victim group. Whilst gender may be a relevant factor in certain situations, as indeed it was in the development of the outlawing of rape – expressly designed to protect one gender group – it is an irrelevant factor in the treatment of victims of violent and traumatic abuse. The conclusion that the fact that a victim is female explains the hostility, aggression and disbelief with which the victims of rape and incest are treated, is one which right-minded citizens would hope not to have to reach. Yet there is no other factor which obviously links them. The violence inherent in these crimes is thus disguised, both by the concentration on sex and sexuality which is contained in their definitions, and by the theories offered to explain the offender, or to justify caution in believing the victim.

Clearly, however, improvements in the treatment of victims cannot be achieved by legal change alone. Although the definition of rape may have contributed to the problems of the victim, and the consequent treatment of female victims may have had significant impact on the victims of incest (at least where they are also female), there is clearly much more at stake than mere legal terminology. When flatly stated, the assumptions about female sexual behaviour, which generate maltreatment and hostility, seem so ridiculous as to defy belief. They are, nonetheless, deeply rooted in the treatment of women in general, and the victims of 'sexual' offences in particular. To discriminate against females seems so endemic to society that mere legal rules or legal change cannot bring about the emotional and intellectual revolution which would be required to change the situation, although they may go some way towards improving it.

However, for as long as societies do not question the assumptions on the basis of which members of a particular sex are treated, and do not challenge the relevance of gender in these matters, the pattern of abuse is complete and seemingly permanent. Not only will females be vulnerable to abuse and attack, but the acceptance that gender is relevant imports into the management of victims – inferences – degrading both individually and collectively – which preclude compassionate and effective treatment. Gender may make females vulnerable, but it is irrelevant to the fact of abuse, and should be seen as such in the treatment of victims.

CHAPTER 10

PORNOGRAPHY

INTRODUCTION

Obscenity and pornography raise difficult questions for jurisprudence, both for traditional male jurisprudence and feminist theorists. Each topic involves a mixture of competing questions and philosophies. Each may be viewed as matters in which individual freedom should reign supreme, and accordingly from a traditional liberal political perspective, participants and consumers should be free to engage in the activities, and market forces should rule. It would follow from this (liberal) standpoint – most clearly expressed in the writing of John Stuart Mill – that the role of the law should be confined to that of preventing any harm to persons. Unless, it can be proven that harm is resulting from pornography, there should be no legal restriction. From the perspective of radical feminists this proposition is both fallacious and dangerous. As will be seen below, while women ostensibly participate freely in pornography the reality of the situation is much different. The pornography industry – for industry it undeniably is – is controlled by men for the benefit and profit of men. Those in control, whether photographic or film producers exercise control over individual women's minds and bodies and also maintain and encourage the now well-documented phallocentric hierarchical power of men over women, thereby simultaneously both denying women true equality and further denigrating women in the eyes of society.

The competition between 'male' liberalism and equality requires examination in this regard. For radical feminists, the tenets of liberalism become dangerous weapons which are employed to defeat true quality which can only be realised when the mask of liberalism is uncovered and understood for what it represents to both men and women: freedom for men, inequality for women. For feminists Andrea Dworkin and Catharine MacKinnon the solution to the 'pornography problem' lies in campaigning for civil remedies to be available to female victims of pornography.[1] An alternative approach – which is generally favoured by the 'Moral Right' – is that of censorship: the prohibition of the production and distribution of pornography. This approach, however, contains inherent problems. For this reason, as will be seen below, there are good arguments for not pursuing the prohibition of pornography, but rather using legal means by which to restrict access to pornography, or alternatively, as advocated by radical feminists, namely, the provision of remedies under civil law.

In this chapter, these approaches to pornography are considered, in order that readers may both appreciate the breadth of the debate, the intractable nature of the problem of pornography, and reach their own preferred solution to the issue.

Pornography represents a graphic and powerful representation of the subordination and in equality of women, and the correlative power and control

1 See pp 441–42 below.

of men. As such pornographic representations may be argued to lie at the heart of the debate on gender equality and continue to raise complex issues for feminist scholars as to the appropriate role of law.

DEFINITIONS

'*Pornography*' –

> begins with a root 'porno', meaning 'prostitution' or 'female captives', thus letting us know that the subject is not mutual love, or love at all, but domination and violence against women … It ends with a root 'graphos', meaning 'writing about' or 'description of', which puts still more distance between subject and object, a replaces a spontaneous yearning for closeness with objectification and voyeurism.[2]

'Erotica', on the other hand, stems from 'eros' or passionate love and 'thus in the idea of positive choice, free will, the yearning for a particular person'.[3] Under English law, legal regulation is concerned neither with 'erotica', nor with pornography, *per se*, but rather with obscene materials. An article[4] is 'obscene' if:

> … its effect … is … such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[5]

An article will be 'published', according to s 1(3) of the Obscene Publications Act 1959, if a person:

(a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or

(b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects its.

Alternatively, as defined by s 163(8) of the Canadian Criminal Code:

> 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.[6]

Or according to the Supreme Court of the United States in *Roth v United States* 'material which deals with sex in a manner appealing to prurient interest' where the prurient interest refers to 'having a tendency to excite lustful thoughts [or as a] shameful and morbid interest in sex' which is 'utterly without redeeming social importance'.[7]

2 *Ibid*.

3 Gloria Steinem, 'Erotica and Pornography: A Clear and Present Difference' in S Dwyer, *The Problem of Pornography* (Wadsworth, 1995), p 31, and see Andrea Dworkin, *infra*.

4 Which covers books, pictures, films, records and video cassettes.

5 Section 1(1).

6 See Legal Appendix in S Dwyer *op cit*, p 240.

7 354 US 476.

LEGAL REGULATION OF PORNOGRAPHY IN ENGLAND

The Obscene Publications Act 1959

The Obscene Publications Act 1959 creates the offence of publication of an obscene article, whether or not for gain. Further it is an offence to have such articles in ownership, possession or control for the purpose of publication for gain or with a view to publication.[8]

The tendency to 'deprave and corrupt'

It is not sufficient that an article disgusts or is 'filthy', 'loathsome' or 'lewd'.[9] What must be established is that the article will 'deprave or corrupt'.[10] Nor is it sufficient that the article is capable of depraving or corrupting one person: the test is whether or not a significant proportion of persons likely to read or see the article would be depraved or corrupted by it.[11] The fact that the persons likely to read the article regularly read such materials is irrelevant to whether or not the material can deprave or corrupt (one can be corrupted more than once)[12] although the same argument may not hold if the likely audience is to be police officers experienced with dealing with pornography.[13]

The defence of public good

The defence of public good[14] was originally interpreted narrowly. In *DPP v Jordan*[15] where the defendant argued the psychotherapeutic benefit of 'soft-porn' the judge rejected the defence, holding that what was for the public good was art, literature or science. However, the tide turned when, in 1968 the trial of *Last Exit to Brooklyn*[16] established the right of authors to 'explore depravity and corruption explicitly described'.[17] In 1976 *Inside Linda Lovelace* was acquitted, despite the judge directing the jury that: 'If this isn't obscene, members of the jury, you may think that nothing is obscene.'[18] In 1979 the Williams Committee

8 Section 2(1) as amended.

9 *R v Anderson* [1972] 1 QB 304.

10 *R v Martin Secker and Warburg* [1954] 2 All ER 683.

11 *DPP v Whyte* [1972] AC 849 at 860 *per* Lord Wilberforce.

12 *Shaw v DPP* [1962] AC 220.

13 *R v Clayton and Halsey* [1963] 1 QB 163.

14 Section 4.

15 [1977] AC 699 and see *Attorney General's Reference (No 3 of 1977)* [1978] 3 All ER 1166.

16 *R v Calder and Boyars Ltd* [1969] 1 QB 151.

17 G Robertson, *Freedom, the Individual and the Law* (Penguin, 6th edn, 1989), p 183.

18 Cited by G Robertson *op cit*, p 189.

recommended that all restrictions on the written word should be lifted.[19] Since that time the use of the criminal law to restrict pornographic literature has largely been abandoned.[20]

Theatre, cinematic regulation and the licensing of sex shops

The Theatres Act 1968 introducing censorship in the theatre stems from 1551. The sole basis for censorship of the theatre is obscenity. The Indecent Displays (Control) Act 1981 placed sex shop proprietors under a duty to regulate window displays, to restrict entry to persons over 18 and to put warning notices in their windows. The Local Government (Miscellaneous Provisions) Act 1982 enabled local authorities to licence shops 'used for a business which consists to a significant degree of selling books, magazine, films, videos and artefacts which portray, encourage or are otherwise used in connection with sexual activity'.[21]

Conspiracy to Corrupt Public Morals

Under the common law, publishers may be caught by the offence of conspiracy to corrupt public morals. In *Shaw v DPP*,[22] Shaw, the publisher of a 'directory' giving the names and details of prostitutes was prosecuted for conspiracy to corrupt public morals.[23] The House of Lords (Lord Reid dissenting) held that the courts have a 'residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State'.[24] *Shaw v DPP* was upheld in *Knuller Ltd v DPP*.[25] The publishers had produced a magazine containing advertisements of male homosexuals. The House of Lords upheld *Shaw* rejecting as a defence the fact that the Sexual Offences Act 1967 provided that homosexual acts between adult males, in private, were no longer an offence. The use of this common law offence is rare; nevertheless it remains an available offence which enables the State to avoid statutory offences which provide defences such as that of the 'public good'.[26]

19 *Committee on Obscenity and Film Censorship* (Cmnd 7772) (London: HMSO).

20 Although jury trial can be avoided by the use of s 3 'forfeiture orders' which results in the destruction of works without a trial.

21 G Robertson *op cit*, p 200.

22 [1961] AC 220.

23 Shaw was also found guilty of an offence under the Obscene Publication Act 1959. See further below.

24 [1962] AC 220 at 268. See JE Hall Williams (1961) 24 *MLR* 626; D Seaborne Davies (1962) 6 JSPTL 104; G Robertson *Obscenity*.

25 [1973] AC 435.

26 Section 4 of the Obscene Publication Acts 1959.

Legal regulation of obscenity in Australia, Canada and the United States of America

Different constitutional arrangements lead to very differing results. In both Canada and the United States pornography and obscenity are clear constitutional issues. The First Amendment to the US Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[27]

Section 2 Canadian Charter of Rights and Freedoms provides:

> Everyone has the following rights and freedoms:
>
> (a) the freedom of conscience and religion;
>
> (b) the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

However, this provision is not absolute since s 1 provides that:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[28]

In Australia, having a written constitution but no Canadian-style Charter of Rights, pornography is largely regulated by State, rather than Federal, law. Exceptions to this lie in the area of customs and excise prohibitions on importing pornographic material and also in the regulation of films and computer games where the State have given power to the Federal Government under 'cross vesting' legislation. In the absence of entrenched freedom of expression legislation, pornography has not become a battleground for litigation as it has become in the United States of America.

THE SCALE OF 'THE PROBLEM' OF PORNOGRAPHY

Pornography is largely a creature of technology. In earlier times, aside from pictorial pornographic images, pornography's existence was dependent upon both printing technology and levels of literacy in society, the scale of pornography was small (if significant). Nowadays, pornography is available in books, magazines, film, video, television, computer software and via the internet. Internationally the pornography business is estimated to amount annually to billions of US dollars. The materials may be generalised or specialised. There is growing lesbian and male homosexual pornography. Paedophiles, fetishists, sadomasochists: all are catered for.[29]

27 See *ibid*, p 235.

28 *Ibid*, p 236.

29 See S Dwyer, *The Problem of Pornography* (Wadsworth, 1995) Chapter 1.

Possible approaches to the pornography 'problem'

1 Pornography offends society's morality: accordingly the law must protect society against pornography.

2 Pornography is an aspect of freedom of expression. In the absence of clear evidence of 'harm' pornography cannot be restricted.

3 Pornography is a manifestation of freedom of expression. However, access to pornography may be restricted to reflect the preferences of society, provided that the restrictions are reasonable and do not place too great an inconvenience etc on those wishing to have access to it.

4 Pornography is outside the boundaries of freedom of expression: it is accordingly not protected by 'free speech' constitutional guarantee.

5 Pornography is an aspect of sexual discrimination and sexual hatred (or incitement thereto). As a central tenet of male supremacy and female subordination, those harmed by pornography should have access to (civil) legal remedies.

Pornography has represented a site of conflict amongst legal scholars. Liberal feminists argue that pornography is in some sense freedom of expression, or alternatively is unproblematical for women in the sense that it is not a causal factor in sexual discrimination or sexual hatred.[30] Alternatively it is argued by liberal scholars, such as Ronald Dworkin, that whatever the possible harm caused by pornography, that harm is overshadowed by the constant and pervasive presentation of women in the media and arts in traditional, subservient, domestic roles or in the portrayal of women – subtle or not – as sexual objects which 'sell' products in advertising.

For radical feminist scholars, such 'defences' of pornography, or the minimising of pornography's damaging effects represents, to adopt Catharine MacKinnon's phrase 'collaboration'.[31]

The enforcement of morals argument

Lord Devlin is the leading exponent of the right – indeed duty – of the law to protect morality within society. Protection of morality is as important as protection against subversion of the State.[32] However, this should not be taken to imply that there should be no toleration. As Devlin states:

> the first factor … is that there must be toleration of the maximum individual freedom that is consistent with the integrity of society … the judgment which the community passes on a practice which it dislikes must be calm and dispassionate and … mere disapproval is not enough to justify interference.[33]

30 See for an example of a feminist anti-anti-pornography approach, Alison Assiter and Avedon Carol (eds), *Bad Girls and Dirty Pictures: The Challenge to Radical Feminism* (Pluto Press, 1993).

31 See CA MacKinnon, *On Collaboration* in *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987).

32 *The Enforcement of Morals* (1965), p 14.

33 *Ibid*, Preface ix.

Thus what is punishable by law must be something 'which lies beyond the limits of tolerance'. For Devlin it is not enough that 'a majority dislike a practice; there must be a real feel of reprobation …'. [34] The judgment as to whether such an effect has been caused by the material is to be made by the 'man in the jury box'.[35] If 12 jurymen come to the unanimous conclusion that something is 'injurious to society' and beyond the limits of tolerance, the law has a right to regulate the matter. This is the view given judicial expression in *Shaw v DPP*:[36]

> There remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State.[37]

Professor HLA Hart observes that morality represents a 'seamless web' within society which binds it together. Without the protection of law, from Devlin's point of view, this 'seamless web' would cease to exist: society would 'disintegrate'.[38] There is little evidence that this is the case – again, as Hart observes – moral values in society shift over time: any rigorous enforcement of moral standards today would not necessarily 'freeze' morality. Society must evolve in its own way.

The liberal's dilemma

John Stuart Mill: *On Liberty*

John Stuart Mill, writing in 1869, argued for the sovereignty of the free individual exercising freedom of conscience, thought and expression 'without impediment from our fellow-creatures, so long as what he does not harm them, even though they should think our conduct foolish perverse, or wrong'.[39] Mill's view, ie that the role of the law should be confined to the prevention of harm to others raises the issue of liberalism and equality, can be stated as follows:

> [T]hat principle is, that 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.[40]

On this basis, without clear proof of harm, there could be no justified legal restriction. Without proof of harm we are free to educate, to criticise, but not to infringe another's liberty by legislating. The inescapable difficulty in relation to pornography is evaluating the harm it causes in a meaningful manner. As seen below, the empirical evidence as to harm is equivocal. From a radical feminist

34 *Ibid*, p 17.

35 *Ibid*, p 15.

36 [1962] AC 220.

37 At p 267.

38 *Law, Liberty and Morality* (1963).

39 *On Liberty* (Cambridge University Press), p 15.

40 *Ibid*, p 13.

perspective, however, the issue of harm is less whether, and the extent to which, there can be proven to be a specific cause and effect relationship, and rather more the idea that it is pornography, in its often sadistic depiction of women generally degraded, hurt and violated, and always submitting to male domination, which of itself – without more – is the harm. For the harm from this perspective, as argued by Andrea Dworkin and Catharine MacKinnon, is to all women, the image of all women, and not only those participating in the acts portrayed.

Empirical evidence concerning pornography[41]

The question – from a liberal perspective – is whether restrictions on freedom of expression should be allowed on the basis that it causes 'harm' to others. This 'harm' principle was adopted by the Williams' Committee in its review of obscenity and censorship.[42] The problem with the 'harm' principle in relation to pornography lies in establishing whether harm is caused, and to whom. The evidence itself is equivocal and provides no clear basis on which to draw conclusions.[43] Thus, for example, the United States Commission on Obscenity and Pornography concluded (by a majority) in 1970, that the evidence was insufficient to establish that 'pornography is a central causal factor in acts of sexual violence.'[44] Conversely the Canadian Attorney General's Commission on Pornography, reporting in 1986, concluded that:

> The available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of violence and, for some subgroups, possibly to unlawful acts of sexual violence.[45]

The efficacy of the pornography debate which focuses on the 'cause and effect' construction has been examined by Deborah Cameron and Elizabeth Frazer, who argue for a rejection of the 'simplistic' linkage between pornography and sexual violence.[46] Notwithstanding that, the authors argue that the pornography debate must be advanced – albeit with a different focus. Basing their argument on the idea that pornography is a form of representation,[47] the writers argue that while in their view it cannot be proven to cause sexual

41 See, *inter alia*, Edna F Einsiedel, 'The Experimental Research Evidence: Effect on Pornography on the Average Individual'; Diana Russell, 'Pornography and Rape: A Causal Model'; James Check, 'The Effects of Violent Pornography, Non-Violent Dehumanising Pornography', and 'Erotica: Some Legal Implications from a Canadian Perspective', all reproduced in Catherine Itzin, *Pornography: Women, Violence and Civil Liberties* (Oxford University Press, 1992).

42 *Report of the Committee on Obscenity and Film Censorship* (Cmnd 7772) (London: HMSO, 1979).

43 D Howitt and G Cumberbatch, *Pornography: Impacts and Influences* (London: Home Office, 1990).

44 See Legal Appendix *op cit*, p 241.

45 *Ibid*, p 245.

46 See D Cameron and E Fraser, 'On the Question of Pornography and Sexual Violence: Moving Beyond Cause and Effect' in C Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (Oxford University Press, 1992).

47 On which see, Susanne Keppeler, *The Pornography of Representation* (Polity Press, 1986).

violence, pornography plays a role in 'shaping certain forms of desire'. These forms, they argue, are essentially transgressive (ie it is 'illicit, forbidden, a dirty secret'): that is to say, that pornographic representations transgress the boundaries of acceptable sexual behaviour and practices and establish in the minds of its consumers, some normative standard to be achieved.[48] The harm caused by pornographic representations lies in the portrayal of men in a position of 'transcendence and mastery' over women. Women, conversely, are portrayed as the 'Other', the (submissive) object of desire of the male consumer. In moving beyond a debate focussing on the cause and effect relationship between pornography and sexual violence, the authors argue that feminists need to develop further an understanding of the effects of pornographic representation and sexual practices with a view to 'shaping alternative' visions of sexual practices which celebrate neither mastery nor submission.

Feminist legal theorists Catharine MacKinnon[49] and Andrea Dworkin[50] argue the case against pornography on the basis that it demeans women by 'objectifying' them – portraying women as merely objects to be used by men:[51]

> Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography, with the rape and prostitution in which it participates, institutionalises the sexuality of male supremacy, which fuses the erotisation of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way. In this light, obscenity law can be seen to treat morals from the male point of view, meaning the standpoint of male dominance. The feminist critique of pornography, by contrast, proceeds from women's point of view, meaning the standpoint of the subordination of women to men.[52]

The Dworkin and MacKinnon Civil Rights' Ordinances

It is for reasons such as those expressed above that Catharine MacKinnon and Andrea Dworkin drafted, in 1983, the amendment to the Minneapolis Civil Rights Ordinance.[53] The amendment both defines what is to be regarded as pornography and also defines pornography as 'a form of discrimination of the basis of sex' which is actionable in law. In 1984 the Indianapolis City and

48 See L Kelly, *Surviving Sexual Violence* (Polity Press, 1989).

49 *Feminism Unmodified* (Harvard University Press, 1987).

52 *Pornography: Men Possessing Women* (Women's Press, 1981).

51 The literature is now extensive. See A Dworkin, *Pornography* (Women's Press, 1981); 'Against the Male Flood'; E Wolgast, 'Pornography' in *Feminist Jurisprudence* (ed) P White. Catharine MacKinnon: see *Feminism Unmodified* (Harvard University Press, 1987); *Towards a Feminist Theory of State* (Harvard University Press); *Only Words* (1993). See also C Smart, *Feminism and the Power of Law* (London: Routledge 1989), especially Chapter 6; C Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (Oxford University Press, 1992).

52 C MacKinnon, *Toward a Feminist Theory of State* (Harvard University Press, 1989) Chapter 11, p 197.

53 On which see further below.