COMMENTS

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Defining Pornography: An Analysis of Bill C-54

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The *Criminal Code* provisions presently in force dealing with pornography have been criticized for a number of reasons by various groups within Canadian society. Among these are feminists, moralists and civil libertarians. The feminists demand greater severity in dealing with degrading pornography; the moralists are asking for a general limitation on the production of erotic as well as pornographic material; the civil libertarians would like to see the definition of pornography in the *Code* clarified in order to limit judicial arbitrariness in the classification process. The author analyzes Bill C-55, a bill which attempts to reform the law relating to pornography. This attempt by the legislators, although praiseworthy, is found deficient in many respects. The author notes, among other problems, the poor drafting of the Bill, the absence of a clear distinction between pornography and eroticism, the measures dealing with child pornography which are in some cases too restrictive and in others too liberal, and sanctions which are disproportionate and often ineffectual. When one considers the existing jurisprudence on pornography, the author concludes, it becomes apparent that the proposed legislation does not offer any new protection to those affected by pornography. Instead, it could well become the source of numerous injustices.

Les mesures présentement en vigueur dans le *Code criminel* relativement à la pronographie sont critiquées pour diverses raisons par de nombreux groupes au sein de la population, groupes que l'on peut distinguer selon qu'ils soient fémimistes, moralistes et défenseurs de libertés civiles. Les premiers demandent une plus grande sévérité à l'encontre des produits pornographiques dégradants, ce qui s'est le plus souvent avéré le cas pour la femme; les seconds recherchent une limitation générale de la production d'oeuvres à caractère tant pornographique qu'érotique; les derniers, quant à eux, demandent une définition plus claire des prohibitions du *Code* afin de limiter l'arbitraire des tribunaux dans l'appréciation du caractère pornographique d'une oeuvre. L'auteure analyse le projet de loi C-54, qui se veut une réforme du droit relatif à la pornographie. Cet effort du législateur, bien que louable, s'avère déficient sur plusieurs points. L'auteure note, entre autres, la mauvaise rédaction législative, l'absence de distinction claire entre pornographie et érotisme, le caractère tantôt trop restrictif et tantôt trop permissif des dispositions relatives à la pornographie enfantine, ainsi que ses sanctions disproportionnées et souvent inefficaces. Ce projet de loi, conclut l'auteure, n'offre pas de protection nouvelle si l'on considère la jurisprudence existante en matière de pornographie. Au surplus, il pourrait s'avérer source de nombreuses injustices.

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Introduction

The Government of Canada has been searching for a way to improve obscenity laws since the mid-1970s.[1] This search has included studies by Parliamentary Committees, special committees, task forces, numerous public hearings and volumes of research.[2] These efforts were sometimes in response to, but often in conjunction with, the formation of citizen coalitions and other lobby groups who organized their own campaigns to protest the state of the current law.[3]

All the studies and reports commissioned or conducted by the government, culminating in the Fraser Committee Report,[4] recommended change. They essentially agreed that the exploitative nature of pornography and its harmful effects on women and children must be addressed by the criminal law. In June 1986, the federal government introduced Bill C-114,[5] which proposed to revise the obscenity provisions of the *Criminal Code* and *Customs Tariff Act*. This bill was dropped at the end of the Parliamentary session and replaced by Bill C-54, in May, 1987.[6]

In this paper, I will examine Bill C-54, by comparing it to the present law and by explaining specific provisions in the Bill. I will examine the Bill's definitions, offences, defences and penalties in light of the government's stated policy objectives and compare them to criticisms and reform demanded by the lobby groups and recommended by the Fraser Committee. I will attempt to draw some conclusions as to the efficacy and potential effects of the Bill.

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[1]There have been over forty bills introduced in the House of Commons in the last twelve years.

[2]For example, see Canada, *Report of the Committee on Sexual Offences Against Children and Youth* (Ottawa: Supply & Services, 1984) (Chair: R.F. Badgley); Canada, Parliament, H.C., *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, "Report on Pornography" No. 18 (22 March 1978); Department of Justice, Special Committee on Pornography and Prostitution (Fraser Committee) (1983).

[3]Some of the major groups were the Canadian Coalition Against Media Pornography (and several provincial coalitions); Canadian and provincial Advisory Councils on the Status of Women; Media Watch; National Action Committee on the Status of Women; Canadian Civil Liberties Association (and provincial associations); Canadian Conference of Catholic Bishops; and the United Church of Canada.

[4]*Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, 2 vols and summary (Ottawa: Supply & Services, 1985) (Chair: P. Fraser) [hereinafter the Fraser Committee].

[5]Bill C-114, *An Act to amend the Criminal Code and the Customs Tariff*, 1st Sess., 33d Parl., 1984-85-86.

[6]Bill C-54, *An Act to amend the Criminal Code and other Acts in consequence thereof*, 2d Sess., 33d Parl., 1986-87.

I. A Critical Review of the Present Law

In order to provide some background to Bill C-54 and to understand why new laws which deal with pornography are thought to be necessary, one must examine the present law and the criticism it has attracted.

All of the relevant provisions in the *Criminal Code* use the word "obscenity" in describing and defining offensive material. "Pornography", by contrast, is not a term employed by the drafters. The definition provided in the Code for "obscenity" is "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."[7]

The *Criminal Code* prohibits the circulation, distribution and production of obscene matter.[8] It permits the seizure, forfeiture and disposal of obscene material[9] and distributors of such material are prohibited from requiring retailers to accept pornographic materials in order to sell non-obscene material ("tied sale" arrangements).[10]

Other provisions make it an offence to exhibit a "disgusting object or an indecent show",[11] to present or participate in "an immoral, indecent, or obscene performance", or to print or publish in relation to any judicial proceedings "any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals."[12]

Critics of the present obscenity laws generally fall into one of three ideological groups: feminists, civil libertarians or conservative moralists. Each group has its own perception of harm and its own rationale for limiting sexual expression. The ideologies of the groups promoting change are of fundamental importance, because as I have discussed in an earlier article,[13] much of the confusion and dissatisfaction surrounding obscenity laws can be traced to the failure of lawmakers to develop a coherent rationale to justify and explain their policies and decisions. Different statutes often have philosophical bases that contradict or clash with one another. Any new laws will require philosophical consistency in order to overcome these problems.

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[7]R.S.C. 1970, c. C-34, s. 159(8).
[8]*Ibid.*, s. 159(1)(a).
[9]*Ibid.*, s. 160.
[10]*Ibid.*, s. 161.
[11]*Ibid.*, ss 159(2)(b), 163.
[12]*Ibid.*, s. 162(1)(a).
[13]K.E. Mahoney, "Obscenity and Public Policy: Conflicting Values — Conflicting Statutes" (1985-86) 50 Sask. L. Rev. 75.

A. Pornography as a Moral Issue

It is clear from the plain words of the obscenity provisions that sexual immorality is the mischief the law seeks to address.[14] This policy has attracted a great deal of criticism. Feminist commentators argue that pornography, far from being a moral issue, is a political issue, because it promotes and ensures the unequal status of women.[15] They say that obscenity laws which only concern themselves with nudity, explicitness, offensiveness and sexual stimulation of the viewer completely miss the point: any new law must necessarily arise out of a collective desire to change societal conditions of women.[16]

A leading positivist has rejected the moralistic approach, pointing out that the present obscenity laws presuppose a common morality and sexual ethic which is not necessarily shared by all in a pluralistic society; a good society can only survive in a market place of ideas, free from restraint.[17]

Civil libertarians reject moral underpinnings because they uphold freedom of the individual as the ultimate value to be protected by law. To them, the social order is not a valued end in itself but rather a means to achieve individual freedom and security. The self-expression and self-fulfillment of individuals who comprise a society are ends in themselves that should be free from majoritarian or state direction.

Conservative moralist critics on the other hand, support the moral foundation of the obscenity laws, arguing that only strong moral values will prevent the destruction of society.[18] Their argument rests on the underlying assumption that pornography is an aberration from normal, acceptable societal conditions. Only obscenity laws need be changed, not society itself.

B. The Definition of Obscenity

The definition of obscenity in the *Criminal Code* has been heavily criticised from all sides. Curiously, there is a consensus that it is too broad and too vague.

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[14]The sections dealing with obscene and indecent materials appear in the *Criminal Code* under the title, "Offences Tending to Corrupt Morals". In *R.* v. *Beaver* (1905), 9 O.L.R. 418 at 425 (C.A.) MacLaren, J.A. stated that obscenity meant "something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd".

[15]C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) c. 13: "Not a Moral Issue".

[16]For example, see B. Faust, *Women, Sex and Pornography* (Harmondsworth: Penguin Books, 1980) at 180-89.

[17]H.L.A. Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963) at 67-81.

[18]P. Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965) at 18.

Civil libertarians argue that the vagueness and subjectivity of the words used in section 159 leave publishers, film makers, authors and booksellers in a state of constant insecurity about compliance with obscenity laws.[19] Any new formulation of the concept, they say, must be narrower in scope and much more precisely defined.[20]

Feminists object to the current definition on the same grounds but make the additional point that subjective norms in the hands of a male-dominated administration often results in biased decision-making.[21] The lack of precision in the definition leaves it open to subjective interpretation by police and customs officers, crown attorneys and judges. Violent, degrading pornography often slips through the net of subjective interpretation while non-violent, non-degrading sexual material is sometimes found obscene. Feminists also criticize the definition for its implicit approval of the sexual exploitation of women. Where section 159 states that obscenity includes the "undue exploitation of sex", it appears to affirm that there is such a thing as "due" exploitation even if combined with the other elements of crime and violence.[22]

Conservative moralist groups oppose the current definition for its vagueness and breadth, arguing that it permits the law to be interpreted too liberally, allowing violent and degrading depictions of sex as well as other explicit portrayals of sexual behavior to escape criminal sanction. Both feminists and conservative moralists attack the definition for not addressing child pornography.

C. Judicial Interpretaion of Obscenity Laws

The judiciary has been criticized from all sides for its fickle interpretation of the obscenity laws and particularly for its resort to the "community standards" test. Civil libertarians condemn the test because it is enormously difficult to apply and yields inconsistent results.[23] Feminists go further. They view judges' use of the "community standards" test as inherently biased. Moreover, in a society where discrimination against women is systemic, any test based on community standards is bound to be disadvantageous for

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[19]Fraser Committee, *supra*, note 4 at 77.

[20]*Ibid.* at 78. In their brief to the Fraser Committee, the Canadian Civil Liberties Association took the position that unless the portrayals of sexual violence were real as opposed to simulated, they should not be proscribed. Various local associations gave qualified support to municipal regulations keeping pornography out of the sight and reach of children.

[21]See K.E. Mahoney, "Biased and Neutral Approaches in Obscenity Decisions" in K.E. Mahoney and S.L. Martin, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 298.

[22]Fraser Committee, *supra*, note 4 at 114.

[23]Canadian Civil Liberties Association, "Pornography and the Law" (1984) [unpublished brief submitted to the Fraser Committee].

women.[24] Judges themselves have recognized that a common community standard in a country as diverse and geographically far-flung as Canada, is extremely difficult to discern.[25] One judge has asserted:

> The lack of unanimity in the decisions of the courts in obscenity cases suggests that the Canadian contemporary community standard may very well be a very elusive, not readily discernible, and ill-defined standard.[26]

D. Fraser Committee Recommendations

The Fraser Committee was struck in 1983 to consider, *inter alia*, the availability, effects and common conception of pornography in Canada; to ascertain public views on ways and means to deal with it; and to consider alternatives, to report findings and to recommend solutions to the problems associated with pornography and prostitution in Canada.[27] The Committee reported to the Minister of Justice in 1985, recommending comprehensive legal reform so that the social causes of the problems associated with pornography and prostitution could be addressed and remedied.

The Fraser Committee detected two forms of harm flowing from pornography: the moral offence caused when people are involuntarily exposed to it and the broader social harm it causes by undermining the right to equality. Its recommendations envisioned a three-tiered approach. Extreme forms of pornography involving children or physical harm to participants would be prohibited and would attract the most serious penalties. On a second level, violent behavior for the purpose of sexually stimulating the viewer, including bondage, bestiality, incest or necrophilia, would also be prohibited but attract less serious sanctions than tier one; the third tier would include visual material depicting vaginal, oral or anal intercourse, masturbation and lewd touching of genitalia which would attract criminal sanction only where no warning was given or material was sold or made accessible to people under eighteen. No portrayal of persons under eighteen or sexual violence were to be included in tier three.[28]

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[24]Mahoney, *supra*, note 19 at 304-06.

[25]See comments of Borins Co. Ct J. in *R.* v. *Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53 at 68-71, 36 C.R. (3d) 154 [hereinafter *Doug Rankine* cited to C.C.C.].

[26]*R.* v. *Cinema International Canada Ltd* (1981), 13 Man. R. (2d) 337 at 342 (Co. Ct), aff'd (1982), 13 Man. R. (2d) 335 (C.A.) [hereinafter *Cinema International* (C.A.)].

[27]Fraser Committee, *supra*, note 4 at 5-6.

[28]*Ibid.* at 276-79.

E. Post-Fraser Report Developments

Subsequent to the Fraser Report, the Supreme Court of Canada clarified somewhat the legal definition of obscenity. Degradation and violence in movies were addressed in *dicta* in *Towne Cinema*[29] and non-degrading, non-violent but explicit sex in movies and video was dealt with in *R.* v. *Video World*.[30] In *Towne Cinema* the Court concluded that sexually degrading depictions were "undue" for the purposes of section 159. Madam Justice Wilson's characterisation of "undueness" explained the type of harm caused by obscenity:

> It seems to me that the undue exploitation at which s. 159(8) is aimed is the treatment of sex which in some fundamental way dehumanizes the persons portrayed and, as a consequence, the viewers themselves.[31]

The Court was of the view that sexual expression portraying persons as objects of violence, cruelty or other dehumanizing treatment was obscene, yet they added their voices to the criticism of the definition when they stated a need for objective criteria to determine the question of "undueness".

In *Video World*, the Supreme Court was asked to rule on films containing simulated depictions of almost every form of sexual activity possible, including anal, oral, and vaginal intercourse, masturbation, cunnilingus, lesbianism and group sex.[32] *Video World* had been brought to the Manitoba Court of Appeal as a test case to decide which of two conflicting views on the content of obscenity previous decisions was correct. On the one hand, obscene films had been described as

> either wholly destitute of plot or, if they do have a story line, it is one that is transparently thin, a palpably meagre framework on which to hang one erotic episode after another. ... [T]hey invariably show, among other depictions of sex, a scene of Lesbianism as well as the inevitable wild orgy. Anyone familiar with skin-flicks — either through stag movies or through certain types of commercial theatres — will be aware of something else too, namely that the sexual scenes often go beyond mere simulation.[33]

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[29]*Towne Cinema Theatres Ltd* v. *R.*, [1985] 1 S.C.R. 494, 45 C.R. (3d) 1, 18 D.L.R. (4th) 1 [hereinafter *Towne Cinema* cited to S.C.R.].

[30]*R.* v. *Video World Ltd*, [1987] 1 S.C.R. 1255, 77 N.R. 77 aff'g (1985), 36 Man. R. (2d) 68, 22 C.C.C. (3d) 331 (C.A.), rev'g (1985), 32 Man. R. (2d) 41 [hereinafter *Video World* (C.A.) cited to Man. R.].

[31]*Supra*, note 29 at 523.

[32]The evidence consisted of an agreed statement of facts, the video cassettes and agreed written summaries of the films. The agreed statement of facts said none of the movies contained scenes of violence, involvement of children or animals or degradation of women, but all of the movies contained scenes of various types of sexual activities.

[33]*Cinema International* (C.A.), *supra*, note 26 at 337, Freedman C.J. in reference to his earlier judgment in *R.* v. *Odeon Morton Theatres Ltd* (1974), 45 D.L.R. (3d) 224 at 233, [1974] 3 W.W.R. 304, 16 C.C.C. (2d) 185 [hereinafter *Odeon Morton*].

On the other hand, another Manitoba court had decided that "films which consist substantially of scenes of people engaged in sexual intercourse" and also scenes of "group sex, lesbianism, fellatio, cunnilingus, and anal sex" were not obscene.[34]

The Manitoba Court of Appeal chose the standard set in the first case. The court added that it was not necessary for sexually explicit depictions to contain crime, horror, cruelty or violence in order to be found obscene and the fact that the sexual acts were simulated did not lessen their obscene character. As Matas J.A. explained,

> in some cases a simulated act can be more graphic and explicit than a depiction of the actual physical act. A more apt distinction would be the manner of portrayal of the sexual acts. The manner of depiction is all important; not whether the scenes are simulated.[35]

He added that the films before him were devoid of artistic merit. The Supreme Court of Canada, dismissing the appeal, adopted his reasoning.

In *Video World* the Supreme Court thus established a minimum standard for sexually explicit visual material. At the very least, an explicit or simulated film must be more than a "skin flick" (as described by Freedman C.J. in *Cinema International*) to avoid being obscene. It appears that sex films, simulated or explicit, are vulnerable to prosecution unless they have some redeeming artistic merit and do not degrade or humiliate the participants. The effect of these two recent decisions is to prohibit a very broad range of sexual expression, beyond that recommended by the Fraser Committee, feminist groups or civil libertarians. It is against this backdrop that I now turn to an examination of Bill C-54.

III. Bill C-54

The Justice Minister revealed the government's policy on pornography when he tabled the proposed amendments to the *Criminal Code* in the House of Commons on 26 November 1987.[36] He said:

> Bill C-54 reflects the Government's commitment to pass legislation to fight against pornography in an effective manner, and to insert in the Criminal Code the relevant provisions it so badly needs. Our legislative response is aimed at ensuring the dignity of the individual in Canadian society. ...[W]e must take the steps necessary to protect our children from gratuitous violence, whether

[34] *R.* v. *Ramsingh* (1984), 29 Man. R. (2d) 110 at 115, 14 C.C.C. (3d) 230 (Q.B.), Ferg J., adopting the view of Borins Co. Ct J. in *Doug Rankine, supra,* note 25 at 70.

[35] *Video World* (C.A.), *supra,* note 30 at 77.

[36] *Supra,* note 6.

> emotional or physical, and must protect individuals from degradation and exploitation.[37]

In order to meet the objectives of ensuring individual dignity and protecting children from sexual abuse, the Government's proposal to amend the *Criminal Code* includes new definitions of "pornography" and "erotica"; a new offence structure including restrictions on display; a broad penalty range from summary convictions to ten year prison terms; child pornography as a distinct type of pornography; new provisions dealing with theatrical performances; a new hate propaganda provision including "sex" as a prohibited category and amendments to the *Customs Tariff Act.*

A. Definitions

The most important changes proposed in Bill C-54 are two new definitions to be added to the *Criminal Code.* One deals with "erotica", the other with "pornography", signalling an apparent change in terminology, spirit and intent. Instead of addressing "offences against morals", the Bill's intent appears to embrace the feminist view in its condemnation of sexual exploitation and violence. In some respects, however, the definition retains the conservative moralist character of existing obscenity laws.

1. Erotica

The definition of "erotica" in Bill C-54 is a serious flaw in the proposed legislation. The generally recognized meaning of the term and that ascribed to it by feminists who lobbied for its inclusion on the Bill is ignored. The Bill defines erotica as

> [a]ny visual matter a dominant characteristic of which is the depiction, in a sexual context or for the purpose of the sexual stimulation of the viewer, of a human sexual organ, a female breast or the human anal region.[38]

The term "erotica" is generally used to describe healthy, non-violent, non-degrading sex. Feminists typically define erotica as the sexual expression of positive and affectionate human sexual interaction between consenting individuals participating on a basis of equality.[39] The courts have agreed that sex *per se* is not necessarily obscene by stating, for example, that "it is the message that counts, not the degree of explicitness."[40] The Bill C-54 defi-

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[37]Canada, *H.C. Debates,* vol. 129, no. 219 at 11226 (26 November 1987).

[38]Bill C-54, *supra,* note 6, s. 138 [all references are to section numbers as they would appear in an amended *Criminal Code* following passage of the Bill in its present form].

[39]See G. Steinem, "Erotica and Pornography: A Clear and Present Difference" in L. Lederer, ed., *Take Back the Night: Women on Pornography* (New York: Morrow, 1980) 35 at 37.

[40]See Shannon J. in *R.* v. *Wagner* (1985), 36 Alta L.R. (2d) 301 at 311, 43 C.R. (3d) 318 (Q.B.) aff'd (1986), 69 A.R. 78, 50 C.R. (3d) 175 (C.A.) (leave refused [1986] 1 S.C.R. xv).

nition fails to provide any context within which to judge sexual depictions, the very element the courts and others have employed to distinguish pornography from non-pornography.

By merely defining erotica as the prominent display of body parts "in a sexual context," the definition fails to recognize that what saves erotica from being pornographic is its positive declaration of equality between participants. Depictions of a woman's body which humiliate, ridicule or present the female in a demeaning, unequal context could not only be saved by the Bill C-54 definition, they would acquire the positive label of "erotica". This result would surely undermine the spirit and intent of the Bill and mislead the public as to the concept of positive, healthy sexual expression. One suggestion is to rename this category as "non-prohibited pornography".[41]

Another misunderstanding of erotica is contained in the Bill's requirement that the display of genitals be a dominant feature of the depiction. The purpose and dominant characteristic of erotica is the sexual stimulation of the viewer. While prominent display of the genitals is a factor to be considered, it should not be an essential element.

2. Visual Pornography

The elimination of the word "obscenity" from the vocabulary of prohibited sexual expression is in keeping with the apparent change in objectives from the protection of public morals to protection of individuals from exploitation and abuse. The word "obscenity" is defined in the Oxford dictionary as "indecency, lewdness ... foulness, loathsomeness."[42] The Latin root of the word means foul, repulsive, filthy, morally impure, or indecent.[43] By contrast, the word "pornography" is defined as "a description of the life, manners, etc. of prostitutes and their patrons."[44] The word "pornography" is thus a more appropriate point of departure for defining what should be prohibited when the mischief sought to be addressed is exploitation.

The definition of "pornography" in Bill C-54 distinguishes visual from non-visual material. There are six kinds of visual matter included in the definition of pornography, as follows:

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[41]Committee Against Pornography, "An Overall Analysis and Detailed Critique of Bill C-54" (Toronto, October 1987) [unpublished] at 15.

[42]*The Shorter Oxford English Dictionary on Historical Principles*, 3d ed. (Oxford: Clarendon Press, 1973).

[43]*Cassell's New Latin-English English-Latin Dictionary* (London: Cassell, 1959).

[44]*Supra*, note 42.

a. Infliction of bodily harm in a sexual context

"Pornography" includes depictions of

> a person causing, attempting to cause or appearing to cause, in a sexual context, permanent or extended impairment of the body or bodily functions of that person or any other person.[45]

There is no defence for actual or simulated depictions of this kind. Intended to address very violent depictions of the infliction of lasting physical injury or even death (such as so-called "snuff" films), the content of this section was clearly influenced by the recommendation of the Fraser Committee. The Committee stated that this type of material should be prohibited to protect performers, to send the message that deliberate physical harm in the context of sexual relations is not acceptable and to avoid social harm caused by the undermining and violation of the equality of women[46] and of human dignity in general. However, the Fraser Committee did not include simulations in this category. Civil libertarians argue that a simulation of extreme violence in a sexual context is not as reprehensible as actual injury. But I submit that the contrary view of Matas J.A. on this point is persuasive.[47]

While the targetting of violence and exploitation in this section is generally praiseworthy, the words "in a sexual context", are undefined and vague. More precise wording is required because judges take differing views of what is "sexual". An example is found in *R.* v. *Arena Recreations (Toronto) Ltd.*[48] In that case, Jewers J. was asked to decide whether photographs of bound women, nude and partially nude, were obscene. The judge determined that photos showing the bound women suspended or hanging by ropes from trees with their breasts exposed were devoid of any "sexual element", despite the fact that he found the publication was an "adult" magazine, devoted largely to the depiction of nudity and sex. He explained the photographs did not have a "sexual element" because they did not show sexual activity nor was any "violator" committing indignities upon or injuring the women ...",[49] although he acknowledged that the same photographs had been found obscene in another jurisdiction.[50]

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[45]Bill C-54, *supra*, note 6, s. 138 "pornography" (a)(ii).

[46]Fraser Committee, *supra*, note 4 at 265.

[47]*Video World* (C.A.), *supra*, note 30 at 77.

[48](1987), 46 Man. R. (2d) 47, 56 C.R. (3d) 118 (Q.B.) [hereinafter *Arena Recreations* cited to Man. R.].

[49]*Ibid.* at 51.

[50]See *R.* v. *Metro News Ltd* (1986), 56 O.R. (3d) 321, 32 D.L.R. (4th) 321, 53 C.R. (3d) 289, 29 C.C.C. (3d) 35, 23 C.R.R. 77, 16 O.A.C. 319 (C.A.) [hereinafter *Metro News* cited to D.L.R.]. A criminal jury of 12 persons found the photographs to be obscene.

Consideration of the type of publication within which the depiction appears should be a factor. If not, pornographers may escape liability merely by ensuring that no overt sexual activity occurs on the same page or in the same frame as the otherwise pornographic image. This would clearly contravene the expressed intent of the Bill. "Pornography" should include depictions of the aftermath of permanent or lasting impairment of the body or bodily functions in a sexual context thus conveying the message that deliberate physical harm in the context of sexual relations is unacceptable. Whether the violator is actually depicted in the act of causing that harm should not be relevant. The violence is no less merely because the act is complete.

b. Sexually Violent Conduct

Bill C-54 defines as "pornography"

> sexually violent conduct, including sexual assault and any conduct in which physical pain is inflicted or apparently inflicted on a person by that person or any other person in a sexual context.[51]

This portion of the definition appears to cover actual sexual violence, whether self-inflicted or inflicted by another. However, the use of the word "apparently" is not as clear as the word "appearing" in subparagraph (ii) with reference to bodily harm, so it is not clear that simulated depictions would be covered. The wording should be consistent if the intent of the Bill is the same in both branches of the definition.

The vagueness of the words "sexual context" is not as pressing an issue here; the specific reference to "sexually violent conduct, including sexual assault" rather than to any broader notion such as physical impairment renders them superfluous. However, the use of the words "any conduct in which physical pain is inflicted or apparently inflicted" raises some additional problems. If a victim is depicted visually as enjoying or not objecting to violent conduct, it could be argued he or she is not experiencing physical pain.

Subparagraph (a)(iv) which addresses "degrading" pornography (see below) says that consent is not relevant. The same standard should apply to sexual violence. Pornography that depicts women as enjoying and consenting to sexual abuse is one of the most objectionable varieties. Feminist critics identify this ingredient as that which most seriously undermines women's dignity as human beings.

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[51]Bill C-54, *supra*, note 6, s. 138 "pornography" (a)(iii).

The case law shows that there is a need to clarify the consent issue. In *Arena Recreations* Jewer J. implies that lack of visible protest or terror in the part of the person shown in a visual medium goes to the issue of whether or not the depiction is sexually violent. He comments:

> [T]here are certain aspects of the material which, to my mind, tend to diminish the impact the photographs might otherwise have had. Any elements of cruelty or violence are implied rather than explicit... . There is a stillness about the figures in the photographs; for the most part, one cannot see the expressions on their faces, but where one can they appear calm and serene... .[52]

Without a consent exclusion, it is arguable that the most commonly portrayed acts of violence against women in pornography could slip past this definition. Apparent consent to sexual violence would disqualify it as a depiction of sexual assault which, by definition, requires touching without consent. It may also fail to qualify as "sexually violent conduct" or "any conduct in which physical pain is inflicted or apparently inflicted" if the victim is shown as enjoying or welcoming pain.

In summary, the underlying rationale of the subparagraphs prohibiting sexual violence is sound because it clearly acknowledges that violent sexual abuse (typically of women) lowers the status of the victims and contravenes their right to equality. Simulations convey the same message as actual depictions. "Sexual context" should be defined. The potential defence of consent, where the victim is portrayed as enjoying abuse, should be removed.

c. Degrading Acts

Subparagraph (a)(iv) defines as pornography

> any visual matter that shows
> ...
> a degrading act in a sexual context, including an act by which one person treats that person or any other person as an animal or object, engages in an act of bondage, penetrates with an object the vagina or the anus of the person or any other person or defecates, urinates or ejaculates onto another person, whether or not the other person appears to be consenting to any such degrading act, or lactation or menstruation in a sexual context... .[53]

Subparagraph (a)(v) states that bestiality, incest and necrophilia are also pornographic.[54]

The underlying rationale of subsections (iv) and (v) is broader than that of the subsections addressing violence. The emphasis here is on the protection of human dignity, protection from socially repellant behaviour,

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[52]*Arena Recreations, supra,* note 48 at 51.
[53]Bill C-54, *supra,* note 6, s. 138 "pornography" (a)(iv).
[54]*Ibid.*, s. 138 "pornography" (a)(v).

and protection of equality rights. Civil libertarians will likely object to this portion of the definition because of the lack of relation between degrading depictions and identifiable harm to individuals. They may view the entire degradation paragraph as an unwarranted limitation on freedom of expression. The pronouncements of the Supreme Court in *Towne Cinema* regarding the concept of harm,[55] indicate that such an argument would not succeed.

However, the inclusion of "lactation or menstruation in a sexual context" under the definition of a "degrading act" goes beyond the Court's stated harm justification. Neither of these bodily functions is inherently degrading, connotes a power imbalance, or is unnatural, like bestiality and necrophilia. Without something more, they are inconsistent with the purpose of protecting individuals from degradation and exploitation. Putting lactation and menstruation in the same category as truly degrading or unnatural acts not only confuses the issue of harm, it even indicates a lack of understanding and respect for the female person. Only if combined with violence or degradation, could portrayal of these bodily functions be pornographic. Therefore, they should either be omitted from the definition or qualified by reference to degradation and violence.

The vague phrase "in a sexual context" recurs here. Unless it is defined or worded more precisely, it could defeat the purpose of the Bill. A more precise phrasing might be "for the apparent purpose of sexual stimulation of the consumer of the material".[56]

d. Masturbation, Ejaculation and Intercourse

The Bill would include as "pornography"

> masturbation or ejaculation not referred to in subparagraph (iv), or vaginal, anal or oral intercourse... .[57]

This portion of the definition refers to explicit acts; thus simulated versions of such conduct would not be pornographic.

This portion of the definition cannot be defended on the basis of protecting individuals from degradation and exploitation. There is no reference to a context within which to evaluate these sexual acts. By eliminating context, this concept ignores the feminist analysis that explicit portrayals of sexuality are not pornographic *per se* and can be beneficial if evidently consenting and positive. It also neglects the civil libertarian position that

[55]Above, text accompanying note 29.
[56]Committee Against Pornography, *supra*, note 41 at 38.
[57]Bill C-54, *supra*, note 6, s. 138 "pornography" (a)(vi).

only demonstrated harm can justify limiting expression. What it does reflect is the conservative moralist view that any explicit sexual portrayal which sexually stimulates the viewer should be prohibited. This represents a backward step in our understanding and analysis of pornography.

The Supreme Court, which in *Video World*[58] adopted the view that simulated or explicit sexual acts, if they amount to "skin flicks", are obscene, says the material must be evaluated in context. Like lactation and menstruation, portrayals of sexual acts are capable of being either pornographic or erotic. Prohibition of a sexual portrayal with which no violence or degradation is associated can only mean that the law regards these depictions as immoral. This justification reflects the same "offences against morals" rationale of the current obscenity provisions. Protecting individuals from their own moral shortcomings and upholding social standards of modesty and good taste may be desirable goals, but using the criminal law to enforce them is inappropriate. Subparagraph (vi) would be more appropriately placed in the section called "erotica" if properly defined, otherwise within a new definition called "non-prohibited pornography". Regulations regarding display and accessibility to children but not prohibition should be applicable.

e. Child Pornography

The child pornography definition[59] addresses the production of pornography involving children and the exhibition of pornography to children; it catches everything that is defined as pornography that involves or is conducted in the presence of children. In addition, child pornography is material which, for a sexual purpose, exposes images of the genitals, female breast, or the anal region of a person under eighteen, or the exhibition of these parts of the body in the presence of a person under eighteen.

The underlying policy is simply that any use of children for the sexual entertainment of adults is reprehensible. It is reinforced by the broad definition of a child, which includes anyone "depicted as under" or "apparently under" eighteen years of age. The Bill does not make a distinction between "erotica" and "pornography" as far as children are concerned. All explicit material, including the simple depiction of sexual organs, is pornographic if it involves children or is shown to them for a sexual purpose.

The words "for a sexual purpose" are not explained and add to the confusion raised elsewhere by the words "in a sexual context". The defi-

[58]*Supra*, note 30.

[59]Bill C-54, *supra*, note 6, s. 138 "pornography" (a)(i).

nition of erotica compounds the problem by adding yet another concept through the words "for the purpose of the sexual stimulation of the viewer". Presumably, three distinct phrases would not have been used unless they were intended to mean different things. If that is the case, the three terms should be defined. If not, the wording should be made consistent.

The intent of the child pornography definition is laudable but its breadth could constrain some legitimate sex education materials. Any visual depiction of children masturbating as well as any written material which incites, promotes, encourages or advocates masturbation for children would be made pornographic and would be vulnerable to prosecution.[60] It is well accepted that masturbation does not harm children and some sex education sources recommend that parents not discourage their children from masturbating in private.[61] Eliminating the word "masturbation" would permit that small amounts of legitimate material in which children are shown or encouraged to participate in a sexual activity not be considered harmful.

The vagueness of the words "for a sexual purpose" could even raise problems in the classroom. Without further clarification, it could be argued that sex education classes are for a "sexual purpose" and that anatomy charts shown to children which display explicit genitalia may fall within the definition of pornography as "the exhibition, for a sexual purpose, of a human sexual organ, a female breast or the human anal region of, or in the presence of, a person who is, or is depicted as being or appears to be, under the age of eighteen years."[62] It is unlikely that any prosecutor would proceed with such a charge, but the words should be more clearly defined nevertheless. This is especially true in light of the fact that section 159.1 exempts child pornography from the defence of educational purpose. It is also inconsistent with section 159.6 which allows the defences of artistic merit, educational purpose or prior acceptable classification to the offence of exhibiting erotica to persons under eighteen in section 159.4 or the sale or rental of erotica to persons under eighteen in section 159.5.

If subparagraph (vi) were separated from the pornography definition as recommended herein[63] the child pornography definition would require amendment so that intercourse and ejaculation involving children would still be prohibited.

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[60]*Ibid.*, s. 138 "pornography" (b).

[61]For example, Planned Parenthood Federation of America, *How to Talk with your Child About Sexuality: A Parent's Guide* (Garden City, Mich.: Double Day, 1986).

[62]Bill C-54, *supra*, note 6, s. 138 "pornography" (a)(i).

[63]Above, text following note 58.

3. Non-Visual Pornography

The pornography definition also reaches "any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in any of subparagraphs (a)(i) to (v)."[64] This appears to include transmissions over telephone lines, computerized material, books, audio tapes, records, commercial advertising or any other non-visual material. In order to be pornographic, non-visual representations must incite, promote, encourage or advocate child pornography, sexual violence or degradation, bestiality, incest or necrophilia. Depiction of various forms of intercourse, masturbation and ejaculation are not included here. In other words, it would be permissible for non-visual material to incite, promote, encourage or advocate these forms of sexual activity without restraint.

This paragraph acknowledges that visual images are more potent than non-visual images and that the written word is more deserving of protection than visual images. In a limited way, it also acknowledges the importance of context. It allows those administering the law to distinguish between mere representations or descriptions of sexual violence, degradation and exploitation and those which incite, promote, encourage or advocate such things.

Offences involving this form of pornography can be defended on grounds of artistic merit, or educational, scientific or medical purpose, but it is not clear from the provision whether the work taken as a whole must incite, promote, encourage or advocate pornography. This should be clarified.

B. Offences and Penalties

Sections 159 to 165 of the *Criminal Code* containing the present obscenity offences would be repealed by Bill C-54. The new offences are dealing in pornography, using children in pornography, possession of child pornography, presenting, exhibiting, selling or renting erotica to children, and display of erotica.[65]

1. Dealing in Pornography

Dealing in pornography is the umbrella offence, including everything from production to display. It is defined in proposed section 159(2) as follows:

> For the purposes of this section, a person deals in pornography if the person imports, makes, prints, publishes, broadcasts, distributes, possesses for the

[64]Bill C-54, *supra*, note 6, s. 138 "pornography" (b).
[65]*Ibid.*, ss 159(2), 159.2(1), 159.2(2), 159.4, 159.5, 159.7.

> purpose of distribution, sells, rents, offers to sell or rent, receives for sale or rental, possesses for the purpose of sale or rental or displays, in a way that is visible to a member of the public in a public place, the pornography.

Dealing in child pornography or pornography showing permanent or extended bodily harm in a sexual context, is an indictable offence and is punishable by a maximum of ten years imprisonment.[66] No defence is listed for dealing in pornography involving bodily harm. The only defence for dealing in child pornography is the "reasonable steps" defence.[67]

The next most serious offence, punishable on indictment by five years imprisonment or by summary conviction, is for dealing in sexually violent or degrading pornography or pornography involving bestiality, incest or necrophilia.[68] An accused may avail himself of the defences of artistic merit, or educational, scientific or medical purpose.[69]

The section does not distinguish between those who produce and distribute pornography and those who sell it. From both a prevention and culpability standpoint, it is inappropriate that the potential liability be the same for producers and distributors as it is for sellers. A producer or distributor on summary conviction would face a maximum sentence of six months or a fine of $2,000.[70] A $2,000 maximum fine is far too low to deter producers or distributors, who generally make much larger profits than sellers, from dealing in pornography; the punishment does not fit the crime.

At the bottom of the hierarchy of offences is dealing in "conventional" pornography involving intercourse, masturbation and ejaculation. This is an indictable offence punishable by a maximum of two years imprisonment or upon summary conviction.[71] The defences of artistic merit or educational, scientific or medical purposes exist here as well.[72] Because there are no inherent qualities in intercourse, masturbation or ejaculation that are harmful or exploitative, this type of material should not be "prima facie" pornographic and would be more suitably placed in the display offences section of the Bill.[73]

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[66]*Ibid.*, ss 159(2), 159(3).

[67]*Ibid.* Section 159.3(b) provides that the accused shall be found not guilty if he establishes on a balance of probabilities that he took all reasonable steps to ensure that no person in the matter or communication was depicted as being, appeared to be or was described as being under the age of eighteen years.

[68]*Ibid.*, s. 159(4).

[69]*Ibid.*, s. 159.1(1).

[70]Subsection 722(1) of the *Criminal Code* provides that where there is no other provision made by law, a maximum fine of $2,000 or six months imprisonment or both can be imposed for a summary conviction offence.

[71]Bill C-54, *supra*, note 6, s. 159(5).

[72]*Ibid.*, s. 159.1(1).

[73]See below, arguments following note 58.

2. Child Pornography Offences

The use of children in the production of pornography would become an indictable offence punishable by a term of imprisonment not exceeding ten years.

The defence of "reasonable steps" is contemplated.[74] Possession of child pornography is punishable upon summary conviction.[75] The rationale for this last offence is that much of the trade in child pornography is through informal networks and the dealing offences therefore might not apply. This reasoning should also apply to the very violent depictions causing or appearing to cause bodily harm because much of the trade in this material, where it exists, is through informal networks and contacts.

3. Offences and Penalties Involving Erotica

There are three offences involving erotica: theatre presentation to persons under eighteen, sale or rental to persons under eighteen and display to the public. All are punishable upon summary conviction.[76] The offences pertaining to those under eighteen have the defences of artistic merit or educational purpose or a prior acceptable classification for viewing by persons under eighteen by a lawful provincial body. The reasonable steps defence also applies. In this context it requires that the accused show all reasonable steps were taken to ensure no erotica was sold, rented or displayed to those under eighteen or to ensure that the person was eighteen years or older.[77] The defences of artistic merit or educational, scientific or medical purpose and "reasonable steps" to ensure no erotica was displayed are available to alleged offenders under the public display provision.[78]

The constitutionality of these sections may be an issue; regulations controlling display and sale are traditionally areas of provincial jurisdiction even though the case law on the point is contradictory.[79] If a provincial classification system has previously approved the material for their age group, the Bill would permit minors access to it. However, by giving supremacy to provincial controls, the Bill will result in differential access in different provinces raising the further issue of uniformity in application of the law.

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[74]Bill C-54, *supra*, note 6, ss 159.2(1), 159.3(a).

[75]*Ibid.*, s. 159.2(2).

[76]*Ibid.*, ss 159.4, 159.5, 159.7.

[77]*Ibid.*, s. 159.6.

[78]*Ibid.*, s. 159.8.

[79]See *Re Sharlmark Hotels Ltd and Municipality of* v. *Metropolitan Toronto* (1981), 32 O.R. (2d) 129, 121 D.L.R. (3d) 415 (Div. Ct) and *Hamilton Independent Variety and Confectionery Stores Inc.* v. *City of Hamilton* (1983), 143 D.L.R. (3d) 499, 20 M.P.L.R. 241 (Ont. C.A.).

Section 159.7 sets out what retailers must do in order to comply with proposed display provisions. It states:

> Every person who displays any erotica in any way that is visible to a member of the public in a public place, unless the public must, in order to see the erotica, pass a prominent warning notice advising of the nature of the display therein or unless the erotica is hidden by a barrier or is covered by an opaque wrapper, is guilty of an offence punishable on summary conviction.[80]

If prevention from involuntary exposure is the aim of the display provisions, as civil libertarians and feminists suggest, then the proposed choices of warning signs, barriers or opaque wrappers is questionable. Warning signs will be the easiest and least expensive method of complying with the Bill, and most sellers of pornography or erotica will likely opt for them. But a prominent warning sign would not protect the person who has no alternative place to shop from involuntary exposure. A provision making the sale, rental or display of erotica illegal where the majority of material sold, rented or displayed is not erotic or prescribing mandatory opaque coverings would be preferable.

4. Offences Involving Theatrical Performances

Bill C-54 would prohibit the use, inducement, incitement, coercion or agreement to use persons under eighteen in any theatrical performance involving "pornography" as set out in the definition section, the maximum penalty being ten years imprisonment with the defence of "reasonable steps".[81] It further forbids the owner, manager or person in charge of a theatre from presenting or allowing to be presented any pornographic performances involving children under eigteen or persons appearing to be or depicted as being under eighteen, the penalty being a maximum of ten years imprisonment with the defence of "reasonable steps".[82] Owners, lessees, managers or persons in charge of theatres are prohibited from presenting or allowing the presentation of all other pornographic performances, the penalties following the same pattern as in the dealing offences.[83] Appearing as an actor, performer or assistant in pornographic performance is a summary conviction offence with a defence of artistic merit.[84]

The artistic merit defence is available for violent, degrading, unnatural or "conventional" pornography.[85] No defence is available for pornographic theatrical performances showing bodily harm.

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[80]Bill C-54, *supra*, note 6, s. 159.7.
[81]*Ibid.*, s. 162.
[82]*Ibid.*, s. 163.
[83]*Ibid.*, ss 163.1-163.3.
[84]*Ibid.*, ss 163.4, 163.5.
[85]*Ibid.*, s. 163.5.

Nonsensically, the Bill does not specifically address those who produce and direct such performances. As a result, they would escape liability unless it could be proven that the criteria of subsection 162(1) applied. For example, it would be difficult to prove that a producer who finances a performance under this category, "uses, induces, incites, coerces, or agrees" to use children in a pornographic performance.

5. Mailing Pornography or Hate Literature

Bill C-54 would amend the hate propaganda provisions of the *Criminal Code* to include "sex" in the listed groups protected by the section.[86] It would become an offence to mail pornography or hate literature. This offence would be indictable, punishable by a maximum of two years imprisonment, or upon summary conviction.[87]

To be effective, the sections dealing with hate propaganda require further amendment. The Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society recommended three changes to the hate propaganda provision:[88] removal of the requirement of specific intent to promote hatred; clarification that the burden of raising the statutory defences is on the accused; and removal of the requirement that the Attorney General consent to a prosecution. The Fraser Committee endorsed these recommendations in its report,[89] accepting the argument that most pornography is an expression of misogyny and very similar to the evil aimed at in section 281.2. The Cohen Committee suggested that the test for hate propaganda is whether the message does injury to the community itself and to individual members of identifiable groups.[90] The recommended amendments are essential in order to give effect to the proposed extension of the hate propaganda provisions and to provide protection against sexual hatred.

C. Defences

The defences to the various pornography offences which Bill C-54 creates are artistic merit, educational or medical purpose and reasonable steps.

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[86]*Ibid.*, s. 281.1(4).

[87]*Ibid.*, s. 164.

[88]*Equality Now!* (Ottawa: Supply and Services, 1984) at 69-71.

[89]Fraser Committee, *supra*, note 4 at 322.

[90]See M. Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy" (1970) 9 Alta L. Rev. 103 at 113.

1. Artistic Merit

Artistic merit is a concept which is inherently vague and subjective. Under the present law, it is only one element among several determinants of "community standards". As such, its inherent problems are diminished in importance. Under Bill C-54, artistic merit takes on a larger significance because it is a complete defence.

The degree of artistic merit which will be required to legitimize pornography is not clear. Under the present obscenity law, the courts have taken different approaches to this question. Some judges require the accused to show serious artistic merit,[91] while others suggest that unless the Crown establishes that the work is virtually devoid of any plot or story line, artistic merit will be in issue.[92] Still others say the artistic merit threshold is met if there is some evidence of a plot or theme.[93] Added to this uncertainty is the fact that scholars, artists and art critics seldom agree on what "artistic merit" means. Bill C-54 does nothing to clarify these uncertainties. The judiciary, the police, customs officials and others who will administer the law will be no farther ahead than they are now.

A strong argument can be made that in addition to being too vague to permit consistent and uniform application, the artistic merit defence is too broad and defeats the purpose of the Bill. The complete defence of artistic merit could legitimize material which advocates sexual violence, degradation, bestiality, or necrophilia. If the primary purpose of the legislation is to supress such harmful material then artistic merit should be irrelevant. Arguably, the more artistic and well done a depiction is, the stronger its message becomes. When that message is the advocacy or portrayal of sexual violence or of degradation in a sexual context, it defeats the purpose of the Bill to excuse it because it is well done. It makes artistry more important than the avoidance of violence and degradation.

To preserve the integrity of the Bill, the defence of artistic merit should be excluded for these types of pornography. Alternatively, artistic merit should not be a complete defence, and some minimum qualifying criteria should be set out.

In summary, the artistic merit defence, as drafted, is a serious flaw in the proposed legislation. It undermines the Bill because of conceptual contradictions and vagueness. The objectivity achieved in the definition of pornography is defeated by an almost purely subjective defence leaving the

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[91] *Arena Recreations, supra,* note 48 at 49.
[92] *Video World* (C.A.), *supra,* note 30 at 71.
[93] *Odeon Morton, supra,* note 33.

final determination of what pornography is resting on the same unsatisfactory grounds it has in the past.

2. Reasonable Steps and Ignorance

Under the current law of obscenity, the defence of ignorance of the nature and presence of the material is expressly removed from the offences of producing and distributing obscenity.[94] In other words, producers and distributors cannot escape liability by claiming they "did not know" the nature or the presence of material alleged to be obscene. Only retailers can use the defence of ignorance. Under Bill C-54, the defence of ignorance is not expressly excluded. It is only addressed in the "reasonable steps" defence as it relates to child pornography.

Those who are charged with child pornography offences must show "all reasonable steps" were taken to ensure that no one in the material was or appeared to be, under the age of eighteen.[95]

The effect is to provide a defence of ignorance not only to retailers, but everyone who deals in other kinds of pornography, including its violent, degrading or unnatural forms. The reason for this new approach is not clear[96] but it does not accord with the underlying concept of protecting individuals from the harm of pornography. There is no apparent justification for treating child pornography differently than pornography depicting serious bodily harm or even the other forms of violent and degrading depictions.

A more appropriate distinction would be to remove the defence of ignorance for producers and distributors of pornography who are in a better position to know its content and retain the reasonable steps defence for retailers only. This way, the condemnation of the content of violent and degrading pornography is not diminished, yet some notice is taken of the different degree of culpability between the different levels of the pornography trade and some incentive is given to merchants to review materials coming into their establishments.

3. Burden of Proof

Bill C-54 requires that the accused person must establish, on a balance of probabilities, any of the defences of artistic merit or educational, scientific or medical purpose, or reasonable steps.[97] Some have argued that the Crown

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[94]*Criminal Code, supra*, note 5, s. 159(6).

[95]Bill C-54, *supra*, note 6, s. 159.3.

[96]It may be a response to freedom of expression concerns; however, s. 159(8) has been upheld as not violating the *Charter of Rights and Freedoms*. See *R.* v. *Red Hot Video Ltd* (1985), 18 C.C.C. (3d) 1 at 24, 45 C.R. (3d) 36 at 60 (B.C.C.A.), (leave refused, [1985] 2 S.C.R. x).

[97]Bill C-54, *supra*, note 6, ss 159.1, 159.3, 159.6, 159.8, 162.1(2), 163.5.

should have the burden of disproving the defences; otherwise, the pornography provisions amount to reverse onus offences. While it is true that the accused has the burden of proving his defence, these are not reverse onus offences in the true sense. It is only necessary for the accused to prove a defence once the Crown has established beyond a reasonable doubt that all the elements of pornography are present and that the accused has dealt in the pornography or committed another pornography offence. If the Crown fails either to apply the definition or to prove commission of the offence, there is no need for the accused to prove anything in order to be acquitted. For example, if the Crown proves the defendant dealt in pornographic material, it is only at this point the pornography becomes presumptively illegal. The defendant can still be acquitted if he proves on a balance of probabilities that the material has artistic merit or educational, scientific or medical purpose.

Conclusions

Bill C-54 addresses many of the concerns raised by critics of the obscenity laws. It creates new definitions of pornography which are much more objective and precise than presently exist. It makes a distinction between pornography and erotica and between visual and non-visual depictions. It establishes a new underlying rationale of protecting children from abuse and adults from degradation and exploitation. It streamlines offences, significantly increases the range and severity of penalites and protects against involuntary exposure to displays of sexual depictions. All of the above changes are positive steps consistent with equality and the feminist critique of pornography.

The majority of the problems in the Bill are caused by poor drafting and a failure to adhere consistently to its underlying rationale. Serious problems arise in the scope of the definitions and the extent of the defences under the Bill. The erotica definition in no way resembles the contextualized concept put forward by both feminists and the courts. Rather, it reflects the concerns of the conservative moralists and thus fails to distinguish properly between positive and negative portrayals of sexuality. The scope of the pornography definition is indicative of the same problem. By defining intercourse, masturbation, lactation and menstruation as pornographic, the drafters go far beyond what feminists have argued is harmful to equality interests. The defence of artistic merit weakens the Bill by undermining its objectivity, while other defences make inappropriate distinctions among the more extreme types of pornography.

In practical terms, if Bill C-54 becomes law it will bring about very little change. Most of what the Bill defines as pornographic the courts have already found to be obscene. Those new categories such as child pornography

and pornography depicting serious bodily harm which have not been specifically addressed in the case law would most likely be ruled obscene under existing standards. By including explicit sex in the definition of pornography, Parliament shows the same conservative moralist inclinations as the Supreme Court in *Video World*,[98] but the Bill is more "liberal" in the sense that it does not prohibit simulated scenes of sexual intercourse. By proscribing violence and degradation, Bill C-54 accords with the *dicta* in *Towne Cinema*.[99] By making artistic merit a complete defence, however, it ignores the Court's call for objective criteria, and ensures that the decision of "what pornography is" will remain, in most cases, a highly subjective one.

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[98]*Supra*, note 30.
[99]*Supra*, note 29.