

# OBSCENITY, MORALS AND THE LAW: A FEMINIST CRITIQUE

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## I. INTRODUCTION

The question of obscenity, morals and the role of the law has been debated for hundreds of years, largely **by** men. Women have been conspicuous **by** their absence in decisions regarding the definition of obscenity and the characterization of its harms. Feminist Elizabeth Cady Stanton commented in **1853**:

Thus far women have been the mere echoes of men. Our laws and constitutions, our creeds and codes, and the customs of social life are all of masculine origin. The true woman is as yet a dream of the future.'

It is trite to say that no man understands what it is like to be a woman, and that no woman knows what it is like to be a man. Men and women, no matter how closely they live and work together, live in different perceptual worlds. Yet laws have traditionally been interpreted and enforced **by** men.<sup>2</sup> These laws embody and reinforce an essentially male conception of human interaction. The laws relating to marriage, marital property, divorce, control over children, illegitimacy, abortion, contraception, prostitution and rape<sup>3</sup> are good examples of how men have defined "women's place" **by** controlling their financial independence, their physical integrity, their sexuality and their actual and potential maternity.<sup>4</sup> When those laws were combined with the private sanctions

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† ELIZABETH CADY STANTON & SUSAN B. ANTHONY: **CORRESPONDENCE, WRITINGS, SPEECHES, ADDRESS OF WELCOME TO THE INTERNATIONAL COUNCIL OF WOMEN, MARCH 25, 1888, at 212 (E. DuBois ed. 1981).**

<sup>2</sup> For a discussion, see S. DRANOFF, **WOMEN IN CANADIAN LAW (J. Cochrane & P. Kincaid eds. 1977)**. For a historical account in greater detail, see L. GLANZ, **THE LEGAL POSITION OF ENGLISH WOMEN UNDER THE EARLY STUART KINGS AND THE INTERREGNUM, 1603-1660 (1973)**.

<sup>3</sup> Many laws dealing with morality set one standard for men and another for women. For example, the law has treated prostitutes as deviant, labelling them criminals, but has considered male customers of female prostitutes to be "normal", indulging in a natural urge. Similarly, the law has treated adultery as a serious offence when committed by women, yet not when committed by men. Under Victorian divorce laws, men could sue their wives for divorce on the ground of adultery alone, but women were required to prove adultery along with bigamy, cruelty, desertion, incest or other "unnatural" offences if they were to get a divorce.

4 In recent years, most universities have instituted women's studies programs: an academic discipline that is devoted to defining women's own realities, examining the contradictions between them and the social or cultural "givens" that generally have

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that ostracized women who left male protection, a "woman's place" became the home. The definition of a woman's role as submissive and domestic was reflected in legal constructs that both assumed and guaranteed her dependence on men.

"Being female" has always interfered with the recognition of women as complete and independent individuals. A legal system that gives unequal legal rights to men and women reinforces the latter's status as dependents. Traditionally, women were placed in the same "protected" category as lunatics, drunkards and children,<sup>5</sup> and were denied access to the political means available to change that categorization. It was, unbelievably, as late as 1928 before women became legal "persons" in Canada. That year marked a turning point of sorts; the Judicial Committee of the Privy Council overruled the Supreme Court of Canada and held that women were "persons" within the meaning of section 24 of the *B.N.A. Act*<sup>6</sup> and, thus, were eligible for appointment to the Canadian Senate.<sup>7</sup> Since that decision, some progress has been made in changing the traditional role assigned to women, both in society's attitudes generally and in those embodied in legislation.<sup>8</sup> However, change has come about slowly. This is in part because of a lack of information as to the different perceptions that women have. Any inroads made have been mere revisionist incursions into a male-defined legal construct. To date, the feminist fight has been to obtain an equal place within the present legal system<sup>9</sup> by lobbying for legislation to secure what women now define as their "rights". In the future women can be expected to do more than ask for rights: they will begin to define rights in their own way, in accordance with their own understanding of justice and morality. In this respect our society must make an effort to try to outline and account for the different moral perceptions of men and women.

It is only recently that any significant body of literature has developed on men's and women's different moral perceptions. In 1949, Simone de Beauvoir's classic work, *The Second Sex*,<sup>10</sup> illuminated some

been structured by men, in men's own interest. This -re-evaluation of widespread assumptions is dealt with extensively in a women's studies textbook: **HUNTER COLLEGE WOMEN'S STUDIES COLLECTIVE**, *WOMEN'S REALITIES, WOMEN'S CHOICES* (1983).

<sup>5</sup> See S. DRANOFF, *supra* note 2 and DEPARTMENT OF LABOUR CANADA, *LEGAL STATUS OF WOMEN IN CANADA* (1924). For the situation of American women, see K. DE CROW, *SEXIST JUSTICE* (1974).

<sup>6</sup> *Now Constitution Act, 1867.*

Edwards v. A.G. Can., [1930] A.C. 124, [1930] 1 D.L.R. 98 (P.C. 1929), *rev'd* [1929] S.C.R. 276, [1928] 4 D.L.R. 98 (1929).

**8** The inclusion of s. 28 in the *Constitution Act, 1982*, Part I, enacted by the Canada Act, 1982, U.K. 1982, c. 11 [hereafter cited as *Charter*], guaranteeing equal rights to male and female persons has been the most significant victory to date, although it remains to be seen how this section will be interpreted.

**9** K. BANTING & R. SIMEON, AND NO-ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT (1983).

**10** S. DE BEAUVOIR, *THE SECOND SEX* (H. Parsley transl. 1952).

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of these differences and provided a challenge to many feminist writers who followed. Now a rich and sophisticated literature exists that provides a philosophical, sociological and scientific framework for the investigation of gender-related biases in fundamental social assumptions.<sup>11</sup> One of the most recent contributions is a book by psychologist Carol Gilligan, exploring male/female differences in moral values.<sup>12</sup> Through experiments, Professor Gilligan analyzed the responses to classic moral dilemmas of a sample of males and females, ranging in age from six to sixty years. In outlining the responses, she highlighted the different conceptions that men and women have about justice and morality.<sup>13</sup> These conceptions cannot help but shape how men and women view the nature of the legal system and the purpose and content of legal rules. She used two contrasting metaphors to describe men and women. The metaphor for men is the ladder, and for women, the web. Men and women have a different moral perspective that can be traced to a different sense of self.

For men, moral development consists largely of a process of individualization." As adolescents, boys must try to separate themselves from the women who are primarily responsible for their care. A male child knows that he is different and seeks to carve out a separate, workable identity. He is more prepared to abstract his situation into rules that will help confirm and preserve this identity.<sup>15</sup> The resulting morality of the ladder is a morality of rights and a hierarchy of rules that regulate the contest between highly competitive, independent individuals. It is a morality based on principles of non-interference with the rights of others. From the male perspective, justice is best served by the least interference with the autonomy of others. Men view rights as personal zones of non-interference.

By contrast, the perception of morality expressed by the web metaphor is one of individuals "connecting" with one another.<sup>16</sup> No

**11** An example of the many bibliographies available is WOMEN'S RESOURCE CATALOGUE (Secretary of State Women's Program, 1982).

<sup>13</sup> Professor Gilligan demonstrated that gender is the one determinant that explains the different responses.

<sup>11</sup> This notion is a steady theme in the literature on human development. Sigmund Freud's psychoanalytic theory depended on it. See S. FREUD, *Some Psychological Consequences of the Anatomical Distinction Between the Sexes*, in XIX THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 257-58 (J. Strachey transl. & ed. 1961). He concluded that women's superego was "never so inexorable, so impersonal, so independent of its emotional origins as we require it to be in men . . . . For women the level of what is ethically normal is different from what it is in men."

<sup>15</sup> N. CHODOROW, THE REPRODUCTION OF MOTHERING (1978), as cited in C. GILLIGAN, *supra* note 12, at 7-8.

<sup>16</sup> Virginia Woolf made a similar observation about values after studying 19th century literature. She concluded: "But it is obvious that the values of women differ

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process of individuation or separation is required between a female adolescent and her mother. The female child, therefore, focuses on and learns to define herself and her moral judgments in terms of her relationship to others. Morality for her consists of fulfilling responsibilities to other people in particular circumstances, and justice becomes a contextual concept. Professor Gilligan found that females have a sense of justice that prefers equitable solutions to the problems that real people experience in their everyday lives, as opposed to a concept of justice based on a hierarchy of abstract rules. She pointed out that all human beings, male or female, share some of these moralities. Nevertheless, our institutions, including the law, are largely systems of the ladder and for the ladder.<sup>17</sup>

For the purposes of this article, I have described the differing moralities as male/female in order to highlight the distinctions between the two modes of thought and to emphasize that the feminist analysis involves a fresh appraisal. The association with gender is not absolute. Gilligan makes the point that while gender characteristics are based on empirical observations, the differences between the sexes are best characterized by theme. The importance of making these distinctions is to make it possible to focus on the problem of interpretation and to present another option.

By asking for social change, women are in fact saying that it is now time for the law to recognize the need to protect the web. To do this, the law must broaden its limits. It will be necessary for the courts to expand their inquiries, to look beyond the zones of personal non-interference and autonomy and to recognize the value of interdependence and concern for real harms to real people. There is much to be gained from a system of laws that takes into account a view of life, self and morality that represents the thoughts of the female half of the population. To illustrate the advantages of such a system I will use the law of obscenity as a case in point. This article will demonstrate how two conflicting moralities, both originating

from the ladder, have dominated the development of the law of obscenity. The result is a quagmire of precedent that fails to satisfy either side. This article points out a third perspective - a perspective from the web - with the hope that it may provide some new solutions to an old and vexing problem.

very often from the values which have been made by the other sex . . . [yet] it is the masculine values that prevail." See V. WOOLF, A ROOM OF ONE'S OWN 128 (1929). 17 John Stuart Mill recognized this theory in 1859. See J. MILL, ON LIBERTY 6 (A. Castell ed. 1949):

Wherever there is an ascendant class, a large portion of the morality of the country emanates from its class interests, and its feelings of class superiority. The morality between . . . men and women, has been for the most part the creation of these class interests and feelings: and the sentiments thus generated, react in turn upon the moral feeling of the members of the ascendant class, in their relations among themselves.

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The three perspectives on the issue of obscenity translate into three political philosophies: liberalism, conservatism and feminism. While it is true that feminism has its early roots in liberal philosophy, <sup>18</sup> major components of liberal tradition have been rejected by feminist analysts. <sup>19</sup> Particularly in the area of sexual expression, feminism has outgrown its liberal roots. <sup>20</sup>

This article begins with a discussion of the traditional liberal and conservative analyses of morality, neither of which incorporates the web morality. Harm, the vital ingredient in the differing moral constructs, is then examined in terms of the values that the two traditional philosophies seek to protect. It is suggested that both the traditional philosophies emanate from the ladder. The third section of the article presents an analysis of female or web morality, which is discussed in terms of feminist definitions of pornography and feminist perceptions of the harm inherent in pornographic expression. The traditional view of morality and harm is critically analyzed and the beneficial consequences that would flow from a web interpretation of morality are discussed.

The final section of the article deals with the response of the courts to the problem of obscenity. Courts have generally fluctuated between the two traditional views discussed in the first section of the article, but there is some evidence that the feminist voice is beginning to be heard.

The article concludes with some thoughts on the judicial interpretation of fundamental freedoms, particularly the right to be free from certain forms of expression.

## II. THE TRADITIONAL ANALYSIS OF MORALITY

### A. Morality and Law

Two conflicting moralities, both originating from the ladder, have dominated the development of the law of obscenity. They can be labelled "conservative" and "liberal" moralities. Under the conservative morality, obscenity is judged from the point of view of the intrinsic wickedness or virtue of the material in question. Underlying a determination of wickedness is an assessment of whether or not the material poses a threat to the organizational structure of society and its institutions. If it is found to pose a threat, there is sufficient reason for

<sup>1</sup> This is evident in the writings of early feminists like Mary Wollstonecraft and John Stuart Mill.

<sup>19</sup> See A. JAGGAR & P. ROTHENBERG-STRUHL, *FEMINIST FRAME WORKS* (1978) and A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983).

<sup>20</sup> See, e.g., S. Wendell, A (Qualified) Defense of Liberal Feminism (unpublished paper presented at the Annual Conference for the Canadian Society for Women in Philosophy, 9-11 Nov. 1984, Concordia University, Montreal, P.Q.).

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the material to be banned. In contrast, the liberal morality is not concerned with the material's inherent character, but rather asks whether more harm will be caused by banning it than by permitting its publication. The suppression of material is regarded as harmful since it is believed to erode the fundamental freedoms upon which a democratic society is based. Individual freedom of expression is regarded as a moral right that should be upheld, however personally distasteful one may find the material, as long as the material does not result in direct harm. In essence, the conservative morality gives priority to institutional integrity, whereas the liberal morality emphasizes individual expression.<sup>21</sup>

These divergent points of view were recognizable as early as 1727, in the first reported successful common law prosecution for publishing an obscene libel.<sup>22</sup> The charge was brought against the publisher<sup>23</sup> of *Venus in the Cloister or the Nun in her Smock*, a book about lesbian love in the convent. The differences between the conservative morality and the liberal morality are reflected in the legal arguments submitted to the Court as well as in the majority and minority judgments. The majority of the Court accepted the argument made by the Attorney-General, based on a conservative morality, that morality was an area of expression subject to the

restrictions of the common law. The majority held that the publication

[was] an offence at common law as it tends to corrupt the morals of the King's subjects and is against the peace of the King. Peace includes good government and order and thus peace may be broken without actual force... if [it be] against morality.<sup>24</sup>

In dissent, Mr. Justice Fortescue was strongly of the opinion that an actual breach of the peace was required before the law could impose restrictions on expression. This limitation, based on the liberal view that direct harm was necessary, was specifically rejected by the majority.

This early case had two important consequences: it introduced the concept of obscenity as a punishable offence, and it placed the responsibility for public morality in the hands of the judiciary. In fulfilling that responsibility, the courts were forced to address the critical issue of when and under what circumstances they should involve themselves in questions of public morality.

<sup>21</sup> For a discussion on a variety of views on censorship held by pressure groups, lawyers, judges and Parliament and the social background that moulded the formation of such opinions; see Davies, *How Our Rulers Argue About Censorship*, in **CENSORSHIP AND OBSCENITY** 9 (R. Dhavan & C. Davies eds. 1978).

<sup>22</sup> *R. v. Curl*, 2 Strange 788, 93 E.R. 849 (K.B. 1727).

<sup>23</sup> An account of the exploits of Edmund Curl can be found in A. CRAIG, **SUPPRESSED BOOKS** 20 (1963).

<sup>24</sup> *Supra* note 22, at 789, 93 E.R. at 850.

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### *B. The Question of Harm*

Both conservatives and liberals agree that some type of harm is required before the legal system should intervene in the sphere of public morality, but their perceptions of what constitutes harm are very different. Originally, the law defined morality in terms of the individual, but its perspective was religious.<sup>25</sup>

Prior to the *Curl*<sup>26</sup> case, offences relating to morality were dealt with by the ecclesiastical courts. The purpose of those courts was to protect a person's soul, and thus they dealt with moral issues as those issues applied to the individual. By extending regulations beyond their religious base in *Curl*, conservatives came to believe that obscenity had political ramifications and could cause harm not only to the individual, but to society generally.<sup>27</sup>

Although obscenity prosecutions were relatively rare throughout the eighteenth century, by the nineteenth century there were about three prosecutions each year. Charges were laid against works that were purely sexual in content, largely because of the activism of the Society for the Suppression of Vice, founded in 1802. Byron's *Don Juan* and Shelley's *Queen Mab* were both found to be obscene along with 152 other publications, out of 159 prosecuted. The decisions almost always supported the conservative view.<sup>28</sup> The apprehension of conservatives that obscene publications could undermine the structure of society is evident in the writings of Ernst and Segal:

It is important to understand that sex radicalism in modern life is the best general index of radicalism in other spheres. The man who publically upholds birth control, the single standard, free love, companionate marriage, easy divorce, and legitimization, is a man prone to play with subversive ideas on private property, to be attracted to criminal syndicalism, to be dubious about the House of Lords, or about the fitness of the republican party to govern, and to question the general efficacy of prayer. When such an individual is attacked under sex censorships it is assumed that no very great tenderness for his rights need be shown.<sup>29</sup>

<sup>25</sup> See A. GERBER, *SEX, PORNOGRAPHY AND JUSTICE* 213 (1965).

<sup>26</sup> *Supra* note 22.

<sup>27</sup> Obscenity paralleled the offence of blasphemy in this regard. In *R. v. Williams*, 26 St. Tr. 653, at 716-17 (K.B. 1797), Ashhurst J. said blasphemy was "[n]ot only [an offence] to God but [a crime] against the government. . . as [it] tend[s] to destroy those obligations whereby civil society is bound together".

<sup>28</sup> J. SCHAUER, *THE LAW OF OBSCENITY* (1976). In his book, Mr. Schauer describes how the efforts of the Society for the Suppression of Vice resulted in obscenity prosecutions emphasizing works that were purely sexual in context without the necessity of political or religious implications. Women have taken part in a number of anti-pornography social movements, many of them opposed to any form of social change. Their ideology, however, echoed the male moralist view.

<sup>29</sup> M. ERNST & W. SEGAL, *TO THE PURE - A STUDY OF OBSCENITY AND THE CENSOR* 176 (1928).

More recently, former President Nixon gave expression to this approach when he said, "if an attitude of permissiveness were to be adopted . . . this would contribute to an atmosphere condoning anarchy in every other field and would increase the threat to our social order as well as our moral principles".<sup>30</sup>

The conservative and liberal positions were defined and debated in the Devlin-Hart exchange on the role of law in the enforcement of morals, which took place in print between 1959 and 1963.<sup>31</sup> Lord Devlin, speaking



from the conservative position, maintained that society was justified in prohibiting any form of action or speech that invoked feelings of intolerance, indignation and disgust.<sup>32</sup> He relied heavily on notions of good and evil, suggesting that there were absolutes that right-thinking persons could discern. He maintained that demonstrable harm to society need not be shown in order to restrict individual freedom because society must protect itself from moral disintegration.<sup>33</sup>

Professor Hart maintained that not only is the preservation of society not dependent upon enforcement of morality, but that the enforcement of morality brings about other evils, such as human misery and the restriction of individual freedoms, that outweigh any benefit derived from the preservation of social morality.<sup>34</sup> He disagreed with the idea that there are ascertainable, eternal truths and said that Lord Devlin's approach would allow the state to define sexual norms. Hart stated that, in order to justify state incursions on liberty, harm must be demonstrated and attempts to change sexual norms would not in themselves constitute harm.<sup>35</sup> The liberal approach thus requires a direct harm before the state is justified in intervening. Those advocating any restriction on free expression are called upon to prove the existence of an immediate threat that will cause direct harm to an individual. Unless a causal connection can be made between the material sought to be restricted and the harm, the restriction cannot be justified. Hart was no doubt encouraged by the Wolfenden Committee's Report emphasizing "the importance which society and the laws ought to give to individual freedom of choice and action in matters of private morality" and that "there must remain a realm of private morality which is, in brief and crude terms, not the law's business".<sup>36</sup>

<sup>30</sup> P. MACMILLAN, *CENSORSHIP AND PUBLIC MORALITY* (1983).

<sup>31</sup> Their respective positions can be found in P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965) and H. HART, *LAW, LIBERTY AND MORALITY* (1963). <sup>32</sup> P. DEVLIN, *id.* at 17.

<sup>33</sup> *Id.* at 18.

<sup>34</sup> H. HART, *Supra* note 31, at 83.

<sup>35</sup> *Id.* at 52.

<sup>36</sup> REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (Cmnd. 247, 1957).

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### C. Conclusion

Both the conservative and liberal approaches to obscenity can be

traced to a male-defined concept of justice and individual rights. Each focuses on the "rights" of the individual, although different tests are used to determine when the state is justified in infringing those rights. It is noteworthy that both approaches share an underlying belief in the unhindered freedom of expression, despite its effects on others. This is consistent with the ladder theory of morality that emphasizes recognized zones of non-interference as the basis of morality and human interaction. Conservatives justify intervention into these private zones if the material is inherently bad. Liberals, on the other hand, require proof of a clear and present danger before any limits on the freedom of expression can be justified. This appeal to human freedom, made in terms of relative consequences, explains the great interest that liberals have in scientific research on the effects of pornography on human behaviour.<sup>37</sup> Until a direct link between obscene material and physical harm can be proven, they insist that no infringement on expression can be justified.<sup>38</sup>

### III. THE FEMINIST ANALYSIS OF MORALITY AND OBSCENITY

In this section, the feminist approach to pornography and Professor Gilligan's web theory are linked. A selection of feminist definitions of pornography are analyzed and their common characteristics identified. All of the definitions exhibit Gilligan's defining characteristics of web morality, requiring respect for women's freedom and privacy, and a conception of individuals in their social circumstances. The underlying rationale of feminist morality is utterly different from that of liberals or conservatives. The traditional analyses of morality are criticized on the grounds that they fail to address either the concerns raised by the morality of the web or the realities of twentieth-century technology. The "clear and present danger" test is criticized in terms of its applicability both in law and in fact. The section concludes with the feminist analysis of harm, the manner in which it relates to the subject of pornography and why the law should take that analysis into account.

The feminist analysis of morality is critical of both the conservative and liberal approaches, but on different grounds. Rather than focusing on the morality of sexual expression within established, male-defined norms

<sup>37</sup> For example, millions of dollars were spent by the American Commission on Obscenity and Pornography to investigate causalist questions. Large amounts are being spent on causalist research today by the Canadian government.

<sup>38</sup> See CANADIAN CIVIL LIBERTIES ASSOCIATION, *PORNOGRAPHY AND THE LAW* (1984) and Beckett, *Obscenity and Censorship Re-Examined Under the Charter of Rights*, 13 MAN. L.J. 351 (1983).

as conservatives do, the feminist analysis concentrates on non-violence, responsibility and caring that goes beyond individualism. Rather than focusing on direct harm as liberals do in order to justify limits on expression, feminists focus on generalized harm to others in the social context. They make a distinction between sexual mores and questions of morality. They argue that harm to others is the defining characteristic of immorality,<sup>39</sup> but they disagree with the liberal view that sexual chastity must be completely detached from moral virtue. Where a liberal view insists that no matter how offensive the material may be, it must be tolerated in the name of freedom of expression, the web theory examines the psychological and social consequences of material, and thereby recognizes the reality of people's lives in a historical world.<sup>40</sup>

### A. Definitions of Pornography<sup>41</sup>

The feminist definitions of pornography differ markedly from those in the *Criminal Code*<sup>42</sup> or in the common law.<sup>43</sup> Distinctions are made between pornography and erotica, pornography and sex education and pornography and moral realism. Helen Longino, a feminist philosopher, defines pornography as "I[v]erbal or pictorial material which represents or describes sexual behavior that is degrading and abusive to one or more of the participants *in such a way as to endorse the degradation*".<sup>44</sup> Debra Lewis, a feminist criminologist, defines pornography as material that "[d]epicts, condones and encourages acts of domination, degradation and violence towards women".<sup>45</sup>

The National Action Committee on the Status of Women has defined pornography as:

[a]ny printed, visual, audio or otherwise represented presentation, or part thereof, which seeks to sexually stimulate the viewer or consumer by the

<sup>19</sup> Longino, *Pornography, Oppression and Freedom: A Closer Look*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 40 (L. Lederer ed. 1980). <sup>41</sup> *Supra* note 12, at 64-105.

<sup>41</sup> Feminists prefer the word "pornography" to "obscenity" because of its etymology and original meaning. Pornography is defined in volume VII of the OXFORD ENGLISH DICTIONARY 1131 (3d ed. 1970) as "description of the life, manners, etc. of prostitutes and their patrons [from the Greek *porne* meaning "harlot" and *grapho* meaning "to write"]; hence the expression or suggestion of obscene or unchaste subjects in literature or art". The term "obscenity" comes from the Latin phrase *ob. cenum*, meaning "about filth" and is defined as material which is "offensive to modesty or decency, lewd; causing or intending to cause sexual excitement or lust". Feminists prefer the word "pornography" because it more clearly defines what is objectionable: treatment of women as a commodity

whose purpose is the sexual pleasure of men.

<sup>42</sup> R.S.C. 1970, c. C-34, s. 159.

"a See notes 102-29 and accompanying text *infra*.

<sup>4</sup> *Supra* note 39, at 43.

<sup>45</sup> REPORT OF THE STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS, No. 12, at 4 (1978).

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depiction of violence, including but not limited to, the depiction of submission, coercion, lack of consent, or debasement of any human being.<sup>46</sup>

The Canadian Advisory Council on the Status of Women defines pornography as:

a presentation, whether live, simulated, verbal, pictorial, filmed or video taped, or otherwise represented, of sexual behavior in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied **by** virtue of the immature age of any participant or **by** contextual aspects of the presentation, and in which such behavior can be taken to be advocated or endorsed.<sup>47</sup>

**All** these definitions reflect Professor Gilligan's web theory of morality. They are typical of the feminist view of pornography in that they emphasize that whether or not a work is pornographic depends upon the context within which it is presented. Explicit depictions of sex, simple representations of degrading behaviour or descriptions or representations of rape will not be pornographic unless they are advocated, endorsed or designed to sexually stimulate the viewer. Feminists say that such subject matters can be **highly** moral when the consequences of the acts are explored and the victim's dignity is acknowledged and reaffirmed.<sup>48</sup> Sex education materials, artistic material, moral realism and erotic sexual material that have often been improperly repressed in times when all non-procreative sex was considered immoral, are not caught **by** feminist definitions.

**All** the feminist definitions have in common the theme of non-violence and equality. "[A] film showing two people making love is much different from one portraying the rape and murder of women for male sexual stimulation."<sup>49</sup> Unlike traditional moralists, feminists believe that erotica is not destructive and harmful and should be freely available to those who wish to obtain it.

The fundamental distinction between pornography and erotica is central to the feminist viewpoint. The word "erotica" derives from the word "eros" which means passionate love. Gloria Steinem defines erotic

<sup>46</sup> CANADIAN CIVIL LIBERTIES ASSOCIATION, *supra* note 38, at 5. See also REPORT OF THE MUNICIPALITY OF METROPOLITAN TORONTO TASK FORCE ON PUBLIC VIOLENCE

AGAINST WOMEN AND CHILDREN 27 (1984), which adopted a similar definition. <sup>47</sup> CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN, BRIEF TO THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION 3 (1984). <sup>48</sup> For example, the National Film Board production, *Not a Love Story: A Fihin About Pornography*, contained explicit, degrading and violent sexual depictions and was banned from commercial theatres in Ontario for this reason. If the film had been scrutinized under any of the feminist definitions cited above, it would not have been banned, because the context would have been examined. The depictions, although offensive when taken out of context, provided a powerful medium for a highly moral film affirming women's dignity and worth.

<sup>11</sup> Bart & Jozsa, *Dirty Books, Dirty Fihns and Dirty Data*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 204, at 207 (L. Lederer ed. 1980).

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sex as "a mutually pleasurable, sexual expression between people who have enough power to be there by positive choice". <sup>50</sup> The message of pornography, she says, is:

violence, dominance, and conquest. It is being used to reinforce some inequality, or to create one, or to tell us that pain and humiliation (ours or someone else's) are really the same as pleasure....

Perhaps one could simply say that erotica is about sexuality, but pornography is about power and sex-as-weapon in the same way we have come to understand that rape is about violence, and not really about sexuality at all.<sup>51</sup>

## *B. Feminist Critique of the Traditional Analysis of Morality*

In this section I will analyze the deficiencies in the conservative and liberal approaches to obscenity.

### *1. Conservative Morality*

The feminist morality largely disagrees with the assumptions, application and consequences of the conservative morality as it is applied to obscenity.

First, the conservative morality creates and advocates what is to many an unacceptable sexual ethic, one that asks the law to subordinate sex to procreation and condemn all sexual interaction outside marriage. Sexual morality is seen by conservatives as the "glue" holding together the rest of the structure of society. Integral to that notion of morality is the concept of the dependent and virtuous woman, without access to birth control, without access to divorce, without access to a single life or to any of the benefits the law generally confers upon men. The "ladder" is well protected by this philosophy since men are free to pursue their lives within a society where inequality is rationalized by theories explaining the need for its continuation.

Second, conservatives, with their blanket emphasis on all sexual interaction, fail to distinguish between the different ways in which sexual

interaction can be depicted. They simply condemn it all. They catch in their net materials dealing with sex education, erotica and moral realism. Under the feminist analysis only something qualifying as "pornography" is considered obscene and worthy of condemnation and censorship.

50 Steinem, *Erotica and Pornography: A Clear and Present Difference*, in TAKE  
BACK THE NIGHT: WOMEN ON PORNOGRAPHY 35, at 37 (L. Lederer ed. 1980). 511 *Id.* at  
37-38.  
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## 2. Liberal Morality

Feminists criticize the liberal approach to morality because of what they see as its improper insistence on proof of a clear and present danger before state intervention is justified and because it stresses the rights of individuals apart from their social context, to the point where the welfare of women and children are compromised. There are two grounds for this criticism: the test has no legal foundation in the law of obscenity and it is based on a theory that does not translate well into twentieth-century capitalism and technology.

Some of the more extreme liberal causalists argue that the test for any infringement on expression, including obscenity, should be the clear and present danger test.<sup>52</sup> They urge its adoption if and when the current obscenity provisions are challenged under the *Canadian Charter of Rights and Freedoms*.<sup>53</sup> However, their approach is misconceived since that test does not properly apply to cases of obscenity.

The "clear and present danger" standard was originally formulated to review government repression of political speech. In order to prove a clear and present danger in law, a compelling and overwhelming threat of harm that is tangible and immediate and that can only be avoided by suppressing speech must be shown. The example usually cited to demonstrate the concept is someone falsely shouting "Fire!" in a crowded theatre. In a democratic society the importance of an individual's right to comment on the activities of his government was said to justify this stringent standard. Political speech constituted a clear and present danger only if it presented an immediate threat to national security. This test was adopted in 1919 in the sedition case of *Schenck v. United States*<sup>54</sup> which involved the distribution of pamphlets that opposed the military draft. It has been most

recently applied in the United States where the government, in its role of guardian of national security, attempted to suppress publication of the Pentagon Papers.<sup>55</sup> Although this test applies to restrictions on the freedom of political speech, it has not been successfully upheld in Canada or in the United States as an appropriate test for obscene publications.<sup>56</sup>

5 See CANADIAN CIVIL LIBERTIES ASSOCIATION, *supra* note 38 and Beckton, *supra* note 38, at 368.

51 Constitution Act, 1982, Part I, enacted by the *Canada Act, 1982*, U.K. 1982, c. 11, 403 U.S. 713 (1971).

54 249 U.S. 47 (1919).

51 In *Commonwealth v. Gordon*, 66 Pa. D.

55 *New York Times Co. v. United States*, 404 U.S. 576 (1972), and *C. 101* (1949), Judge Bok sought to establish the principle that no book should be suppressed unless it could be shown that there was a clear and present danger of the commission of a crime as a result of its publication. This reasoning was not upheld in the Appeal Court. In *Miller v. California*, 413 U.S. 15, at 34 (1973), Mr. Justice Burger held that "to equate the full and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the

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To suggest that the clear and present danger standard should be adopted in the case of violent pornography is to improperly imply that pornography is a form of protected political speech. The Manitoba Court of Appeal in *R. v. Prairie Schooner News Ltd.* made it clear that obscene material is not protected speech:

Freedom of speech is not unfettered either in criminal law or in civil law. The *Canadian Bill of Rights* was intended to protect, and does protect, basic freedoms of vital importance to all Canadians. It does not serve as a shield behind which obscene matter may be disseminated without concern for criminal consequences.

The Court further commented on the question of harm, that "[i]t is not for the Court to determine whether publications of this kind hurt anyone or do any demonstrable harm. Parliament has already made that determination."<sup>58</sup>

Although the *Prairie Schooner* case was decided pursuant to the *Canadian Bill of Rights*,<sup>59</sup> the same result seems inevitable under the *Canadian Charter of Rights and Freedoms*. A challenge to the current obscenity provisions under the *Charter* would require the courts to determine whether or not the provisions "unreasonably" infringe upon freedom of expression. The reasonable limitation clause in section 1 of the *Charter* makes it clear that none of the fundamental freedoms are absolute. The High Court of Ontario addressed this question in *Re Ontario Film and Video Appreciation Soc'y and Ontario Board of Censors*.<sup>60</sup> It held that

some prior censorship of films was demonstrably justifiable in a free and democratic society in order to prevent sexually offensive films from being shown. However, it held that although the Ontario Censor Board's authority was constitutional, its guidelines were not: they were not definite and precise enough to meet the "prescribed by law" requirement in the *Charter*.

The British Columbia County Court in *R. v. Red Hot Video Ltd.*<sup>61</sup> held that subsections 159(1) and (8) of the *Criminal Code*<sup>62</sup> which make it an offence to distribute obscene matter and which define obscenity, do not offend the guarantee of freedom of expression in subsection 2(b) of the *Charter*. The Court further held that section 159 could not be said to be vague, broad or unreasonable. More recently, the Manitoba Court of Queen's Bench in *R. v. Ransingh*<sup>63</sup> held that section 159 of the *Criminal Code* represents a reasonable limitation prescribed by law that can be

historic struggle for freedom. It is a misuse of the great guarantees of free speech and free press".

<sup>57</sup> 1 C.C.C. (2d) 251, at 271, 75 W.W.R. 585, at 604 (Man. C.A. 1970). <sup>58</sup>

*Id.* at 254, 75 W.W.R. 585, at 588.

<sup>59</sup> R.S.C. 1970 (App. III).

<sup>60</sup> 41 O.R. (2d) 583, 147 D.L.R. (3d) 58 (H.C. 1983).

<sup>61</sup> 38 C.R. (3d) 275, 11 C.C.C. (3d) 389 (B.C. Ct. 1984).

<sup>62</sup> R.S.C. 1970, c. C-34, subs. 159(1) & (8).

<sup>63</sup> 14 C.C.C. (3d) 230 (Man. Q.B. 1984).

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demonstrably justified in a free and democratic society within the meaning of section 1 of the *Charter*. The Court said that the purpose of section 159 is to protect society generally and that it is not unreasonable for a democratic society to impose some limits on what can be viewed, such as child pornography or sex with violence or horror.<sup>64</sup>

The constitutionality of the *Customs Tariff*<sup>5</sup> was challenged in *Re Luscher and Deputy Minister, Revenue Canada*.<sup>66</sup> It was held to be a demonstrably justifiable and reasonable limit on freedom of expression to prevent "socially offensive material" from entering Canada. The judge held that the words "immoral" and "indecent" were a sufficiently precise limit to be properly prescribed by law as required under the *Charter*. In an appeal to the Federal Court of Appeal,<sup>67</sup> the decision of the lower court was reversed on the grounds that the words "immoral and indecent" in section 14 of the *Customs Tariff* are not sufficiently "prescribed by law" to satisfy section 1 of the *Charter*. The Court made the observation that the words "immoral and indecent" were not defined in the legislation, thus distinguishing the *Customs Tariff* provisions from the obscenity provisions of the *Criminal*



*Code*. Further, the Court commented that the words "immoral" and "indecent" are highly subjective and emotional in their content and thus are too uncertain to meet the degree of predictability of legal consequences the *Charter* requires. Within a matter of days, the Federal Court of Appeal decision was effectively overruled when Parliament passed temporary emergency legislation restoring powers of customs officials to prohibit materials from entering Canada.<sup>68</sup> The legislation redefined prohibited material as:

1. Books, printed paper, drawings, paintings, prints, photographs or representations of any kind....
- (ii) that are deemed to be "obscene" under s. 159(8) of the *Criminal Code*....

The United States Supreme Court has taken the position that the First Amendment's<sup>69</sup> protection of speech does not extend to obscene material. Such material is not "speech" in a constitutional sense, because it lacks communicative content.<sup>70</sup> Obscene material could, therefore, be suppressed without showing the circumstances that amount to a "clear and present danger"<sup>71</sup>

<sup>64</sup> *Id.* at 244.

<sup>65</sup> R.S.C. 1970, c. C-14.

<sup>66</sup> 149 D.L.R. (3d) 243 (B.C. Ct. 1983).

<sup>67</sup> *Luscher v. Deputy Minister, Revenue Canada, Customs & Excise* (unreported, F.C. App. D., 7 Mar. 1985).

<sup>68</sup> Bill C-38, 33rd Pan., 1st sess., 1984-85 (proclaimed in force 2 Apr. 1985). <sup>69</sup> U.S. CONST.

<sup>70</sup> See *Roth v. United States*, 354 U.S. 476 (1957). See also Schauer, *Speech and "Speech" - Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEORGETOWN L.J. 899 (1979).

<sup>71</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968) (Brennan J.).

The second criticism is that the clear and present danger standard is based upon a political theory that is no longer applicable in the context of obscenity. Liberals argue that John Stuart Mill's "marketplace of truth" theory<sup>72</sup> applies to obscenity.<sup>73</sup> For example, the American Civil Liberties Union has stated that any restrictions, including the restriction of a juvenile's access to obscene material, inhibit both the creative artist's free expression of ideas and the individual parent's freedom to choose what his or her children will read.<sup>74</sup> The Union states:

Obscenity statutes which punish the distribution of material purchased <sup>or</sup> view [sic] by minors violate the First Amendment, and inevitably restrict the right to

publish and distribute such material to adults.<sup>75</sup>

Mill posited that the only way that truth can emerge is through a form of natural selection in a "free market" of ideas: if all ideas are allowed expression, good ideas will multiply and bad ideas die out. Mill hoped that this theory would help to further "the permanent interests of man as a progressive being".<sup>76</sup> The implication of the American Civil Liberties Union's approach is that if the messages contained in pornography are bad, they will die out and be replaced by good ones. Therefore, the view that women are equal to men, and that children have dignity and deserve to be treated with respect, will prevail. The messages in pornography that women and children are sex objects, available to be violated, subjugated and coerced at the will of men, will disappear. In fact, however, one only needs to observe the modern marketplace to know that the "marketplace of truth" cannot be advanced as the governing approach to the modern genre of pornography. Pornographic images proliferate virtually everywhere<sup>77</sup> and statistics of rape,<sup>78</sup> wife battering<sup>79</sup> and sexual abuse of children<sup>80</sup> indicate that egalitarian ideals

<sup>72</sup> *Supra* note 17, at 15-54.

<sup>73</sup> It is interesting that the proponents of the clear and present danger test for obscenity rely so heavily on Mill's reasoning to justify their stand when a sequel to ON LIBERTY was an eloquent protest against the manner in which women's freedoms have been subjected to irrational limitations: J. MILL, **THE SUBJECTION OF WOMEN** (1869). Social science studies indicate that pornography perpetuates those irrational limitations: *see* notes 86-110 and accompanying text *infra*.

<sup>11</sup> AMERICAN CIVIL LIBERTIES UNION, POLICY GUIDE, No. 5, at 8 (1981). *11 Id.*, No. 4, at 5.

<sup>11</sup> *Supra* note 17, at 33.

<sup>77</sup> *See* DEPARTMENT OF JUSTICE, SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION 11 (1983).

<sup>78</sup> *See* L. CLARK & D. LEWIS, **THE PRICE OF COERCIVE SEXUALITY** 61 (1977). They state that the incidences of rape increased by 174% between 1961 and 1971. In the period 1969-1973, it increased 76%.

<sup>71</sup> Armstrong, *Wife Beating: Let's Stop it Now*, **CANADIAN LIVING** 89 (Jul. 1983), states that one woman in every ten is beaten by her husband or common-law mate. <sup>80</sup> REPORT OF THE COMMITTEE ON SEXUAL OFFENCES AGAINST CHILDREN AND YOUTHS 180-83 (Badgley ed. 1984), states, among other staggering statistics of abuse, that 50% of women and 30% of men have been victims of unwanted sexual acts, the majority of these occurring before they were legal adults.

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are far from being universally accepted. Modern methods of mass media communication, unanticipated by Mill, make it difficult to see how his argument can include all forms of publication, especially pornographic photographs, which are largely devoid of any expression at all. Marshall

McLuhan analyzed the difference between print and photographic images. He said that "**It]**he logic of the photograph is neither verbal nor syntactical, a condition which renders literary culture quite helpless to cope with the photograph".<sup>8</sup> Further, it can be argued that it is naive to transpose nineteenth-century *laissez-faire* notions onto the multi-million dollar pornography market. A "free market of ideas" implies equal, unhindered access to the marketplace and an opportunity for all citizens to communicate and to be heard. The reality today is that the mass media own the skills and language techniques necessary to address the citizenry. The marketplace of truth - if it ever did exist - has long ago given way in the face of technological and social change. In today's world, untruths can certainly prevail if powerful agencies with enough profit motive behind them gain a hold on the market.<sup>82</sup> The Ninety Eighth Congress of the United States recently enacted the *Child Protection Act* of 1984<sup>83</sup> which has taken the true marketplace into account. Section 2 of that Act states:

The Congress finds that -

- (1) child pornography has developed into a **highly** organized, multi-million dollar industry which operates on a nationwide scale;
- (2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and
- (3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.

Gresham's Law, that bad money drives out good, would be a more sensible rule of thumb in the commercial world of pornography.<sup>14</sup> It has

<sup>81</sup> M. McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 197 (1964).

<sup>12</sup> See note <sup>87</sup> and accompanying text *infra*.

<sup>13</sup> *Child Protection Act of 1984*, P.L. No. **98-292**, **98** Stat. 204.

<sup>84</sup> This point is made in *ACTRA Policy Statement on Censorship and Pornography*, **13** ACTRA **SCOPE**, No. **6**, at 14-16 (1984). It states that "members who refuse to participate in such productions [of material which is sexually violent and indicates harm to other people] find that the small amount of work available becomes smaller".

NATIONAL COMMITTEE ON WOMEN'S ISSUES, *SUBMISSION ON PORNOGRAPHY AND CENSORSHIP TO THE ACTRA BOARD OF DIRECTORS* **6** (1984), makes the point more clearly:

Canada, unlike America, is the only country we know of where the pornography industry and the mainstream film industry are inextricably combined. Opportunities in the film industry here mean work in the porn industry. . . . The combination of these two industries in Canada seriously limits the artistic development of writers and performers in that **porn**

production insists on formula films, *i.e.* "T. & A.", "Chop'em Ups", etc.

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also been persuasively argued that Mill, if he were living today, would

interpret his words so as to include the requirements of social justice.<sup>5</sup> For these two reasons then, the liberal approach is flawed. Its insistence on direct harm is not sound in law and its underlying rationale cannot be literally transposed into twentieth-century society where modern communication techniques have facilitated the growth of a multi-million dollar pornography industry.

### *C. The Question of Harm*

"Harm" in the feminist analysis of pornography differs from both the liberal and the conservative concepts. The conservative view that obscenity is harmful because it causes the erosion of the social order, and the liberal view that obscenity is harmful if it constitutes a direct injury to individuals, both fail to take into account the harms perceived by feminists.

The feminist analysis of harm starts with the premise that to understand the harm caused by pornography, the full implications of violence against women in contemporary society must be examined. Feminists point out that, for many years, women have been unable to walk the streets after dark without male protection. Women routinely protect themselves with mace, whistles, extra keys, dead-bolt locks, security buildings and peep holes.<sup>86</sup> Rape crisis centres, battered wives' shelters, and child abuse and incest counselling centres are considered social necessities in many Canadian cities and towns. Sexual harassment has become so common that guidelines to deal with it have been legislated or bargained for in most places of employment.

At the same time, debasement of women in pornographic magazines, books, movies, films, on television, on street corner news-stands, on covers of record albums and in shop windows has steadily increased. Three recent surveys indicate that sales of<sup>porno</sup> graphic magazines in Canada increased by 326.7 percent between 1965 and 1980. This represents an increase of at least fourteen times the growth of the Canadian population during the same period.<sup>87</sup> Content analysis studies on "soft-core" pornographic magazines indicate that

The porn and mainstream cross-over seriously bleeds legitimate films of funds they need to be made, and lowers the general quality of all film.<sup>85</sup> Humphrey, *The Just Requirements of Morality, Public Order and General Welfare in a Democratic Society*, in *THE PRACTICE OF FREEDOM* 137 (R. MacDonald & J. Humphrey eds. 1979).

<sup>88</sup> For a thorough discussion about rape and the fear of rape in Canada, see *supra* note 78.

<sup>87</sup> *Supra* note 80, at 1267. It is estimated by the Committee that the gross revenue of pornographic magazines is at least \$100 million annually in Canada. This figure would not

include pornographic pocket books, films, "sex aids" and admission fees charged for commercially exhibited motion pictures.

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depictions of sexual violence increased steadily in the five year period between 1973 and 1977.<sup>88</sup>

The Report of the House of Commons Standing Committee on Justice and Legal Affairs commented on the image that pornography presents of women:

This material is exploitive of women - they are portrayed as passive victims who derive limitless pleasure from inflicted pain, and from subjugation to acts of violence, humiliation, and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in minute detail. . . . The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable.<sup>89</sup>

The Committee concluded that pornography "promotes values and behavior which are unacceptable in a society committed to egalitarian, consensual, mutual and non-violent human relationships".<sup>90</sup>

### *1. Harm to Women Generally*

Feminists argue that one of the harms of pornography is that it provides a framework that encourages a range of violent, coercive and exploitive acts against women. They claim that the sheer volume of pornography requires that the moral issue be expanded to include not only the assessment of individual works, but also the meaning and force of the mass production of pornography.<sup>91</sup> If allowed to continue unabated, the pornographic image of women will foster oppression by further entrenching sexist attitudes.

Feminists are of the view that, unlike rape, wife battering and incest aggression where the victims are individuals, pornography's victims are women in general. The harm it causes is public, generalized harm - the degradation of women as a class, resulting in assaults on institutions, values and practices relating to marriage, privacy, employment and the family, in a way not envisioned by male moralists. Many women's goals, such as greater participation in public life, equal pay for work of equal value and daycare, are that much more difficult to achieve when female credibility is assaulted on such a massive scale.<sup>92</sup>

<sup>88</sup> Malamuth & Spinner, *A Longitudinal Content Analysis of Sexual Violence in the Best-Selling Erotic Magazines*, 16 JOURNAL OF SEX RESEARCH, No. 3, at 226-37 (1980).

Similar results were reported by Dietz and Evans in a more recent study in 139 AMI. J. PSYCH. 1493-95 (1982).

89 REPORT OF THE STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS, No. 3, at

3-4 (1978). 90 *Id.* at 7.

91 *Supra* note 39, at 46.

92 T. MCCORMICK, MAKING SENSE OF RESEARCH ON PORNOGRAPHY 37, a report for the subcommittee of the Metropolitan Toronto Task Force on Violence against Women (1983).

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Social scientific research over the last fifteen years clearly supports the feminist stand. It has been demonstrated in content analytic research that violent and degrading pornography can have a number of harmful effects. Subjects exposed to pornography demonstrate an increased acceptance of rape myths, increased acceptance of violence against women, increased rape fantasies, increased aggressive behaviour toward women in a laboratory setting, decreased future perceptions of rape victim suffering, a future desensitization to sexual violence and an increased reported willingness to rape.<sup>93</sup>

In their book, *Sex, Violence and the Media*, Eysenck and Nias undertook an extensive review of the literature on violence and pornography and concluded that:

[W]here the context is hostile to women, as most pornographic films are, we feel that such films should fall under the category of "incitement to violence towards minority groups" - even though women are not a minority group. Nevertheless such films do constitute a clear case of incitement to maltreat women, downgrade them to a lower status, regard them as mere sex objects, and elevate male *machismo* to a superior position on the scale of values. Evaluative conditioning, modelling, and desensitization all point to the same conclusion, namely that such presentations have effects on men's attitudes which are detrimental to women; in fairness to more than one half of the population, such incitements should be proscribed.<sup>94</sup>

In another summary of research, psychologist Edward Donnerstein concluded:

Given the increase in sexual and other forms of violence against women depicted in the media, a concern over such presentations seems warranted. There is ample evidence that the observation of violent forms of media can facilitate aggressive response.<sup>95</sup>

In its recent report the Badgley Committee<sup>96</sup> also came to the conclusion that pornography is harmful because it corrupts moral and social values and alters personal values and behaviour." There is also some support in American case law for the view that pornography is related to actual harm. In *Miller v. California*<sup>98</sup> the United States Supreme Court held that the states, in determining whether or not something was obscene, had the right to assume that there was a causal connection between pornography and

crime or other anti-social behaviour. In *Paris Adult Theatre I v.*

11 Check & Malamuth, *Pornography and Sexual Aggression: A Social Learning Theory Analysis*, in **COMMUNICATION YEARBOOK 9** (M. McLaughlin ed. 1985). *See also* **PORNOGRAPHY AND SEXUAL AGGRESSION** (N. Malamuth & E. Donnerstein eds. 1984).

94 H. GYSENCK & D. NIAS, *SEX, VIOLENCE AND THE MEDIA* 259 (1978). 95 Donnerstein, *Pornography and Violence Against Women: Experimental Studies*, 347 **ANNALS OF THE NEW YORK ACADEMY OF SCIENCE** 277, at 287 (1980). 96 *Supra* note 80.

97 *Id.* at 1274.

98 *Supra* note 56.

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*Slaton*,<sup>99</sup> the Court said that there was "at least an arguable correlation between obscene material and crime".<sup>100</sup> Feminists argue that if, as the researchers say, pornography promotes the view that women are less equal, less valuable and less worthy than men, allowing pornography to proliferate will create a culture of perpetual inequity. This argument remains valid even where physical aggression or direct harm cannot be proved in individual cases.

## 2. Harm to Children

The Badgley Committee also found a link between direct harm to children and pornography. Its report states:

The graphic accounts given, when taken in conjunction with cases investigated by the police, leave no doubt that incidents of unwanted exposure of children to pornography occur, and that in some of these situations, such exposures are associated with children having been sexually assaulted.<sup>101</sup>

These findings are strikingly different from those of the Committee on Obscenity and Film Censorship in England in 1979 and the United States Commission on Obscenity and Pornography in 1970. The British Committee was reluctant to confirm any link between pornography and harm, because the studies placed before it contained conflicting evidence:

It seemed to us right to be sceptical about attempts to apply the lessons of these laboratory experiments to real life and we therefore preferred the more noncommittal view. . . . We consider that the only objective verdict must be one of "not proven".<sup>102</sup>

The United States Commission concluded that exposure to pornography does not seriously promote anti-social behaviour. The Commission stated:

In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant

A minority of that Commission called for removal of all restrictions, noting that there was no evidence that pornography was harmful even to juveniles.

The findings of both the British and American Committees

<sup>99</sup> 413 U.S. 49 (1973).

<sup>100</sup> *Id.* at 98.

<sup>101</sup> *Supra* note 80, at 1275.

<sup>102</sup> REPORT OF THE COMMITTEE ON OBSCENITY AND FILM CENSORSHIP 68 (Cmd. 7772, 1979).

<sup>103</sup> REPORT OF THE PRESIDENTIAL COMMISSION ON OBSCENITY AND PORNOGRAPHY 32(1971).

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have been severely criticized on the grounds of faulty methodological approach, the type of data examined,<sup>04</sup> and inherent sexual bias.<sup>105</sup>

### *3. Harm to Participants*

Another harm that feminists consider significant is that suffered by those involved in the production of pornography. Lederer's research confirms that many runaway girls are used in the production of pornography because they have no other means of livelihood. She notes the coercion used to secure their participation and the evidence of venereal disease and psychological damage that results from employment as a pornographic model.<sup>106</sup> Similar findings appear in other research on adult participants in pornography.<sup>107</sup>

In summary, the feminist contention that pornography causes harm is supported by three arguments:

- (1) Oppression and exploitation of women and children is<sup>rein</sup> forced by the dissemination of distorted perceptions about female nature.
- (2) Some women and children become real-life victims of crimes of violence in which pornography is implicated.<sup>108</sup>
- (3) Women and children who participate in the production of pornography are degraded and abused.

### *4. Harm to Society*

A fourth argument advanced by feminists is that pornography harms society because it is a form of hate propaganda.<sup>109</sup> Society suffers harm because hatred contributes to the destruction of a free and democratic



society. When members of a society are encouraged to hate each other, democracy disintegrates.

.04 For example, see Bart & Jozsa, *supra* note 49 and Donnerstein, *supra* note 95. 105 McCormick, *Machismo in Media Research: A Critical Review of Research on Violence and Pornography*, 25 SOCIAL PROBLEMS, No. 5, at 544 (1978). 106 Lederer, *An Interview with a Former Pornography Model*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 57 (L. Lederer ed. 1980).

107 K. BARRY, FEMALE SEXUAL SLAVERY (1979); CRIMES AGAINST WOMEN: PROCEEDINGS OF THE INTERNATIONAL TRIBUNAL (D. Russell & N. Van de Ven eds. 1976).

108 Russell, *Pornography and Violence: What Does the New Research Say?*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 218 (L. Lederer ed. 1980). 109 See, e.g., J. RIDDINGTON, DISCUSSION PAPER ON PORNOGRAPHY (1983); Wachtel, *Our Newest Battleground: Pornography*, 63 BRANCHING OUT 33, at 35; A. DWORKIN, WOMEN HATING (1976).  
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*D. Conclusion*

If the "clear and present danger" test were used for obscenity, a kind of pornographic anarchy with complete freedom of expression for pornographic materials would be the inevitable result. Sociological and psychological studies are not capable of making the necessary connection between pornography and direct harm to satisfy the test, other than in child pornography or in violent pornography where it can be proven that actual harm occurs. In order to establish a "clear and present danger", the Crown would have to show that watching a pornographic video or movie would cause people to rush from the theatres to rape or murder. This is ludicrous. Any examination of the scientific data makes it clear that pornography's effects are far more subtle. The effects discussed in this article," x0 and supported by scientific evidence, are the promotion of an ideology that fosters and supports sexual aggression. This helps to create and maintain a climate that is more likely to tolerate the actual physical abuse of women, and in which opportunities for women are limited.

The concept of pornography as sexual discrimination was accepted in the recent case of *Saskatchewan Human Rights Commission v. Engineering Students' Soc'y*.<sup>111</sup> The Human Rights Commission alleged that a newspaper regularly published by the student Engineering Society ridiculed, belittled and affronted the dignity of women contrary to section 14 of *The Saskatchewan Human Rights Code*.<sup>112</sup> The Board held that the publication, which promoted violent and demeaning treatment of women,

contravened the *Code* because it interfered with women's rights to equal enjoyment of education, employment and security of the person. The Board further held that the protection of women's equality rights outweighed the right to freedom of expression, guaranteed in the *Canadian Charter of Rights and Freedoms* and in *The Saskatchewan Human Rights Code*.<sup>113</sup>

This decision clearly reflects a concept of rights not as absolutes, but as reciprocal and proportionate to other rights. The liberal approach tends to view freedom of expression as an absolute right that is a function of each individual rather than of a reciprocal relationship between individuals. The feminist concept of the equal value of all human beings requires that limits be placed on freedom of expression with respect to pornography. The real evil of pornography is not that it violates chastity

<sup>111</sup> See notes 86-108 and accompanying text *supra*.

<sup>112</sup> 5 C.H.R.R. 2074 (Sask. Human Rights Code Bd. of Inquiry 1984).

<sup>113</sup> S.S. 1979, c. S-24.1, s. 14.

<sup>114</sup> A similar approach was taken in *Rasheed v. Bramhill*, 2 C.H.R.R. 249, at 252 (N.S. Human Rights Act Bd. of Inquiry 1980), a case where racial depictions on a badge were found to offend the *Human Rights Act*, S.N.S. 1969, c. 11. The Board said: "In particular cases, the right of free speech may have to give way to other human rights, such as the right not to be discriminated against. . . . "

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but that it portrays women and children simply as instruments of pleasure for men, thereby denying their value as individual human beings.<sup>114</sup>

#### IV. THE RESPONSE OF THE COURTS

In this section, obscenity cases are examined in light of their underlying moral rationales. Do the courts protect the liberal, conservative or feminist moralities, or have they adopted a morality of their own? Common law definitions of obscenity and pornography are examined and compared to the feminist definitions. The failure of the courts to acknowledge violence as a component of the obscenity definition is examined. Finally, the community standards test is explained and criticized as being both conceptually unsound and unfairly applied.

##### A. Definitions of Pornography

From time to time, judges have attempted to distinguish between "pornography" and "obscenity". The majority of the Manitoba Court of

Appeal in *R. v. Dominion News and Gifts (1962) Ltd.* <sup>115</sup> said, in *obiter dicta*, that a publication did not have to be pornographic to be obscene, and that sex in itself was not obscene. Unfortunately the Court did not elaborate on its concept of "pornography". However, it appeared to indicate that pornography is something worse than obscenity. In *R. v.*

*Odeon Morton Theatres Ltd.*, Provincial Court Judge Enns defined pornography as "[t]hat complete depiction of every conceivable kind of carnal connection between humans or humans and animals vividly portrayed in close-up views".<sup>116</sup> On appeal, the Manitoba Court of Appeal did not dispute this definition.

Another definition of "hard-core" pornography is cited by Professor Charles in *Obscene Literature and the Legal Process in Canada*:

[H]ard core pornography does not usually have much of a story line, and in so far as it does, this only serves as a flimsy frame on which to hang a series of erotic incidents. Hard core pornography also either neglects altogether or underplays characterization of the persons in the story, descriptions of surrounding, philosophical or political discussions, and so forth. This is done to provide for maximum erotic concentration in the story.<sup>117</sup>

<sup>114</sup> For a discussion of value reciprocity, see R. HENLE & A. ROSENBAUM, *THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVES* 87-93 (1980). <sup>115</sup> [1963] 2 C.C.C. 103, 42 W.W.R. 65 (Man. C.A.).

<sup>116</sup> 16 C.C.C. (2d) 185, at 198, [1974] 3 W.W.R. 304, at 316 (Man. C.A.), *citing* the unreported provincial court decision.

<sup>117</sup> Charles, *Obscene Literature and the Legal Process in Canada*, 44 CAN. B. REV. 243, at 277 (1966).

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In *R. v. Prairie Schooner News Ltd.* Freedman C.J.M., in finding the publications before him to be obscene, cited the above definition and held that the materials before him conformed to the "standard formula of hard core pornography".<sup>118</sup> It is evident that Chief Justice Freedman was also of the view that erotic depictions could amount to hard-core pornography.

In the United States, as in Canada, attempts by judges to define pornography have not met with much success. In *Jacobellis v. Ohio*, Mr. Justice Stewart, in referring to "hard-core" pornography, said: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I can never succeed in intelligibly doing so. But I know it when I see it. . . . " <sup>119</sup>

Definitions attempted by the various courts have considered pornography from the female perspective only very recently. They most often fail to consider the context within which pornography is shown or

what it means to women generally. Instead, they examine each depiction on the basis of offence to the sensibilities of the viewer. The degree of explicitness is usually the ultimate criterion in determining whether a depiction is "pornographic" or unduly exploitive. The endorsement of violence, coercion and degradation, the critical elements of the feminist definition, has rarely been considered in judicial attempts to define pornography.

### *B. Definitions of Obscenity*

Both liberal and conservative arguments have been heard in courts of law for more than 250 years, so it is not surprising that their views are reflected in the legal decisions. The traditional demarcation between the two was noted as early as the eighteenth century in *R. v. Curl*.<sup>120</sup> However, a legal definition of obscenity was not established until 1868, in the case of *R. v. Hicklin*.<sup>121</sup> One can only presume that up until that time the meaning of obscenity was universally agreed upon, and thus the need for a legal definition was not apparent. The publication found to be obscene in *Hicklin* was an anti-Catholic pamphlet that suggested illicit sexual behaviour between priests and female parishioners. In his decision, Cockburn C.J. defined obscenity as:

the tendency of the matter charged ... to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.<sup>122</sup>

<sup>118</sup> *Supra* note 57, at 258, 75 W.W.R. at 592.

<sup>119</sup> 378 U.S. 184, at 197 (1964).

<sup>120</sup> *Supra* note 22.

<sup>121</sup> L.R. 3 Q.B. 360 (1868).

<sup>122</sup> *Id.* at 371.

The *Hicklin* test of obscenity survived in England until 1954<sup>123</sup> and in Canada until 1959, when the Parliament of Canada enacted its own definition.<sup>124</sup> The present Canadian definition of criminally obscene material provides that:

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. <sup>125</sup>

By enacting the legislation, Parliament appeared to depart from the common law traditional emphasis on the immorality of explicit sex. Parliament enlarged the definition of obscenity to include the portrayal of

certain forms of violence if accompanied by the undue exploitation of sex. Violence could not by itself be obscene. This became known as <sup>the</sup> "sex plus" requirement and its effect was to limit the reach of the obscenity law to sexual depictions. <sup>126</sup>

In 1962, the majority of the Supreme Court of Canada held that the new definition was the exclusive test of obscenity, thereby rendering the *Hicklin* test obsolete.<sup>127</sup> The cornerstone of the definition of obscenity became the "undue exploitation of sex" rather than the "tendency to deprave and corrupt". Community standards were to determine whether or not the exploitation of sex was "undue", but because the Crown was not required to adduce evidence of community standards, this determination was often made by the judge based on his understanding and appreciation of community levels of tolerance. It is apparent from a review of the case law that the term "undue exploitation of sex" in the new definition came to be interpreted as nothing more than the degree of explicitness of sexual depiction. The definition's additional categories of sex combined with cruelty, violence, horror and crime were largely ignored by the courts. Certainly the impact of sexual depictions on equality was not analyzed or commented upon. It is also apparent that in recent obscenity cases, the courts have shifted from a conservative to a liberal approach. This has, by and large, resulted in greater permissiveness.

The liberal view was emphasized in *R. v. Coles Co.*, a case involving the book, *Fanny Hill, Memoirs of a Woman of Pleasure*, which

<sup>123</sup> *R. v. Martin Seeker Warburg Ltd.*, [1954] 2 All E.R. 683, [1954] 1 W.L.R. 1138

(Cent. Crim. Ct.). <sup>124</sup> *An Act to amend the Criminal Code*, S.C. 1959, c. 40, s. 11. <sup>125</sup> R.S.C. 1970, c. C-34, sub. 159(8).

<sup>126</sup> In England this is not the case. In *John Calder (Publications) Ltd. v. Powell*, [1965] 1 Q.B. 509, [1965] 1 All E.R. 159 (1964), it was held that a book advocating drug use had the tendency to deprave and corrupt and was, therefore, obscene. In *R. v. Calder & Boyars Ltd.*, [1969] 1 Q.B. 151, [1968] 3 All E.R. 644 (C.A. 1968), it was held that violence *per se* was obscene, a finding similar to that in *D.P.P. v. A. & B.C. Chewing Gum Ltd.*, [1968] 1 Q.B. 159, [1967] 2 All E.R. 504 (1967).

<sup>127</sup> *Brodie v. The Queen*, [1962] S.C.R. 681, 32 D.L.R. (3d) 507.

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described the activities of a prostitute. <sup>128</sup> Chief Justice Porter stated that the freedom to describe human life with complete candour is fundamental to the progress of a free society and should not be curtailed unless "extreme circumstances" exist. The majority of the Court was of the view that the book had historical and literary merit and lacked the degree of prurience

required to render it obscene. Roach J.A., in dissent, adopted the classic conservative view. In his judgment he said that the book in question "descends to the lowest possible level of impurity or lust in that it is a deification of the phallus. . . . It is plain, unvarnished dirt for dirt's sake." <sup>128</sup>

<sup>129</sup> Mr. Justice Roach further stated that "[s]adism, bestiality, cruelty and crime are not necessary ingredients of pornography - if that term is to be equated with obscenity". <sup>130</sup> Similar emphasis on the degree of sexual explicitness as the critical factor of illegality is evident in cases decided pursuant to customs legislation. Section 14 of the *Customs Tariff* reads: "The importation into Canada of any goods enumerated, described or referred to in Schedule C is prohibited. . . ."<sup>131</sup> The provisions of tariff item 99201-1 of Schedule C (prohibited goods) reads as follows: "Books, printed paper, drawings, paintings, prints, photographs or representations of any kind of . . . an immoral or indecent character." <sup>132</sup>

This section was recently challenged in the case of *Re Luscher and Deputy Minister, Revenue Canada*.<sup>133</sup> A magazine, brought from the United States into Canada, was wholly concerned with sexual activity between a man and a woman. The lower Court found that, although the actions contained in the magazine were in no way unnatural or unlawful and were a common part of the lives of Canadian men and women, they were immoral and indecent. He gave immoral and indecent their dictionary definitions of "morally evil", "dissolute", "wicked", "lewd", "unchaste", "in extremely bad taste", "suggestive or tending to obscenity", "disgusting" and "obscene", saying that these words must be applied in light of contemporary moral or ethical standards. Similar magazines were presented to the judge as evidence of contemporary community standards in British Columbia. The judge found all the exhibits tasteless but said that "[n]one of them feature such explicit sexual activity as the magazine in question". <sup>134</sup> Although violence was not an issue in the case, the Court was clearly deciding whether the material was obscene on the basis of the degree of sexual explicitness in the magazine. <sup>135</sup>

<sup>128</sup> [1965] 1 O.R. 557, [1965] 2 C.C.C. 304 (C.A. 1964).

<sup>129</sup> *Id.* at 573, [1965] 2 C.C.C. at 322-23.

<sup>130</sup> *Id.* at 572, [1965] 2 C.C.C. at 322.

<sup>131</sup> R.S.C. 1970, c. C-14, s. 14.

<sup>132</sup> R.S.C. 1970, c. C-14, sched. C.

<sup>133</sup> *Supra* note 66.

<sup>134</sup> *Id.* at 247.

<sup>135</sup> The decision was reversed on other grounds: *see* note 67 and accompanying text *supra*.

A suggestion that something other than explicit sex could be obscene (and therefore harmful) was finally discussed in the case of *Delorme v. The Queen*,<sup>36</sup> which involved the book, *Histoire d'O*. The majority of the Court held that the book was obscene because it contained repeated descriptions of sexual acts - both normal and abnormal - accompanied by acts of extreme brutality. The defence of public good failed even though the Court felt that the book might have been of some literary or scientific value in psychology or sexology courses. The fact that it was made available to the general public eliminated any defence of "public good" because the average reader, unsophisticated in psychology or sexology, would derive no "advantage" from the book. The Court's analysis of the defence of "public good" did not consider any negative impact that the book might have on women or on equality between the sexes.

A different approach to violent content was taken in the case of *R. v. Odeon Morton Theatres*. This case concerned the movie *Last Tango in Paris*. At trial, the defence called a number of film critics, two professors of English, a stage director and the chairmen of the Manitoba and Ontario film classification boards. None of the experts found the movie to be obscene, but a dissenting judge in the Court of Appeal, Mr. Justice Monnin, found that the most surprising aspect of the expert testimony at trial was the opinion that no violence occurred in the film. He quoted from the transcript:

Q: Did you find a combination of- we will just say the exploitation of sex, we won't say "undue", but did you see in your assessment of "Tango" an exploitation of sex in conjunction with violence?

A: First, I see no violence in "Last Tango". Secondly, I see no exploitation of sex. I don't like the word "exploitation".

Q: Do I understand, Father Pungente, that you saw no violence in the film? A: No.

Q: Do I understand then that in your view the simulated anal intercourse scene did not have any element of violence whatsoever? A: I don't see that as violence, no.

THE COURT: I have listened for a long time; are you seriously suggesting that scene, no matter if it is symbolic, or what symbolic means, then suggests nothing of violence at all? It suggested no protesting, screaming, almost shrieking, hurt her, of this brutal pinning of her down, holding her arms down? Do you suggest that is all nothing, is not suggestive of violence; is that sincerely your view?

THE WITNESS: No, when you explain it like that, your honour, that I understand, yes. Well, I'm sorry, what I was understanding Mr. Montgomery to mean is the type of violence in films today.

<sup>136</sup> 21 C.R.N.S. 305, 15 C.C.C. 350 (Que. C.A. 1973). The Ontario Court of Appeal,

in *Re Gordon Magazine Enterprises Ltd.*, 46 C.R. 313 (Ont. C.A. 1965), on<sup>an</sup> appeal from a forfeiture order, held that in the pocket novels seized, sex was a dominant characteristic associated in varying degrees with crime, horror, cruelty and violence. No further analysis was offered by the Court.

<sup>137</sup> *Supra* note 116.

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THE COURT: You are talking of sub machine guns and -

THE WITNESS: Pulling people's stomachs apart, ripping them open, burning them alive.

THE COURT: I see. With a strong force of violence.

THE WITNESS: With a force such as you express it, I understand it better, yes.

<sup>138</sup>

This exchange is a good example of how certain male perceptions of violence can exclude the consideration of female reality. Thelma McCormick describes this recurring phenomenon as "machismo". She says:

Machismo refers to an attitude of male pride in sexual virility, a form of narcissism that condones the sexual use and abuse of women, and, in the extreme, violence as a dimension of sexual gratification or instrumental to sexual goals. <sup>139</sup>

In the foregoing example, "machismo" is arguably occurring at two levels - in the movie itself, and in the witness box. Mr. Justice Monnin disagreed with the experts when he concluded that:

[O]n the basis of the transcript as it appears, the exhibits as I have read or seen, the film is unduly exploitive of sex and that by virtue of this undue exploitation, coupled with a degree of violence in language and in acts which can be seen or heard through the 129 minutes of it, the film is deemed to be obscene pursuant to s. 159(8). <sup>1°</sup>

Even though Monnin and Guy J.J.A. thought the violence was obscene, the majority of the Court dismissed the appeal and concluded that there was no error of law on the face of the record. However, Chief Justice Freedman, in *obiter dicta*, commented on the merits of the Crown's appeal. Violence was not specifically considered in his analysis; it merely became part of the sexual activity in the film. He looked at the "internal necessities" of the film and found that the sexual scenes were justified. He also compared the degree of sexual explicitness in *Last Tango in Paris* with "skin-flicks" and found that there were far more explicit films being shown in various parts of Canada and that, therefore, it would be "particularly unfair" to find *Last Tango* obscene.

In recent lower court decisions, more attention has been directed toward depictions that combine sex and violence. In *R. v. McCormick*, <sup>141</sup> where homosexual acts were depicted in photographs showing juvenile



boys engaged in fellatio and sadomasochistic activities, the Court said that the depictions combined sex with cruelty and violence and were thus obscene.

Degradation and dehumanization in the context of sexual depictions were specifically discussed for the first time in the case of *R. v. Doug*

<sup>138</sup> *Id.* at 205, [1974] 3 W.W.R. at 323-24.

<sup>139</sup> *Supra* note 105, at 545.

<sup>140</sup> *Supra* note 116, at 208, [1974] 3 W.W.R. at 327.

<sup>141</sup> (Unreported, Ont. Ct., 10 Jan. 1980).

*Rankine Co.* <sup>142</sup> Mr. Justice Borins of the Ontario County Court held that videotapes for private home use were obscene when they consisted "[s]ubstantially 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 . . . " <sup>143</sup> The *Rankine* case represents the first time a Canadian court has examined an allegedly obscene depiction specifically from the point of view of the victims of the sexual abuse, rather than of the sensibilities of the observers. Mr. Justice Borins, however, still maintained that a high degree of explicit sex is obscene. He stated that: "As for the other films which I am satisfied are obscene and which do not contain scenes of sex and violence and cruelty, it is the degree of explicitness of the sexual acts which leads me to the conclusion that they exceed community standards." <sup>144</sup>

In *R. v. Ramsingh*, <sup>145</sup> another case involving home video cassettes, the Manitoba Court of Queen's Bench appears to have taken Mr. Justice Borins' analysis one step further. While Borins J. would require that sex and violence be accompanied by degradation and dehumanization in order to find depictions obscene, Ferg J. in *Ramsingh* suggested that degradation and dehumanization alone could be obscene. He commented:

As well, I think that where violence is portrayed with sex, *or* where there are people, particularly women, subjected to any thing which degrades or dehumanizes them, the community standard is exceeded, even when the viewing may occur in one's private home. <sup>146</sup>

In a recent landmark decision in Alberta, <sup>147</sup> the feminist analysis of obscenity laws and morality seems to have been adopted. The general principles set forth in *Rankine* <sup>148</sup> and *Ramsingh* <sup>149</sup> were applied in the case, but several new approaches were taken as well. In his analysis of the meaning of "undue exploitation of sex", Shannon J. of the Alberta Court of Queen's Bench distinguished three different types of sexually explicit material: violent, non-violent but degrading and dehumanizing, and erotica.

He described the three categories in detail, providing examples of each, and held that the Canadian community will tolerate erotica, but not material falling into the other two categories. Unlike

142 9 C.C.C. (3d) 53 (Ont. Ct. Ct. 1983). In *R. v. Intercity News Co.*, (unreported, Ont. Prov. Ct., Jul. 1982), a magazine was found to be obscene where the Court found an article "display[ing] violent and abnormal sex in an objectionable and repulsive manner".

143 *Id.* at 70.

144 *Id.*

145 *Supra* note 63.

146 *Id.* at 240.

147 *R. v. Wagner* (unreported Alta. Q.B., 16 Jan. 1985). To be reported in Vol. 36, Part

III A.R. May, 1985.

148 *Supra* note 142.

149 *Supra* note 63.

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Borins J. in *Rankine*, Shannon J. was of the opinion that explicit sex per se is not obscene. He said that "[i]t is the message that counts, not the degree of explicitness".<sup>150</sup> By emphasizing "the message", the Court is saying that the context of the sexual depictions is the paramount consideration.

With the exception of the recent trial court decisions and dissenting opinions cited above, judicial acknowledgement of violence in obscenity is rare. At the appeal court level, the degree of explicitness of a sexual depiction is still the most important factor in deciding whether or not an obscenity finding will be made. It remains to be seen whether or not appeal courts will change their view that the "harm" of obscene depictions lies, by and large, in their explicitness. Mr. Justice Shannon's decision has provided the courts with the opportunity of assessing the social harm caused by pornography.<sup>151</sup> In dealing with the *Charter*

argument that subsection 159(8) of the *Criminal Code*<sup>52</sup> is an unwarranted infringement on freedom of expression, Shannon J. held<sup>153</sup> that the obscenity section came within the saving provision of section 1 of the *Charter* because of the social harm that results from viewing obscenity. He held that sexually violent or degrading and dehumanizing pornography causes social harm to women. He accepted evidence that men repeatedly exposed to such depictions become calloused towards women and are less receptive to their claims for equality. By relying on social science evidence and by identifying social harm as a justification for infringements of subsection 2(b) of the *Charter*, Shannon J. added a new dimension to the type of evidence usually heard in obscenity cases. This development is very much in line with the view that courts should, in interpreting the *Charter*,

consider the social, economic and political context of Canadian society. <sup>154</sup>

### *C. The Community Standards Test*

#### *1. Its Development* <sup>155</sup>

In 1964, the Supreme Court of Canada adopted Manitoba Chief Justice Freedman's dissenting opinion on the question of community

<sup>150</sup> *Supra* note 147.

<sup>131</sup> The B.C.C.A. in *Red Hot Video v. The Queen* (unreported 18 Mar. 1985) adopted the Shannon approach and found that violent and degrading depictions in pornography adversely affect women's right to equality.

<sup>152</sup> R.S.C. 1970, c. C-34, sub. 159(8).

<sup>153</sup> *Supra* note 147.

<sup>154</sup> Gibson, *Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations*, in *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 25, at 27 (W. Tarnopolsky & G. Beaudoin eds. 1982).

<sup>155</sup> For a thorough discussion on the recent developments of obscenity law in Canada, see M. MANNING, *RIGHTS, FREEDOMS AND THE COURTS* (1983).

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standards in the case of *Dominion News and Gifts (1962) Ltd. v. The Queen*.<sup>156</sup> These standards were not to be set by those individuals of lowest taste or interest. Nor were they to be set exclusively by those of rigid, austere, conservative or puritan taste and habit of mind. In stating that the general average of community thinking was to be the standard, Freedman C.J.M. also held that in borderline cases, tolerance was to be preferred to proscription because to do otherwise might inhibit creative endeavours.<sup>157</sup> This decision marked a significant departure from the conservative espousing of a single moral ethic, in favour of the liberal view of free expression, using the community standards test as the vehicle of change.

The *Coles*<sup>5,8</sup> case established that the literary purpose and merit of a publication, viewed as a whole, was to be considered, as was its author's or creator's motive. The Supreme Court of Canada in *Dechow v. The Queen*<sup>5,9</sup> added that the test of "undueness" was to be the objective standard of the contemporary Canadian community as a whole. In *R. I'*.

*Prairie Schooner News Ltd.*, the Manitoba Court of Appeal said that expert testimony regarding community attitudes was admissible and desirable, as were public opinion surveys, as long as proper methods were used and the materials were introduced through an expert in the field of opinion research.<sup>61</sup> In *R. v. Sudbury News Service Ltd.* the Ontario Court of Appeal said that the manner and circumstances in which printed material

was distributed were also relevant to the community level of tolerance.'<sup>61</sup> In *R. v. Times Square Cinema Ltd.*,<sup>162</sup> the community standard was described as the instinctive sense of decency of the average contemporary Canadian. The Court in *R. v. MacLean and MacLean (No. 2)* identified the relevant factors to be taken into account where theatrical performances are challenged:

(1) the locale of the performance; (2) the forewarning of the public of the nature of the performance; (3) the condition of admission; (4) the size and nature and the extent of the reception of the audience to the particular performance and to similar performances.<sup>163</sup>

The Court added that the performer's purpose in giving the performance should also be considered.

<sup>156</sup> [1964] S.C.R. 251, [1964] 3 C.C.C. 1, rev'g *Dominion News*, supra note 115. <sup>157</sup> *Supra* note 115, at 116-17, 42 W.W.R. at 79-80.

<sup>158</sup> *Supra* note 128.

<sup>159</sup> [1978] 1 S.C.R. 951, 76 D.L.R. (3d) 1.

<sup>160</sup> *Supra* note 57, at 265, 75 W.W.R. at 599.

<sup>161</sup> 18 O.R. (2d) 428, at 435, 39 C.C.C. (2d) 1, at 8 (C.A. 1978).

<sup>162</sup> [1971] 30.R. 688, 4 C.C.C. (2d) 229 (C.A.).

<sup>163</sup> 1 C.C.C. (3d) 412, at 414-15 (Ont. C.A. 1982), *leave to appeal denied* [1982] 2

S.C.R. x, 1 C.C.C. (2d) at 412n-13n.

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## 2. A Feminist Critique of the Community Standards Test

The community standards criterion appears, at first blush, to fulfil the requirement of the web. Judicial analysis of the impact of obscene material on the community seems to address women's need to have the court look beyond the narrow confines of strict legal interpretation at evidence of real harm to real people. However, the test has not in fact fulfilled this function.

<sup>164</sup> It has resulted in a downward spiral of increasing permissiveness because the only evidence actually considered comes from the side of the ladder. As support for the liberal ideology grows, it has become increasingly difficult for the courts to find material "obscene" on the basis of the old-fashioned conservative view. When the view from the web is not heard, <sup>165</sup> there is very little, in a permissive society, that can be found to be obscene.

Experts often testify to the community's increasing tolerance of sexual material by referring to its widespread availability. For example, in *R. v.*

*Campbell*, the judge commented that "[t]he evidence of Professor Haines was to the effect that all of these periodicals were acceptable to the community and that their availability on the news stands indicated such".

<sup>166</sup> Chief Justice Freedman also used widespread availability as one of his reasons for judgment:

In a situation where films of the "skin-flick" character are being shown in various parts of Canada - with the apparent acquiescence of the agencies of prosecution - it would be particularly unfair to proscribe "Last Tango" as obscene. <sup>167</sup>

This method of analysis is circular. Offending material cannot be taken off the streets until it is deemed obscene, but if it is on the streets it cannot be obscene because its presence indicates that the community accepts it. Since most pornography is imported <sup>168</sup> into Canada and because the standards applied under the *Customs Tariff*<sup>169</sup> were less stringent than those in the *Criminal Code*,<sup>170</sup> standards were constantly lowered and foreign pornographers were provided with an incentive to flood the Canadian market with increasingly "harder-core" material. When acceptance into the marketplace is the admissible evidence of

<sup>164</sup> However, the new development in the case of *R. v. Wagner*, *supra* note 147 is encouraging.

<sup>165</sup> Except in *Pei-Yuan v. The Queen*, 8 C.C.C. (2d) 399, 30 D.L.R. (3d) 57 (B.C. Ct. Ct. 1972).

<sup>166</sup> 17 C.C.C. (2d) 130, at 135 (Ont. Ct. Ct. 1974) (Fogarty J.).

<sup>167</sup> *Supra* note 116, at 197, [1974] 3 W.W.R. at 315.

<sup>168</sup> Fox, *Obscenity*, 12 ALTA. L. REV. 172, at 212-13 (1974).

<sup>169</sup> R.S.C. 1970, c. C-14. The standard of "indecent and immoral", having been struck down by the Federal Court of Appeal in *Luscher*, *supra* note 67, was recently replaced by the *Criminal Code* standard discussed at note 68 and accompanying text, *supra*.

*See supra* note 165.

<sup>170</sup> R.S.C. 1970, c. C-34.

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community standards, a two-way relationship develops between the judiciary or other censoring bodies on the one hand and authors, publishers and producers on the other. What "just makes it" today is the standard fare tomorrow, which in turn will be used to determine what can "just make it" the day after tomorrow.

Another aspect of the pornography trade that the "marketplace" analysis overlooks is the fact that large quantities of pornography are smuggled into the country. <sup>171</sup> Often numerous copies are made for distribution and sale. <sup>172</sup> These materials then circulate in the community. To use the mere presence of these materials as evidence of community

standards is to abdicate the responsibility of applying any standards at all.

The trial judge in *R. v. Odeon Morton Theatres Ltd.* recognized the problem of this downward spiral of standards. He said:

What must surely be the concern of the judiciary is that wittingly or not, by being the final arbiter in the assessing of prevailing community standards of acceptance with each decision, in a sense, a new level of acceptance, is, so to speak, officially sanctioned; which then in turn encourages even further degrees of permissiveness to evolve. While the law simply demands that courts mirror the prevailing community standards, by this argument they indeed become allies to the cause of increasing and legal exploitation of sex.<sup>173</sup>

The Court of Appeal disagreed, stating that there were at least as many convictions for obscenity as there were acquittals.<sup>74</sup> The Court failed to recognize that the number of convictions does not necessarily address the issue of lowering standards of permissiveness.

In obscenity cases involving theatrical performances, judges often look to audience reaction as a measure of community standards. In *R. I. Kleppe*, the Court held that:

The law now seems to say that if a performance does not offend the audience that chooses to watch it, it is not obscene. Is simulated sexual intercourse before an uncomplaining audience obscene? Who is being offended? Is it as bad and as offensive as a man who, much to the displeasure of those around him on a bus, insists on smoking a very cheap and foul-smelling cigar?<sup>175</sup>

In *R. v. Heathcote*,<sup>176</sup> the judge dismissed charges against participants in a performance because the twenty-six men who attended the show did not seem offended in the least by the women's actions. In *R. v. Gray*,<sup>177</sup> a case involving a charge of public nudity, the judge found that there was

<sup>171</sup> *Supra* note 80, at 1168-69.

<sup>172</sup> J. RIDDINGTON, *supra* note 109, at 19.

<sup>173</sup> *Supra* note 116, at 198, [1974] 3 W.W.R. at 316 (Monnin J.A.), *citing* the unreported provincial court decision.

<sup>174</sup> *Id.* at 189, [1974] 3 W.W.R. at 308 (Freedman C.J.M.).

<sup>175</sup> 35 C.C.C. (2d) 168, at 174 (Ont. Prov. Ct. 1977).

<sup>176</sup> (Unreported, Ont. Prov. Ct., Jul. 1982).

<sup>177</sup> 65 C.C.C. (2d) 353 (Ont. H.C. 1982).

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evidence to indicate that the appellant's performance did not offend public decency, that it was tolerated "in the milieu in which it occurred" and that none of the spectators, who were a consenting, adult audience, showed any disapproval of it.

When this evidence is used to determine community standards, the standards of those who would not attend such performances are ignored.<sup>17</sup>

<sup>8</sup> Studies indicate that pornography is produced for, and caters to, the male consumer. <sup>179</sup> It is also true that most of those involved in the manufacture and control of pornography are male. The manufacturers, the police, the expert witnesses, the prosecutors and the judges, are key participants in the determination of community standards. Women are not heard when it is decided whether or not there has been "undue" exploitation of the female body. <sup>180</sup> By applying the community standards test in the manner described above, judges are 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 a recent case where women were called upon to testify as to community standards, defence counsel argued that their evidence should be disregarded because they were presenting a "fashionable notion of militant feminism". <sup>181</sup> To his credit, Mr. Justice Borins responded:

A woman does not have to be a "militant feminist" to be intolerant of what is portrayed in many of the films before the court. Nor does a woman have to be a "militant feminist", or any other type of feminist, to believe that the distribution of such films would be unacceptable on the basis of current community standards. She need only be a person who respects the dignity of life and rejects those who seek to degrade it. <sup>182</sup>

Another problem associated with the community standards test is that the Crown is not required to adduce evidence of community standards. <sup>183</sup> In light of the lack of sensitivity and awareness sometimes

<sup>178</sup> In most of the leading cases on obscenity, evidence of community standards put before the courts has been from male expert witnesses. *See, e.g., Coles, supra* note 128; *Prairie Schooner, supra* note 57; *Brodie v. The Queen, supra* note 127; *Delorme v. The Queen, supra* note 135; *R. v. Great West News Ltd., [1970] 4 C.C.C. 307, 72 W.W.R. 354 (Man. C.A.); Dominion News, supra* note 115.

<sup>71</sup> Kutchinsky, *Pornography in Denmark - A General Survey of Censorship and Obscenity*, in *CENSORSHIP AND OBSCENITY* 76 (R. Dhavan & C. Davies eds. 1978). <sup>180</sup> There are some exceptions to this approach. In *R. v. Campbell, supra* note 166, the Ontario County Court said that those who voluntarily attend performances do not set community standards. The Ontario Provincial Court in *R. v. Giambalvo, 63 C.C.C. (2d) 122 (Ont. Prov. Ct. 1981), rev'd 39 O.R. (2d) 588, 70 C.C.C. (2d) 324 (C.A. 1982)*, also held that generally accepted standards of modesty and decency could not be set aside merely to pander to the tastes of people who attended the performance. <sup>181</sup> *Supra* note 142, at 56.

<sup>182</sup> *Id.*

<sup>183</sup> *See, e.g., Coles, supra* note 128; *Brodie v. The Queen, supra* note 127; *Great West, supra* note 178.

displayed by witnesses and judges to the views that women generally hold, it would be preferable if the Crown was required to adduce evidence of community standards, provided that the evidence adduced represented the whole community and not just the male portion of it. As Mr. Justice Dickson (as he then was) stated, "It]he area is treacherously subjective".<sup>184</sup>

Mr. Justice Shannon in the *Wagner*<sup>185</sup> case identified an inherent weakness in the community standards test when it is used to describe the general attitudes of Canadians to obscenity. An expert witness for the defence testified that Canadians generally are very liberal when it comes to judging what sexual materials their neighbours can consume. However, he also admitted that most Canadians are unaware of the content of modern pornography. Mr. Justice Shannon concluded from this admission that, if most Canadians are unaware of what they profess to tolerate, such uninformed attitudes have little value as indicators of community standards. By using this mode of analysis, Shannon J. seems to be questioning the "presence in the marketplace" criterion as an indicator of community acceptance. Arguably, he is suggesting that in the future, the evidence of informed citizens or citizens' groups be treated as more accurately reflective of community standards than the evidence that traditionally has been relied upon. If this analysis is followed in future cases it will encourage the Crown to call evidence of community standards from informed sources.

#### *D. Conclusion*

If the community standards test is to be used to determine what will or will not be banned, a greater effort should be made to determine what the standards are in the real community, one composed of both men and women. Otherwise, the *laissez-faire* attitude toward community standards, where men generally establish what is acceptable, assumes that there is only one kind of social experience and interpretation. The morality of the web, which abhors violence, coercion, degradation and child abuse, is not adequately reflected in the community standards that so far have been defined in the case law. Susan Brownmiller succinctly states the feminist standard: "We are unalterably opposed to the presentation of the female body being stripped, bound, raped, tortured, mutilated and murdered in the name of commercial entertainment and free speech."<sup>186</sup> If evidence were required from a truly representative sample of the community in order to determine the community standard, the courts would arrive at a more complex construction of human

<sup>184</sup> R. v. Great West News Ltd., *id.* at 309, 72 W.W.R. at 355.

<sup>185</sup> *Supra* note 147.



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experience. The moralities of both separation and attachment would be brought to bear on the obscenity issue and, more important, the courts would recognize the integrity of two separate approaches to existence that represent equally valuable truths.

To continue to emphasize explicit sex as the governing criterion<sup>for</sup> "undue exploitation of sex" in the definition of obscenity, is to use a consideration that is irrelevant in light of modern pornography and modern morality. The elements of crime, horror, cruelty and violence in the sexual context are of far greater importance. Two alternative interpretations of subsection 159(8) are possible.

First, "undue exploitation" in subsection 159(8) could be interpreted as applying only to "undue exploitation of sex". The remainder of the section, which reads, "[o]f sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene"<sup>187</sup> could be interpreted as not requiring "undue exploitation". This interpretation makes sense because if undue exploitation of sex (i.e., explicit sex) is the governing factor for an obscenity ruling, then the words following "or" are superfluous. Furthermore, it is arguable that if the drafters of the legislation intended to have the words "undue exploitation"

modify all the subsequent words, they would have put a colon after the words "exploitation of" and then listed the proscribed grounds. The difficulty with this interpretation, however, is the presence of the word "of" before the words "sex and any one or more of the following". Grammatically, "of" properly refers to "undue exploitation". Furthermore, to eliminate the words "undue exploitation" as a modifier would be to eliminate the community standards test from the latter half of the definition. This result could create more problems than it would solve.

A second, and perhaps more workable solution would be to consider material containing sex and violence or any one of the other enumerated criteria as a different kind of obscenity in which the "undueness" requirement could be satisfied by something less than explicit sex. Arguably, the presence of the other elements of violence, crime, horror and cruelty add a different meaning to the words "undue exploitation". This argument is particularly persuasive when one considers scientific evidence that certain depictions of violence in a non-explicit sexual context can be harmful.<sup>188</sup> Through this interpretation, depictions that do not include explicit sex, but which are nevertheless violent, degrading or dehumanizing

could be found to be obscene. The approach taken by Borins, Ferg and Shannon JJ. and now the British Columbia Court of Appeal is a step in the right direction.<sup>189</sup> By focusing on the degradation and dehumanization of those portrayed in pornography they have added

<sup>187</sup> *Criminal Code*, R.S.C. 1970, c. C-34, sub. 159(8).

<sup>188</sup> See notes 90-110 and accompanying *texts supra*.

<sup>189</sup> See notes 137-39, 151, and accompanying *texts supra*.

an important element of context that goes some way to protect the interests of women.

The *Wagner*'<sup>90</sup> decision has future ramifications for films shown in commercial theatres. While the Court dealt only with highly sexually explicit films, of a type not usually shown in commercial theatres, it is arguable that its reasoning could be applied to less explicit commercial films that degrade and dehumanize people. By stressing context rather than explicitness, Mr. Justice Shannon gave the impression that he would have found the videos obscene even if they had not contained explicit sex. At one point in his judgment he commented on *The Story of O*, a commercial film offered by the defence as evidence of community standards because it had been approved by the Alberta Board of Censors.

Mr. Justice Shannon in describing the film adopted the words of an expert witness: "It's one of the most violent and degrading films that I have come across in a long time because the woman submits to incredible brutality and abuse."<sup>191</sup> Although it was not necessary for him to pass judgment on *The Story of O*, his statements, when read with his general comments regarding the context, indicate that he would have found such a film obscene.

## V. CONCLUSION

The concepts of separation and attachment to a great extent shape the pattern of our lives. Professor Gilligan describes their part in reproduction and human development. Because of the different roles that separation and attachment play in the formation of their sexual identity, men and women embody different truths. For the former, separation defines and empowers the self; for the latter, the ongoing process of attachment creates and sustains the human community.<sup>192</sup> The egalitarian principles of the *Canadian Charter of Rights and Freedoms* guarantee equal citizenship for all Canadians. The idea of citizenship that emerges from our

present obscenity laws, however, confirms the citizenship of men at the expense of women. The male view, which values separateness and non-interference, is the one that enjoys the most protection in the law of obscenity. Individual rights and zones of personal non-interference are assiduously but narrowly protected. Cultural harms are largely ignored, with the result that the integrity of the female experience and female morality is not recognized.

Short of amending the present obscenity provisions in the *Criminal Code*, any significant and meaningful change must come from the

<sup>190</sup> *Supra* note 147.

<sup>191</sup> *Id.*

<sup>192</sup> *Supra* note 12, at 156.

<sup>193</sup> R.S.C. 1970, c. C-34.

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courts. To make the "clear and present danger" test the determining factor in deciding whether limits on freedom of expression in pornography are justified would be to ignore the changing role of women in society as well as their perception of justice and morality. Use of this test would ignore precedent and would set a standard that cannot address the very significant social harms scientifically determined and accepted by several government commissions.

The community standards test should be abolished in its present form. As it is applied now, it rarely represents the community standards of people who do not consume pornography, nor does it reflect the standards of web morality. It fails to address the concept of harm articulated by feminist philosophers and commentators and demonstrated by social scientific research. Furthermore, evidence of availability in the marketplace, admissible as evidence of community standards, encourages proliferation of increasingly "harder-core" material in Canadian society. Prevalence in the community should not be considered a relevant factor in identifying community standards.

A number of laws have been altered in recent years in recognition of the fact that the law has not recognized women's interests fairly in the past. Obscenity laws should also change, for in their present state they are outdated and unacceptable. The *Canadian Charter of Rights and Freedoms* is a new legal instrument that provides the courts with an opportunity to create new precedent. The act of judging always requires choices among competing interests. In making these choices, judges and legislators should take into account moral conflict in its particular context. This could lead to a changed understanding of human development and to a

more generalized view of human life.

The association of gender with the web and the ladder is not absolute. The views presented in this article have been described as male/female only to highlight a distinction between the two modes of thought. The focus, regardless of gender, should be on the problem of interpretation, rather than on a generalization about either sex. The ability to discover new approaches to the law is the essence of the "living tree" doctrine often ascribed to constitutional law.

Fear of the unknown often prevents action, yet once changes are made, it is not very long before those changes become a natural and inevitable part of life.