PORNOGRAPHY, LAW AND MORAL THEORY

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I. INTRODUCTION

It is always important to remember that law is not an end in itself, but rather a means of realizing certain values. This becomes especially apparent when we are faced with the problem of creating laws in an area in which there is considerable conflict between competing values. Pornography is such an area.

Liberals, legal moralists (conservatives) and feminists all appear to agree that, in certain circumstances, restrictions on pornography are justified, but they vehemently disagree as to why and in what circumstances such restrictions are justified. *Liberals* argue that restricting pornography means curtailing freedom of expression and the right to individual liberty, and that such restrictions are only justified where the exercise of these rights and freedoms can be shown to cause harm to individuals. *Legal moralists*, on the other hand, argue that restrictions on pornography are necessary even where no harm to individuals can be shown. Pornography, they claim, is immoral, and the law must protect society from breaches of its moral standards. *Feminists* are not concerned with the moral or immoral nature of pornography, but with the harm that pornography causes to individual women. In this sense the feminist position is consistent with liberal theory, although there is a reluctance on the part of many liberals to recognize this.

This article will investigate the problem of legal restrictions on pornography in the context of moral theory. A brief discussion of the two major moral theories that inform the pornography debate, liberalism and legal moralism, will be followed by a discussion of Canadian obscenity law in terms of its moral foundations. A number of justifications for legal restrictions on pornography that are consistent with liberal ideology will then be explored and illustrated. Feminist theses will be included in this section since, in my view, they are consistent with the principles of liberalism.

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II. PORNOGRAPHY AND MORAL THEORY

In this article "pornography" is defined as "any materials that eroticize dominance and submission or portray women in a degrading manner as objects to be sexually exploited and manipulated".[1] To restrict such materials will necessarily restrict the right to individual liberty of those who produce, distribute and use pornography, and will, in those cases in which pornography can be classified as "expression",[2] curtail freedom of expression as well. The types of arguments that are advanced in order to justify or condemn such restrictions vary depending on whether they are founded on liberalism or legal moralism.

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[1] Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5, at 24 (1984). This is a definition with which most feminists would agree. I am primarily concerned with the type of literature encompassed by the definition, since it is this material that appears to be at the centre of the contemporary pornography debate. Non-submissive eroticism, child-porn, gay-porn, pornography for women, etc., are not discussed because they bring up different, less pervasive issues and concerns.

[2] It is necessary to distinguish those types of pornography that may be classified as "expression", from those that cannot. The production, distribution, and use of the former types will be protected by the principle of freedom of expression *and* that of the right to individual liberty; the latter will be protected only by the right to individual liberty. (*See* note 15, *infra*). It might be argued that some types of pornography are more akin to a sexual aid than to a type of expression. According to Schauer:

> [A] refusal to treat hard core pornography as speech . . . is grounded in the belief that the prototypical pornographic item shares more of the characteristics of sexual activity than of communication. The pornographic item is a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification in that way.

F. SCHAUER, FREEDOM OF SPEECH: A PHILOSOPHICAL ENQUIRY 181 (1982); *see also* Dworkin, *Is There a Right to Pornography?*, 1 OXFORD J. LEGAL STUD. 177 (1981). In the United States, a considerable jurisprudence has developed on the issue of whether a particular item is "expression". In Miller v. California, 93 S. Ct. 2607, at 2615 (1973), "speech" under the First Amendment of the United States Constitution did not include "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value". *See also* Hamling v. United States, 94 S. Ct. 2887 (1974); Pinkus v. United States, 98 S. Ct. 1808 (1978).

In Canada, obscenity cases do not contain much discussion of the principle of freedom of expression and there is thus little jurisprudence distinguishing "expressive" acts from other acts. The constitutional entrenchment of freedom of expression will clearly change this. It has already been held that "expressive" in para. 2(b) of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982*, Part I, *enacted by* the *Canada Act, 1982*, U.K. 1982, c. 11, does not contemplate the "artistic expression" of a burlesque entertainer, but is confined to the "political and governmental domain": *Re* Koumoudouros and Municipality of Metropolitan Toronto, 45 O.R. (2d) 426, at 435, 6 D.L.R. (4th) 523, at 533 (H.C. 1984) (Eberle J.). *But see* the differing opinion of Osler J., *id.* at 428, 6 D.L.R. (4th) at 526.

A. *Liberalism*

For the liberal, the particular evil associated with restrictions[3] on pornography is that they may unduly violate two of the fundamental principles of liberal ideology,[4] freedom of expression and the right to individual liberty.

1. *Freedom of Expression*

Freedom of expression is the freedom of an individual to openly communicate his or her ideas and beliefs. Its corollary is the freedom to hear the ideas and beliefs of others.[5] For the liberal, freedom of expression is both important and necessary, since it allows for the moral, political and intellectual growth of a society. According to Mill, "the peculiar evil of silencing the expression of an opinion is that it is robbing the human race".[6] If an opinion is stifled it is a loss both to those who agree with it and to those who disagree with it. If the opinion is correct, the opportunity to hear the truth is lost and if it is incorrect, "the clearer perception and livelier impression of truth, produced by its collision with error"[7] is not achieved. Restrictions on expression are considered to be especially pernicious where the expression in question presents a challenge to the existing moral and political order. The relationship between such an expression and the proper functioning of a democracy was eloquently expressed by Mr. Justice Rand:

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[3] Throughout this article I use the word "restrictions" to mean laws and regulations, created and enforced by any federal, provincial or municipal government or government agency, that are designed to make the production, distribution and/or use of certain materials either a criminal offence, or a civil cause of action. "Government agencies" include courts, and therefore judge-made law and interpretation of law would be included in the definition of "restrictions".

[4] The terms "liberal ideology", "liberal" and "liberalism" are used in this article to refer to that ideology which is based on the writings of J.S. Mill and his followers. This is often referred to as "liberty-based" liberalism, and is contrasted with the "equality-based" liberalism of writers such as Kant, Dworkin and Rawls. In the context of law-making in the area of obscenity and pornography, arguments founded on "liberty-based" liberalism emphasize the paramountcy of freedom of expression and the right to individual liberty (*but see* Dworkin, *supra* note 2). Legal manifestations of this concern can be found in the national constitutions of many Western states (*e.g.*, the *Canadian Charter of Rights and Freedoms*, para. 2(b) and s. 7) and in international human rights documents (*e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 GAOR Supp. (No. 16) at 59, U.N. Doc. A6316 (1967), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (reprinted in part in CAN. CHARTER OF RIGHTS ANNOTATED (Canada Law Book) 31-1).

[5] *See*, *e.g.*, Sunday Times v. United Kingdom, 2 E.H.R.R. 245, at 246 (Eur. Ct. H.R. 1979).

[6] J. MILL, ON LIBERTY 24 (1859).

[7] *Id.*

> Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society. . . . But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas.[8]

2. *The Right to Individual Liberty*

The right to individual liberty is the right of an individual to act as he or she wishes without interference or the threat of interference from others.[9] "Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree."[10] For Mill, liberty is manifested in the security and autonomy of the individual and, thus, a person's most vital interest is his or her security and autonomy. Only a secure and autonomous person can assert his or her individuality, and "it is only the cultivation of individuality which produces, or can produce, well developed human beings".[11]

3. *Justifications for Restrictions on Liberal Principles*

The liberal acknowledges that neither freedom of expression nor the right to individual liberty can be absolute. It is understood in liberal ideology that it is necessary to circumscribe "these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law".[12] This protection of an individual's security and autonomy is, according to the liberal, the *only* valid justification for restricting the liberty of another individual to act as he or she wishes:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others.[13]

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[8] Switzman v. Elbling, [1957] S.C.R. 285, at 306, 7 D.L.R. (2d) 337, at 358.

[9] This has been termed "negative liberty" by some: *see* I. BERLIN, FOUR ESSAYS ON LIBERTY 122-30 (1969).

[10] *Id.* at 122.

[11] *Supra* note 6, at 79.

[12] Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at 329, [1953] 4 D.L.R. 641, at 670 (Rand J.).

[13] *Supra* note 6, at 15. This principle excludes restrictions based on paternalistic concerns, as is emphasized by the words "harm to others". Some liberals, however, do accept paternalistic justifications for the restriction of liberty where a person is in an irrational state of mind and is uncontrollable.

This principle applies to both freedom of expression and the right to individual liberty,[14] although the amount of harm necessary to justify a particular restriction will depend on whether the act in question involves an exercise of both freedom of expression and the right to individual liberty, or only the right to individual liberty.[15]

B. *Legal Moralism*

Legal moralism is the antithesis of liberalism. It begins with the proposition that the function of the law is to enforce community morality. If an act contravenes the moral standards of the community, it is subject to legal restriction *even if it does no harm to individual interests*. The classic example of the difference between the legal moralist and the liberal is their different reaction to private sexual practices, such as homosexuality between consenting adults,[16] that are contrary to the moral standards of the community but not harmful to any particular individual. The liberal would regard such acts as being beyond the legitimate jurisdiction of the law since no individual is actually harmed by them. The legal moralist, on the other hand, would like to see legal restrictions placed on such activities since they are contrary to the community morality.

The underlying concern of the legal moralist is that society will disintegrate if adequate measures are not taken to protect community morality. According to Lord Devlin, when a society is created people come to an agreement about what is good and what is evil. Without such an agreement, the society could not exist. And if, having come to such an agreement, "the agreement goes, the society will disintegrate".[17]

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[14] Mill applies the principle to freedom of expression in his famous "coin dealer" example, *supra* note 6, at 69. *See also* Feinberg, *Limits to the Free Expression of Opinion*, in PHILOSOPHY OF LAW 135 (J. Feinberg & H. Gross eds. 1975); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Schauer, *Free Speech and the Paradox of Tolerance*, in VALUES IN CONFLICT: LIFE, LIBERTY AND THE RULE OF LAW 228 (B. Leiser ed. 1981).

[15] Not all acts involve "expression". Those that do will be protected by the principle of freedom of expression *and* by the right to individual liberty, since all expressive acts involve the exercise of individual liberty. The restriction of an act involving "expression" is graver than the restriction of an act that does not, since in addition to the prejudice to the individual's security and autonomy, society as a whole loses by the stifling of opinions. Therefore, the justifications for restricting an expression will have to be at least slightly stronger than those for restricting an act that does not involve expression. For a thorough discussion of this point, *see* F. SCHAUER, *supra* note 2, at 9ff. The problem of what constitutes "expression" is discussed in note 2, *supra*.

[16] It was the issue of private homosexuality that generated the famous Hart/Devlin debate. *See* H. HART, LAW, LIBERTY AND MORALITY (1963); Devlin, *The Enforcement of Morals*, 45 PROC. OF BR. ACADEMY 129 (1959).

[17] Devlin, *id.* at 138.

Consequently, "a recognized morality is as necessary to society as, say, a recognized government, [and] society may use the law to preserve morality in the same way that it uses it to safeguard anything else essential to its existence".[18]

Thus, according to the legal moralist, restrictions on individual liberty and freedom of expression are justified whenever those freedoms are exercised in a way that is contrary to the moral standards of the community, even if no harm to individual interests ensues.

III. PORNOGRAPHY AND LAW

A. *The Present Law in Canada*

There are no legal provisions in Canada dealing specifically with pornography. In the statutory context, pornography is viewed as a type of obscenity, and any criminal action[19] must be brought under the obscenity provisions of the *Criminal Code*.[20] Section 159 of the *Criminal Code* makes it an offence to make, print, publish, distribute, circulate, or have in possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever.[21] It is also an offence for a person, knowingly and without lawful justification or excuse, to sell, expose to public view or have in his possession for such a purpose, any such item.[22]

Obscenity is defined in subsection 159(8):

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

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[18] *Id.* at 139. Legal moralism, as manifested in this statement, is the philosophical basis of conservatism, the "new right", the "moral majority", and other similar ideologies. Legal moralist themes can also be found in the "humanist" writers who argue that the use of pornography may have the effect of destroying our very humanity by perverting our psychological response to sex and sexuality. *See* Van Den Haag, *Democracy and Pornography*, in WHERE DO YOU DRAW THE LINE 261 (V. Cline ed. 1974); Kristol, *The Case for Liberal Censorship*, *id.* at 50.

[19] *See* note 39 and accompanying text, *infra*, for a discussion of "private" actions under nuisance statutes and human rights legislation.

[20] R.S.C. 1970, c. C-34.

[21] R.S.C. 1970, c. C-34, para. 159(1)(a).

[22] R.S.C. 1970, c. C-34, para. 159(2)(a). A person shall also not be convicted of an offence under the section "if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good" (R.S.C. 1970, c. C-34, sub. 159(3)). *Cf.* R. v. American News Co., 25 C.R. 374, 118 C.C.C. 152 (Ont. C.A. 1957).

Considerable jurisprudence has developed on the application of this definition. The basic principle was stated by Zuber J. in *Popert v. The Queen*:[23] "In cases dealing with obscenity, it is now accepted that the appropriate test is the community standard of tolerance." Thus, the judge must decide whether, in a particular case, the "exploitation of sex" is "undue" in the sense that it would not be tolerated by the community.

The law in this area thus appears to be concerned with protecting society from that which it will not tolerate. It will often be the case that society will not tolerate that which is not in fact harmful to individuals simply on the ground that it is indecent, disgusting or immoral. Similarly, society might tolerate that which *is* harmful to individuals. The law is thus directed more at the protection of public morals than at the protection of private security and autonomy, and it is thus more consistent with legal moralism than liberalism. The present law gives the entire Canadian community[24] the right to dictate what an individual may do, even where the activity of that individual is not harmful to other members of the community.[25] The fact that the item the individual wishes to produce, distribute, or use is beyond the community standard of tolerance is in and of itself enough to bring it within subsection 159(8) and thereby subject it to restriction. According to Freedman J.A., "[i]t is not for the court to determine whether publications of this kind hurt anyone or do any demonstrable harm. . . . All that remains . . . for the court to decide [is] whether according to contemporary Canadian standards, the present publications are within the definition or without

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[23] 19 C.R. (3d) 393, at 399, 58 C.C.C. (2d) 505, at 510 (Ont. C.A. 1981). *See also* Brodie v. The Queen, [1962] S.C.R. 681, 32 D.L.R. (3d) 507, where the idea of the community standard in obscenity cases was first discussed, particularly in the judgment of Ritchie J.; R. v. Penthouse Int'l Ltd., 23 O.R. (2d) 786, 96 D.L.R. (3d) 735 (C.A. 1979); R. v. Sudbury News Serv. Ltd., 18 O.R. (2d) 428, 39 C.C.C. (2d) 1 (C.A. 1978); and R. v. Prairie Schooner News Ltd., 75 W.W.R. 585, 1 C.C.C. (2d) 251 (Man. C.A. 1970). Recent examples of items held to be obscene under sub. 159(8), using the community standard of tolerance test, include: a magazine containing vivid colour pictures of genitals and of homosexual and heterosexual acts (R. v. Saint John News Co., 47 N.B.R. (2d) 91 (Q.B. 1982)); a magazine depicting various acts of sexual intercourse where the woman was "dehumanized" (R. v. Chin (unreported, Ont. Prov. Ct., 22 Feb. 1983)); a magazine with graphic representations of male homosexual and masturbatory acts (R. v. Lee (unreported, Ont. Prov. Ct., 16 Dec. 1982)).

[24] The word "community" in the community standard of tolerance test does not mean a particular community, but rather the Canadian community as a whole: R. v. Sudbury News Serv. Ltd., *id.*; R. v. Goldberg, [1971] 3 O.R. 323, 4 C.C.C. (2d) 187 (C.A.).

[25] Theories that require harm as a condition precedent for restricting individual activity with respect to pornography will be discussed in Part III, Section B, Subsection 1, *infra*.

it.''[26] Once this test has been met, the state may prevent[27] ''the publication being seen and read by [individuals]''.[28]

Thus the law is not as concerned with protecting the security and autonomy of the individual, but is concerned instead with obscenity's ''overall tendency . . . to injure public morality''.[29] This is further evidenced by the fact that section 159 is found in a part of the *Criminal Code* concerned with ''Sexual Offences, Public Morals, and Disorderly Conduct'' and ''Offences Tending to Corrupt Morals''.[30]

B. *Proposals for Pornography Law that are Consistent with Liberalism*

As discussed above, for the liberal, restrictions on freedom of expression and individual liberty are not justified unless it can be shown that the exercise of those freedoms is harmful to individual interests. Thus, the current Canadian obscenity law is not satisfactory from the liberal perspective:

> It is not enough to say merely that moral standards are offended by the proliferation of obscene material, without demonstrating that harm is caused by the dissemination of objectionable material. If freedom of expression is to be a valuable right, a moral sense of indignity is not sufficient reason for prohibiting access to allegedly obscene material.[31]

This does not, of course, mean that pornography can never be restricted. It simply means that the only valid justification for its restriction is that it causes harm to individuals. Legal curtailment of pornography that is consistent with liberalism must therefore be based on the proposition that pornography harms individuals. Any restriction must be motivated by the harm to individuals that flows from pornography and must be justified as a means of preventing such harm. The rest of this article discusses a number of justifications for restrictions on pornography that may be consistent with liberalism. The ''offence thesis'' will be discussed first, followed by two ''feminist theses'': the ''provocation thesis'' and the ''direct harm thesis''. In my view, both of these are consistent with liberalism.

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[26] R. v. Prairie Schooner News Ltd., *supra* note 23, at 588, 1 C.C.C. (2d) at 254-55.

[27] *See Criminal Code*, R.S.C. 1970, c. C-34, s. 160, (*amended by* S.C. 1974-75, c. 48, sub. 25(1)), for the mechanics of enforcing s. 159.

[28] Penthouse Int'l Ltd. v. The Queen, [1978] Que. C.A. 436, at 438.

[29] (Unreported case, Ont. C.A., No. 226/1964, at 10, Roach J.A.), as quoted in Getz, *The Problem of Obscenity*, 2 U.B.C.L. REV. 216, at 231 (1965).

[30] *See* Ritchie J. in Brodie v. The Queen, *supra* note 23, at 708, 32 D.L.R. (2d) at 531.

[31] Beckton, *Freedom of Expression*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS — COMMENTARY 75, at 107 (W. Tarnopolsky & G. Beaudoin eds. 1982).

1. *The Offence Thesis*

According to the offence thesis, where the public presentation of pornography might cause an individual to suffer harm through disgust, shock or embarrassment, then restrictions on such a display are justified. The substance of the harm is not the fact that the display itself is immoral, but rather that individuals suffer as a result of having to look at it. The distinction between immorality and offence is well illustrated by Professor Hart:

> Sexual intercourse between husband and wife is not immoral, but if it takes place in public, it is an affront to public decency. Homosexual intercourse between consenting adults is immoral according to conventional morality, but not an affront to public decency, though it would be if it took place in public.[32]

Feinberg suggests that a "legitimate reason for prohibiting conduct is the need to protect others from certain sorts of offensive, irritating or inconveniencing experiences".[33] Such protection is analogous to the protection provided by the law from activities that cause harm through nuisance and it is this "nuisance" effect of public displays of pornography that may justify its restriction:

> [P]ornography, at its worst, is not so much a menace as a nuisance. . . . [T]he moral right of legislatures to restrict it derives from and is limited by, the same principles that morally entitle the state to command owners of howling dogs to stop their racket.[34]

There are two important principles that must be observed when applying the offence thesis. First, the test of whether an item is offensive must be objective, so that an item will not be deemed offensive unless "almost any person chosen at random, taking the nation as a whole would be offended by it".[35] Second, exposure to the item must be unavoidable: "no one has a right to protection from the state against offensive experiences if he can easily and effectively avoid those experiences with no unreasonable effort or inconvenience".[36] Thus, the centrefold of a pornographic magazine would not be restricted under the

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[32] H. HART, *supra* note 16, at 45.

[33] Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567, at 567 (1979).

[34] *Id.* at 568.

[35] J. FEINBERG, RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY 88 (1980). This might be termed a "community standard of offence". It is a criterion by which to determine whether the harm to an individual is of a nature that requires legal interference since "[i]t is the person of normal vulnerability whose interests are to be protected by coercive power": *id.* at 91. The "community standard of offence" is thus different from the "community standard of tolerance" since, while the former determines whether individual harm has been done, the latter is a means by which the morality of a community can be established in order to determine if it is threatened.

[36] *Id.* at 89.

offence principle, since an individual need not look at it. An individual is only harmed when he or she has no choice but to look, as for example, in the case of a "billboard on Times Square to promulgate to the general populace the techniques and pleasures of sodomy".[37]

Legal manifestations of the offence principle can be found in nuisance and zoning legislation directed at commerce in obscene materials. In the United States, both private citizens and county attorneys have made use of public civil nuisance statutes as a means of attacking pornography.[38] For them to succeed, "nuisance" must be defined so as to include "commerce in obscene materials". Since courts have not consistently defined nuisance in this way,[39] some states have found it necessary to include this definition explicitly in their nuisance legislation.[40]

Canadian law does not appear to include "commerce in obscene materials" as part of the definition of nuisance. In *Re Prestige Video Productions (1982) Ltd. and City of Victoria*,[41] "nuisance" was taken to mean "nuisance at law". The Court held that the law did not recognize a nuisance of "immorality and indecency", and therefore a by-law prohibiting the sale or lease of indecent films was not a by-law designed to "prevent, abate and prohibit nuisances".[42]

Zoning laws that govern obscenity differ from nuisance laws, since they do not prevent commerce in obscene materials but rather restrict it to

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[37] Schwartz, *Moral Offenses: Comment on Model Penal Code* 681, quoted in J. FEINBERG, *id.* at 86.

[38] *See* Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisances*, 14 WAKE FOREST L. REV. 1 (1978); O'Connor, *The Nuisance Abatement Law as a Solution to New York City's Problem of Illegal Sex Related Business in the Mid-Town Area*, 46 FORDHAM L. REV. 57 (1977); Oglesby, *Porno Non Est Pro Bono Publico: Obscenity as a Public Nuisance in California*, 4 HASTINGS CONST. L.Q. 385 (1977).

[39] *See, e.g.*, State v. Diversified Theatrical Corp., 229 N.W.2d 389 (Mich. Ct. App. 1975), *rev'd on other grounds*, 240 N.W.2d 460 (1976); Napro Dev. Corp. v. Town of Berlin, 376 A.2d 342 (Vt. 1977).

[40] *E.g.*, OHIO REV. CODE ANN. §2907.37(B) (Page 1982); FLA. STAT. ANN. §823.13 (West 1982); IND. CODE ANN. §§35-30-10.5-1 to 5-10 (West 1978). *See also* Rendleman, *Civilizing Pornography: The Case For An Exclusive Obscenity Nuisance Statute*, 44 U. CHI. L. REV. 509 (1977). In one case, however, such a provision was found to be in violation of the First Amendment of the U.S. Constitution: Spokane Arcades, Inc. v. Ray, 449 F. Supp. 1145 (E.D. Wash. 1978).

[41] 39 B.C.L.R. 263, 139 D.L.R. (3d) 718 (S.C. 1982).

[42] *Municipal Act*, R.S.B.C. 1979, c. 290, para. 932(b). Para. 932(b) gives a city council the power to establish by-laws to "prevent, abate, and prohibit nuisances . . . ". Para. 932(n) of the Act gives a city council the power to establish by-laws to prevent "immorality and indecency". It was held in *Re* Prestige Video Prod. (1982) Ltd. and City of Victoria, *id.*, that the latter provision was not an individuation of the former and that, in the present case, a by-law prohibiting the sale or lease of indecent films was not a nuisance law but rather a law to prevent "immorality and indecency", and therefore an encroachment on Parliament's legislative authority under sub. 91(27) of the *Constitution Act, 1867*.

areas where it is not likely to cause harm through offence.[43] In *Red Hot Video Ltd. v. Vancouver*,[44] a zoning provision that excluded the "sale or rent of sex-oriented products" from the definition of "permitted use" of premises used for the sale of merchandise,[45] was held to be a reasonable limit, demonstrably justified in a free and democratic society, on the right to freedom of expression.[46]

Not all liberals are satisfied with the offence principle as justification for restricting obscenity and thereby restricting the right to individual liberty and freedom of expression. They would not be in agreement with the types of nuisance and zoning laws discussed above. The American Civil Liberties Union, for example, has argued that offensiveness is not a substantial enough ground upon which to base restrictions on obscenity.[47] Furthermore, some liberals point out that although the offence principle is conceptually distinct from legal moralism, it may lead to the same kind of consequences. They argue that regulations directed at the publishers and promoters of immoral materials in effect restrict their right to individual liberty and freedom of expression on the ground that what they are doing is immoral.

2. *Feminist Theses*

The provocation thesis and the direct harm thesis are considered feminist theses, since they both view pornography as an issue of particular concern to women. The basic premise of each is that pornography is, in certain circumstances, harmful to individual women, and that its restriction is therefore justified. The provocation thesis contemplates as harm the assault and discrimination that may be suffered by women as a result of the potential of pornography to provoke misogynist behaviour in men. The direct harm thesis, on the other hand, is concerned with the psychological harm that may be suffered by individual women by virtue of their awareness of a societal practice that

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[43] For an American example of a case concerning such a zoning ordinance, *see* Young v. American Mini Theatres, 96 S. Ct. 2440 (1976), where a zoning ordinance specifying certain locations for the exhibition of pornographic films was upheld.

[44] 48 B.C.L.R. 381, 5 D.L.R. (4th) 61 (S.C. 1983).

[45] *City of Vancouver Zoning and Development By-law* 3575, s. 10.22.1.

[46] *Supra* note 44, at 386, 5 D.L.R. (4th) at 66 (Dohm J.). The reasoning used is somewhat vague:

> I do not think that a fair-minded person accustomed to the norms of a free and democratic society would object to the limitation imposed on the freedom of expression by the by-law. It seems to me to be a reasonable limitation. Similarly, I am of the view that the limitation is demonstrably justified in our society having in mind, again, the kind of activity at which the by-law is directed. . . . I think that the court is entitled to take judicial notice that there is an undesirable effect which any reasonable person would understand and object to.

[47] J. FEINBERG, *supra* note 35, at 85.

systematically degrades women as a group. In this section, I will investigate each of the feminist theses separately, and will then discuss their manifestations in Canadian law.

(a) *The Provocation Thesis*

The provocation thesis states that if pornography provokes men to behave in such a way as to cause harm to women, either through assault or discrimination, then its restriction is justified in order to protect women. A full understanding of the type of harm contemplated by the provocation thesis can only be gained through an awareness of the unique attributes of pornography and the difference between it and obscenity.[48] It will be recalled that pornography includes "any materials that eroticize dominance and submission or portray women in a degrading manner as objects to be sexually exploited and manipulated".[49] Obscenity, on the other hand, is generally defined in terms of its immoral or offensive nature. The provocation thesis is not concerned with the potential harm of immoral or offensive material, but rather with the harm that women may suffer if they are treated by men in the same way that they are portrayed in pornographic literature:

> Our pornographic society injures us. We are all subject to the attitudes about women that influence pornography and that pornography, in turn, reinforces. By mixing misogyny and violence with sexuality, pornography exerts powerful behavioral conditioning on its male viewers. . . . Pornography directly and ubiquitously intrudes upon women's lives — it encourages and incites men to acts of sexist violence against women.[50]

Thus, the provocation thesis is entirely consistent with liberal principles, since it is concerned with harm suffered by individuals rather than with the potential of pornography to weaken the community morality.[51]

However there is no definitive proof of a causal link between the use of pornography and increased sexual assault or discrimination against

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[48] Such a distinction was not necessary in order to understand the types of harm contemplated by legal moralism and the offence principle since, in both of those cases, pornography is seen as a category of obscenity that leads to the same types of harm as obscenity.

[49] *Supra* note 1.

[50] Jacobs, *id.* at 13. This emphasizes the concern of feminists with the *individuation* of the harm that is potentially caused by pornography. It is true that feminists are also concerned with the harm caused by pornography to "womankind" but in the context of justifying legal restrictions on pornography it is the harm to *individual* women that is generally discussed. This is true for both the provocation thesis and the direct harm thesis which are discussed below.

[51] In *Re* Luscher and Deputy Minister, Revenue Canada, 149 D.L.R. (3d) 243 (B.C. Cty. Ct. 1983), a magazine was held to be "immoral or indecent" under the *Customs Tariff*, R.S.C. 1970, c. C-41, s. 14 since it was beyond the "community standard of tolerance". The magazine described by Anderson J., at 245, was clearly not "pornographic" in the sense of the definition given in this article: "The magazine in

women.[52] There appear to be two opposing theories in the social science literature. The first is usually referred to as the "harmless catharsis" theory. The substance of this theory is that pornography at best serves as a catharsis of sexual frustration and aggression and, at worst, is harmless. This theory is supported by the work of *The Report of the Commission on Obscenity and Pornography (1970)*[53] and by experiments carried out by Berl Kutchinsky in the early nineteen-seventies, following the decriminalization of pornography in Denmark.[54] The opposing theory is that pornography, and particularly violent pornography, leads to increased sexual assault and discrimination against women.[55] Supporters of this theory have found numerous faults in the experimental methodology of the research supporting the harmless catharsis theory.[56] There is at present no certainty as to which of the two theories is scientifically

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question is completely concerned with the sexual activity of a man and a woman from foreplay to orgasm. . . . These actions are in no way unnatural or unlawful and, indeed, they are a common part of the lives of Canadian men and women." It is unlikely that feminists or others who adhere to the provocation thesis would object to this magazine since there is no indication that it did anything more than, explicitly, record the sexual activity of two individuals. *See* Brownmiller, *Pornography and the First Amendment*, 8 N.Y.U. REV. OF L. & SOC. CHANGE 255 (1978-79):

> We are not afraid of prurient interest. We are not troubled by the idea of people thinking about the sex act; we are not troubled by the idea of people being stimulated by seeing an explicit picture of the sex act. What we object to is the sexual humiliation and degradation of women that is the essence of pornography.

[52] It has been suggested that definitive empirical proof is not necessary to justify a legal manifestation of the provocation thesis. *See, e.g.*, Paris Adult Theatre v. Slaton, 93 S. Ct. 268 (1973):

> But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible". We reject this argument. . . . Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.

[53] (U.S.G.P.O., 1970). *See* in particular the evidence from D.I. Mosher in TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY, Vol. 8, at 255-312, 313-25 (U.S.G.P.O., 1971).

[54] Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crime: The Danish Experience*, 29 J. SOC. ISSUES 17 (1973).

[55] *See, e.g.*, Feschbach, Haber & Malamuth, *Testing Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Difference, and the "Normality" of Rapists*, 14 J. RESEARCH IN PERSONALITY 121 (1980); Donnerstein & Malamuth, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1 (L. Berkowitz, ed. 1964); Russell, *Pornography and Violence: What Does the New Research Say?*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 218 (L. Lederer, ed. 1980).

[56] Russell, *id.*; Garry, *Pornography and Respect For Women*, in VALUES IN CONFLICT: LIFE, LIBERTY AND THE RULE OF LAW, *supra* note 14, at 254.

correct, though there is an increasing literature supporting a link between pornography and violence against women.[57]

The uncertain state of the scientific literature supporting a link between pornography and misogynist acts may account for the scarcity of legislation embodying the provocation thesis. In Canada, subsection 14(1) of the *Saskatchewan Human Rights Code*[58] is the only statutory manifestation of the provocation thesis, although a *Charter* argument for a positive duty on the part of the government to restrict pornography might be made on the basis of the provocation thesis under subsection 15(1). These Canadian examples will be discussed in greater detail below.[59] It seems that the only American examples of legal manifestations of the provocation thesis are two ordinances of the City of Minneapolis,[60] enabling an individual to "bring a civil action directly in court"[61] where that individual has suffered harm as a result of the behaviour of others that has been provoked by pornography.[62] Both of these ordinances were passed by City Council but vetoed by the mayor.

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[57] *See generally* the following works on the relationship between pornography and violence: Berkowitz, *Sex and Violence: We Can't Have It Both Ways*, 5 PSYCHOLOGY TODAY 14 (1971); Cline, *The Pornographic Commission: A Case Study of Scientists and Social Policy Decision Making*, in WHERE DO YOU DRAW THE LINE?, *supra* note 18, at 245; Chervenak, *Selected Bibliography on Pornography and Violence*, 40 U. PITT. L. REV. 652, at 658-60 (1979); Wills, *Measuring the Impact of Erotica*, 11 PSYCHOLOGY TODAY 30 (1977); Wilson, *Violence, Pornography and Social Science*, in WHERE DO YOU DRAW THE LINE?, *supra* note 18, at 293. Recent studies consistently demonstrate that there is a link between pornography and violence, and thus we may be close to an empirical vindication of the provocation thesis. *See* H. EYSENCK & D. NIAS, SEX, VIOLENCE AND THE MEDIA 257 (1979); Donnerstein, *Aggressive Erotica and Violence Against Women*, 39 J. PERSONALITY AND SOCIAL PSYCHOLOGY 269 (1980); Feschbach & Malamuth, *Sex and Aggression: Proving the Link*, 12 PSYCHOLOGY TODAY 110 (1978).

[58] *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1.

[59] The *Saskatchewan Human Rights Code* provision and *The Canadian Charter of Rights and Freedoms* argument are discussed in detail below, at notes 120-132 and accompanying text, *infra*.

[60] *Ordinance of the City of Minneapolis* (*amending* Title 7, c. 139 of the *Minn. Code of Ordinances Relating to Civil Rights*) (passed 30 Dec. 1983 by 7 votes to 6, but vetoed by the Mayor) and *Ordinance of the City of Minneapolis* (*amending* Title 7, c. 141 of the *Minn. Code of Ordinances Relating to Civil Rights*) (passed 30 Dec. 1983 by 7 votes to 6, but vetoed by the Mayor).

It has recently come to my attention that the City of Indianapolis has passed similar by-laws: *see City County General Ordinances* #24 (23 Apr. 1984) and #35 (ll Jun. 1984), amendments to the *Code of Indianapolis and Marion County, Indiana*, c. 16, 1975. These were struck down by the District Court on the grounds that they were too vague, that they involved prior restraint and that they violated free speech: American Booksellers Ass'n Inc. v. William H. Hudnut, (unreported, 30 Jul. 1984, #IP 84-791C). The case is on appeal to the 7th circuit (docket #84-3147).

[61] *Ordinance of the City of Minneapolis*, sub. 2(a) (*amending* Title 7, c. 141 of the *Minn. Code of Ordinances Relating to Civil Rights*).

[62] *Ordinance of the City of Minneapolis* (*amending* Title 7, c. 141 of the *Minn. Code of Ordinances Relating to Civil Rights*). An action will accrue where damage has resulted from discrimination against women by means of "trafficking in pornography"

The provocation thesis basis of the ordinances is made clear by the definition of pornography in section 1 of the first ordinance:

> Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it *promotes*, with the acts of aggression it *fosters*, harm women's opportunities for equality of rights in employment, education, property rights, public accommodations and public services; create public harassment and private denigration; promote injury and degradation such as rape, battery and prostitution and inhibit just enforcement of laws against these acts; contribute significantly to restricting women from full exercise of citizenship and participation in public life, including in neighborhoods; damage relations between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the constitutions and laws of the United States and the State of Minnesota.

All of these harms are brought about by the behaviour of men towards women that results from the use of pornography by men, and they are all consistent with the liberal definition of harm, since they all involve restrictions on the security and autonomy of individuals, whether in a physical, economic, participatory or political sense.

The provocation thesis might also be implemented by means of a common law civil action based on provocation. In *Olivia v. National Broadcasting Co.*,[63] a minor brought an action against a broadcasting company to recover damages for injuries suffered as a result of an artificial rape with a bottle carried out by a group of juveniles who were stimulated by a similar artificial rape scene on television. The action was in negligence, and it failed on the ground that "traditional negligence concepts" are inappropriate where the subject matter is a television broadcast.[64] The Court, however, left open the possibility of an action where a broadcast is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action".[65] The stringency of such a test, however, makes it unlikely that a "tort of incitement" could ever be a useful means of attacking pornography.[66]

(para. 3(2)(i)), "forcing pornography on a person" (para. 3(2)(n)), or "assault or physical attack due to pornography" (para. 3(2)(o)).

[63] 178 Cal. Rptr. 888 (Ct. App. 1981); *cert. denied sub nom.*, Neimi v. National Broadcasting Co., 103 S. Ct. 17 (1982).

[64] *Id.* at 892.

[65] *Id.* at 893. The words are taken from Brandenburg v. Ohio, 89 S. Ct. 1827 (1969). In the present case the appellant's attorney conceded that the film did not constitute incitement within this definition.

[66] In De Filippo v. National Broadcasting Co., 446 A.2d 1036, at 1040 (R.I. Sup. Ct. 1982), it was held that such an action might succeed if actual "incitement to immediate harmful conduct" could be shown. On the facts of the case it was not shown. According to the court "the incitement exception [to the First Amendment] must be applied with extreme care since the criteria underlying its application are vague. Further, allowing recovery under such an exception would inevitably lead to self-censorship on the part of broadcasters, thus depriving both broadcasters and viewers of freedom and choice . . . ": (at 1042).

(b) *The Direct Harm Thesis*

The direct harm thesis is considerably more controversial than the provocation thesis. As discussed above, the fundamental difficulty with the provocation thesis is that the scientific evidence in support of a causal relationship between pornography and misogynist behaviour is not conclusive. It is, however, quite likely that if such a link were proven, liberals would have little difficulty in accepting the provocation thesis as a valid justification for restrictions on pornography. The situation is quite different with regard to the direct harm thesis: even if the type of harm contemplated by this thesis were scientifically proven, it is likely that many liberals would object to restrictions on pornography on this basis.

According to the direct harm thesis, the mere existence of certain types of pornography is an affront to the dignity and integrity of women as a group. Individual women therefore suffer psychological harm[67] by virtue of their awareness that such material exists. Although the harm contemplated is to *individuals* and is thus consistent with liberal ideology, it is necessary to distinguish between this concept of harm and that contemplated by the provocation thesis.

The provocation thesis is concerned with the harm suffered by a woman as a result of an attack or discrimination by a male, provoked by that male's use of pornography. The direct harm thesis, on the other hand, is based on the idea that harm flows *directly* from the pornography to the woman, with no need for an intermediate actor. The direct harm thesis is concerned with the knowledge and awareness on the part of a woman that women as a group are being systematically degraded. According to Ann Garry:

> [T]here need be no increased likelihood of behaviour degrading to women. Pornography itself treats women not as whole persons but as mere sex objects "to be exploited and manipulated sexually". Such treatment is a "degrading and demeaning portrayal of the role and status" (and humanity) of women.[68]

Similarly, Leah Fritz has said that:

> [E]ven if all the films of women being raped, tortured, and murdered led to nothing but male masturbation as some advocates blithely claim . . . should women endure the indignity of pornography?[69]

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[67] The term "psychological harm" will be used throughout the rest of this article to describe those types of harm that are generally associated with feelings of humiliation and degradation, emotional distress, fear, loss of self-respect, etc. Examples of factors that may cause such harm are affronts to an individual's dignity, insults and scare tactics.

[68] Garry, *Pornography and Respect for Women*, in VALUES IN CONFLICT: LIFE, LIBERTY AND THE RULE OF LAW, *supra* note 56, at 256-57.

[69] Fritz, *Pornography As Gynocidal Propoganda*, 8 N.Y.U. REV. L. & SOC. CHANGE 218, at 222 (978-79). *See also Colloquium on Violent Pornography: Degradation of Women Versus Right of Free Speech*, 8 N.Y.U. REV. L. & SOC. CHANGE 181 (1978-79) where similar views are expressed by Hommel, at 209; Dworkin, at 215;

Feminists are primarily concerned with what is commonly referred to as "hard core" pornography, since it is likely that this type of pornography has the greatest potential for causing the type of harm contemplated by the direct harm thesis. Examples of such material illustrate this concern:[70]

> — *Snuff*, a pornographic film, depicts the torture, dismemberment, and disembowelment of a woman for a man's sexual pleasure. It was shown all over the nation, advertised as the record of a real torture murder. The marquee of a New York theatre proclaimed: "The film that could only be made in South America . . . where life is CHEAP."
> — *Cherry Blossoms*, a magazine, consists entirely of photographs of Asian women being bound and tortured.
> — *Columbine Cuts Up*, a photo essay, shows a woman stabbing herself in the vagina with a large butcher knife and cutting her labia and breasts with scissors.
> — *The Peep Show*, at a Mount Ephraim, New Jersey store, features a live nude woman who dances in a glass box when the customer inserts a coin.
> — *Whipping for a Wicked Wife*, a book, is displayed and sold with a real whip.
> — *The Joy of Rape: How to, Why to, Where to*, an article, includes an appendix of instructions on "How to Get Away With It".

Feminists point out that the potential harm to women caused by pornography such as that described above is exacerbated by the proliferation of such material in our society:

> The degrading effect of pornography upon all women is assured by the industry's magnitude. In 1977 its revenues were estimated to be four billion dollars a year — larger than those of the recording and film industries combined. "There are 265 pornographic magazines available currently. There are more pornographic books and publishers than can be counted, twenty thousand 'adult' bookstores", reports Kathleen Barry. A weekly audience of two and a half million people saw hardcore films in 1978. In that same year, 400,000 pornographic video cassettes were sold to private consumers. Pornography is now offered on cable television. Even pornographic video games have been created.[71]

The causal link between the wide proliferation of materials that are degrading to women as a group, and psychological harm to individual women, is a problem that has received the attention of a number of social scientists.[72] Their major concern appears to be that women will adopt "as

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Chester, at 231; Brownmiller, at 255. *See also* Kostash, *Whose Body? Whose Self? Beyond Pornography*, in STILL AIN'T SATISFIED 43 (M. Fitzgerald, C. Guberman, M. Wolfe eds. 1982); Bryant, *Sexual Display of Women's Bodies — A Violation of Privacy*, 10 GOLDEN GATE U. L. REV. 1211 (1980).

[70] The list is from Jacobs, *supra* note 1, at 5-6.

[71] *Id.* at 6-7.

[72] Although it has not received nearly the same amount of attention as the causal link between pornography and male behaviour and attitudes towards women.

self images those that are presented to [them] by pornographers".[73] According to Mona Vivar:

> A more subtle danger for women as a class is that they may become the image that others have of them; that is, they may adapt to what culture says they are. This is analogous to school children becoming poor students because they are told that they are poor students. It is also reminiscent of observations by social scientists who have concluded that people who are oppressed or enslaved engage in behaviour which their captors expect of them. . . . [V]iolent pornography extols male dominance and female submissiveness in a world where many women are trying to overcome these erroneous beliefs and practices. Brutal depictions, if allowed to flourish, may finally lead women to *accept* the idea that male-female relationships are premised on terror, violence, and cruelty.[74]

In other words, the dissemination of certain types of pornography may lead to a dangerously distorted self-image on the part of women and thereby be psychologically harmful.[75] The research and writing in this area is, however, rather undeveloped, although it is likely that the recent concern with the direct effect of pornography on women will soon remedy that.

However, even if we accept that certain types of pornography do cause the type of harm with which the direct harm thesis is concerned, there remains the question of whether the law should protect women from such harm. Many feminists insist that it should. They ask us to imagine how we would react to the same proliferation of degrading material if its subject was a minority group rather than women, and they point out the hypocrisy of recognizing the former as harmful without so recognizing the latter:

> Civil libertarians do not recognise that pornography is hate literature, that it does not provide harmless titillation but is, in itself, an institution which

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[73] Longino, *Pornography, Oppression and Freedom: A Closer Look*, in TAKE BACK THE NIGHT, *supra* note 55, at 46.

[74] Vivar, *The New Anti-Female Violent Pornography: Is Moral Condemnation the Only Justifiable Response?*, 7 LAW AND PSYCH. REV. 53, at 63 (1982).

[75] *See, e.g.*, HEARTH AND HOME: IMAGES OF WOMEN IN THE MASS MEDIA (G. Tuchman, A. Daniels & J. Benet eds. 1978); Bryant, *supra* note 69, at 1232: "The potentially lasting sense of humiliation and inferiority experienced by young women living in an environment of female sexual exposure and subordination also must be recognized for the serious impediment it presents to women's full autonomy and dignity." A concern about the effect of humiliating and degrading stimuli on children was expressed by the United States Supreme Court, thus providing an analogy for the present discussion. In Brown v. Board of Educ. of Topeka, 74 S. Ct. 686, at 691 (1954), Warren J., in discussing the question of whether the segregation of black children was unconstitutional, said: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court went on to demonstrate by way of psychological evidence that this sense of inferiority affected the motivation of the child, and therefore retarded the learning process.

> defines and sells women-hatred. Therefore, civil libertarians have long opposed degrading depictions of social and minority groups, but recoil from taking a position against an industry which profits from encouraging the violent abasement of women.[76]

Canadian feminists have called for amendments that would include pornography within the hate literature provisions of the *Criminal Code*.[77] At present, even if it were accepted that pornography is a form of hate literature, the provisions in the definition could not be used to attack it, because "sex" is not the basis of an "identifiable group".[78] Thus, "women must take a circuitous route and employ the blunt instrument of the law relating to pornography, namely obscenity, to enforce protections from some of the widespread manifestations of hatred focussed upon them".[79]

Reluctance to amend the hate literature provisions to include pornography, and to restrict pornography in general on the basis of the direct harm thesis, may be attributable to the belief of many liberals that affronts to a person's dignity and the resulting psychological injury are not severe enough harms to warrant the interference of the law. Such harms, according to these liberals, do not justify the infringement on individual liberty and freedom of expression that would be entailed by restrictions on pornography. It is, however, difficult to find any justification for this position in liberal theory. As was discussed above, liberalism permits state interference when the security and autonomy of an individual is threatened. Most liberals acknowledge that the security and autonomy of individual women may be compromised by pornography-provoked assault and discrimination. To draw the line there

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[76] FREEDOM FROM HARM OR FREEDOM OF SPEECH 43 (S. Ridlington, Ottawa, National Association of Women and the Law, 1983, quoting *Open Road*).

[77] *An Act to Amend the Criminal Code*, R.S.C. 1970 (1st Supp.), c. 11, sub. 281.2(1) (amending R.S.C. 1970, c. C-34), forbids a statement communicated in a public place that "incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace". Sub. 281.2(2) forbids a statement that is communicated "other than in private conversation . . . [which] wilfully promotes hatred against any identifiable group . . . ". The concern of the former is with preventing breaches of the peace and would thus appear to be concerned with protecting individuals who are members of minority groups from attacks to their dignity: *see* notes 80-93 *infra*. For provincial provisions similar to sub. 281.2(2) *see* the British Columbia *Civil Rights Protection Act*, S.B.C. 1981, c. 12, s. 7.

[78] *An Act to Amend the Criminal Code*, R.S.C. 1970 (1st Supp.), c. 11, sub. 281.1(4) (amending R.S.C. 1970, c. C-34): an "identifiable group" is defined as "any section of the public distinguished by colour, race, religion or ethnic origin".

[79] Saskatchewan Human Rights Comm'n v. Waldo, 5 C.H.R.R. 2074, at 2083 (Sask. Bd. of Inquiry, 1984). Also, in the recent debate among the leaders of the three national political parties, one of the panellists asked Mr. Turner, the leader of the Liberal Party, whether, if he were elected, he would amend the *Criminal Code* to include "women" as an identifiable group for the purposes of s. 281.2. His one word answer was "yes". Unfortunately, the format of the debate did not require Mr. Mulroney to answer the question.

and say that the affront to a woman's dignity and the psychological harm that may be caused her by pornography is not prejudicial to that woman's security and autonomy would appear to be arbitrary. Surely, "security and autonomy" includes freedom from "mental pain and distress",[80] and freedom from attacks to a person's "spiritual nature . . . feelings and intellect".[81] It is exactly these kinds of freedoms that restrictions on pornography based on the direct harm thesis would protect.[82]

A study of other areas shows that in certain cases the law does protect the individual from affronts to his or her dignity and the psychological harm that results from such affronts, thus providing support for the feminists' claims. An investigation of the material behind the enactment of the hate literature provisions indicates that the impetus for enacting those provisions was to protect minority groups from exactly the type of harm contemplated by the direct harm thesis. According to *The Report of the Special Committee on Hate Propaganda in Canada*[83] "the materials now circulating in this country are deeply hurtful to the minority groups at which they are aimed".[84] The Commission believed that those materials caused direct psychological harm to the members of the minority groups under attack: "Through no fault of his own, a member of society is being degraded and humiliated. He is on guard against the insults, the sarcasm, the cruel humour accorded to his group."[85] Considerable psychological evidence was cited by the Commission to demonstrate how the "derogation and stereotyping" of minority groups might affect the personalities, attitudes, opinions and actions of their members.[86] In particular, like the apparent psychological effect of pornography on women, the evidence suggested that a member of a minority group might begin to identify with his or her stereotype[87] and that this process would lead to self-doubt and self-hatred.[88]

A similar concern with protecting the individual from affronts to his or her dignity and from the resulting psychological harm can be found in

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[80] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, at 196 (1890).

[81] Olmstead v. United States, 48 S. Ct. 564, at 572 (1928).

[82] In *Rights, Resistance, and the Demands of Self-Respect*, 32 EMORY L.J. 405, at 418 (1983) author David Richards argues that the very basis of injustice is to treat individuals in ways that cause them psychological harm:

> [I]njustice is not thought of in terms of an impersonal state of affairs, but in terms of contempt, degradation, failure of respect for those demands of the person that express what [is] . . . described schematically as rational autonomy, and what can also be expressed as the demands of self-respect.

Even if we do not go this far, it is clear that "psychological harm" can be very severe and, in many cases, more severe than physical harm. This fact is recognized in the law as will be pointed out below.

[83] (Ottawa, 1966).

[84] *Id.* at 27.

[85] *Id.* at 214.

[86] *Id.* at 211-15.

[87] *Id.* at 213-14.

[88] *Id.*

the "right to privacy" doctrine.[89] According to Mr. Justice Brandeis:

> [The makers of the Constitution] recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government the right to be left alone.[90]

Thus, the right to privacy is concerned not with protecting the physical integrity of the individual, nor even with protecting his reputation, as is the right to freedom from defamation; rather, it is concerned with preventing the direct harm to his or her peace of mind that might result from the invasion of privacy.[91]

It was with this type of harm that the original proponents of the right to privacy, Warren and Brandeis, were concerned. According to them:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that

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[89] The "right to privacy" is well entrenched in the law of the United States. *See, e.g.*, P. DIONISOPOULOS & C. DUCAT, THE RIGHT OF PRIVACY (1976); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). In Canada, privacy law is not as developed, but it is in the process of becoming a recognized principle of law. Glasbeek, *Outraged Dignity — Do We Need A New Tort?*, 6 ALTA. L. REV. 77 (1967-68), argues that if the common law jurisprudence relating to nervous shock continues to develop, it will be possible to compensate psychological injury through established torts rather than by following the American example and creating a separate tort of privacy. However, a distinct "privacy law" has begun to develop since the time that Glasbeek was writing. In three provinces, a statutory tort of invasion of privacy exists (British Columbia: *Privacy Act*, R.S.B.C. 1979, c. 336 (*as amended by* S.B.C. 1982, c. 46); Manitoba: *The Privacy Act*, S.M. 1970, c. 74 (*as amended by* S.M. 1971, c. 82); Saskatchewan: *The Privacy Act*, R.S.S. 1978, c. P-24 (*as amended by* S.S. 1979, c. 69), and the right to privacy is given legislative expression in Quebec: *Quebec Charter of Human Rights and Freedoms*, L.R.Q. 1977, c. C- 12 (*as amended by* L.Q. 1978, c. 7; L.Q. 1979, c. 63; L.Q. 1980, c. 11; L.Q. 1980, c. 39; L.Q. 1982, c. 17; L.Q. 1982, c. 61). As for the common law, "[r]ecent trends in common law and equity are encouraging to those who place a high value on privacy interests . . . but these trends in no way lead to the conclusion that a general right to privacy is emerging in Canada and the Commonwealth": Burns, *Privacy and the Common Law: A Tangled Skein Unravelling?*, in ASPECTS OF PRIVACY LAW 21, at 39-40 (D. Gibson ed. 1980). At common law, however, traditional heads of liability are being used more and more to protect privacy-related interests. *See* Gibson, *Common Law Protection of Privacy: What to do Until the Legislators Arrive*, in STUDIES IN CANADIAN TORT LAW 343 (L. Klar ed. 1977); Burns, *The Law and Privacy: The Canadian Experience*, 54 CAN. B. REV. 1, at 12-24 (1976). The right to "liberty and security" entrenched in the *Canadian Charter of Rights and Freedoms* is likely to stimulate the growth of the right to privacy in both public and private law in Canada. *But see* R. v. Yellowquill (unreported, Man. Q.B., 15 Mar. 1984), where it was decided that even if s. 7 of the *Charter* were interpreted liberally it would not create an independent right to privacy.

[90] Olmstead v. United States, *supra* note 81, at 478 (dissent).

[91] *See, e.g.*, Themo v. New England Newspaper Publishing Co., 27 N.E. 2d 753 (Mass. 1940).

> solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[92]

The person whose privacy has been invaded suffers an injury to his "estimate of himself", an "assault upon his own feelings".[93] Whether we are concerned with actual intrusion into a person's home, undue publicity of his private affairs, or causing him to be held in a "false light", the essence of the wrong is that there is an "intrusion on personality, an attack on human dignity".[94]

Invasion of privacy is, however, not the only area in which the law protects the individual from "psychological harm". In a number of recent sexual harassment cases, human rights commissions have included in their assessment of damages the harm suffered by the complainant as a result of degrading treatment. The general principle was first articulated in a case before the Ontario Human Rights Commission:

> There is no reason why the law, which reaches into the work-place so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative psychological and mental effects where adverse and gender-directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment.[95]

In other words, just as the law protects the individual from physical harm in the work place, so it should protect the individual from psychological harm. This line of reasoning has been followed in a number of recent sexual harassment cases[96] and it seems that "a principle [has] emerged that the complainant, in addition to being entitled to damages based on

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[92] Warren & Brandeis, *supra* note 80, at 196.

[93] *Id.* at 197.

[94] Bloustein, *supra* note 89, at 995. *See also* Bryant, *supra* note 69. Ms. Bryant argues that the interest women possess as a class with regard to the public display of female sexuality is "akin to a right to bodily privacy". The difficulty with this argument, however, is that although the tort of invasion of privacy is useful in demonstrating the law's concern with the dignity of the individual, a literal application of the tort would face the difficulty that the right to privacy is a right that inheres in an individual. Although we might say that a particular woman has been humiliated or degraded by the existence of pornography, it would be difficult to maintain that this *necessarily* means her right to privacy had been compromised. An affront to one's dignity is a necessary element of the right to privacy, but a violation of that right is only one way to cause an affront to one's dignity. The situation would be different if, for example, pictures were taken of a woman without her knowledge and then publicly displayed. This would be an invasion of *her* right to privacy: *see* Eick v. Perk Dog Food Co., 106 N.E. 2d 742 (Ill. App. Ct. 1952) and Flake v. Greensboro News Co., 195 S.E. 55 (N.C. 1938).

[95] Bell v. Ladas, 1 C.H.R.R. 155, at 156 (Ont. Human Rights Code Bd. of Inquiry 1982).

[96] *See, e.g.*, Graesser v. Porto, 4 C.H.R.R. 1569, at 1575 (Ont. Human Rights Code Bd. of Inquiry 1983); Cox v. Jagbritte Inc., 3 C.H.R.R. 609, at 616 (Ont. Human

specific damages such as lost earnings, is also entitled to general damages based on psychological damages, mental distress and the like".[97] This principle, like that in the hate literature provisions of the *Code*, seeks to limit the individual's freedom of expression and action, by establishing liability where the exercise of those freedoms leads to psychological harm to another individual.

In some jurisdictions, it is a separate tort to humiliate and degrade an individual. For example, in South African law there is an action known as the *Actio Inuriarium*. It is defined as follows:

> The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of injuries are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation. . . . [B]y dignity [is meant] that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive or degrading treatment, or when he is exposed to ill will, ridicule, disesteem or contempt. . . . Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth . . . and against degrading and humiliating treatment.[98]

A similar principle can be found in the American case of *Nickerson v. Hodges*.[99] In that case the plaintiff had been the victim of a practical joke carried out by the defendants and was embarrassed in front of a large crowd of people. She recovered damages on the ground that "the mental suffering and humiliation must have been quite unbearable".[100]

Rights Code Bd. of Inquiry 1982) (general damages awarded for the "intimidating, hostile and offensive work environment suffered by the complainants"); Hughes v. Dollar Snack Bar, 3 C.H.R.R. 1014, at 1016 (Ont. Human Rights Code Bd. of Inquiry 1982) (damages awarded for the "embarrassment and humiliation suffered by the complainants"); Torres v. Royalty Kitchenware Ltd., 3 C.H.R.R. 858 (Ont. Human Rights Code Bd. of Inquiry 1982); Imberto v. Vic and Tony Coiffure, 2 C.H.R.R. 392 (Ont. Human Rights Code Bd. of Inquiry 1981) (damages awarded for "frustration and mental distress").

[97] Graesser v. Porto, *id.* at 1574.

[98] M. DE VILLIERS, THE ROMAN AND ROMAN-DUTCH LAW OF INJURIES: A TRANSLATION OF BOOK 47, TITLE 10 OF VOET'S COMMENTARY ON THE PANDECTS 24-25 (1899), quoted in O'Keefe v. Argus Printing and Publishing Co., [1954] 3 S.A. (N.S.) 244(g), at 247-48.

[99] 84 So. 37 (La. 1920).

[100] *Id.* at 39 (Dawkins J.). Since Nickerson v. Hodges, an extensive jurisprudence has developed on the recovery of damages for psychological harm. *See, e.g.*, Boisdore v. International City Bank & Trust Co., 361 So. 2d 925 (L.A. Ct. App. 1978), *writ denied* 363 So. 2d 1384 (La. 1978); Leopold v. Britt, 396 N.Y.S. 2d 680 (App. Div. 1977); Holmquist v. Volkswagen of America, Inc., 261 N.W. 2d 516 (Iowa Ct. App. 1977); Clark v. I.H. Rubenstein, Inc., 335 So. 2d 545 (La. Ct. App. 1976); Endress v. Brookdale Community College, 364 A.2d 1080 (N.J. Super. Ct. App. Div. 1976); Blinick v. Long Island Daily Press Publishing Co., 323 N.Y.S. 2d 853 (Civ. Ct. 1971), *appeal dismissed* 337 N.Y.S. 2d 859 (App. Div. 1972); Sharp v. St. Tammany Parish Hosp., 190 So. 2d 500 (La. Ct. App. 1966).

In Anglo-Canadian law a legal recognition of psychological harm can be found in the tort of trespass to the person. According to Halsbury:

> Trespass to the person, whether by assault, battery or false imprisonment, is actionable without proof of actual damage. Thus in all cases of trespass . . . substantial damages are recoverable for discomfort and inconvenience, *or injury to dignity even where no physical injury is proved*.[101]

The italicized portion of the principle has been emphasized in two recent Canadian cases. In *Tanner v. Norys*,[102] an action was brought for false imprisonment. At trial, the Court held that an assessment of general damages "requires a consideration of the elements of the loss of dignity involved including the mental suffering and humiliation . . . ".[103] In *Johnston v. Barrett*[104] the defendants were found liable for assault and battery after they physically ejected the plaintiff from a political meeting. In assessing the general damages, Dickson J. stated that a trespass to the person is "a wrong committed against the personal security or personal liberty of one man by another"[105] and that it was not necessary "to show physical injury, but damages may be given for loss of dignity".[106]

The decisions in invasion of privacy and sexual harassment cases, and the civil judgments awarding damages for psychological harm, are all indications of the law's concern with protecting the individual from psychological harm. It has already been noted that in the criminal law the hate literature provisions of the *Code* are based on a similar concern. It should further be noted that the current sexual assault laws in Canada are designed, *inter alia*, to protect individuals from psychological harm.[107] The essence of sexual assault is the intentional application of force to another person in a sexual context, or an attempt or threat to apply such force without that person's consent.[108] Neither physical harm nor potential physical harm are necessary elements of the *actus reus* of basic

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[101] HALSBURY, LAWS (4th), v. 12, 454.

[102] 21 A.R. 410, [1979] 5 W.W.R. 724 (S.C.), *rev'd on other grounds* 21 A.R. 372, [1980] 4 W.W.R. 33 (C.A.).

[103] *Id.* at 426, [1979] 5 W.W.R. at 741.

[104] 8 N.B.R. (2d) 499 (Q.B. 1973).

[105] *Id.* at 505.

[106] *Id.* at 507.

[107] *See, e.g.*, Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, at 159 n. 104 (1983): "Currently, rape laws are aimed at protecting women. But the basic values protected by rape laws are, or should be, the woman's privacy and freedom of sexual choice, not her freedom from physical harm." *See also* C. BOYLE, SEXUAL ASSAULT 57 (1984): "[S]exual assault can be seen as an interference with one's physical, emotional and psychological integrity, as well as one's sense of dignity and autonomy. It may not be desirable to force the concept into any one particular mode."

[108] *Criminal Code*, R.S.C. 1970, c. C-34, paras. 244(1)(a) and (b) (*amended by* S.C. 1974-75-76, c. 93, s. 11, S.C. 1980-81-82, c. 125, s. 19).

sexual assault.[109] In *R. v. Burden*,[110] the Court held that there had been an assault when a man placed his hand on a woman's thigh for a few seconds without the exertion of any strength or power.

Even in the more serious case of non-consensual sexual intercourse it appears that the essence of the crime need not be physical harm, since sexual intercourse is not of itself *physically* harmful. It is rather an interference with the "woman's privacy and freedom of choice", her "emotional and psychological integrity, as well as [her] sense of dignity and autonomy".[111] The type of harm contemplated by this and the other sexual assault provisions[112] is the harm that a woman suffers as a consequence of such interference. This point is vividly made by a statement in a pamphlet put out by the London Rape Crisis Centre:

> When a man rapes you he is using his power as a man to frighten and degrade. He is telling you that your wishes and feelings are not important; that you are there for his use and nothing else.[113]

It is implicit in the law of sexual assault that the psychological harm suffered by a woman as a result of the violation of her bodily privacy requires severe redress even if she has suffered no physical harm.

These examples illustrate how the law seeks to protect the individual from the psychological harm associated with degrading treatment and affronts to his or her dignity, and demonstrate that the direct harm thesis regarding pornography is not radical. It does not advocate that the law recognize a new type of harm. Rather, the theory proposes a new application of the existing concern in the law for the psychological well-being of the individual. In recognizing psychological harm as harm that deserves legal redress, the law is entirely consistent with liberal ideology. Psychological harm is as likely to compromise the security and autonomy of the individual as is physical or economic harm, and it is therefore within the proper jurisdiction of a law informed by the principles of liberalism to provide legal redress for those who have suffered psychological harm at the hands of others. Thus, if it can be shown that a particular type of pornography leads to the type of harm contemplated by the direct harm thesis, restrictions on that pornography would be a justifiable limitation on the individual liberty and freedom of expression of its producers, distributors and consumers.

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[109] This is made clear by the fact that sexual assault that "causes bodily harm to the complainant" (para. 246.2(c)), and aggravated sexual assault in which the accused "wounds, maims, disfigures or endangers the life of the complainant" (subs. 246.3(1) and (2)), are separate offences from that of sexual assault (paras. 246.1(a) and (b)).

[110] 25 C.R. (3d) 283, 64 C.C.C. (2d) 68 (B.C.C.A. 1981).

[111] *Supra* note 107.

[112] As in paras. 246.1(a) and (b).

[113] LONDON RAPE CRISIS CENTRE, SEXUAL VIOLENCE 11 (1984).

(c) *Manifestations of the Feminist Theses in Canadian Law*

(i) *Degrading Representations and Obscenity*

A concern with degradation in relation to pornography appears to underlie the recent unsuccessful attempt to amend subsection 159(8) of the *Criminal Code*.[114] Had the amendment been enacted the definition of obscenity would now be 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 manner".[115] Thus, the effect of the amendment would have been to "include degrading representations as a means of undue exploitation".[116] Two recent Ontario cases illustrate a judicial definition of obscenity that is similar in spirit to that proposed in the amendment. In *R. v. Chin*,[117] the material in question contained photographs and articles depicting acts of sexual intercourse. This material was held to be obscene within the meaning of subsection 159(8), since the women portrayed were "dehumanized" and the contemporary Canadian community would not tolerate such "degrading" portrayals. Similarly, in *R. v. Rankine*,[118] it was held that the contemporary Canadian community would not tolerate films in which people were "degraded" and "dehumanized".

If, at some point in the future, the attempted amendments to subsection 159(8) are resurrected, or if the jurisprudence of the two Ontario cases develops, Canadian obscenity law may contain a manifestation of the direct harm thesis. If so, degrading representations, such as the hard core pornography discussed above, would be outlawed where they exceeded the community standard of tolerance.

There are, however, a number of difficulties with this approach. The first is that it preserves the term "obscenity". It has been noted above that in Canadian law the word "obscenity" is associated with the lewd and the dirty, not with the degrading and subjugating.[119] It is possible that, by maintaining the word "obscenity", the law would merely continue to restrict materials that are offensive to community morality, rather than materials that could potentially degrade and affront the dignity of women. Second, a "degrading representation" is not necessarily the same as a "representation that degrades women as a group". The feminist thesis is concerned with materials that are degrading to women, and such materials may not always be "degrading

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[114] *Criminal Law Reform Act, 1984*, Bill C-19, 32nd Parl., 2d sess., 1983-84 (1st reading 7 Feb. 1984) [hereafter cited as Bill C-19].

[115] Bill C-19, cl. 36.

[116] Bill C-19, note on cl. 36.

[117] *Supra* note 23.

[118] 36 C.R. (3d) 154, at 173 (Ont. Prov. Ct. 1983).

[119] *Supra* note 48 and accompanying text.

representations'' in the sense that the model within the representation is degraded. For example, an explicit representation of a woman's genitals may be considered as ''degrading to women as a group'', but it may not necessarily be a ''degrading representation'' of the particular woman in the picture. Finally, with respect to the two Ontario cases, these cases appear to be primarily concerned with the possibility that a portrayal of a person being degraded exceeds the community standard of tolerance and is thereby obscene. The difficulty with this approach is that it will always be possible to argue that such portrayals *do not* exceed the community standard of tolerance. The community standard of tolerance is a standard that is subject to change. Even if the contemporary standard is exceeded by degrading representations of women, it is not necessarily so that this will always be the case.

(ii) *The Saskatchewan Human Rights Code*

The *Saskatchewan Human Rights Code*[120] is the only example of legislation in Canada that can be used to address the problem of pornography from the perspective of the feminist theses. Subsection 14(1) forbids a person, on what appear to be two distinct grounds, to ''publish or display, or cause or permit to be published or displayed'', through specified means, ''any notice, sign, symbol, emblem or other representation''. The grounds are:

> (1) That it is ''tending or likely 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
> (2) That it ''exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin''.[121]

The first ground is broad enough to encompass both the provocation thesis and the direct harm thesis. A right ''under the law'' could mean a ''right to equality of opportunity'', and thus could be violated by pornography-provoked discrimination. It could also mean a ''right to security and autonomy'', and thus be violated by pornography-provoked physical assault, or by direct psychological harm caused by degrading material.[122] The second ground, on the other hand, appears to con-

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[120] S.S. 1979, c. S-24.1 [hereafter referred to as the *Human Rights Code*].

[121] This will be dealt with as two distinct grounds, although in the *Human Rights Code* the actual provision is one long sentence with an ''or'' conjunction between ground one and ground two.

[122] As discussed earlier, the essence of the direct harm thesis is that the mere presence of certain types of pornography in society is enough to violate a woman's security and autonomy.

template only the type of harm addressed by the direct harm thesis. As with subsection 281.2(2) of the hate literature provisions of the *Criminal Code*, the second part of subsection 14(1) is not concerned with the behaviour that pornography may *provoke*, but is concerned instead with the direct impact that it may have on individual members of the group it attacks. The purpose of this second ground appears to be to protect individuals from the harm that flows simply from the existence of material that ridicules, belittles, or otherwise affronts their dignity.

In the recent case of *Saskatchewan Human Rights Commission v. Waldo*,[123] subsection 14(1) of the *Human Rights Code* was held by the Board of Inquiry to apply to pornographic material. An engineering society had included in several issues of its publication, *Red Eye*, cartoons and text of a sexually explicit and misogynist nature. The Board found two issues to be in violation of subsection 14(1) of the *Human Rights Code*, since they "discriminated against women by ridiculing, and belittling them, and affronting their dignity".[124] However, the Board did not explicitly interpret subsection 14(1) of the *Human Rights Code* as establishing two different grounds of attack based on the two distinct parts of the section set out above. They could have treated as separate issues the potential of the impugned material to *provoke* discriminatory behaviour, and its potential to cause affront to the dignity of women. Instead, the Board seems to have read each part in terms of its relationship to the other, without explicitly distinguishing the two.

The Board began by suggesting that a woman has a right to equal treatment by virtue of the *Saskatchewan Human Rights Code*, subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, and the

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[123] *Supra* note 79.

[124] *Id.* at 2094. The submissions of Counsel for the Commission on the description of the material were accepted by the Board. They were 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. (at 2082)

One particularly striking example is described by expert witness Dr. Wendall:

> There's a cartoon on page two which portrays a woman in an extremely ridiculous and humiliating position. Her body has been apparently — I would say the cartoon asks us to believe that her body has been hideously deformed by an act of sexual intercourse and that the cartoon asks us to laugh at that consequence of sexual intercourse. I believe that [it] belittles and ridicules women as women and women's roles in sexuality. It depicts a woman not only so passive as to allow herself to be seriously harmed by an act of sexual intercourse but it asks us to laugh at the possibility of a woman being seriously harmed by sexual intercourse. (at 2085).

[125] *Id.* at 2080-81.

International Covenant on Civil and Political Rights.[126] Material that is "tending or likely to deprive, abridge or otherwise restrict the enjoyment of any person or class of persons" of this right under the law is caught by subsection 14(1) of the *Human Rights Code*.[127] According to the Board, there are two ways in which a woman's right to equal treatment could be compromised by material such as that before it. First, such material could provoke discrimination against women in areas such as "education, work, aspects of social life, and the professions",[128] since a portrayal of women that "ridicules, belittles, and otherwise affronts [their] dignity"[129] promotes "a consistent image of women as less than human", and:

> Once a class of people is presented as less than equal members of the human family with impunity the class may well be treated as such. Material of the kind in these two newspapers perpetuates a social climate which is discriminatory to women. Women are already targets of manifold discrimination and horrible violence. No social interest is served by tolerating the free expression of such material.[130]

Second, such literature could violate a woman's right to equal treatment, not by provoking discrimination against her, but rather by directly ridiculing, belittling or otherwise affronting her dignity, and thereby treating her as less than human simply because she is a member of a particular group. In this sense the concern expressed in subsection 14(1) is similar to that shown in the hate literature provisions of the *Criminal Code*, and it is not surprising therefore to find the Board referring to those provisions as providing a "very close" analogy to subsection 14(1).[131] As was indicated above, subsection 281.2(2) of the *Criminal Code* is designed to prevent harm to members of minority groups ensuing from the dissemination of materials that affront their dignity. The same concern is apparent in subsection 14(1) but, unlike the hate literature provisions, this subsection uses "sex" to characterize a class of persons protected by the provision. Thus, in addition to protecting a woman's equal right to opportunities in education, employment, et cetera by restricting pornography that provokes discrimination, subsection 14(1) protects a woman's equal right to integrity

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[126] G.A. Res. 2200A, 21 GAOR Supp. (No. 16) at 59, U.N. Doc. A6316 (1967).

[127] *Supra* note 123, at 2080:

> The reconciliation of the social interest in the freedom of expression and the social interest in the enforcement of rights guaranteeing equality of *treatment* [emphasis added] for all is sometimes accomplished through restrictions on the scope of the freedom of expression by legislative and judicial means. The phrase "*under the law*" in Section 14(2) clearly acknowledges this type of restriction in the [*Human Rights*] *Code*.

[128] *Id.* at 2089.

[129] The *Human Rights Code*, s. 14.

[130] *Supra* note 123, at 2094.

[131] *Id.* at 2082.

and dignity by restricting pornography that ridicules, belittles, or otherwise affronts her dignity.

Furthermore if, as has been argued above, integrity and dignity are aspects of a person's security and autonomy, it is a woman's equal right to security and autonomy, as well as her right to equality of opportunity, that is violated by the type of pornography that subsection 14(1) addresses. According to the Board:

> A stereotypical image of a certain protected class of persons, namely women, is presented when they are consistently depreciated as ridiculous objects and when sexual violence and other forms of discriminatory depictions and descriptions are directed at them because of their sex. The class consisting of this gender is then ridiculed, and belittled and their dignity affronted. Discrimination like this jeopardizes their opportunity to obtain *equality rights* including employment, education and *security of their persons on an equal footing with the dominant gender grouping*.[132]

It is not clear from the decision, however, exactly how much weight is to be given to the harm contemplated by each thesis, since the Board does not clearly distinguish between the two parts of subsection 14(1) of the *Human Rights Code* in its decision. Subsection 14(1) appears to give an action against material that *either* provokes discrimination *or* is merely ridiculing, belittling or affronting to the dignity of a person or class of persons. The Board's decision, however, does not make it clear whether the existence of *either* of these effects is sufficient for material to be caught by subsection 14(1), or whether *both* are necessary.

(iii) *The Canadian Charter of Rights and Freedoms*

I would like to conclude this section by tentatively suggesting that a *Charter* argument exists, based on either the provocation thesis or the direct harm thesis, that would establish a positive duty on the part of the government to restrict certain types of pornography. According to subsection 15(1) of the *Charter*:

> 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.

The provocation thesis states that certain types of pornography prejudice the right of women to liberty, security and equal opportunity, since such pornography provokes misogynist behaviour on the part of those who use it. According to the direct harm thesis, certain types of pornography prejudice the right of women to liberty, security and equal opportunity since such material constitutes an affront to the dignity of individual women and thereby causes them psychological harm. Since

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[132] *Id.* at 2089 (emphasis added).

the hard core pornography industry is almost exclusively devoted to the portrayal of women for the entertainment of men, it is women who are virtually the sole "victims" of the alleged harmful effects of such pornography. Thus, by allowing the production and dissemination of hard core pornography, the law fails to provide women with the same protection of their rights to liberty and security as it gives to men. This is a violation of women's "right to the equal protection and equal benefit of the law" and, therefore, directly contravenes subsection 15(1) of the *Charter*. The effect of this proposed *Charter* argument might be to impose a positive duty on Parliament to amend the present law relating to pornography and obscenity in such a way as to ensure that women are equally protected from pornography-induced harm.

The tentative nature of this argument should again be emphasized. The scope of subsection 15(1) is not yet apparent since there is at present no judicial interpretation of the section. Furthermore, this argument is contingent on certain types of pornography actually causing the type of harm contemplated by the two feminist theses and, as noted above, the scientific evidence for both theses has yet to be ascertained. Nonetheless, providing that subsection 15(1) is liberally interpreted, and providing that the scientific basis for the feminist theses is established, there is no reason why such an argument would not be accepted by the courts.

IV. Conclusion

This article has investigated legal restrictions on pornography by examining reasons typically given to justify such restrictions. Liberalism and legal moralism were discussed initially, since they represent the two major moral theories that inform the contemporary debate on pornography in Canadian society. A brief discussion of current obscenity law in Canada led to the conclusion that this body of law is based primarily on legal moralistic concerns. According to liberals, such concerns do not justify legal restrictions on pornography, since the immorality of an act is not in itself sufficient to justify restrictions on an individual's right to liberty and freedom of expression.

It was then suggested that feminists, although often aligned with legal moralists in their call for restrictions on certain types of pornographic material, are not subject to liberal criticism since their theses are consistent with liberalism. Feminists are not concerned with the moral or immoral nature of pornography. They are, instead, concerned with the potential of pornography to harm women physically, economically or psychologically.

Liberal reluctance to admit that the harm contemplated by the feminist theses in itself justifies a legal response may be attributed to a scepticism as to whether pornography actually *causes* that harm. This scepticism can only be met by proof of a link between pornography, misogynist activity and psychological harm. For many liberals, however,

it is not the lack of proof of a link between pornography and harm that causes their reluctance to accept the feminist theses, but rather their belief that the harm contemplated by the feminist theses does not justify a legal response. This is less true for the provocation thesis than for the direct harm thesis, since even the most "conservative" liberals are likely to accept that women should be protected from physical assault and economic discrimination. However, "conservative" liberals may not accept that individuals require legal protection from direct psychological harm. Nevertheless, it has been argued in this article that psychological harm is as likely to compromise the security and autonomy of an individual as is physical or economic harm. This is clearly recognized in a number of areas of the law and should be admitted by even the most conservative proponents of liberalism; the liberal concept of harm is wide enough to include psychological harm and, thus, its exclusion seems arbitrary.

This article has tried to clarify the concepts of law, pornography and moral theory. Law is simply a means of realizing certain policies and it can only be formulated rationally if its relationship to those policies is understood. I have tried to dispel the confusion arising from the belief that the feminist theses on pornography are inconsistent with liberalism. The emphasis of the feminist theses on the *harmful* nature of pornography brings them within the rubric of liberalism, and distinguishes them from the doctrine of legal moralism. However, I have not addressed a number of other complicated policy concerns, such as which moral theory should provide the basis of pornography law, what level of proof of harm is required before restrictions on pornography are justified, and whether civil remedies, criminal sanctions or prior restraint should be used. I have only tried to establish a framework for discussion of these very difficult policy issues and to show that the fundamental principles of individual liberty and freedom of speech are not, in themselves, an answer to feminist concerns about pornography.

Feminists are concerned about the harm that certain types of pornography may cause individual women, and they want to restrict those types of pornography in order to protect women. Their arguments for restricting pornography are *liberal* arguments and cannot be met by simply evoking liberal principles and complaining that restrictions on pornography limit those principles. Those liberals who reject all restrictions on pornography would do well to rethink their position in terms of the relationship between their own most fundamental principle — that the state is justified in interfering with an individual's right to liberty and freedom of expression in order to protect another individual from harm — and the claims of feminists that pornography causes harm to individual women.