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**PRESSURE GROUPS AND LAW REFORM:  
A CASE STUDY OF PORNOGRAPHY IN CANADA**

**NANCY-JEAN PÉMENT**

Submitted to the School of Graduate Studies and Research,  
University of Ottawa, in partial fulfillment of the  
requirements for the degree of Master of Arts in Criminology

1987

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## ABSTRACT

The creation and/or the enforcement of legislation has traditionally been utilized to deal with unacceptable behavior or social phenomena. As can be expected, however, there are profound differences of opinion concerning the origins of legislation and its ongoing process of amendment. This thesis discusses two perspectives regarding how laws are created. The first school of thought, known as the consensus perspective, posits that norms and values are generally agreed upon and enshrined in legislation. Therefore, the law is merely a reflection of the ideology of the majority of the populace. The other school, known as the conflict perspective, presumes that the legal order is shaped by conflict amongst competing interest groups which have vested concerns that they seek to satisfy. Legislation, in this case, is a reflection of the interests of those groups and individuals who have managed to secure the power and the resources necessary to have their views embodied in law.

This research project attempted to examine the socio-political factors related to the creation of the Special Committee on Pornography and Prostitution (the Fraser Committee), the role of interest groups in lobbying for amendments to the pornography legislation, the

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subsequent recommendations made by the Fraser Committee and finally, the government's draft legislation embodied in Bill C-114.

This investigation was undertaken from a gender-based conflict theory perspective which proposes that men have mobilized much of the resources necessary to secure their interests in law as they traditionally hold most of the power, status and authority to do so. Hence, legislation reflects primarily the interests and concerns of men as opposed to those of women. The issue of pornography, being of primary concern to women, presents an interesting case study within this analytical framework.

This research project examined and categorized a random sample of briefs presented to the Fraser Committee during its public hearings. Each brief was classified into one of four broad categories based upon the following criteria - the definition of pornography suggested, the perceived effects of pornography on society and individuals and the policy recommendations proposed. The briefs were classified as being either of the feminist, the moral conservative or the civil libertarian persuasion. The fourth category was termed 'undefined' and reserved for those presentations which were not coherent in terms of the criteria to be met.

Results of this data collection show that certainly there was much conflict during the pornography debate, this being due to the diverse view points amongst the three identified pressure groups. Statistically, feminists/women's organizations were well represented during the public hearings accounting for 53 percent of all of the briefs in the sample.

Further analysis of the briefs and the subsequent recommendations made to the government by the Fraser Committee shows that the concerns and interests of women were essentially legitimized by the Committee. However, the examination of the Committee's recommendations and the proposed legislation presented by the Conservative government during the summer of 1986 reveals that the recommendations made by the Fraser Committee were only selectively met and incorporated into Bill C-114. This phenomenon was interpreted as being related to the fact that a government oriented to patriarchal, moral-conservative values was not prepared to translate the concerns of feminist organizations into a coherent body of legislation. Rather the government produced tentative laws that were more likely to reflect its dominant political ideology and what it perceived to be the interests of the majority of its supporters.

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## INTRODUCTION

Any serious discussion about pornography necessarily includes a discussion of morality, human relations, culture, economics, ideology and politics. Consequently, this thesis will, at times, touch upon these areas. The issues surrounding the pornography debate in Canada are undoubtedly complex and confusing.

This research project attempts to outline the political process of law reform using pornography legislation in Canada as a case study. Central to this examination is an investigation into the role played by interest groups in attempting to have the law shaped to reflect and embody their specific concerns. Specifically, this thesis attempts to investigate the extent to which the Fraser Committee incorporated the views of one group as opposed to another in its recommendations to the government regarding pornography. The government's proposed legislation on pornography found in Bill C-114 will be examined in an effort to determine the extent to which the recommendations of the Fraser Committee were incorporated.

The methodology used in the collection of data consists of a quantitative and qualitative analysis of the briefs presented to the Fraser Committee during the public hearings held across Canada in 1984. A random sample of the briefs is taken and each brief is classified as belonging to one of

four broad categories (i.e. feminist, moral conservative, civil libertarian or undefined) based on three criteria. These criteria are - 1) the definition of pornography suggested, 2) the perceived effects of pornography on society and individuals and 3) the policy recommendations proposed.

The first chapter consists of a retrospective review of the Canadian Criminal Code legislation from 1892 to the present day that is relevant to pornography. Specifically such legislation is found under the headings 'Offences Tending to Corrupt Morals', 'Spreading False News', 'Hate Propaganda' and 'Defamatory Libel'. Essentially amendments in the legislation are monitored and related to various social and political events.

The second chapter of this thesis presents a review of the literature that relates to the examination of pornography in Canada. The literature review undertakes a discussion of conflict theory and attempts to argue for a gender-based conflict theory by demonstrating the relative subordination of women in Canadian society. To conclude, Chapter Two culminates with the development of working assumptions and hypotheses useful in guiding the collection of data and structuring the analytical framework.

Chapter Three is primarily descriptive in nature. This chapter outlines the factors that lead to the creation of the Fraser Committee. Moreover, the most important recommendations made by the Fraser Committee are summarized and the draft legislation introduced last summer in parliament by the then Minister of Justice is examined.

The fourth chapter outlines the methodology used in the process of data collection. This chapter also includes a quantitative and qualitative discussion of the results of the data analysis. Moreover, a discussion of the demands of various interest groups is undertaken firstly in terms of the recommendations of the Fraser Committee and secondly, in terms of the proposed legislation entitled Bill C-114.

The final chapter presents a summary of the research project and attempts to apply Spector and Kitsuse's (1973) natural history model of social problems to the law reform efforts of interest groups involved in the pornography debate in Canada. The discussion focuses upon the gains and losses of concerned groups throughout the political process, and attempts to explain the phenomenon by using a gender-based conflict interpretation.

CHAPTER ONE

A HISTORICAL REVIEW OF RELEVANT SECTIONS OF  
THE CRIMINAL CODE RELATED TO PORNOGRAPHY

This chapter presents a historical review of specific sections of the Canadian Criminal Code which in some way are related to the pornography debate in Canada. This retrospective examination of the Criminal Code deals particularly with legislation found under the heading entitled 'Offences Tending to Corrupt Morals', namely sections 159 to 165. Section 162 is not included in this review as it focuses on the restrictions on publication of reports of judicial proceedings and, is therefore, not necessarily pertinent to this analysis.

The legislation will also be examined under section 177 entitled 'Spreading False News'. Finally, to complete this review, sections of the Criminal Code that deal with defamatory libel (s.281 to s.268 and s.274 to s.280) and hate propaganda (s.281 to s.281.3) will be discussed. Sections 269 to 273 which refer to the publication of proceedings of courts of justice, parliamentary proceedings and reports of public meetings, are not deemed relevant to this examination of the criminal law and not included in this review. The sections concerned with the spreading —

of false news, defamatory libel and hate propaganda are included in this chapter because it has been proposed that pornography is hate literature directed against women (The Fraser Report, 1985:28). Currently, women's groups are demanding protection from pornography under the above-mentioned sections.

The purpose of this chapter is to review the changes that have occurred in the legislation outlined above. This succinct historical review will merely set the scene, and thus, provide a background for further discussion of the pornography debate in more recent Canadian history.

#### Methodology

This retrospective review of relevant sections of the Criminal Code was accomplished through an examination of the Statutes of Canada. Essentially, the Statutes of Canada record the various changes made by Parliament to diverse pieces of legislation, one of which is the Criminal Code.

To begin this review, the pertinent sections of the Criminal Code were examined in the 1986/1987 edition of Martin's Criminal Code. At the end of each section in the Criminal Code, a reference to the year, the chapter and the section of the Statutes of Canada is made. The Statutes of

Canada outline the amendments that have been made in Canadian legislation.

This examination of the criminal law begins with the creation of the Canadian Criminal Code in 1892 and ends in 1987.

### A Chronology of Changes in Specific Sections of the Criminal Code

Each section of the Criminal Code is discussed separately and is initially identified by the number used in the 1986/1987 edition of Martin's Criminal Code.

#### A. Offences Tending to Corrupt Morals

SECTION 159 - In 1892, s.179 dealt with the publication of obscene matter, and stated:

179. Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse -

a) publicly sells, or exposes for public sale or to public view, any obscene book, or other printed or written matter, or any picture, photograph, model or other object, tending to corrupt morals; or

b) publicly exhibits any disgusting object or any indecent show;

c) offers to sell, advertises, publishes an advertisement of or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion.

2. No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done.

3. It shall be a question of law whether the occasion of the sale, publishing, or exhibition is such as might be for the public good, and whether there is evidence of excess beyond what the public good requires in the manner, extent or circumstances in, to or under which the sale, publishing, or exhibition is made, so as to afford a justification or excuse therefore: but it shall be a question for the jury whether there is or is not such excess.

4- The motives of the seller, publisher or exhibitor shall in all cases be irrelevant (Statutes of Canada, 1892, C.29, S.179).

The first amendment made to this section occurred in 1900 where, although the number of the section remained the same, the wording of paragraphs 'a' and 'c', and of subsection 2 was slightly altered. Essentially, the words 'manufacture... distributes or circulates, or causes to distribute or circulate' were added to the legislation in paragraph 'a' such that those who produce and distribute obscene matter would now also be subject to the wrath of the criminal law. Furthermore, the word 'typewritten' is also added to paragraph 'a' such that the law remains representative of various changes in technology. Moreover, in paragraph 'c' the word 'miscarriage' is added. Hence, this paragraph now provided sanctions for any one who "offers to sell, advertises, publishes an advertisement of or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or of causing abortion or miscarriage" (Statutes of Canada

1900; c.46, s.179). In subsection 2, the phrase "...and that there was no excess in the acts alleged beyond what that public good requires" (S.C. 1900, c.46, s.179) was added at the end of the subsection. Aside from these minor changes, this section remained the same.

In 1906, only the section number was altered. The former s.179 was now known as s.207. Nonetheless, the wording of the section remained the same. In 1909, section 207 was altered again by repealing paragraph 'a' and substituting this with:

a) makes, manufactures, or sells or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated, or has in his possession for sale, distribution or circulation, or assists in such making, manufacture, sale, exposure, having in possession, distribution or circulation, any obscene book or other printed, type-written or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals, or any plate for the reproduction of any such picture or photograph (S.C. 1909, c.9, s.207).

The 1900 and 1909 amendments result in the explicit recognition of a new offence namely that of producing obscene material. Furthermore, the modifications made to the wording of the paragraph appear to have been done to account for certain technological changes in the area of the production and the reproduction of obscene material. Clearly, however, paragraph 'a' was expanded to include not

only activities related to the distribution and production of obscene material but also to deal with the possession of such material. Amendments include the addition of such words as 'makes', 'has in his possession for sale...', 'having in possession', 'assists in such making...' and 'or any plate for the reproduction of any such picture or photograph'.

Similarly, in 1913, paragraph 'c' of subsection 1 of section 207 is repealed and substituted for:

c) offers to sell, advertises, publishes and advertisement of, or has for sale or disposal any means or instructions or any medicine, drug or article intended or represented as a means of preventing conception or of causing abortion or miscarriage; or advertises or publishes an advertisement of any means, instructions, medicine, drug or article for restoring sexual virility or curing venereal diseases or diseases of the generative organs (S.C. 1913, c.13, s.8).

Unfortunately, the Debates of the House of Commons Session Reports (Hansard) lends no insight into the reasons proposed by the legislators which support changes to the law. The Hansard merely documents this change in legislation without discussing any arguments given during the debates of the House of Commons.

In 1949, section 207 was repealed and substituted by the following legislation:

207. (a) Every one is guilty of an indictable offence and liable to two years' imprisonment who

a) makes, prints, publishes, distributes, circulates, or has in possession for any such purpose any obscene written matter, picture, model or other thing whatsoever; or

b) makes, prints, publishes, distributes, sells or has in possession of any such purpose, any crime comic.

(2) Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse

a) sells, exposes to public view or has in possession for any such purpose any obscene written matter, picture, model or other thing whatsoever;

b) publicly exhibits any disgusting object or any indecent show; or

c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a means of preventing conception or causing abortion or miscarriage or advertises or publishes an advertisement of any means, instructions, medicine, drug or article for restoring sexual virility or curing venereal diseases or diseases of the generative organs

(3) 'Crime comic' means in this section any magazine, periodical or book which exclusively or substantially comprises matter depicting pictorially the commission of crimes, real or fictitious.

(4) No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done, and that there was no excess in the acts alleged beyond what the public good required.

(5) It shall be a question for the judge whether such acts are such as might be for the public good, and whether there is evidence of excess beyond what the public good required; but it shall be a question for the jury whether there is or is not such excess.

(6) The motives of the accused shall in all cases be irrelevant.

(7) It shall be no defence to a charge under subsection one that the accused was ignorant of the nature or presence of the matter, picture, model, crime comic or other thing (S.C. 1949, c.13, s.207).

Obviously, the wording of this section has been altered slightly. The first change in the legislation occurs in subsection 1 paragraph 'a' which was amended by adding the verb 'prints' and thereby making it an offence for anyone to print or copy any obscene matter. Moreover, the addition of the verb 'prints' to subsection 1 was deemed necessary such that "the possession of this obscene matter by the publisher has to be related to his act of publishing" (Hansard, 1949 (2nd Session):2690). Furthermore, amendments to this section include the separation and distinction of the acts of producing and distributing obscene material. The production and distribution of obscene material is dealt with in subsection one and subsection two respectively. One interesting distinction between the two acts is that those who engage in the production of obscene material (or selling of crime comics) may no longer maintain a defence of ignorance. Essentially, subsection one was amended by removing the words 'knowingly, without lawful justification or excuse' and subsection seven was added because it was argued in the House of Commons and by the attorneys general of the provinces at that time that these words made prosecution under this subsection difficult (Hansard, 1949:1037).

The inclusion of the so-called 'crime comic' in the legislation was based mostly on arguments that such pictorial depictions of violence were becoming readily available in Canada. Furthermore, it was believed that the relatively violent content of the 'crime comics' would have a strong and harmful influence on Canadian youth (Hansard, 1949: 1036-1043 and 2687-2698). The above mentioned arguments were those most often cited during the debates in the House of Commons in 1949. The current pornography debate also includes this concern about the negative effects possibly associated with the consumption of violent images. However, as Boyd states, the "fundamental difference in the present is the focus given to violence against women" (1984: 11).

In 1954, the old section 207 becomes section 150. Essentially, the wording of section 150 in 1954 is very similar to that of section 207 in 1949. Furthermore, the wording and content of the section resembles section 159 found in the Criminal Code today. In 1953-1954, section 150 reads as follows:

Offences Tending to Corrupt Morals

Obscene matter.

150. (1) Every one commits an offence who (a) makes, print, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or

Crime comic	(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic
	(2) Every one commits an offence who knowingly, without lawful justification or excuse,
Selling obscene matter.	(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,
Indecent show.	(b) publicly exhibits a disgusting object or an indecent show,
Offering to sell contraceptives.	(c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of preventing conception or causing abortion or miscarriage, or
Offering to sell other drugs.	(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases of the generative organs.
Defence of public good.	(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.
Question of law and question of fact.	(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.
Motives irrelevant.	(5) For the purposes of this section the motives of an accused are irrelevant.
Ignorance of nature no defence	(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or the presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.
"Crime comic".	(7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious, or  
(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.  
(C.S. 1953-54, c.51 s.150).

One noticeable amendment to the section is the inclusion of the word 'phonograph record'. This amendment appears to be in keeping with the technological innovations of the time. Essentially, there was a perceived need to include phonograph records as well, within the realm of things or media that could communicate obscene matter (Hansard, 1959: 5543-5544). Moreover, the definition of a 'crime comic' is slightly altered to include any pictorially depicted events that are related to the commission of crimes and not only the explicit commission of crimes.

In 1959, section 150 is amended by adding after subsection 7 the following subsection:

8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects namely crime, horror, cruelty and violence, shall be deemed to be obscene (S.C. 1959, c.41, s.11).

The Debates of the House of Commons reveal that subsection 8 of section 150 was added to the Criminal Code because it was felt that the existing legislation offered no intrinsic definition of the term obscenity. It was argued that section 150 had merely stipulated a list of acts which

the law considered to be offences tending to corrupt morals (Hansard, 1959: 5309). Furthermore, the words 'dominant characteristic' are used such that "to be deemed obscene, the publication (would) have to be dealt with as a whole. Obscenity in an isolated passage of a publication (would) no longer be sufficient to describe it as obscene" (Hansard, 1959: 5309). For the first time the concepts of horror and violence are mentioned. Essentially, the pairing of sexual acts and violence is recognized in some materials deemed to be obscene at this time.

In 1968-1969, an interesting amendment is made to the law. Paragraph 'c' of subsection 2 of section 150 is repealed and the following is substituted for:

c) Offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, ... (S.C. 1969, c.41 s.13).

This amendment has effectively removed the words 'preventing conception' from the law. This amendment was believed necessary because although violations of section 150 subsection 2 paragraph 'c' had seldom been prosecuted, the legislation was criticized "by many individuals and organizations" as conflicting with modern thought and practice in the area of family planning (Hansard, 1969 (2nd

Session):7201). No further changes have been made to the content of this section. In 1987, section 150 is known as section 159 (refer to Appendix 1 for the complete text).

SECTION 160 - In 1959, the Criminal Code was further amended by adding immediately after section 150 (section 159 in 1987), section 150a. Section 150a was worded similarly to section 160 found in the most recent Criminal Code. Over the years this section has been subject to several amendments. These amendments were made in 1959, 1968-1969, 1974-1975, 1978-1979 and in 1984, mostly in response to the reconstitution of various provincial courts. The reconstitution of these courts affected this section as it is concerned with the jurisdiction of the courts. Section 160 reads today as follows:

WARRANT OF SEIZURE - Summons to occupier - Owner and author may appear - Order of forfeiture - Disposal of matter - Appeal - Consent - Definitions - "Court" - "Crime comic" - "Judge".

160. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be obscene or a crime comic may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is obscene or a crime comic, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is obscene or a crime comic, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XVIII and sections 601 to 624 apply mutatis mutandis.

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, no proceedings shall be instituted or continued in that province under section 159 with respect to those or other copies of the same publication without the consent of the Attorney General.

(8) In this section  
"court" means

(a) in the Province of Québec, the provincial court, the court of the sessions of the peace, the municipal court of Montréal and the municipal court of Québec;

(a.1) in the Province of New Brunswick, Manitoba, Alberta and Saskatchewan, the Court of the Queen's Bench; 1978-79, c.11, s.10(1); 1984, c.41, s.21(1).

(b) in the province of Prince Edward Island, the Supreme Court, or

(c) in any other province, a county or district court. "crime comic" has the same meaning as in section 159; 'judge' means a judge of a court. 1959, c.41, s.12; 1968-1969, c.38, s.8; 1974-1975, c.48, s.25(1).

SECTION 161 - In 1959, the Criminal Code was amended by adding section 150b immediately after section 150a. Since 1959, the section number has changed to 161. However, the content of this section has remained exactly the same. Section 161 deals with tied sales and reads as follows:

161. Every one commits an offence who refuses to sell or supply to any other person copies of a publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other is apprehensive may be obscene or a crime comic (S.C. 1959, c.41, s.12).

SECTION 163 - In 1903, section 179a was inserted immediately after section 179. Section 179a resembles section 163 of the most recent edition of the Criminal Code which deals with immoral theatrical performances. In 1903, section 179a read:

179A Every person who, being the lessee, agent or person in charge or manager of a theatre, presents or gives or allows to be presented or given therein any immoral, indecent or obscene play, opera, concert, acrobatic, variety, or vaudeville performance, or other entertainment or representation, is guilty of an indictable offence and liable, if convicted upon indictment, to one year's imprisonment with or without hard labour, or to a fine of five hundred dollars, or to both, and, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both.

2. Every person who takes part or appears as an actor, performer, or assistant in any capacity, in any such immoral, indecent or obscene play, opera, concert, performance, or other entertainment or representation, is guilty of an offence and liable, on summary conviction, to three months' imprisonment, or to a fine not exceeding twenty dollars, or to both.

3. Every person who so takes part or appears in any indecent costume is guilty of an offence and liable, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both.

4. In this section the word 'theatre' includes any place open to the public, gratuitously or otherwise, where dramatic, musical, acrobatic or other entertainments or representations are presented or given. (S.C. 1903, c.13, s.179).

In 1906, section 179a became section 208. The wording of the new section remains the same. The punishments meted for the offences remain the same as well. In 1954, the section number changes once again. At this point, persons taking part in immoral theatrical performances are defined under section 152 of the Criminal Code. By 1986, the wording of this section does not provide for the specific punishment of persons taking part in immoral theatrical performances. Rather this section simply states that anyone who takes part in an immoral theatrical performance is guilty of an offence. Today section 163 states:

163.(1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre; presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representations

(2) Every one commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment in a theatre (C.C. 1986/1987, s. 163, p.142).

SECTION 164 - In 1892, the Criminal Code legislated against the usage of the postal system for the transmission or delivery of obscene material:

180. Every one is guilty of an indictable offence and liable to two years' imprisonment who posts for transmission or delivery by or through the post, -

(a) any obscene or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph or any publication, matter or thing of an indecent, immoral, or scurrilous character; or

(b) any letter upon the outside or envelope of which, or any post card or post band or wrapper upon which there are words, devices, matters or things of the character aforesaid; or

(c) any letter or circular concerning schemes devised or intended to deceive and defraud the public or for the purpose of obtaining money under false pretenses. (S.C. 1892, c.29, s.180).

In 1906, the section number was changed from section 180 to section 209. It is not clear exactly when section 180 was altered to its present form. The change in the wording of the legislation would have most likely occurred sometime between 1927 and 1954. Today this section is called s.164 and reads as follows:

164. Every one commits an offence who makes use of the mails for the purpose of transmitting or of delivering anything that is obscene, indecent, immoral or scurrilous, but this section does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection 162 (4) (C.C. 1986/1987, s.164, p.148).

Essentially the only change that has been made to this section concerns the reference to subsection 162 (4). Section 162 deals with the restrictions on publication of

reports of judicial proceedings making it an offence for an editor, master printer, proprietor or publisher who prints or publishes "in relation to any judicial proceedings any indecent matter... that if published (is) likely to injure public morals" (The Pocket Criminal Code, 1985: 82). Subsection 4 of section 162 provides for the exceptions concerning the restrictions on publication of judicial proceedings. Subsection 4 states that the restrictions do not apply to persons who print or publish any material used in connection with any judicial proceedings or communicates it to persons connected with the proceedings:

(c)(i) in a volume or part of a bona fide series of law reports that does not form any part of any other publication and consists solely of reports or proceedings in courts of law, or  
 (ii) in a publication of a technical character that is bona fide intended for circulation among members of the legal or medical profession (S.C. 1953-1954, c.51, s.151).

SECTION 165 - Section 165 of the most recent Criminal Code has not been altered since 1953. Because there was no reference in the Statutes of Canada to this section before 1953, it is difficult to determine when this section was introduced and what changes in punishment have occurred. In 1953-1954, section 165 was known as section 154 and read:

154. Every one who commits an offence under section 150, 151, 152 or 153 is guilty of an indictable offence and is liable to imprisonment for two years, or  
 (b) an offence punishable on summary conviction (S.C. 1953-1954, c.51, s.154).

Today this section reads the same, the only changes that have occurred are in references made to specific sections of the Criminal Code. Therefore, every one who commits an offence under section 159, 161, 162, 163 and 164 could be subject to the sanctions layed out in section 165 of the present Criminal Code. These sanctions have not been altered since 1953 and remain exactly the same today as outlined in the 1953-1954 section 154.

SECTION 177 - In 1892, section 126 stated that:

126. Every one is guilty of an indictable offence and is liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is, or is likely to be occasioned to any public interest (S.C. 1892, s.126).

In 1906, the wording of this section remained the same as in 1892, however the section number changed from s.126 to s.136. In 1953, the wording of this section was slightly altered, as well as the section number. Moreover, the punishment was increased to two years. Today, the spreading of false news is dealt with under section 177 of the Criminal Code. Yet, the wording of this section has remained the same since 1953-1954 and it reads:

177. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years (S.C. 1953-1954, c.51, s.166).

B. Defamatory Libel

SECTION 262 - In 1892, the definition of a defamatory libel could be found under section 285 of the Criminal Code:

285(1) A defamatory libel is matter published, without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person to whom it is published.

(2) Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony (S.C. 1892, c.29, s.285).

By 1906, the section number had changed to section 317. Finally, by 1953-1954, there is a change in the phrasing of this section and in the section number. Despite the fact that the phrasing of this section has been altered, it seems that the content of the section has essentially remained the same up to 1987. Today this section is called 262 and reads as follows:

262(1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

(2) A defamatory libel may be expressed directly or by insinuation or irony

(a) in words legibly marked upon any substance, or

(b) by any object signifying a defamatory libel otherwise than by words. (S.C. 1953-1954, c.51, s.248)

SECTION 263 - In 1892, section 286 dealt with the definition of publishing a defamatory libel. In 1906, the section numbers were changed from s.286 in 1892 to s.318.

Essentially, however, the content of this section has remained the same up to the present. Although the layout of the section has changed, this appears to have been done only for purposes of clarity. The essential elements of the section are still there. Today section 263 reads:

263. A person publishes a libel when he  
(a) exhibits it in public,  
(b) causes it to be read or seen, or  
(c) shows or delivers it, or causes it to be read or seen by the person whom it defames or by any other person. (S.C. 1953-1954, c.51, s.249).

SECTION 264 - This section deals with the punishment of a defamatory libel that is known to be false. In 1892, this law could be found under section 301 and in 1906, the section number was altered to s.333. The wording of this section remained the same however. In 1953-1954, this section was amended to provide for an increase in the severity of sanctions. In 1892, the law read:

301. Every one is guilty of an indictable offence and liable to two years' imprisonment or to a fine not exceeding four hundred dollars, or both, who publishes any defamatory libel knowing the same to be false (S.C. 1892, c.29, s.301).

whereas in 1987 the law provides for:

264. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and is liable to imprisonment for five years (S.C. 1953-1954, c.51, s.250).

SECTION 265 - This section provides for the punishment of a defamatory libel. In 1892, section 302 set out the law. In 1906, the section numbers had changed to section 334. The most noticeable change in this legislation is, once again, found in the increase in the severity of the penalty. In 1892, the law stated:

302. Every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both who publishes any defamatory libel (S.C. 1892, c.29, s.302).

However, in 1987, the law states:

265. Every one who publishes a defamatory libel is guilty of an indictable offence and is liable to imprisonment for two years (C.C. 1986-1987, s.265, p.289).

SECTION 266 - This section deals with the punishment for extortion by defamatory libel. During 1892, this law could be found under section 300. In 1953-1954, the section number is altered to section 266. However, the most important change occurs in the penalties that are proposed by the different sections. In 1892, the penalty is liability to two years imprisonment or to a fine not exceeding six-hundred dollars or both. On the other hand, in 1987, the penalty under the similar section (s.266) makes the offender liable to imprisonment for five years.

SECTION-267 - This section is concerned with the sale of periodicals that contain defamatory libels. Again, the content of this section remains fairly consistent from 1892 to 1987. Rather, the change in layout of the more modern section, seems to have been done not really to alter the content of the section but to make the 1987 section 267 easier to read. In 1892, this section was called section 297 (see Appendix Two for the complete text). Today section 267 reads:

PROPRIETOR OF NEWSPAPER PRESUMED RESPONSIBLE - General authority to manager when negligence - Selling newspapers.

267.(1) The proprietor of a newspaper shall be deemed to publish defamatory matter that is inserted and published therein, unless he proves that the defamatory matter was inserted in the newspaper without his knowledge and without negligence on his part.

(2) Where the proprietor of a newspaper gives to a person general authority to manage or conduct the newspaper as editor or otherwise, the insertion by that person of defamatory matter in the newspaper shall, for the purposes of subsection (1), be deemed not to be negligence on the part of the proprietor unless it is proved that

(a) he intended the general authority to include authority to insert defamatory matter in the newspaper, or

(b) he continued to confer general authority after he knew that it had been exercised by the insertion of defamatory matter in the newspaper.

(3) No person shall be deemed to publish a defamatory libel by reason only that he sells a number or part of a newspaper that contains a defamatory libel, unless he knows that the number or part contains defamatory matter or that defamatory matter is habitually contained in the newspaper. 1953-54, c.51, s.253

SECTION 268 - This section concerns itself with the sale of books containing defamatory matter. Few changes have occurred to the original section 298 in 1892. The content of this section has remained essentially similar. The most obvious change has been in the layout of the section. Furthermore, the words 'whether forming a part of any periodical or not' which appear in the 1892 version of S.298, are replaced by the words 'other than a newspaper' in the 1953-1954 version. Perhaps this change is due to the fact that in 1953-1954, the definition of a newspaper was outlined separately in section 261. Today, in 1987, section 268 states:

SELLING BOOK CONTAINING DEFAMATORY LIBEL - Sale by servant.

268. (1) No person shall be deemed to publish a defamatory libel by reason only that he sells a book, magazine, pamphlet or other thing, other than a newspaper that contains defamatory matter if, at the time of the sale, he does not know that it contains the defamatory matter.

(2) Where a servant, in the course of his employment, sells a book, magazine, pamphlet or other thing, other than a newspaper, the employer shall be deemed not to publish any defamatory matter contained therein unless it is proved that the employer authorized the sale knowing that

(a) defamatory matter was contained therein, or

(b) defamatory matter was habitually contained therein, in the case of a periodical. 1953-54, c.51, s.254. (C.C. 1986, p.299).

SECTION 273 - This section discusses the defence of public benefit. Again, aside from changes made to the section numbers, the wording of this section has remained

fairly consistent from 1892 to 1987. Any changes made to the text of the section appear to have been made for purposes of clarity. Section 273 states:

273. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit (C.C. 1986-1987, s.273, p.300).

SECTION 274 - This section administers the fair comment on public figures and on works of art. As most of the sections under the heading 'Defamatory Libel', this section has not undergone any major revisions since its inception in 1892. Aside from a few changes in the section numbers, the wording and content of this section have been consistent. In 1987, section 274 provides that:

274. No person shall be deemed to publish a defamatory libel by reason only that he publishes fair comments (a) upon the public conduct of a person who takes part in public affairs, or (b) upon a published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any subject, if the comments are confined to criticism thereof (C.C. 1986-1987, p.300).

SECTION 275 - This section provides for the defence of truth for persons being tried for defamatory libel. The wording of the section has remained almost the same from 1892 to 1987. Today, section 275 states:

275. No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true (C.C. 1986-1987, s.275, p.300).

SECTION 276 - This section deals with the publication of defamatory libel upon invitation or necessity. The wording of the original section in 1892 (s.287) has been altered somewhat. However, the essential content of the section remains the same. No changes occurred to the section, except for changes in the section numbers and in the overall layout of the section. Today, section 276 states:

**PUBLICATION INVITED OR NECESSARY.**

276. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter

(a) on the invitation or challenge of the person in respect of whom it is published, or

(b) that it is necessary to publish in order to refute defamatory matter published in respect of him by another person,

if he believes that the defamatory matter is true and it is relevant to the invitation, challenge or necessary refutation, as the case may be, and does not in any respect exceed what is reasonably sufficient in the circumstances. 1953-54, c.51, s.262. (C.C. 1986, pp 300-301).

SECTION 277 - This section deals with answers to inquiries. No major changes have been made to this section since its inception in 1892. Once again, any changes made to the wording of this section have been done, it would

appear, to improve the clarity of the section. Section 277 of the most recent Criminal Code provides for:

277. No person shall be deemed to publish a defamatory libel by reason only that he publishes, in answer to inquiries made to him, defamatory matter relating to a subject-matter in respect of which the person by whom or on whose behalf the inquiries are made has an interest in knowing the truth or who, on reasonable grounds, the person who publishes the defamatory matter believes has such an interest, if

(a) the matter is published, in good faith, for the purpose of giving information in answer to the inquiries,

(b) the person who publishes the defamatory matter believes that it is true,

(c) the defamatory matter is relevant to the inquiries, and

(d) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances. 1953-54, c.51, s.263. (C.C. 1986, p.301).

SECTIONS 278 and 279 - These sections deal with giving information to interested persons and the publication of material in good faith for redress or wrong respectively. Like most of the sections under the heading 'Defamatory Libel', no major modifications have been made to the Criminal Code. Therefore, these sections have maintained the same essential elements from 1892 to 1987. In 1987, section 278 provides for:

278. No person shall be deemed to publish a defamatory libel by reason only that he publishes to another person defamatory matter for the purpose of giving information to that person with respect to a subject-

matter in which the person to whom the information is given has, or is believed on reasonable grounds by the person who gives it to have, an interest in knowing the truth with respect to that subject-matter if

(a) the conduct of the person who gives the information is reasonable in the circumstances,

(b) the defamatory matter is relevant to the subject-matter, and

(c) the defamatory matter is true, or if it is not true, is made without ill-will toward the person who is defamed and is made in the belief, on reasonable grounds, that it is true. 1953-54, c.51, s.264. (C.C. 1986, p.301).

Similarly, despite some minor changes in the section number and in certain expressions, section 279 of the present Criminal Code has not been greatly modified since 1892. Today, section 279 reads as follows:

279. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter in good faith for the purpose of seeking remedy or redress for a private or public wrong or grievance from a person who has, or who on reasonable grounds he believes has the right or is under an obligation to remedy or redress the wrong or grievance, if

(a) he believes that the defamatory matter is true,

(b) the defamatory matter is relevant to the remedy or redress that is sought, and

(c) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances. 1953-54, c.51, s.265. (C.C. 1986, p.301).

SECTIONS 280 and 281 - Concerning sections 280 and 281, which provides for proving publication by order of legislature and verdicts in cases of defamatory libel respectively, no reference was made in the Statutes of Canada to previous legislation. One can only assume therefore that these particular sections were implemented

sometime after the 1953-1954 consolidation of the Criminal Code. Thus, any analysis of the changes made to these sections is impossible. For the complete text of sections 280 and 281 refer to Appendix Three and Appendix Four respectively.

### C. Hate Propaganda

In 1969, the Criminal Code was amended by adding after section 267 the heading and the sections dealing with hate propaganda. The then section 267a, 267b and 267c were eventually renamed in 1970 where only minor changes related to the renaming of the section were made. Hence, sections 281.1, 281.2 and 281.3 were added immediately after section 281 of the Criminal Code.

SECTION 281.1 - This section deals with the advocacy of genocide. The concepts of 'genocide' and 'identifiable group' are defined in this section. Recently, the definition of 'identifiable group' has come under considerable attack by concerned lobbyists and individuals as it fails to include groups distinguished by gender within the realm of the legal definition (see Report of the Committee on Pornography and Prostitution (Summary), 1985: 26-27 and Lawlor, 1984:12). Moreover, this section also provides for a maximum five years imprisonment for anyone who advocates or promotes genocide. For the complete text concerning this section refer to Appendix Five.

SECTION 281.2 - This section provides for the willful promotion of hatred a) in a public place where such incitement may lead to a breach of the peace and b) in any conversation that is not private. The sanctions for such behavior are, in both cases, punishable as an indictable offence with liability to two years imprisonment or as an offence punishable on summary conviction. Section 281.2 also sets out the various legal defences available to one charged with the public incitement of hatred against an identifiable group or individual. The complete text of this section is available in Appendix Six.

SECTION 281.3 - This section provides for the issue of a warrant of seizure of material deemed to be hate propaganda and the summons of those individuals involved as the owner or author of such hate propaganda. Furthermore, grounds for appeal are set out in this section, as well as various definitions. For the complete text refer to Appendix Seven.

### Conclusions

This chapter has attempted to outline the various amendments that have been made to the legislation related to pornography since the creation of the Criminal Code in 1892. Overall, few changes have been made to the sections of the

Criminal Code investigated in this chapter. In the instances where amendments to the law have occurred, such amendments were usually minor. Words were usually added to certain subsections to account for a change in technology. The inclusion of words such as 'typewritten', 'plate for the reproduction of any such picture or photograph' or 'phonograph record' demonstrate an attempt by the legislators to keep abreast with the various technological innovations of the time. Moreover, there appeared also to be an increase in awareness on the part of the legislators that such material deemed obscene may be communicated to the populace through several forms of media (e.g. the inclusion of the word 'phonograph record').

Another interesting and important amendment to the law occurs in 1968-1969 in the then section 150(c) (section 159(c) today). Essentially, the words 'preventing conception' thereby designating any form of contraception, are removed from the Criminal Code. Clearly, such an amendment to the legislation is a reflection of a more general change in morality. The growing number of proponents of family planning criticized the old law and demanded legislation that was in tune with more modern views concerning child bearing.

The final set of important amendments made to the legislation reviewed in this chapter, includes a general increase in the severity of punishments for certain infractions. Section 177 concerned with the spreading of false news, saw a twofold increase in punishment for such an offence. Likewise, sections 264 and 265 were amended to provide more lengthy terms of imprisonment for those who publish a defamatory libel known to be false or otherwise.

Nonetheless, on the whole, few substantial and major changes were made to the legislation concerned with offences tending to corrupt morals, defamatory libel and hate propaganda.

## CHAPTER TWO

### A LITERATURE REVIEW AS IT RELATES TO THE STUDY OF PORNOGRAPHY IN CANADA

The purpose of this chapter is twofold. Firstly, an analysis is undertaken to determine the applicability of a conflict perspective to the pornography debate in Canada at the present time. Secondly, this literature review is instrumental in the development and the formulation of general working hypotheses and assumptions necessary for systematically structuring the inquiry.

Specifically, this chapter begins with a discussion of conflict theory. This overview focuses primarily on the works of two theorists namely Austin Turk and George B. Vold. The second part of this chapter examines a selected number of studies which apply a conflict theory perspective in the sociology of law. Thirdly, a review of the major positions of the interest groups involved in the pornography debate is done. Essentially the various perceptions of pornography and the policy demands are succinctly described. The fourth section of this chapter focuses specifically on the cultural and political position of women in Canadian society. This section argues that women in Canada are still viewed and treated as second-class members of our society.

The position of women in a capitalist patriarchal society is essentially one of submission whereby men maintain most of the power and authority. Men, traditionally, hold the top political, socio-cultural and economic positions within the hierarchy that controls and dominates women (see Escobel, 1985; Carrier, 1983; Valverde, 1985; Griffin, 1982; Flinn, 1985, 1986a, 1986b and others). The existence of this hierarchy (and the subsequent differential distribution of power and authority) which structures the relationships between men and women is argued from a conflict theory perspective and is hence conceptualized as gender conflict. Finally this chapter concludes by stating the various working assumptions and hypotheses that are formulated for the purposes of this research project.

#### Conflict Theory According to Turk and Vold

Essentially, conflict theory suggests that individuals and groups who hold the power in a society will enact laws which will serve their interests and needs, irrespective of whether other segments of society concur (Brzozowski, 1986: 11). Therefore, from a conflict theory perspective, legislation and changes in legislation are prompted not to establish a social consensus, but rather to serve the interests of those who control the mechanisms necessary to

secure change. A conflict model of society may therefore be conceptualized based on the following propositions:

- 1- society is ever changing or subject to change.
- 2- at every point in society there is dissent and conflict.
- 3- every element of society contributes to change. and
- 4- society is based on the repression of some of its members by others (Quinney, 1970: 147).

It is this continuous process of change (whereby individuals or groups contend to secure their interests) that creates conflict within society. However, it is important to recognize that not only those persons who hold some sort of power within societal institutions may effectively use the law to represent their interests. One criticism of conflict theory is that it does not acknowledge the possibility that law reform, resulting from a struggle between the classes and/or the gender groups, may, in some cases, reflect the interests of those with relatively little power and not simply be imposed from above (Gavigan, 1986: 105 and Hopkins, 1975: 618).

The conflict perspective employed for the purposes of this research will not be based on socio-economic class conflict but rather on gender conflict. This gender-based conflict theory assumes essentially that men and women experience different economic statuses and differing socialization processes and thus their interests and

expectations are dissimilar too. Hence, it is proposed that men and women will have different demands regarding the issues surrounding pornography legislation. Thus, central to this whole examination is the contrasting of the interests of men on the one hand, and the interests of women on the other.

In 1958, Dahrendorf attacked consensus theory for being unrealistic and somewhat utopian (Dahrendorf, 1958). Dahrendorf supported his argument by noting that fundamental changes which occur in societies can only be explained by assuming that certain individuals or groups in the society do not necessarily concur with the apparent societal consensus. Hence, these individuals are ultimately able to modify or replace the existing social order. Dahrendorf concludes:

(F)rom the point of view of this model (conflict perspective), societies and social organizations are held together not by consensus but by constraint, not by universal agreement but by coercion of some by others (Dahrendorf, 1958: 127).

Since the late 1960's the emphasis in criminology has moved from a structural-functionalist approach to a conflict theory perspective (Rich, 1979: 178). Essentially, consensus theorists view society as a "functionally intergrated system held together in equilibrium" whereby every element of society helps to maintain the system based

on a general consensus of values (Quinney, 1970: 147). This shift in perspectives is, in part, related to the radical ideologies introduced by largely European marxian and critical theorists and the increasing acknowledgement that traditional consensus theory has systematically failed to provide adequate answers to problems within the criminal justice system (Rich, 1979: 178). Austin Turk criticizes the consensus notion of law for the purpose of socio-legal research for the following reasons:

- 1- "consensus theory introduces a cultural bias into research by denying the disruptive and exploitive aspects of the law".
- 2- "consensus theory tends to equate legal with consensual methods of conflict management, which are presumed to be more effective than coercive means," and
- 3- "consensus theory appears to encourage research in which natural law and/or functional-systems assumptions are taken for granted" (Turk, 1976: 279).

Turk argues for a "more neutral and empirically grounded conception of law" and he suggests that perhaps legislation is a tool of power which can create and exacerbate conflicts rather than aiding in resolving or mollifying them (1976: 176-179). Turk views legislation as a result of efforts made by various parties in order to affect the processes by which legal standards are produced (1969: 32). Legislation is therefore a product of social conflicts, for even those who have the power to advance their own interests through

the law, consideration must be given to the interests of competing groups who secure similar political and economic resources. By this Turk suggests that legality depends upon the ability of some social groupings to seize the "mechanisms for creating, maintaining, changing and destroying laws" (1969: 32). Thus, for those groups who have control of the legal process, legislation will represent usually, what Turk calls, regulative compromises. While for those groups that have somehow been denied control of the legal process, legislation will represent edicts under which these less powerful groups will be dominated (Turk, 1969: 32).

In his book entitled Criminality and Legal Order, Turk states that the conflict perspective on law appears to be the most relevant for criminological research. Conflict theory, as already mentioned, focuses upon the patterns of conflict between essentially different groups namely what Turk calls the authorities (those who make a difference) and the subjects (those who are affected by the laws but affect the laws relatively little) (Turk, 1969: 32-33).

For Turk, the law represents an instrument of social and political power whereby individuals will use the law as a mechanism for securing their authority and interests. Power is defined by Turk as the "control of resources in an attempt to maximize the chance of acceptable solutions to

potential or actual conflict" (Rich, 1979: 55). Legislation is therefore considered to be a means of power or resource control whereby some people are better able to promote their own interests against others. Thus, because people may seek, either consciously or unconsciously, the resources necessary to secure their interests, they essentially are seeking the mechanisms necessary to secure and exercise power (Turk, 1976: 280). Turk proposes five types of resource control or powers which are all part of the cultural and social structural reality of law. The first type of power that Turk discusses is police power which means having the law on your side in various conflictual situations if an adversary refuses to conform to the law. The police are permitted to use coercion or power to compel conformity to the law. The second type of power, according to Turk, is economic power which may enhance or diminish a person's life chances or opportunities. This is to say that the less economic power one has, the less resource control the person will have in order to secure his/her interests. The third type of power is political power or the control of decision making processes. The law is created by those who have political clout and therefore provides the format for creating, interpreting and implementing norms. Essentially, the law defines what is considered to be right and what is considered to be wrong. The fourth type of power is ideological power. Turk states that the law has an

"authoritative force upon people's intellectual frame of reference" such that the law may promote adherence to the political order and "gives prestige and approval to traditional conceptual frameworks while denying legitimacy to other conceptions through legal rejection or refusal of legal recognition" (In Rich, 1979: 55). The law is therefore designed to promote adherence of the population to the prevailing political ideology. The final type of power is diversionary power which is achieved through the control of the mass media, entertainment and perhaps even education. Turk suggests that those in charge of the mass media are well aware that the more sensational aspects of the law and its enforcement can, in the name of 'human interest' and 'information' be presented to capture the public's attention. Thus, the public's pre-occupation with the law may not only divert attention away from the more serious concerns, but will also reinforce the concept of the law as "an overwhelming scarcely challengeable reality and criterion of reality" (Turk, 1976: 282).

Turk's theory of power assumes necessarily that the law is not value-neutral but rather is a reflection of the interests of specific persons or groups who can mobilize the resources necessary to secure their interests. Hence, authority structures are all essentially similar in that such structures are "maintained primarily by conditioning

(the dominant and subordinates to interact as authorities and subjects), partly by consensus and ultimately by coercion" (Turk, 1969: 49). Basically, there exists a somewhat coercive relationship between the authorities and the subjects within societies. Legislation is thus both a source and a means of conflict according to Turk. Turk exemplifies how legislation can be a catalyst in social conflict in twelve propositions in his article entitled 'Law as a Weapon in Social Conflict'. These twelve propositions can be summarized as follows:

- 1- The availability of legal resources is, in itself, an incentive for social conflict. When legal resources are not available to some groups they will be forced to rely upon non-legal power to promote their interests. Turk exemplifies this point by stating that the American southern whites used extralegal and illegal methods in an effort to keep Negroes from using legal resources that were granted to them for their emancipation.
- 2- Groups with the most legal and non-legal power may be able to exclude other more subordinate groups from the legal arena and therefore deny weaker groups the opportunities necessary to advance their claims and defend their interests legally.
- 3- Legal power provides the opportunity and the means necessary to accomplish a "denial of reality of conflicts by making it... difficult for (these conflicts) to be articulated" and thus managed.
- 4- When the power differences between two groups are less drastic, legal resources are more likely to be used. Turk states that legislation is relatively less dangerous or costly than non-legal power struggles.
- 5- Furthermore, the availability of legal resources will decrease the pressure upon antagonistic groups to resolve conflicts through the non-legal means that they

can mobilize. Informal settlements are less likely to occur when groups or parties "have the option or hope of (acquiring) legal resources".

- 6- The use of social categories in legislation may stimulate old conflicts and create new ones. The recognition of such possibilities has been used for resisting the use of the law as a mechanism for social change.
- 7- Legal procedures, especially the admissibility and inadmissibility of evidence, have been used often to exclude or distort information and can therefore prevent or interfere with conflict resolutions.
- 8- Legislation is primarily oriented "to regulating the symptoms of conflicts" without concerning itself with the less easily controlled problems of dealing with the origin of the conflict. The legalization of conflicts only confuses the real issues.
- 9- In cases where communication between antagonistic parties or groups is essential in order to become aware of common interests, "communication may be precluded by the risk of disclosing injurious facts or by ...weakening the case at hand".
- 10- Legal settlements may only be "illusory resolutions of conflicts". Moreover, dissatisfied groups may seek redress through non-legal means and may be less likely to use the law in the resolution of conflicts.
- 11- The law may provide authorities with "the cloak of claimed impartiality". It has been noted by Turk that legal officials develop a partiality on behalf of their own specific interests. Furthermore, even when authorities make a conscious effort to be unbiased, "the intent of legislation can never be identical to the effect of the law" as it is experienced by those affected by the law.
- 12- Changes in legislation that facilitate non-legal social, cultural and political changes will inevitably exacerbate conflicts. As new legislation supersedes old ideals and interests, those who identify with these older interests may feel threatened. At least in the short-term, Turk proposes that the law contributes to the creation of conflicts (Turk, 1976: 285-287).

It is this conception of law as power (i.e. a resource whose control and mobilization may create and even worsen conflicts rather than resolving them) that is the basic contribution made by Turk to the study of the sociology of law.

In Theoretical Criminology, George Vold (1979: 301) presents a theory of 'group conflict' to supplement rather than replace crime causation theories. Vold suggests that persons tend to organize themselves into groups such that they may collectively further their own interests. Implicit to this view is the assumption that people are gregarious beings whose lives are both a part of and a product of their group organizations (Simmel, 1962 quoted in Vold, 1979: 283).

Vold makes a distinction between the concept of 'collective behavior' and the idea of individuals behaving simultaneously. It becomes simple to envision, therefore, the constant struggle of interest groups in maintaining and defending their statuses amongst all other groups.

Groups are formed to serve the needs of the members that compose them, otherwise they will disintegrate. New groups are formed as new interests arise within a society. Moreover, this cooperative organization is maintained because the interests and needs of the group can best be

accomplished collectively. The goal of any group struggle is to improve its relative status. By improving its status, the group may be better able to secure its interests. Conflicts between groups become therefore one of the "principal and essential social processes upon which the continuing ongoing of society depends" (Vold, 1979: 284). Furthermore, conflicts between different groups tend to intensify and maintain the loyalty of group members (Simmel, 1974 in Vold, 1979: 285). Interest groups are a necessary link in the process of communication they tie those who rule and those who are ruled (Pross, 1975: 1).

The obvious outcome of inter-group conflict is a victory of one group and the defeat of another. However, Vold recognizes that another outcome of inter-group conflict may be "compromise and withdrawal to terminate the conflict with no final settlement of the issues involved" (Vold, 1979: 286). Vold notes further that generally there is rarely any compromise for those in a position of relative weakness. The weak are usually overwhelmed and subjugated to the more powerful (Vold, 1979: 286). These more powerful groups are able to somehow force subordinate groups to compromise or to give up their demands altogether, at least in the short term. As Roby notes "groups which are unable to shape the enacted law according to their interests may be able to affect the enforcement of the law or to amend

the law at a later date" nonetheless (1969: 84). Vold states further that interest groups may seek the assistance of the organized state to help them defend their rights and protect their interests. Therefore, on the one hand, feminist groups (and other groups that support their views) may argue that pornography is essentially misogynous and must be controlled. On the other hand, civil libertarians (and other groups that support their views) may state that all members of society have the right and freedom to consume whatever form of media they choose. Both feminist and civil libertarian groups will seek to promote their interests and for this reason, both groups will resist any proposed legislation that would maintain the interests of the other group. Essentially then, whichever group can acquire the most support from the state will determine whether or not a new law is created to restrain the interests of the opposing group. In other words, as Vold points out "...the whole political process of law making, law breaking and law enforcement directly reflects deep-seated and fundamental conflicts between interest groups and their more general struggle for control...Those who produce legislative majorities win control over the police power and dominate the policies that decide who is likely to get involved with the law" (Vold, 1979: 288).

In furthering his argument, Vold suggests that youth gangs are really minority groups that are "out of sympathy with the dominant majority" (in Rennie, 1978: 144). A youth gang may directly oppose the rules and regulations of the adult world. Likewise, feminist groups usually oppose the values of a male-dominated or patriarchal society. This list of the relationship between dichotomous groups could be extended further - for example the French speaking and the English speaking, the Whites and the Negroes and so forth. Therefore, definitions of criminal behavior, or of what should be criminalized, is really an outcome of groups struggling for power. Hence, the enactment and enforcement of the law is perceived as the result of some process of conflict and compromise whereby each group struggles to enhance their own relative positions (Vold, 1979: 301). Therefore, when the interests of different groups conflict with one another, it is usually the group with the least amount of political power whose behavior will be criminalized and whose interests may be neglected in the legislation.

According to Vold's theory of group conflict, the behavior of an individual is viewed as "incidental to the course of action required for the group to maintain its place in the struggle with other groups" (Vold, 1979: 296).

Both Turk and Vold are non-Marxist conflict theorists. Non-Marxist theorists differ in some ways from Marxist conflict theorists. Marxist conflict theorists tend to focus primarily on the class structure with economics at its base. Marx, in his analysis, never really explored the sources of the sexual ordering within society (see Gallher, 1978: 254 for a comment). Marx viewed the exploitation of men and women as stemming from the same source - the class structure of society. He therefore assumed that the oppression of men and women could be understood in the same structural terms (Eisenstein, 1979: 11). Non-Marxist conflict theory may prove to be more flexible therefore as it generally examines the roles that many different groups play in the legal process. Despite the fact that Vold is a non-Marxist theorist, he nonetheless agrees with Marxist criminologists in their perception of society as being based upon force, constraint and domination (Rennie, 1978: 144). Hence, the conflict perspective views society as essentially a forum for the struggles of various pressure groups in promoting their interests through the law and through the mobilization of power resources as Turk would suggest. The remainder of this chapter is dedicated to investigating the literature that relates to the pornography debate in Canada. This debate, it is hypothesized, is necessarily one where group conflict flourishes and that ultimately, those groups

which secure the most political and economic resources are most likely to have their views reflected in any legislative amendments that might ensue.

### Studies in the Sociology of Law

There exists a variety of methods employed in the analysis of law reform. This section outlines two approaches that have traditionally been utilized. These two approaches essentially use similar methodologies while attempting to establish differing theoretical view points.

The first approach attempts to test the consensual nature of society. Roscoe Pound, a proponent of consensus theory, employed a historical approach to his examination of the development of legal philosophy. Pound, in two articles published in 1914 and 1917, begins his discussion by examining Greek juristic thought because he felt that although the "...law, in a modern sense, begins with the Romans, philosophy of law begins with the Greeks" (Pound, 1914: 605). Moreover, he claims that "since the Romans took their philosophical ideas from the Greeks, the Greek concept of the end of law not only governed the Roman world but in consequence in large measure governed the medieval world"

(Pound, 1914: 605). Essentially the legal order is a device which helped maintain the social status quo "to keep each man in his appointed groove and thus prevent friction with his fellows" (Pound, 1914: 606). This discussion of the Greeks is concluded by stating that despite elements of conflict in Greek society, the ultimate end of law and the legal order was the maintenance of the status quo.

According to Pound, the purpose of law being the upholding of the status quo continued through to the Middle Ages. During the subsequent period of reformation, jurists began to insist on replacing Roman and canon law with the civil law of each state (Pound, 1914: 611).

During the sixteenth century, Spanish jurist-theologians also had an effect on the development of legal philosophy throughout the world. The Spanish legislators sought to reconcile a theory of equal yet independent states to a theory of natural law "from which all rules of justice of every description derive their authority and of which Roman law and canon law are but expressions within their respective fields" (Pound, 1914: 614). Legislation should be used as a method of limiting the activities of men in the interests of other men. Laws serve the purpose of balancing the activities of individuals and their freedoms according to Spanish jurist-theologians. Therefore, the law is no

longer seen as a device to maintain the social status quo. Rather it is the legal order that serves to maintain a natural equality amongst individuals (Pound, 1914: 616). Pound goes on to discuss the development of legal thought through the seventeenth, eighteenth and nineteenth centuries.

During the seventeenth century, Grotius expounded a new doctrine composed of two main premises. On the one hand, there was a theory of the reasonable limitations of human activities based on the interests of other individuals. On the other hand, there was a theory of natural rights or rather the intrinsic right of individuals to act freely. Pound's analysis demonstrates how this theory of natural rights led ultimately "to a hard and fast scheme of individual interests, beyond the reach of the state, which the state was bound to secure by law, it had important consequences in broadening the conception of justice and inducing more liberal views as to the end of the law" (Pound, 1914: 619). This phenomenon led to the development of the idea of a social contract amongst individuals and the individual and the state. Pound states that the creation of the legal transaction was "one of the most important of Roman contributions to law, and in an age when trade and commerce were expanding the law of such transactions was becoming the living part of the law" (Pound, 1914: 620). The rights of individuals were upheld and the performance of

duties was secured by the contract. In terms of juristic thought this theory of natural rights and of a social contract "invited the inquiry into the foundations of the social status quo", (Pound, 1914: 621). Hence, laws existed to maintain and protect individual interests.

During the eighteenth century juristic theory was based upon four propositions:

- 1- There are natural rights demonstrated by reason. These rights are eternal and absolute. They are valid for all men in all times and in all places.
- 2- Natural law is a body of rules, ascertainable by reason, which perfectly secures all of these natural rights.
- 3- The state exists only to secure men in these natural rights.
- 4- Positive law is a means by which the state performs this function, and it is obligatory only so far as it conforms to natural law. (Pound, 1914: 623)

Legislation was essentially a means of securing natural rights.

Thus, for both the English and American jurists of the eighteenth century, common-law rights were identified with natural rights. Hence, common law was believed to exist not only to secure individual interests against the competing interests of others, but also to protect individuals against the arbitrary invasion by the state or society (Pound, 1914: 625).

Immanuel Kant was the first to criticize the natural law theory at the end of the eighteenth century. Kant wondered "(1)f natural rights were inherent moral qualities to be ascertained by reason, granting that reason could deduce infallibly from given premises, how could reason give us the premises? If, on the other hand, natural rights rested on a social contract, how could the details or the implied terms of a contract of a past generation bind the men today?" (Pound, 1914: 627). Kant was essentially searching for a principle which could explain the security of rights of individuals. He found his answer in the concept of the free will. Pound states that Kant viewed laws as a mechanism to reconcile conflicting free wills whereby:

(h)e held that the principle by which this reconciliation was to be effected was equality in freedom of will, the application of a universal rule to each action which would enable the free will of the actor to co-exist along with the free will of every one else (1914: 628).

Therefore, by the end of the eighteenth-century the view of justice as securing the status quo was shifted to a conceptualization of justice allowing a maximum of individual self-assertion.

Jurisprudence was conceived as a separate science in the nineteenth century distinct from other fields of study such as politics. Pound discusses five types of juristic

thinkers at this time. The first group Pound names are the metaphysical jurists (1917: 203). Metaphysical jurists were proponents of Kant's theory. These thinkers believed that the end of mankind was freedom. Hence, the concept of civil liberty was a practical consequence of this idea of the free will and henceforth guaranteed a general freedom of action for individuals (Pound, 1917: 204).

The second school of thought was led by the English utilitarians most of whom were legislators. The essential principle of this school of thought was embodied in the concept of securing the greatest happiness to the greatest number of individuals (Pound, 1917: 207). Jeremy Bentham, a proponent of social utilitarianism, believed in "allowing the maximum of free individual action consistent with general free individual action" (Pound, 1917: 207). Therefore, the end of law as perceived by the English utilitarians was, in essence, the same as for the metaphysical jurists namely to secure the most individual freedoms.

The third group to influence the philosophy of legal thought was the historical jurists. Historical jurists were more concerned with "the nature of law and the content of legal systems than with the end of law" (Pound, 1917: 209). This group studied legislation from a historical-metaphysical approach and held the concept of individual liberty as the fundamental principle.

The last group that Pound discusses is the social individualists. The social individualists sought individual liberty. However, they believed that individual liberty could be obtained only through maximum governmental control and through collective action (Pound, 1917: 224).

Although Pound's analysis of the development of legal philosophy indicates that conflicts do arise throughout the ages, there is nonetheless a consistent unanimity "stemming from a consensual resolution of conflict" (Brzozowski, 1986: 34).

The second approach utilized in the examination of amendments made to legislation and the creation of new laws also employs a historical perspective. However, the goal of such research is to explore whose interests are served by changes in legislation. Therefore, legislation is not viewed as established on a societal consensus but rather on conflict. Such studies which attempt to test a conflictual model of society usually examine specific sections of legislation, and attempt to identify the social climate and interest group pressures under which the legislation was enacted.

Hall's study of the origins of contemporary theft legislation begins in 1473 with a discussion of the Carrier case which provides a concrete example of the selective use

of power in the interpretation and enforcement of legislation. The facts of the case reveal that Carrier had been hired to transport several packages for a merchant. En route, the packages were opened and Carrier was alleged to have stolen the contents of the packages instead of delivering them. However, at that particular time, such an act was not clearly defined as being criminal since the defendant was legally in possession of property which had been given to him for the purpose of transportation. This obvious weakness in the law was subsequently resolved by introducing an amendment whereby the very act of opening the packages would terminate the defendant's legal possession. Previously there had been no precedent for this interpretation of the law. However, it was now possible to admit into the law of theft acts that had otherwise been dealt with as civil wrongs (In Hagan, 1980; 605). Essentially, what Hall did was identify the social, political and economic conditions that influenced this reinterpretation of theft laws. If a merchant wished to transport property, he could normally protect himself by asking a trustworthy person to do the job. However, with the expansion of trade this became more difficult and merchants began to seek the protection of the state.

Moreover, it was a known fact that the King was himself a merchant, and therefore was very interested in the outcome of the Carrier case.

The Carrier case was first heard in the Star Chamber which "made the likelihood of royal control extremely probable" (in Hagan, 1980: 606). Hall concludes that the most powerful political and economic groups in England (i.e. the King and the merchants) at the time influenced to some extent this reinterpretation of the law dealing with theft. The King not only had a political commitment to the protection of merchandise, he also had a personal interest to secure. In reinterpreting Hall's findings, Chambliss concludes that the new legislation could not be logically justified but that it was possible for the judges to create legal fictions that gave credence to the amendments such that the interests of the new upper class were protected (in Hagan, 1980: 606).

Similarly, Chambliss used a historical method in the examination of English vagrancy legislation. He attempted to establish whether or not vagrancy legislation was a reflection of the interests of the ruling class. Thus, this investigation was conducted from a conflict theory perspective.

The emergence of the first vagrancy statute in 1349 made it a crime to give alms to anyone who was unemployed and yet otherwise able to work. Two years later, in 1351, the statute was amended by stating that "none shall go out of the town where he dwelled in the winter, to serve the summer, if he may serve in the same town" (Chambliss, 1964: 238). The purpose of this amendment appears to be directed towards controlling the labor force. Chambliss claims that the vagrancy statutes emerged as a result of changes in the social structure caused by the Black Death which struck England in 1348 and desimated the labor force. At this time, England was highly dependent upon the supply of cheap, unskilled manual labor. Consequently, wages for the personally free laborers increased. This increase in wages caused problems for landowners who could not afford to pay for personally free labor. Therefore, the vagrancy statutes forced laborers to accept employment at a low wage such that landowners were ensured an adequate supply of labor at a price they could afford to pay (Chambliss, 1964: 240).

In 1381, the Peasants' Revolt reduced the need for serfs. Essentially England's social structure was changing. With the breakup of feudalism there was an increased emphasis upon commerce and industry in a 'free' economy (Chambliss, 1964: 244). Subsequently, there was a shift in concern on the part of lawmakers from the control of the

in transporting goods" (Chambliss, 1964: 248-249). Therefore, Chambliss concludes that the legislation was altered to accommodate the needs of those who ruled, namely the landowners at one period in time and the merchants at another period when England was becoming more industrialized. Law reform, in terms of vagrancy legislation, was clearly prompted by changes that occurred in the social setting.

Another study, conducted by Quinney, attempted to examine the manipulation of the so-called Sunday Law in the United States. The Sunday Law was initially designed to ensure a day of rest and to keep holy the Sabbath when it was originally enacted in 1237. However, Quinney notes that during the twentieth century the Sunday laws have been altered in terms of economic considerations. Slowly various types of enterprises are being allowed to conduct business on Sundays. Quinney demonstrates that a criminal law which was originally enacted to secure religious concerns has today been amended to control the operation of certain economic interests (in Brzozowski, 1986: 36). Quinney perceives legislation as the result of the operation of interests rather than an instrument that functions regardless of particular interests. Moreover, Quinney states that though legislation may "control interests, it is in the first place created by interests...law incorporates

in transporting goods". (Chambliss, 1964: 248-249). Therefore, Chambliss concludes that the legislation was altered to accommodate the needs of those who ruled, namely the landowners at one period in time and the merchants at another period when England was becoming more industrialized. Law reform, in terms of vagrancy legislation, was clearly prompted by changes that occurred in the social setting.

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the interests of specific persons and groups; it is seldom the product of the whole society" (Quinney, 1975: 75).

In Canada, Goode examined the political ideology of the Law Reform Commission. This 1976 study revealed that the Law Reform Commission had adopted a so-called value consensus model of society. Furthermore, Goode suggests that this philosophy was reflected in the Commission's proposals to amend legislation.

Essentially, what Goode did was examine a number of working papers published by the Law Reform Commission. Through content analysis of these working papers, Goode found a rather common ideological thread based on what he viewed to be two major assumptions. Firstly, in the working papers the Commission seemed to imply that there exists in society a fundamental agreement concerning the values which society wishes to uphold. Secondly, that such a consensus is reflected in law-making and in the application and interpretation of the law (Goode, 1978: 394).

Goode concluded that the working papers of the Law Reform Commission actually represent the application of a particular ideology, what he calls liberal positivism, to the framework of the criminal justice process. However, this view of society is seemingly inconsistent with the

existing social reality - one in which there is never ending conflict and compromise between differing views.

Cook (1969) examined the development of Canadian narcotics legislation from 1908 to 1923. Using a conflict model interpretation and gathering data from the Debates of the House of Commons (the Hansard), she documents the political process which led to the creation of narcotics legislation in Canada.

The first anti-opium law was passed in 1908 as a result of Mr. Mackenzie King's personal investigation into opium use in Vancouver. Subsequently in 1911, King, by this time considered an expert on the subject of opium, introduced a more stringent Opium and Drug Act. Cook states that this second act "originated largely as the result of King's personal and moral fervour" (1969: 37). From 1920 to 1923, there was much public agitation concerning the use of illicit drugs. The Canadian government decided in 1923 that convicted drug traffickers would not be permitted to appeal their convictions since "...this provision would not apply to honest citizens but only to criminals who, as a rule, had no fixed residence or place of abode and thus simply vanished after serving notice of appeal" (Cook, 1969: 44). Moreover, Cook writes that as moral indignation of the legislators increased so did the severity of sanctions for drug offences (Cook, 1969: 43).

This study concludes by stating that clearly Canadian narcotic legislation was influenced by such factors as the stratification order, cultural beliefs and interracial conflicts. This legislation essentially reflected the interests of the upper classes (a group that felt threatened by the use of drugs of the lower class immigrants) in attempting to control Chinese Canadians and others who engaged in the use of illicit drugs.

In a more recent study, Comack (1985) proposes a different interpretation of the origins of Canadian drug legislation. This study argues that a Marxist perspective would provide a better theoretical framework in which to gain a complete understanding of the origins of the drug legislation. Comack essentially questions the accuracy of Cook's conflict interpretation of the law and finds that the analysis fails to adequately describe the structural variables surrounding the origins of the drug laws (Comack, 1985: 71).

Comack demonstrates that the massive immigration of the Chinese to Canada was a blessing to various industries in British Columbia during the nineteenth century. She argues that an adequate supply of cheap labor was required at the time to develop the resource industries and the necessary industrial infrastructure, as well as to "attract capital investments to the west coast" (Comack, 1985: 74).

Essentially, the Chinese provided the necessary human resources. However, while the B.C. capitalists were reaping the benefits of this pool of cheap labor, Canadian workers began to view the Chinese as a serious threat which eventually promoted racial antagonism and hence, a division within the working class. In face of the Canadian workers' growing unionization, militancy and open opposition to the exploitation by the capitalists, the state used drug legislation to contain and control class conflict. Thus, as Comack suggests:

...the definition of the situation generated by the state was that an 'alien element' was responsible for the deteriorating situation in British Columbia. It was not, in other words, the fundamental material conflict between capital and labor that gave rise to problems and tensions within the system but the invasion of 'foreign agitators', 'immoral outsiders' and the like. The Opium Act further reinforces this definition of the situation. In essence the criminalization of opiate use amounted to the creation of a social problem by the state (1985: 82-83).

Before 1908, the use of opium by the Chinese was not generally considered to be a social problem. In fact, the provincial and federal governments were collecting considerable revenue from the importation of opium indicating, as Comack states, "an awareness and implied condonation of the practice" (1985: 83). The criminalization of the use of opium resulted, as would be expected, in the black market drug trade where prices were ..

lucratively inflated. Hence, the official prohibition of opium use seemingly aggravated the problem of drug consumption. Comack concludes her study by stating that:

There appears to be a clear and inescapable connection between legislation aimed at the 'immoral' habit practiced by the Chinese and the ideology of an 'alien element'. Opium-smoking became an easy symbol for the dangers and evils embodied in the fantasy of the 'Yellow Peril', and the opium legislation helped to affirm Oriental immigrants as a major cause of social problems... Consequently one could argue that the drug laws were not so much directed at the Chinese but rather helped to identify them - and by extension 'foreigners' and 'aliens' - as a source of the problems confronting B.C. society. In doing this the laws de-legitimized further the competing view of the socialist movement, which insisted on defining labor issues in class, not racial, terms (1985: 83).

Sutherland (1950) examined the diffusion of sexual psychopath laws in various U.S. states that had been enacted since 1937. He recognized several propositions which were implicit in sexual psychopath legislation. These propositions are:

- 1- the danger to women and children from serious sex crimes is very great because the number of sex crimes is large and is increasing more rapidly than any other crime;
- 2- most sex crimes are committed by oversexed individuals and "these persons persist in their sexual crimes throughout their lifetime";
- 3- sexual psychopaths "always give a warning that they are dangerous by first committing minor offences (and) that any psychiatrist can diagnose the (budding sexual psychopath accurately) at an early age, before they have committed serious sex crimes";
- 4- "sexual psychopaths who are diagnosed and identified should be confined as irresponsible persons until they

are pronounced by psychiatrists to be completely and permanently cured of their (disease)" (Sutherland, 1950: 142).

Sutherland's study focuses primarily on the role of psychiatrists in having legislation created and passed:

(t)he psychiatrists, more than any others, have been the interest group back of the laws. A committee of psychiatrists and neurologists in Chicago wrote the bill which became the sexual psychopath law of Illinois...(it) was enacted with little opposition in the next session of the state legislature (Sutherland, 1950: 145).

Sutherland links the diffusion of sexual psychopath laws to the following conditions. Firstly, a fearful societal climate is created mostly by the media and reports of a few spectacular sex crimes. Within the community, individuals and groups react in a conflicting manner. Each group will suggest a different way of dealing with the perceived problem of the increase in sex crimes. Secondly, an official committee is appointed and sometimes guided by psychiatrists. This committee collects information on sex crimes and the most appropriate methods of dealing with the problem. Tentative sexual psychopath legislation is drafted and presented to the legislature and the public as the "most scientific and enlightened method of protecting the public against dangerous sex criminals" (Sutherland, 1950: 147).

Hence, when one group of individuals has most of the power in drafting laws, conflict theorists would suggest that the resulting legislation will reflect the values and interests of this group.

Anthony Platt (1977) studied the establishment of the juvenile justice system in the United States from a conflict theory perspective. Essentially, he argued that the creation of the judicial system for juveniles during the nineteenth century led to the subjugation of more young people to arbitrary and degrading punishments. Hence, the 'child-saving movement' was not successful in humanizing the criminal justice system. Rather Platt states that:

The child-saving movement was not a humanistic enterprise on behalf of the working class against the established order. On the contrary its impetus came primarily from the middle and upper classes who were instrumental in devising new forms of social control to protect their power and privilege. The child-saving movement was not an isolated phenomenon but rather reflected massive changes in the mode of production, from laissez-faire to monopoly capitalism and in strategies of social control, from inefficient repression to welfare state benevolence. This reconstruction of economic and social institutions, which was not achieved without conflict within the ruling class, represented a victory for the more "enlightened" wing of corporate leaders who advocated strategic alliances with urban reformers and supported liberal reforms (1977: xx).

Platt argues further that the child-saving movement attempted to "achieve (social) order, stability and control

while preserving the existing class system and distribution of wealth" (1977: xxii). Most of those who supported the movement were to some extent wealthy and powerful. Since the movement could not have achieved significant reforms without the financial or political clout of the wealthy, the support of these individuals was imperative for the success of the movement.

Despite the fact that many of the reformers were probably sincerely concerned about the treatment of juveniles within the criminal justice system, they generally accepted the basic political and ideological structure of society and typically did not seek to alter economic conditions and structural inequalities (Platt, 1977).

Roby (1969) in her study of prostitution laws in the state of New York focuses on the political nature of law making and law enforcement. Essentially, what Roby did was divide the formulation and enforcement of prostitution laws into five stages. These five stages were:

- 1- the creation of a commission to write a proposal to amend the pertinent section of the New York Penal Law,
- 2- the introduction of the proposal as a study bill in the New York State Assembly and Senate, and the public hearings on the proposed law,
- 3- the enactment of the Penal Law,
- 4- the enforcement of and the public reactions to the Penal Law, and

5- the subsequent proposed amendments to the legislation.

This study attempted to "analyze the political processes which were part of the formulation of the law" (Roby, 1969: 85). By studying one article of the Penal Law which was publicly debated, the researcher was able to "infer many of the factors influencing the Commission's decisions" (Roby, 1969: 86). Data were collected by means of interviews, summary analyses of the prostitution cases reported in the Criminal Court of New York City and of data on arraignments and dispositions, disorderly conduct and loitering cases found in the Statistics Office of the Criminal Court, and an examination of the proceedings of the public hearings on the Proposed Penal Law (Roby, 1969: 86).

Results of this study demonstrate that during the five stages, the power of interest groups seemed to shift from one group to another. Furthermore, Roby noticed that one group (a coalition) exercised some form of power with respect to amendments made to one section of the law, while another coalition did so with another section. However, even if legislation was enacted, the interests of certain powerful persons or groups were instrumental in deciding if the law was to be enforced and to what extent the law was enforced. For example, after considerable debate amongst various pressure groups, a clause dealing with the patronage of prostitutes was included in the New York amendments.

However, Roby relates this inclusion of the 'patron' clause to the fact that the group who forced the clause (a small number of organizations and individuals represented by the president of the American Social Health Association and a retired chief probation officer of the New York City Magistrates Court), had some vested interests involved in the creation of such legislation (Roby, 1969: 108). To conclude, Roby suggests that the creation and enforcement of legislation dealing with prostitution in New York involved a political process whereby a relatively small number of pressure groups attempted to legislate the behavior of a group of persons to secure their own interests which were largely political and economic in nature. For example, some New York business people and hotel owners claimed that prostitution was directly linked to the commission of other crimes such as breaking and entering, muggings and extortion (Roby, 1969: 99). These business people and hotel owners wanted the penalty for prostitution to remain imprisonment up to a maximum of one year as opposed to the proposed change in the penalty suggesting imprisonment for a maximum of fifteen days. According to Roby, the business people and the hotel owners were unsuccessful in having the legislation amended because the Committee on Codes feared that giving prostitutes a one-year sentence would lead to overcrowding

in the Jails and the senators on the Committee did not feel that the act of prostitution warranted a one year Jail sentence (1969: 103).

Roby concludes that behavior is not 'automatically' defined as being criminal. Rather, as already stated, it would appear that there exists a political process whereby a relatively small number of interest groups attempt to have legislation changed in a manner that they desire. This situation is obviously conflictual in nature. Throughout the development of the New York Penal Law dealing with prostitution, many interest groups and concerned individuals worked in an effort to have the legislation drafted and enforced in the fashion they desired (Roby, 1969: 103).

Another study somewhat similar to Roby's was undertaken by Snider in 1985. Snider examined the passage of legislation designed to reform the laws concerning sexual offences in Canada. This study begins with an analysis of the origins of the feminist movement and the Law Reform Commission, and ends with a descriptive discussion of the public debates on the matter in the House of Commons. Thus, the author of this study begins with a retrospective analysis of sexual offence legislation and the origins of the reform movement. Secondly, an analysis is conducted of the legislative changes and rationals for these changes, based on a study of parliamentary committee meetings.

Finally, a macro-level analysis of the direction of the changes highlighting their significance in the understanding of the reform process is undertaken (Snider, 1985: 337).

Snider examined the demands of various groups which presented briefs to a Standing Committee on Justice and Legal Affairs. She subsequently classified the groups into four categories. These four categories were the following:

- 1- women's groups,
- 2- members of the law enforcement community (eg. prosecutors and chiefs of police),
- 3- defence lawyers, and
- 4- homosexuals.

Essentially, Snider outlines the political process of law reform and ultimately examines how the recommendations by the various groups are reflected in the new legislation. Snider concludes by stating that although the amendments made to the legislation concerning sexual assault, on the surface, appeared to be a victory for the women's movement, upon closer examination this may not be an accurate interpretation. The reform of legislation dealing with sexual assault has effectively led to greater social control "over the large and impotent under classes" (Snider, 1985: 353). Hence, the groups whose views were most like those of the state representatives (eg. the law enforcement agents) were found to be given the most credence. Snider states

"not surprisingly, their (the law enforcement agents) interests coincided exactly with those of the state, and virtually all their recommendations were instituted" (Snider, 1985: 350). However, had the members of the law enforcement community proposed more liberal amendments to the law, Snider contends that they would not have relished in such success (1985: 350). In terms of the legislative changes proposed by the women's groups, it would appear that their demands were only selectively met. Essentially, those demands for law reform made by feminists were incorporated in the amendments when they were instrumental in securing the dominant ends of those who maintained the monopoly of power to create legislation that reflects their interests.

This review of several studies in the consensus/conflict debate demonstrates that most have examined a specific piece of legislation and have attempted to infer the social, political and economic factors related to specific legislative amendments. This approach has been referred to as the institutional interpretation of history (Hall, 1952).

#### Review of Major Positions Concerning the Legal Control of Pornography

The issues concerning the present pornography debate in Canada are certainly very emotionally charged and complex. Any discussion of pornography eventually leads to the

realization that this is an area where there exists no absolute moral, legal or social consensus (Taylor, 1984: 2). It has been suggested that perhaps a consensus regarding the legal control of pornography did exist in the past. However, Bertrand recognizes that such a consensus, if in fact it ever really existed, has essentially been eroded by time (1985: 243). Today, various interest groups, concerned about pornography and its implications on the broader social structure, have come to the forefront and have expressed their particular concerns. The current debate has focused primarily on such issues as harm, freedom of expression, freedom from expression, censorship, the decline in the moral standards of the nation, the protection of the nuclear family, the degradation and oppression of women and the like. Nonetheless, many Canadians remain yet unaware of the actual level of conflict which characterizes the climate of the current debate. As McKay and Dolff state:

...(many) would register surprise at the methods of expressing opinions, beliefs and attitudes regarding pornography. Reasoned and informed debate has for many participants become subordinate to stridency, inflexibility and an unyielding proposal and defence for a particular position. Advocates of 'unacceptable' positions are subjected to personal insult not for what they are, but rather for what they represent. For many, it is good versus evil, we against they, in the combative climate for means by which social influence can be exerted to enact changes in law and policy (1984: 12).

Essentially, three distinct viewpoints or expressions of interest can be discussed in opinions regarding the pornography issue (a more indepth discussion of these viewpoints is undertaken in a later chapter). Groups of individuals expressing these viewpoints are characterized by their philosophical position regarding pornography and are identified as 1) the civil/libertarian position, 2) the moral conservative position and 3) the feminist position (see The Report of the Special Committee on Pornography and Prostitution - vol.1, 1985: 15-22 and Kalte, 1984: 7-9). These positions are briefly examined in the following section.

#### A. The Feminist Position

In the mid 1970's, the feminist movement became concerned over the amount of visible, physical violence that was directed towards women, and is represented and glorified through the media (Escomel, 1985: 39). One of the first indictments of pornography occurred in 1976, after promoters of a rock music album put up a billboard in Los Angeles showing a bound and bruised woman with the words "I'm Black and Blue From the Rolling Stones - And I Love It" (Friendly, 1985: 59). The following year, two pornographic movies were shown in New York. One film was entitled Nazi Love Camp and the other Snuff (which purports to show the actual murder of an actress (see Dixon, 1984: 1-2)).

Feminists picketed both films, both of which left town early. A little closer to home, in Quebec, pornography began receiving more attention by feminist groups in 1979. The catalyst was an article published in Chatelaine by Micheline Carrier describing the many aspects of the pornographic industry (Quebec, 1981: 1). In a later piece of work, Carrier (1983) argues that pornography is at the ideological root of women's oppression.

Feminists throughout North America propose that pornography is the propaganda of misogyny (Canada, 1985: 26; Maltaise, 1984: 38; and many others) - misogyny being the hatred or distrust of women. Similarly, Neil Malamuth has also suggested that pornography is the "eroticization of violence" (in Friendly, 1985: 60). The feminist movement views pornography as hate literature directed against women, and in some cases, children and men. What is essentially wrong with pornography is that it degrades and dehumanizes women because of the way they are portrayed. Often the issue which the feminists protest is not the explicit sexual content of pornographic material, but the objectification of woman and her body. Pornography merely aggravates the differences and inequalities that already exist between men and women in our society (Canadian Advisory Council on the Status of Women: 1). This movement stresses however the fact that the representation of explicit sexual activity is

not what is objected to (Canadian Advisory Council on the Status of Women: 3). The feminist movement is primarily concerned with images of degradation and the combination of sexual activity and violence which is felt to ultimately lead to negative attitudes regarding women and violence against women (Canada, 1983: 20; Stickney, 1983; Clarke and Lewis, 1979: 140 and Robertson, 1979 for a review of the research done on the effects of pornography amongst others).

Moreover, feminists are concerned about the obvious power play that exists in all areas of production and consumption of pornography which is essentially a reflection of the uneven structural distribution of power between men and women. Each group responsible for the production, distribution and consumption of pornography has a vested interest to secure - the producers want the business and the capital gains; those who consume pornographic material fulfill a need and thus receive pleasure; and the models who have agreed to participate have usually made some money. The economic dimension of the pornography industry is quite blatant. Furthermore, because most of the producers and virtually all the consumers of pornography are male, and most persons portrayed in a degrading fashion in such films are female, the differential distribution of power between the sexes becomes quite obvious in pornography. The sexual stratification that exists in the broader social context is

clearly reflected and maintained in pornographic material (Finn, 1985, 1986a, 1986b). Patriarchy, feminists would argue, is supported and maintained through the objectification of women's bodies and the portrayal of women as inferior to man. It is the existence of a patriarchal social structure that feminists are concerned with and which pornography sustains. Atwood suggests that perhaps there is a link between the political repression of women and pornography (1983: 101). Feminists desire a change in the gender stratification of our society, such that the control and ~~power~~ of male dominated institutions over women is minimized. Essentially, feminists argue that the portrayal of "women being bound, raped, beaten, tortured and killed...for sexual stimulation and pleasure should be banned, because...these portrayals encourage and condone these crimes against women in the real world" (Russell, 1978: 304).

U In order to hinder the proliferation of pornographic materials, a segment of the feminist movement advocates the censorship of all types of pornography which is distinguished from erotica by its violence and degrading portrayal of women. It is the issue of censorship which divides the feminist community. There are those who advocate censorship and at the other extreme, there are those who are opposed to the use of censorship in the

control of pornography. Essentially both groups feel the same way about pornography (Callwood, 1985: 122). However, women against censorship argue that the legal control of pornography would leave the oppressive structures of our society perfectly intact, if not strengthened. This last statement is best exemplified by Kostash:

The state is hardly a neutral, let alone prowoman, institution that can be captured and directed toward our (the feminist movement's) projects; it is specific to the development of capitalist patriarchy; its capture and transformation requires a revolution (1985: 37).

The censorship of pornography is considered sexist because it actually places power in the hands of men to look after the interests of women and thus "replicates the powerlessness of women" (McCormack, 1980: 8). Furthermore, it has been alleged that the women who are appointed to censorship boards (usually by men) are often carefully selected to reflect the sexist views of the patriarchy (McCormack, 1980: 8). Another argument against censorship proposes that it is not only sexist in form but also in content.

(t)he evolution of censorship over the past century has been to make an arbitrary distinction between erotic art and pornography which has, in effect, allowed the educated elites to enjoy Ulysses... while depriving the semi-literate of their erotic entertainment. The distinction between so-called erotic art and pornography based on some vague principles conceals a basic distrust of the masses: the erotica of the elites expresses a civilized sensuality, while the erotica of

the masses is a projection of their lust... To censor pornography then, is to penalize the poor doubly; first, by withholding their entertainment from them, and second, by stigmatizing them for not having more refined taste. (McCormack, 1980: 8).

Moreover, the censorship of pornography may only result in a thriving black market and create a monopoly of organized crime (Escomel, 1985: 41). Prohibiting pornographic material may simply increase people's curiosity, which could in turn justify higher prices paid for pornographic material and thus, higher profits for producers, distributors and wholesalers may be the outcome (English, 1980: 24).

Regardless of their views about censorship, most feminist groups advocate the greater use of legal measures coupled by various political and social strategies to combat and eliminate sexism within society (The Special Committee on Pornography and Prostitution, 1985: 19).

#### B. The Moral Conservative Position

Lord Patrick Devlin, a British jurist, remarked that the structures of most societies are made up of both politics and morals (1968: 9). Devlin, a proponent of what may be termed a moral conservative position, firmly argues that there exists consensus amongst members of society regarding what is morally right or wrong, and hence, what is permitted or disallowed in law. This societal consensus, Devlin called 'public morality'. It is through legislation

that morality is preserved. In essence, society "has a prima facie right to legislate against immorality as such" (1968: 11). An established morality is therefore necessary to the welfare of a society. Societal disintegration occurs when no consensus exists amongst reasonable individuals regarding what constitutes morality. Devlin states that:

...history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities;... It is wrong to talk of private morality or of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice. There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality (1968: 13-14).

Freedoms are, therefore, to be tolerated as long as they are "consistent with the integrity of society" (Devlin, 1968: 16). If the boundaries of tolerance are crossed, as is certainly the case with pornography, this disgust or repugnance cannot be ignored by legislators.

Dworkin (1983) in her book entitled Right-Wing Women exposes the paradoxes utilised by what she calls the Right in order to sustain traditional male/female roles. The Right provides women with, at most, symbolic restraints on male aggression and dominance by offering the following:

- 1- Form - women are not given the same opportunities as men to develop the skills necessary to function autonomously in the modern world. Women do not have the same educational and intellectual forums made available to them as men do, women are deprived of physical strength and of self-confidence through socialization processes. The Right camouflages this reality by "offering women a simple, fixed, predetermined, social, biological and sexual order. Form conquers chaos. Form banishes confusion. Form gives ignorance a shape, makes it look like something instead of nothing."
- 2- Shelter - women are socialized into believing that they must care for a man's home because without men, women would be homeless. "The Right claims to protect the home and the woman's place in it."
- 3- Safety - for a woman the world is a very dangerous place. Women must ensure against giving men the 'wrong impression' (i.e. no provocative clothing, sensuous looks and so forth). The Right recognizes the "reality of danger, the validity of fear. The Right then manipulates the fear. The promise is that if a woman is obedient, harm will not befall her."
- 4- Rules - the Right, by creating and enforcing traditional norms and mores, tells women what is expected of them. "The Right also promises that, despite their absolute sovereignty, men too will follow specific rules."
- 5- Love - a woman is loved for being a woman - for doing what she is told to do. Obedience is an expression of love as is sexual submission and childbearing. The men, in return, must ensure the material welfare of women. Hence, "to reduce the cruel inadequacies of mortal men, the Right offers women the love of Jesus... the one male to whom one can submit absolutely - be Woman as it were - without being sexually violated or psychologically abused" (Dworkin, 1983: 21-23).

Moral conservatives are primarily concerned with the decline in morality and the disintegration of the nuclear family. Representations of sexual activity outside the confines of heterosexual marriage are considered potentially harmful to adults, but especially to youth. Thus, the

concern of moral conservatives with pornography becomes quite obvious. Pornography, in essence, may be instrumental in leading to the destruction of the social fabric where traditional, and perhaps Christian, values, mores and roles must be upheld and maintained. Moral conservatives, unlike feminists may, in fact, argue for the maintenance and promotion of patriarchal values.

In Canada, many, if not all, moral conservative groups and individuals base their views upon a Christian doctrine (Escomel, 1985: 38). These interest groups are by and large composed of both men and women. However, groups such as Real Women provide an excellent example of women who support traditional conservative notions of the family, the law, sex and society.

#### C. The Civil Libertarian Position

"Our society knows the value of freedom", state those of the civil libertarian position, "and we are committed to liberty as a general defining and regulating principle of our moral and political lives" (Dixon, 1984: 2). Dixon goes on further to state that "as a culture and a nation, Canadians have a philosophy: we know something about ourselves and what we want. We know that freedom is

something essential to our sense of ourselves and may well be the first of all goals that we seek" (1984: 2).

For civil libertarians, the issue is one of freedom. Freedom refers to the "ability (of an individual) to act in terms of one's interests, desires, and tastes, it is the ability to act in order to realize one's aims, whatever they may be" (Golding, 1975: 53). Civil libertarians acknowledge the fact that formal social organization is inevitably coercive and therefore, freedom, in the ultimate sense, can never truly be had. Rather modern democratic societies attempt to implement the 'ideal of freedom' recognizing the problem that freedoms can only be more or less guaranteed as protected rights. However, protected rights, by definition imply the potential use of coercion or force against individuals who impinge upon the protected rights of others (Golding, 1975: 54). Hence, the protected rights (i.e. freedoms) are often "bought at the expense of somebody else's liberty" (Golding, 1975: 54).

John Stuart Mill, a famous philosopher, wrote regarding the issue of liberty:

...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant... The only part of

the conduct of anyone, for which he is amenable to society, is that which concerns others... Over himself, over his body and mind, the individual is sovereign (In Golding: 1975: 55).

Thus, the fundamental position of civil libertarians is that there are spheres of conduct whereby the State and its law have no legal or moral jurisdiction unless, as Mill argues, the action results in direct and observable harm to others. If the behavior or action is merely an inconvenience to an individual, a group or society, this inconvenience must be tolerated "for the sake of the greater good of human freedom" (Golding, 1975: 58).

Today, the pornography debate has created a forum for civil libertarians where they argue that citizens have a guaranteed right to freedom of expression. Furthermore, actions that are not demonstratively harmful should be preserved - and by implication allowed (Dixon, 1984: 3). Specifically in terms of pornography, a definite link between the consumption of such material and harm to individuals has not been empirically demonstrated (Dixon, 1984: 7). Hence, censorship of pornographic material is not advocated. In Canada, the British Columbia Civil Liberties Association's position regarding censorship is recommended only on the basis of evidence that shows that consumption of pornography causes direct harm and not because it is regarded as hateful (Dixon, 1984: 3).

Research which attempts to link the consumption of pornography to violent behavior against women has generally been criticized harshly by civil libertarians on methodological grounds. Some feminists have suggested that these methodological requirements, argued for by civil libertarians, are far more rigorous than would be required for research on other social phenomena. Mahoney (1984) has criticized the liberal approach to morality because of its "improper insistence on the proof of a clear and present danger; and because it stresses the right of individuals at the expense of the collectivity" (p. 21). Censorship is therefore not advocated by civil libertarians because there is not substantial evidence to link the consumption of pornography to violent, acting-out behavior. — Hence censorship is viewed as a repressive means that would infringe upon the guaranteed rights of freedom of expression (Racine, 1985: 59). Censorship is feared by this group because its use may lead to an abuse of power by those who maintain the control mechanisms used in censoring sexually explicit materials. The main concern for those of the civil/libertarian position is that more harm may be done by banning than by permitting pornographic material to exist uncensored. Therefore, according to this group, "the democratic community is bound to protect the freedom of expression of those who produce pornography, and the rights of those who wish to view it" (Dixon, 1984: 7).

Women In Canadian Society, Gender Conflict and Pornography

The relative subordination of women in modern societies around the world appears to be an everpresent reality irrespective of the social, political and economic compositions of various countries. In contemporary states men dominate women through gender related norms. Schur echoes this view by stating that:

From beauty norms to female crime-processing, from maternity norms to male crimes against women...all these and many more women-and-deviance patterns are linked together. They are all shaped by, and constitute important parts of, an overall system of subordination and devaluation (1984: 9).

The subordination of women is based on a system of gender stratification whereby women are always at the bottom of the hierarchy (Escomel, 1985: 37 and Coderre et al., 1984: 3). Historically, the dominance of men over women had essentially been ignored. Gender stratification was overlooked because the male-dominated social order was simply taken for granted (Collins, 1985: 81). Therefore, can we not perceive the oppression of women as founded essentially in the structural and ideological position of women within patriarchy and its ideological justification (Eisenstein, 1979: 24)?

In Canada the pornography issue is one of great concern for women. What distinguishes pornography and various other offences against women from all other illegal acts (such as

theft or murder), is the blatant attack by pornography upon one segment of the population namely women (Shanal, 1986: 49). Smart (1976), in discussing sexual assault and prostitution, states that these forms of sexual deviation may be viewed as mere extensions of cultural attitudes towards sexuality and women in general (p. 107). Clearly, this statement may be broadened to include the issue of pornography. Only since recently has the relative subordination of women within the social structure been seriously addressed. The obvious outcome of such investigations has been the rejection of the assumption that sexual stratification reflects the natural order of things. The issue of pornography requires women and others to examine not only the relationship between the genders, but also the wider capitalist patriarchy which constitutes the setting for the interaction between the genders.

In many ways pornography contributes to the subordination of women by promulgating and reinforcing images and misogynistic attitudes regarding the position of women within society. Feminists regard the presence of pornography as evidence of a social malaise that is linked to the broader capitalist patriarchal social structure. The message of pornography is mainly what concerns feminist groups. In pornography, as in the broader social structure, the portrayal of gender identity refers to power for men and

powerlessness for women (Gates, 1978: 13). Pornography is simply a more explicit reflection of misogynistic attitudes that are widely prevalent in our society. Pornography promotes the idea that woman is a mere commodity ready to be bought and consumed by any man who desires her (Boyd, 1987). In furthering his argument, Boyd states that:

...sex is a product to be purchased. Pornography shares with prostitution this buying and selling of sexual life, urging a conception of gender relations in which human beings are valued for their breasts and respective genitalia... (Pornography and prostitution cannot be easily distinguished from other promotions of gender relations, insofar as the imagery of male dominance is concerned. And yet by specifically making one's genitalia or breasts the subject of a commercial transaction, pornography and prostitution transform human sexuality into alienated labor (Boyd, 1986: 128-129).

Pornography says that it is fine to beat a woman to keep her in "her place", to degrade her, to objectify her body and to ridicule her attempts to strive for equality amongst her male contemporaries. However, these messages are not solely found in the most degrading and violent hard-core pornographic magazines and videos. Lisa Steele (1985) has pointed to advertising and has considered it to be pornographic. In discussing the ads for Calvin Klein underwear she writes:

The young man is quite muscular; the young woman who is also basking in her briefs, is very thin. He is at ease, but also powerful in his pose, and photographed frontally; he is erect in his posture. She seems less relaxed, photographed from the side, her reclining

figure positioned diagonally in the frame: her spine is arched...gender difference is highlighted in such a way as to visually reinforce the very traditions of male dominance... the Calvin Klein enterprise is not more interested in promoting androgyny and symmetry - thus equality - between the sexes than it is in nationalizing its bank accounts. The company knows as well as any of us that its sales might drop dramatically if its customers were less anxious about their own sexuality (p. 66).

Images of male dominance are found everywhere in popular culture and continuously reinforce the concept of female subordination. Valverde argues that it is the capitalist patriarchy that gives pornography its power (1985: 152). Moreover, she argues that masculine beliefs and practices are encouraged and glorified by pornography. However, instead of focusing on how to define pornography, she contends that we must view pornography as a social process (examining how pornography operates in concrete situations) and then, perhaps we will know what it is. Essentially, Valverde makes two points. Firstly, she states that the hegemony of pornography seeks to create a female desire in its own image. This image purports to show woman as aspiring to the position of object of the oppressor's desire (Valverde, 1985: 153). The final point is that pornography is not necessarily the most misogynistic or patriarchal form of culture. Rather there are equally offensive patriarchal forms of culture (such as advertisements of everyday goods) that must be investigated and that will render broader insights into women's oppression (Valverde, 1985: 153).

Geraldine Finn's (1985) philosophical analysis of pornography focuses on the role of men as observer-subject (i.e. through men's consumption of pornography) and examines the role of pornography within a patriarchal social structure. She begins her discussion by stating, as most feminist writers do, that pornography reproduces the hierarchical differences that exist between men and women, and subsequently promotes the idea that women are objects available for the consumption by a subject which is essentially male (Finn, 1985: 82). Correspondingly, women become, what Finn terms the observed-objects in pornography as they are, in fact, observed by men. Therefore, man is regarded as the observer-subject and woman as the observed-object. Finn states that:

(Pornography) presents images of women, but only to designate men and the social relationship between them and the object-woman-viewed. Paradoxical as it may seem, pornography does not reveal Woman, though in it Woman reveals all, because Woman does not disclose herself as subject in pornography. On the contrary, it is Man who is revealed in her objectification. For the Woman he observes is the objectification of his idea. She is after all Man-made: not a real prostitute, but a product of the masculine imagination, the Word made Flesh and inevitably bearing the mark of her creator (1985: 83).

Hence, men are constructed in pornography as the creators, spectators and owners of women's bodies. It is this ownership which gives men a sense of power and domination over women. Moreover, Finn argues that pornography offers

men a sort of security from having to interact with real women. Firstly, the consumption of pornography protects men from prostitutes whom the author claims are women who are subjects (i.e. controllers) of their own sexuality. Pornography severs any real-life link to a real-life person. This distance between the observer and the observed increases men's control by reducing the prostitute to the sight/site of men's sexuality (Finn, 1985: 86). Secondly, pornography allows men to participate within a larger community of men who also consume pornography, and who can therefore exchange women albeit only symbolically. Finn argues that "(m)en it seems must exchange women to realize themselves as men, i.e. establish their gender-identity as masculine, and earn the recognition and, more importantly, the alliance of other men" (1985: 85).

In terms of the broader social context, Finn states that "(i)t is the power of patriarchy, men's will inscribed on women's bodies, which excites the pornographers" (1985: 87). Therefore, pornography is about power - the power of men to dominate and control women:

(p)atriarchy requires such a regime and thrives on sexual incitement: on the identification of self with sex, sex with pleasure and pleasure with potency (dominance and submission) (Finn, 1985: 90).

In conclusion, the author proposes that members of society must begin to refuse the sexual codification of

their identities and of their pleasures. Furthermore, as individuals we must stop appraising one another as objects, using superficial criteria such as appearance as a guideline of worth. Rather the author states that we must present ourselves to the world "in all our ambivalence and ambiguity" (Finn, 1985: 92).

In terms of abolishing patriarchy the key lies not in the creation of a 'new man'. Instead we must destroy the concept of man that we, as a society, have all created and reproduced. It is only in doing so that patriarchy will be ruined thereby allowing for a society where men no longer need pornography.

The evident subordination of women within the formal social structure obviously reinforces women's inferior position. However, it is important to recognize that the dominant culture also reinforces women's social status through informal norms and stereotypes. Since the pornographic industry is not only dominated by men's financial interests, but is also directly linked to the promotion of the most damaging cultural sexism, it quite clearly constitutes an issue which cannot be investigated without considering the reality of gender-based group conflict (Łoś, 1987).

Recapitulating the discussion of Turk's societal dichotomy consisting of the authorities or those who compose the dominant decision-making group, on the one hand, and the subordinate category or those who are affected by the law but who affect the law relatively little, on the other hand, we can clearly relate this dichotomy to the status of men and women in Canada. It is general knowledge that men in Canadian society are those who hold the majority of decision-making positions in government, business and other formal agencies. Clearly, the sexual stratification of men and women exists in Canadian society. However, this is not to suggest that we can or should dichotomize the conflicts between the interests of men and women on such a cut and dried basis. It is assumed that in terms of the pornography debate in Canada, we will witness the phenomenon of strange political alliances amongst various groups in an effort to promote their similar interests. For example, men who support the emancipation of women may join forces with feminist groups. Furthermore, we may have conservative groups which may also associate themselves with the feminists in promoting certain policies. These three groups may come together with common demands - for example they may call for the censorship of pornographic material. Nevertheless, the underlying reasons that these groups may have concerning their demands may differ greatly.

### Working Assumptions and Hypotheses

Certain general assumptions have been formulated based upon and validated in earlier research presented in this literature review. These assumptions are outlined below:

#### A. General Background Hypotheses

- 1- Similar to other discussed earlier attempts at law reform, the pornography debate in Canada creates a forum for much social conflict whereby differing groups attempt to create and enforce legislation that is reflective of their particular political and philosophical positions.
- 2- This conflict surrounding the pornography debate stems from a more fundamental societal conflict namely that of gender conflict.
- 3- This gender conflict is rooted in the different life experiences of men and women, the different socialization processes of men and women and the different perceptions of male and female sexuality resulting from the unequal distribution of power and status amongst men and women.
- 4- The present Criminal Code provisions dealing with pornography represent the views of men in a capitalist patriarchy.

As well, several working hypotheses have been developed on the basis of this literature review and are used mainly to focus and guide the process of data collection. Due to the limited nature of this research project, the hypotheses that could be tested are those that are quite narrow in scope and therefore, at this stage, it would neither be justified nor practical to formulate more general, properly theoretical hypotheses regarding the relationship between different variables. The following specific suppositions

will be assessed through the systematic categorization and the examination of the briefs presented to the Special Committee on Pornography and Prostitution during the public hearings held throughout Canada in 1984. The hypotheses are:

B. Specific Hypotheses Related to the Fraser Committee

- 1- The presentations made to the Fraser Committee were generally based upon three philosophical traditions. These philosophical traditions are the civil libertarian, the moral conservative and the feminist positions.
- 2- Due to the great and explicit feminist concern with pornography, most presentations made during the public hearings of the Fraser Committee were reflective of the feminist position in terms of the definition of pornography proposed, the perceived effects of pornography and the policy recommendations suggested.
- 3- Those presentations made to the Fraser Committee during the public hearings which were of the civil libertarian or the moral conservative views coincided, in some cases, with the specific demands and concerns expressed by those who support the feminist position. However, the demands and concerns of the civil libertarian and moral conservative groups stemmed from different philosophical premises and did not share the feminist point of view.
- 4- The Fraser Committee's recommendations to the federal government reflected an effort to acknowledge and incorporate the demands of those numerically dominant groups who voiced their concerns from a feminist point of view.
- 5- The tentative legislation introduced by the Conservative government during the summer of 1986 did not reflect the general orientation of the recommendations proposed by the Fraser Committee but instead, was a direct expression of a partisan ideological bias.

While some elements of the feminist demands were incorporated they were placed in an alien philosophical context and deprived of their original meaning. The patriarchal government was not ready to recognize feminist organizations as fully legitimate political pressure groups and to translate their concerns into a coherent legislation.

### Conclusions

The first two sections of this chapter attempt to demonstrate that a conflict theory approach to the study of law reform in the area of pornography is both relevant and applicable. Furthermore, a gender-based conflict perspective is also applicable due to the relative subordination of women in Canadian society. The third section of this chapter reviews briefly the three major positions of the interest groups involved in the present pornography debate. The fourth section discusses the relative subordination of women in Canadian society. More specifically, this subordination of women is shown to be related to pornography whereby pornography is instrumental in maintaining the attitudes that perpetuate the notion of the relative powerlessness of women. Pornography, therefore, merely reflects the reality of women within the broader social context of the capitalist patriarchy. Finally, this literature review leads to the formulation of a number of assumptions as well as specific working hypotheses, or suppositions, to be tested in a study of the Fraser Committee's public hearings, final recommendations and the proposed draft legislation embodied in Bill C-114.

- CHAPTER THREE

THE FRASER COMMITTEE AND THE 1986

LEGISLATIVE INITIATIVE

This chapter focuses primarily on the Fraser Committee. To begin, the creation of the Fraser Committee is contextually located. Essentially, the various social and political factors which led to the creation of the Fraser Committee's implementation are discussed. Secondly, the terms of reference and the Committee's mandate are outlined. This chapter goes on to provide an overview of the recommendations subsequently made to the Canadian government regarding the pornography question. Finally, the draft legislation embodied in Bill C-114 that was introduced during the summer of 1986 by the then Minister of Justice John Crosbie is examined.

The Social and Political Context of the Establishment of the Fraser Committee

In 1978, the Standing Committee on Justice and Legal Affairs of the House of Commons, chaired by Mr. Mark MacGuigan, reported on the subject-matter of pornography. At this particular time, Canadians were apparently becoming increasingly concerned over the quantity and nature of sexually explicit material available throughout the country. Consequently, various members of the House of Commons

introduced private member's bills to deal with the perceived problem of pornography. The introduction of these bills (C-206, C-207, C-239, C-241, C-318, C-325, C-348, C-399, C-400 and C-402) led to the question of pornography being referred to the House of Commons Standing Committee on Justice and Legal Affairs (see Report of the Standing Committee on Justice and Legal Affairs, Issue No. 18-1978).

The Standing Committee heard evidence from various sectors of Canadian society. Those who voiced their concerns to the Standing Committee repeatedly discussed the increased availability of sexually explicit materials. Furthermore, there was, at this time, an awareness that this sexually explicit material was clearly exploitive of women and children. This notion of harm was echoed in the Report of the Standing Committee:

... (women) are portrayed as passive victims who derive limitless pleasure from inflicted pain, — and from subjugation of acts of violence, humiliation and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in minute detail. Also of concern to this Committee and to all Canadians has been the recent influx of publications depicting and describing the participation of children in sexually explicit acts... This so-called "kiddie porn" is reprehensible and clearly unacceptable in contemporary Canadian society. It is exploitive of children. Very little of either type of sexually explicit material involves men as a main feature... The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships

appear normal and acceptable (Report of the Standing Committee on Justice and Legal Affairs, 1978: 18:3-4).

Eleven recommendations were put forth by this Standing Committee. They are outlined below:

- 1- Police forces at all levels, in both Canada and the United States, must engage in a vigorous effort to apprehend and prosecute the producers, manufacturers, distributors and importers and sellers of sexually explicit material.
- 2- Canadian Customs must undertake an intensive campaign of detection and prohibition of the entry into Canada of sexually explicit material.
- 3- The necessary personnel should be trained and the necessary equipment should be acquired by the Customs and Exise Branch of Revenue Canada in order to enforce Recommendation Two across Canada in a coordinated manner. (Report of the Standing Committee on Justice and Legal Affairs, 1978: 18:5).

These first three recommendations dealt with the importation of pornographic material. Apparently, much of the pornographic material that is available in Canada is produced in and imported from the United States, and to some extent, from Europe. The Standing Committee encouraged police forces at all levels and customs officials to engage in a vigorous campaign against the producers, manufacturers, distributors and importers of pornography. The remaining recommendations are as follows:

- 4- Section 159(8) of the Criminal Code should be amended to define obscenity more clearly by including any material involving children (anyone

who is or appears to be under 16 years of age) or the undue degradation of the human person within the criteria.

- 5- Expert witnesses should not be permitted to give evidence regarding community standards during a trial.
- 6- The Attorney General should be permitted to over-ride an accused's option for mode of trial, and request a trial by jury in cases prosecuted under section 159 of the Criminal Code.
- 7- Section 166 of the Criminal Code should be amended to make the procurement of children for the purposes of prostitution or participation in the production of sexually explicit materials an offence punishable by ten years imprisonment.
- 8- Legislation should be created to ensure that sexually explicit materials be discreetly advertised, displayed and sold to adults and under no circumstances should youth or children be exposed to such material.
- 9- Section 165 of the Criminal Code should be amended such that anyone convicted of a first violation of section 159 is guilty of a summary conviction-offence or of an indictable offence and is liable to imprisonment for five years, and for any subsequent offence, to imprisonment for ten years. In the instance of procedure by indictment, to a fine established at the discretion of the court.
- 10- An order of forfeiture should be applied to stop further dissemination of any suspect sexually explicit material while criminal charges are pending.
- 11- Section 165 of the Criminal Code should be amended to provide for the automatic forfeiture of anything seized from a person convicted under sections 159 (Corrupting Morals) or 164 (Mailing Obscene Materials). (Report of the Standing Committee on Justice and Legal Affairs, 1978: 18:5).

These recommendations were deemed necessary in light of the growing demands voiced from women's groups which argued that "the obscenity legislation did not take sufficient account

of the insult and degradation to women which is contained in pornographic materials" (Minutes of the Proceedings of the Standing Committee on Justice and Legal Affairs, 1979: 9:23). Moreover, there was an obvious concern regarding the question of child pornography and the sexual abuse of children. However, from what can be found in the Minutes of Proceedings of the Standing Committee, it would appear that these recommendations were altogether rejected by the then Minister of Justice Jacques Flynn (Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs, 1979: 9:24).

A couple of years later another Standing Committee was created to investigate the question of street soliciting for the purpose of prostitution. In 1983, this Standing Committee, chaired by Mr. Claude-André Lachance, put forth five recommendations to the federal government suggesting amendments to various sections of the Criminal Code dealing with street soliciting for the purpose of prostitution. Moreover, this Standing Committee recommended the creation of another committee, within three years of the coming into force of the proposed Criminal Code amendments, to review the problem of prostitution in Canada and to submit a report to Parliament which would include a statement of changes

such a committee would deem necessary. (Report of the Standing Committee on Justice and Legal Affairs, 1983: 126:11).

Consequently, in June of 1983, the Special Committee on Pornography and Prostitution (cited as the Fraser Committee) was established to investigate the problems associated with pornography and prostitution, and to conduct sociolegal research to provide a foundation for its work. However, prior to the establishment of the Fraser Committee, the federal government had been accused of vacillating on both the issues of pornography and prostitution. Concerned individuals and lobby groups were left disappointed when the recommendations of the Standing Committees dealing with pornography in 1978 and prostitution in 1983 were disregarded. However, the increasing concern and political voice of feminists and various community groups was certainly instrumental in keeping the pornography and prostitution debate on the political agenda. As one member of the Fraser Committee states in retrospect:

The creation of the Fraser Committee was thus seen by those who were eager for action as (at best) a stalling tactic and (at worst) a farce (McLaren, 1987: 40).

It would appear that the then Minister of Justice Mark MacGuigan was confronted with a situation which required "the more honorable objective of undertaking a careful and

deliberate study of both these social phenomena with the view of developing more rational and less emotional responses than had been vaunted up to that point in time... (n)o other options open to the Minister for formulating policy seemed likely to produce satisfactory or timely results" (McLaren, 1987: 40). The previous reports of the Standing Committees of Justice and Legal Affairs could have perhaps been utilized to amend legislation dealing with pornography and prostitution. However, in terms of pornography, the time lapse had left some of the assumptions of the 1978 report outdated (McLaren, 1987: 41). Regarding prostitution, the 1983 report was narrowly confined to investigating street soliciting and therefore was not sufficiently sensitive to prostitution as a broader social issue in Canada (McLaren, 1987: 41). Moreover, it was thought that the hearings held by the Standing Committee on prostitution did not render a wide range of views on the topic. Thus, from the point of view of the government, the Fraser Committee was created to deal with the issues of pornography and prostitution in a more "sensitive and comprehensive manner" than the two previous Standing Committee reports had done (McLaren, 1987: 41).

#### Terms of Reference and Mandate of the Fraser Committee

The Fraser Committee was created by the Trudeau government and was, as previously stated, established to

respond to public concerns about pornography and prostitution. As the Committee states in its report, it regarded the most important aspect of its work to ascertain the views of the public on the issues (The Fraser Report, 1985: 9). Friedland points out that virtually all Royal Commissions established by the government make an attempt to consult with the public (1978: 234). Hence, if the federal government is more willing to at least symbolically permit committees to make recommendations to amend legislation, it follows that the committee system will not be ignored by interest groups (Friedland, 1978: 235).

The Fraser Committee was composed of four women and three men, and was chaired by British Columbia Lawyer Mr. Paul Fraser. Initially there was some public concern over the composition of the Committee. Some individuals criticized the choice of Committee members by stating that these people held and reflected the political and social interests of the then Liberal government in power (McLaren, 1987: 42). Another assessment of the Fraser Committee members was made in an editorial by the Edmonton Sun on Saturday, June 25, 1983. The article stated that:

° (t)he Committee itself is a travesty. It is a stacked deck of professional men and women - feminists, lawyers, professors - to whom prostitution itself is probably an anathema (in McLaren, 1987: 41).

Thus, to some extent the establishment of the Fraser Committee was somewhat controversial.

The specific terms of reference of the Fraser Committee were set out in its Report as follows:

- 1- To consider the problem of access to pornography, its effects and what is considered to be pornographic in Canada.
- 2- To consider prostitution in Canada with particular reference to loitering and street soliciting for prostitution, the operation of bawdy houses, living off the avails of prostitution, the exploitation of prostitutes and the law relating to these matters.
- 3- To ascertain public views on the ways and means to deal with these problems by inviting written submissions from concerned individuals and groups and by conducting meetings in major centers across the country.
- 4- To consider the experience and attempts to deal with these problems in other countries, including the United States, European Economic Community and selected Commonwealth countries such as Australia and New Zealand.
- 5- To consider alternatives, report findings and recommend solutions to the problems associated with pornography and prostitution in Canada (The Fraser Report, 1985: 5-6).

To fulfill these terms of reference, the Department of Justice, after consultation with the Fraser Committee, commissioned various research projects. These studies were published in the Department of Justice's series of Working Papers on Pornography and Prostitution and were useful in familiarizing the Fraser Committee with the issues and the various attempts to deal with the problems in other

countries. Furthermore, extensive legal research was undertaken by the Fraser Committee's Director of Legal Research in the following areas:

- 1- Comparative legislation and Jurisprudence in the United States, the United Kingdom, Australia and New Zealand.
- 2- The provisions of the Criminal Code and related Canadian Jurisprudence.
- 3- The provisions of the Charter of Rights and Freedoms as they relate to pornography and prostitution.
- 4- Canadian municipal by-laws and related Jurisprudence.
- 5- Previous proposed Canadian legislation and suggestions for law reform.
- 6- Review of reports of various Canadian Parliamentary Committees, Law Reform Commission, American, English and Australian Commissions and Committees on obscenity, pornography, film classification and prostitution. (The Fraser Report, 1985: 8).

The public hearings held by the Fraser Committee were instrumental in allowing concerned individuals and interest groups to express their views and submit written briefs to the Committee for further consideration. Before actually beginning the public hearings, the Fraser Committee decided to publish an Issues Paper for public circulation which would describe and publicize the issues and would ultimately aid in focusing discussion during the meetings. The public hearings were conducted from January 1984 to June 1984 in twenty-two centers throughout Canada. The public hearings were held in every province and territory of Canada, in

large cities and in small towns, in an attempt to ascertain the viewpoints, reactions and suggestions of Canadians living in all parts of the country and in all sizes of communities (The Fraser Report, 1985: 10). Furthermore, for those individuals who did not desire to make a public submission before the Committee, private interviews were conducted. During these private interviews Committee members benefited from the experience and insight of prostitutes, former prostitutes, performers, parents of young prostitutes, social workers and others (The Fraser Report, 1985: 10). Moreover, in terms of pornography, members of the Fraser Committee also made an effort to view material that was deemed to be pornographic and that was circulating in Canada at the time. Finally, the Fraser Committee undertook consultations with various federal and provincial Departments and Commissions in an effort to consider not only the views of the public, but also those of administrators, bureaucrats, researchers and others involved with the effects and the regulation of pornography and prostitution.

On April 23rd, 1985, the seven hundred and fifty-three page, two volume Report of the Fraser Committee containing one hundred and five recommendations was released.

### Recommendations on Pornography

The Fraser Committee proposed a total of fifty-eight recommendations concerning pornography, suggesting legislative amendments and innovations to the Criminal Code, the Customs Tariff, Canada Post, the Broadcasting and Communications Act, Human Rights Law and the Film Classification and Censorship regulations. The Fraser Committee, in making its recommendations, was guided by the fundamental principles of equality, responsibility, individual liberty, human dignity and the appreciation of sexuality (The Fraser Report, 1985: 24-26). In terms of equality, the Committee recognized that legislation dealing with pornography must embody the notion of legal, social and economic equality between men and women. However, a child cannot be treated as the full legal equal of the adult and therefore must accept a curtailment of her/his capacity to act as a free agent. Similarly, the Committee assumes that most adults make decisions freely and are thus responsible for their actions. In contrast, children are considered to be more vulnerable and thus require society's protection when dealing with pornography. In terms of individual liberty, the Fraser Committee felt that the state must impinge upon the lives and conduct of individuals when their behavior is deemed unacceptable, results in harm to others, or threatens the dignity of the person. Moreover, the

Committee recognized the fact that individual rights may, at times, conflict with other guaranteed rights such as human dignity and voluntary sexual activity (The Fraser Report, 1985: 26). With regards to pornography, the Fraser Committee acknowledged that "the right of some to equality will sometimes run directly counter to the right of others to create and enjoy the creations of others" (The Fraser Report, 1985: 26). And finally, the recommendations of the Fraser Committee were premised on the acknowledgment that human beings generally enjoy and benefit from open and caring relationships characterized by mutuality and respect. This principle extends to those who are under the age of 18 years as well. Hence, children are regarded as sexual beings by the Fraser Committee.

The following is a summary of the main recommendations put forth by the Fraser Committee to the federal government regarding pornography:

- 1- The term 'obscenity' should be replaced by the word 'pornography', care being exercised to ensure that the definition of the prohibited conduct, material or thing is very precise.
- 2- Pornography should be classified according to the harm involved or the acts depicted. Controls on pornography should be organized on the basis of a three-tier system namely:
  - A- pornography causing physical harm,
  - B- sexually violent and degrading pornography, and
  - C- explicit pornography the definition of which would include "visual pornographic material in which is depicted vaginal, oral, or anal intercourse,

masturbation, lewd touching of the breasts or the genital parts of the body or the lewd exhibition of the genitals" (The Fraser Report, 1985: 672).

- 3- The use of the postal system to mail pornographic material which describes or depicts children under the age of 18 years or advocates the sexual abuse of children should become a new offence.
- 4- Live shows in which explicit sexual conduct is depicted should be allowed on the condition that an appropriate warning is given regarding the nature of the performance.
- 5- Section 282.1(4) dealing with the definition of identifiable group in the hate propaganda section of the Criminal Code should be broadened to include sex, age and mental or physical disability. Hence, graphic representations which promote the misogyny of women should also be covered in the legislation dealing with hate literature.
- 6- Regarding the Customs Tariff, the nature of pornographic material should be precisely defined to control the importation of pornography.
- 7- Customs Canada should maintain jurisdiction to clear film and video recordings for importation into Canada.
- 8- The application of existing legislation to pornography issues should be explored by Human Rights Commissions.
- 9- A new section of the Criminal Code should be enacted to deal with the production, dissemination and possession of material advocating, encouraging or presenting as normal the sexual abuse of children. The penalty for such an offence would be imprisonment for up to ten years.
- 10- In terms of film classification and censorship, the Fraser Committee suggests that film reviews should continue to be done at the provincial level whereby such review boards could refuse to permit exhibition in the province of films which are contrary to the proposed Criminal Code definition of pornography.
- 11- Provincial film review legislation should contain explicit standards to govern the review boards' activities in the classification and censorship of films (The Fraser Report, 1985: 671-681).

Moreover, a number of general recommendations were made by the Fraser Committee which are equally applicable to the areas of pornography and prostitution involving both adults and children. These general recommendations propose that the federal and provincial governments should engage in efforts to strengthen both their moral and financial commitment to removing economic and social inequalities between women and men, and discrimination on the basis of sexual preference. Furthermore, the Fraser Committee suggests that adequate social programs must be made available to assist women and youth in need of specialized services. These specialized services might include, for example, both mental and physical health services, as well as education, employment and advocacy programs. And finally, specifically in terms of education, adequate programs must be designed to 1) increase the general understanding of sexual relations and 2) to promote further appreciation of the impact of the mass media in creating and maintaining attitudes about human behavior (The Fraser Report, 1985: 703).

#### The Draft Legislation

On June 10th, 1986, the then Minister of Justice Mr. John Crosbie introduced in Parliament legislation to completely revise Criminal Code sections and the item of the Customs Tariff which deals with pornography (Canada - News Release, 1986). This proposed legislation was embodied in Bill C-114.

Similarly to the recommendations of the Fraser Committee, Bill C-114 proposed a definition of pornography under section 159 of the Criminal Code which would ideally lead to a precise classification of pornographic material. Essentially, the tentative legislation made provisions for dealing with four types of levels of pornographic material unlike the three-tier system that the Fraser Committee proposed. The four levels of sexually explicit materials would be: 1) degrading pornography, 2) pornography that shows physical harm, 3) sexually violent pornography and 4) simple pornography.

Bill C-114 proposed a general definition of pornography. Pornography would be defined as:

Any visual matter showing vaginal, anal or oral intercourse, ejaculation, sexually violent behavior, bestiality, incest, necrophilia, masturbation or other sexual activity (An Act to Amend the Criminal Code and the Customs Tariff, 1986: 2).

It was essentially this last part, namely the words 'other sexual activity', which most troubled feminists, artists, civil libertarians and others due to the vagueness of the expression. Clearly, feminists who advocate the creation of sex-positive images felt threatened by the definition. Likewise, civil libertarians and artists, for obvious reasons, were also concerned with the new legislation (see Diamond, 1987).

Furthermore, despite this attempt to make a distinction between the different types of pornographic material, the proposed legislation provides the exact same penalties for offences regardless of the nature of the pornographic material. Thus, everyone who distributes pornography, regardless of the level of violence or sex contained within, is guilty of an indictable offence and is liable to a maximum term of imprisonment of five years. Moreover, everyone who sells, rents or displays pornography is liable to imprisonment for a term not exceeding two years or is guilty of an offence on summary conviction.

This tentative legislation also provided the accused with various defences regarding the educational, scientific or artistic merit of the material. As well, this bill held the 'eighteen years of age' limit making it the fine line which divides those who may legally consume pornographic material and who may purchase so-called sexual aids from those who may not.

Child pornography was clearly a concern in this proposed legislation. The child pornography provisions were designed to apply to children under 18 years of age similarly to the recommendations of the Fraser Committee. Hence, the distribution, importation, and production of child pornography could result in a penalty of up to ten years imprisonment. Likewise, the use of a child in the

production of pornography carried with it a penalty of up to ten years imprisonment. Also prohibited was the distribution, sale, rental or display of pornography advocating child sexual abuse. Once again, the sanction meted out for such an offence was imprisonment for up to ten years. The simple possession of pornography advocating child sexual abuse was punishable on summary conviction.

In terms of theatrical performances, every owner, lessee, manager or person in charge of a theatre who allows to be presented a performance that advocates as normal the sexual abuse of children is liable to imprisonment for up to ten years; a performance that involves in a sexual context the physical harm to a person is liable to imprisonment for up to five years; a performance that involves violent or degrading acts (e.g. bondage, bestiality and the like) is liable to imprisonment for a term of up to five years or on summary conviction (Bill C-114; 1986: 11). Finally, performances that present sexual acts generally (e.g. masturbation, intercourse and so forth) are illegal and may have been punishable by up to two years imprisonment or on summary conviction.

Furthermore, Bill C-114 also widened the definition of 'identifiable group' to include groups distinguishable by sex. This aspect of the proposed legislation was clearly in accordance with the demands of women's organizations and

with the earlier recommendations made by the Fraser Committee. In terms of the Customs Tariff, a new item was added which would have made it illegal to import into Canada all forms of pornography including hate propaganda and child pornography.

### Reaction to the Proposed Legislation as Portrayed in the Media

The introduction of Bill C-114 in the House of Commons left members of parliament and the public in an uproar. The controversy centered primarily on the definition of pornography suggested. However, in terms of child pornography and child sexual abuse, public reaction to the Bill was generally favorable. Members of both opposition parties and child service providers were cited as praising the government initiatives in these areas (Bindman and Warburton, 1986: A16; Sallot, 1986: 1). One Liberal critic John Nunziata called the proposed bill "good legislation dealing with the young" (Warburton, 1986: 4). Bill C-114 was apparently designed to target 'kiddle porn' particularly. In fact, Crosbie described the new legislation as a virtual panacea, stating that it would "end (the) sexual abuse of children and exploitation by adults" (Warburton, 1986: 4) and "restore human dignity" (Bindman and Warburton, 1986: 1). Furthermore, this relatively tough legislation was deemed necessary and in a sense, was

legitimized by Crosbie when he stated further that "it's a statement by the government of behalf of the people of Canada that these abuses are unacceptable in Canada today and will not be tolerated" (Bindman and Warburton, 1986: 1 and also Sallot, 1986: A4). This last statement by the then Minister of Justice appears to imply a notion of consensus amongst Canadians regarding the protection of children. Quite probably, in terms of the pornographic exploitation of children, there may very well exist a general consensus in Canada on the issue. Nevertheless, what is interesting is the usage by Crosbie of the same argument - suggesting this image of 'consensus amongst Canadians' - to gain support for the remainder of the bill which, in certain areas, was clearly far more controversial. As one journalist suggests, "Crosbie's officials could not produce any evidence that supported the Minister's contention that he was merely responding to the demands of a majority of Canadians by introducing Bill C-114 in Parliament" (Calamai, 1986: 1).

In making reference to adult pornography, Crosbie stated that "the pinup has now become depictions of sodomy, incest, bestiality, sadism, masochism and degrading sexual conduct, and society must act to prevent this going any further" (Sallot, 1986: A4). Moreover, Crosbie's reading of the public opinion was that "the Canadian public does not

want this monstrous material freely available ... (t)hey want pornography stopped" (Steffenhagen, 1986: A11).

According to media reports, the adult pornography amendments were criticized by the Liberals, the New Democrats, feminists and others as being far too broad and all encompassing as "you can fit any visual material into the definition" (Bindman and Warburton, 1986: 1). Yet these amendments to the obscenity provisions of the Criminal Code were advertized by the Conservative government as replacing the "current vague" legislation with "a more precise definition of pornography" (Sallot, 1986: A4). However, critics of the proposed law dubbed the bill "the type of legislation that would make Queen Victoria very happy" (Bindman and Warburton, 1986: 1) and as a "giant chastity belt around all forms of pornography in Canada..." (Steffenhagen, 1986: A11). Another quoted critic, Louise Dulude, president of the National Action Committee on the Status of Women, called the proposed definition "puritan" and commented on the government's initiative as "reaching much too far in the hope of making political capital out of this very sexy issue" (Bindman and Warburton, 1986: A16). Likewise, a Toronto lawyer and president of the Video Retailers Association argued that Bill C-114 "will roll us back to the nineteenth century... Crosbie is a time traveller, only he's going backwards" (Alaton, 1986: A14).

Another commentator viewed the anti-pornography legislation as a "dangerous product of right-wing, fundamentalist, puritanical thought" (McLaren, 1986: 1). Clearly, this proposed definition of pornography troubled both civil libertarians and feminists alike. Members of the Vancouver Coalition Against Media Pornography stated that they "wanted laws that outlaw the degradation of women... we didn't want laws that were going to be Victorian and outlaw healthy human sexuality" (McLaren, 1986: A2).

The proposed definition of pornography which included the words 'other sexual activity' equated erotica with other more violent forms of pornography. This definition of pornography clearly overwhelmed the other more progressive aspects of the bill dealing with the protection of children and the inclusion of women within the definition of 'identifiable group' under the hate propaganda provisions of the Criminal Code. Generally, critics of Bill C-114 saw it as an "abuse of power" on the part of the Conservative government and an attempt to impose on others "their view of taste" (McLaren, 1986: A2). An editorial in the Globe and Mail concluded that the "government's suppressive attitude towards depictions of sex between consenting adults is a puritanical throwback that makes a mockery of the legislation" ('A tory view of sex', 1986: A6). Similarly, it was suggested that perhaps the Conservative government

did not even want the legislation to be passed. As Maude Barlow, a former advisor to Prime Minister Trudeau, argued:

There is good reason to believe the proposed bill is a sop to the Progressive Conservative's right-wing... The government could then quietly succumb to raging opposition against it, let it fade between sessions of Parliament, and sadly tell its right-wing that: "Well, we tried" ('PCs confuse hate and sex, Activist says', 1986: A4).

Bill C-114 was given two readings in the House of Commons and subsequently died on the order paper when Parliament was prorogued.

## CHAPTER FOUR

### THE FRASER COMMITTEE'S PUBLIC HEARINGS AND INTEREST GROUPS

Central to the examination of the development of any piece of legislation is a discussion of the roles and claims made by interest groups. The aim of this chapter is to describe the demands of the interest groups and concerned individuals who presented briefs during the public hearings of the Fraser Committee. This chapter begins by setting out the methodology employed in the collection of pertinent data and then proceeds to a discussion of the demands made by the various interest groups and concerned individuals.

#### Methodology

The transcripts of the public hearings held by the Fraser Committee from January to June 1984 throughout Canada are contained in a collection of thirty-five volumes. The transcripts recorded in the thirty-five volumes are only of those groups and concerned individuals who made public submissions to the Fraser Committee. Non-appearing submissions are not included in this collection.

The data for this chapter was gathered by randomly selecting eighteen (or approximately half) of the thirty-five volumes. The briefs examined in these eighteen

volumes represent only those submissions made regarding pornography. Briefs that dealt with prostitution were not taken into consideration. Where a brief discussed both the issues of pornography and prostitution, only the comments made regarding pornography were of interest and hence recorded. The eighteen volumes from which the briefs were taken represent the public hearings held in fourteen Canadian centers namely:

Calgary	London
Edmonton	Windsor
Vancouver	Montreal
Toronto	Sherbrooke
Victoria	Winnipeg
Whitehorse	Fredericton
Halifax	Thunder Bay

In order to systematically collect the pertinent information that concerns this research project, a simplified application of content analysis was utilized such that the material under investigation would be more manageable and amenable to coding. The instrument employed took the form of a questionnaire. The use of this questionnaire made it possible to classify the briefs of the public hearings held by the Fraser Committee into four distinct categories characterized by their philosophical orientation. These four categories are namely: 1) civil libertarian, 2) moral conservative, 3) feminist and 4) undefined. These categories represent three philosophical

traditions which are, by no means exhaustive of all view points concerning pornography represented in the hearings but as the Fraser Committee states:

... these (the three philosophical traditions) are foundations on which the presentations we heard at the public hearings were based. (Moreover), these philosophical traditions are at the root of the principles which we believe must inform any attempt to reform our legal and social responses to pornography and prostitution (The Fraser Report, 1985: 22).

The categories are purposely broad so as to allow for a range of views within each category. The Fraser Committee's finding concerning the three dominant views represented during the hearings is consistent with the prevailing viewpoints found in and discussed in Chapter Two. The first supposition (B1) formulated at the end of that chapter has thus been confirmed.

The questionnaire utilized consisted of three questions. However, in order to classify the briefs into one of the four categories, so-called model answers that are characteristic of one of the three philosophical traditions were developed. Essentially, key terms or concepts which reflect the particular philosophical viewpoint as discussed in the first volume of the Fraser Report from pages 15 to 22, and in the earlier literature review, are isolated and become criteria which represent the particular philosophy.

The following represents the questions posed and the model answers:

#### QUESTION ONE

What is the definition of pornography suggested?

##### A. Civil Libertarian

The civil libertarian tradition recognizes the elements of sex and violence within pornographic material and yet defends one's right to individual consumption and expression (see Dixon, 1984: 2). Essentially, the nature of the material in question is not what is at issue, rather the civil libertarian is primarily concerned with the freedom of individuals to consume whatever they please.

##### B. Moral Conservative

Regardless of pornography's character, it is the fact that pornography is produced to stimulate sexual feelings of fantasy that is subversive to the moral values of the community (The Fraser Report, 1985: 18).

##### C. Feminist

The following definition has been proposed by the Canadian Advisory Council on the Status of Women:

(p)ornography is any representation of sexual conduct where one or more persons are either tacitly or obviously coerced to participate, are harmed or mistreated psychologically or physically, where there is an unequal distribution of power of one person over another, implicitly or explicitly, due to either a difference in age or to the contextual factors (The Advisory Council on the Status of Women, 3, this author's translation from French).

Those who support the feminist philosophy (broadly speaking) are not concerned so much with the erotic content of pornographic material but rather with the degradation and violence against women, and the negative portrayal of women.

QUESTION TWO

What are the effects of pornography as perceived by the groups and/or individuals throughout the public hearings?

A. Civil Libertarian

A definite link between the consumption of pornography and physical harm or the threat of physical harm to individuals must be clearly demonstrated (The Fraser Report, 195: 16). According to the civil libertarian view, no such relationship has been empirically demonstrated (Dixon, 1984: 7).

B. Moral Conservative

The moral conservative view is concerned that consumption of pornographic material may lead to the moral disintegration of society. Pornography does not portray acceptable sexual conduct. The sanctity of the family must be preserved and sexual relations should take place only within the context of marriage (The Fraser Report, 1985: 18). Furthermore, moral conservatives tend to argue that there is a link between the consumption of pornography and the acting out of sexually violent behavior and abusive behavior against the person, and even criminal behavior (e.g. such as the illicit use of drugs).

C. Feminist

Pornography is thought to cause social harm because it is at the root of the development and reinforcement of misogynistic attitudes especially amongst men (The Fraser Report, 1985: 21). Furthermore, feminists argue that "there is enough data to demonstrate that women are victimized by the sexism inherent in pornography..." (The Fraser Report, 1985: 21). Feminists suggest a link between pornography and violence against women and children. Furthermore, frequent exposure to this material may have an adverse effect on male perceptions of women (The Fraser Report, 1985: 21). Essentially, pornography sets women apart as being different and characterizes them as the legitimate objects of not only male sexual pleasure but of male frustration and violence (The Fraser Report, 1985: 19).

QUESTION THREE

What policy recommendations are proposed by the groups or individuals during the public hearings?

### A. Civil Libertarian

"The law has no acceptable role in preventing the production, distribution, sale or possession of pornographic material, unless some recognized harm can be attributed to it. It is legitimate for the law to intrude to prevent physical harm being done or event threatened to those who participate in pornographic productions. Moreover, the law... may ensure that pornographic materials are not marketed in such a way that they cause involuntary offence to members of the public. (However), the law has no role in curbing the sort of alleged... moral disintegration of society..." (The Fraser Report, 1985: 16).

### B. Moral Conservative

The law proscribes the moral conduct of society.. Even when individuals freely choose to consume pornographic material in private and of no direct harm to anyone else, the law should sanction against immoral conduct. Essentially, the "state has a right to step in and prevent personal immorality where it clearly offends the sense of... decency of the majority of the community. Moreover, the criminal law... has an important symbolic role to play in stating what the common morality will not tolerate.... Furthermore, they (moral conservatives) accept some pragmatic reservations of these principles, such as those which stem from difficulty of enforcement" (The Fraser Report, 1985: 18). Hence, the ambit of legislation to control pornography is very wide. Censorship of pornographic material is generally advocated (Escome!, 1985: 38).

### C. Feminist

Legal measures should be adamantly used, as well as political and social strategies to combat and eliminate sexism within society (The Fraser Report, 1985: 19). A change in focus in the substantive law is required. Therefore, in terms of pornography, what is necessary is a "new emphasis on proscribing the violence and degradation of women and children which pornography contains" (Russell, 1980 and The Fraser Report, 1985: 19). It must be made easier for an individual to challenge the product of the pornographer through legal avenues. Most feminists advocate the complete censorship of pornography, but not the censorship of erotica which is differentiated from pornography in that it purports to show healthy, caring sexual relationships between two equal individuals.

Using the classification scheme outlined above, a total of 169 briefs were examined. I found that 53 percent of the briefs (90 of 169 briefs) that were presented to the Fraser Committee were classified as belonging to the feminist category when the definition of pornography suggested, the perceived effects of pornography and the policy recommendations proposed were taken into consideration. The remaining briefs were categorized as 29 percent (49) moral conservative, 11 percent (18) civil libertarian and 7 percent (12) unidentified. Those briefs that could not be placed in a specific category usually contained contradictory statements and were presented by individuals on their own behalf or they were presented by groups who voiced very specific concerns (for example the Vancouver Island Cooperative Preschool Association and the Association of Canadian Television and Radio Performers) not generally expressed during public forums regarding pornography. Contrastingly, those briefs that were classified within one of the three remaining categories usually clearly reflected the views traditionally held by such groups. The position of the group or individual was generally quite obvious and hence all three criteria were met. The only groups which caused one to seriously ponder how to categorize the presentation were those of a more conservative-feminist persuasion. Those groups and individuals were not so-called radical feminists or socialist feminists, yet they were

concerned about the plight of women. Often these groups and individuals realized the need for change but they were generally willing to work within the existing structures and institutions that already exist. Examples of such groups were the University Women's Club of Vancouver, the Whitehorse United Church Social Justice Committee and the Anglican Church of Canada and Diocese of New Westminster in British Columbia. Such moderate feminists, so to speak, were generally classified as feminists even though only two of the three criteria for classification were met. For the two remaining groups - i.e. the moral conservatives and civil libertarians - all three criteria were met.

The percentage breakdown of the categorized briefs reveals that clearly women's groups and feminists (both male and female) were well represented throughout the public hearings. Two groups composed solely of men (A Group of Men Against Pornography in Halifax and a group called Men Against Sexism in Winnipeg) in this sample made submissions that were categorized as feminist. However, there were more individual men who presented briefs to the Fraser Committee that were also clearly feminist.

The main issues raised during the public hearings were:

- 1- Concerns over the increased availability of pornographic material and the increasing violence within pornography.

- 2- The implied increase in the number of people who are exposed willingly or unwillingly to such material.
- 3- The resulting harms to individuals and society (The Fraser Report, 1985: 63).

An analysis of the one hundred and sixty-nine briefs (169) found in the sample of eighteen volumes, reveals a wide range of opinions amongst Canadians. However, as previously stated, the model answers developed for the questionnaire generally reflected the demands of most groups from the three philosophical traditions. The briefs were relatively easy to classify as they were quite blatant in terms of the position advocated by the group or individual.

#### The Moral Conservatives

As already mentioned, 49 of 169 briefs were classified as belonging to the moral conservative category. The following percentages are based on the 49 conservative briefs.

The definition of pornography suggested by moral conservatives usually included criteria such as any depiction of sexual activity outside of the sanctity of marriage (3 briefs or 6 percent) and the pairing of violence and sex (20 briefs or 41 percent). Furthermore, as the Alberta Federation of Women United for Families suggests, "...the alleged distinction between hard core pornography and so-called erotica or soft pornography" is essentially

rejected by moral conservatives. (Canada, 1984, vol. 1: 113). This failure to make a distinction between pornography and erotica was echoed by seven of the forty-nine briefs that were classified as moral conservative (i.e. 14 percent). Only 8 percent (4) of the moral conservative briefs made a distinction between pornography and erotica, similar to the distinction made by feminists, while 33 percent (16) did not even attempt to propose a definition of pornography. Other submissions to the Fraser Committee suggested that pornography is a 'social evil' (18 percent or 9 briefs) or defined it as hate literature against women and children (8 percent or 4 briefs).

In terms of the perceived effects of pornography, most of the submissions would agree with the following statement by the Pentecostal Assembly of Canada stating that pornography is a social evil which harms "the individual, the family, the social structure of the nation and undermines values that are essential to society" (Canada, 1984, vol. 7: 140). This view was echoed by such groups as the Roman Catholic Archdiocese of Toronto, a group called Canadians for Decency in Toronto and many concerned individuals who made presentations on their own behalf. More specifically, 51 percent (25) stated that the consumption of pornography leads to the moral degeneration of the individual consumer while 47 percent (23) thought

that pornography harms society as a whole. Others suggested that consumption of pornography leads to violent acting-out behavior against individuals (often women and children) or undefined criminal behavior (45 percent or 22 cases). Thirty-five percent (17) of the moral conservative presentations found in this sample argued that the consumption of pornographic materials by young people can have detrimental effects upon the values and attitudes of these impressionable individuals. Only 33 percent (16) of the presenters before the Fraser Committee explicitly stated that pornography affects the societal perception of women. Pornography was perceived as weakening the bonds of the traditional family and harming men by telling lies about women and their sexuality in 31 percent (15) and 10 percent (5) of the cases respectively.

The policy recommendations suggested by moral conservatives were quite varied. No one specific recommendation took precedence. Thirty-three percent (16) of the briefs suggested that all sexually explicit material be censored. Likewise, 33 percent (16) suggested that legislation dealing with pornography be stricter in terms of penalties and that a more specific definition of sexually explicit material be created. Only 18 percent (9) advocated that all sexually explicit material be totally banned. Where youth and children were concerned, 27 percent (13)

felt that any new legislation dealing with pornography should protect young people from having access to pornographic or sexually explicit materials. Furthermore, 16 percent (8) demanded that the simple possession of child pornography become an offence. Overall, 57 percent (28) of the presentations suggested that the federal government enact legislation that would specifically deal with the protection of youth and children from pornography. Other legislative amendments proposed included suggestions to change the Broadcast Act to include obscene material under its realm (16 percent or 8), to amend the Customs Tariff such that the importation of pornographic material would become more difficult (16 percent or 8) and to implement specific guidelines for the Canadian Radio Television and Telecommunications Commission (CRTC) such that obscene material could no longer be televised (12 percent or 6). Furthermore, it was recommended by 16 percent (8) of the presenters that efforts be made to educate the populace regarding the harms associated with the consumption of pornography.

#### The Civil Libertarians

Only 11 percent (18) of the total briefs were classified as civil libertarian. The following discussion presents percentages that are based on the total number of briefs classified as civil libertarian.

Generally, civil libertarians found all pornographic material to be legally acceptable, usually with the exception of the explicit sexual portrayals of children. Such groups and individuals, including a few gay rights organizations, generally argued against government interference in the rights of individuals (see The Alberta Human Rights Association, Canada, 1984, vol.1: 2). In fact, an analysis of the briefs that were classified as civil libertarian reveals that a total of 83 percent (15) argued for no government intervention or regulation of pornographic material.

Seventy-two percent (13) of the submissions made to the Fraser Committee suggested no definition of pornography. Others (17 percent or 3) vaguely stated that pornography is whatever an individual person defines it to be. Some of the civil libertarians (11 percent or 2) did recognize the violence and subjugation of women implicit in pornography.

Civil libertarians generally failed to acknowledge, however, any link between the consumption of pornography and the harm to society in general, and to women and children specifically. In 28 percent of the briefs (5) there was no suggestion of any link between pornography and violent behavior. On the other hand, in 33 percent of the briefs (6) the presenters explicitly stated that there was no demonstrable evidence which suggests that there is in fact a

link between the consumption of pornography and acting-out violence against women. Only in one instance did a presenter propose that pornography may be harmful to youth and children. Generally however, in the words of some civil libertarians:

Harm must be demonstrated - freedom of speech is the real issue, not harm. Harm must be measurable (The Libertarian Party of Canada, 1984, vol. 7: 129).

Pornography caters to the lurid fantasies of some, thus keeping them away from prostitutes or from becoming potential rapists... Pornography can be therapeutic by contributing to a more fulfilling sexual relationship in a lackluster sex life (Concerned citizen, Canada, 1984, vol. 1: 123-124).

La pornographie nous suggère des comportements sexuels explicites... la porno est très valable... elle nous libère de nos secrets et elle nous déculpabilise (Concerned citizen, Canada 1984, vol. 14: 26).

The views that pornography diverts some people away from committing crimes of violence against women by providing an outlet for aggressive and sexual energy and frustrations and that pornography can be therapeutic was proposed by 6 percent (1) and 28 percent (5) of the presenters respectively.

As previously stated, an overwhelming majority of civil libertarians (83 percent or 15 briefs) argued for no government intervention in the area of the manufacture, distribution and sale of pornography. Seventeen percent (3)

suggested that freedom of expression should be upheld at all costs. Likewise, only 17 percent of the presenters suggested that there should be specific laws enacted to protect children and youth from exposure to pornography. Other recommendations made by civil libertarians to the Fraser Committee ranged from ideas such as men and women working together to create a non-sexist society, better sex education in the schools and the "modest control of pornography in the area of distribution" (Concerned citizen, Canada 1984, vol. 4: 146).

### The Feminists

Fifty-three percent (90 briefs) of the total briefs were classified as feminist. Once again, the following statistics are based on the ninety briefs belonging to this group.

Among moral conservatives and civil libertarians there is a wide range of opinions regarding what is acceptable sexually explicit material. Likewise, there was a plethora of definitions of pornography suggested by feminists. Although it would be interesting to list all the definitions that were proposed during the public hearings, perhaps this is not necessary. There appeared to be common themes amongst the definitions of pornography suggested. The positions of 40 percent (36) of the feminist groups was to

distinguish between pornography and erotica. Erotica can be defined as "sexually explicit material which contains no violence or coercion and in which the participants (are) there by choice" (The Fraser Report, 1985: 63). Erotica should depict "mutually pleasurable sexual expression between two people who have enough power to be there by positive choice" (The University Women's Club of Calgary, Canada, 1984, vol. 3: 66). Feminists were generally totally opposed to violent pornography which was defined as containing one or all of the following elements - a sexual context combined with violence, degradation, dominance, humiliation, objectification, dehumanization, abuse and/or hatred whereby men are depicted as the aggressor (i.e. powerful and strong) and women as the subordinate or victim (i.e. powerless and weak). With respect to the sample taken in this case, 72 percent (65) of the feminist presentations endorsed one or more elements of this definition. In 34 percent of the cases (31) pornography was explicitly recognized as being a form of hate literature directed against women.

In 59 percent of the briefs (53) feminists argued against pornography by stating that it affects consumers' attitudes about women, children and sexuality by perpetuating false images about them. Moreover, feminists suggested in 48 percent of the briefs (43) that the

consumption of pornography leads to male violence against women and children such as sexual assault, incest and wife battering. Thirty-six percent of the feminist submissions to the Fraser Committee (32) claimed that pornography perpetuates the the subordination of women by objectifying, dehumanizing and degrading them. In terms of children, pornography was viewed to harm them by exposing them to false images about sexuality and by having them participate in pornographic materials (23 percent or 21 briefs). Finally, pornography lessens the quality of life of women by heightening the fear of victimization of women and condones the pairing of sex and violence according to 21 percent (19) and 19 percent (17) of the presentations respectively.

Unlike the wide variety of definitions of pornography suggested, there appeared to be a majority consensus regarding the question of what should be done about pornography. In 66 percent of the presentations (59) made to the Fraser Committee, the control of pornography was requested through the use of censorship.

Other recommendations which feminists and women's groups proposed were:

- 1- Forty-three percent of the briefs (39) suggested that the word 'obscenity' be replaced by the word 'pornography' under section 159(8) of the Criminal Code and that the definition of pornography should focus on the sexism inherent in such material. Furthermore, the legal definition of pornography should.

distinguish it from erotica. Moreover, this definition should be incorporated into all other bodies of law and deal with pornography.

- 2- Thirty-four percent of the cases (31) argued for the creation of specific laws to protect children from the exploitation of 'kiddle porn'.
- 3- Thirty-two percent of the cases (29) argued for the inclusion of groups distinguished by gender/sex and children within the definition of 'identifiable group' under the hate literature provisions of the Criminal Code.
- 4- Twenty-nine percent of the submissions (26) requested that the penalties against the distributors, manufacturers and sellers of pornographic material be increased.
- 5- Thirty-two percent of the cases (29) proposed that more funding be made available for research into the effects of pornography and to support educational initiatives which would promote anti-sexist attitudes and sex-positive images and literature.
- 6- Twenty-one percent (19) stated that the government must establish guidelines to define what is acceptable material. These guidelines would be useful for establishing the uniform classification of films and videos and for the functioning of review boards.
- 7- Twenty percent (18) stated that access to pornography by minors be prohibited.
- 8- Nineteen percent (17) argued for the complete ban of violent pornography and of 'kiddle' pornography.
- 9- Eighteen percent (16) suggested that a specific definition of pornography be incorporated into the Customs Tariff to ensure that such pornographic material does not enter Canada.
- 10- Seventeen percent (15) suggested that the Canadian Radio Television and Telecommunications Commission (CRTC) implement specific guidelines such as exploitive and degrading material not be televised.
- 11- Eighteen percent (16) suggested that the Broadcast Act be amended such that women and children are also protected from abusive comments on the radio.

- 12- Twelve percent (11) argued for the abolishment of the use of the community standards test.
- 13- Thirteen percent (12) proposed that Human Rights legislation be amended to allow women to initiate civil suits against pornographers.
- 14- Ten percent of the submissions (9) stated explicitly that a section should be added in the Criminal Code making the simple possession of child pornography an offence.

#### Interest Groups and the Fraser Committee

As is quite evident, there was a varied range of ideas presented to the Fraser Committee during the public hearings on the subject-matter of pornography.

The censorship of sexually explicit material was a major issue. On the whole, feminists clearly advocated the practice of the censorship of pornography - material which they distinguished from erotica. Furthermore, support for the control of sexually explicit material through censorship was voiced by those of the moral conservative persuasion as well. Moral conservatives, however, generally did not make a distinction between pornography and erotica. Rather any type of material with sexual overtones was considered offensive by moral conservatives. Nevertheless, it is regarding the issue of censorship that we clearly witness a strange political alliance amongst groups which generally diverge on a number of other social issues. It was found that despite the fact that women's organizations and moral conservatives differed with regards to their perception of

the effects of pornography or sexually explicit material upon the social fabric, they clearly stood together in terms of their policy recommendations for the greater use of legal sanctions and the censorship of pornography. Contrastingly, the only groups who did not view the censorship of pornographic material as necessary were civil libertarians, 'feminists against censorship', artists and some homosexuals. Civil libertarians argued that the state already interferes far too much in the lives of Canadians. Hence, legal controls were not advocated. On the other hand, of the feminist briefs taken in this sample, only 6 percent (5) of the recommendations did not suggest the use of censorship. Generally so-called 'feminists against censorship' felt that censorship would merely perpetuate the very forms of social control which maintain the subordination of women (see Burstyn, 1984). Homosexuals, on the other hand, feared that their sexually explicit literature would be targetted along with exploitive pornography due to the pervasive climate of homophobia that exists in Canada today.

On the issue of the exploitation and use of children in the production of pornography, for the most part, there was a consensus regarding the use of greater legal remedies to deal with the problem. Moreover, it was felt that children should be protected from exposure to

sexually explicit materials. Only in a couple of cases (2) did the presenters think that the exposure of youth to pornography was harmless. These two presentations were classified as civil libertarian, but were by no means representative of the views of the majority of civil libertarians.

The demands of the various groups which made submissions to the Fraser Committee during its public hearings were met in varying degrees in the Committee's final recommendations to the federal government. One of the main recommendations to the government was to replace the term 'obscenity' with the word 'pornography' and to ensure that the new legal definition of pornography be very precise. Clearly, this recommendation was prompted by the demands of feminists/women's groups which advocated such a change in legal terminology. No other group made such a claim although some moral conservatives did request that a more specific definition of obscene material be created. Moral conservatives, on the whole, did not feel the need to use the word 'pornography' as opposed to 'obscenity' in the law.

The three-tier classification system of pornography suggested by the Fraser Committee was not specifically proposed by one individual or group during the public hearings. However, the awareness of the Committee that some

pornographic material is sexually violent and degrading and purports, in some instances, to cause physical harm to the participants is again related to the demands and concerns of feminist organizations. Most moral conservatives felt that any matter that is even slightly sexual in nature is obscene. Feminists, on the other hand, were primarily concerned with such issues as degradation and the physical and emotional abuse found in pornography. For civil libertarians the nature of pornography, sexually explicit or obscene material is generally a non-issue. Thus, the three-tier classification system of pornography can be related to the claims made by feminists.

The suggestion by the Fraser Committee that the definition of 'identifiable group' found in the hate propaganda section of the Criminal Code be widened to include groups distinguished by gender is again clearly linked to the demands of women's organizations. No other group from any of the two other broad ideologies suggested such an amendment to the Criminal Code.

In terms of setting up very specific guidelines to define and handle pornographic material at the Canadian border, both moral conservatives and feminist groups demanded that the Customs Tariff be amended in order to become more effective. This recommendation therefore is a reflection of the views of both moral conservatives and

feminists. On this particular issue one clearly witnesses the strange political alliance between ideologically opposing groups making a similar claim while justifying it on dissimilar grounds.

The recommendation that Human Rights Commissions deal with suits initiated by women against pornographers is obviously another example of the Fraser Committee's awareness of the plight of women. This recommendation was suggested and supported by feminist groups and individuals.

Both moral conservatives and feminists, and even some civil libertarians, were concerned about the effects of pornography on children. Hence, individuals and groups from all philosophical traditions suggested that specific laws be created to protect children and youth from pornography. However, only moral conservatives and feminists proposed that a new offence be created making the simple possession of child pornography an offence. Consequently, the Fraser Committee did recommend stricter laws regarding the exposure of children and youth to pornography, and the criminalization of the simple possession of so-called 'kiddle porn'.

Regarding film and video classification, the Fraser Committee suggested that all material which is contrary to the proposed Criminal Code definition of pornography be

banned. Both moral conservatives and feminists suggested this recommendation during the public hearings. Furthermore, clear and precise classification guidelines for provincial review boards were recommended by the Fraser Committee. This idea was suggested by feminists such that matter that may be deemed erotica may be permitted to be shown while any type of pornography will be banned.

The Fraser Committee also suggested that the federal government create and promote adequate social services and remove the economic and social inequalities between women and men. Clearly, this recommendation was argued for and supported for by women's organizations/feminists. Furthermore, the Fraser Committee proposed that educational programs designed to heighten awareness of sex-role stereotyping and to provide adequate information regarding sexual behavior be implemented by the federal government. Clearly, once again, this recommendation was advocated by feminists and, in some cases, by a few civil libertarians as an alternative to the complete ban of pornography.

Overall, it is quite obvious that the Fraser Committee's recommendations clearly took into consideration the demands of women's groups/feminists and essentially legitimized their concerns and claims. Moral conservatives did manage to have some of their views incorporated into the recommendations. However, they generally were successful

when their claims corresponded to those by feminists. Civil libertarians were overall unsuccessful in having their position reflected in the Fraser Committee's recommendations.

### Interest Groups and the 1986 Legislative Initiative

This section will essentially compare some of the main demands put forth by various pressure groups with the Conservative government's proposed legislation on pornography entitled Bill C-114.

It was the proposed definition of pornography which presented some major problems for the federal government. The new definition of pornography was based on a four-tier classification system recognizing elements such as degradation, physical harm and sexual violence all of which feminists have argued are harmful to the perception and standard of living of women. Specifically, it was the definition of 'simple pornography' which included the words "other sexual activity" that proved troublesome to feminists and civil libertarians alike. This part of the proposed definition which reflects the more puritanical viewpoint of the moral conservatives was viewed as being all-inclusive and threatening to the promotion of sex-positive images that feminists advocate.

Bill C-114 made various provisions to deal with child pornography and the protection of youth from exposure to pornography. This proposed legislation was clearly supported by moral conservatives and by women's organizations/feminists alike. Furthermore, the relatively severe penalties associated with the new laws were also advocated by moral conservatives and feminists.

Bill C-114 also broadened the definition of 'identifiable group' under the hate propaganda provisions of the Criminal Code to include groups distinguished by gender/sex. Obviously, the proposed amendment to the law reflects the claims made by women.

Finally the proposed legislation would have strengthened the Customs Tariff to make it illegal to import into Canada all types of pornography. At first glance, this proposal was advocated by moral conservatives and feminists. However, keeping in mind the vagueness of the suggested definition of pornography, such an amendment would not be supported by feminists. The all-encompassing nature of the definition of pornography would clearly threaten the entry into Canada of certain materials that feminists may not find offensive but that moral conservatives might.

Thus, the proposed legislation on pornography introduced by the Conservative government during the summer

of 1986 was more likely to reflect the demands of moral conservatives than those of the two other ideological groups. Feminists' demands were, overall, more likely to be incorporated into the tentative legislation when they were similar to those of moral conservatives.

#### Discussion of Hypotheses

Hypothesis B1 - It has been confirmed that the presentations made by various groups and individuals to the Fraser Committee were based upon three philosophical traditions consistent with the findings in the literature review on the pornography debate found in Chapter Two. The Fraser Committee itself concluded in its report that these three perspectives (i.e. feminist, moral conservative and civil libertarian) were most representative of the views presented at the public hearings. Furthermore, the content analysis of the public hearings held by the Committee confirmed that most of the briefs could be classified as belonging to one of these philosophical traditions.

Hypothesis B2 - This hypothesis has been confirmed as well. Most of the presentations made during the public hearings (53 percent or 90 of 169 briefs) were of the feminist position as opposed to any other ideological group. The classification of each brief was based on the definition of

pornography suggested, the perceived effects of pornography and the policy recommendations made.

Hypothesis B3 - In some instances the views of civil libertarians and moral conservatives did, in fact, coincide with the concerns voiced by feminists. This strange political alliance occurred when two groups (primarily moral conservatives and feminists) made the same claim and yet their demand stemmed from a different ideological background. This is to say that two or more groups may have similar concerns but they are based in different rationals and perceptions of the problem. For example, moral conservatives and feminists wanted pornography censored but for different reasons. This hypothesis is thus confirmed.

Hypothesis B4 - The Fraser Committee did, quite clearly, make recommendations to the federal government that incorporated the demands and claims made by feminists. For example, the widening of the definition of 'identifiable group' under the hate propaganda provisions of the Criminal Code, the use of Human Rights Commissions to protect women against the degradation inherent in pornography, the creation of specific legislation dealing with the protection of youth from pornography, the use of the term pornography as opposed to 'obscenity' in new legislation and so forth are all recommendations that were based upon the demands of women's organization/feminists presented during the public

hearings. Essentially the Fraser Committee legitimized the concerns of women regarding the issue of pornography. Once again the hypothesis is confirmed.

Hypothesis B5 - The tentative legislation embodied in Bill C-114 did not give serious consideration to the demands of women's groups. Rather the proposed Bill gave credence to the interests of moral conservative groups - this is especially noticeable in the wording of the suggested definition of pornography. Some of the demands of feminists were incorporated in the proposed legislation but such demands were only selectively included and were those that most resembled the viewpoints of moral conservatives.

A further attempt at interpreting these findings is offered in the final chapter.

## CHAPTER FIVE

### CONCLUSIONS AND INTERPRETATIONS

This study of the pornography debate in Canada essentially attempted to answer relatively specific research questions developed at the outset of the project. This project sought to identify the various types of interest or lobby groups which voiced their opinions concerning the present pornography legislation. Then, the question was posed regarding what views of the interest groups were given more credence by the Fraser Committee during the public hearings and subsequently, what was the prevailing tone of the Fraser Committee's recommendations on pornography. Finally, to what extent were the recommendations on pornography incorporated into the proposed Bill C-114 presented in the House of Commons during the summer of 1986. Essentially, these broad research questions were useful in guiding the study and eventually led to the formulation of more specific working assumptions and hypotheses. Moreover, a gender-based conflict theory framework was useful in structuring the analysis of the collected data.

This study begins with a retrospective overview of obscenity and related Criminal Code legislation from the creation of the Criminal Code in 1892 up to the present day. This section was useful in 'setting the scene' so to

speaking, and it was essentially an important point of departure. This historical review of the Criminal Code legislation related to pornography was purposely restricted to that body of legislation for practical considerations. Although this study does discuss other bodies of law that are equally as important as the Criminal Code, it was not deemed necessary to do a historical review of such a wide and varied selection of laws.

Sections under the heading of 'Offences Tending to Corrupt Morals', and the sections under the defamatory libel and the hate propaganda provisions were examined. It was found that relatively few changes had occurred in the legislation since the creation of the Criminal Code in 1892. Amendments to the legislation were usually minor and consisted primarily of increases in the severity of penalties or in technical rewordings done to stay abreast of technological innovations occurring at various times. However, the most important amendment to the obscenity law occurs in 1968-1969 whereby the words 'preventing conception' - referring to any form of contraception - are removed from the Criminal Code. This change in legislation was certainly a victory for those women's groups and proponents of family planning who had lobbied against the previous law.

Aside from these relatively small amendments to the Criminal Code legislation, not many legislative innovations were created to adequately deal with or control pornography.

The second chapter of this study presents a literature review that relates to the examination of pornography in Canada. To begin, a discussion of the positions of two conflict theorists is undertaken. Essentially, conflict theorists argue that those individuals who hold the power and the resources necessary will attempt to secure their interests irrespective of whether or not other segments of the population concur. Thus, from a conflict theory perspective attempts to reform legislation will occur not necessarily for the betterment of society, but rather to serve the interests of those who control the mechanisms useful in implementing changes such as legislative amendments.

The second section of this chapter presents a number of studies in the sociology of law. These studies either supported a consensus notion of law or a conflict position. However, the latter has been confirmed by a great number of empirical studies.

The third section of the second chapter reviewed the major ideological positions of the three most important groups concerned with pornography laws. These three groups

were identified as feminists, civil libertarians and moral conservatives. Each group played an important role in the pornography debate, albeit in differing degrees, and eventually contributed to the inevitable conflict. Civil libertarians generally argued for little or no government intervention in the area of pornography. Although such a position would likely be viewed as extreme by most Canadians, the civil libertarians may have sensitized the public to the fundamental principle of necessarily balancing the rights of one group with the rights of another. Overall, it would appear, however, that the civil libertarians had relatively little impact on the recommendations proposed by the Fraser Committee and subsequently on the tentative legislation introduced last summer.

Clearly the role of feminists and moral conservatives was more influential in the whole process. Perhaps because feminists and moral conservatives had a greater vested interest in seeing pornography controlled, they were more likely to have their claims met by government officials. It is important to note that the notion of greater social control is an attractive one for most governments, and therefore claims which demand greater social control may be more likely to be implemented. Hence, because feminists generally advocated greater social control of pornography this may explain the selective incorporation of some of

their claims in Bill C-114 (for example the creation of new sections dealing with child pornography and stricter penalties).

Moral conservatives generally fared better than feminists in having their views reflected in the proposed Bill C-114 despite the fact that the recommendations of the Fraser Committee clearly supported the claims made by feminists. This phenomenon may be related to the fact that a Conservative government is far more likely to implement legislative schemes that are similar to its policies and political ideology.

The literature review culminates with the development of working assumptions and hypotheses used primarily to guide the process of data collection.

The third chapter is a descriptive one which outlines the social and political context leading to the establishment of the Fraser Committee to deal with the problems of pornography and prostitution in Canada. The discussion then moves to an examination of the terms of reference and the mandate of the Fraser Committee. Then, the most important recommendations made by the Committee regarding pornography are summarized. Finally, the draft legislation embodied in Bill C-114 is examined and discussed, and a relatively modest review of the media

coverage regarding the public's reaction to the proposed legislation is undertaken.

In the fourth chapter, the methodology used in the collection of the data is presented and explained. In essence, the categorization of the briefs presented to the Committee during the public hearings depended upon a set of three criteria. These criteria were all met in most classified cases and an attempt made to explain the few exceptions. Overall, it was quite easy to classify the briefs based on the model answers that were developed for categorization.

Subsequently, the results of the data collection are given in a discussion of the main demands or claims made by either the feminists, the moral conservatives or the civil libertarians.

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Recapitulating the research questions that were posed initially, in light of the gathered information they may be answered as follows.

There were three main types of interest groups who attempted to have their claims recognized and implemented in legislation. These three groups have been identified as the feminists, the moral conservatives and the civil libertarians. In terms of the views that were given credence by the Fraser Committee and that were reflected in

the recommendations to the government, it was found in the sample taken that more of the briefs were presented to the Fraser Committee were feminist than moral conservative or civil libertarian. Moreover, it would appear that the Fraser Committee also made an effort to legitimize the claims made by women's organizations by making recommendations which by and large reflected the concerns of these groups. Finally, the analysis of the proposed legislation embodied in Bill C-114 reveals that the recommendations of the Fraser Committee were not fully implemented or reflected in the Bill. Rather, the proposed legislation, it would appear, was created to satisfy various political and ideological considerations.

In the final section of this thesis an attempt will be made to analyse the described process of debate, lobbying and legislative efforts related to pornography. To engage in such an analysis, a natural history model of social problems developed by Kitsuse and Spector (1973) and Spector and Kitsuse (1973) will be utilized.

#### Spector and Kitsuse's Natural History Model of social Problems

Spector and Kitsuse's (1973, and Kitsuse and Spector, 1973) natural history model of social problems appears to offer a comprehensive and systematic tool for the develop-

ment of an analytical framework which will be useful in making sense of the role of interest groups involved in efforts to amend legislation in Canada. Spector and Kitsuse's natural history model was developed partially in response to the shortcomings of two major approaches in the study of social problems. These two theoretical approaches, as mentioned by Spector and Kitsuse, were Merton's (1971) functionalism and the value-conflict approach advocated by Waller (1936), Fuller and Myers (1941a, b) and others. Essentially, Kitsuse and Spector argued that both theoretical approaches "harbor crucial ambiguities as to the distinctive nature of the phenomenon of social problems and the kind of theory one would have to develop to account for it" (1973: 418). In response, Kitsuse and Spector propose that what must be addressed by those concerned with social problems are the subjective elements of social problems namely the "process by which some groups successfully define a condition as a problem within their society" (1973: 418). The theoretical approach suggested would therefore necessarily involve three main components:

- 1- A theory of interests whereby it is recognized that groups which participate in the process of defining social problems "do so in order to pursue or protect their own social, political, economic and other interests".
- 2- A theory of moral indignation whereby some groups attempt to define a situation as a social problem because it offends their sense of values.

- 3- A theory of natural history which conceptualizes social problems not as static conditions or instantaneous events but rather as a sequence of activities that progress through different stages (Kitsuse and Spector, 1973: 418).

The following discussion will attempt to outline the natural history of the pornography debate in Canada. Implicit within this discussion will be references to a gender-based conflict interpretation found in some feminist literature. This gender-based conflict approach suggests that the relative subordination of women is based on a system of gender stratification whereby women are always at the bottom of the gender hierarchy (Escomel, 1985: 37 and Coderre et al. 1984: 3). In contemporary states men have traditionally dominated women through class and gender norms. Moreover, until recently the dominance of men over women has usually been ignored. Gender stratification has been overlooked because the male-dominated social order is simply taken for granted. The oppression of women is thus perceived as founded essentially in the structural and ideological position of women within patriarchy (Eisenstein, 1979: 24) whereby men hold the power and the resources necessary to secure their interests.

In Canada the pornography issue is one of great concern for many women. As previously mentioned, what distinguishes pornography from various other offences is the blatant targeting by pornography upon one segment of the population

namely women (Shanai, 1986: 49). Only until recently has the relative subordination of women within the social structure been seriously addressed. The obvious outcome of such investigations has been the rejection of the assumption that sexual stratification reflects the natural order of things. The issues surrounding pornography require women and others to examine not only the relationship between the genders, but also the wider capitalist patriarchy which constitutes the setting for the interaction between the genders.

The following is an application of Spector and Kitsuse's natural history model to the pornography debate in Canada outlined in this study.

#### A. Stage One

Stage 1. "The attempts by some group(s) to assert the existence of some condition, define it as offensive, harmful, and otherwise undesirable, to publicize the assertions and stimulate controversy and to create a public or political issue over the matter" (Spector and Kitsuse, 1973: 147).

This stage begins when one or several group(s) attempt(s) to remedy a condition which they/it perceive(s) as undesirable. Clearly, in terms of the pornography debate in Canada, women's organizations were at the forefront of the debate by ensuring that the issue of pornography remain on the political agenda. Feminists increasingly began to recognize the misogynistic messages and the degradation

Inherent within pornography. Furthermore, they began to link the portrayal of women in pornography to the broader social, economic and political reality which condones power the domination of women by men (see Gates, 1978). The recognition was that women, as a social category, occupy the lower ranks within the sexual, political, economic and cultural hierarchies.

In Stage One, Spector and Kitsuse distinguish between two types of groups which may advance complaints regarding a particular social phenomenon. These two types of groups are either interest groups (i.e. those groups which are directly affected by the condition and take action in their own interests) or moral crusaders (usually those not directly subject to the condition which is undesirable but who find it aversive) (Spector and Kitsuse, 1973: 148).

Women's organizations obviously have a vested interest in complaining about the prevalence and degrading nature of pornography. Women's groups became concerned with the harmful consequences that pornography could have on the quality of life of women specifically, and subsequently, on society as a whole. Thus, in accordance with Spector and Kitsuse's definition, feminist/women's organizations may be viewed as interest groups.

On the other hand, moral conservative groups may be defined as moral crusaders. Although they too have a vested interest in attempting to eradicate pornography, they are not directly affected by the problem. Unlike the feminists who question the broader social structure which maintains and promotes the subordination of women, moral conservatives in protesting against pornography attempt to uphold the traditional values, sexual mores and the family structure which they view threatened by sexually explicit matter. In essence, moral conservatives do not question the status quo.

#### B. Stage Two

Stage 2. "The recognition by some official organization, agency, or institution of the group(s) legitimate standing. This may lead to an official investigation of the matter, proposals for reform, and the establishment of an agency to respond to those claims and demands" (Spector and Kitsuse, 1973: 147).

The assertions of the women's organizations were sufficient to warrant the establishment of the Standing Committee on Justice and Legal Affairs in 1978 to deal with the question of pornography in Canada. More recently, the official investigation into the matter was undertaken by the Fraser Committee. Spector and Kitsuse would suggest that at this point when governmental agencies respond to the complaints of some group, "the social problem activity undergoes a considerable transformation" (1973: 151-152). The transformation begins with the formal recognition of the

group. Once the group(s) is/are recognized, they/it will be likely to be asked to participate in the official proceedings on the problem (for example by meeting with a committee concerned with the issue). However, as is the case with the pornography issue, the establishment of a Committee represents to some extent the end of feminists control over the issue. As Spector and Kitsuse write:

Although the group may be called to testify before the committee, they find that they are cast in the role of providing information rather than negotiating and defining the nature of the problem. The committee may seek out other opposing views on the topic, reducing the original group(s) to simply one voice among many. When the hearings are over, the members of the committee will be the new experts and authorities on the subject. While the original group may comment on the report of the committee, it is that report that will define the issues, summarize the facts, put various groups in perspective and in their places (1973: 153).

During the public hearings held by the Fraser Committee, the prevailing tone of the submissions was clearly reflective of a feminist position. Whether only a particular coalition of feminists presented briefs to the Committee, thereby being representative of a certain segment of feminists, remains uncertain. Nonetheless, women's organizations and individuals who advocate a feminist position on the pornography issue were overall quite well represented during the public hearings. Similarly, in terms of the views that were reflected in the recommendations for

law reform concerning pornography, it was found that the Fraser Committee did, in fact, give serious consideration to the demands of women's organizations. By and large the concerns of women were well reflected in the recommendations of the Fraser Committee. For example, a stricter, more clear definition of pornography, the abolishment of the use of the term 'obscenity' and the introduction of specific laws dealing with children were frequent demands made by women's organizations. Furthermore, moral conservative groups and women's groups tended to agree on various policy initiatives necessary for the control of pornography. Hence, the views of the moral conservatives are also to some extent reflected in the Fraser Committee recommendations. However, the fundamental principles upon which the Fraser Committee based its recommendations appear more indicative of the principles that feminists would advocate than those of moral conservatives. The Fraser Committee essentially legitimises feminist complaints regarding pornography. Women's organizations and feminists were overall quite pleased with the recommendations of the Fraser Committee (see Canadian Advisory Council of the Status of Women, 1986: 1 and Riggs, 1985: 35).

However, the fact that the Fraser Committee gave credence to the demands of women does not necessarily suggest that the Committee was attempting to deny or

disregard the demands of other groups such as civil libertarians. Rather, it would appear that the Committee did reasonably attempt to consider all view points and to make recommendations which would reflect a compromise between the demands of all groups (for example the Committee recognized the need to consider the balance between the state's impingement upon the rights of the individual and the guaranteed freedom of individuals). It seemed, however, to take into consideration the fact that feminist groups were the most active and numerous among all groups lobbying for change. On the other hand, one could speculate that it was also politically necessary for the Fraser Committee to consider all view points and to avoid alienating any of the groups involved. Clearly the Report of the Fraser Committee is a significant piece of work as it not only attempted to incorporate the views of all three major ideological positions, but it also advocated moderate political change and social improvement through various educational schemes.

Stage Two ends when the complaints about the social phenomenon have become domesticated and routinized by some formal agency that "develops a vested interest in doing something about the complaints, though not necessarily dealing with the conditions the complaints are presumably about" (Spector and Kitsuse, 1973: 154). There are various organizations established to deal with the problem of

pornography (for example Media Watch). However, as one variant of feminist theory would suggest the only way to eradicate the pornography problem is to change the very social structures which perpetuate the subordination of women. Attempts to reform have consistently focused upon methods of handling the problem within the institutional structures traditionally dominated and empowered by men. Many of the organizations set up to deal with the grievances of women are forced to work within the confines of the structure that perpetuates the subordination and the victimization of women. As one critic of the Fraser Committee writes:

Our strategy cannot be merely to work within the system. We must challenge the system that promotes an ideology of women-hating. The (Fraser) report, instead, accepts that incremental changes can be made within the system which will ultimately better women's position (Riggs, 1985: 37).

#### C. Stages Three and Four

Stage 3. "The re-emergence of the claims and demands by the group(s), expressing dissatisfaction with the established procedures for dealing with the imputed conditions, the bureaucratic handling of the complaints, and the failure to generate a condition of trust and confidence in the procedures as sympathetic to the complaints"

Stage 4. "The rejection by complainant group(s) of the response or lack of response of the agency or institution to their claims and demands, and the development of activities to create alternative, parallel, or counter-institutions as responses to the established procedures" (Spector and Kitsuse, 1973: 147).

This model has suggested that when social problem activities culminate in the creation and establishment of procedures to deal with claims, those activities may diminish and even disappear. This is to say that an official response to a claim may give the protest group its 'finest hour' so to speak. However, it may also lead to the end of the group's control over the claims that it raises. As Spector and Kitsuse (1973) write, "the response to their complaints may take the edge off their protest that 'nothing is being done'" and hence claims making activities may halt. However, if a group or many groups remain dissatisfied with the formal response to their demands, they will ultimately develop alternative responses to the established procedures.

After the recommendations of the Fraser Committee were made public in 1985, Bill C-114 was created in response to the increasing pressure put on the federal government to enact legislation to deal with the problem of pornography. The establishment of the Fraser Committee was not enough. Groups, especially those with moral conservative and feminist stances, wanted the government to take a stand on the issue of pornography once and for all. However, the tentative legislation embodied in Bill C-114 more closely reflected the views of moral conservatives than the demands voiced by women's groups. Although the Bill provided draft legislation that would create new criminal offences dealing with child pornography and made provisions to include groups

distinguished by sex within the definition of 'identifiable group', the most important and controversial section of the Bill related to the general definition of pornography suggested. Under Bill C-114 the proposed definition of pornography was as follows:

Any visual matter showing vaginal, anal or oral intercourse, ejaculation, sexually violent behavior, bestiality, incest, necrophilia, masturbation or other sexual activity (An Act to amend the Criminal Code and the Customs Tariff, 1986: 2).

It was the inclusion of the words 'other sexual activity' which caused much reaction amongst feminist groups and others. These words clearly rendered the proposed definition unclear and all encompassing. Feminists often argued for a distinction to be made between erotica and pornography, and for the promotion of sex-positive images. The proposed definition of pornography was clearly troublesome.

With regards to pornography, the Fraser Committee attempted to implement substantial changes for women within the existing institutional structures by transferring the debate from a discussion of the rights of consumers of pornography and the sexual content of pornography to a discussion of the concerns and rights of women and children. Bill C-114, on the other hand, appears to be, at best, a conservative government's interpretation of what Canadians

demanded regarding pornography and, at worst, a stalling tactic used to mollify the concerned individuals who were requesting a speedy and effective governmental response to the pornography issue. Bill C-114 was not necessarily a reflection of what concerned Canadians wanted but rather a reflection of what a select few - moral conservatives - wanted. The recommendations on pornography made by the Fraser Committee did attack some of the most blatant forms of sexism found in the present obscenity legislation. However, these recommendations were only selectively reiterated in the proposed Bill C-114 thereby maintaining the patriarchal application of the law and moral conservative or fundamentalist ideologies. In essence, if Bill C-114 were passed, not much would change regarding the condition of women. Instead the proposed Bill C-114 would merely expand the power and ideology of the conservative "ruling apparatus in the articulation and disposition in the realm of the sexual" (Brock, 1986: 8).

Thus, those groups, such as feminists, which demanded legislative and structural changes, are not yet satisfied with attempts to reform. Feminists will continue to seek change both by working within the male-dominated institutions and outside such institutions. However, the creation of the Fraser Committee and the introduction of the proposed legislation having occurred in very recent history

makes it difficult to predict the ultimate outcome of efforts of the various groups which have a vested interest in seeing pornography eradicated or criminalized. The fact that the now infamous Bill C-114 died on the order paper may suggest that the federal government was not very serious in implementing innovative legal changes to deal with the pornography problem. Rather, it would appear that the federal government was really trying to save face by creating the illusion that it was attempting to do something about the problem. This notion was clearly supported by a media analysis of the public reaction to Bill C-114 (see Chapter Three).

Feminists and others are well aware of the fact that the establishment of Special Committees is somewhat controversial. As the Calgary Status of Women remarks during the public hearings of the Fraser Committee:

Before we begin talking we (would) like to speak about commissions and the relationship with the government which appoints them. We have given many briefs over the past several years, but conditions for women do not seem to be getting much better as a result of our analysis and recommendations.

Usually the people chosen to sit on commissions and committees of this sort are well-meaning, concerned individuals who are light years ahead of the politicians who appoint them, both in understanding of the issues and in their intent. We do not question the motives and intentions of the people of this Committee. What we are calling into question, however, are the motives and intentions of the politicians who run this country. We have seen little evidence that

they have the best interests of women at heart. In fact quite the contrary. They seem more interested in maintaining the status quo, in maintaining their power over our lives and our bodies. The white, male political, judicial and business system works best for those who created them, and who maintained them, not for women, poor people or people of color (Canada, 1984 (vol. 2): 90-91).

The failure of Bill C-114 to include many of the more 'advanced' views proposed by the Fraser Committee demonstrates an unwillingness on the part of the federal government to challenge the status quo. The government, by introducing Bill C-114, was primarily concerned with its appearances that 'it was doing something about pornography'. The somewhat liberal recommendations of the Fraser Committee could be perhaps interpreted as threatening the political and ideological power of the then Conservative government, and hence such recommendations could not plausibly be fully implemented or advocated in any resulting legislative initiatives.

The issue of pornography over the past nine years has remained on the political agenda primarily due to the efforts of feminists and to some extent, to the efforts of moral conservatives as well. Nonetheless, the pornography issue is essentially one that concerns women particularly and thus, women's organizations have a vested interest in having something done about the problem. Therefore, for women, their definition of the problem has been sustained

throughout the development of the issue and their vocal concerns have been heard, albeit sometimes to deaf ears. When the recommendations of the Fraser Committee were released women's groups were generally pleased. However, when Bill C-114 was introduced in the House of Commons it was clear that the interests of women were not at the heart of the matter. Rather it would appear that the federal government was primarily concerned with maintaining a favorable façade suggesting that it was addressing the problem of pornography in Canada. Bill C-114 was essentially written to respond to the demands of moral conservatives and not necessarily to those advocated by feminists. In fact, the Ottawa Citizen claimed in a couple of articles that the then Justice Minister John Crosbie's proposed pornography legislation was drafted after "a concerted and unpublicized lobbying campaign by church groups" (Cowan, 1986: 1 and see also 'Fraser's Anti-porn proposals too lax for Tories, says Crosbie', 1986: A5). The most influential interest group was reportedly the Interchurch Committee on Pornography whose membership included Roman Catholic, Baptist, Anglican, Mormon and Methodist churches and The Salvation Army, and whose position was almost certainly rooted in religious doctrine.

Hence, due to the specific nature of the issue of pornography and the fact that the debate is still in its

early stages, it is difficult to predict the exact extent to which Spector and Kitsuse's natural history model is applicable. This difficulty is, in part, due to the relative recentness of the whole law reform process in the area of pornography. At this point, however, the model is clearly relevant up to Stage Three where evidence tends to suggest that the pornography issue has not, as of yet, been effectively dealt with especially from the point of view of feminists who appear to have a greater stake than all other groups in reforming not only legislation but also the institutions which perpetuate the subordination of women, and therefore maintain the conflict between genders.

## APPENDIX ONE

## OFFENCES TENDING TO CORRUPT MORALS

CORRUPTING MORALS - Idem - Defence of public good - Question of law and question of fact - Motives irrelevant - Ignorance of nature no defence - "Crime comic" - "Obscene".

159. (1) Every one commits an offence who

- (a) makes, prints, publishes, distributes, sells, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or
- (b) makes, prints, publishes, distributes, circulates, or has in his possession for the purposes of publication, distribution or circulation, a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

- (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,
- (b) publicly exhibits a disgusting object or an indecent show,
- (c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, or
- (d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

- (a) the commission of crimes, real or fictitious, or
- (b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene. 1953-54, c.51, s.150; 1959, c.41, s.11; 1968-69, c.41, s.13.

## APPENDIX TWO

297. Every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part.

2. General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section unless it be proved that the proprietor, when originally giving such general authority meant that it should extend to inserting and publishing defamatory matter, or continued such general authority knowing that it had been exercised by inserting defamatory matter in any number or part of such newspaper.

3. No one is guilty of an offence by selling any number or part of such newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper. (S.C. 1892, c.29, s.297).

## APPENDIX THREE

PROVING PUBLICATION BY ORDER OF LEGISLATURE - Directing  
verdict - Certificate of order.

280. (1) An accused who is alleged to have published a defamatory libel may, at any stage of the proceedings, adduce evidence to prove that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature.

(2) Where at any stage in proceedings referred to in subsection (1) the court, judge, justice or provincial court judge is satisfied that matter alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature, he shall direct a verdict of not guilty to be entered and shall discharge the accused.

(3) For the purposes of this section a certificate under the hand of the Speaker or clerk of the Senate or House of Commons or a legislature to the effect that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate, House of Commons or legislature, as the case may be, is conclusive evidence thereof. 1953-54, c.51, s.266.

## APPENDIX FOUR

## VERDICTS IN THE CASES OF DEFAMATORY LIBEL.

281. Where, on trial of an indictment for publishing a defamatory libel, a plea of not guilty is pleaded, the jury that is sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon the indictment, and shall not be required or directed by the judge to find the defendant guilty merely on proof of publication by the defendant of the alleged defamatory libel, and of the sense ascribed thereto in the indictment, but the judge may, in his discretion, give a direction or opinion to the jury on the matter in issue as in other criminal proceedings, and the jury may, on the issue, find a special verdict. 1953-1954, c.51 s.267 (in C.C. 1986-1987, s.281, p.302)

## APPENDIX FIVE

## HATE PROPAGANDA

## ADVOCATING GENOCIDE - "Genocide" - Consent - "Identifiable group".

281.1 (1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.

(2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:

- (a) killing members of the group; or
- (b) deliberately inflicting on the group conditions of life calculated to bring upon its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin. R.S.C. 1970, c.11 (1st Supp.), s.1. (C.C. 1986, p.284).

## APPENDIX SIX

PUBLIC INCITEMENT OF HATRED - Wilful promotion of hatred - Defences - Forfeiture - Exemption from seizure of communication facilities - Consent - Definitions - "Communicating" - "Identifiable group" - "Public place" - "Statements".

281.2 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of

- (a) an indictable offence and is liable to imprisonment for two years; or
- (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for two years; or
- (b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

(4) Where a person is convicted of an offence under section 281.1 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, upon such conviction, may, in addition to any other punishment imposed, be ordered by the presiding magistrate or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) Subsections 181(6) and (7) apply mutatis mutandis to section 281.1 or subsection (1) or (2) of this section.

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section

"communicating" includes communicating by telephone, broadcasting or other audible or visible means;

"Identifiable group" has the same meaning as it has in section 281.1;

"public place" includes any place to which the public have access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations. R.S.C. 1970, c.11 (1st Supp.), s.1.

## APPENDIX SEVEN

WARRANT OF SEIZURE - Summons to occupier - Owner and author may appear - Order of forfeiture - Disposal of matter - Appeal - consent - Definitions - "Court" - "Genocide" - "Hate propaganda" - "Judge".

281.3 (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propoganda, shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be hate propoganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is hate propoganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is hate propoganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part VXIII, and sections 601 to 624 apply mutatis mutandis.

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

(8) In this section

"court" means

(a) in the Province of Quebec,

(i) the court of the sessions of the peace, or

(ii) where an application has been made to a judge of the provincial court for a warrant under subsection (1), that judge;

(a.1) in the Provinces of New Brunswick, Alberta and Saskatchewan, the Court of Queen's Bench; 1978-79, c.11, s.10 (1).

NOTE: Paragraph (a.1) enacted by 1978-79, c.11, s.10(1), in force in Alberta, June 30, 1979; proclaimed in force in New Brunswick, September 4, 1979; and to come into force on proclamation in Saskatchewan.

(b) in the Province of Prince Edward Island, the Supreme Court; or

(c) in any province, a county or district court;

"genocide" has the same meaning as it has in section 281.1;

"hate propaganda" means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 281.2;

"judge" means a judge of a court or, in the Province of Quebec, a judge of the provincial court. R.S.C. 1970, c.11 (1st Supp.), s. 1; 1974-75, c.48, s.25(1).

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