PORNOGRAPHY AS AN ISSUE IN CANADIAN PUBLIC POLICY

by

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ABSTRACT

The federal government is being pressured into formulating new policy on pornography. The government has tried on several occasions to draft legislation which would meet the requirements of lobby groups, the pornography industry, the justice system and the general public. Each attempt at draft legislation has met with considerable criticism and, to date, the 1959 legislation remains in place. The former Liberal government had appointed a task force in an attempt to locate a public consensus and a resolution to the problem. Recommendations of this task force were met with some reservations and were not followed by the Progressive Conservative government which had taken office in the interim. Instead, both of the Justice Ministers under the current administration have introduced bills which reject the liberal approach taken by the appointed task force and, instead, have adopted a far more conservative, puritanical approach to the issue.

This paper presents evidence to support the thesis that the only policy which can effectively resolve the government's dilemma is one which is predicated on the

analogy between pornography and hate propaganda, and thus deals with pornography as a human rights issue. This approach attains legitimacy for the legislation by presenting itself as a compromise position between essentially contestable concepts, since no public consensus can be reached. Moreover, the human rights paradigm is one which is fundamental to the ideology and principles of liberalism, and is therefore consistent with the Canadian public philosophy.

Chapter I presents a discussion of the pornography controversy within the context of Canada's public philosophy. Relying on the writings of Robert Presthus, A. Paul Pross and Ronald Manzer, this chapter argues that public policy in Canada must remains within the parameters of liberalism in order to maintain legitimacy. There follows an analysis of the liberal dialectic and the place of the human rights model within liberal ideology.

Chapter II explores the philosophical arguments underlying the pornography controversy and demonstrates how each of these arguments is rooted in a distinct political ideology. It goes on to argue that, with respect to pornography, the human rights approach provides a philosophical compromise between the three major ideologies represented in the debate, and is consistent with current patterns in Canadian public

philosophy.

Chapter III explores the conceptual and legal frameworks for hate propaganda legislation in Canada. There follows a discussion on the relationship between the regulation of hate propaganda as a policy instrument in preserving social harmony and our multi-cultural heritage, and the protection of civil liberties, in particular, freedom of expression. This discussion takes place within the context of liberal theory and public policy.

Chapter IV explores the hate propaganda model with respect to pornography issues. This chapter looks at the history of obscenity legislation in terms of both public policy and legal principles. The chapter goes on to explore recent jurisprudence on obscenity as compared with policy issues and legal interpretations of hate propaganda legislation. The two are again compared in a constitutional context, with respect to both policy considerations and legal interpretation of the recently entrenched Charter of Rights and Freedoms. The conclusion arrived at is that pornography legislation, if based on the hate propaganda model, would address the major issues raised by all three philosophical perspectives, and in addition would achieve a high degree of congruence with both the technical requirements and the underlying policy of the Charter.

The Conclusion presented in Chapter V seeks to relate the approach herein proposed for pornography with social policies in related areas over the past decade.

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CHAPTER I

THE PORNOGRAPHY CONTROVERSY

State intervention in the area of so-called obscene material is neither peculiar to Canada nor unique to modern times. Since the early nineteenth century, British common law had dealt with "obscene libel" as a criminal offence and, even prior to that time, a system of licencing had served as an effective form of pre-censorship.[1] Indeed, in ancient Rome, senators were entrusted with protecting the masses from inappropriate material, both sexual and political, and meting out punishment to the perpetrators.[2]

The publication and distribution of obscene material has been a criminal offence in Canada since 1892.[3] Over the years there have been a number of swings of the pendulum from puritanism to permissiveness. The so-called "sexual revolution" of the 60s brought a period in which restrictions on sexual materials were seen as both unnecessary and unjustified. Public opinion had turned against state paternalism in sexual matters. There was a general belief that the government should relinquish its role in "victimless crimes" such as prostitution, homosexual behavior and pornography.

However, some regulation of pornography will continue to be necessary in the foreseeable future. There is a limit to what society will accept. There is a point at which, in our liberal democratic society, the state will step in and say "enough"; "a point at which liberty becomes licence."[4] Government's dilemma is to find an approach which accords with societal mores and, within that context, to formulate social policy to coincide with that point. The federal government must act quickly; the existing legislation must be replaced without further delay.

The main body of legislation on sexually oriented material is found in the Criminal Code of Canada under the heading, "Offences Tending to Corrupt Morals". The relevant sections of the Code refer to obscenity, a vague term which has been applied to a number of non-sexual as well as sexual depictions. In contrast, the term pornography is usually associated with titillating depictions presented as a form of entertainment. A useful definition is provided by D. F. Barber in his book Pornography and Society:

> [Pornography is] a generic term to denote various forms of entertainment which present, celebrate and focus attention unequivocally on the genitals and intercourse. It must, of necessity, also include the depiction of various sexual perversions, irrespective of whether they include nudity and the display of genitals.[5]

In its present form the obscenity provisions of the Criminal Code are both anachronistic and obsolete. The statutory definition of obscenity in sub-section 159(8) of the Code was enacted in 1959 and remains substantially the same to this day. Societal values and attitudes have undergone considerable change since 1959, particularly with respect to sexual behavior, and a re-evaluation in lights of contemporary societal mores is essential. At the present time, the efficacy of the legislation is being seriously questioned, as the justice system attempts to apply outdated criteria to contemporary pornographic material. This problem will be discussed in greater depth in Chapter IV.

A second reason for an early review of the existing legislation on obscenity concerns the newly enshirned Charter of Rights and Freedoms. The obscenity provisions in the Criminal Code and other related legislation regulating pornographic material have been held to encroach on freedom of expression, a liberty specifically protected by the Charter. Although the Criminal Code provisions have not, as yet, been ruled unconstitutional, similar legislation has been ruled invalid by the courts. The status of the obscenity provisions is still in question, as will be demonstrated in Chapter IV.

The third major element necessitating decisive action by the legislature concerns the public perception of the current situation. Numerous lobby groups have formed over the past five years to bring to the attentions of the government the public's demands for stricter control of pornographic materials. These demands have received considerable attention from the media, and have been exacerbated by complaints of inconsistent judgments, contradictory guidelines and arbitrary prosecutions from police, the legal profession, judges and the pornography industry itself. Government inaction in response to such widespread and vocal criticism of existing legislation creates lack of confidence in both the administration of justice and the government itself.

The pornography issue is proving to be one of the most troublesome problems facing the federal government in this decade. First under Pierre Trudeau's leadership and then under the Conservative government, assurances have been given both to interest groups and to the general public that the requisite changes were immediately forthcoming.[6] While the Liberals were in power, Mark MacGuigan, then Minister of Justice, had circulated a proposed amendment which dealt with changes to the Criminal Code with respect to both pornography and prostitution.[7] At the same time, a committee headed

by Vancouver lawyer, Paul Fraser, Q.C. was appointed and given a mandate to canvass public views on these two issues, a move which signified that the problems had proven more complex than anticipated.[8] The Fraser Committee conducted a series of public meetings across the country in 1985, and tendered its recommendations to John Crosbie, then Minister of Justice under the newly elected Conservative government, in 1986. Barely acknowledging the Fraser Report, Crosbie plunged in with the infamous Bill C-114, but was subsequently transferred to another ministry. On May 4th, 1987 the current Justice Minister Ramon Hnatyshyn introduced Bill C-54 in the House. The successor to Crosbie's bill is based on a similar philosophy and is, in some ways, even more draconian.[9]

At first blush, the pornography issue seemed to be simply a question of whether or not to add further restrictions to the existing Criminal Code provisions which pertain to pornography. The debate seemed to be polarized between those who defended civil liberties and those who thought the industry "had gone too far" in its constant use of violent depictions: sex should not be repeatedly shown in conjunction with violence, particularly since there was already a problem with excessive violence in the media. There had also been concern expressed regarding the public display of

sexually-oriented material. Children should not be exposed to these "adult" materials, nor should people be made to feel uncomfortable or embarrassed by being confronted with visual images which they personally find offensive.

As the debate received more time and attention from the media and the public became more aware of the controversy, it became apparent that there was no consensus among those who were pressing for stronger governmental regulations of pornographic material.[10] The first symptom of this problem was the fact that various definitions of pornography had been proposed and these definitions were clearly quite different. As the debate progressed, there were other indications that, although there was strong public opposition to the existing state of affairs, both the issues which were identified and the solutions proposed were quite disparate. As David Copp, co-editor of a recent publication on this topic pointed out:

> Conceptions of pornography do in fact differ quite widely. And even when conceptions of pornography are similar, there are differences in what things are counted as pornographic. It could be that two people share a single conception of pornography as, say, sexually explicit depictions that violate the proper cannons of modesty; yet, because of different beliefs about the canons of modesty, they differ on whether a particular depiction is pornographic. . . These two kinds of

> disagreement cause confusion and, in fact, may make it misleading to describe the debate as a debate about pornography. The latter description may suggest, perhaps falsely, that one specifiable kind of phenomenon is the sole subject of debate.[11]

An examination of the arguments advanced against the dissemination of adult pornographic material confirms that the problem is not simply one of semantics.[12] The public is divided on philosophical grounds: views on the issues raised with respect to pornography stem from a value-system or paradigm which also includes a set of views on various social institutions such as the family and the church, and on fundamental questions on the role of the state. Ultimately, these grounds differ both in their assessment of the societal problems which are caused by pornographic materials and in their motives for attacking pornography. They differ not only on the means to achieve their goals but on the goals themselves.

Sir Isaiah Berlin, noted British philosopher and theorist once said:

> Where ends are agreed, the only questions left are those of means, and these are not political but technical, that is to say, capable of being settled by experts or machines like arguments between engineers or doctors.[13]

The fact that there is no public consensus on pornography, but a number of competing positions, requires that the government adopt a policy which effects a compromise between these positions. That the nature of these differences is not merely a question of means but of philosophies necessitates a philosophical compromise as well as a technical one. I intend to show evidence to support the thesis that the choice of public policy on pornography must be found within the parameters of liberalism and that, for both philosophical and technical reasons, pornography should be dealt with as a form of hate propaganda against women.

The 'public philosophy' of a society defines the parameters within which a polity functions - the over-arching hegemony which governs societal values and expectations. Samual Beer points out that it is the system of beliefs and values and accepted symbols which provide legitimacy for those governing and for the policies they implement.[14] For the governed to obey the laws set down by the governors without recourse to constant force and coercion, the state must operated in both procedures and substance, within the boundaries of the prevailing public philosophy.

How, in practical terms, does a government insure that its policies are consistent with prevailing

societal values and beliefs? In Canada, the process of policy formulation is often viewed in terms of an informed political elite which shapes and implements public policy as it both interprets and influences public opinion. This political elite, according to Robert Presthus, is made up of three sub-elites, viz. legislators, upper-level bureaucrats and interest group leaders who, as a whole, possess "disproportionate shares of such scare political resources as legitimacy, expertise, continuity, access and power."[15] The interactions between the three sub-elites plays a significant role in the process of policy formulation.

> In sum, our empirical analysis of interest group interactions with both legislators and higher bureaucrats suggests that both the substance and the implementation of public policy in Canada are largely shaped by accommodation among three political elites, comprised of legislators and higher bureaucrats and the leaders of major interest groups. . . . [I]t seems clear that in operational terms the national political process is essentially one of continual ad hoc bargaining and compromise, in which the resolution of the claims of a bewildering variety of interests is often the major activating force in the behavior of governmental elites. At the very least, Government's policy initiative is virtually always shared with members of the [interest group] elite.[16]

Within this process, the interest groups act as a conduit between the government and the public,

aggregating public opinion on a specific issue, communicating public demands and opinions to government, and in turn, providing government with public reaction to its proposed policies. The end result is not only the formation of policy, but the mobilization of public opinion and the legitimizing of the policy in question.[17] As a consequence public policy remains consistent with the prevailing public philosophy.

Ronald Manzer, in his recent book, Public Policies and Political Development in Canada, demonstrates that, since the end of its colonial status, Canada's public philosophy has been liberalism. Professor Manzer demonstrates the patterns of Canadian public philosophy by reviewing governmental policy decisions from the nineteenth century to the 1980's. Assuming that governmental decision-making conforms to prevailing public philosophy, he traces the patterns of public policy in six pivotal areas.

> [My purpose is] to describe the substance of policies as they have been made over time and to interpret the political ideas and beliefs that appear to be implicit in them. The historical record covered here sets out what federal and provincial governments have done to promote economic development, relieve poverty, regulate markets, control crime, build school systems, and protect human rights. The policies that comprise this record . . . can be analysed in terms of standard concepts of political ideology and their patterns can be interpreted as

> collective responses to enduring questions of human need and political good in the Canadian polity.[18]

Professor Manzer adopts Samuel Beer's definition of "public philosophy".

> Samuel H. Beer defined a public philosophy as 'an outlook on public affairs which is accepted within a nation by a wide coalition and which serves to give definition to problems and direction to government policies dealing with them.'[19]

Within this "coalition" may be found one or more political ideologies. Manzer acknowledges that the Canadian public philosophy has been formed by a number of political ideologies: "traditional conservatism, anti-democratic liberalism, protective liberal democracy, developmental liberal democracy, and non-Marxist social democracy,"[20] but argues that the resulting philosophy is liberalism.

> [T]he conclusion is clear: liberalism is not just the core, it is the essence of the Canadian public philosophy. Traditional conservatism and socialism make distinctive though limited contributions to the substance of Canadian public policies; but after the French colonial regime and the first few years of the British colonial regime, public policies in Canada were based overwhelmingly on liberal ideas, beliefs, and values.[21]

Manzer's argument is based on the models proposed by C.B. Macpherson. Macpherson envisaged four stages

in the evolutionary progression of liberal democracy: "anti-democratic democracy," "protective democracy," "developmental democracy,"and "participatory democracy", the first three stages serving as a prelude to participatory democracy.[22] Manzer views the last two stages as repetitions of the first two: a repeating fluctuation between protective and developmental democracy which began after an era of "non-democratic democracy", the liberalism of the seventeenth and eighteenth centuries from Locke to Burke.[23] Manzer incorporates Macpherson's first two models into his own scheme of the liberal dialectic.[24]

Professor Manzer has demonstrated that public policy in Canada has, since colonial times, remained consistent with the tenets of liberalism. He has gone beyond this to argue that, over this period of time, there have been fluctuations within the patterns of public policy, fluctuations which can be explained in terms of the liberal dialectic. According to Manzer, the development of public policy in Canada can be characterized as a fluctuation between "economic" and "ethical" liberalism.

The notion of two competing versions of liberalism is subscribed to by many liberal theorists. John Dunn maintains that the conflict originated with the writings of "James Mill's hapless son, John Stuart Mill."[25]

> The attempt to integrate intellectual traditions so deeply and explicitly inimical to one another was not in principle a very promising one in prospect; and it certainly did not belie this lack of promise in its actual execution. But it was a strikingly brave attempt and some of the discrete fragments of thought which it left behind still have a notable power to move the imaginations (or at least the feelings) of those who find liberal values attractive.[26]

These contradictions have been examined by a number of highly respected liberal theorists. The terms "positive and negative liberty" have also been frequently applied to describe and explain the liberal dialectic. Perhaps the most eminent proponent of this view is Sir Isaiah Berlin, whose paper, "Two Concepts of Liberty" will be cited throughout this paper. A third model postulates a version of liberalism which shares with both conservatism and socialism a number of co-operative or "collectivist" characteristics. In this model, the liberal dialectic is seen as a conflict between the individualism typically associated with liberalism, and these collectivist aspects.[27] Although these three models differ in their explanations and interpretations, the concepts they represent are very similar in essence.[28] All three models will be considered in examining public attitudes and policy options with respect to pornography.

Professor Manzer explains Canadian public policy in terms of ethical and economic liberalism. From the writings of J. S. Mill, he selects the "moral vision" which focusses on the development of human potential:

> In [John Stuart] Mill's theory of liberal democracy, 'the good society is one which permits and encourages everyone to act as exerter, developer, and enjoyer of the exertion and development of his or her own capacities.[29]

In contrast, the components of economic liberty focus on the marketplace, and on the competitive aspects of human nature:

> For "liberal" can mean freedom of the stronger to do down the weaker by following market rules; or it can mean equal effective freedom of all to use and develop their capacities. The latter freedom is inconsistent with the former.[30]

While Manzer appears partial to the ethical version of liberalism, his argument makes clear that the forms of liberalism are like two side of a coin; both are an integral part of the whole.

Although Professor Manzer reaches the conclusion that "liberalism is the essence of the Canadian public philosophy," that is not to say that liberalism is the sole ideology of Canadian society. It will be recalled that Manzer defined <u>public philosophy</u> as a "coalition". Manzer acknowledges that other ideologies continue to affect public policy, but he argues that, although these

influences impinge upon the decision-making process, the policies which result are unquestionably liberal. Public health insurance, for example, was introduced in Saskatchewan as a result of CCF/NDP social democratic policy. When universal health insurance was instituted on a national basis, however, it was done as part of a post-war program of welfare state measures: an overall shift to ethical liberalism.

> The social democratic commitments of CCF and NDP governments in Saskatchewan gave health-policy a direction and priority that might otherwise have been lacking, but the establishment of national insurance programs depended ultimately on the long-term commitment of liberal policy-makers.[31]

Economic liberalism and ethical liberalism can not be seen as polarized views in opposition to each other; rather, they are poles at either end of the spectrum along which governmental policy-making shifts toward one end or the other. "The post-war policy-making system," he contends, "has been governed by a tenuous conjunction of economic and ethical liberalism."[32] The question then, is one of priorities on either one set of values or the other.

> [L]iberalism contains within itself the contradictions of the human condition: . . . liberalism still shows its original tendency to see people as selfish, calculating, atomistic individuals who are motivated primarily by their material interests. On the other

> hand, liberalism assumes in principle the worth and dignity of each person and aspires to provide each person's basic needs for welfare, safety, belongingness, respect, and freedom.[33]

Professor Manzer's findings demonstrate the importance of a public policy which is consistent with the Canadian public philosophy. His conclusions indicate that this philosophy is liberalism. But the form that liberalism is to take, whether the shift is toward the ethical version with its focus on self-development and a welfare state, or toward economic liberalism with its marketplace economy, will determine the choices in public policy and the degree of state intervention. The public philosophy is, in turn, affected by other factors: economic factors such as the Great Depression and the failure of Keynesian theory, and political and sociological factors such as the cataclysmic impact of the Second World War. The philosophical response to these factors will also be affected by forms of liberalism in other countries, particularly Britain and the United States, and the strength of ideologies such as conservatism and socialism found within our own philosophical coalition.[34]

The question of pornography is one which drives a wedge between the various ideological positions which

together make up Canada's public philosophy. While the pornography debate did not carve and isolate these ideological schisms, it is a volatile and emotional issue which has served to augment the cleavages. Manzer's findings make it clear that the public philosophy has a direct bearing on the decision-making process, although this may often be a result of unconscious collective responses by the decision-makers.[35] However, as the positions have already crystallized on the pornography debate, and because the issue is a focus for public attention and public concern, it is essential that the new policy on pornography reconcile the various ideological positions.

A philosophical compromise on pornography must take into account the conservative voice which has recently garnered strength in Canadian society. Although far more prevalent and vocal in the United States, this voice has recently had a considerable impact on Canadian social policy. Chapter II will present evidence for the proposition that treating pornography as hate literature presents a compromise between the position taken by the conservatives on the one hand, and the economic or autonomistic liberals on the other; a compromise which comes down squarely within the liberal dialectic. 'Economic' or 'negative' liberalism lies in opposition to state intervention unless rendered necessary in

accordance with the 'harm principle'. In the case of the pornography debate, this paradigm is manifested in both the civil libertarian position which is opposed to any regulation, and, for those liberals who view pornography as a danger, in the cautious acceptance of minimal regulation for those aspects of pornographic material which can be shown to cause harm. The antithesis of this is the conservative position, in which the state plays a pivotal role in upholding social institutions of church and family, in preserving a prescribed view of morality, and in protecting those who may succumb to corrupt influences. Between these polarized views lies positive or collectivist liberalism, a position which validates state intervention when used to foster and uphold human dignity, equality of opportunity and individual and collective development.

Chapter III will show that government regulation of hate propaganda can be legitimized in a liberal state if it can be shown that such regulation hinders divisive attitudes, counteracts discriminatory practices and fosters minority group self-respect and self-development. Government regulatory measures are considered to be valid state functions when enacted as part of a policy to promote human rights. At that point, such regulation is legitimized and entitled to be

weighed on its merits against the benefits of free speech. These philosophical questions have already been deliberated upon in Canada following the 1965 report of the Cohen Committee, a task force appointed to investigate the problem of hate propaganda. The Committee had premised its recommendations on the following basis:

> The prevailing view in Canada is that freedom of expression is a qualified right, representing the balance that must be struck between the social interest in the full and frank discussion necessary to a free society on the one hand, and the social interests in public order and individual and group reputation on the other hand.[36]

During the public debate which preceded the 1970 enactment of legislation based on the Committee's recommendations, there was ample opportunity for the Canadian public to weigh these conflicting values.

Chapters II and III demonstrate that the hate propaganda approach provides a philosophical compromise. Broadly speaking, this compromise can be viewed in terms of the liberal concern for dignity; a notion which is central to liberalism in all of its forms. Chapter II argues that the concerns regarding the violence and degradation which characterize contemporary pornographic material can be addressed through a policy promoting equal opportunity, the 'positive liberty' approach, rather than as a moral issue, as the conservative lobby

would have it. Chapter III demonstrates that 'negative liberal' concerns regarding proof of harm can, in our Canadian society, be weighed against 'positive liberal' values such as promoting tolerance, self-worth and social harmony. The human rights approach to pornography can replace the current moralistic approach to sexual activity with a policy designed to regulate material which denigrates women.

Chapter IV examines this philosophical position from a technical perspective.[37] The current criminal law is unsatisfactory because it does not set out the element of the crime of obscenity but instead, leaves it to the individual judge or jury to, in each case, lay down the legal criteria before make a determination of guilt or innocence. Apart from the problems this situation poses for law enforcement agents, it is manifestly unfair to both the accused and the members of the public who feel victimized. For this reason constitutional attacks on the obscenity provisions should rightly be upheld.

Viewing the obscenity provisions from the perspective of social policy reveals that the intent of the legislation neither addresses current issues nor reflects prevailing attitudes and values. The fact that the obscenity provisions appear under the Criminal Code head, "Offences Tending to Corrupt Morals" indicates a

moral and ethical approach to pornography which does not reflect the prevailing view that the state should not dictate morality and is particularly offensive to those who are pressing for stronger controls on other than moral grounds. Moreover, the current provisions do not look at questions of visibility and accessability, which were sometimes considered under the former Hicklin Rule, nor do they take into account the attitudes toward sex and sexual relationships which many lobbyists consider the most virulent aspect of sexual entertainment. With respect to the latter, it is significant that terms such as "degrade" and "dehumanize" have become key in a number of recent judicial decisions. However, to ensure that the courts render decisions which are consistent with prevailing attitudes and the criteria used are the same for all federal statutes pertaining to pornography and are applied uniformly throughout the country, specific legislation must be passed.

Chapter IV presents a short review of the existing legal framework and jurisprudence on obscenity legislation. Following this it will be shown how the hate propaganda approach can be fitted within the existing body of jurisprudence, including the principles enshrined in the new Charter of Rights and Freedoms as judicially interpreted. This examination will demonstrate that the hate literature approach is not

only a philosophical compromise but also a technical compromise which is compatible with both the principles and the rules of construction of our legal system.

As will be demonstrated, the afore-mentioned proposals put forward by the Liberal government and by the task force appointed by that government can be characterized, in Berlin's terms, as "technical" solutions. The MacGuigan proposed amendment, apart from a few procedural changes, would have done little to correct the problems of the existing obscenity provisions. The policy underlying current legislation, as developed by the legislators and through judicial interpretation, presupposes that the display of sexual activity at some point becomes "obscene"; whether from a moral perspective or an aesthetic one is of no matter.[38] Regulation of "obscenity" is therefore a question of degree, and to ascertain the point at which the portrayals become offensive or unacceptable, one simply sets up a comparison with prevailing societal mores. The MacGuigan proposal responded to public concerns regarding violent and degrading material by simply including these terms as criteria in the process of determining at what point sexually-oriented material becomes "obscene", i.e., societally unacceptable. It is not unduly critical to describe the provisions contained in the proposed amendments as a band-aid solution.[39]

The Fraser Committee, appointed by MacGuigan, did appear to recognize that philosophical disparities are at the root of the pornography problem, but the Report's recommendations reflect a failure to deal with these competing demands. The Committee identified three disparate philosophies which it labelled "liberal", "conservative" and "feminist":

> [O]ur discussion is intended to present the essential arguments in each of the three approaches, since these are the foundations on which the presentations we heard at the public hearings were based. In addition, these philosophical traditions are at the root of the principles which we believe must inform any attempt to reform our legal and social responses to pornography and prostitution.[40]

Having identified these three ideological components, the Committee then summarily dismissed the "conservative view". It is therefore not surprising that the resulting recommendations were, as one critic put it, "liberal with a healthy dose of feminism."[41] Although the Fraser Report presented a useful analysis of the dominant public ideological positions, the remedies proposed do not follow from this analysis.[42] The Report singled out certain features of pornography which have attracted censure, assessed each feature from a technical perspective, and arrived at a determination of how each of these features, in isolation, were to be treated. The result is a piecemeal collage of draft

legislation which is not internally consistent and which satisfies no one. Philosophical arguments have been extracted from their context and rendered meaningless. These individual fragments have been analysed, compared with other fragments, and either rejected or placed at some point where they are devoid of meaning. This distinction will be discussed in Chapter IV.

Unlike the Fraser recommendations, Bill C-114 is internally consistent. The policy behind the legislation accords well with the paradigm embraced by conservatives. The derision with which this bill was greeted testifies to the fact that, as Manzer demonstrates, public policy must be consistent with liberal ideology.[43] Although the conservative view cannot be treated lightly, the Canadian public philosophy remains fundamentally liberal.

The conservative ideology is a force which cannot be ignored in this decade. This ideology places strong demands on government to regulate social policy, demands which are also in evidence with respect to issues such as abortion, sex education, homosexual and heterosexual promiscuity and prostitution as well as pornography. Government policy on these issues has become the focus of confrontation between those advocating a wide berth for civil liberties and those demanding that the government regulate morality. As Manzer demonstrates,

it is essential that public policy remain consistent with liberal ideology. On this issue of pornography, this requires government intervention, not for purposes of dictating morality as the conservative philosophy would have it, but for purposes of upholding liberal ideals: dignity, equal opportunity and social harmony. On the issue of pornography, this calls for the rationale applied to hate propaganda.

ENDNOTES: CHAPTER 1

1. D. F. Barber, Pornography and Society (London: Charles Skilton Ltd., 1972) at. 22-26. Star Chamber in 1538 forbade the printing of any books without prior approval.

2. Barber, at 20 says political dissenters were often banished by the state under the pretext of punishing writers of obscene material.

3. Neil Boyd, "Censorship and Obscenity: Jurisdiction and the Boundaries of Free Expression," Osgoode Hall L.J. 23 (1984): 37 at 37.

4. R. v. Keegstra (1984) 19 C.C.C. (3d) 254. (Alta. Q.B.).

5. D. F. Barber, at 82. Unless stated otherwise, it will be assumed that the term pornography, when it is used, falls within this definition.

6. See, for example, Mark MacGuigan, letter to Shirley Avril, 24 May 1983, and also Canadian Coalition Against Media Pornography, (CCAMP) "Newsletter No. 2," (June 1983).

7. CCAMP, "Newsletter No. 2" indicates that the proposed amendments are intended as interim legislation pending the recommendations of the task force, struck simultaneously.

8. Minister of Justice and Attorney General for Canada, "Justice Minister Tables Pornography and Prostitution Proposals and Names Special Committee," News Release, Ottawa: 23 June 1983. The task force was struck "because of the apparent absence of public consensus on these issues." at p. 1.

9. Bill C-54, introduced Mon. 5 May 1987 by Justice Minister Ramon Hnatyshyn.

> Mr. Hnatyshyn acknowledged that the intent of his bill is the same as the one introduced last June by his predecessor, John Crosbie.

Patricia Poirier, "New Bill Quickly Criticized: Porn Violators Facing 10 years in Prison," Globe and Mail 5 May 1987, Natl. ed: A1.

10. see Michael Kanter "Prohibit or Regulate? The Fraser Report and New Approaches to Pornography and Prostitution," Osgoode Hall L.J. 23-1 (1985): 171 at 174-175.

11. David Copp and Susan Wendell, eds., Pornography and Censorship (Buffalo: Prometheus Books, 1983) at 16-17.

12. This thesis deals exclusively with the issue of pornographic representations of women. Although the sexual exploitation of children has attracted a great deal of criticism, this issue does not form part the pornography debate. This is both because of the government has dealt separately with policy in this regard, (the Badgeley Commission) and because there appears to be a public consensus that "kiddie porn" should be proscribed.

The question of representation of homosexual men has not been dealt with here because this subject seldom if ever receives public attention. A number of years ago, an article entitled "Men Loving Boys Loving Men" published in a magazine catering to homosexual men, was the subject of public attention, but this could be characterized under sexual exploitation of children. In the Wagner decision, the court noted that the only film under scrutiny which could not be considered either violent or degrading and dehumanizing was a film on homosexuality. This film was held not be not obscene.

13. Isaiah Berlin, "Two Concepts of Liberty," Four Essays on Liberty, London: Oxford UP, 1969 118-172.

14. Samual H. Beer, "Modern Political Development," Patterns of Government, Ed. Samuel H. Beer et al, (New York: Random House, 1973) 26-40.

15. Robert Presthus, Elite Accommodation in Canadian Politics, (London: Cambridge UP, 1973) 17.

16. Presthus at 17.

17. A. Paul Pross, "Pressure Groups: Adoptive Instruments of Political Communication," Pressure Group Behavior in Canadian Politics, Ed. A. Paul Pross, (Canada: McGraw-Hill Ryerson, 1975) 6.

18. Ronald Manzer, Public Polices and Political Development in Canada (Toronto: U of Toronto P, 1985) 18-19.

19. Manzer at 13.

20. Manzer at 180.

21. Manzer at 180.

22. C. B. Macpherson, Life and Times of Liberal Democracy (Oxford: Oxford UP, 1977).

23. Manzer at 18; Macpherson Life and Times at 20. Manzer points out that, in Canadian theory, this doctrine was usually labelled "toryism."

24. Manzer at 193, #22.

25. John Dunn, "Liberalism," Western Political Theory in the Face of the Future (Cambridge: Cambridge UP, 1979) 28-54.

26. Dunn at 48.

27. see Edward Shils, "The Antimonies of Liberalism", The Relevance of Liberalism, Ed. Research Institute on International Change (Boulder Colorado: Westview Press, 1978) 135-200.

28. Although Manzer indicates that both forms of liberalism are based on individualism, (Manzer at 18) Berlin, in his criticism of 'positive liberty' refers to 'collective' or 'organic' aspects (Berlin at 132) not dissimilar from those characterized by Shils as 'collectivistic.'

29. Manzer at 17.

30. Manzer at 18.

31. Manzer at 186.

32. Manzer at 189.

33. Manzer at 190.

34. In particular, note Manzer's references to the CCF/NDP influences from within, and the impact of American and British liberalism.

35. Manzer at 18-19.

36. Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada, by Maxwell Cohen, Chairman (Ottawa: Queen's Printer, 1966) at 60.

37. The word technical is used here in two senses. In one sense, it is argued that the model is compatible with our legal system, both the legal framework and the principles enshrined in the new Charter of Rights and Freedoms. In the second sense, the term also refers to Berlins argument (supra) which draws a distinction between political differences, which involve the question of goals, and technical differences, which pertain to "means" or methods.

38. Anne M.K. Curtis, "Notes on DeChow v. The Queen", Ottawa L.R. 11 (1979): 501 .

39. If the proposed amendment was to be an interim measure only, as indicated by CCAMP, a band-aid solution may have been appropriate.

40. Report of the Special Committee on Pornography and Prostitution, 3 vols. by Paul Fraser, Chairman, (Ottawa: Canadian Government Publishing Centre, 1985), vol. 1 at 22.

41. Kanter at 175.

42. The Committee dismissed outright the position put forward by conservatives, while giving a sympathetic response to the "feminist" position's concerns regarding sexism. As a whole however, the Fraser recommendations do not come to grips with either position. See discussion in Chapter IV infra.

43. See, for example, Lynda Hurst, "New Porn Law Don Old Dress Despite Outcry," Toronto Star, 25 Oct 1986, B5. Also as per footnote 2, Chap. 5, p. 137.

CHAPTER II

THE PHILOSOPHICAL COMPROMISE

The strong protest against pornography which we have witnessed over the past half-decade has frequently been regarded as a feminist lobby and attributed to feminist ideology. For example, Edward Greenspan, a noted Ontario criminal lawyer who has often acted for defendants in obscenity cases, was quoted as saying:

> There is a feminist perspective on censorship and it is having a strong influence in cases in this country in terms of what will be banned and what films and art will be permitted. Anyone who says anything against the feminist perspective is invariably subjected to an allegation of being anti-feminist.[1]

In reality, this view is largely fallacious. Some of the major lobby groups opposing pornography advocate views which are fundamentally irreconcilable with feminism. Moreover, feminists themselves are divided in their perspectives on pornography as well as in their positions on censorship. Even within an anthology of papers by Canadian feminists who declared themselves to be against censorship, views were found to be widely diverse. Several of the papers were not only opposed to censorship - but in favour of pornography itself, including films which portrayed violence against women.

As the editor of the anthology pointed out:

> The women's movement is itself in conflict over explicit sexual material, especially that large and mixed body of material we lump together under the single term 'pornography'. Most media have conveyed the impression that all feminists have a uniform assessment of pornography and uniformly advocate its censorship. In fact there is no consensus on either of these points.[2]

This chapter will examine and analyse the dominant views in the pornography debate. Each of these views is rooted in a different political ideology and each will be discussed within the context of the over-riding paradigm which governs its perspective. For purposes of clarity and simplification, the views expressed by the various lobby groups will be treated under three headings: the 'harm principle' paradigm, the 'human rights' paradigm and the 'decency' paradigm. Because feminists do not subscribe to any single ideology, feminism will not be dealt with as a single paradigm, but will be referred to where relevant.[3]

The 'Harm Principle' Paradigm

The notion of a free exchange of opinion is the rationale behind civil liberties associations opposition both to censorship of pornography and to the present criminal legislation on "obscenity". The British Columbia Civil Liberties Association, for example,

following in the tradition of John Stuart Mill, takes the position that censorship is unjustified even though 'Snuff' films and other forms of violent material are termed "a vomitus of deranged hatred."[4]

However, there are other groups which are equally committed to the principle of freedom of expression, but favour government measures to regulate pornography. These groups argue that those who have perpetrated acts of violence against women have, to some extent, been more prone to commit these acts as a result of having viewed certain forms of pornographic material. This rationale is articulated by many individuals who favour regulation of pornography although usually protective of civil liberties.[5] A clearly articulated version of this position is found in a paper by Professor Susan Wendell, whose recommendations for controls on pornography are made on the following basis:

> In reaching these conclusions, I am working with the premise that freedom of expression is a prima facie right in any good society, that is, that there is a presumption in favour of free expression and that, therefore, any restriction on expression must be justified by good reasons. Specifically, what counts as a justification for restriction on expression is that some form or acts of expression tends to harm people other than those expressing themselves, that there is no effective and acceptable way to prevent the harm it does without restricting the expression, and that the harm it does outweighs the harm

of restricting the expression.[6]

Those liberals who have formed anti-pornography lobby groups have done so, not because they find the material immoral, but because they are convinced that the material causes harm to others; the only basis on which to justify state intervention. Because it is crucial to their argument to show evidence that pornography does indeed cause harm to others, these lobby groups rely heavily on the recent findings of psychologists and other social scientists which support this conclusion. Literature distributed by these groups makes frequent reference to Dr. James Check at York University, Dr. Neil Malamuth at the University of Manitoba and Dr. Ed Donnerstein of the University of Wisconsin who has collaborated with Malamuth on a number of publications. Their research, it is argued, contradicts earlier studies which had indicated that pornography provides a catharsis for sexual repression and suggests just the opposite: that violent or aggressive sexual material both increases male aggressive hostility towards women and increases their tolerance of those males who perpetrate violence against women.[7]

Many of the arguments put forward by feminist groups fall into this 'harm principle' paradigm.[8] The position paper presented by the National Action

Committee on The Status Of Women (NAC) demonstrates adherence to this paradigm.[9]

> When our arguments [on prostitution and pornography] are examined carefully, it can be seen that the consistency of our position is based on an understanding of the 'harm to others' principle. . . . The availability of material which depicts the violations and abuse of women does contribute to both criminal and social harms against women; and, on these grounds, we believe that such material should not be available to the public. But we add a caution here: we have made it clear by our recommended definition of 'pornography', that we do not feel that the Criminal Code is the place to deal with material that is simply sexist, demeaning, or sexually explicit. In the first two cases, public pressure, broadcasting regulations, and the like are the appropriate means. In the case of material which is simply sexually explicit, no controls are necessary unless the material also contains elements of coercion, violence, or debasement, which make it pornographic.[10]

NAC concludes with a recommendation to limit state intervention to areas where harm has been shown:

> We therefore believe that pornography must be controlled. But we believe that such regulation should be of a limited nature, and very clearly defined.[11]

Although the sexist attitudes found in pornography are usually criticized by feminists in the harm principle paradigm, state-imposed regulation such as censorship and criminal sanctions are recommended only

for materials which appear to cause direct harm to women or children. According to Wendell, the materials which may be justifiably restricted are those which depict:

> Unjustified physical coercion of human beings, with or without additional harm being inflicted, such as murder, rape, torture, and involuntary bondage...[and] sexual acts between adults and children.[12]

Wendell adds the proviso that depictions which 'sincerely attempt to dissuade people from committing the actions' and those which are presented from the perspective of the victim should not be restricted.[13]

Wendell's proposal is fairly representative of those seeking to eliminate forms of pornography which cause harm to others. Scenes of violence and coercion should be proscribed when the context appears to condone or promote this behavior. One way to ascertain this is to look at the apparent intent at the author of the material; a presumed intent to "sexually stimulate" the viewer, carries an implicit endorsement of the coercive behavior:

> Pornography is any printed, visual, audio, or otherwise represented presentation, or part thereof, which seeks to sexually stimulate the viewer or consumer by the depiction of violence, including, but not limited to, the depiction of submission, coercion, lack of consent, or debasement of any human being.[14]

For those who subscribe to the 'harm principle' paradigm, it is important to keep intervention to a minimum. Regulation of pornographic material is an infringement on freedom of expression; such infringement can only be justified when the exercise of this liberty causes harm to others. Moreover, it is not sufficient to argue that pornography is generally detrimental to society: that it creates a climate which fosters violence towards women and predisposes men to view women with contempt. Although there is agreement within this paradigm that these attitudes are to a large extent promoted through pornography, to warrant regulatory means the material must be shown to cause direct harm, preferably physical harm, which is more readily identifiable. It must also be shown that the harmful result is in fact, attributable to the pornographic material. The fact that a perpetrator of sexual assault is a habitual consumer of allegedly harmful pornographic material does not establish a cause/effect relationship. Moreover, if it is established that one individual committed a violent act as a result of viewing pornographic material, this does not signify that the material is, in itself, harmful. A more general pattern must be established.

The compendium of conditions attached to the harm principle exemplifies the difficulties involved in

arguing the case for government regulation of pornography on the basis of this rationale. With such a narrow view of harm and such stringent criteria for establishing that the harm resulted from the material in question, it became almost impossible to obtain sufficient evidence to enlist support for regulatory legislation. This accounts for the attention paid to recent social science research. However, social science research has not provided conclusive empirical evidence of harm, and it is questionable whether it ever will. Accordingly, within this paradigm, the central question has been, "how much proof is enough?" While some position papers assert firmly that the harmful effects of pornography have been confirmed by empirical evidence, others are far less certain and their arguments contingent on finding further evidence.

It is clear that the harm principle paradigm is an exemplification of classical liberalism. J. S. Mill in his treatise, On Liberty viewed liberty as freedom from coercion by others - in particular by government. This freedom was vastly important, both from a utilitarian view which draws a connection between liberty and happiness, and as an essential prerequisite for self-development. Thus, the state should not restrict this freedom except to prevent harm to others.[15] Accordingly, the 'harm principle' paradigm is simply the reverse of

the civil liberties position: while civil liberties advocates are opposing state interference with expression, the 'harm principle' position, although no less concerned about protecting free expression, is that in the case of pornography, the exercise of this freedom is creating harm to other individuals. This argument is founded on principles of liberty laid down by J. S. Mill, and, in this context, is usually referred to as "negative liberty".

The 'Human Rights' Paradigm

Sir Isaiah Berlin describes negative liberty as "the area within which a man can act unobstructed by others."[16] and points out that this freedom is a question of degree, not of absolutes:

> The wider the areas of non-interference, the wider my freedom. . . . [The classical English political philosophers] supposed that it could not, as things were, be unlimited, because if it were, it would entail a state in which all men could boundlessly interfere with all other men; and this kind of 'natural freedom' would lead to social chaos in which men's needs would not be satisfied; or else the liberties of the weak would be suppressed by the strong.[17]

Within this context, the other side of the liberal dialectic is referred to as "positive liberty", a notion first conceived by T.H. Green in the late 1800's. Based on ethical and religious principles which he explored in

great depth, Green questioned the notion of liberty from the perspective of the common good and, more relevant to this discussion, from the perspective of barriers to freedom. Looking at liberty in this context, freedom from government intervention is of no avail for those who do not have the means, whether physical, economic or spiritual, to exercise free choice.

The notion of "positive liberty" as it is currently understood within liberal parameters,[18] is closely akin to what Macpherson calls "developmental liberty" and Manzer terms "ethical liberalism". Within this context, the modern day version of positive liberty is usually associated with "welfare state" liberalism and concern with human rights, the logic being that, as put by C. B. Macpherson:

> [L]iberty is the absence of humanly imposed impediments, [including] not only coercion of one individual by another, and direct interference with individual activities by the state or society (beyond what is needed by secure each from invasion by others) but also lack of equal access to the means of life and the means of labour.[19]

Viewing liberty from this perspective, the state is seen as taking on the role of remedying the inequities which have deprived disadvantaged members of society of equal access to free choice and self-development. The state occupies a protective, benevolent role rather than an oppressive role. Government policy aimed at

counteracting discrimination through such instruments as affirmative action programs and anti-discrimination legislation can be explained in terms of the "positive liberty" model. It is this model which is enlisted by minority groups fighting for equal rights, or "equality of opportunity".[20]

In recent years, women as a group have often been characterized, under government policy, as a disadvantaged minority. Programs developed to combat racism have been applied to deal with sexism. The analogy has, to a large extent, been incorporated into our political culture. Accordingly, the positive liberty approach to human rights issues is often referred to with respect to women's rights. Some, like feminist lawyer Lorenne Clark, have argued that government policy has not gone far enough in fostering the rights of women:

> The history of social reform is largely the history of first establishing that some previously disenfranchised group ought to have rights that have already been accorded to others, then removing legal or other social and institutional impediments to their getting what they want, and then fighting further to have these privileges concerted into claims. But this involves liberalism in a fundamental contradiction, because it means that, during the third stage, the libertarian has to argue for the <u>limitation</u> of the freedom of some in the name of promoting greater equality among all those

> nominally said to be in possession of the right.[21]

Clark maintains that, in the case of women's rights, the struggle was not carried beyond the 'second stage', i.e. that positive liberty has not manifested itself with respect to equality for women. She goes on to press for an approach akin to positive liberty with respect to women's rights, and specifically for the hate literature model in dealing with pornography. Rather than questioning whether pornography causes harm, she says, we should be viewing it as hate literature.

> Feminists and civil libertarians are now at complete loggerheads over this issue. The trend among feminists is clear. More and more of them are coming to see pornography as a species of hate literature. Hate literature seeks to make one dislike and despise the people depicted, to make those persons seem inferior and unworthy of our respect. . . . So too with pornography. To achieve its impact, it relies on depicting women in humiliating, degrading, and violently abusive situations. To make matters worse, it frequently depicts them willingly, even avidly, suffering and inviting such treatment.[22]

Many feminists have indeed equated sexism with racism, and pornography with hate literature. The analogies are both frequent and graphic. Lynn Mcdonald, NDP Member of Parliament writes in Canadian Forum:

> It is difficult to imagine that the current pornographic portrayal of women would ever be acceptable for blacks or Jews. Consider a channel broadcasting, three hours a night, programs with whites fully clothed, blacks nude; whites giving orders, blacks grovelling and begging; whites whipping and chaining blacks, blacks being spat and urinated on. Or consider programming with Jews dancing in the nude, their Stars of David bouncing up and down against breasts or genitals while uniformed Gestapo agents crack whips and kick them in the face. Would there then be as many outraged letters to the editor from civil libertarians concerned about the dangers of censorship?[23]

Feminists who subscribe to this model often equate 'pornography' with violence and misogyny. Sexual material that is not 'pornographic' in these terms is labelled 'erotica': a vision of arousing sexual material which is non-coercive and does not treat women with contempt. Perhaps the clearest definition of the distinction is furnished by an American academic, Rosemary Tong,

> If by pornography is understood 'a view of sensual delight in the erotic celebration of the body' or the depiction of a 'mutually pleasurable, sexual expression between people who have enough power to be there by positive choice', then most feminists have no objection to it whatsoever although they would prefer that it be termed 'erotica.' In contrast, if by pornography is meant "verbal or pictorial material which represents or describes sexual behavior that is degrading or abusive to one or more

> the participants in such a way as to endorse the degradation, (sic) then most feminists are opposed to it.[24]

In this definition of pornography are found the characteristic criteria for this paradigm: viz. the use of power as opposed to free choice, the reference to violence or other forms of abuse, and the context of condonation. Accompanying these aspects is the element of 'degradation' which Tong includes. Sometimes termed 'humiliation', or 'dehumanization', this term is intended to address the types of portrayals which Lynn Mcdonald described (above). The "Toronto Task Force on Public Violence Against Women and Children", a body initiated by Metropolitan Toronto Chairman Paul Godfrey and appointed by the Metropolitan Board of Commissioners of Police, recommended that the following definition be substituted for the current statutory definition:

> Pornography is any printed, visual, audio or otherwise represented presentation, or part thereof, with a theme of violence for the sexual gratification of another or others, including the depiction of submission, coercion, lack of consent or denigration of any human being where such behavior can be taken to be condoned.[25]

Headed by feminist lawyer Jane Pepino, the Toronto Task Force shows itself to fit squarely within the 'human right' paradigm. Rather than limiting itself to the issues of physical violence and abuse which are

claimed to be directly attributable to specific forms of pornographic material, the task force addresses itself to the broader issues of systemic sexism.[26]

> The Task Force sees pornography as a form of hate literature against women and children. . . . Over the past decade a growing body of scientific evidence has linked the portrayal of aggression and violence in the media with subsequent aggressive and violent behavior in society. There is significant research that demonstrates that the portrayal of sexual violence in today's sexually explicit magazines and films can lead to an increase in their readers' and viewers' aggressive sexual fantasies, acceptance of aggression, beliefs in rape myths and in aggressive behavior. Moveover, sex-role stereotyping in the media has been shown to have an unhealthy effect on our children's view of themselves and their ability to fully related to members of the opposite sex. We have to conclude that, given no change, the mass production and distribution of exploitive pornography and a continuation of sex stereotyping, can only sustain and intensify the problem of sexual violence and inequality in society.[27]

The conclusion of the Toronto Task Force reflects the view that violence and degradation in pornography are merely symptoms of systemic attitudes towards women as a group.

> People's attitudes must change and in the long run this will only evolve through positive sex education and positive depictions in all forms of the media. Human rights legislation in Canada has

> evolved in response to public opinion and it has also changed public opinion and behavior. Visible minorities can no longer be subjected (legally) to hate propaganda and discrimination. The time has come for women and children to be accorded the same respect through principles defined legally. Such protection is a crucial part of the whole for which we strive.[28]

Although the problem is seen to be much broader than the issue of pornography, this task force recommends the strengthening of federal, provincial and municipal regulation to control the problematic aspects of pornographic material. There are, however, others who share this paradigm but do not desire government intervention. For example, a Newfoundland anti-pornography group proposes a non-governmental "provincial regulatory board" made up of lay people delegated by local organizations which would replace the provincial censorship board and supercede the C.R.T.C. with respect to local public and pay-tv programming.[29] In British Columbia, the Victoria group, Women Against Pornography is opposed to both federal obscenity legislation and provincial censorship, "even where the criteria are based on violence/coercion."[30] The group would, however, support "a drive to have porn legally defined as hate literature." [31]

An articulate condemnation of state regulation by Canadian feminists appears in a anthology entitled Women

Against Censorship. Edited by Varda Burstyn, the collection includes papers by high-profile journalists such as June Callwood and Myrna Kostash, and lawyer Lynn King. Although each writer presents a particular perspective, the opposition to censorship has three major focal points. First, state control of pornography is undesirable because government appointees either can not or will not use feminist criteria in censoring material. Second, regulation of the more violent and graphic forms of pornography would, in effect, be endorsing milder forms of sexist material which are equally harmful from a feminist perspective while, at the same time restricting material which feminists want shown. Third, women's efforts should not be directed towards pornography which is but one symptom of systemic sexism. Instead, all energy should be focussed on changing society by achieving social and economic equality for women. Several of the authors also point out that pornography constitutes visible evidence of women's oppression and can thus serve as a focus for social reform.

The diverse opinions expressed by these feminists relates to a question of means, not ends. The message reflected in pornographic material is only one aspect of what is perceived as a human rights problem which exists throughout our current society. Whether abused or

glorified, women are held in contempt in North American society. Pornography is misogynistic material which reinforces that status. The issues raised within this paradigm clearly pertain to tactics rather than ideological differences.

The Decency Model

Attacks on pornography often claim to hark back to 'traditional values' or to a criterion alluded to as 'moral decency.' The paradigm which is in effect here is held mainly by those advocating a neo-Conservative philosophy, or by church groups who ascribe to a form of Christianity which is predominantly evangelical. While these groups also hold views which are dis-similar, for the sake of simplicity, they will be treated together as they share similar moral concerns.

This paradigm is premised upon a largely unarticulated code of ethics which encompasses virtually all aspects of daily life. This code of ethics is not confined to those who ascribe to this philosophy, but rather, is held to be manifestly universal. The rationale for this universality is premised on two assumptions: first, that men are weak and easily seduced to stray from any set of rules under which people can co-exist in an orderly society, and, second, that members of society are inter-dependent. Taken together,

these two assumptions lead logically to the inevitable conclusion that an ordered society can be maintained only by removing factors which may potentially corrupt individuals members of society.

The preservation of the family unit is a primary concern within this paradigm. There are several ways in which pornographic material, in its current form, poses a threat to this particular vision of the family. An article entitled "Pornography: The Polluting of Human Sexuality" appeared in the February 1983 issue of The Plain Truth, an evangelical magazine distributed without charge throughout Canada. The view that pornography is "anti-love and anti-family" is the major thrust of the argument presented.

> In the shallow world of pornography, people don't grow old together. Forgotten are children, husband and wife. Never displayed is emphasis on the proper family and normal father-mother or parent-child relationships. Sadly, but true, the one family interest often revolves around incest.[32]

It is significant for our purposes to note that this argument has two components. One concerns the duty of a husband to protect and support his family, and parents to protect their children. The lure of illicit sex, it is feared, will cause a man to abandon this responsibility. The second concerns the relationship between spouses and children. Love and mutual respect

are essential elements of the family unit. This is demonstrated in the magazine's criticism of pornography:

> The "love" (really lust) that magazines describe is anything but outgoing concern or giving to the other person.[33]

Obviously, the endorsement of sexual promiscuity in pornographic material is anathema to the notion of the monogamous family unit. Of at least equal significance, however, is that current pornography symbolizes, the absence, indeed the antithesis, of any affection and respect in male-female relationships. Accordingly, violence and degradation or dehumanization in pornographic material the major targets in terms of this paradigm.

> Pornography might be defined as dehumanized sexual behavior, there is not concern for human feelings.[34]

In the same vein, Mary Brown, head of the Ontario Censor Board, views pornography in terms of this notion of dehumanization.

> Pornography is that which exploits and dehumanizes sex, so that human beings are treated as things and women in particular as sex objects.[35]

Addressing the lobby group, Canadians for Decency, Brown focusses on the violence and degradation of men and women in pornographic material:

> The erotic presentation of degradation and violence is a problem that most authorities now

> agree must be addressed. The degradation of man, his perverted sexuality and his untempered violence are combined for our entertainment in on-camera portrayals of bondage and rape, bloody castrations, mutilated vaginas, forced acts of bestiality, sexual abuse of young children and snuff films.[36]

The theme of 'dehumanization' also poses to a second threat in this paradigm. This threat might best be described as 'a breakdown of law and order' and the rationale for this fear is persuasively argued by neo-Conservative philosopher Irving Kristol. According to Kristol, obscenity, of which pornography is one aspect, is "inherently and purposefully subversive of civilization and its institutions."[37] Because Kristol articulates a causal relationship between the dehumanization found in pornography and the belief that pornography can cause to a breakdown of law and order, his argument is worth some exploration.

Kristol regards as obscene the public display of acts which, in his opinion, are universally conducted in private.[38] Public display of copulation is no different than a public spectacle of dying or of such bodily functions as defecation; we reduce man to his animal component. Witnessing these functions gives the observer a distorted perspective of human activity because "the viewer does not see - cannot see - the sentiments and the ideals."[39] Pornography is obscene

because it portrays the act of copulation without conveying any of the human emotions involved in sexual activity. For Kristol, then, pornography is dehumanizing because it does not reflect the civilized aspects of human relationships in its portrayal of sexual activity. Kristol quotes the words of literary critic Susan Sontag:

> What pornographic literature does is precisely to drive a wedge between one's existence as a full human being and one's existence as a sexual being while in ordinary life a healthy person is one who prevents such a gap from opening up.[40]

Kristol argues that pornography, because it promotes narcissistic self-gratification and because it is 'obscene' (dehumanizing, in his view), can undermine society's respect for law and order. Obscenity can and has been used as a political tool, he argues. He cites the incidents of student dissidence at Columbia and Berkeley during the 1960's in which the "obscene four-letter words" were, according to Kristol used by the radical students, to successfully undermine and demoralize the university administration. Further, he argues, pornography promotes a philosophy which, ultimately will lead to nihilism and the destruction of the social order.

> What is at stake is civilization and humanity, nothing less. The idea that "everything is permitted" as Nietzsche put it, rests on the

> premise of nihilism and has nihilistic implications.[41]

Implicit in Kristol's words is a distinction between pornography, which Kristol equates with 'obscenity', and other forms of erotic material. The following passage should be considered for definitional purposes in analysing this paradigm.

> I say pornographic and obscenity because, though they have different dictionary definitions and are frequently distinguishable as "artistic" genres, they are nevertheless in the end identical in effect. Pornography is not objectionable simply because it arouses sexual desire or lust or prurience in the mind of the reader or spectator; this is a silly Victorian notion. A great many nonpornographic works - including some parts of the Bible - excite sexual desire very successfully. What is distinctive about pornography is that, in the words of D.H. Lawrence, it attempts "to do dirt on (sex). . . (It is an) insult to a vital human relationship." (sic)[42]

It is significant to recognize that Kristol, not an inappropriate spokesman for the neo-Conservative lobby, is not as intransigent as the public might be lead to believe. He admires the works of D. H. Lawrence, whose novel Lady Chatterley's Lover was the subject of a notorious obscenity trial in both Britain and Canada,[43] and shows himself not averse to works which could be characterized as "erotica".

> In other words, pornography differs from erotic art in that its whole purpose is to treat human being obscenely, to deprive human beings of their specifically human dimension. That is what obscenity is all about. It is light years removed from any kind of carefree sensuality - there is no continuum between Fielding's Tom Jones and the Marquis de Sade's Justine. These works have quite opposite intentions.

Thus Kristol, while opposed to works such as those of de Sade which feature acts of sexual violence and perversion, is in favour of a novel such as Tom Jones whose theme is non-coercive but unequivocally promiscuous sex.

This view is not contradicted by the available literature emanating out of this paradigm. An article written by Daniel Cappon, a professor at York University, is part of the literature distributed by the Toronto-based lobby group, Canadians for Decency.[44] Listing what he terms the "corroders of decency," Cappon refers to "hazards" such as drug abuse, "excessive violence" and "sexploitation," including "all forms of sex deviance from pedophilia and incest to necrophilia and bestiality." He considers pornography to be a "corroder of society" which, along with material seen on mass media and private cable TV and video, contain "excessive violence and deviant sexploitation." Emphasis is placed on violence, coercion and "deviant"

acts such as incest, pedophilia, bestiality and to some extent, homosexuality. Again, the Cappon article and the other literature distributed by this group rail against cruelty and incest, but not sensual and humane treatment of sexuality; with the possible exception of more blatant allusions to promiscuity such as group sex. This suggests that the criteria for "decency" are neither as peculiar to this paradigm nor as uncompromising as would otherwise be expected.[45] Moreover, the emphasis remains on coercive or violent sex and on inhuman and degrading depictions.

The respect for institutions, particularly those of family and church, typify the conservative position, as do the other attitudes evidenced here such as respect for law and order, and concern for the "social fabric". The current upsurge of conservative values must be taken into account in formulating policy which affects sexual practices. Although there are different forms of conservatism, from traditional to "new right" to neo-conservatism, all embrace similar fundamental attitudes towards sex, church and family.[46] This position constitutes a force which cannot be ignored.

A Philosophical Compromise

The preceding discussion reveals just how far apart the three paradigms are in their perceptions of

pornography. The diversity in these views provides an appreciation of the difficulties which have been encountered in attempting to locate a consensus among either the anti-pornography lobby groups or the general public. The alternative is to see whether a compromise position can be arrived at. To seek a compromise, it is necessary to compare the paradigms to determine whether they overlap in any area; i.e. whether there are any factors which the three have in common.

Since both the 'human rights' paradigm and the 'negative liberty' paradigm are aspects of liberalism, one would expect to find shared views and beliefs. In fact, both are opposed to the promotion of violence in pornographic material, on the basis that these aspects reflects a systemic contempt for women. However, whereas the 'negative' liberal would not endorse state regulation on this basis, the 'human rights' feminists looks to government to rectify this manifestation of systemic discrimination. The 'negative' liberal asks only that government proscribe material which condones violence against women, on the basis that such material causes direct harm to women.

There are also shared perceptions between feminists who subscribe to the 'human rights' model and conservatives, as evidenced by the combined lobbying efforts which have taken place.[47] Each objects to the

manner in which women and men are treated in the material: whether beaten, ridiculed, or displayed as an object of male lust, the message conveyed is that men are insensitive and rapacious, and women are not worthy of being treated with respect and dignity. While 'human rights' advocates consider this to be negative stereotyping which hinders women's struggle for equality, conservatives see these portrayals as undermining both the family and the church.

As discussed above, conservatives would prefer to proscribe all sexual depictions. However, in terms of priorities, the major offenders are pornographic materials which condone violence and degradation, dehumanizing people by stripping them of their human dignity. 'Negative' liberty advocates are opposed to government intervention except where absolutely necessary, and are particularly hostile to any state regulation on moralistic grounds. They are, however, in accord with the notions of dignity and equality of opportunity, and sympathetic to furthering these values as goals. As a compromise, the 'human rights' model would be better received by those advocating 'negative' liberty than either the conservative model or the existing 'obscenity' laws. The hate propaganda approach, an aspect of the 'human rights' model, could be accepted by both conservatives and 'negative'

liberals: the latter with misgivings that it goes too far, the former concerned that it may not go far enough.

Professor Manzer, demonstrates that public policy decisions "have been drawn overwhelmingly from the doctrine of liberalism."[48] He has also shown that the liberal dialectic can accommodate other ideological influences by shifting towards the ethical or the economic polarity while remaining within the confines of liberalism. In the case of pornography, the highly visible conservative force can be accommodated within the parameters of liberalism by shifting towards ethical or positive liberty and the 'human rights' paradigm.

ENDNOTES: CHAPTER II

1. "Feminists Undermining Judges: Lawyer", Globe and Mail, 27 June. 1986, Natl. ed:. A3.

2. Varda Burstyn, ed., Women Against Censorship. (Vancouver: Douglas and McIntyre, 1985) 2.

3. Examination of feminism indicates a number of different ideologies: liberal, socialist, Marxist and radical feminism. See discussion: Diane Marie Crossley, "Liberalism and American Feminism: Theoretical and Historical Perspectives," Master's Thesis, U of Victoria, 1986, Chapter 4.

4. John Dixon, "Defending the Indefensible," Position Paper, B.C. Civil Liberties Assoc., Rights and Freedoms, Dec. 1984 at 2.

5. It is not uncommon for liberals who have always supported the doctrine of individual freedom to now find themselves in the position of advocating more stringent control on pornography. For many, this situation creates a dilemma; what Robert Fulford terms a "hard-core dilemma." Fulford, editor of Saturday Night and the consummate liberal, has grappled with this issue and reluctantly concluded that pornography must be viewed as "one of the central disappointments of the age of liberalism". A civil libertarian who once believed that, given free reign, pornography would "exhaust itself," Fulford now finds that, "in the treatment of women, it moved effortlessly from seduction to humiliation to degradation to brutality, answering the needs of a changing market." See also article by Canadian author David Lewis Stein, "Pornography or Censorship?" Toronto Star 18 Dec. 1983 F1; and Michele Landsberg, "Censorship's A Must in any Sane Society," Toronto Star 9 Apr. 1983, F1. British Columbia M.L.A Rosemary Brown announced her resignation from the B. C. Civil Liberties Association over the issue of censorship of pornography. She has, on several occasions, spoken in the House in support of stronger measures against pornography.

6. David Copp and Susan Wendell, eds., Pornography and Censorship, (Buffalo: Prometheus Books, 1983) 169.

7. see Copp and Wendell: papers by Kutchinsky, Donnerstein, Donnerstein and Berkowitz, and Malamuth and Check, and also papers relying on their research, e.g. Jillian Ridington, "Pornography: What Does the Research Say?" Status of Women News Summer 1983: 9.

8. As stated earlier, feminists do not subscribe to a single political philosophy. With respect to the pornography issue, those who do not fall within the 'harm principle' paradigm can be said to subscribe to the 'human rights' paradigm. The fact that the Fraser Committee overlooked this distinction is a shortcoming in the Fraser Report.

9. National Action Committee on the Status of Women (NAC), is an umbrella organization for virtually all women's groups in Canada. However the organization functions mainly as a lobby group to promote women's rights.

10. NAC, "Brief to: The Special Committee on Pornography and Prostitution," by Jillian Ridington (Toronto: Feb. 1984) 17-18.

11. NAC Brief at 22.

12. Copp and Wendell at 168.

13. Copp and Wendell at 175-176.

14. NAC Brief at 17. Another point often raised in the anti-pornography literature although not included in either of these definitions, is that women are often portrayed as enjoying brutal or degrading treatment. These portrayals, it is argued, are all the more harmful because they appear to be voluntary, particulary in situations in which the theme is either self-mutilation or bestiality. A number of groups have pointed out that the coercion in these cases is normally off-camera. It should not be overlooked because the appearance that the victim enjoys this treatment also implicitly suggests endorsement of the conduct.

15. John Grey, Liberalism (Milton Keynes, England: Open UP, 1986) 53.

16. Berlin at 122.

17. Berlin at 123.

18. Although Berlin argues against positive liberty, a number of liberal theorists take issue with his position. See C. B. Macpherson, "Berlin's Division of Liberty," (Gt. Brit.: Clarendon-Oxford UP, 1973) and also Virginia Held, "Men, Women and Equal Liberty," Equality and Social Policy, ed. Walter Feinberg (Urbana, IL: U of Illinois P, 1978).

19. Macpherson on Berlin at 96.

20. see discussion, Chapter III infra.

21. Copp and Wendell (Clark 47-48).

22. Copp and Wendell (Clark 52-53).

23. Lynn McDonald, "Censorship and the New Pornography" Canadian Forum May 1983: 36.

24. Rosemary Tong. "Feminism, Pornography and Censorship" Social Theory and Practice 8, (Spring 1982): 1.

25. Preliminary Report of the Metro Toronto Task Force on Public Violence Against Women and Children, by Jane Pepino, Chairman (Toronto: Jul. 1983) 30.

26. Toronto Task Force at 28.

27. Toronto Task Force at 20-21.

28. Toronto Task Force at 33-34. Similar Newfoundland group to that of B.C.

29. Dorothy Inglis, "Pornography: A Newfoundland Solution," reprinted from The Evening Telegram, n.p. n.d.

30. Women Against Pornography, "WAP Policy on Censorship and Anti-Porn Strategy," ts. (Victoria, B.C. n.d.): 1.

31. WAP Policy at 2.

32. Jeff E. Zhorne, "Pornography: The Polluting of Human Sexuality!" The Plain Truth: A Magazine of Understanding, Feb. 1983: 35 at 37. The magazine is distributed, free of charge throughout Canada and the U.S. Founder and Editor-in-chief Herbert W. Armstrong is heard nightly on a number of Canadian radio stations.

33. Zhorne at 37.

34. Zhorne at 37.

35. Mary Brown, "The Message in the Media," Canadians for Decency Speaking Engagement, ts. ([Toronto] n.d.) 6.

36. Mary Brown at 8.

37. Irving Kristol, "Pornography, Obscenity, and the Case for Censorship," On the Democratic Idea in America (New York: Harper Torchbook, 1972) 31-47 at 40.

38. Kristol is renowned for his witty but pithy statements. Of obscenity he is quoted as saying:

> Sex is always a problem for orthodoxy. It unites people, and it tears them apart. Orthodoxy copes with sex within the institution of the family. Gnosticism copes with sex outside the family. This can take one of two roads, the ascetic or the orgiastic. Both are rejections of the biblical commandment to be fruitful and multiply. It is obscene for a women to get pregnant at an orgy.

Quoted by Geoffrey Norman, "The Godfather of Neoconservatism," Esquire, 13 Feb. 1979: 37 at 40.

39. Kristol at 38.

40. Quoted in Kristol at 34.

41. Kristol at 39.

42. Kristol at 33-34.

43. R. v. Brodie in Canada. (1962) 132 C.C.C. 161; 32 D.L.R. (3d) 507; 37 C.R. 120 (S.C.C.)

44. Daniel Cappon, "Social Decency," Reprinted from The Medical Post, Toronto: McLean Hunter, 3rd and 17th May [c. 1983].

45. Groups which are cited by the Fraser Committee, viz The Roman Catholic Archdiocese of Toronto, and REAL Women appear far more rigid and intransigent with respect to 'erotica.' (p. 70 of Fraser Report) There is little point in ascertaining which view is more representative. Clearly there are differing views on the question of erotica within the paradigm. It therefore follows that this issue is peripheral rather than key to the paradigm. For purposes of seeking a compromise, it can be assumed that 'erotica' does not occupy the highest priority.

46. Shils lists the characteristics of conservatism at 136. They include "respect for familial obligations, an expectation of religious piety and observance, a high regard for the virtues of manliness and womanliness,. . . [and] a respect for traditional ways of thinking and acting". At the time this paper was delivered, (1976) Shils did not appear aware of any trends toward conservatism. He noted that conservatism did not receive any support worthy of note from either intellectuals or politicians at 136-7.

A cursory glance at current conservative writings shows little difference between the "New Right" the neo-conservative, and the traditional conservative with respect to social policy - the primary distinctions pertain to questions of state regulation of the marketplace. On the whole, conservatives, like economic liberals, want minimal government interference in the market economy but, with the exception of "libertarians", want the state to control morality. Irving Kristol said:

> The current version of liberalism, which prescribes massive government intervention in the marketplace but an absolute laissez-faire attitude towards manners and morals, strikes neoconservatives as representing a bizarre inversion of priorities.

Irving Kristol, Reflections of a Neoconservative: Looking Back, Looking Ahead, (New York, Basic Books, 1983.) at 77.

47. Kristol compares the conservative approach to pornography with the feminist analysis at 37.

48. Manzer at 188.

CHAPTER III

HATE PROPAGANDA AND HUMAN RIGHTS

The human rights model represents the essence of Manzer's ethical liberalism, Shils' collectivism and T.H. Green's positive liberty. Manzer tells us that the state is able to provide for man's basic needs pertaining to physical requirements such as food and shelter, and for security, by way of maintaining a system of law and order. The remaining requirements, according to Maslow's model of human needs, viz. a sense of belonging, self-esteem, and self-development, cannot be met through the kind of "political goods" which the state can provide directly. Instead, the state must cultivate a political environment which provides fraternity, equality and liberty through which these human needs can be met.[1] Berlin and Shils each explore the state's role in providing for these needs. Berlin contends that these political goods cannot be characterized as liberty:

> Yet it is not with individual liberty, in either the 'negative' or in the 'positive' senses of the word, that this desire for status and recognition can easily be identified. It is something no less profoundly needed and passionately fought for by human beings - it is something akin to, but not itself, freedom; although it entails negative freedom for the entire

> group, it is more closely related to solidarity, fraternity, mutual understanding, need for association on equal terms, all of which are sometimes - but misleadingly- called social freedom.[2]

According to Shils, the characteristics of 'collectivistic' liberalism are:

> First, a demand for far-reaching freedom of expression of opinion, particularly of opinion critical of authority and of established institutional arrangements; second, a demand for control over executive authority by "the people". . . that is to say, 'participatory' democracy has now become highly prized; third, a concern for the individual's freedom of effective expression from control by authority, private and public; fourth, a desire for a vigorous, comprehensive and far-reaching exercise of authority. . . [by] the central government - for the advancement of the "common welfare"; fifth a belief in the urgency of realizing these various ends and in the wickedness of those who disagree with this form other than a radical standpoint.[3]

Shils stresses the fourth point - the expanded role of government in regulating the economy, re-distributing income, and "[imposing] patterns of associations which had previously been left to private choice." It is this last feature which spawns the 'human rights' model. Shils describes the movement during the sixties to bring equality of opportunity to blacks, immigrants, and the poor:

> The movement of blacks for civil rights was, of course, a movement to realize the liberal ideals of equality of opportunity, equality before the law, of the operation of the market mechanism without regard to ethnic qualities and the right of the citizen to affect the exercise of authority through representative institutions.[4]

The values which Shils describes are essential characteristics of liberalism. These values are the sum and substance of the human rights model: remove discriminatory laws but also work towards off-setting the consequences of discriminatory treatment by programs which attack the promulgation of discriminatory practices and programs of affirmative action which provide a catch-up mechanism. As Professor Manzer points out, "The mere absence of discriminatory laws and administrative practices does not ensure the protection and promotion of egalitarian rights".[5]

Legislation to counter and control hate propaganda constitutes one aspect of this policy to promote egalitarian rights. At the present time, there are two main avenues being utilized in Canada to address the dissemination of hate propaganda. As in the case of pornography, the first avenue is through the imposition of criminal sanctions under legislation contained in the Criminal Code of Canada. The second avenue is through the regime which has been developed under human rights legislation, both provincial and federal.

The Human Rights Model

According to Professor Manzer's argument, ethical liberalism flourished during the post-war period of the 1950's and '60's. During that period the government was committed to a policy directed at addressing inequities in the system and providing a climate conducive to self-development, tolerance and dignity.

> In the 1950s and 1960 equal opportunity in education, protection against discrimination, recognition of language rights, and support for cultural development became acknowledged priorities of public policy-making. They asserted individual dignity and self-fulfillment as proper ends of government.[6]

It was within this context that the human rights model was development.

Prior to the 1950's, there were several pieces of provincial legislation which proscribed specific discriminatory practices. Ontario's Racial Discrimination Act enacted in 1944, for example, addressed the problem of "whites only" signs in shop windows and public resort areas.[7] The operative provision was found in section 1 of the statute:

> 1. No person shall,
>
> (a) publish or display or cause to be published or displayed; or
>
> (b) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or

> by means of any other medium which he owns or control,
>
> any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class or persons for any purposes because of the race or creed of such person or class of persons.[8]

Other provinces had enacted similar legislation. Anti-discrimination clauses were also inserted in statutes pertaining to such matters as, for example, restrictive covenants in property transfers.

During the 1950's, more comprehensive legislation was enacted. Ontario took the lead with The Fair Employment Practices Act in 1951 and The Fair Accommodation Practices Act in 1954. Other provinces followed suit with similar legislation. By the end of the decade, the provinces were putting mechanisms in place to consolidate all anti-discrimination legislation into a single statute which would be administered by a government agency created for that purpose. The Ontario Anti-Discrimination Commission Act of 1958 set up a "human rights commission" which was in place by 1962 when all legislation in this area was consolidated under The Ontario Human Rights Code.[9]

The initial anti-discrimination legislation enacted by the provinces was quasi-criminal. This created problems because police were reluctant to lay charges

and judges reluctant to convict in matters of discrimination. When the provinces consolidated their legislation under one Act or Code, they also created a commission to administer the legislation. The commissions were to investigate complaints, attempt to mediate settlements and also to carry out a program of education and awareness in the community. The process is conciliatory rather than adversarial, aimed at mediation rather than punishment.[10] However if mediation fails, the case can be put before a board of inquiry. An order of the board of inquiry has the effect of a Supreme Court order; what Walter Tarnopolsky terms "the iron hand in the velvet glove."[11]

Professor Manzer states that these egalitarian rights constituted the third stage in the development of rights in Canada. The first stage addressed the area of political rights: universal suffrage and civil liberties including freedom of expression, association and assembly. Manzer's second stage, "legal rights", pertained to rules of criminal procedures, particularly habeas corpus, due process and the principles of fundamental justice.[12] Manzer points out that, as late as 1971, entrenchment of egalitarian rights was rejected by the provincial premiers. Articles from the Victoria Conference held in June of 1971 fail to include protection from discrimination on the basis of race,

national or ethnic origin, colour, religion, and sex, as proposed in the federal government's 1968 white paper, A Canadian Charter of Human Rights.[13] As Manzer points out, however, these rights are now addressed in the Canadian Charter of Rights and Freedoms.[14]

As demonstrated by Manzer, "egalitarian rights", here termed "human rights", were not the focus of governmental policy-making until the trend towards ethical liberalism after the Second World War. Human Rights legislation involves active government intervention into private affairs, a role which was not tolerated in the previous period of economic liberalism.

> The economic liberal view of human rights focused on political and legal rights that would protect individual enterprise against the arbitrary exercise of state power. Ethical liberal thought focused on the needs of every individual for respect and opportunities for self-development, and it showed that barriers to individual development resulted not only from state intervention but also from prejudicial private conduct.[15]

It is this aspect of state intervention which characterizes human rights legislation as a form of ethical liberal policy-making or as an integral part of the positive approach to liberty. The principles which are being enforced: dignity, equal opportunity, and social harmony are all fundamental principles of liberalism.[16]

These principles have been enshrined, along with political and legal rights, in the Charter of Rights and Freedoms. Section 15, which recently came into force, provides equal protection and equal benefit of the law. Subsection 15(2) acknowledges and allows for affirmative action programs to provide "catch-up" opportunities to members of disadvantaged minorities. Sections 27 and 28 provide that the provisions of the Charter be interpreted in a manner consistent with our multi-cultural society and with equality of rights to both sexes respectively. Alternatively, viewed from the perspective of the entrenchment of liberal principles, it can be said that freedom of expression, association, and other political rights are addressed in section 2 of the Charter, equality before the law and equality of opportunity for minority groups are guaranteed by section 15, and social harmony with respect to Canada's cultural components and with respect to both genders underlie the provisions in sections 27 and 28. That members of Canadian society are entitled to be treated with dignity is one of the fundamental underpinnings of the Charter and has been so interpreted by the courts.[17]

Hate Propaganda: Human Rights Legislation

The liberal principles of dignity, equal opportunity and social harmony are reflected in the

provisions of human rights legislation which pertain to hate propaganda. Although little used, this provision was first enacted in the 1944 Ontario Racial Discrimination Act, and has been included in every provincial human rights statute. The federal human rights legislation includes a similar provision as well as a proscription against the use of the telephone for pre-recorded hate messages.[18] Some of the provincial statutes contain an expanded version of the provision which specifically addresses hate propaganda. Saskatchewan's Code provides:

> 14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person, any class of person or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.[19] [emphasis mine]

Very few cases have been reported under these provisions but two of these will be examined with respect to principles of application.[20] In a 1980 case under the Nova Scotia legislation, the complaint concerned the sale of a button bearing the picture of a Black women, mouth open, and the words, "I'm a Big Mouth Cape Bretoner - So Kiss Me."[21] Members of the Black community testified that they felt "anger, shock, disgust, outrage, and indignation." The finding of the Board was that the button was intended to satirize a politician's statement regarding Cape Breton residents, and did not pertain to Black people at all. Nonetheless, the Board held that the button did discriminate against Black persons as a class.

The Board's decision rested mainly on two considerations: dignity and equality of opportunity. Based on the wording of the preamble to the Nova Scotia Code the Board determined that human dignity was a key factor in ascertaining discrimination. Reference was also made to the definition of discrimination used by Professor Ian Hunter, an authority in the area of human rights legislation:

> discrimination means treating people differently because of their race, colour, sex, as a result of which the complainant suffers adverse consequences or a serious affront to dignity.[22]

The questions of whether someone's dignity has suffered is viewed from the perspective of a reasonable person standing in the place of the person complaining[23] and it is irrelevant whether the insult was intentional or unintentional.[24]

The Board proceeded to examine the question of adverse effects on equal opportunity. Citing a Saskatchewan decision which concerned a restaurant called "Sambo's Pepper Pot" the Board held that a logo depicting a caricature of a Black person could constitute discrimination.

> To put it another way, it is not only a question of whether a Black person would feel humiliated or insulted by this representation, but the question of whether or not such a person's rights to equal employment opportunities and even to non-discriminatory treatment in housing and public accommodations would be affected.
>
> It seems to us that to ask the question is to answer it. If a stereo-typical image of a certain class of persons as incompetent, childish, and funny, is allowed to be displayed, the opportunities of members of the class for responsible jobs and to obtain rights on an equal footing with the majority class grouping are endangered.
>
> The effect of such a caricature, is to reinforce prejudice against Blacks and as a consequence to prolong the existence of hangovers of prejudice against non-white minority groups in Canada. It also promotes a negative image about Blacks.[25]

Based on these reasons, the Board found the respondent did discriminate, but because the discrimination was unintentional, the Board decided against awarding damages. The respondent was ordered to write a letter of apology and surrender the existing buttons to the Commission.

A decision of the Saskatchewan commission merits attention because it concerns hate literature directed at women. The Engineering Students Society at the University of Saskatchewan published a magazine called "Red Eye." In applying the legislation[26] the Board posed the question: "Does the material ridicule, belittle and otherwise affront the dignity of women because of their sex?"[27] The Board put this question in the context of the underlying policy behind the Act set out in Section 3.

> The objects of this Act are:
>
> (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
>
> (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.[28]

The Commission argued, on behalf of the complainant, that the material:

> (a) Suggests that the violent destruction of women's bodies through sexual acts is humorous;

> (b) suggests that women have no capacity to feel, think, analyse, debate; or in other words are less than human;
>
> (c) promotes either sexual violence against or sexual harassment of women; or
>
> (d) depicts women's bodies as objects and thereby depicts women as less than human.

The Board, after scrutinizing the material and hearing from witnesses, concluded:

> Does the representation of women as objects of violence and sexual gratification, as incapable of independent thought and action, as inferior, as funny, indicate discrimination or the intent to discriminate? It seems to us that to ask the question is to answer it.[29]

In interpreting the application of the legislation with respect to discrimination based on sex, the Board used the analogy between racism and sex discrimination, between hate literature and misogyny.[30] Accordingly, the Board posed questions taken from an earlier hearing dealing with a complaint of racism:

> The Commission feels it is proper to ask the following question: "Would the presentation of blacks as childish, funny, emasculated, inferior, as described by the witnesses, indicate discrimination?
>
> . . . It seems to us that to ask the questions is to answer it. If a stereotypical image of a certain class of persons as incompetent, childish and funny is allowed to be displayed, the opportunities of

> members of the class for responsible jobs and to obtain rights on an equal footing with the majority class grouping are endangered.[31]

Based on this rationale, the Board concluded that the stereotypes presented in material such as the Red Eye affects women's participation as equals in society including their rights to employment, education, and "security of their persons."[32]

Criminal Code Legislation

Coincident with human rights policy, hate propaganda became a matter of concern in the late 1950s and early 60s when there was a resurgence of Nazi and other extreme right-wing groups propounding an all-white society.[33] Added to this was the pressure on government in the mid-60s to deal with the advocation of genocide and with group defamation in conformity with the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on the Elimination of All Forms of Racial Discrimination, both of which Canada has ratified.[34] A committee was appointed by Guy Favreau, then federal Minister of Justice, in January of 1965 to investigate the situation and make recommendations. The Special Committee on Hate Propaganda in Canada was chaired by Maxwell Cohen, Dean of Law at McGill University. Included on the Committee were Mark MacGuigan, then Associate Professor of Law at

the University of Toronto, Pierre E. Trudeau, then Associate Professor of Law at the University of Montreal, and the Executive Vice-President of the Canadian Jewish Congress, Saul Hayes, Q.C.

In November of 1965, the Report of the Cohen Committee was presented to Lucien Cardin, then Minister of Justice. Its main recommendations were to add certain hate propaganda offenses to the Criminal Code. While there was an acknowledgement in the Report of the need for education, this was considered "beyond the scope of the enquiry," and only criminal legislation was dealt with.[35]

The focus of the Cohen Committee's enquiry was propaganda which advocated either the expulsion or extermination of target groups selected on the basis of religion or race. Right-wing groups advocating these sentiments were involved in a campaign to reach as large an audience as possible. To appeal to potential adherents, literature was disseminated through the mails and on the streets, while pre-recorded messages were available by dialing certain telephone numbers. In addition, public meetings were held at which speakers addressed masses of people, and riots sometimes ensued.[36]

The Committee considered the various applicable criminal provisions which were already in force, such as

those dealing with sedition, libel, causing mischief in a public place, and spreading false news. Because most of the material came from outside the country, it examined the customs regulations and also the Post Office Act with regard to both foreign and local distribution of mails. The conclusion reached by the Committee was that the existing laws were inadequate to deal with the situation.[37] The Report stated that there was a need for criminal legislation specifically pertaining to hate propaganda.

The Committee addressed itself to three areas in its recommendations.

1. advocacy of genocide,
2. incitement likely to lead to a breach of the peace, and
3. group defamation.[38]

The recommendations were in the form of draft legislation which, with some variation, resulted in the present legislation under the Criminal Code.[39]

The legislation proscribed two specific forms of hate propaganda: section 281.1 proscribed propaganda which advocated genocide of an identifiable group, while s. 281.2 proscribed the public incitement of hatred when likely to lead to a breach of the peace, (S. 281.2(1)) and the wilful promotion of hatred in other than private conversation. (S. 281.2(2)) The latter provided the defence of truth, public interest and opinion on a

matter of religion. "Identifiable group" was defined as,

> (4) ...any section of the public distinguished by colour, race, religion or ethnic origin.[40]

Section 281.3 allowed for a judge to issue a warrant of seizure with respect to suspected hate propaganda.[41] Proceedings for any of these charges could not be initiated without the consent of the Attorney General.

Within the five years between the time the Committee report was presented to Lucien Cardin, the Minister of Justice in November of 1965, and 1970 when the recommendations were, with minor modifications, enacted into law, there was considerable opportunity for debate on the floor of the House, in committee, and among the public. In an article published in 1970, Maxwell Cohen, Chairman of the Committee, commented:

> Few pieces of legislation in recent years have evoked or provoked such strong divisions of opinion, not only on the part of these who might be expected to support or oppose such legislation but, more significantly perhaps, among those who held in common their devotion to free speech in particular and civil liberties in general.[42]

Civil libertarians were naturally upset with the curtailment of the exercise of free speech and its resultant encroachment on liberty. There was however, very little opposition to the proscription of promoting genocide. It was generally agreed that there was no

social interest being protected in such a debate,[43] and one author commented that this provision attracted "only a trickle of opposition".[44] Objections, on the whole, reflected fear of potential abuse of the legislation, rather than opposition to the curtailment of expression in suppressing hate propaganda itself.[45] Assurances that the legislation was drafted so as to limit police powers to the intended targets appeared to satisfy many of those concerned with infringement of civil liberties. The main objections to the legislation on principle came from those concerned that prosecutions would give a platform to hate-mongers so as to gain public attention to their message. Harry Arthurs, then Associate Dean of Osgoode Hall Law School, gave an empassioned plea before the Senate Committee. Speaking as both a civil libertarian and a Jew, Arthurs argued that hate propaganda could not be addressed through penal sanctions. In addition to his arguments pertaining to free speech, he pointed out in what he termed a "pragmatic analysis",

> In the first place, by courting prosecution, and by using the trial as the means of gaining public attention, the hatemonger may in fact gain considerable advantage, even if he is ultimately convicted. As will be seen, certain features of the proposed Bill afford the hatemonger an opportunity, publicly sanctioned, to conduct his defence by a further propagation of his perverted ideas.[46]

There have been only two reported cases under the 1970 legislation since it became law.[47] This may be due to the requirement that the Attorney General give his consent to any prosecution, but likely is also partially attributable to the contentious nature of the legislation. The decision of the Alberta Queen's Bench in R. v. Keegstra, a pre-trial Charter challenge to the legislation, has received favourable comment from a number of sources.[48] In that decision, Mr. Justice Quigley spoke strongly in favour of the rights of minority groups to be treated with dignity and asserted that the protection of that right enhanced, rather than contradicted freedom of speech.

> In my view, the wilful promotion of hatred under circumstances which fall within s.281.2(2) of the Criminal Code clearly contradicts the principles which recognize the dignity and worth of identifiable groups, singly and collectively; it contradicts the recognition of moral and spiritual values which impels us to assert and protect the dignity of each member of society; and it negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal position and benefit of the law without discrimination.
>
> Under these circumstances, it is my opinion that s.281.2(2) of the Code cannot rationally be considered to be an infringement which limits "freedom of expression," but on the contrary it is a safeguard which promotes it.[49]

It appears that the hate propaganda offenses have come to be accepted by the general public.[50] Proposals for reform of the provisions pertain to technical aspects of the legislation, such as eliminating the need for the Attorney General's consent and reducing the statutory defences available to the accused.[51] Consideration has been given to expansion of the categories of "identifiable groups" so as to include sex, age and mental or physical disability to conform with section 15 of the Charter.[52]

Conclusion

The regulation of hate propaganda is one aspect of a program by the state to undertake active measures to eliminate discrimination against minority groups within society. Such regulation can only be one part of governmental policy to cultivate a political environment conducive to fraternity, equality and liberty. Proscription and education are two approaches to curbing the dissemination of racist propaganda.

In Canada, efforts to promote human rights have resulted in two system each of which can address the problem of hate propaganda. The first is a system of education and mediation through the use of an administrative body. Adjudication and sanctions are available as a last resort. Since prejudice is often

perceived as an attitudinal problem which should be corrected through education, this regime presents an appropriate means of dealing with systemic discrimination.[53]

The report of the Cohen Committee and the various speeches and papers presented by members of the committee in defence of its recommendations indicate three major factors which motivated this legislation. The first is to ensure continued social harmony among the various groups in Canadian society. Maxwell Cohen wrote, in a 1970 retrospective looks at the committee's recommendations:

> [T]here was a growing recognition that [newly won individual rights] could be dangerously abused through their use in attacking the sense of well-being and group security through such propaganda, and thereby threaten the goodwill and cohesion within a democratic society itself.[54]

Second was the fear that a number of members of society would be influenced by the propaganda and accept the lies as truth. Mark MacGuigan, wrote in defence of the recommendations in Chitty's Law Journal:

> [A]ny significant dissemination of hate propaganda is of its very nature a serious matter. Social psychologists have discovered in recent years the effectiveness with which persuasive communication of all kinds can affect the attitudes of human beings. The belief that anything can be sold or marketed effectively is basic to modern

> advertising, and recent studies by the Ontario Human Rights Commission have shown that racial and religious prejudice is so widespread in Toronto that it might be considered fertile soil for the growth of race hatred.[55]

In a 1983 appearance before the Senate Committee on Visible Minorities, Mr. MacGuigan re-emphasized however, that the most insidious and damaging aspect of hate propaganda is its effect on the target group.

> I think what many people fail to realize about hate propaganda is that its effects cannot be measured only or perhaps even primarily by its effects on the majority . . . Social psychology has shown that members of minority groups, especially those which are the principle targets of hate materials or of general social disapprobation, will have lesser feelings about themselves as people. They will not think of themselves as being equal to the others, even if they are legally equal and the majority is prepared to accord them that status. Even in those cases they will feel an internal lack of worth. It is this internal effect on the minority group which is the most pernicious aspect of hate and hate propaganda.[56]

The hate propaganda provisions under the Criminal Code have been described as a response to 'clear and present danger'. The Cohen committee however, also stressed the educational value of such legislation. However, perhaps the most significant reason for enacting this legislation under the Criminal Code was to give to those minority groups which had been singled out

by the hate literature of the 1950s and 60s, the reassurance that the Canadian state was concerned for their welfare and safety, and would not tolerate this persecution. In this context, the legislation could be viewed as a symbolic measure by government to the persecuted as well as the persecutors.

The Canadian public has clearly accepted the hate propaganda rationale as contained in both human rights legislation and criminal legislation. In the last three or four years, there have been a number of proposals to strengthen the Criminal Code provisions.[57] Civil liberties proponents while not condoning the legislation, are not unsympathic to the goals.[58] MacGuigan himself, surely the strongest proponent of sanctions against hate-mongers, is himself a former chairman of the Canadian Civil Liberties Association.[59]

The principles underlying hate propaganda policy are liberal principles: the right to be treated with respect, self-esteem, fraternity, tolerance and social harmony within a multi-cultural pluralist society. These are fundamental to the doctrine of liberalism and essential for the furtherance of equality of opportunity, self-development and human dignity.

ENDNOTES: CHAPTER III

1. Manzer at 4-9.

2. Berlin at 158.

3. Shils at 140.

4. Shils at 148.

5. Manzer at 163.

6. Manzer at 179.

7. Report Arising out of the Activities of the Ku Klux Klan in British Columbia, by John D. McAlpine, Commissioner, (Vancouver: n.p. 30 Apr. 1981) 58.

8. S. O. 1944, c. 51.

9. John I. Laskin, "Proceedings Under The Ontario Human Rights Code", Advocates Quarterly, 2 (1979-81): 280.

10. Ian Hunter, "The Origin, Development and Interpretation of Human Rights Legislation," The Practice of Freedom, (Toronto: Butterworth's, 1979) 95.

11. Walter S. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada," Canadian Bar Rev. 48 (1968): 565.

12. Manzer at 145-163.

13. Manzer at 170.

14. Manzer at 171. As is pointed out infra, the rights against discrimination in section 15 which are alluded to by Manzer, are not the only anti-discrimination provisions covered by the Charter. Sections 27 and 28 are also significant in this regard.

15. Manzer at 173.

16. See for example, Berlin, at 155-6 agrees that these are liberal principles but argues that they cannot be characterized as freedoms. Also Shils (supra) at 163 concedes that, although liberalism accepts inequality and deference, "it would maintain a floor of dignity below which human beings would not be degraded."

17. see: Reference re S.94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c.288. [1986] 1 W.W.R. 481 (S.C.C.); R. v. Keegstra, (1984) 19 C.C.C. (3d) 254 (Alta Q.B.) and Town Cinema Theatres, [1985] 1 S.C.R. 494; [1985] 4 W.W.R. 1; 45 C.R. (3d) 1 (S.C.C.)

18. Canadian Human Rights Act, S.C. 1976-77, c.33. s.13. This provision only applies in provinces where the telephone system comes under the legislative authority of Parliament.

19. Saskatchewan Human Rights Code, S.S. 1979, c.S-24.1, s.14.

20. Walter Tarnopolsky points out that it seems to make no difference whether the provision is in the form of Saskatchewan's revised legislation or the old version such as Ontario's, supra.

21. Hamid Rasheed and the Black United Front of Nova Scotia vs. Barry Bramhill. Vol. 2 Dec. 49, C.H.R.R. p.D/249 (20 Jan. 1981)

22. quoted in Bramhill at D/250, para 2153.

23. Bramhill D/250, para. 2155.

24. Bramhill at D/251, para. 2162.

25. Bramhill p. D/251.

26. See supra, Sask. Human Rights Code, s.14.

27. Apparently counsel for the Commission had chosen not to argue that the material tended to expose women to hatred, as is also set out in s. 14 of the Act. See Sask. H.R.C. v. Waldo et al (1984) 5 C.H.R.R. D/2074 para 17668. ("Red Eye")

28. "Red Eye" p. D/2079, para 17629.

29. "Red Eye," p. D/2089, para. 17721.

30. "Red Eye"p. D/2082, para. 17668-69 and p. D/2084, para. 17678.

31. "Red Eye," p. D/2089 para. 17720.

32. "Red Eye," p. D/2089 para. 17722.

33. Maxwell Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy," Alta. L.R. 10 (1970): 103 at 105.

34. Walter Tarnopolsky, The Canadian Bill of Rights, (Toronto: Macmillan, 1975) 186.

35. Cohen Report

36. Mark R.MacGuigan, "Hate Control and Freedom of Assembly," Sask. Bar Rev. 31 (1966): 232.

37. This conclusion has been strongly criticized by Walter Tarnopolsky but others support the committee position. See e.g. S.J. Cohen, "Hate Propaganda: Amendments to the Criminal Code," McGill L.J. 17 (1971): 740 at 771.

38. Cohen Report at 61.

39. For a comparison of the two, see M. Cohen, "Reflections" Appendixes A and B.

40. R.S.C. 1970, c.11 (1st Supp.), s. 1.

41. Followed by a summons to a "show cause" hearing within 7 days.

42. Cohen, "Reflections," at 103.

43. P. 63 of the Cohen Report and referred to in MacGuigan, "Proposed Anti-Hate Legislation," Chitty's L.J. Nov. 1967: 302.

44. S. J. Cohen at 771.

45. Robert E. Hage, "the Hate Propaganda Amendment to the Criminal Code," U of T. Fac. L. R., 28 (Aug. 1970): 63.

46. Harry A. Arthurs, "Hate Propaganda - An Argument Against Attempts to Stop It by Legislation," Chitty's L.J. 18 (Jan. 1970): 1. This fear was also expressed by some leaders of the Jewish community. Ironically, it was the trial of Ernst Zundel which brought into question the authenticity of the holocaust and provided a public forum for anti-semitism. Zundel was prosecuted under section 177 of the Criminal Code rather than under the hate propaganda legislation. Section 177 pertains to intentionally publishing false news which is likely cause public mischief. Rabbi Gunther Plaut, a spokesperson for the Toronto Jewish community, was

quoted as saying:

> I think it was an error, regardless of how it comes out. Even if the jury convicts, I'm not happy. The pseudo-legitimacy they have been given is very harmful.
>
> Globe and Mail, February 28, 1985.

The jury did convict Zundel, but his subsequent appeal has succeeded and a new trial ordered. The main thrust of the appeal court's decision pertained to the judge's summation with respect to the issue of 'falseness', an element of the offence. The Law Reform Commission states that the reason Zundel was charged under s. 177 rather than s. 281.2, was because the Attorney General refused to give consent to prosecute as a hate propaganda offense as required under s.281.2 (L.R.C.C. at p. 38.) The Law Reform Commission of Canada has strongly recommended that s.177 be abolished. See Law Reform Commission of Canada, Hate Propaganda, (Working Paper 50, Ottawa: 1986) 29-30.

47. The cases are R. v. Buzzanga and Durocher (1979) 49 C.C.C. (2d) 369 (Ont.C.A.) and the pre-trail motion R. v. Keegstra (1984) 19 C.C.C. (3d) 254. (Alta.Q.B.). The charges laid against Zundel were under pre-existing legislation. (s. 177)

48. Law Reform Commission of Canada at 10-11.

49. R. v. Keegstra at 268.

50. L.R.C.C. at 25.

51. See L.R.C.C. at 24-25 re proposals of the Canadian Bar Association, the Special Parliamentary Committee on Visible Minorities and the Fraser Committee.

52. Section 15 provides for equal protection and benefit of the law without discrimination on the basis of race, national origin, ethnic origin, colour, religion, sex, age or mental or physical disability.

53. See, for example, argument in favour of education rather than criminal legislation in S.J. Cohen, at 785.

54. M. Cohen, "Reflections" at 105.

55. Mark MacGuigan, "Anti-Hate Legislation", at 304.

56. Evidence 22-11-1983, (Tues. Nov. 22, 1983) "Visible Minorities", pp. 27:7 - 27:14 at 27:8. This phenomenon is discussed at length in Appendix II of the Cohen Report.

57. e.g. dispensing with the need for the consent of the Attorney-General and eliminating some of the defences.

58. see, for example, "Expression of Freedom; The Politics of Opinion" in Canadian Forum Apr. 1986: 7.

59. MacGuigan's appearance before the Senate Committee on Visible Minorities was for the purpose of urging stronger sanctions for hate-mongers under the Criminal Code and a broader mandate to the federal Human Rights Commission with respect to preventative measures, particularly in the area of education.

CHAPTER IV

THE LEGALISTIC COMPROMISE

The regulation of pornography in Canada falls mainly under the jurisdiction of the federal government. The "obscenity" provisions found in section 159 of the Criminal Code of Canada constitute the primary federal legislation governing the regulation of pornographic material. Other federal statutes also directly or indirectly affect the distribution of pornographic material, the most relevant being the Customs-Tariff Act, the Post Office Act, and regulations under the Broadcasting Act and Canadian Radio-Television and Telecommunications Act (CRTC). Censorship boards which classify, cut and prohibit films do so under provincial legislation.[1] Until recently, the powers of these boards were restricted to films (and film advertisements) intended for public showing but in some of the provinces, these powers have been extended to include video films for private use. Municipal government may also regulate distribution of pornographic materials to some extent, primarily through their powers of licensing and through by-laws.[2]

The criminal provisions on "obscenity" are found in Sections 159 and 160 of the Criminal Code. This is the seminal legislation which governs pornography. The

sections appear in Part IV of the Code, entitled "Sexual Offences, Public Morals and Disorderly Conduct" under the sub-heading "Offences Tending to Corrupt Morals." Included in the section with "obscene matter" are offences dealing with cures for venereal disease and information on abortion. At one time, the section made it an offence to distribute information on birth control.

> 159.(1) Every one commits an offence who
>
> (a) makes, prints, publishes, distributes,circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever.
>
> (2) Every one commits an offence who knowingly, without lawful justification or excuse,
>
> (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,
>
> (b) publicly exhibits a disgusting object or an indecent show,
>
> (c) offers to sell, advertises. . . any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, or,
>
> (d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases

> or diseases of the generative organs.

Section 159 makes it a criminal offence to sell or distribute any material which is judged "obscene" under this section. A conviction carries either a fine or up to two years imprisonment and results in a criminal record.[3]

Section 159 includes a statutory definition of obscenity which is notoriously vague and ambiguous. The court is supposed to determine, by the application of this definition, whether or not a person should be convicted of the publication or distribution of obscene material:

> s. 159 (8) For the purposes of this Act any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene.

Until 1959, the Canadian courts had been applying the Hicklin rule, a test which originated under British common law in the middle of the nineteenth century. The case of Regina v. Hicklin concerned the distribution of copies of a pamphlet entitled "The Confessional Unmasked". The publication was printed by a political group, of which the accused was a member, whose purpose was to "protest against those teachings and practices which are un-English, immoral, and blasphemous, to

maintain the Protestantism of the Bible, and the liberty of England".[4] The pamphlet presented a variety of quotations which were critical of the Catholic Church, and included a condemnation of the Confessional with a description of "impure and filthy acts, words, and ideas".[5] The lower court had acknowledged that Hicklin made no profit on the pamphlets, as he sold them for the same price he had paid to the organization's head office in London. In his decision, Chief Justice Cockburn found that, whether or not it was the author's intention, the work "would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character." Uppermost in the considerations of the court was the question of whether the work would have a deleterious effect on the morals of the society.[6] This was the rationale behind Cockburn's test articulated in the Hicklin case:

> . . . and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprive and corrupt those who minds are open to such immoral influences, and into who hands a publication of this sort may fall.[7]

Although the case of R. v. Hicklin came before the Queen's Bench in 1868, a 1956 Canadian decision reflected the same concern with society's moral fabric. In the case of R. v. American News Co. Ltd., heard just

prior to the enactment of the subsection 8 statutory definition, Laidlaw J.A. expanded the Hicklin test:

> I observe, too that the effect of the tendency may vary in character. The tendency might be to suggest thoughts of a more impure and libidinous character, as pointed out by Cockburn C.J. in the Hicklin case; or it might be to influence certain persons to do impure acts; or it might be to imperil the prevailing standards of public morals.[8]

Thus, until subsection 8 was added to the Criminal Code in 1959, Canadian courts were still looking to the effect of obscenity on society's morals.

This paternalistic concern, usually directed at children, women and the lower classes, was typical of traditional conservatism, as reflected in the following excepts from Manzer's characterization of "traditional conservatism":

> The members of [the privileged] elite have the responsibility to guide their community in a way of life determined by them to be the good or proper way. . . . According to conservative doctrine, public policies must give priority to protecting the social basis of order by strengthening family relationships, defending the prerogatives of the church, and protecting the privileges of the governing class.[9]

The result of the 1959 enactment of sub-section 159(8) was to substitute a statutory definition of obscenity in place of the Hicklin test.[10] Faced with

the definitional requirements of subsection 8, the courts devised several criteria for determining what constitutes "undue exploitation" under the new legislation. The primary test developed was the "community standards test", a test which remains the central, if not the sole criterion for determining obscenity today.[11]

The function of the community standards test is to ascertain what constitutes "undue exploitation of sex", once it has been established that a "dominant characteristic" of the material under scrutiny is the "exploitation of sex," or of sex in conjunction with violence, cruelty, horror or any of the other enumerated characteristics. Implicit in the test is the presumption that societal standards of propriety will dictate at what point such exploitation becomes undue. The test becomes, in effect, a sliding scale of what is acceptable. The conservative concern for the preservation of the moral and social fabric of society, implicit in the Hicklin rule, is replaced by an "objective" reading of societal mores.[12]

The jurisprudence on obscenity law does not, however, support this interpretation of the community standards test. The paternalism evident in the Hicklin test has been retained by asking, not what the average person would find acceptable, but what the average

person would allow others to view.

> [The judge] must determine whether, by contemporary Canadian community standards, the book is tolerable in the sense that general average of community thinking would have no objection to the book being read and seen by those members of the community who wished to do so. The question is not whether personal standards are affronted but whether community standards would tolerate the publication being seen and read by others.[13]

Moreover, there is an implicit assumption that the community's standards are dictated by considerations of morality or "decency". In rendering a decision on D. H. Lawrence's Lady Chatterly's Lover, Chief Justice Kerwin stated:

> There does exist in any community at all times - however the standard may vary from time to time - a general instinctive sense of what is decent and what is indecent, of what is clean and what is dirty and, when the distinction has to be drawn.[14]

The question of access also suggests paternalism. Under the Hicklin rule, the question was germaine. In the Hicklin case, the pamphlet in question was distributed on street corners. Chief Justice Cockburn's concern with this method of distribution was evidenced by the following:

> This work, I am told, is sold at the corners of streets, and in all directions, and of course it falls into hands of persons of all classes, young and old, and the minds of those hitherto pure are

> exposed to the danger of contamination and pollution from the impurity it contains.[15]

The words of Lush J. in the same case echo these sentiments:

> It does not follow that because [the Venus] is exhibited in a public gallery, that photographs of it might be sold in the streets with impunity.[16]

Until recently the Hicklin test was still in use in Britain. At the trial of Lade Chatterly's Lover concern was expressed over the fact that the novel was available in an inexpensive soft-cover edition, readily accessible to the general public.[17]

Canadian courts have, nonetheless, continued to consider the question of access, at least from the standpoint of protecting children, although the question is not relevant under the legislation.[18] The argument is articulated in a 1978 Ontario decision:

> In my opinion, the manner and circumstances of distribution are relevant in determining whether the standards of tolerance by the Canadian community have been exceeded. Here distribution was to ordinary confection stores who made their merchandise available to the general public. In my opinion, the Canadian community would be less tolerant in the case of such distribution than they would be in the case of distribution to stores who only made sales to persons 18 years of age and over, or who confined their sales to publications of legitimate interest to particular segments of the Canadian community,

> such as, for example, writers and artists.[19]

This is not to say that material available to the general public is proscribed if found unsuitable for children, but only that a more stringent test may be applied in this case.[20] The community standards test is applied only after other conditions have been met. As noted above, there must first be a finding that the material does exploit sex, or sex in conjunction with one or more of the enumerated items. It must also be established that this exploitation is a dominant characteristic of the material at bar.[21] In determining whether the exploitation is "undue", other factors may also be considered. Courts have questioned the intention of the author or producer,[22] and the literary merits and artistic value of the material.[23] While these are important considerations in evaluating a book such as Lady Chatterly's Lover[24] or the film Last Tango in Paris[25] they are irrelevant with respect to the pornography which has come before the courts over the last decade. The community standards test is therefore the main and often the only factor determining the question of "undueness".[26] The decision of whether the material in question goes beyond the standard of tolerance of the community rests with the jury, or the judge if sitting alone. An Ontario judge complained:

> The judge, who by the very institutional nature of his calling is required to distance himself or herself from society, for the purposes of the application of the test of obscenity is expected to be a person for all seasons familiar with and aware of the national level of tolerance. Thus the trial judge (or jury) is required to rely upon his or her own experience and decide as best he or she can what most people in Canada think about such material to arrive upon a measure of community tolerance of that material. . . I am sure that s. 159 (8) of the Criminal Code is unique in its delegation by Parliament to the contemporary Canadian community of its power to determine what books and motion pictures should or should not be stigmatized with the label "Criminal".[27]

Government Proposals for Reform

There have been four government attempts at reforming the obscenity legislation presented to the public since 1980. Each of the proposals has attempted to address what has appeared to be the two dominant areas of public concern: violence and degradation.

The first attempt was MacGuigan's proposed amendment in June of 1983. The effect of the amendment would have been to add "degradation" to the definition of obscenity in s. 159(8) and to sever the link between sex and the other enumerated catagories so that violence, as well as the other catagories would not have to be shown in conjunction with sex in order to be

considered 'obscene'.

> . . . where the dominant characteristic . . . is the undue exploitation of any one or more of the following subjects, namely, sex violence, crime, horror or cruelty, through degrading representations of a male or female person or in any other way. [emphasis mine][28]

The community standards test would still apply, as would the other criteria articulated in the case law. The MacGuigan amendment was apparently intended as an interim measure only, since the announcement of the appointment of the members of the Fraser Committee appeared in the same press release.[29]

The Fraser Committee recommended a three-tiered system to address problems with pornography. The most onerous criminal sanctions would apply to the first tier: materials which portray or advocate sexual activities involving children. The sanctions would also apply to materials produced so as to cause actual harm to the participants. The second tier, the one most pertinent to this discussion, recommends the proscription of material which depicts sexually violent behavior, including self-inflicted harm, sexual assault or other physical harm such as murder or bondage, if shown for purposes of sexual gratification. Also in this category is material which depicts bestiality, incest and necrophilia. The third tier addresses the problem of the unwilling viewer and requires that other

pornographic images, as defined, not be openly displayed to the public nor available to children.

The Fraser recommendations address a number of the problems which have been raised by the public but do not go far enough to satisfy either 'human rights' feminists concerns or conservative concerns.[30] In particular, the committee rejects the notion of degradation and restricts its recommendations to considerations of direct harm.

The Fraser Report, while adopting the 'human rights' feminist rhetoric with respect to pornography, in fact restricts itself to recommendations which are consistent with the negative liberty ideology. Whereas the report goes on at length about sexual equality and dignity, and justifies the use of state control to promote social values,[31] in fact the recommendations on reform to the obscenity provisions in the Criminal Code are limited to matters which can be characterized as causing direct harm. The contrast between the rhetoric and the actual draft legislation cannot help but confuse the public and the courts as to the interpretation to be placed on the draft provisions.[32]

Two additional proposals for reform have been introduced by the Conservative government since taking office. Each of these proposals are premised on a policy consistent with conservative philosophy. Bill C-

114, introduced in June of 1986 by John Crosbie, does address both violent and degrading pornographic material. As could be anticipated from the discussion in Chapter II supra, the bill, in keeping with the "decency" paradigm, also proscribes what, in both versions of liberalism, is characterized as "erotica", i.e. any form of non-coercive, non-degrading sexual activity.[33] Bill C-114 attests to the fact that the conservative position on pornography does indeed go far beyond the position advocated in the 'human rights' paradigm and is at opposite poles from the 'negative liberty' position discussed in Chapter II (supra).

Bill C-54 was recently introduced in the House by Ramon Hnatyshyn, Crosbie's successor, and has the same underlying policy as Bill C-114.[34] The new bill is, in some ways, even more draconian than Bill C-114. Although it purports to distinguish between "harmful pornography" and "erotica",[35] in fact, the "erotica," which may not be displayed openly or shown to children, is defined as "a human sexual organ, a female breast or the human anal region", if shown "in a sexual context or for the purpose of sexual stimulation."[36] This new bill applies to printed as well as visual material, apparently overlooked in the Crosbie amendment. The main criticism levelled at Bill C-114, that it does not allow for what the Canadian Advisory Council on the

Status of Women terms "healthy sexuality", applies equally to Hnatyshyn's bill.[37]

Recent Obscenity Jurisprudence

In the past few years, the courts have begun to move in the direction of a hate propaganda interpretation of the obscenity legislation. There have been several recent decisions in which a determination of obscenity has been made on the basis that the material included the use of violence or the degradation of women. The first in this line of cases applied the traditional community standards test, using violence and degradation as characteristics which exceeded the level of tolerance of the community. Later decisions have applied the same criteria on the rationale that these materials promote discriminatory treatment towards women and are harmful to society. The resultant policy which emerges from this recent body of case law is that pornographic material which treats women with contempt or promotes violence towards women is deemed to be obscene.

This approach was first explored by the courts in the case of Regina v. Doug Rankine Company Ltd. and Act III Video Productions Ltd.[38] One of the witnesses called to testify on the question of community standards was June Rowlands, a Toronto alderman:

> Mrs. Rowlands testified that in her opinion the contemporary community of Metropolitan Toronto would tolerate the following elements in a video cassette tape: explicit scenes of oral sex, masturbation, sexual intercourse and group sex involving three or more people, voyeurism and offensive language. However, she was of the opinion that the following elements would exceed the level of community tolerance in Metropolitan Toronto: scenes of men ejaculating on women's faces, penetration of the vagina by foreign objects such as corn-cobs, explicit scenes of buggery, a woman urinating into a pot, a man inserting a candle into his anus, sexual intercourse with women portrayed as young girls and scenes of sexual intercourse coupled with violence and cruelty. She said that the great lie of such films is that they depict women as enjoying sex and violence.[39]

Judge Borins adopted the criteria outlined in Mrs. Rowlands' testimony. The films which condoned the use of violence and degrading treatment as described were held to be obscene. Judge Borins' reasons for judgement have provided clear criteria for other courts to follow:

> Several of the films have scenes which couple violence and cruelty with sex. These scenes, such as scenes of bondage, frequently involve men perpetrating indignities on women in a sexual context. In my opinion, many of the films are exploitative of women, portraying them as passive victims who derive limitless pleasure from inflicted pain and 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 clinical detail. Whether deliberately or otherwise, most of the films portray degradation, humiliation, victimization and violence in human relationships as normal and acceptable behavior.[40]

This Ontario decision was followed in a Manitoba case heard several months later. Ferg J. of the Court of Queen's Bench applied Borins C.C.J.'s approach to the material. He also pointed out that it was the presentation of the material rather than the acts themselves which were crucial to a finding of obscenity.[41] Ferg J.'s description echoed Judge Borins' words:

> [Women] are exploited, portrayed as desiring pleasure from pain, by being humiliated and treated only as an object of male dominations sexually, or in cruel or violent bondage. Women are portrayed in these films as pining away their lives waiting for a huge male penis to come along, in the person of a so-called sex therapist, or window washer, supposedly to transport them into complete sexual ecstacy. Or even more false and degrading one is led to believe their raison d'etre is to savour semen as a life elixir, or that they secretly desire to be forcefully taken by a male.[42]

As Mr. Justice Ferg himself noted, his decision focusses not on the sexual acts but on the context and the message which is presented. The thrust of his decision on the Criminal Code provision resembles the reasons given by the Board of Enquiry in the "Red Eye"

hearing under the Saskatchewan Human Rights legislation which proscribes material which "ridicules, belittles, or otherwise affronts the dignity of any person. . . because of his race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin."[43]

> 17717 The manner in which women were "belittled" and had their dignity affronted because of their sex involved material suggesting that women in educational institutions are less than human; that they are inferior beings; that they are there to gratify male sexual desires; that they have no independent motivation or capacity to participate in social and intellectual activity. Women are belittled by being represented as mere objects, their dignity or quality of being worthy is depreciated. The material further affronts the dignity of women by trivializing and deriving humour from material which promotes sexual violence and the objectification of women. The material repeatedly represents women, in general, as less than human. In places the newspapers promote violent and demeaning treatment of women because of their sex.[44]

The focus in both decision is clearly human dignity.

Two subsequent obscenity decisions applied these same criteria but used the rationale that violent and degrading material promoted discrimination toward women and was harmful to society. The issue of harm arose in the case of Regina v. Wagner Mr. Justice Shannon of the Alberta Court of Queen's Bench based his decision on the

testimony of Dr. James Check, Assistant Professor of Psychology at York University, one of a group of Canadian and American social scientists who have been researching the effects of various forms of pornography on male subjects. Dr. Check had testified that both violent 'sexually explicit pornography' and degrading and dehumanizing 'sexually explicit pornography' were harmful:

> (a) sexually explicit [pornography] with violence: . . . one finds the overt infliction of pain and the overt use of force, or the threat of either of them.
>
> (b) sexually explicit [pornography] without violence, but dehumanizing or degrading:
> . . . men and women are often verbally abused and portrayed as having animal characteristics. Women, particularly, are deprived of unique human character or identity and are depicted as sexual playthings, hysterically and instantly responsive to male sexual demands. They worship male genitals and their own value depends upon the quality of their genitals and breasts. Thus in such films professional women, such as nurses and secretaries, are hired solely for the purpose of sexual gratification, without regard for their professional qualifications and abilities.[45]

Dr. Check's testimony also supported the point made in the Rankine decision that pornographic material which did not fall into these two catagories was not harmful:

> (c) sexually explicit erotica portrays positive and affectionate human sexual interaction, between consenting individuals participating on the basis of equality. There is no aggression, force, rape, torture, verbal abuse, or portrayal of humans as animals.[46]

Applying Dr. Check's criteria in the Rankine case, the Alberta Court of Queen's Bench ruled that six of the seven films in question encouraged discrimination against women and were socially harmful:

> [Dr. Check] contended that both sexually violent pornography and degrading and dehumanizing pornography convey the message that women enjoy abusive and anti-social behavior. Men who are repeatedly exposed to such films become more sexually aggressive in their relations with women and more tolerant of such behavior in others. That leads to increased callousness towards women on a personal level and less receptiveness to their legitimate claims for equality and respect.[47]

These same criteria were adopted by the British Columbia Court of Appeal in the Red Hot Video case. Both the Supreme Court of Canada and the Manitoba Court of Appeal have confirmed that these are valid grounds for a finding of obscenity under section 159 of the Criminal Code.[48]

The courts, in this line of cases, have adopted criteria consistent with the hate propaganda approach. The criteria spelled out in the Wagner decision which includes excerpts from the testimony of James Check,

have been adopted in their entirety by the British Columbia Court of Appeal.[49] These criteria address the concern of pornographic material which condones the use of violence or coercion in a sexual context. Moreover, the criteria laid out with respect to "sexually explicitly pornography without violence, but dehumanizing or degrading" incorporate a number of the substantive features of hate propaganda legislation. In particular, the criteria for non-violent sexually explicitly pornography echoes the decision of the Board of Inquiry under the Saskatchewan Human Rights legislation in Red Eye:

> Does the representation of women as objects of violence and sexual gratification, as incapable of independent though and action, as inferior, as funny, indicate discrimination?[50]

It will be recalled that this decision was predicated on the policy outlined in the Saskatchewan Code, viz. "to promote recognition of the inherent dignity. . . of all members of the human family", "to further public policy. . . that every person is free and equal in dignity and rights", and "to discourage and eliminate discrimination."[51] Most important both the courts and the Human Rights adjudicators view the material in the contextual manner, a treatment consistent with the regulation of hate propaganda.

Characteristics of Hate Propaganda Legislation

Violence

Section 281.1 of the Criminal Code makes it an offence to advocate genocide. For a legislative model pertaining to more general forms of violence, we might look to the West German legislation which includes a provision which

> . . . prohibits writings that describe acts of violence against human beings in a cruel and otherwise inhuman manner, which express glorification or the harmlessness of such acts of violence, or that instigate to race hatred.[52]

Promoting Hatred

Subsections 281.1(1) and (2) of the Criminal Code both deal with advocating hatred: the latter creates an offence of deliberately engendering hatred against a minority group, while the former is concerned with causing a riot or other breach of the peace. Both refer to "statements which promote hatred" without attempting to describe the statements or define hatred.

(a) Insult

France's legislation is somewhat more specific. It refers to defaming or insulting a group as defined.[53] Similarly, Britain's Race Relations Act 1976 refers to spoken or written matter which is "threatening, abusive or insulting."[54] An Illinois provision is more specific

still: it speaks of exposing any specified groups to "contempt, derision or obloquy" by portraying "depravity, criminality, unchastity or lack of virtue."[55]

(b) Inferiority

British Columbia's Civil Rights Protection Act (1981) was enacted in response to the entry of the Ku Klux Klan into this province.[56] It provides for an action in tort with injunctive relief and an option for the Attorney General to become a party. Substantively, the statute speaks of promoting the inferiority or superiority of one group as compared to another, and to the promotion of hatred and contempt.[57] Similarly, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination proscribes "all dissemination of ideas based on racial superiority or hatred. . . ."[58]

Contextual

It may be noted that, for the most part, the legislation discussed here pertains either to the alleged intent of the perpetrator or to the affect of the material on the targeted victim. The words or actions cannot be seen and identified apart from their context. Hate propaganda convinces and converts by exploiting the socio-psychological environment and the emotions of the audience.[59] No 'shopping list' of

words, actions or symbols could adequately describe the elements of the offence.

The courts have therefore pointed a way out of the dilemma to the legislators and the public, through the hate propaganda approach. As can be seen, the findings of Dr. Check and the social scientists involved in pornography research supported the hate propaganda approach to pornography. Their findings, although applauded by both the 'human rights' advocates and conservatives, were not sufficiently conclusive to satisfy those advocates of 'negative' liberty seeking proof of harm.[60] In accepting Dr. Check's criteria in Wagner and subsequent decisions, the courts have laid down criteria directed at material which discriminates against women, and have done so using the harm principle as rationale for entrenching on freedom of expression.

The research cited by Dr. Check as applied in Wagner, not only set out criteria for violent and degrading pornography, it specifically excluded 'erotica' from the sphere of material to be proscribed. The Wagner decision articulates the principle that 'erotica' as defined by Check, is harmless and should not be regulated. This provides a threshold which confines state intervention in this area. Some of the courts have refused to accept these limits, and have simply added the Wagner criteria to an inexhaustive list

of depictions which may be deemed legally obscene.[61] However, the British Columbia Court of Appeal, in the case of Red Hot Video, has cogently argued in favour of the limitations laid down in Wagner, on the basis that all other grounds for a finding of obscenity are null and void under the Charter.

The Effect of the Charter

The cases discussed above reflect the extent to which the laws on obscenity vary with judicial interpretation. The flexibility which has been built in to the legislation has exposed the provision to charges of vagueness and unpredictability. These changes have become particularly relevant in light of the Canadian Charter of Rights and Freedoms passed in 1981. Section 2, subsection (b) of the Charter provides "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Under section 1, these freedoms are limited only by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

A recent decision of the Federal Court of Appeal suggests that federal obscenity legislation under section 159 may still be in jeopardy. The Federal Court of Appeal recently overturned a County Court decision

upholding the validity of customs legislation intended to prevent objectionable material from being imported into Canada. Section 14 of the Customs Tariff Act prohibited importation of goods which, (in accordance with Schedule C of the applicable regulations) are of "an immoral or indecent character". The County Court had held that the legislation was valid but the Federal Court of Appeal reversed that decision and ruled that the words used in the tariff, "immoral and indecent" were too vague to be justified under section 1 of the Charter. The Court stated:

> In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences.[62]

The fact that this legislation was struck down for vagueness suggests that serious consideration must be given to the status of the obscenity provision of the Criminal Code. Although the terms used in this legislation are different than section 159 (8), the community standards test was also being applied to interpret the regulations under the Customs Tariff Act. This is but one of several decisions under section 2(b) of the Charter which brings the validity of section 159 of the Criminal Code into serious doubt.[63]

In contrast, Criminal Code legislation proscribing hate propaganda is far less vulnerable to constitutional challenge. A pre-trial constitutional challenge in the case of Keegstra was readily defeated.[64] One reason for this has been the considerable attention paid to this legislation prior to its enactment. Public debate as well as deliberations on the floor of the House and in Committee provided an opportunity for a collective acceptance of encroachment on freedom of expression to eliminate the spewing of vicious hatred against members of the Canadian community. In the Keegstra decision, the court cited a number of the arguments put forward by the Cohen Committee in justification of this legislation. For example:

> The committee firmly believes that Canadians who are members of any identifiable group in Canada are entitled to carry on their lives as

> Canadians without being victimized by the deliberate vicious promotion of hatred against them. In a democratic society freedom of speech does not mean the right to vilify. . . However small the actors may be in number the individuals promoting hate in Canada constitute a "clear and present danger" to the functioning of a democratic society. . . . The Canadian community has a duty not merely the right, to protect itself from the corrosive effects of propaganda that tends to undermine the confidence that various groups in a multicultural society must have in each other. The Committee therefore concludes that action by Government is necessary. . .[65]

In justifying the hate propaganda offences, the court also looks to the other sections of the Charter as aids to interpretation. In the case of hate propaganda, section 15 and section 27 of the Charter are particularly relevant. Section 27 provides:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Section 15, which only recently came into force requires:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Sub-section 2 legitimizes affirmative action programs:

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental of physical disability.

Both of these provisions in the Charter give added weight to legislation whose purpose is to protect identifiable minorities in Canada from hate propaganda.

It is also relevant to bring to the attention of the Court other Canadian legislation and the legislation of other western democracies. Evidence can be presented to the Court regarding the measures taken by other countries to combat racist organizations and hate propaganda activities. Relevant here are the various international conventions against racism and racist propaganda, many of which include Canada as a signatory.[66] This kind of evidence impresses the Court with the significance of legislation which guards Canadian society from the threat of racist propaganda.

The obscenity legislation has none of the attributes of the hate propaganda offences. Far from being narrow and precise, it has been described as a "top contender [for] the most muddled law in Canada today."[67] It has survived challenges under the Charter only by judicial legal gymnastics, presumably because

the courts are loathe to leave the country without its mainstay regulating legislation on pornographic material.[68] However, constitutional challenges to the legislation have not, as yet, been heard by the Supreme Court of Canada.

In the British Columbia Court of Appeal ruling on the validity of s. 159 in the case of Red Hot Video, Mr. Justice Anderson declares that the traditional grounds for obscenity do not satisfy the requirements of the Charter. Only the grounds outlined in the Wagner decision and pornography involving children could justifiably be ruled obscene since passage of the Charter. Anderson J.A. applies the criteria laid down in Wagner: "sexually explicit material with violence", and "sexually explicit material without violence but dehumanizing or degrading." These grounds he justifies on the basis of the harm principle, as argued in Wagner, and because they discriminate against women.

> The materials in question offend against the standard enunciated in s. 159(8) because they constitute a threat of real and substantial harm to the community. They have no literary or artistic merit and in a revolting and excessive way create an attitude of indifference to violence insofar as women are concerned and tend to dehumanize both men and women. They approve the domination of women by men as an acceptable social philosophy.[69]

These sentiments are echoed by Chief Justice Nemetz, speaking for the majority.[70]

In defending the constitutionality of the obscenity provisions, Mr. Justice Anderson relies on both section 15 and section 28 of the Charter as justification for the proscription of material which promotes discriminatory treatment of women This rationale clothes s. 159, as interpreted here, with a good deal of the protection afforded hate propaganda legislation. This leaves broader interpretations of the obscenity legislation vulnerable to Charter attack, which is clearly Anderson J.A.'s intention.

The question of dignity also become relevant in this line of approach. As was evidenced in the discussion on hate propaganda, the use of humiliation, ridicule, dehumanization and other like techniques, attacks the dignity of members of the target group. As Mr. Justice Quigley pointed out in the Keegstra decision, the preface to the Bill of Rights speaks of "the dignity and worth of the human person," and the Charter also carries an underlying theme of the protection of individual dignity and worth.[71] At the same time the Red Hot Video decision stands for the principle that all other sexual material must be free of regulation.[72] Anderson J.A. made clear that neither morality nor public opinion are sufficient reasons to

justify infringing on freedom of expression as enshrined in the Charter. This, in effect, disposes of both the Hicklin test and the community standards test and leaves 'erotica' untouched. Only the potential for harm and the prejudicial effects on women are sufficient reasons to restrict this freedom.

> It will also be observed that s. 2(b) of the Charter narrows the scope of s. 159(8) of the Code. Any limitation on freedom of expression must meet the strict requirements of s.1 of the Charter, namely, that the limitation is reasonable and such "as can be demonstrably justified in a free and democratic society." We must be careful, therefore, not to prohibit the publication of materials for the sole reason that the materials do not meet with popular approval or do not appeal to popular tastes. In my view, a restriction on freedom of expression can be "demonstrably justified" only if it can be shown that the material sought to be banned from publication causes or threatens to cause real and substantial harm to the community. In this respect, it is my opinion that publication of material placing excessive emphasis on explicit sex with violence, explicit sex involving children and explicit sex portraying human beings as having animal characteristics results in substantial harm to the community and we are thus justified in prohibiting the publication of such material.[73]

If the principles laid down by Anderson J.A. are followed, the proscription of violent and humiliating or degrading material would become central to the regulation of pornography.[74] Leave to appeal to the

Supreme Court of Canada in the Red Hot Video case has been denied.[75] Given this tacit approval by the highest court in the land, the words of both Mr. Justice Anderson and Chief Justice Nemetz carry a great deal of authority.

For the time being, judge-made law has pre-empted the legislature. To date, the federal government has ignored the policy formulated by the courts under the existing legislation and has proposed draft legislation which accords with the conservative paradigm. Bill C-54, currently before the House, is far more restrictive than the decisions in this recent line of cases. Should this bill be passed into law, the courts will be in a position to ultimately rule upon the validity of legislation. The decision rendered by Anderson J. of the B.C. Court of Appeal in the Red Hot Video case suggests that Bill C-54 would not survive a Charter challenge.

> Section 2(b) of the Charter prevents Parliament from enacting legislation to prohibit the publication of any materials unless it can be demonstrably justified that the publication of such materials will clearly cause substantial harm to the community.[76]

By virtue of the enshrinement of freedom of expression in section 2(b) of the Charter, the Courts are in a position to rule on the scope of pornography legislation. It is entirely possible that the Courts

will supercede the legislature to arrive at the hate propaganda approach as set out in Wagner and Red Hot Video.[77]

ENDNOTES: CHAPTER IV

1. Not all of the provincial boards are empowered to cut and prohibit the showing of films. The Fraser Report points out that Quebec and Manitoba boards are only authorized to classify films. (at 205.)

2. Both provincial and municipal powers in these areas have been challenged on the question of jurisdiction. Provincial jurisdiction to censor films was upheld by the Supreme Court of Canada in Re Nova Scotia Board of Censors and McNeil [1978] 2 SCR 622, 84 DLR(3d)1. A Charter challenge to the Ontario legislation was upheld on the basis that the Ontario Board had not been given specific guidelines in the act or regulations as to the basis on which the Board was empowered to prohibit or cut films. Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984) 5 DLR (4th) 766, (Ont. C.A.) Legislation has now been amended accordingly. Municipal zoning by-laws were also struck by the court on the basis that the wording of the legislation was too vague. Red Hot Video v. City of Vancouver, 18 C.C.C. (3d) 153. (B.C.C.A.)

3. Unlike section 159, section 160 of the Code simply provides for (police) seizure of the allegedly obscene material. If the material is found by the court to be obscene the material is confiscated. This section is rarely used. An Ontario judge recently commented that the state should consider using this section rather than the criminal sanctions contained in section 159. See R. v. Doug Rankine (1983) 9 C.C.C. (3d) 53; 36 C.R. (3d) 154.

4. R. v. Hicklin, 3 L.R. 360 (Q.B.) at 362.

5. Hicklin at 363.

6. In his judgement, Cockburn, C.J. quoted an earlier decision: "Although many vicious and immoral acts are not indictable, yet, if they tend to the destruction of morality in general, if they do or may effect the mass of society, they become offences of a public nature."

7. Hicklin at 371.

8. Hicklin at 150.

9. Manzer at 10.

10. It was the intent of the legislature to expand, rather than replace the Hicklin test. It was thought that the statutory definition would add an objective test to the subjective criteria used in the Hicklin rule. see Boyd at 42-43. However, after the Brodie decision, (infra) the courts abandoned the Hicklin rule.

11. The community standards test has been used in the U. S. since they abandoned the Hicklin test in 1957.

12. As Boyd points out, at pp. 44-47, the measure of societal mores arrived at through application of the community standards test does not provide any basis for legitimizing criminal charges.

13. R. v. Benjamin News cited in R. v. Penthouse Intl. (1979) 46 C.C.C. (2d) 111.

14. R. v. Brodie at 182.

15. Hicklin at 372.

16. Hicklin at 365.

17. Ralph, at 17.

18. re S.C.C. in Towne Cinema.

19. R. v. Sudbury News Service (1978) 39 C.C.C. (2d) 1; 18 O.R. (2d) 428. (Ont.C.A.) at 437-438.

20. These principles could be extended to cover the situation of video film rentals, currently a major public concern. A lower court Ontario decision takes judicial notice of the fact that Ontario does not restrict access to this films.

> In the present case there are no restrictions with respect to the age of the persons to whom the videocassette tapes may be rented or sold.
> R v. Doug Rankine at 68.

21. R. v. Brodie.

22. R. v. Brodie, R. v. Odeon Morton Theatres (1978) 39 C.C.C. (2d) 1; 18 O.R. (2d) 428. (Ont. C.A.)

23. R. v. Brodie; R. v. Dominion News and Gifts.

24. R. v. Brodie.

25. R. v. Odeon Morton Theatres.

26. R. v. Sudbury News Service. (1978) 39 C.C.C. (2d) 1; 18 O.R. (2d) 428. (Ont. C.A.)

27. R. v. Doug Rankine Co. This problem has also been raised within the legal profession, along with other concerns on pornography legislation. See Catherine Mitchell, "Pornography Debate Heated at Manitoba Mid-Winter," The National, Feb. 1986: 28.

28. MacGuigan Proposed Act to Amend the Criminal Code, s.l.

29. Minister of Justice and Attorney General of Canada, News Release, "Justice Minister Tables Pornography and Prostitution Proposals and Names Special Committee," Ottawa: 23 June 1983.

30. For an excellent summary and critique of the Report, see Michael Kanter, "Prohibit or Regulate? The Fraser Report and New Approaches to Pornography and Prostitution," Osgoode Hall L.J. 23 - 1: 171.

31. See e.g. Fraser Report, "Summary" (vol. 3) at 11. ". . . impairment of a fundamental social value [i.e. the improvement of the status of women] can properly be regarded as a "harm" meriting legislative control."

32. For example, the Report recommends draft legislation sub-titled "Sexually Violent and Degrading Pornography" whereas, in fact, the draft sections refer to violence, bestiality, incest and necrophilia, none of which are normally characterized as "degrading", see Summary at 13.

33. The definition of "pornography" in s. 138 of the bill includes (inter alia) vaginal, anal or oral intercourse, masturbation and ejaculation as well as behavior such as incest and bestiality. The penalty for dealing with such material is up to five years imprisonment.

34. Bill C-54 had its first reading on 4 May 1987. According to the Globe and Mail, Hnatyshyn said that "the intent of his bill is the same as the one introduced by Crosbie. . . ." Patricia Poirier, Globe and Mail: 1A.

35. Poirier, Globe and Mail 1A.

36. Bill C-54 s. 138, "erotica".

37. See C.C.A.S.W at 1-3.

38. Doug Rankine Judgement, Oct. 24, 1983. 9 C.C.C. (3d) 53; 36 C.R. (3d) 154. (Ont. Cy. Ct.)

39. Doug Rankine at 58.

40. Doug Rankine at 68.

41. R. v. Ramsingh (1984) 14 C.C.C. (3d) at 240.

42. Ramsingh at 239.

43. S. 14 (1) Saskatchewan Human Rights Code.

44. "Red Eye" at p. D/2088.

45. R. v. Wagner (1985) 43 C.R.R (3d) 318 at 331.

46. R. v. Wagner.

47. R. v. Wagner.

48. see Town Cinema Theatres reported at [1985] 4 W.W.R. 1. (S.C.C.) and R. v. Video World [1986] 1 W.W.R. 413 (Man. C.A.).

49. In the case of Red Hot Video.

50. "Red Eye" at 3.

51. S. 3 of the Saskatchewan Code cited at Para. 17629, p. D/2079, "Red Eye". Similarly, in the Bramhill decision the same concerns are addressed by the Nova Scotia Board of Inquiry:

> If a stereo-typical image of a certain class of persons as incompetent, childish, and funny, is allowed to be displayed, to opportunities (sic) of members of the class for responsible jobs and to obtain rights on an equal footing with the majority class grouping are endangered.
>
> Bramhill p. D/251, para. 2158.

52. Law Reform Commission of Canada, "Hate Propaganda," at 21.

53. See discussion in L.R.C.C. at 20-21.

54. L.R.C.C. at 22.

55. The constitutionally of the Illinois provision is being questioned.

56. John McAlpine, Report Arising Out of The Activities of The Ku Klux Klan in British Columbia.

57. S.B.C. 1981, c. 12.

58. L.R.C.C. at 18.

59. See Cohen Report, Chapter III, pp. 27-33 and Appendix II, pp. 171-251, with particular attention to Chapters IV and V.

60. See discussions McLaren and Fisher, Regulating Sex, and Chapter II supra.

61. see R. v. Video World, a decision of the Manitoba Court of Appeal. [1986] 1 W.W.R. 412.

62. Re Luscher and Deputy Minister, Revenue Canada, 17 D.L.R. (4th) 503. (Fed. C. A.)

63. e.g. Re. Luscher and Deputy Minister Revenue Canada. 149 D.L.R. (3d) 243 overturned at 17 D.L.R. (4th) 503 (Fed. C.A.). See also Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983) 147 D.L.R. (3d) 58; 41 O.R. (2d) 583 (Ont. Div. Ct.). Affirmed by the Ont. Court of Appeal at 5 D.L.R. (4th) 766; 45 O.R. (2d) 80n.

64. This often cited decision is quite rare in that the protection of free expression under s. 2(b) of the Charter is deemed to exclude hate propaganda. Challenges to the obscenity provisions and to almost all other statutes which impact on freedom of expression under s. 2(b) have been dealt with under section 1 of the Charter, in which the Crown has the onus of proving that the offending legislation is nonetheless justifiable in a free and democratic society. See Macdonald pp. 138-139.

65. Passage at page 24 of the Cohen Report cited in Keegstra at 272.

66. see Chapter III on Hate Propaganda. (supra)

67. Doug Schmeiser, at 233. Once the legislation in question must be "saved" by section 1 of the Charter, problem of overbreadth and vagueness became fatal. See S.C.C.'s onerous test: R. v. Oakes. (1986) 24 C.C.C. (3d) 324. (S.C.C.)

68. see, for example the Popert decision and the Ontario Censor Board case. In both, the legislation was struck for vagueness.

69. Red Hot Video at p. 61.

70. Nemetz C.J. does not refer to the question of harm but speaks of the "degrading vilification of women" at 43.

71. see Keegstra and also Reference re s. 94(2): This consideration also becomes available to tip the scales in favour of legislation interpreted in accordance with these principles.

72. Anderson J. appears to be 'reading down' the legislation - i.e. ruling that the legislation as interpreted, is inconsistent with the Charter - and substituting a narrower construction which brings it within constitutional requirements. Also note that artistic or literary merit are assumed to be absolute defences.

73. Red Hot Video at pp. 58-59. Anderson J.A. also quotes a passage from a paper on censorship by Clare Beckman in Tarnopolsky and Beaudoin, eds., Canadian Charter of Rights and Freedoms (Ottawa: Carswell, 1982) 75-121. The inference made by Mr. Justice Anderson is that only the "clear and present danger" test, as applied in the U.S., gives sufficient justification for interference with freedom of expression. This same rationale was applied by Mr. Justice Quigley in the Keegstra decision. See footnote #65 supra.

74. See Sheila Noonan. "Pornography: Preferring the Feminist Approach of the British Columbia Court of Appeal to that of the Fraser Committee," 45 C.R.(3d)61 at 62.

While each of the changes to the way subsection 159(8) has been construed in these judicial decision can be described as "technical" the overall effect is a radical change to the philosophy underlying the legislation. Viewed as policy-making by the judiciary rather than the legislature, this appears to contradict Berlin's distinction between technical and philosophical policy-making (Chapter 1 supra), and to support the incrementalist theory of policy making as articulated in an American context by Charles Lindblom.

Charles E. Lindblom, "The Science of 'Muddling Through'," Bobb's Merril Reprint, Reprinted in Pub.

Admin R., 19 (Spr. 1959): 79.

Nor does Manzer suggest that the policy decision-making process necessarily entails a deliberate choice of political philosophy. However, the question of philosophy on this issue has loomed large in the eyes of both the government and the public. Following the introduction of Crosbie's Bill C-114, political commentator Jeffrey Simpson cautioned that ". . . no one should look for a change in the philosophy behind [Crosbie's] pornography proposals, . . . the Tories think they're onto a political winner in their crusade against porn.

Jeffrey Simpson, "The Tories on Porn," Globe & Mail, 16 June, 1986 at A6.

Simpson's prediction has been borne out by the latest bill introduced by Ray Hnatyshyn.

Philosophy in itself has become a political issue in the case of pornography. This may, to some extent, be due to the 25-year time lapse since the last amendment to the obscenity legislation. Alternatively, Canadian attitudes toward social policy may be somewhat different than that of the American polity. A discussion by Lipset on the differences between political culture in the U.S. and Canada suggest that this view may have some merit.

Seymour Martin Lipset, "Revolution and Counter-revolution: The United States and Canada," Revolution and Counterrevolution: Change and Persistence in Social Structures, (New York: Basic Books Inc., 1968) 31-63.

In particular, Lipset notes that Canadians have, to a great extent retained an elitist structure which can be contrasted with American egalitarianism and individualism. Such a structure could potentially create philosophical differences between the elites and the remainder of the populace; at least, that seems to be the view of the Conservatives. According to Simpson:

> The Tories profoundly believe that their tough measures against pornography are politically popular. "There's a split between mass and elite opinion on this," said one well-placed Tory yesterday.
>
> Simpson, Globe & Mail

Certainly, one cannot deny that there are opposing views

on the subject - views which can be characterized as differences in goals rather than means, to use Berlin's terms. In contrast, Lindblom's incrementalism theory is premised on "fundamental agreement on patently disruptive issues;" agreement between the two major parties and among the general public. See Lindblom, pp. 84-85.

However, the recent upsurge of conservative values on moral issues appears to be an American phenomenon as well as a Canadian one. On issues such as abortion, the family, sexual equality and other social policies, attitudes seem to have polarized on philosophical grounds in the United States as well as in Canada. In view of these recent apparent abberations in the area of social policy, both American and Canadian public policy theory may require some re-evaluation.

75. September 30, 1985.

76. Red Hot Video at 60.

77. Bill C-54 does take a contextual approach to degrading and violent sexual material. On a constitutional challenge, the courts may 'read down' the legislation so as to be consistent with the Charter. It is possible to 'read down' the provision of Bill C-54 so as to arrive at what is substantially the Wagner approach.

CHAPTER V

CONCLUSION: THE HATE PROPAGANDA COMPROMISE

Formulation of social policy does not take place in a vacuum. Governments must build on existing legislation in related areas, and must take into account general trends in public policy and in public philosophy.

When Edward Shils delivered his paper, "The Antimonies of Liberalism", (supra) at a conference in January of 1976, his major concern was a shift in American public philosophy towards "collectivist" liberalism; a shift which he claimed has passed beyond the parameters of liberalism into socialism. Recently, the pendulum in the United States has swung in the other direction and we have witnessed a decided shift towards the right: a shift which, in terms of social policy has manifested itself in, among other things, a more rigid approach to law and order, a movement towards traditional views of morality and a tendency towards fusion of church and state. As Manzer points out, Canadian public philosophy is influenced by ideological movements in the United States; for that, if no other reason, we have certainly felt the impact of the conservative ideology over the past two or three years.

In formulating policy on pornography, the federal government must take into account this recent wave of conservatism. However, we cannot ignore our recent history, our ongoing social programs and our liberal philosophy. Sexual attitudes and sexual practices have undergone considerable changes since the 1950s. Pre-marital and extra-marital sexual relations have become commonplace. Homosexual relationships and practices have, by and large, become acceptable. Attitudes towards the institutions of marriage and the family have also become far less rigid, accommodating a variety of arrangements outside of the heterosexual nuclear family. Trends in government policy over the past few decades have corresponded to these attitudinal changes: the offence of rape has for the most part, been replaced by sanctions against 'sexual assault', dispensing birth control information is no longer illegal, homosexual practices between consenting adults has been de-criminalized, no-fault divorce has been accepted and has recently become even easier to obtain. These and other examples of legislative reform have been the result of government policies initiated to accommodate changes in societal attitudes. Accordingly, husbands can no longer "rape" their wives with impunity, it is no longer necessary to prove adultery or other blameworthy behavior in order to obtain a divorce, fathers are often

awarded custody of young children and homosexuality is not necessarily sufficient grounds for dismissing an employee.

Along with these changes in attitudes towards sex, marriage and the family, there have been changes in the role and perception of women in society. Many women have found themselves in a position to pursue careers and take their place alongside men in the labour force and in political life. Those changes which have taken place in sexual morality and in the institution of the family have accommodated, and in some ways necessitated, a role for women outside of the home. These factors have contributed to societal recognition that women must be accorded equal rights in many, and perhaps all areas of society, but, in particular, in the workplace.

Government policy over at least the past decade has, to a great extent been supportive of women's right to work alongside men in the labour force. There have been numerous programs to encourage women into non-traditional jobs, to give them incentives to obtain increased education and training and to sponsor re-training programs for women re-entering the labour force. At the same time there have been policies directed at both the public and private sphere to change hiring and promotional policies, and to pay women at a rate more closely aligned with the wage scales for men.

This has involved various efforts by government to work with private industry on affirmative action schemes, to eliminate discriminatory hiring and training practices, and to re-evaluate salary levels with respect to jobs traditionally held by women. Other programs such as pension schemes, medical benefits, daycare, and maternity leave benefits have been implemented to facilitate these policy goals.[1]

These and other policy decisions made by government to encourage women's participation in all aspects of public life are clearly consistent with a philosophy of ethical liberalism. Policies which encourage growth, self development and self-worth are being extended to women as full members of society. In addition, various measures taken by government can be characterized as "affirmative action" programs to assist women in overcoming the various barriers which arose as a result of previous practices and attitudes. Such measures and the philosophy which engenders them have now been constitutionally endorsed in the Charter of Rights and Freedoms. Moreover, human rights programs, as discussed by Manzer, have been deliberately and systematically extended to include 'sex' as a ground for complaints pertaining to discrimination. The hate propaganda approach will bring pornography legislation into line with this policy.

The purpose of this thesis has been to demonstrate that the regulation of pornography by means of legislation which approaches the material as a form of hate propaganda presents a pragmatic and viable public policy which accords with both the public philosophy and our jurisprudence. Although the problem is a complex one and no approach can provide a panacea, the human rights approach to this problem offers the following benefits:

1. The human rights approach presents a workable compromise to a divided public. Philosophically, both the civil libertarians and the conservative lobby share common elements of positive liberal ideology. The adoption of this policy would, in utilitarian terms, provide the greatest satisfaction to the greatest number.

2. The hate propaganda approach addresses the aspects of pornography which, in all three paradigms, were found to be most objectionable; viz. violence and degradation. This model, therefore, provides a degree of appeasement to each of the major segments of the public.

3. The human rights model removes the pornography issue from the sphere of sex and morality. State intervention in the area of human rights garners a higher degree of legitimacy in a liberal society than regulation of morality.

4. The hate propaganda approach excludes from the scope of regulation most pornographic material which can be characterized as "erotica." This should narrow the scope of the legislation and provide a threshold in terms of sexual content.

5. A legal framework for hate propaganda is

already in place.

6. The rationale for the regulation of hate propaganda has been incorporated in the Canadian public philosophy with the passage of the hate propaganda provisions of the Criminal Code and the debates which preceded it.

7. The hate propaganda approach is consistent with the goal of equality for women as contained in the Charter of Rights and Freedoms. As such, it is defensible on both legalistic and policy grounds.

8. An acceptable and efficacious approach to pornography from this perspective has already been formulated by the courts and become a part of the jurisprudence on obscenity. This provides both confirmation and guidance for a legislative scheme based on these principles.

The proposals for reform made by the Conservative government - both Bill C-114 and the modification recently introduced by Justice Minister Ray Hnatyshyn have been met with strong criticism for their sweeping broad attack on sexual material.[2] Such legislation will not, in the end, be efficacious in terms of enforcement.[3] Moreover, if the Courts accept the rationale put forward by Mr Justice Anderson in the Red Hot Video appeal, such legislation will not be upheld by the Courts.

The hate propaganda approach as enunciated in the Wagner and Red Hot Video decisions brings the violent and degrading aspects of so-called soft core pornography

within the scope of the law while at the same time, narrowing the over-all parameters of the legislation. It was apparent from the analysis of public opinion in Chapter II that much of the material which is the subject of criminal prosecution for obscenity is generally acceptable in contemporary Canadian society. The government should not confuse a repugnance for violence, cruelty and mockery with conservative puritanical avoidance of sexual depictions. Public response to Bills C-114 and C-54 introduced by the Conservative government suggests that the legislators have misinterpreted public philosophy. Although the conservative voice is currently vocal, Manzer's research demonstrates that public philosophy remains liberal.

The Fraser Committee elected to proscribe violence but rejected degradation and dehumanization as grounds for criminal sanctions.[4] Yet the Committee acknowledged overwhelming support for the hate propaganda approach to pornography. It might be argued that the floodgates would open if all sexual material that degraded or dehumanized women became the subject of criminal prosecution. Yet, the Fraser Committee did recommend that "sex" be added as a ground under section 281.2, of the Criminal Code, thereby subjecting all material, pornographic and otherwise, to scrutiny as potential hate propaganda. Moreover, the defences provides to the

accused in obscenity charges - and in Mr. Justice Anderson's approach - defences such as artistic or scientific merit, are not available to the accused under s.281.2. It was clearly irresponsible of the Fraser Committee to recommend this measure, and the recommendation was rightly rejected by the Law Reform Commission on Hate Propaganda.[5]

Certainly, the use of the criminal law is not appropriate for all the material which degrades women, in a society where discrimination against women is systemic. In the Red Hot Video decision, Mr. Justice Anderson relied on the traditional defences to obscenity to narrow the scope of application: the material must be sexually explicit, "undue" emphasis on sex must be the dominant characteristic of the material, and the material must be devoid of any artistic, political, literary or scientific value.[6]

There are existing regulatory bodies which can play a part in controlling pornographic material. Human Rights Commissions, if supplemented financially by the federal government, can be instrumental in promoting awareness of the misogynist content in pornographic material.[7] Provincial regulatory boards have already begun to classify video material as they classify films. The C.R.T.C. can play a much larger role in monitoring the content of private cable networks. Municipal

governments have the authority to restrict the distribution of pornographic material to certain stores or to designated areas.[8] With pornography as with hate propaganda, the only solution is a change in societal attitudes. For this, other instruments of social policy are appropriate. The criminal law must only be used when immediate and drastic measures are required.

ENDNOTES: CHAPTER V

1. A number of these measures have been taken within the past 10 years. Compare the current situation with respect to these areas to the circumstances described in a paper published in 1976. Margrit Eichler, "Social Policy Concerning Women" Canadian Social Policy ed. Shanker A. Yelaja (Waterloo, Ont: Wilfred Laurier UP. 1978) 133-146.

2. See, e.g. "Its Goodbye to the Old Community Test" Toronto Star, 21 June 1986, at B6; Lynda Hurst, "New Porn Law Dons Old Dress Despite Outcry," Toronto Star, 25 Oct. 1986 at B5; Patrica Poirier, "New Bill Quickly Criticized: Porn Violators Facing 10 Years in Prison," Globe and Mail 5 May 1987 Natl ed. at A1. Pritchard in the Saskatoon Star-Phoenix, "The 'Auntie' Porn Movement" Cartoon in Vancouver Sun 25 June 1986 at B6.

3. David Hume said "Force ultimately rests on opinion" quoted in Samuel H. Beer, "Political Culture," Patterns of Government: The Major Political Systems of Europe, eds. Samuel H. Beer and Adam B. Ulam, 3rd ed. (New York: Random House, 1973) 37. Beer argues that, to maintain legitimacy, a government must have support other than force, in its polity. H.L.A. Hart defines "efficacy" as "the fact that a rule of law is obeyed more often than not." Hart relies on the concept of "natural law" rather than the notion of public consensus. H.L.A Hart, The Concept of Law, (Oxford: Clarendon Press, Oxford UP, 1961).

4. Noonan at 67 argues that, while degrading representations would not be proscribed, a number of feminists erotic depictions would attract criminal sanctions, c.f. Kantor at 181.

5. The L.R.C.C. indicated that pornography by legislation should remain as a separate category with its own definitions and defences.

6. Red Hot Video at 58.

7. The L.R.C.C. recommended that provincial human rights commissions be given a mandate to deal with sexist material. However, the Fraser Committee had argued against this move on the basis that these commissions are already under-funded.

8. Insofar as the legislation is precise. See Red Hot Video v. City of Vancouver (1985) 18 C.C.C. (3d) 153.

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PORNOGRAPHY AS AN ISSUE IN

CANADIAN PUBLIC POLICY

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FRANCES S. RAPAPORT

24 Aug. 1987