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Commentary
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Abstract
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COMMENT

PROHIBIT OR REGULATE? THE FRASER REPORT AND NEW APPROACHES TO PORNOGRAPHY AND PROSTITUTION

BY MICHAEL KANTER*

The Fraser Report adopts a liberal-feminist approach to pornography and prostitution at a time when conservatism is on the rise. Michael Kanter reviews the basis for and the recommendations of the Report and concludes that, rather than going too far to the political left, it has not gone far enough in addressing male domination of North American society.

I. INTRODUCTION

In June 1983, the government introduced amendments to the Criminal Code which dealt with pornography and prostitution. There were two main features of the proposed amendments. One involved making it easier to obtain convictions for street soliciting by making it possible to charge customers as well as prostitutes and by making soliciting in a car a crime. The second feature involved including a reference to “degrading representations” in the Criminal Code definition of obscenity. These proposed amendments were part of longer standing efforts to deal more comprehensively with issues relating to the commercial exploitation of sex. Generally speaking, the extended efforts to deal with these issues have resulted in a series of recommendations urging a strengthening of the laws controlling prostitution and pornography.¹ None of the major proposed amendments or recommendations

1 E.g. with regard to pornography, in 1978 the Standing Committee on Justice and Legal Affairs submitted a report to the House of Commons calling for strengthening of pornography laws (Fraser Report, infra note 2 at 133). With regard to prostitution, the police have been urging reform of the law since the 1978 Supreme Court decision in the Hutt case, [1978] 2 S.C.R. 476. In 1983, the Standing Committee on Justice and Legal Affairs issued a report recommending a strengthening of the impact of the soliciting section of the law (Fraser Report, infra note 2 at
have yet been enacted.

At the same time as the introduction of the amendments, the Justice Minister also announced the creation of a committee (the Fraser Committee)\(^2\) to study all questions related to pornography and prostitution. The Minister suggested that he would proceed with the amendments but that he wanted to hear from the Committee on more basic questions, such as whether or not prostitution should be illegal, before bringing in substantial changes to sex laws.\(^3\) This put the newly created Fraser Committee in an interesting position. Had the Committee followed the trend toward advocating strengthening the laws relating to prostitution and pornography, it would almost certainly have resulted in tougher legislation. However, the Committee has recommended the decriminalization of prostitution and the prohibition only of pornography which depicts physical harm or abuse. This is an important reversal of approach, especially at a time when conservative forces have been gaining strength. Hence, the approach and analysis of the Committee deserves attention.

This review essay of the Fraser Report is divided into four parts: (1) its political and social context; (2) an account of the Report, discussing the approach, major recommendations and some important research findings of the Committee; (3) an analysis of the Report, involving consideration of some of its best features, as well as some of its most important problems; and (4) a deeper framework which might inform Canadian public policy debates on these two major issues.

II. THE CONTEXT OF THE REPORT

While it may initially appear that the general position advocating a strengthening of the law in relation to pornography and prostitution represents some kind of consensus about these issues, this does not turn out to be the case. The Justice Minister was reacting to two very different pressures in setting up the Committee. One involved feminist concerns about the prevalence of degrading images of women. The other involved expressions of frustration by police and municipal officials about the apparently unmanageable problem of street prostitution.

Firstly, feminist concerns about the prevalence of degrading images of women are part of a wider feminist movement. It has caused

\(^{467-68}\).

\(^2\) The Committee's final recommendations are contained in *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (1985) (hereinafter the Fraser Report).

\(^3\) See Report in the *Globe and Mail* (24 June 1983) 1.
contemporary society to struggle with issues as varied as the sexism of language, legal process, philosophy and art. While the feminist community involves many different approaches, there is some unity regarding the concern with degrading images of women. Pornography is a significant theoretical issue within the women's movement because it centres around sexual behaviour. Described as both a symptom and a cause of the oppression of women, it is a fruitful place to look for the essence of contemporary feminism.

Many feminists believe that sexual behaviour itself reflects power relations. In a sexual encounter, men have traditionally been described as the initiator, aggressor and dominant partner. This is often assumed to be a fact of nature. Feminism wishes to show that sexual relations unfold in the context of specific cultures and, consequently, that men are defined as the dominant partner both in sexual encounters and in other spheres of activity as a result of the dominance (over time) of men as a social group. The dominance established in sexual relations has historically been carried through to other spheres such that normal males and females are expected to exhibit different personality traits. The segregated sexual and personality roles are now being attacked more strongly than ever and, for feminists, pornography demonstrates the role society has cast for women.

Given this context, it is not simply extreme violence which has been described as pornographic, but also images which depict women as locked into a role which places total emphasis on appearance. Feminists see pornography as oppressive because it promotes an image of women as essentially sexual objects. Men view such images as a predominant part of their exposure to media, and this is said to affect their attitudes towards women. Feminists have described pornography as hate literature, as the portrayal of women as whores by nature and as telling lies about women. Some have called for legal prohibitions on such material.

The second concern giving rise to the Committee was very differ-

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4 See, e.g., MacKinnon, “Feminism, Marxism, Method and State” (1982) 7 Signs 515 at 519-31, where she speaks of sexuality as determining gender. She suggests that feminism identifies sexuality as the primary social sphere of male power.

5 There is a large volume of work dealing with the issue of male dominance and its origins, examining the issue from different perspectives. See, e.g., Eisenstein, “Developing a Theory of Capitalist Patriarchy and Socialist Feminism” in Eisenstein, ed., Capitalist Patriarchy and the Case for Socialist Feminism (1979) 5; Engels, The Origin of the Family, Private Property and the State (1942); Firestone, The Dialectic of Sex (1970).

6 See, e.g., Hughes, “Pornography: Alternatives to Censorship” in Kroker & Kroker, eds., Feminism Now (1985) 96 at 96; the model anti-pornography by-law drafted by Dworkin and McKinnon, s. 2, reprinted in Ms. (April 1985) 37 at 47.
ent. The catalyst for recent police frustration was the Supreme Court of Canada decision in the *Hutt* case. In that case, soliciting was held to involve an element of pressing or persistent behaviour, and it was also suggested that a car was not a public place. This made it more difficult to secure convictions for the crime of soliciting.

From this difficulty has followed a series of provincial, municipal and police initiatives aimed at controlling street prostitution. A Calgary city by-law was ruled unconstitutional on the ground that it was more properly criminal law and therefore fell under federal jurisdiction. Other municipalities have by-laws which could be open to constitutional challenge. At the time of the creation of the Fraser Committee, the Chairman of the Canadian Association of the Chiefs of Police suggested that prostitution laws had to be strengthened even beyond the proposed amendments introduced by the Justice Minister. He said that the problem was particularly bad in Vancouver, Toronto, Montreal, Calgary and Halifax. In March of 1985, the Nova Scotia Court of Appeal refused a request by the Attorney General of that province for an interim injunction aimed at prostitutes based on public nuisance. In the House of Commons, just prior to the announcement of the formation of the Committee, the Conservative justice critic said that mayors and municipalities wanted firm action to overcome the “pressing and persistent” requirement imposed by the courts.

III. ACCOUNT OF THE REPORT

One of the issues which the Minister of Justice wanted to resolve with the establishment of the Committee was whether there was a consensus in Canada on sex-for-sale issues. The study involved public hearings across the country, empirical research commissioned by the government for use by the Committee (including a National Population Study on Pornography and Prostitution) and reliance on the work already available on these issues. It is an understatement to say that the Committee did not find consensus. The groups most concerned with each issue were different, and when these different groups discussed the same issue, they were likely to disagree. For example, while the police wanted to make convictions for street soliciting easier to obtain,
women's groups often wished to decriminalize prostitution. The Report will, given this lack of consensus, offend some and be welcomed by others.

The Committee did not see its task as simply ascertaining the views of the public and, from a position of neutrality, suggesting how the government might implement public preferences. The Commission considered the gathering of public views to be an important part of its task, but it did not avoid taking a theoretical position on the issues which in fact guided its analysis and recommendations. The Committee sets out three philosophical positions which might inform strategies to deal with pornography and prostitution. A conservative position is described as involving the view that sexual relations should take place within marriage, that the traditional family needs to be preserved, that sexual conduct such as homosexuality is unnatural and deviant, and that the state should legislate and represent the shared morality of the community. A liberal position is said to be closely identified with John Stuart Mill's principle that the state is justified in interfering with the liberty of individuals only when those individuals harm others. A feminist position is described as involving a broad coalition of interests rather then being a discrete philosophy. The unifying element to feminist thought is the view that society is built around a sexual class system which frustrates the aspirations of women for economic, social and sexual freedom.

Of these three positions, it is clear that the Report rejects the conservative one, because two of the principles that the Committee adopts are "individual liberty" and "an appreciation of sexuality". Individual liberty refers to a zone free of state regulation where individuals are responsible only to themselves. An appreciation of sexuality refers to the Committee's position that the child is a sexual being and that sexual expression between consenting peers is a human need. Although the Committee does not adopt any one of the theoretical positions, its recommendations can best be described as liberal with healthy doses of feminism.

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13 See, e.g., Globe and Mail (24 June 1983) 3, where it was reported that the police favoured tough laws while the National Action Committee on the Status of Women favoured decriminalization.

14 Fraser Report at 17-18.

15 Ibid. at 15.

16 Ibid. at 19.

17 Ibid. at 25-26.

18 Ibid. at 26.
A. Pornography

The Report notes the difficulties in defining pornography. In its approach, the Committee divides the material into two categories. One is the sexually explicit and the other is sexual content combined with degradation or abuse of women. Ultimately, the Report recommends regulation of the sexually explicit and prohibition with criminal penalties for the sexually explicit plus abuse. However, the Committee recognized the difficulties associated with the concept of the abuse of women, pointing out, for example, that presenting women as commodities (abuse?) might catch much of contemporary advertising.\textsuperscript{10} The Committee therefore explicitly confronts the continuum problem, that is, the problem of drawing an effective line between pornography and advertising. It rejects the idea of casting a broad net because of the danger of stifling the creation of erotic art by women.\textsuperscript{20}

The following would be the practical effect of the Report's recommendations on controlling pornography. At the extreme end, material which was produced in such a way that actual physical harm was caused to the persons depicted or material which advocated the sexual abuse of children would be criminalized. This would include the worst violent material, such as "snuff" films. At the other end, it appears that Playboy and Penthouse would be included in the sexually explicit material which would attract regulation. This material would be accompanied by warnings as to its content and would be inaccessible to those under eighteen years of age. This would solve the problem of forcing sexually explicit material on the unwilling store customer. In the middle would be material which \textit{represents} physical harm, which would also be criminalized. While the intention is to keep the meaning restricted to depictions of assault and violence, there is the possibility that this middle category could include the more abusive depictions of Penthouse. Generally, however, the Committee recommends regulation rather than prohibition of the degrading images which are the mainstay of a magazine such as Penthouse.

The Report notes some interesting findings on the issue of pornography and public perceptions. Some groups painted a picture of increasingly large amounts of violent pornography and child pornography being consumed by the public. The Committee suggests that this is unconfirmed, relying on content analysis by the Badgely Report and other

\textsuperscript{10} Ibid. at 56.

\textsuperscript{20} Ibid. at 58.
Fraser Report

recent reports. It also relied on a working paper prepared on sexually explicit videos in British Columbia. The researchers found that violence and domination are not predominant themes. In fact, triple X videos contained sex scenes that involved mutual consent and enjoyment more often than did adult videos. As well, none of the films involved children.

The Committee does confirm, however, the public perception that technology is outstripping the law’s ability to deal with pornography. This includes programming available by satellite antenna, by pay television and through private videos. Pay television is subject to Regulations made under the Broadcasting Act. The most recent policy is to allow material for an adult audience to be shown rather than prohibiting representations, provided a warning is given. Satellite television is the main difficulty, as it is outside the regulation system of the Canadian Radio-Television and Telecommunications Commission (CRTC). The amount of pornographic material being received is unknown, but regulation would require international cooperation. The sale and rental of videotapes for private consumption is dealt with differently, depending on the province. Many provinces do not regulate videos for private use. Ontario, however, now requires video stores to possess a licence and will be regulating the videos available. This will be an onerous task, involving additional staff and possibly up to six thousand titles to be reviewed.

With regard to the question of exposure to pornography and associated harm, the Committee asserts that it “is not prepared to state, solely on the basis of the evidence and research it has seen, that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or the disintegration of communities and society.” Existing research is reported to be inconclusive. The Committee recognizes that this kind of causal connection is not necessary for many feminists, who view the harm in wider terms. It also raises the question of the impact of long-term low level exposure to such things as adult movies and Penthouse magazine. This, the Report indicates, may be what many Canadians see, and yet existing research offers nothing on such issues.

Generally speaking, the Report is quite well informed by feminist insights. For example, it notes that the right to freedom of expression

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21 Ibid. at 93.
22 Ibid. at 95.
23 Ibid. at 183.
25 Fraser Report at 99.
conflicts with the right of women to equal treatment, when rights are defined more broadly. An expanded version of the right to equal treatment suggests that curtailing the “right” to read pornography is infringing on one right to protect another, not simply state infringement on individual rights. What is involved is a conflict between rights, with policy makers forced to choose between them. The Committee takes seriously the position that one must carefully consider the “right” of women to be free from the possible effects of men exercising rights to freedom of expression.

The Committee notes an important debate taking place in the feminist community. One recent position describes pornography as discrimination or hate literature. This view recommends using the human rights commissions to deal with pornography as a violation of equality rights. Thus, for example, a woman would be able to sue for damages or for injunctive relief on proof that a merchant was selling pornography. The harm is the material itself, without requiring proof of harm to the individual woman offended by the material. Alternatively, the hate message provisions of the Criminal Code could be used by women. Pornography would be classified as hate literature and its supply would be punishable as a crime. Intent to promote hatred would no longer be an element of the offence.

The use of human rights legislation or criminal code provisions raises, for other feminists and artists, the haunting prospect of new and more stringent censorship. The Report is aware of this position. This view makes two notable points. One is that pornography is not a significant cause of sexism but is instead a reflection of it. The second is that censoring at a time when women are trying to find new ways of expressing their sexuality will inevitably affect the wrong people. Thus, while pornography is seen as objectionable, the remedy is not to censor, which represents new dangers, but to advance the position of women through economic and social reforms.

B. Prostitution

This broader economic and social approach is taken by the Committee when it considers the issue of prostitution. Its first five recommendations on this issue involve non-legal, social and economic responses. For example, the first involves a commitment by both levels of

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26 Ibid. at 20.
27 See ibid. at chs. 24-25, where the Minneapolis by-law is discussed.
28 The best known Canadian study adopting the anti-censorship stance is Burstyn, ed., Women Against Censorship (1985).
government to remove the economic and social inequities between men and women. The Committee sees economic factors as a primary cause of prostitution, and sees it becoming a less attractive option with the coming of economic equality. It takes the position that prostitution cannot be addressed solely through the law. The position that convictions for soliciting should be more easily obtainable to rid cities of the problem is rejected. This is seen simply as chasing the problem elsewhere and avoiding the deeper causes of prostitution.

The legal position advanced is that since prostitution is unlikely to disappear in the near future, legislative efforts should concentrate on allowing prostitutes to carry on their business, while attempting to redress the underlying causes of prostitution. Only the most severe nuisance aspects of street soliciting should be dealt with by law. The type of unacceptable conduct by either prostitutes or their customers which would be penalized is a sequence of intrusive conduct, not the soliciting itself. This could include seriously impeding the flow of traffic or using sexually offensive language.

In line with the approach of enabling prostitutes to carry on their business as discreetly as possible, the Committee recommends that prostitutes be able to operate out of their own residences, either alone or in pairs. The Report recommends that the provinces have power to regulate prostitution establishments in commercial areas. Thus, the Committee takes the controversial position that soliciting and operating a prostitution establishment should be decriminalized. The Report is aimed at enabling prostitutes to run their own affairs, moving prostitution from public streets to more private establishments and penalizing the pimps who force women to engage in prostitution.

The Committee takes a courageous stand in suggesting that prostitution is a symptom of a sexist society and that it would resist further attempts to stamp it out. The demand for prostitution continues to exist. The Report suggests that the majority of customers are married men between the ages of thirty and fifty, although research on customers is inconclusive. Here it should be noted that the incidence of prostitution is likely higher than that indicated in many surveys, since

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29 Ibid. at 527.
30 Ibid. at 526.
31 Ibid. at 537, 547.
32 Ibid. at 377-78. While the research provided for the Committee, based on a nation-wide survey, indicated that only 4% of men had visited prostitutes at least once, in a recent edition of Mademoiselle, Wetzsteon states that “[a]ccording to almost all surveys, at least three quarters of American men have been to prostitutes at least one in their lives.” (April 1984) Mademoiselle 196 at 197.
many men will not admit to using the services of a prostitute or escort service. Given this context, the Report recommended that those involved in the profession should be allowed the dignity of carrying on business without being hassled by the police or pimps.

C. Children

The Committee devotes a shorter part of the Report to the effects of pornography and prostitution on children. It is here that one can say that the Committee draws on a consensus. While later some difficulties with the Committee’s approach will be pointed out, there is a broad consensus that children require protection from the harmful effects of pornography and prostitution.

With regard to pornography, the Report suggests that the commercial production of child pornography is not a problem because it does not appear to occur in Canada. It recognizes the existence of small-scale non-commercial production, and recommends strong sanctions against persons who use children in such productions. The Report notes that the main problems involve access to pornography by children and the impact on children and adults of pornography involving children. The Report recommends that children under eighteen should not be exposed to pornography and that there should be criminal penalties for the possession of pornographic material which involves children under the age of eighteen. In practical terms, retailers who carry pornographic material would have to prohibit access of it to children. They would also be subject to criminal penalties for possessing pornography involving children. A defence to selling child pornography, based on exercising due diligence to inspect the material, would exist.

The Report suggests that although juvenile prostitution exists, most prostitutes appear to be sixteen years or older. One of the major new provisions recommended by the Committee is the creation of a criminal offence for persuading a person under eighteen to engage in sexual activity for money. This was felt to be necessary because the Criminal Code does not now deal with procuring of children any differently from procuring of an adult. A new related offence would be being supported by the proceeds of the sexual activities of a child. The offence need not involve threat or force. Therefore, an important distinc-

33 Fraser Report at 569.
34 Ibid. at 584-85.
35 Ibid. at 631.
36 Ibid. at 573.
37 Ibid. at 651.
tion made by the Commission is that, whereas in the case of adults, an
offence exists only when a woman is coerced into prostitution, for
young people under eighteen, even a voluntary arrangement is illegal.

IV. ANALYSIS OF THE REPORT

This section will focus on three controversial issues specifically
dealt with by the Committee, pointing out some positive features of and
some problems with the Report. Following this, there will be a discus-
sion of a general problem with the Report. While some problems will
be highlighted, this section is not meant to detract from the basic posi-
tion that the Report is a thoughtful, sensitive study and valuable for
Canadian policy debates. Since it rejects the option of taking tougher
action on prostitutes and on pornography, present governments of all
levels will likely reject many of the recommendations. However, hope-
fully, the Report represents the beginning of a more sensitive and
thoughtful approach to sex issues.

Beginning with the specific issues and proceeding to the more gen-
eral issue, the focus will be on how the Committee integrated impor-
tant feminist insights but also sometimes did not follow through on its
own insights. The specific issues to be discussed include the use of a
civil cause of action to combat pornography, the connection between
pornography and violence and, finally, the Committee's use of eighteen
as the age of adulthood. The more general issue concerns the need to
stress more basic, structural reforms in order to advance the position of
women.

A. Civil Cause of Action

The Report wisely avoids recommending the use of the Criminal
Code as a mechanism to prohibit images offensive to women. It rejects,
for example, the idea of using the word “degrading” in the Code, since
such a strongly subjective element could present real threats to mate-
rial which is not sexist but sexual. Such an approach could play di-
rectly into the hands of conservatives who find sexual expression itself
degrading. They are against sexual expression outside the traditional
family, while liberals and feminists often are not. While the Report
rejects this option, it favours the use of a civil cause of action, focusing
on the violation of human rights inherent in pornography. The harm
would be the material itself, without requiring proof of actual damage.
Damages or an injunction could be awarded for the promotion of ha-

38 Ibid. at 269-70.
tred or contempt of a class of persons on the basis of sex.\textsuperscript{39}

There are two difficulties with advocating the use of a civil cause of action to stop pornography. One is that it introduces the problem, which the Committee wanted to avoid, of presenting new threats to sexual material. Note that the Report has already recommended use of the \textit{Criminal Code} to penalize depictions of sex plus violence and use of human rights legislation and the \textit{Criminal Code} to move pornography away from public places. To go farther and recommend injunctions to prohibit material would re-introduce problems involved in defining precisely to what one objects. A civil cause of action is desirable in that it removes some of the control from the police, and focuses on violations of the rights of women as a class rather than on vague definitions of obscenity. However, whatever the method of prohibition of the offensive material, the difficulty revolves around defining what is pornographic.\textsuperscript{40} The flexibility required in the law, even for the purposes of anti-pornography feminists, will encourage conservative forces to use the law to stamp out sexual expression altogether.

Stopping sexist images at a time when society is trying to encourage new, non-sexist forms of eroticism is dangerous. It is quite likely that the wrong people, from a feminist point of view, will be penalized. Sexual material which celebrates sensuality, and appears to encourage sexual activity, will be seen as subversive because it may undermine the traditional family. There is enough experience with present censorship laws to know that, even apart from gay and lesbian sex against which many people react, non-sexist material is often harder hit than pornography. A recent example, which indicates male fear of female sexuality, included the owner of a Toronto bookstore being charged with exhibiting obscene material. The content was a display involving a critical look at female socialization which included red-stained menstrual pads.\textsuperscript{41} Critical examinations of issues, such as this and the film "Not a Love Story", are particularly susceptible to being censored.

Feminists have the difficult task of saving eroticism from its sexist context. It is very difficult to find the erotic when it is so often imbedded in the pornographic. Most familiarity with nudity comes in forms degrading to women, but the danger of stopping nudity itself should not

\textsuperscript{39} \textit{Ibid.} at ch. 24.

\textsuperscript{40} See, \textit{e.g.}, Duggan, Hunter & Vance, "False Promises: Feminist Anti-Pornography Legislation in the U.S." in Burstyn, ed., \textit{Women Against Censorship} (1985) 130 at 134. They discuss the Dworkin/MacKinnon by-law.

\textsuperscript{41} Reported in (1985) 6 \textit{Broadside} at 5.
be underestimated. Providing more ways to prohibit material heightens this danger.

The second difficulty is that too much of society’s visual landscape is pornographic. The very norms of society are objectionable. In fact, such an argument has been made for art as well as for popular culture. For example, consider the words of a Toronto writer:

Is Picasso, who made his own sexual prowess and domination of women the subject of his art, and was fond of saying that all women are either goddesses or doormats, less effective a propagandist for sexism than Larry Flynt? Or does he merely have a more select and influential clientele?\(^\text{41}\)

Such a point cannot effectively be made through a legal prohibition strategy. The Report recognizes how pervasive the problem is\(^\text{42}\) and that legal prohibition strategies are not effective for counteracting it.\(^\text{43}\) Yet, by promoting the use of civil rights actions, the Report is adopting the view that it is not mainstream material which is most problematic. This view is that it is other material, for which one can sue the supplier, which is the main problem. By prosecuting around the edges, it is suggested that it is the extreme images which constitute the main problem, which is not the case.\(^\text{44}\) Many media images are erotic in a manner degrading to women, more subtle, but promoting the values of pornography.\(^\text{45}\) The message should be that mainstream images are objectionable, with a strategy designed to make people aware of that position.\(^\text{46}\)

\(^{41}\) Steele, "A Capital Idea: Gendering in the Mass Media" in Burstyn, ed., Women Against Censorship (1985) 58 at 62-63, 71. Also see, e.g., Globe and Mail (6 June 1985) M1, where a report on Media Watch, the women's group which watches media stereotyping, illustrates this point. The group suggested that self-policing by the advertising industry was not working. An official with the Canadian Advertising Board responded that feminists overwork the word "pornography" and that "pornography is what you find in Hustler magazine." This shows how censorship can be misleading. As the most offensive images are concentrated upon, the advertising industry is increasingly led to believe that the problem has nothing to do with them.

\(^{42}\) Crean, "Eroticism is Where You Find it", Globe and Mail (June 1984).

\(^{43}\) Fraser Report at 56.

\(^{44}\) Ibid. at 264.

\(^{45}\) Such a strategy has been adopted by some feminists, and more people are being made aware that media images are offensive. Activity has included boycotts, publicity campaigns, sticker campaigns and even civil disobedience. Doing something about pornography includes strategies beyond legal efforts to prohibit its supply. As well, boycotts and protests tend to empower people more than isolated law suits or criminal prosecutions. Examples include the protest against Sanyo stereo advertisements carried on public transportation in Toronto in 1982 (noted in Steele, ibid at 62); defacing of billboards in major cities; more controversial action such as attacks on the Red Hot Video store in British Columbia; and more mainstream activity such as the Conseil du statut de la femme du Quebec soliciting entries for the worst sexist advertising as part of a campaign to build awareness of unfavourable images of women.
B. Pornography and Violence

The thrust of the new prohibitory effort against pornography is tied to the argument connecting pornography to violence. The main argument is that individual acts are occurring on a large scale and that society can ill afford to wait until there is proof that the use of pornography is causally related to the commission of sexual offences. The Committee was unable to accept that pornography is a significant causal factor in the commission of violent crime. The Report stresses the inadequacy of existing research, and is also aware that many people view the harm in wider terms than direct contribution to violent crime. The Commission is courageous in not succumbing to the pressures of recommending harsh action on pornography because of an assumed connection between it and violence. While debates on this issue will certainly continue, several difficulties need to be pointed out with the view that pornography can be isolated and linked to violent behaviour.

The Report points out how little is known about the effects of low levels of exposure to pornography over long periods of time, suggesting that this may be the sort of use characteristic of most people. If Penthouse and Playboy are included in a definition of pornography, it is far too pervasive a phenomenon to link to violent behaviour. A cross section of the population purchases such magazines and attends pornographic films. If the harm was considered in wider terms — that is, of behaviour such as insensitivity and greater tendencies toward abuse or violence in the general male population — it is hard to separate the impact of Penthouse and Playboy from the general, highly erotic but sexist elements of television, advertising and film. In so far as pornography degrades women, so does the Calvin Klein advertisement or the James Bond movie. Attacking one without the other will have little impact on the cultural milieu which devalues women.

If one is more concerned with sex offenders, then it is hard to link the use of pornography with the commission of sexual crime. While sex offenders may use pornography, so do many other people. As McCormack points out, some researchers have found that sex offenders do not use pornography significantly more than the control group; they used it

48 Fraser Report at 99.
49 Ibid. at 96-103.
50 Ibid. at 101-102.
differently. The sex offender, she suggests, was one who has problems with sexual development, which leads to an atypical use of pornography. It seems that, while much pornography demeans women in a general sense, individual rapists and child abusers need much more than pornography to commit sexual assault. Sexual abuse in childhood, for example, is more likely to be a significant causal factor in such assaults, although research is inconclusive.

C. Children

The Committee recognized one of its principles to be an appreciation of sexuality. This extended to those under eighteen, as the Report adopts the view that the child is a sexual being. However, when it makes recommendations on pornography and prostitution, the division between youth and adulthood is the age of eighteen. Some of the recommendations are unrealistic, given this age category and the nature of these issues.

For example, under the recommendations for the classification of pornography, material which is sexually explicit may not be seen by or sold to those under the age of eighteen. While it may be desirable to protect the vulnerable, the goal of opening up sexual information is also important. In one sense, vulnerability requires access to more information, not a heightened mystique which is so commonly associated with sexuality. Those who are fifteen to seventeen years old need not be shut off from sexual depiction. Society certainly does not shut off violent depictions in, for example, mainstream movies such as “Indiana Jones and the Temple of Doom”, which involved a scene where one person rips out the heart of another. The over-defensive reaction which one may have when children and sexuality are considered is a symptom of one’s own severe repression of sexual matters.

The Report recommends a ban on depictions of sexual activity for the young. Just when young people become sexually aware and active, society wants to shut off information. This only intensifies the repression and stifles normal sexual curiosity. Contrary to the conservative view that sexual activity can be stopped by preventing the flow of information, it should be accepted that young people are sexually active whether or not they are informed. For example, statistics provide information on just how active young people are. In 1981, more than twice

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62 Ibid. at 191.
64 Fraser Report at 26.
as many women fifteen to nineteen years old had abortions as women over twenty-five. Young people are already engaged in sexual activity, but they are not allowed to see representations of it.

The Committee does recommend education programmes designed to increase the understanding of human sexuality. However, the only information available to the young would be under supervised conditions. While it is very important to discuss sexuality with the young under those conditions, it should not be expected that they only have access to what educators provide. Unfortunately, in North American society, pornography is sometimes the most accessible sexual information. It will be sought out and prohibiting it is unrealistic. Young people who are fifteen to seventeen years old can be responsible young adults and they are not overwhelmed by exposure to pornography.

D. General Problem

The Fraser Report moves the debate on pornography and prostitution in the proper direction. That direction regards these phenomena as symptoms of deeper problems related to sexual inequalities. It also sees that, with regard to pornography, certain kinds of depictions ought to be of concern, whereas with regard to prostitution, prostitutes themselves require more control over their business affairs with less harassment. Regarding the issue of pornography, the Committee is sensitive to the debates going on in the feminist community. Pornography is part of a political problem involving power imbalances in society. The Committee has explicitly recognized this. It also recognizes that in an important sense, pornography is simply a more extreme variant of the same images presented by the mainstream media. The Report does not, however, stress the need for structural reforms to redress the power imbalance and the need to address the problem of the content of the media.

When it comes to a discussion of prostitution, the Report does emphasize the need for social and economic reform. It discusses the causes of prostitution and recognizes that the economic position of women must be improved for prostitution to become less prevalent. However, the commitment is either very abstract (for example, removing inequality for women) or narrowly tied to the problem of prostitution (for example, social services for prostitutes). While these commitments are

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66 Fraser Report at 668.
67 Ibid. at 56.
68 Ibid. at 263.
important, there is insufficient attention to making some basic changes. If the analysis of both pornography and prostitution as women's issues is developed further, the need for specific changes can be pointed out. Both phenomena flourish in a society in which women as a social group have traditionally lacked power. Women have been excluded from public life and have been economically dependent on men in their private lives. In an era when individual independence is so highly prized, women are second-class citizens.

What requires attention are those aspects of public policy which continue to assign a dependent role to women. This includes policies both inside and outside the sexual sphere. One of the reasons feminists consider the abortion issue central to their cause is that it represents the assertion of control over female sexuality, the displacement of male control by female control. The resurgence of interest in midwives is also part of the demand by women to control their own birth process, in preference to the control of the male-dominated medical establishment.

However, issues outside the sexual sphere are also important. Men have never had to confront women as equals in the workplace or in the family. Societal institutions and public policy encourage men to relate to women as emotional support for them and as sexual objects. Women are passive, emotional and dependent, while men are active, strong and independent. Yet, when power relations are equalized, the two sexes will exhibit both sides of what are essentially human qualities, not sex-related ones. Pornography reflects the fact that real women have been locked into one half of the established, segregated personality roles. Its depiction of women as dependent and passive objects rather than subjects with their own needs and desires, will have less appeal when general power relations are equalized. Perhaps it will be replaced by depictions of mutual activity.

Equalizing power relations requires the implementation of policies which favour women as a social group. Many of these policies have already been discussed in the political arena, and some are close to implementation. In considering examples, affirmative action frequently heads the list of demands. It is important to break down the

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88 Burstyn makes the argument that pornography is more a reflection than a cause of women's oppression. She sees serious dangers in pouring energy into attempting to censor pornography. I have benefitted from her article, “Political Precedents and Moral Crusades: Women, Sex and the State” in Burstyn, ed., Women Against Censorship (1985) 4.

89 As examples: family law reform has been a major issue of reform in many provinces in the last few years, in particular Ontario since the end of 1982; the last federal and provincial election in Ontario both featured election promises on the issues of equal pay and affirmative action; it was recently reported that Manitoba garment manufacturers are unhappy about, among other things, equal pay legislation which has been proposed. Globe and Mail (11 June 1985) B16.
ghettoized job market in both the public and private sectors. Equal pay for work of equal value is also important. As well, more subsidized day care space is vital in order for real choices to be available for women. Men must also be encouraged to spend more time with their children, and paternity leave is one way to do this. On another front, the issue of pensions is often raised. Homemaker pension plans need to be considered so that work in the home is valued in the same way that work is valued outside the home. Finally, in the area of family law, property division and support laws upon marriage breakdown require reform to ease the dependency often associated with a breakdown. Women who perform traditional tasks are often left with few economic resources because they were dependent on the husband's income during marriage. Despite the fact that the division of labour within the family enables the husband to acquire property, after a separation the husband is usually free to keep well over half of the property acquired during the marriage.

These are just several of the types of reforms needed to help equalize power relations so that men and women can interact on a basis of mutual need. At present, public policy mainly helps create and reinforce psychological, social and economic dependency for women. It is not enough to speak in general terms, as the Report does, about the need for government to strengthen its commitment to removing inequality. Undoubtedly, governments will proclaim that they are committed to removing inequality. The issue is how to do so. Given the context of two of the issues which point most clearly to the need for greater economic and political power for women, governments need to be pinned down on the specific reforms which need to be implemented. Such reforms will slowly alter the nature of the social order.

In addition, particular attention needs to be focused on the content of the media, which has a significant impact on everyone's life. The Report does discuss the need for educational and informational programmes to address the concerns about media content. It also discusses changing that content, through the use of the CRTC as a regulatory body. It is possible, for example, through the CRTC, to utilize guidelines to reduce sex-role stereotyping. These points are important, but what the Report fails to emphasize are the policies needed to give women access to the media in order to provide alternative images to the dominant, objectionable ones. For example, the National Action Committee on the Status of Women suggested to the Applebaum-Hebert

61 Fraser Report at 264.
62 Ibid. at ch. 51.
Committee, which was studying media related issues, that a women’s television network be established. The National Film Board of Canada already has a separate women’s studio, which has produced important films such as “Not a Love Story”. Affirmative action in parts of the media is also important (for example, news broadcasting), as is assistance for the production and distribution of independent film and video. Public assistance to non-commercial publications to ensure wider distribution of alternative books and magazines has also been proposed. All of society’s energy cannot be poured into objecting to the visual images which exist, without attending to the forces behind their production. Censorship may be less expensive but it is not more effective.

V. A DEEPER FRAMEWORK

To see both pornography and prostitution as expressions of women’s position in the world, one must look at some of the ways in which male domination is institutionalized. Central to feminism is the assertion that women are caught in structures which perpetuate their oppression. Individual men need not be guilty of intent to discriminate. If present institutions are allowed to operate, women will be disadvantaged. For example, the family and the nature of work can be considered in order to gain further insight into the nature of patriarchy. One should also note that the family and economy are interdependent structures. For example, at a time when the biological requirements of mothering are lessened (such as bottle feeding, fewer children, greater mobility and so on), women’s role in the home is emphasized even more. That is, the importance of family life is stressed and the burden falls on the mother, since father remains the breadwinner. Home life represents the emotional sphere of everyone’s life, as opposed to the cruel world of the economy. While there is no doubt that family life satisfies real needs, there is some difficulty with the present form of the family, which meets needs at a heavy cost to women.

During the first years of life, little boys and girls learn how to be “male” and “female”. Many cultures attach exclusive kinds of behaviour to each sex. Freud took the position that pre-Oedipal children are

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63 Steele, supra note 45 at 74.
64 Burstyn, supra note 53 at 165.
66 See, e.g., Zaretzky, Capitalism, the Family and Personal Life (1976).
bisexual in that they have active and passive aspects to their sexual instincts and that both the mother and father can be the object of desire for both children. In the Oedipal stage, boys become male by renouncing passivity and girls become female by renouncing their more active side. The final result of “normal” maturity in patriarchy is that men are active, independent and aggressive while women are passive, dependent and submissive.

Freud recognized that the maturing process was both painful and protracted. Each person does not start off as an obedient, productive, self-regulating being. One grows into specific roles which are culturally determined. In any human culture, children go through a painful growth process from an undifferentiated, bundle of desire to a separated ego which represses elements of the sexual instinct. While such repression is inevitable, its particular expression may not be. This is one of the radical insights of Freud, drawn out by Marcuse and developed by Horowitz.

Character traits vary in different societies. Freud was discussing those of industrialized Europe. Such a society could be called a patriarchal, capitalist one. Conceptually speaking one can look at two systems at work. There is a patriarchal social order in which men are the dominant partners, as well as a capitalist economy, in which the dominant mode of work is wage labour within a highly specialized and rigid division of labour.

Focusing on the patriarchal aspect, man is the protector, the dominant partner who is independent and strong, with the woman exhibiting the opposite characteristics. In such a society, the penis is “superior” to the clitoris and vagina. However, this is culturally significant, not biologically so. A central point of feminism is that the power relationship between men and women has important roots in sexual activity. The fact that sex has predominantly been defined as man actively thrusting the penis into the woman who passively receives it reflects man’s dominant social position, not the “natural” sex act. Note that biologically speaking, it is not unusual for sexual activity to involve the woman on top engulfing the “smaller” penis; yet culturally men make love “to” women. Also note that women are capable of multiple orgasms but sex-

69 Horowitz, ibid. I have relied on the work of Horowitz in discussing both Freud and the nature of work.
70 Marcuse, Eros and Civilization (1955); Horowitz, ibid.
71 See, e.g. Rubin, supra note 68 or MacKinnon, supra note 4.
ual performance has traditionally been defined as involving men.\footnote{See, Hite, \textit{The Hite Report: A Nationwide Study of Female Sexuality} (1981). Apart from findings related to the female capacity for multiple orgasms, there are other findings related to the pleasure derived from intercourse for each sex. One of the many interesting findings is that "normal" intercourse does not usually bring women to climax. Their greatest sexual pleasures may be found outside traditional intercourse, for example, through manual stimulation of the clitoris (see, e.g., \textit{Hite Report} at 229-48).}

Focusing on the capitalist aspect, it can be seen how economic needs are translated into character traits, as habits and behaviour appropriate to the labour process are produced. The modern industrial process requires a rigid separation of work and leisure, with an intense emphasis on punctuality, competitiveness, regularity and productivity. These become not just individual character traits but cultural ones. A culture such as North America's emphasizes an instrumental rationality.\footnote{For a discussion of the theme of instrumental rationality as developed by the Frankfurt School theorists, see Held, \textit{Introduction to Critical Theory} (1980) at ch. 5.} The need to transform nature to continually meet new needs and a separation from nature rather than an identity with it are emphasized. This is simply one of many possible approaches to the world. Note how native Canadians, who were not assimilated into the modern industrial process, appear to fit poorly into an achievement-oriented society. This orientation which is internalized, regardless of the physical or mental drudgery associated with tasks in the division of labour, is the generalized work ethic. Native people fit poorly into the labour process because their culture had a different approach to nature.

In modern capitalism, the work ethic requires a rigid repression of the sensuous and emotional aspects of one's being. Each is prepared for a life in which the human body is fundamentally de-eroticized, because establishing a zone of intermediate sensuality would be destabilizing for the work process as we have learned it.\footnote{Horowitz, \textit{supra} note 68 at 180.} Work is primarily the sphere of men, men who are already the dominant partner in the sense of being more active both in sexual and other spheres. Work requires a kind of ban on affection, spontaneity and pleasure. In labouring, men test their earlier learning to repress their sexuality and its potential associated zone of sensuality. They transform this potential into isolated acts of intercourse "performed", much like work, upon women. Men learn to focus their sexuality on the penis, with total dependence on the erection. Although this is seen as "normal" sexuality, the associated repression of other forms of affection and sexuality exacts heavy costs on the mental health of men.\footnote{For an important book which criticizes the traditional norms of male sexuality, see Zilbergeld, \textit{Male Sexuality} (1970).}
Generally speaking, social life for men emphasizes active, aggressive qualities. Their active side of sexuality is developed and then intensified in the work process and in public life, where they produce, achieve and compete. To be independent and above the need for intimacy is seen as a virtue. What is noteworthy is, first, how these character traits are emphasized almost to the exclusion of others and, second, that many of these traits are quite anti-social. This behaviour is the same as that expressed in pornography. Men dominate while women are submissive and respond to the initiatives and desires of men.

Women remain in the home, where they raise the children and generally are able to integrate labour tasks and pleasure more easily, but they are also deprived of important social contacts in the world of politics and the market. When women finally emerge into the labour market, they do so as secondary wage earners and face the structural difficulties of gaining entry. For example, they face pregnancy-related discrimination, lack of day care, lack of organizational support from unions and much more. They also have inappropriate character traits. To become successful in non-domestic jobs, women have found that they have to, in effect, become like men.

In terms of social roles, therefore, it can be seen that men are the dominant partners in sexual and non-sexual spheres of activity. It is not surprising that depictions of sexual activity in a supposedly liberated society express this power relationship. If women were not in positions of dependence, they would not be seen as the submissive and weaker sex.

Recent feminist writing provides further insights into how deeply-rooted male domination has been. This work explains such domination as resulting primarily from the role of the mother in raising children. The major work is that of Dinnerstein and Chodorow, which has been described by Balbus. From these works there is a sense that phenomena such as pornography are expressions of the norms of society and, like prostitution, they cannot simply be prohibited.

This work notes that an almost universal fact in society has been the use of women as initial love object and continuing authority figure for the child. This therefore involves the inevitable frustration and hostility which accompanies childhood. Mother provides but she also withholds. Maternal frustration must be part of the process in the sense

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76 See, e.g., Hartmann, “Patriarchy and Job Segregation by Sex” in Eisenstein, ed., Capitalist Patriarchy and the Case for Socialist Feminism (1979) 206.

77 Balbus, Marxism and Domination (1982) at 303-52; Chodorow, supra note 65. I have drawn on Balbus in this section.
that it is a catalyst for the development of the child's ego. Emotional ambivalence is naturally experienced in childhood and later in life. However, what is important is the relationship between the mother, who alone brings up the children, and the boy. The boy must define himself in opposition to the mother while the girl, being of the same sex, can identify with the mother. This definition in opposition to the mother is required by patriarchal society, where males suppress their passive side. The male separation is more extreme and intense. The boy then identifies with the father to consolidate his independence from his mother. The girl, having had a more prolonged period of identification, submits to an over-idealized father who becomes the repository of the good feelings that were previously directed to the mother.

The adult male views women with associations from the dreaded past relationship with the mother. She was a powerful, dominant and autonomous woman. The emotions the situation evoked must not be revived. Consequently the fear of women causes hostility toward them. They must be put in a dependent place and trivialized. This explanation explains the hatred element of male/female relationships. It is not merely a question of men being more active and women more passive. There is an unconscious hostility generated by fear; the emotions are intense. Only dependent women are safe and can enable men to escape the dread associated with mother.

Once again, pornography and prostitution would be seen as expected phenomena in a deeply patriarchal society. Their values are the values of society, and here it is mother-dominated child rearing practices which are seen as the major problem. Whether it be reform of the family or of the nature of work, these difficult, deep-rooted patterns require one's attention far more than a focus on the legal prohibition of either pornography or prostitution.

In such a society, men and women are products of a culture which has long assigned child rearing almost exclusively to women. People also see the nature of work as natural and have internalized its requirements. The present structures limit views of viable alternatives and also set up patterns which are psychologically very hard to break. These conditions make it difficult even to enact the economic and social reforms necessary to advance the position of women and, in a sense, get the ball rolling.

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78 Balbus, ibid. at 307-309.
79 Ibid. at 309.
80 Ibid. at 310.
81 Ibid. at 311.
VI. CONCLUSION

One must recognize that the Fraser Committee could not possibly fulfill the many and varied expectations built around it. The Report is sensitive and thoughtful, demonstrating an awareness of the various positions in the debates. It rejects simple deterrent-oriented solutions which, while often favoured by government, are short-sighted and insensitive. The Committee recognizes that pornography and prostitution are symptoms of deeper social problems. However, the Report fails to fully appreciate the feminist insights which are now part of the contemporary political landscape. Now is the time to make a serious commitment to social change. It will require nothing less.