crippled by internalizing as self-images those that are presented to us by pornographers".

[27] Ridington, Freedom From Harm or Freedom of Speech?, p. 43

> an industry which profits from encouraging the violent abasement of women.[28]

The analysis of pornography as hate literature (discrimination on the basis of sex) along with the allegation that pornography causes harm to women has resulted in attempts at legislation which would address these concerns. Catharine MacKinnon and radical feminist Andrea Dworkin drafted legislation in Minneapolis and Indianapolis which would enable individuals to initiate a civil action on the grounds that harm had resulted from the behaviour of others who had been provoked by pornography.[29]

The position that pornography harms some women and that the existence of pornography is a relevant factor in the oppression of women is generally accepted by both liberal feminists and radical feminists.[30] However, whereas radical feminists view pornography as "the essence of a sexist social order, its quintessential social act",[31] liberal feminists view the discrimination caused by pornography as a

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[28] Open Road, "Pornography: Feminists Breach the Barrier", Summer, 1979, cited in Ridington, Freedom From Harm, p. 43

[29] The Minneapolis legislation was vetoed by the mayor after being passed by the city council on two occasions. The Indianapolis legislation was passed and then immediately challenged in court where it was struck down as unconstitutional, **American Booksellers, Inc. v. Hudnut,** 11 Media Law Reports 1105, 1984 (cited in MacKinnon, "Pornography, Civil Rights, and Speech", Harvard Civil Rights - Civil Liberties Law Review, Vol. 20, 1985, p. 2)

[30] Lahey, "Actual Gender Equality", p. 671

[31] MacKinnon, "Not A Moral Issue", p. 335

cultural form of gendered socialization,[32] and therefore they look towards empowering the state to redress these 'wrongs' (through prohibition or greater regulation) while radical feminists look towards empowering women,[33] through civil action, to seek compensation for the harms that are caused by pornography.

Socialist feminists are critical of any usage of the state whether in criminal or civil-type actions. They fear that the state, which is in itself an institution of male dominance, will inevitably be used against women: right-wing forces will adopt the rhetoric of the pro-censorship feminists and eventually use their arguments to further their own 'moral causes'.[34]

Socialist feminists do not agree with many of the contentions of the liberal or radical feminists; hence, they are opposed to the use of the state in censoring pornography. Central amongst these disputes is the role of pornography in the creation and maintenance of the civil inequality of the sexes.[35] Although pornography is seen as

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[32] Lacombe, Ideology and Public Policy, p. 19

[33] Lahey, "Actual Gender Equality", pp. 671-675

[34] Susan Cole, "Review (Women Against Censorship)", Canadian Journal of Women and the Law, Vol. 1, 1985, p. 235, refers to this fear of right-wing abuse as "future tense panic", which tends to "confuse the present with the possible". Unfortunately with respect to the Indiannapolis legislation proposed by MacKinnon and Bill C-54 as proposed by the Conservative government in Canada, the "possible" became the "actual".

[35] A. Snitow, "Retrenchment Versus Transformation: The

playing a role in the oppression of women, this role can hardly be called the 'quintessential act':

> The socialist feminist analysis of pornography . . . . is more powerful than radical feminists' because it tries to articulate pornography within the context of patriarchal and capitalist social relations. Part of the relationship between patriarchy and capitalism regarding pornography is presented in the following way. Patriarchy is setting the rules for sexuality in society whereas capitalism, by marketing sexual presentations, sells the ideology implied in patriarchy. It is also argued that the messages implied in pornography are not only selling the ideology of male domination/female submission. They also imply that various accessories such as high heels, mini-skirts, jewels, leather clothes and underwear, S & M equipment, as well as countless additional attributes such as big breasts, long penises, and hairless bodies will increase one's sexuality. It is, therefore, suggested that capitalism not only reinforces patriarchy but also reinforces its own economic interests by commodifying the patriarchal content of pornography. The interaction between patriarchy and capitalism is consequently characterized by the **commodification of sexuality** and the **sexualization of commodities.** (emphasis added)[36]

This commodification of sexuality and sexualization of commodities is exploitative of **both** men and women and is implicit in many sexual presentations such as commercials, television programs like soap operas, advertisements in a variety of media and mainstream movies.[37] If social change is to be made, the social feminists argue, then it would make more sense to challenge the sexist attitudes and

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Politics of the Antipornography Movement", in Women Against Censorship, Burstyn (ed.), pp. 107-120

[36] Lacombe, Ideology and Public Policy, pp. 79-80

[37] ibid., p. 80; see Steele, L., "A Capital Idea: Gendering in the Mass Media", in Women Against Censorship, pp. 58-78

behaviours inherent in the above representations than to focus exclusively on pornography.[38]

Socialist feminists also argue that radical feminists are confusing fact and fantasy: image and reality.[39] Many of the themes of dominance and even rape which are purportedly common in pornography are also common in another genre, namely, the so called 'romance novels'.[40]

With respect to the charge that pornography exploits women, Deidre English posits the opposite conclusion:

> Actually, since there are so few women (but hundreds of thousands of pictures of them), the overwhelming feeling is one of the commercial exploitation of male sexual desire. There it is, embarrassingly desperate, tormented, demeaning itself, begging for relief, taking any substitute, and paying for it. Men who live for this are suckers, and their uncomfortable demeanor shows they know it. If as a woman, you can detach yourself . . . you see how totally tragic they appear.[41]

Even though it may be women who are subordinated in some forms of pornography, in an economic sense, it is male sexual and sometimes aggressive desire which is being exploited for commercial gain.

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[38] Lacombe, Ideology and Public Policy, p. 80

[39] S. Diamond, "Pornography: Image and Reality", in Women Against Censorship, pp. 40-57

[40] Hoffman, "Feminism, Pornography and Law", p. 527, "Yet, what excites women's fantasies in romance is the very same male power that pornography glorifies"; B. Faust, Women, Sex and Pornography: A Controversial Study, New York: Putnam, 1981, p. 98; cf. Donnerstein et al, The Question of Pornography, pp. 108-109

[41] D. English, "The Politics of Porn: Can Feminists Walk the Line", Mother Jones, Vol. 5, 1980, p. 49

It has even been suggested by a number of authors, that, as far as securing and maintaining the subservient status of women, there is no greater example than the **Bible.**[42] Consequently, in this sense, the feminist critique of the conservative perspective with regard to pornography is similar to the liberal position. The emphasis on traditional Christian values perpetuates an inferior role for women. This inequality is structurally reinforced in a society in which men have disproportionate control over most aspects of life. In this sense, the socialist feminist analysis appears to resonate with more validity because of its refusal to ascribe to pornography the 'quintessence' which the radical feminists do. Still, the emphasis which feminists in general place on equality in their analysis has shifted the focus away from 'sexual prurience' and 'sexual immorality' which have traditionally dominated the debate. This has provided conceptual clarification with respect to the differences between pornography, erotica, sex education materials and moral realism.

The liberal feminist and radical feminist view has further challeged the traditional liberal perspective which is reluctant to acknowledge that pornography causes harm to women. These feminists maintain that pornography causes

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[42] Hawkins and Zimring, Pornography in a Free Society, p. 163; V. Burstyn, "Political Precedents and Moral Crusades: Women, Sex and the State", in Women Against Censorship, pp. 4-41; Thelma McCormack, "The Censorship of Pornography: Catharsis or Learning?", American Journal of Orthopsychiatry, Vol. 58, No. 4, 1988, p. 502

tangible harm to women, as articulated in both the provocation thesis and the direct harm thesis, which meets the liberal 'harm to others' criteria. Pornography is viewed as a form of sex discrimination as well as an incitement to violence. These allegations are worthy of further analysis because if pornography does indeed cause demonstrable harm of this sort, then it can be prohibited on liberal grounds which resonate with greater theoretical validity than does the conservative view, with its over emphasis on emotionalism. An examination of the empirical research is necessary to investigate these allegations.

Chapter III

PORNOGRAPHY, AGGRESSION AND SEXUAL PATHOLOGY

> If a case is to be made against "pornography" in 1970, it will have to be made on grounds other than demonstrated effects of a damaging personal or social nature. Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behaviour among youth or adults.[1]

> There is a plethora of empirical data in the social science field which indicates that exposure to pornography as defined in the ordinance has a negative impact on the behaviour of the viewer in terms of his attitudes and perceptions toward women as well as his willingness to aggress against them. By mixing misogyny and violence with sexuality, pornography exerts powerful behavioural conditioning on its male viewers which in turn affects the treatment of women in our society. This becomes quite apparent when some of the major studies are examined.[2]

Which of the above two statements is true? Is it possible that social science research could yield such contrasting conclusions? Or perhaps the pornography discussed in the

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[1] The Report of the Commission on Obscenity and Pornography, 1970, p. 169, herein after cited as 1970 Commission Report

[2] Defendants' memorandum from **American Booksellers Association v. Hudnut,** 1984, cited in Donnerstein et al, The Question of Pornography, p. 8

first quote is different in kind from that referred to in the second? Or are both conclusions unwarranted considering the 'facts' at issue? In this chapter the findings of the The Report of the Commission on Obscenity and Pornography (1970), will be reviewed and assessed in light of the studies that have been done since that time; studies which some have 'interpreted' as yielding the conclusions stated in the defendants' memorandum in **American Booksellers Association v. Hudnut** in Indianapolis in 1984.[3]

It must be stated at the outset here that it is a liberal assumption that 'harm' must be of a 'demonstrable' nature that may or may not be discernable by empirical research. Prior to the establishment of the Commission on Obscenity and Pornography (1970), there was very little empirical research that dealt with sexually explicit materials.[4] The 'Majority Report' became the 'cultural truth' for more than a decade and was acclaimed continually in the "liberal social science community for having definitively documented the benignity of pornography.[5]" As noted in chapters 1 and 2, one of the most important considerations with respect to the debate over, and study of, pornography is definitional in nature. The 1970 Presidential Commission believed that the word 'pornography' denoted disapproval so they preferred to use the phrases 'explicit sexual materials', 'sexually

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[3] For instance, law professor Catharine MacKinnon.

[4] Donnerstein et al, The Question of Pornography, p. 23

[5] Irene Diamond, "Pornography and Repression", p. 691

oriented materials' and 'erotic materials'.[6]

The research with respect to pornography and aggression falls within two working models: 1) the catharsis (also called psychoanalytic or Freudian) model and 2) the behavioural (also called imitation or learning) model.[7] The catharsis model suggests that pornography cannot change our inherent sexual nature, but can help resolve inner conflicts by providing a 'safety valve' for aggressive or anti-social forces.[8] Some of the underlying assumptions of this theory are that human beings, especially males, are aggressive by nature and that sublimation of these urges is necessary to society; furthermore, sex and aggression are more closely related in the male than in the female. With respect to pornography, the catharsis model suggests that "the more you see, the less you do ". The behavioural model on the other hand says that aggression is a socially learned behaviour rather than 'instinctual', hence, "the

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[6] The Report of the Commission, p. 5, fn. 4, " . . . pornography . . . denotes subjective disapproval . . . rather than their content or effect", ; but see Richards, "Free Speech and Obscenity Law", pp. 47-59

[7] A number of researchers use either one or the other or combination of these terms to discuss the research; see Thelma McCormack, "The Censorship of Pornography: Catharsis or Learning"; Thelma McCormack, "Machismo in Media Research", Social Problems, Vol. 25, No. 5, 1978 Diamond, "Pornography and Repression"; P. B. Bart and M. Jozsa, "Dirty Books, Dirty Films, and Dirty Data", Take Back the Night; D. English, "The Politics of Porn", Mother Jones, Vol. 5, 1980; S. H. Gray, "Exposure to Pornography and Aggression Toward Women: The Case of the Angry Male", Social Problems, Vol. 29, No. 4, 1982

[8] McCormack, "Machismo in Media Research", p. 545; see Gray, "Exposure to Pornography", p. 387

more you see, the more you do".

The 1970 Report consisted of a number of different studies: 1) attitude studies; 2) retrospective studies; 3) experimental laboratory studies; and 4) social indicator statistics. A public opinion study (attitude study) indicated that only 2 percent of Americans thought that the availability of sexually explicit material was one of the "two or three most serious problems facing the country today".[9] Considering that most people replied that the Vietnam war (54 %), the economy (32 %), breakdown of law and order (20 %), and drugs (20 %) were more important, this does not necessarily mean that sexually explicit materials are not important, only that one must consider the social context within which the question is phrased[10] Further attitude surveys on the effects of sexually explicit materials indicated that most respondents considered the effects to be harmless.[11] It is equally important to remember that opinion data tell us very little about the empirical consequences of these materials.[12] For instance, even in situations where respondents thought that erotica had negative effects, these effects were assumed to happen to other people.[13]

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[9] 1970 Commission Report, pp. 187-188.

[10] ibid., at p. xii of introduction by C. Barnes.

[11] ibid., pp. 190-191

[12] Diamond, "Pornography and Repression", p. 692

[13] Donnerstein et al, The Question of Pornography, p. 27

A number of retrospective studies, which examined the past histories of individuals, were conducted. These included the use of convicted sex offenders and control groups. The results of these studies indicate that rapists report less exposure to sexual materials during adolescence compared to the control group.[14] Feminists have continually challenged these studies on numerous grounds. One of the most frequently repeated is that such a study is insignificant because 'sex offenders or rapists are not much different from the general male population.[15]

The experimental laboratory studies on the effects of sexually explicit materials with respect to attitudes, arousal and behaviour indicated that exposure tended to produce more liberal and more tolerant attitudes, that males tended to become more aroused, and that normal sexual activity increased temporarily.[16] Overexposure led to boredom.[17]

Only one series of studies examined the effects of erotica on aggressive behaviour.[18] This study found that

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[14] ibid., p. 264

[15] Bart and Jozsa, "Dirty Books, Dirty Data", pp. 211-212; see MacKinnon, "Pornography and Speech", p. 53, " . . . normal men more closely resemble convicted rapists attitudinally, although as a group they don't look all that different from them to start with".

[16] Donnerstein et al, The Question of Pornography, pp. 23-37

[17] ibid., p. 29

[18] P. H. Tannenbaum, "Emotional Arousal as a Mediator of Erotic Communication Effects", Technical Report of the

subjects were more likely to exhibit aggressive behaviour (in the form of administering shocks) to a confederate after viewing an 'erotic' film sequence as opposed to a 'neutral' film sequence. In this case the confederate angered the subjects prior to the viewing of the films. However, the subjects acted in more positive ways to the confederate if their initial encounter was friendly.[19]

One study[20] found that males with highly 'sex-calloused' attitudes experienced a reduction in these attitudes after viewing erotic films. Sex calloused males also reported greater arousal. The researcher concluded that:

> Following the viewing of the films, the males had less need to endorse calloused attitudes . . . If this interpretation does stand the test of further research, it would add some support to the argument that pornography may serve a function as an outlet or safety valve.[21]

The results of this experiment, which allegedly demonstrated the 'cathartic' effect of sexually explicit materials, represented the overall general tone of the 'Majority Report'.

Commission on Obscenity and Pornography, Vol. 8, Washington, D. C.: U.S. G. P. O., 1970

[19] Donnerstein et al, The Question of Pornography, pp. 31-32

[20] D. L. Mosher, "Psychological Reactions to Pornographic Films", Technical Report of the Commission on Obscenity and Pornography, Vol. 8

[21] ibid., p. 255

The Commission also relied on social indicator statistics especially from Denmark where pornography had been decriminalized in the sixties.[22] The increase in availability of pornography resulted in apparently lower incidence of rape and other sex crimes. However, upon closer examination there was not a decrease in rape. By lumping rape together with flashers, 'peeping Toms', and other milder 'sex crimes', the statistics were misleading.[23]

Most of the materials studied by the Commission on Obscenity and Pornography (1970) were of a non-violent nature, consequently this was one of the major criticisms leveled against the Report.[24] Feminists argue that the Report is outdated because of its failure to consider much of pornography which is violent. However, it is important in this case that an assessment of such materials be included because they contain non-violent sexually explicit images that are considered pornographic by conservatives; that are currently considered obscene under provisions of

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[22] B. Kutchinsky, "Sex Crimes and Pornography in Copenhagen: A Survey of Attitudes", Technical Reports of the Commission on Obscenity and Pornography, Vol. 7, 1970

[23] Bart and Jozsa, "Dirty Books, Dirty Films and Dirty Data", p. 208; cf. I. Diamond, "Pornography and Repression", p. 697

[24] V. B. Cline (ed.) Where Do You Draw the Line?, Provo, Utah: Brigham Young University Press, 1974: Cline was a major contributor to the 'Minority Report' (see fn. 61-63 and text at pp. 21-22, Chapter 1 above); Bart and Jozsa, "Dirty Books, Dirty Films, and Dirty Data", Take Back The Night, p. 207

the **Criminal Code;** and that are also included in the definition of pornography in Bill C-54.

Another major criticism of the 1970 Commission Report was based on the observation that in 1969, the President's Commission on the Causes and Prevention of Violence accepted the view that people could 'learn' to be violent from the mass media; how could exposure to pornography not promote the same sort of 'behaviour'?[25] One possible answer is supplied by Dienstbier[26] who suggests that we view the two phenomena in different ways: violence is an accepted way of dealing with conflict in the real world while sex is rarely discussed and is often associated with guilt and shame. Mass media reinforce our attitudes about violence while pornography (at least sexually explicit material) may reduce our feelings of shame and disgust, in other words, it may provide a 'cathartic' effect. He also pointed out that the amount of violence depicted on television is **much** greater than that shown in pornography.

Despite the criticisms levelled at the 1970 Report, social scientists have qualified its conclusions:

> Given the nature of pornography in the 1960s and the state of scientific inquiry about pornography at that time, there was probably no other conclusion the commission could have drawn. The totality of evidence suggested no effects.[27]

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[25] I. Diamond, "Pornography and Repression", p. 691

[26] R. Dienstbier, "Sex and Violence: Can Research Have It Both Ways?", Journal of Communication, Vol. 27, 1977

[27] Donnerstein et al, The Question of Pornography, pp. 34-35

In order to draw conclusions from the empirical research done in this field since 1970 it becomes necessary to formulate some sort ot typology to help classify the different types of material that various reseachers have used. Perhaps the best known typology of empirical research is one developed by Donnerstein, Linz and Penrod,[28] will be used. This typology consists of the following categories:

1. **Nonviolent sexually explicit stimuli** that are either low or high in their tendency to degrade women. 'Erotica' as defined by many feminists would be an example of low degradation. High degradation would be demeaning but not expressly violent and would exclude rape.
2. **Explicit or nonexplicit sexual aggression against women.** This would include material that portrays the myth that women desire, deserve, or benefit from rape (what is termed 'positive outcome' in the research). Some of the material in this category is of the type that would be permissible under television broadcast standards.
3. **Sexualized explicit violence and negative-outcome rape depictions.** This material either depicts graphic violence in the form of torture, murder or

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[28] Donnerstein et al, The Question of Pornography; this book represents the 'leading edge' of research in the field, and the authors' work is constantly cited in any discussion dealing with alleged harms of pornographic material (including the work of radical feminist and law professor Catharine MacKinnon).

> mutilation, or graphic or brutal rapes where there is no indication that the victim enjoyed the rape. It is important to note that most of the sexualized violence in the first part of this category comes in the form of 'R-rated' Hollywood 'slasher-type' films.[29]

This typology includes materials that would not normally be considered 'pornographic' or 'obscene', although the categories do not purport to classify all the research. However, they provide a useful classification for studying most of the material.

The types of materials examined by the 1970 Commission Report, would be classified as **type** 1 non-violent sexually explicit material. A number of studies[30] have shown a modest increase in sexual behaviour after exposure to erotica (type 1). One study[31] in which the participants were asked to fill out questionnaires concerning their sexual backgrounds and attitudes towards sex prior to the

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[29] ibid., pp. 3-5

[30] R. B. Cattell, G. F. Kawash and G. E. Deyoung, "Validation of Objective Measures of Ergic Tension: Response of the Sex Erg to Visual Stimulation", Journal of Experimental Research in Personality, Vol. 6, 1972; Schmidt, G., "Male - Female Differences in Sexual Arousal and Behavior During and After Exposure to Sexually Explicit Stimuli", Archives of Sexual Behavior, Vol. 4, 1975; W. A. Fisher and D. Byrne, "Individual Differences in Affective, Evaluative, and Behavioral Responses to An Erotic Film", Journal of Applied Social Psychology, Vol. 8, 1978

[31] Fisher and Byrne, "Behavioral Responses",

experiment helped develop another typology. After viewing an erotic film a second questionairre was filled out. Compared to individuals who rated the film as non-pornographic (along a porno-nonporno continuum), those who reported it as pornographic, also reported more restrictive sexual-socialization and more negative attitudes towards sex, and consequently responded to the film more negatively. Interestingly, these individuals consistently reported the greatest increase in sexual activity. Out of this experiment came the typology of **erotophobes** and **erotophiles.**

> Socialized to be apprehensive, inhibited, and guilty about sex, the erotophobe fears pornography and is relatively conservative in his or her sexual attitudes and practices. (emphasis added)[32]

In a number of studies, subjects previously angered and then exposed to some form of erotic stimulation exhibited increased levels of aggressive behaviour.[33] These findings are interpreted on the basis of Bandura's general arousal model which states that where aggression is a dominant response, "any source of emotional arousal will tend to increase aggressive behavior".[34] However, with respect to

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[32] ibid., p. 364

[33] T. P. Meyer, "The Effects of Sexually Arousing and Violent Films on Aggressive Behavior", Journal of Sex Research, Vol. 8, 1972; D. Zillmann, J. L. Holt and K. D. Day, "Strength and Duration of the Effects of Aggressive, Violent and Erotic Communications on Subsequent Aggressive Behavior", Communication Research, Vol. 1, 1974

[34] cited in E. Donnerstein and G. Barret, "Effects of Erotic

erotic material, prior anger arousal was necessary for a facilitative effect.

Conversely, there are a number of studies which have shown a reduction of aggression after exposure to erotic stimuli.[35] In response to the contradictions between these studies, in that erotica has both facilitated and inhibited aggressive behaviour, Donnerstein et al[36] proposed that erotica possesses two components, arousal and attentional shift: depending on the intensity of the stimuli, erotica could either facilitate an increase in aggression or a shift in attention away from anger. However, once again prior anger arousal was a key constituent in these experiments.

Whereas most of these experiments dealt with the issue of erotica and aggression in a general manner, more recent work began to focus on explicit materials with aggressive content (type 2 explicit sexual aggression), in order to

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Stimuli on Male Aggression Toward Females", Journal of Personality and Social Psychology, Vol. 36, No. 2, 1978, p. 180

[35] R. A. Baron, "Aggression-Inhibiting Influences of Heightened Sexual Arousal", Journal of Personality and Social Psychology, Vol. 30, 1974; R. A. Baron and P. A. Bell, "Effects of Heightened Sexual Arousal on Physical Aggression", Proceedings of the 81st Annual Convention of the American Psychological Association, 1973; D. Zillmann and B. S. Sapolsky, "What Mediates the Effect of Mild Erotica on Annoyance and Hostile Behavior in Males?", Journal Of Personality and Social Psychology, Vol. 35, 1977

[36] E. Donnerstein, M. Donnerstein and R. Evans, "Erotic Stimuli and Aggression: Facilitation or Inhibition", Journal of Personality and Social Psychology, Vol. 32, 1975

see whether such material would facilitate attitudinal changes or even cause aggressive acts against women.[37] These studies found that men exposed to aggressive erotica (rape film) created more aggressive sexual fantasies (including rape fantasies) than a group of men exposed to non-aggressive erotica,[38] especially where there was a 'positive' outcome; that there was a lessened sensitivity to rape as well as an increased acceptance of rape myths and interpersonal violence against women.[39] Other studies[40] have found that exposure to aggressive erotica has caused increases in aggression towards women (in a laboratory setting). These studies are important for another reason since they are the ones most commonly cited by feminists[41] who also believe that violence has become a prevalent theme

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[37] N. Malamuth and E. Donnerstein "The Effects of Aggressive Erotic Stimuli", Advance in Experimental Social Psychology, Vol. 15, 1982; N. Malamuth and J. Check, "Sexual Arousal to Rape and Consenting Depictions: The Importance of the Women's Arousal", Journal of Abnormal Psychology, Vol. 89, 1980; N. Malamuth, "Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli ", Archives of Sexual Behavior, Vol. 10, 1981; E. Donnerstein and L. Berkowitz, "Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women", Journal of Personality and Social Psychology, vol. 41, 1981

[38] Malamuth, "Rape Fantasies"

[39] Malamuth and Check, "Sexual Arousal"

[40] E. Donnerstein and L. Berkowitz, "Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women", Journal of Personality and Social Psychology, Vol. 41, 1981; N. Malamuth and E. Donnerstein, "The Effects of Aggressive - Pornographic Mass Media Stimuli", Advances in Experimental Social Psychology, Vol. 15, 1982; E. Donnerstein, "Pornography: Its Effects on Violence Against Women", in N. Malamuth and E. Donnerstein (eds.), Pornography and Sexual Aggression,

in pornography.[42]

Two studies are commonly cited by feminists to support their allegations that pornography is increasingly more violent. The first study is a longitudinal study by Malamuth and Spinner[43] in which the content (pictorials and cartoons) of **Playboy** and **Penthouse** from 1973-1977 were analyzed. This study found that violent images had increased from a total of one percent to five percent over the period in question. Another study by Smith[44] analyzed 'adults only' paperbacks between 1968-1974. It was noted that rape with no negative outcomes had doubled during the six years in question and that one third of all sexual interactions described in these books was 'coerced'. It is precisely because of studies like these that feminists contend that erotic violence has become the major theme in pornography. However more recent studies may not support this contention. Scott[45] examined the level of violence in

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New York: Academic Press, 1984

[41] See MacKinnon, "Not a Moral Issue", p. 324, fn. 9 and p. 340, fn. 59

[42] I. Diamond, "Pornography and Repression"; Bart and Jozsa, "Dirty Books, Dirty Films and Dirty Data";

[43] N. Malamuth and E. Spinner, "A Longitudinal Content Analysis of Sexual Violence in the Best - Selling Erotica Magazines", Journal of Sex Research, Vol. 16, 1980

[44] D. Smith, "The Social Content of Pornography", Journal of Communication, Vol. 26, 1976

[45] J. E. Scott, "An Updated Longitudinal Content Analysis of Sex References in Mass Media Circulation Magazines", cited in The Question of Pornography, p. 89

Playboy from 1954 to 1983 and concluded that levels of violence peaked in 1977 and since then the levels have actually dropped. Similarly, Slade[46] found that the level of both rape (5%) and violence (10%) had remained constant from 1915 to 1972. An even more recent study conducted in British Columbia by Palys[47] analyzed the content of 150 random video - tapes that were either classified as 'Triple X' or 'Adult'. 'Triple X' videos show explicit and graphic sex whereas 'Adult' videos do not show explicit sex. The videos in question were produced between 1979 and 1983. Palys notes that **contrary to initial expectations** the 'Adult' videos consistently showed more aggression, sexual violence and domination of women (type 3 sexualized explicit violence) than the 'Triple X' videos in which sexual violence had actually decreased in the period in question. Also, the 'Triple X' videos showed more scenes of 'consensual' sex (type 1 low degradation) as opposed to scenes of 'coerced' sex (type 2 nonexplicit sexual aggression) in the 'Adult' videos.

In reviewing many of the studies listed above, Donnerstein et al[48] state:

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[46] J. Slade, "Violence in the Hard - Core Pornographic Film: An Historical Survey", Journal of Communication, Vol. 34, 1984

[47] T. S. Palys, "Testing the Common Wisdom: The Social Content of Video Pornography", Canadian Psychology, Vol. 27, 1986

[48] Donnerstein, Linz and Penrod, The Question of Pornography,

> At least for now, we cannot legitimately conclude that pornography has become more violent since the time of the 1970 obscenity and pornography commission . . . . It is probably the case that the sheer quantity of violent and nonviolent pornographic materials that are for sale or rent in the United States has increased over the last 15 years . . . Undoubtedly, the ready availability of all forms of sexually explicit materials makes it much easier today to come in contact with those materials that are sexually violent. In other words, we may be more aware of the sexually violent forms of pornography because all forms of pornography are more prevalent than they once were.[49]

The point here is not to diminish the fact that violent pornography may be harmful but rather to make it clear that violent pornography **is not** the most common form of sexually explicit material that many feminists would have us believe. For instance, the Badgley Committee, in its content analysis of sexually explicit material, revealed that only 1. 2 percent of the photographs depicted "elements of force against victim, violence, [or] use of weapons" and only 3. 7 percent of the text involved "elements of force against victim, violence, [or] use of weapons".[50]

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[49] ibid., p. 91

[50] cited in W. A. Fischer, "The Emperor Has No Clothes: On the Fraser and Badgley Committees' Rejection of Social Scientific Research on Pornography", in J. Lowman, M. A. Jackson, T. S. Palys and S. Gavigan (eds.), Regulating Sex: An Anthology of Commentaries on the Findings and Recommendations of the Badgley and Fraser Reports, Burnaby, B. C.: School of Criminology, Simon Fraser University, 1986, p. 168

[51] One of the first feminists to make this charge was Robin Morgan who coined the phrase "Pornography is the theory,

Another common claim is that pornography causes rape.[51] Two studies[52] found that men exposed to pornography that combined sex and violence (type 2 and type 3) became more aroused and less sympathetic to the victims. However, the most startling revelations from these studies were that approximately **50 percent** of the males indicated that they might **commit rape or sexual coercion** if they were assured that no adverse consequences would result (ie. if they were assured that they would not be caught). Although this may not present a very complimentary view of male sexuality it is hard to attach too great a significance to such studies. For instance if we were to ask a wide group of individuals whether they would: 1) forge a winning lottery ticket; 2)rob a bank; 3)cheat on their income tax, should we be surprized at their answers in the **assured absence** of any negative consequences. Herein lies one of the major criticisms of empirical laboratory research.

Sociologist Thelma McCormack is one of the strongest critics of the way in which social scientific research has been conducted and interpreted by various individuals to support their positions. Just as feminists have shown us how important it is to consider the **context** within which

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and rape the practice".

[52] S. Feshback and N. Malamuth, "Sex and Aggression: Proving the Link", Psychology Today, Vol. 12, 1978; N. Malamuth and J. Check, "Penile Tumescence and Perceptual Responses to Rape as a Function of Victim's Perceived Reactions", Journal of Applied Social Psychology, Vol. 10, 1980

explicit depictions occur, so too is it important to consider the **context** within which most of the empirical research takes place.

> Briefly, the empirical studies of pornography show that men who (a) are prone to violence and (b) have traditional sex-role attitudes are more likely in a (c) experimental situation after they have first been provoked by a confederate and have been shown a pornography film and are then (d) invited to express aggression will (e) express more aggression toward women than men (f) in the absence of any other opportunities for expressing aggression.[53]

The problem with much of this empirical research, as noted by McCormack and others,[54] is that the laboratory setting within which most of these pornography-aggression experiments take place is so unlike the 'real' world that it is hard to place too much credence in their findings. Typically, these studies use stimuli that are atypical (as noted above, violent pornography is not the norm), subjects have only a **single aggressive response** open to them, subjects are in fact encouraged to aggress by the

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[53] T. McCormack "Porn Not the Cause", letter to the Editor, Globe and Mail, Jan. 25, 1988; see McCormack, "Making Sense of the Research on Pornography", Women Against Censorship, pp. 182-205: This study was originally prepared for the Metropolitan Toronto Task Force on Public Violence Against Women and Children, who upon receipt of same, decided to disregard it because it did not support the view that "pornography is the theory, rape is the practice". Not only did the Task Force disregard this study, but it also commissioned another study from David Scott, an anti-pornography activist who in his zeal to suppress pornography has been accused of misinterpreting empirical data: see Donnerstein et al, The Question of Pornography, p. 101

[54] W. A. Fisher, "The Emperor Has No Clothes"; Gray, S., "Exposure to Pornography and Aggression Toward Women: The Case of the Angry Male", Social Problems, Vol. 29, 1982

experimenters in a punishment free environment. Also, in experiments in which male arousal to violent pornography is measured, a plethysmograph (a device placed around the penis) is used, which in and of itself may cause arousal. Grey also argues that with respect to sex offenders, these persons are able to create their own sexual connotations from a wide variety of materials. Similarly Goldstein and Kant report:

> A problem that arises in studying reactions to pornography among sex offenders is that they appear to generate their own pornography from nonsexual stimuli . . . the sex offender . . . reads sexual meanings into images that would be devoid of erotic connotations for the normal person.[55]

A good example is provided by Murphy:

> It is for this reason that books, pictures, charades, rituals, the spoken word, **can** and **do** lead directly to conduct harmful to the self indulging in it and to others. Heinrich Pommerenke, who was a rapist, abuser, and mass slayer of women in Germany, was prompted to his series of ghastly deeds by Cecil B. DeMille's **The Ten Commandments.** During the scene of the Jewish women dancing about the Golden Calf, all doubts of his life came clear: women were the source of the world's trouble and it was his mission to both punish them for this and to execute them. Leaving the theatre, he slew his first victim in a park nearby. John George Haigh, the British vampire who sucked his victims' blood through soda straws and dissolved their drained bodies is acid baths, first had his murder-inciting dreams and vampire-longings from watching the "voluptuous" procedure of -- an Anglican High Church Service!(emphasis in original)[56]

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[55] M. J. Goldstein and H. S. Kant, Pornography and Sexual Deviance, Berkeley: University of California Press, 1973, p. 31

[56] E. F. Murphy, "The Value of Pornography", Wayne Law Review, Vol. 10, 1964, p. 668, cited in Berger, "Pornography, Sex and Censorship", Pornography and

It is not clear whether the stimulus that induces such behaviour is one that represents sexuality or aggression.

Criticisms aside, if we are to place any significance on empirical studies at all, then an analysis of recent experiments that deal with the effects of non-explicit sexualized violence or aggression is necessary. This material (both type 2 and type 3 non-explicit) is often found on television (in the form of soap operas), 'romance novels', and in theatrically released productions.[57] Malamuth and Check[58] conducted a field experiment in which one group of subjects was shown two sexually aggressive movies, **The Getaway** and **Swept Away,** while another control group was shown two neutral feature length films. Several days later, subjects were asked to fill out questionnaires that measured viewers' acceptance of both rape myths and interpersonal violence against women. Malamuth and Check, in examining the results of this field experiment, claim to have obtained "perhaps the strongest evidence to date to indicate that depictions of sexual aggression with positive consequences can adversely affect socially important perceptions or attitudes.[59]" Whereas it is hard to prove a

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Censorship, p. 94

[57] Donnerstein et al, The Question of Pornography, p. 109

[58] N. Malamuth and J. Check, "The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment", Journal of Research in Personality, Vol. 15, 1981

[59] cited in Neil Boyd, "Sexuality, Gender Relations and the Law: The Limits of Free Expression", Regulating Sex,

link between erotica, pornography and sexual pathology such as rape and assault, there does appear to be an adverse effect on attitudes and beliefs. However, the most important point which the above field experiment demonstrates is that it may be sexualized aggression and violence, whether explicit or not, that facilitates these behaviours. **The Getaway** and **Swept Away** could hardly be considered pornographic or erotic under anybody's definiton: these were theatrically released movies that have even appeared on television. The question we have to ask ourselves is, given the pervasiveness of violence against women in the mass media, is the focus on sexually explicit material somewhat unfounded?

> If we are to outlaw pornography for its promotion of women as commodities and for its patriarchal form, we are casting an **arbitrarily narrow** and perhaps misplaced net over what seems to be a pervasive theme in gender relations. (emphasis added)[60]

The 1970 Commission Report demonstrated that sexually explicit materials per se did not cause any harmful effects with respect to behaviour. Extensive empirical research in the social sciences has reached a similar conclusion. Feminists have helped shift the focus away from sexually explicit materials to materials which contain aggression or

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p. 131

[60] ibid., p. 131

violence against women. Even though researchers hesitate to attribute a causal relationship to these materials and subsequent pathological behaviour in the real world, as opposed to the 'laboratory setting', there does appear to be a positive relationship between these materials and generally negative attitudes about or toward women. In this sense, some forms of pornography can be seen as an impediment towards the full equality of women in society: negative images tend to perpetuate negative attitudes. Recent research indicates that negative images of women are pervasive in society, especially in mainstream media which are accessible to a much larger audience than is pornography. Given the pervasiveness of these images, it is unclear whether legal remedies are the appropriate responses to these concerns. These are the issues that the most recent Canadian governmental commission with respect to pornography, the Special Committee on Pornography and Prostitution (the Fraser Commission), undertook to examine.

Chapter IV

IN SEARCH OF REFORM: THE FRASER REPORT

From different ideological perspectives, the current provisions of the Criminal Code that deal with pornography under the rubric of obscenity, have been criticised as too broad and/or too vague. Legal moralists seek stricter control of both erotic and pornographic material; liberals want a clearer definition that would not include erotica in a definition of pornography and that would also eliminate judicial arbitrariness; feminists also seek a distinction between erotic and pornographic materials with an emphasis on more severe restrictions on degrading, aggressive and violent pornography.[1] The current provisions of the Criminal Code which define obscenity appear under Section 159 Subsection (8):

> For the purpose of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.[2]

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[1] Cf. Mahoney, "Defining Pornography: An Analysis of Bill C-54", McGill Law Journal, Vol. 33, 1988, p. 575

[2] Criminal Code, S. C. 1959, c. 41, s. 159(8)

The fact that this definition appears under the heading of "Offenses Tending to Corrupt Morals", is in and of itself an indication of the conservative philosophy which underlies it.[3] Other sections of the Criminal Code that deal with offenses in this area use words such as "immoral", "disgusting", "indecent" and "scurrilous". Feminists are especially critical of this underlying philosophy which categorizes pornography as obscenity because to them it is clear that the conservative view is concerned with so-called 'sexual immorality'. For feminists, pornography is a political issue, not a 'moral issue',[4] that threatens womens' aspirations for equality in a democratic society. Liberals maintain that state intervention is only justified when there is 'demonstrable harm' : pornography is little more than a nuisance. They reject the conservative notion of a 'common morality'. Rather than being an end in itself, society is seen as being a means of achieving individual freedom and security.

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[3] See Chapter 1

[4] MacKinnon, "Not A Moral Issue".

There have been a number of different government studies in Canada, Great Britain, and the United States that have dealt with the issue of pornography and/or the relationship between law and morality.[5] By focusing on the Fraser Report, an attempt will be made to analyze its findings and place them within the context of developing Canadian socio-legal policy. This will involve an examination of the various briefs submitted by different interest groups who appeared before the Fraser Commission, as well as the different strategies that have been created to deal with pornography, including the MacKinnon/Dworkin approach that gained widespread attention as a 'novel' way to address the issue of pornography.

In 1983, then Justice Minister Mark MacGuigan announced the creation of the Special Committee on Pornography and Prostitution (Fraser Commission) to deal with the myriad of issues pertaining to both prostitution and pornography. With respect to pornography, the Fraser Commission was to ascertain the extent of availability, the effects and

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[5] U. K., Committee on Homosexual Offenses and Prostitution, 1957 (a. k. a. Wolfendon Committee); U.S., President's Commission on Obscenity and Pornography, 1970 (a. k. a. Johnson Commission); Canada, Standing Committee on Justice and Legal Affairs, 1978; U. K., Committee on Obscenity and Film Censorship, 1979 (a. k. a. Williams Committee); Canada, Committee on Sexual Offences Against Children and Youths, 1984 (a. k. a. Badgley Report); Canada, Special Committee on Pornography and Prostitution, 1985, (a. k. a. Fraser Report); U.S., Attorney General's Commission on Pornography, 1986, (a. k. a. Meese Commission)

common conceptions as to what actually constituted the 'pornographic'. The Commission was also to hold public hearings to gather input, to consider alternatives, report findings and recommend solutions to the problems associated with pornography and prostitution.[6] From the outset the Fraser Commission recognized the complexity of the task at hand:

> In areas as complex as these it is difficult to be certain about anything. On one issue, however, we are certain: the answers to the problems raised by pornography and prostitution in Canada are **not just legal answers.** They are to be found, instead, in the social order of things and in the way in which Canadians practise the equality, dignity and respect that our Constitution enshrines. (emphasis added)[7]

At the same time that the Fraser Commission was formed, Justice Minister MacGuigan introduced amendments to the Criminal Code that included reference to "degrading representations" in the definition of obscenity in Section 159 (8). The formation of the Fraser Commission and the amendments to the Criminal Code were seen as a response to feminist concerns about the prevalence of 'degrading images' of women in pornography.[8] This perception of the 'new pornography' was compounded by relatively new communications

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[6] Fraser Report, pp. 5-6

[7] ibid., preface at v

[8] Michael Kanter, "Prohibit or Regulate? The Fraser Report and New Approaches to Pornography and Prostitution", Osgoode Hall Law Journal, Vol. 23, No. 1, 1985, p. 172; J. McLaren, "The Fraser Committee: The Politics and Process of a Special Committee", Regulating Sex, p. 40; T. McCormack, "Deregulating the Economy and Regulating Morality: The Political Economy of Censorship", Studies in Political Economy, No. 18, 1985, p. 174

technology: pay television, videotapes and satellite transmissions.

Whereas the 1970 Commission Report (U. S.) and the 1979 Williams Commission Report on Obscenity and Film Censorship (U. K.) failed to consider the feminist view, primarily due to the fact that at the time of these inquiries, feminist analysis was in its infancy,[9] the Fraser Commission acknowledged that their are three philosophical traditions which have influenced the debate on pornography:[10] the conservative, liberal and feminist. Although the Fraser Report does not adopt any one perspective or theory of society or of pornography, their explication of the **essential principles** upon which their recommendations are based include "individual liberty" and "an appreciation of sexuality". This would appear to indicate a rejection of the conservative view as outlined earlier in this analysis. Other **essential principles** include "equality", "responsibility" and "human dignity".[11]

The Fraser Commission held public hearings in 22 different centres across Canada[12] and noted that there was a

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[9] See Simpson, Pornography and Politics: The Williams Committee in Retrospect, p. 67, "The radical feminist attack has however been developed since the report was written . . . "

[10] Fraser Report, pp. 15-21

[11] ibid., pp. 23-26

[12] For a complete list of cities and groups that submitted briefs see Fraser Report, Vol. 2, pp. 711-753.

wide range of opinion among Canadians. At one extreme was the conservative view that wanted the legal definition of pornography to include "any depiction of sexual activity, whether it be inside or outside of marriage, or any depiction of persons in nude or suggestive poses".[13] At the opposite end of the spectrum was the civil libertarian view that everything was acceptable except explicit sexual portrayals of children. In between were a number of feminist groups and church organizations many of whom acknowledged the distinction between non-violent, non-degrading explicit sexual depictions (erotica) which were acceptable and the more violent and degrading forms which were not acceptable. In noting the difficulties in defining pornography, the Fraser Commission divided the material into two categories: 1) the sexually explicit (they did not adopt "erotica") and 2) sexual content combined with violence, degradation and abuse in such a way as to show approval for same.[14] A number of church groups[15] stated that the effects of pornography were damaging to women, children and society as a whole. Municipalities complained that the present Criminal Code provisions dealing with obscenity were so nebulous that enforcement was becoming increasingly

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[13] Fraser Report, Vol. 1, p. 63

[14] Fraser Report, Vol. 1, p. 59: the theoretical basis for this sort of categorization is founded upon the work of Jillian Ridington, Helen Longino, Andrea Dworkin and Catharine MacKinnon.

[15] Anglican Diocese of Toronto, United Church of Canada and the Canadian Conference of Catholic Bishops

difficult as prosecutors invariably waited for cases to go through the appeal procedure all the way to the Supreme Court before laying more charges. Women's groups reiterated concerns about pornography objectifying them and robbing them of their dignity, however there was disaggreement among some women's groups as to the distinction between erotica and pornography.[16] Similarly the conservative position was articulated by groups such as the Roman Catholic Archdiocese of Toronto:

> Consensual sex, as portrayed in the media, can be destructive of Canadian societal values . . . Even depictions of loving, indeed marital, sexual intimacy in full, explicit detail . . . ultimately dehumanizes sexuality itself.[17]

REAL Women of Canada, a group of anti-feminist, anti-abortion, homophobic right-wing women, also articulated the conservative position:

> There is a direct relationship between habitual exposure to standard sexual material referred to as "erotica" and an increased desire for more bizarre material . . . If the people in the representation . . . seem to be "consenting adults" rather than people involved in "degrading" or "demeaning" activity, the material could still be pornographic . . . Pornography should be defined so as to include . . . explicit sexual acts.[18]

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[16] For instance the Manitoba Advisory Council on the Status of Women maintained that all pornography (soft core (erotica), hard core) degrades women while the Manitoba Action Committee on the Status of Women maintained that there was a distinction between the two; cf. Gloria Steinam's definition of 'erotica' and 'pornography'.

[17] Fraser Report, Vol. 1, p. 70

[18] ibid.

A number of organizations presented briefs that placed pornography within the larger framework of a sexist society. For instance, Media Watch stated,

> Sex role stereotyping of women creates an environment that encourages the dehumanization, misrepresentation and degradation of women . . . Presently our environment is polluted with messages that tell us women are powerless, feebleminded, submissive, victims, and only valuable if they are young, beautiful and white . . . Media Watch views sex role stereotyping and pornography as a continuum which must be uprooted from our culture.[19]

Another forthright submission by the United Church of Canada noted,

> It is a painful act of self-recognition of Christians, especially male Christians, that the Church has transmitted and shaped male domination in western culture. It is beyond doubt that the Church is part of the problem. But with God's grace, we may find courage to become part of the solution.[20]

A number of groups, especially the Metro Toronto Task Force on Public Violence Against Women and Children, submitted briefs which argued that psychological and sociological research had **conclusively demonstrated** a causal link between pornography and violence against women. Unfortunately, such briefs rarely included the self-confessed limitations of the social psychologists'

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[19] ibid., pp. 70-71

[20] ibid., p. 71; cf. text at fn. 42 at page 39 above. It should be noted that the United Church is probably one of the most 'progressive' Churches and its views are not necessarily held by other Churches.

[21] The most frequently cited studies were those of Malamuth

research.[21] Various women's groups[22] provided anecdotal and circumstantial evidence that linked pornography with crime. Because of this sort of 'evidence', these groups invariably sought more government control with respect to pornographic materials.

Opposition to increased government control came from the Canadian Civil Liberties Association (herein after C. C. L. A.) and provincial associations (ie. Manitoba Association for Rights and Liberties), some professional associations (ie. Canadian Association of University Teachers), film and video associations (ie. Ontario Film and Video Appreciation Society-herein after OFAVAS),[23] periodical and video distributors and retailers, and gay rights organizations.

The Canadian Civil Liberties Association, in its brief[24] to the Fraser Commission states:

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and Donnerstein which were discussed in Chapter 3.

[22] Ontario Advisory Council on the Status of Women; Le Regroupement Feministe Contre la Pornographie (Montreal); Canadian Federation of University Women in Toronto; La Federation des Femmes du Quebec.

[23] Although OFAVAS was categorized as a film and video association, most if not all of its members are self confessed anti-censorship socialist feminists, some of whom were the authors of various articles in Women Against Censorship, including Varda Burstyn.

[24] Pornography and the Law, prepared by A. Borovoy and L. Arbour. A similar version of this brief appears in Borovoy's book When Freedoms Collide: The Case For Our Civil Liberties, Toronto: Lester and Orpen Dennys, 1988, pp. 53-66

> The C. C. L. A. has no hesitation in joining the National Action Committee on the Status of Women in an unequivocal denunciation of the "new pornography". We refer to those publications and films which appear to celebrate the sexual abuse of women and children. It is hard to fathom how exposure to such material could elicit a reaction more positive than revulsion.
>
> It is necessary to distinguish, however, between moral condemnation and legal prohibition. The former is easy; the latter is frought with difficulty. The legal problem is one essentially of definition. How is the law to formulate a standard which will prohibit this vile pornography without simultaneously catching in the same net a lot of other material which it would be unconscionable to suppress? So often, our obscenity laws have wound up nailing the wrong material.[25]

The C. C. L. A. lists a number of court cases that point out the historical problem of defining pornography and the lack of unanimity amongst various Canadian judges. The vagueness of the current law is a burden to publishers and distributors who can never be sure if their material is obscene or not. Inevitably it is the police who make the judgements as to what constitutes "obscene" material.[26] The result of such a condition causes publishers and distributors to act as self censors for fear of prosecution. The C. C. L. A. goes on to state that "dangerous imprecision is inherent in the very existence of attempting to define pornography".[27] The contention that pornography causes harm is also rejected:

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[25] Pornography and the Law, p. 1

[26] ibid., p. 2

[27] ibid., p. 3

> In any event, the evidence fails to demonstrate a direct causal link between exposure to pornography and the serious abuse of women and children. We are aware, of course, of the reports that on a number of occasions, those who have violated women and children were found with pornography in their possession. What is not known, however, is whether the pornography produced the violence or whether those violence prone people were attracted to pornography. Moreover, there has been no adequate measure of the number of people, otherwise violence prone, whose aggressive impulses have been moderated by sublimation through pornography.[28]

With respect to the harmful attitudes which pornography may facilitate against women, the C. C. L. A. argues that the counter influences of the 'market place' should prevail over the urge for legal prohibition. The type of material which these arguments pertain to is that of <u>simulated</u> sexual abuse.[29]

The C. C. L. A. would permit government action for material which involves the "actual, not simulated, abuse of real people". This would include the so-called "snuff films" and "kiddie porn" and is a variant of the "clear and present danger" exception.[30] The C. C. L. A. is also not opposed to the regulatory licencing of pay television services.[31]

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[28] ibid., p. 12. The last sentence of this quote is a direct reference to the 'catharsis theory' discussed earlier and it points to the very real problem of how do you measure crimes which have not been committed.

[29] ibid., p. 14

[30] ibid.

[31] ibid., pp. 15-16

The other major group that expressed opposition to censorship was OFAVAS, a self described group of feminists against censorship[32] that had previously challenged the power of the Ontario Board of Censors in court. OFAVAS alleged that the Board's power contravened the Charter of Rights and Freedoms and was therefore unconstitutional. This allegation was supported by the Ontario Divisional Court as well as the Ontario Court of Appeal. The result of this action was specific legislation that set out the powers of the Ontario Board of Censors (now called the Ontario Film Review Board).

In their brief to the Fraser Commission, OFAVAS expressed a number of concerns. One of these concerns was the idea of a government-appointed board (ie. Fraser Commission) "interpret(ing) the meaning of images and ideas on behalf of everyone else in this society".[33] They view this as unacceptable in a democratic society. Although OFAVAS acknowledges that pornography is a form of misogyny, they reject the view that it is the 'root cause' of sexism. Consequently there is little benefit to be derived from curtailing (censoring) representations that combine sexism **with** violence:

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[32] Although it is clear that OFAVAS **is** a group of feminists, namely socialist feminists, The Fraser Commission refers to them as a group of "filmmakers, writers, journalists, artists, performers and others" who are opposed to censorship.

[33] Fraser Report, p. 79

> We see censorship as a placebo measure that does nothing about the real problems that discrimination causes, and in fact, distracts from giving those problems the attention they deserve and require. Furthermore, the very real danger exists that censorship, perhaps even inadvertently, will serve to silence the very voices that could raise awareness toward social change.[34]

With respect to the liberal and radical feminist view regarding violent pornography:

> The feminist perspective that has gained wide acceptance and momentum has shifted emphasis away from graphic sexuality to questions of violence and power. This approach, however, implicates a whole range of imagery, from news, sportcasts and documentaries to narrative films like Westerns and horror movies. From our standpoint, it makes more sense to challenge overtly sexist behaviour and the discrimination and hatred behind that behaviour. But if we look for images that show women in a way that could be seen as sexist, it becomes very difficult to define the pornographic. Everything from fashion magazines to the paintings of the old masters could conceivably be seen to be in this category. Our fear, of course, is that if it is so difficult to define pornography, it is inevitable that attempts to define it in law for the purpose of censoring it will affect other areas such as social comment and artistic expression.[35]

Although the Fraser Commission has lumped OFAVAS with the civil libertarians because of their mutual opposition to censorship, the arguments made by OFAVAS are not based solely in terms of "freedom of expression". The structures of inequality inherent in capitalist society illustrate the failure of the "marketplace of ideas" in which minorities are denied access to "speech":

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[34] ibid., p. 79

[35] ibid.

> Censorship, by simply eliminating "objectionable" images, undermines public challenge and debate over the values which motivated their production. It attacks the symptoms, not the root cause.[36]

Censorship, which empowers the state, is seen as a mechanism that preserves the status quo. The alternative as proposed by OFAVAS is to encourage affirmative action programs that will allow women to gain access to the institutions that currently regulate their sexual and social lives.[37] This would include greater access to the broadcast media,[38] more assistance to social services such as shelters for battered women, childcare programs and greater access to educational opportunities.

The other groups which were concerned with increased controls on pornography included periodical and video distributors and retailers and gay organizations. The former group was especially concerned that more clearly defined standards be established which would enable both business and law enforcement to know what would be termed "pornographic" and which would also be constitutionally workable. On the other hand, gay organizations were concerned that gays, who have been historically oppressed[39]

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[36] ibid.

[37] Lacombe, Ideology and Public Policy, p. 81

[38] As recommended by the Report of the Task Force on Sex-Role Stereotyping in the Broadcast Media, "Images of Women", C. R. T. C., 1982, cited in Fraser Report, p. 80

[39] G. W. Kinsman, The Regulation of Desire: Sexuality in

and subject to greater Canada Customs harrassment[40] because of their non-traditional and non-heterosexist sexual practices (which sometimes may include sado-masochistic practices, albeit consensual), were especially concerned that any further restrictions would affect them unjustly. They argued that even presently, the "community standards" test in obscenity cases was discriminatory against them. At a time in which gays have gained some measure of acceptability through Human Rights Legislation, the homophobic backlash due to AIDS coupled with stricter pornography legislation is seen as a very real threat to the gay community.[41] Gay organizations asked the Fraser Commission to explore the possibility of extending the hate literature sections of the Criminal Code to include sexual

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Canada, Montreal: Black Rose Books, 1987, for a general discussion in this area; See **Klippert v. The Queen,** cited in Caron, "Hart-Devlin Controversy", pp. 11-12: Klippert , who while being questioned on some unrelated matter confessed to police that he was a homosexual and had been for 24 years. He was incarcerated for gross indecency and later placed in preventive detention as a "dangerous sex offender": "All convictions against him stemmed from **private acts with consenting adult males.**" (emphasis in original)

[40] V. Burstyn, "Porn Again: Feeling the Heat of Censorship", Fuse, No. 45, 1987, pp. 16-17, states, " . . . the amount of gay material seized, banned, or held up for months at a time is impressively out of proportion to the amount of straight material that suffers a similar fate . . . This is because, though no clause specifies gay sex as such as prohibited, anal sex is a major -- if not the major -- taboo at Customs, . . . it features more prominently in most gay erotica . . . ."

[41] In light of the AIDs epidemic, 'homophobic' right-wing reaction has been very real. Ultra conservative American Senator Jesse Helms has vigorously opposed government funds for safe sex programs for homosexuals, in this case a comic book entitled Leather Man, which advocated safe

minorities as well as visible minorities and women.[42]

In addition to soliciting briefs from the public, the Fraser Commission also had the Department of Justice contract out empirical research that appeared as a number of Working Papers,[43] and which were made available to the Committee. After reviewing its own studies, as well as those of a number of other social psychologists, the Fraser Commission asserted that it

> is not prepared to state, **solely on the basis of the evidence and research it has seen,** that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or the disintegration of communities and society.
> [T]he research is so inadequate and chaotic that no consistent body of information has been established . . . overall, the results of the research are contradictory or inconclusive. (emphasis in original)[44]

Even though the Fraser Commission is unwilling to posit a direct relationship between pornography and violent crime, it acknowledges that feminists' conceptions of harm are expressed in broader terms than merely a 'causal' connection. None-the-less, the Committee recognizes two

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sex techniques to the gay community. Helms objects to the government use of funds for what he terms 'perverted practices'. This information taken from the PBS television program AIDs Quarterly, February, 1990.

[42] Fraser Report, p. 83

[43] Two of these were written by T. S. Palys and N. Boyd and the research of these authors reviewed in Chapter 3 is based on the research they did for the Fraser Commission.

[44] Fraser Report, p. 99; see Fisher, "The Emperor Has No Clothes"

types of harm from pornography: the first is the harm that arises when individuals are involuntarily subjected to pornography (liberal 'offense' notion) and the second is the broader social harm which pornography causes by "undermining the right to equality which is set out in Section 15 of the Charter of Rights and Freedoms".[45]

This represents the first time that a government sponsored analysis of pornography has included feminist insights. By acknowledging that individual liberty (in the form of free expression) of some (ie. men) may run counter to the equality rights of others[46] (ie. women) goes a long way in identifying pornography as a problem based on the gender inequality inherent in a patriarchal society.[47]

The Fraser Report recommends a three-tiered approach to deal with pornography: the first tier would include material that involved children or extreme forms of violence against the participants. Tier one would be the most seriously penalized. Tier two would include sexually violent and degrading material including bondage, bestiality, incest or necrophilia. Tier three would include visual material that depicted vaginal, oral or anal intercourse, masturbation and lewd touching of the genitals. This

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[45] Fraser Report, p. 259

[46] ibid., p. 26

[47] T. McCormack, "Pornography and Prostitution in Canada. Report of the Special Committee on Pornography and Prostitution. Volume 1", Atlantis, Vol. 13, No. 2, 1987, p. 160

three-tiered approach focuses more specifically on sexually explicit material that combines elements listed above. The typology developed in Chapter 3 is broader in the sense that sexualized violence of a non-explicit nature was also considered to be worthy of concern. Tier one would warrant the most serious penalties; tier two would attract less serious sanctions and tier three would attract criminal sanctions only where no warning was given or if materials were sold to minors.[48] This represents only one recommendation of a total of forty-nine with respect to pornography. Other recommendations included removing the term "obscenity" from the Criminal Code; removing sanctions against material that is deemed "disgusting"; to consider the introduction of sanctions against material representing violence without sex (this recommendation explicitly acknowledges the concern for materials fitting the typologies analyzed in Chapter 3); and the possibility of the use of human rights legislation and/or hate literature provisions in dealing with pornography.[49] For a Commission that explicitly stated at the outset that the "answers . . . are not just legal answers", this emphasis on legal remedies as opposed to other remedies such as educational programs comes as a bit of a surprise. Although generally viewed as a "progressive" document, The Fraser Report has still been the subject of criticism.

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[48] Fraser Report, pp. 271-272

[49] See Fraser Report, Vol. 2, pp. 671-681 for the full list of recommendations.

Sociologist Thelma McCormack argues that the major contribution of the report was not its analysis about violence or gender inequality but rather the positive case for censorship which takes the following form:

1. There is no demonstrable evidence of harm caused by pornography;
2. It is not necessary to show such evidence in order to apply criminal sanctions;
3. Pornography causes diffuse and inferential harm to the equality rights of women;
4. In the event that there is a conflict between freedom of expression (section 2(b) of the Charter) and the equality rights (section 15 of the Charter), the latter should prevail.[50]

The argument here is worth pursuing. The Fraser Commission, by acknowledging in various parts throughout its analysis that the sexist values inherent in our culture[51] harm women, then infers that pornography constitutes an obstruction of equality. If the equality of women is indeed the primary concern, and if sexist images are everywhere around us, it

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[50] McCormack, "The Political Economy of Censorship", pp. 180-181

[51] Fraser Report, p. 24, " . . . perceptions that women are inferior . . . has played a significant role in the historical allocation to women of subordinate roles in the social, political and economic order"; and p. 56, " . . . images that present women as commodities would catch much of contemporary advertising"; cf. Steele, "Gendering in the Mass Media", Women Against Censorship

does not follow that by eliminating those images that have an additional explicit sexual content, that we would be helping solve the problem. By focusing on pornography, the impression is made that it is the main problem, something that is not the case.[52] As Kanter points out,

> Many images are erotic in a manner degrading to women, more subtle, but promoting the values of pornography. The message should be that mainstream images are objectionable, with a strategy designed to make people aware of that position.[53]

Another problematic theme in the Fraser Report is its definition of children as being those individuals under the age of eighteen. At one point, in eliciting essential principles, specifically 'appreciation of sexuality', the Commission states,

> We think that it is essential, . . . the idea that human beings enjoy and benefit from open and caring sexual relationships, characterized by mutuality and respect. This principle extends to those under 18 as well, for the child is, in our view, a sexual being.[54]

It does not follow then that pornography, especially tier three (which is 'erotica'), be considered out of bounds for adolescents. This is especially unrealistic considering that we do not restrict access to a large number of violent

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[52] Kanter, "Fraser Report and New Approaches", p. 183; See McCormack, "The Political Economy of Censorship", p. 181; See Lacombe, Ideology and Public Policy, p. 90

[53] Kanter, "Fraser Report and New Approaches", p. 183; cf. Lacombe, Ideology and Public Policy, p. 90, "And it follows that women's oppression can only be eradicated by putting a halt to the propagation of sexist images."

[54] Fraser Report, p. 26

movies which are arguably more harmful than pornography. To deny adolescents access to depictions of sexual activity at a time when their curiosity is peaking is unrealistic and unreasonably repressive.[55] This problem is exacerbated when conservative forces attempt to eradicate sex education from high schools on the grounds that it promotes promiscuity.

The Fraser Commission noted that many feminists were describing pornography as a form of sex discrimination or hate literature. The Dworkin/MacKinnon legislation proposed in Minneapolis and Indianapolis incorporated these concerns. A further analysis of this approach is necessary to evaluate its efficacy in dealing with the issue of pornography.

In 1983, the Minneapolis legislature had become increasingly frustrated when zoning restrictions for pornographic materials were struck down in the courts.[56] The Minneapolis Neighborhood Pornography Task Force asked Dworkin and MacKinnon to testify at a public hearing for a new zoning variance, at which they testified that zoning variances were ineffective and inappropriate because they do

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[55] cf. Lacombe, Ideology and Public Policy, pp. 96-97; cf. McCormack, "The Political Economy of Censorship", pp. 182-183

[56] L. Dugan, N. Hunter and C. S. Vance, "False Promises: Feminist Antipornography Legislation in the U.S. ", Women Against Censorship, p. 131

not address the harm caused by pornography. The city of Minneapolis retained Dworkin and MacKinnon to draft a city ordinance that would treat pornography as a form of discrimination based on sex, which is an infringement of civil rights, and which would create a means by which individuals could initiate civil action against pornographers (producers, distributors, sellers). Dworkin and MacKinnon pointed out that the first step would be to establish a legislative record (through public hearings) that would document the harm caused by pornography.[57] Sexual abuse victims, social workers, clinicians, counselors, educators and social scientists provided testimony (all carefully selected by Dworkin and MacKinnon).[58] As a result of the public hearings, the Minneapolis City Council concluded:

> Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and

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[57] **Public Hearings on Ordinances to Add Pornography as Discrimination Against Women,** Committee on Government Operations, City Council, Minneapolis, Minn., (herein after **Hearings**) (Dec. 12-13, 1983) cited in MacKinnon, "Pornography, Civil Rights and Speech", p. 2

[58] some examples of this testimony appear in MacKinnon, "Pornography Civil Rights and Speech", at the following footnotes (and text): fn.s. 57, 62, 65, 69, 79, 80, 82, 86-89, 92, 95, 96, 99-106. One of the key witnesses was Linda Marchiano, otherwise known as Linda Lovelace, star of the film **Deep Throat,** and who now asserts that she was coerced by abduction, beating, threats, torture and hypnosis (these events are recounted in her book **Ordeal,** 1980) into pornography. MacKinnon, at page 35 above states, "Most concretely, before "Linda Lovelace" was seen performing deep throat, no one had ever seen it being done in that way, largely because it cannot be done without hypnosis to repress the natural gag response".

> maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods.[59]

Based on these findings, the city council passed legislation that amended the human relations and equal opportunity codes and incorporated Dworkin and MacKinnon's "what we mean by pornography" definition into the law:

> Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of nine specific forms of degradation of women.[60]

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[59] **Hearings,** cited in Donnerstein et al, The Question of Pornography, p. 139

[60] i) women are presented dehumanized as sexual objects, things or commodities; or ii) women are presented as sexual objects who enjoy pain or humiliation; or iii) women are presented as sexual objects who experience sexual pleasure in being raped; or iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or v) women are presented in postures of sexual submission or sexual servility, including by inviting penetration; or vi) women's body parts -- including but not limited to vaginas, breasts, and buttocks -- are exhibited, such that women are reduced to those parts; or vii) women are presented as whores by nature; or viii) women are presented being penetrated by objects or animals; or ix) women are presented in scenarios of degradation, injury, or torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.
This version (or similar versions) is/are cited in a number of works including the following: MacKinnon, "Not A Moral Issue", p. 321; MacKinnon, "Pornography, Civil Rights and Speech", pp. 1-2; Hoffman, "Feminism,

The ordinance also provides for the use of men, children, or transexuals in the place of women and provides that "any woman has a cause of action (against traffickers in pornography) as a woman acting against the subordination of women". Other provisions which allow for action are: 1) coercion into pornography; 2) forcing pornography on a person; and 3) assault or physical attack due to pornography.[61]

Although this legislation was enthusiastically supported by the city council, the mayor vetoed the ordinance twice, claiming that the city would be involved in legal battles over its constitutionality. Meanwhile, in Indianapolis where conservative anti-pornography groups were frustrated at the lack of convictions stemming from arrests, the Republican mayor, William Hudnut III, saw the Minneapolis approach as a possible solution to his problems. Catharine MacKinnon was recruited by Beulah Coughenour, a conservative Republican STOP - ERA activist, to draft similar legislation.[62] Whereas there was some feminist support in Minneapolis, there was none in Indianapolis; support came from Citizens for Decency and the Coalition for

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Pornography and Law", p. 520; Donnerstein et al, The Question of Pornography, pp. 139-140; and Appendix II, Women Against Censorship, p. 206; Hawkins and Zimring, Pornography in a Free Society, p. 154

[61] Appendix II, Women Against Censorship, pp. 207-208

[62] Duggan, Hunter and Vance, "False Promises", p. 132

a Clean Community.[63] The Indianapolis City Council passed a slightly altered version of the above definition[64] which was subsequently challenged in Federal District Court as being unconstitutional.[65] Judge Sarah Barker ruled that the Indianapolis Ordinance was an unconstitutional infringement on freedom of speech[66] on five grounds: 1) the definition of pornography in the Ordinance exceeds the definition of "obscenity" (as articulated in **Miller v. California,** 1973) and therefore attempts to regulate "speech"; 2) the Ordinance unconstitutionally attempts to suppress protected "speech"; 3) state interest in prohibiting sex discrimination by law is not sufficiently compelling to outweigh the interest of free speech; 4) the Ordinance is unconstitutionally vague for want of fair notice; and 5) it constitutes an unconstitutional prior restraint on speech for failure to provide procedural safeguards for the protection of freedom of speech.[67]

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[63] ibid., pp. 132-133

[64] Subsections i), v), vi), and vii) were eliminated and replaced with vi) "women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display", cited in MacKinnon, "Pornography, Civil Rights and Speech", p. 2

[65] **American Booksellers Inc. v. Hudnut,**

[66] ibid., the ruling was upheld by the Seventh Circuit Appeal Court (7th. Cir. 1985) and by the United States Supreme Court (U.S. Feb. 24, 1986), cited in Lahey, "Actual Gender Equality", pp. 673-674

[67] ibid.

Although the Minneapolis and Indianapolis Ordinances heralded in a 'new way' to regulate pornography, this approach still fell prey to criticisms that it is too broad and vague. Phrases such as "the sexually explicit subordination of women", "postures of sexual submission" and "whores by nature" is left up to the interpretation of individual complainants and the civil court judges who hear the case.[68] Another problematic term is "degrading".[69] The traditional view of sex, as espoused by conservative moralists, maintains that any explicit depictions of sex that involve women are affronts to women's dignity, and are therefore degrading.[70] The view that the mere existence of pornography is demeaning raises further objections:

> Embedded in this view are several other familiar themes: that sex is degrading to women but not to men; that men are raving beasts; that sex is dangerous for women; that sexuality is male, not female; that women are victims, not sexual actors; that men inflict "it" on women; that penetration is submission; that heterosexual sexuality, rather than the institution of heterosexuality, is sexist.
> Its ironic that a feminist position on pornography incorporates most of the myths about sexuality that feminism has struggled to displace.[71]

It is not at all hard to imagine that ultra - conservative forces, which view explicit heterosexuality as "degrading" or "demeaning", would quickly invoke the above ordinances

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[68] Duggan, Hunter and Vance, "False Promises", p. 134

[69] Fraser Report, pp. 269-270; see Kanter, "Prohibit or Regulate", p. 181

[70] Duggan, Hunter and Vance, "False Promises", p. 142

[71] ibid., pp. 142-143

against explicit homosexual depictions which must surely be "degrading". Suffolk County on Long Island in New York was exploring the potential of using a version of the Dworkin/MacKinnon legislation to rid pornography (which according to the conservatives sponsoring the proposed bill, causes sodomy, disruption of the family, rape, incest, and other acts) and "restore ladies to what they used to be".[72]

In considering the Dworkin/MacKinnon approach, the Fraser Commission noted that recourse for some of the harms attacked in the Indianapolis by-law already exist in Canadian Law (albeit in an indirect way).[73] With respect to being coerced, intimidated, or fraudulently induced into performing pornography, a person can sue for damages for fraudulent misrepresentation or for defamation.[74] Civil damages for direct harm caused by pornography is a possible remedy in Canada,[75] although it may be difficult to establish causation and proof. The indirect harm that feminists claim occurs by the mere existence of pornography could be addressed by human rights legislation. This

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[72] ibid., p. 133: from the examples provided here it is clear that much of the 'radical feminist' anti-pornography rhetoric has been adopted by conservative forces. Unfortunately, "future tense panic" (See fn. 34, Chapter 2, p. 36) became reality.

[73] Fraser Report, pp. 307-308

[74] ibid.

[75] ibid., p. 308

approach has proven effective in the case of Saskatchewan Human Rights Commission v. Waldo et al.[76] Although the human rights approach proved effective in Saskatchewan, the Fraser Commission has reservations about using this approach because of the nature of the process which in the above case took almost five years to resolve. They recommend the use of the hate literature provisions of the Criminal Code as a viable alternative. This would require the inclusion of "sex" as an identifiable group.[77] However, if we view pornography as hate literature and include gender as an identifiable category under the hate literature provisions of the Criminal Code, then the further inclusion of a new definition of sexually violent pornography in the Criminal Code would seem redundant.[78]

The Fraser Report has made an important contribution to the ongoing debate over pornography and sexually explicit materials, both in terms of analysis and in terms of socio-legal strategies. The dominant ideologies have been identified, both in the relevant literature and in the

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[76] Saskatchewan Human Rights Commission v. Waldo et al (Red Eye Decision), Canadian Human Rights Reporter, Vol. 5, Decision 360, 1984: although this case involved cartoons and text of a sexual and misogynist nature, it is arguable whether the material in question was 'pornography'.

[77] Fraser Report, p. 322

[78] Boyd, "Sexuality, Gender Relations and the Law", p. 127

briefs presented by various interest groups. A number of feminist insights (mostly liberal feminist insights) are evident in the recommendations: specifically the difference between erotica and other more violent and degrading forms of pornography. The Fraser Commission recognized that the time has come for a move away from the conservative 'moralistic' approach with its undue emphasis on emotionalism. The liberal feminist 'balancing **Charter** rights' approach is a logical step in the further evolution of more precise criteria for determining which materials are 'harmful' and ways in which we should deal with them. In order to further our understanding of the processes involved, a review of the case law under the current provisions of the Criminal Code, as well as a discussion of constitutional considerations, in the form of fundamental rights and their reasonable limits, is required.

Chapter V

JURISPRUDENCE AND CONSTITUTIONAL CONSIDERATIONS

In 1959, when then Justice Minister D. E. Fulton introduced the legislative reforms which resulted in the current provisions in the Criminal Code which define obscenity (Sec. 159, subsection 8), he stated:

> We believe that we have produced a definition which will be capable of application with speed and certainty, by providing a series of simple objective tests in addition to the somewhat vague subjectivity test which was the only one formerly available. The test will be: "Does the publication complained of deal with sex, or sex and one or more of the other subjects named? If so, is this the dominant characteristic? Again, if so, does it exploit these subjects in an undue manner?" We have been careful in working out this definition not to produce a net so wide that it sweeps in borderline cases or cases about which there may be genuine difference of opinion. In our efforts we have deliberately stopped short of any attempts to outlaw publications concerning which there may be any contention that they have genuine literary, artistic or scientific merit. These works remain to be dealt with under the **Hicklin** definition, which is not superceded by the new definition.[1]

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[1] D. E. Fulton, Minister of Justice, **House of Commons Debates,** Vol. 5, 1959, at 5517, cited in F. L. Sharp, "Obscenity: Prurient Interests and The Law", University of Toronto Faculty of Law Review, Vol. 34, 1976, p. 245

Even though Justice Minister Fulton stated that the **Hicklin** test which was described in the Introduction of the thesis, was not superceded, this view was not shared by the Supreme Court of Canada, who adopted Section 159(8) as the operative standard.[2] The Supreme Court stated that the courts must consider the author's or producer's purpose, the artistic merit of the work in question, and community standards.

In this chapter, the jurisprudence that has evolved over the years with respect to pornography as subsumed under the rubric of obscenity will be examined. Implicit in this exposition is an analysis of the different criteria by which legal judgements are rendered. These judgements invariably reflect a conservative bias. Parallels can be drawn from American case law, so a number of important United States decisions will be examined. With the proclamation of the **Charter of Rights and Freedoms,** legislation dealing with pornography, whether by criminal, civil or human rights approaches, will inevitably be scrutinized under provisions of the **Charter.** Herein, the American experience indicates that such litigation will first deal with whether or not pornography is "speech", and therefore subject to Section 2(b) protection. If pornography is "speech", is legislation which limits its "expression" justified under Section 1 of the **Charter** which reads:

> The **Canadian Charter of Rights and Freedoms** guarantees the rights and freedoms set out in it subject only to such reasonable limits by law as

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[2] **R. v. Brodie et al,** (1962), Canadian Criminal Cases, 132

> can be demonstrably justified in a free and democratic society.[3]

Other sections of the **Charter,** which are pertinent to legislation dealing with pornography (specifically Bill C-54) are:

> Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> Section 11(d): Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
>
> Section 15: (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> Section 28: Notwithstanding anything in this **Charter,** the rights and freedoms referred to in it are guaranteed equally to male and female persons.[4]

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[3] **Constitution Act,** 1982

[4] ibid.

In determining whether or not a 'publication' is obscene, the **Crown** must prove beyond a reasonable doubt that it (ie. book, film, video) exploits sex in an "undue" manner as has been defined by the courts.[5] In **R. v. Brodie et al,** Justice Judson, for the majority, attempted to define "undue" as follows:

> There does exist in any community at all times - however the standard may vary from time to time - a general instinctive sense of what is decent and indecent, of what is clean and what is dirty, and, when the distinction has to be drawn, I do not know . . . that today there is any better tribunal than a jury to draw it . . . . I am very far from attempting to lay down a model direction, but a Judge might perhaps, in the case of a novel, say something like this: "It would not be true to say that any publication dealing with sexual relations is obscene. The relations of the sexes are, of course, legitimate matters for discussion everywhere . . . . There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing, and capable of justly applying, those standards. What is obscene is something which offends against those standards". (emphasis added).[6]

Thus the 'community standards' test of the word 'undue' was made part of Canadian law. This phrase was further refined in subsequent case law. Justice Freedman in his dissenting opinion of 1963 in **R. v. Dominion News and Gifts,** wrote:

> Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered . . . . Community standards must be contemporary. Times

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[5] **R. v. Ramsingh et al,** Canadian Criminal Cases 14, (3d), 1984, Justice Ferg at p. 235

[6] **R. v. Brodie et al,** p. 182

> change, and ideas change with them. Community standards must also be local. In other words, they must be Canadian.[7]

This concept of 'contemporary community standards' was adopted by the Supreme Court of Canada in 1964.[8] The explicit reference to 'contemporary' indicated that the standards to be considered were not 'fixed' but rather variable over time. This marked a notable departure from the conservative view that espoused a single fixed moral ethic.[9] Furthermore, the 'contemporary community standard' was to be one of 'tolerance' and not 'acceptance'. Justice McGillivray, in **R. v. Goldberg and Reitman,** coined the phrase "exceeds the accepted standard of tolerance in the community".[10] However, regardless of the methods used to determine community standards,[11] the final decision is made by the judge:

> The authorities would seem to ascribe to the Judge a much more important role in the assessment of contemporary community standards than counsel for the appellants would accord him. I do not find in **Brodie,** or elsewhere in the Commonwealth, any majority opinion that expert evidence of community standards is an essential ingredient to a finding of guilt. If any inference can be drawn from

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[7] **R. v. Dominion News and Gifts,** Canadian Criminal Cases 2, 1963, pp. 116-117

[8] Supreme Court Reports, 1964, p. 251

[9] Mahoney, "Obscenity, Morals and the Law", p. 64

[10] **R. v. Goldberg and Reitman,** (1971), Canadian Criminal Cases 4, (2d), cited in D. G. Price, "The Role of Choice in a Definition of Obscenity", Canadian Bar Review, Vol. 57, 1979, p. 312

[11] Sharp, "Prurient Interests and the Law", at p. 247 lists four methods used in Canada: judge alone, jury, survey evidence and other expert evidence.

> **Brodie** it is that the Judge must, in the final analysis, endeavour to apply what he, in the light of his experience, regards as contemporary standards of the Canadian community. In so doing he must be at pains to avoid having his decision simply reflect or project his own notions of what is tolerable.[12]

The rationale that Justice Freedman employed for this approach is based on the concept that "the judiciary has a general duty to protect the moral welfare of the state". (emphasis added)[13] Justice Wright notes:

> These views indicate a powerful historic sense of the role and authority (and capability) of a trier of fact in respect of social and moral issues in our society. They illustrate legitimate concerns concerning our country but it appears as well they reflect a somewhat paternalistic view of the manner in which those concerns may be met (emphasis added).[14]

Despite the fact that the judge is the final arbiter of community standards, the use of opinion polls and other expert evidence is admissible and helpful, especially in questions relating to literary and scientific merit.[15]

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[12] Justice Dickson, **R. v. Great West News et al,** (1970), Canadian Criminal Cases 4, pp. 314-315

[13] Justice Wright, **R. v. Avenue Video Boutique,** Manitoba Queen's Bench, Aug. 25, 1989, unreported, p. 10. Justice Wright notes that Justice Freedman quotes a number of sources to support this view including Viscount Simonds and Lord Patrick Devlin. The fact that Justice Freedman is often cited in the case law would seem to indicate that there is a proclivity towards legal moralism.

[14] ibid., p. 13

[15] examples include **R. v. Prairie Schooner News Ltd. and Powers,** Canadian Criminal Cases 1 (2d), 1970; **R. v. Odeon Morton Theatres Ltd. and United Artists Corp.,** Canadian Criminal Cases 16 (2d), 1974; **Towne Cinema Theatres Ltd. v. R.,** C. R. 45 (3d), 1985; but see **R. v. Pink Triangle Press,** Canadian Criminal Cases, 51

In determining whether or not a work has literary, artistic, political or scientific merit, it is important to consider the work as a whole: "For how can one determine whether a dominant characteristic of a work is undue exploitation of sex without reference to the other non-sexual characteristics of the work?" (emphasis added)[16] This has become known as the 'internal necessities' test and stands in contradistinction to the old **Hicklin** test in which evidence of artistic merit was irrelevant - the severity of the offense was its tendency to deprave and corrupt those most likely to be influenced.[17] The problem that the 'internal necessities' test created was how to strike a balance between serious literary works that contained a 'prurient' component and other works that 'unduly' exploited sex for sex sake:

> In Canadian jurisprudence . . . the question for the courts became whether the objectionable appeal to pruriency was a necessary means to an otherwise meritorious end or whether it was an end in itself. If it was the latter, Canadian Courts usually suppressed the work. If it was the former, the objectionable appeal to sex or sex-related interests was deemed to be submerged or subsumed into the theme and the work was allowed. The context of the work became

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(2d), 1980 in which the Ontario Court of Appeal ruled that public opinion surveys were irrelevant - it is up to the court to determine community standards, (cited in N. Boyd, "Censorship and Obscenity: Jurisdiction and the Boundaries of Free Expression", Osgoode Hall Law Journal, Vol. 23, No. 1, 1985, p. 46)

[16] Braun, "Freedom of Expression v. Obscenity Censorship", p. 47

[17] ibid.; Braun notes that Justice Dickson expressed a similar view in **Towne Cinema Theatres Ltd. v. R.** (1985)

absolutely essential. (emphasis added)[18]

Unfortunately, the 'internal necessities' test has not precluded judges from reaching different conclusions. In **R. v. Brodie,** the work in question was Lady Chatterley's Lover. Justice Judson stated:

> I do not think that there is undue exploitation . . . That the work under attack is a serious work of fiction is to me beyond question. It has none of the characteristics that are often described in judgements dealing with obscenity -- dirt for dirt's sake, the leer of the sensualist . . . I agree with . . . counsel for the appellant that measured by the internal necessities of the novel itself, there is no undue exploitation.[19]

However, Justice Taschereau, in his dissent in the same case noted:

> What . . . is objectionable, is not the aim . . . but the means . . . Over three quarters of the book, or 250 pages deal with filthy, obscene descriptions that are . . . entirely unnecessary for what we have been told is the purpose of the book.[20]

Lady Chatterly's Lover was found to be not obscene in Canada, as well as in England in 1961[21] and in the United

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[18] ibid., p. 49

[19] **R. v. Brodie,** p. 185

[20] ibid., p. 172; Interestingly, Kate Millett's study of Lady Chatterley's Lover in Sexual Politics (1970) was, to a degree, an idictment of the writers, professors and critics that praised the novel as about class struggle in industrial society whereas the Crown had argued that it was about adultery. For Millet "it was a misogynist's hatred and humiliation of educated women . . . ", cited in McCormack, "Feminism, Censorship and Sadomasochistic Pornography", p. 43; cf. I. Diamond, "Pornography and Repression", p. 688: "Millett dramatically demonstrated the centrality of male domination and female subjugation in literary descriptions of sexual activity. "

[21] **R. v. Penguin Books Ltd,** cited in Sharp, "Prurient

States in 1959.[22]

It is clear that many, if not most, of the early cases prosecuted under Section 159(8) dealt with the 'undue exploitation' of sex; the additional categories dealing with sex and cruelty, violence, horror and crime were ignored by the courts.[23] The Court's emphasis on 'sex' rather than on 'sex-plus' is indicative of the conservative ideology which underlies this approach: an ideology which views sexual arousal, 'prurience', or sex for sex sake as something immoral, disgusting or shameful. This bias is further amplified by the requirement that works of this sort may be redeemed if there is some serious value which may 'detach' the viewer from the sexual aspect.[24] The pervasiveness of this bias is not unique to Canadian jurisprudence: United States jurisprudence has experienced (and perhaps predated)a similar evolution.

Interests and The Law", p. 246

[22] **Grove Press Inc. v. Christenberry,** cited in Sharp, "Prurient Interests and The Law", p. 246

[23] Mahoney, "Obscenity, Morals and the Law", p. 58

[24] Hoffman, "Feminism, Pornography, and Law", pp. 507-508

One might presume that, because the First Amendment is written in absolute terms, that American jurisprudence with regard to pornography (obscenity) may have evolved somewhat differently. The first major Supreme Court decision in the United States took place in 1957, **Roth v. United States.** Prior to this case the leading judicial precedent was the **Hicklin** test. Justice Brennan, in his majority opinion, pointed out the flaws of this test: 1) it permitted books to be judged obscene without determining context; 2) the obscenity of a work was determined by its effects on unusually susceptible persons; and 3) standards of propriety were fixed, regardless of time, place and circumstances.[25] The Supreme Court posited a 'new test' of obscenity:

> Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.[26]

It is evident that the Canadian legislation and judicial approach took its lead from this landmark decision. Further, the United States Supreme Court argued that obscenity is "utterly without redeeming social importance". These definitional clarifications were considered an improvement over the old **Hicklin** test, however, in constitutional terms, the most significant statement was the following:

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[25] **Roth v. United States,** United States Reports 476, 1957, pp. 488-490 cited in Feinberg, "Pornography and the Criminal Law", pp. 583-584

[26] **Roth v. United States,** p. 489

> All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing social climate have the full protection of the First Amendment . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance . . . . It has well been observed that such utterances (lewd and obscene) are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit . . . is clearly outweighed by the social interest in order and morality. We hold that obscenity is not within the area of constitutionally protected speech or press.[27]

In **Jacobellis v. Ohio,** the court reaffirmed the three point test to be that the material 1) appeals to the prurient interest; 2) is patently offensive; and 3) is utterly without redeeming social importance.[28] The court also indicated that the determination of obscenity was to be based on a national standard rather than a local one.[29] However, Justice Warren commented in his dissent:

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[27] ibid., p. 484; Samuel Roth was convicted of mailing obscene materials. He appealed his conviction: the Court of Appeals and the Supreme Court upheld his conviction. However, in the Appeal Court, Justice Jerome Frank expressed serious reservations in his concurrence. These reservations appeared as an Appendix and although written prior to the Supreme Court's disposition listed above, Justice Frank's statement is considered a classic argument for those who regard legal control of obscenity as both unconstitutional and unwise. This statement appears in abbreviated form in Censorship and Freedom of Expression, H. Clor (ed.), 1971 and also in Pornography and Censorship, D. Copp and S. Wendell (eds.), 1983

[28] **Jacobellis v. Ohio,** United States Reports 378, 1964, cited in G. Byerly, and R. Rubin, Pornography, The Conflict Over Sexually Explicit Materials in the United States, New York: Garland Pub., 1980, p. 128

[29] ibid.

> It is my belief that when the Court said in **Roth** that obscenity is to be defined by reference to 'community standards, ' it meant community standards -- not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . . At all events, this court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.[30]

In **Memoirs v. Massachusetts,** the court elaborated on the **Roth** concept but differed with respect to the "utterly without redeeming social value" aspect. Whereas in **Roth** the court presumed 'obscenity' to be "utterly without redeeming social importance", **Memoirs** required

> . . . to prove obscenity it must be affirmatively established that the material is **"utterly** without redeeming social value" . . . the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, i. e., that the material was **"utterly** without redeeming social value" -- a burden virtually impossible to discharge under our criminal standards of proof. (emphasis in original)[31]

The inclusion of the concept of "utterly" could prove potentially problematic for prosecutors in future cases.[32]

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[30] **Jacobellis v. Ohio,** quoted by Justice Burger in **Miller v. California,** (United States Supreme Court) United States Reports 413, 1973, cited in Copp and Wendell (eds.), Pornography and Censorship, p. 362

[31] Chief Justice Burger, **Miller v. California,** cited in ibid., p. 359

[32] This was pointed out by P. J. McGeady in the "Proceedings of the Conference on Morality, Pornography and the Law", in Communications and the Law, Spring, 1982 at pp. 51-52:

> It is absolutely impossible to say that something doesn't have some social value . . . Just envision this cartoon that was in the paper around that time. The judge in all his finery, in all his robes looking down at the advocate presenting his case and at the defense lawyer, and he looks

The next notable obscenity decision was **Stanley v. Georgia (1969),** in which the issue was whether the possession of an obscene film, in ones own home, constituted grounds for prosecution.[33] The Court unanimously agreed that it did not: "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.[34]" However, this right to privacy was confined to one's own home and nothing more.

By the time **Miller v. California (1973),** rolled around, there were important changes taking place in America and the Supreme Court. Chief Justice Burger, a conservative appointee of President Nixon[35] ushered in a 'new era' of stricter obscenity law by acknowledging, but altering the three prong approach laid down in **Memoirs:**

> The basic guideline for the trier of fact must be: (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,

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over his glasses and says, "Counsel, you mean that because this dirty book has consecutively numbered pages, that that gives it social value?"

[33] Feinberg, "Pornography and the Criminal Law", p. 599

[34] **Stanley v. Georgia,** United States Reports 394, 1969, p. 569

[35] Donnerstein et al, The Question of Pornography, p. 150; cf. Feinberg, "Pornography and the Criminal Law", p. 600

> taken as a whole, lacks serious literary, artistic, political, or scientific value.[36]

The **Miller** decision rejected the view (in **Jacobellis**) that the community standard was a national one by replacing it with a local standard[37] and by further removing the "utterly" clause that was established in **Memoirs.**

Feinberg notes:

> Recourse to a local community norm rather than a national standard for applying the "prurient interest" test permits local courts to find persons guilty for distributing materials that could not plausibly be found obscene in other, more sophisticated, jurisdictions . . . . . The substitution of local community standards in effect makes it difficult to publish anywhere materials that would violate the most puritanical standards in the country . . . . Publication will be commercially feasible only when the materials are unchallengeable anywhere in the country.[38]

Another notable decision handed down by Chief Justice Burger in 1973 was **Paris Adult Theatre I v. Slaton.** This decision was an explicit reaffirmal of legal moralism. Chief Justice Burger invoked the arguments of Irving Kristol[39] and the Hill-Link Minority Report[40] of the 1970 Commission on Obscenity and Pornography in asserting that:

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[36] **Miller v. California,** United States Reports 413, 1973 pp. 25-26

[37] ibid., pp. 30-34

[38] Feinberg, "Pornography and the Criminal Law", pp. 600-601

[39] See fn. 30 and text at p. 13, Chapter 1

[40] See fn. 61-63 and text at pp. 21-22, Chapter 1

> The States have the power to make a morally neutral (sic) judgement that . . . such material has a tendency to injure the community as a whole, to endanger the public safety, or to jeapordize . . . the States' right . . . to maintain a decent society.[41]

The Canadian experience closely parallels the American one with regard to the criteria adduced in a determination of 'obscenity' with the notable exception that, after the **Miller** decision, the American 'contemporary community standard' was to be a local one. Despite the different approach (national versus local) of the community standards test, its prominence in the jurisprudence of both countries is a reflection of the dynamic social and political pluralism of democratic systems.[42] Still, legal decisions and dissents in both countries invariably revolved around a conservative/liberal axis: conservatives arguing for the maintenace of a 'decent' society while liberals argued for the greatest personal freedom without unjustifiable government intrusion. The emergence of a feminist critique and the entrenchment of the **Charter of Rights and Freedoms** in Canada, would shift the 'focus' from 'prurience' or 'undue exploitation of sex' to the 'sex - plus' categories in Section 159 (8) of the Canadian Criminal Code.

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[41] **Paris Adult Theatre I v. Slaton,** United States Reports 413, 1973 cited in Copp and Wendell (eds.), Pornography and Censorship, p. 372

[42] Braun, "Freedom of Expression v. Obscenity Censorship", fn. 9 at p. 41

In **R. v. Doug Rankine Co.**[43] a feminist perspective in the matter of obscenity legislation was adopted for the first time: the court was primarily concerned with degradation and dehumanization within a sexual context. Justice Borins held that:

> [C]ontemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse and would also tolerate the distribution of films which consist of scenes of group sex, lesbianism, fellatio, cunnilingus, and anal sex. However, films which consist . . . of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanise the people upon whom they are performed, exceed the level of community tolerance.[44]

Professor Mahoney comments that:

> The **Rankine** case represents the first time a Canadian court has examined an allegedly obscene depiction specifically from the point of view of the victims of the sexual abuse, rather than of the sensibilities of the observers.[45]

In **R. v. Ramsingh,**[46] Justice Ferg followed **Rankine** and appeared to take Justice Borin's analysis one step further:

> As well, I think that where violence is portrayed with sex, or where there are people, particularly women, subjected to any thing which degrades or dehumanizes them, the community standard is

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[43] **R. v. Doug Rankine Co.** Canadian Criminal Cases 9 (3d), 1983

[44] ibid., p. 70

[45] Mahoney, "Obscenity, Morals and the Law", p. 62; cf. Boyd, "Censorship and Obscenity", p. 63, " . . . **Rankine** . . . sets a new focus for judicial analysis"; cf. Bakan, "Pornography, Law and Moral Theory", p. 26

[46] **R. v. Ramsingh,** Canadian Criminal Cases 14 (3d), 1984

> exceeded, even when the viewing may occur in one's private home.[47]

The next notable case that incorporated feminist analysis is **R. v. Wagner**[48] in which Judge Shannon distinguished three different types of sexually explicit materials: 1) violent; 2) non-violent but degrading and dehumanizing; and 3) erotica.[49] Judge Shannon's analysis emphasized the context of the explicit depictions and was of the opinion that explicit sex per se was not obscene.[50] This case along with **Rankine** and **Ramsingh,** represented an important shift in focus that acknowledged the feminist analysis as well as the liberal contentions that sexually explicit material (erotica), based on the empirical research of social psychologists, was harmless and not obscene. Unfortunately, this 'new focus' did not last very long.

In **R. v. Avenue Video Boutique,** Justice Wright notes:

> The British Columbia Court of Appeal in **Regina v. Pereira-Vasquez** . . . reviewed the Canadian decisions in respect of obscenity since the inclusion of Sec. 159 in the Criminal Code. The court comments on a brief "detour" [**Rankine; Ramsingh; Video World (1985); Wagner**] that occurred in the mid-eighties when some trial judges concluded that the state of the Canadian law permitted the exercise of discretion to decide

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[47] ibid., p. 240, cited in Mahoney, "Obscenity, Morals and the Law", p. 62 - this observation is hers as is the emphasis in the quote.

[48] **R. v. Wagner,** Alberta Law Report 36 (2d), 1985

[49] Mahoney, "Obscenity, Morals and the Law", p. 62; See Fraser Report, pp. 271-272; cf. text at pp. 29-30, Chapter 2

[50] **R. v. Wagner,** p. 311

> that scenes of explicit and detailed sex not involving violence or cruelty or degradation and dehumanization of individuals, should no longer be found obscene . . . The court, however, finds that the Manitoba Court of Appeal rejected the reasoning of the trial judge in **R. v. Video World Ltd.** (1986) and that this position was sustained on appeal to the Supreme Court of Canada. Accordingly the British Columbia Court of Appeal concludes that the detour has brought the law back to the main road and "depraved sludge" or "dirt for dirt's sake" or "hard porn" are obscene whether or not violence or cruelty is involved . . . . I should mention that I have been unable to find on the part of the trial judges responsible for the "detour" referred to in **Pereira-Vasquez** above, any indication of error in the manner in which they sought to identify the standard. Yet their decisions were not accepted. (emphasis added)[51]

Feminist analysis has made the courts sensitive to violent and degrading portrayals.[52] However, the courts have returned to the view that explicit portrayals are obscene in and of themselves.

Presently, there is no definitive finding by the Supreme Court of Canada as to whether or not obscenity is protected "speech" or "expression" under Section 2(b) of the Charter of Rights and Freedoms and if so, is it or should it be subject to limits under Section 1. Defense counsels in a number of recent cases[53] have argued that Section 159(8) of the Criminal Code is an unwarranted infringement of freedom of expression. Even in those cases[54] in which the courts

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[51] **R. v. Avenue Video Boutique,** pp. 27-28

[52] See **Towne Cinema Theatres Ltd. v. R.,** Supreme Court Reports 1, 1985

[53] **R. v. Wagner; R. v. Ramsingh; R. v. Red Hot Video; R. v. Avenue Video Boutique**

have expressly or implicitly concluded that obscenity per se falls within the ambit of Section 2(b), the courts have relied on Section 1 as the means by which freedom of expression is qualified and justifiably restricted.[55] No doubt the existence of Section 1 has influenced the courts in their willingness to broaden the scope of protected expression.

In **Red Hot Video,** Justice Collins stated:

> The Crown has established that the provisions of ss. (1)(a) and (8) of s. 159 constitute reasonable limits as can be demonstrably justified in a free and democratic society . . . [and] . . . there appears to be some uncertainty as to how to determine what is or is not obscene. Whatever may be the cause of this uncertainty, it does not . . . result from a lack of clarity in the law. I think the law is sufficiently clear[56].

Justice Ferg, in **Ramsingh,** cites Justice Collins above, and reaches a similar conclusion:

> Difficult as it may be to apply the elusive standard, nevertheless, I am of the view that the legitimate legal rules are accessible, are precise enough to be determinable by the well-intentioned citizen, and are couched in terms which do afford proper application.[57]

Although obscenity has historically not enjoyed "speech" status in the United States,[58] the logic is somewhat

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[54] ibid.

[55] Justice Wright, **R. v. Avenue Video Boutique,** p. 35

[56] cited in Boyd, "Censorship and Pornography", p. 62

[57] **R. v. Ramsingh,** p. 246

[58] See text at fn. 27, p. 103, Chapter 5 (re: **Roth** decision)

elusive. Even if obscenity is considered to lack any social value, which in itself is arguable, it does not necessarily follow that it has no meaning. In examining the whole issue of protected "speech" or "expression", Justice Wright[59] notes that the Supreme Court of Canada has recently identified the "standards applicable to the proper interpretation of the scope of freedom of expression" in **Attorney General of Quebec and Irwin Toy Limited et al:**[60]

> Freedom of expression was entrenched in our Constitution . . . to ensure that everyone can manifest their thoughts . . . , however unpopular, distasteful or contrary to the mainstream. . . .
> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facia falls within the scope of the guarantee.[61]

Justice Wright goes on

> The obscene expression reflected in the material certainly conveys meaning, albeit a meaning that is offensive and disgusting to many people. But as the court has noted in the portion of its judgement I have quoted, "Freedom of expression was entrenched . . . so as to ensure that everyone can manifest their thoughts . . . however distasteful . . . " Even if the expression depicts violence, provided the form of the expression is not violent, the protection of Sec. 2(b) is not lost.[62]

and

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[59] **R. v. Avenue Video Boutique**

[60] unreported (April 27, 1989)

[61] ibid., pp. 41-42 cited in **R. v. Avenue Video Boutique** p. 32

[62] **R. v. Avenue Video Boutique** p. 33

> Furthermore it cannot be said that the "government action in issue", namely the proscription of obscene material, is aimed only "to control the physical consequences of particular conduct". On the contrary, the purpose of the legislation is aimed to control attempts "to convey meaning".[63]

On this basis, as well as drawing on the precedent of case law cited above, Justice Wright concludes that obscenity is protected under Sec. 2(b). The question remains as to whether Section 1 can be invoked.

A number of analysts[64] have attempted to derive the necessary elements for using Section 1. These usually include a breakdown into a word by word or phrase by phrase examination of the constituent elements. The directives established by the Supreme Court in **Regina v. Oakes,** and reconfirmed in **Irwin Toy** are:

1. The onus of proof to justify the application of Sec. 1 is on the Crown.
2. The civil standard of proof by preponderance of probabilities applies.
3. These requirements should be applied vigorously and will generally but not always require supportive evidence that should be cogent and persuasive.

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[63] ibid., p. 34

[64] Beckton, "Obscenity and Censorship Re-Examined Under the Charter of Rights"; Paul Bender, "Justifications For Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section One of the Canadian Charter", Manitoba Law Journal, Vol. 13, No. 4, 1983; W. E. Conklin, "Interpreting and Applying the Limitations Clause: An Analysis of Section 1", Supreme Court Law Review, Vol. 4, 1982

4. The objective sought to be achieved by the impugned legislation must relate to concerns which are pressing and substantial in a free and democratic society.

5. the means utilized must be proportional or appropriate to the objective. In this connection there are three aspects: (i) The limiting measures must be carefully designed or rationally connected to the objective; (ii) They must impair freedom of expression as little as possible; (iii) Their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the restriction of freedom of expression.[65]

The fact that parliament has enacted certain legislation is insufficient reason to favour restriction.[66] Legislation must have a more precise purpose than simply to control morals or encourage decency if it seeeks to proscribe fundamental freedoms[67] (emphasis added). More specific

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[65] Justice Wright, **R. v. Avenus Video Boutique,** pp. 38-39

[66] ibid., p. 40; See Lahey, "Actual Gender Equality", p. 683: To treat existing legislation as prima facie demonstrable justification of reasonable limits is a very weak reading of the Charter guarantees. This seems to be the approach taken by the Courts in **Re Ontario Film and Video Appreciation Society and Ontario Board of Censors,** Dominion Law Reports 147 (3d) cited in **Ramsingh,** p. 242-243: "One thing is sure, however, our courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable. "

[67] **R. v. Avenue Video Boutique** p. 42

objectives such as equality rights, other Charter rights or human rights must be the goal.[68] Justice Wright contends:

> The objective should not be to impose controls on the presentation and transmission of material deemed to be obscene simply because one section of society, or even a majority, believe it to be immoral, or indecent, or unworthy, or that it contains nothing of value, or that it is disgusting, or that it is simply bad for others who are capable of deciding themselves whether they wish to be exposed to it. There must be better defined bases for restriction. We do not protect freedom and democracy by diluting its lifeblood, freedom of expression, save in limited, well - justified circumstances.[69]

In summation Justice Wright concludes material that contains scenes of violence or cruelty intermingled with sex, or that shows lack of consent to sexual contact, or that dehumanizes men or women in a sexual context, can be legitimately proscribed according to the requirements of Section 1 of the **Charter.**[70] However, material depicting consensual activity by adult individuals not involving force, duress or cruelty, regardless of how explicitly presented, and whether depicting masturbation, group sex or other heterosexual or homosexual activity, does not prima facie relate to sufficiently specific concerns which are

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[68] ibid.; see Lahey, "Actual Gender Equality", pp. 677-684; See Mahoney, "Obscenity, Morals and the Law", pp. 51-56; See Bakan, "Pornography, Law and Moral Theory", pp. 30-32

[69] Justice Wright, **R. v. Avenue Video Boutique,** p. 43; see Justice Brennan's dissent (Justices Stewart and Marshall concurring in dissent), **Paris Adult Theatre v. Slaton,** United States Reports 413, 1973

[70] Justice Wright, **R. v. Avenue Video Boutique,** p. 46. The accused was found guilty on 8 charges of obscene material described above.

pressing and substantial in a free and democratic society to justify restricting or limiting the basic fundamental freedom permitting them to be expressed.[71]

Another approach to the question of whether pornography is a form of protected "speech" grew out of the radical feminist approach adopted in Indianapolis in **American Booksellers Inc. v. Hudnut.** The United States Seventh Court reasoned that for feminists, the "personal is the political". The subordination of women that pornography endorses is a 'political goal'. The Court stated:

> [W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination.
> Yet this simply demonstrates the power of pornography as speech . . . If pornography is what pornography does, so is other speech. Hitler's oratios affected how some Germans saw Jews . . . Most Governments of the world . . . [suppress] critical speech. In the United States, however, . . . all is protected as speech, however insidious.[72]

A similar argument has been made in Canada by Louise Arbour.[73] She quotes the Metro Toronto Task Force on Public Violence Against Women and Children definition of pornography

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[71] ibid., pp. 48-49. The accused was aquitted on 242 charges which contained material described above. The Crown has appealed this decision.

[72] cited in Lahey, "Toward Gender Equality", p. 681

[73] L. Arbour, "The Politics of Pornography: Towards An Expansive Theory of Constitutionally Protected Expression", in J. M. Elliot and R. M. Elliot (eds.) Litigating the Values of the Nation: The Canadian Charter of Rights and Freedoms, Toronto: Carswell, 1986

> As a form of sexual Propaganda, pornography both promotes and encourages the degradation and exploitation of women . . . many women maintain that pornography is the ideology of a society which creates complacency about rape, wife battering and other forms of violence against women,

and concludes that the use of the words **propaganda, promotes, encourages** and **ideology,** identifies pornography as political speech and hence, worthy of constitutional protection.[74] Arbour's libertarian analysis, in rejecting the 'balancing interests' approach concludes,

> There must, therefore, be something about pornography, apart from its advocacy and promotion of the subordination of women, that makes it suitable for democratic limits. But the fact is that there is nothing; the efforts to curtail the circulation of pornography are entirely based on a view that its content is objectionable.[75]

The problem with this analysis is two fold. First of all, the type of pornography that Arbour refers to is not typical of most pornography, although it is the type which is most objectionable to both men and women (in this sense, this is the same criticism levelled against the radical feminist analysis). Secondly, there is a fine line between advocating subordination and advocating hatred or violence.[76] Canada has hate literature provisions in the Criminal Code, and although at present there is no provision for discrimination on the basis of sex, the use

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[74] Arbour, "Politics of Pornography", p. 295-300

[75] ibid., p. 305

[76] Neil Boyd, "Sexuality, Gender Relations and the Law: The Limits of Free Expression", p. 136

of Section 1, as listed above by Justice Wright, would appear to be justifiable with respect to this sort of material.

Up to this point the analysis has proceeded by way of examination of the current Criminal Code provisions dealing with pornography under the rubric of obscenity, as well as the American experience within this area. In order to further evaluate jurisprudential and constitutional arguments, a more detailed examination of the content of Bill C-54 is required. Specifically, although Bill C-54 deals with a wide range of issues dealing with offenses, restrictions, penalties, and amendments to other acts in consequence thereof, the primary focus here is definitional in nature. For it is from the definitions that the other consequences thereof, are contingent on. Bill C-54 introduces the terms "pornography" and "erotica" into the Criminal Code for the first time. "Erotica" is defined as follows:

> "Erotica" means any visual matter a dominant characteristic of which is the depiction, in a sexual context or for the purpose of the sexual stimulation ['prurient interest'] of the viewer, of a human sexual organ, a female breast or the human anal region;
> "Pornography" means (a) any visual matter that shows
> (i) sexual conduct that is referred to in subparagraphs (ii) to (vi) and that involves or is conducted in the presence of a person who is, or is depicted as being or appears to be, under the age of eighteen years, or the exhibition, for a

> sexual purpose, of a human sexual organ, a female breast or the human anal region of or in the presense of, a person who is, or is depicted as being or appears to be, under the age of eighteen years,
> (ii) a person causing, attempting to cause or appearing to cause, in a sexual context, permanent or extended impairment of the body or bodily functions of that person or any other person,
> (iii) sexually violent conduct, including sexual assault and any conduct in which physical pain is inflicted on a person by that person or any other person in a sexual context,
> (iv) a degrading act in a sexual context, including an act by which one person treats that person or any other as an animal or object, engages in an act of bondage, penetrates with an object the vagina or anus of that person or any other person or defecates, urinates or ejaculates onto another person, whether or not the other person appears to be consenting to any such degrading act, or lactation or menstruation in a sexual context,
> (v) bestiality, incest or necrophilia, or
> (vi) masturbation or ejaculation not referred to in subparagraph (iv), or vaginal, anal or oral intercourse, or
> (b) any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in any of the subparagraphs (a)(i) to (v)[77]

Although the inclusion of the terms "erotica" and "pornography" seems to indicate a change in terminology, spirit and intent, the meaning ascribed to "erotica" here is much more restrictive than what is generally meant by that term. "Erotica" usually describes consensual, non-violent, non-degrading sex. As such the generally accepted notion of erotica would fall under Subparagraph (a)(vi) which the courts have previously ruled is not

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[77] Canada, "Bill C-54, An Act to Amend the Criminal Code and Other Acts in Consequence Thereof", 2d Session, 33d Parliament, 1986-87-88

justifiably restrictable. This would most certainly be challenged as an unconstitutional restriction and justifiably so.

Another problematic area is the one dealing with individuals under the age of eighteen, Subparagraph (a)(i). The breadth of the definition of "child pornography" here is so sweeping that the Zeffirelli movie version of **Romeo and Juliet,** in which a seventeen year old Olivia Hussey, bared her breast is considered pornography with no defense of artistic merit. This could logically be challenged under Section 7 and Section 11 of the **Charter.** Even in the case where a defense of artistic merit is possible, the burden of proof is placed on the accused. This again would be unconstitutional under Section 11(d) as it involves reverse onus.[78]

The sections of Bill C-54 dealing with violent and degrading sex, specifically dealing with women, could, despite the fact that they may be protected speech under Section 2(b) of the **Charter,** be limited under Section 1. A 'balancing interests' approach,[79] taking Section 15 and Section 28 of the **Charter** into consideration, would further justify the limits imposed by Section 1.

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[78] See the discussion of **R. v. Oakes** in D. Stuart and R. J. Delisle, Learning Canadian Criminal Law, Toronto: Carswell, 1987, pp. 89-97

[79] as suggested by the Fraser Report; See Saskatchewan Human Rights Commission v. Waldo et al above.

Chapter VI

CONCLUSION

With respect to the three competing political ideologies identified in this analysis, the conservative, the liberal and the feminist, it is clear that obscenity per se, and Bill C-54 in particular, reflect views that can best be described as 'conservative'. The almost overwhelming emphasis throughtout the definition of "pornography" in Bill C-54 is **sexual** conduct, **sexual** context, **sexually** violent, and **sexual** purpose. Given the fact that it was a 'conservative' government (albeit allegedly 'progressive conservative') that introduced this bill, the contents thereof should probably not surprise us. However, given the considerable input from feminist circles as well as constitutional arguments from liberals, the result may have been expected to be more 'progressive'.

Under the conservative view, sex is something that has to be controlled because

> " . . . if an attitude of permissiveness were to be adopted . . . this would contribute to an atmosphere condoning anarchy in every other field and would increase the threat to our social order as well as our moral principles.[1]"

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[1] President Richard Nixon, quoted in the New York Times,

This is a view shared by Lord Patrick Devlin and more recently by the United States Supreme Court.[2] The major assumption here is that the law should enforce a common morality which is reflected in traditional moral values. Legal moralists fear that if moral values are not enforced by the law, then society will lose its moral 'cement' and disintegrate.[3] This view seems to have its genesis in Catholic Canon Law.[4] The most significant feature of legal moralism is its preoccupation with 'sexual immorality'. It is not surprising then that 'unnatural' acts like homosexuality and masturbation are particularly repugnant because of their 'immoral' content and the threat they pose to the social order. Legal moralists are particularly 'homophobic'.

The liberal on the other hand sees the social order as a means for achieving individual freedom and security. The writings of John Stuart Mill are frequently invoked to support this position, specifically On Liberty. Central to the attainment of freedom in the liberal sense is 'freedom of expression', the lifeblood[5] of democracy. Not surprisingly, this freedom is paramount in both the United

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1970, cited in MacMillan, Censorship and Public Morality, p. 114

[2] See **Miller v. California** and **Adult Paris Theatre v. Slaton**

[3] Devlin, The Enforcement of Morals, pp. 12-18

[4] See Chapter 1 above.

[5] Justice Wright, **R. v. Avenue Video Boutique,** p. 43

States and in Canada. Interference with this right can only be justified wherein harm of a discernable nature arises. Liberals also maintain that "there must be a realm of private morality or immorality which is . . . not the law's business.[6]" There are difficulties in attempting to regulate or legislate morality:

> [I]n the context of private consumption of ideas and information we should adhere to the view that 'among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violation of the law. '.. [W]e rejected as 'wholly inconsistent with the philosophy of the First Amendment . . . the notion that there is a legitimate state concern in the control (of) the moral content of a person's thoughts' and . . . [the] State 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. ' But the State's interest in regulating morality by suppressing obscenity, while often asserted, remains essentially unfocused and ill defined. And since the attempt to curtail unprotected speech necessarily spills over into the area of protected speech, the effort to serve this speculative interest through the suppression of obscene material must tread heavily on rights protected by the First Amendment.[7]

Feminist analysis has made a significant contribution to the debate. By emphasising the threat to women's equality which <u>some</u> pornography may cause, they have shifted the focus to the more objectionable forms of the genre. At the same time they have posited the argument that pornography is really about power rather than about sex. The historical predominance of men in most social, political and legal

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[6] See text at fn. 40, p. 15, Chapter 1

[7] Justice Brennan's dissent, **Paris Adult Theatre v. Slaton,** cited in Copp and Wendell (eds.), <u>Pornography and Censorship</u>, p. 380

institutions is reinforced by the images in pornography that systematically degrade women to subserviant status. At the same time, conservative thought which has dominated both obscenity legislation and case law is patriarchal, heterosexist and sexist.

By emphasising equality, feminist analysis has enabled distinctions to be drawn between pornography, erotica, moral realism and sex education materials.

Feminists argue that pornography causes some men to rape, batter and assault women. The mere existence of some forms of pornography is said to constitute discrimination on the basis of sex. Empirical research by social psychologists does not conclusively prove a causal link between pornography and crime. However, research seems to indicate that negative attitudes towards women may be caused or reinforced by some forms of pornography. There is a caveat though. Donnerstein et al, in writing what is perhaps the most thorough review of empirical findings note:

> It is perhaps ironic, but we did not write this book because of our concern about the prevalence of sexually explicit materials in American society. Rather, we were concerned that so much attention was being paid to the possibly damaging consequences of exposure to pornography that more pervasive and more troubling combinations of sex and aggression in the media were being ignored. We contend that the violence against women in some types of R-rated films shown in neighborhood theatres and on cable TV far exceeds that portrayed in even the most graphic pornography. (emphasis added)[8]

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[8] Donnerstein et al, The Question of Pornography, preface at ix

This contention would seem to lend more credence to the socialist feminist view that although pornography is blatantly sexist, it is not the 'quintessence' as propounded by the radical feminists. Therefore, strategies that simply focus on pornography leave the greater issue of systemic inequality untouched. In this sense, the recommendations of the Fraser Commission are somewhat misplaced. By recognizing that both pornography and contemporary advertising "commoditize" women, the Fraser Report pays lip service to the socialist feminist analysis. However, by proscribing the former while leaving the latter untouched "suggests a distinction between the profitability of shady enterprise and the economic value placed on big business.[9]" This results in the decontextualization of pornography from the social relations giving it its existence.[10] Still, the Fraser Report incorporates feminist insights and examines various strategies that may prove useful in controlling objectionable portrayals and images. At the same time it recognizes the inadequacy of the current legislation and also suggests the 'balancing of rights' approach which has been introduced into the adjudication of limits under Section 1 of the **Charter.**

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[9] McCormack, "The Political Economy of Censorship", p. 176

[10] Lacombe, Ideology and Public Policy, p. 98

Case law in the United States and Canada has provided a multitude of examples that highlight the problems of obscenity legislation. It is with good cause that obscenity laws are often called the 'most muddled laws' in the country: lower court decisions are often overturned; Supreme Court decisions are often split and in the process the reputation and administration of justice suffers. Although the 'community standards' test appears to democratize the procedure by which material is deemed 'obscene', the latitude given to the 'trier of fact' - the judge, in determining these 'standards' and in protecting the 'moral fabric' of the state, is a regression to the paternalism inherent in the **Hicklin** test.

There is no reason to believe that Bill C-54 will make the situation any better, in fact, the overbreadth inherent in it will most likely make things worse: legal precedent suggests that many sections are unconstitutional; empirical research indicates that the inclusion of certain categories is unwarranted; common sense would suggest that the denial of adolescent sexuality is unrealistic; the cultural and arts community suggest that the legislation posits a serious threat to artistic freedom; feminists feel somewhat betrayed in that although their rhetoric has been adopted, the distinctions they have made above were ignored.

There is a greater problem involved here also. If one argues that pornography models antisocial behaviour, the

same logic necessitates that censorship may similarly model antisocial behaviour.[11] By officially endorsing censorship, we invariably make intolerance a legitimate form of behaviour, even in situations when it is unwarranted. Justice Wright notes:

> Every limit on the circulation of obscene expression involves the arbitrary removal of an individual's oppurtunity to make his or her own choice. Free choice is part of the bedrock of a democratic society. Temptation is necessary to allow people to choose - to choose to be right-minded, or moral or not. Without temptation, can free choice fully exist?[12]

This is not to take the libertarian position and say 'anything goes'. What is needed is a precise approach which targets those concerns which are most pressing. Justice Wright identifies such items which are legitimate and warranted in this context:

1. The protection of people from involuntary exposure to pornographic material;
2. The protection of the vulnerable, for example children, from either exposure or participation;
3. The prevention of the circulation of pornographic material that effectively reduces the human or equality rights or other **Charter** rights of individuals. This may arise, and often will arise, in material that mixes sex with violence or cruelty, or otherwise dehumanizes women or men.[13]

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[11] Fisher, "The Emperor Has No Clothes", p. 173

[12] **R. v. Avenue Video Boutique,** p. 46

To its credit, Bill C-54 does address some of these concerns. However, the primary focus should be violence, not sex. In this sense the feminist analysis which focuses on the misogynist nature of some pornography is illuminating. Logic would indicate that it is misogyny, whether in a sexual context or not, that should be our main concern, if indeed we are committed to equality. Otherwise, to reduce the discourse to an exercise in the repression of so-called 'sexual immorality' is to miss the point completely.

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[13] ibid., p. 42-43; cf. Justice Brennan's dissent in **Paris Adult Theatre v. Slaton,** pp. 649-650; cf. Feinberg, "Pornography and the Criminal Law", generally

Appendix A

AFTERWORD

It is highly unlikely that a researcher in the social sciences will not have encountered the conundrum of the alleged fact/value dichotomy. Do facts exist separate from values or are facts inherently imbued with values? Philosophers in the social sciences have debated this alleged distinction for years, and increasingly the line between the two has become blurred.[1] This is a very important consideration to be taken into account in discussing and analyzing the issues and concepts inherent in this thesis -- issues such as pornography, censorship, freedom of expression, discrimination, degradation, and equality, because political decisions made with respect to

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[1] For instance see Max Weber, "Objectivity in Social Science and Social Policy", in F. Dallmayr and T. McCarthy (eds.), Understanding and Social Inquiry in which Weber observed that the actors in the intersubjective social world are not devoid of values and goals, therefor, the systematic study of this interaction cannot remove itself from the actor's values. However, Weber maintained that an attempt must be made to conceptualize facts themselves as essentially value-free; see also Charles Taylor, "Neutrality in Political Science", in P. Laslett, Philosophy, Politics and Society, in which Taylor states " . . . a conception of human needs thus enters into a given political theory and cannot be considered something extraneous which we later add to the framework to yield a set of value judgements. "(at page 40)

these issues are not made in a vacuum: disciplines such as philosophy, psychology, sociology and law influence the debate. There is a considerable amount of conflict between competing values in these disciplines. Despite the ideal of 'objectivity', the research in this area is fraught with subjectivity; positions are invariably 'tainted' with the author's values, including my own.

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