

# The Law, Gender Discrimination and Sexual Stereotypes: Whither with Prostitution and Pornography?

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## I. INTRODUCTION

This paper examines the extent to which Canadian courts have recognized that both prostitution and the production and dissemination of pornography involve important issues of gender discrimination. It then addresses the question of whether the reality of gender discrimination is a factor that can and should be considered in the application of the criminal law to those two forms of conduct. The forms which arguments alleging gender discrimination might take, in light of the *Charter of Rights and Freedoms*, are also considered.

## II. HISTORICAL CONSIDERATIONS

The characterization of prostitution and the application of the criminal law to it as gender discrimination is of some vintage. Prior to the *Criminal Code* of 1892 prostitution was dealt with as a form of vagrancy. Although there were offences with which both men and women could be and were charged, such as keeping a common bawdy house, others, such as streetwalking, were gender specific in that only the woman involved could be charged and convicted. In these cases a "double standard" applied which reflected the view that the female partners in such liaisons were inherently depraved and engaged in illicit conduct, while the males were merely playing out their natural sexual drives.<sup>1</sup> It was in large part a reaction to this discriminatory attitude that induced the framers of the *Criminal Code* of 1892 to include a complex of provisions, still by and large intact (although now couched in gender neutral language), whereby girls and young women would be protected from sexual predators.<sup>2</sup> To this extent the provisions were designed to abolish the "double standard" in matters of sexual misconduct. However, the reformers were never prepared to move beyond this, to recognize that the females who engaged in prostitution were victims of a more profound set of social and economic inequities, a reality which might have suggested that the criminal law was an inappropriate tool for dealing with their conduct. The moral reformers who influenced the *Criminal Code* and its evolution could not persuade themselves that a career in prostitution was a rational choice for anyone to make, and therefore ascribed the phenomenon in part to moral or mental weakness on the part of the women concerned, which, they felt, needed to be cured. So it was that the older vagrancy offences were retained and used to prosecute prostitutes.<sup>3</sup>

In applying the *Code* provisions on prostitution and the sexual exploitation of women some judges, almost certainly a minority, were willing to construe the provisions in

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1. On the character and development of 19th century prostitution law in Canada, see C. Backhouse, "Nineteenth Century Canadian Prostitution Law: Reflection of a Discriminatory Society" (1985) 18 *Social Hist.* 387; G. Parker, "The Legal Regulation of Sexual Activity and the Protection of Females" (1983) 21 *Osgoode Hall L. J.* 21.
  2. See G. Parker, "The Origins of the Canadian Criminal Code" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) 249.
  3. See J. McLaren, "White Slaves: The Reform of Canada's Prostitution Laws and Patterns of Enforcement, 1900-1920" (1987) 8 *Crim. Just. Hist.* 53.

a broad, purposeful way in order to achieve the legislative objective of protecting girls and women. A good example is the decision of the Ontario Court of Appeal in *R. v. Wing* in 1913 in which a conviction under then s. 216(h) of the *Code* for procuring by false pretences or representation a woman or girl "not being a common prostitute ... to have unlawful carnal connection" was sustained even though the accused was only guilty of an attempt.<sup>4</sup> The Court applied the general attempt provision of the *Code*, despite the fact that no mention of attempt was made in s. 216(h) unlike other clauses in the same section.<sup>5</sup>

To the extent that liberal construction was invoked in cases like this, the judiciary may be said to have been sensitive to the presence of gender discrimination. Furthermore, some judges, while not necessarily sympathetic to the social and economic plight of women who became prostitutes, were ill-disposed to what they considered underhanded tactics by the police in enforcing the law against them.<sup>6</sup> Thus it was that the Calgary police drew the ire of Justice Beck in *R. v. Marceau* in 1915 for using decoys to secure keeping charges against women who picked up their customers on the street and took them back to rooms or residences.<sup>7</sup>

By contrast, the early history of the law relating to pornography in Canada, or obscenity as it was described at law, reveals little or no sensitivity to the gender discrimination involved in the production and dissemination of such material. The architects of the *Code* were content to make it an offence "to knowingly and without lawful excuse publicly sell obscene material for public sale or to public view".<sup>8</sup> In interpreting the word "obscene" Canadian courts, like their English counterparts, were guided by the test established in *R. v. Hicklin*:

*whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall.*<sup>9</sup>

This formulation reflected strong moral condemnation of such material, but it made no comment on the inequality of gender relations evident in the representations. Moreover, it always possessed the capacity in zealous hands to be used to attack genuinely erotic and artistic works. When it is considered that in one part of the white Anglo-Saxon world or

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4. (1913), 22 C.C.C. 426 (Ont. C.A.).

5. That the same court was capable of a strict, some would say mechanical, construction of exploitative provisions in the *Code* is evident in *R. v. Quinn* (1918), 30 C.C.C. 372 (Ont. C.A.). In that case the court refused to hold a taxi driver who used his vehicle to drive prostitutes and customers to their places of liaison and was paid for his introductory services by the prostitutes guilty of procuring under the *Code*.

6. On police tactics, see J. McLaren, "The Canadian Magistracy and the Anti-White Slavery Campaign, 1900-1920" in W. Pue and B. Wright, eds, *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 329 at 333.

7. (1915), 23 C.C.C. 456 (Alta. S.C.), making reference to earlier strictures of his on the conduct of the Calgary police in *R. v. Miller* (1913), 25 C.C.C. 151 (Alta. S.C.). For an example of judicial misgivings from Manitoba, see *R. v. Sands* (1915), 25 C.C.C. 116 (Man. Q.B.), Galt J.

8. *The Criminal Code* S.C. 1892, c. 29, s. 179.

9. (1868), 3 Q.B.D. 360, at 371.

another in the late 19th and early 20th centuries the work of Bernard Shaw (writing on prostitution), Havelock Ellis, Guy de Maupassant, Sir Richard Burton, Emile Zola and Honoré de Balzac, to name a few, fell to morals censorship of one form or another it is clear that prudery was in the ascendant in the law and in its interpretation.<sup>10</sup>

### III. CHANGES IN THE LAW

The law on prostitution in the *Code* has undergone few changes since 1920. Despite the instrumental moral vision of the reformers who influenced the *Code* that prostitution could and should be suppressed, the law was administered with varying degrees of vigour and laxity by the police in pursuit of a rather different policy of containment and control. Until the 1960s there was little evidence of challenge in the superior courts. As one might expect, the prostitutes, especially those on the street, bore the weight of the law and its sanctions. In *R. v. Lavoie*<sup>11</sup> and *R. v. Beaulne*<sup>12</sup> the argument that the old "Vag. C" offence whereby a suspected prostitute could be picked up and charged for failing to give a good account of herself selected streetwalkers for discriminatory treatment contrary to the *Bill of Rights* was rejected because, said the courts, the offence could only be committed by females. In 1972, in response to charges of gender discrimination in the *Report of the Royal Commission on the Status of Women of 1970*<sup>13</sup> the streetwalking provision was repealed and replaced with a street soliciting provision (s. 195.1).<sup>14</sup> This change promised a move away from the treatment of street prostitution as a status offence. Although the Supreme Court, correctly in my view, emphasized the nuisance character of the offence,<sup>15</sup> implying that both parties could fall afoul of the law, a division of judicial opinion existed as to where the legal responsibility for soliciting lay. The B.C. Court of Appeal in *Dudak* denied that s. 195.1 of the *Code* could be invoked against a customer, because prostitution is, as a matter of law, a unilateral form of conduct whereby the prostitute yields her body to indiscriminate intercourse with men.<sup>16</sup> For its part the Ontario Court of Appeal disagreed, characterizing the relationship as a mutual one, in which the woman offers her body in return for money supplied by the male customer to purchase sexual gratification.<sup>17</sup> Apart from the recognition in the latter case that there is a demand as well as a supply element in liaisons for the purpose of prostitution, the courts seemed disinclined in the case of street prostitution to explore the more profound issues of gender power and discrimination involved. In the case of the exploitative offences, procuring, pimping and brothel keeping, there was also evidence of a cleavage of opinion on how

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10. See E. Bristow, *Vice and Vigilance: Purity Movements in Britain since 1700* (Dublin: Gill & MacMillan, 1977).

11. (1971), 5 C.C.C. (2d) 368 (B.C.C.A.).

12. (1970), 2 C.C.C. (2d) 196 (Ont. H.C.).

13. *Report of the Royal Commission on the Status of Women* (Ottawa: Queen's Printer, 1970) at 369-372.

14. *The Criminal Code Amendment Act*, S.C., c. 13, ss. 12, 15.

15. *R. v. Hutt* [1978] 2 S.C.R. 476.

16. *R. v. Dudak* (1977), 38 C.C.C. (2d) 172 (B.C.S.C.), aff'd 41 C.C.C. (2d) 31 (B.C.C.A.).

17. *R. v. Di Paola*; *R. v. Palatics* (1978), 43 C.C.C. (2d) 199 (Ont. C.A.).

narrowly or broadly the provisions should be construed, depending on whether judges felt that a restrictive or purposeful approach was in order.<sup>18</sup>

With pornography the *Code* underwent little change until 1959 when the definition in s. 159(8) [now s. 163(8)] was included:

*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.*<sup>19</sup>

With the exploits of Lady Chatterly as a focus the Supreme Court accepted this as the exclusive test of obscenity in the case of publications.<sup>20</sup> The subsection was designed to provide a more objective basis for assessing the quality of material challenged, and was interpreted to a degree in that more liberal spirit. The balance between a concern to avoid undue censorship and to strike at socially objectionable material was articulated in Justice Freedman's classic explanation of the standards applicable (contemporary Canadian community standards) in *R. v. Dominion News & Gifts (1962) Ltd.*:

*They are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered.*<sup>21</sup>

Here, in contrast to the high morality of the *Hicklin* test is a redefinition which provided some leeway for the application of liberal rights ideology, especially in the context of material which was seen as having "artistic value".<sup>22</sup> For the moment that attempt at objectivity held sway, with no overt concern directed towards the gender power implications of the images presented and portrayed. However, given that a community standard was the criterion of the quality of the material under suspicion, the door was open to the raising of gender discrimination arguments in the process of giving substance to the standard.<sup>23</sup>

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18. See *R. v. Wong* (1977), 33 C.C.C. (2d) 6 (Alta. C.A.) [narrow interpretation given to offence of allowing premises to be used as a common bawdy house] and *R. v. Deutsch* (1983), 5 C.C.C. (3d) 41 (Ont. C.A.) [extended definition of procuring under s. 195(1)(a)].

19. *The Criminal Code Amendment Act*, S.C. 1959, c. 41, s. 11.

20. *R. v. Brodie* [1962] S.C.R. 681.

21. *R. v. Dominion News and Gifts (1962) Ltd.* (1963), 2 C.C.C. 103 (Man. C.A.), Freedman J.A., dissenting. This judgment was accepted in its entirety when the decision of the Manitoba Court of Appeal was appealed to the Supreme Court of Canada, [1964] S.C.R. 251.

22. Compare the decisions of the Manitoba Court of Appeal in *R. v. Great West News* (1970), 4 C.C.C. 307 (Man. C.A.) and *R. v. Prairie Schooner News Ltd.* (1970), 1 C.C.C. (2d) 251 (Man. C.A.) [magazines engaging in the unremitting exploitation of sex found obscene] with its decision in *R. v. Odeon Theatres Ltd.* (1974), 16 C.C.C. (2d) 185 (Man. C.A.) ["Last Tango in Paris" held not obscene].

23. See especially *R. v. Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53 (Ont. Cty. Ct.).

## IV. GENDER DISCRIMINATION AS AN ISSUE IN THE CHARTER ERA

### A. Prostitution

To no one's surprise the enactment of the *Charter of Rights and Freedoms* has encouraged lawyers representing those charged with prostitution related offences to appeal to *Charter* provisions as a basis for arguing that their clients be acquitted. Courts have accordingly been challenged to consider social policy issues raised by the legal treatment of prostitution in Canada.

A significant majority of cases in which such arguments have been raised have involved prosecutions under the street soliciting provision which underwent major amendment in 1985. In the wake of a major study by the Special Committee on Pornography and Prostitution (the Fraser Committee) which recommended partial decriminalization of prostitution related offences in the case of adults, with the retention of provisions aimed at genuine exploitation and nuisances in public places,<sup>24</sup> the federal government chose to deal exclusively with street prostitution.<sup>25</sup> By virtue of s. 213(1) [formerly s. 195.1] of the *Code*,

*Every person who in a public place or in any place open to the public view*

- (a) *stops or attempts to stop any motor vehicle,*
- (b) *impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or*
- (c) *stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person*

*for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.*

Among a handful of cases decided since the enactment of the *Charter* dealing with the exploitative prostitution offences of procuring, pimping and brothel keeping, only one is suggestive in terms of what it has to say on the issue of gender discrimination in the context of prostitution. In *Deutsch v. The Queen*,<sup>26</sup> in which no *Charter* argument was raised, the Supreme Court of Canada upheld a decision of the Ontario Court of Appeal ordering a new trial of the accused charged with attempting to procure female persons to have illicit sexual intercourse with another person contrary to s. 195(1)(a) [now s. 212(1)(a)] of the *Code*. Le Dain J., speaking for the court, stressed the need for a purposeful construction of this

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24. Special Committee on Pornography and Prostitution, *Report on Pornography and Prostitution in Canada*, vol. 2 (Ottawa: D.O.S.S., 1985) at 530-538.

25. *The Criminal Code Amendment Act*, S.C. 1985, C-50, s. 1.

26. (1986), 27 C.C.C. (3d) 365 (S.C.).

provision and others like it so as not to restrict or compromise the protection afforded to girls and women by the criminal law.<sup>27</sup> This decision, it can be argued, is indicative of a strong feeling on the part of our highest court that the exploitative provisions on prostitution in the *Code* are to be taken seriously as a basis for impugning the pressure, even mental pressure, which some men apply to women to do their sexual will.

Prosecutions under s. 213.1 of the *Code* are typically brought under clause (c) of that provision for the simple reason that the law is normally enforced by undercover work by police officers posing as prostitutes or potential customers. Thus, clause (c) has been the primary target of challenge. Arguments invoking the *Charter* made under ss. 2 and 7 have not raised issues of gender discrimination directly. However, in several decisions there is a recognition by some judges of the impulses to and character of prostitution.

Traditionally prostitution has evoked two major responses from the judiciary: on the one hand that it is the mark of innate deviance or moral weakness on the part of its practitioners and by its nature socially disruptive and thus deserving of punishment; on the other that it is an inevitable by-product of the human condition and thus tolerable, except to the extent that it threatens public order and decorum or provides an excuse for other more serious deviance. Courts still have difficulty, it seems, breaking out of these moral and social constructs. In *Reference re Sections 193 and 195.1 (1) (c) of the Criminal Code*, a decision of the Manitoba Court of Appeal,<sup>28</sup> all of the judges demonstrated a distinct testiness towards the suggestion that prostitution should be graced with constitutional protection as a form of expression. Their words suggest that the issue is one of public morality of which the courts and not "social scientists, behavioural experts or moralists for that matter", to quote Monnin J.A., are the arbiters.<sup>29</sup> Justice Huband expressed his astonishment that it should be suggested the proposition of a prostitute to a customer could be equated with the free expression of ideas. "I think", he said, "that Milton and Mill would have been astounded to hear that their disquisitions were being invoked to protect the business of whores and pimps."<sup>30</sup> Later with added piquancy he remarked: "not every grunt, burp, or gesture falls within freedom of expression."<sup>31</sup> He went on to suggest that the adverse consequences of prostitution in terms of the threat to public health, decency and the encouragement of drugs and violence were clear for all to see.<sup>32</sup> Lyon J.A. in a terse judgment felt that principles of "freedom under the rule of law" were to be protected, not subverted by the *Charter*. "To hold otherwise", he added "is, in the name of liberty, to elevate perversity and to demean the general good of the community."<sup>33</sup>

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27. *Ibid.* at 396.

28. *Ibid.*

29. *Ibid.* at 412.

30. *Ibid.* at 413.

31. *Ibid.* at 416.

32. *Ibid.* at 418-419.

33. *Ibid.* at 423-424.

Very different were the sentiments expressed by a majority of the Nova Scotia Supreme Court in an appeal by a male customer convicted under s. 195.1 (1) (c) on the evidence of a female police officer acting as a decoy.<sup>34</sup> MacKeigan J.A. demurred from an earlier trial judgment from British Columbia in which views similar to those of the Manitoba Court of Appeal had been voiced by Justice Mackay.

*I respectfully believe this opinion is clearly wrong: freedom is not to be denied because of the unpopularity of views expounded or the immorality of the exponent. As Voltaire said: "I do not believe in a word that you can say, but I will defend to the death your right to say it."<sup>35</sup>*

In what seems to be an historical comment based on the Haligonian experience of prostitution Justice MacKeigan noted that "[t]he criminal laws against vagrancy and common bawdy houses were rarely invoked against prostitutes so long as disorderly conduct, participation in drug or alcoholic traffic or abuses of minors etc. were avoided."<sup>36</sup> A policy of toleration was, he suggested, also called for in modern law.

*No matter how much one disapproves of the prostitute and her customer, the law must preserve through the Charter their right to live, sexually and otherwise, without interference by the law where no harm is done to anyone else.<sup>37</sup>*

His lordship concluded by suggesting that the adoption of the proposal by the Fraser Committee that the law be crafted to encourage liaisons to take place off the street might have produced a legal regime more in tune with the *Charter* and its spirit.<sup>38</sup>

Notwithstanding the continued pursuit by appellate courts of the traditional form of dialectic surrounding prostitution (admittedly now graced with reference to Milton, Voltaire and J.S. Mill!) several statements in recent decisions suggest some understanding of the social and economic reality of prostitution. In the *Reference*, for example, Philp J.A. in his judgment was willing to concede, although it did not affect his view of law, that "[p]rostitution flourishes in the climate of poverty and unemployment in which so many young people must struggle."<sup>39</sup> The Alberta Court of Appeal in *R. v. Jahelka and Stagnitta*<sup>40</sup> faced a challenge to s. 195.1 (1) (c) on the ground that it infringed s. 2(b) of the *Charter*. The court occupied the middle ground between the *Reference* and *Skinner*, ruling that the *Code*

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34. *R. v. Skinner* (1987), 35 C.C.C. (3d) 203 (N.S.S.C.A.D.).

35. *Ibid.* at 206. The decision with which he took issue was that in *R. v. McLean*; Tremayne (1986), 28 C.C.C. (3d) 176 (B.C.S.C.).

36. *Ibid.* at 210. On the history of the toleration of prostitution in Halifax, see J. Fingard, "The Social Evil in the Mid-Nineteenth Century" (Dept. of History, Dalhousie University, 1977) [unpublished]; J. Fingard, "Jailbirds in Victorian Halifax" in P. Waite, S. Oxner & T. Barnes, eds, *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1985) 81.

37. *Ibid.* at 214.

38. *Ibid.*

39. (1988), 38 C.C.C. (3d) 408 (Man. C.A.) at 431.

40. (1987), 36 C.C.C. (3d) 105 (Alta. C.A.).



provision infringed s. 2(b) of the *Charter*, but was saved in the circumstances by section 1. In the process of his judgment, Justice Kerans made several observations, indicating some understanding of the exploitation to which female prostitutes are subject. In responding to the argument that prostitution is a livelihood much like others he indicated that he inclined "to the view that prostitution is an example of exploitation of women, and not of their liberation."<sup>41</sup> Later in his judgment he expressed doubts about the validity of the contention that repression of street prostitution would be beneficial in minimizing its negative effect on youth and the crime associated with it. Indeed, he observed that closing off the streets to prostitution might create greater problems for the prostitutes as "there is some suggestion ... that when prostitutes are not permitted to ply their trade on the streets, they fall more readily under the control of hoodlums."<sup>42</sup> Moreover, in a statement unique among appellate judges in Canada, he was willing to concede that the effect of s. 195.1 [s. 213(1)] might be to "demean and endanger prostitutes", although he concluded that its object of preventing nuisances in public places outweighed that concern.<sup>43</sup>

The judicial statements made in *Charter* litigation which show some appreciation for the social and economic realities of prostitution and the exercise of gender power involved are unfocussed. Furthermore, apart from the almost casual reference by Kerans J., there has been no recognition that prostitution law itself may well conduce to gender discrimination. To be fair to the courts defence counsel in the cases analyzed have shown little appreciation of the oppression which lies behind the characterization of the conduct of prostitutes as deviant, and which is inherent in the way in which the law, especially that directed against street prostitutes, is enforced. While s. 15 of the *Charter* was argued in one Ontario case, *R. v. Smith*,<sup>44</sup> it was on the basis of the dual argument that the law discriminates against prostitutes on the basis of their occupation unlike other lawful occupations; and on the basis of the payment of money, as it penalizes the conduct of those who charge for sexual services, while ignoring those who do not so charge. Although it is difficult to determine from the judgment just what the thrust of these arguments by defence counsel was, the sense is of market inequity reasoning as opposed to any concern for the injustice of the treatment to which prostitutes are subject by both the social and legal systems. In any event Watt J. gave short shrift to the contentions of the defence.

There are, I believe, genuine bases for challenge to the law on street prostitution under s. 15 of the *Charter* which, unlike that in *Smith*, clearly focus on the serious issue of differential treatment of the sexes in our society and by our law.

Recent studies of prostitution in Canada by both the Badgely and Fraser Committees put it beyond doubt that there is a correlation between the sexual and physical abuse accorded to young girls and the limited educational and economic opportunities which are open to those who have been mistreated in this way on the one hand and entry into prostitution on the

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41. *Ibid.* at 108.

42. *Ibid.* at 110.

43. *Ibid.* at 113.

44. (1989), 44 C.C.C. (3d) 385 (Ont. H.C.) 477-478.

other.<sup>45</sup> In short, many female prostitutes are the victims of male sexual power which conditions their earliest relational and emotional experiences as well as their ongoing social and economic status. Both the social and legal systems provide little in the way of realistic protection to young female persons from abuse or support after abuse has occurred. Both these systems then proceed to classify the way of life to which some of those young female persons become attracted (which might be their only option in terms of emotional and economic support) as deviant and to penalize it. This is done in the main not out of any fundamental belief in the criminality of the selling of sexual favours nor out of any great and abiding concern to further the welfare or rehabilitation of the offender, but to prevent her conduct being an irritant to the peace of mind of respectable folk. There is, I would argue, a basic injustice in the application of the criminal law to punish and harass a group of people who are victims of a combination of outrageous gender abuse and social indifference, especially when there is basic and enduring ambivalence in society as to the criminality of the central activity involved, that is prostitution itself. Notions of individual responsibility which are strong in our concept of criminal law of course militate against the general efficacy of equality arguments based on deprivation or abuse during childhood. It would be difficult for those who claimed to have taken to lives of theft or assault because of child abuse or neglect to claim that they are victims of discrimination and so deserve to be shielded from the reach of the criminal law. The argument seems to me to be much more persuasive when the so-called deviant conduct relates to a form of activity which, while it is considered distasteful, has never itself drawn the direct opprobrium of the criminal law. Here, it may be contended, the role of the criminal law is not to punish individual irresponsibility or induce reformation, but to repress an underclass whose problems are in large part the product of social neglect — an underclass which society is hesitant to address in any more positive and imaginative manner. The existence of a "criminal class" which, if allowed to spread and prosper, would mean the collapse of respectable society was a strong impulse to reform of the criminal law from the seventeenth until well into the present century. It explains indeed the proliferation of vagrancy and status offences during that period, including those related to prostitution. The present street soliciting provision, it can be argued, is one of the more overt vestiges of this philosophy of "guilt by association". It is ill-suited to a society which professes to have a developed commitment to individual rights and worth and gender equality.<sup>46</sup>

Even if the argument above, which focuses on the structural discrimination inherent in social and legal reactions to prostitution, is problematic, there is an alternative line of argument which emphasizes the inequities of enforcement. Unlike the period before 1972 when the law on prostitution contained elements of overt gender discrimination, namely in the "Vag. C" provision, the modern law purports to be gender neutral. Both male and female offenders can be charged and convicted of all the prostitution-related offences, and in the case of street soliciting the law is designed to penalize the conduct of both prostitutes and customers. At a formal level, then, it might be argued that the law, especially relating to street soliciting, would survive any challenge based on s. 15 of the *Charter*. The substantive reality is, of course, very different. Especially in the case of soliciting, prostitutes in fact get the lion's

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45. Committee on Sexual Offences Against Children and Youth, *Sexual Offences Against Children*, vol. 2 (Ottawa: D.O.S.S., 1984) at 967-1006; Special Committee, *supra* note 24 at 572-577.

46. For a helpful feminist critique of the law relating to prostitution, see C. Boyle, "Gender Neutrality and Prostitution" in L. Bell, ed., *Good Girls/Bad Girls: Sex Trade Workers and Feminists Face to Face* (Toronto: Women's Press, 1987) 37.

share of attention from the law enforcement authorities. Unlike individual customers who come into focus by and large randomly, the prostitutes are a community whose identities, records, backgrounds and preferred locales are normally well known to police. This means that if the police experience pressure from the local community to "do something" about prostitution the easiest response is to "scoop up" and charge every prostitute in sight. The reality is that the availability and vulnerability of the prostitute population makes them in fact, if not in law, the deviant actors, in effect culpable because of their status. Furthermore, there is no police force in Canada with anything close to equality in numbers of female and male officers. As prosecutions are typically laid under s. 213(1) of the *Code* on the basis of decoy work, it is far more likely that the prospective seller of sexual services will be the object of police attention than the purchaser. Although arguments based on discriminatory enforcement practices have received little attention to date and would require very solid, supportive evidence to have any chance of succeeding, an increasing volume of data, including statistics from specific communities across Canada, will undoubtedly provide a basis for pursuing such arguments in the future.<sup>47</sup> While it has been possible for courts in the past to limit analysis and discussion to the immediate and overt purpose of *Code* provisions on prostitution, i.e. the objective of preserving public order and decorum, they may be challenged in the near future to delve more deeply into social and legal policy relating to prostitution.

## B. Pornography

By contrast with prostitution, in pornography, the manifestations of gender power and discrimination, both explicit and implicit, have been the focus of considerable attention and comment in the courts during the past decade. This process of judicial debate has been undoubtedly stimulated by the vigorous dialectic occurring in the community at large on what to do about pornography, which itself has been spurred by the profound concerns of women over the adverse implications and effects of the widespread use of pornographic material in Canadian society.<sup>48</sup> The role of the courts in mediating the varying and often strongly opposed views on legal policy in this area has been accentuated by the failure of Parliament to agree on an acceptable package of reforms to the present law.<sup>49</sup> The trend towards a more open articulation of issues and philosophies in the courts in fact started before the *Charter*, and especially s. 15, came into force. In *R. v. Doug Rankine Co.*<sup>50</sup> Judge Borins of the Ontario County Court, faced with the challenge of assessing a series of videos charged under s. 159(1) [now s. 163(1)] of the *Code*, sought to add a gloss to the community standards test by distinguishing between material portraying "violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize people" and that, which, while explicit, lacked those elements and was apparently consensual. This distinction

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47. There is already revealing research on patterns of prostitution law enforcement done for the Fraser Committee in 1984-85. To this will be added the research commissioned by the federal Department of Justice on the impact of s. 213(1), soon to be released.

48. See Special Committee, *supra* note 24, vol. 1 at 63-76.

49. See J. McLaren, "New Puritans: 0 Free Speech United: 0 — The Great Canadian Pornography Shoot-Off" (1988) 9 J. Media L. & Pra. 128.

50. (1983), 9 C.C.C. (3d) 53 (Ont. Co. Ct.).

which was in part informed by feminist critique of the oppressive and menacing character of violent pornography, also owed much to the liberal view that censorship should be limited as far as possible.

The balancing of liberal impulses and feminist critique was further refined by other trial judges, most notably Justice Ferg in the Manitoba case of *R. v. Ramsingh*<sup>51</sup> and Justice Shannon of the Alberta Court of Queen's Bench in *R. v. Wagner*.<sup>52</sup> Both these judges distinguished between material which was dehumanizing and degrading (although not necessarily violent or cruel) on the one hand which, they felt, fell outside the bounds of toleration and that which portrayed consensual sex on the other, which, they believed, would be tolerated. Ferg J. in *Ramsingh* made it clear that in his opinion representations of apparently consensual sex may be thoroughly degrading to women. In characterizing three of the films before him, he observed

*Women are portrayed in these films as pining away their lives waiting for a huge male penis to come along, on the person of a so-called sex-therapist, or window washer, supposedly to transport them into complete sexual ecstasy. Or even more false and degrading one is led to believe their raison d'être is to savour semen as a life elixir, or that they secretly desire to be forcefully taken by a male.*<sup>53</sup>

In the *Wagner* decision the Court's judgment was heavily influenced by expert testimony from a social psychologist which found a link between violent and degrading pornography and violence against women and drew a clear distinction between sexually explicit pornography in which women were used as sexual receptacles and "playthings" and sexually explicit erotica marked by "affectionate human sexual interaction, between consenting individuals participating on a basis of equality."<sup>54</sup> In both cases the defence argued infringement of freedom of expression under 2(b) of the *Charter*. However, the two judges, while finding that s. 159(8) of the *Code* fell afoul of s. 2, concluded that it was saved by s. 1. In *Wagner* a further challenge that s. 159 of the *Code* offended s. 7 of the *Charter* because it was too vague was rejected on the ground that the *Code* provision struck a realistic balance between the application of objective criteria and the need for flexibility in working with evolving community standards.<sup>55</sup>

The growing sensitivity on the part of Canadian courts to feminist discourse on pornography, which defines the latter clearly and unequivocally in terms of the oppression of women, has not stopped with a redefinition of s. 163(8) [formerly s. 159(8)] of the *Code*. The argument has been made and accepted that pornography in its essence is a form of discrimination which denies the right to gender equality, itself protected under the *Charter*, namely in ss. 15 and 28. The imaginative and powerful proposition that pornography

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51. (1984), 14 C.C.C. (3d) 230 (Man. Q.B.).

52. (1985), 36 Alta. L.R. (2d) 301 (Q.B.). See also *R. v. Pelletier* (1986), 27 C.C.C. (3d) 77 (Qué. S.C.).

53. (1984), 14 C.C.C. (3d) 230 (Man. Q.B.), 239.

54. (1985), 36 Alta. L.R. (2d) 301 (Q.B.), 311, aff'd (1986), 26 C.C.C. (3d) 242 (Alta. C.A.).

55. *Ibid.* at 314-315.

represents a subversion of the equality of the sexes and therefore strikes at the roots of a public policy commitment to full gender equality in this country has found a resonance among Canadian judges. The most notable example is in the decision of the British Columbia Court of Appeal in *R. v. Red Hot Video Ltd.*<sup>56</sup> Chief Justice Nemetz, having rejected a *Charter* challenge to s. 159(8), concluded that the videos in question were "obscene" under that subsection.<sup>57</sup> In doing so he remarked that "this type of degrading vilification of women is unacceptable by any reasonable Canadian community standard."<sup>58</sup> More suggestive, because it addresses the equality issue openly, is the concurring decision of Anderson J.A.<sup>59</sup> Drawing on the distinctions made in the earlier trial decisions and the terms of s. 28 of the *Charter* that "the rights and freedoms referred to in it are guaranteed equally to male and female persons", he remarked:

*If true equality between male and female persons is to be achieved it would be quite wrong in my opinion to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material described above. As I have said, such material has a tendency to make men more tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women.*<sup>60</sup>

Justice Anderson concluded that the impugned materials were obscene for "they constitute a threat or real and substantial harm in the community". The reason he gave for this characterization was that "[t]hey approve the domination of women by men as an acceptable social philosophy".<sup>61</sup>

This judgment is intriguing both because, to quote Sheila Noonan, "it adopts the feminist discourse of degradation, dehumanization and objectification",<sup>62</sup> and because it redefines the traditional liberal notion of harm, to include a species of "social harm" involved in the denial of full humanity to at least half the population of the country. This is not a moralistic notion based on the apprehended crumbling of the nation's social fibre, but derives from an understanding that there is a clear political and social consensus, now enshrined in the country's constitution, that equality of the sexes is a dominant national objective.<sup>63</sup> Pornography, the argument goes, with its particularly insidious and mindless celebration of male domination, flies in the face of this clear and unequivocal commitment. *Wagner* notwithstanding, given the difficulty in establishing a direct, primary link between the use of

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56. (1985), 18 C.C.C. (3d) 1 (B.C.C.A.).

57. *Ibid.* at 3-8.

58. *Ibid.* at 7.

59. *Ibid.* at 8-24.

60. *Ibid.* at 23.

61. *Ibid.* at 24.

62. S. Noonan, "Gender Neutrality and Pornography" in L. Bell, *supra* note 46 at 42, 44-45.

63. Special Committee, *supra* note 48 at 266-268.

pornography and violence towards women,<sup>64</sup> this is an important line of argument to press, especially in the face of vigorous appeals by accused parties to s. 2 of the *Charter*.

An increasing number of trial and appeal courts have upheld s. 163(8) of the *Code* under s. 1 of the *Charter*, and rejected the vagueness argument under s. 7. It is true that the Supreme Court of Canada has yet had to deal directly with the issue of a *Charter* challenge to s. 163(8). However, there are hints, especially in the judgment of the Court in *Towne Cinema Theatres Ltd. v. The Queen*,<sup>65</sup> that the subsection would be sustained. In an appeal from a conviction for presenting an obscene motion picture under s. 163 [now s. 167] of the *Code*, the Court affirmed that the test in s. 159(8) [now s. 163(8)] is one of "objective toleration" not "personal taste". Chief Justice Dickson who did not carry a majority of the Court on his contention that the character of the audience is a legitimate consideration in applying the "community standard of tolerance" in such a case, does seem to have had majority support for his musings that the capacity of the material for degradation or dehumanization is a relevant factor in applying s. 163(8).<sup>66</sup> He was willing to suggest that some sexually explicit material would fall within the range of tolerance. At the same time he remarked that in construing the words "undue exploitation of sex" reference should be had not only to the standard of tolerance "but also to whether the material is seen as harmful to society".<sup>67</sup> Wilson J. in a separate opinion came to similar conclusions on the considerations relevant to applying the community standard test.<sup>68</sup> The impression at least is left by the judgments of the Chief Justice and Madam Justice Wilson that the test of what is obscene in s. 163(8) is workable, and that the issue of the "social harm" done by pornography is a relevant factor in determining responsibility in individual cases.

Clearly the feminist discourse on pornography has had some influence in recent years on court decisions. Indeed, it may be said that the notions of degradation and dehumanization, along with violence, have been accepted as important elements in the process of assessing whether material is obscene under s. 163(8). It would be wrong, however, to assume that the dividing line between what is and what is not obscene will depend exclusively on a distinction between depictions of violent and degrading sex on the one hand, and explicit, but consensual, sex on the other. Indeed, in a number of recent decisions the courts have concluded otherwise. In *R. v. Video World*<sup>69</sup> the Manitoba Court of Appeal, in sustaining an appeal by the Crown in an acquittal from a charge under s. 159 of the *Code* for circulating or possessing for the purposes of circulation a number of obscene videos, ignored the reasoning in the line of cases starting with *Rankine*, in particular reference to whether the representations were degrading or dehumanizing. The majority preferred to relate "undue exploitation" to the degree of sexual explicitness involved.<sup>70</sup> Matas J. in a more extensive and

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64. *Ibid.* at 95-103.

65. (1985), 18 D.L.R. (4th) 1 (S.C.C.).

66. *Ibid.* at 10-11.

67. *Ibid.*

68. *Ibid.* at 25.

69. (1986), 22 C.C.C. (3d) 331 (Man. C.A.).

70. *Ibid.* at 343-344.

considered judgment explicitly rejected the view that it was open to a court in such cases to consider the issue of whether the material caused any demonstrable harm or not. "It is unnecessary", he said, "for us, in this case, to consider the question of 'adverse societal influences'."<sup>71</sup> The Manitoba decision was sustained by the Supreme Court in a terse judgment which found that, on the basis of its earlier decision in *Towne Cinema*, the test of "community tolerance" had been correctly applied by the lower courts.<sup>72</sup> In *R. v. Pereira-Vasquez*<sup>73</sup> the British Columbia Court of Appeal in upholding the conviction of the accused who was charged with making and distributing obscene videos contrary to s. 159(1)(a) [now s. 163(1)(a)] of the *Code* asserted that it is still perfectly legitimate to find sexually explicit material obscene which does not have the qualities of violence or degradation about it.<sup>74</sup> While accepting that depictions of sexual violence and degrading sexual conduct directed at females are the least tolerable forms of pornography in Canada, the Court, drawing on the full jurisprudence on obscenity since the enactment of s. 159(8), its "plain language" and distinguishing openly between material with some pretension to artistic quality and "dirt for dirt's sake", found the material before it obscene. Devoid of artistic merit or "socially redeeming aspects" the productions which depicted "female homosexual activity, intercourse, fellatio, and cunnilingus, group sex and various variations on these themes" were characterized as "hard porn" and "depraved sludge". The court concluded that earlier decisions, such as *Rankine* and *Ramsingh*, had confused a feminist "tributary" of concern with violent and degrading pornography which had been erected as the basis of an exclusive definition of obscenity, with the "mainstream" of national opinion, which in fact reflects a broader range of concerns about this type of material and thus warrants a more inclusive definition.<sup>75</sup> In the minds of the judges of the British Columbia Court of Appeal, the decision of the Supreme Court in *Video World* has effectively blocked the detour opened up by those earlier decisions and asserted the correctness of earlier interpretations of s. 159(8) [now s. 163(8)] in which harm or potential harm to any person is considered to be irrelevant to culpability.

These recent developments may be seen as a step backwards by feminists committed to using the criminal law to deal more effectively with pornography. These individuals have tried to distance themselves from the arguments of moralists who would ban all depictions of or reference to nudity or sexual activity. For the feminists the celebration of consensual sexuality involving loving, caring relationships, in what is described as genuinely erotic material, is to be applauded rather than suppressed.<sup>76</sup> It was this view which induced the

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71. *Ibid.* at 332-343, 342.

72. *Video World v. The Queen* (1988), 35 C.C.C. (3d) 191 (S.C.C.). See also *Germain v. The Queen* (1986), 21 C.C.C. (3d) 289 (S.C.C.) in which the court upheld a conviction from Quebec for the sale of obscene articles, described as sex stimulants.

73. (1988), 43 C.C.C. (3d) 82 (B.C.C.A.).

74. *Ibid.* at 85-100.

75. *Ibid.* at 99.

76. Noonan, *supra* note 62 at 45-46. It should be noted that feminists are not by any means all *ad idem* on the advisability of using the criminal law to attack pornography, see V. Burstyn, ed., *Women Against Censorship* (Vancouver: Douglas & MacIntyre, 1985). Some feminists are of the view that pornography is only a symptom of more deep seated social and cultural problems, which themselves should be the primary focus of feminist energies. They also express grave reservations about the co-option of the anti-

opposition of a number of anti-pornography groups organized by women to the federal government's abortive attempts to reform the law of obscenity in terms which reflected conservative morality.<sup>77</sup> The question arises of whether these decisions represent a similar process of moral retrenchment by the judges. The indifference to feminist discourse by the Manitoba Court of Appeal in *Video World* is certainly unfortunate. Moreover, the assertion by both Courts of Appeal that the issue of harm, whether individual or social, is irrelevant to the interpretation of s. 163(8) is likely to generate fears of some judicial slippage in the direction of conservative morality, fears accentuated by the emotive language used, especially in *Pereira-Vasquez*, to characterize the material under examination.<sup>78</sup> To the extent that these decisions herald a return to gender neutral analysis, their reasoning warrants challenge. Indeed, it is to be hoped that the Supreme Court of Canada has the chance to directly address the issue of the criteria to be applied in construing s. 163(8) in the near future. That having been said, it is difficult to argue that the conclusions reached are offensive to feminist sentiment. These decisions represent in part a recognition that a neat distinction between nasty, violent or degrading pornography on the one hand, and nice, consensual erotica on the other does not reflect reality. There is a large grey area of material, which most people would characterize as pornography, comprising depictions which are not violent or ostensibly degrading, but which are obsessive, tasteless and exclusively designed to stimulate sexual urges and fantasies, especially those of men. Given the wording of s. 163(8) and its reference to "undue exploitation of sex", the courts are, like it or not, faced with evaluating this material to determine on which side of the line it falls. It is difficult to see what redeeming features most feminists would find in the materials considered in those two cases. Moreover, it may be a matter for encouragement to feminist opinion that the B.C. Court of Appeal was careful to distinguish between material which is "dirt for dirt's sake" and that which has some genuine artistic or other positive merit in terms of what is socially tolerable.<sup>79</sup> Feminists certainly would have cause for worry, if the imaginative, artistic and tasteful material which they describe as erotica (which is currently, one suspects, largely non-existent, except in sex education publications) fell afoul of s. 163(8) of the *Code*. There is no evidence, based on recent case law, that such material would be treated by the courts as "obscene".<sup>80</sup> If there is room for genuine concern in the most recent developments it is surely that of civil libertarians who see no tangible harm evident in the dissemination or use of the material at issue in the cases, notwithstanding its "quality" and no justification for denying adults, at least, access to it.

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pornography movement by the forces of moral conservatism.

77. McLaren, *supra* note 49 at 131-132.

78. Somewhat perplexing too is the suggestion of Cummings J. in *R. v. Mood Video Ltd.* (1987), 33 C.C.C. (3d) 221 (Nfld S.C.) that the best criterion of the community standard of tolerance is the combined wisdom of the churches.

79. *R. v. Pereira-Vasquez* (1988), 43 C.C.C. (3d) 82 (B.C.C.A.) at 85.

80. In *University of Manitoba v. Deputy Minister of Revenue Canada* (1983), 24 Man. R. (2d) 198 (Man. Co. Ct.), sexually explicit material for presentation to medical students was not found obscene because it was designed for a legitimate educational or scientific purpose. In *Serup v. Board of Trustees of School District #57* (1987), 10 C.R.D. 525.100-06 (B.C.S.C.), Lander J. refused to grant an injunction to the plaintiff to allow her to "review" sex education material lodged in the library of the local high school where her son was a pupil.



In the case of pornography, unlike prostitution, Canadian courts in the past decade have openly discussed and in some instances adopted the discourse of gender discrimination in reaching their decisions. In the absence of further reform of the law relating to pornography, judges will continue to interpret, as best they may, the definition of obscenity in s. 163(8) of the *Code*. It is important that in this exercise the courts continue to canvass and seek inspiration from feminist theory in reaching their decisions. Gender neutral interpretations of obscenity law have not seemed to serve women well in the past, tending toward over-inclusive definitions where fuelled by conservative moral sentiment, and over-exclusive definitions where based on liberal rights notions. The characterization of pornography as a form of gender power and oppression is a vital link in any antidote to "rights based" arguments, especially those couched in terms of "freedom of expression" under the *Charter*, as well as suggesting appropriate outer limits for the reach of the criminal law, when it comes to matters of expression. Given the present terms of the law on obscenity, a sort of "twilight zone" of sexually explicit material will continue to exist, capable of characterization as pornography or erotica, depending on the eye of the beholder, which the courts will from time to time be called upon to assess. Here it is to be hoped, judges will be careful to examine closely the character and purpose of the material, and at the same time consider fully the competing arguments for and against its proscription, including both those of feminists and civil libertarians. It is this type of open analysis which is likely both to expose the real danger of pornography, and to evoke resistance to calls for the ushering in of a new "age of Prudery"!