

FEMINIST PROTEST AND THE REGULATION OF MISOGYNIST SPEECH: A CASE STUDY OF SASKATCHEWAN HUMAN RIGHTS COMMISSION V. ENGINEERING STUDENTS' SOCIETY

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This article presents an historical account of feminist protest from 1978 to 1991 against a newspaper published by engineering students at the University of Saskatchewan. Using judicial records, newspaper reports, and personal interviews, the author documents events surrounding the reform of The Saskatchewan Human Rights Code in 1979, the adjudication of a formal complaint under the Code and the ultimate denial of this attempt to regulate misogynist speech. The author draws on this specific historical context to explore both the dynamics of speech under conditions of sexual inequality and the impact of law reform on social change. As illustrative of the difficulties in effectively counteracting misogynist speech, she identifies ways in which feminist response to publications like the Red Eye at the University of Saskatchewan and elsewhere has been silenced and marginalized. The author also examines the impact of law and the legal process on women by tracing their participation in the adjudicative process and by evaluating the responsiveness of decision-makers such as university officials and members of tribunals and courts to the concerns and conditions affecting women. She concludes that reform of the Code did

Cet article relate l'histoire d'une lutte féministe qui a été menée entre 1978 et 1991 contre un journal publié par des étudiants en génie à l'université de Saskatchewan. En se servant de dossiers judiciaires, d'articles de journaux et d'entrevues, l'auteure fait état d'événements survenus lors de la réforme du Saskatchewan Human Rights Code, du jugement rendu sur une plainte formelle déposée en vertu du Code et du rejet définitif de cette tentative de réglementation du discours misogynne. L'auteure s'inspire de ce contexte historique particulier pour examiner les dynamiques du discours en situation d'inégalité sexuelle ainsi que l'impact de la réforme du droit sur le changement social. Pour illustrer le fait qu'il est difficile de neutraliser efficacement le discours misogynne, elle montre comment on a réduit au silence et marginalisé les féministes qui réagissaient à des publications comme Red Eye, à l'université de Saskatchewan et ailleurs. L'auteure examine aussi l'impact du droit et de la procédure judiciaire sur les femmes en déterminant comment elles participent au processus judiciaire et comment les décisionnaires tels que le personnel dirigeant des universités et les membres des tribunaux réagissent aux problèmes

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reduce the prevalence of misogynist imagery at the University of Saskatchewan but has had an indeterminate effect on the overall consciousness of (hetero)sexist ideology and sexual inequality.

et aux circonstances qui affectent les femmes. Elle conclut que la réforme du Code a atténué la prédominance des images misogynes à l'université de Saskatchewan, mais que ses effets sur la prise de conscience générale de l'idéologie (hétéro)sexiste et de l'inégalité sexuelle sont imprécis.

I. INTRODUCTION

The publications and antics of engineering students have been staple and controversial features of post secondary education in Canada for more than two decades. Since the late 1970s, women's groups on Canadian campuses actively opposed these publications as part of an effort to raise consciousness about sexual harassment, pornography, and violence against women. Until recently, feminist protest received little support from university administrators. In the wake of the murders of women engineering students by Marc Lépine in Montreal in December 1989, however, we have witnessed increasing official censure of a tradition that has been the most overt manifestation of sexism and misogyny in Canadian universities. Many engineering students, deans, and professionals now profess to have a new-found awareness and sensitivity to the interests of women.

This article presents an historical account of a specific protest against one student newspaper, the *Red Eye*, which was published by the Engineering Students' Society (ESS) at the University of Saskatchewan. In many respects, this account of protest, which included demands for apologies, the manual destruction of copies, and complaints to administrators, resembles protests against similar publications and practices at other faculties and other institutions in Canada.¹ Its claim to special historical interest, however, lies in the fact that the challenge to misogynist speech on the Saskatchewan campus was made the subject of lengthy and contentious administrative and judicial proceedings.

Although most anti-discrimination statutes in Canada prohibit the publication or display of sex-segregated notices or advertisements,² the

¹ In 1980, for example, women's groups challenged engineering publications at several universities including the *Plumblin* at McMaster University, the *Red Rag* at the University of British Columbia, the *Toike Oike* at the University of Toronto, the *Red Lion* at the University of Manitoba, the *Godiva* at the University of Alberta, *Rebogge* at Concordia University, and the *Plumber's Pot* at McGill University: "Several Campus Publications Criticized" *the sheaf* (6-13 March 1980) 5; "Engineering Paper Problem Nationwide" *the sheaf* (8 October 1981) 1.

² For prohibitions of "any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons" because of one's sex, amongst other grounds, see *Human Rights Code*, R.S.N.B. 1973, c. H-11, s. 6(1); *The Newfoundland Human Rights Code*, R.S.N. 1970, c. 262, s. 11(1); *Fair Practices Ordinance*, R.S.N.W.T. 1974, c. F-2, s. 5; *Nova Scotia Human Rights Act*, S.N.S. 1969, c. 11, s. 12(1); *Prince Edward Island Human Rights Act*, S.P.E.I. 1975, c. 72, s. 12(1); *British Columbia Human Rights Act*, S.B.C. 1984, c. 22, s. 2(1); *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, s. 2(1). The *Quebec Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 11 extends to notices, symbols, or signs "involving discrimination" and other statutes make reference to representations that incite, counsel, or advocate discrimination: see *Human Rights Code*, 1981, S.O. 1981, c. 53, s. 12(1); *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 12; *The Human Rights Code*, S.M. 1987-88, c. 45, s. 18. All statutes contain separate provisions regarding questions asked and information solicited during employment interviews. The federal act also prohibits hate messages telephonically communicated in s. 13.

Saskatchewan Human Rights Commission proposed revisions to *The Saskatchewan Human Rights Code*³ in 1979 expressly with a view to catching the sexist and misogynist imagery for which engineering student publications across Canada became notorious. Pursuant to the *Code*, the Saskatchewan Action Committee of the Status of Women and the Saskatchewan Human Rights Commission complained that the publishers of the *Red Eye* had discriminated against women on the grounds of sex. Subsequent proceedings marked the first occasion in which claims against misogynist speech have been investigated and adjudicated as human rights violations in Canada and the United States. In 1984, in what Kathleen Lahey hailed as a "landmark in how to think positively about regulating pornography",⁴ a three-person Board of Inquiry appointed by the Attorney General for Saskatchewan found the ESS and those responsible for the publication to be in violation of the *Code* by portraying women in a manner that ridiculed and affronted their dignity.⁵ Although this decision was ultimately overturned, it remains the first and only human rights decision to analyse and address misogynist imagery in terms of its particular harm to women and gender inequality.⁶ In 1989, the Saskatchewan Court of Appeal reversed the Board's ruling on the narrow ground that the statutory provision did not extend to written statements and articles contained in the publication.⁷ The Supreme Court of Canada refused leave to appeal in June 1989.⁸

In this article, I assess the social significance and impact of the legal proceedings against the *Red Eye* using judicial records, newspaper reports, and personal interviews. My account is factual and interpretive to the extent that my distillation of "the facts" from the mass of available factual data has necessarily entailed an assessment and analysis of relevance and significance.⁹ The method is feminist insofar as it attends to the experience of women, in this context predominantly but not exclusively white, relatively privileged women, and attempts to address

³ S.S. 1979, c. S-24.1, s. 14 [hereinafter *Code*].

⁴ *The Charter and Pornography: Toward a Restricted Theory of Constitutionally Protected Expression* in J.M. Weiler & R.M. Elliott, eds., *LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (Toronto: Carswell, 1986) 265 at 284.

⁵ *Saskatchewan Human Rights Comm'n v. Engineering Students' Society* (1984), 5 C.H.R.R. D/2074 (Sask. Bd of Inq.), rev'd (1986), 7 C.H.R.R. D/3443 (Sask. Q.B.), aff'd (1989), 10 C.H.R.R. D/5636, 56 D.L.R. (4th) 604 (Sask. C.A.) [hereinafter *SHRC v. ESS* cited to D.L.R.].

⁶ Complaints regarding engineering publications were also filed in British Columbia but were not taken to the adjudicative stage: see "Several Campus Publications Criticized" *supra*, note 1.

⁷ *Supra*, note 5.

⁸ [1989] 1 S.C.R. xiv, 102 N.R. 320.

⁹ My concern with sexism inevitably affected the organization and "apprehension of truth" in this paper: see W. Wesley Pue, *Theory and Method in the History of Law* in W. Wesley Pue & B. Wright, eds., *CANADIAN PERSPECTIVES ON LAW & SOCIETY: ISSUES IN LEGAL HISTORY* (Ottawa: Carleton University Press, 1988) 24.

the law from the perspective of women's experience.¹⁰ Specifically, this study is informed and animated by two objectives: first, to explore the dynamics of speech in its social context, focusing specifically on the relationship between the oppression of women and the exercise of speech and second, to explore the role of law, the legal process and legal reasoning in empowering and/or disempowering women.

The critique of "free speech" — the notion that speech is costless, equally accessible and hence can be counteracted by more speech — has been one of the most powerful themes of radical feminist work on pornography.¹¹ While much feminist thought implicitly acknowledges the importance of speech as a form of dialogue and a means of connection, the exercise of speech in a context of unequal social relations has been identified as predominantly a male privilege. For women generally, silence is a socialized role and a real consequence of unequal economic, political, and physical power.¹² In addition to the impact of racism and other structures of domination, women's silence is a result of threatened or actual male violence,¹³ of economic dependence upon men as husbands, employers, or superiors¹⁴ and the result, not least, of a largely unexamined but widely accepted assumption in Western culture that

¹⁰ Such a method reflects the understanding that our experiences and knowledge are socially constructed according to gender and other important power relations. For an approach to gender inequalities in a university setting that is informed by women's knowledge of inequality, see C. Sheppard & S. Westphal, *Equity and the University: Learning from Women's Experience* (1992) 5 C.J.W.L. 5 [hereinafter *Equity and the University*].

¹¹ See C.A. MacKinnon, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (Cambridge: Harvard University Press, 1987) at 163-97 [hereinafter *FEMINISM UNMODIFIED*] and A. Dworkin & C.A. MacKinnon, *Pornography & Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988).

¹² See *FEMINISM UNMODIFIED*, *ibid.*; A. Rich, *ON LIES, SECRETS AND SILENCE: SELECTED PROSE, 1966-1978* (New York: Norton, 1979) [hereinafter *LIES, SECRETS AND SILENCE*]; S.M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation* (1988) 38 J. LEGAL EDUC. 147 at 150; and S. McIntyre, *Gender Bias Within the Law School: 'The Memo' and its Impact* (1987) 2 C.J.W.L. 362.

¹³ Studies suggest that at least one out of every ten women in married or common-law relationships in Canada are physically assaulted by their spouses. The overwhelming majority of victims of domestic violence are women: see L. MacLeod, *Wife Battering in Canada: The Vicious Circle* (Hull, Que.: Supply & Services Canada, 1980) 21 and M.D. Smith, "Women Abuse in Toronto: Incidence, Prevalence and Demographic Risk Markers", Dept. of Sociology, York University, Ontario, April 1988. The overall incidence of sexual assault is likely higher; one study suggests that for each reported incident of forced sexual intercourse another nine go unreported: see D. Kinnon, *Report on Sexual Assault in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981) 1.

¹⁴ Women's dependency on men for the economic survival of themselves and their children reflects unequal pay for women in the workplace as well as the unpaid domestic labour of women in heterosexual relationships. In almost all spheres of economic, political, and social activity, women are concentrated in subordinate positions and earn less on average than men.

what women say is less credible and less important.¹⁵ According to the radical critique, the silence of women is also a consequence of pornography and other forms of misogynist speech that generate fear on the part of women and reinforce the expectation that what women say need not be listened to.¹⁶

Over the eleven years that the *Red Eye* and its publishers were pursued by the Saskatchewan Human Rights Commission, there were widely varied views of the nature of the *Red Eye* and the proceedings that were launched against it. In what parallels the current media attack on "political correctness",¹⁷ columnists in the local and national press repeatedly characterized the proactive position of the Commission as a "fit of righteousness",¹⁸ "an attempted power grab",¹⁹ and a misuse of scarce time and taxpayers' resources.²⁰ The implicit if not explicit assumption underlying such statements is that the *Red Eye* was neither offensive nor harmful. The tabloid has been described as mere "puerile foolishness",²¹ as part of a fifty-year tradition of vulgar humour,²² and has even been distinguished as "satirical comedy".²³

I argue that the *Red Eye* was literally and blatantly misogynist and sexist. Although the purpose of this article is not to demonstrate empirically the harmful effects of the *Red Eye*, it is quite clear that neither the *Red Eye*, nor the tradition of which it forms a part can be dismissed as harmless. In exploring the dynamics of speech, I describe the context in which complaints regarding the *Red Eye* arose and document responses to such complaints which included indifference on the part of university administrators, attacks by engineering students on the credibility of complainants, and instances of harassment and intimidation. Patterned responses aimed at discrediting and silencing speech that was critical of the *Red Eye* appear not only in campus debates but are replicated in the conduct of proceedings before the Board of Inquiry which was appointed

¹⁵ As Sophocles put it, "A woman's silence is her crown", Wildman, *supra*, note 12.

¹⁶ By presenting false images of what women want, pornography also disqualifies women's accounts of sexual violence and undermines our credibility in the home, the workplace, and in the courtroom: see FEMINISM UNMODIFIED, *supra*, note 11; C. Smart, FEMINISM AND THE POWER OF LAW (London: Routledge, 1989) [hereinafter POWER OF LAW]. The pervasiveness of pornography makes it difficult for women to imagine, experience, and talk about a different sexual reality.

¹⁷ See generally S. McIntyre, paper presented at the Learned Conference, Law and Society, Queen's University, Kingston, Ontario, June 1990.

¹⁸ J. Callwood, "Reeking Herring in Swimming Pool Distracts From Real Abuse Cases" *The Globe and Mail* (12 April 1989) A2.

¹⁹ C. Laughlin, "Red Eye Case Shows SHRC Obsession" *The [Saskatoon] Star Phoenix* (15 July 1989) A5.

²⁰ J. McKenzie, "Rights Obsession Makes A Wrong" *The [Regina] Leader Post* (4 October 1989).

²¹ *Supra*, note 18; *Feminist Debates and Civil Liberties* in Varda Burtysn, ed., WOMEN AGAINST CENSORSHIP (Vancouver: Douglas & McIntyre, 1985) 127.

²² *Supra*, note 19.

²³ L. MacPherson, "Red Eye Ruling Wrong" *The [Saskatoon] Star Phoenix* (22 March 1984) A5.

to adjudicate the complaint and in the response of administrators to my research on this topic. These responses often appeal to an assumed relationship between objectivity and (male) authority and in general highlight the costs and difficulties of counteracting the effects of misogynist speech through more speech.

I also attempt in this article to evaluate the gains, if any, achieved through legal reform. Widely varied claims have been made regarding the efficacy of incremental legal reform ranging from generalized claims that it is "eventually progressive" to "inevitably futile".²⁴ Carol Smart, for example, in her recent work doubts whether law can legitimize women's aims given its record in areas of rape, equal pay, and violence against women. She believes "law is powerful in silencing the alternative discourse of women" but "far less powerful in transforming society to meet the various needs of all women."²⁵

More specifically, skeptics have questioned the legal regulation of hate speech and pornography. The efforts of Catherine MacKinnon and Andrea Dworkin to define pornography as a "practice of sex discrimination"²⁶ and the attempts by feminists in Canada to define obscenity in the *Criminal Code* as a practice of sex inequality, endorsed most recently by the Supreme Court of Canada in *R. v. Butler*,²⁷ have been at the centre of a long, unsettled, and divisive debate among and between feminists and others over censorship. This case study does not attempt to address all aspects of these debates but does provide a specific context in which many of the conflicting claims on the use of human rights law to combat misogynist speech can be considered and evaluated. In general, it provides an opportunity to examine questions about the forms that feminist protest might usefully take and the utility of feminist engagement with law.

In Part II, I describe the editions of the *Red Eye* at issue and the social context in which the publications emerged. I document the initiatives of certain women's groups against the *Red Eye* at the University of Saskatchewan and the response of engineering students, student council members, and university administrators over a five-year period, from about 1978 to 1983. In an attempt to identify the difficulties in counteracting misogynist speech, I specifically address the fate of the Women's Directorate which was responsible for sustained opposition to the *Red Eye*. In Part III, I discuss the response to the complaint by the Saskatchewan Human Rights Commission and the presentation of it and the respondent's case before the Board of Inquiry appointed to adjudicate the complaint. In Part IV, I analyse and contrast the decision of the Board of Inquiry with the decisions of the Court of Queen's Bench and

²⁴ Pue, *supra*, note 9.

²⁵ POWER OF LAW, *supra*, note 16 at 81.

²⁶ See FEMINISM UNMODIFIED, *supra*, note 11 at 175-83 for the text of the ordinance. The ordinance was broader than laws against hate propaganda in that it created a civil suit for the coercion of pornography models, forcible exposure to pornography, sexual assault caused by pornography, and trafficking in pornography.

²⁷ [1992] 1 S.C.R. 452, 70 C.C.C. (3d) 129 [hereinafter *Butler* cited to S.C.R.].

Court of Appeal in terms of their responsiveness to women's interests and experiences. I explore the practical impact of the proceedings in greater depth in Part V including the significance of recent shifts in the sites and resolution of these debates.

II. TAKING ON THE *RED EYE* TRADITION

In 1974, Adrienne Rich described the university as a microcosm of a "man-centered society", "a breeding ground not of humanism, but of masculine privilege".²⁸ Rich was critical of the content of university education, which obscured or devalued the history and experience of women as a group and of the prevailing style of discourse that assumed neutrality, shunned the emotional and subjective, and was indifferent to human values and ends. But "the university is above all a hierarchy" — "at the top is a small cluster of highly paid and prestigious persons, chiefly men, whose careers entail the services of a very large base of ill-paid or unpaid persons, chiefly women".²⁹

The notion of a hierarchy, based not only on gender but also on race and class privilege, aptly describes the University of Saskatchewan in 1978. As in most universities, women were (and remain) seriously under-represented as faculty members and senior administrative officials at the Saskatchewan campus.³⁰ As workers in a male-dominated forum, women have been excluded or disadvantaged by mores and structures defined by men to reflect their needs (for example, male-defined career patterns).³¹ Although women comprised 45.6% of the university student body in 1979-80 and now make up approximately 50%,³² research on campus education has indicated that women students in general have received less attention and feedback from their instructors and are not

²⁸ *Supra*, note 12 at 127 & 237. The university, according to Rich, played a central role in "subtly and openly [confirming] men as the leaders and shapers of human destiny both within and outside academia".

²⁹ *Ibid.* at 136.

³⁰ In 1990, women held 17% of upper level management positions and 20% of faculty positions: see *Compliance Review Report and Employment Equity Plan* (Saskatoon: University of Saskatchewan, May 1992) [hereinafter *Compliance Review Report*]. A study conducted during 1987-88 by the university's faculty association indicated that 52% of women respondents, as opposed to 20.4% of men, began their academic careers at ranks below assistant professor. Women are concentrated in the lower academic ranks, move more slowly through the ranks than their male counterparts, and have lower starting salaries on average at all ranks except that of full professor: see *Project Report on the Relative Status of Women Faculty Members at the University of Saskatchewan*, January 1988.

³¹ See *Equity and the University*, *supra*, note 10 for a discussion of discriminatory practices experienced by women at McGill University including non-respect, exclusion, and isolation; sexual harassment; unequal pay for equal work; the disparate impact of family responsibilities; pay inequities across job classifications; the exclusion of women from the university curriculum and research; and physical insecurity as a result of male violence.

³² University of Saskatchewan Statistics, Volume VI, June 1980, submitted in evidence in the *Red Eye* proceedings and on file with the author.

accepted as legitimate peers or colleagues.³³ As in many Canadian universities, the vast majority of all students and faculty members, both male and female, are white and most appear to have middle-income backgrounds.³⁴

While sexual harassment remains a regrettable reality for women on campuses in the 1990s, in the late 1970s, the women's movement was only beginning to make visible the alarming incidence of male violence against women. Until the mid-1980s, there was little if any social recognition of practices such as harassment, rape, and wife battering as injuries suffered by women as a group and there was no institutionalized mechanism for complaints.³⁵ The historical review that follows reveals that university officials and student leaders viewed misogynist publications and practices on campus not as instances of sexual harassment but rather as the inevitable "pranks" of a few students that, if not positively amusing, were certainly within the bounds of tolerance. The struggle on the part of some women to make visible the

³³ R.M. Hall & B.R. Sandler, *Out of the Classroom: A Chilly Campus Climate for Women?* (Washington: Ass'n of American Colleges, Project on the Status and Education of Women, 1984); C. Backhouse *et al.*, *The Chilly Climate for Faculty Women at the University of Western Ontario: Postscript to the Backhouse Report* [hereinafter *Postscript*].

³⁴ In 1990, Aboriginal peoples, visible minorities, and persons with disabilities made up 0% of upper level managers; 1%, 4%, and 3% respectively of middle and other managers; 1%, 11%, and 2% of professionals (faculty and others). *See Compliance Review Report, supra*, note 30. Aboriginal peoples are under-represented in almost all occupational groupings relative to their representation in the applicable labour market and their representation in the provincial population. Unfortunately, no statistics are available on the socio-economic backgrounds of university employees and students.

³⁵ Sexual harassment policies and offices were instituted on most campuses in the 1980s (on the Saskatchewan campus in 1986), and universities may also be liable for sexual harassment of students under human rights statutes: *see, e.g., Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd* 631 F.2d 178 (2d Cir. 1980). Until recently, there has also been little recognition of the problem of date rape among college students: *see* R. Warshaw, *I NEVER CALLED IT RAPE* (New York: Harper & Row, 1988) at 48, who found in a survey of 6,159 undergraduate students on thirty-two college campuses that 25% of the 3,187 women respondents had sexual experiences that met the legal definition of rape or attempted rape (including anal or vaginal penetration, fellatio, or cunnilingus achieved through force or threat of bodily harm) by an assailant who was known to the victim. The average age of the women respondents was twenty-one and most were single, white, and middle class. According to the study, women in their college years run the greatest risk of rape although few incidents are officially reported. As this article goes to print, a survey of 1,835 female and 1,307 male students on 44 Canadian campuses has apparently made the following findings: 81% of women questioned said they had been subjected to sexual, physical, or psychological abuse by a dating partner; 22.4% reported incidents of physical abuse and 28.8% reported sexual abuse within the past year, and 45.8% said they had suffered sexual assault and 34.9% physical abuse since leaving high school. 81.3% of the men admitted being psychologically abusive during a date; 13.1% admitted being physically violent, and 11.3% sexually abusive within the past year; 19.4% acknowledged being sexually abusive and 17.2% physically violent towards women since high school: D. Downey, "Students Fear Abuse on Dates" *Globe and Mail* (8 February 1993) A1-2.

misogynist attitudes underlying these practices and their efforts up to 1983 to remedy the harm of such practices met largely with indifference on the part of university officials and with resistance if not outright hostility on the part of student leaders.

Engineering students distributed the *Red Eye* across the Saskatchewan campus two or three times annually. Each issue contained information on college events and professional opportunities for engineering students as well as cartoons and limericks, many of which were extracted from engineering publications elsewhere. The activities of the ESS, including the publication of the *Red Eye*, were directly financed through the payment of membership fees by engineering students which was supplemented by a subsidy from the University Students' Union until the early 1980s. Of all colleges and professions, engineering has been perceived as particularly resistant to the inclusion of women.³⁶ The participation rates of women have always been low in the physical sciences but even lower in engineering colleges.³⁷

Like its counterparts across the country, the *Red Eye* prominently featured and celebrated sexist and homophobic humour. The "*Red Eye* tradition",³⁸ including the culture reflected in collegial events such as the annual "Lady Godiva Ride", is best described by extracts from the three editions that became the subject of legal controversy. The January

³⁶ Studies have attributed the extremely low involvement of women in engineering to sex role socialization (which discourages women from taking the prerequisite "hard science" courses), few female role models, and a lack of information: see *More than just Numbers: Report of the Canadian Committee on Women in Engineering* (Chair: Dr Monique Frize) (Fredericton: University of New Brunswick, 1992) at 36 [hereinafter *Report of the Canadian Committee*] and N.S. Javed, *Female Engineering Students: Reflections and Perceptions* (M.A. Thesis, University of Saskatchewan, 1988) at 48 [hereinafter *Female Engineering Students*]. Javed examines and rejects, for lack of evidence, the view that women are biologically less suited for the profession. Studies have also referred to a hierarchical work structure that does not accommodate family life: see R. Hubbard, *Should Professional Women be like Professional Men?* in V. Haas & C. Perrucci, eds., *WOMEN IN SCIENTIFIC AND ENGINEERING PROFESSIONS* (Ann Arbor: University of Michigan Press, 1984) at 205-11 and R. Carter & G. Kirkup, *WOMEN IN ENGINEERING: A GOOD PLACE TO BE?* (London: MacMillan Education Ltd, 1990). For an insightful examination of this question in terms of a more general sexual division of labour, see C. Cockburn, *MACHINERY OF DOMINANCE: WOMEN, MEN AND TECHNICAL KNOW-HOW* (London: Pluto Press, 1985).

³⁷ In the 1977-78 academic year, women accounted for only 3.9% of all engineering students at the University of Saskatchewan — in absolute terms, 42 out of 1045, *supra*, note 32. The proportion of women students in engineering averaged approximately 8% till 1990 when it jumped to 10.5%. Across Canada, as of 1990, women made up 14% of undergraduate students in engineering, *Report of the Canadian Committee*, *ibid.* at 34-35. The first and only female professor in the Engineering College at the University of Saskatchewan was hired in 1990. In 1990, women made up 3.2% of the total number of professional engineers in Canada, *Report of the Canadian Committee*, *ibid.* at 2.

³⁸ I use the word "tradition" to refer to a set of customs and practices that are passed down to new students with the expectation that they will be honoured. The word also captures the fact that assumptions embedded in the tradition go unchallenged and uninterrogated.

1978 issue featured a cartoon which depicted only the legs, buttocks, pubic hair, and large breasts of a woman. Captioned "The Perfect Woman", the headless image literally reduced "woman" and by implication, all she is good for, to her sexual parts. Another cartoon, loosely drawn from the Peanuts and Charlie Brown comic strip, showed Lucy (the little girl with the Big Mouth) taunting "Peanus" about his blanket. "Peanus" responds by using it to bind, rape, sodomize, and finally force fellatio upon her.

The 3 October 1979 edition of the *Red Eye* contained eight pages, much of it advertising copy. As the first edition published in the academic year, it addressed first year students and recorded events occurring during "Hell Week", a week in which engineering students sponsored a number of activities on campus including the "Hell Dance" and the "Lady Godiva Ride" in the campus bowl. The first page was headlined "Welcum Frosh" and featured a photograph of a semi-clad woman on a horse being led by ogling male students and was captioned "Godiva Mounts Agro President". The same page featured a blown up picture of the same woman's exposed breasts with the caption "Found at Hell Dance: Owner Please Claim at ESS Office".

The second page ran an article concerning parking tickets on campus which contained three totally irrelevant references to "Fucking Blondes with Big Tits". A cartoon portrayed a woman whose body had been grossly deformed apparently through an act of sexual intercourse. Pages three and four contained only advertisements, cartoons, the president's message, and photos of officers of the ESS. On page five, the following limerick appeared: "There once was a lady from Guam who swallowed an atomic bomb. The first time that she'd made it the damn thing detonated and she found her cunt in a ditch." It also featured an article by the internal vice-president inviting members of the ESS to join "The Rape and Plunder Squad", which was described as a "symbol" of the engineers "in charge of harassing Agros, Voc Ags, Directorates or whatever". A fictitious job application form for *Red Eye* staff invited female applicants to provide information on their measurements, outstanding physical features, and sexual habits.

Pages six and seven contained advertising and some allegedly humorous pieces. A cartoon on page seven featured a man and woman mourning over a coffin which was designated "S and M" and was headed "Poor Innocent Denise. What Killed Her?" Following the instructions at the bottom ("Fold B over to A to find out") revealed a crude drawing of a penis. Page eight contained photographs of male engineers drinking and staging a mock crucifixion of an "Agro" and was titled "Engineers in Action".

It is hard to imagine a more graphic representation of what Andrea Dworkin calls the ideology of male sexual domination than the cartoons that appeared in the January 1978 issue.³⁹ Not only does the cartoon

³⁹ See RIGHT-WING WOMEN (New York: Perigee Books, 1978) [hereinafter RIGHT-WING WOMEN] and PORNOGRAPHY: MEN POSSESSING WOMEN (New York: Perigee Books, 1979) [hereinafter PORNOGRAPHY].

"The Perfect Woman" assume that men enjoy a natural entitlement to physical possession of the female body but it also blatantly suggests that male sexual desire "properly and naturally defines the parameters of a woman's sexual being, which is her whole identity".⁴⁰ More shocking, however, is the second cartoon in which "Peanus" uses sexual violence to put the assertive, vocal woman in her "rightful" place. The use of such imagery as a source of humour trivializes the painful reality of women's experience of sexual violence and reflects the all too commonly held view that violence is a legitimate response to challenges by women to male authority. The prevalence of sexually violent imagery, which was even more blatant in the 27 January 1981 issue,⁴¹ is illustrative of the links between heterosexuality, violence, and male dominance that radical feminists have identified as pervasive.⁴²

While satirical works use ridicule and derision in order to expose and attack folly or vice, the treatment of women in the *Red Eye* was not presented or in any way challenged as folly or wickedness. Students who prepared the *Red Eye* intended to shock, belittle, amuse, and likely not least, to sexually excite. In its mode of production and distribution, the *Red Eye* obviously differed from the bulk of what we recognize as pornography; it was not a multibillion dollar business trafficking in

⁴⁰ PORNOGRAPHY, *ibid.* at 203.

⁴¹ The front page of the issue featured in large bold type the heading: "WOMEN INFERIOR TO ENGINEERS". Below in much smaller type, it read: "That's right. Everyday women are significantly inferior to Engineers. For years the *RED EYE* has been accused of treating women as being INFERIOR. Well there's a reason for that. They are. SO ARE EVERYDAY MEN. (our duty is to offend)". Page two featured four short stories, several poems or limericks, the central theme of which was sexual activity. On page three, in addition to a cartoon, a fictitious ad, a critique of the campus newspaper *the sheaf*, and three articles, there was at centre page, the following note — "Is your girlfriend worn out: Check and see. Stick your thumb up her cunt and your middle finger up her ass. If you can snap your fingers she's worn out".

Page four contained an ad, a cartoon, a satirical piece, and an article by the editor entitled "Fuck Off" which was directed against the Women's Directorate and Action Committee — calling them "you snotty-nosed bitches" and in requesting information from them stated, "Don't just sit there, you dumb broad. Get off your ass and do something" with the sign-off "Fuck you all". Page five featured an ad, two drawings, three articles, and three limericks, two involving women and bestiality, and a chain letter which was allegedly started with the hope of bringing relief to tired and unhappy wives. At the bottom, a postscript read, "At the time of this letter a friend of mine had received three hundred and sixty-five men. They buried her yesterday and it took seven good undertakers thirty-six hours to get the smile off her face and two days to get her legs together so that they could close the coffin". Page fourteen contained two large ads and "The *Red Eye* Dictionary" of thirty-eight entries, seventeen of which made women the brunt of humour because of their sexuality, for example, assault — "what every woman likes to be taken with a grain of". This edition also contained an important nine-page supplement of notices concerning professional conferences and opportunities.

⁴² See RIGHT-WING WOMEN, *supra*, note 39 and FEMINISM UNMODIFIED, *supra*, note 11.

photographs of real women having "real" sex.⁴³ The *Red Eye*, however, did deal in graphic, sexually explicit imagery that resonates with standard pornographic themes — women as objects of abuse and depersonalized sex, promiscuous, oversexed women who presumably enjoy or deserve whatever men do to them.

Throughout the *Red Eye*, the perspective almost exclusively advanced and appealed to was that of the heterosexual male.⁴⁴ As in much pornography, the culture was explicitly a phallic one. The penis in these accounts is glorified as having an almost mystical power to avenge, insult, and destroy. While males are portrayed and encouraged to show spirit, zest, and intercollegiate rivalry, women are represented only in connection with sex and are portrayed either as purely passive objects of male sexual desire (their own pleasure being presumably irrelevant) or as having themselves an insatiable desire for sex at any cost, even that of personal injury or death. Like pornography, the cartoons and limericks in the *Red Eye* constructed women symbolically as the subordinate "other" — or all that "man" is not.⁴⁵

While I draw on only three issues of the *Red Eye*, other issues and social events of the ESS reflected a similar ideology.⁴⁶ Across the country, engineering students have sponsored annual "Lady Godiva

⁴³ See M. Valverde, *SEX, POWER AND PLEASURE* (Toronto: Women's Press, 1985) [hereinafter *SEX, POWER AND PLEASURE*]. Mari J. Matsuda suggests that pornography, as distinct from hate speech, is "visceral", "noncognitive", and "tied to the practice of actual violence" in *Public Response to Racist Speech: Considering the Victim's Story* (1989) 87 MICH. L. REV. 2320 at 2332 n. 66 [hereinafter *Racist Speech*].

⁴⁴ Although neither the October 1979 nor the January 1981 issues contained such references, homosexuals were commonly referred to as "queers" or "faggits" in the *Red Eye*. Agriculture students also posted notices and graffiti inviting students to come to the annual AgBag Drag and "burn a fag": S. Collie, "Destructive Gossip" *the sheaf* (3 November 1983) 5.

⁴⁵ Being male is presented as active, strong, aggressive, and invulnerable; being female as passive, weak, and vulnerable. These polarized characteristics express a hierarchy, and their "oppositional force" may serve to promote bonding or a unity of interest among men. Other patterns of "male bonding" occur in offices, boardrooms, and university faculties where they also operate to exclude women and identify them as outsiders: see *Postscript*, *supra*, note 33. For a discussion of such dichotomized hierarchies in the context of racism and for Black women: see K. Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law* (1988) 101 HARV. L. REV. 1331 at 1372 [hereinafter *Race, Reform, and Retrenchment*] and *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER*, ed. K. Bartlett & R. Kennedy (Boulder: Westview Press, 1991). Pornography also "[sexualizes] racial hatred": Black women are usually portrayed as the most lustful and in the most degraded positions; Asian women are portrayed in positions of utter passivity: *Feminism Unmodified*, *supra*, note 11 at 199-200.

⁴⁶ Until at least 1983, the imagery in the *Red Eye* continued to be sexually violent according to a telephone interview with B. Olley, then president of the University Students' Union (24 August 1990) Saskatoon.

Rides", strippers at student events,⁴⁷ and "pantie raids of women's residences".⁴⁸ Students of the University of Saskatchewan sold T-shirts on which was emblazoned "Makers of Fine Women since 1890". For years, the University of Toronto engineering faculty annually sponsored a popular slave auction in which, in the words of an alumni member, "some of the best-looking girls on campus were auctioned off for charity".⁴⁹ Such an event is ideologically consistent with the adoption of the Lady Godiva mascot by many engineering colleges. According to another alumni member of the University of Toronto engineering faculty, "Lady Godiva" symbolized the engineer's "undergraduate life, his zest, his innovation" (as if by objectifying women, men gain in or demonstrate "spirit") and "his active sense of involvement in his community's affairs".⁵⁰ What is disturbing in this account, as in the legend of Lady Godiva, is the celebration both of the use of women as sexual objects to gain the recognition of male peers and of women's "selfless" participation in their own objectification. The use of "woman" as a sexual object of exchange between men culminated in another disturbing episode on the University of Saskatchewan campus. During "Hell Week" in 1983, a number of agriculture students chased a male agriculture student who had dressed in drag as Godiva across the campus bowl. Upon catching "her", students simulated a gang rape of Godiva before cheering onlookers and then performed a parody of The Engineer's Song.⁵¹

Organized opposition to these activities on the Saskatchewan campus came predominantly from members of the Women's Directorate, a feminist collective formed in 1972. The Directorate was wholly funded by the University Students' Union but set its own agenda and served as the only information and educational centre, referral agency, and support

⁴⁷ See, e.g., "Halifax Strippers Banned" *the sheaf* (1 April 1982) 3; A. Heisey, *The Ajax years* in R.S. Harris & I. Montagnes, eds., *COLD IRON AND LADY GODIVA: ENGINEERING EDUCATION AT TORONTO 1920-1972* (Toronto: University of Toronto Press, 1973) 73 at 80 [hereinafter *COLD IRON AND LADY GODIVA*].

⁴⁸ See A.I. Dagg & P.J. Thompson, *MISEDUCATION: WOMEN & CANADIAN UNIVERSITIES* (Toronto: Ontario Institute for Studies in Education) at 98 [hereinafter *MISEDUCATION*].

⁴⁹ E.J. Miglin notes, "With the new morality, [the slave auction] also became more and more *risqué* each year. For the auction of October 1971 the Mechanical Engineers of 7T3 secretly hired a stripper from the Victory. There on the lecture table in Old Physics 135 she did her thing — right down to the buff in front of three hundred unsuspecting Engineers. The place went wild" in *COLD IRON AND LADY GODIVA*, *supra*, note 47 at 90.

⁵⁰ R.S. Harris, *Introduction* in *COLD IRON AND LADY GODIVA*, *supra*, note 47 at vii. According to the legend, which is highly disputed in fact, Godiva's husband promised to relieve the peasantry of burdensome taxes if Godiva rode naked through Coventry.

⁵¹ Interview with K. Storrie (14 June 1989) Saskatoon. According to the campus newspaper, engineering students then charged the agriculture students and all tried to disrobe each other. The "real" Godiva arrived later, clad only in a black cloak, surrounded by chanting engineering students: T. Smith, "Spectators Involved" *the sheaf* (6 October 1983) 1. Dagg notes an instance of simulated rape of an inflated female doll at the University of Toronto's, engineering faculty in *MISEDUCATION*, *supra*, note 48 at 98.

group for women students. In 1978, members of the collective scheduled a public meeting to discuss the January 30th issue of the *Red Eye*⁵² and in letters to the campus newspaper, both men and women students accused the publishers of intimidating women by tacitly condoning sexual violence.⁵³ One student spoke of her distress “as a woman and a potential rape victim” upon seeing a cartoon enactment of a rape.⁵⁴ The director of the Directorate objected to the “sexual stereotyping” in the *Red Eye* and criticized the social and economic dominance of white heterosexual men relative to heterosexual women, gays, and lesbians. She argued that women (on the *Red Eye* staff) could be sexist too. Noting the exclusion of racist jokes from the *Red Eye*, she attempted to describe parallels between racism and sexism.⁵⁵

In response to the *Red Eye*, the dean of engineering was reported in the campus newspaper to have said that he “didn’t appreciate [its] content”.⁵⁶ The staff of the *Red Eye* (two women, six men) claimed that the tabloid degraded all of humanity including the male sex but conceded that the paper would be “toned down” in the future.⁵⁷ Dissatisfied, however, with an informal verbal apology from the *Red Eye* editor and vague promises to “tone it down”, the Directorate wrote letters of

⁵² After the public meeting, one member of the Directorate described her frustration, “at the amount of times I’ve talked, and explained, and justified, and argued my right to resent and object to the disgusting way in which women are treated by this society. I felt frustrated that I spent over an hour along with other frustrated women and men discussing semantics and responding to a myriad of “boys will be boys” type comments”: W. Kolasinska, “I Am Not Amused” *the sheaf* (14 February 1979) 5.

⁵³ K. Morwick, “Red Eye Violence” *the sheaf* (7 February 1978) 4; Letter by campus chaplains, “Red Eye condemned” *the sheaf* (14 February 1978) 4. My search included issues of *the sheaf* from September 1976 to 21 March 1985.

⁵⁴ S. Marski, “Red Eye a Bomb” *the sheaf* (28 February 1978) 6. As a first year university student, my sister saw “The Perfect Woman” and recently described it to me from her memory as the figure of a decapitated woman, i.e. the cartoon was seen or experienced by her as involving an act of violence. For a discussion of women’s responses to threats of sexual violence, see R. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory* (1987) 3 WISC. WOMEN’S L.J. 81 at 106 [hereinafter *Women’s Hedonic Lives*]. According to West, street hassling (which may be similar in effect to the *Red Eye*) “teaches girls that their sexuality implies their vulnerability. It is damaging to be pointed at, jeered at, and laughed at for one’s sexuality, and it is infantilizing to know you have to take it....It feels [both] frightening and infantilizing.”

⁵⁵ V. Barclay, “An Open Letter to the Red Eye and Their Supporters” *the sheaf* (21 February 1978) 4-5.

⁵⁶ M. Stobbe, “Red Eye condemned for Sexist Copy” *the sheaf* (7 February 1978) 3. Engineering students both denounced, see, P. Phillips, “I object” *the sheaf* (14 February 1978) 4, and defended the paper by alleging that it represented a “lunatic fringe” of engineering students and was only an “enormous joke” that shouldn’t be taken seriously, D. Waldner, “Red Eye joke” *the sheaf* (14 February 1978) 4.

⁵⁷ Staff of the *Red Eye*, “Staff responds” *the sheaf* (14 February 1978) 4. See also Stobbe, *ibid.*

complaint to advertisers⁵⁸ and made a number of demands including delivery of a public apology, publication of an issue on sexism and gay rights, cancellation of the "Lady Godiva Ride", and a ten-year bursary for women students in recognition of the specific barriers women confront in engineering. Unless these demands were met, the Directorate announced that it would file a complaint with the Saskatchewan Human Rights Commission.⁵⁹

These demands evoked a storm of protest. Letters accused the Directorate of insensitivity and violence by calling on the Commission "to administer a public beating".⁶⁰ They criticized the Directorate's approach as overzealous, "tainted with vindictiveness", and humourless, amounting to blackmail and extortion.⁶¹ The Directorate was accused not only of interference with freedom of the press but of being sexist itself by stereotyping male engineering students and by demanding a bursary for women only. A number of women engineering students stated that they did not face any barriers, were not regarded as "handicapped", and did not want to be singled out as "different".⁶² According to one observer, while the involvement of the Directorate had "sparked an unprecedented discussion of sexism" on campus, the attacks that followed the Directorate's appeal to the Human Rights Commission had only served to obscure and divert attention from that issue.⁶³

Elected student representatives on the University Students' Council (USC) voted to write a letter to the ESS "demonstrating [their] extreme displeasure" but ultimately defeated a motion to deny a college subsidy to the ESS on the grounds that such a motion would interfere with the individual's right to freedom of speech and freedom of the press.⁶⁴ Over the next five years, the USC maintained that position either explicitly or implicitly (by refusing to take any position on the *Red Eye*). The majority of USC was forced to elaborate and defend this position in January 1980 when an employee of the Student Unions' print shop refused to typeset an article in the *Red Eye* which he believed advocated

⁵⁸ One advertiser replied that the *Red Eye* is "not in good taste but it is not objectionable": M. Stobbe, "Reaction Builds Against *Red Eye*" *the sheaf* (21 February 1978) 1.

⁵⁹ *Ibid.*

⁶⁰ J. Dalton, "From the Back of the Bus" *the sheaf* (28 February 1978) 5-6. For a discussion of the tendency to project violence onto women who confront male privilege, see C. Ramazanoglu, *Sex and Violence in Academic Life or You Can Keep a Good Woman Down* in J. Hanmer & M. Maynard, eds., *WOMEN, VIOLENCE AND SOCIAL CONTROL* (London: MacMillan Press, 1987) at 61.

⁶¹ Rod B., "Let it go" *the sheaf* (28 February 1978) 6, A. Low, "Demands Attacked" 5; D. Kneeshaw, "Twice Even" 5; K. McDuffie, "Sexism Distorted" 10; and T. Von, "Humour Lacking?" 10; K. Radke, "White Heterosexual Male" *the sheaf* (7 March 1978) 6. See also P. Sallaway, "Hell Hath no Fury Like Women..." *The [Saskatoon] Star Phoenix* (21 February 1978) 3 which portrayed members of the Directorate as unreasonable and excessively confrontational.

⁶² S. Petrosenko, "Directorate Unjust?"; B. Beck, "Engineers Respond" *the sheaf* (28 February 1978) 6 & 10; P. Janzen, "ESS Supported" *ibid.* (7 March 1978) 6.

⁶³ M. Stobbe, "Reaction Dodges the Question" *the sheaf* (7 March 1978) 4.

⁶⁴ USC Minutes (2 February 1978) 11 & (9 February 1978) 6-7.

rape and physical assault on female students.⁶⁵ In response to the engineers' refusal to withdraw the article, Council passed a motion providing that any material submitted to the university print shop would be typeset (even if racist, sexist, etc.) provided it was "legal".⁶⁶ Students in favour of the motion argued that the typesetting service was a business and that refusal to typeset would constitute censorship over what students could read and discuss. According to the student representative for the College of Law whose views represented the majority of those on the Student Council, "censorship within a university community....is completely contrary to the basic function of a university and purpose of a student organization....Leaving the determination of what materials are fit to typeset up to the subjective evaluation of a changing USC executive is too high a cost".⁶⁷

The president, however, one of three dissenters, argued that the USC had abdicated its responsibility to make moral and political judgments both by trying to be a business and trying to assume a "neutral" stance that left "any political decisions up to individual students":

A students' union is by its very nature a political organization....We can't afford to be a "business" if that means undermining our own work by printing prejudicial attacks on our own constituents. We can be "business-like" if that means "efficient", but that efficiency is judged in the context of achieving goals that are by necessity political and partisan.⁶⁸

In assuming that the USC's role as a business or service organization would be apolitical and self-evidently fair, the majority ignored the politics of the status quo, including the impact of entrenched prejudice and unequal power on the exercise and effects of speech. In addition to ignoring the damaging effects of such material on women students, USC also apparently failed to ask whose speech and freedom of conscience was being protected when a typesetting labourer was not permitted to hold back his labour.

The USC also resisted the involvement of the Saskatchewan Human Rights Commission. On 23 February 1978, the USC defeated a motion which would have permitted the Directorate to file a complaint with the Human Rights Commission on its own account.⁶⁹ Women representatives from pharmacy and home economics, in speaking to the motion, indicated that the Directorate did not represent a large number of women on campus and that the complaint would only serve to draw attention to the *Red Eye*. Others expressed concern that action would be taken against the editor personally and called the Directorate's demands for settlement

⁶⁵ K. Larson, "Sexist Article 'Only a Joke'" *the sheaf* (17 January 1980) 1.

⁶⁶ USC Minutes (23 January 1980) 1-2 (six out of twenty-two representatives were women); D. Perry, "Print Shop Policy Defeated" *the sheaf* (31 January 1980) 1.

⁶⁷ K. Cornea, "Typesetting Service Available to Anyone" *the sheaf* (14 February 1980) 5.

⁶⁸ B. Fairbairn, "The USSU: Role and Function" *the sheaf* (31 January 1980) 3.

⁶⁹ USC Minutes (23 February 1978) 11-15.

unreasonable. Eventually, however, the USC passed a motion that permitted the Directorate to "approach" the Human Rights Commission "for an unbiased ruling on possible violations on grounds of sex discrimination"⁷⁰ but required the Directorate to state the number of its members when making press statements in order to avoid giving the impression that it represented all women. Students also required that the Directorate give written notice of its intent to approach the Commission ostensibly on the ground that the Students' Union could be liable for the actions of the Directorate.⁷¹

Noticeably absent from the history of events from 1978 to 1983 is any action by administrative officials of the university. Members of the Directorate and female faculty complained to university administrators about engineering activities but to no avail.⁷² Although university officials had to be aware of student activities, they apparently considered the activities of the engineering students harmless and believed that intervention would constitute unjustified paternalism.⁷³ The dean of engineering, who has acknowledged that the publication likely deterred women from entering engineering, has insisted that he was powerless to do anything beyond having informal chats with students from time to time.⁷⁴

As many as twenty individuals (both male and female) eventually lodged complaints against the ESS with the Saskatchewan Human Rights Commission in February and March of 1978. In September 1978, however, these complaints were dismissed by the Commission itself based upon two independent legal opinions that it lacked statutory jurisdiction to deal with them.⁷⁵ The ESS was explicitly advised by the Chair of the Commission that he would seek a legislative amendment, known to students as the "*Red Eye* Amendment", which would render material like that contained in the *Red Eye* actionable.⁷⁶ In the wake of the Commission's ruling, during the course of the 1978-79 and 1979-80 academic

⁷⁰ USC Minutes (2 March 1978) 9-10.

⁷¹ USC Minutes (9 March 1978) 9-11.

⁷² The city police were also contacted and refused to interfere with the "Lady Godiva Rides": see Interview with K. Storrie, *supra*, note 51.

⁷³ See K. Norman & C. Wong, *Campus discipline quick and decisive in response to sexist, racist hatred* CAN. H.R. ADVOCATE (September 1987) vol. III, no. 8 at 9. This account was confirmed during interviews with subsequent members of the university administration, Gwenna Moss, Academic Vice-President, (22 June 1990), and Howard Nixon, Assistant Vice-President (Student Liasons) (26 May 1989) Saskatoon.

⁷⁴ Interview with P. Nikiforuk (12 June 1989) Saskatoon. Dean Nikiforuk still insists that censorship is ineffectual in changing attitudes. He appears to assume that perpetrators are willing to be "educated" (even though engineering students refused outright to attend educational workshops conducted by the Human Rights Commission) and to assume that law itself cannot be educational. See *Report of the Canadian Committee*, *supra*, note 36 at 41-44 for a discussion of a range of support structures administrators can implement including mentorship programs, speakers' series, editorial policies, and codes of behaviour.

⁷⁵ See *infra*, text accompanying note 107.

⁷⁶ Letter from K. Norman, Chief Commissioner, to ESS (4 October 1978).

years, there was little ongoing debate over the *Red Eye* in *the sheaf*. The "Lady Godiva Ride" proceeded in accordance with tradition, the October 1979 issue was released, and controversy only briefly resurfaced in January 1980 with the typesetting debate described above.

Although the complaints filed in 1978 did not proceed to adjudication, they and the responses to them are important to understanding the social context in which subsequent complaints were lodged. Given the response of the USC to the Directorate's challenge to the 1978 issue, members were reluctant to complain on their own and encouraged Kathleen Storrie, a professor in the Department of Sociology, to lodge a complaint as Secretary on behalf of the Saskatchewan Action Committee of the Status of Women against the October 1979 issue of the *Red Eye*. This complaint was made possible by the passage of the promised "*Red Eye* Amendment" in *The Saskatchewan Human Rights Code*⁷⁷ and was initially seen by the Status of Women only as an attempt to educate engineering students and mediate settlement of the complaint through seminars or workshops.⁷⁸ Obviously these objectives were never realized because engineering students released the January 1981 issue during the course of negotiations. On 14 April 1981, the Human Rights Commission itself, on behalf of all women resident in Saskatchewan, lodged a complaint under the *Code* in relation to both the October 1979 and January 1981 issues of the *Red Eye*.

From 1980-83, the Directorate had a strong and active core membership of twelve to fourteen women and thirty to forty supporters, most of whom were in their mid to late twenties and older, including a number of single parents and immigrant women.⁷⁹ The collective adopted an anti-hierarchical structure and maintained strong links to women's organizations in the community of Saskatoon.⁸⁰ Members were active in promoting awareness of issues such as abortion, sexual harassment, sexual violence, pay equity, and sexism in the media through the sponsorship of seminars, films, speakers' corners on campus, and through letters and articles in *the sheaf* and for a time, their own newsletter.⁸¹

⁷⁷ For further discussion, see *infra*, notes 108-10.

⁷⁸ Interview with K. Storrie, *supra*, note 51.

⁷⁹ Interview with S. Archer, former member of the Women's Directorate (20 August 1990) Saskatoon.

⁸⁰ They refused to hire a coordinator or director and made all decisions on the basis of consensus. For a general discussion of process as a feminist issue in the women's movement, see N. Adamson, L. Briskin & M. McPhail, *FEMINIST ORGANIZING FOR CHANGE: THE CONTEMPORARY WOMEN'S MOVEMENT IN CANADA* (Toronto: Oxford University Press, 1988) at 234 [hereinafter *FEMINIST ORGANIZING FOR CHANGE*].

⁸¹ K. Windsor & L. Doerkson, "A Herstory of the Women's Directorate" *the sheaf* (7 October 1982) 7; Women's Directorate Mandate, approved by the USC, University of Saskatchewan Students' Union (USSU) (7 October 1982). In many respects, the principles underlying the organization and structure of the Directorate reflected Rich's vision of "a woman-centered university"; a university in which styles of teaching would be anti-hierarchical, responsive to human needs and informed by one's community: see *LIES SECRETS AND SILENCE*, *supra*, note 12.

Many students characterized the activism of members of the Directorate, however, as paranoia and "unnecessary militancy".⁸² While engineering students continued to applaud their own raucous antics,⁸³ they stereotyped Directorate members as strident, shrill "bitches"⁸⁴ or identified them as militant lesbians or "castrating man-haters".⁸⁵ The label "lesbian" was assumed to discredit the Directorate given the prevalence of lesbophobia and heterosexism.⁸⁶ Anti-feminist propaganda was clearly influential in alienating members of the Directorate from the majority of the student body.⁸⁷

Hostility towards members of the Directorate was not only expressed in newsletters. Individual women on the Directorate or associated with the human rights hearings complained, as early as 1978, of various forms of harassment and intimidation, primarily through obscene or "silent" telephone calls.⁸⁸ Vicious attacks on individuals did not occur to the same extent here as at other universities⁸⁹ possibly because the Directorate functioned without individual leadership from 1980 onwards. Members from this time period, however, complain of feeling personally vulnerable, of having to deal with obscene and hateful graffiti, rotten food, and occasionally excrement outside their office door.⁹⁰ In December

⁸² K. Azure, "Feminists in Fine Forum" *the sheaf* (4 March 1983) 3.

⁸³ They continued to defend their publications and activities as jokes, ways of letting off steam, and showing spirit: *see, e.g.*, Letter to the Editor, *the sheaf* (20 Octobre 1983) 17. In an attempt to deny or shift responsibility, students continued to refer to their charitable activities and to the fact that women contributed to the *Red Eye*: *see, e.g.*, D.D. Fandry, "Forum: In Defense of the *Red Eye*" *the sheaf* (17 March 1983) 4. Women engineering students continued to describe the *Red Eye* as "harmless sexual innuendo" and to assert that they had no complaints and need not be defended: *see, e.g.*, S. Kearley *et al.*, Letter to the Editor, *the sheaf* (14 January 1982) 4; H. Quale, "More Attention Than The *Red Eye* Deserves" *the sheaf* (5 February 1981) 6.

⁸⁴ *See, e.g., supra*, note 41. *See also* COLD IRON AND LADY GODIVA, *supra*, note 46. If women are in fact shrill or strident, it is likely because they seriously doubt whether they will be listened to.

⁸⁵ *Supra*, note 19. *See also supra*, note 41. As other feminists have pointed out, if "normal" women are seen only or primarily as sexual objects for men, "dissident" women will be perceived as asexual or lesbian. Sex-based insults undermine the credibility of women because they "[remind] her and those around her of what she *is* and what she *is for*": *see* RIGHT-WING WOMEN, *supra*, note 39 at 199.

⁸⁶ RIGHT-WING WOMEN, *supra*, note 39 at 198. *See also* A. Rich, *Compulsory Heterosexuality and Lesbian Existence* (1980) in A. Rich, ed., BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979-1985 (New York: Norton, 1986) at 23; S. Pharr, HOMOPHOBIA: A WEAPON OF SEXISM (California: Chardon Press, 1988).

⁸⁷ *Supra*, note 79; Interview with B. Olley, *supra*, note 45.

⁸⁸ *Supra*, note 55. One of the witnesses for the Saskatchewan Human Rights Commission has for the past six years, since the *Red Eye* hearings, received an anonymous silent call every three to four months: Interview with K. Storrie, *supra*, note 51.

⁸⁹ Engineering newsletters have published cartoons of individual women in sexual poses with their home telephone numbers: *see, e.g.*, "Several Campus Publications Criticized" *the sheaf* (6 March 1980) 5; T. Gould, "The Engineers of Dumb Behavior" *Vancouver* (May 1991) 30.

⁹⁰ Interview with A. Wildman (25 May 1989) Saskatoon; *Supra*, note 79.

1982, when the *Red Eye* hearings were just beginning, the Directorate's offices were vandalized. The invader(s) wrote sexist graffiti on the walls, destroyed photographs of members of the Directorate, urinated on tables, and inscribed the words "Fuck Me I Love It" across the torso of a daycare doll. A copy of the *Red Eye*, the October edition specifically at issue in the *Red Eye* complaint, was prominently left on a table. Although the police were contacted, no one was charged with the break-in.⁹¹

In general, members of the Directorate were annoyed and demoralized by a number of delays and adjournments in the adjudication of the *Red Eye* complaint.⁹² The hearing of the complaint, which finally proceeded in March 1983, was attended primarily by engineering students and members of the Directorate and actually received little coverage in the campus newspaper. According to a former member, the hearing then seemed very removed from the Directorate's day to day problems most of which involved a struggle for its existence.⁹³ Relations between the Directorate and the USC were increasingly antagonistic not only because of the USC's refusal to take a position on the *Red Eye* but also because of a number of other disputes, including one over free speech. In September 1982, members of the Directorate criticized a commercial advertisement in the local newspaper as sexist and offensive to women.⁹⁴ When the advertiser's lawyer threatened the Students' Union with a libel suit, the USC upon legal advice ordered the Directorate to explain its allegations and enter into communications with the advertiser. The Directorate in turn accused the USC of failing to support its right to express a viewpoint and of an irresponsible exercise of authority.⁹⁵

⁹¹ L. Norris, "Women's Directorate Trashed" *the sheaf* (6 January 1983) 1. No further complaints were made regarding police investigation of this incident. Women on campus, however, have more recently complained that security guards are failing to take seriously concerns with women's security and privacy in campus washrooms and locker rooms: see D. Yanko, "Peeper in U. of S. Washrooms has Police Puzzling over Charge" *The [Saskatoon] Star Phoenix* (12 March 1992) 2. After eight women on the editorial board of *Surface*, an alternative paper at Queen's University, received an anonymous letter which said in part "Congratulations! Here is your politically correct death notice....we're going to rape and kill u dykes", one of the investigating officers was alleged to have said that he had "read the paper and could understand why people were upset", P.L. Shanok, "Rape and Death Threats at Queens", *the sheaf* (21 November 1991) 5; T. Smyth, "Kingston Police 'Taking Matter Very Seriously'" *the sheaf* (5 December 1991) 5.

⁹² L. Doerksen, "Red Eye on Trial?" *the sheaf* (3 February 1983) 3; interview with A. Wildman, *supra*, note 90; see *infra*, notes 114-19.

⁹³ *Supra*, note 79.

⁹⁴ The business was giving away a free gold chain with every purchase of a dual exhaust system, and its advertisement featured a cartoon of a man placing a necklace on a voluptuous woman subtitled, "Wring your wife's neck". Unknown to the members, the man in the advertisement happened to be a caricature of the owner himself.

⁹⁵ The Directorate retained its own counsel and upon her advice, refused to initiate contact for fear of aggravating the libel, if any. In the result, no libel suit was ever initiated. Members of the Directorate filed a complaint against the business with the Human Rights Commission which was settled years later.

On 29 September 1983, a majority of the USC approved a motion rescinding the Directorate's status and funding. The male student who introduced the motion explained that the Directorate had an image problem, was too political, unnecessarily excluded men, and did not provide enough services.⁹⁶ The motion was passed even though the complaint regarding inadequate service was not substantiated by a survey⁹⁷ and no immediate replacement for the Directorate was guaranteed. Nine of the twenty-four representatives voting were women — seven of the twenty-two voting in favour of the motion were women.⁹⁸

Although some observers believed that anti-choice advocates on the USC had engineered the motion,⁹⁹ its supporters included pro-choice women who felt that the Directorate was unable to attract the broad support of women students.¹⁰⁰ The marginalization of the Directorate may be attributed to a number of factors including propaganda by engineering students, differences in age and socio-economic status, and to some degree, a failure to recognize these differences and present their claims in terms that could be more readily understood by the majority

⁹⁶ USC Minutes (29 September 1983) 2-8. The Directorate's policy of excluding men from their two-hour weekly meetings on the grounds that their presence would inhibit open discussion by women had been repeatedly challenged, primarily by engineers, who also argued that there was a need for a Men's Directorate, "all things being equal". In 1985, a newly constituted "women's centre" opened its membership to men. In 1987-88, three to four men were members; in 1988-89, two, and in 1989-90 none.

⁹⁷ The claim regarding inadequate service was contested by members of the Directorate who indicated that they had received 960 requests for information in the past year.

⁹⁸ Those voting in favour were from the colleges of agriculture, arts & sciences, commerce, home economics, law, nursing, and physical therapy. The first woman president of the USSU abstained from the vote — only one woman voted against the motion: *see* USC Minutes (29 September 1983) 8-9.

⁹⁹ Catholic students opposed the Directorate's pro-choice position on abortion and claimed that the Directorate was at least in practice excluding anti-choice women from their meetings. Members of the Directorate maintained that such women were free to join but that it was within the Directorate's mandate to take a position on issues critical to the welfare of women if supported by a consensus or majority vote of its members: *see* USC Minutes (7 October 1982) 5-6. The two male members responsible for the motion rescinding the status of the Directorate were both anti-choice.

¹⁰⁰ L. Warner, Letter to the Editor, *the sheaf* (14 October 1983) 4. The male student introducing the motion complained that members of the Directorate were perceived as "anti-men, older students, radical, far left wing [and confrontational]": *see* A. Shpyth, USC Minutes (23 September 1983) 4. B. Olley, then the first woman president of the USC, believes that the Directorate was marginalized as a result of propaganda by engineering students, age and socio-economic differences between Directorate members and the majority of female students, a tendency to be "reactive not proactive", and a failure to cater adequately to its subscribed population, *e.g.*, women students, as a result of its involvement in community groups and projects. As the only female member of the student executive, she also acknowledged the existence of pressure on her "to be one of the boys" and to distance herself from the Directorate in order to avoid compromising other objectives: *see supra*, note 45.

of younger women students.¹⁰¹ But the tendency toward marginalization must also be seen as an inevitable reaction to any critique of misogyny and gender inequality given deeply embedded beliefs in the legitimacy of the status quo among the largely young, white, and middle-class student body.¹⁰² In fact, most speakers in favour of the abolition of the Directorate attributed its failure to the fact that the Directorate had taken stands on "political issues" rather than having functioned solely as a referral or information centre.¹⁰³ In their opinion, the Directorate should not have been aligned with the women's movement and members should not have viewed themselves as the collective "voice of women" on campus.¹⁰⁴

¹⁰¹ This failure may have been due to limited resources and energy. According to Adamson and others, feminist organizers must maintain a strategic balance between "disengagement" and "mainstreaming": the former is needed to maintain a deep critical perspective and the latter seems necessary to instill widespread support for social change: see FEMINIST ORGANIZING FOR CHANGE, *supra*, note 80 at 176-90. According to Adamson, the feminist emphasis on process can also reinforce a tendency toward marginalization given the following: the collective's focus on personal experience (which can be exclusionary), the likelihood of informal and unacknowledged leaders, and the possibility that consensus decision-making will stifle conflict and debate and work best in small homogeneous groups.

¹⁰² Adamson argues that resistance to change arises from deeply rooted beliefs in individual responsibility, a tendency to attribute inequalities to fallacious attitudes rather than structural factors, a fear of socialism and of change itself, and finally a belief that representative democracy is the only legitimate route to social change. This latter factor disempowers the individual, distancing him or her from change, and presumes that elected representatives are making decisions in the best interests of the majority: *ibid.* at 147-59. The tension between the Women's Directorate and the USC may also have reflected a presumption that the latter was the only legitimate forum for change. I suspect that commitment to such beliefs generally reflects race and class privilege on the part of men and women.

¹⁰³ C. Bell, USC Minutes (23 September 1983) 7. One woman, however, a non-member of the Directorate stated:

I have gone to [the Directorate] for help and did not receive any lectures in feminism. I was not asked about my beliefs in any political issues, they just gave me the information I needed. As far as the image problem, this can be resolved through the newsletter, which should be better distributed and more speakers' corners....Many of the issues raised tonight have been completely resolved and are not relevant. There is a more important issue about women underlying this debate.

L. Webster, USC Minutes (23 September 1983) 6.

¹⁰⁴ Similar problems arose that year in connection with *the sheaf*. A committee set up 27 October 1983 to study its funding found that the newspaper should be restricted to coverage of campus events, not international issues such as El Salvador, etc., and should not act as an agent for social change. Engineering students unexpectedly packed an annual general meeting of the USSU and were able to block passages of a motion changing usage of the word "chairman" to "chair" and to pass a motion cutting off funds to *the sheaf* unless staff agreed to restrict coverage of events not directly involved with the University of Saskatchewan campus to 40% and devote not more than 50% of any single issue to a single racial, ethnic, political, or sexual group. This action was taken one month after *the sheaf* devoted an entire issue to gay and lesbian issues. However, the refusal of *the sheaf* to publish advertisements for "Pro-Life" groups in early 1983 also generated widespread opposition: see, e.g., B. Fink, "Liberal Con-game" *the sheaf* (4 March 1983) 6. The USSU ultimately decided that funding would be continued but that *the sheaf* would be monitored: see A. Pavo, "Council Notes" *the sheaf* (1 December 1983) 3.

Obviously at stake in the rescission of funding for the Directorate was the ability of women to organize, to set their own agenda and to work independently toward systemic solutions to the problems encountered by them in the university. Although a "women's centre" was re-established for students in 1985,¹⁰⁵ the closure of the Directorate resulted in a sharp decline in feminist activism and signalled an end to a vigorous feminist voice in campus affairs throughout the 1980s.

III. THE *RED EYE* ON TRIAL

For over a decade, members and staff of the Saskatchewan Human Rights Commission devoted a great deal of the Commission's resources and credibility to challenging the misogynist content of the *Red Eye*. Relative to traditional judicial proceedings, the process of legal reform and adjudication initiated in response to the *Red Eye* was more conducive to the participation of women and more receptive overall to their concerns and interests. In the course of the administrative proceedings, many women testified before the tribunal, some of whom provided insights that would not have been received given conventional rules of evidence. However, the efficacy of the proceedings in terms of empowering women was limited by a number of delays, by adversarial notions of "good lawyering", and by the failure of the process to fully explore and come to terms with apparent differences in the perspectives offered by women at the hearing.

In 1978, an investigator with the Commission concluded that the publishers of the *Red Eye* had violated *The Saskatchewan Bill of Rights Act*¹⁰⁶ and had attempted to proceed towards settlement of the complaints. Upon further legal scrutiny, however, and after the lawyer for the ESS refused to negotiate, members of the Commission themselves dismissed these complaints on the basis that the statutory provision in

¹⁰⁵ In 1985, a survey of 168 women students, the vast majority of them white, single, under twenty-four, and childless, was conducted into the need for "women's services" on campus: W. Woo, *Women's Services: A Needs Assessment* (University of Saskatchewan, 1985). Seventy percent of respondents believed a "women's centre" was moderately or very important primarily for the provision of referrals, information, and support services. Approximately 44% of respondents felt that the centre should not take a "political stance" on issues of concern to women (e.g., equality rights, abortion, pornography) primarily for fear of alienating women and preventing them from using the centre; 24.4% felt that it should and 32.1% did not know, at 24. The researcher recognized that designating "politics" as offbounds would disable women on campus from working collectively toward anything other than "band-aid" solutions but recommended that the centre ensure that its positions were clearly supported by a majority of women, at 40. The recommendations were adopted by the USC without any significant debate: USC Minutes (21 March 1985) 4.

¹⁰⁶ R.S.S. 1965, c. 378, s. 12.

question was too narrowly drafted to apply to the *Red Eye*.¹⁰⁷ It was under a revised section of *The Saskatchewan Human Rights Code*¹⁰⁸ that complaints were lodged against the ESS for publishing and distributing "articles, notices, symbols and other representations" in the October 1979 and/or the January 1981 issues that ridiculed, belittled, and otherwise affronted the dignity of women because of their sex. Subsection 14(1) of the new *Code* consolidated and expanded upon the provisions of three former acts, in effect creating an independent cause of action for group defamation.¹⁰⁹ The statute's use of terms such as "ridicule", "belittle", or "an affront to dignity" represented a deliberate attempt on the part of the Commission to catch representations in the *Red Eye* that it considered degrading and humiliating to women.¹¹⁰

The "*Red Eye* Amendment" was drafted and presented to the Attorney General, then Roy Romanow of the New Democratic government, by Carole Geller, then Director of the Commission and an outspoken feminist, and the newly appointed Chief Commissioner, Ken Norman, a law professor at the University of Saskatchewan. Drawing on the Cohen Report of 1966 regarding hate propaganda and its effects,¹¹¹ the conduct

¹⁰⁷ Section 12 prohibited "any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict...the enjoyment [by the claimant because of his or her sex] of any right to which he or it [sic] is entitled under the law". Commission members believed that this section required the direct denial of an explicit legal right. While the *Red Eye* may have reinforced sexist attitudes towards women, it did not directly attack an already established legal right: see K. Norman, Department Memo to Members of the Commission (1 September 1978). The fact that the investigative staff of the Commission had already attempted to settle this complaint apparently contributed to a sense of victimization on the part of members of the ESS: see *supra*, note 19.

¹⁰⁸ *Supra*, note 3. Section 14 provides:

s. 14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person, any class of 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.

s. 14(2) Nothing in subsection (1) restricts the right to freedom of speech under the law upon any subject.

¹⁰⁹ Section 14 of the *Code* replaced provisions in *The Fair Accommodations Practices Act*, R.S.S. 1965, c. 379, s. 4 and *The Fair Employment Practices Act*, R.S.S. 1965, c. 293, s. 7 which had prohibited signs, notices, or other representations "indicating discrimination or an intention to discriminate" on proscribed grounds. The amendments were intended to create a separate legal right that was not derivative of or dependent upon other sections of the *Code*.

¹¹⁰ Interview with K. Norman, former Chief Commissioner of the Saskatchewan Human Rights Commission (18 November 1989) Saskatoon.

¹¹¹ See Canada, *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) (Cohen Committee).

prohibited was presented in the language of hate propaganda and as a violation of the dignity of the person. Surprisingly, the provision, which was broader than legislation elsewhere in Canada, was passed by the NDP Cabinet and the Legislature with little debate. When the new *Code* was approved by Cabinet, attention focused, it appears, on the Commission's proposal to include sexual orientation as a prohibited ground of discrimination and on its proposed powers with respect to affirmative action. The inclusion of subsection 14(2) which specifically provided that subsection 14(1) did not derogate from freedom of speech may have operated as some reassurance and it is possible that the full potential ramifications of the amendment were not known or fully considered by Cabinet.¹¹² The Bill was presented to the Legislative Assembly in the immediate aftermath of a successful election for the New Democrats and its passage generated no debate, apart from congratulations from the Conservative party leader for the government's eventual refusal to add sexual orientation as a prohibited ground of discrimination.¹¹³

The Commission directed a Board of Inquiry to proceed with the complaint lodged in April 1980 as early as 17 December 1980 but concerns were subsequently raised regarding the Board's jurisdictional ability to proceed with a class action suit.¹¹⁴ To avoid procedural complications, the Commission itself filed a complaint 14 April 1981 and eventually withdrew the Storrie complaint on the first day of the hearing.¹¹⁵ Attempts at settlement as required under the *Code* were unsuccessful.¹¹⁶ On 17 September 1981, the Attorney General appointed three members to a Board of Inquiry to determine whether the complaint could be substantiated. Board members were chosen ad hoc from a small roster of names that the Commission had generally recommended for appoint-

¹¹² Interview with K. Norman, *supra*, note 110. The Deputy Commissioner, Louise Simard, also had personal influence with staff of the Attorney General's office.

¹¹³ (Second Reading 23 April 1979) S. Gaz. 1979.II.1951.

¹¹⁴ Section 12 of the Regulations were found *ultra vires* the power of the Lieutenant Governor in Council to proclaim: *Huck v. Canadian Odeon Theatres Ltd* (1981) 2 C.H.R.R. D/351 (Sask. Bd of Inq.).

¹¹⁵ Although the Commission always has carriage of the case under the *Code*, the *Red Eye* was one of the few cases in which a Commission has been a party to a complaint: see S. Day, *Impediments to Achieving Equality*, in S.L. Martin & K.E. Mahoney, eds., *EQUALITY AND JUDICIAL NEUTRALITY* (Toronto: Carswell, 1987) [hereinafter *EQUALITY AND JUDICIAL NEUTRALITY*] 402 at 404. Day notes that the reliance on individuals to lay complaints can place an unfair and onerous burden on victims of discrimination who have limited knowledge and may easily be subjected to intimidation and harassment.

¹¹⁶ Terms of settlement proposed by the Commission included a commitment to abide by s. 14 in the future, to participate in workshops with the Commission on the requirements of s. 14, and to publish a text of the agreement in a subsequent issue of the *Red Eye*. Interview with M. Woodard (27 August 1989) Saskatoon.

ment to Boards of Inquiry.¹¹⁷ The Board consisted of three individuals: Paul Havemann, the Chair who was then the Director of the School of Human Justice of the University of Regina and believed by members of the Committee to be sensitive to women's issues; Joan Thorsteinson, a teacher who was active in women's organizations; and Ruben Richert, an executive with the Saskatchewan Teacher's Federation.

The Board first convened in January 1982 and the last witness was heard 25 April 1983. On average approximately thirty people attended the hearings on an ongoing basis. Only one of the individual respondents appeared before the Board, the then president of the ESS, who had not been personally involved in the publication and who was ultimately exonerated. Both this individual respondent and the ESS were represented by the same counsel at the hearing although counsel argued without prejudice that the ESS was not an entity that could be charged under the *Code*. Four other individual respondents were neither present in person nor represented by counsel at any point during the hearing. Three of these respondents argued on appeal that they were improperly served with the complaints.

In total, the Board heard only six days of actual testimony and the delay of over a year was due to a number of adjournments, most of which were requested by the respondents. During the course of the hearing, two applications were made for orders prohibiting the Board from proceeding; bias was alleged, among other grounds. Both applications were dismissed, the first because the Board was not properly named as a party. The Court of Queen's Bench found the allegations in the second application to be vague and unsubstantiated. From the material made available to the court, however, Mr Justice Wright described the proceedings as "long standing and often uncontrolled" and described the role of counsel as "more combative than adversarial".¹¹⁸ He admonished both counsel but attributed "much of the squabbling and partisanship" to the fact that the Board was unable to regulate the proceedings properly and lacked legal counsel with knowledge and experience in administrative law.¹¹⁹

¹¹⁷ Office interview with K. Norman (4 September 1991) Saskatoon. The panel from which the Attorney General made appointments contained less than ten names. These nominees were believed to be sensitive to human rights and equality issues, although they were not proportionately representative of the groups most likely affected by discrimination. The Commission recommended the number of people on a panel and generally asked that only one lawyer be appointed in the hope that the process might benefit from input or stimulate change in other sectors of the community. The Commission also hoped that certain people would, by sitting on a number of boards, develop expertise on the *Code*. See K. Norman, *Problems in Human Rights Legislation and Administration* in EQUALITY AND JUDICIAL NEUTRALITY, *supra*, note 115 at 391 for criticism of the Devine government's policy of appointing chairs on the basis of partisan political affiliation.

¹¹⁸ *Engineering Students' Society v. Saskatchewan Human Rights Comm'n* (1983) 24 SASK. R. 167 (Q.B.) 167 at 174 & 172.

¹¹⁹ *Ibid.* at 172-73. Other participants have also expressed this view.

The transcripts of the hearing before the Board of Inquiry do reveal exchanges between counsel and between counsel and Board members that were frequently hostile, explosive, and uncontrolled. Counsel for ESS, Clyde Harradence, was a senior lawyer well known throughout the province for his combative style in the courtroom. Mr Harradence has acknowledged that he did not find the *Red Eye* humourous (it was worse than anything he'd seen in the navy) but he viewed his role, like that of any "good criminal defence lawyer", strictly as one of providing his clients with the best defence.¹²⁰ In his opinion, members of the Board had predetermined the issue against his clients and demonstrated a cynical approach towards procedural irregularities. Much of the hearing was dominated by "skirmishes" on questions of procedure that were initiated by respondent's counsel.¹²¹

In general, counsel for the Commission's strategy was to establish that the material in question would reasonably be perceived as ridiculing or belittling or as an affront to the dignity of women because of their sex. Such evidence, he presumed, would also tend to show that the publications at issue contributed to the deprivation of equal opportunities for women who might otherwise be interested in engineering. The Commission called three women witnesses: Dr Dormar Ellis, a professional engineer and education consultant; Susan Wendell, a professor in philosophy and women's studies; and Kathleen Storrie, a professor in sociology who had filed the earlier complaint on behalf of the Status of Women. These witnesses were called by the Commission and, over the objections of counsel for the respondent, were qualified as experts to fill in background social facts and to address whether "a reasonable woman" would find the material demeaning to women.¹²² In general, opinion evidence, expert or otherwise, while admissible to establish relevant surrounding social facts, is legally inadmissible on the ultimate issue to be decided by the court or jury.¹²³ Under the *Code*, however, the Board has a broad discretion to determine its own procedure and accept any evidence whether admissible as evidence in a court of law

¹²⁰ Interview with C. Harradence (15 January 1990) Saskatoon.

¹²¹ For example, at the outset counsel refused to indicate to the Board of Inquiry who he was representing until the Board established its jurisdiction to his satisfaction.

¹²² Interview with M. Woodard, *supra*, note 116. In its application for prohibition, the respondent objected in particular to the admission of evidence by Professor Storrie because she had filed the prior complaint as Secretary to the Saskatchewan Action Committee of the Status of Women. Mr Justice Wright found that her expertise in "sex roles" was relevant to background social facts irrespective of her former status as complainant.

¹²³ The rationale is that the expert evidence is neither helpful nor necessary: see R.J. Delisle, *EVIDENCE: PRINCIPLES AND PROBLEMS* (Toronto: Carswell, 1984) at 277. Unless expert evidence is necessary to explicate the meaning of technical, slang, colloquial, or obsolete words, or those of a foreign language, opinion evidence as to the proper interpretation or meaning of a publication in a defamation action is inadmissible as a usurpation of the jury's role: see R. Brown, *THE LAW OF DEFAMATION IN CANADA* (Toronto: Carswell, 1987) at 148 & 153.

or not.¹²⁴ The testimony of such “experts” provided Board members with a perspective on the meaning and impact of the publication in light of its historical and social context that would have otherwise been lacking.¹²⁵

In attempting to discredit these witnesses on cross-examination, respondent’s counsel adopted tactics which substantially paralleled the attacks by members of the ESS on the Women’s Directorate. Counsel claimed that the material was simply “ribald humour” intended to offend everyone irrespective of class, race, or sex.¹²⁶ The material was not seriously intended and could not be taken seriously since wholly unrealistic situations such as women swallowing bombs and husbands being sent through the mail were presented. The respondent attempted to characterize the Commission’s witnesses as paranoid (“who would seriously think women weren’t persons?”)¹²⁷ and lacking a sense of humour. There was some suggestion of witnesses being biased in favour of the women’s liberation movement.¹²⁸ The first questions asked of one witness on cross-examination, questions as to her sexual orientation and marital status, were argued to be relevant to whether the witness was “a paranoid homosexual”.¹²⁹ A witness was also accused of trying to impose her personal standards of allegedly asexual behaviour on men and some women who might “just like to be sexual beings”.¹³⁰ Women opposed to the *Red Eye* were described in argument as “an activist militant minority who at the best may represent 500 disgruntled frustrated women in our society”.¹³¹

Dr Ellis Dormar testified to the low number of women in engineering in Canada both as practising engineers and students and identified the perception of engineering students as “rough and tough and nasty” as one of the factors which discouraged increased enrolment of women. She, as well as all other witnesses for the Commission, described the material in the *Red Eye* as degrading to women and suggested that women would naturally discount their place in a male dominated profession if made the object of ridicule in a student-funded paper. Professor Wendell complained that because the *Red Eye* did not recognize the possibility of women as engineers or as anything more than sexual objects, the paper contributed to denying women opportunities to enter the profession by making them feel unwelcome among fellow students or colleagues.¹³² Although statistics presented to the Board established

¹²⁴ S. 31(1), Regs 19(2),(3).

¹²⁵ The assistance of these witnesses in describing the nature of the material and the context in which it could discriminate was explicitly acknowledged by the Board at D/2087-88.

¹²⁶ Transcript of hearing at 500.

¹²⁷ *Ibid.* at 497, cross-examination of Professor Susan Wendell.

¹²⁸ To which one witness aptly responded, “I have a point of view”: *ibid.* at 561.

¹²⁹ *Ibid.* at 620. Unfortunately, in spite of objections by Commission counsel, the chair held that the witness could choose to answer or not.

¹³⁰ *Ibid.* at 638.

¹³¹ *Ibid.* at 758.

¹³² *Ibid.* at 496-98, quoted by the Board at D/2088.

that women constituted only 7% of engineering students, neither statistical evidence nor evidence from actual or potential engineering students was led as to the actual effect of the *Red Eye* on the career choices of women.

Both Dr Wendell and Professor Storrie objected to the consistent portrayal of women in the *Red Eye* as passive sexual objects, apparently without feelings, thoughts, or intentions of their own.¹³³ Each witness was asked to comment on how the specific content of the *Red Eye* affronted the dignity of women. According to Susan Wendell, representations which asked the reader to laugh at or condone the physical destruction of or injury to women through sexual intercourse or by virtue of their sexuality in and of themselves constituted an affront to dignity. At least four items of this nature were identified in the *Red Eye* editions.¹³⁴ Other cartoons and limericks which depicted nude female bodies or parts of bodies such as disembodied breasts constituted an affront only by virtue of the nature of the publication overall. These offended section 14 because women were repeatedly and exclusively portrayed as sexual objects in a publication which purported to represent engineering students, some of whom were women.

On cross-examination, each witness was confronted with a number of magazines on sale in the community — *Playboy*, *Penthouse*, *Cherie* — and asked whether such material demeaned women. The defence also asked whether the Bible, Shakespeare's RAPE OF LUCRETIA and the extensive commodification of women in television commercials was demeaning and should be banned. This line of questioning served to identify problems in clearly defining what constitutes "ridicule" or an "affront to dignity" and raised the spectre of overwhelming censorship.¹³⁵ In comparing the *Red Eye* to pornographic magazines, counsel for the respondent apparently also wished to suggest either that the Commission's efforts were misdirected since more serious offenders were freely publishing or alternatively, if the magazines did not them-

¹³³ Witnesses implied that women, as persons, should not be considered simply as objects to gratify male sexual desires. Kathleen Storrie indicated that dignity here had a relational aspect and was not simply an individual matter: *ibid.* at 700.

¹³⁴ For example, Dr Wendell commented on the chain letter appearing in the January 1981 edition which referred to a woman who had, through the mail, received 365 men. "They buried her yesterday and it took seven good undertakers thirty-six hours to get the smile off her face and two days to get her legs together so that they could close the coffin." In her opinion, the cartoon affronted the dignity of women "[b]ecause it asks us to laugh at the prospect of a human being being either seriously harmed or killed and in particular in virtue of her sexuality, in virtue of her sexual identity as a woman. It also ridicules and belittles women's role in sexual intercourse which is portrayed as so passive and so much the instrument of men that she would allow herself to be killed by sexual intercourse": *ibid.* at 491.

¹³⁵ One witness testified that the material demeaned women if as a whole it systematically showed women in a negative light. Counsel for the respondent responded, "[m]ust we always have to say things that are encouraging and proper and in the view of some people, respectable? Anything that's not nice affronts women?": *ibid.* at 680.

selves violate section 14, that the *Red Eye* similarly did not violate community standards of dignity.¹³⁶

Interestingly, Professor Susan Wendell found that while the issues of pornographic magazines presented to her contained numerous depictions of women as mere sexual objects, they were not intrinsically offensive because they did not contain violent images of female sexuality. Assessing other representations in light of the magazine "as a whole", Wendell was able in almost all instances to find at least one article or representation which portrayed women in another light and which in her opinion, therefore exonerated the publication.¹³⁷ Although the issue of *Playboy* portrayed women as sexual objects almost exclusively, in her opinion it did not affront women's dignity because its sole explicit purpose was to cater to men's sexual tastes.¹³⁸ Wendell did not explain how a single image could wholly offset or neutralize the impact of a publication that otherwise treats women only as sexual objects nor why a publication directed solely towards men should for that reason be exonerated under the *Code*. Her position, however, was consistent with the Commission's focus on publications that explicitly condoned or promoted violence against women as distinct from soft-core pornography that could be "privately" consumed.¹³⁹

Many feminists have noted the limits of the adversarial trial process, the difficulty of presenting a complex and nuanced argument, the narrow characterization of issues and the emotional costs of such proceedings to participants.¹⁴⁰ In attempting to control the responses of witnesses, counsel for the respondent would tell witnesses to stop philosophizing, to provide yes or no answers without elaboration, and would on occasion provide misogynist illustrations of his own for witnesses to respond to.¹⁴¹ Despite his efforts to draw and force witnesses to respond out of context on cross-examination, however, all witnesses demonstrated a keen sensitivity to the context in which the material was presented in ascertaining its meaning and message. An assessment of

¹³⁶ Interview with C. Harradence, *supra*, note 120.

¹³⁷ In *Cherie*, five out of 120 pages presenting an interview of a female director and a story by a woman describing what she enjoyed sexually (titled "The Dream-suck Queen") were sufficient to rebut the general theme. Radical feminists have complained that this kind of reasoning has been used to admit too much pornography under obscenity laws: *see infra*, note 198.

¹³⁸ *Supra*, note 126 at 605.

¹³⁹ Section 24 was never intended by its drafters to cover soft-core pornography such as *Playboy*: interview with K. Norman, *supra*, note 110. When the respondent's counsel suggested that men (particularly "Agros") were equally degraded or demeaned by much of the *Red Eye*, reference was made to the absence of sexual violence against men: *see supra*, note 126 at 497. Oddly, however, no evidence was led as to the overall incidence of sexual violence against women in Canada.

¹⁴⁰ *See, e.g., A. Kessler-Harris, Equal Employment Opportunity Comm'n v. Sears, Roebuck and Company: A Personal Account* (1987) 25 FEMINIST REVIEW 46.

¹⁴¹ For example, "You mean the Chairman of the Board can't have an attractive woman as an adornment in his office. That is against the law....He has to have some wizened old bag that can type": *supra*, note 126 at 666.

the material in light of its context and apparent purpose is consistent with feminist concerns that censorship of pornography not endanger critiques of pornography and compulsory heterosexuality.¹⁴²

The main defensive strategy of the respondent was to call a number of women students to establish that a significant number of women did not in fact find the *Red Eye* offensive. For practical reasons, the Board rejected witnesses who could speak only from their personal experience or opinion. Although the Board's criteria was loosely formulated and applied, to be allowed to give evidence a woman had to be able to speak from knowledge gained as a representative — i.e., as an elected representative of a significant group of women students.¹⁴³ All such evidence was only provisionally admitted; the Tribunal ultimately held that the actual perception of a majority of women students was not relevant to a violation of section 14.

Respondent's counsel called the president of the College of Nursing Students' Society, two women students including the president of the Home Economics Students' Society, one woman from arts and science as well as two women engineering students to testify that the *Red Eye* was not taken seriously and hence not considered demeaning to themselves or to women in general.¹⁴⁴ These students also testified that the *Red Eye* was a matter that should not have gone beyond campus; that it served a useful purpose in bolstering the "spirit" of the engineers and that the hearing was a waste of everyone's time and money.¹⁴⁵ In rebuttal, the Commission called members of Women and Law and a medical student who spoke to a consensus among women in their colleges that the material was degrading. Students in home economics and arts and science testified as to the lack of any consensus on the *Red Eye* among women students in their colleges.

While the hearing provided an opportunity for the expression of views of a significant number of women students, it did not (and because of its adversarial nature likely could not) render a deep account of their responses or feelings.¹⁴⁶ A number of questions remained unasked and unanswered in both examination-in-chief and cross-examination: did students possibly confuse the issue of degradation in the *Red Eye* with the appropriateness of censorship; how or why could anyone find the *Red Eye* funny; what precisely was meant by saying that the publishers

¹⁴² For further discussion, see *infra*, text accompanying notes 207-09.

¹⁴³ *Supra*, note 126 at 886-87. Witnesses appeared to base their opinions of the *Red Eye* generally on casual conversations with students. The opinions were not randomized or polled and were not an issue in their election.

¹⁴⁴ *Ibid.* at 894.

¹⁴⁵ *Ibid.*

¹⁴⁶ Compare the non-adversarial hearings on Pornography before the City Council Chamber in Minneapolis where numerous witnesses testified as to the uses and harmful effects of pornography: P. Brest & A. Vandenberg, *Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis* (1987) 39 STAN. L. REV. 607 [hereinafter *Politics, Feminism and the Constitution*] at 621-33. A trial is generally not a safe environment for the exploration or expression of feelings.

did not take the *Red Eye* seriously since they obviously did intend to demean and ridicule women;¹⁴⁷ did women lack the language or the confidence to express their real concerns; were they deferring to male intentions or to a male definition of humorous or acceptable behaviour as a matter of survival,¹⁴⁸ or did they seriously consider the publication harmless to themselves and women generally, perhaps because of the absence of a direct and obvious connection between the exaggerated form of its stereotypes and cartoons and their personal experience? Addressing most of these questions would have involved a broader and more in-depth account and examination of the social context of women's lives including evidence as to the actual incidence of violence against women and conditions of gender inequality in male-dominated institutions.

In the legal proceedings against the *Red Eye*, the Board of Inquiry was the only forum in which women had a significant voice. Upon appeal to the Court of Queen's Bench, as permitted by the *Code* on questions of law,¹⁴⁹ counsel on behalf of Women Against Pornography (WAP) was granted *amicus curiae* status and, among other matters, presented argument on whether the *Red Eye* contained pornographic descriptions of degradation that were without redeeming value.¹⁵⁰ None of these matters

¹⁴⁷ In individual actions for defamation, humour has been recognized as an effective form of ridicule and the plaintiff need not be portrayed in realistic circumstances to be defamed: see Brown, *supra*, note 123; J.G. Fleming, *THE LAW OF TORTS* 7th ed. (Melbourne: Law Book Company, 1987).

¹⁴⁸ Deference to a male perspective was likely a matter of survival for women engineering students given the ratio of male to female engineering students and the fact that assignments, projects, and labs usually involve group work: see Interview with J. Rudd (30 December 1989) Saskatoon. According to MacKinnon, "many women joke about sex to try to defuse men's sexual aggression, to try to be one of the boys in hopes they will be treated like one": see FEMINISM UNMODIFIED, *supra*, note 11 at 112; see also RIGHT-WING WOMEN, *supra*, note 39 at 219 & 234. The *Report of the Canadian Committee*, *supra*, note 36 noted that denial of discriminatory behavior and attitudes has been prevalent among women engineering students who are busy advancing their careers. In an attempt to reduce cognitive dissonance, women may adjust to and cope with pervasive sexism by refusing to be continually offended.

¹⁴⁹ S. 32.

¹⁵⁰ Brief of Law, Counsel for members of the Saskatchewan Coalition against Pornography at 14. WAP presented argument on whether women could constitute a class of persons and whether women had inalienable rights to dignity. Its brief documented increasing social concern with the extent of pornographic imagery: [s]uch materials convey the message that: a) women are victims in the same sense that grass is green; b) women like to be abused and beaten; c) women encourage and ask for abuse; d) women are appropriate, easy targets; e) victimized or abused women are humorous [sic], sexually stimulating, or thrilling; and f) the appropriate and normal way for a man to treat a woman is to abuse and demean her. These myths trivialize, condone, and encourage acts of violence against women. They breed discrimination, dehumanization, and abuse of women, and jeopardize their rights and safety. Pornography was distinguished from erotica by elements of force and subordination and was defined as, "[a]ny material that depicts violence, submission, coercion, lack of consent, ridicule, degradation and humiliation of any human being, whether this material is sexually explicit or not, or which condones or otherwise endorses such behavior, for the purposes of sexual stimulation or pleasure" at 15.

were dealt with in the judgment of Mr Justice Milliken of the Court of Queen's Bench, however, and WAP did not present argument upon the further appeal. In the Court of Appeal, not one woman either argued or decided the case.

IV. CHALLENGING A TRADITION OF LEGAL REASONING

A. *Board of Inquiry*

Members of the Board of Inquiry unanimously found the ESS and four of the five individuals named in the complaint in contravention of section 14 of *The Saskatchewan Human Rights Code*. As I shall argue, the Board's decision, when rendered, was a fairly radical endorsement of feminist concerns regarding misogynist speech. In its attention to social context and its responsiveness to the type of harm at issue, the decision contrasts sharply with that of the Court of Queen's Bench and of the Court of Appeal. It also, however, raises interpretive issues regarding the scope of section 14 that have generally plagued attempts to regulate pornographic and hate speech.

In terms of remedial relief, the Board ordered members of the staff and executive of the ESS to attend educational workshops conducted by the Commission on the impact of section 14 and assessed costs against the ESS in the sum of \$360 on account of unnecessary and unreasonable delays. The Board prohibited further dissemination of the two issues of the *Red Eye* and required distribution of the decision to each member of the ESS and broadly throughout the campus. None of the orders were complied with because of subsequent appeals.

1. *Freedom of Speech*

The feminist critique of the law of freedom of speech in relation to pornography has been developed largely by and in response to the insights of Catherine MacKinnon.¹⁵¹ Her critique has challenged the terms in which legal debates have traditionally been conducted by emphasizing the harms of speech and an understanding of how certain forms of speech exist in a context of unequal gender relations. In general, feminists have been critical of a rationality in legal decisions that relies on abstract universals, that purports to be value free and that fails to acknowledge the significance of social context.¹⁵²

American jurisprudence on the constitutionality of laws controlling hate propaganda and pornography provides a classic example of judicial failure to take such a context seriously. In *American Booksellers Ass'n*,

¹⁵¹ See FEMINISM UNMODIFIED, *supra*, note 11 at Part III and TOWARD A FEMINIST THEORY OF THE STATE (Cambridge: Harvard University Press, 1989) 195-214 [hereinafter FEMINIST THEORY].

¹⁵² See, e.g., A.C. Scales, *The Emergence of Feminist Jurisprudence: An Essay* (1986) 95 YALE L.J. 1373; POWER OF LAW, *supra*, note 16 at 81.

*Inc. v. Hudnut*¹⁵³ the Seventh Circuit Appeals Court invalidated under the First Amendment of the U.S. Constitution an ordinance which sought to create a civil action analogous to a human rights complaint against traffickers in “the graphic sexually explicit subordination of women”.¹⁵⁴ Mr Justice Easterbrook, for the majority, appeared to have accepted the premises of the legislation when he stated: “[d]epictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets”.¹⁵⁵ But that pornography has such effects “simply demonstrates the power of pornography as speech”.¹⁵⁶ He described the ordinance as an attempt at “thought control”, an attempt to establish an “approved” view of women and sexual encounters between men and women. As a form of “political” speech, “[t]he state may not ordain preferred viewpoints in this way”.¹⁵⁷ *Hudnut* is largely consistent

¹⁵³ 598 F. Supp. 1316 (U.S. Dist. Ct. 1984), *aff’d* 771 F.2d 323 (7th Cir. 1985), 475 U.S. 1001 (1986). The District Court decision challenged the ordinance on grounds of vagueness but also placed the value of free speech above that of sexual equality. The latter was “not so fundamental an interest as to warrant a broad intrusion into otherwise free expression”: *see* 598 F. Supp. 1316 at 1336.

¹⁵⁴ *Ibid.* at 1320.

¹⁵⁵ *Ibid.* at 329.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* at 325.

with recent American decisions on the constitutional validity of hate propaganda laws and anti-slur regulations by state universities.¹⁵⁸

Although Mr Justice Easterbrook purports to take a "neutral" position on speech, he discounts the harmful effects of pornography without

¹⁵⁸ Defamation of a group or individual is actionable only where the statement is known to be false by its maker, *Gertz v. Welsh*, 418 U.S. 323 (1974), or constitutes a clear and imminent danger. The United States Supreme Court has struck down, as violations of the First Amendment, laws aimed at preventing Nazi demonstrations, *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. den'd* 439 U.S. 916 (1978); see also *Village of Skokie v. National Socialist Party of America*, 69 Ill.2d 605 (1978), or propagation of the ideas of the Klu Klux Klan unless intended to and likely to incite imminent violence, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The earlier authority of *Beauharnais v. Illinois* 343 U.S. 250 (1951) which upheld criminal legislation prohibiting hate propaganda has been questioned and limited to those publications "liable to cause violence and disorder": see *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) per Brennan J. at 268. More recently, the Supreme Court in *R.A.V. v. City of St. Paul, Minnesota*, 112 S.Ct. 2538 (1992) [hereinafter *St. Paul*] found unconstitutional an ordinance prohibiting the display of symbols (such as cross burning) that one knows or should know will arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender". According to Mr Justice Scalia, for the majority, even if the ordinance reached only "fighting words", it was invalid because it selectively silenced speech on the basis of its content (the subject of race or color, etc.). Content neutrality was seen as necessary to avoid driving certain ideas or viewpoints from the marketplace, at 2545. Other members of the Court found the ordinance overbroad but were critical of the majority's reasoning. According to Mr Justice White, the majority's analysis legitimized hate speech and placed the value of "fighting words" above the social interest in order and morality, at 2553-54. In practical terms, it left lawmakers with two options: (1) enact a sweeping prohibition on an entire class of speech (thereby requiring "regulation for problems that do not exist"); or (2) not legislate at all, at 2555. Mr Justice Blackmun noted that the inability to categorize would probably result in less protection overall.

The *St. Paul* decision will likely render unconstitutional most hate speech codes on state universities in the United States. See also *Doe v. University of Michigan*, 721 F. SUPP. 852 (U.S. Dist. Ct. 1989) where a District Court struck down a university policy prohibiting behaviour that "stigmatiz[ed] or victimiz[ed]" members of identifiable groups and threatened, was intended to, or had the reasonable foreseeable effect of interfering with their academic performance, employment, personal safety, or involvement in extra-curricular activities. The student alleged that the policy prohibited academic discussion of biologically based differences between races and sexes. Cohn, D.J. found the policy overbroad in that it applied to speech protected under the First Amendment, such as serious comments made in classroom discussion, and was impermissibly vague in that it did not specify the precise type of conduct implicated by the policy and provided no principled basis upon which to distinguish proscribed speech from merely offensive speech. According to Cohn, D.J., "[w]hile the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech", at 868. See also *Recent Cases* (1990) 103 HARV. L. REV. 1397; S.M. SeLegue, *Campus Anti-Slur Regulations: Speakers, Victims and the First Amendment* (1991) 79 CAL. L. REV. 919; D.F. McGowan & R.K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech* (1991) 79 CAL. L. REV. 825; and *Racist Speech*, *supra*, note 43 at 2370-73.

justification.¹⁵⁹ In characterizing the issue as simply one of "thought control", he ignores the experience and perspective of women whom he acknowledges are victimized by pornography and implicitly assumes the perspective of one who is not. In the result, although obscene speech that appeals to the prurient interest or offends community standards can be regulated without infringement of the American Constitution, speech that denigrates and harms women is constitutionally protected.¹⁶⁰ As Catherine MacKinnon aptly states, one "wonders why prurience counts but powerlessness does not, why sensibilities are better protected from offense than women are from exploitation".¹⁶¹

By contrast, members of the Board in the *Red Eye* case not only recognized and responded to the potential harm at stake but were also sensitive to the predominance of male interests in the law itself. Havemann, writing for the Board, noted that although the *Charter*, human rights codes, and criminal provisions against hate propaganda exist "to promote the egalitarian rights of minorities", criminal laws against hate propaganda and some provincial enactments such as the B.C. *Civil Rights Protection Act* excluded sex as a ground of protection.¹⁶² He questioned whether depictions of injury or harm to Blacks or Aboriginal peoples would not immediately be seen as demeaning and hateful.¹⁶³ "The egalitarian rights of women are taking much longer to be recognized and enforced. This reflects the dominance of male interests in our social, legal and political institutions."¹⁶⁴ Apart from using the "blunt instrument" of obscenity law, subsection 14(1) was the "only vehicle for women in Saskatchewan to enforce equality rights of the kind abrogated by hate literature as such".¹⁶⁵

Havemann identified the value of freedom of speech and freedom of the press, protected both under the *Charter* and under the *Code* itself,

¹⁵⁹ As Frank Michelman argues, the court's refusal to weigh the harmful effects of such speech is inconsistent with the consequentialist approach taken to justify non-regulation: see *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation* (1989) 56 TENN. L. REV. 291.

¹⁶⁰ Obscenity cases as well as child pornography are categorized as low value speech and a valid exception to the First Amendment. The test in obscenity cases is whether the work predominantly appeals to a prurient interest, offends contemporary community standards, and lacks any serious artistic, political, or scientific value: see *Miller v. California*, 413 U.S. 15 (1972) at 24. As a practical matter, very little material is censored under the obscenity test. See *Politics, Feminism, and the Constitution*, *supra*, note 146 at 610. In *Butler*, *supra*, note 27 the Supreme Court of Canada endorsed the view that obscenity laws were aimed at preventing harm to women and children rather than maintaining community standards of sexual propriety.

¹⁶¹ See FEMINIST THEORY, *supra*, note 151 at 202; P. Seator, *Judicial Indifference to Pornography's Harm: American Booksellers v. Hudnut* (1987) 17 GOLDEN GATE U. L. REV. 297.

¹⁶² *SHRC v. ESS* (1984), 5 C.H.R.R. D/2074 at D/2083.

¹⁶³ *Ibid.* at D/2082.

¹⁶⁴ *Ibid.* at D/2083.

¹⁶⁵ *Ibid.* at D/2083. For the text of s. 14, see *supra*, note 108; see also *Butler*, *supra*, note 27 and *infra*, note 184.

in terms of their "contribution to the full and free analysis of government policy", "individual self-expression", and the "advancement of truth".¹⁶⁶ In marked contrast to American jurisprudence, however, he also recognized a social interest in equality and the right to be free of discrimination that was protected under the *Charter* and the *Code*.¹⁶⁷ In his opinion, nothing on the face of either document indicated which should prevail in the event of conflict.¹⁶⁸ Havemann concluded that subsection 14(1) operated as a limit on freedom of expression analogous to the law of defamation and hate propaganda, at least where no redeeming social interest in the expression is evident.¹⁶⁹

Human rights legislation has always recognized that speech must be curtailed in order to eliminate discrimination. From its inception, such legislation prohibited speech which expressed an intention to deny opportunities on discriminatory grounds and more recently, speech has become actionable as a form of harassment. The *Red Eye* was not as explicitly linked to the denial of an opportunity as a sex-segregated employment advertisement but it almost certainly deterred and adversely

¹⁶⁶ *Supra*, note 162 at D/2081-82. Subsection 2(b) of the *Charter* guarantees that "[e]veryone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". Subsection 14(2) of the *Code* provides that "[n]othing in subsection (1) restricts the right to freedom of speech under the law upon any subject" and s. 5 provides: "[e]very person and every class of persons shall, under the law, enjoy the right to freedom of expression through all means of communication, including, without limiting the generality of the foregoing, the arts, speech, the press or radio, television or any other broadcasting device."

¹⁶⁷ Sections 15 and 28 of the *Charter* provide:

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

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

s. 28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Sections 9-19 of the *Code* prohibit discrimination on the grounds of sex in the provision of services, education, and employment.

¹⁶⁸ Subsection 14(2) of the *Code* would render s. 14(1) meaningless if widely interpreted and on that account was seen as "probably superfluous", *supra*, note 162. At any rate, the phrase "under the law" recognizes the existence of some legal restrictions on freedom of speech.

¹⁶⁹ *Supra*, note 162 at D/2082.

affected women's use and enjoyment of educational opportunities.¹⁷⁰ The definition of sexual harassment by the Supreme Court of Canada as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment" is broad enough to include conduct involving sexual remarks or the circulation of sexist material.¹⁷¹ However, a finding of harassment on the basis of sexist slurs or insults alone has generally depended upon their frequency and offensiveness.¹⁷² The "occasional use of coarse or off-colour language" or an isolated insult or offensive joke will not, in the absence of a sexual advance or proposition, constitute harassment.¹⁷³

Although section 14 more generally addresses the same type of harm, it differs from other anti-discrimination provisions in significant ways.¹⁷⁴ Its focus is on harm to the group, not necessarily an individual victim. Section 14 defines discrimination in terms of the message itself

¹⁷⁰ Subsection 13(1) of the *Code* provides "[e]very person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination because of his or their race, creed, religion, colour, sex, marital status, physical disability, nationality, ancestry or place of origin." Kathleen Ruff argues that the *Red Eye* publication constituted sexual harassment in education, *Saskatchewan Engineering Society Ridiculed Women In Articles, Drawings* (1986) II:7 CAN. H.R. ADVOCATE 1. See also, *Attis v. New Brunswick School Dist. No. 15* (1991), 15 C.H.R.R. D/339 where a Board of Inquiry held that the published writings and media appearances of a schoolteacher alleging an international Jewish conspiracy poisoned the educational environment for children of Jewish ancestry and constituted discrimination with respect to a public service.

¹⁷¹ *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284. Sexual harassment may include situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, or inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour: see *Bell v. Ladas* (1980), 1 C.H.R.R. D/155 (Ont. Bd of Inq.) at D/156 [hereinafter *Ladas*]; *Aragona v. Elegant Lamp Co. Ltd* (1982), 3 C.H.R.R. D/1109 (Ont. Bd of Inq.) at D/1110 [hereinafter *Aragona*]. One frequently cited rationale for a finding of harassment based on sexist comments or pornographic material is that female employees and students, to varying degrees (but especially those in small male-dominated colleges), constitute a "captive audience" and are less able to avoid or effectively protest the proliferation of such material: see, e.g., *FACT Brief, infra*, note 191 & 192. However, anti-pornography feminists would dispute the extent to which women at present are or can choose to be free of male domination and pornography even in the "privacy" of their homes: see *Feminism Unmodified, supra*, note 11 at 93-102.

¹⁷² *Watt v. Regional Municipality of Niagara* (1984), 5 C.H.R.R. D/2453 at D/2457 (Ont. Bd of Inq.) [hereinafter *Watt*]; *Dhillon v. F.W. Woolworth Co. Ltd* (1982), 3 C.H.R.R. D/743 (Ont. Bd of Inq.). In *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399 (1986), the U.S. Supreme Court held that a hostile work environment case must be based on more than a mere showing of "isolated indicia of a discriminatory environment" where no loss of a concrete or tangible job benefit is entailed.

¹⁷³ *Chu v. Persichilli* (1987), 9 C.H.R.R. D/4617 (Ont. Bd of Inq.) at D/4622 and *Watt, ibid.* Matsuda notes that racist hate messages are, in fact, rarely isolated even though they may be perceived as such by dominant group members: *Racist Speech, supra*, note 43 at 2327. The same is likely true of misogynist speech.

¹⁷⁴ For the text of s. 14, see *supra*, note 108.

(at least insofar as it prohibits messages that expose or tend to expose to hatred, ridicule, belittlement, or constitute an affront to dignity) and, unlike a sexual harassment complaint, it does not require proof of actual tangible harm such as psychological harm or adverse impact on work performance.¹⁷⁵ Nor does it appear to require proof that the message actually reinforces or perpetuates social inequality through its effect on the attitudes and behaviour of both victimized and non-victimized groups.¹⁷⁶ Statistical attempts to prove or disprove group harm would in any event be difficult and costly, hampered by information problems, controversy over the proper interpretation of studies, ethical limits to experimentation and the difficulties of isolating the effects of hate propaganda from all other cultural and social influences which conspire over the long term toward the same end.¹⁷⁷

In describing the interests at issue in the *Red Eye* as "competing", Havemann assumed that hate propaganda was antithetical to enjoyment of the right to be free of discrimination. He identified the discriminatory effects of the portrayal of women in the *Red Eye* as follows:

Discrimination like this jeopardizes [women's] opportunity to obtain equality rights including employment, education and security of their persons on an equal footing with the dominant gender grouping.

The effect of such representations is to reinforce and legitimate prejudice against women. It prolongs the existence of hangovers of prejudice against equal female participation in education, work, aspects of social life and the professions.

¹⁷⁵ Section 14 is not subject to the credibility problems in sexual harassment suits. Under s. 14, liability attaches to the publisher itself, not only to the employer or educational authority. Moreover, the section, *on its face*, is not confined to pornographic material as it surfaces in places traditionally considered "public", namely workplaces or educational forums, which is one reason why anti-pornography feminists are not content with the mere expansion of sexual harassment provisions as a way of combatting pornography. *But see infra*, text accompanying notes 208-16.

¹⁷⁶ In this respect, it is analogous to that of a plaintiff in an action for defamation who seeks to protect his or her reputation in the community. *See Fleming, supra*, note 147 at 501, 503 & 504; Brown, *supra*, note 123 at 92-95 & 100-102. The issue in a defamation suit is whether the individual has been discredited in the community, not just insulted. Injury may occur by way of ridicule, humour, caricature, or cartoons, but "mere vulgar abuse" or "name calling" is not actionable. Neither the presence of ill will or an intention to defame nor actual injury (i.e. evidence as to the actual understanding of the words used) need be proven. *See Brown* at 147; *Fleming* at 506. If an average reader would reasonably identify the material as defamatory, harm to reputation is assumed because proof of actual harm is notoriously difficult and would deprive most plaintiffs of an effective remedy. *See Fleming* at 502 & 511; Brown at 25 & 128-36. In defamation, however, truth may operate as justification and fair comment on matters of public interest as a defence. *See Fleming* at 514.

¹⁷⁷ According to MacKinnon, the harm may be so systemic and pervasive that it cannot be effectively isolated from the system in which pornography exists. *See FEMINISM UNMODIFIED, supra*, note 11 at 272.

Material of the kind in these newspapers serves to perpetuate a social climate discriminatory to women who are already targets of manifold discrimination and horrible violence. No social interest is served by tolerating the free expression of such material.¹⁷⁸

Havemann's approach is consistent with an earlier decision of the Saskatchewan Human Rights Commission, *Singer v. Iwasyk and Pennywise Foods Ltd.*,¹⁷⁹ which held that use of the caricature Sambo to advertise a restaurant "indicated discrimination" contrary to *The Fair Accommodations Practices Act*.¹⁸⁰ Sambo, the complacent, docile, and comical slave of the American South, is the Black male analogue to Lady Godiva.¹⁸¹ In both cases, the boards of inquiry broadly defined the harm at issue as the reinforcement of prejudice which perpetuates social inequality.¹⁸²

In its sensitivity to the way in which expressions of hatred or contempt can perpetuate discrimination against historically subordinate groups, Havemann's analysis has much in common with more recent decisions of the Supreme Court of Canada which have upheld the constitutional validity of federal laws against hate propaganda and obscenity.¹⁸³ Had the Tribunal required proof of actual harm or made

¹⁷⁸ *Supra*, note 162 at D/2089.

¹⁷⁹ Unreported, 5 November 1976, *cert. granted* on other grounds, (*sub nom. Iwasyk and Pennywise Foods Ltd v. Human Rights Comm'n*, [1977] 6 W.W.R. 699 (Sask. Q.B.) *rev'd* [1978] 5 W.W.R. 499 (Sask. C.A.) [hereinafter *Singer*]. This case dealt with different statutory language than existed in *The Saskatchewan Bill of Rights*, *supra*, note 105, under which the 1978 complaints against the *Red Eye* were filed.

¹⁸⁰ "To put it another way, it is not only a question of whether a Black person would feel humiliated or insulted by this representation, but the question of whether or not such a person's rights to equal employment opportunities and even to non-discriminatory treatment in housing and public accommodations would be affected. It seems to us that to ask the question is to answer it. If a stereotypical image of a certain class of persons as incompetent, childish, and funny, is allowed to be displayed, opportunities of members of the class for responsible jobs and to obtain rights on an equal footing with the majority class grouping are endangered", *Singer*, *ibid.* at 4.

¹⁸¹ In *Singer*, Douglas Daniels, an anthropologist, testified that the character Sambo was also "chronically given to lying and stealing". For an account of the racism in "Little Black Sambo", the story about the boy who watched tigers turn to butter, see C.R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* (1987) 39 STAN. L. REV. 317.

¹⁸² *Singer*, *supra*, note 179 at 4. See also *Rasheed v. Bramhill* (1980), 2 C.H.R.R. D/249 (N.S. Bd of Inq.) [hereinafter *Rasheed*] which held that the commercial distribution of a button featuring a black female singer stereotyped Blacks as loud and stupid. Given its historical context, the button went "beyond bad taste and mere offensiveness" and might "tend to activate latent prejudice and indirectly affect employment opportunities for Blacks", at D/250. More recently, the Board of Inquiry in *Kane v. Church of Jesus Christ Christian-Aryan Nations*, relied on both *Singer* and *Rasheed* in finding that use of a swastika, a burning cross, and a "KKK White Power" sign in an Aryan Fest "indicated discrimination" contrary to the *Alberta Individual Rights Protection Act*, 28 February 1992, Edmonton.

¹⁸³ On the criminal offence of obscenity, see *Butler*, *supra*, note 27; on wilfully promoting hatred under s. 281.2(2) of the *Criminal Code*, see *R. v. Keegstra*, [1990]

3 S.C.R. 697, 1 C.R. (4th) 129 [hereinafter *Keegstra*]; and on prohibiting repeated telephonic messages "likely to expose a person or persons to hatred or contempt" under s. 13(1) of the *Canadian Human Rights Act*, see *Canada (Human Rights Comm'n) v. Taylor*, (1990), 13 C.H.R.R. D/435 (S.C.C.) [hereinafter *Taylor*]. In all cases, the Court found that the legislation violated s. 2(b) of the *Charter* but was justifiable as a reasonable limit under s. 1. Although *Butler* represents a strong endorsement of feminist concerns with sexually violent imagery and imagery that is "degrading or dehumanizing" in the context of pornography, only a slim majority of the Court (including the now retired Chief Justice Dickson and Madam Justice Wilson) found that the provision in *Taylor* could be saved under s. 1. Dickson C.J.C. held that words like "hatred" and "contempt", when read in light of the objects of the *Act*, had a sufficiently precise core of meaning, that restrictions in the human rights context were easier to justify (the proceedings were conciliatory in nature and less likely to generate the stigma, punishment, and chilling effect associated with an analogous criminal law) and that s. 13 did not "severely abridge" the values underlying freedom of expression such as pursuit of truth, individual development, and democratic participation. According to a strong dissent by Madam Justice McLachlin, however, the language of hatred was inherently subjective and vague (it lacked a "constant and universal meaning" at D/474), was of doubtful efficacy in achieving the suppression of hate because it provided hatemongers with a public platform to defend their views, and was overly broad because it restricted speech that could not be justified by the objective of discouraging discrimination. As a whole, Madam Justice McLachlin's judgment is consistent with the narrow view that harm results only from the direct and intentional counselling of discriminatory practices, at D/481. In a split 4:3 decision in *Zundel v. R.*, 27 August 1992 [hereinafter *Zundel*], the Supreme Court of Canada found that the offence of spreading false news in s. 181 of the *Criminal Code* could not be saved under s. 1. The majority judgment of Madam Justice McLachlin, however, affirmed and distinguished *Keegstra* and *Taylor* on a number of grounds including the finding that the original purpose of s. 181, the protection of powerful landowners was neither pressing nor substantial. McLachlin J. refused to assess the legislation in light of what she considered to be a radically different purpose, namely the protection of disadvantaged groups, given the Court's rejection of the shifting purpose doctrine: see *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at 335-36, 18 D.L.R. (4th) 321 & *Butler*, *supra*, note 27, *dist'd*. In catching false statements injurious to the "public interest", the offence was also found to be overly broad and undefined.

The *Red Eye* complaint was lodged before the *Charter* came into effect, thus, the impact of the right to freedom of expression was ultimately not at issue. In the wake of *Taylor*, *Butler*, *Zundel*, and a newly constituted Supreme Court of Canada, the constitutional validity of s. 14 of *The Saskatchewan Human Rights Code* is uncertain. See, e.g., the recent criticism by Mr Justice Sopinka (who wrote the unanimous judgment in *Butler*) of minority groups for stifling "free speech" in their fight for equality in S. Bindman, "Political Correctness Has Limits: Sopinka" *The [Saskatoon] Star Phoenix* (18 April 1992) B8. While a separate provision in the *Code* does create a summary conviction offence for violation of the *Code* (the section has never been used), a charge cannot result in imprisonment unless, as in *Taylor*, a court injunction issued for failure to comply with a Board's order is breached, *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, ss. 35 & 41. Unlike the provision of the *Canadian Human Rights Code* examined in *Taylor*, however, s. 14 is not limited to one particular form of expression and the terms "ridicule", "belittle", or "affront to dignity", which were relied upon in the *Red Eye* complaint, may be seen as less restrictive than "hatred" and "contempt". In *Saskatchewan (Human Rights Comm'n) v. Eugene Bell* (1992), 88 D.L.R. (4th) 71, [1992] 2 W.W.R. 1 (Sask. Q.B.) Hunter J. upheld s. 14 under s. 1, noting that the terms "ridicule", "belittle", or "affront to dignity" were not overly broad when read in light of the objectives of the *Code*. This decision is presently under appeal.

the finding of harm dependent upon the intentions of the respondent, the effectiveness of the legislation would have been seriously undermined. Moreover, although Havemann defined the harm of hate speech in very general terms, he clearly located the harm in a context of oppression and inequality.¹⁸⁴ Such an approach implicitly recognizes that members of dominant groups are not likely to suffer psychic trauma to the same degree as subordinate group members and are less likely to suffer any other adverse effects by virtue of their numbers, economic power, social status, and linguistic control.

By viewing equality and liberty interests as strictly dichotomous, however, the Board failed to fully recognize how hate propaganda can also undermine the values freedom of speech is supposed to protect and how laws curbing hate speech can protect and promote the liberty interests of targeted groups. In order to avoid exposure to misogynist speech, women may feel forced to forego careers, avoid certain public places, curtail their speech and otherwise modify their own behaviour. In constructing the issue purely as a contest between equality and liberty interests, as though these interests were always in conflict for everyone, the tribunal implicitly relied on a definition of liberty that regards the state as the only threat to freedom and obscures the coercion of "private" power in a social context of inequality.¹⁸⁵

2. *Discriminatory Messages*

The Board ruled that the language of section 14 had to be interpreted in its "plain and ordinary sense". In interpreting the message of the publication, the Board relied upon an "objective test" of the reason-

¹⁸⁴ Havemann does not clearly identify the extent to which hate speech can induce fear and a sense of alienation in members of the target groups but the reasons for this may lie in the inconsistent testimony given by women at the hearing. For a discussion of the effects of racist hate speech that explicitly or implicitly threatens and endorses violence on its victims, see *Racist Speech, supra*, note 43 and the discussion in *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation* (1988/89) 37 BUFF. L. REV. 337. Matsuda takes the position, with which I concur, that the serious harm addressed by hate propaganda laws can arise only in a context of oppression. However, anti-discrimination statutes have typically been viewed as prohibiting discrimination symmetrically, against, for example, both women and men on the grounds of sex and against both Whites and Blacks on the grounds of race. In a notable exception, a Nova Scotia Board recently adopted an asymmetrical approach when it dismissed a complaint alleging sex discrimination by the editorial staff of a feminist newspaper who refused to publish letters unless they were written by women and were "women positive". David Miller held that the policy did not constitute discrimination since it was designed to ameliorate the historic and continuing disadvantage of women: *Keyes v. Pandora Publishing Ltd.*, [1992] N.S.J. No. 113. Most statutes permit affirmative action programs only if applied for and previously approved by the Human Rights Commission.

¹⁸⁵ See J. Fudge, *The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles* (1987) 25 OSGOODE HALL L.J. 485, who argues that the *Charter*, in taking aim at state power, reinforces the distinction between public and private.

able (or average) person's understanding.¹⁸⁶ The question was not whether a reasonable person would be seriously influenced or convinced by the message or even approve or disapprove of it. At issue was simply the meaning of the text, i.e. "what would the average reader find that this newspaper indicated or intended".¹⁸⁷

In applying this test, Havemann evaluated each edition of the *Red Eye* in its entirety and found on balance, given the context in which the material was presented,¹⁸⁸ that both violated section 14. Nothing in either issue served "to neutralize the discriminatory focus on women".¹⁸⁹

The manner in which women were "belittled" and had their dignity affronted because of their sex involved material suggesting that women in educational institutions are less than human; that they are inferior beings; that they are there to gratify male sexual desires; that they have no independent motivation or capacity to participate in social and intellectual activity. Women are belittled by being represented as mere objects, their dignity or quality of being worthy is depreciated. The material further affronts the dignity of women by trivializing and deriving humour from material which promotes sexual violence and the objectification of women. The material repeatedly represents women, in general, as less than human. In places the newspapers promote violent and demeaning treatment of women because of their sex.¹⁹⁰

Thus the material affronted the dignity of women on at least two grounds: through the portrayal of women *only* as objects of male sexual desire and through the depiction, trivialization, and promotion of sexual violence against women.

By focusing on the appropriation of women's sexuality through sexual violence and the portrayal of women as sexual objects in relation to men, Havemann's decision avoids many of the pitfalls identified or documented by feminists in the debate on pornography. Anti-censorship feminists have, for example, argued that in a male-dominated society the legal meaning most likely to be given any sexually explicit representation will either be a sexist one or one that reflects a conservative

¹⁸⁶ See *supra*, note 162 at D/2086. See generally *McKinley v. Cranfield* (1980), 1 C.H.R.R. D/246 (Sask. Bd of Inq.) [hereinafter *McKinley*], which questioned whether a letter would be regarded by the average reasonable person as belittling or demeaning to the physically disabled.

¹⁸⁷ *Supra*, note 162. Compare *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450 at D/6470 & D/6486 (Can. Trib.), endorsed by the majority of the Supreme Court in *Taylor, supra*, note 183 in which the test was not that of the reasonable person but whether "anybody, even the most malevolent or unthinking person, who might be inspired to treat the targets with hatred or contempt". Factors relevant to the potential impact of the message included the medium of communication, the audience it was directed to, the use of propagandistic techniques to make the message plausible, effective, and credible and the seriousness of its themes — violence, segregation, deportation. Certain phrases in s. 14 such as, material "tending to expose to hatred" likewise address potential harm.

¹⁸⁸ *Supra*, note 162 at D/2084.

¹⁸⁹ *Ibid.* at D/2088.

¹⁹⁰ *Ibid.*

understanding of female sexuality.¹⁹¹ Admittedly, use of what are considered average, normal, or reasonable perceptions may only too readily reflect a sexist point of view (as reflected in a general community standards test). In sexual harassment cases, for example, a "normal work environment" has been seen as one in which "sex jokes" are commonplace¹⁹² and in which objections by women may be characterized simply

¹⁹¹ N.D. Hunter & S.A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al. in American Booksellers Association v. Hudnut* (1987-88) 21 U. MICH. J.L. REF. 69 at 76-80 & 99-135 [hereinafter *FACT Brief*]. Both interpretations deny sexual autonomy to women. To the extent that radical feminists describe the reality of heterosexual women as only pornographic and portray women merely as walking embodiments of men's projected needs and desires, they also participate in denying the possibility of women's sexual pleasure and alternative conceptions of sexuality. MacKinnon has questioned whether there is any real difference between erotica and the subordination of women if subordination, itself, is eroticized in a male dominated society. See FEMINISM UNMODIFIED, *supra*, note 11 at 160. Smart persuasively argues that if heterosexual sex is, itself, defined as coercive, the radical feminist position converges with that of the moral right — all representations of heterosexual sex are degrading to women: see POWER OF LAW, *supra*, note 16 at 121-22.

¹⁹² *Ladas, supra*, note 171 at D/156. "There are some employers (and employees) who simply are very crude and who speak in bad taste in discussing in the work place, their relationships with the opposite sex, or in telling sex "jokes". It is not the intent, or effect, of the *Human Rights Code*, or the function of a Board of Inquiry, to pass judgment on such persons". See *Torres v. Royalty Kitchenware* (1982), 3 C.H.R.R. D/858 at D/861 (Ont. Bd of Inq.). See also *Daigle v. Hunter* (1989), 10 C.H.R.R. D/5670 at D/5677 (N.B. Bd of Inq.); *Aragona, supra*, note 171 at D/1110. Under Title VII in the United States, in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) at 620-21 [hereinafter *Rabidue*], a co-employee's routine obscenities toward the complainant, coupled with sexually oriented posters of nude or scantily clad women, did not result in a working environment that was considered intimidating, hostile, or offensive, in part, because such imagery was so pervasive in society at large and Title VII was not "designed to bring about a magical transformation in the social mores of American workers". The majority of the 6th Circuit found at 622 that the sexually oriented poster displays had a *de minimis* effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places. According to the minority judgment at 626-27, the majority assumed that the prevailing work environment had a right to perpetuation and confirmed "the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy." In *Robinson v. Jacksonville Shipyards Inc.* 760 F. Supp. 1486 (M.D. Fla. 1991) a federal District Court judge declined to follow *Rabidue* and upheld a complaint of sexual harassment based on extensive posting of pictures of nude or partially nude women and sexually demeaning comments and graffiti by male co-workers. Melton D.J. found that a "reasonable woman" would find such a work environment abusive given expert testimony on the conditions and incidence of sexual stereotyping of female employees and the negative psychological impact on women over time. Melton D.J. also held that a woman may experience pornography in the workplace differently from pornography at large because of an inability to avoid it short of not working or quitting one's job.

as differences in humour, taste, or aesthetics.¹⁹³ However, while Havemann relies upon the test of the "average viewer", his interpretation of the meaning of the *Red Eye* takes seriously the interests of members of the target group, namely women. The specific criteria relied upon in applying the test subverts rather than condones the sexual objectification of women prevalent in our society.

It is also true that any sexually explicit work may be viewed as "belittling" to women by those who ascribe to archaic stereotypes of women as asexual or essentially maternal.¹⁹⁴ However, despite the respondent's efforts to confuse the feminist critique with conservative views of sexuality, the Board did not identify the issue in terms of sexual immorality. Since human rights legislation directly attempts to secure equal opportunities for women in spheres of education and employment and prohibits discrimination on the basis of marital status and in some provinces, though not in Saskatchewan, sexual orientation, human rights decisions are not likely to be confused with traditional conservative defences of the family or heterosexual marriage. Unlike the activities of censor boards over the past eleven years, section 14 has not been used to reinstate family values or to repress alternative conceptions of sexuality.¹⁹⁵

Havemann's decision also reveals a sensitivity to the context of speech that has been a major concern of feminists critical of the censor-

¹⁹³ *Rabidue, ibid.* See also *Allan v. Riverside Lodge* (1985), 6 C.H.R.R. D/2978 (Ont. Bd of Inq.) where female cocktail waitresses complained that the harem style uniforms required to be worn were discriminatory. Based upon his review of photographs of the waitresses in uniform, the male adjudicator, at D/2987, described the uniforms as tacky and unattractive but "neither unduly revealing nor risqué" and "consistent with commonly accepted social norms". In his opinion, the issue was one of aesthetics. Customer actions including leering, joking, and placing their hands through leg slits onto the buttocks of the waitresses were characterized merely as a nuisance. While the test used by the Chair was not approved on appeal, the outcome was affirmed without reasons: see *Ontario (Human Rights Comm'n) v. Chrysalis Restaurant Enterprises Inc.* (1987), 87 C.L.L.C. 17,034, 42 D.L.R. (4th) 752 (Ont. Div. Ct). In *Lamers v. Pacific Building Maintenance Ltd* (1991), 91 C.L.L.C. 17,014, 14 C.H.R.R. D/235 at D/241 (Ont. Bd of Inq.) the Chair concluded that a statement by a male supervisor implying that a female employee was making passes at a male worker could not reasonably be viewed as an affront to her dignity because the male worker was not offended by the remark. *Compare Shaw v. Levac Supply Ltd* (1991), 14 C.H.R.R. D/36 (Ont. Bd of Inq.).

¹⁹⁴ Sexual initiative by women outside the traditional confines of monogamous marriage could be interpreted by some as an "affront to the dignity" of women. Regulation of pornography may also endanger homosexual or lesbian erotica: see *FACT Brief, supra*, note 191.

¹⁹⁵ The following cases have been accepted as complaints by the Saskatchewan Human Rights Commission and proceeded to settlement or adjudication: the *Red Eye*; the complaint against Arnies Muffler by members of the Women's Directorate: see text accompanying notes 94-95; a complaint against the provincial government over a dam named "Squaw Rapids" which was ultimately changed to "E.B. Campbell Dam"; a 30-40 page pamphlet on "The Negro — Origin of the Species"; and two allegedly racist pins one of which depicted Sikhs, Asians, and Africans under a "Not Allowed" symbol.

ship of films (such as *Not a Love Story*) which depict sexual violence for the purpose of critique, not endorsement or promotion.¹⁹⁶ In allowing for the neutralizing impact of other material and work having "socially redeeming value", Havemann necessarily took into account the apparent purpose of the publication, the position of the viewer and surrounding messages. Mariana Valverde has also argued that legal skills are powerless to give an authoritative reading of a particular publication or text because meaning is dependent upon context and where there is no particular victim, "no one person's interpretation carries particular weight".¹⁹⁷ Meaning is not wholly subjective, however, and the mere fact that interpretation depends upon context is surely not determinative since any use of language is context-dependent. Admittedly, where the context is unstable or ill-defined, neither the purpose of the presentation nor the likely position of the viewer may be clear enough to ground determinant meaning. But interpretation is not problematic where the context is stable or the message sufficiently explicit. An employment advertisement that specifies "men only need apply" is readily understood.

Likewise, irrespective of whether one would describe the Board's interpretation as "objective", no other interpretation of the limericks, cartoons, or articles in the *Red Eye* was as plausible or convincing. Given its context, the publication not only depicted but also trivialized and promoted sexual objectification and violence towards women. The women who testified in favour of the *Red Eye* were not offering an alternative account of its meaning but were choosing, for their own reasons, to ignore or deny it.¹⁹⁸ Close consideration of context itself is always within a tribunal's capacity and an order prohibiting publication can be sufficiently specific to allow for the legitimate use of similar material for another purpose — for example, my use of extracts from the *Red Eye* for the purpose of critique.

Although the Board's decision is in many respects an example of the possibilities of law and legal interpretation, questions regarding the potential scope of section 14 remain unanswered. Beyond being part of the interpretive context, what might constitute work having socially redeeming value or what might neutralize the message is unspecified.¹⁹⁹

¹⁹⁶ SEX, POWER AND PLEASURE, *supra*, note 43; S.G. Cole, PORNOGRAPHY AND THE SEX CRISIS (Toronto: Amanita Enterprises, 1989); D. Lacombe, IDEOLOGY AND PUBLIC POLICY: THE CASE AGAINST PORNOGRAPHY (Toronto: Garamond Press, 1988); POWER OF LAW, *supra*, note 16.

¹⁹⁷ SEX, POWER AND PLEASURE, *ibid.* at 142. Madam Justice McLachlin appears to have similar concerns regarding the identification of meaning in *Zundel*, *supra*, note 183 at 17-18.

¹⁹⁸ See text accompanying notes 144-48. In any event, discriminatory policies and practices need not affect all women or affect all women identically provided the basis of the complaint is sex-based: *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 26 C.C.E.L. 1.

¹⁹⁹ Anti-pornography feminists have complained that consideration of the publication "as a whole", rather than any single depiction, has been used to legitimize the bulk of pornography under obscenity laws in the U.S. See FEMINISM UNMODIFIED, *supra*, note 11 at 174-75.

The Board's focus on objectification, though it loosely describes feminist concerns with pornography, is also potentially problematic because the term has various meanings.²⁰⁰ Havemann is unclear as to whether sexist but non-violent representations of the female body could ground a cause of action under section 14.²⁰¹ Our culture is constituted in large part by symbols of female subordination and sexist representations of women. Numerous representations in soft-core pornography, commercial advertising, and popular media eroticize female submission and male dominance and use the image of the female body or body parts to appeal

²⁰⁰ As Lorna Weir and Leo Casey have noted, there is a sense in which sexuality itself would not be possible without objectification of another: "if there were no specific objects of desire — specifically desirable men and women with particular characteristics — then the conditions for sexual attraction would not be present": see *Subverting Power in Sexuality*, SOCIALIST REVIEW 139 at 144 [hereinafter *Subverting Power*]:

There is also another sense of the term "objectification" in which every representation — be it a photograph, a novel, or a film — is complicit. The material nature of representations necessitates their presentation as objects for other people. What is unacceptable, of course, is the type of violent exploitation identified by a third meaning of objectification, which has two variants, one individual, the other collective. The former concerns the use of the body of an unwilling, coerced subject for a sense of sexual power; the latter, the reinforcement of the oppression of dominated social groups.

Havemann appears to use "objectification" in terms of the reinforcement of oppression of social groups. See POWER OF LAW, *supra*, note 16 at 122-23, for different views of objectification.

A major concern of some feminists has been the status of sado-masochistic imagery or depictions of women wanting or enjoying acts of sexual violence, which have been specifically targeted by anti-pornography feminists. While women are thus, in a sense, presented as sexual agents, some would argue that their agency is limited to consent or participation in their own treatment as objects. In *Women's Hedonic Lives*, *supra*, note 54, West claims that women can experience pleasure in controlled submission to pain if the pain does not exceed a certain threshold and the woman's submission arises through trust in her partner rather than fear. In many contexts, it may be difficult to distinguish representations of sado-masochism that are genuinely consensual or motivated by trust from those that are not. The real danger is that such representations in a heterosexual context fuel rape myths and bolster the beliefs of some viewers that women "naturally" like to be abused or raped by men. In *Butler*, Sopinka J. stated that apparent consent to sexually violent or degrading acts may make "the depicted acts even more degrading or dehumanizing": *supra*, note 27 at 479.

²⁰¹ Some feminists have criticized efforts to regulate violent pornography on the ground that other forms of speech may have wider acceptance and hence, more power to legitimize gender inequality. However, legitimizing less of the sexist material out there is arguably better than legitimizing all of it through non-regulation. Violent pornography may be particularly harmful in any context, not only because the violence against models may not be simulated but because its realism and ability to sexually arouse the viewer make it a particularly potent form of ideology with potentially serious harm to victims. The fact that violent imagery appears to anger and distress women most is important because the remedy promises to address pervasive feelings of vulnerability and fear.

to the vanity or sexual desire of a male spectator or consumer.²⁰² Like sexist stereotyping in the media, the cumulative effect of these messages, which predominantly portray women as opposed to men as sexual objects, is to reinforce prejudice against women. However, identifying whether any single image, in isolation, exposes women to hatred or belittles, demeans or ridicules them is potentially problematic. The fact that section 14 has been used sparingly, in only eight cases over eleven years,²⁰³ suggests that other forms of law or social activism may be better able to effect such a major transformation.

B. *Appellate Courts*

In contrast to the decision of the Board, the decisions of Mr Justice Milliken of the Court of Queen's Bench and of Mr Justice Cameron, for the majority of the Court of Appeal, represent a more traditional form of legal reasoning. Amazingly, the justices in both decisions manage to reverse the Board's decision without relying on the purposes section 14 seeks to advance and without discussing freedom of speech — either under the *Charter* or the *Code* itself. Mr Justice Milliken of the Court of Queen's Bench sustained the appeal of the ESS upon finding that section 14, as interpreted by the Board, trenched on the federal criminal law power.²⁰⁴ He also held that the Board had erred by incorrectly assuming that section 14 included "articles" within its scope. A number of other successful grounds of appeal related to improper service of the complaint on the respondents, the inadequacy of evidence linking individual respondents with the publication, the liability of the ESS as an unincorporated association under the *Code* and the jurisdiction of the Board to order costs against the respondent.

Upon further appeal, Mr Justice Cameron acknowledged, almost in passing, that the *Red Eye* had "destructive effects" but decided on grounds that were related neither to the potential harm addressed by section 14 nor to the concerns with freedom of speech.²⁰⁵ His judgment was dominated by two issues: first, whether the division of powers under the Constitution affected the validity or interpretation of the provision; and second, whether the "general content of a newspaper" could be considered a "notice, sign, symbol, emblem, or other representation" set out in section 14. While the first argument was dismissed on the facts, he ultimately rejected the Commission's appeal by finding that the Board had erred in considering the publications in their entirety, including

²⁰² See J. Berger, *WAYS OF SEEING* (London: B.B.C., 1972). In this "regime of representation", women, as opposed to men, are predominantly portrayed as passive, as objects to be surveyed, as "sight(s) for the active male look": see *Subverting Power*, *supra*, note 200 at 146; see also Smart's discussion in *POWER OF LAW*, *supra*, note 16 at 123-28.

²⁰³ *Supra*, note 195.

²⁰⁴ *Hoffer v. Saskatchewan Human Rights Comm'n* (1986), 7 C.H.R.R. D/3443 (Sask. Q.B.) [hereinafter *Hoffer*].

²⁰⁵ *Supra*, note 5.

articles and written statements, as prohibited representations under subsection 14(1).

In the result, the judgment of Mr Justice Cameron radically reduced the potential scope of section 14. In his confidence that the provision can be so interpreted without reference to the purposes sought to be achieved, his judgment is a classic instance of formalist reasoning.²⁰⁶ The resort to formalist reasoning provides an apparent escape from value conflict and purports to represent value-free, objective, neutral results. The apparent reliance upon neutral distinctions lends an air of inevitability to the outcome which tends to obscure the reasons for the choice that is actually being made and to relieve the decision-maker of accountability for it.²⁰⁷ In its indifference to context while purporting to be "objective", formalist reasoning is a barrier to the recognition of feminist concerns in law.

1. *Division of Powers*

It is well established that the bulk of provisions of anti-discrimination statutes relating to activities such as employment, education, and the provision of public services and accommodation are within provincial power to legislate with respect to property and civil rights, subsection 92(13) and with respect to matters of a local nature, subsection 92(16) of the *Constitution Act*.²⁰⁸ Provinces may legislate with respect to the dissemination of ideas if the aspect of the legislation or the activity being regulated is itself within provincial competence.²⁰⁹ While the

²⁰⁶ Formalism is defined by Roberto Unger as a belief that deductive logic or plain meanings can provide determinant legal outcomes without regard to the policies or purposes served by the law: KNOWLEDGE AND POLITICS (New York: Free Press, 1975) at 92. Robert W. Gordon defines formalism as the belief that legal forms can be understood independent of their social context: see *Critical Legal Histories* (1984) 36 STAN. L. REV. 57 at 66.

²⁰⁷ Formalist reasoning in this sense seems to be what Mary Jane Mossman describes as "legal method" in *Feminism and Legal Method: The Difference It Makes* (1987) 3 WISC. WOMEN'S L. REV. at 163.

²⁰⁸ *Scowby v. Glendinning*, [1986] 2 S.C.R. 226 at 233, 32 D.L.R. (4th) 161 at 166-67.

²⁰⁹ *A.G. (Can.) v. Dupond* (1978), 84 D.L.R. (3d) 420 (S.C.C.), per Beetz J. The provinces have some degree of regulatory power over newspapers but cannot either substantially interfere with the workings of parliamentary institutions or constitute an invasion of the criminal law power: see *Reference re Alberta Statutes; Switzman v. Elbling*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337. The censorship of films for exhibition in theatres within the province has been upheld as regulation of local business in *Nova Scotia Bd of Censors v. McNeil*, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1 and provincial regulation of advertising by commercial enterprises within the province has been found constitutional under subsections 92(13) and (16): see *A.G. (Que.) v. Kellogg's Co.*, [1978] 2 S.C.R. 211, *aff'd* *A.G. (Que.) v. Irwin Toy*, [1989] 1 S.C.R. 927, 94 N.R. 167. According to the Court in *Irwin Toy* at 194 & 198-99, regulation is valid even if the medium in question (such as television) is ordinarily subject to federal control, provided that all media are equally affected, the regulation is directed against advertisers not broadcasters, and the operation of the undertaking is not thereby sterilized.

Commission argued that legislation with respect to notices, signs, and media within the province provided the necessary provincial aspect, Mr Justice Cameron held that the legislation was valid only if it could be shown that "a specific effect of the message is to enhance discrimination against women in ways prohibited under the *Code*".²¹⁰ Absent a showing of "some causal link between publication of the matter and denial of rights guaranteed by the *Code*", the legislation would trench upon the federal power to regulate criminal law.²¹¹ In the Court of Queen's Bench, Milliken J. held that the Board had failed to consider "whether the objectionable material in each edition enhanced discrimination against women in the ways or means prohibited by the *Code*."²¹² The Court of Appeal, however, found that the Board, by adverting to the discriminatory effects of the *Red Eye* and given the evidence before it, had "in principle" recognized the need for a causal link between the publication and the violation of rights guaranteed by the *Code* which was consistent with the approach taken in *Singer*.²¹³

This ruling appears to run counter to the hopes of the Commission that section 14 would be viewed as establishing a discriminatory practice, independent of the denial of any other right under the *Code*.²¹⁴ In light of such a ruling, it is unclear whether the creation of a tort action of group defamation in B.C. or the Indianapolis ordinance that targeted pornography would be beyond provincial competence since in each case the injury addressed is not necessarily linked to discriminatory access to education, employment, or the provision of services in what has

²¹⁰ "A general adverse effect upon the class will not be sufficient to engage the provision": see *supra*, note 205 at D/5638. See also W.S. Tarnopolsky & W.F. Pentney, DISCRIMINATION AND THE LAW: INCLUDING EQUALITY RIGHTS UNDER THE CHARTER (Don Mills: De Boo, 1985) at 10-14 & 15. Notwithstanding express differences in statutory language, Cameron J. considered subsection 14(1) similar in impact to provisions in the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6, s. 12 and the *Human Rights Code*, 1981, S.O. 1981, c. 53, s. 12, which prohibit notices, etc. that indicate an "intention of the person to infringe a right [under the *Code*] or that is intended by the person to incite the infringement of a right". It seems the Court accepted, at D/5644, the ruling in *Singer*, *supra*, note 179 as an albeit generous interpretation of such language and one that the enactment of subsection 14(1), in its expanded form, endorsed.

²¹¹ *Supra*, note 205 at D/5648. The respondent argued at D/5655 that s. 14(1) was, in pith and substance, criminal law regarding hate propaganda, akin to s. 261 and s. 281.1 of the *Criminal Code*, because it was not directly related to acts of discrimination and interfered with the dissemination of political ideas. The Commission argued that the provisions were not criminal because the legislation was not punitive in nature and the intention of the respondent was not at issue.

²¹² *Supra*, note 204 at D/3447.

²¹³ Cameron J.A. stated "Nor, to the extent we are empowered to consider the issue, do we believe the Board, given the evidence before it, erred in its conclusions in this respect." *Supra*, note 205 at D/5648.

²¹⁴ See text accompanying note 109.

traditionally been recognized as the "public" sphere.²¹⁵ Nor is it clear what recognition of a causal connection "in principle" requires; whether the link must be direct or how much or what kind of evidence must be adduced in support of it. Although the majority may have seen the causal connection as an issue of fact which was beyond appellate review,²¹⁶ the court's endorsement of the approach in *Singer* suggests that estimations of the likely impact of a publication on a particular class can be made without statistical evidence. The willingness to find a causal connection in future cases may depend largely upon the context in which the complaint is made and at least in part upon the content of the notice or advertisement. If the message is blatantly misogynist, as in the *Red Eye*, and readily connected to opportunities such as educational opportunities, the necessary link may be more easily established.

2. *Form of Communication: Notices, Signs, Symbols, Emblems, or other Representations*

Ultimately, Cameron J.A. dismissed the Commission's appeal as a result of finding that the words, "notice, sign, symbol, emblem or other representation" in section 14 extended only to certain forms of expression, primarily visual images and reproductions, and did not include oral and written statements found in articles or editorials.

Mr Justice Cameron did advert to the possibility that individual photographs or cartoons within each issue of the *Red Eye* might have in themselves constituted a violation of section 14. However, instead of explaining his apparent refusal to remit such matters back to the Board for reconsideration²¹⁷ or draw inferences in law from the factual findings of the Board, as counsel for the Commission argued, he vaguely hinted at a fatal deficiency in the complaint:

We might add, also, that whether, as a matter of law, this cartoon or that photograph might have been fitted to the phrase and then, as a matter of fact, been taken to have satisfied the remaining elements of the wrong defined by the section, was, of course, not determined by the board. And that is understandable. As noted, the complaint was not aimed so much at this piece or that, as it was directed at the whole. It was the aggregate of the impugned material which was so offensive and which provoked the complaint. And so that is how the board took it. But the section is simply not wide enough, in our respectful view, to accommodate the material when taken as a whole.²¹⁸

²¹⁵ The effect of the decision is thus to preserve a distinction between the "public/private" domain. To challenge violent pornography sold in the corner store under anti-discrimination legislation one would now have to establish a causal link between the publication and a denial of an equal right to the provision of services. Such a link may be furnished by evidence that women are endangered in the streets but not in the home since personal security in one's home is not a right protected under the *Code*. For assessments of how the distinction between public and private operates to subordinate women, see FEMINISM UNMODIFIED, *supra*, note 11 at 93-102.

²¹⁶ *Supra*, note 3.

²¹⁷ Under s. 32(4) of the *Code*, the appellate court may affirm or reverse the decision or remit the matter back to the Board for revision.

²¹⁸ *Supra*, note 5 at 630-31.

Presumably, characterization of the problem as the "aggregate of the impugned material" precluded remedial relief. However, Cameron J.A. did not allude to the evidentiary or factual basis for this assumption which is particularly puzzling in light of testimony that suggested that specific representations clearly offended section 14.²¹⁹ Moreover, the *Code* indicates that procedural irregularities will not invalidate a complaint.²²⁰

In concluding that articles or statements were beyond the scope of section 14, Mr Justice Cameron relied upon two canons of statutory interpretation: *noscitur a sociis*, that words used in association be given analogous meanings if possible, and *ejusdem generis*, that general words following particular ones be taken to refer to things of the same kind. He cited with approval the reasoning in *Warren v. Chapman*²²¹ which held that the words "notice, sign, symbol, emblem" in a provision almost identical to subsection 14(1),²²² referred to "briefly worded or graphic form[s] of communication".²²³ By virtue of their use in association, "other representations" was intended to refer to similar forms of representation such as a pictorial "image, likeness or reproduction" but not to relatively complex literary works such as articles or editorials or to oral or written statements.²²⁴ According to the Manitoba court, the Legislature could have specified articles and editorials if it had intended that these fall within the scope of the statute.²²⁵ The court did not consider why, if the Legislature had intended a restrictive interpretation, it did not expressly refer to "similar representations", as is the case in Ontario.

In dissent, Vancise J.A. argued against *ejusdem generis* on the basis that the words preceding "other representations" did not represent any common category.²²⁶ The statute was ambiguous because of the word "notice", which "necessarily denoted words", the fact that "representation" could in its ordinary usage refer to both statements and visual images, and the existence of the marginal note to section 14 which was titled "Prohibition Against Publications".²²⁷ This ambiguity could only be resolved with reference to a liberal interpretation that best advanced the broad purposes of the *Code*. The Supreme Court in numerous deci-

²¹⁹ See testimony of Dr Wendell, *supra*, text accompanying note 134.

²²⁰ S. 37.

²²¹ [1984] 5 W.W.R. 454 (Man. Q.B.), *aff'd* [1985] 4 W.W.R. 75 (Man. C.A.) [hereinafter *Warren* cited to C.A.]. In *Warren*, the defendant had allegedly stereotyped an Aboriginal person as "a drunk, a wastrel, an idlemonger, a person who is only too happy to live on a government cheque, an in-breeder, a parasite, a non-contributor". Note that a letter on display in a window of a downtown Saskatoon business was not disputed as a notice or other representation within s. 14 in *McKinley*, *supra*, note 186.

²²² *Manitoba Human Rights Act*, C.C.S.M. c. H-175, s. 18.

²²³ *Warren*, *supra*, note 221 at 79.

²²⁴ *Ibid.* at 79-80.

²²⁵ *Ibid.* at 81.

²²⁶ *Supra*, note 5 at D/5659-61.

²²⁷ *Ibid.*

sions has endorsed a broad purposive interpretation of anti-discrimination legislation as a guide to the resolution of ambiguities.²²⁸

In *Warren*, the Manitoba Appellate Court had acknowledged an ambiguity in meaning and at least noted some reluctance in applying "technical rules of construction" to a statute dealing with human rights.²²⁹ Cameron J.A. indicated that the meaning of the statutory words must be construed in context but defined context narrowly to exclude the mischief the *Act* was designed to prevent. He expressly acknowledged that a wider interpretation of section 14 would further the legislature's objectives: to prohibit express indications that discrimination will be practised and "to discourage some of the *underlying causes* of those discriminatory practices".²³⁰ He noted, however, that the general objects of the *Code* occasionally outdistanced specific provisions.

It is not for us to say why the legislature chose to limit the scope of the section, but limit it it did, and we must respect that. And that raises the central dilemma of this case. The purpose of the *Act* pulls in one direction, the cast of the section in another.²³¹

Mr Justice Cameron's reference to the "cast of the section" simply denies ambiguity and asserts that the meaning is clear without addressing the counter-arguments raised in dissent.

The distinction Cameron J.A. sought to draw between language and visual imagery is also difficult to sustain solely in formal terms, given variations in the size of print, brevity, and complexity, without reference to the underlying interests protected or the degree and type of harm generated by the message. The formalistic approach adopted by the Court suggests ominously that the message conveyed by a cartoon or photo might also be assessed independent of its context and the apparent purpose of the respondent's use of imagery. The judgment as a whole may be indicative of a tendency to attribute absolute, fixed, and acontextual meanings to cultural products.²³²

Elsewhere in his judgment, Cameron J.A. remarked on the numbers of contexts that could be implicated were the provision broadly construed and referred twice to the possibility of criminal proceedings as a reason for restraint in interpreting section 14.²³³ While Cameron J.A. only hinted at the possible dangers and undesirable effects of restricting

²²⁸ See generally *Winnipeg School Div. No. 1 v. Craton*, [1985] 2 S.C.R. 150, 6 C.H.R.R. D/3014; *Robichaud v. Canada (Treasury Bd)*, [1987] 2 S.C.R. 84, 8 C.H.R.R. D/4326; *Canadian National Ry Co. v. Canada (Canadian Human Rights Comm'n)*, [1987] 1 S.C.R. 1114, 8 C.H.R.R. D/4210; and *Bhinder v. Canadian National Ry Co.*, [1985] 2 S.C.R. 561, 7 C.H.R.R. D/3093.

²²⁹ *Warren*, *supra*, note 221 at 79-80.

²³⁰ *Supra*, note 5 at D/5642.

²³¹ *Ibid.* at D/5645.

²³² According to Valverde, "it is in the nature of legal proceedings to see cultural products as distinct entities with an absolute meaning": see *SEX, POWER AND PLEASURE*, *supra*, note 43 at 143.

²³³ *Warren*, *supra*, note 221 at D/5647.

speech, the irresistible inference is that he relied upon a narrow interpretation of section 14 in order to avoid a more explicit evaluation of the tension between freedom of speech (for some) and equality under subsection 14(2) of the *Code*. The lip service Cameron J.A. paid to the harm of the *Red Eye* may, in light of the result, belie a failure to take its impact on women seriously.

None of the above is intended to suggest that differences in the form of expression are wholly irrelevant to the appropriate scope of legal restrictions. Such differences, as a part of the context of speech, may roughly have some bearing on the interpretation of the message, on the degree and type of harm generated by the message and on the extent of interference with speech.²³⁴ Certainly, mainstream newspaper articles and editorials are more likely to address subjects of public interest and controversy including abortion, Aboriginal land claims, language rights, etc. all of which require and deserve unlimited expression.²³⁵ However, because purely formal limits fail to address the substance of speech, they will arbitrarily exempt genuinely harmful speech from regulatory scrutiny. The exclusion of statements or articles not only exempts misogynist articles in campus newspapers such as the *Red Eye* but also racist tracts published by the Aryan Nations. In mainstream media, it translates into automatic judicial deference to the predominantly male, white, and middle-class editors of privately owned and monopolistic newspaper chains.

In summary, the reliance on plain meanings and legal forms by Mr Justice Cameron obscures and legitimates what is essentially a personal value judgment with political implications. While Havemann directly confronted the impact of misogynist speech on women, Cameron J.A.

²³⁴ For example, written and oral forms of defamation have traditionally been distinguished as libel and slander. Libel has received harsher legal treatment because it is seen as more likely to have been deliberately calculated, more likely to endure longer and to attract more attention: see Fleming, *supra*, note 147 at 519-20, who is critical of the distinction. Some writers have suggested that visual imagery may have a more powerful impact upon the viewer than language: see K.E. Mahoney, *Defining Pornography: An Analysis of Bill C-54* (1988) 33 MCGILL L.J. 575 at 591 and *Women's Hedonic Lives*, *supra*, note 54. E.H. Lipsett suggests that a visual image, limerick, or joke may be more difficult to counteract with equal effect: see *Freedom of Expression and Human Rights Legislation: A Critical Analysis of s. 2 of The Manitoba Human Rights Act* (1983) 12 MAN. L.J. 285. D. Greschner distinguished electronic media such as television from other forms of communications as particularly harmful in the perpetuation of sex stereotypes because of its "persuasiveness" and "pervasiveness": see *Still Kept in Her Place: Sex Stereotypes in Television Commercials and the Law* (1980), 1 C.H.R.R. C/21. Studies of the effects of pornography have been limited to visual imagery not words.

²³⁵ In *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435 at 469, 97 D.L.R. (3d) 577 at 601-02, Dickson J., in a minority judgment, suggested that expressions of opinion or fact in news items, editorials, columns, or letters to the editor as opposed to commercial advertising should be protected by freedom of the press as matters of public concern and discussion. *Warren* involved a refusal to censor a columnist with the *Winnipeg Sun* who relied on prejudicial stereotypes and caricatures of Aboriginal peoples in his column.

managed to evade such concerns in the name of judicial detachment and neutrality. His narrow characterization of the issue serves to deflect attention from the issue of gender inequality and to deny the political nature of the conflict. It is significant, however, that local news coverage attributed the failure of the Commission's appeal to a technical "loop-hole".²³⁶ Within weeks of the decision, the provincial Conservative government had amended the *Code* to bring statements both oral and written within the scope of section 14.²³⁷

V. A TRADITION IN DECLINE

In their study of the implementation of the Minneapolis and Indianapolis ordinances, Paul Brest and Ann Vandenburg concluded that the feminist attack on pornography, though ultimately unsuccessful in litigation, had still succeeded in raising popular consciousness.²³⁸ In this section, I review events subsequent to the release of the decision of the Board of Inquiry in 1984 in an attempt to identify the effects of the *Red Eye* proceedings. Like Brest and Vandenburg, I argue that legal reform had a favourable impact on the educational climate for women at the University of Saskatchewan although its role is admittedly difficult to isolate, particularly in the wake of the Montreal Massacre.

Deans of engineering and review councils have acknowledged that the killings in Montreal raised concerns about the profession's image and that "the massacre puts [engineering student publications] in a very different light".²³⁹ Marc Lépine's actions proceeded from a belief that women had taken his rightful place in the profession and that women posed a threat to male power. The *Red Eye* both reflected an image of women as outsiders to the profession and suggested that violence was a legitimate male response to women. The gruesome and very public realization of these ideas in this professional context has rendered them even more suspect, if not illegitimate.²⁴⁰ On the first anniversary of the

²³⁶ "Rights Code Loophole to be Plugged" *The [Saskatoon] Star Phoenix* (1 April 1989) A7; D. Traynor, "Legislation Introduced to Close *Red Eye* Loophole" *The [Saskatoon] Star Phoenix* (5 July 1989) A6.

²³⁷ *The Saskatchewan Human Rights Code Amendment Act, 1989*, S.S. 1989-90, c. 23, s. 10 and see *infra*, note 256 for a discussion of the Conservative agenda. A more explicit endorsement of freedom of speech might also have legitimized misogynist speech but would at least have exposed value conflict and likely contributed to more enlightened public debate regarding reforms: see M.L. Minow and E.V. Spelman's criteria for judging in *Passion for Justice* (1988/89) 10 CARDOZO L. REV. 37.

²³⁸ *Politics, Feminism and the Constitution*, *supra*, note 146 at 658-61.

²³⁹ P. Belanger, Dean of McGill's Faculty of Engineering, quoted in B. McKenna "Quebec Engineers Observe Day of Mourning" *The [Toronto] Globe and Mail* (12 December 1989) A14.

²⁴⁰ While some educators believe the massacre has itself raised levels of consciousness, others speak of reinforced fear, powerlessness, and vulnerability which was heightened by media response to feminist outrage at the murders: see M. Randall, "Men Cannot Know the Feelings of Fear" *The [Toronto] Globe and Mail* (12 December 1989) A7.

deaths in Montreal, for example, the first woman editor of the *Red Eye* refused to reverse her non-sexist editorial policy on the ground that the traditional format of the *Red Eye* could have contributed to the scarcity of women and to sexism within the profession.²⁴¹ While the impact of the Montreal Massacre must be distinguished from the impact of the human rights proceedings, popular response to the massacre is instructive and parallels in important ways official responses to sexism on the University of Saskatchewan campus up to 1990.

Since the USC abolished the Women's Directorate after the hearings had closed but before the release of the Board's decision, the involvement of the Commission and the hearings themselves obviously did little to legitimize the position of the Women's Directorate. There are indications, however, that the threat of further action by the Commission did affect the content of subsequent issues of the *Red Eye*. As early as 1984, the editors of the *Red Eye* announced a change in editorial policy eliminating sexist and racist material in order to protect themselves from further complaints under *The Saskatchewan Human Rights Code*.²⁴² Unfortunately, I was unable to verify these claims because the ESS denied me access to issues of the *Red Eye* published since the lodging of the complaint and which were unavailable from other sources.²⁴³ Although a 1985 issue I managed to locate broke completely with the tradition in order "to avoid offending certain groups who felt [discriminated] against in the past", the logical inference from the refusal to provide me with access to all issues is that the new editorial policy was not scrupulously followed.²⁴⁴ Some readers have indicated that explicitly sexist material was screened more carefully in the aftermath of the Board's decision but that more coverage was given to homophobic material.²⁴⁵ A few complaints were made to the Human Rights Commission about subsequent publications but none were considered actionable under the *Code*, which does not prohibit discrimination on the basis of sexual orientation. Issues of the *Red Eye* in September and November 1989 did not contain representations of sexual violence.²⁴⁶ However,

²⁴¹ Editorial, "Serious Stuff" *Red Eye* (November 1990) 1. The 1990-91 issues of the *Red Eye* contained neither sexist nor homophobic material yet still contained humorous articles and cartoons on sexual themes.

²⁴² The *Red Eye* editor admitted they were still "lax on the sexist part": see A. Pavo, "Engineering Students Not Appealing" *the sheaf* (22 March 1984) 1. See also M. Cherry, "Engineers Seek to Improve Public Image" *the sheaf* (28 March 1985) 1.

²⁴³ As critics have noted, part of the difficulty in researching the effects of censorship is the fact that contested material tends to go underground: see *supra*, note 18. Shifts in the site and manner of publication and distribution may still be important from the victim's point of view.

²⁴⁴ Editorial, *Red Eye* (9 September 1985) 12. A 1983 issue contained a few subtle references to sexual violence.

²⁴⁵ Interview with members of the Women's Centre (18 May 1989) Saskatoon.

²⁴⁶ The editorial in the September 1989 issue of the *Red Eye* referred to their victory over the "Sask heil reich commission" in the Supreme Court of Canada but added that they intended to be very careful in future publications "since we have no desire to get taken to the cleaners on a regular basis".

several cartoons and limericks displayed a more subtle form of sexism in ridiculing homosexuals, lesbians, anorexic, and obese women.

The ESS did adopt other measures, largely symbolic, but which appeared designed to improve a public image tarnished by the *Red Eye*. "Hell Week" became "Hello Week", the "Rape and Plunder Squad" the "Red and Proud", and the "Godiva Ride", until cancelled recently, had attempted to feature both nude male and female riders.²⁴⁷ Of some significance is the fact that two male engineering representatives on the USC voted in favour of two motions restricting pornography in the 1984-85 year. A motion requesting the bookstore to remove pornographic material such as *Playboy* and *Penthouse* was ultimately defeated but a motion requiring that the student theatre not be used for the Miss Teen Saskatoon contest was passed on the grounds that the contest was harmful to women. Although these debates were dominated by men, the participants did demonstrate some concern with the impact of such events on women.²⁴⁸

Such changes cannot be attributed to an actual increase in the enrolment of women in engineering. Throughout the 1980s, the proportion of women in engineering remained steady at approximately 7-8%²⁴⁹ and only recently have engineering students, administrators, and professionals intensified their efforts to change the image of engineering as a male preserve²⁵⁰

²⁴⁷ The ESS evidently had difficulty finding men to play the part of Lord Godiva but would never cancel the "Ride" on that account. The engineering vice-president in September 1989 rode in shorts: telephone interview with representative of Women's Centre (15 October 1989) Saskatoon.

²⁴⁸ USC Minutes (24 January 1985) 1-2. They also expressed concern that renovations to student washroom facilities not be as amenable to graffiti.

²⁴⁹ See *Report of the Canadian Committee*, *supra*, note 36 at 35. In a graduate thesis by a feminist psychologist on women in the engineering college at the University of Saskatchewan, seven women students in 1988 described male colleagues and professors as generally "helpful" and discussed survival tactics (such as sticking together, trying not to be physically conspicuous, and involving oneself in women's team sports): see *Female Engineering Students*, *supra*, note 36 at 119. In a survey in which thirty women engineering students rated the strength of twenty-four personality traits in themselves, the ability to have male friends ranked highest overall (a mean rating of four). High self-esteem rated tenth out of fifteen rank orders at 2.71; being an innovator, socially conscious, and authentic all ranked thirteenth at 2.01; being a feminist ranked fourteenth at 1.14 and a realist ranked lowest at .86. Of seven students personally interviewed, all expressed a desire not to be called a feminist. According to one, "I dislike the label, it generates too much unconstructive animosity. I like to tell people that I am a balanced woman. I want to have a career which is nontraditional for women, but I also have plans for marriage. I let people figure out what that means. My mother refers to me as a feminist", at 96-97.

²⁵⁰ See *Report of the Canadian Committee*, *ibid*. Colleges across the country have, for example, organized a fundraising campaign to establish a scholarship for women in memory of the fourteen women killed in Montreal: see M. Marud, "Engineering College Fights Sexist Image" *The [Saskatoon] Star Phoenix* (6 February 1990) A9. In Alberta, a major employer indicated that it would look elsewhere for employees unless the College of Engineering addressed its "image problem": see G. Norman, "Engineers Recognize the Importance of Being Earnest" *the sheaf* (1 March 1990) 9.

and recruit more women students.²⁵¹ Even if such changes demonstrated a recognition of some feminist concerns, they were also far from an open endorsement of feminism. Although the Students' Union supported the establishment of a Sexual Harassment office and grievance board and reopened the Women's Centre in January 1985, the Centre has played a very low-key role in campus politics. The relationship between the Centre and the USSU remained unstable throughout the 1980s and members attributed their silence to fears of being shut down if they were again to assume a more proactive role in campus debates.²⁵² As of 1989, members complained that feminism was a scorned label and that students in the main perceived feminism as either anti-male or irrelevant since gender equality had already been achieved. Members had only a passing knowledge of the *Red Eye* proceedings but felt that students, faculty and administrators were not prepared to address seriously their concerns.

Some evidence suggests that the impact of the proceedings on students may have been limited to engineering students. The threat of legal sanction did not deter similar publications by agriculture and vocational agriculture students which came to light in 1987 and in February 1990 but which had been distributed in their respective colleges over a much longer period. The university administration, however, was quick to respond to public complaints about these publications and in both instances, convened a Non-Academic Offences Disciplinary Board²⁵³ which fined the student association and individual students involved.²⁵⁴ According to the assistant vice president (Student Affairs), the administration's interference in 1987, as opposed to 1981, reflected a number of factors: a change in personnel, a new commitment to monitoring campus "morality", and a desire to avoid the involvement of

²⁵¹ In response to the thesis by Javed, *supra*, note 36, a student-faculty committee was formed to identify ways of increasing the enrolment of women and minorities in 1988-89. Women engineering students and professionals are speaking to high school and university students to encourage women's enrolment: interview with J. Rudd, Chair, Committee Examining the Enrolment of Women and Minorities in Engineering, *supra*, note 148. In seeking more women students, the profession may also be responding to a predicted shortfall of engineers in the next decade: see O. French, "Engineer Clears Path For Other Women" *The [Toronto] Globe and Mail* (7 February 1990) A11.

²⁵² Ironically, some believe that the Centre would have been shut down but for the fact that the majority of members of the University Students Union Executive were male engineering students who feared further damage to their image: *supra*, note 244.

²⁵³ University of Saskatchewan, *University Council and College Regulations on Examinations and Student Grievances, Appeals and Discipline Regulations*, Part B "Non-Academic Offences" September 1988 at 58-59. Student Disciplinary Regulations, *Student Handbook*, September 1988 at 41.

²⁵⁴ In 1987, the Agriculture Association was fined \$2000 and individual students \$250-500. In 1990, the Vocational Agriculture Association was fined \$1000 and placed on probation for one year. Individual students received fines ranging from \$200 to \$400: see T. Craig, "U of S Fines 15 Voc-Ag Students for Newsletter" *The [Saskatoon] Star Phoenix* (30 March 1990) A3.

the Human Rights Commission and the attendant negative publicity.²⁵⁵ The concern with campus "morality" resulted largely from the tragic death of a man at a student party during "Hell Week" in September 1984 in circumstances that some believe was symptomatic of an abusive social climate.²⁵⁶ Intervention may also have reflected an increasingly conservative political climate in the province as a whole.²⁵⁷

In 1990, the university administration responded almost immediately to complaints by members of the Women's Centre over a publication by vocational agriculture students. A Disciplinary Board in a one line disposition of the merits of the case found that the material "is sexist, racist and....generally offensive to the university community".²⁵⁸ In the Saskatoon daily newspaper, the vice president (Student Affairs) was reported as having said, "It [the newsletter] offends every student on campus. For the university's young men and women, this [newsletter] is entirely repugnant because it is not how they talk, think or act."²⁵⁹ The vice president and president also expressed deep concern over the impact of the newsletter on the university's reputation and its ability to attract funding.²⁶⁰

Although some form of critical response by university officials is welcome, characterizing the problem in gender neutral and individualistic terms tends to ignore the specific type of harm at issue and the context of inequality in which the harm by definition arises. By asserting that the publication is "repugnant" to most students, the misdeed can still be presented as an aberrant event attributable to a few irresponsible students who claimed to be ignorant of the *Red Eye*. There are obvious parallels here to the denial of any connection between Marc Lépine's actions and systemic violence against women. As with the massacre, the publication is presented as an event that "diminishes us all", giving the

²⁵⁵ Interview with H. Nixon, *supra*, note 73.

²⁵⁶ The young man had passed out at the party and had been thrown, by persons still unknown, down the garbage chute of a highrise apartment. The ESS was one of the first to disclaim responsibility by pointing out that the party was not an official engineering event.

²⁵⁷ As T. McCormack notes, in the last decade, Conservative governments (in Saskatchewan as elsewhere) have attempted to both "deregulate the economy and regulate morality": see *Deregulating the Economy and Regulating Morality: The Political Economy of Censorship* (1985) 18 *STUD. IN POL. ECON.* 173 at 175. The Conservative government in Saskatchewan adopted feminist language in presenting its case against pornography to the Fraser Committee: see *Respecting Human Dignity*, Presentation by the Government of Saskatchewan to the Special Committee on Pornography and Prostitution (5 April 1984) Regina. The same government cut levels of welfare (creating hardship for welfare recipients, most of whom are women), substantially reduced the Commission's budget, and refused to include sexual orientation as a prohibited ground of discrimination.

²⁵⁸ University of Saskatchewan Board for Student Discipline, Summary of Judgment (27 March 1990) 2.

²⁵⁹ K. Piche, "U of S Students Face Expulsion, Charges" *The [Saskatoon] Star Phoenix* (16 March 1990) A3.

²⁶⁰ K. Piche, "Controversy Affects U of S Reputation" *The [Saskatoon] Star Phoenix* (17 March 1990) A6; Craig, *supra*, note 253.

misleading impression that we are all equally affected by the attitudes and structures that underlie and foster these actions.²⁶¹ The assumption of equal participation and impact amounts to a failure or refusal to acknowledge the systemic dimensions of inequalities on campus and suggests that little may be done to remedy them.

Rather than publicly acknowledging the systemic dimensions of this problem, officials responding to the publications presented the university itself as the dominant if not the only victim. The fact that the newsletters had been published several times a year for several years in the same format and that university officials had apparently done little to monitor or discourage the publications suggests that officials are motivated primarily by concern for the reputation of the institution and not by concern for the welfare of students victimized by racism and sexism.²⁶²

My personal experience suggests that the involvement of some administrators is not only insensitive to the nature of the harm at issue but that they may be apt to use their power against those genuinely concerned about the welfare of its real victims.²⁶³ In the course of researching this article in the summer of 1989, I interviewed the vice president in charge of Student Affairs. He expressed concern that the college's reputation had been marred by the *Red Eye* proceedings and openly condemned the publications at issue as immoral.²⁶⁴ For reasons unknown, this official also led me to believe that he had access to or possession of issues of the *Red Eye* that had been published since the human rights proceedings were instituted. However, in response to my eager requests to review such material, he questioned my motives for conducting this research by suggesting that I was only seeking to "sensationalize" the issue and further questioned my ability to be "objective" in making any independent assessment. These accusations were made in the course of a twenty to thirty minute interview by a man who had never before met me and knew only from our conversation that I was then a term employee who taught a feminist legal theory course. After

²⁶¹ See, e.g., "Man Kills 14 Women in Montreal" *The [Toronto] Globe and Mail* (7 December 1989) A1 & A5; P. Poirier & B. McKenna, "Quebec Mourns Slaying of Women at University" *The [Toronto] Globe and Mail* (8 December 1989) A1 & A14; V. Malarek, "Killer Fraternized with Men in Army Fatigues" *The [Toronto] Globe and Mail* (9 December 1989) A6.

²⁶² University officials at Queen's University have also been accused of being more interested in protecting the reputation of their institution than in the welfare of groups such as women students: see S. Donaldson & W. Kymlicka, "No Thaw in Chilly Campus Climate" *The [Toronto] Globe and Mail* (17 November 1989) A8 [hereinafter "No Thaw"]. The insensitivity of administrators to the harm of such publications is perhaps not surprising given that a former senior woman administrator likened the climate for women in senior administrative positions at the University of Saskatchewan to "working in a locker room", where swearing and sexist puns and jokes are openly tolerated: interview with G. Moss, *supra*, note 73.

²⁶³ *Supra*, *The Charter and Pornography: Toward a Restricted Theory of Constitutionally Protected Expression*, note 4 at 286.

²⁶⁴ Interview with H. Nixon, *supra*, note 73.

a grievance was lodged against the university alleging interference with my ability to perform the duties of my employment and discrimination, this official denied ever having possession of or access to such material.²⁶⁵

My experience serves as a classic example of how appeals to "objectivity" are used to authorize the status quo and to suggest that feminists are incapable of advancing a reliable or justifiable position. Any challenge to the status quo is presumed to be illegitimate. By accusing me of "sensationalizing" this issue, I also stand accused of exploiting past events for personal purposes. In a similar fashion, by drawing attention to the incidence of violence in the wake of the Montreal murders (which were blatantly motivated by anti-feminism), feminists across the country were subtly accused of opportunism, of appropriating grief, and of using the tragedy to further their own "political agenda".²⁶⁶ While there are justifiable concerns about reifying victims of violence, at work here is a narrow conception of equality and a very cynical (and very privileged) conception of political discourse as the pursuit of individual self-interest. Given this conception, any challenge to the status quo, any struggle for justice or equality by members of a disadvantaged group, will be characterized in disparaging terms. Such a view of political discourse effectively discredits the claims and aspirations of victims of oppression.

If administrators view their mandate simply in terms of salvaging the reputation and image of the university as a corporate body or institutional entity, they are apt to view critics and purveyors of criticism as part of the problem. Efforts by women faculty members at other campuses to openly address sexism through detailed descriptions of their experience and through anonymous reports have not all been well-

²⁶⁵ After having filed a grievance alleging interference with academic freedom and sex discrimination (the deliberate obstruction of feminist work and the sheltering of sexist practices from open scrutiny), the Employer's Grievance Committee, in large part due to the support of two sympathetic university administrators, conceded in negotiations that the university would have released the documents had they been in any university official's possession. They blamed "much of the confusion that has arisen in this matter" on "the way [the responsible official] handled this conversation" leading me and others in subsequent conversation to believe that I was denied access to the *Red Eye*: letter from Chair of the Employer's Grievance Committee to Senior Grievance Officer (4 May 1990).

²⁶⁶ L. Zakuta, "Used to Attack Men" *The [Toronto] Globe and Mail* (18 December 1989) A6. See also Randall, *supra*, note 240.

received.²⁶⁷ While the media is blamed for blowing things out of proportion, feminists are blamed for making it more difficult to attract women students or faculty by tarnishing the reputation of the institution.²⁶⁸ Such a response not only ignores institutional failure to address the problem but simultaneously attempts to silence criticism of this failure.

The official response to the latest publication did little to encourage enlightened dialogue between students. The USC did pass a resolution in favour of convening a disciplinary board and instituting editorial guidelines.²⁶⁹ However, the disciplined students felt victimized by bad luck and questioned why similar issues published in the past did not result in disciplinary action.²⁷⁰ Representatives of the Women's Centre and Aboriginal students loudly denounced student fines as inadequate ways of addressing the underlying problems.²⁷¹ In their opinion, the

²⁶⁷ See *Postscript*, *supra*, note 33 at 3. This report records interviews with thirty-five women faculty at the University of Western Ontario from 1974-1989, all of whom chose to remain anonymous for fear of libel suits, professional stigmatization, isolation, or loss of tenure or promotion. The report alleges that pervasive and often unconscious attitudes and practices "communicate a lack of confidence in women, a lack of recognition or a devaluation of their capabilities and successes" at 5. Conduct complained of included differential hiring policies and practices that favoured men, lack of collegial feedback, sexual commentary, sexist language and humour, and promotion of a "boy's club culture". As the authors predicted, President George Pederson discounted the report, particularly its reliance on anonymous statements, as "shabby work", an "unsystematic selection of perceptions formulated into unproven, untestable, and unverifiable complaints and allegations", and added that the report "impugns the reputation of the institution" and "does nothing to advance the cause of women or assist the University in recruiting more women on faculty". According to three of the authors, the hostile response of the president justified concerns for anonymity: J. Sloan, "Report on Sexism Blasted by Senior Administrators" *Western News [London]* (23 November 1989) 6. For an insightful analysis of the male "right not to know", see B. Feldthusen, *The Gender Wars: "Where the Boys Are"* (1990) 4 C.J.W.L. 66.

²⁶⁸ Vocalizing discontent may admittedly deter the entry of women provided nothing is done to address the reasons for the discontent. The response of the president at the University of Western Ontario amounts to a denial and refusal to take responsibility for that failure and its consequences. In Alberta, after a woman student left the Engineering College as a result of intensive harassment after speaking openly about sexism, the dean of engineering advised that women students were touring high schools, telling students that there is no problem — "women here do not feel disadvantaged": C. Schuler, "Engineering Student Says She Was Forced to Leave City" *The Edmonton Journal* (21 February 1990) B1.

²⁶⁹ M. Scrivens, "Voc-Ag Newsletter Condemned" *the sheaf* (22 March 1990) 1.

²⁷⁰ K. Trefiak, "Critics Don't Recognize Humor in Comics Like The Spreader" *The [Saskatoon] Star Phoenix* (4 April 1990) A5; T. Craig, "'Toilet Humor' in Newsletter Has Voc-Ag Students Worried" *The [Saskatoon] Star Phoenix* (17 March 1990) A6. These publications were defended in terms identical to the defence of the *Red Eye*, as instances of humour intended for vocational agriculture students only. Students also referred to screening by women members of the executive and to their community work.

²⁷¹ N. Saxena & P. Fichtner "Resolution of Spreader Case Dealt with Image Not Issues" *The [Saskatoon] Star Phoenix* (17 April 1990) A5; J. Acoose-Pelletier, "U. of S. Racism Finds A Scapegoat" *The [Saskatoon] Star Phoenix* (11 April 1990) A5; K. Piche, "Native Group Incensed Over Student Publication" *The [Saskatoon] Star Phoenix* (20 March 1990) A12.

remedy failed to address the need for a mandatory gender/race relations class in the curriculum to promote greater understanding of these issues and the need for a mandatory editorial policy for student publications.²⁷² In general, the outcome is seen as doing little to empower or improve the position of non-Aboriginal women and Aboriginal men and women. Moreover, the official response may also send conflicting messages to students. As critics of similar responses at Queen's University have suggested, "[S]ince administrators loudly proclaim their commitment to eliminating sexism, while silently neglecting the problem, men and women get different messages. Men get the message that the administrators are committed to equality. They see any further benefits as unnecessary, and bitterly resent them. Women get the message that the administrators couldn't care less about equality, and will do as little as possible to further reform."²⁷³

A more recent incident demonstrates the importance of genuine and far reaching institutional support in dealing effectively with sexism on campus. In March 1991, women students from the College of Law advised faculty that male law students had sold tickets in the law library to an off-campus stag for male students in which a dancer had performed a striptease and performed fellatio on the winner of a "door prize". Faculty only became aware of this event in the course of an intensive inquiry into education equity at the college. The stag quickly became front page news in the local media, and the university administration again was quick to press for disciplinary proceedings.²⁷⁴ Many women students were deeply disturbed by this event although, of those who complained, none desired disciplinary action. Aboriginal women in the college were particularly affected due to a widespread but unconfirmed rumour among students that a male student had specifically requested that a Black woman or Aboriginal woman perform at the event (there are no Black women in the college).

Instead of embarking on disciplinary proceedings, faculty (as both complainant and probable respondent) referred the matter to the sexual harassment officer for investigation and the stag (as well as the apology

²⁷² The Disciplinary Board had recommended that the School of Agriculture institute a class on social values, human rights and responsible group behavior, that a notation in the university calendar inform students that the rights of minorities must be respected and that the USC be encouraged to formulate an editorial policy for publications. The notation has been included in the calendar and as part of their writing component in a communications class, vocational agriculture students are required to interview a minority person and write a report: telephone interview with J. Peters, Director (1 October 1991) and letter to J.W. Ivany, President, from H. Nixon, Assistant Vice-President (28 March 1991).

²⁷³ "No Thaw", *supra*, note 262.

²⁷⁴ K. Piche, "Stag Party Has Law Students on Hot Seat" *The [Saskatoon] Star Phoenix* (21 March 1991) A1; K. Piche, "Campus Hurt by Stag Party Incident: Ivany" *The [Saskatoon] Star Phoenix* (22 March 1991) A1; D. Hoffman, "Law Student's Stag Receives Mixed Reviews on Campus" *The [Saskatoon] Star Phoenix* (22 March 1991) A3; C. Bond, "Stag Parties not Uncommon: Not Just a Male Domain" *The [Saskatoon] Star Phoenix* (23 March 1991) A1.

that was posted anonymously in the college) was made the subject of an open forum at the law school. At the forum, the dean affirmed the commitment of the college to race and gender equality. He also accepted the apology and presented and defended faculty's position that the stag was both an event in which the college had a legitimate interest and an event with harmful consequences to women students and faculty. In open discussion, both men and women talked about the impact of the event on them as students. One woman spoke openly of her experience of sexual violence.

Although it would be naive to suggest that such a process changed attitudes, it did provide some insight into the reality of women's lives. Instead of dwelling on the reputation of the law school, the discussion hinted at the symbolic significance of such an event for women in a world where women are the victims of sexual exploitation and violence and where sexual objectification is a common way of undermining the credibility and competence of women in male-dominated workplaces and professions. After the forum, the Law Students' Association agreed to form a student committee, including members from Women and the Law and Aboriginal Law Students, to promote awareness of equality issues among students. While much more obviously needs to be done, as a result of this incident, at least some students felt more able to criticize sexist and racist behaviour openly and to address the systemic dimensions of disempowerment.

What was critical in an event which seemed, if only momentarily, to both empower victims and promote a sense of community was a clear acknowledgment of institutional responsibility for addressing conditions of systemic inequality. Given this commitment, rejection of a narrow focus on legal or coercive measures, while potentially necessary in some circumstances, avoided both the risk of failing to establish a legal case for lack of evidence or on grounds of privacy and the very real danger of serious backlash. It also emphasized the institution's social responsibility, regardless of legality, to address systemic discrimination openly and constructively.

In the absence of broad-ranging institutional support, the possibility of a legal claim may still provide an important incentive to curb the proliferation of misogynist imagery on campus. Legal reform is not a necessary condition for such a change given the fact that other campuses, largely in response to the increasing visibility of violence against women,²⁷⁵ have addressed these issues without the direct threat of a legal claim. However, the *Red Eye* decision has been cited as a persuasive precedent in the deliberations of at least one other university inquiry²⁷⁶

²⁷⁵ Compare current reactions to violence against women with the response of several Members of Parliament who laughed when Margaret Mitchell described the pervasiveness and seriousness of wife assault in the House of Commons: HOUSE OF COMMONS DEBATES, vol. XV, 1st sess., 32nd Parl. at 17334.

²⁷⁶ P.J. Miller, Findings of a hearing by the dean of students at the University of Alberta into a complaint against the ESS and its publication of *The Bridge* (1 June 1990) Edmonton at 4.

and positive action on these issues is neither universal nor inevitable. At the University of British Columbia, for example, administrative officials not only failed to respond vigorously to the sexist and racist activities of engineering students, including their publication of the *Red Rag*, but also allegedly silenced attempts by female staff to challenge the content of the tabloid.²⁷⁷ The B.C. Human Rights Commission dismissed complaints against the *Red Rag* without adjudication and women's groups on campus have complained of an educational climate that was pervaded by racism and sexism throughout the 1980s.²⁷⁸ Unless administrative action is swift and vigorous, racist and sexist messages may in fact escalate.²⁷⁹

Effective recourse to an adjudicative forum forces those in power to take account of and to listen to voices they can otherwise easily dismiss or silence. Making officials accountable to an authority outside of themselves provides them with an incentive to take account of feminist demands. Since there is, at the very least, an experiential difference between working and learning in an environment in which misogynist and sexist imagery is openly tolerated and one in which it is not, that incentive can have tangible benefits for women.

VI. CONCLUSION

The limericks, jokes, and articles published in the *Red Eye* relied upon assumptions of a natural entitlement on the part of men to sexual control and domination of women. These assumptions generate fear on the part of women precisely because they have been and still are widely believed and acted upon. Depictions of female subordination also gen-

²⁷⁷ The director of a women's counselling agency has alleged that a university official threatened closure of the agency and dismissal of herself and her staff in response to their assistance in the preparation of a human rights complaint against the publication of the *Red Rag*: Gould, *supra*, note 89. The complaint was lodged by five women's groups such as the Status of Women against the presidents of the university and the ESS, among others. A second complaint was filed in 1986 and again dismissed without the appointment of a Board of Inquiry because of freedom of the press: telephone interview with J. MacGregor, Intake Officer, British Columbia Human Rights Council (26 August 1991) Vancouver. As with the Women's Centre after the closure of the Women's Directorate at the University of Saskatchewan, the B.C. agency also abandoned an advocacy role for women on campus for fear of being shut down.

²⁷⁸ "Year after year, incident after incident all through the 1980s, we stood by and watched while the engineers, frats and foresters did their dirty work and the women poured into our office, some of them deeply upset by the vile things they had seen....Many of these women had endured sexual abuse as children, and the line they were given in the dorms or at parties was, '[if] you don't like it, don't watch it'", quoting N. Horsman: Gould, *supra*, note 89 at 40. About three thousand or one quarter of the women on the University of British Columbia campus seek counselling for sexually-related matters every year.

²⁷⁹ See Matsuda, *supra*, note 43 at 2327 n. 37. She suggests that racist hate messages "arise in a setting where racial tensions exist, they tend to spread and replicate, and the presence of one hate message tends to give rise to others".

erate fear because they undermine the competence and credibility of women who are struggling for recognition as legitimate peers in male-dominated professions and institutions such as the university. In light of these facts, the *Red Eye* tradition cannot simply be dismissed as the idiosyncratic pranks of a few individuals. Nor can student attacks on members of relatively powerless and discredited groups in the face of an inactive administration be credibly characterized as merely a youthful rebellion against authority.²⁸⁰

I have addressed the social context of the *Red Eye* in order to challenge the model of "free speech" which in constitutional rhetoric is often cast as an abstract value. In a social context of inequality, speech by disempowered groups is costly, not equally accessible and rarely effective without institutional support. It is because of the widespread currency of misogynist or sexist assumptions that women who openly challenged the content of the *Red Eye* were characterized as militant, humourless, and anti-male both in campus debates and in hearings before the Board of Inquiry. By refusing to defer to or take lightly the idea that women are subordinate to men, members of the Women's Directorate were subjected to contempt, harassment, and intimidation. Efforts to alienate and discredit members of the Directorate drew not only upon a negative feminist stereotype but also upon prejudice against lesbians which demonstrates how lesbophobia and sexism are mutually reinforcing.

The conflict over the *Red Eye* was more than an intellectual debate or a difference in points of view that could be settled by disinterested rational argument. Many men obviously feel they have something at stake when their sexual superiority — including their power to define what is funny or acceptable — is challenged. Attempts by women to negotiate the differences that exist among them and to challenge that power collectively will inevitably be hobbled by deeply entrenched prejudice, by limited resources, and by fear. Women have something at stake in avoiding isolation and discreditation, not to mention harassment and intimidation. For these reasons, even for women faculty, freedom of speech on issues of sexism can seem "more like a distant dream".²⁸¹ Because of enforced silence, however, the full extent to which women experience sexism as a daily feature of campus life has remained largely unknown, unchallenged, and unchanged.

Resistance to the Directorate reflected not only a defence of sexist or misogynist ideology but a more generalized opposition to a value-laden and explicitly political discourse that focused on substantive

²⁸⁰ *Supra*, note 18. Some evidence suggests that the 1979 issue was deliberately designed to infuriate the Human Rights Commission after its scrutiny of the 1978 issue: *supra*, note 19. However, the publications were marked by little if any political parody and no direct parody of the Commission. The escalating displays of misogyny up to 1983 are better explained as a reaction to the strength and radicalism of feminist critiques and their appeal to the Human Rights Commission for validation.

²⁸¹ See *Postscript*, *supra*, note 33 at 3.

inequality. The responses of elected student representatives mirrored the widespread assumption, reflected in current debates on the "political correctness" movement, that the status quo is presumptively legitimate and non-ideological. The attempt to "depoliticize" student groups by making them more like business or service organizations effectively rendered them less resistant to the unequal distribution of power that represents the status quo. The fall of the Directorate demonstrates how speech is most readily curtailed not by law but by power and influence exercised extra-legally, often in the name of neutrality.

Like student organizations, university administrators responding to sexism on the Saskatchewan campus in this study have by and large failed to see or address the systemic dimensions of inequality and have been more prepared to attach individual rather than collective responsibility to outcomes. They have either ignored the harm at issue, viewing potential intervention simply as paternalistic, or failed to understand the specific nature of the harm, identifying what is harmful only in terms of the vulgar, obscene, and distasteful. The harmful effects of sexist or racist propaganda are arguably of greater concern in a university where young men and women are at a formative stage of their psychological and intellectual development.²⁸² From the perspective of those affected, inaction by responsible officials signals condonation of the harmful behaviour and supports a context of systemic inequality.²⁸³ Among other factors, the relative absence of women in positions of authority in the university and the exclusion of women's history and experience from the curriculum tend to reproduce relations of male dominance and female subordination by making them appear "natural". Unless administrators actively acknowledge and combat gender inequality in all its dimensions, and as more than a "male attitudinal problem", significant change for women is unlikely.²⁸⁴

By failing to address the concerns and experiences of women as a group, laws have also reflected and reinforced gender inequality.²⁸⁵ According to Carol Smart, the "positivistic legal tradition" including law's language, methods, and procedures are "fundamentally anti-feminist" and "bear no relationship to the concerns of women's

²⁸² See generally Matsuda, *supra*, note 43 at 2370-73.

²⁸³ *Ibid.*

²⁸⁴ See, e.g., T. Kierans, "Where Were the Guardians?" (May 1990) 6:11 THE GLOBE AND MAIL REPORT ON BUSINESS MAGAZINE 47. In charging universities with a failure to provide moral leadership, Tom Kierans suggests that gender inequality is wholly or primarily a "male attitudinal problem" that need not entail interference with private market activity.

²⁸⁵ See FEMINISM UNMODIFIED, *supra*, note 11 and FEMINIST THEORY, *supra*, note 151.

lives".²⁸⁶ Arguably, this tradition (at least in its formalist and procedural emphasis) was exemplified by the decision of the Court of Appeal on the publication of the *Red Eye*. As the case proceeded through the court system, participation by women not only dramatically declined but the issues became increasingly abstract and formalistic. The law was unresponsive to women not only because of lengthy delays that distanced the case from the lives and struggles of women affected by it but also because issues of vital concern to women were ultimately never dealt with. It is unclear whether appellate courts fully appreciated the harm to women since the effects of the *Red Eye* were only summarily adverted to and never specifically identified. The majority's virtual silence on this point may reflect a lack of empathy for the experience of women, the probable result of a lack of knowledge of the social conditions that grounded the complaint. Mr Justice Cameron's reliance on the "plain meaning" of the legislation in the face of patent ambiguity suggests an attempt to dodge or avoid an open discussion of the substantive issues and a more explicit defence of the value choices actually being made.

The decision of the Board of Inquiry (along with more recent decisions of the Supreme Court)²⁸⁷ demonstrates, however, that the "positivistic" legal tradition is neither inevitable nor required by the demands of a judicial role.²⁸⁸ Although questions remain regarding the proper scope of section 14, Havemann's decision reflects the potential of law to address the realities of women's lives and reveals that law is itself a site of conflict over norms, values, and social meanings. His decision appropriately identifies the harm of publications like the *Red Eye* and demonstrates a sensitivity to the context of speech and a

²⁸⁶ *Supra*, note 16 at 160-61. She suggests that appeal to legal reform by feminists serves to "fetishize" the law and legitimate the claim that law has access to truth and justice. To similar effect, critical legal scholars such as Alan Freeman have argued that the demands for legal reform by the civil rights movement in the United States were largely ineffective in bringing about significant change for most African-Americans: A.D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine* (1978) 62 MINN. L. REV. 1049 [hereinafter *Legitimizing Racial Discrimination*] and A.D. Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay* (1988) 23 HARV. C.R.-C.L. L. REV. 295.

²⁸⁷ See *supra*, note 184 and accompanying text.

²⁸⁸ The contrast between the decision of the Board and the Court of Appeal may also reflect a tradition in which administrators have been more open to and more conscious of the objectives of human rights legislation than the judiciary. In 1979, Denise Réaume noted that boards were not as constrained by the "English tradition of legal positivism" and had not been as defensive of individual liberty as the judiciary in dealing with allegations of sex discrimination: see *Women and the Law: Equality Claims Before Courts and Tribunals* (1979) 5 QUEEN'S L.J. 3 at 33 ff. Many of the decisions of the Supreme Court of Canada from 1985 to date appear to mark a departure from this tradition. Walter S. Tarnopolsky has described the period since the establishment of human rights agencies as one of increasing acceptance of human rights codes by the judiciary: *The Evolution of Judicial Attitudes* in K. Mahoney & S. Martin, eds., *EQUALITY AND JUDICIAL NEUTRALITY* (Toronto: Carswell, 1987) 378.

readiness to distinguish feminist concerns from those of right-wing conservatives. Such an outcome was facilitated by flexible evidentiary rules which allowed for an enhanced appreciation of context and an appointment process that identified potential chairpersons on the basis of their experience with and perceived sensitivity to human rights and equality issues.²⁸⁹ Such an outcome was achieved in spite of an adversarial process that further divided women students and failed to adequately explain or explore the reasons for the different positions presented by them.

Even if the *Red Eye* proceedings were ultimately unsuccessful, legal reform did promote changes in the prevalence and degree of exposure to misogynist imagery at the University of Saskatchewan. At least partly in an effort to avoid negative publicity and potential sanctions under the *Code*, both student organizations and administrative officials have reversed their policy of tolerance of sexist and racist student publications. These material changes are generally regarded as positive for women and their significance should not be underestimated. To the extent that such imagery has been repressed (*even if* only driven underground), legal reform has successfully challenged a very real aspect of patriarchal privilege.²⁹⁰

Any real or apparent rise in consciousness on campus and in the community, however, has ambivalent, contradictory, and not wholly positive aspects. On the one hand, the proceedings have likely made sexist ideology relatively more visible and less acceptable. The limericks and jokes in the *Red Eye* would no longer be viewed merely as matters of taste, humour, or aesthetics. By taking on what was widely perceived to involve a trivial issue, members of the Commission took the humiliation of women seriously and validated feelings and concerns that women have most often felt forced to ignore or deny. In addition, the *Red Eye* proceedings represented a demand for the inclusion and recognition of women as equally valued members of the university community. By identifying the *Red Eye* as an injury to women as a group, the Commission affirmed an entitlement on the part of women to an equal

²⁸⁹ The latter factor is particularly significant given the wide discretion both judges and members of administrative tribunals can exercise in admitting evidence and finding facts in the adjudicative process. See M. Eberts, *New Facts for Old: Observations on the Judicial Process* in R.F. Devlin, ed., *CANADIAN PERSPECTIVES ON LEGAL THEORY* (Toronto: Emond Montgomery, 1991) 467 for an insightful discussion of barriers to the presentation of women's experience in legal settings.

²⁹⁰ For a concurring view on the possibilities of legal reform generally, see Z. Eisenstein, *THE RADICAL FUTURE OF LIBERAL FEMINISM* (New York: Longman, 1981); Z. Eisenstein, *FEMINISM AND SEXUAL EQUALITY: CRISIS IN LIBERAL AMERICA* (New York: Monthly Review Press, 1984); M. Randall, *Feminism and the State: Questions for Theory and Practice* 17 R.F.R. 10. I do not mean to imply, however, that restrictions on speech should not be narrowly defined. While we must avoid the silencing and serious harm of hate speech, we must also try to avoid broad restrictions that could stifle genuine attempts at dialogue. We can only identify and effectively challenge and dispel prevalent attitudes and beliefs if students are able and prepared to discuss them.

sense of emotional and physical well-being in male-dominated forums and institutions. Human rights legislation in general has contested the assumption that women are inferior by nature or belong only in the home. For this reason, human rights commissions, by contrast to university administrators, police, prosecutors, judges, or other figures in authority are likely to show more sensitivity in practice to feminist concerns. In the human rights context, issues like discrimination are kept at the forefront, reducing the risk that the legislation is used to reinforce institutions or practices that have traditionally repressed women.

However, while the proceedings may have legitimized the position of women on campus to a greater degree, feminist organizing and discourse suffered a major setback on the Saskatchewan campus and was neither more common nor less controversial among students through the 1980s. Many commentators have assessed the significance of legal reform primarily in terms of its ability to mobilize or demobilize popular political movements.²⁹¹ Critics of civil rights legislation in the United States have argued that anti-discrimination legislation (and rights discourse generally) has had a pacifying or moderating influence on subordinate groups such as African-Americans.²⁹² The involvement of the Commission as an eventual party to the complaint certainly did not prevent the backlash suffered by members of the Directorate, and Havemann's decision was rendered too late to legitimize or assist in its defence. The fact that there was little continuing debate over the *Red Eye* in the immediate aftermath of complaints to the Commission may suggest a moderating influence but likely speaks more to the general

²⁹¹ See, e.g., P. Gabel & P. Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law* (1982-83) 11 N.Y.U. REV. L. & SOC. CHANGE 369 and E. Schneider, *The Dialectics of Rights and Politics: Perspectives from the Women's Movement* in M. Fineman & N. Thomadsen, eds., *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* (New York: Routledge, 1991) 301.

²⁹² *Legitimizing Racial Discrimination*, *supra*, note 286. Although the material conditions of subordination for African-Americans persist, critics such as Kimberle Crenshaw have argued that anti-discrimination legislation did radically challenge and transform the pervasive influence of racist ideology: *Race, Reform, and Retrenchment*, *supra*, note 45. See also R. Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* (1987) 22 HARV. C.R.-C.L. L. REV. 301; R. Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color* (1987) 5 LAW & INEQUALITY 103; P. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights* (1987) 22 HARV. C.R.-C.L. L. REV. 401; F.L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship* (1989) 74 CORNELL L. REV. 993; M.J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations* (1987) 22 HARV. C.R.-C.L. L. REV. 323. All these authors suggest that the demand for civil rights on the part of African-Americans was in its historical context a radical demand for inclusion by members of an excluded group. In Crenshaw's opinion, Freeman's critique also fails to take account of coercive racial subordination and the power of racist ideology (which more than legal consciousness has resigned Blacks to their subordination) and is insensitive to the limited choices available to subordinate or dispossessed groups in bringing about social change. My analysis demonstrates the cogency of Crenshaw's analysis in the context of sexism.

limits of rationally refuting hate speech. Moreover, the decline in feminist activism in the late 1980s was clearly a "chilling effect" of the abolition of the Directorate (and the intimidation of its members) and not a consequence of the human rights proceedings. Many female students likewise resist the label of feminism because of the likelihood of male hostility.

It is true, nonetheless, that human rights legislation, as presently constructed, does not deeply challenge or disturb and may in fact reinforce popular suppositions of "liberal" consciousness, including a false belief in the present reality of equal opportunity, an insistence on formal equality and the legitimacy of vested rights, a rigid division between public and private, and a view of the state as a neutral arbiter of disputes.²⁹³ *The Saskatchewan Human Rights Code* does not provide a context in which problems regarding violent sexuality can be fully addressed or understood because the ambit of the legislation is confined to the traditional "public" sphere and ignores the coercion of women in the "private" sphere of the family. Mr Justice Cameron's decision reinforces this distinction in requiring a causal connection between a violation of section 14 and other provisions of the *Code*. Because the *Saskatchewan Code* does not include sexual orientation as a prohibited ground of discrimination, the Human Rights Commission has also been unable to address the way in which the *Red Eye* reinforced compulsory heterosexuality and promoted homophobia and lesbophobia.

More generally, anti-discrimination legislation has to date been relatively ineffective in dealing with systemic inequalities in the workplace, in transforming the standards of evaluation or "merit", and in addressing subtle issues of climate. Relatively few complaints of systemic discrimination have been vigorously pursued by human rights commissions. Moreover, the rhetoric of equal opportunity, which manifests itself in human rights codes in the symmetrical protection of both dominant and subordinate groups from discrimination and makes "special" or exceptional provision for affirmative action programs, tends to obscure the prevalence of substantive and structural inequalities.²⁹⁴ The removal of formal barriers to equality (and the apparent success of a few visible women) has apparently convinced many women students, and certainly many more young men, that women presently enjoy equal opportunity. The widespread currency of such beliefs likely explains in large part the indifference or hostility to feminism, which acknowledges foremost the lived reality of gender inequality.

Recognizing the limits of human rights legislation as presently constructed and enforced, resort to a commission will always present a

²⁹³ *Legitimizing Racial Discrimination*, *supra*, note 286. I distinguish "liberal" consciousness from the philosophical exposition and development of liberalism.

²⁹⁴ Alan Freeman argues that anti-discrimination legislation has had a legitimizing impact on social consciousness. For a critique of the concept of legitimization, see A. Hyde, *The Concept of Legitimation in the Sociology of Law* (1983) *Wis. L. Rev.* 379 and for a defence, compare M. Kelman, *A GUIDE TO CRITICAL LEGAL STUDIES* (Cambridge: Harvard University Press, 1987) at 262-68.

strategic choice that depends largely on the available alternatives. Pragmatically, in light of the likely delays given funding cuts to commissions and the likely appeals, future disputes regarding student publications and campus sexism will probably be resolved where possible by university administrators who are at least potentially in a position to provide more immediate, continuous, and far-reaching systemic relief and whose actions are not subject to narrow legal and constitutional constraints.²⁹⁵ Nonetheless, recourse to the Human Rights Commission was important for women responding to the *Red Eye* and may yet be important wherever administrators are hostile or indifferent to feminist concerns. In addition to being costless and relatively flexible in terms of evidentiary rules and remedial relief, the *Red Eye* proceedings also provided an opportunity to mediate and the power to press the claim further. Given a hostile community and an indifferent administration, women's groups had and may yet have few if any other alternatives in bringing about change.²⁹⁶

Legal reform is obviously a limited form of political struggle. Progressive change for women will ultimately depend on the organization and participation of women at all levels of the university and the wider community. Although as Adrienne Rich noted, universities as presently structured are not at the vanguard for change, the university is still capable of being "a vital spot", "if only because it is a place where people can find each other and begin to hear each other."²⁹⁷ It is important that this struggle is now taking place to an even greater degree on campuses across the country; a "boys will be boys" culture has for far too long presaged and sustained an "old boys network".

²⁹⁵ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 2 C.R.R. (2d) 1.

²⁹⁶ See, e.g., the complaint filed 11 January 1990 by a coalition of women's groups against all universities in Manitoba alleging a broad range of employment practices (including inadequate day care facilities) which systemically discriminate against women. In order to expedite investigation of the complaint, the Faculty Association of the University of Manitoba has retained its own legal counsel. To my knowledge, no other complaints of systemic discrimination are now being actively pursued against universities in Canada.

²⁹⁷ *Supra*, note 12 at 127.

