

APPROACHES TO PORNOGRAPHY: A CONSIDERATION OF HARM BEYOND THE
MORALIST/CIVIL LIBERTARIAN DICHOTOMY

by

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Approaches to Pornography: A Consideration of

Harm Beyond the Moralist/Civil Libertarian Dichotomy

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ABSTRACT

The "problem" of pornography is analyzed here through an examination of published literature and Canadian case law and legislation. Feminist analyses of the harms associated with pornography and corresponding feminist remedies are presented as attractive alternatives to traditional moralist and civil libertarian approaches.

The history of obscenity legislation is traced from its earliest focus on heresy and sedition to the law's contemporary consideration of sexual materials. The relationships between federal obscenity restrictions and provincial and municipal pornography controls are outlined. The "community standards" concept is discussed in terms of its central role in the circumscription of pornography in Canada. The controversy surrounding its ambiguous nature and arbitrary application is profiled. The validity of the standard of intolerance as a basis for criminal law is questioned.

Feminist analyses of the existence and function of pornography address the unequal power relationships within a patriarchal society. Anti-pornography and anti-censorship views are contrasted to illustrate the diversity of approaches which coexist within the feminist camp. The incoherent state of the "pornography effects" literature militates against the possibility of an empirical answer to the harm question.

The moralist, civil libertarian and feminist strategies for the legal control of pornography are reviewed, and are evaluated on their respective strengths and weaknesses, given Canada's constitutional framework. A focus on the problem of harm, freedom of speech and equality rights demonstrates an incompatibility between civil libertarian thought and some branches of feminist theory.

The Badgley Report, the Fraser Report and Bill C-54 are discussed as examples of potential draft legislation. Various anti-censorship measures are considered as adjunct rather than alternative solutions to the question of pornography's legal control.

It is concluded that educational, social and legislative reforms are necessary, and that pornography be considered hate literature under s.281.2 of the Criminal Code. The enactment of provincial civil rights legislation is proposed to complement the suggested federal provisions.

DEDICATION

for my father,
William Joseph Henry

It is not quite true that you can't go home again. The deeper truth is that you never leave the part of home that becomes the movable feast of your imagination.

Author Unknown

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CHAPTER I

PORNOGRAPHY: DEFINITIONS AND DEVICES

Introduction

The pornography problematic has engendered considerable discord among various factions of the Canadian community in recent years. In Canada no laws exist for the specific prohibition of pornography, yet legal controls on pornographic materials are effected at all three levels of government. The municipal strategy is basically one of regulation, while provincial measures entail the practice of prior restraint. Federally, a variety of legal alternatives are available, although the longstanding Criminal Code obscenity provisions are by far the most commonly employed.

The single most important variable in judicial interpretation of the present legislation is the community standards test. Pornography is deemed obscene when the material is considered to exceed the national community standard of tolerance. The standard has been severely criticized on legal, political, practical and social grounds. A fairly unanimous voice denounces the legitimacy and utility of the concept as a legislative device, although ideological and philosophical positions determine the nature of proposed solutions. Constraints imposed by the Canadian Charter of Rights and Freedoms and the existing constitutional paradigm gauge the

respective efficacies of various propositions. Discussion concerning the most appropriate approach to pornography has developed into a heated debate.

The examination of a controversial issue often commences with a definition of the subject matter. A consideration of pornography is atypical in that regard. The term is afforded no one definition. Adoption of a specific interpretation of 'pornography' would ultimately cause one to disregard a large range of material, and narrow an analysis considerably.

Even within one understanding of the concept, various types of pornography can be addressed. Researchers have identified homosexual, lesbian, transsexual and child pornography. Pornographic expression may contain racist elements or political and religious criticisms. It can cater to a diversity of interests through many media, reflecting common fantasies or unusual fetishes. Perhaps most commonly, it is designed for a heterosexual audience. Therefore, the discussion of pornography will be restricted to a consideration of heterosexual material.

One interesting manner in which to structure the pornography argument is in terms of the harms that are associated with it. Individuals from different political and philosophical platforms tend to identify and focus on different types of harm in pornographic material. The brand of harm perceived determines the conditions for control.

The traditional opponents of pornography, sometimes called 'moralists', object to the continuing existence of pornography. As the name implies, these individuals believe that pornography both encourages and promotes moral decay (Zurcher, Kirkpatrick, Cushing & Bowman: 1973: 80). Their opposition to pornography stems from the belief that any public exposure of the human body is immoral in itself. This relates back to the conservative Judeo-Christian notion that sex should be confined to the purpose of procreation (Jacobs 1984: 23). Moralists contend that the government should prohibit pornography and that such proscription is rightfully determined by majoritarian intolerance.

At the other end of the continuum, the civil libertarian group can be identified. This group determinedly pits itself against censorship and is dedicated to the preservation of freedom of expression and free choice. The civil libertarian perspective is often not concerned with a discussion of harm or the content of the material (Jacobs 1984: 24). This stance in no way condones unlawful coercion, or the use of children in the production of pornography, however (B.C.C.L.A. 1984: 31). The views espoused by the civil libertarian group are heavily reliant on John Stuart Mill's analysis. Mill felt that truth is best sought in the open exchange of ideas and that a censorship of those ideas could distort the truth (Jacobs 1984: 24). The restriction of pornography undermines the condition of unfettered expression, which is viewed as necessary to the

preservation of a free and democratic society. Mill believed that the only justification for preventing a person from exercising his or her right of freedom of expression was if the action posed some demonstrable harm to others (Copp 1983: 28). Liberals acknowledge that the criminal law should address culpable conduct that causes or threatens serious danger to individuals, yet they do not recognize evidence indicating that the effects of pornography are hazardous. Regardless, many concede that some regulation is reasonable. Civil libertarians suggest that the prohibition of pornography is unnecessary and concentrate on restricting its circumstances of exposure according to the offence principle.

Definitions of 'pornography' are presently the subject of social negotiation (Palys et al. 1984: 1). The definition of pornography now assumes a radically different meaning from what it once did. This is due largely to the efforts of the feminist movement. Although feminism is a political movement, all feminist groups do not share the same conception of pornography. In fact, feminist thought on pornography has become so diversified that it has been described as tending towards a continuing state of dynamic instability (Lahey 1985: 649). However, the various feminist definitions do overlap to a considerable extent. These definitions do not recognize the moralist/civil libertarian dichotomy, and define pornography in terms of social and physical harm to women (Jacobs 1984: 24). Social justice is granted precedence over individual rights

(Kostash 1982: 51).

Susan Brownmiller helped to promote discussion between liberals and feminists of the nature of pornography. She felt that pornography "like rape, is a male invention, designed to dehumanize women, to reduce the female to an object of sexual access, not to free sensuality from moralistic or parental inhibition" (Brownmiller 1975: 394). Brownmiller further describes pornography as "the undiluted essence of anti-female propaganda" (1975: 394). Longino shares a similar definition of pornography, stating that pornographic material is that material which "explicitly represents or describes degrading abusive sexual behaviour so as to endorse and/or recommend the behaviour as described" (Longino 1980: 44). She carefully distinguishes between the feminist and traditional moralist opposition to pornography in the statement "What is wrong with pornography, then, is its degrading and dehumanizing portrayal of women (and not its sexual content)" (Longino 1980: 45). The feminist definitions indicate a political phenomenon, not a moral one (Hughes 1985: 101).

Andrea Dworkin defines pornography in terms of harm to women:

It is physical injury and physical humiliation and physical pain: to the women against whom it is used after it is made; to the women used to make it.

As words alone, or words in pictures, moving or still, it creates systematic harm to women in the form of discrimination and physical hurt. It creates harm inevitably by its nature because of what it is and what

it does. The harm will occur as long as it is made and used (Dworkin 1985: 11).

She feels that the oppression of women occurs through sexual subordination, stating:

It is the use of sex as the medium of oppression that makes the subordination of women so distinct from racism or prejudice against a group based on religion or national origin (Dworkin 1985: 15).

Subordination, in Dworkin's terms, involves objectification, submission and violence.

The feminist movement was successful in identifying violent, coercive and degrading sexual activity as pornographic. It identified the power imbalance that exists within pornography as well as the controversial separation between erotica and pornography (Palys et al. 1984: 5).

Gloria Steinem distinguishes between pornography and erotica. Although all feminists do not view the two concepts as mutually exclusive, the distinction has been well received. Steinem sees some similarities between pornography and erotica, in that they both identify the possibility of sexuality being separated from conception. Her definition of the erotic emphasizes that the individuals involved are powerful enough to be there by their own accord and demonstrate a mutually pleasurable sexual expression. A pornographic work's message however, is "violence, and conquest. It is sex being used to reinforce some inequality, or to create one, or to tell us that pain and humiliation... are really the same as pleasure" (Steinem 1980: 37). Steinem clearly states that "erotica is

about sexuality, but pornography is about power and sex-as-weapon" (1980: 38). Faust expands upon this distinction, stating that pornography records the acts rather than presenting an attempt to understand or interpret them. Erotica, she suggests, "presents sexuality according to either the current artistic taste or current values, or the artist's personal vision" (Faust 1980: 19).

Other feminists see the difference as rather arbitrary, and unimportant to the pornography debate. The distinction may serve no practical purpose. Kostash (1985: 33) suggests erotica may not even presently exist, unable to flourish in a patriarchal, capitalist culture. It can be argued that erotica is merely well produced, artistic pornography, and the distinction becomes one between 'good' erotica and 'bad' pornography. It reduces the distinction to "What turns me on is erotic; what turns you on is pornographic" (Willis 1981: 223). In any event, few feminists contend that pornography is only concerned with violence and aggression, with no resemblance to erotica (Diamond 1980b: 144).

Feminists view pornography as causing harm to women, but the effects of pornography are not the sole concern. Many feminists regard pornography as a symptom of a misogynist society. Pornography has been defined as the sexually explicit depiction of the subordination of women (Arbour 1985: 5). It is considered to be an expression and reflection of our society and the position women hold within it (Check & Malamuth 1982: 7). Today a growing number of feminists feel that pornography is not the

proper focus of attack. This is due to the fact that many of the images feminists object to which are common to pornography are found in many other aspects of our daily lives (Coward 1982: 19). There is growing concern that new laws to curb pornography will be used in the moralist tradition to suppress alternate views of sexuality and feminist concerns. Feminists have no assurance that legislative reform will be interpreted or enforced in the manner in which it was intended (King 1985: 90).

This faction of the community argues that the specific feminist approach to pornography is a political one, rather than a moral or social one. Moral interpretations concentrate on the degradation of women, while social understandings isolate pornography as a causal factor in rape. The feminist analysis examines the impact of pornography on the feminist movement, conceptualizing pornography as part of a greater symbolic system which devalues women (McCormack 1985b: 282).

A few common threads can be identified in the feminist perspective, despite its mosaic nature. The harms feminists identify can be reduced to physical and psychological harm to individual women, as well as a more general social harm. Feminist theories for the control of pornography can be translated into two main principles, known as the provocation principle and the direct harm thesis. The provocation principle states that women suffer discrimination and abuse as a consequence of male pornography consumption. The second thesis involves direct harm, whereby women themselves suffer

psychological harm as a result of the existence of pornography. Both principles recognize pornography's damage to women's equality rights.

The framework which can be assembled around the notion of harm lends coherence to the sometimes confusing pornography debate. It clarifies the positions of the various social groups, and directs an understanding of their respective approaches. As a consequence of the groups' interpretations of the relationship between law and morality, different legal strategies are available to them. Moralists promote state intervention to curb expressions of sexuality. The conservatives are not threatened by the present situation where criminal sanctions are predicated upon a nation's intolerance. In practice, they may advocate any approach which will function to further their aims. Liberal notions are consistent with regulation based upon the offence principle. Therefore, at least on a theoretical level, liberals concur with municipal proposals such as licensing by-laws and zoning ordinances. The nuisance and civil adjudication strategies share a regulatory purpose, explaining their similar acceptance. When any approach functions to prohibit expression it is incompatible with civil libertarian doctrines, however.

Feminists have suggested a wide variety of approaches. Different branches of the perspective have considered taxation, civil rights proposals, human rights strategies, civil remedies, changes to the hate literature provisions, emphasis of the provincial role and reinterpretation of the existing obscenity

legislation. Anti-censorship strategies have included many forms of conduct which do not necessitate state restrictions, such as alternative imagery, affirmative action programmes and educational measures.

All of the approaches have their respective strengths and limitations. Given widespread dissatisfaction with the community standards approach, legislative change is imperative. Therefore, approaches which reflect contemporary concerns must be analyzed to determine their feasibilities within the Canadian dynamic.

Devices for pornography control can be seen within the parameters of the federal, provincial and municipal roles. It is necessary to trace the history of these controls and the nature of their proscriptions. The most powerful strategy is illustrated in the current Criminal Code obscenity legislation. It is a curious fact that pornography has come to be circumscribed by obscenity legislation. A consideration of the relevant terminology, history and case-law is a prerequisite for the comprehension of the present obscenity approach.

The Federal Approach: From Heresy and Sedition to Sexual Obscenity

The distinction between obscenity and pornography is not a clear-cut one. In many cases the two terms have been used interchangeably, yet they are not synonymous. The criminal concept of 'obscenity' can be conceptualized as both over and

underinclusive of 'pornography' (Lahey 1985: 665). As a result of the distinction which has developed between the two terms the word pornography can no longer be substituted for 'obscenity'. The two ideas approach a certain class of materials from different directions and, therefore, mandate discrepant demands on social policies and state intervention (Arbour 1985: 3). Much of the controversy over obscenity and pornography finds its roots in definitional difficulties.

The origin of the word 'obscenity' is debatable. The Latin word for obscenity translates as 'ill-omened' or 'inauspicious', and originally the English term shared this definition. During the Shakespearian Era it meant 'offensive to the senses, filthy, foul, disgusting'. Only a supplementary meaning identified obscenity as offensive to modesty or taste (Hart et al. 1975: 8). An alternative explanation is that 'obscene' was derived from 'ob' and 'scaena'. 'Ob' means 'in the way of', and 'scaena' refers to a stage, supposedly used for religious rites (Kenyon 1975: 227). Still others feel that our word obscenity was derived from the Latin word 'caenum'. This word appears to have a variety of meanings which range from 'dirty' to 'genitalia', and in the plural form can refer to buttocks (Bullough and Bullough 1977: 159).

Our expression 'pornography' is derived from Greek and translates as writing of or about prostitutes and their patrons (Wilson 1973:8). Although it was derived from the Greek words meaning 'harlot' and 'writing', the word 'pornography'

apparently was not in use until the 1800's. The meaning of the word evolved to refer to literature about "unchaste or obscene subject matter" (Hart et al. 1975: 8).

Censorship in Western civilization has only fairly recently become directed at sexual depictions (Wilson 1973: 8). Censorship was common to early English law, but was connected with heresy and sedition, rather than obscenity (Hart et al. 1975: 8). Obscenity consisted of "primarily derogatory statements about the established religious and political order" (Wilson 1973: 19). Occasionally it referred to literature concerned with excrement or excretion. It was not until the eighteenth century that obscenity was prosecuted, and even then it was in the context of anti-religious works.

The first prosecutions, occurring in the early 1700's, were the cases of R. v. Read (1709) and R. v. Curll (1727) (Lutes 1974: 30). During the eighteenth century in England more attention became focussed on the issue of sexual obscenity. This was due in part to the widely extended use of printing. Before this time books were a luxury that many could not afford, and few individuals could read (Bullough & Bullough 1977: 161). A larger percentage of the population began developing literacy skills (Wilson 1973: 9). This produced an uneasiness on the part of the elite about the morals of those individuals. The upper-class had previously wielded most of the influence in England. Yet, the growing power of the middle-class, had an effect on the attitudes towards obscenity (Bullough & Bullough

1977: 167). The upper-class had been much more liberal than the rising, work-oriented middle-class.

Combined with these factors are the many other social changes of the period, including the changing scientific attitudes towards sex, the development of privacy and the different attitude towards the notions of women and family which were emerging (Bullough & Bullough 1977: 167). It was within this social context that common law, and sometime later legislation, developed concerning obscenity.

The case of R. v. Read (1709) was the first case that addressed the issue of obscenity in English common law. James Read was indicted after the publishing of a book called The Fifteen Plagues of A Maidenhead. The ecclesiastical courts were not effective in dealing with indecent literature at that time.

Mr. Justice Powell stated in 1708:

This is for printing bawdy stuff, that reflects on no person or persons, or against the Government. It is stuff not fit to be mentioned publicly. If there is no remedy in the Spiritual court, it does not follow there must be a remedy here. There is no law to punish it: I wish there were: but we cannot make law (Hyde 1964: 25).

It has been suggested that the sanctions the religious courts had at their disposal, the most severe being excommunication, were rapidly losing their deterrent effect. Hence the move to try these types of cases in the secular court (Bullough & Bullough 1977: 165). At this date no criminal sanctions existed for the control of literary obscenity (Hyde 1964: 25). An obscene book could be published without the danger of

prosecution (Hyde 1964: 26).

In 1727 this changed with the case of R. v. Curll. The judiciary created the law, while Parliament refused to pass legislation curtailing the printing of obscene or salacious literature (Bullough & Bullough 1977: 165). Edmund Curll was a notorious printer and book-seller who was arrested for publishing two books, entitled Venus in the Cloister or the Nun in her Smock, and Curll's version of a translation of Meibomius's De usu Flagnorum in re Medical et Venera by Dr. George Sewille of Hampstead. During the course of the trial the Lord Chief Justice of the King's Bench at Westminster Hall stressed that a matter in writing could not be the concern of the Spiritual Court. The Attorney-General emphasized that corruption of the morals of the King's subjects was an offence to common law. After a great deal of argument among the judges, Curll was convicted and subsequently fined (Hyde 1964: 29). The case of R. v. Curll represented a turning point for English common law concerning obscenity. It determined that the publication of an obscene libel was a misdemeanor at common law, (Hyde 1964: 32).

Subsequent to Curll's conviction, pornographic works were easily attainable in England and literary obscenity stood as a member of the libel family (Hyde 1964: 33). During the 1700's the use of the law of obscenity was "generally in the role of a hanger-on to its more substantial cousins, seditious and blasphemous libel" (Hyde 1964: 34). The law rarely was

successfully invoked unless it was directed at obscenity in conjunction with religion or religious slurs and had political overtones (Bullough & Bullough 1977: 165-166).

In the mid-nineteenth century the law of obscenity passed a milestone in its development with the approval of the Obscene Publications Act of 1857, commonly known as the Lord Campbell's Act (Lutes 1974: 30). Previous to this there were a number of less important acts such as Section 4 of the Vagrancy Act of 1824, and an amending Act of 1838. The sale of obscene books was attended to in the Metropolitan Police Act of 1839 and the Town Police Clauses Act of 1847. It can be argued that until the Lord Campbell's Act obscenity law did not disturb 'serious literature' or the reading material of the wealthy (Hyde 1964: 38).

During Queen Victoria's reign the pornographic trade grew considerably, perhaps as a reaction to the severe repression and inhibition that were indicative of this period (Hyde 1964: 40). Kenyon recognizes this explanation, but suggests that the increase in pornography could have been a result of a reaction to the emerging female emancipation of the era (Kenyon 1975: 226). Lord Campbell was the Lord Chief Justice of England at the time. His introduction of this act changed the law of obscenity because the law became directed at the literature, which was to be liable to summary destruction by the magistrate, rather than directed at the publisher. It was assured that this law would only be used to suppress 'gross pornography' and not serious

works, yet this assurance was never substantiated. The Act addressed only those materials "made to corrupt morals of youth and calculated to shock the common feelings of decency in any well-regulated mind" (Hyde 1964: 42). The Lord Campbell's Act (1857) made the test of obscenity indictable under the present laws of the time (Hyde 1964: 42).

It must be stressed that

This Act did not become the basis of law concerning literary obscenity. It created no new offence, but was a preventative measure which sought to forestall the sale of obscene books by destroying them (Hyde 1964: 42).

Lord Campbell himself emphasized that the act did not alter the existing law. It did, however, provide for extremely effective enforcement (Bullough & Bullough 1977: 170).

In 1868 English common law witnessed the development of the first test of obscenity. The case concerned a man named Henry Scott, who was accused of distributing a Protestant pamphlet that was designed to discredit the Catholic Church. It was entitled The Confessional Unmasked and basically 'exposed' the depravity of the priests. Scott's copies of the pamphlet were seized in accordance with the Lord Campbell's Act. Benjamin Hicklin was a Wolverhampton magistrate who ordered that the pamphlets be seized and destroyed (Bullough & Bullough 1977: 170). Scott appealed to the Recorder at the Quarter Session, who quashed the order of the justices, subject to the opinion of the Court of Queen's Bench. It was at the Queen's Bench where Lord Chief Justice Cockburn reversed the decision and presented his

definition of obscenity. Chief Justice Cockburn wrote in R. v. Hicklin (1868) at page 371, that the test of obscenity was "...whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." According to the Hicklin test, obscenity became defined by focusing on the effect such material has on individuals (Fox 1974: 224). This pronouncement was not binding as law, however, because the issue of obscenity was not in question at the appeal where Cockburn was presiding. The Recorder had already found the pamphlet obscene, yet decided in Scott's favour since his motive was to expose the Church of Rome. Regardless of this fact, the definition was adopted and accepted in future judgements of obscenity (Hyde 1964: 43).

The 1892 Criminal Code contained the first Canadian statutory prohibition to control the publication of obscene material. Section 179 "provided that the public sale, or exposure for sale of any obscene book or printed matter would constitute an indictable offence" (Fox 1974: 203). The Draft Criminal Code of Indictable Offences was created in 1879 by an English Royal Commission directed by Sir James Stephens. Although rejected in England, the code was passed in 1891 in Canada and became law a year later (Lutes 1974: 31). The word 'obscene' was not defined on the grounds that "the commission felt the word should be allowed to adopt the meaning that the word itself conveys" (Lutes 1974: 31). The courts saw fit to

adopt the definition of obscenity as proposed by Chief Justice Cockburn in the case of R. v. Hicklin (1868) (Fox 1974: 203).

This definition of obscenity proved to be problematic for a number of reasons. Perhaps the main concern was that the judge would be forced to speculate on the possible effect of some material on a group of unidentified persons. Since the Hicklin decision, courts have based a number of decisions of obscenity on the possibility that youths or emotionally unstable people will obtain the material, making the standard of censorship unreasonably restrictive. The vast majority of the population should not be deprived of some material for the sole reason that a small percentage of people could possibly be effected. Another important concern regarding the Hicklin decision is that isolated passages of the books in question are focused on, not the work in context (Charles 1966: 245). Other criticisms include the fact that the test concerns the effects of the material on the audience, yet no evidence from experts showing the impact of the material is allowed. The tendency of the material to corrupt is decided by a consideration of the publication itself (Fox 1974: 204).

There existed only five obscenity cases between the years 1900 and 1940, and all reinforced what came to be known as the 'Hicklin Test'. They were The King v. McAuliffe (1904), The Queen v. Jourdan (1904), R. v. Beaver (1904), R. v. MacDougall (1909) and R. v. St.Claire (1913). This trend was upset in 1944 with the case of Conway v. the King (1944) and the introduction

of the element of 'mens rea' into the test (Lutes 1974: 31). The case concerned a production of Spin A Web of Dreams, in which young women appeared to be partially nude (Boyd 1984: 19). Lazure J. overturned the previous conviction on the grounds that "the object was not to suggest obscenity... the intention was to create an artistic background and not an immoral scene" (536).

Changing attitudes in the post World War II period influenced the degree of sexuality in the public sphere. The Special Senate Committee on the Sale and Distribution of Salacious and Indecent Literature "was formed as a consequence of public reaction to this new prominence" (Boyd 1984: 19). There was a concern over the proper approach to control of the literature. Mr. Stewart S. Garson, the Minister of Justice in 1952, felt that the real problem was one of enforcement, however (Fox 1974: 204). Law enforcement agencies had given him no indication that the law was unenforceable (Charles 1966: 252). Garson was of the belief that the Hicklin test was adequate and effective, as was the Special Committee (Boyd 1984: 22). The Conservative government replaced the Liberal government and placed E. David Fulton in the position of Minister of Justice.

When the Minister of Justice, Mr. Fulton, introduced the new obscenity bill in 1959, he suggested that the Hicklin test was one of two "measures" to be employed for different types of material in assessing "obscenity". Mr. Fulton stated that the Hicklin definition "is not superseded by the new statutory definition" (Fulton 1959: 5517), and that the Hicklin test was

to be applied to publications and productions that were considered to have literary merit (Lutes 1974: 35). Cases initially supported this distinction. R. v. Munster (1960) and R. v. Standard News (1960) both considered s.150(8) not to be an exhaustive definition of obscenity (Barnett 1969: 10). The Supreme Court of Canada had the opportunity to decide if the Hicklin test could still be employed in obscenity cases. A discussion of the status of the Hicklin test was avoided in Dechow v. The Queen (1977), however. The Supreme Court merely broadened the definition of 'publication' to include the sex devices in question (Verdun-Jones 1984: 39). Dechow v. The Queen (1977) determined that the section 159(8) definition was exhaustive where it applied, that is when publications are the focus of the case. The four dissenting judges were of the opinion that the Hicklin test had now been replaced by the s.159(8) definition, even where non-publications were alleged to be obscene. The issue has not been put to rest, and theoretically, the Hicklin test can still be employed today. Canadian courts do not recognize the Hicklin rule in practice however; it has apparently been "completely swept away" (Getz 1964-66: 216). In this sense judges seem to have ignored the original intentions of Parliament when formulating the current legislation (Lutes 1974: 39).

The second approach available for defining obscene material is by "reference to its contents and its internal characteristics" (Fox 1974: 224). This approach is seen in our

present obscenity legislation in Canada, s.159(8) of the Canadian Criminal Code, which Fulton intended to be used to eliminate "trash" from the newsstands (Lutes 1974: 35). This section became law in 1959 and has not been altered since, with the exception of a section number change in 1970 (Lutes 1974: 40).

There are a number of offences in the Canadian Criminal Code that deal specifically with published obscene material. These offences are lodged under the heading 'Offences Tending To Corrupt Morals'. Section 159 is concerned with obscene materials, objects and indecent shows, and constitutes the main element of Canadian obscenity legislation. It prohibits the sale, display or possession of obscene materials. Court judgments since 1959 have functioned to clarify the 8 subsections which divide s.159. Subsections (1) and (2) set out the substantive offences. Section 159(1)(a) declares it is a crime for any person to make, print, publish, distribute, circulate or possess for those purposes any obscene written matter, picture, model, phonograph record or other thing whatsoever. Every person commits an offence under s.159(1)(b) if they make, print, publish, distribute, sell or have in their possession for those purposes, a crime comic. Section 159(2)(a) makes it an offence for any one to sell, expose to public view or possess for that purpose the obscene material addressed in s.159(1)(a). Interestingly, s.159(2)(a) is only applicable to offences which are committed knowingly. Therefore, conviction

could be obtained under s.159(1)(a) if the accused had no knowledge of the obscene material. Because of this, s.159(1)(a) was declared to contravene the Canadian Charter of Rights and Freedoms. Subsection (6) dictates that an individual can make or circulate obscene matter, not knowing that it is obscene, and still be convicted. It was argued that subsection (6) was unconstitutional because it attempted to make s.159(1) an absolute liability offence in R. v. St. John News Co. Ltd. (1984). However, R. v. Red Hot Video Ltd. (1984) stated that subsection (6) just removed the defence that the accused did not know the material was obscene. Therefore, the Crown must still prove knowledge over what is supposed to be in the accused's possession (Greenspan 1985: 142).

The remaining aspects of s.159(2) deal with exhibiting disgusting objects or indecent shows and advertising drugs or articles for miscarriages, abortions, restoring sexual virility or curing venereal diseases and diseases of the generative organs.

Subsection (3) applies to both the first subsections, and states that no one will be convicted under these sections if he or she establishes the public good was served by the alleged acts. Subsection (4) declares that it is a question of the law whether ^{an act served} the public good was served, whereas s-s.(5) states that ~~under this act~~ the motives of the accused are irrelevant. It is not sufficient to prove that a person attempted to serve the public good. The court restricts its concern to the consequences

of the action. Subsection (7) defines a crime comic and s.159(8) defines an obscene publication.

Section 160 of the Code addresses a specific procedure suited to obscene matter. It provides for 'in rem' proceedings, that are against the publication itself. Fulton, and others who proposed the law, believed that by avoiding the prosecution of an individual, and the resulting damage to his or her reputation, judges would be less reluctant to prosecute (Charles 1966: 255).

Section 161 prohibits 'tied sales', meaning that the sale or supply of one publication must not be contingent upon the purchase of other allegedly obscene publications. Section 162 involves the publication of judicial proceedings, and section 163 addresses presenting or permitting the performance of an immoral, indecent or obscene theatrical performance. Section 164 is directed at the mailing of obscene matter and, lastly, s.165 addresses the punishments associated with obscenity (Mewett & Manning 1985: 519). These are not the only legal alternatives which function to suppress erotic literature in Canada, however. Charges of conspiracy to commit an indictable offence, the Post Office Act, the Customs Tariff Act, The Broadcasting Act, and the Trade Marks Act could all theoretically be invoked (Fox 1974: 213).

Although eleven different Acts are currently available, s.159(8) of the Canadian Criminal Code is by far the most

frequently implemented (Kenyon 1975: 228). Section 159(8) of the Canadian Criminal Code states "For the purposes 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."

Both the Hicklin test and s.159(8) have been severely criticized for their vagueness and arbitrariness (Fraser Committee 1983: 15), despite the fact that this section was acclaimed in 1959 by Fulton as producing a situation where obscenity could be assessed with 'speed and certainty' by using a series of supposedly simple and non-subjective tests (Hunter 1975: 488).

Because the written law is so vague and imprecise, the law has been 'created' through the hearing of individual cases. It is interesting that this process of 'legislation through litigation' (Stern 1969: 54) harkens back to the authors of the Draft Criminal Code of 1879, who neglected to define 'obscenity' in the belief that "the word should be allowed to adopt the meaning that the word itself conveys" (Lutes 1974: 31). This evolving contemporary usage deserves further consideration.

The Canadian cases in the area of obscenity have focused on two major elements of the s.159(8) formula: the terms 'dominant characteristic' and 'undue exploitation'. The words 'characteristic' and 'exploitation' have posed no real

difficulties, but the words 'dominant' and 'undue' have been highly problematic (Fox 1974: 206). } *Baker*

Some preliminary guidelines were laid down by Mr. Justice Judson and three concurring judges at the Lady Chatterly's Lover hearing (R. v. Brodie; R. v. Dansky; R. v. Rubin [1962]). Although the judgements have not since been questioned, it should be noted that they are not binding, since this was not a majority decision (Barnett 1969: 12). Judson, J.'s judgement was only one of the nine judgements which culminated in a 5-4 decision. It was never endorsed or adopted by the Supreme Court of Canada.

The judges' formula argued, firstly, that a book need not be limited to one dominant characteristic. Further, the 'undue exploitation of sex' was to be determined by a consideration of the work as a whole, and not just of specific sections. The author's purpose and the "literary or artistic merit of the work" were to be simultaneously focused upon (Fox 1974: 206). In other words, exploitation of sexual themes per se is not forbidden. << The author's purpose, the merit of the material and whether the piece offends community standards of decency determine whether the exploitation is undue (Fox 1974: 206). >>

Of course each of these terms, and the relationships among them, have been subjected to further scrutiny in other cases. As outlined in R. v. Fraser (1966), the contemporary and local standards of the community are measured against the concepts of

purpose, merit, and the work in context. Although R. v. Adams (1966) dictated that community standards determined merit, this was overturned in a decision by O'Hearn, Co. Ct. J., who felt that community standards were decided by a consideration of merit and purpose. Lastly, R. v. Cameron (1966) suggested that merit was important for determining 'obscenity' and 'purpose'. If material contravened contemporary community standards, it could not be vindicated by a finding of serious purpose, however (Barnett 1969: 12)(Fox 1974: 207).

The purpose of the author is important to the issue of obscenity. In Brodie (1962) Judson J. separated the notions of different types of purposes. He identified a base purpose as distinct from a serious literary one; obscenity being associated with the former and non-obscene publications with the latter (Barnett 1969: 13). R. v. Duthie Books (1967) identified base purpose as that which vilified sex and treated it as something less than beautiful or involving material written in a manner calculated to serve aphrodisiac purposes (Fox 1974: 207). The case of R. v. Coles (1965) illustrated the point, however, that it was impossible to distinguish between merit and purpose. If the purpose was base, arguing that a work had artistic merit would be to no avail. Barnett (1969: 15) asserts that the cases have shown that serious purpose in isolation will not prevent a finding of obscenity, if some other elements identify material as obscene. But if a base purpose is discovered other redeeming criteria are not useful. Such was the case in Cameron (1966),

where it was decided that serious purpose alone is not sufficient to save a work which is thought to offend community standards (Fox 1974: 207).

Although merit is considered to some degree intertwined with purpose, it does have an effect of its own. It has been recognized that authors must have a certain amount of artistic freedom to create works with genuine artistic or literary merit. If it is decided that a work has artistic or literary merit, a finding of obscenity is still possible if the purpose is considered base and an offence against community standards exists. Lack of merit however, could outweigh a serious purpose in the event of no offence to community standards (Barnett 1969: 16). Regardless, a determination of undue exploitation must be made on all of the evidence having regard to the purpose, artistic merit of the work and the community standard of tolerance, as was demonstrated in R. v. Times Square Cinema Ltd. (1971) (Greenspan 1985: 142). In determining whether a publication has a dominant characteristic which is the undue exploitation of sex, consideration must be given to the work as a whole, not to isolated portions of it, and also to the expressed or implicit purpose of its author.

If only to eschew obfuscation, community standards are now judged to be the most 'weighty consideration in the negative' (Barnett 1969: 18). A finding of an offence to community standards can negate the effects of merit and purpose. Community standards cannot make a positive contribution, however. The

defence will not profit by merely showing that some material will be tolerated by the prevailing standards. Proof that material does contravene existing standards can be extremely deleterious for the defence, however.

Community standards can be considered a rather elusive concept, due to its fluid nature. Because of the confusion surrounding the interpretation of our obscenity laws, the constitutionality of the legislation was challenged. In the case of R. v. Red Hot Video (1985) it was decided that section 159(8) was an infringement on freedom of expression as guaranteed by s.2(b) of the Canadian Charter of Rights and Freedoms, but it was nonetheless declared constitutional. It was appealed to the Supreme Court of Canada. The appellant acknowledged that his three videotapes were indeed 'obscene', yet pressed the issue on two grounds. Firstly, he believed that s.159(8) of the Canadian Criminal Code is "so vague, uncertain, overbroad and incapable of definition that it violates the principles of fundamental justice guaranteed by s.7 of the Charter." Secondly, s.159(8) was accused of not being a "reasonable limit" upon freedom of expression following s.1 and 2(b) of the Charter.

The Canadian Charter of Rights and Freedoms is a constitutional document which outlines the basic rights and values of Canadians. Within the Charter, section 2(b) guarantees the right to freedom of expression. It declares:

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression...

section one of the Charter outlines the limits that are placed upon this freedom. It states:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The freedoms Canadians enjoy are entrenched in the Charter to ensure that these rights will be protected. These rights (section 2) are not absolute and can be constrained under the 'notwithstanding clause' in section 33, and as previously stated, section one (Magnet 1985: 901). Section 33 allows Parliament and the Provincial legislatures the power to override the fundamental freedoms in s.2, the legal rights in sections 7 through 14, and the equality rights in s.15.

The second legal argument in R. v. Red Hot Video (1985) was quickly dismissed, with the explanation that Canadian courts encountered minimal difficulties deciding what is obscene in Canada. The first argument required more attention, but it was not accepted either. It was the opinion of the court that one can 'demonstrably justify' restricting the guaranteed right of freedom of expression when material causes, or threatens to cause, real and substantial harm to the community. Anderson, J. referred to s.28 of the Charter, which ensures that the rights of men and women are equally protected, before declaring:

If true equality between male and female persons is to be achieved it would be quite wrong in my opinion to

ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material described above. As I have said, such material has a tendency to make men more tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women.

The judiciary are obviously willing to adopt the findings of some of the recent research concerning the effects of pornography, although critics might argue that problems with the research may not 'demonstrably justify' the conclusions that have been drawn. Regardless, this decision laid to rest many concerns that the Charter, and its 'freedom of expression' provisions, would be used to shield the producers and distributors of even the more extreme forms of pornography.

Federal obscenity legislation has been the major mechanism by which obscene material has been controlled in Canada. The provincial censor boards do complement these powers to some extent, although the two approaches often do not present a unified front.

Provincial Censorship as Prior Restraint: Regional Differences

Obscenity legislation, and the prior restraint known as censorship, present two different avenues for controlling obscene materials in Canada. They can function either simultaneously or alternatively. Censorship is the act of proscription (Price 1979: 302). Prior restraint prevents expression before it occurs. Price (1979: 302) distinguishes between obscenity legislation and censorship. Censorship

generally controls the existence of material, while obscenity legislation controls the circumstances of its exposure. Obscenity legislation is under federal jurisdiction, whereas censorship is generally the prerogative of the individual provinces. There is no federal legislation which endorses censorship, although it could be argued that elements of the Criminal Code and the Customs Tarrif Act do just that. They effectively preclude expression by preventing material from crossing the Canadian border (Fox 1974: 116).

Legal authorities have been divided into provincial and federal jurisdictions under the Constitution Act, 1982, formerly known as the British North America Act, 1867. The Criminal Code is responsible for matters tending to corrupt public morals. Section 92 (13) of the B.N.A. Act concerned provincial property and civil rights. Dean (1981: 173) states:

Film censorship became and has remained a provincial jurisdiction in Canada for one of the strangest and least appropriate of reasons: film has been viewed solely as property and as a business, and such matters fall within provincial jurisdiction and direction.

Although film censorship may have been the responsibility of the provinces for curious reasons, there are justifications for preserving the present practice. The diversity of the Canadian population is such that the provinces, and their boards, may be more in tune with changing attitudes and levels of tolerance within the individual provinces than a federal body could be. Provincial legislation is able to apply a local standard of morality, while federal legislation applies a national one

(Price 1979: 307). The provinces are apparently radically different in their approaches to censorship, prohibition and classification (Boyd 1985: 51). This can be viewed both positively and negatively. On the one hand, this flexibility between provinces could more easily reflect the attitudes of the people within that province. Unfortunately, it is not always clear that this is the case.

The issue of community standards is heavily emphasized in the notion of provincial censorship (Boyd 1985: 47). All of the provinces do give some consideration to the public sentiment or community standard, yet only Ontario has made an attempt to study the attitudes of the individuals in the province (Boyd 1985: 55). There is some disagreement over the rationale behind the provinces relying on community standards. Dean (1981: 218) states that 'community standards' is:

a theory of censorship which permits the vast, non-film going public to censor the tastes of those who do attend films, on the grounds that 'the majority' has a right to determine what goes on in 'their community'.

It is arguable that with an absence of information as to what the inhabitants of the different provinces feel offends the community standard, we are not relying on the majority opinion in provincial censorship.

The flavour or climate of each of the provinces is largely determined by the attitude of the different chairpersons, yielding sometimes discontinuous models of censorship and classification (Boyd 1985: 38). Since the provinces' respective

ensor boards operate independently of each other, they must be focused on individually.

Omri J. Silverthorne headed the Ontario Board of Censors for just under forty years. He was considered quite modern, and his policies and decisions reflected his liberal approach. Ann Jones has recently become the new Director of the Theatres Branch in Ontario. It is too early in Ann Jones' career as chairperson to evaluate her position on censorship, although her most recent predecessor, Mary Brown, was often criticized for her conservative approach.

Alternatively, Quebec's early censors could be considered quite restrictive. This trend was reversed with the appointment of Andre Guerin in 1962. British Columbia and Nova Scotia appeared to follow the same route as Quebec, where "a restrictive area of censorship resulted in increasing criticism and was followed by entrance into a more liberal era" (Boyd 1985: 40). The catalysts for these changes in policy were Ray MacDonald in British Columbia, and Gerald Doucet in Nova Scotia (Boyd 1985: 40).

The provinces began their practice of prior restraint in 1911, with Ontario's Theatres and Cinematographs Act, although Manitoba and Quebec had their legislation assented to on the same day (Price 1979: 318). Both British Columbia and Nova Scotia enacted film legislation shortly afterward (Boyd 1985: 40). The Ontario Act authorized the appointment of a Board of

Censors, giving them the power to permit, prohibit or reject any film. All films had to be shown to the board. Provisions made in 1953 and 1960 allowed for new classifications, and in 1975 the Act was amended and 'exhibit' was defined. This restricted censorship, depending on the circumstances of exposure.

Nine of the provinces have enacted legislation that deal with either, or both, film classification and censorship (Fox 1974: 215). Quebec, Ontario and Saskatchewan address the same problems in literature (Fox 1974: 215). Film classification is the process whereby the films submitted to the various boards are separated into different categories according to the age of the audience. Some of the provinces now emphasize film classification and theatre licensing, rather than their censorship functions (Fox 1974: 216). Laskin J. has recognized that the more recent censorship legislation passed by the provinces has been directed at classification and advertising control (Price 1979: 318).

Within the individual provinces and territories, each censorship authority operates under a Provincial Act. In British Columbia and Quebec the censors operate under the Attorney-General's office. In New Brunswick and Nova Scotia the Provincial Secretary is the ministry responsible for censorship, and in Ontario it is the Ministry of Consumer and Commercial Relations. The Department of Culture and Youth in Saskatchewan was created especially for the purpose of focusing on art and culture in that province, and censorship is practiced under this

body (Dean 1981: 253).

Ontario, British Columbia, Saskatchewan, Alberta, Quebec, New Brunswick and Nova Scotia all have censor boards and classification schemes. Only Prince Edward Island and the Yukon do not have some form of film legislation (Dean 1981: 253). This does not mean that controls are not provided in these areas, however. They simply are not challenged. For example, movies that are shown in P.E.I. reflect the same user-classification ratings as those in Nova Scotia (Dean 1981: 257). Interestingly, if a film is rejected for exhibition in Nova Scotia, it is simply not shown in Prince Edward Island.

The Yukon provides an exception to the film censorship and classification process in Canada. The Canadian Criminal Code is considered to be the mechanism for film control in that territory. Age restrictions are posted outside cinemas, as they are in other provinces, yet if they were objected to, no paying customer could be refused admittance. The B.C. classification scheme is followed mainly to give consumers an indication as to the content of their product (Dean 1981: 170).

The Northwest Territories can adopt the same classification as any other province for a particular film. Because of geographical considerations, the western provinces' classifications are often employed. In the event of the film classification officer disagreeing with a certain decision, another province's scheme could be used (Dean 1981: 132).

The Manitoba experience is especially relevant to the debate over the provincial role of prior restraint. Neither Manitoba nor Quebec has the power to request that changes be made to films, although the Quebec Bureau de Surveillance du Cinema is effectively involved in cutting the films to be shown in that province (Fraser Committee 1975: 206). In 1972 the Manitoban New Democratic Party eliminated the powers of film censorship, but not classification, in that province. Surprisingly, theatre owners were not overjoyed with this development, and felt that their somewhat limited protection from prosecution was being withdrawn (Dean 1981: 128). The new classification procedure merely helped the Attorney-General's office in launching prosecutions, and forced the theatre owners to be more selective over which films were chosen for exhibition (Dean 1981: 128).

Indeed, one of the main problems with the somewhat tenuous relationship between the provincial and federal approaches to pornography is that although a film may be passed by provincial censorship authorities, it can still be prosecuted for obscenity under the Code (Fox 1974: 216). The Saskatchewan Court of Appeal decreed in R. v. Daylight Theatres Company Limited (1972) that the classification a film received from a provincial censor board had no relation to the Criminal Code, and individuals were justly answerable to both these legal processes (Price 1979: 307). This leaves distributors and theatre owners in something of a dilemma. A film that could be exhibited in one province could be prosecuted for obscenity there. Alternatively, a film

found 'not obscene' federally may be refused exhibition by a provincial censor board. There is no guarantee that both forms of proscription will address the same material, or raise issue with the same circumstances of exposure (Price 1979: 305).

As federal obscenity legislation has been condemned for allowing a great deal of discretion and inconsistent application, so too have the policies of the various censor boards. It is this lack of strict criteria among the various boards that has currently been an issue in Canadian courts.

One of the first important cases in the censorship domain was the much cited Re Nova Scotia Board of Censors et al. and McNeil (1978). The case began with the Nova Scotia Amusement Regulation Board banning the exhibition of a film entitled Last Tango In Paris. As was usually the case, the movie was banned without explanation or reasons. This interesting case highlights the jurisdictional problems in the area of obscenity. The case addresses the questions of who defines obscenity, and who is responsible for creating a censorship board. The discussion revolved around the constitutionality of a provincial legislation establishing a film censorship board, and whether the Theatre and Amusement Act could be considered criminal law, in that an offence was outlined and a penalty provided. Although the Court of Appeal found the Act ultra vires, (beyond the proper authority of the provinces), the Supreme Court overturned this decision. The Doctrine of Federal Paramountcy states that in the event of a conflict between federal and provincial

legislation, the provincial legislation will be declared ultra vires.

Ritchie, J., speaking for the 5-4 majority, referred to the fact that sections 92(13) and 92(16) of the Constitution Act of 1867 empowered the provinces to control their property and civil rights, and all matters of a local or private nature. The Theatre and Amusements Act was found to prevent, not punish, crime. Section 32 of the Act was struck down, however, because it was found to be practically identical to s.159(2) of the Criminal Code, which identifies the offence of publicly exhibiting an obscene show (Verdun-Jones 1984: 22-24). Therefore, it is clear that provincial censorship and federal obscenity legislation generally do not interfere with each others' practices.

Other more recent cases have addressed the constitutionality of the prior restraint practices of the provinces. These cases are based on Canada's new Charter of Rights and Freedoms.

The recent case of The Ontario Film and Video Appreciation Society v. the Ontario Board of Censors (1983) has raised the question of the constitutional validity of 'prior restraint' or censorship under the Ontario Theatres Act. The court was requested to decide whether the censorship provisions of the Theatre Act, as well as the standards and procedures used by the Ontario Film Review Board limit the guaranteed freedom of expression and do not meet the test outlined in section one of

the Charter.

Section 3(2)(a) and ss. 35 and 38 of the Act allowed for the censoring of any film, stating that all films exhibited in Ontario must be submitted for approval, or they could not be shown. The court accepted that the sections of the Theatres Act, do impose limits on the freedom of expression. The court was satisfied that some censorship of film is permissible in a free and democratic society. The position that was taken was that it was not necessary for the judiciary to discuss whether the 'Standards' the Board of Censors provided were reasonable limits, stating:

our courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable.

On the next issue, whether the limits were 'prescribed by law', the court took a firm stance. It was of the opinion that it was not sufficient to authorize a Board to censor or prohibit the exhibition of any film of which it does not approve. This regulation must not be considered 'law' because it depends on the discretion of an administrative tribunal.

Since the Ontario Board is not legally bound to adhere to the standards it outlines in its brochure, it was declared the guidelines "have no legislative or legal force of any kind." Although the standards have no effect, it was suggested that they could be operable if regulations were passed or statutory amendments were enacted thereby imposing reasonable limits and

standards.

The Ontario Court of Appeal dismissed the appeal and agreed with the Divisional Court. They suggested that s. 3(2)(a) is ultra vires, as well. The case is being appealed to the Supreme Court of Canada, and to this date the issue has not been resolved.

Traditionally, the provinces have only been concerned with the public exhibition of film. This trend has recently been upset, with Ontario and Nova Scotia including the sale and rental of videotapes for private consumption in their regulatory schemes and British Columbia taking steps to enter into the private domain (Fraser Committee 1985: 203). This is not inherently problematic, however. There is nothing in the concept of censorship which necessarily restricts its operation to the public exposure of material (Price 1979: 318). Videotapes, because of their increasing popularity and accessibility, have become a major focus of concern. Many Canadians object to being told by the provincial censorship boards what is unavailable for viewing in the privacy of their own homes. Other individuals identify the paradox of being denied access to a film in a theatre, while being permitted the rental of the same film from a video store.

The future of the provincial censor boards' powers are yet to be determined, yet some insight into the direction the judiciary may be taking has been provided. Anderson, J. quoted

from Clare Beckton in the Red Hot Video (1985) trial, when he stated:

If freedom of expression is to be a valuable right, a moral sense of indignity is not a sufficient reason for prohibiting access to allegedly obscene material. Any censorship which is not clearly justifiable interferes with the right of free expression. Clearly there are legitimate interests to be protected, particularly as they pertain to access by minors to material described as obscene or pornographic, but the danger is ever present from legislation that is overbroad, and from the lack of clear standards against which to measure the material (Magnet 1985: 957).

Perhaps the provinces will be required in future to make their standards and criterion for censorship, prohibition and classification public, and be bound to them, to eliminate some of the arbitrariness that surrounds not only federal obscenity legislation, but the provincial legislation as well.

Municipal Regulation: See No Evil

Attempts at controlling pornography have likewise been identified at the municipal level. Municipalities are corporations which are created by the various provincial governments (Fraser Committee 1985: 37). Rather than defining what is deserving of the criminal sanction, municipalities regulate the pornography in their communities through municipal by-laws and zoning ordinances. This practice complements the federal and provincial measures, allowing communities some latitude in monitoring their neighborhoods.

A municipality's authority to regulate and control the pornography within its borders is determined by three factors. Those factors are the Charter of Rights and Freedoms, the division of powers within the constitution and the municipalities' powers as assigned to them by provincial legislators (Fraser Committee 1985: 217).

The Charter of Rights and Freedoms constrains a municipality's powers through s.2(b), which guarantees the fundamental freedoms as limited by section 1. The Constitution Act (1867) allows the provinces to create laws concerning "Property and Civil Rights in the Province", and "Shop, Saloon, Tavern, Auctioneer, and other licenses in order to the raising of a Revenue for Provincial, local, or Municipal purpose". It consequently allows the provinces the power of fine, penalty or imprisonment if their laws are transgressed (Badgley Committee 1984: 1134).

The provinces have municipal acts which outline the power of the municipalities. The various provinces generally enact very encompassing legislation that allows their municipalities the power to license, regulate and govern specific types of businesses and occupations. Furthermore, municipalities determine zoning and land use, they have limited control over the highways and other public places and have control of nuisances within their boundaries (Fraser Committee 1985: 217). They are able to legislate for the health, safety, welfare and morality of their inhabitants (Fraser Committee 1985: 37).

Each municipality, as a consequence of this legislation, is enabled to enact municipal by-laws to indicate exactly and precisely how the municipality intends to regulate specific types of enterprises (Badgley Committee 1984: 1134). Municipalities are able to regulate the manner and conditions of display of pornographic materials in advertising and retail outlets (Badgley Committee 1984: 1084). Common by-laws are those which prohibit access of pornographic materials to children and demand that sexually explicit images be shrouded by an opaque covering. Zoning by-laws dictate where shops catering to certain wants can locate within a municipality. Municipalities are capable of levying licensing fees, although those should not be prohibitive. Often, regulations are employed to effect the nature of businesses conducted within the municipality, their hours and advertising practices.

Clearly worded by-laws that seek to regulate pornography, and not eliminate it, are generally upheld by Canadian courts. By-laws have been struck down by the courts, but this has been due to the fact that the by-law was overly vague or trespassed on the federal power to determine criminal law (Fraser Committee 1985: 217).

Many municipalities across the country have designed by-laws to regulate pornography within their borders, despite the fairly prohibitive potential for challenges as to their legality. Although court can be very expensive (Fraser Committee 1985: 220), municipalities generally do not have to fear this

response, provided that they abide by three general rules regarding municipal by-laws. Municipalities must be aware that they have no greater power than those which are awarded to the provinces. Furthermore, their legislative capabilities must be outlined within provincial enabling legislation under a municipal act, or the by-laws will be considered invalid. Fortunately, the provinces have been quite generous in their delegations of authority to the municipalities (Fraser Committee 1985: 37). Lastly, a municipal by-law must be clearly worded so that an average individual will understand his or her obligations under it (Badgley 1984: 1135). Zoning regulations must likewise adhere to fairly strict rules concerning zoning ordinances. They must concentrate only on the land uses within a municipality.

By-laws and zoning ordinances at the municipal level have a limited impact on the large North American pornography industry. They are able to compensate for the diverse interests and regional variations within Canada, however, and in that sense complement provincial and federal measures addressing sexually explicit imagery. While municipalities do not directly determine or restrict expression, they do have some ability to manipulate it through regulation. The municipal approach reflects the attitudes and dispositions of a community concerning the dissemination of pornographic materials within its jurisdiction, while preventing over zealous individuals from enacting criminal law from within municipal boundaries.

The issues surrounding pornography have changed dramatically over the years. Variations in the social climate have been accompanied by differences in attitudes towards pornography. The feminist viewpoint enhances the pornography debate, providing an alternative perspective to the traditional moralist/civil libertarian dichotomy. Feminists, moralists and civil libertarians have formulated their own definitions of pornography, reflecting their ideologies and concerns. Many of these groups have been particularly critical of the federal obscenity laws and provincial practice of prior restraint. Some individuals have tried to compensate for the inadequacies of the federal and provincial strategies with municipal by-laws, notwithstanding the fact that this reflects a misinterpretation of the municipal role.

In Canada, dissatisfaction with the state of pornography control resides. Community standards are at the heart of the federal, provincial and municipal approaches. The debate concerning the appropriateness of the community standards model is unquestionably most intense at the federal level, however. Individuals representing a variety of perspectives, armed with practical, theoretical and political arguments, are now engaged in challenging the validity of this strategy.

CHAPTER II

THE COMMUNITY STANDARDS DEBATE

A considerable jurisprudence has developed surrounding the community standards concept. It continues to be an integral element of Canadian obscenity law, despite the confusion it engenders. The standard's fluid and dynamic nature translates to ambiguity and obscurity in practice. Film and magazine distributors, the police and even the judiciary have difficulty determining its parameters. Social scientists have had to enter the debate in the capacity of expert witnesses, proffering the results of public opinion survey evidence. Although statistical techniques may offer the best approximation of this elusive concept, the criterion is intrinsically problematic. Judicial criticisms of its legal impracticalities flourish. Other members of the Canadian community thoroughly reject the concept on theoretical grounds, demanding that criminal law be based on a firmer foundation than mere intolerance.

Section 159(8) of the Criminal Code has been interpreted to mean that a finding of obscenity is necessarily precluded by a determination that the undue exploitation of sex is a dominant characteristic of a publication. It will not suffice to prove that the exploitation of sex is the exclusive characteristic, however, it must be undue. Yet, it need not be the main characteristic, for more than one dominant characteristic may be in evidence. Mewett and Manning (1985: 513) state that:

"A dominant characteristic of which is the undue exploitation of sex" has become a test of whether the community at large would consider that the sexual elements of the publication are unnecessary to pursue its artistic or literary purposes but are, on the contrary, so pervasive as to amount to no more than an appeal to the prurient interests. If obscenity must be defined at all, and it must, in terms of changing social mores, this seems to be as good an approach to the difficulty as any.

This view is by no means unanimously accepted in the literature. A brief examination of the history of the concept is useful to an understanding of the confusion and controversy which engulfs it today.

It is interesting that the community standards concept predated our current legislation, and was borne from the New Zealand case of R. v. Close in 1948, in a consideration of 'undue emphasis'. The judge in that case, Fullagar J., had instructed the jury to determine whether exploitation was undue according to community standards.

R. v. Prairie Schooner News Ltd. and Powers (1970) indicated that the test of undueness is determined according to contemporary community standards in Canada. The purpose of the author, and regarding the book as a whole, seem to now be subsumed under a broader heading of 'internal necessities'. According to R. v. MacMillan Company of Canada (1976) 'undue' is to be measured against the 'internal necessities' of the book itself, and the contemporary Canadian community standards.

It was Judson J. in R. v. Brodie, Dansky and Rubin (1962), who quoted from Fullagar J. in R. v. Close (1948), when he

stated that "There does exist in any community at all times-- however the standard may vary from time to time-- a general instructive sense of what is decent and what is indecent, of what is clean and what is dirty" (p. 465). In sum it was proposed that 'community standards' is a fluid, dynamic concept which does in fact exist at any one point in time in Canada (Lutes 1974: 43).

Others have elaborated on the concept. Justice Freedman asserted in R. v. Dominion News and Gifts (1962) Ltd. v. The Queen (1963) at page 117, that these 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 or habit of mind. Something approaching a general average of thinking and feeling has to be discovered." He contended that a large readership does not offer a solution to the obscenity question, although it may be noted (Fox 1974: 200).

As stated in R. v. Goldberg and Reitman (1971), the community standards cannot be those of one community, such as a university community, but must reflect the view of the whole community. Community standards are also considered to be contemporary and local. The observation that Canadian standards are 'contemporary' suggests that as social conditions and influences change, so too may attitudes concerning sexuality and erotic or pornographic materials. The notion that these standards must be 'local' is misleading. By 'local' it was intended that regardless of standards and attitudes in the

United States of America, Canadian standards must be assessed. In sum, 'local' implies a national, Canadian standard. Furthermore, this standard is one of tolerance, not acceptance. Implicit in this statement is the assumption that there is a distinction between what adults are willing to view themselves and what they would permit others to watch, or hear. The issue is what material adults would allow others to view, regardless of whether they themselves have any interest in viewing the material.

The issue of tolerance has been expanded upon. R v. Sudbury News Service Ltd. (1978) specified that if certain publications are available to the general public the standard of tolerance is based upon that. It was accepted that Canadians would tolerate different levels of explicitness, depending on the audience and the circumstances involved. The manner and circumstances of distribution are relevant considerations for tolerance (Greenspan 1985: 143). Price (1979: 316) explains that the operation of obscenity legislation is confined to the public exposure of material where the advertising and other circumstances do not restrict the audience to those adults who choose to be exposed to it. Therefore, the community standards test of undueness does not oscillate depending on the group to which material is exposed, but in accordance with the manner in which the material is shown or disseminated.

The audience to which a film is exposed is not relevant to a consideration of whether the film is obscene, although

consideration should be given to the fact that some films are restricted to adults who choose voluntarily to view them. Judge Dickson, C.J.C., of the Supreme Court of Canada dictated at page 194 in Town Cinema Theatres Ltd. v. The Queen (1985), that "The trial judge also erred in failing to give consideration to the fact that the film was restricted to adults only and only those who chose to see it could be exposed to it." Thus, it appears as if the characteristics of the audience and parameters of the viewing situation are still important considerations when determining the issue of tolerance.

Of course it is the judge who ultimately decides if the material brought before the court offends community standards. In October of 1983, Borins, C.C.J. stated in R. v. Doug Rankine Co. Ltd., and Act III Video Productions Ltd. (1983)

It remains the task of the trier of fact who is assumed to have his finger on the 'pornographic pulse' of the nation, to assess objectively whether or not the contemporary Canadian community will tolerate the destruction of the motion pictures before the Court. There is some irony to this requirement. The judge, who by the very institutional nature of his calling is required to distance himself or herself from society, for the purposes of the test of obscenity is expected to be a person for all seasons familiar with and aware of the national level of tolerance.

The policy whereby the judge alone determines whether or not an offence to community standards has been committed has been severely criticized. As Hunter (1975: 503) stated "Who could be less qualified than judges, uniformly drawn as they are from the same background, education and career to discern it?" In the absence of evidence on the contemporary community standard it

would be extremely difficult for a judge to determine if a community standard, that is national in character, has been breached. Lamont (1972-73: 141) asserted "...it is foolish to assume that a single judge, or even a panel of twelve jurors drawn from one locality, and limited in their range of exposure, could adequately represent that standard". He further criticized Canadian courts for being "under the illusion that judges and juries are so knowledgeable and so well attuned to the ever fluctuating mood of the nation that they can perceive, almost by intuition, what the level of tolerance of the Canadian people is at any given point in time" (Lamont 1972-73: 141).

It would seem naive to operate on the assumption that one person, without the benefit of evidence on Canada's community standards, is able to monitor the attitude of all adult Canadians on that subject, despite that person's intellect, knowledge, ability or degree of exposure. Fox argued that "The test of obscenity as interpreted by Canadian courts, may be little more than, 'Does the publication shock the judge?' If it does, it will be interpreted as being in conflict with community standards" (Fox 1974: 209).

A jury is also limited in its ability to assess an offence against the standards of a nation, but perhaps less so than a judge. Nonetheless, Hunter advocated the use of a jury in obscenity litigations, stating that "moral judgements of a society must ultimately be decided by its citizens" (Hunter 1975: 503). Hunter argued that a jury is more representative

than a judge. Those individuals in a jury are identified as being in closer contact with the norms of a community. Hunter viewed jurors as having a better ability to be 'practical and sensible' in applying the community standards test than a judge (Hunter 1975: 503), and suggested that twelve heads are better than one. Although the jury, like a judge or other individuals, is capable of making wrong decisions, "For sensing and applying the shifting and moral standards of a community, we have no better alternative" (Hunter 1975: 504).

Getz recognized the arguments that a jury is best able to comprehend and apply moral standards, and that the jury reflects the community ethic (Getz 1964-66: 219). He did not support Hunter's propositions, however, and stated the "use of the jury as a technique for ascertaining the permissible level of exploitation of sex is at best unsatisfactory, and at worst highly dangerous" (Getz 1964-66: 221). This statement was based on the observation that the jurors must be capable of applying the standards of a nation, not just the community from which they were extracted. The jury is put in the awkward position of having to make assumptions about what other individuals would feel about a specific piece of work if they were exposed to it (Getz 1964-66: 219). In no other area of the law does the court request that members of the jury, as representatives of the community, apply the conscience of other individuals. The jury is habitually instructed to follow the law and their individual consciences (Robson 1985: 18). Jurors would be better prepared

to apply their own standards to the material. In any event, there is "no basis for assuming that community standards take precedence over personal standards when jurors decide on the degree of objectionability of an erotic presentation" (Herrman & Bordner 1983: 363). The danger exists that jurors might not even inappropriately use their own standards of tolerance, but see their role as one of 'protectors of society' (Getz 1964-66: 220).

Bell (1977), like Getz, does not share Hunter's confidence in the abilities of a jury. Bell asserts that individuals living in larger communities are likely to separate themselves into various subgroups on the basis of income or daily activities. The 'pseudo-communities' that are a result of these subgroups could be very homogeneous, in contrast with the heterogeneity of the larger community. The juror is handicapped by viewing only a segment of the community and "the juror may think his or her pseudo-community is representative, when in fact it is not" (Bell 1977: 1207).

A large readership, or the popularity of a publication could be viewed as one type of indicator that could possibly gauge the tolerance of a community, although there are a limited number of advantages to this notion. Certainly the market would be fairly easy to assess, compared to the complicated prospect of determining the attitudes of a nation. Distributors of 'erotic' films and magazines promote this method of determining an offence to community standards. Some distributors feel their

product and its "sales dictate what current standards are" (Kraite 1984: 23).

In the United States, using the market to help determine tolerance levels has proven to be problematic. Since pornography is so easily available in cities like New York, and so few complaints are received, it is assumed that the community tolerates, as well as supports, the blossoming pornography industry. Prosecutors are unwilling to bring many obscenity cases to trial for fear of difficulty of conviction (Sansfacon 1984: 26).

Use of the market as an indicator of the level of community tolerance is perhaps the worst alternative available to the judiciary. When evidence of the availability of pornographic materials on the market is employed to designate tolerance, the test becomes circuitous (Noonan 1985: 320). The 'market place' analysis is unworkable because the vast majority of Canadian pornography is imported and much violent pornography is smuggled over the border. American distributors could flood the Canadian market with increasingly more violent and degrading pornography, washing away new boundaries of tolerance.

Furthermore, the great majority of the consumers of pornographic materials are males (Fraser Committee 1983: 12). Application of the market analysis to determine tolerance to this material would be negligent since less than half the national population would be represented. The courts would

ultimately be catering to those individuals who desire this material, not finding an average of Canadian thinking. Mahoney (1984: 67) argues that most of those individuals associated with the manufacture, but also control, of pornography are male, including the police, expert witnesses, prosecutors and judges. Therefore, judicial acceptance of the 'market place analysis' in an ascertainment of community standards of tolerance entails:

imposing the standard of the man in the Clapham omnibus, but not that of the woman sitting beside him. Women are forced to accept a standard that does not consider their views, but victimizes and exploits them instead.

In any event, Canadian courts are not willing to recognize the market as an adequate measure (Boyd 1984: 26). The information can be considered, but it is not decisive.

Given the problems associated with each of the above alternatives as a means to gauge contemporary community standards, various individuals have suggested that expert testimony based on public opinion surveys might offer a desirable and viable alternative.

Tapping the Pornographic Pulse: Public Opinion Surveys and Expert Evidence

There have been a number of attempts to determine existing community standards. The courts have suggested that the notion of community standards is a phenomenon that is amenable to empirical testing, and that public opinion research surveys are the most appropriate way to assess this phenomenon. Public

opinion surveys are increasingly being accepted in Canadian courts as evidence of Canada's community standards of tolerance (Coons and McFarland 1985: 30).

Fox (1974: 222) discusses three cases in Canada where expert evidence concerning the results of public opinion surveys had been introduced. These surveys were directed at the issue of the community's level of tolerance to sexually explicit material. Until this time it was the judge's opinion which decided the issue of obscenity. Mr. Justice Jessup clearly indicated that survey evidence is not admissible per se, but only when it forms the basis for expert opinion testimony (Fox 1972: 321). The expert's role is not limited to providing evidence on the validity of a survey, however. It is often necessary for the interpretation of the results of the survey as well (Fox 1972: 325). The professional witness testifies concerning a particular application of his skill and knowledge (Sorensen and Sorensen 1953: 1221). Expert opinion evidence can be introduced in defence of the public good for s.159(8). One of the ways it can be used is to illustrate the state of community standards. It can also be introduced to prove the author's purpose, and literary, artistic or scientific merit of the material under scrutiny (Fox 1974: 221). The Canadian approach is to allow the tribunal of fact to hear expert evidence. This approach acknowledges that community standards can be tested empirically, and some scientifically obtained evidence is preferable to other methods that have been used in the past, such as relying on

judicial notice or ordinary experience.

There are some basic rules which govern the admissibility of expert evidence in Canadian courts. It is acknowledged that in some instances jurors and judges may require some expert assistance in specific matters. Judges and jurors are not always properly prepared to draw inferences from the facts as stated by witnesses. For this a legal expert is necessary. An opinion is considered to be "any inference from observed facts" (McCalla 1981: 74). Witnesses can only comment on that which they themselves have observed. The judge or jury has the opportunity to draw inferences. The basic rule concerning the opinion evidence of experts is "A witness may not give his opinion on matters which the court considers call for the special skill or knowledge of an expert unless he is an expert on such matters, and he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner, equally conducive to the ascertainment of the truth" (McCalla 1981: 74). In other words, if special skill or knowledge is necessary, a legal expert may be called. There are no specific rules as to what qualifications an individual must possess to be considered an 'expert witness'. The judge must decide if the individual is qualified through some special course of study or some special experience. One need not be a professional in the area. An expert is qualified as such if he or she has "firsthand knowledge of the situation or transaction at issue" (McCalla 1981: 75). This knowledge gives him or her

the ability to draw inferences that a jury would not be able to draw competently from the facts.

Courts have, in the past, been rather lenient in admitting individuals into the expert witness category (McCalla 1981: 76). The court listens to evidence for and against the qualifications of an individual as an expert witness, and proceeds with a cross-examination. If the members of the court wish to object to the expert evidence, it must be done directly after the person has listed qualifications and before the evidence is heard by the court (McCalla 1981: 78).

Historically, expert evidence was employed when it was determined that a correct decision could not be made without the help of individuals who had special capabilities and experience in certain areas (McCalla 1981: 78). The criteria for when expert evidence is necessary are now quite specific. Expert evidence is deemed necessary on issues necessitating specialized skill or knowledge. The two issues which arise in this sphere are whether the subject matter in focus demands some expertise, and whether the individual is qualified to be an expert (McCalla 1981: 74). It is the rule that the evidence must be associated with some business, occupation, science or profession so as to be beyond the scope of the ordinary individual. The expert witness must possess enough ability that his inferences benefit the court in its quest for truth. Basically, if the court feels it is in need of assistance in some area the expert witness's testimony will be allowed. It is considered appropriate for an

opinion research expert to present the results of a survey, notwithstanding that he or she may not be an expert in the subject area that the survey addresses (Sorensen and Sorensen 1953: 1227; McCalla 1981: 75).

The proper method for accepting expert evidence is still not clear. As a result many judges are uneasy about accepting this important evidence (Fox 1972: 315). Two of the greatest barriers are the ultimate issue doctrine and the hearsay rule (Fox 1972: 315). The ultimate issue doctrine states that evidence should not be accepted when it concerns the issue that judges and juries are supposed to decide (McCalla 1981: 82). McCormick asserts that the courts have begun to reject this barrier to admissibility, although it still stands regarding opinion as a matter of law. Ontario courts in particular have demonstrated a willingness to overlook the ultimate issue doctrine. It is felt that regardless of whether the expert witness evidence addresses the exact issue the courts are to decide, that evidence is a valuable and valid part of the proceedings (McCalla 1981: 84). There is "no rule that opinion evidence touching on the very issue the court has to decide is not permitted" (Fox 1972: 326).

Perhaps the more problematic, yet not insurmountable barrier to the use of expert witnesses' testimony based on public opinion research surveys is the hearsay rule. All surveys must technically be considered hearsay since they are presented to prove the truth of an aggregate of responses from individuals who are not present for questioning at the trial (Lamont

1972-73: 146). The legal argument of hearsay proves especially challenging in the case of certain methodological problems, as when respondents are asked to indicate not only their viewing or reading habits, but also those of their families. A statement is recognized as hearsay if opinion research evidence is presented to prove the truth of the statements contained "in the unverified statements or opinions of persons not called as witnesses" (Sorensen and Sorensen 1953: 1231). The expert witness is presenting the opinions of people who are not present and are therefore not subject to oath or the test of cross-examination (Fox 1972: 322).

There are two situations under which survey evidence can be admitted and not considered to be hearsay. The first is the situation where the evidence is given as proof that opinions do exist, but not to prove the validity of those statements. In the second situation a number of conditions must be met. First it must be demonstrated that survey evidence is the best alternative to present public or mass opinion. An example of other alternatives would be to allow innumerable witnesses to come before the court to state their views on community standards. This is obviously not a viable or possible alternative, and would succeed only in lending to the court the atmosphere of a circus. Second, the opinions that are offered must present the state of mind of the public, and cannot be a result of shock or some temporary effect of an unusual event or circumstance. Last, and perhaps most important, the evidence

must be obtained by research scientifically conducted with sampling procedures which produce an accurate representation of the community (Lamont 1972-73: 149). It is possible with the use of expert witnesses to determine at the time of trial whether the last condition has been met.

One can accept that the first situation is not hearsay at all. The second situation has come to be known as the 'state of mind' exemption to the hearsay rule. It has been asserted that the state of mind of a community can be assessed precisely in the same manner as the state of one's health (Fox 1972: 319). This principle allows that as a psychiatric doctor can indicate the mental condition of a person, so too can an expert in another area testify to the state of mind of a community.

Jessup J. stated in R. v. Times Square Cinema Ltd. (1971) that "no question of inadmissible hearsay arises because the survey or poll is not offered to prove the truth of the statements it contains, but merely to show the foundation of the expert on community standards" (Lutes 1974: 44). This line of reasoning neatly sidesteps the hearsay argument, but unfortunately poses other disadvantages. In the case where it is desired to enter a survey concerned with facts, the 'state of mind' exemption is not useful. It has been posited that this line of reasoning may allow the courts to "overlook technical pitfalls which are more likely to occur in state-of-mind surveys than in other types of surveys" (Stern 1969: 333). This criticism does not pose any real threat since a review of the

cases that have accepted these types of surveys demonstrates very stringent, perhaps harsh, criteria for survey evidence.

The theory behind surveys is that through the examination of a representative part of a population one can gain knowledge about the whole (Fox 1974: 222). Opinion can be defined as "a tendency to believe certain things about a given person, object or event as well as the response to stimuli (questions) in terms of the particular belief" (Sorensen and Sorensen 1953: 1215). Opinion research surveys glean knowledge about subjective facts. These subjective facts are a result of their holders' opinions and personal experiences and backgrounds.

There are four general types of surveys. They are population and sampling surveys involving verbal statements, and population surveys and sampling surveys not involving verbal statements. The type of survey of concern to public opinion researchers is the sampling survey involving verbal statements, and unfortunately it is this type which suffers the most substantially from legal difficulties (Zeisel 1960: 323).

Scientific advances and the use of computers in the area of public opinion research and statistical analysis have made this approach very useful to the courts. In recent times there have been advances in survey techniques as well as in interpretive skills necessary to understand the results (Lamont 1972-73: 143; Lutes 1974: 45). Whether or not public opinion polling is actually a science has been questioned. More important questions

seem to be whether proper statistical, social research and interview techniques were employed in the research (Fox 1972: 321). Survey evidence was introduced through the Manitoba and Ontario Courts of Appeal in both R. v. Prairie Schooner News Ltd. and Powers (1970) and R. v. Times Square Cinema Ltd. (1971). This indicates a willingness by these courts to accept properly introduced survey evidence (Fox 1972: 315). The Manitoba Court of Appeal has rejected evidence on the grounds that it did not have an adequate sample (Fox 1972: 318). It is imperative that the sample reflect the 'proper segment of the population' whose characteristics are to be studied (Fox 1979: 319).

Sample surveys are an attempt to measure the whole by focusing on one part, which is to be representative of the whole. Many methods are available for choosing this sample. Two general categories of sampling methods can be identified. The first is non-probability sampling, where the probability of a person being chosen is not known. This approach is of limited value to a public opinion researcher. The investigator cannot generalize his or her findings beyond the sample studied or claim that the sample is representative of the larger population. The sampling error cannot be estimated either (Bailey 1978: 97).

The second type of sampling is known as 'probability' sampling. These methods yield samples which are useful because the probability of each respondent being chosen is known. Random

sampling is the most common form of probability sample (Bailey 1978: 91). Random samples are involved when each person in the population has an equal chance of being chosen for participation in the survey.

The ideal survey design would be a random probability sample of all Canadians, with concentrated efforts in the larger communities from each different major regional area (Wallace 1973: 54). This would allow the researchers to detect any possible differences between regions, between communities, or between communities within a given region (Wallace 1973: 55). A design of this nature is not always practical or feasible because of time considerations and financial constraints.

Experts can determine whether distortion of a survey's findings exists due to an improper sample selection. They are also knowledgeable enough to determine the effect of a survey's sampling error and how much of a distortion results (Fox 1972: 324). Buffer questions and lie scales are available to the researcher to be used in assessing and balancing the effects of distortions due to unintentional or purposeful incorrect responses. The surveyor can respond to questions during trial to justify the construct validity of his survey and prove that his instruments do in fact measure what is intended and not some other phenomenon (Fox 1972: 325). Both the results and the design and methodology aspects of the survey can be scrutinized to satisfy the requirements of reliability and probability (Sorensen and Sorensen 1953: 1227). Proof of randomness is

easily established through the application of well known tests (Sorensen and Sorensen 1953: 1247). Scientific principles exist which can be presented to determine if the research was conducted, evaluated and reported appropriately (Sorensen and Sorensen 1953: 1221).

There are some problems that accompany the use of any survey evidence presented by an expert witness. Judges can use their own verdict to decide if the survey has no probative value due to bias or lack of representativeness. He or she can choose to totally disregard the evidence if either is the case. It is not necessary to throw out survey evidence altogether if problems are identified. If defects are recognized they affect the weight of the opinion of the expert because they are presumably what the opinion is based on. One must always have a certain degree of uncertainty with the use of samples. The degree of uncertainty can be reduced to a very minimal amount. Rarely in law do judges demand perfection. This is reflected in the concept of 'beyond a reasonable doubt' (Stern 1969: 330). Census operations are considered acceptable as evidence, regardless of the fact that they too are based on sampling techniques. The Canadian population is one of great heterogeneity. Adequate sample measurements are still possible with the use of a larger sample (Stern 1969: 330).

Small samples can be adequate, but the range of error will change with the size of the sample. Freedman J.A. has acknowledged that a very large sample might prove so expensive

that only very few could afford it. He emphasized that the sampling size may affect the weight, but not the admissibility of the evidence (Lamont 1972-73: 150).

It is the expert's task to enlighten the court on the shortcomings of the surveys presented as evidence. If the survey is directed at the wrong universe or an inadequate sample is used it is the expert's responsibility to identify these inherent problems. He or she can also comment on the manner in which respondents were chosen and the effect of non-response. The expert can direct the court's attention to difficulties encountered in the interview situation and possible factors which could have influenced the results (Stern 1969: 342).

The presentation of survey evidence is preferable to bringing a number of laypersons before the court to testify to their own personal standards of tolerance. A multitude of witnesses would be required to adequately represent the community. Surveys more accurately measure community standards at the time of the alleged offence. Often there is a long delay before a case comes to court, and the opinions or attitudes of witnesses could change. Questionnaires can be distributed soon after the time charges are laid. The recorded responses of the survey respondents will not change, regardless of the respondents' changes in attitude over time. Respondents can also afford to be more candid in their responses than witnesses before the court, since they can be assured of anonymity or confidentiality.

The production of surveys can be extremely expensive and time consuming. The expense alone may prove prohibitive to many individuals. It has been suggested that the court should appoint or hire researchers for the express purpose of designing and conducting opinion research surveys on the issue of community standards. These referees could be retained as consultants for the court (Sorensen and Sorensen 1953: 1231). Surveys conducted by other individuals should still be considered acceptable. The organizations whose business it is to conduct opinion research are reputable and suitably impartial.

The courts should specify the standards for sampling size and sampling error that they feel are acceptable (Stern 1969: 331). All survey staff should be available at the trial for questioning on how the survey was conducted, and all survey materials should be available as evidence, including the sampling plans, questionnaires and other survey instruments (Stern 1969: 345). An expert witness should present the survey evidence, and if the survey is conducted during a litigation the defence and prosecution should both be allowed to monitor the development and execution of the survey. The identities of the individuals who gave certain answers should be protected to ensure that the questionnaires are answered truthfully with the guarantee of confidentiality (Stern 1969: 338).

The fact that evidence is admitted and accepted by the court does not guarantee that it will affect the decision. The judge may consider the evidence, but the final decision rests with the

court and the judge's decision. In R. v. Great West News Ltd., Mantell and Mitchel (1970) evidence used to describe community standards of tolerance was judged to be admissible, but it was stated that this was not the sine qua non of conviction (Fox 1974: 221). In R. v. Prairie Schooner News Ltd. and Powers (1970) Dickson J.A. stated that it is the function of the judge to consider expert evidence and then, if he feels for any reason that it does not aid in a finding, he can dismiss it completely (McCalla 1981: 81). Lawton J.A. stated that on many issues concerning normal human nature and behaviour judges and jurors are as capable as any 'expert' (McCalla 1981: 82). In the case of R. v. Pipeline News (1971), Legg, D.C.J. held that evidence submitted by the defence could be admitted, because it was based upon surveys which met the strict requirements demanded by the court. He subsequently attached no weight to them, however, because the prosecution's expert witness suggested that a suitable statistical methodology and research design were not employed. The judge chose, instead, to apply his own subjective standard. This had the same practical effect of holding the evidence inadmissible (Lamont 1972-73: 159).

Coons and McFarland (1985: 35-36) reviewed the shortcomings of the research presented in these cases and stated "The courts quite properly challenged the methods used in obtaining the data and the qualifications of the witnesses proffering them. Social scientists, if they are to make a contribution in this area, must pay closer attention to the quality of the evidence they

propose to tender, and do a better job of persuading the courts of the value that properly conducted scientific research can have in the decision-making task."

In R. v. Pipeline News (1971) it was decided that the "judge must in the final analysis, endeavor to apply what he, in the light of his experience, regards as contemporary standards of the Canadian Community" (Fox 1974: 222). The legal climate may be changing however. Chief Justice Brian Dickson stated that the trial judge had erred in R. v. Towne Cinema Theatres Ltd. (1980) in applying his own subjective standard. It was suggested that expert opinion was available from the provincial censorship boards, and that those individuals associated with the boards offered valuable advice on the issue of Canadian tolerance. Although the judge has the option of rejecting any testimony, he or she must have good reason for doing so. Dickson stated in Towne Cinema Theatres Ltd. v. The Queen (1985) at page 211 "this inquiry, though involving judgments about values, must be distinguished from the application of the trier of fact's subjective opinion about the tastelessness or impropriety of certain publications." It appears that the courts are more willing to entertain expert evidence than they have been previously. Dickson's statement demonstrates that they are not inclined to rely on the personal tastes and opinions of the judiciary.

In Quest of Consensus: Researching Community Standards

The courts have declared that we cannot look to the United States to define current Canadian standards of community tolerance. This means our Canadian researchers cannot follow American findings in a determination of Canadian community standards of tolerance. Nonetheless, it is still a useful exercise to examine American attempts at determining community standards in the U.S., since many of the difficulties encountered by American researchers are shared by their Canadian colleagues.

In one early effort, Wallace (1973) conducted a survey of 1,083 adult volunteers from the Detroit Metropolitan Area. Using photographic stimuli, he discovered that no single standard was used to determine offensiveness. Respondents were subdivided into four groups: the church group, the social service group, the professional group and the student group. Wallace's findings supported the contention that in a community one could not identify a common attitudinal position with respect to erotic materials. If this was the case, Wallace predicted, he would have obtained greater between category agreement for his attitude items (Wallace 1973: 60).

Wallace suggested that although a certain number of individuals may label a particular portrayal offensive or sexually arousing, it is a different investigation altogether to find the degree of arousal or offensiveness of an image (Wallace

1973: 61). Wallace stated that "any sample which is heterogeneous with respect to age, education, religion, religiosity, sex, and sexual attitudes is unlikely to respond to erotic stimuli with any unanimity" (Wallace 1973: 65). A mean score could be statistically generated, but it would be meaningless, given the between group differences in attitude and rating of erotic stimuli. While theoretically one could create a group of people who could arrive at a consensus in their evaluation of visual erotica, or the dimensions relevant to the legal concept of obscenity "the probability that such a consensus will be obtained will decrease in a non-linear manner as the size of the group increases linearly" (Wallace 1973: 66). Therefore, it appears as if the group size is positively correlated with the degree of heterogeneity existing in a community. The greater the heterogeneity, the lower the likelihood of obtaining one community standard.

Brown, Anderson, Burggraf and Thompson (1978) used a sample of 114 Americans who resided in a town in Idaho with a population of approximately 43,000 people. They discovered that various individuals used differing standards for what they believed to be pornographic. Scores on a conservatism scale were found to be the best predictor of judgements on pornography (Brown et al. 1978: 94). Brown and his associates also found that church attendance, an increase in age, and negative attitudes towards sex and sexual materials were associated with a higher conservatism score, and more negative attitudes toward

pornography (Brown et al. 1978: 92-93). This is in accordance with recent Canadian findings which suggested that variability in age, education, geographical location, social sexual attitudes and awareness are associated with variability in judgements of acceptability of pornography (Peat and Marwick 1984:17). Glassman (1978) discussed studies by Massey (1970) and Wallace, Wehmer and Podany (1970), and suggested that, when taken together, these studies indicate that community standards "follow a gradient of perceived sexual deviance" (Glassman 1978: 163). Although not inconsistent with the Brown et al. (1978) findings, Glassman suggested that because of problems with the sampling technique (nonrandom samples) the validity of both these studies he has referred to is unknown.

In his own research, Glassman had difficulty determining a community standard. The method he employed to determine the community standard was simply to use majority opinion in each community type, or the median or fiftieth percentile. In doing so, he discovered that the community standard was largely a function of the level of urbanization of the community (Glassman 1978: 167). Adults in urban areas were found to have the least restrictive attitudes towards sexual materials. Glassman offered Stouffer's (1955) explanation that this may have been due in large part to the diversity of social life that inhabitants of cities enjoy (Glassman 1978: 167). Glassman found that suburbs were more restrictive than urban areas, yet less restrictive than the rural community. This community type was identified as

the least liberal type.

Given the restrictions the courts have placed on the use of survey evidence in obscenity litigations, researchers must use a sample representative of the universe, which in this instance is the Canadian population. Two rather extensive surveys have been completed recently, one with the express purpose of determining a community standard of tolerance for Canada.

Check, Heapy and Iwanyshyn (1985) designed a survey in an attempt to determine the Canadian national contemporary community standards. In addition to showing sensitivity to the legal differentiation between standards of tolerance and acceptance, the researchers paid particular attention to both non-violent and violent pornography, in keeping with recent theory and research emphasizing this dichotomy. An innovative strategy was employed, whereby the survey was embedded within a CBC diary on television viewing habits that was distributed after telephone contact was made, employing the random digit dialing procedure. Of the 2,104 respondents who agreed to complete diaries, 1,079 (or 51.2%) were returned. This study revealed a 30% difference between levels of tolerance and acceptance of violent and degrading sex in the media. Ninety percent of the sample found violent and degrading sex to be unacceptable for their personal viewing, yet only sixty percent wanted it completely banned. A similar differential was observed concerning levels of tolerance and acceptance for consenting, nonviolent sex (Check et al. 1985: 9). Over half of the

respondents did not find consenting sex acceptable, yet three-quarters of the sample were willing to tolerate viewing by other individuals. Levels of tolerance and acceptance were, therefore, higher for consenting than for nonconsenting depictions. The authors concluded that Canadians appear willing to accept consenting sexual activity in the media, but not sexual violence and degradation.

Indeed, definitional difficulties would seem to hamper interpretation of the results considerably. The respondents' answers to how often they watched sexually explicit programmes on television reflects an apparent lack of consensus regarding what is considered 'sexually explicit'. Six per cent of the respondents reported that they watched sexually explicit scenes on television several times a week, 9% viewed these programmes several times a month, and 15% report watching them once a month or so. This would seem to indicate a definitional problem with 'sexually explicit' because it is doubtful that any individuals viewed sexually explicit material on Canadian television.

Check and his associates concluded that they had found evidence for a community standard of tolerance. Sixty per cent of their sample wanted violent and degrading material banned completely. In contrast, only a quarter of the population would ban consenting explicit portrayals of sexual activity that involved no degradation or abuse of men and women (Check et al. 1985: 9).

A second Canadian study in the community standards realm was completed in 1984 by Peat Marwick and Partners for the Special Committee on Pornography and Prostitution. These researchers used a sample of 2,018 men and women aged eighteen and over, utilizing scientific probability techniques "allowing unbiased inferences to be drawn from Canada as a whole and for various domains within Canada" (Peat Marwick 1984: 1.3). This was accomplished through stratification by geographic region and community size, selection of interviewing locations, selection of census tracks and selection of blocks. The researchers were interested in the five issues areas of public concepts, use, exposure, legal knowledge and policy options concerning pornography. In contrast to Check et al. (1985), no negligible difference was found between people's levels of acceptance and their levels of tolerance (Peat Marwick 1984: 10).

Peat Marwick discovered that the portrayal of sex combined with violence was the least acceptable. Homosexual intercourse was considered the next most objectionable (Peat Marwick 1984: 10). Equal numbers of people accept pornography as do not accept pornography. Acceptability was found to be little influenced by the media type, whether it be television, magazines or films. The type of scene and the audience who was exposed to it were factors that had the greatest influence on judgements of acceptability. Peat and Marwick did not define 'pornography'. The rationale behind this was that standards of acceptability or offensiveness were inextricably entwined in what is defined as

pornographic. Terms such as 'adult entertainment magazines' and 'adult-only video cassettes' were used to denote sexual materials or pornography (Peat Marwick 1984: III.1). This poses major interpretive problems, since 'adult' material could have implied a wide range of materials.

In sum, surveys that have been done in recent years in the hopes of obtaining a clear notion of community standards have posed more questions than they have answered. It appears as if one of the major difficulties of interpretation concerns the lack of consensus as to the criterion that is to be applied. Would a 51% majority intolerant of certain portrayals suffice to have the material subject to criminal conviction? Herrman and Bordner (1983: 356) claimed that the collective agreement implied by consensus suggests more than a simple majority and utilized the 'convention' of a two-thirds majority. Bell (1977) argued that the finding of a 50% agreement and a 50% disagreement illustrates a perfect dissensus of opinion. He stated that an agreement rate of over 75% is necessary to demonstrate the existence of a consensus on any issue.

Another inconsistency among the research results prevails. Some researchers are willing to accept results identifying certain levels of tolerance, yet other social scientists insist that one must look beyond the responses given to the psychological processes involved. These individuals feel that the same reasons or criteria must be used to decide the issue of tolerance before a community standard can be stated. This

conflict in approaches must be resolved if we are to have any consensus over the community standards issue.

The judiciary recognizes social scientific problems with the concept. They, too, are dissatisfied with the community standard of intolerance and have begun to voice their legal objections to its continued implementation.

Dissent from Within: Judicial Discontent

Noonan (1985: 320) contends that growing judicial disenchantment exists with regards to the community standards test of tolerance. The judiciary does not have an unanimous opinion on the most appropriate method of deciding whether the standard of 'undue' sexual exploitation has been breached.

Borins, Co. Ct. J. stated in R. v. Nicols (1984) at 57:

with due respect to those who have considered the subject in the past... the time may have come when the appellate courts may wish to reconsider the interpretation of s.159(8)... It is, in my view, significant that in interpreting "undue" the courts have stepped away from the plain meaning test of statutory interpretation.

Borins, J. elucidated upon his position that it is incorrect to adopt the community standards test. He suggested that he was unable to ascertain what the standard is or how to discover it. The judge stated that he would rather adopt the plain meaning of the word, yet he felt the community standards test was so deeply ingrained in Canadian precedent that it would be necessary for Parliament or the Supreme Court of Canada to change it. Other

judges have not considered these measures to be necessary.

Millard, Co. Ct. J. in R. v. Pereira-Vasquez (Martinez)
(Venegas) (1985) delineated:

where there is no difficult issue such as the balancing of artistic integrity with the concept of undueness of exploitation, it is unnecessary to deviate from the plain meaning of the words.

He considered the ordinary meaning of undueness to be 'going beyond what is appropriate, warranted or natural' or 'excessive'.

New Brunswick's Harper, P.C.J. made even greater motions towards abandoning the community standards test of tolerance. He introduced his view in R. v. Neil's Ventures Ltd. (1985), and further developed and expanded on his position in R. v. Lynnco Sound Ltd. (1985). Harper, J. steadfastly refused to accept the community standards of tolerance interpretation of s.159(8), stating in R. v. Neil's Ventures Ltd. (1985) at 57:

There is absolutely no statutory foundation for the "community standards" rule and this arose purely as "judge-made" law.

With all due respect, trial and appellate courts should perhaps reorient their thinking and in the future abide by the clear wording of the statute.

Any publication... which is entirely concerned with the undue exploitation of sex should be ruled per se obscene.

In R. v. Lynnco Sound Ltd. the same judge explained that when the test was initially outlined by Judson, J. in R. v. Brodie (1962) it was neither adopted or endorsed by the Supreme

Court of Canada. Brodie's judgement was only one of the nine judgements which culminated in a 5-4 decision. The test remains without solid foundation based upon binding precedent. Therefore, the New Brunswick Provincial Court held that the 'accepted standards of tolerance in the contemporary community' should not exist as a test to determine obscenity.

Judicial criticisms of the community standards test revolve around legal issues, such as the fact that the test is not supported by precedent, but also rely on more pragmatic ones. The test has been regarded as completely impractical and impossible to objectively apply. Judges argue that exercise of the test results in the removal of the judicial function of the courts and completely disregards the plain and unambiguous wording of the statute.

Notwithstanding these reproofs, it is unlikely that Harper, J.'s notions will be widely adopted, given the jurisprudence in this area. General, practical and ideological criticisms have been directed at the community standards concept from other segments of the Canadian community, however. Perhaps the combined weight of these criticisms will be effective in limiting the perpetuation of this legal strategy.

Inherent Limitations: Challenging the Community Standards Concept

The community standards concept has been criticized on a number of grounds. Many of the criticisms can be levelled at our present obscenity legislation in general, but some are specific to the notion of community standards.

If we are willing to recognize the use of the community standards test, potential distributors and producers of pornographic material must have the results of community standards surveys available to them. It is not fair to assume that they should be able to distinguish the obscene from the tolerable. The present situation is inadequate, where no consistent guidelines are available under which to operate. The authorities do not work together on the issue of obscenity. Knowledge that censor boards or customs officials have approved sexual materials offers no guarantee that the holder of that material will not be subject to raids and charges by the local police department (Kaite 1984: 20). Although our obscenity laws are federal and apply to all of Canada the laws enforced across the provinces are not uniform (Barnett 1969: 27). The community standard concept is subject to considerable regional variation. The policies of the local police departments and the crown attorneys' offices are the best predictors of whether charges will be laid. This poses real problems for distributors, who are undecided over what can be distributed in Quebec as opposed to

Ontario, for example, the latter of which has notoriously stricter enforcement practices (Barnett 1969: 27).

Alternatively, Verdun-Jones (1984) suggested that the community's dissensus of opinion over the proper role that criminal law should assume in regards to obscenity is responsible for the court's difficulty with the application of community standards.

A contrasting but more plausible explanation for the confusion that surrounds obscenity legislation has been presented. It can be argued that the main problem with the community standards concept is that we are not trying to determine standards of decency at all. The meaning of obscenity cannot be determined from the s.159(8) formula (Barnett 1969: 27). The real use of the obscenity legislation is the protection of the community from the harmful effects of pornography. But because of the tremendous difficulty that has been encountered in attempts to prove or disprove the harmful effects of pornography, we must rely on other justifications, such as preventing an offence to public decency. Barnett (1969) and Price (1979) have both proposed that the actual issue of community standards is the tendency of the material to deprave and corrupt. The courts cannot clarify the issue of community standards because the material's effect is of ultimate concern (Price 1979: 324).

Hunter states that the s.159(8) definition of obscenity and its interpretation avoids and does not directly address a more important area of concern, which is not obscenity but pornography (Hunter 1975: 488). Hunter distinguishes pornography from obscenity by identifying pornography as that material whose subject matter portrays other than consenting noncoercive sexuality between adults. Obscenity, he asserts, concerns sexual activity between consenting adults, regardless of the level of explicitness (Hunter 1975: 482).

The community standards test could theoretically be considered a flexible enough instrument to accommodate Hunter's definition of pornography, given recent judicial acceptance of feminist philosophies. Yet, King (1985: 1) submits that there are serious problems with even the most 'feminist' of decisions. She contends that these difficulties will recur as long as material must be judged within the parameters of present obscenity laws.

In other areas of the law, legal sanctions have been used to influence public sentiment, not merely reflect it. There is some support for the notion that community standards may not be the most appropriate test for obscenity, because this is one area where the law could be used to 'morally educate' rather than just reflect the morals of a nation. This has been the case with laws concerning areas such as racial discrimination (Glassman 1978: 168), and most recently sexual discrimination (Dworkin 1985: 20). The prejudices which exist in our society should not

be reinforced by the criminal law. Pornography is regarded by many as supporting a misogynist ideology. The purpose of the law, it is proposed, should be to help eliminate, not legitimize, that prejudice against women.

Community standards are recognized to be fluid and contemporary. The argument has been raised that an increase in hard-core material in our society could be accompanied by individuals being able to tolerate greater deviance over time, as a function of exposure. The distinction between hard- and soft-core material is not well defined, yet 'hard-core material' generally involves implied sexual activity with a focus on the genitals, while 'soft-core' material is usually less explicit (Gray 1982: 388). The Ontario Area Caucus of Women have voiced the concern that if hard-core sexually violent or sado-masochistic depictions became more commonly portrayed, the community standard of tolerance would increasingly accept them (Boyd 1984: 33). Sometimes called 'creeping gradualism', this phenomenon has been recognized and used by some publishers. More extreme materials are presented because, by comparison, the publishers' usual wares seem less worthy of the criminal sanction. In this way the boundaries of the community standards test are stretched more widely over time (Fraser Committee 1985: 269).

Alternatively, community standards have been accused of being merely another arm of the social control mechanism to preserve the status quo. It is a means by which the 'moral

majority' protects traditional depictions of sexuality. Lawrence submits that there is a tendency for censorship laws to attack the work of serious artists who do not express ideal models (Robertson 1979: 20).

A reflection of the contemporary values of a people is undoubtedly an important consideration when dealing with such a dynamic issue. One must question the appropriateness of such a concept, however, when it is revealed that scenes of homosexual activity are rated as highly unacceptable by Canadians, second only to scenes of sex combined with violence (Peat Marwick 1984: III.5). The community standards interpretation can be viewed as a manner of preserving current sexual mores and norms by preventing the dissemination of materials promoting or describing non-conformist sexual behaviour, notwithstanding any theoretical harm (Fox 1972: 193; McCormack 1983: 221).

Willis claims the purpose behind (obscenity laws) has been to reinforce cultural taboos on sexuality and suppress feminism, homosexuality, and other forms of sexual dissidence (1981: 226). Hannon (1979: 7) agrees, stating "Obscenity laws are laws without content. (Like vagrancy laws,) they exist to be used for political purposes only, to harass unpopular groups and censor divergent opinion."

reference!

Feminists contend that the community standards concept is a sexist and discriminatory instrument in terms of gender and class (McCormack 1985: 278). The standard is determined by male

judges, and is typically based upon the experience of other men. It is not consistent with feminist notions of morality and social harm (Mahoney 1984: 65).

McCormack suggests judicial recognition of the distinction between hard-core and soft-core pornography represents a class distinction and provides one law for the rich and one for the poor. McCormack (1983: 221) contends:

Hard-core pornography is pornography that the critics have declared is without artistic merit; it is pornography of the inner city, of the slum and of the deviant subcultures.

An elitest approach is problematic, yet an average of uninformed attitudes may have a limited utility as an indicator of community standards of tolerance (Shannon, J. 1985: 333). McCormack questions whether the community standard criterion can be used "to counteract the tendency toward elitism and discrimination without acquiescing to the Philistine majority" (1983: 221).

It has been suggested that the use of community standards cannot be condoned. It is "not a proper function of criminal law to suppress attacks on existing morality, when there is no positive utilitarian justification for doing so" (Fox 1972: 193).

At the heart of the controversy concerning the appropriateness of the community standards concept is the question of whether community intolerance provides a legitimate basis for criminal control (Boyd 1986: 277). The concept has

been accused of lacking a principled foundation. The reasons behind peoples' decisions on the tolerance issue are not communicated. Therefore, it is difficult to determine if these decisions are valid (Fraser Committee 1985: 269). It is proposed that "decisions in respect to criminal charges should be made on the basis of clearly articulated principles and not on the basis of majoritarian impulses" (Fraser Committee 1985: 269). Consequently, serious challenges to the community standards concept in the form of legislative alternatives are being proposed. These approaches are deeply rooted in and reflect specific ideologies and philosophies.

It remains true that in contemporary Canadian law, the single most important variable in the Supreme Court's interpretation of our present obscenity legislation is the community standards test. Community standards are stated to be contemporary national standards of tolerance. They are empirically testable, and although fluid in nature, can be measured at any one point in time. The results of public opinion research surveys cannot be considered completely accurate with zero probability of error, but, done properly, they are the most comprehensive and representative method available to the courts at this time for determining an average of Canadian thinking. If the law of obscenity could be modified, it would prove beneficial if the laws for accepting evidence were made less restrictive.

The legal definitions should be analyzed and perhaps reformulated to allow for a more systematic assessment of community standards. Judges should be advised that by making the requirements for survey evidence too stringent they are effectively preventing the courts from receiving the benefits of scientific techniques. Social scientists can be very useful in obscenity litigations in the capacity of expert witnesses. There is a great need for more research to be completed determining community standards of tolerance to obscenity. Social scientists should make every effort to improve upon the quality of evidence that has been introduced, and familiarize themselves with the standards the courts have adhered to concerning survey evidence. Guidelines for the design and production of public opinion surveys concerning community standards of tolerance should be created and presented to help eliminate the confusion in this area.

Yet cosmetic modifications dedicated to enhancing the accuracy of assessment of community standards will not redress the inherent limitations in the test. Fundamental changes must be instigated. Legislation concerning sexually explicit materials must address contemporary concerns and isolate the problematic aspects of pornography. The standard of intolerance as a basis for criminal law is intrinsically problematic, and yet the abolition of it would do little to improve the vague and subjective nature of s.159(8). Criticisms of the community standards concept and our present obscenity legislation are

shared by many individuals with diverse interests. A major overhaul of the existing legislation has been advocated by various factions. Convincing alternative interpretations of the existence of pornography in our society and methods to combat it have been presented by proponents of the feminist perspective. This political division tends to emphasize the consideration of individual and social harm in its strategies. Feminists reformulate the notion of pornography and provide an interesting framework in which to scrutinize this phenomenon.

CHAPTER III

FEMINIST ANALYSES AND THE EFFECTS OF PORNOGRAPHY

A discussion of pornography inevitably leads to a discourse on harm. This harm can be conceptualized in a number of ways; harm to society, harm to the individuals who participate in the production of pornography, and harm to those who consume it. The research that has been conducted in this area is confusing and contradictory. (It is unclear what the effects of pornography are, and whether they are, in fact, dangerous.) Moralists, civil libertarians and feminists present different arguments concerning the harm that is allegedly produced by pornography.

The traditional moralist group, often called the Right, promotes the belief that pornography is portrayal of sex for purposes other than procreation, and is therefore inherently evil. Pornography leads to, and signals, the moral deterioration of society. Diamond (1981: 192) ^{no reference!} suggests that the traditional view purports that the problem with pornography is that it destroys the virtue of the reader or consumer. Moralists believe it is a base pleasure which is improperly substituted for more noble ones. The potential 'victims' of pornography, focused on in the feminist perspective, are not of primary importance to the traditional moralists. For this group, a discussion of pornography is strictly a discussion of sexually explicit materials, and their effect on (individuals and society).

Civil libertarians argue that the research has not demonstrated a definite link between pornography and aggressive behaviour. Until this link can be firmly established, civil libertarians assert that a graver concern is the harm that would result from constraint of the free dissemination of ideas. Pornography is considered an expression of ideas and values and must not be prohibited. The feminist perspective agrees that pornography expresses ideas and values, but isolates these representations as dangerous and harmful to women (Jacobs 1984: 9).

The feminist perspective shares some commonalities with the moralist position, (in that feminists concur that pornography is damaging.) Feminists are interested, however, in the effect of pornography on individuals other than the consumer (Diamond 1980: 192). (Power and coercion, not sex, are the central issues.)

The similarities between the two groups are concluded upon this point, as the feminists have developed a philosophy and ideology of the condition of women which identifies pornography as an important issue. Dworkin states that a discussion of pornography is crucial because pornography "completely perpetuates the sexual possession of women by men. It is propaganda for and a tool of sexual suppression of women" (Wilson 1980: 26). Pornography is, it is suggested, a by-product and device of patriarchy and male domination to keep women subservient.

(Pornography dehumanizes, objectifies and degrades women for this purpose. The result is an inferior status for women in our

society.) Some feminists contend that the research that has been conducted concerning the effects of pornography is supportive of a link between pornography and aggression. A growing number of feminists feel that scientific verification of the link is not essential to demonstrate that pornography causes harm to women. Pornography reflects the position of women in our society. It can be perceived as a microcosm of the power imbalance and systematized coercion and violence that is routinely practiced upon women.

Even this analysis of pornography is being questioned. A new wave of feminism is rejecting the traditional feminist interpretation of pornography. Sexist representations and the relationship between fantasy and pornography are offered as subjects deserving investigation. Pornography may not be the most appropriate focus for the feminist movement. It distracts attention from real violence against women, and increases the likelihood of a misinterpretation between feminist concerns and goals of the right. The new wave of feminism does not regard the censorship of pornography as providing any ineluctable solutions to sexist representations or sexism. This anti-censorship posture is not due to an alignment with the civil libertarians, but a fear that within a patriarchal society, any censorship laws will ultimately be used against women and their political objectives.

Images of Women in Pornography: Objects, Animals and Masochists

Feminists have posited that pornography is a particular medium of communication that harbours specific misogynist themes. It is an important focus of concern for it promotes and condones violence against women. Rape and wifebattering are crimes that demand immediate remedies, yet long term solutions are unavoidable if we are to improve the condition of women. The images which feminists rebel against promote a climate in which these criminal acts are made possible (Lederer 1980: 16). Although the films, books and pictures may have different packaging, they share some common characteristics. (Feminist theory objects to the images of women; the way women and their bodies are portrayed. Women are described as objects, animals or masochists, and do not exist outside the whore/madonna duality in the pornographic image.)

As objects, they do not exist in and of themselves, but only to serve men. They have no purpose other than a sexual purpose (Griffin 1981: 38). Griffin advances that "For what the pornographer's mind believes he loves is the body of a woman and not the woman. It is her flesh alone he prizes" (Griffin 1981: 37). Russell (1980: 24) describes objectification as the portrayal of women not as human beings but as things. Women are merely commodities within pornography, and reduced to their various body parts, whether genitals, buttocks, legs or mouths (Dworkin 1985: 10). (Woman are represented in pornography as

objects to be sexually exploited, manipulated and enjoyed (Jacobs 1984: 24).

Feminists assert another characteristic of pornography is that women are depicted as bestial. Women are illustrated as animals, they are not denoted human status. Griffin (1981: 26) proposes that by seeing women as animal we are seeing them as closer to nature, therefore lacking a spiritual dimension. Women are given animal names, such as bunny, chick and beaver. They can be pictured as tame pets or wild creatures. Animals can be chained, caged and trained. They can be whipped and beaten. Frequently women are portrayed as engaging in sex acts with animals, reinforcing their bestial nature (Jacobs 1984: 17).

Not only are women characterized as existing solely to be used by men, they are shown as enjoying the situation. Women are portrayed in pornography as masochistic. Dworkin addresses the masochistic myth as "the most enduring truth of pornography" (1979: 166). The average woman is presented as warranting, enjoying and encouraging sexual violence against herself. Dworkin considers female masochism in pornography to be "the ideology that justifies force against women, and at the same time makes that force invisible" (1979: 148). If a woman encourages violence against herself then she vindicates all those who aggress against her. Women are depicted as basically masochistic and in need of male domination (Bart & Jozsa 1980: 215).

Susan Brownmiller (1980: 32) contends that "females in pornographic genre are depicted in two clearly delineated roles: as virgins who are caught and "banged" or as nymphomaniacs who are never sated." She discerns that the most popular image is the blending of these two characterizations. The innocent female, once raped, becomes the dependent sexual slave through choice (1980: 32). Dworkin feels the catchwords 'Madonna/Whore' or 'Good Woman/Bad Woman' do not correctly address the message of pornography. The terms are not mutually exclusive, nor do they refer to two sides of the same coin. Dworkin argues they "are not really distinct because they are applied simultaneously or sequentially in any proportions to any woman in any circumstance" (Dworkin 1979: 148). Griffin (1981: 21) acknowledges the same images. The virgin in pornography, although 'pure', has rejected men through her chastity. Her rape is punishment or humiliation, and thereafter she develops into her real self, the whore. The virgin was actually a whore all along.

The Function of Pornography: Oppression as Sexual Liberation

The feminist perspective relates a particular purpose to pornography. Women are objectified, degraded and humiliated in pornographic materials as a function of male domination. Diamond (1980: 192) suggests that feminists do not view pornography, and the depiction of females within it, as a male fantasy. She feels it has a basis in reality and is a reflection as well as a

mechanism "that has sustained the systematic domination of women by men throughout history" (Diamond 1980: 192).

The image of woman as whore is a predominant theme in our culture, and central to the concept of male domination. Dworkin states:

The ideology of sexual domination posits that men are superior to women by virtue of their penises; that physical possession of the female is a natural right of the male; that sex is, in fact, conquest and possession of the female...that the use of the female body for sexual or reproductive purposes is a natural right of men; that the sexual will of men properly and naturally defines the parameters of a woman's sexual being, which is her whole identity. The metaphysics of male sexual domination is that women are whores (Dworkin 1979: 203).

This feminist formulation of the pornography experience is a relatively recent phenomenon. One of the first theorists to present this analysis of pornography, and its roots in our culture, was Kate Millett. Her book, Sexual Politics (1969), has been touted as the catalyst for the recognition of the primacy of patriarchal power and the violence in pornography (Diamond 1980: 190). Millett regards patriarchy as a status category with political implications (Millett 1969: 24). Millett defines politics as "power-structured relationships, arrangements whereby any group of persons is controlled by another" (Millett 1969: 23). The relationship between the sexes can be seen as a relationship of dominance and subordination, with females occupying the latter position (1969: 25). Because our society is a patriarchy, men rule women as if it was some assumed birthright.

The assumption of patriarchy in our society is problematic for feminist theorists. Millett describes the extent of the difficulty with patriarchy:

Perhaps patriarchy's greatest psychological weapon is simply its universality and longevity. A referent scarcely exists with which it might be confuted. While the same might be said of class, patriarchy has a still more tenacious or powerful hold through its successful habit of passing itself off as nature. Religion is also universal in human society and slavery was once nearly so; advocates of each were fond of arguing in terms of fatality or irrevocable human "instinct" even "biological origins". When a system of power is thoroughly in command, it has scarcely need to speak itself aloud; when its workings are exposed and questioned, it becomes not only subject to discussion, but even to change (1969: 58).

The departure point for feminists, then, is the examination and scrutinization of patriarchy, and one of its major devices of male domination, pornography. Pornography works as a device to objectify and liken women to beasts, thereby dehumanizing them. For in pornography, to be female is to be less than human.

The major theme of pornography can be identified as male power, and the degradation of the female as the means of achieving his power. The way women are valued (read 'devalued') in pornography is a subordinate refrain, because the degradation of women prevails for the intention of affirming, and triumphing in male power (Dworkin 1979: 25).

Dworkin states:

Male power, as expressed in and through pornography, is discernible in discrete but interwoven, reinforcing strains: the power of self, physical power over and against others, the power of terror, the power of naming, the power of owning, the power of money, and the

power of sex (1979: 24).

Men possess a self, an autonomy, an identity, while women lack it. Men harbour physical strength, and are rewarded in our society for strength. Women are not valued for being strong. The female cultural ideal is a slim, frail female who lacks strength. Through man's possession of self and strength, he has the capacity to terrorize women. This power of terror is realized in the potential for, and actuality of wife abuse, battery and rape. Men also maintain the power of naming. The power of naming includes the ability to define, and give meaning to, as well as the power to ridicule. Men have the power of owning, while women traditionally have been owned as chattel. The power and control of money is predominantly a male domain, while the power of sex is expressed in virility. Through sex, men conquest and express their power. All these elements of power combine to constitute male power, and are expressed throughout pornography.

From an economic perspective, pornography is considered a primary manifestation of sexist attitudes responsible for women's slow integration into the economic framework. An economist discussing women's devalued station in the economy insists:

Only an intrinsically sexist society could wholeheartedly support (financially and legally) the volume of pornography available. Pornography is the most visible/virulent form of sexism that may continue to segregate women's abilities from the economic mainstream long after legislation protecting equal pay for work of equal value, or prohibiting sexual harassment or even encouraging affirmative action is in place and being

protected (Fraser Committee 1985: 69).

Sexism can be defined as "attitudes and social practices based on the assumption that sexual inequality is a natural, biological universal phenomenon rather than a social and historical one. This assumption supports a sexual division of labour and a wide range of discriminatory legal, political, and economic practices, policies, and traditions" (McCormack 1978: 545). The sexism which is evident in society is reportedly manifested in pornography. It may be argued that in a society where women were indeed considered equal to men, pornography would not flourish to the same degree. Equality in the economic framework would be translated and reflected in alternate images of women, changing the form of sexually explicit materials irrevocably. Longino postulates that pornography invites tolerance of the social, economic and cultural oppression of women. Longino insists that "A cultural climate which tolerates the degrading representations of women is not a climate which facilitates the development of respect for women" (Longino 1980: 54).

Male sexual domination is visible in pornography, but it is identifiable within many other institutions of control. Within law, marriage, prostitution, health care, the economy, organized religion and and systematized physical aggression against women, women experience and learn male domination (Dworkin 1979: 203). Pornography can be conceptualized as a social control mechanism for suppressing women in a subordinate position (Diamond 1980:

188). Diamond maintains that pornography functions as a means of preserving the status quo. If this were indeed the case, pornography would be expected to increase at a time when women were becoming more socially mobile in our society, and improving their status. Feminists assert that this has been realized. An increase of pornography was documented in the late eighteenth century. Kenyon asserts this phenomenon was at least partly due to the beginnings of the emancipation of women. As the social status of women improved, pornography committed to the degradation of women flourished. Kenyon suggests that the further threat of the women's movement may be responsible for the recent increase in pornography (Kenyon 1975: 226). Ellen Willis views aggressive pornography, in particular, as a political phenomenon that results in a form of backlash against women (Willis 1981: 219). Diamond (1980: 192) submits that not only the quantity, but also the quality, of pornography is altered by women's attempts to modify the status quo, with an increase in violent depictions. Diamond concedes that she is not able to offer any systematic quantitative evidence to prove her contention, yet she argues that if we refuse to accept a sexual hierarchy in which women are subordinate, no answer exists in which to explain women's continual victimization (Diamond 1980: 201). Pornography survives as an instrument to reassert male dominance.

With the sexual revolution of the 1960's and 1970's there was a great increase in the amount of pornography being

introduced into the market. Sexual freedom was being equated with a lack of control on representations dealing with sexuality. At the same time however, women were beginning to form feminist groups and lobby for increased determination over their lives. Wilson asserts the women's liberation movement originated as a rebellion against stereotypes. Even within the revolutionary movements of the left, women were not conferred a status equal to that of the men (Wilson 1983: 171). Dworkin identified the misogynist attitudes the counterculture of the sixties inherited from the previous generations, and Robin Morgan was responsible for drawing public attention to the anti-female expressions in the hippie underground papers (Diamond 1980: 190). Robin Morgan (1970: 123) objected to the sexism which she saw as pervasive among her associates, and stated "A genuine Left doesn't consider anyone's suffering irrelevant or titillating." Dworkin maintains that the women's movement was formed on the recognition that men commit acts of forced sex against women systematically (Wilson 1982: 24).

One explanation that is proposed for the resurgence of pornography in response to increased social standing by women is that men are really in fear of women. Women are supposedly portrayed as helpless in pornography because men are terrified of female power in society (Lurie 1980:171). Susan Griffin (1981: 13) identifies our culture as possessing a pornographic mind. That mind is in terror of woman, nature and eros or love. Men desire women, but deny that part of themselves. Men dread

and deny that part of themselves which is part of nature. They project their desire onto women. Women are, therefore, considered evil and wanton. They tempt men, and are responsible for men's lust for them. Griffin suggests that men try to separate themselves from the fear and desire they experience, and therefore project those feelings onto women. He hates those elements of himself, and gazing upon them in the image of women, his rage is incited. Women's images become degraded, humiliated images as a result of man's initial fear of himself and his helplessness (Griffin 1981: 19). Women are viewed by Griffin as being silenced by pornography, for the images of women are not communicating the language of nature and eros. Pornography becomes culture's revenge against nature, of man humiliating the nature in himself upon the embodiment of nature: the image of woman (Griffin 1981: 13).

The utility of pornography is not restricted to social control. Chesler analyzes the sex fantasies in pornography. She identifies the common rape fantasies as supporting men's superiority and women's unconstrained availability. But the fantasies within pornography also become a way of denying and preventing violence towards other males (Chesler 1980: 157). Dworkin presents this alternate conceptualization of the function of pornography. It cannot be completely separated from the all encompassing function of preserving male domination, but it contributes to it.

Dworkin contends that men do not aggress against other males in the same manner as they do against women. This behavior is not reinforced by society, and could be detrimental to the continuation of male domination. Aggression against other males could damage male power, because other men have the ability to retaliate, while women have been effectively silenced. Dworkin states "one to one sexual combat between fathers and sons would rend the fabric of patriarchy" (Dworkin 1981: 59). Dworkin questions why the sexual abuse of male children within a household is relatively uncommon compared to the sexual abuse of young girls by fathers, stepfathers, near relatives and friends of the family. Male children develop into potentially dangerous adversaries, and men would jeopardize their own positions by aggressing against them. This is not to say that the criminal sanction is not available to deal effectively with violence against women. Dworkin comments:

Rape of women, battery of wives, forcible incest with daughters, are also proscribed by male law but are widely practiced with virtual impunity by men. The key is not what is forbidden but in what is sanctioned, really and truly sanctioned. Sexual violence against women and girls is sanctioned and encouraged for a purpose: the active and persistent channeling of male sexual aggression against females protects men and boys rather effectively from male sexual abuse (Dworkin 1979: 57).

This interesting argument implies that the abuse of women augments, shields and protects male interests.

Pornography accommodates this aim by advocating violence against women. In a climate in which women are viewed as objects or things, rape and violence against women are the result. Men

are educated to have this perspective on women. It is more difficult to aggress against a human being than an object. People become desensitized to the images of women being harmed. It becomes less abnormal when the violence occurs in an individual's life (Russell & Lederer 1980: 25). Dworkin (1985: 15) states "those who can be used as if they are not fully human are no longer fully human in social terms; their humanity is hurt by being diminished."

Clark fortifies the argument that pornography is intrinsically offensive to the dignity of women (1983: 53). Like Dworkin, she regards pornography as a method of socialization and a type of morality stressing female passivity accomplished through male violence. Pornography can harm men "because it encourages men to combat feelings of inadequacy and low self-esteem by being aggressive and sadistic" (Clark 1983: 56). Therefore, the humanity of men is diminished by pornography.

Men are also demeaned in pornography, but they have many more positive images to use as reference (McCormack 1985: 199).

Garry maintains:

it is generally harder to degrade men sexually or nonsexually than to degrade women. Men and women have grown up with different patterns of self-respect and expectations about the extent to which they will be respected and the extent to which they deserve respect or degradation. The man who doesn't understand why women do not want to be treated as sex objects (because he'd sure like to be) would not think of himself as being harmed by it (Garry 1978: 412).

Few individuals would deny that pornography is demeaning to men, although the effect and meaning of that degradation may be

different than the exact degradation of women, due to the relation between the sexes.

Longino (1980: 43) maintains that many representations are degrading to women, but one must look beyond this point to the contextual features in an ascertainment of pornography. Material is pornographic when it represents or describes sexual behaviour that is abusive to the participants, in a manner designed to endorse or recommend the degradation (Longino 1980: 43). According to Robin Morgan, "Pornography is the theory, and rape is the practice" (Morgan 1968: 169), and pornography is no more than sexist propaganda. Susan Brownmiller conceptualized the philosophy of rape and the philosophy of pornography as virtually indistinguishable and identical. In Brownmiller's terms "Pornography is the undiluted essence of anti-female propaganda" (Brownmiller 1980: 32).

Propaganda can be defined as:

2. any systematic, widespread dissemination or promotion of particular ideas, doctrines, practices, etc. to further one's own cause or to damage an opposing one.

3. ideas, doctrines, or allegations, so spread: now often used disparagingly to connote deception or distortion (Guralnik 1984: 1138).

LaBelle (1980: 175) defines propaganda in an attempt to demonstrate how pornography is, in fact, propaganda against women. She argues that pornography employs eight techniques to discredit women and promote solidarity among men. These methods include the use of stereotypes, name substitution, selection, lying, repetition, assertion, pinpointing the enemy and an

appeal to authority. The use of stereotypes refers to the way women are portrayed. They are seen as unintelligent, bestial whores at nature, who are no more than a sum of their body parts. These themes are repeated constantly, and pedantically. The name substitution involves the slang derogatory names that are reserved for women in pornography, such as tramp, whore, slut and bitch.

Selection and assertion are similar techniques which are employed in the creation of propaganda. Selection is where only certain chosen 'facts' are presented to the consumers, such as information on why pornography is good for people and why women do not necessarily mind being raped. Assertion is a more straight-forward technique where the marketplace is flooded with the presence of pornography, thereby legitimizing itself. Legal action, such as the protection of free speech, is invoked to defend pornography's presence. An 'appeal to authority' is illustrated by Playboy's interviews with influential persons and legitimization through serious articles. It is also accomplished by using history or science to prove why pornography's view of sexual relations is the correct one. Feminists strongly object to attempts by some disciplines to support notions that sexual aggression is normal, or that it is natural for women to occupy a subordinate position. Some sociobiologists endeavour to draw parallels between animal behaviour and human social behaviour. Steinem (1980: 36) suggests that the purpose of these individuals becomes illuminated by the animals and behaviours

they choose to focus upon. Dworkin rebuffs sociobiologist arguments with the statement "a multitude of insects may be seen to indicate either a new militancy or a new desperation on the part of those who look to other species to justify male domination" (Dworkin 1979: 135).

Lying is yet another technique used to develop the misogynist propaganda. Pornography tells lies about women (Rich 1980: 316). It misrepresents women's sexuality and encourages rape myths and other mistruths about women's masochistic nature. LaBelle contends that although misogynist propaganda is familiar to all in our culture, it is rarely recognized as such. The ideas pornography promotes are so insidious and common, they are accepted as entertainment and not as contributing to the propagation of male supremacist ideology (LaBelle 1980: 178). Pornography has been referred to as an \$8 billion trade in sexual exploitation in the United States alone (Dworkin 1985: 10). By any standards it is considered a lucrative industry. Pornography is created for a profit, and what sells in a sexist society is lies about women and sex (Russell & Lederer 1980: 27).

Pornography is not only charged with advocating and engendering violence. Dworkin (1985: 9) holds pornography to be an act. Susan Griffin conceptualizes pornography in the same manner. She views pornography as a harm in itself, whether or not it results in violence to women. She identifies pornography as equivalent with sadism. Humiliation is recognized as the crux

of sadism. Degradation is the essence of pornography, and its images degrade and humiliate women. Therefore pornography in itself is a sadistic act (1981: 111).

There is no consensus concerning the status of pornography as sadism. There is, however, general agreement among many feminists that pornography is an antecedent to harm against women. This sentiment is reflected in much of the feminist literature. Some authors defer to the results of research in the area to support their arguments.

Effects of Pornography: The Good, the Bad and the Ugly

During the last twenty years concern has grown over the impact of pornography. The effects of pornography are registered upon the consumers of pornography, society, and upon the participants themselves. There is a paucity of research dealing with the participants in pornography's production, while a number of federal commissions from Canada, the U.S.A. and England attest to the interest in the effects on consumers and society. (An examination of the empirical studies on pornography reveals an inconsistent body of research which produces inconclusive results. The central concern is that pornography consumption will lead to violence against women. No definite link can be ascertained between pornography and aggression, or pornography and rape, notwithstanding many provocative studies. Researchers have generated considerable interest in the negative)

effects of pornography. There are indications that pornography may have positive consequences as well, but these arguments are even less convincing. Sexist research, inadequate models and methodological problems have plagued the enquiry into pornography's effects, shouldering the blame for the incoherent state of the research.

Participants in Pornography Production

Little is known about those who participate in the creation of pornography. Organized crime is sometimes implicated or considered responsible for much of the production. It is often difficult to substantiate this claim, given the limited body of knowledge concerning pornography's manufacture (McKay & Dolff 1984: 52).

The effects of the production of pornography on the models is another vastly underresearched area. There are suggestions that being involved in pornography production is physically damaging to participants (MacKinnon 1985: 33). Feminist ideology is highly concerned with the condition of women in general, but theorists do identify the participants in pornography as subject to many potential and actual harms. It is suggested that models are often coerced into participating in the production of Pornography, not only economically, but physically (Russell & Lederer 1980: 28). The exploitation that these women are subject to can result in adverse effects on their mental health, and

lead to social ostracism and alienation (Fraser Committee 1983: 30). Lederer (1980:57) presents an interview with a former pornography model and documents the abuse this woman experiences. She advances that this woman's ordeal is not atypical, and that new evidence and research is available to support her testimony. There is every indication that this group of persons is subject to a great deal of harm, yet no systematically collected data is available to support the proposition. The nature of this avenue of employment increases the opportunity for the contraction of disease and also the potential for violent coercion, yet:

Although a number of retrospective, anecdotal and (auto)-biographical accounts of individual participants have appeared in various popular media during the past decade, it is not entirely clear as to the generalizability of this qualitative material to the experience of other participants (McKay & Dolff 1984: 53).

Hopefully, future research will illuminate the condition of the men and women who are involved in the production of pornographic material, and provide some insight into their experience.

Yaffe (1979: 91) cautions that a peculiar kind of moralism is in operation when individuals discuss exploitation in pornography production. One runs the risk of assuming that all models must have been victim to coercion, because involvement in pornography appears so distasteful. Researchers must refrain from projecting their own value judgements onto those they are attempting to 'help'. The issue of coercive tactics and exploitation in pornography production deserves further exploration, but must be accompanied by an open-minded approach.

More intensive study has been focused on the effects of pornography on consumers and their potential victims.

The Elusive Link

A great deal of research has been concentrated on the elusive effects of pornography. Many researchers feel that this attention to the impact of pornography is unwarranted. It is suggested that the majority of the population does not incorporate pornography into their daily lives. Any contact with it is usually an uncommon, unimportant event, compared to the many other forces that act upon individuals. McCormack (1984) displays bewilderment with regard to the fascination that the pornography issue attracts. Many other critics have echoed this sentiment, and have remonstrated that the concern enjoyed by the pornography issue far outweighs any proven or potential effects. An absence of any strong evidence of behavioural consequences persists (McKay & Dolff 1984: 40).

Public attention could be partly due to the recent augmentation of sexual violence in pornography. There are indications that the levels of violence and sexual violence in pornography, and more mainstream entertainment, are on the increase. Smith (1976: 19) observed a definite increase in the explicit sexual content of paperbacks that were available to the general public. In approximately one third of the episodes some degree of force was utilized to persuade the, usually female,

victim to acquiesce to the aggressor's intentions (Smith 1976: 22). Malamuth and Spinner (1980: 226) documented a significant increase in sexually violent pictorials in popular magazines. This increase should not be exaggerated, however. By the last of the five years of the study, only 5% of the pictorials were regarded as sexually violent. McKay and Dolff (1984: 96) did not find adequate evidence to support the contention that the violent content in pornography had significantly increased, although public sentiment may not reflect the vigilance of these researchers. Violent pornography may be increasingly available, but there is very little evidence to justify this assertion (McKay & Dolf 1984: 95). The development of technology may have swayed the public's view on the extent of the 'pornography problem'. A 'playboy' channel, bringing pornography into people's homes, as well as the popularity of video cassettes, may have added to the perception. Electronic transmissions, including satellite or telephone 'dial-a-porn' have been described as significant problems (Government 1986: 61). The suspected increase in media sexual violence, combined with a variety of recent studies implicating pornography as a causal element in aggression, may have helped to heighten interest in Pornography effects.

International Concern

Various countries have recently demonstrated an interest in the impact of pornography on consumers, and concern regarding the resulting impact of these consumers on others. Among those countries are Canada, the United States and England; producing the Fraser Report, the Badgley Report, the U.S. Report of the Commission on Obscenity and Pornography, the Meese Report, the Longford Report and the Williams Report. All the committees were partial responses to a fear that pornography is a noxious substance in society. There is a certain anxiety that one of two things will happen if people view pornography. There is a belief that exposure to pornography will increase the likelihood of an individual engaging in violent behaviour, or that people will become sexually aroused by the material they are studying, and try to imitate the depictions, resulting in an increase in crimes pertaining to sexual assault (Fraser Committee 1984: 22).

A discussion of the research concerning pornography inevitably leads with a reference to the findings of the 1970 U.S. Commission on Obscenity and Pornography. The U.S. Congress felt that the pornography problem was an issue of national concern in 1967, and made provisions for the formation of a commission to assess and comment on the extent of the problem. The report states that pornography actually has few proven effects. Concerning exposure, the report states:

In general, established patterns of sexual behaviour were found to be very stable and not altered

substantially by exposure to erotica (Commission on Obscenity and Pornography 1970: 25).

The connection between pornography and violence was explored by the commission. They state:

In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime and delinquency (Commission on Obscenity and Pornography 1970: 27).

The methodological problems encountered in the research prepared for the report have been well documented. Critics of the report often isolate the liberal, permissive social climate which prevailed at that time, as a contributing factor to the report's findings. Also cited is the fact that this report purposefully avoided an examination of sexually violent materials (Bart & Jozsa 1980; Lederer 1980). Regardless of the inadequacies of the methodology and conclusions, and a suspect relevance to the pornography of today, the report remains the first large scale investigation into the belief that pornography engenders crime and violence. In the interim, a myriad of projects have been embarked upon to investigate the possible link between pornography and negative effects in the community and society.

The Longford Report was completed in 1972 in England. It found that a causal connection between pornography and anti-social behaviour could be conclusively proven in few cases, if only because of the undesirability of using humans in that type of research. The Longford Committee challenged that "No one

can confidently deny that a connection between pornography and behaviour, whether promiscuous, deviant or aggressive, can sometimes be demonstrated" (Longford Committee 1972: 413). Another English committee, responded to the pornography effects question in 1979. The material examined in the Williams Report was more similar to that which is available today, including both sexually violent and sexually explicit material. This committee was unable to find evidence supporting a link between pornography and aggression, although the possible connection was not discounted. The committee relied on the clinical experience of medical witnesses, and a report prepared for them by Yaffe (1979). They determined that no strong evidence exists that exposure to sexually explicit material triggers anti-social sexual behaviour (William Committee 1979: 66). The Williams Report was unable to provide proof of socially harmful effects, commenting "We consider the only objective verdict must be one of 'not proven'" (Williams Committee 1979: 68).

Two Canadian efforts have added to the body of research concerning the effects of pornography in recent years. The 1983 Badgley Committee, which addressed sexual offences against children, did not offer conclusions entirely consistent with the previous report. Relying on the data assimilated from a national population survey and a national police survey, the committee felt that their findings indicated:

for a number of persons, pornography had served as a stimulus to committing sexual assaults against children. The findings do not elucidate, however, why exposure to pornography may affect some persons, but not others, in

this way nor do they indicate the nature of the circumstances in which incidents of this kind are more likely to occur (Badgley Committee 1984: 1283).

Although the Badgley Report seemed to be suggesting a cause and effect model, the Fraser Report reversed this trend. The Fraser Report (1985), officially known as the Report of the Special Committee on Pornography and Prostitution, more directly addressed the causal nature of pornography in a consideration of violent criminality. The Badgley Report focused largely on child pornography and offences against children. Although many of the individuals who presented information before the Fraser Committee felt strongly that pornography has many deleterious effects, the committee did not come to the same conclusion. It proffered no proof of a relationship between crime against individuals and pornography, declaring:

The Fraser Committee 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 community and society. It may be a prime factor but we cannot conclude this is the case (Fraser Committee 1985: 99).

The Fraser Committee indicated an understanding that there were results suggesting positive and negative effects of pornography, yet no reliable conclusions could be drawn.

In July of 1986, the latest of the pornography commissions, known as the Meese Commission, presented its report. The U.S. Commission on Pornography asserted that a cause and effect link existed between pornography and sexual violence. Conversely, however, the committee refrained from maintaining that

pornographic materials could be considered dangerous to the American people. Although two of the eleven committee members could not endorse the findings, the majority agreed that substantial exposure to pornography begets sexual violence, sexual coercion and unwanted sexual acts (Austen 1986: 42). This commission has received considerable criticism in the brief period since its release. Allegations that the committee was less than impartial, and that some members were anti-pornography activists before their appointment, must be weighed against the credibility of the findings (Shachat 1986: 11).

The national commissions from these three countries failed to produce any homogeneous results. Dealing with essentially identical information, the Canadian Fraser Committee and the American Commission on Pornography exhibited irreconcilable differences. With the exception of the Meese Report (Austen 1986: 42), all commissions apparently approached the subject with appropriate academic caution. The resulting discrepancies testified more to the inadequate state of the research, than the incompetency of the various committees' members.

Given the lack of conclusive results, and the contradictions inherent in the research, it is astonishing that proponents of either side of the effects debate are so steadfast in their views. Individuals seem to be divided over whether the research is strong enough to prove there are harmful effects, or whether it is not. No serious attempt is made to say that pornography serves some ultimate good, although isolated positive benefits

have been identified.

Positive Effects of 'Erotica'

Often, when positive effects of pornography are discussed, the term erotica is used. Although different studies use various types of stimuli, 'erotica' usually alludes to nonviolent sexually explicit materials, which may or may not objectify women.

McKay and Dolff (1984: 14) found no legitimate endeavour in the related literature or public forum to announce a pro-pornography stance. A number of benefits due to pornography use have been suggested, however.

The 1970 U.S. Commission on Obscenity and Pornography and the 1979 Williams Committee both discussed the educational potential of erotic materials. Wilson argues that female sexuality is construed so incorrectly within 'erotica' that this material cannot be conceived of as the ideal educational device. Wilson seconds Kate Millet's argument, that it might be educational for some individuals to view others' genitals, but that is not equivalent to the statement that pornography is educational (Wilson 1983: 155). Dr. P.L. Gallwey suggested that pornography could be useful by creating a sense of security. This is accomplished through a lessened sense of exclusion, and a reduction in the violent feelings which could be related to that exclusion (Williams Committee 1979: 63). Along similar

lines, it has been suggested that pornography could serve as a useful therapeutic tool in behaviour modification programmes for individuals suffering from sexual dysfunction. Those who consider pornography to be in opposition to women's interests disagree. Understandably, feminists object to misogynist material being used to modify behaviour. This is especially due to the consideration that many feminists classify pornography as hate literature against women (McCormack 1984: 186).

This is not to say that pornography could not, in theory, be educational. Raboch (1976) argues correct information concerning sexual difficulties could be conveyed through pornography, thereby helping to establish sound attitudes toward sexuality. Similarly, Check and Malamuth (1984), believe that some types of pornography could conceivably be produced which could demonstrate negative response for the maltreatment of others, following a social learning perspective (McKay & Dolff 1984: 40).

Susan Gray advances the proposition that pornography allows people to decide what they do like, as well as what they do not, revealing exploitive and non-exploitive options open to individuals in their sexual lives (Gray 1982: 394).

Some positive results from pornography consumption have been documented in laboratory studies. Zillman and Bryant (1982: 15) discovered that their subjects' predictions of the popularity of certain sexual practices became more realistic after exposure to

pornography, yet the reverse was found for unusual sexual practices. Indications exist that married couples were able to exhibit more openness and renew interest in past sexual practices after viewing 'erotica' (Masterson 1984: 250). One line of research found that pornography could reduce aggression under some circumstances, and perhaps dispel beliefs that force can be justified to obtain sex (Masterson 1984: 250).

Although these benefits to pornography consumption are encouraging, they must be accepted with caution. Some pornography, under certain circumstances, consumed by specific individuals may be considered to have positive consequences. This does not lead to the assumption that pornography in general is advantageous to everyone, regardless of context. The problems associated with the pornography research, demonstrating harmful effects, are equally applicable to this avenue of enquiry. The possible detrimental effects of pornography have received substantially greater scrutiny, however.

Harmful Effects of Pornography

Considerable attention has been focused on the harmful effects of pornography. In fact, most of the studies on pornography have concentrated on the harms associated with pornography (Fraser Committee 1985: 99). McCormack identifies five areas of research which comment on pornography and its impact. These areas include aggression studies, pornography

studies, studies of sexual offenders, a combination of aggression and pornography studies and media influence studies (McCormack 1985: 184). The results from these different branches of enquiry yield limited opportunity for substantial conclusions. This is not to say that harmful effects have not been demonstrated, however.

A variety of studies have produced frightening results. Zillman and Bryant (1982: 18) demonstrated that massive exposure to pornography clearly promotes sexual callousness towards women, particularly emphasized in subjects' trivialization of rape and callousness toward the plight of the victim. Surprisingly, the material used was not extreme sadomasochistic pornography, but was rather judged to be of a standard, common variety. Yaffe and his associates instructed their subjects to read erotic passages, thereafter allowing them the opportunity to shock other individuals. The results demonstrated that sexually aroused subjects chose to deliver significantly more intense shocks than subjects who were not sexually aroused (Yaffe et al. 1974: 763). Malamuth and Check, (1980) presented the disturbing finding that over half of college males, on the assurance that they would not be caught, indicated some likelihood of raping (Malamuth & Donnerstein 1982: 109). Check and Malamuth's research has suggested that individuals, who held beliefs that were highly sex-role stereotyped, showed high levels of arousal to rape, which were indistinguishable from convicted rapists (1983: 352). The mass media may affect the

perceptions of the meaning and consequences of rape, increasing men's self reported likelihood of rape (Malamuth 1981: 150). Donnerstein and Malamuth (1982: 129) found that exposure to mass media stimuli that have violent and sexual content increases the subjects' aggressive-sexual fantasies, acceptance of aggression, belief in rape myths and aggressive behaviour.) Results have indicated that aggressive erotic stimuli can lead to increased aggressive behaviour towards women (Donnerstein 1980: 275). Even Kutchinsky's monumental finding that a complete lack of governmental controls over pornography led to a decrease in sexual crimes in Denmark has been partially discredited by Court's (1976: 142) re-evaluation of the findings, suggesting an actual increase in reported rapes. Although Court's analysis has received intense criticism itself, it has tainted Kutchinsky's conclusions to some degree (Williams Committee 1979: 85). In light of these findings, the public's fears of an association between pornography and sexual violence seem warranted. These results are not presented as a testament to the dangerousness of pornography, but rather to serve as an illustration of the kind of evidence which urges a condemnation of pornography. For a comprehensive review of the literature see McCormack, 1985; and McKay & Dolff, 1984.

A discussion concerning the effects of pornography is, in essence, a debate over the effects of pornography on men's treatment of, and attitudes towards, women (Gray 1982: 387). The central issue remains whether a link can be proven between the

consumption of sexually violent pornography and actual anti-social sexually violent behaviour, or a greater tolerance of this behaviour by society. Considerable recent research has made suspect the allegation that erotica is harmless, yet has not confirmed the intuition that it causes harm. Masterson emphasizes that although many of the pornography experiments are convincing, they are measuring changes in attitudes, and not necessarily changes in behaviour (Masterson 1984: 250). Yaffe (1972: 465) reviewed the literature and found no evidence that pornography use resulted in anti-social behaviour. Yaffe states that there exists "no consensus of opinion by the general public, or by professional workers in the area of human conduct, about the probable effects of sexual material" (Williams Committee 1979: 4). Kenyon (1974: 232) states that, after regarding present evidence, "pornography does little harm to mental health and cannot be held responsible for initiating anti-social behaviour in those not already so pre-disposed."

Susan Gray, in her review of the literature, found that the studies (laboratory) that had been completed commented extensively on male anger, but had relatively little to say about pornography (1982: 389). McCormack (1985: 192) states "As things stand at present there is no systematic evidence to link either directly or indirectly the use of pornography (soft core or hard core) with rape."

McCormack discusses the somewhat tenuous relationship between pornography and rape, asserting:

Rape is a complex social act which is the culmination of many influences. And pornography, like any other symbolic text, is multi-dimensional, encoding a number of messages. It is not, therefore surprising that there is no empirical evidence of any relationship between pornography and rape, despite the parallels that exist between them (McCormack 1980: 8).

Rape and pornography are not simple discrete entities. To suggest that one causes the other is to ignore the variability in, and complexities of, human behaviour. Although McCormack does not identify direct cause-and-effect models as being applicable to the pornography issue, she acknowledges the possibility of similarities between the concepts of rape and pornography.

McKay and Dolff (1985: 94), after a thorough review of the research, uncovered no persuasive evidence that viewing pornography causes harm to the typical adult individual, or causes the average individual to harm others. Any final resolutions concerning the effect of pornography are at this time not plausible. The results, despite intense efforts to prove otherwise, are inconclusive. Problems with the research are largely responsible for the confusion and uncertainty which engulfs the pornography debate.

Problems with the Research

Addressing the effects of pornography is a difficult endeavour. Those seeking straightforward answers to the harm issue will be frustrated. The existing body of research is

incomplete and contradictory. Methodological issues assume a certain responsibility, and yet definitional confusion and ideological biases are also responsible. New theoretical approaches are considered necessary for a more complete consideration of the problem.

Definitions

Susan Gray (1982: 388) identifies the task of defining pornography as the key problem in the debate concerning pornography effects. The terminology is confusing and confounds an adequate interpretation of the results. 'Erotica', 'pornography' and 'sexually explicit materials' are used synonymously (Bart & Jozsa 1980: 216). This ignores the theoretical distinctions that are sometimes made between the terms.

McKay and Dolff (1984: 6) observe that pornography attracts extremes in definitions. Feminists have been criticized for defining pornography by its effects. McKay and Dolff (1984: 16) complain that:

Both pornography and anti-social behaviours are seen as equivalent consequences of some other supraordinate, antecedent event (rape myth, male dominated culture).

Drawing parallels between pornography and rape may be a fruitful enterprise, but suggesting the two are dependent on patriarchy and manifestations of a common evil may not be very productive from an empirical perspective.

The different definitions adopted by various social groups may be problematic, yet equally misleading are the operational definitions invoked by social scientists. Researchers use various stimuli in individual experiments, yet their miscellaneous 'pornographies' may be highly dissimilar. Pornography may be simply explicit sexuality in some experiments, sex and violence in others. Without specific detail of the written or pictorial stimuli used, complications emerge (Russell 1980: 218). The examination of a large body of literature which purports to explain one concept may result in a canvassing of literally hundreds of different issues. Therefore, attempts at making comparisons, detecting trends or drawing conclusions between the results is hampered by the fact that 'pornography' is not a constant phenomenon (Fraser Committee 1985: 99; Fisher 1986: 326). The lack of conceptually based definitions has similarly been blamed for the inadequacy of the research. The findings of particular studies must be placed in some type of theoretical framework in order to lend the results meaning (Fisher 1986: 326). Definitional difficulties are an impediment to the formation of a coherent body of information pertaining to pornography effects. Definitions, however, are often dependent on the ideological position one maintains.

Ideological Positions

Divergent theoretical stances are available by which Pornography can be analyzed. The conflict over the appropriateness of the various ideological positions has

attracted researchers to study pornography's possibly harmful nature (Gray 1982: 387). McCormack argues that traditionally, two models have been employed to ascertain the relationship between pornography and aggression. These models are known as the imitation model and the catharsis model. English (1980) structures the controversy over pornography as a conflict between two social views, namely behaviourism and psychoanalysis (Gray 1982: 387). Behaviourists promote the imitation model, while psychoanalytic tradition endorses the catharsis explanation. The imitation model suggests that people learn patterns of violence from role models. The assumption is made that all social habits, including anger and aggression, are learned as a cultural phenomenon (Bart & Josza 1980: 206). This model, proposed by Bandura, suggests that people imitate what they view in the media. These patterns of response, once established, become very resistant to change, and can be reactivated in the company of certain environmental cues (McCormack 1985: 186).

The catharsis model is very controversial, and does not enjoy the support it once did. The catharsis model is heavily based on Freudian assumptions about the nature of the psyche. It states that "art, literature, religion, and other symbolic systems serve as "safety valves," reducing the tension created by sublimating "antisocial" forces in the psyche" (Bart & Jozsa 1980: 206). This model assumes a rather negative view of human nature, whereby man is innately aggressive. In the interests of

preserving social order and harmony, his real wishes and desires must be sublimated. Pornography, therefore, serves a positive role, allowing dangerous urges and wishes to be experienced vicariously. The catharsis perspective would not view the consumption of pornography as a contributing factor in sexual assault, as would the imitation model. Instead, pornography can be seen as one form of "safety-valve" which effectively aids in the prevention of sexual assault and other crimes of violence.

McCormack contends that the catharsis model may have more value than it is given credit for. Although both models are flawed to some extent, they may each be operative in different situations and contexts (McCormack 1985: 186). As McCormack asserts, studies demonstrate that:

there can be both an increase and decrease of a tendency toward aggression as a direct result of exposure to aggressive stimuli. Second, there are a variety of hypotheses about the effect of aggression stimuli on behaviour and attitudes; we are not, as is sometimes said in semipolar discussions of the pornography issue, restricted to a choice between imitation or catharsis (McCormack 1985: 188).

Although imitation and catharsis do not represent the only alternatives in a theoretical debate on pornography effects (McCormack 1978: 547), these two possibilities do help define the parameters of the discussion. Bart and Jozsa (1980: 217) consider the imitation and catharsis models to be highly inadequate. These researchers caution that the paradigms that social scientists use reflect their biases, and, in turn, support a sexist status quo.

McCormack states that research pertaining to pornography is predicated on sexist assumptions. Both pornography and violence research reflect their sexist biases at the problem conceptualization and research design stages, manifested in their methodologies. Men are responsible for the direction of the majority of the experiments, which usually enlist male subjects. Where women are used as subjects, it is frequently in the company of their husbands. This could radically alter the women's responses. The research instruments utilized in the studies are often designed with no regard for the female experience (McCormack 1978: 549). Perhaps the most fundamental problem with pornography research is the fact that men are considered to be the active party in the sexual and aggressive domains, determining and assuming responsibility for the consequences of their actions. Women are no more than passive pawns, thus reinforcing the sexism which is so pervasive in violence and pornography research (McCormack 1978: 551).

Feminists suggest research based on a sensitivity to sex roles must be instigated. Interest and attention in female subjects is necessary. Knowledge of the effects of pornography on women is scarce. Especially scant, is information concerning the effects of pornography on women in society (Bart & Jozsa 1980: 216).

Unbiased pornography research is difficult in a patriarchal society. Feminist social scientists could offer a new perspective to the study of pornography effects, avoiding some

of the inherent pitfalls with a majority group studying its own culture (Bart & Jozsa 1980: 213). Feminists have remarked that less biased research could be instituted if the conflict model or reference group theory were adopted. Conflict theory, promoted by theorists such as Andrea Dworkin, identifies the sexes as social groups in conflict with each other (McCormack 1978: 548). McCormack promotes the reference group theory, which suggests "our perceptions of, and responses to, inequality in life or art, are structured by our own positions in the social structure, as these are modified by our reference group identification" (McCormack 1978: 548). It concentrates on the inequality between the sexes in the social structure. McCormack submits that this approach may provide a superior theoretical framework from which to conceptualize research problems. Pornography would be seen as an ultimate form of sexual inequality in which women are sex objects designed to arouse and satisfy men. If one uses the conflict model or reference group theory to comprehend the issue, the sexist bias in pornography research is more readily apparent. McCormack (1978: 551) isolates the significant feature of these approaches as the assumption that social phenomena necessitate social, rather than, biological explanations.

Methodological Problems

Pornography research is particularly vulnerable to methodological criticisms. Studies are constrained by the nature of the responses one wishes to measure. Concern over pornography

stems from the fact that pornography has been implicated in some sex crimes. People fear that pornography is a precipitating factor in crimes, such as rape against women. Obviously, one cannot examine this situation in a laboratory environment. Ethical and legal considerations aside, other avenues of enquiry must be established. For this reason experiments measuring changes in attitude toward women, social indicator studies and retrospective analyses have been embarked upon. Critics have reproved pornography researchers on a number of grounds.

The relationship between pornography and sex crimes has received limited investigation. Correlational studies focussing on pornography effects usually involve attempts to illustrate an increase or decrease in sex crimes following a loosening on restrictions concerning pornography availability. Kutchinsky (1971: 263) presented Copenhagen police statistics demonstrating a dramatic decrease of reported sexual offences. He asserted that this decrease was partially the result of the increasing availability of pornography in Denmark. Court (1976: 143) re-evaluated the data in question and declared that increases for more serious crimes, such as rape, existed. These findings remain questionable, however, given that Court's work has received ample criticism (Williams Committee 1979: 85). Abramson and Hayashi (1984: 178) found that movies in Japan are much less explicit than those in the U.S.A., yet the themes of bondage and rape are quite common in Japanese pornography. Japanese rape statistics are not at a correspondingly high rate, however,

shedding doubt on a direct connection between the occurrence of rape representations and actual rape (Abramson & Hayashi 1984: 181).

Correlational studies have enjoyed considerable reflection and scrutiny. The 1970 U.S. Presidential Commission on Obscenity and Pornography and the Williams Committee appraised correlational research. Unfortunately, no correlational research is available using Canadian data. Regardless, this type of research is not very indicative of the effects of pornography. Among the many criticisms of correlational research is the fact that definitions of sex crimes vary over time. Police reports are often not good indicators of the actual incidence of sexual offences, due to an epidemic of under-reporting. These factors contribute to a plea for caution when monitoring the rise and fall of sex crimes. Correlational results offer limited information on the effects of pornography, because the method used prohibits the possibility of making cause-and-effect statements (Fraser Committee 1985: 100). A more beneficial investigation of the link between the use of pornography and sexual offences would be an analysis of the behaviour of sexual offenders. This relationship has not been adequately addressed.

Many critics call for the study of the long-term effects of pornography, yet this information would be difficult to assimilate. Retrospective studies do not allow extrapolation to causal relationships, and the problems due to forgetting or inaccurate memories introduce new difficulties (Diamond 1980:

195). Little is known about the cumulative effects of pornography. The most common experience of pornography is in small doses over long periods of time. Social psychology uses the opposite approach, whereby subjects are saturated with pornographic stimuli over a short period of time. Consequently, an inappreciable amount of information can be gathered, since subjects are often surveyed immediately following, or shortly afterward presentation of some pornographic stimuli (Fraser Committee 1985: 100).

Numerous pornography studies have been conducted in the social psychologist's laboratory. Fisher (1986: 337) proposes that research suggesting a relationship between pornography and anti-female thoughts, fantasies and perceptions has been fairly well received by the academic community.

Many of the standard criticisms which are levied on social psychologists' experiments are applicable to pornography studies. The stimuli used in the experiments may be highly unrepresentative of the pornography an individual has access to. While Palys (1984) found violent pornography to be the exception, not the rule, recent research has employed very extreme stimuli.

Generally, young college males are employed as subjects. Critics are disturbed by the fact that any demonstrated changes in the subjects may be the result of other impinging stimuli external to the pornography stimulus. There is justified concern

that these subjects may not be representative of the population as a whole, and the results obtained could not be generalized to a less homogeneous audience (Fraser Committee 1985: 100). The reactions of college males may not be equivalent with the responses of men in society.

Fisher (1986: 342) suggests that college males may possess greater internal constraints than the average adult male. This instance would result in an underestimation of aggression subsequent to pornography exposure. In addition, college males familiar with the university environment might simply 'play along' with the study and not take the research seriously.

Some critics argue that there should be greater interest in those disturbed individuals more likely to commit crime, and one should not worry about generalizing to the male population as a whole (Gray 1982: 389). Ethical constraints prevent researchers from studying the effects of pornography on individuals more susceptible to the messages within pornography. It is felt that by doing so with potential sex offenders, we may be legitimizing their aggressive tendencies toward women. Studies of pornography effects have involved sex offenders, albeit incarcerated ones. There is a contention that these people may not be representative of the many rapists outside of institutions who manage to evade detection.

Experiments addressing the impact of pornography on children are too unethical to be seriously considered (Fraser Committee

The experimental demands and the devices used in experiments measuring sexual arousal may confound the results. Subjects may be reluctant to report their actual responses. There may be major incompatibilities between what subjects indicate they believe, and what they actually do believe, taking into account the delicacy of the subject matter (Bart & Jozsa 1980: 201). Physiological arousal might not be equivalent to psychological arousal. Devices such as the plethysmograph may be arousing in themselves. Simply asking subjects to attend to their levels of arousal may be stimulating to some degree (Gray 1982: 389).

Bart and Jozsa (1980: 201) discuss a major criticism of the laboratory research. They address the gap between attitude and behaviour. It is difficult to ascertain the exact relationship between what subjects say they will do, and what they actually will do. Given the complexity of human behaviour, researchers need to understand the environmental constraints on people, and how various circumstances alter responses.

It is imperative that context be regarded as a crucial variable in pornography research. The circumstances of exposure may manipulate the interpretation of pornographic stimuli. A consideration of context entails a recognition of those aspects of the situation which provide meaning for the behaviour or phenomenon in question (Palys & Lowman 1984: 4). Palys and Lowman (1984: 8) argue:

research for policy requires a special emphasis on situational representativeness or contextual integrity in order to ensure that one's results bear relevance to more than just artificially generated and delimited behaviour of an insular laboratory context.

These authors are objecting to the use of the supposedly 'context free' classical laboratory experiment as a determiner of social policy. They suggest that contextual relevance is a more important variable deserving attention in pornography research.

Fisher argues that laboratory experiments share few commonalities with natural settings. In everyday life, individuals may choose to aggress against a woman or not, although in some experiments decisions are limited to how intense a shock to provide. The varied response alternatives available in social life are innumerable. Restricting response alternatives effectively restricts the generalizability of experimental results (Fisher 1986: 340).

Subjects volunteering for a social psychological experiment examining aggression towards women do not expect or foresee retaliation or meaningful punishment for anti-social actions. The subjects may not recognize their responses as causing legitimate harm, regardless of how their actions are interpreted by an experimenter. Fisher (1986: 342) reminds us that fear of punishment in natural settings may not be an overwhelming consideration, but it generally engenders some degree of concern.

New Areas of Research

Feminists have detailed many harms associated with pornography, not directly related to past laboratory investigations. There are contentions that pornography impedes women's equality rights. These issues have not been addressed by the research (Fraser Committee 1985: 99). Correspondingly, many studies are preoccupied with the distinction between pornographic and erotic materials. This distinction continues to be highly problematic for social scientists because of its methodological imprecision (Nelson 1982: 174). Russell (1980: 218) advocates that research pertaining to sexist versus healthy behaviour deserves consideration. A deficiency of information in reference to possible alterations in values regarding human dignity and equality subsequent to pornography exposure remains. Literature addressing those aspects of behaviour most vulnerable to influence is inadequate (Fraser Committee 1985: 102).

Feminists point to the anecdotal accounts of husbands using pornography on battered wives. This assertion remains, to date, uninvestigated by research. Similarly, accounts of children forced to accommodate adults' sexual demands, subsequent to the consumption of pornography portraying those behaviours, have not been focussed on by the research (Fraser Committee 1985: 101). In fact, the whole dilemma over pornography as a precipitating factor in anti-social behaviour has not been demonstrated. Although arousal and aggression are popular topics for study, Russell (1980: 218) suggests more pertinent research

necessitates a study of pornography and violence against women.

Many problems with the research concerning pornography effects have been documented. Criticisms range from sexism at the problem conceptualization stage to specific denunciations of the methodologies of different experiments. The results of the study of pornography effects are not able to support the contention of a causal relation between pornography and violence against women. Peculiarly, some feminists have effectively ignored the research to date.

Is Research Necessary?

Theoretical discussions founded in assumptions of a causal connection between pornography and violence against women are seriously threatened by the literature's inability to support their contentions. Russell (1980: 221) questions:

Do we really need research to tell us that such material reinforces or even fosters dangerous myths about rape? Material such as this not only encourages men to rape, but also serves to undercut the credibility of the victims, thereby contributing to their isolation and victimization by society.

Russell has legitimate concerns, but if stances against pornography are to be predicated on assumptions of harmfulness, these assumptions must be verified empirically.

Brownmiller similarly avoids the conclusions to be inferred from the social sciences. Brownmiller (1975: 444) queries:

does one need scientific methodology in order to conclude that the anti-female propaganda that permeates

our nation's cultural output promotes a climate in which acts of sexual hostility directed against women are not only tolerated but ideologically encouraged?

Hughes (1985: 105) submits that individuals are more eager to censor pornography if they can be assured with evidence implicating pornography in instances of sexual assault. She believes, however:

the very existence of pornography is the problem and that while there is evidence to suggest a correlation between exposure to porn and the commission of brutal sex acts against women, the connection is not necessary to justify controlling pornography ... At the least ... we must recognize that the factors which allow ever more brutal pornography also encourage sex crimes against women and children; and we can go further: pornography invites imitation because, like the cigarette and beer ads, it promises pleasure and success.

Russell, Brownmiller and Hughes recognize the inability of social science to empirically demonstrate a causal connection between pornography and violence, yet refute this information. They argue that pornography does cause harm and defer to anecdotal police reports. This approach weakens their position. A causal relationship is not a necessary precursor for objection to pornography. Garry (1978:400) feels the disturbing feature of these positions is that they "have succumbed to the temptation to disregard empirical data when the data fail to meet the authors' expectations." An acceptance of the current literature is revealed in McCormack's posture on the effects issue.

McCormack contends:

everyone agrees that experimental data cannot be the basis for social policy. These studies add to our knowledge about human behaviour, but they are designed in a very special way and for particular theoretical purposes. In short, we could not establish any reliable

statistical association between pornography and acts of sexual violence (McCormack 1985: 182).

Experimental research is not very helpful in suggesting the best approach to pornography. Many feminists feel that the effects issue is largely irrelevant to feminist concerns. Ultimately, one cannot look to research on the impact of pornography to provide much insight into the most suitable approaches to pornography. Feminists acknowledge the inability of empirical investigations to determine social policy. A branch of feminism, separate to the one previously discussed does not promote more scientific research as the answer to the pornography problem.

The New Wave: Feminism II

Like many political movements, the women's movement appears to present a unified front. Internally, theoretical differences reside. Bitter disagreements have erupted between feminists over the effects and meaning of pornography (Wilson 1983: 135). This issue appears to have divided feminists into mutually incompatible groups. A new branch of feminism has emerged, critical of the focus on pornography and the theories employed by the anti-pornography campaigners. This group, rather than focusing on depictions of women being mutilated and objectified in a dehumanizing manner, seeks to comprehend the meaning of the imagery in representations (Wilson 1983: 166). Sexism is the ultimate problem, while pornography in itself is infantile and demonstrates an inability to address sexual issues in our

society. A more useful discussion of pornography focuses on the concept of fantasy, and avoids the anti-pornography campaign, which inevitably leads to a call for censorship.

Stern (1982: 39) argues that the pornography issue initially served to prevent the disintegration of feminism, as the movement was losing support:

It is a response to something that is evident, that is noticeable, and it arrived at precisely the time when the Women's Movement was losing energy and coherent organization. Because pornography is there, can be pointed to, shown, because it appears to be explicit in a way that sexism is usually not, it has been seized upon as a target.

Pornography became a symbol for female defeat (Snitow 1985: 112). By the late 1970's, women were becoming aware that social progress was an extremely tedious process. This awareness witnessed the enthusiasm of the time being replaced by frustration. The anti-pornography campaign gave new energy to a cause that was losing momentum (Snitow 1985: 111). The dissension which is now evident in feminism, is a result of that factor which initially created cohesion (Stern 1982: 47).

Coward (1982: 9) believes that anti-pornography campaigners, such as Dworkin, Morgan, Brownmiller and theorists adopting similar perspectives, are mistaken in their perception of pornography. It is not part of a spectrum of male power, which is, at the end of the continuum, physical violence against women. She contends that equating pornography and violence effects no practical purpose and evades important issues. It makes complex human behaviour appear rather simplistic. The

majority of pornography is not violent (Wilson 1983: 137; Willis 1981: 222). Pornography is not the same as violence against women. It is not sexual sadism (Wilson 1983: 163). Conflating the imagery of pornography with actual violence is an oversimplification and is an exercise in reductionism. Women will not benefit by pursuing this avenue of thought. This approach suggests that images of sex are the same as real sex. It blames images for the position of women in society (Diamond 1985: 41). Social strategies and policies cannot be founded in this theoretical framework. This anti-pornography approach remains ahistorical. The categories of 'male' and 'female' are structured as fixed and timeless within this approach (Snitow 1985: 112). The fatalism of Dworkin's 'male supremacy' perspective preempts proposals for change, relating a "rhetoric of despair, not of liberation" (Wilson 1983: 162; Coward 1982: 10). This focus on pornography avoids other more pressing issues in society, which involve major social changes, such as preventing real violence against women, aiding battered women and improving women's economic position in society. The problem of violence, and representations of violence in this culture must be faced. Male hostility is a pressing social problem, and male hostility causes violence to women, not pornography (Willis 1981: 221).

If we are not willing to accept patriarchy and male supremacy as sufficient explications for the proliferation of Pornography, other reasonable answers must be proposed.

Feminists contend that pornography thrives because it is considered illicit (Coward 1982: 52; Stern 1982: 40). It requires a social context of ignorance and shame (Snitow 1985: 116). Wilson (1983: 159) believes the main problem with pornography is that it is extremely infantile. Sex is considered an 'adult' game. By keeping it hidden, we are reinforcing its naughtiness. The illicit nature of pornography encourages its popularity as a forbidden fruit, which promises pleasure through male arousal. Although pornography may appear immature and silly it does provide some valuable information. Perhaps the most important message that pornography relays is a comment on the state of human relations. It exemplifies the problems we have in dealing with sexuality (Wilson 1983: 221). It focuses on the obsession men have with male arousal, and illustrates sexual stereotypes (Coward 1982: 53). Wilson contends the proliferation of pornography is indicative of a society which is not dedicated to the open discussion of sexual matters (Wilson 1983: 154).

The anti-pornography movement is criticized for being divorced from a larger feminist perspective (Willis 1981: 22). Pornography must not be conceptualized independently from other social phenomena. The theories used by feminist anti-pornography campaigners are inadequate because they operate independently from larger issues (Wilson 1983: 213). Pornography, as a distinct category, is the wrong focus of attack (Coward 1982: 19). The new wave of feminism dictates that pornography is problematic, because it forms part of a larger phenomenon of

sexist representations. Pornography shares its sexist images and codes with other depictions. Romance fiction, Cosmopolitan Magazine, Vogue, Bazaar, soap operas and advertisements all provide images of women that are disturbing to feminists. A comprehensive discussion must address sexist codes in general, and negotiate how their meanings are produced. Ros Coward (1982: 13) suggests that the meanings of a representation can be gauged through a consideration of its contexts and uses. The way in which the different elements of an image are arranged elucidate its message. Coward disputes traditional interpretations of pornography, implying that cultural codes allow a picture to be understood. Codes of availability, fragmentation and submission prevail, and are mobilized to effect a certain meaning. Repeated images of female availability serve to reinforce ideologies that female sexuality functions to meet depersonalized male needs (Coward 1982: 18). Fragmentation can be defined as a tendency to concentrate on areas of women's bodies in a very fetishistic way (Coward 1982: 17). Although fragmentation is not always a negative practice, it can be an accomplice to the 'death effect', which has become popular in representations. Codes of submission relegate women to passivity, illustrated in female submission to male force. Women's sexual pleasure is represented as passionate death (Coward 1982: 18). It is futile to assault these sexist codes and images in pornography, yet embrace them in areas such as advertising and fashion.

Pornography has little more to add to a discussion of sexism than other portrayals. It may present a good medium to analyze the function of fantasy, however. Wilson suggests that an understanding of fantasy must be prefaced with the statement that fantasy is not the same as real violence (Wilson 1983: 164). The relationship between fantasy and act, between desire and sex, and between representations and acts deserves further exploration (Coward 1982: 20).

Those feminists arguing that pornography must be contained and censored are not necessarily oblivious to the concerns of the new feminist camp. They concede that censorship will undoubtedly drive pornography further underground, accomplishing little in the way of restricting availability. They feel, however, that censorship laws must be invoked to demonstrate society's intolerance of, and will to prevent, the abuse and humiliation of women. The feminists objecting to censorship suggest that this approach may prove more detrimental to the women's movement than is presently foreseen (Callwood 1985: 123).

The new current which flows through the feminist group is in vehement opposition to the censorship of pornography. The sentiment which holds censorship strategies to be impractical, and in dangerous opposition to feminist aims, is widely shared. Censorship provides the wrong approach because "it offers a paternalistic, catchall solution to our problems and distracts our attention from less visible but more insidious injustices we

suffer by focusing on symptoms rather than disease" (Gronau 1985: 97). Censorship of pornography is an ineffective 'band-aid' solution to the cultural problem of sexism. It does little to effect changes in socialization processes and childrearing practices, where individuals develop many of their attitudes and prejudices. Censorship contributes to the traditional notion that sex itself, not just sexist representations, is objectionable (Wilson 1983: 153).

By adopting a pro-censorship position, feminists would be broaching on an unfortunate alliance with non and anti-feminist forces. Stern (1982: 47) alerts us to the futility of an alignment with the Right, predicting a deleterious effect on feminist and gay interests. Recognizing these obstacles, Burstyn (1985: 15) argues for a greater selectivity in the type of power women bestow upon the state. She acknowledges that state institutions compose part of a larger system that harbours the objective of preserving the status quo. A maintenance of the status quo translates to an affirmation of sexism. Laws that serve to empower women, such as equal pay and opportunity laws, are much preferable to censorship laws which remove women's power (Diamond 1986: 295).

The people who are relegated the responsibility of enforcing censorship laws are selected by a system which does not advocate feminist aims, and often proceeds in direct opposition to those goals (King 1985: 90). Gronau remarks that "there are already too many impediments to our being heard; we must not be

complicit to another barrier" (Gronau 1985: 96). Censorship laws will undoubtedly be exercised by those refuting feminist concerns. The laws which many anti-pornography campaigners construct will be employed to prevent future expressions of feminism. In this sense, censorship approaches are admonished for falling into patterns of traditional conservatism, and being sexist in themselves. McCormack (1980: 6) warns that censorship "places power in the hands of men to look after the interests of women, thus replicating the powerlessness of women." The creation of policies which are contingent upon censorship strategies cause women to be accomplices to their own oppression.

Willis states that in a "male supremacist society the only obscenity law that will not be used against women is no law at all" (Willis 1981: 226). The belief that pornography censorship will be used as yet another device to silence women's voices, persists. McCormack contends "Dissenting views will inevitably suffer, and thus we will deprive ourselves of the social forces that act as catalysts for change. Censorship undercuts the democratic conditions that make change possible" (McCormack 1985: 181). The censorship of pornography is conceived of as a superficial response to a complex problem. Deceivingly promising an improved social environment, it nonetheless detracts from feminist ambitions. Within a patriarchal society, censorship will function to strangle non-sexist images of sexuality. Feminists warn that investing greater power in institutions that

traditionally suppressed their concerns cannot be considered a progressive strategy. The censorship of pornography provides yet another barrier to the feminist goal of equality between the sexes and the eradication of sexism.

A feminist perspective has upset the traditional moralist/civil libertarian dichotomy which previously defined the parameters of a pornography discussion. Feminist theory demands a social justice, distinct from the moral outrage of the Right or the civil libertarian plea for individual freedoms. Feminists argue pornography is a symptom of patriarchy. Pornography functions as a social control device to maintain the subordination of women by dehumanizing and objectifying them. It not only condones, but encourages, violence against women. Decades of research have failed to provide empirical support for this contention. The information regarding pornography effects is inconclusive and contradictory. Regardless, empirical investigation cannot provide the basis for social policy.

A new branch of feminism has emerged, critical of the concern over pornography. This perspective concedes that pornography is the wrong focus of attack. Pornography should not be conceptualized outside of theoretical constructs, or serve as an impetus for the women's movement. The serious problem pornography shares with other forms of media and advertising is in its sexist representations. The context and codes particular to each representation determine the nature of the imagery and direct a certain comprehension. Pornography does not cause

violence against women, male hostility does. Simplifying complex human interactions to a pornography equation is reductionistic. New theories which address women's issues and incorporate them into a model of change are required. A descriptive fatalism usurps the need for social responsibility. The pornography issue is dangerous to feminism because it risks an obliteration of the boundaries between feminism and the Right. Ultimately, censorship would only silence women's voices.

New approaches to the pornography issue are necessary. Feminists from the anti-censorship camp suggest various electives to censorship, while other feminists have been instrumental in drawing attention to alternative legal interpretations of the pornography problematic and proposing strategies which morally educate and serve to empower women. Their interests are in competition with the concerns of other social groups. A general dissatisfaction with the current community standards approach is expressed. Many proposals for change are, therefore, currently available, reflecting the definitions, conceptualizations and ideologies of the individuals and groups that harbour a vested interest in the pornography issue.

CHAPTER IV

LEGAL STRATEGIES IN COMPETITION

Ideological and philosophical positions regarding pornography hinge on individuals' perceptions of the relationship between law and morality. Approaches to pornography are premised on the 'harms' it may produce. Many moralists, civil libertarians and feminists, as a function of their ideologies and notions of harm, believe that under specific circumstances pornography must be legally curtailed. The competing values of the social groups determine the necessary circumstances for control. Alternate views of harm are presented by the groups, including harm to society through moral decay, harm to individuals either psychologically, morally or physically, and harm to groups of individuals, where the harm is manifested through injury to equality rights, notions of integrity and social status. These diverse notions of harm can be translated into three main principles: the offence thesis, the provocation thesis and the direct harm thesis.

The various theses are justifications for legal restrictions on specific types of pornography. The offence thesis regards legal restrictions to be necessary "where the public presentation of pornography might cause an individual to suffer harm through disgust, shock or embarrassment" (Bakan 1984: 9). The offence principle is only applicable in cases where the pornographic material is unavoidable and it has been objectively

ascertained that the display is offensive (Bakan 1984: 9). Those who accept the offence thesis as a basis for restrictions on pornography must recognize disgust, shock or embarrassment as substantial enough harms to warrant legal control.

Both the provocation thesis and the direct harm thesis are feminist theses. The two justifications for pornography restrictions are founded in the belief that pornography is harmful to individual woman (Bakan 1984: 11). The provocation thesis states that:

certain types of pornography prejudice the right of women to liberty, security and equal opportunity, since such pornography provokes misogynist behaviour on the part of those who use it (Bakan 1984: 30).

This principle regards the harm produced by pornography to be realized through the material's potential ability to provoke aggressive or discriminatory behaviour in men. Women may be assaulted and discriminated against as a consequence of men's consumption of pornography. The provocation thesis does not consider moral evaluations or the shocking or offensive nature of the pornography. The capacity of a certain article of pornography to cause men to harm women is the only justification for restriction under the provocation principle. Consequently, the inability of researchers to resolve the debate over the causal link between pornography and aggression is a considerable impediment to the adoption of legal restrictions based upon this thesis.

The direct harm thesis is not concerned with the effect of pornography on men's behaviour. The harm, according to this principle, emanates from the material itself. The direct harm thesis suggests that the existence of certain types of pornography constrains women's right to liberty, security and equal opportunity because such material presents an affront to the dignity and integrity of individual women (Bakan 1984: 30). The injury is, therefore, conceptualized in terms of psychological harm. It:

may be suffered by individual women by virtue of their awareness of a societal practice that systematically degrades women as a group (Bakan 1984: 11).

The psychological harm may take the form of a distorted self-image and lowered self-esteem (Bakan 1984: 18). The direct harm principle is based on the notion that psychological harm is as likely to endanger the security and autonomy of the individual as is physical or economic harm (Bakan 1984: 25). Acceptance of the direct harm thesis is contingent upon evidence that pornographic material has such effects, and a belief that affronts to a person's dignity and the subsequent psychological injury create severe enough harms to merit legal sanctions (Bakan 1984: 19).

Legal solutions to the pornography problematic are predicated upon these three assumptions. While the moralist approach does not require any proof or demonstration of harm, the liberals and feminists pose more stringent restrictions. Moralists concur with and propose any approach which will serve

to throttle expressions of sexuality. Consistent with the liberal approach is the offence thesis, which is reflected in the practices of many municipalities. Municipal remedies include licensing, zoning regulations and nuisance statutes.

Elements of the provocation thesis and the direct harm thesis coexist within the feminist camp and are, theoretically, compatible with liberal principles. Many civil libertarians refuse to support the manifestation of the feminist theses in law, however. Liberals do not acknowledge evidence of the harm discussed by proponents of the provocation principle. Furthermore, it is debatable whether they would ever recognize the psychological harm addressed by the direct harm principle as constituting a serious enough injury to form the foundation for criminal sanctions.

The provocation thesis is reflected in many remedies, among them strategies such as common law civil action, the Dworkin-MacKinnon Ordinance and the existing Saskatchewan Civil Rights Code.

Those feminists who propose that legal control be predicated upon the direct harm assumption advocate the use of hate law provisions within the Criminal Code. This thesis is manifested within both the Saskatchewan Human Rights Code and the Canadian Charter of Rights and Freedoms. Provincial film boards could incorporate feminist notions of harm into their policies with relative ease. At the federal level, evidence indicating that

the judiciary has begun to recognize the direct harm principle is available in the form of recent judicial interpretations of the community standards of tolerance test. Although this direction is qualitatively different from the traditional community standards approach, various individuals, including many feminists, do not feel that this strategy offers any meaningful solution to the problems associated with pornography in our society. Therefore, evaluation and exploration of other innovative strategies is necessitated.

Moralism and Pornography: Blanket Condemnations

Moralists do not regard proof of harm as a necessary prerequisite for criminal sanction. The conservative position states that the morals of society are shared by the majority of individuals. Individual actions may serve to destroy the purity of the moral environment, however. Another moralist perspective states that unless the law protects a society's morals this neglect could lead to the moral decay and deterioration of society. These notions are known as the 'moral environment' and 'moral cohesion' views. Both share the belief that pornography is used to produce feelings of lust and to encourage sexual activity outside the bonds of marriage (Fraser Committee 1985: 18). Pornographic material is, therefore, identified as inherently bad or evil because of its focus on sexuality. It is considered to be detrimental to the institutions of marriage and the family. Sexually explicit material may be banned on the

grounds that it poses a threat to the organizational structure of society. Obscenity is "judged from the point of view of the intrinsic wickedness or virtue of the material in question" (Mahoney 1984: 37). Therefore, harm to individuals is a sufficient but not necessary condition for legal control.

The community standards interpretation of obscenity legislation is supported by the moralist position. Harm to individuals is not at issue since "the law in this area... appears to be concerned with protecting society from that which it will not tolerate" (Bakan 1984: 5). The law deals with the protection of public morals (Bakan 1984: 7). The obscenity approach to pornography is a consequence of the traditional moralist perspective (Jacobs 1984: 29).

Moralists believe that the question of whether adults should have access to certain sexual materials is appropriately determined by community intolerance to those individuals being exposed to such material. They urge the tightening of controls and stricter enforcement of the law by police and the courts. They contend that control of pornography is rightly governed by obscenity legislation, nested within the 'Offences Tending To Corrupt Morals'. They similarly support the prior restraint of pornography at the provincial level, and will generally agree with any law which may further their aims, notwithstanding the original intention of those laws. Proposals promoted by feminists may enjoy the support of moralists, because the conservative approach realizes laws can be interpreted various

ways to preserve the status quo.

Liberalism and Regulation: A Focus on Freedoms

The liberal approach is the antithesis of the moralist position. Civil libertarian views are deeply rooted in the writings of a nineteenth century Englishman named John Stuart Mill. Mill's emphasis was on the rights of the individual and individual liberty, rather than on the rights of society (BCCLA 1984: 5). Mill objected to the moralist notion of majoritarian 'wisdom' and argued that the truth could only be obtained through discussion within an open marketplace of ideas. This ideology holds that individuals are most qualified to determine their own actions (Fraser Committee 1984: 15). The civil libertarian perspective has evolved to the position where it can accommodate the offence principle, and yet it can be argued that restrictions on individual freedoms in the form of prohibitions against pornography cannot be justified in the absence of proof of harm to individuals (Bakan 1984: 8).

The prohibition of pornography is an abhorrent phenomenon for the civil libertarians, as any form of censorship restricts the free flow of ideas in a democratic society. Censorship prevents the unhindered current of information which allows the true to be separated from the false. Social change is precluded by restrictions on the dispersion of ideas. Liberals maintain that the suppression of speech negates the possibility of

dissent and functions to preserve the status quo (Clark 1983: 53). Civil libertarians do accept that the curtailment of pornography would be compatible within the context of the provocation thesis and the offence thesis.

The offence thesis facilitates regulation, as opposed to censorship. Therefore, it does not necessitate modification of liberal tenets. Sometimes referred to as the 'adults only' model, this view would cease the absolute state repression of sexually related materials with respect to consenting adults (Hunsaker 1974: 939). One avenue that has received a great deal of support from the liberal community is the municipal by-law approach. As a consequence of constitutional constraints, municipalities have no authority to ban that pornography which has not been declared obscene within their jurisdictions, but they may regulate it.

Approaches to pornography at the municipal level are advantageous because they allow communities some flexibility with regards to the display and access to pornographic materials in their community. An affront to its inhabitants may be prevented, while an individual's right to produce or consume sexually explicit material will not be refused. Municipalities in different locations express dissimilar concerns over pornography as a function of community size, culture and regional variation. Municipal by-laws can effectively address specific problems peculiar to a given community. Occasionally municipalities invoke by-laws because of a shared sentiment that

federal measures concerning obscenity are ineffective. This reason for the employment of by-laws is most likely to encounter constitutional challenges. Municipalities have an important, yet limited, role to play in the regulation of pornographic materials. Zoning approaches, licensing regulations and nuisance statutes are at their disposal.

Zoning Ordinances

There are two varieties of zoning ordinances. One type seeks to disperse certain businesses dealing in pornography over a specific area, while the other approach is to concentrate those businesses within the same region. Both approaches zone different areas of a municipality, outlining the land uses that are permitted within those areas. Rules exist which govern the breadth of zoning regulations. A zoning code must have very accurate definitions of specific land uses. Municipalities create zoning ordinances by creating a list of uses that will be regulated, identifying each by its main characteristic. If the proprietor of an establishment uses his business in a different manner than is outlined by the zoning ordinance, his or her permit may be revoked. The purpose of zoning ordinances is not to prevent pornography per se, but to minimize the negative influences which sometimes accompany the concentration of businesses servicing the pornography market (Toner 1977: 12). City planners and community groups object to the pornography trade because of the well documented negative effects that are associated with a high percentage of pornographic uses in a

given area. These include a decrease in property values, higher crime rates, traffic congestion and depressed neighborhood conditions (Toner 1977: 2).

The 'divide and regulate' approach is designed to eliminate the 'skid-row' effect evidenced in many neighborhoods of large metropolitan areas. This form of zoning mandates that specific types of businesses must be a set distance from any area that has been zoned as residential. Similar businesses cannot be within a specified distance from each other, such as 1000 feet. The advantages to this model are that like uses are separated, the 'public costs' of pornography are spread out over a much wider area and the number of new pornographic establishments within a community is effectively limited (Toner 1977: 12).

Critics of this strategy contend that dispersal allows 'distasteful' businesses into sections of the city that would not normally be polluted by them (Tushnet 1970: 745). This approach has little impact on the existing retail distributors of pornography.

Both types of zoning ordinances usually have 'grandfather clauses', whereby previously established businesses are not effected by the ordinance (Meese Committee 1986: 388). Therefore, the problem remains static. Those municipalities interested in 'cleaning up' their cities will be frustrated by this barrier. The 'grandfather clause' is not as detrimental to the clustering approach.

The clustering model concentrates like uses in a specified area, creating an adult entertainment district. This approach was adopted by the city of Boston, because many pornographic businesses were already in existence in a specific area in that city. To prevent the skid-row effect, this alternative must be accompanied by other positive measures such as renovations, increased police surveillance and environmental measures, such as better lighting and general maintenance. Adoption of this model legitimizes the businesses which do exist, and allows for easy access by consumers. Although people in the immediate area might complain, the rest of the municipality is protected from offence by pornography and the problems that have become associated with it. Uniform district standards can apply to the whole area, so that all businesses are treated equally. This model ensures lower administration costs, and helps entice established businesses from other parts of the city to this area (Toner 1977:7).

The disadvantages of this model include the fact that non-pornographic businesses may not be able to compete and stay in the area. Alternatively, there may be a great deal of pressure to expand the area into other zones. Tushnet (1970: 745) argues this strategy will be malproductive because it will gather the consumers of socially disapproved material together, and allow people access to more bizarre, extreme forms of pornography. Women who live in neighborhoods where pornography is concentrated have complained that the number of pornography

consumers draws prostitutes into the area. Many of the women who live in the community are mistaken for prostitutes and harassed (MacKinnon 1985: 41).

The clustering model can also be objected to on ideological grounds. Some critics have maintained that this approach results in a city subsidy of sex businesses (Toner 1977: 7). Perhaps more importantly, the concern remains that zoning may be another instrument of power which protects the neighborhoods of the politically influential at the expense of economically disadvantaged areas (Meese Committee 1986: 390; Friedman & Yankowski 1976: 29). The poorer sections of the city may lack the ability to deal with the increase in pornography. From this perspective, pornography can be viewed as a class issue (MacKinnon 1985: 41).

The success of both types of zoning models is contingent upon very concise definitions of pornographic uses. To avoid challenges, municipalities must be very specific about the types of businesses named in a particular classificatory scheme. The utility of the zoning approach lies in the fact that it is not based on the content of sexually explicit materials. That usefulness is only maintained through precise definitions of the different uses. The most feasible method of zoning for pornographic uses is through age restrictions (Toner 1977: 6). If the recommendations of the Fraser Report and the Badgley Report concerning access of children to pornography were implemented, municipalities would not run the risk of

trespassing on the federal prerogative to legislate on criminal matters. If laws existed which criminalized the dissemination of pornography to minors, the stores would effectively define themselves for fear of prosecution. Children would be protected from offensive advertising, signs or views of the interior of the stores by the issuance of conditional use permits.

Jacobs (1984: 51) objects to the fact that businesses which have a partial trade in sexually explicit material will have all their wares and services determined by the zoning ordinance, constraining protected expression in attempts to control 'obscene' material. This is a legitimate problem with the zoning approach, but it is not insurmountable. Toner (1977: 12) advocates the use of waiver provisions in ordinances. These provisions allow the municipality to grant exemptions from the zoning restrictions in specific circumstances, such as for movie theatres which occasionally show an explicit movie. The waiver provisions are a reasonable way of ensuring that the zoning ordinances do not present too great of an obstacle to different enterprises, providing their effects do not contribute to community decay.

Zoning approaches must relate to the planning effects of the use. If a municipality cannot offer evidence that certain types of uses will have negative effects on the city through noise pollution, unsightly signs, traffic problems or crime the zoning strategy may not be the most appropriate measure. Many communities prefer the licensing approach, and the leeway which

accompanies it.

Licensing Regulations

Licensing ordinances often outline specific rules governing the operating practices, facility standards and development standards for businesses. The conditions of the license are concerned with the operation of the business, and not its content or the actual products it provides. Therefore, adult entertainment stores are often confined to particular hours of operation, must restrict their window displays and advertising and must not provide minors with pornographic materials (City of Vancouver 1984: 5). Some municipal regulations state that sexually explicit materials must be placed a certain height off of the ground, out of the reach of children, or be wrapped in an opaque covering.

Municipalities have been accused of creating licensing procedures that are unnecessarily strict. Some applicants are required to provide detailed background histories and are denied licenses if they have been convicted of a criminal offence (Toner 1977: 16). Many municipalities charge licensing fees or special deposits. These fees should apply equally to all similar businesses, and not be designed to prohibit trade in sexually explicit materials. It should be expected that the fees cover the costs incurred by the municipality. They should, therefore, not be exorbitant. Municipalities may perceive that licensing approaches are quite flexible, and are preferable to zoning

strategies for that reason. The licensing approach is much more vulnerable to legal challenges, however. Municipalities must be certain that their by-laws are not vague and that they do not prevent any legal enterprises (Fraser Committee 1985: 217). Licensing power cannot be used as an indirect method of suppressing pornography. Licenses can only be revoked on the basis of the faulty operation of a business (Wachtel 1979: 8). Municipalities are not responsible for legislating morality and must bow to the federal power to do so.

The aims of municipal zoning ordinances and licensing regulations are not to prevent commerce in obscene materials. They do not usually restrict the market, and in the event that they do, they will be considered unconstitutional (Tushnet 1970: 745). Moralists disagree with this regulation approach because it allows access to sexually explicit materials. Feminists are critical of using this strategy in isolation from other controls. Municipal by-laws rarely address the problem of violent materials within the community, and focus exclusively on sex (Hughes 1985: 110).

Some municipal practices receive more criticism than others. Placing magazines five feet off the ground, for instance, does little to protect women or tall children from the material (Working Group 1984: 60). Although the strategy does minimize the amount of insult suffered by women, it does not question the existence of pornography within society (Jacobs 1984: 51). Regardless, it remains a feminist assumption that women do not

escape the effects of pornography if they have not been forced to view it or have not been sexually assaulted. Pornography is estimated to defame all women, irrespective of individual exposures (Robson 1985: 19).

Feminists and civil libertarians fear that municipal by-laws will be misused and applied to non-sexist sexual material. They cite similar situations in the United States, where licensing and zoning regulations have been used to control the availability of birth control, feminist, gay and lesbian information (Burstyn 1985: 160). Fahringer and Cambrian (1978: 555) caution that zoning ordinances can be manipulated to suppress sexually oriented material that has never been judicially declared obscene, stating "Vague statutes and administrative classifications affront the due process clause by permitting and encouraging the arbitrary prosecution and enforcement of zoning laws" (Fahringer & Cambrian 1978: 561).

Many liberals argue that "regulating a forum is not inconsistent with the maintenance of its freedoms" (BCCLA 1984: 27). These individuals may feel that specific by-laws border on censorship but they still support the offence principle as justification for regulation. Other civil libertarians object to zoning ordinances and licensing provisions because the consequences of such strategies may be indistinguishable from moralism.

Liberals react even more strongly to the prospect of control of pornography by nuisance statutes. The employment of nuisance statutes for the control of obscenity has not been successfully upheld in Canadian courts, although it has been proposed as one alternative to our Criminal Code obscenity provisions.

Nuisance Statutes

Many liberals believe that criminal penalties are too severe for regulating obscenity. Nuisance statutes are conceptualized as one viable alternative. Legislatures are able to formulate statutes that define public nuisances. Public nuisances can then be zoned against and abated (Feinberg 1979: 569). Conceptually, this strategy is consistent with the view that pornography is a nuisance, like aversive noise, but not dangerous. It is, therefore, subsumed under the offence principle. The public nuisance tort doctrine is a non-criminal process used to protect unwilling audiences from contact with public displays of pornography (Vivar 1982: 67). The nuisance approach is distinguished from the zoning strategy because it regulates the content of expression. Its aim is prohibition as opposed to relocation. Civil libertarians object to the procedures involved in abating a nuisance and their consequences, yet not the philosophy underlying the nuisance approach.

Nuisance statutes developed from the common law nuisance offence. Any activity injurious to the safety, health, or morals of the public was considered a public nuisance and could be

abated by judicial injunction (Catlett 1984: 1617). Nuisance statutes are widely used in the United States. The many statutes differ to some extent but maintain some commonalities. The courts have not unanimously agreed that obscenity is properly defined as a common nuisance. Therefore, many statutes define a nuisance to include obscenity. The statutes authorize the prosecutors to initiate a civil action to abate the nuisance. Some statutes allow enforcement by private citizens (Jacobs 1984: 49). Abatement hearings are provided for, whereby the court decides whether some person is actually maintaining a nuisance. It must be ascertained whether the material is obscene, and therefore a nuisance. If the material is considered a nuisance, an injunction will be issued to abate it. The injunctions have two main sections. The first is a specific injunction which bans the material that has been declared obscene. The second part of the typical injunction is responsible for the majority of the controversy surrounding nuisance statutes. It is known as a 'blanket' or 'standards' injunction outlawing the future display or distribution of obscene materials. If a person does not concede to the injunctions, contempt proceedings can be instigated for the violation. In essence, this becomes a criminal obscenity trial (Catlett 1984: 1619).

This approach is very enticing to some liberals. Nuisance regulatory methods are considered more effective and less stigmatizing than regular criminal obscenity proceedings

(Catlett 1984: 166). Injunctions offer a more efficient method than Criminal Code options because they take precedence over other matters and can prevent the dissemination of obscene material very swiftly. The nuisance approach recognizes that context as well as content effects the determination of obscenity (Milligan 1970: 643). It is consistent with the liberal approach and is not predicated upon a link between pornography and aggression. It acknowledges that communities suffer from a concentration of pornography in economically disadvantaged areas, and protects individuals from unwanted confrontations with pornographic displays.

If it was decided that pornography constituted a public nuisance it would be a strict liability offence, requiring no proof of intent. The application of fines upon violation of an injunction could arguably aid in removing the profitable aspect from pornography (Milligan 1970: 645). The injunctions help to regulate future conduct, not penalize past conduct. They are created on an individual basis and, therefore, are very applicable and precise. The sanctions available are much more flexible than criminal sanctions. In the event that a violation does occur, the court may impose compensation requirements for the wronged party, or effect compliance through coercive sanctions (Rendleman 1977: 511). These could take the form of special taxes to be levied, void leases or a closing of theatres or businesses (Cherry 1973: 171).

The legal procedures invoked by a public nuisance statute are much less onerous than the corresponding criminal procedures. The burden of proof is not as strict, with no requirement of proof beyond a reasonable doubt. It is lowered to that of a 'preponderance' or of 'clear and convincing' evidence (Jacobs 1984: 49). Other barriers for protecting the defendants are not applicable to civil proceedings, including the guarantee of trial by jury (Rendleman 1977: 511). These are certainly questionable advantages from a civil libertarian perspective.

Although they ensure quicker actions they destroy the procedural safeguards which are built into the criminal system. The public nuisance statutes have been criticized for their overbreadth and vagueness, granting them a questionable constitutionality (Rendleman 1977: 525). The 'blanket' injunction is highly controversial because it operates against materials that have not been declared obscene, severely endangering the freedom of expression (Catlett 1984: 1619). Known as 'padlock statutes', the injunctions do not inform individuals about what is proscribed. Liberals complain that one piece of pornographic material should not condemn a whole business. The injunctions do not distinguish between protected speech and pornography (Fahringer & Cambrian 1978: 576). Store owners and theatre managers, wary of penalties for commerce in obscene materials, may resort to a self-censorship which is effectively much more restrictive than any obscenity law. A nuisance approach to pornography becomes a form of prior

restraint. Prior restraint preempts the possibility of public scrutiny and accountability. Fahringer and Cambrian (1978: 577) warn of the high potential for abuse inherent in a nuisance strategy. Powerful individuals can use this device to prohibit ideas contrary to their own.

Canadian law does not recognize 'commerce in obscene materials' as part of the definition of 'nuisance' (Bakan 1984: 10). The aim of nuisance statutes is prohibition. This approach is not very feasible within the Canadian context. An implementation of public nuisance statutes would constitute a trespass on the federal power to create criminal law.

Civil Adjudication

Another strategy very similar to the nuisance approach is the civil adjudication of obscenity. Civil adjudication can proceed before, with, or separately from any criminal proceedings. The procedures available for the civil adjudication of obscenity are outlined in enabling legislation (Schmidt 1977: 146). In brief, if a prosecutor believes any material to be obscene he or she is able to file a suit against the publisher or distributor. Subsequent to an advisory hearing, a temporary injunction can be issued, preventing further dissemination or display of the suspect material. A civil trial would normally ensue and a finding of obscenity would result in the surrender and destruction of the obscene material. If the distributor or retailer violated a permanent injunction against sale or

dissemination of the material he or she would be subject to a fine and possibly prosecution according to other statutory provisions (Vivar 1982: 68).

This approach suffers almost all of the weaknesses of the nuisance strategy. The civil adjudication process questions the principles of due process, right to trial by jury, and similar constitutional restrictions. It depends on existing definitions of obscenity. In addition, this avenue increases the potential for abuses by over zealous prosecutors (Vivar 1982: 68; Schmidt 1977: 147). This is due to the fact that the prosecutor initially uses his or her own discretion in the decision to initiate an action against material that he or she believes to be obscene (Schmidt 1977: 146). The main advantages of civil adjudication are the relatively short period of time the process requires, as well as the fact that distributors and retailers can avoid the stigmatizing effects of criminal conviction. Liberals reject this approach however, contending that this form of control would cause non-pornographic works to be jeopardized because the material would be shunned by cautious distributors. Although the civil adjudication approach is an expression of the offence principle, its consequences are similar to those of moralism.

The Problems of Harm, Freedom of Speech and Equality Rights

Liberal ideology is theoretically congruent with the provocation thesis. In the event of a systematic causal connection between pornography and demonstrable harm to an individual, civil libertarians would champion state attempts to legally control specific types of pornography. The bone of contention between feminists and civil libertarians exists in the type of harm necessary and the required standards of proof of this harm. The B.C.C.L.A. (1984: 27) argues:

There is no evidence which suggests any systematic causal link between the production and viewing of any variety of pornography and the commission of criminal acts against women or anyone else. In the face of the absence of such evidence, a democratic community is bound to protect the freedom of expression of those who produce pornography, and the rights of those who wish to view it.

Liberals contend pornography is speech and a proper response to objectionable speech would be more speech. From this perspective the good would triumph over the bad. This conclusion is preceded by the conviction that harm from speech is categorically different and less serious than physical harm. Harm engendered by speech is considered possibly avoidable and withstandable (BCCLA 1984: 12). Civil libertarians, therefore, have a powerful investment in free speech. Liberals argue that all obscenity laws should be repealed and free speech should reign. The free speech approach is entirely unacceptable to some strands of feminist theory.

Freedom of Speech

The legal control of pornography is threatened by the idea that pornography is political speech, and should therefore be protected. Hughes (1985: 113) disagrees, maintaining that freedom of speech has never been awarded the status of an absolute freedom. Pornography is not a judicially recognized form of protected political speech in the United States, despite the fact that feminists consider it to have a political function. It remains to be seen whether this issue will assume the same controversial nature under the provisions of the Canadian Charter of Rights and Freedoms.

The free speech debate seriously endangers the viability of approaches to pornography within the feminist community. Critics contend that anti-pornography campaigners are contradicting themselves by stating that pornographic speech contains no ideas or expressive interests, while simultaneously fearing it for the power of its misogynous messages (Duggan et al. 1985: 146). Some types of pornography may be regarded as a form of political speech, such as representations created by oppressed sexual groups. Duggan et al. presents the view that:

for some sexual minorities, sexual acts can be self-identifying and affirming statements in a hostile world. Images of those acts should be protected more for that reason, for they do have political content. Just as the personal can be political, so can the specifically and graphically sexual (1985: 146).

Rather than asserting that pornography is not political, many prominent American feminists, such as Andrea Dworkin and Susan

Griffin, maintain that pornography is an act. MacKinnon (1985: 65) agrees that pornography is more act-like than thought-like and, therefore, does not deserve protection as free speech. MacKinnon states:

The fact that pornography, in a feminist view, furthers the idea of the sexual inferiority of women, which is a political idea, doesn't make the pornography itself into a political idea. One can express the idea a practice embodies. That does not make that practice into an idea.

Both positions are difficult to defend, because pornography does not fit neatly into either category. Hard-core pornography scarcely resembles what one would normally regard as speech, and yet it is not an act in the true definition of the word. It is perhaps safest to claim that pornography has elements of speech and conduct within it. Its message is undoubtedly political, but many contend that outdated notions of free speech have a dubious bearing on the pornography issue.

Consistent with the provocation thesis, both liberals and feminists believe that speech must be restricted if it causes serious harm. Feminists regard civil liberties and individual rights as secondary to equality rights and social justice (McCormack 1980: 7). Feminists do not believe that pornography must cause acts of violence against individuals before it can be considered harmful. Clark (1980: 10) argues that pornographic materials do not directly cause crimes of violence against women and children, but must be objected to because they reinforce a system built upon the unequal status of the sexes.

Liberal harm demands proof of a 'clear and present danger' with the onus on the would-be censors to substantiate its existence. A clear and present danger must be:

a compelling and overwhelming threat of harm that is tangible and immediate and that can only be avoided by suppressing speech (Mahoney 1984: 45).

Mahoney (1984: 45) submits that the 'clear and present danger' test is not applicable to obscenity. The test was initially used in the United States to examine repression of political speech by the government. The test has been modified to some extent, but it essentially states that freedom of speech should not be constrained unless it presents a clear and present danger to society (Linz et al. 1984: 284). It has not been used successfully in either Canada or the U.S.A. with respect to obscenity. It never had to be considered in the U.S. because obscenity has never qualified for first amendment protection. It is doubtful that the 'clear and present danger' exemption, as it applies to the welfare of women, will ever qualify as a reasonable limit upon freedom of expression in Canada (Arbour 1985: 11).

Feminists assert that civil libertarians must re-evaluate their position concerning pornography and free speech for two reasons. Firstly, Mill's nineteenth century principles have little practical relevance and applicability to contemporary circumstance. Secondly, liberal notions of the necessity of a clear and present danger must be reformulated to include other types of harm. Contemporary sexual representations share few

commonalities with nineteenth century pornography. Technology and photography have radically altered the nature and quantity of pornography. Modern pornography serves to subordinate women. The goals of nineteenth century liberals were to loosen the hold of the church and the state on expressions of sexuality (Clark 1980: 11). Today's pornographers do not share those liberals' intentions. Pornography has radically changed in content, form and function.

Mill's 'free marketplace of ideas' is based on equality, so that truth or good will naturally overpower negative ideas. Women do not have the power to combat capitalism and the power of the pornographers. Letters to the editor do little to combat the many faceted abilities of modern technology. Pornography functions to silence women and deny them the right to object to their oppression (Mahoney 1984: 49). MacKinnon (1985: 63) believes pornography to be incompatible with more speech for women because it "strips and devastates women of credibility, from our accounts of sexual assault to our everyday reality of sexual subordination." Unconstrained free speech translates to civil inequality and guarantees that women's voices will not be heard.

McCormack (1980: 8) criticizes the civil libertarians for:

Using eighteenth century rhetoric to defend nineteenth century economic laissez-faire in the cultural monopoly of capitalism of the twentieth century.

A free 'market place of ideas' will only be meaningful for feminists with the help of affirmative action programmes and

policies mandating and subsidizing preferential access for women. This avenue will allow an opportunity to correct the one-sided market by giving women a voice to object to their oppression (McCormack 1985: 271).

Feminists enjoin that Mill's principles and utopian notion of an open forum of ideas is not possible in a patriarchal society dedicated to sexism. Feminists maintain that pornography is not dissent, and actually supports the status quo. It is consistent with the notions of marriage and the nuclear family within our society. Pornography reaffirms the social values of male domination and the oppression of women. Pornography is a prejudice rather than a protest (McCormack 1985: 274).

Clark (1983: 50) argues that liberalism must rethink its concept of harm so that it will be consistent with equality. She states:

the liberal principle behind opposition to censorship is based on a recognition that desirable social change requires public access to information which challenges the beliefs and practices of the status quo, what it does not acknowledge is that information which supports the status quo through providing materials which advocate the use or threat of coercion as a technique of social control directed at a clearly identifiable group depicted as inferior, subordinate, and subhuman, works against the interest both of desirable social change and the members of the subgroup so identified (1983: 57).

Clark asserts that liberalism assists the dominant sex and class. She argues for a reinterpretation of its principles to account for equality rights and a greater liberty for all.

One of the greatest barriers to restrictions on pornography is the liberal contention that any control of pornography would amount to a denial of freedom of expression. The protection of free speech is a crucial element to the maintenance of democratic systems. Bakan (1984: 30) argues, however, that an acceptance of feminist principles of harm would necessitate a protest that the law fails to provide women with equal protection of their rights to liberty and security. He contemplates the imposition of a positive duty on Parliament to amend the existing obscenity provisions to guarantee that women will be equally protected from harm engendered by pornography. This motion is premised on the assumption that pornography differentially harms women. His proposal is in congruence with ss.15(1) of the Canadian Charter of Rights and Freedoms which states:

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.

Bakan (1984: 31) emphasizes the tentative nature of his proposition. This possibility is not inconsistent with the recent judicial trend in Charter considerations, however. Although the Charter is relatively new and untested, there is a great optimism concerning its potential. The members of the Fraser Committee share this anticipation, stating:

Signs are that courts are prepared to take seriously the task of balancing individual rights and social concerns, and pay attention to other community members' rights which are at the root of the broader social concern with

pornography (Fraser Committee 1985: 143).

Many individuals are fearful that Canadian courts will eventually follow the American tradition with respect to pornography control. American courts regard 'obscenity' as speech which is not constitutionally protected. The American approach is to maintain a fairly narrow interpretation of speech so as to exclude pornographic expression. The Canadian term 'freedom of expression' is considerably broader than the American 'freedom of speech', however, making it more difficult for courts to deny that pornography falls within its ambit. Regardless, freedom of speech has never been held to be absolute in the U.S.A. Some restrictions have always applied (Hughes 1985: 114). Therefore, the American instance tenders an improper categorization, disregarding the feminist critique of pornography as the sexually graphic depiction of the subordination of women (Arbour 1985: 20). Many feminists advocate allowing 'speech' or 'expression' a wide enough berth to include pornography and subsequently limiting that speech under section 1 of the Charter. Therefore, the preferred interpretation is that the curtailment of pornography is a restriction on the freedom of expression guaranteed in s.2(b) of the Charter, but one that is demonstrably justified in a free and democratic society, given the Charter's commitment to the preservation of equality rights.

Pornographers and others defying feminist pornography laws will inevitably challenge that the legislation restricts their

freedom of speech under the Charter guarantees. The legislators responsible for enacting the legislation will undoubtedly respond that the law is a reasonable limit on freedom of expression, because the government is dedicated to eliminating sex discrimination. The state could defend its legislation with the argument that clause 28 creates an overriding exception to clause 2 freedoms, because clause 28 explains that the guarantee of sexual equality imposes a positive duty on the state to create an 'exception' to free speech for the elimination of sex discrimination (Lahey 1985: 682). Lahey reduces the 'free speech' issue to a consideration of clause 28. She states:

Viewed within the Canadian constitutional paradigm, then, the ultimate constitutional issue is the meaning and effect of clause 28. Immune from the limitations language in clause 1, insulated from the provincial overrides in clause 33, and even exempt from the three year moratorium on equality rights under clause 32, clause 28 stands as a strong statement that Canadians no longer believe that sex discrimination is justifiable, defensible, or tolerable (Lahey 1985: 684).

Canadian proposals for pornography laws are, therefore, more likely to escape Charter battles if they are presented in the form of sexual discrimination legislation.

Feminists advocating the control of pornography face the challenge of reconciling the problems of harm, freedom of speech and equality rights. They accuse liberals of being unduly reticent concerning the exercise of the provocation principle. Feminists do not consider the 'clear and present danger' test to be applicable to the pornography issue. Mill's notion of a 'free marketplace of ideas' is felt to be irrelevant within a

patriarchal society marked by sexual inequality. Freedom of expression challenges can be countered with the feminist argument that pornography is an act. Yet, stronger rebuttals are available within the Canadian context. Feminists exhorting new controls on pornography are banking on Parliament changing Canada's existing obscenity laws. Bolstered by the emphasis on equality rights within sections 15 and 28 of the Charter, many feminist approaches to pornography are now being submitted.

Feminist Theses: Perspectives on Harm

Both the provocation thesis and the direct harm thesis are feminist theses. Although both notions focus on harm to individual women, the provocation thesis conceptualizes men as a mediating variable between pornography and harm to women. The direct harm principle asserts that the harm emanates from the pornography itself. Women suffer psychological harm as a result of the existence of pornography. This is a function of the recognition that pornography systematically degrades women as a group. It must be remembered that a feminist discussion of pornography does not hinge on the issue of sexual explicitness. Many approaches to pornography are compatible with feminist principles. The human rights approach, civil actions based on the provocation principle, civil rights legislation, and proposed amendments to hate literature provisions are all manifestations of the provocation thesis or the direct harm thesis. Often the proposals have elements of both theses within

them.

The human rights approach has assumed a very popular position within the anti-pornography movement. Different procedural options are available under this strategy. One could argue for a broader and more liberal interpretation of the existing human rights codes, consistent with the Charter. Alternatively, one could create new civil rights legislation or draft and enact a separate, distinct amendment to existing human rights codes, specifically restricted to pornography. The Dworkin-MacKinnon Ordinance employs this approach (Fassel 1985: 9).

The Dworkin-MacKinnon Ordinance

Perhaps the most famous manifestation of the human rights angle can be found within the anti-pornography ordinance, which was drafted by Catherine MacKinnon and Andrea Dworkin for the city of Minneapolis. The by-law was borne from the understanding that obscenity laws and zoning ordinances did not directly address the harm that pornography does to women (Blakely 1985: 40). The by-law combines a civil rights approach with class action. All three levels of government can enact civil rights legislation of this variety (Cole 1981: 11). The only American municipality to actually adopt it was Indianapolis, Indiana, despite the fact that it, and versions of it, were proposed in many other communities (Duggan et al. 1985: 133). The ordinance has been declared unconstitutional in the United States, because

it attempts to reach material other than sexually violent or degrading material which is legally obscene (Meese Commission 1986: 394).

The by-law identifies pornography as an evil which is best addressed by legislation drafted to ensure human rights and dignity. The by-law illuminates pornography as a form of discrimination on the basis of gender (Fraser Committee 1985: 305). It makes pornography a violation of women's civil rights by declaring that it harms women's rights of citizenship through sexual exploitation and torture (Dworkin 1985: 22). It provides that the use of men, children or transsexuals in the place of women does not avoid the definition of pornography for the purpose of the ordinance.

The civil rights law that Dworkin and MacKinnon framed identifies pornography as a "systematic practice of exploitation and subordination based on sex that differentially harms women" (Dworkin 1985: 24). The harms that these theorists identify mainly support the provocation thesis. The harms include physical injury, coercion, and economic and social discrimination. The injuries are presented in the context of harms that are caused by men as a consequence of their pornography use.

Some of the by-law's harms could arguably be attributed to the direct harm thesis, because basic civil rights include the right to dignity and bodily integrity (Hughes 1985: 120). Yet,

this interpretation of the ordinance stretches its intent to some degree. Although it may acknowledge the direct harm thesis, the ordinance is basically designed as a tool to combat the harms laid out in the provocation thesis. Dworkin and MacKinnon's ordinance could only be considered a manifestation of the direct harm thesis if women suffered direct psychological harm which became transferred into damage to their civil rights, as a result of the existence of pornography.

Since the by-law is more directed at harms to women engendered by the male consumption of pornography, it is largely an expression of the provocation principle. The human rights approach identifies pornography as a form of hate literature which promotes misogyny in our culture. Pornography, therefore, is discrimination against women on the basis of sex.

The anti-pornography ordinance states that actions could be brought against the pornographers, distributors of pornography and users of pornography. The anti-pornography statute is aimed at trafficking in pornography, coercing someone into a pornographic performance, forcing pornography upon a person and assault engendered by pornography. An individual bringing an action under this ordinance could file a complaint with the city's civil rights commission which could then file a lawsuit, or the person could file a lawsuit directly. Remedies at court could include a monetary award and the issuance of an injunction (Duggan et al. 1985: 134).

The by-law defines pornography in very explicit terms. It defines pornography as "the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: ..." (Dworkin 1985: 25). The by-law provides a very exhaustive list of behaviours. This approach was adopted in the hopes that the general public would be able to distinguish the pornographic from the non-pornographic, thereby minimizing the likelihood of the 'chilling effect' of self-censorship (MacKinnon 1985: 24).

The anti-pornography ordinance has received considerable scrutiny since its conception. On the positive side, it empowers women to fight pornography. It frames pornography as a civil rights issue, and allows for action to be taken through civil rights commissions. The by-law permits a civil remedy, redistributing some of the power from the state to individual women. The Dworkin-MacKinnon Ordinance does not rely on the community standards benchmark in a determination of liability. It disconnects pornography control from the sexist and heterosexist overtures of obscenity laws and censorship regulations (Cole 1985: 234).

Remedies can take the form of an injunction or monetary awards for damages. This avenue could potentially remove the profit factor from the production and distribution of pornography. Supporters of this approach applaud it for procedural reasons. It could be much less expensive than private prosecution, and the burden of proof would not be as strict

(Fraser Committee 1985: 307).

Section 3 of the municipal by-law outlines the Unlawful Practices. The most controversial section is the trafficking offence. It states "It shall be sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs" (Dworkin 1985: 26). Any woman could bring an action under the trafficking provision on the behalf of women as a group. This section requires no proof of harm caused by pornography. It was specifically designed that way because the law has traditionally suspected women's words. The trafficking provision is interesting because "women's lack of credibility cannot be relied upon to negate the harm. There is no woman's story to destroy" (MacKinnon 1985: 60). Landau (1985: 8) argues that legal difficulties with class actions in Canada may preempt any meaningful consideration of this section. There is confusion over what damages could be awarded and how the damages could be proven.

The coercion provision mandates that it would be sex discrimination to coerce any person into a pornographic performance. Laws already exist in Canada which prohibit this conduct, such as laws against assault and fraud. The notable element of this provision is that it is accompanied by a list of thirteen defences that could not be used by pornographers, including that a person signed a contract or was paid for a pornographic performance. The list of inapplicable defences was compiled by Dworkin and MacKinnon. They made a record of all of

the excuses that were used in court to undermine the credibility of sexual assault victims. They incorporated these excuses into the ordinance, in the hopes of preventing similar abuses by pornographers (Blakely 1985: 120). Landau (1985: 8) suggests that the trauma of suing under this provision and the accompanying cross-examinations by the defence counsel could be more unpleasant than the indignities suffered by women during rape trials. Further, she feels the section is not necessary because Canadian women can already sue for crimes associated with coercion into pornography.

Section 3(3) provides for forcing pornography on a person. It is unclear how 'forcing' would be interpreted by a court. In any event, sexual harassment laws now prevent that behaviour in the workplace. This section may help prevent the open display of pornography in corner stores and drug stores, but anti-display by-laws can effect the same purpose. This section would not affect the producers and distributors of pornography, but largely the small retailers. The pragmatics of the provision are called into question when one contemplates suing a small business person for 'forcing' pornography. Any damages awarded on the basis of mental suffering would be too minimal to justify the court case (Landau 1985: 8).

The last provision is clearly a form of the provocation principle. It allows for the makers, distributors, sellers and distributors of pornography, as well as the perpetrator, to be sued or enjoined in the event of a physical assault as a result

pornography consumption. It would be very difficult to prove in court that an attack was a direct consequence of the viewing or reading of a specific piece of pornography. Remedies are already available which can address this circumstance, such as under the negligence principle, but they would encounter the same problem of proof.

The practicality of this section is questionable. Much of Canada's pornography is imported, and yet it would be difficult to reach American producers within the Canadian framework. There would be problems involved in bringing actions against retailers as well. If a magazine was purchased in one location, and a crime committed in another, a plaintiff would have to show evidence concerning which retailer sold the magazine (Landau 1985: 9). This could prove to be a very difficult process.

Arbour (1985: 14) observes that federal-provincial clashes might develop if the discrimination approach is to be adopted at the provincial or municipal levels. She suggests that the remedies created by provincial legislators may determine whether or not such legislation could be deemed ultra vires. As long as remedies remain within the asymptotes of 'property and civil rights' the legislation may remain constitutional. However,

anything beyond compensation in the form of damages may be found to amount to an attempt to legislate with respect to criminal law by using remedies more suited to the protection of a public interest than to the vindication of a private right (Arbour 1985: 13).

Many feminists do not share Dworkin's and MacKinnon's enthusiasm over the effectiveness of their municipal approach. It is unclear why the ordinance restricts its focus to sexually explicit depictions (Blakely 1985: 120). The harms the theorists cite would most probably apply to non-explicit depictions. There is a danger that by focussing exclusively on extreme images, one can legitimize the remaining sexist images (Manion 1984: 75).

Although the authors purposely provided exhaustive definitions of pornography, critics submit that the definitions are still vague, and in practice revert the focus from sexual violence back to sexuality itself. Terms such as 'subordination' and 'whores by nature' can be interpreted in many different ways by the individual bringing the action, as well as the judge hearing the case (Duggan et al. 1985: 134). MacKinnon (1985: 23) explains that 'subordinates women' focusses on the sexually explicit which subordinates women, and not on all of the sexually explicit depictions of the subordination of women. The court need not interpret the by-law in the intended manner, however. Phrases such as 'whores by nature' are equally problematic because, according to some points of view, women who have a variety of sex partners are indeed whores by nature.

The criteria used to identify pornographic images within the ordinance are very ambiguous. The by-law operates independently from a consideration of context and the role of audience interpretation of images. Individuals use culturally and historically specific codes in an effort to decipher a

representation (Diamond 1986: 306). Fragmentation and objectification in isolation cannot provide a recipe for pornography. Context remains the deciding factor.

Boyd (1986: 21) maintains that the ordinance is just too broad in its scope, although Emerson (1984: 132) insinuates that this is not accidental. It is because virtually all of the products of our culture reflect the inferior status of women. Regardless, one cannot attack the objectification inherent in pornography without fighting it in more mainstream images, such as those found in advertising or fashion.

There is concern that if this approach were adopted in its present form, publishers could be open to a multitude of legal battles (Meese Committee 1986: 395). Artists and writers could conceivably be restricted from being able to exhibit their work because the by-law is so broad in its scope. Wary publishers would refrain from publishing borderline works, victims of the 'chilling' effect of too repressive a legislation.

Although the proponents of this by-law claim it is directed at misogynist, sexually explicit and violent representations the sexually explicit and sexist can easily come under fire (Duggan et al. 1985: 140). Dworkin and MacKinnon undoubtedly did not foresee explicit consensual representations as being within the ambit of their ordinance. The presentation of women as sexual objects "through positions of servility or submission or display" might accomplish this purpose, however, making explicit

sexuality a target of the by-law.

The argument is also made that the by-law is not a radical device for righting the wrongs of patriarchy. In fact, the ordinance has been accused of presenting women in the same manner that pornography has traditionally. Because of its adherence to the provocation principle, the ordinance views women as passive creatures, while men assume the role of the aggressor and actor. The ordinance is also misleading because it implies that sexuality is male and not female, and that sex is dangerous for women. It alludes to the fact that penetration is synonymous with submission and that heterosexuality is sexist (Blakely 1985: 40). The coercion clause implies that women cannot consent to pornography and must be awarded protection. Women are conceptualized only in terms of their victimization. The ordinance, therefore, cannot be considered an empowering weapon. Critics question the pragmatics of women initiating actions and challenging pornographers. In the end the argument must be settled in court, by a usually male judge, reflecting non-feminist concerns (Duggan et al. 1985: 134).

Many feminists, sensitive to the oppression of any group on the basis of sexual preference, feel the ordinance inappropriately strikes at sado-masochistic depictions. Duggan and associates argue that the "legislation would virtually eliminate all SM pornography by recasting it as violent, thereby attacking a sexual minority while masquerading as an attempt to end violence against women" (1985: 140). Sado-masochistic

presentations present a particular dilemma for the feminist community, which is divided on the issue of how one is to distinguish between sexual violence and sado-masochism. Feminists are worried that this type of legislation presents yet another barrier to feminist goals, because "further narrowing of the public realm of speech coincides all too well with the privatization of sexual, reproductive and family issues sought by the far right" (Duggan et al. 1985: 147). Despite Dworkin's contentions that the by-law is not censorship and that it will not result in a black market effect, critics identify it as yet another form of control that will limit expressions of sexuality and thwart feminist aims.

If the by-law was not adopted in its entirety it would lose much of its effect as a legislative tool and defeat the purpose of its authors (Emerson 1984: 138). The Meese Commission considered using the Dworkin-MacKinnon Ordinance at the federal level, but only after it was tailored to their aims (1986: 395). Different versions of the by-law have become popular in the United States. The ordinance has been adopted by right-wing groups who see elements of this approach as supportive of their goals. Dworkin and MacKinnon themselves fought a mutant version of their bill in Suffolk County, New York where right-wing forces were attempting to use the bill in the moralist tradition (MacKinnon 1985b: 40). Duggan et al. (1985: 133) warn of the repressive potential of the anti-pornography bill, suggesting the attempts to co-opt this feminist intent illustrate the

danger of any alliance with right-wing forces. This brand of censorship could be used by powerful concerns in our society to further their own causes.

Cole (1985: 235) does not respect this argument, however, identifying it as a scare tactic which supersedes needed reform. She counters that:

The cooptive potential of the ordinance is a much smaller present threat to feminists than are the present powers of the police or of the film censors. Furthermore, the right wing in Canada is not embracing the strategy at all. Canadian moral majoritists trust the police far more than they trust women.

The Minneapolis Ordinance was created to empower women. It treats pornography as sex discrimination and as a violation of women's civil rights. In this sense, it is not a conventional form of censorship. It offers no reassurance to those who have traditionally relied upon the State to enforce their politics. Currently, this approach is being investigated by feminists working towards its implementation within the Canadian context. Although their Bill is not yet public, many individuals are hoping that the guarantees of equality within the Charter will advance the civil rights strategy, making it a practicable option in this country.

Civil Causes of Action

The enactment of civil rights legislation has been promoted as yet another human rights approach which would be feasible in Canada. This civil action remedy retains the spirit and intent of the human rights proposal. This approach does not negate the

possibility of other strategies, and it does avoid many of the definitional pitfalls endemic to the Dworkin-MacKinnon ordinance.

The Fraser Committee (1985: 314) was impressed with this strategy. The committee suggested designing provincial legislation similar to the Civil Rights Protection Act of B.C. The Act now identifies hatred or contempt of a person or a class of persons, or maintenance of the superiority or inferiority of a person or class of persons as a prohibited act. A prohibited act "is a civil wrong (tort) that can be subject of a claim by a person or class of persons, without the necessity of the complainant proving that any actual damage was suffered" (Fraser Committee 1985: 313). The court is empowered to award damages and issue injunctions under this Act. The committee was attracted to the concept of identifying sex as one of the prohibited bases.

The section of the B.C. legislation dealing with the "superiority or inferiority of a person or class of persons in comparison with another or others" may be problematic. Television advertising and other mainstream images often succeed, with or without intent, to portray women as inferior. This section may be overly inclusive. Feminist attempts to promote the value and worth of women could similarly be accused of notions of superiority. Correspondingly, feminist criticism of masculinity, although not a condemnation of males, could be interpreted as such and be attacked for promoting female

superiority. Arguably, however, the cost factor may prevent many unnecessary or inappropriate actions from reaching court.

The cost factor is naturally also one of the drawbacks to this strategy. Individuals would be responsible for the expense of these actions. Other difficulties may present themselves as well. Unfortunately, passing legislation does not ensure that judges will recognize pornography that is not blatantly violent as hate literature. Landau (1985b: 36) suggests the inclusion of examples as to what material the law can address be incorporated into the legislation to help alleviate this problem. The advantages of the civil action approach over other human rights approaches that are directed through human rights commissions include the fact that this avenue allows for a relatively accelerated process and the plaintiff retains control over the case.

Common Law Civil Action for Violent Pornography

Civil actions based on common law principles could complement actions under civil rights legislation. Common law civil actions for violent pornography are an illustration of the provocation principle. Tort principles could be applied to the case in which a plaintiff claims injury through a third party as a result of exposure to violent pornography. This approach would be similar to the provision in the Dworkin-MacKinnon ordinance which allowed for individuals to bring an action if it could be verified that some harm was caused to an individual as a result

of a specific piece of pornography. The limitations involved in the two approaches are identical. It would be very difficult to prove in court that some piece of pornography, and not an offender's mental disorder or lack of socialization, was responsible for a sexual assault. An individual would have to prove in court that a causal link does exist between pornography and acts of violence.

Actions of this nature are theoretically possible under the negligence principle. In the American case of Olivia v. National Broadcasting Co. a young woman brought an action against a television network after she was victim to an attack which was very similar to a scene that had recently been aired. Her suit was not successful, primarily on the grounds that the judge did not feel that traditional negligence concepts could be applied to television programming. He did imply that similar actions could be successful if it could be proven that a broadcast is "directed to inciting or producing imminent lawless action and... likely to incite or produce such action" (Bakan 1984: 15). The outcome of this particular case might have been different if the plaintiff had not focussed exclusively on the negligence of the company, but on incitement to advocate and encourage violent acts (Jacobs 1984: 53). The case was dismissed because the plaintiff could not prove that the television network intended for its viewers to imitate the assault.

Linz et al. (1984: 278) argue that empirical research on the effects of exposure to violent pornography could be used by the

plaintiff in a civil suit to help establish that media portrayals of sexual violence represent acts of foreseeable or predictable harm. These authors contend that plaintiffs should be able to refer to social science research to indicate what type of pornographic materials are the most dangerous, who is most likely to be affected by the material and which individuals are most likely to be victimized by a third party as a result of exposure to violent pornography. Linz et al. (1984: 301) also contend that social scientific research could be used to prove that these injuries were foreseeable by the distributors and producers of these materials and could have been prevented if films were altered or modified to eliminate the sections most likely to engender negative consequences.

Social psychological research, however, usually involves comparing the behaviours of groups. In a tort action against a media corporation the plaintiff would have to ascertain that a causal link existed in the particular case before the court. Linz et al. (1984: 290) contend a lawyer would be responsible for convincing the jury that a movie scene so closely resembled an assault in its characteristics and severity that causation could be assumed. It would have to be shown that the film had an instructional effect accompanied by an incitement effect. Admittedly, only bizarre or unusual crimes closely resembling specific scenes in detail could be found to have 'movie liability'. This provides little consolation for the thousands of women who are assaulted 'normally' in our society, even if a

causal link could be verified. Pornography's most damaging effects may be cumulative. Indeed, it need not be the case that the harm to which pornographers contribute is identical to the harm depicted (Clark 1978: 4).

The application of the 'clear and present danger test' for civil damage actions has been regarded as unworkable in Canada. This approach has been considered destined for failure because social science research is not able, in its present state, to prove the connection between pornography and the resulting physical or social injury to individuals (Mahoney 1984: 55). The effects of pornography are far more subtle than are implied by this strategy. Secondly, this civil approach alludes to the notion that only violent pornography is problematic. Thirdly, if it could be verified that some material caused specific predictable acts of violence to be perpetrated against women, society would be ethically bound to prevent these crimes through prior restraint. Otherwise victims would have to initiate actions and assume the legal fees necessary for their own compensation. Many individuals would find the prospect of challenging large corporations, such as NBC, very prohibitive, limiting the feasibility of this approach. Lastly, it must be remembered that real men rape women, not films or programmes. Adoption of this perspective could serve as a potential defence or excuse for individuals who choose to victimize others in this manner.

Proponents of this strategy find it appealing because, legal limitations aside, it removes the profit factor from pornography. The producers or distributors are sued and the victim receives some compensation for his or her injuries. The burden of proof is not as severe in civil actions as it is in criminal ones. Rather than providing proof beyond a reasonable doubt, the plaintiff need only have his or her case proven on the balance of probabilities (Fraser Committee 1984: 307). Unfortunately, problems of proof and causation and the necessary financing may negate this positive feature of a civil action to redress the harms of violent pornography.

Linz et al. (1984: 300) discuss a situation where civil actions could pose such a threat to pornographers that the corporations would consider raising the price of their product to effect loss spreading of liability to the consumer. This approach could have the result of making pornography less attractive to the consumer because of its increased price. Taxation could have the same consequence and could contribute to the possibility of civil actions.

Taxation and Corrective Funds

The taxation of pornography has been suggested to alleviate the financial burden of civil cases through the formation of a corrective fund (Linz et al. 1984: 300). The taxation of pornography would necessitate that it be considered as a potentially harmful drug such as cigarettes and alcohol. This

would allow the government to extract higher taxes, because the taxation would be based on the need to regulate dangerous enterprises (Jacobs 1984: 54). Taxation of pornography could be implemented at the municipal and provincial levels (Ridington 1983: 53). The revenue gained from the sale of pornography could similarly be used to help mitigate the effects of male violence against women and provide shelters and resources for women in crisis (Cole 1981: 11). The monies provided could fund research exploring the relationship between pornography and violence (Ridington 1983: 53). The taxation approach is also attractive because it contributes towards removing the profit factor from pornography. Some pornographic materials would be so overpriced that the demand for them would drop considerably. Cole (1981: 11) suggests taxation not only of the products, but also of the pornographer's income. If profits were defrayed to a great degree the pornographer might find other business endeavours more lucrative.

The taxation approach provides a blend of both liberal and feminist concerns. Civil libertarians regard regulation as a necessary evil in a democratic society. Pornography can be considered a commodity for which there is a high demand. Taxation's goal is regulation not prohibition, so in theory the liberals might not voice loud objections to its instigation. The taxation approach also attempts to decrease the demand for pornography, however. The formation of a corrective fund suggests that the taxation supports the feminist provocation

principle, because it attempts to reduce some of the suffering created by men as a function of their consumption of pornography.

Feminists do not regard taxation as a viable alternative on a different basis. The taxation of pornography could legitimate its presence in our society. It is arguable that the state should not profit from the exploitation of women's bodies. The government may be less dedicated to the promotion of women's dignity given its potential reliance on revenues from the pornography industry (Jacobs 1984: 54). The taxation and corrective fund approach is problematic because it recognizes pornography as a vice on the same level as cigarettes and tobacco and simultaneously identifies it as engendering violence against women.

If the state were to predicate its taxation on the view that pornography is simply another vice or bad habit, it could not distinguish between pornography and erotica. Erotic art and other sexual representations would be similarly taxed out of the market. Boyd (1986: 286) suggests that a taxation strategy is elitist, in that it allows access to pornography as a function of income. Taxation does not focus on the problem with pornography (Boyd 1986: 286). Alternative approaches, such as the human rights approach, are premised on a consideration of pornography as gender based hate literature.

The human rights approach to pornography conceptualizes pornography as a form of hate literature or hate propaganda against women. Proponents of this approach consider pornography to be a human rights question. Because pornography is considered to be an affront to the dignity of women and a purveyor of misogynist messages in our society, many individuals believe that human rights commissions are the most suited to a pursuance of this issue. The roots of obscenity legislation make it incompatible with an appreciation of pornography as a human rights issue. In Canada, human rights legislation at both provincial and federal levels was initially motivated by a drive for racial equality (Task Force on Public Violence Against Women and Children 1984: 73). Feminist efforts have succeeded in making it a consideration of sexual equality as well. The Canadian Human Rights Act, the Manitoba Human Rights Act, and the Saskatchewan Human Rights Code all address the issue of hate messages and protect against exposure to hatred on the basis of sex (Fraser Committee 1984: 198). The Saskatchewan Human Rights Code contains provisions which are more inclusive and encompassing than the Canadian or Manitoban approaches.

Subsection 14(1) of the Saskatchewan Human Rights Code is the only existing Canadian illustration of the provocation principle. It also supports the feminist direct harm principle, and is therefore considered quite a triumph for Canadian feminists who often complain that their views are not recognized

by our patriarchal legal system.

The Saskatchewan Human Rights Code explicitly states its objects as the promotion of "recognition of the inherent dignity and the equal inalienable rights of all members of the human family" and "to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination". Part II of the Human Rights Code concerns the prohibition of certain discriminatory practices. Section 14(1), 'Prohibitions Against Publications', is applicable to the pornography issue and has been heralded as progressive legislation incorporating the feminist theses. S.14(1) states:

No person shall publish or display... any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.

Section 14(2) states:

Nothing under subsection (1) restricts the right to freedom of speech under the law upon any subject.

This section of the Code recently became the focus of a case concerning pornography as a human rights issue. The 1984 case of The Saskatchewan Human Rights Commission v. The Engineering Student's Society, University of Saskatchewan et al. was initiated by a complaint made to the board alleging that an

issue of the students' newspaper, Red Eye, contained representations of women which ridiculed, belittled and otherwise affronted the dignity of women in Saskatchewan. The complaint did not maintain that the newspaper promoted hatred against women although the board found that the representations they examined often included the "allegedly humorous description of the violent destruction of women's bodies through intercourse" (49). The Board held that two issues of Red Eye interfered with women's rights to equal enjoyment of education, employment and security of the person.

In its final decision, the members of the board rejected the argument that section 14(2) makes the right to freedom of speech paramount to other rights. The board was of the opinion that the right to freedom of expression could be abridged without a violation to Constitutional rights. When there is no redeeming social interest evident in material, the freedom of expression guaranteed under s.2(b) of the Charter and s.5 of the Code can be abridged. It acknowledged that when "representations infringe upon the rights of others such as their egalitarian rights the freedom of expression will be restricted" (28).

The board, therefore, supported the direct harm thesis and the provocation thesis. The board framed their arguments in terms of an affront to women's dignity. The decision supported the direct harm principle because the newspaper "discriminated against women by ridiculing, and belittling them, and affronting their dignity" (2094). Affronts to dignity included:

material suggesting that women in educational institutions are less than human; that they are inferior beings; that they are there to satisfy male sexual desires; that they have no independent motivation or capacity to participate in social and intellectual activity... material further affronts the dignity of women by trivializing and deriving humour from material which promotes sexual violence and the objectification of women.

The board accepted that the material promotes either sexual violence against or the sexual harassment of women, stating:

the newspapers promote violent and demeaning treatment of women because of their sex... Discrimination like this jeopardizes their opportunity to obtain equality rights including employment, education, and security of their persons on an equal footing with the dominant gender grouping... The effect of such material is to reinforce and legitimate prejudice against women. It prolongs the existence of hangovers of prejudice against equal female participation in education, work, aspects of social life and the professions (51-52).

These statements support the provocation principle, asserting that pornography causes men to either discriminate or aggress against women (Bakan 1984: 28).

Although the argument was not raised that the paper was a form of hate literature, the provision does exist within the Saskatchewan Human Rights Code, keeping the door open for complaints consistent with the provocation principle. The board acknowledged that the complaint did not refer to the tendency of the newspapers to expose women to hatred, but indicated that s.14(1) is the only vehicle available to women in Saskatchewan to pursue this avenue, since no requirement of intent is necessary. The board accepted analogies to racial discrimination and commented on the similarity of Criminal Code hate law

provisions (34). The board did not treat as two distinct issues the potential of the paper to provoke discriminatory attitudes and the potential of the paper to cause psychological harm to women through an affront to their dignity. Therefore, it is unclear how much effect is to be accorded to the harms associated with each of the two feminist theses (Bakan 1984: 30).

Feminists commend the human rights approach because it is one area of the law which recognizes the social harm done to 'minority groups' and the importance of balancing equality rights and individual rights. Human rights legislation is one vehicle which allows controls of pornography to be versed in feminist terms, such as 'dignity to women', and not puritan ones. The language need not be coached in terms of sexual explicitness. The appeal of embedding anti-sexist legislation within the human rights strategy is that the restriction of pornography can be conceptualized as a propaganda exercise. It does not compel a blend of the feminist perspective and the 'pro-familial, rightwing, anti-sex position' (Coward 1982: 20). This strategy concedes that sexism is akin to racism and provides a 'sex discrimination' alternative to 'anti-pornography' advances (Wilson 1983: 220).

The approach is a practical, realistic option for many individuals. It is not necessary in a complaint of this nature to prove intent to affront a person's dignity (Fraser Committee 1985: 310). Contrary to the procedure in civil actions, the

board takes responsibility for the costs incurred, and not the individual. Therefore, regardless of financial circumstance, the human rights approach can be investigated by all.

Many individuals are supportive of the human rights approach because it does not have to maintain a consistency with the existing federal obscenity laws. The Human Rights boards need not recognize or adhere to the principle of community standards. Furthermore, the human rights strategy does not maintain the highly elastic nature of obscenity legislation. It is not as dangerous to oppressed, unpopular groups as obscenity legislation has been traditionally. The bureaucratic and administrative screenings circumvent abusive complaints. Lahey states "the screening process in a civil/human rights procedure, taken in conjunction with a more clearly defined legislative purpose, is less susceptible to being turned against the very people it has been designed to protect" (Lahey 1985: 680).

The human rights approach has many positive features, but there are also some limitations inherent in the nature of the human rights process. The human rights codes do not cover all types of discrimination that may be desired by women pursuing this avenue (Landau 1985: 8). Once the commission becomes involved in an investigation of a complaint, the complainant loses control over the direction in which the commission will proceed. If the commission decides not to pursue the issue, the individual has very little recourse available to him or her through the Human Rights Board. The human rights approach was

not suggested by the Fraser Committee for these reasons, and also because an inquiry by a human rights commission is a long drawn out process, and its aims of reconciliation may not be shared by the complainant. Similarly, the boards are not adequately prepared or funded to manage the bulk of complaints which could ensue if this became a popular approach to pornography in Canada (Fraser Committee 1985: 312). The commissions are notoriously overworked, understaffed and slow (Fraser Committee 1985: 312; Landau 1985: 8). The outcome of the human rights commissions' enquiries may not be satisfactory for all parties. Common remedies include injunctive relief, damage awards and counselling and educational workshops. While these remedies may be effective on an individual basis, they may be trivial to a large corporation. The arbitrators in human rights cases traditionally give very small awards. These awards will have a limited utility and deterrent effect on a billion dollar industry like the pornography industry (Landau 1985: 8).

Feminists continue to be wary of additional legislative endeavours. Coward (1982: 21) recapitulates a familiar theme, asserting "who implements the law and to what end it is put is no less of a problem for anti-sexist legislation than it is for anti-pornography legislation." Burstyn (1985: 159) agrees, submitting that "When there is a fundamental clash in values and goals, even ideas about hate are not free from misinterpretation and manipulation." Susan Cole is concerned that despite their potential, human rights approaches will absorb the outdated

concept of community standards, because in a sexist society standards are bound to be sexist (Hughes 1985: 120). The Red Eye case seemed to dispel some of these fears, but the triumph was short lived.

Human rights legislation, like any other approach to pornography, must be sensitive to the constraints imposed by the Canadian situation. Legislation in this area must respect the legal statement of basic rights and values within the Canadian Charter of Rights and Freedoms and the division of powers delineated by the Constitution Act (Fraser Committee 1985: 31). Although the Red Eye (1984) case was instrumental in drawing attention to the practicality and feasibility of approaches of this nature, the decision was overturned.

Milliken J. stated in Engineering Students' Society, University of Saskatchewan et al. v. Saskatchewan Human Rights Board of Enquiry (1986):

unless there was evidence before the board to show that the effects of the material which the board felt fell within the category of notices, signs and symbols or other representations which were published in either issue of "the Red Eye" under review, would be to enhance discrimination against all women resident in the province of Saskatchewan because of their sex in ways or by means prohibited by the code, then the particular portion of s.14(1) being applied to the board would be beyond the power of the legislature as being criminal law in view of the provisions in the criminal code covering dissemination of hate literature and public defamation (28).

Therefore, Milliken J. declared that the board erred in law and the interpretation of s.14(1) given by the board was declared ultra vires as an invasion into criminal law. The board was

found to have erred at law on other grounds as well. 'Articles' and 'editorials' were not addressed by s.14(1) and the unincorporated society could not be considered a 'person' under the definition in the Code. Other problems included the fact that the appellants were not given sufficient notice of the hearing in accordance with principles of natural justice. The issue of whether s.14(1) of the Saskatchewan Human Rights Code is repugnant to the Charter was not decided, due to the fact that the two editions of the newspaper were issued before the Charter came into effect (49).

This decision can be considered very discouraging for proponents of the human rights perspective. It emphasizes the fine line between provincial and federal domains, and reinforces the notion that attempts to control pornography outside of the bounds of criminal law must respect the inherent limitations in the process. Amendments to the hate literature provisions of the Criminal Code have been contemplated as one alternative to the human rights approach.

Hate Literature

Feminists have been instrumental in having pornography regarded as a form of hate literature. Fundamental to the idea of pornography as hate literature is the belief that pornography causes, or at least reflects, a societal tendency to hate women (Fraser Committee 1985: 317). Modern pornographers are accused of using techniques of the hate propagandist in their portrayals

of sex (Task Force 1984: 70). Proponents of this perspective identify more commonalities between the notions of racial and sexual hatred than they do between modern pornography and the legal concept of obscenity. The misogyny intrinsic in pornography is denounced for provoking harm and causing direct harm to women. This strategy therefore supports both feminist theses. The hate literature provisions are conceptually indistinct from the human rights approach, excepting the fact that they are considered a much stronger measure since they have the weight of the criminal sanction behind them.

Hate propaganda laws were initially conceived as a measure to be employed to cease the dissemination of racist material. In 1970 the Canadian Parliament added the hate propaganda offences to the Criminal Code. These offences included advocating genocide, the public incitement of hatred and the wilful promotion of hatred (LRC 1986: 7). The present Criminal Code also includes a fourth offence which could be considered applicable to hate propaganda, spreading false news. Section 281.2 has been deemed the most appropriate section with which to address pornography.

Section 281.2(1) makes it an offence to incite hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, by communicating statements in any public place. Section 281.2(2) makes it an offence to communicate statements, other than in private conversation, which wilfully promote hatred against any identifiable group.

Conviction under subsection two will be impossible if the accused establishes that the statements made were true; if he expressed or attempted to establish by argument an opinion on a religious subject; if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true, or; if, in good faith, he intended to point out, for the purpose of removal, matters producing or intending to produce feelings of hatred towards an identifiable group in Canada. 'Identifiable group' refers to any section of the public distinguished by colour, race, religion or ethnic origin.

In its present state, this legislation would not be very practicable for the goals of feminists. They propose to amend this legislation by adding gender to the list of identifiable groups, by removing the element of intent in 'wilfully' promoting hatred and by no longer making prosecutions contingent on approval by the Attorney General. There has also been some suggestion that s.281.2(7), which defines 'statements', may not be applicable to pornography. This subsection may need some expansion to accommodate feminist concerns (Fraser Committee 1985: 324).

The hate literature approach to pornography has been awarded a great deal of approval from the feminist community. The attractiveness of this strategy lies in the fact that it addresses violent or degrading material, and not sexually explicit depictions, consistent with the feminist perspective

(Fraser Committee 1985: 324). The hate literature approach recognizes that pornography is contextual. It does not include a list of objective behaviours which are considered pornographic. It forces the judge to consider the representation within its context and decide if it indeed promotes hatred. It forces one to use the codes one takes for granted in deciphering an image and decide if, in context, they contribute to a finding of a tendency to promote hatred. It makes one aware of what is problematic in a representation and why.

Perhaps one of the most important aspects of the proposed amendment is its symbolic value (Fraser Committee 1985: 324). It clearly distinguishes the notions of sexual immorality and gender based hatred and more clearly reflects pornography's true nature. In this sense, the hate propaganda section serves as an educational tool (Andrew et al. 1984: 61). It elevates the position of women to that of the minority groups and presents the promotion of hatred toward women as equally intolerable to that hatred directed at other peoples.

Conversely, some individuals are concerned that adding 'gender' to the existing hate law provisions will be an exercise in futility. S.281.2 remains virtually unused at the present time (Hughes 1985: 111). The Fraser Committee (1985: 323) suggested that the provisions would only apply to a limited range of material. A considerable amount of 'criminal' and 'repellent' material will remain unscathed by this legislation. Landau (1985b: 30) doubts the courts and police will be willing

to recognize pornography as hate literature. Feminists and other groups lobbying to get pornography recognized as a form of hate propaganda are not promoting an exercise in symbolism. They are interested in this section in terms of its utility as a legislative device. Critics doubt such an approach will be effective.

McDonald (1984: 9) does not consider the issue of pornography to be properly addressed within the range of hate literature provisions. He argues that even the most violent pornography is fundamentally different from racist or anti-religious material. Pornography may depict generalized aggression against women, but this is categorically different from material which attempts to promote specific animosity against a race or religion. The Law Reform Commission (1986: 46) was similarly perturbed by the proposal that pornography be controlled through a revised version of s.281.2. They do not accept the analogy between racism and sexism, quoting Ryan (1985: 349), who submits that although hate may sometimes be a motive, the motivation behind pornography is complex and distinct from that behind racial and religious hatred. Ryan contends that pornography is tied to the sexual urges of man.

Thelma McCormack (1983: 223) is similarly unimpressed by the argument that pornography should be considered gender based hatred. She contends that important differences exist between racial or religious hate and misogyny. The message of true hate literature is genocide. Pornography communicates the message of

sexual compliance. She illustrates her position with the comment that even sado-masochistic depictions emphasize the voluntary, consensual participation of women. If some minority group was depicted enjoying and participating in its own abuse, would that negate the finding of hate propaganda, however?

The Law Reform Commission of Canada did consider including 'sex' as one of the identifiable groups in s.281.2. They suggested that if the proposal was accepted the requirement of 'wilfulness' would be maintained, however. They explained that this was to ensure that only the most vicious forms of pornography, those which were done intentionally, would be affected. Interestingly, they were concerned that hatred directed against homosexuals and lesbians would be captured by the amendment if 'sex' was made one of the identifiable groups (LRC 1986: 32). Members of the commission were concerned that 'sex' would be interpreted as 'sexual orientation'. Feminists would not regard this as a detracting feature, but would tend to identify this event as a positive element of the legislation. Members of the Fraser Committee were opposed to the retention of the requirement of wilfulness. They felt that the section would not be unduly broad because the requirement of general intent, which is an element of any criminal offence, would still be present. The committee suggested that retaining the wilfulness requirement would merely provide a loophole for pornographers who would contend they were not trying to promote hatred, they were trying to make money or provide entertainment (Fraser

The Law Reform Commission was moreover critical of the proposal that s.281.2 be amended in the manner outlined above, because they predicted that this approach would address non-pornographic statements of misogyny (LRC 1986: 46). This concern reflects the opinion that the Law Reform Commission is not dedicated to the same goals as is feminism. Presumably, the commission is upset that non-sexually explicit depictions promoting women-hating will be included in the enforcement of this legislation. It is arguable that the promotion of hate within, or separate from, a sexually explicit context is appropriately a target for prohibition.

The hate propaganda approach has been criticized for the same reasons as was the human rights proposal. It is argued that laws designed by feminists will inevitably be used against them and other groups bartering for equitable treatment within a patriarchal society. Diamond states:

Fundamentalist groups with money and resources may well persist in organizing against gay and feminist images more successfully than feminists will be able to defeat commercial pornography.

Burstyn (1985: 159) and the Law Reform Commission (1986: 46) foresee a potential situation where ardent feminists, and their viewpoints, will be interpreted as man-hating. This is a legitimate worry, and yet it encourages feminists to be specific in their terminologies. Indeed, the biological differences between men and women are not responsible for the subordination

of a gender. The social interpretation of the biological distinction within the constructs of a patriarchal society dictates a language of misogyny. Radical feminists must be careful to identify clearly that which is problematic and avoid a condemnation of all men. Arguably, men as a group do merit protection from the promotion of hatred. For all practical purposes, however, they are already awarded that consideration under the existing social and legal structure.

Jacobs (1984: 47) questions the basics of using a form of criminal law to combat pornography. She insists that corporations engaged in the pornography business are not amenable to criminal sanctions such as jail sentences. Using the criminal law to attack pornography would perhaps only deter the very small pornographers.

Other critics urge that the hate law approach not be implemented, yet they propose other criminal approaches. They claim that specific pornography offences offer a superior strategy because offences can be tailored to focus on the most objectionable aspects of pornography. Criminal law can, in that manner, better define the target of proscription. Defences for artistic merit or scientific purpose could be built into legislation of that nature. Otherwise, a possible circumstance could arise whereby prosecutors eager for a conviction are able to undercut the safeguards provided in the interests of art, education and science (LRC 1986: 47). Furthermore, subjective or ideologically impelled motivations would then be less likely to

inspire suits against certain images (Diamond 1986: 305). Individuals presenting these concerns are wary of a situation which could have a 'chilling effect' on the freedom of expression. Proponents of this perspective cite a 'chilling effect' on women's equality rights, however.

Some corners of the pornography debate have suggested that the constitutionality of the hate propaganda approach could be in jeopardy. These individuals argue that freedom of expression under s.2(b) of the Charter of Rights and Freedoms "extends to all but the most repugnant ideas, so long as nothing is done to incite violence or illegality during that expression" (McDonald 1984: 10). McDonald contends that the issue remains one of whether pornography incites violence, and therefore, before one accepts the hate propaganda approach one must ascertain the harms engendered by pornography.

There is considerable disagreement over which harms the hate propaganda approach recognizes. Many theorists contend that it is a pure manifestation of the provocation principle. Others identify the hate literature strategy as the most illustrative prototype of the direct harm thesis.

Thelma McCormack (1983: 223) assumes the position that the hate propaganda approach is misdirected. She considers it to be a straightforward manifestation of the provocation principle. The feminist argument for conceptualizing pornography as hate literature is stated as:

in a sexist society, rape or other forms of life-threatening violence are a "clear and present danger". Pornography contributes directly or indirectly, as a causal or a contributing factor, to the probability of rape or other forms of assault to body and/or mind.

She objects to the hate literature approach because she believes it to be based on the misconceived linear relationship between pornography and rape.

Bakan (1984: 18) identifies the hate literature approach as a classic example of the direct harm thesis. Vivar (1982: 63) describes the potentially dangerous effects of the presence of pornography in terms of injury through direct harm. She parallels women's position with that of other oppressed groups. Women would fall victim to the phenomenon whereby slaves engage in behaviours which their captors expect of them. Women run the risk, as a class, of accepting the degrading, denigrating images of themselves which are so predominant in our culture. This could eventually culminate in extreme psychological harm to individual women. The direct harm principle is said to be expressed in many other areas of the law, such as civil judgements awarding damages on the basis of psychological harm, our current sexual assault laws and sexual harassment cases. Therefore, Bakan contends that the legal acceptance of the direct harm principle would not be a radical or innovative move for legislators. The direct harm principle has been incorporated into our justice system in many legal areas (Bakan 1984: 22).

There are indications that the direct harm principle forms the basis of existing hate law provisions. Bakan suggests that

an investigation of the motivation which initially created the offence reveals that the enactment was intended to serve to prevent minority groups from experiencing derogation and stereotyping. A belief existed that hate literature could have the effect of altering the personalities, attitudes, opinions, and actions of minority group members. A member could identify with his or her stereotype and eventually practice self-doubt and self-hatred (Bakan 1984: 20). Subsection 281.2 of the Criminal Code is, therefore, designed to prevent harm to members of minority groups ensuing from the dissemination of materials that affront their dignity. Bakan does not regard it as consistent with the feminist provocation principle. It is not "concerned with the behaviour that pornography may provoke, but is concerned instead with the direct impact that it may have on individual members of the group it attacks" (Bakan 1984: 24).

The hate literature offence can be considered as a combination of the direct harm thesis and the provocation principle. Proponents of this philosophy believe pornography is not simply hate literature, "It is that and more... Pornography not only promotes hatred it promotes sexual aggression" (Ridington 1983: 44). Lorene Clark assumes this perspective. She aptly describes the harm of hate literature in provocation terms. She identifies it as causing a situation where men view women as inferior and inherently masochistic. It attempts to encourage feelings of wishing to contribute to women's misery by

doing things to women which men would not think of doing to those they perceive as similar to themselves. Women become the victims of discrimination and violence. They become a group that is both hated and despised (Clark 1983: 52).

Yet the hate literature approach similarly supports the direct harm principle, according to Clark. Pornography is an example of the direct harm thesis because it:

encourages women to combat insecurity and low-self esteem by becoming passive and masochistic... it creates the conditions for their own victimization (Clark 1983: 56).

Pornography is hate literature which is responsible for causing psychological harm to women. It is intrinsically offensive to the dignity of women and an infringement on the rights of women.

The psychological harm elicited by pornography is translated into an infringement of their rights which serves to undermine the community. The important aspect of the test of hate literature, according to the Fraser Committee, is whether the impugned material does injury to the community and individual members or identifiable groups. They assert "one of the group of community values which is harmed by pornography is the constitutionally entrenched equality of women, in that the message of pornography is that woman are inferior and subordinate" (Fraser Committee 1985: 320). Mahoney (1984: 54) conceptualizes pornography as causing just this type of harm. She asserts that because pornography is hate propaganda it harms society. Any hatred within a community detracts from, and

actually operates in direct opposition to, the goals of a free and democratic society. Therefore, pornography as hate propaganda has goals which are subversive to those of democracy.

The popularity of the hate literature approach arises, in part, from its flexibility. It allows pornography to be viewed as contributing to a harm to society through its exercise of the provocation principle and the direct harm principle. The hate propaganda strategy addresses harms which stem from both feminist theses. The proposal is, as yet, only a possibility. Law reform is a lengthy, time consuming process. Many feminists are searching for pliable approaches which can reflect their principles in the mean time. Provincial censorship and classificatory boards are potentially flexible instruments amenable to modifications which reflect contemporary theories.

Prior Restraint and Jurisdictional Considerations

Feminists have endeavored to reframe the federal obscenity legislation in attempts to address the more contemporary notions of harm with which pornography has become associated. Another approach involves persuading provincial film review boards to incorporate feminist notions of harm in the creation of their guidelines. This approach did not prove especially effective in Ontario, where feminist groups struggled unsuccessfully to have violent non-sexual material proscribed and condemnatory material exempted (Lahey 1985: 667). This avenue could be mobilized, however, to reflect the feminist notions of harm.

A majority of the provinces have legislation which authorizes the classification and often the censorship of film. At the present time the boards function to reflect community tastes and attitudes. They operate on the offence principle. This is not intrinsically problematic from a feminist perspective, however. Although the community standards concept is inappropriate at the federal level, it can accommodate for regional variation at the provincial level. Feminists are confident that the provincial review boards can represent their theses, but they are highly critical of the way many of the boards function. Civil libertarians harbour even more serious concerns, stemming in part from their complete rejection of the practice of prior restraint.

Provincial classification procedures receive a limited amount of criticism. Even civil libertarians often accept that some regulation is necessary and classification aids in protecting young children who may not be able to make responsible choices regarding the material they wish to view. Provincial censorship practices function on the basis of prior restraint, however. Many of the provinces have the capability to prohibit films, make cuts themselves or request that cuts be made, in addition to their powers of classification. Liberals are fundamentally opposed to prior restraint because communication is precluded before expression takes place. There is no opportunity for positive ideas to triumph over negative ones in the free market-place of ideas. Furthermore, prior

restraint is more likely to bring a wider range of materials under governmental regulation than would be the case if criminal controls were operating in isolation. Although a greater variety of expression is constrained, fewer safeguards are maintained. The protection associated with principles of due process is not ensured. Many of the provinces do not make public the reasons for their cuts or prohibitions. Therefore, limited opportunities for public scrutiny are afforded by the various systems. Many individuals maintain that the prior restraint process leads to excesses, due to the nature of its operation (Task Force 1984: 71).

Despite these criticisms, other groups support prior restraint for ideological reasons, as well as procedural ones. Moralists, according to their traditionally conservative nature, believe that the state should properly determine what should be seen for the public good. Moralists, but also many individuals from other social groups, speculate that the present obscenity laws and enforcement practices are ineffective. Therefore, they suggest that prior restraint practices function to prevent the dissemination of dangerous material which could evade the criminal sanction. Other justifications revolve around the fact that Criminal Code provisions are only implemented after an offence has been committed. Due to the nature of our system, unless the film has been confiscated or prohibited it can be shown pending a verdict from the trial. A final motion in favour of prior restraint is the suggestion that Criminal Code changes

are very slow in occurring. Even if amendments are made, it could take a considerable period of time before jurisprudence could develop to determine the effectiveness of the changes. Supporters of prior restraint maintain that this practice could compensate in the interim (Task Force 1984: 72).

The Fraser Committee had an opportunity to comment on the provincial practice of prior restraint. They were unimpressed with the provincial banning or cutting of films. While they recognized the importance of protection from offence, they submitted that the classificatory powers of the boards were sufficient to control for unwanted exposure (Fraser Committee 1984: 332). The committee suggested that if the various boards were unwilling to abandon their powers of prohibition and cutting of films, they should incorporate them and their classificatory schemes in provincial legislation. Many feminist groups believe these guidelines could incorporate feminist concerns and could address issues of violence and sexual violence while attending to context. Specific rules and guidelines could be entrenched in the legislation to minimize arbitrary decisions and ensure that contemporary notions of harm are respected. Entrenchment of the guidelines would function to make the policies of the boards more public, and prevent Charter challenges on the grounds that the powers of cutting and prohibition are not reasonable limits which are prescribed by law (Fraser Committee 1985: 323).

Boyd (1985: 38) has observed that the flavours or climates of the provinces' film boards are largely determined by the different chairpersons. This phenomenon offers no reassurance to feminists who wish to ensure that their views are consistently represented. Drafting specific guidelines would reduce the ambiguity, yet Andrew and associates (1984: 61) suggest further measures are necessary. They are concerned that the various boards' members become desensitized, isolated and suffer from a lack of accountability. They suggest that the chairperson and board members should be appointed by a Legislative Committee to make them accountable for their decisions. Terms should be limited to reduce the risk of embedding one perspective and compensate for the effects of desensitization (Andrew et al. 1984: 61).

The operation of the individual boards is an issue of concern, and yet so is the relationship of the boards to each other and to the criminal law. Many distributors submit that classification or approval for display by the provincial boards should forestall any conviction under the Criminal Code obscenity legislation. The present situation is problematic, whereby films are prohibited in some jurisdictions and not others. A circumstance where provincial approval of a film in one province prevented conviction throughout Canada should not be encouraged. Distributors would undoubtedly approve, yet this approach is not acceptable on a number of grounds.

Firstly, the criminal law presently suffers from the negative attributes associated with regional variation. Although our obscenity laws are federal and apply to all of Canada, the laws enforced across the provinces are not uniform (Barnett 1969: 27). This suggests that obscenity is, to some extent, a function of geography. Making conviction contingent upon provincial approval or classification would introduce even more variability into the criminal law and augment its ambiguous nature in the area of obscenity. For this reason, some individuals advocate a national classificatory system, whereby the provinces cooperate to create common standards or actually form a national board with representatives from each province and territory (Fraser Committee 1985: 327).

This approach is not inviting. The national board would be too removed from community sentiment. The community does have a valuable role to play in determining classification based upon the offence principle, and provincial decisions can most adroitly reflect the views of its inhabitants (Fraser Committee 1985: 327). Boyd (1986: 287) maintains that independent decisions on the part of the individual provinces should be used as defences to criminal prosecution. He submits that the proposals made under the provisions of Bill C-19 would be advantageous. Critics oppose this strategy because they believe it would entail elevating the censor boards' positions to that of the judiciary. The board members would effectively be determining criminal law (Fraser Committee 1985: 335). It has

been argued that the provinces would not be challenging federal supremacy, however, because criminal proceedings could still be instigated with the Attorney General's consent and the Supreme Court could always function to safeguard abuses (Boyd 1986: 288).

Despite these redeeming features, criminal law should not properly follow the decisions of the provincial boards. The provincial boards function to reflect community attitudes and operate under the auspices of the offence principle. Given the tremendous difficulties and conflicts created through application of the community standard of tolerance test at the federal level, effort should not be made to further entrench the concept in criminal proceedings.

The provincial boards could be used to represent feminist concerns while simultaneously reflecting community sentiment. The classificatory decisions of the boards could provide an educational, as well as an informational, function. The decisions could identify the problematic aspects of representations and afford consumers the opportunity to avoid displays which they find offensive. Provincial film board decisions should not preclude criminal conviction, however. Motions are being made to replace the federal obscenity legislation. Legislative change is a slow and tedious process, however. The traditional community standards approach may offer some remedy consistent with feminist theses in the interim.

Community Standards and Direct Harm

Many feminists are wary of any new approach to pornography, suspicious that progressive intentions may be transformed into restrictive practices. These women are unwilling to invest yet more power in a legal system which has traditionally operated oblivious to the concerns of feminist theory. It is therefore with extreme astonishment that the feminist community is witnessing the incorporation of the direct harm principle into that moralist stronghold known as the community standard. The community standards test of tolerance has begun to emphasize the variables of violence and degradation and to reflect the popular distinction in feminist literature between pornography and erotica. Every feminist does not applaud this new direction for the community standards test, however. Many feel that its negative attributes far outweigh any positive influences it may have. Others are hopeful that the community standards test will evolve to the position where it reflects the direct harm principle.

The concepts of degradation and dehumanization in the context of sexual depictions were first introduced in the case of R. v. Doug Rankine Ltd. (1983). Borins, Ont.C.C.J. stated at 54:

While the contemporary Canadian community is prepared to tolerate the distribution of video-cassette tapes for use in the home which consist substantially of scenes of people engaged in "run of the mill" scenes of sexual intercourse and other sexual acts, films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex,

particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance.

Borins, J. hastens to add, however, that violence and degradation are not necessary elements for a finding of obscenity (54). Mahoney (1984: 62) praises the decision as representing "the first time a Canadian court has examined an allegedly obscene depiction specifically from the view of the victims of the sexual abuse, rather than that of the sensibilities of the observers."

The case of R. v. Ramsingh et al. (1984) is interesting in that Ferg, J. did not emphasize that violence must be in evidence with the degradation or dehumanization. He stated at 240:

I think where violence is portrayed with sex, or where there are people, particularly women, subjected to anything which degrades or dehumanizes them, the community standard is exceeded, even when the viewing may occur in one's private home.

A similar line of reasoning was used in R. v. Chin (1983). Harris, Prov.J. stated at 250:

The general public does tolerate the viewing of explicit photographs of sexually aroused men and women in various exhibitions of sexual activity -- However, although sexually explicit material was not necessarily obscene, when people were dealt with as objects, with their humanity removed, the contemporary Canadian community would not tolerate such degradation.

Noonan (1985: 320) contends that the previous cases "contextualize sexual explicitness by acknowledging that the Questions of degradation and dehumanization must also be

analyzed, they nonetheless ... revert to the view that explicitness can be determinative of the issue of undue exploitation." Feminists have stated that the R. v. Wagner (1985) decision is a landmark decision that heralds the birth of a new definition for obscenity (Appleford 1986: 142; Mahoney 1984: 62). This case witnesses Canadian courts giving credence to a feminist analysis of pornography.

The Wagner case does not recognize sexual explicitness as a determinative factor in the finding of obscenity. Shannon J. surprised the feminist community by stating at 318:

That which is undue exceeds the contemporary Canadian standard of tolerance. The contemporary Canadian community will not tolerate pornography that is sexually explicit without violence but dehumanizing or degrading. It will tolerate erotica no matter how explicit.

Shannon J. continues to explore the difference between obscenity and erotica at 318:

In sexually violent pornography one finds the overt infliction of pain and the overt use of force or the threat of either. Sexually explicit pornography is free of violence but is degrading or dehumanizing, with men and women often verbally abused and portrayed as having animal characteristics. Sexually explicit erotica portrays positive and affectionate human sexual interaction between consenting individuals participating on a basis of equality.

Shannon J., similar to Rankine, allowed expert evidence which aided in a determination of whether the films were obscene. He identified that pornography causes social harm to women. Another important factor in this case is that Shannon J. judged a film called "Greenhorn" to not be obscene. It was a non-violent video depicting explicit footage of male homosexual acts. This

decision has bolstered the morale of many who worried that the law operated irrespective of feminist and sexual minority concerns. Noonan states "the determination of community standards is a process through which the feminist perspective can be heard. This process is empowering, insofar as the court allows the community to define what is pornographic and the nature of the harm produced by it" (1985: 320).

The aforementioned cases were lower court decisions. The first upper court decision recognizing the importance of focus on the manner in which the behaviours are presented and the context of the acts was R. v. Red Hot Video (1985). Anderson, J. judged the films in front of him to pose real and substantial harm to the community, stating at 956:

such materials are clearly a threat to society. They constitute a threat to society because they have a tendency to create indifference to violence insofar as women are concerned. They tend to dehumanize and degrade both men and women in an excessive and revolting way. They exalt the concept that in some perverted way domination of women by men is accepted in our society.

Although Anderson, J. recognized this type of pornography as presenting a "threat to equality" he explained that the court cannot prevent individuals from reading, seeing or hearing all material involving the subject of sex which is not harmful to others. Material must still be explicit to be judged obscene, however, and that material which can be banned is only "material which is clearly offensive, explicit, excessive and substantially harmful" (957).

Anderson, J. stated, however, that brevity or artistic merit could prevent the exploitation of sex from being regarded as the dominant characteristic. In fact, 'excessiveness' could be employed to find positive sexually explicit portrayals obscene. This position offers no protection to erotica (King 1985: 4).

Those who eagerly anticipated that the courts would follow the Wagner lead were dismayed by the Supreme Court of Canada's decision in Towne Cinema Theatres Ltd. v. R. (1985). The court was divided in its consideration of the acceptability of both erotica and violent and degrading pornography. Although all seven judges agreed on the result, they attained it through different lines of reasoning. King submits:

the case is encouraging for feminists in that a clear majority of the Court expressed acceptance of degradation and dehumanization as a part of the test for obscenity. However, by its lack of clarity about the role to be played by the new concept, and by its renewed emphasis on community standards, the Court failed to give the concept real judicial force. In this decision, the Court did not take the opportunity to mark a clear, new direction in obscenity law.

Appleford (1986: 142) suggests that the above cases have effectively established a new definition for obscenity. It remains a debatable assertion. The Wagner decision was not a Supreme Court of Canada decision, and is therefore not binding. It is purported that if the jurisprudence of the above cases develops, the direct harm thesis could be incorporated into Canadian obscenity law.

Mahoney proposes that there is opportunity for a judicial expansion on the Wagner decision. She (1984: 69) offers a new interpretation of 'undue exploitation' in the s.159(8) definition of obscenity, whereby the sex and any one of the 'sex plus' categories could be obscene without the requirement of explicit sex. Therefore, violent, dehumanizing or degrading representations in conjunction with non-explicit sex could be obscene. This avenue proffers the opportunity for the courts to attack more mainstream representations, such as those found in feature length films and videos, which are degrading or violent. This strategy is advantageous in that it circumvents the parliamentary process, for the updating of the obscenity concept is traditionally within the judicial role. This approach does not provide examples of acceptable or unacceptable material, however. The courts are not bound to permit material which condemns degrading or violent material (Lahey 1985: 667).

Bakan claims that there are two additional problems with this approach to pornography. Firstly, the term 'obscenity' is kept intact, with its connotations of moral ideas concerning the 'lewd' and 'dirty', not degradation and dehumanization. This accommodates a return to the restriction of material on the basis of offensiveness. Secondly, and perhaps more importantly, this strategy is merely another manipulation of the community standards concept. Due to its evolving nature, the standard can prohibit degrading representations of women. This standard could easily change, however, as a function of a flux in Canadian

attitude, as monitored by a judge (Bakan 1984: 27). If one is willing to concede that the increase in violent or degrading pornography is, at least in part, due to the rising status and emancipation of women, one must be wary of the community standards concept. A backlash against women could plausibly be manifested in a 'community standard' which served to undermine feminist concerns. This eventuality could render void many of the advances that have been made in judicial recognition of the feminist perspective.

As King (1985: 5) states:

The Court is left powerless if frequent exposure to sexual hate propaganda results in a community standard of callous acceptance or disregard of the abuse or degradation of women. As long as the court can only apply the community standard, and there is no minimum standard or definition of the kinds of materials that are unacceptable, women and sexual minorities remain vulnerable to whatever forces go into the making of public opinion.

A reinterpretation of the present obscenity provisions does not appear to offer a feasible solution for the pornography problem in Canada. This type of law would undoubtedly carry with it vestiges of its origin (Task Force 1984: 68).

Legal Control: Balancing Incompatible Assumptions

Many different types of approaches to pornography have been outlined. The natures of these approaches reflect different ideological and philosophical positions. The various strategies are predicated upon incompatible assumptions. Therefore, it is

inconceivable that one strategy should accommodate all social aims within our society. The approach one adopts is inevitably a reflection of one's definition of pornography. Different definitions reflect dissimilar harms. The pornography debate, therefore, can be reduced to a discussion of harm and argument over whether the seriousness of the harm merits social control.

The moralist position appears to be fairly straightforward and is consequently awarded limited consideration. Legal and social controls over pornography are regarded as necessary for the preservation of society and the protection of its members. The illicit, explicit nature of pornography makes it a harm in and of itself. The verification of harm is unnecessary because pornography's focus on unbridled sexuality makes it abhorrent to the conservative. Pornography is simultaneously a dangerous evil which has the potential for great harm. It advocates sexual activity beyond the sanctity of marriage and for purposes other than procreation. The sexually chaotic state pornography encourages leads to the moral decay and eventual destruction of society, witness Sodom and Gomorrah. One need not provide evidence of such a harm, however, because control of pornography is considered to be appropriately premised upon community intolerance.

The liberal position on pornography is more complex, and arguably more hypocritical and contradictory than the moralist stance. Liberals consider and weigh notions of harm in their deliberations. Although they recognize the offence principle,

civil libertarians refuse the direct harm thesis and have a tentative association with the provocation principle. Many liberals contend that prohibition is only adequately premised on incitement. Rioux and McFayden (1978: 8) maintain that social control is not justifiable unless it can be proven that some form of pornography actually incites individuals to commit specific anti-social behaviours. These women contend that within a democracy suppression of expression can only be justified if the incitement effect is demonstrated, with the onus for proof on the advocaters of control. Other liberals are willing to concede that even if the influences of some varieties of pornography are not irresistible and immediate, they may regardlessly cause harm to women as a function of attitudinal and dispositional changes. Before a consideration of prohibition is contemplated it must be shown that this harm is substantial and demonstrable, however (BCCLA 1984: 16).

Many individuals feel that liberals pose unrealistically strict requirements for proof of a relationship between harm and pornography. It has been argued that in other areas of the law we do not have conclusive proof of harm, but fairly strong indications of a relationship, such as with alcohol and traffic deaths (Appleford 1986: 145). Others contest that medical science as yet does not have conclusive evidence that smoking definitely causes cancer, only that it may. Boyd suggests that the debate concerning a causal link between the consumption of pornography and actual violence is not particularly crucial. He

states "While it is certainly difficult to establish such a causal connection unequivocally, the criminal sanction is adequately premised on indications of social harm" (1985: 66).

Bakan (1984: 32) feels the causal relationship is really a moot issue since 'conservative' liberals would never accept laws based on the feminist theses, regardless of levels of proof. This is especially apparent for the direct harm thesis. Bakan (1984: 18) believes that the reluctance to restrict pornography on the basis of the direct harm thesis is attributable to the liberal notion that an affront to a person's dignity and the resulting psychological injury does not justify infringement on individual liberty by the law. Bakan (1984: 8) suggests that civil libertarians should re-evaluate their position, because their emphasis on freedom of expression and the right to individual liberty are not jeopardized by the feminist theses. He argues that pornography laws must be based on the notion that pornography harms individuals and be presented as a means of presenting such injury. Bakan (1984: 25) maintains that "psychological harm is as likely to compromise the security and autonomy of the individual as is physical or economic harm." Liberals are challenged to refute this reasoning, given their belief that protection of an individual's security and autonomy is the only legitimate excuse for limiting the liberty of another individual (Bakan 1984: 4).

Lawmakers may be uneager to incorporate the direct harm principle into legislation because of a concern that it is too

closely aligned with the offence thesis. The two principles appear diametrically opposed upon closer examination, however. The former focuses on an offence to a person's sensibilities. Explicit portrayals can be shocking and upsetting to unprepared, conservative or naive individuals. The uncomfortableness these people experience cannot be confused with 'psychological harm'. A shock is not capable of challenging a person's conception of him or herself and cannot be responsible for damaging equality rights and economic opportunities.

The three social groups are divided as to the most appropriate pornography remedy, and even debate the necessity of one. Moralists strategies include the present community standards of tolerance approach, yet the group also proposes a wide variety of other measures. Legal restrictions on the dissemination of sexual materials are welcomed, as conservatives encourage state intervention in the legislation of morality. Conversely, civil libertarians oppose any tethering of freedom of expression in the absence of empirically demonstrable harm. Although a number of individuals who assume this position stand in defiance of any form of interference, many liberals are amenable to some form of regulation, in accordance with the offence principle. Therefore, provincial classification schemes and appropriately worded municipal by-laws and zoning ordinances are acceptable strategies because they protect the young or uninterested citizens from unsolicited pornographic material and allow access to consumers. Nuisance statutes and

civil-adjudication devices are less attractive approaches because they function to restrict pornography, notwithstanding their purported intentions to abide by the offence principle.

Feminist strategies can often be recognized as manifestations of the provocation or direct harm theses. A considerable number of these proposals appeal to equality guarantees within the Charter. Like any of the other possible Canadian avenues, these suggestions must respect the rights and privileges enshrined in that document and its accompanying constitutional constraints.

Human and civil rights propositions have been granted substantial feminist recognition in recent years. Canadian feminists are in the process of developing a bill which would incorporate the civil rights approach pioneered by Andrea Dworkin and Catherine MacKinnon. It is not clear how this instrument would fare in the Canadian context, however. Furthermore, its tremendous scope threatens proponents of both the liberal and feminist communities.

Provincial legislation modeled after the B.C. Civil Liberties Act retains the spirit of the aforementioned strategy. It is not burdened with the exhaustive definitions of pornography which can function to limit acceptability within the provincial sphere, however. Although the legislation could be considered empowering, costs are nonetheless incurred by women, limiting the practicality of this approach in the absence of

other remedies.

Common law civil actions for violent pornography are unlikely to be successful, given the fact that social scientific research is unable to support the contention of a causal relation between pornography and violence against women. Taxation is an impractical alternative because it necessitates state legitimation of the sexual inequality inherent in most heterosexual pornography.

Human rights commissions frame the pornography question in terms of sexual discrimination. The approach removes the financial burden from women, but it is associated with other drawbacks endemic to the nature of any human rights organization. Recent judicial considerations have questioned the efficacy of this non-criminal measure, as well. Consequently, the stronger hate literature approach is receiving considerable support from the feminist anti-pornography camp, despite concerns about its potential utility as a legislative device. It effectively combines elements of the provocation and direct harm principles, without emphasizing explicit sexuality. The hate literature strategy allows for a discernment of context. It properly addresses the promotion of hatred and elevates the position of women to that of other 'minority' groups in society. The instrument morally educates the public and directs a comprehension of the problematic aspects of some forms of pornography.

The same focus could be reflected at the provincial level in film classification, although provincial community standards should arguably also receive some consideration. Federal maintenance of the concept has been proposed, as a result of the qualitatively different perspective some courts have taken in their interpretation of community standards of tolerance. This approach offers, at best, an interim solution, however. New strategies, fundamentally distinct from traditional obscenity approaches, are mandated.

Many groups are presently lobbying within Canada for change to the existing obscenity provisions found in the Criminal Code. An examination of the Fraser Report, the Badgley Report and proposed Bill C-114 is illustrative of the competing values that exist within our society. Anti-censorship strategies are given limited consideration in the government recommendations, yet the importance of this avenue must be emphasized, given the conservative Canadian climate.

CHAPTER V

LEGISLATIVE REFORM: CHOOSING ALLIES AND TAKING SIDES

Within the last ten years over forty bills have been introduced into the house of commons concerning proposals for reform of the existing obscenity section of the Criminal Code. The relative number of submissions serves to attest to the dissatisfaction with the manner in which Canadian courts have dealt with the pornography problematic. Change in the existing legislation is long overdue, despite the fact that the community standards approach has begun to reflect the popular distinction between depictions of consenting and degrading or violent sexuality. Although apparently progressive in nature, this judicial trend has been severely criticized. This avenue, in itself, will not redress the limitations inherent in the present approach to pornography. Consequently, alternate strategies have been considered.

Many of the approaches were examined within two recent Canadian efforts at alleviating the pornography situation, the Badgley Report and the Fraser Report. Both offer detailed recommendations for amendments to Canadian obscenity laws. Although these reports received considerable criticism upon release, they enjoyed many positive evaluations. The reviews these reports engendered are illustrative of the diversity of interests to which legislators must attend.

The Canadian community eagerly anticipated reforms in the wake of these reports. Few individuals were optimistic that amendments would respect the liberal-feminist essence of the Fraser Report, yet they were nonetheless disappointed with the introduction of Bill C-114. It represented repressive legislation which better reflected conservative political trends than progressive insights borne from discussion of contemporary philosophies. Many Canadians, yet especially those espousing an anti-censorship perspective, reacted strongly to this bill. The anti-censorship position promotes strategies which are offered as democratic alternatives to proscription and criminal sanctions. Meaningful change necessitates that its suggestions for social and educational reforms be adopted. Yet, the proposals are better conceptualized as adjunct solutions than absolute resolutions.

Many feminists contend that legislation constraining expressions of sexuality will ultimately hobble women's motions towards equality. Legal innovations can pave the way for social modulations, however, and actually contribute in an educational capacity. Law is a means of realizing certain values and reflecting different moralities. The feminist conceptualization of the pornography debate offers valuable insights, which extend beyond the parameters of the moralist/civil libertarian dichotomy. Feminist morality focuses on social justice and harm to women, expressed within the provocation and direct harm principles. The government has indicated a substantial interest

in the pornography debate. In the present conservative climate, legislative change to obscenity laws can be predicted with some degree of accuracy. Censorship may be interpreted as an ineffective or even dangerous phenomenon, yet it will develop with or without feminist participation. Feminists must not assume a passive role in the legislative process, because the moral conservatives are lobbying for the representation of competing interests. Laws which do not reflect feminist perspectives will indeed function to suppress their goals.

The Canadian government's concentrated examination of the pornography issue is displayed in the 1984 Report of the Committee on Sexual Offences Against Children and Youth (Badgley Report) and the 1985 Report of the Special Committee On Pornography and Prostitution (Fraser Report). The vagueness of obscenity laws and the problems involved in their application, combined with feminist pressure, prompted the federal government's enquiry into this area. The mandates of both committees stipulated the consideration of alternatives to the present legislation and recommendations for solutions to the pornography problem in Canada.

The Badgley Report: Parental Overtones

The Badgley Report's consideration of pornography was secondary to its focus on children. Pornography issues were discussed mainly in the context of children and sexual abuse,

particularly in terms of child pornography and access by children and youths to pornographic material (Badgley Committee 1984: 1079).

The Badgley Committee's recommendations have received considerable criticism. On the surface many of the recommendations appear quite feasible and reasonable, yet there may be certain ramifications associated with their enactments. The main arguments against the Report are a consequence of its traditional perspective. The committee's proposals, taken as a whole, do not attempt to significantly alter the status quo. The Report is criticized for its failure to mandate fundamental changes which could upset the balance of power in our society, or seriously challenge the ideology behind pornography.

Although the production of child pornography was assessed to be virtually nonexistent in Canada, the committee was critical of the fact that there are no laws specifically prohibiting it. This is despite the fact that other legislation is available which can be invoked to address the problem, such as provincial child welfare legislation, the Customs Act and various Criminal Code offences (Badgley Committee 1984: 1083). The committee suggested the application of the criminal sanction to those involved in the production, display, sale or distribution of representations of a person under eighteen participating in sexual conduct. 'Sexual conduct' is a very broad term that is used to denote anything from sexual activity to the lewd exhibition of the genitals. The proposed legislation's purpose

would be the protection of young people from sexual exploitation (Badgley Committee 1984: 101). Therefore, only visual depictions of pornography would be focussed upon, since their production necessitates criminal conduct (Badgley Committee 1984: 102).

An individual convicted of one of the offences would be subject to imprisonment and would be guilty of an indictable offence. It would similarly be considered an indictable offence to possess material of this variety, punishable upon summary conviction. The onus would rest on the defendant to ensure that the representation was not of someone under 18 years of age (Badgley Committee 1984: 103).

Accompanying the above proposal is the recommendation that the importation of pornography under this definition be similarly penalized. The Badgley Committee requested that the Customs Tariff, Customs and Broadcasting Act, Canada Post Corporation Act and Broadcasting Act undergo renovations to meet Criminal Code standards. They suggested that criteria for film and video classification similarly be developed guaranteeing that provincial and territorial definitions correspond to the proposed Code amendments. The Badgely Committee accompanied its legal reforms with proposals for the strengthening of federal enforcement services, making the operation of the central registry of customs seizures more efficient and encouraging proactive measures on the part of the R.C.M.P. to effect these maneuveres. The Badgley Committee had a secondary aim in its focus on children and pornography. The committee was concerned

with respect to the possibility of children being exposed to visual pornography through that material's open display or accessibility by young persons. It proposed a Criminal Code amendment detailed in terms of content and medium be enstated which address the knowing sale or offers of pornographic material to anyone under 16, punishable on summary conviction.

Despite the recognition by many feminist theorists and academics that the pornography problematic is a result of sexist images and symbolic of the power imbalances in our society, the Badgley Committee restricted its focus to sexually explicit images. The committee has been attacked for accepting uncritically, the existing legal definitions of pornography (Brock & Kinsman 1986: 239). It does not recognize the mainstream media and advertising portrayal of young people as problematic. Many accepted images of youth in our society are sexualized as well. A social value system that presents pubescent girls as the cultural ideal has more fundamental problems than can be effectively suppressed through rigid legislation aimed at sexually explicit imagery (Brock & Kinsman 1986: 240; Clark 1986: 211).

The Badgely Committee identified children under sixteen as in need of protection from the pornographic images of our society. This may indeed be the case, but the pornographic images the committee is referring to share more in common with a traditional moralist definition of pornography than a feminist one. Instead of preventing young people's access to degrading or

violent images, the Badgley Committee would refuse them sexually explicit material. Brock & Kinsman (1986: 239) warn that this "blanket condemnation of sexually explicit imagery could be used to deny young people access to sex education materials". The laws could be used as instruments to deny sex education, rather than as vehicles encouraging exploration of young people's sexuality and an understanding of their own bodies.

Wachtel (1986: 166) blasts the report for its "striking ambivalence about children and sexuality". Similarly, Boyd (1986: 278) suggests that the Badgley Committee draws "overly definitive lines on the subject of adolescent sexuality." The committee feared that youths' sexual orientations could be swayed by pornographic materials. Concerns exist that the committee's views mask an underlying homophobic reaction which is shared by much of Canadian society. Boyd argues that the criminal law should not be responsible for the preservation of heterosexuality within Canada (Boyd 1986: 278). Brock & Kinsman are equally perturbed with the fact that visual depictions of young people engaged in sexual activity are confused with actual child abuse (Brock & Kinsman 1986: 239). This may be a valid interpretation of the Badgley Committee's concerns, but portrayals of sexual conduct involving young people could pose other problems. It is not necessarily a positive thing for the young to have permanent public records of their sexual conduct or early experiences, whether they be intended for sex education purposes or as a form of entertainment. In addition, legislators

do not want to encourage adults in identifying young persons as legitimate sexual objects (CAP 1986: 25). The restrictions on the availability of sexually explicit materials may be unfounded, but the prevention of dissemination of material depicting the sexual conduct of young people does not unjustifiably preempt the possibilities for childhood sex education.

Clark (1986: 200) asserts that the Report is written from the same perspective which has condoned and tolerated the sexual abuse of children. She recommends substantial changes in societal structure before any real improvements can be effected. The Badgley Committee's recommendations can be reduced, in Clark's terms to "creating behavior specific offences and fine tuning the sentencing process" (Clark 1986: 207).

Brock and Kinsman (1986: 246) condemn the Report for approaching pornography as if it were an administrative problem. The committee's conclusions are a consequence of the fact that the police and other 'experts' in criminal offences were employed in the development of institutionalized administrative approaches to pornography. Brock & Kinsman (1986: 227), similarly criticize that the "Badgley Report advises state agencies how to organize a much narrower process of administrative and managerial change... which cannot account for the necessity of a transformation in the present organization of social relations if the problem of socially organized male violence is to be overcome" (1987: 227). A sentiment shared by

many individuals, especially those endorsing the feminist perspective, states that existing social arrangements and the relationships between the powerful and the powerless allow violence and sexual abuse to exist and be maintained. Clark's solution involves the dismantling of patriarchy and paternalism (1986: 219). State and social policies which empower, not 'protect' young people are necessary to combat problems of pornography (Brock & Kinsman 1986: 258).

Clark (1986: 205) is convinced that:

things will go on just as they have so long as men are socialized to regard women and children as property, and to link male sexuality with power, authority and violence. The system cannot be saved and the problem simultaneously solved because the problem is endemic to the system.

The Badgley Report lacks a certain sensitivity to contemporary debates regarding sexuality and power. The committee proceeded with a moralist perspective, which denied childhood sexuality as it condemned the homosexual orientation. It addressed pornography as sexually explicit material, thereby refusing to acknowledge feminist distinctions. The Badgley Report's unconditional acceptance of the institutionalized power structures which have enabled violence and abuse in public and private sectors, does not inspire confidence for any meaningful change.

The Fraser Report: Progressive Insights

The Fraser Report was the product of the 1985 Special Committee on Pornography and Prostitution. Within its Report, the committee made recommendations on how to deal with the pornography circumstance in Canada. The Fraser Committee developed upon some of the proposals made by the Badgley Committee and further explored the pornography issue. Its report was greeted with more enthusiasm than was the Badgley Report. Many herald it as an insightful piece of work which provides a great body of knowledge. Although the committee was acclaimed for its progressive approach, critics maintain that its actual recommendations are underdeveloped. The Report demonstrates an awareness of the extent of the pornography problem, yet does not indicate a commitment to complete legal and social reforms.

Children And Pornography

The Fraser Committee made 22 recommendations dealing specifically with those under 18 years of age. These included recommendations 66 through 68 which instruct provincial child welfare authorities to review children's involvement in pornography and encourages provincial and municipal authorities to continue their attempts to control the access of pornographic films, materials and videos to minors through provincial classification and municipal by-laws. Criminal code sanctions for the production, dissemination and possession of child pornography were also urged (Fraser Committee 1985b: 45). There

were nineteen additional recommendations made concerning pornography as related to children. These are amendments and additions to, or repeals of, the Canadian Criminal Code, and recommendations concerning the evidency acts of Canada and the provinces.

Interestingly, the Fraser Committee did not restrict the imposition of criminal sanctions to visual pornographic material involving children. The Fraser Committee would criminalize sexually explicit portrayals of children, but also material advocating or encouraging the sexual abuse of children, punishable for production, distribution or possession (Fraser Committee 1985: 691). Therefore, material that did not involve any criminal conduct in its creation, such as written material, would be prohibited. Adhering to this line of reasoning, some critics comment that pornography involving those over eighteen years of age, but appearing younger, should be forbidden. Material which presents models as children, actually or symbolically, transmits the message that child pornography should be condoned or that children can be appropriately seen as sexual objects (CAP 1986: 27).

The Fraser Committee, like the Badgley Committee, would make the sale or access of visual pornography or sex aids to those under 18 years of age a criminal offence (Fraser Committee 1985: 638). It is argued that different penalties should be associated with children in different age categories, with a distinction being made between those under and over 14 years of age. Even at

the production stage it is suggested that not all children are equally vulnerable, and the penalties associated with the offences should reflect those differences (Marshall 1985: 5). The committee chose to allow the defences of artistic merit, and educational or scientific purposes, quelling some of the fears that this would hinder the availability of sex education materials.

These defences did not prevent the committee from receiving criticism in this area, however. Kanter (1986: 85) questions the notion that protection of the young denotes less access to information. He argues that the vulnerable require more access to sexually explicit materials. Diamond (1986: 304) echoes these concerns and indicates that tighter restrictions might dissuade many publishers from dealing with material that could warn children of the danger of sexual abuse. She criticizes the Report for its attitude toward youth. Although it recognizes the child as a sexual being (Fraser Committee 1985: 26), it prohibits access to sexual material and sex aids, thereby reinforcing the concept that childhood sexuality is appropriately controlled by adults. No attempt was made by the committee to explore the feelings and attitudes of children and youths regarding their sexuality and expressions of it (Diamond 1986: 318).

Adults And Pornography

Although the Fraser Committee explored the subject of children and pornography, its main focus was on pornography made by and for adults. The Fraser Committee indicated that the laws as they stood had severe limitations. Among those were the fact that some obscenity laws were difficult to enforce; there was a lack of uniformity between the Criminal Code and federal acts; child pornography was not specifically prohibited, and; sex or gender was not identified under Hate Literature provisions.

The committee made recommendations concerning the policies involved in sexually explicit live shows, broadcasting and communications, customs and the mails. They examined many approaches to pornography including amendments to the obscenity legislation within the Criminal Code, the provincial role in pornography control, the hate literature laws and the possibility of a civil rights approach.

Among the most controversial of the committee's recommendations was the idea that the present obscenity provisions of the C.C.C. be abolished and replaced with a section specifically focussed on pornography. The committee advocated the abolition of the community standards test and proposed that a three-tiered test replace it. The committee's three-tiered test was not premised on offensiveness but rather notions of harm, both direct demonstrable harm to individuals and social harm (Fraser Committee 1985: 264). This three-tiered

test would be accompanied by another Criminal Code amendment recognizing gender as one of the identifiable groups to be covered under Hate Literature provisions.

The first tier was not accompanied by defences for artistic merit or scientific or educational purpose and would apply criminal sanctions to material involving sexuality and children, as discussed above, and visual pornographic material that involved physical harm to participants during production (Fraser Committee 1985: 264). The making, printing, publishing or distribution of this material, or possession for such purposes, would be an indictable offence and would be accompanied by a prison sentence of up to five years. Someone convicted of selling, renting or possession for those purposes would be liable to indictment or summary conviction, and could be imprisoned for up to two years.

Tier two addressed sexually violent and degrading pornography. It specifically criminalized any matter or performance which depicts or describes sexually violent behaviour, bestiality, incest or necrophilia. Defences of artistic merit, scientific and educational purpose would be permitted in this tier (Fraser Committee 1985: 277).

The third tier concerned material that would only be prosecuted contingent upon its display, the circumstances of exposure and access by individuals under eighteen years of age. The definition of pornographic materials for tiers one and two

included:

any matter or thing in or on which is depicted vaginal, oral or anal intercourse, sexually violent behaviour, bestiality, incest, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals (Fraser Committee 1985: 276-277).

The tier three definition of visually pornographic materials was identical to the definition of pornographic materials which was proposed for tiers one and two, except for the fact that sexually violent material, bestiality, incest and necrophilia were excluded.

A general consensus mandated that the consideration of sexual material be removed from the title of 'Offences Tending To Corrupt Morals'. There was some disagreement over whether the control of sexual material should be appropriately placed under an individual section entitled 'Pornography', however. There are those who submit that replacing the term 'obscenity' with 'pornography' does little to effect change, since the social definitions of the word vary so widely. Perhaps the term 'pornography' will be as ambiguous as obscenity has been.

The three-tiered pornography offence structure is more accurately described as a four-tiered structure, if one is to focus on the penalties accorded to different offences (CAP 1986: 4). Child pornography is associated with greater sanctions than material in which actual physical harm was caused to those depicted in it. Critics contend that, objectionable as child pornography is, material in which actual physical harm transpires should carry the heaviest penalty (CAP 1986: 5).

It is possible that tier one is simply duplicative. A variety of Criminal Code offences such as assault and sexual assault laws already exist to penalize this behaviour. The proposal may be an aim on the part of the committee to legitimize complaints by women whose abuse may not be recognized as such by the police departments uneager to lay charges. Creating a new law does not dismiss the problem of police enforcement or make the women any less reluctant to make complaints to a less than sympathetic body, however.

The Report was criticized for its use of vague terminology and lack of explicit definitions (CAP 1986: 17). In this area of the law, vagueness could have important consequences. The Fraser Committee recommended the abolition of the community standards test, to be replaced by the tiered system. The committee reportedly rejected the use of broad terminology which would leave the characterization of the material to a test, such as the community standards of tolerance. In tier two, the word 'degrading' was pointedly omitted, although it is stated that degrading depictions or writings are the focus of tier two. The committee was of the belief that the ambiguity associated with the term would detract from its utility as a legislative tool. As was the case with the 1959 legislation, the reformers have lauded the objectivity this proposed legislation would ensure. The committee identified specific acts as deserving of the criminal sanction, namely those absent of the element of consent. The justification for specifying different behaviours

is to accomplish the goals of objectivity and uniform application.

Many of the Report's reviewers maintain that the list of degrading behaviours is underinclusive. Actions such as urinating or defecating on someone, ejaculating into an individual's face or treating someone as an animal for the apparent purposes of sexual stimulation are arguably degrading (CAP 1986: 16; Landau 1985b: 13). The tier two recommendations do not clearly capture the feminist notions of degradation, dehumanization and objectification of women (Marshall 1985: 3). Incest is regarded as a degrading behaviour, yet Landau (1985b: 15) questions whether the Criminal Code should identify depictions of incest between consenting adults as deserving of the criminal sanction.

The committee defined sexually violent material as that material whose purpose is the sexual gratification or stimulation of the viewer. It is unclear how this would be determined. Will it be the prerogative of the judge to determine if he, as a viewer is sexually stimulated, or will he rely on an average of Canadian thinking to determine whether the material is deserving of criminal sanction? A variation of the community standards test could conceivably be resorted to, whereby a judge refers to levels of community tolerance in an ascertainment of 'pornography'.

Appleford (1986: 146) argues that abandonment of the community standards test is not necessarily a positive step. Although flawed, it is a potentially flexible response to public opinion. Its utility is underlined by the fact that the community standards test has begun to recognize the pornography/erotica issue and is focusing on it in a determination of obscenity (Boyd 1986: 277).

Feminists were disgruntled by the fact that the Fraser Committee's proposals for legislative reform did not recognize the distinction between pornography and erotica. Objections have been registered to the committee's use of the phrase 'Visual Pornographic Material' to identify sexually explicit consenting depictions. The failure of the Report to emphasize the variables which distinguish a pornographic representation from an erotic one reflects an insensitivity to the importance of context (CAP 1986: 18). This underlines the incompatibility between the committee's and feminist definitions (Landau 1985b: 6).

The erotica/pornography distinction remains problematic, however. Diamond (1986: 297) presents the argument that it is easier in theory than in practice to distinguish between pornography and erotica, while McCormack (1983: 278) submits that the distinction may actually be a reflection of culture and social class. The argument arises that the erotica concept can be reduced to a consideration of artistic merit.

The Fraser Committee allowed the defences of artistic merit, educational purpose and scientific purpose in its tier two offences. The discussion of artistic merit is highly subjective, with artists unable to agree on the value of a particular presentation. It is maintained that allowing a defence of artistic merit will function to put the focus on the form of the material and not the content (Landau 1985b: 5). The high quality of a representation should not necessarily outweigh the impact of its well done sexist imagery. It is suggested that the defence be abolished and be replaced by a defence stating that the work as a whole must clearly condemn the violence and degradation depicted in it (CAP 1986: 15).

Some groups are concerned that the educational and scientific purpose defences will be misused. These individuals contend that "material of prurient purpose could also be produced in a pseudo-scientific or pseudo-educational format in an attempt to escape sanctions" (Interchurch Committee 1986: 6). In order to prevent this situation, they suggest that all three defences be collapsed into one defence of making a demonstrable contribution to the public good.

The vague or ambiguous nature of some of the terms employed by the committee are often the focus of criticism. Critics assert that the meaning of the term 'lewd' is controversial. The committee recognized this fault, but designed it that way so as to allow the law to discriminate between what is patently offensive when displayed in public and what is not. Diamond

(1986: 298) objects to 'lewd' on different grounds. She feels that the term presents the idea that we are dealing with something dirty or unmentionable. 'Lewd' is defined as 'obscene'. The use of the term can operate to refocus the emphasis on violence and degradation back to sexual mores (CAP 1986: 9; Marshall 1985: 5). Boyd (1986: 283) argues that criticisms of the vagueness of the Fraser Committee's definitions are not valid. He suggests that, due to its nature, obscenity is decided by the individual case.

The display of visually pornographic material is the concern of tier three. Critics maintain that the display of written and recorded material should similarly be regulated. The method of regulation used by the committee is questionable, however. An advertisement could easily masquerade as a warning sign, making that requirement unnecessary (Marshall 1985: 5). The inclusion of tier three recommendations in the Criminal Code could be accompanied by certain unwanted ramifications. This occurrence could prevent or inhibit regulation at the provincial and municipal levels (CAP 1986: 20). Many communities enjoy the regulatory powers now available to them and are leery that the adoption of the Fraser Report's proposals will make municipal by-laws which regulate display ultra vires as a trespass into federal jurisdiction (Landau 1985b: 20).

The Fraser Committee suggested that the hate literature provisions of the Criminal Code be modified to include sex or gender as an identifiable group, along with the other

identifiable groups that were named in the Charter. The Committee would also remove the requirement of wilfulness from that section, and remove the requirement that the Attorney General consent to a prosecution and classification of the defences (Fraser Committee 1985: 27). The identification of pornography as hate literature can be regarded as a fairly progressive step. It is not clear what material would come under the ambit of pornography laws, however, and what material would be addressed by hate law provisions. The hate law provisions seem somewhat redundant. Many authors question whether the provisions will serve more than a symbolic function (Landau 1985b: 30; CAP 1986: 31).

The committee asserted that this section would deal with material which would not be caught by the pornography offences, such as violent or degrading material which is not sexually explicit. It would apparently complement the pornography offences because no defences of artistic, educational or scientific merit would apply (Fraser Committee 1985: 324). The Law Reform Commission (1986: 47) argued that not only would the reform of hate law provisions not provide any substantially new additions to the law, it "could be used to undercut the safeguards provided by more specific offences of pornography." The LRC asserted that using specific pornography offences could more adequately address the nature of pornography and prevent misuses or abuses of the law by overzealous prosecutors seeking the shortest possible route to conviction.

In addition to its other proposals, the committee examined the prospect of using human rights legislation to control pornography. A private cause of action could ensue to redress a public wrong. The committee stops short of advocating the human rights approach, by not recommending that a separate pornography-related offence be added to the Human Rights Codes, although the Fraser Committee encouraged Human Rights Commissions to explore the application of the existing legislation and jurisprudence on pornography issues (Fraser Committee 1985: 313). The committee's approach was rather confusing, making it unclear whether they were willing to endorse the approach or not (Landau 1985b: 35).

The committee did recommend that provincial and territorial legislation be enacted to provide a civil cause of action in the courts with respect to the promotion of hatred by way of pornography (Fraser Committee 1985: 314). The violation of civil rights by pornography would be focused upon. No requirement of proof of damage would be necessary, as the harm would be in the material itself. This approach illuminates the issue of pornography as a violation of women as a class, not just individuals (Fraser Committee 1985: 314). Unfortunately, the utility of this legislation has not been demonstrated (CAP 1986: 39).

Kanter (1986: 182) feels this civil rights approach introduces new difficulties. Kanter suggests this civil action poses additional threats to sexual material in Canada. The

Report already advocates use of the Criminal Code for sex and violence, and human rights legislation and the Criminal Code to eliminate its display from public places, such as the workplace. Furthermore, problems of definition could surface with its injunctions, for they must define the objectionable material. Kanter submits the civil rights option could allow conservative forces to use their influence to prevent the dissemination of sexual material.

Many are perturbed that the civil rights approach represents yet another strategy which would detract from the progress made by the new-wave of feminism, which recognizes pornography as a system of representations and judges context to be the determining variable.

Kanter states:

by promoting the use of civil rights actions, the Report is adopting the view that it is not mainstream material which is the most problematic. This view is that it is other material, for which one can sue the supplier, which is the main problem. By prosecuting around the edges, it is suggested that it is the extreme images which constitute the main problem, which is not the case. Many media images are erotic in a manner degrading to women, more subtle, but promoting the values of pornography. The message should be that main stream images are objectionable, with a strategy designed to make people aware of that position (Kanter 1986: 183).

Kanter (1986: 186) reprimands the members of the committee for not emphasizing the need for complete structural reforms and social change after their recognition that pornography was part of a much greater problem ingrained into the fabric of society. Pornography is a microcosm of the power imbalance and social

inequality expressed in sexism. The committee members are consequently censured for not following through on their own insights (Kanter 1986: 181).

The Fraser Report outlined specific sexual behaviours to be prohibited. The system offered by the committee does not address elements of context and manner of depiction (Appleford 1986: 146). Diamond (1986: 293) admonishes the committee for presenting pornography along a continuum of sexist images, rather than placing it within a framework of oppression against women. The committee apparently does not identify pornography as a system of representations within a network of representations, in the Rosalind Coward tradition.

Although the Fraser Committee considered the Criminal Code an inept device for confronting sexist attitudes, they chose to select legal answers to social problems (Diamond 1986: 291). The Fraser Committee advocated the use of the law over an arguably more effective, if more expensive, employment of progressive economic and social policies, despite contentions that the law is a necessary first step for change (McLaren 1986: 111). The need for educational and informational reforms was discussed, but only on the level of generalities. Kanter (1986: 188) argues that the government must be forced to outline specific recommendations aimed at removing inequality.

Notwithstanding the fact that the Fraser Report calls for sex education, its proposals are not particularly progressive.

The Report suggests the financial support of voluntary community and religious organizations that are already involved in this area. Diamond (1986: 293) argues that these groups function to maintain the status quo, which is highly problematic from the feminist perspective.

Moralists object to the recommendations on the grounds that representations of explicit adult sexuality would not be prohibited in the absence of violence and degradation. Liberals see the implementation of hate law provisions and tier two concepts of sexual violence and degradation as adding fuel to the censorship fire. The Fraser Report's perspective has been described as "liberal with healthy doses of feminism" (Kanter 1986: 175). Despite its recognition of contemporary concerns and feminist theory, feminist critics contend that the insights were not illustrated within the legal reforms. The progressive views conveyed in the main body of the Report were not translated into many of its recommendations (Landau 1985b: 2).

Bill C-114: Moralism Revisited

John Crosbie proposed Bill C-114 in the June of 1986. Many individuals interested in the pornography issue were sadly disappointed with the main thrust of the bill, which did not attend to the issues and principles presented in the Fraser Report. Bill C-114 represents repressive legislation which would reroute the pornography debate to a moralistic consideration of

depictions of sexuality. Although Bill C-114 died on the order paper when parliament was prorogued on August 28, 1986, it could be re-introduced as it exists or in an amended version' (CCAMP 1986: 1). Regardless, it represents an example of overinclusive legislation which can be identified as a product of our conservative times.

Bill C-114 creates many new definitions, including those for degrading pornography, pornography that shows physical harm and 'sexually violent behaviour'. The proposed sections 159 to 159.8 would replace the offences of corrupting morals, the 'obscenity' and 'crime comic' provisions of s.159 and s.160, the restrictions on publication of s.162, and make consequential changes to s.160, 161, 164 and 165. Bill C-114 includes proposed section 162.1 which would deal with material advocating child sexual abuse. Section 163 to 163.5 would deal with various theatrical performances.

Sections 281.1 to 282.3 of the Criminal Code would be broadened under the bill, with the inclusion of 'sex' as one of the identifiable groups under the 'hate propaganda' offences. The Customs Tariff would be updated to reflect the proposed

'Subsequent to the submission of this thesis the federal government presented a bill similar to Bill C-114 in both form and content. On May 4, 1987 Justice Minister Ray Hnatyshyn introduced Bill C-54 with its proposed amendments to the Criminal Code. Bill C-54 included a definition of erotica and a slightly altered definition of pornography. In addition, some of the penalties associated with the various offences had been changed. Despite these deviations, the approaches to pornography offered by Bill C-114 and Bill C-54 are not fundamentally different.

changes in the Criminal Code under the pornography section, the child pornography section and hate propaganda within the definition of 281.3(8) of the Criminal Code.

Crosbie's definitions of pornography have not received positive comment from the feminist or liberal communities. A clause by clause analysis best illuminates the essence of the legislation. Section 138 of the Criminal Code would be amended to include the definitions. Pornography is defined as:

any visual matter showing vaginal, anal or oral intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or other sexual activity.

Degrading pornography refers to:

any pornography that shows defecation, urination, ejaculation, or expectoration by one person onto another, lactation, menstruation, penetration of a bodily orifice with an object, one person treating himself or another as an animal or object, an act of bondage or any act in which one person attempts to degrade himself or another.

Pornography that shows physical harm means:

any pornography that shows a person in the act of causing or attempting to cause actual or simulated permanent or extended impairment of the body of any person or of its functions.

Lastly, sexually violent behaviour is defined as including:

sexual assault for the apparent purpose of causing sexual gratification to or stimulation of the viewer, in which physical pain is inflicted or apparently inflicted on a person by another person or by the person himself.

Bercovitch and Busque (1986: 3) contend the proposed legislation may be both under- and over-inclusive. Some of the definitions have a nebulous nature. It is unclear what is meant by 'or other sexual activity' in the pornography definition. It is apparently

a catch-all phrase to legitimize prosecution of any representations which do not meet with judicial approval. The pornography definition is overly broad and vague, and yet it does not affect aural or written material. The authors argue that the combined effect of the written and visual provides the greatest impact, yet it is not addressed by the legislation. They predict a situation in which a relatively neutral picture could be paired with violent text, producing a highly disturbing impact. Furthermore, by focusing on only visual matter, which includes pictures, films and videotapes, the definition would not include some forms of pornography now available, such as Dial-a-Porn.

Under the provisions of Bill C-114, all depictions of sexuality are considered pornographic. The definition does not distinguish between pornography and erotica. It deals with depictions of consenting intercourse in an identical manner as depictions of bestiality and necrophilia. Feminist distinctions between healthy consenting sexuality and more problematic behaviours are not acknowledged. Perhaps the most disturbing aspect of this definition is that it does not address the notion of context. Depictions of the behaviours from any perspective, regardless of their connotations, are identified as pornographic. The definition does not differentiate between the truly objectionable and the unpernicious.

The definition of degrading pornography may similarly criminalize many images that, although shocking in the framework

of our culture, are not appropriately subsumed under the heading of degrading pornography. The manner in which menstruation or lactation are portrayed would determine whether the behaviours appeared pornographic. The ridicule of pregnancy, lactation and menstruation may be a better target for control (Bercovitch & Busque 1986: 18). In addition, the phrase "any act in which one person attempts to degrade himself or another" is very ambiguous. A variety of behaviours may be incorporated under legislation of this nature. As feminist artists begin to explore issues of the female condition, their works could conceivably be restricted on the grounds that actors and actresses within their skits and films attempt to degrade themselves. Similarly, many feminists would argue that exploring the relationship between dominance and submission in depictions of bondage may be a worthwhile purpose that should not be preempted. Purpose is not addressed by Crosbie's definition, however. Therefore, the message a work is supposed to emit would not be necessarily examined by a court. Although this approach may save the court from the difficult task of trying to second-guess the motives of film-makers and producers, it fails to distinguish between pornographers exploiting the degradation of women and artists examining the human condition.

The definition of pornography that shows physical harm has been criticized on the grounds that it may serve to legitimate other behaviours that are equally problematic (Bercovitch & Busque 1986: 15). It deals with the depictions of the actual or

simulated and attempted 'permanent or extended impairment of the body or any of its functions'. Permanent or extended impairment may not be necessary. Injuries that are of a shorter duration should debatably be addressed under a section identifying pornography that shows harm. This section would most probably affect 'snuff' movies and their simulations. The practicality of this section is disputable because so few snuff films are actually found in Canada. It is believed that those films which are discovered in Canada are produced in the United States and Europe.

The last definition is the only one that focuses on the purpose of the representation. Bercovitch and Busque (1986: 16) contend that the section should name aggravated sexual assault, and even plain assault and aggravated assault in its definition. Therefore, any assault, with or without consent, for the apparent purpose of causing sexual gratification to or stimulation of the reader would be prohibited.

Sections 159 to 159.3 present the offences of distributing and displaying, selling or renting pornography. They are accompanied by a maximum penalty of five years in prison. It is obviously an oversight that the display of pornography that shows physical harm is not an offence. With the exception of that pornography, all of the offences are accompanied by the defences of a genuine educational or scientific purpose or artistic merit, given the presence of a warning sign. An inclusion of the last defence undermines any facade of trying to

respect feminist principles.

The most problematic aspect of the defence of artistic merit is the notion of balancing the content of degrading and sexually violent images with their form. The term 'artistic merit' is vague and it necessitates judicial discretion in an area beyond judicial training. Furthermore, the necessary warning sign could be considered no more than an advertisement. Bercovitch and Busque (1986: 24) argue that if the work truly has artistic merit the sign is of no consequence. Such warnings are not necessary for works of art in museums.

Bill C-114 includes rather confusing legislation in regards to conditions of display, exhibition to minors and the role of the provincial film review boards. Section 159.4 states that display to the public of any pornography or other material in which the breasts or genitals are shown for a sexual purpose is an offence unless there is a prominent warning notice or the material is hidden by a barrier or it is covered by an opaque wrapper. Apparently, either one of the three conditions precludes a finding of guilt. Sections 159.5 and 159.6 make it an offence to sell, rent or show any pornography, or any material referred to in the previous section, to a person under eighteen years of age. Section 159.6 refers to material other than visual pornography, including any matter the dominant contents of which are a description of masturbation or vaginal, anal or oral intercourse. Section 159.7 names the defences available for offences under these sections. The defence of due

diligence in ensuring there was no pornographic material still applies. It is similarly a defence to show that the material has a genuine educational or scientific purpose and that it was sold, rented or displayed for that purpose. The last defence suggests that if the material had been classified or rated by the provincial classification system as acceptable for viewing by those under eighteen, no offence will have been committed.

These sections appear very incoherent when they are viewed in conjunction with each other. Firstly, the display offence addresses 'pornography or other material'. Bercovitch and Busque (1986: 28) suggest that 'other material' refers to nudity. They point out the inherent contradictions in the bill, stating:

If the government did intend sections 159.4 to apply to pornography, then sections 159.1 and 159.2 would be prohibiting the sale of the material, and this section would be determining how it could be sold.

If the material is that which had been allowed by one of the defences, yet more confusion is introduced. Bercovitch and Busque submit that if a person was found not guilty of the offence of displaying pornography, the display conditions set out in s.159.4 would be redundant. Otherwise, an individual could be found not guilty of an offence under one section and be guilty of the same offence because of another section (Bercovitch & Busque 1986: 28).

It appears as if the federal government would regard any one of the measures constraining display as equally adequate. Traditionally, conditions of display are determined by municipal

by-laws. If federal legislation is going to enter into this area it is unclear what the powers of the municipalities and provinces are concerning conditions of display. The legislative status of the provincial and municipal levels of government are brought into question. The last of the three defences is perhaps even more controversial. Because the federal government would follow the provincial film review boards' decisions, administrative bodies could carry more weight than the Criminal Code. Administrative bodies would, therefore, be entrusted to determine criminal law.

If the federal government was willing to adopt the proposals laid out in Bill C-114, the penalties accompanying the offences would have to be altered. Display, sale or rental of pornography to adults could be an indictable offence, associated with a possible term of imprisonment not exceeding two years. The identical display, sale or rental to minors would only be an offence punishable upon summary conviction. Presumably, the young should be afforded more protection than should adults.

Section 159.8 makes it a crime for anyone to sell, offer to sell or display a sex-aid to a person under eighteen years of age. This addition to the Criminal Code seems rather arbitrary, given the fact that persons younger than eighteen can legally participate in sexual activity.

Sections 162 and 162.1 address child pornography. Anyone who uses a person under eighteen years of age in the making of

pornography, or imports, makes, or distributes such pornography can be subject to conviction of an indictable offence and is liable to imprisonment for up to ten years. Possession of such visual materials is accompanied by an offence punishable upon summary conviction. Section 162.1 criminalizes any thing that advocates, encourages, condones or presents as normal child sexual abuse. The offences range from indictable offences accompanied by maximum ten year sentences for importing, making, printing, publishing, broadcasting or distributing such material to a summary conviction offence for possession. Therefore, written, aural or visual material could be addressed by this legislation.

Bill C-114 can be criticized for many of the same reasons the Fraser Report was censured. The proposals for child pornography do not distinguish between offences dealing with young children and older teenagers. Perhaps a graver error, incorporated in both documents, lies in the fact that the penalties do not reflect the degree of harm. Section 159 declares that the making or distribution of any pornography that shows physical harm is an indictable offence and can be accompanied by a prison term not exceeding five years. The making or distributing of child pornography, or material advocating child pornography where no children need be involved, is associated with a prison term twice that length. 'Pornography that shows physical harm' can include 'snuff' movies, which are films that record the actual murder and mutilation of women.

Feminists assert that the degree of harm, whether it be focused on children or adults, should govern the associated penalty.

Adoption of Bill C-114 would entail that subsection 281.4 of the Criminal Code be amended so that 'identifiable group' would mean any section of the public distinguished by colour, race, sex, religion or ethnic origin. Although many corners of the feminist community have worked diligently for this addition, Crosbie did not accomplish the extra step necessary to make this motion effective. Hughes (1983: 107) suggests that adding sex to the hate propaganda section will be a futile exercise, unless the addition is accompanied by other changes. If the government refuses to remove the 'wilfully' term and does not withdraw the requirement that the Attorney General consent to every prosecution, the hate literature provision will be functionally inoperative as a control against pornography. The hate literature legislation has never been widely used in the past, and without the recommended changes it will continue to lay dormant.

Bill C-114 was destined to be unpopular with all social groups interested in the pornography issue, with the exception of the conservative forces. It has been regarded as sweeping and Draconian legislation (Fisher 1986: 352). Its vague, broad nature serves to chill freedom of expression. Opposition to the bill derives from the fact that its explicit denunciation and condemnation of images of sexuality is considered Victorian in nature (Vancouver Sun June 11, 1986: A1). Louise Dulude,

president of the National Action Committee on the Status of Women, suggests that underlying the bill is the notion that sex is dirty. She submits that the bill has a Puritan flavour, clearly reflecting the views of fundamentalist religious groups rather than the feminist community.

Diamond (1986: 314) predicts that if legislation of this nature is passed, sexually violent fantasies will merely take on more symbolic forms. Bill C-114 is ineffective in preventing such violent images as women fellating guns. The bill disregards the codes that necessarily determine the interpretation of images. Bill C-114 precludes a consideration of context, for the essence of an image cannot always be reduced to its subject matter (Bercovitch & Busque 1986: 6).

Because the bill avoids a focus on context it is unable to distinguish between erotica and sexual violence. It dismisses all representations of sexuality to the pornographic realm. The proposed legislation proffers the notion that sex is bad. It condones the distortion of women's visions of themselves, and of women's and men's views of their sexuality (Bercovitch & Busque 1986: 7). The defence of artistic merit condones the attitudes the bill alleges to condemn (Bercovitch & Busque 1986: 9). The precedence art is granted over equality rights is incompatible with feminist ideology. Bill C-114 apparently does not accept feminist notions of social harm. Although it does concede that pornography can be conceptualized as hate propaganda, the bill does not loosen the bindings that might

allow this provision some utility. Bill C-114 is a product of moralist attitude and cannot be reconciled with feminist or liberal philosophy.

Anti-censorship: Common Ground

Civil libertarians and feminists supporting an anti-censorship position were not confounded or caught unaware by the essence of Bill C-114. They were apprehensive that any state intervention, regardless of its purported intentions, would operate to deny sexual expression and suppress the development of groups which are dedicated to the exploration of sexual issues. Censorship of sexual materials is additionally disturbing to liberals, because sexual behaviour and attitude have traditionally been considered aspects of the private realm. Therefore, the costs of censorship must be balanced against its goals.

The criticisms against censorship are many. They are largely directed at state censorship, although many other types of censorship operate implicitly on a daily basis. Individuals running corporations, art exhibition organizers and the boards of film companies are continually employing a form of censorship, allowing one type of expression precedence over another. Quality of depiction or design is but one factor which determines production, display or dissemination. Decisions concerning allotment of funding, studio time or wall-space in

galleries effectively censor individual expression as strategically as any government aspiration. Politics on a global, but also a local and individual level, functions to silence some forms of thought and give life to others. Politically viable notions will consistently be represented over less popular philosophies, whether they be within right- or left-wing organizations.

Regardless, many individuals identify their greatest threat as state censorship. It has been appraised as an ineffective social control vehicle which damages sexual attitudes, silences divergent thought and destroys the foundations of democracy. Ironically, censorship is purportedly most dangerous to those who champion it. Liberals and the anti-censorship branch of the feminist movement warn that the anti-pornography campaigners are contributing to their own oppression by relegating their freedoms to a patriarchal structure which has consistently opposed their development.

Censorship has been accused of being an ineffective tool as a function of geography and technology. The argument has been made that Canadians cannot adequately suppress pornography because it is so freely available in the United States. The complexities of modern technology defeat any attempts at controlling the spread of pornographic materials (Fisher 1986: 355). Without the combined attempts of both countries, Canadian censorship will be ineffectual.

Liberals postulate that censorship will not eradicate pornographic expression, it will merely drive it underground. Pornography thrives on its illicit, explicit nature. An element of pornography's attraction and appeal is that it is considered naughty. Civil libertarians indicate that the pornography industry actually benefits from legal prosecution, because this attention serves to enhance the value of pornography. A black-market effect will function to raise the market price of pornographic materials, making the pornography trade an even more profitable and lucrative business (Diamond 1986: 314). Although the black-market has always existed, civil-libertarians fear it will contribute to the spread of criminality (Fulford 1979: 18).

According to proponents of the anti-censorship camp, the transformation or suppression of the more mainstream images of pornography would not eliminate the images which critics find offensive, problematic and harmful. The images would merely assume more symbolic forms (Diamond 1986: 314). Even violent or sado-masochistic pornography would not be circumvented through censorship because violent pornography is a reflection of social reality (Robertson 1979: 27).

Civil libertarians and many feminists identify any censorship approach as incompetent in nature because the strategy does not recognize the fact that society is so inundated with degrading images of women, that the complete abolition of pornography would not compensate for the pervasive

sexism in advertisements, education, literature, art and western culture in general (Fisher 1986: 356). Censorship does not effect changes upon the socialization processes and childrearing practices where individuals develop many of their attitudes and prejudices.

Ultimately, censorship of pornography will not improve the condition of women. Feminists posit that it is an ineffective 'band-aid' solution to the cultural problem of sexism. King (1985) emphasizes that laws are never enforced in a social vacuum. Although they may be predicated upon feminist thought, the power of the feminist movement determines their efficacy. Many individuals enjoy pornography. They believe and contribute to a more general sentiment that pornography is harmless. The censorship of obscenity is consequently arbitrary and its ineffectiveness is well documented (McCormack 1985b: 281). Critics are more concerned with its potential dangerousness, however.

Fisher (1986: 354) speculates that the censorship of sexually explicit materials may promote negative attitudes towards sexuality and result in erotophobia. This consequence could contribute to poor sexual hygiene and less satisfying sexual relationships. Furthermore, the censorship of sexual materials teaches a fear and repression of sexuality (Fulford 1978: 12). Censorship contributes to the traditional notion that sex itself, not just sexist representations, is objectionable (Wilson 1983: 153).

McCormack (1985b: 281) commends the censorship of pornography because she suggest it is symbolically important due to its potential consciousness raising effect. She does not endorse it, however, because she regards the symbolism as hostile. The practice of censorship may be dangerous because it promotes intolerance (Fisher 1986: 353). The theory of censorship works against democracy and refutes the hypothesis that ours is a pluralistic culture, with competing and conflicting views (Fulford 1978: 12). It transmits the message that disfavored opinion and dissent must be suppressed.

Liberals expound the view that censors will not be content with suppressing the most obnoxious images. Fulford (1978: 12) suggests that censorship will grow as one feeds it, until it reaches the dimensions of totalitarianism. It has a reportedly uncontrollable nature. It will attack the best works and condemn the worthless with an indistinguishable relish, so that even classic literature and art will eventually be afforded no protection (Hughes 1983: 113). Moreover, Fisher (1986: 356) submits that any support of official censorship of sexual material is misplaced because censorship will be used as a weapon against researchers active in the social sciences, law and education. This is often referred to as the 'slippery slope' argument. In the context of the pornography debate, this argument becomes:

one small step toward interfering with civil liberties puts all of us onto the slippery slope that leads to fascism, for if we surrender one liberty, we have no moral claim to any others. It is a version of the

'all-or-nothing' argument (Cole 1985: 230).

A new wave of feminists are contending that a strategy of censorship, such as that adopted by the anti-pornography movement, distracts the attention of feminists and the rest of society from needed structural and institutional change (Burstyn 1985: 157). By prosecuting only a select category of images, one sanctions or legitimizes the remaining unhealthy portrayals. Gronau speaks for the new-wave of feminists when she remarks "there are already too many impediments to our being heard; we must not be complicit to another barrier" (Gronau 1985: 96). The censorship device will be used to silence women's voices, and actually precludes the democratic conditions which are necessary for social change (McCormack 1985: 181). Women are not empowered by the weapon of censorship, for it is not their power to exercise. It is the power of the state. The state has traditionally ignored the interests of feminists and sexual minorities, and in many instances, functioned in opposition to those interests. It is a tool of dominance and repression. The anti-censorship stance argues that law exists to legitimize ideology. In this context, censorship is futile because:

The use of the legal system to change social relations will always degenerate either into utopian idealism (a form of ineffectiveness) or into gradualist reform (a form of cooptation) and each apparent gain on women's behalf will inevitably result in a net loss, as the power of the state (and of men) increases (Lahey 1985: 669).

Individuals assuming an anti-censorship stance object to state interference for a variety of reasons. Many of them are

highly disturbed by the content of pornographic expression, however. They are not advocating a policy of complacency. Liberals prescribe various methods of protest to combat pornography. Feminist groups similarly employ these tactics, yet they do not frame the pornography debate as a freedom of speech issue.

At one time civil libertarians did maintain that a lack of controls on pornography would function to decrease its demand. This logic suggested that individuals would become bored with pornography and interest in it would consequently wane (Diamond 1980b: 142). Unfortunately, history refuted this hypothesis. Pornography has become increasingly popular since the 1960's. It is estimated to be a billion dollar industry. Rather than witnessing a decrease in demand, society has observed a great expansion in the industry. As pornography has become increasingly violent, civil libertarians are not as eager to associate it with the progressive and the good. All pornography is not simply viewed as one medium for sexual expression. The feminist movement has successfully publicized the other more insidious elements within it.

Few individuals are now so naive as to assume that an absence of restrictions on pornography would contribute to its extermination. The opposite view is more prevalent. Economic interests may function to increase the quantity and degree of violence in pornography, as entrepreneurs acquire increasingly bizarre products to maintain their share of the market

(Robertson 1979: 9). Irrespective, civil libertarians do not perceive censorship as a viable alternative due to their confidence in the free flow of speech in the market-place of ideas.

Anti-censorship feminists advocate non-legal approaches for different reasons. Pornography is sometimes conceptualized as a medium in which power relationships and cultural codes can be interpreted and explored. Pornographic products become the documents of sexual oppression, testifying to the condition of women (Gronau 1985: 97). Other feminists prefer to discuss pornography in terms of fantasy, symbols or imagery in representations (Stern 1982; Wilson 1983; Diamond 1985). These women advocate an analysis of pornography, with a focus on the relationship between fantasy and act, between desire and sex, and between representations and acts (Coward 1982: 20). The anti-censorship position interprets pornography as part of a larger phenomenon of sexist representation (Coward 1982: 19). It entails that a feminist analysis must examine the impact of pornography and censorship on the feminist movement. Pornography is conceptualized as part of a larger symbolic system which devalues rather than degrades women. That devaluation can be estimated both economically and politically (McCormack 1985b: 282).

Anti-censorship feminists have strategies which respect their philosophies. They advise open discussion, demonstrations, consumer boycotts, education and alternative imagery (Manion

1985: 65). Many of the advocated proposals are suggestions to improve the position and condition of women within society.

At the individual level, persons can ask their local stores not to sell pornography. They may write letters to companies whose advertisements reflect pornographic themes and boycott products if the commercials or billboards continue. Theatres which consistently display misogynist material can also be picketed (Hughes 1985: 110). People can protest particularly sexist spectacles or events, as feminists did the beauty pageants (Burstyn 1985: 161). Cole (1985: 237) confronts the effectiveness of these techniques, however, when it is revealed that stores may remove 'adult magazines' from their shelves in efforts to be consistent with their family image, and not in a recognition of the insidious essence of sexism. She questions under which auspice more violence against women has been committed: the family or the state.

Extremist non-censorship approaches have even included the fire-bombing of pornographic video-outlets (Hughes 1985: 110). It is debatable whether women promoting anti-censorship would advocate this strategy, however. If the violence in imagery is problematic, so too are terrorist tactics. Although the actions of the Wimmin's Fire Brigade did draw public scrutiny, the deeds were rather an attempt to gain attention from authorities which were ambivalent towards pornography control.

Perhaps censorship would not be perceived as such a dangerous weapon by artists, writers, feminists and civil libertarians if those groups participated in some form of self-government. The state would possibly be less compelled to intrude into the domains of art and literature if various organizations demonstrated some conscience in the absence of external controls. McCormack suggests that professionalization may offer some protection from state censorship. She states:

It is precisely the failure of artists to adopt the model of the professions that leaves them so exposed and vulnerable to censorship, vigilante groups, and the least-informed public opinion, not to mention the tyranny of critics who have their own intellectual vested interests (McCormack 1983: 212).

Because there is no organized policy of self-policing, the government assumes authority. Cole (1981: 11) identifies some merit in this proposal. She recommends that members of the film industry collaborate to censure or expel directors from their associations and academies, contingent upon their conduct. Those film-makers who continually exploit themes of violence, sexism or pornography in their work could be reprimanded by their peers. This notion could reduce state intervention. Furthermore, an elected board of artists and writers would be more sympathetic and sensitive to the concerns and limitations of this group.

Other avenues exist through which the film industry could contribute to a decrease in pornography. Many feminists assert that alternatives to sexist imagery could help eliminate pornography. This strategy focuses on positive energy, without

the negative, condemnatory tones of censorship. Garry (1978: 416) suggests meeting the demand for sexually explicit material with nonsexist, morally acceptable material. Burstyn (1985: 165) is attracted to this approach. She expands upon methods which use the media to combat pornography. Government arts bodies at all three levels could subsidize cultural producers, enabling them to promote non-sexist imagery on a wide scale. Funds could be diverted or increased from mainstream films and art to artists who are providing alternative visions of sex and male/female roles and relationships (Andrew et al. 1984: 63). A women's television network could be established to help give women equal input into culture (Steele 1985: 74). In this manner, women could have access to 'speech' and the power to combat the pornographer.

A growing number of feminists are unconvinced of the efficacy of this approach, however. Hughes (1985: 112) submits that this strategy demonstrates an obliviousness to the nature of pornography. There can be no equivalent, non-sexist pornography because pornography is based on power. Valverde (1985: 126) contends that reversing the power relationship in film would be similarly ineffective. Patriarchy would never be threatened by this option because fact is so firmly rooted within it. It would be an exercise in fantasy production, with no veritable alteration in a corresponding reality. Alternative sexual imagery remains as ineffective as censorship, because neither strategy challenges the sexual regime itself (Finn 1985:

90). The condition of the viewer would not be altered, and new images would be interpreted through existing frameworks (Finn 1986: 1).

Cole (1985: 236) is not impressed with the increased speech approach. She states:

I do not think...that women's prose, poetry, eight millimeter films, and video tapes by themselves will be able to counteract the effect of an industry that has more outlets than McDonald's. In fact, in a society in which money buys speech, feminist dissidents are allowed a few inroads, but the real beneficiaries of the civil liberties movement are the pornographers.

An increase in the amount of women's speech through alternative imagery will not be sufficient to eradicate pornography (McCormack 1985b: 274). Affirmative action programmes, and policies mandating preferential access for women are necessary to reverse the economic discrimination which translates to a lack of power in our society. Meaningful change to the existing system necessitates economic independence for women and youth and reproductive rights for women and sexual minorities (Burstyn 1985: 171). Women must receive equal pay for work of equal value. Subsidized day-care will also aid in making various options a reality for women (Kanter 1986: 188). Family laws must be reformulated to allow women more economic opportunities in the event of divorce (Kanter 1986: 188). Effective legislation which addresses sexual harassment, assault, working conditions and wages for all women must be adopted if the power relationships reproduced in pornography are to be fundamentally altered (Burstyn 1985: 159).

Anti-censorship liberals and feminists contend that education will eventually triumph over pornography. Educational reforms are regarded as providing the most meaningful approach, for they will afford long term solutions. They will fight the ideology behind pornography and other sexist material (Fisher 1986: 357). Fisher (1986: 358) suggests a process he calls 'educational immunization', whereby individuals will be trained to detect and reject sexist and pornographic images in society. They will learn to effectively practice a form of self-censorship. Many individuals recommend that funding and research be dedicated to improving educational programmes (Fisher 1986; Andrew et al. 1984; Diamond 1986: 322).

Social education programmes must be complemented with a sex education agenda. Comprehensive sex education programmes are necessary for use in the schools and communities (Diamond 1986: 322). Burstyn (1985: 163) suggests that they be integrated into the programmes offered by community colleges, university extension facilities, libraries, local Y's and other organizations.

Many theorists are critical of the way sex education material is traditionally presented. It is usually exhibited in a dry, informational, documentary tone. Some sex educational materials have been accused of resembling pornography, because they seek to merely record sexual activity in the absence of emotion (Faust 1980). Critics have acknowledged that young people are often drawn to pornography in attempts to gain

information about sexuality. If educational materials are to seriously compete with pornographic ones, they must be well produced and interesting. Theoretically, "they should include expressive and creative work that acknowledges confusion and pain and validates eroticism and pleasure" (Burstyn 1985: 163). Educational programmes should be designed in recognition of various cultures, religions and sexual orientations. Burstyn suggests that people presently exploring sexuality in the arts contribute to the process.

Although anti-pornography campaigners and anti-censorship proponents employ dissimilar tactics, there is a considerable amount of overlap between their intentions. Lahey (1986: 671) distinguishes between the anti-pornography and anti-censorship strategies:

The essential difference... is that some of the anticensorship feminists are more concerned to regulate the "soft core" content of the broadcast media, while antipornography feminists want to regulate the "hard core" content of films, videotapes, and printed media.

Despite the fact that they are pitted against state censorship, anti-censorship proponents are often amenable to some variation of public regulation of media which promotes negative images of women, such as those found within the CRTC regulations. The anti-censorship feminists believe that sexism pervades our culture completely. They contend that one must challenge the mainstream images found in television, advertising, women's magazines and feature length films. The censorship of pornography results in the treatment of a symptom, not a

disease. Anti-censorship advocates support a combination of approaches which do not necessitate state censorship. Their policies of social intervention, anti-sexism campaigns, improved sex education, alternative imagery and grass-roots measures are actually supported by the wider feminist community, however.

Adjunct vs Alternative Solutions

Every feminist position recognizes that pornography cannot be completely obliterated without fundamental alterations to the political and social structures which subordinate women (Lahey 1985: 671). Many anti-pornography feminists acknowledge the dangers of state censorship. These women argue for the implementation of legal resources, however. Jacobs (1984: 45) outlines the major concerns which envelop the censorship issue. She states:

First, feminists cannot rely on patriarchal society to enforce laws on our behalf, even if the laws explicitly protect women. Second, to the extent that pornography is a product of misogyny, suppressing pornography cannot cure all sexism but can only stop one, albeit very effective means of perpetuating it. Third, any regulation of speech presents the potential for unacceptable censorship of ideas (Jacobs 1984: 44).

Despite these barriers, she contends that legal approaches are mandated. Legislation must serve women. The concerns of half of the population should not be suppressed, or subjugated to private remedies. Women cannot wait for patriarchy to be dismantled (Hughes 1985: 120). All action cannot be precluded on the grounds that sexism is all pervasive. Because it effectively

denies women basic civil rights, pornography must be proscribed. Pornography laws can institutionalize a promise for equality.

Feminists entertaining the concept of legal control recognize the importance of the anti-censorship strategies. These women label the proposals as adjunct, rather than alternative solutions, however (Hughes 1985: 108). According to this perspective, approaches to pornography should simultaneously include legal and extra-legal measures. Social and educational devices must be implemented, yet one cannot underestimate the importance of legislation. Cole (1985: 232) states:

I have never heard of a legal remedy that was intended to be the sole solution to social problems, or that would have much impact if there were no corresponding changes in perceptions or values. Why do we make these special demands on pornography law?

Feminists recognize that pornography laws will not eradicate sexism. Legal controls are never completely effective. They are relying on the combined weight of legal reform and political process, however (Cole 1985: 235). Because pornography is a prejudice, laws constraining its expression will enlighten the Canadian population. The law can be used as an instrument of moral education in efforts to illuminate the public as to the pathological elements of pornography.

Various writers are cognizant of the conservative climate in Canada, and the potential for repressive social policy which accompanies it (Brock & Kinsman 1986: 238; McCormack 1985b: 272). Comprehension of this cultural trend entails a certain

apprehension with regards to the conservative tendency to deregulate the economy and regulate morality (McCormack 1985b: 272). Feminists are wise to be distrustful of the powers of the state, yet they must not retreat from the legislative challenge. They should make every attempt to have their views acknowledged. Cole (1985: 233) fears that "if feminists withdraw entirely from the legislative and legal process, there is an even greater risk that the law will be used against us." Her concern is that if Canadian women refuse to contribute to the legal reform of obscenity laws, proposed legislation will reflect right-wing ideologies. Lahey (1985: 685) shares her anxiety, arguing:

the time is rapidly approaching when women will discover that if they do not engage in this struggle, then publishers, politicians, lawyers, and judges will be all too happy to put words in women's mouths -- which will make it even more difficult for women to break through the silences that men have imposed upon them.

Conclusions and Prescriptions

Recognition of the harms associated with contemporary pornography precludes the continued proscription of sexual material on the basis of its tendency 'to corrupt morals'. The inappropriate focus of Canada's existing obscenity legislation is compounded by the vague and ambiguous nature of its interpretation. Consequently, a consideration of various creative and innovative legislative alternatives is mandated.

The community standards test is the most important variable in a determination of obscenity. Community standards are

identified as national standards of tolerance. Although extremely fluid in nature, this elastic concept is amenable to empirical testing. Scientific and technological advances have permitted moderately accurate estimations of contemporary Canadian attitudes through the use of public opinion surveys and statistical techniques. The courts need not adhere to the results of public opinion research, however. Strict methodological research requirements may render a survey's results inadmissible, or once they are accepted, they may be given no weight due to a reliance on judicial notice. The guidelines for survey evidence are unnecessarily rigid. Even poor research technique is superior to one person's impressions of the attitudes of a nation. Regulations must be relaxed to allow an increased opportunity for expert testimony on the state of the mind of the Canadian community.

Yet closer approximations to majoritarian inclinations will not fundamentally alter this misdirected approach to pornography. The community standards interpretation of the present legislation does not address the harms pornography purportedly engenders. Its elusive and dynamic character may accommodate the process of creeping gradualism, whereby the Canadian public becomes desensitized to increased violence. Critics contend that the standard functions to preserve the status quo and maintain current sexual mores. The community standards test works as a social control mechanism to stifle divergent opinion and reinforce cultural taboos on sexuality. It

is considered a sexist and discriminatory instrument in terms of gender and class. The standard gauges uninformed opinions in an area where legislators could morally educate. It does not allow for an evaluation of the validity of the opinions which it aggregates. The community standards test must be rescinded. The criminal sanction is improperly predicated upon a nation's intolerance. Individuals debate the alternatives from many perspectives, while a lack of consensus presides.

The government has demonstrated a dedication to the resolution of the pornography issue. It recently released two reports which focussed on the pornography problematic. The Badgley Report was reproached for its paternalistic perspective. The recommendations within it represented superficial improvements on the existing situation, not efforts to eradicate underlying problems. The Fraser Report was conceived out of a recognition for the liberal and feminist analyses of pornography and their respective roles for the state. Its blueprint for change did not necessitate a fundamental alteration to the existing social structure and the power relationships within it. Therefore, many critics felt the Fraser Report did not follow through on its own insights after correctly identifying the difficulties endemic to a patriarchal society.

The criticisms are valid, yet not entirely unexpected. Governmental approaches to the pornography dilemma will inevitably involve legal remedies. Few individuals are so naive as to assume that unaccompanied legal measures will adequately

alleviate social problems. There is a consensus on the necessity of educational and social reforms. Canadians must be confronted by the discriminatory nature of their attitudes. Education could ultimately put sexism into remission. Alternative imagery could afford consumers the opportunity to acquire sexual materials which do not contain detrimental messages. Social programmes could greatly improve the status and condition of women within our society. Economic parity will allow women the power to combat pornographic and sexist representations.

All feminists, regardless of their particular persuasions, agree that pornography will not evaporate when it is strongly reinforced by other political and social mechanisms which devalue women. They unanimously concur with the belief that women need access to more speech and empowering images. Specific chapters of the feminist movement are too idealistic in their proposals, however. Change to the existing social structure will prove to be a slow and tedious process. In the meantime, pornography continues to be a factor which contributes to social interpretations. It can undermine women's progresses towards equality. Legal approaches do have their limitations and dangers, but the law reinforces a certain morality. Furthermore, legislative change is inevitable. Liberals and feminists should not collaborate with the moralists, but they must not be complacent in the face of the impending legislative amendments. Moralistic proposals, such as Bill C-114, testify to the conservative climate. Laws which do not respect feminist aims

will undoubtedly be used against them.

The best strategies are those which are not over-inclusive, yet focus on the most insidious aspects of pornography. The hate literature approach is very attractive. The Criminal Code is a federal mechanism. A structuring of pornography as hate literature will not engender constitutional challenges in accordance with the Doctrine of Paramountcy. An incorporation of gender into the list of identifiable groups in s.281.2 and removal of the present restrictions to prosecution would be compatible with the Charter of Rights and Freedoms's emphasis on equality.

The sexism which saturates mainstream media would not be affected by this legislation, but that does not mean that legal remedies are not worthwhile pursuits. The law could serve to morally educate, while social and educational measures methodically and systematically reshape prejudicial opinions.

The hate literature section would not focus on explicit depictions of sexuality, and it would be sensitive to the importance of context. Sexually violent material would not be censored if the main thrust of the material was to condemn the act portrayed, and not to promote hatred.

Unfortunately, that aspect of the hate literature approach which allows a sensitivity to context may also introduce ambiguity into the strategy. One of the main limitations of the community standards test is its vague and imprecise nature.

There is an apprehension that the proposed legislation might be applied inconsistently and arbitrarily, thereby introducing yet more variability into the criminal law. Approaches which create specific pornography offences, complete with definitions of prohibited conduct or material, may be capable of selecting targets for proscription with greater consistency. The arguments which can be made for the uniformity and reliability of legislative devices must not be downplayed, yet they should be balanced with the importance of context. The message which is emitted from a particular depiction or description cannot always be reduced to the sum of its individual elements. The blend of text and image can have a tremendous impact, although the words or illustrations may be relatively innocuous when considered separately. In addition, many of the behaviour-specific approaches are incapable of addressing uncommon, yet disturbing images, such as representations which display women's legs protruding from meat grinders or illustrations of women fellating guns.

In an effort to preserve the consideration of context and reduce the subjectivity of the hate literature provisions some feminists have suggested that the legislation be accompanied by a statement of legislative intent. This statement could incorporate a definition of material promoting hatred against a specific group on account of sex or include examples of the types of pornography that the section might address. The difficulty with this strategy is that it forces proponents of

the hate literature approach to be concrete in their descriptions of objectionable material, making them vulnerable to the criticisms which are sometimes directed at other approaches which define pornography on the basis of specific behaviours or types of conduct.

The potential utility of the hate literature law has been questioned, for it is rarely employed at the present time. The federal measure could be complemented with provincial approaches modeled after the B.C. Civil Liberties Act, however. This strategy would serve to empower women, and allow them a voice in determining what images are objected to. Provincial film review boards should serve a totally classificatory function. They could retain their autonomies, in order to reflect the attitudes of their inhabitants. The decisions of the boards would not affect criminal prosecution, however. Community standards should not be introduced into criminal measures in any capacity. Municipalities could have the role of regulating conditions of display and circumstances of exposure through municipal by-laws and zoning ordinances. They could prevent an offence to the general public and control access to young persons.

Furthermore, the government would have to update other legislation affecting pornography, such as customs, postal and broadcasting measures, so as to ensure a unified front. An assortment of other restrictions are also necessitated, including criminal measures for the distribution, sale, display or possession of material which advocates the sexual use of

children. If actual children were used in the production of pornography, other legal mechanisms could still be employed. Moreover, harms caused to adults during pornography production could be addressed by existing criminal provisions and civil remedies. Finally, if the suggested strategies are to be successful, they must be accompanied by supporting social and educational instruments. All of the above recommendations have received tremendous criticisms on various grounds. The lack of consensus concerning the most appropriate pornography strategy is inextricably rooted in the confusion and debate regarding the proper function of the criminal law. Any approach to pornography is destined to be controversial, however, given the diversity of definitions and explanations associated with the subject and the nature of the corresponding relationships between alternative views of law and morality.

Pornography is a phenomenon which divides and unites individuals on many fronts. Groups which provide a cohesive exterior may be split on many issues. As is sometimes the case, the most vocal or politically viable section of a group may be heard at the expense of others. For example, many people consider the Dworkin-MacKinnon Ordinance to be the definitive feminist approach, despite the existence of anti-censorship remedies. Regardless, it is a useful exercise to make generalizations about the proponents of certain political, ideological and philosophical views.

The moralist, civil libertarian and feminist postures are not mutually exclusive. Many feminists and moralists share the sentiment that pornography is harmful to some women and that it is a destructive influence on society. Civil libertarians concur with factions of the feminist movement which contend that pornography is not indicative of violence and discrimination. Forms of sexual expression are regarded as liberating because they reduce sexual repression, which is identified as a threat to human freedoms. There is a concern that restrictions could further intensify the oppression of sexual minorities.

In the interest of clarity, the three social groups can be investigated as if they are conceptually distinct entities, however. The moralist and civil libertarian assemblages are most easily contrasted because of their divergent philosophies.

Moralists define pornography according to its sexual nature. They argue from a Judeo-Christian perspective that pornography leads to the moral decay of society. It incites lustful thoughts for purposes other than procreation, and decidedly detracts from the pursuit of higher pleasures. The moralist strategy can be differentiated from the feminist and liberal approaches because it does not require any proof of harm. Therefore, the present Canadian approach to pornography, as seen in obscenity laws that preempt the corruption of morals, is considered satisfactory. The conservatives believe that depictions and descriptions of sexuality are appropriately legislated against by the state and ascertained through measures of community intolerance.

Civil libertarians are firmly braced at the other end of the sexual expression continuum. Their ideology suggests that any conduct which does not result in demonstrable harm must not be proscribed, in efforts to preserve the individual freedoms necessary for a democratic society. The liberals have a fairly limited notion of harm. They refuse to accept evidence of a causal connection between pornography and violence due to the inadequate state of the pornography effects literature. Although they do express concerns over pornography, they maintain that its unhealthy images can be combated through more speech. This optimistic view contends that good will prevail. Many civil libertarians accede to some form of regulation of pornographic materials, consistent with the offence principle. They will abide by regulatory measures, such as municipal by-laws and zoning ordinances, on the assurance that freedom of expression will not be precluded.

The feminist analysis adds a new dimension to the pornography debate. Power, not sex, is the focus and social justice is given precedence over individual rights. Feminist conceptions of harm include personal psychological and physical injuries. Furthermore, they include group harms, which are manifested in damages to equality rights, bodily integrity and social status. The provocation principle implies that men will aggress and discriminate against women subsequent to pornography consumption. Human rights approaches, civil actions and civil rights remedies all represent attempts at redressing this

consequence. Feminists simultaneously identify women's rights to equality and protection from individual psychological harm which results because of the existence of pornography, in accordance with the direct harm principle. Our legal system realizes the value of shielding individuals from messages which promote or incite hatred. The direct harm principle regards the position of women to be similar to that of other minorities, and demands corresponding measures. Hate literature provisions, human rights proposals and provincial civil rights legislation could function to prevent the possibility of women acquiescing to the denigrating and negative images of themselves which permeate our culture.

During the late seventies, the feminist movement was revitalized by the anti-pornography sentiment. Ironically, the issue which once afforded it impetus and coherence now divides the feminist community. The anti-censorship faction regards pornography as contributing to a larger phenomenon of sexist representations. Pornography shares its sexist images and codes with other mainstream depictions. It illuminates the conditions of women's subjugation in a sexual tabloid. Pornography is not defined as a causal or contributing factor to violence, but a testament to the economic and social oppression of women. Censorship is considered ineffective, and feminists predict that it will serve to strengthen the state, making women complicit in their own subordination. They caution that anti-pornography advocates must re-evaluate their goals and allocations of

resources if they do not wish to endanger the feminist movement in an alliance with the right. Anti-censorship feminists identify the importance of analyzing and exploring sexual representations, including sado-masochistic depictions. Our society is so inundated with sexist imagery and attitudes that complete social, educational and economic reforms are proposed. They are regarded as the only meaningful approaches to a problem of this magnitude.

The moralist, liberal and feminist positions serve as anchors in an understanding of the unpredictable pornography debate. The recognition of these three social groups allows for the construction of a framework which helps to separate and simplify the issues surrounding pornography. The harms associated with the offence, provocation and direct harm principles can similarly be accorded different positions within the framework and serve a classificatory function, organizing various approaches to pornography. In the process of formulating ideas around the structure created, one must acknowledge that the pornography issue has many dimensions. The notion of harm provides one interesting way to structure the pornography debate, but certain harms are not always associated with specific strategies. Many variables contribute in various capacities to the determination of social policy.

CHAPTER VI

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