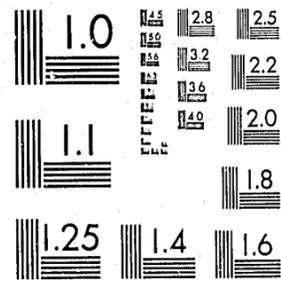


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PORNOGRAPHY
AND
PROSTITUTION

ISSUES PAPER

NOVEMBER 1983

92416

PORNOGRAPHY AND PROSTITUTION ISSUES PAPER

THIS IS A DISCUSSION PAPER PREPARED BY THE
SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION,
APPOINTED BY THE MINISTER OF JUSTICE FOR CANADA

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I. INTRODUCTION

On June 23, 1983, the Minister of Justice for Canada, the Honourable Mark MacGuigan, established a Special Committee to study the problems associated with pornography and prostitution and to carry out a programme of socio-legal research in support of its work.

The terms of reference of the Special Committee are as follows:

- (1) to consider the problems of access to pornography, its effects and what is considered to be pornographic in Canada;
- (2) to consider prostitution in Canada with particular reference to loitering and street soliciting for prostitution, the operation of bawdy houses, living off the avails of prostitution, the exploitation of prostitutes and the law relating to these matters;
- (3) to ascertain public views on ways and means to deal with these problems by inviting written submissions from concerned groups and citizens and by conducting public meetings in major centres across the country;

- (4) to consider, without travelling outside Canada, the experience and attempts to deal with these problems in other countries including the U.S., E.E.C. and selected Commonwealth countries such as Australia and New Zealand;
- (5) to consider alternatives, report its findings and recommend solutions to the problems associated with pornography and prostitution in Canada, as soon as possible, but not later than December 31, 1984.

Our terms of reference are very broad. They include the effect both these issues have on adults as well as children. Our mandate is to ascertain the views of the public.

In order to try to do so effectively, we have prepared this Paper. It has been designed to raise as many of the issues and questions as possible about pornography and prostitution. The Paper comes to no conclusions. It simply poses alternatives and asks questions. There may well be vital questions that we have missed. If so, we hope that this oversight will quickly be brought to our attention so that our work can proceed on an informed basis.

The Paper opens with a discussion of some of the matters that are common to both pornography and prostitution as areas of possible law reform. It then proceeds to deal separately with each of the two areas. We attempt to describe the harm allegedly done to society by pornography and prostitution. Next we consider the consequences of this harm in the context of the fundamental rights of free thought and expression and the liberty of the individual. Finally, we discuss some of the options for reform.

The Committee has not been at work for very long. Those persons and groups who have for many years been particularly concerned with the problems of pornography and prostitution may find that the issues and questions have been put too simply. That is a risk that we have been prepared to take in publishing this Paper for the purpose of helping to galvanize debate. We realize that this Paper will be more helpful to the uninitiated than to those persons and groups who, by their concern, have helped to bring the problems involved to public attention.

To the extent that the context of this Paper has required that views be expressed by the Committee, those views are entirely tentative. We have consciously avoided reaching

any conclusions on either subject until we have had the benefit of the views of the public.

To obtain these views, the Committee will hold public hearings in a variety of locations throughout Canada from December of 1983 until April of 1984. We hope and expect that many Canadians will let us have their views.

The actual dates and the locations of the hearings can be obtained from the Committee's Secretary at the Committee's office. The address is Box 48720, Bentall Centre, Vancouver, British Columbia, V7X 1A6, telephone (604) 687-8670.

If you want to appear before the Committee, please notify us in writing of your intention to do so. We would be greatly assisted to have a written summary of your presentation in advance and, if possible, a copy of your full submission. Scheduling details and other information about the public hearings can be obtained from the Committee's Secretary, Ms. Robin Jamieson, at the above address.

The Committee is interested in hearing what you have to say on any or all of the issues and on either or both of the subjects of pornography and prostitution.

The Committee will also receive written submissions from those persons who either cannot or do not want to appear at the public hearings. Where it is possible to do so, members of the Committee will consider meeting privately with those who are interested in providing us with their views. Those who wish to meet privately should so advise the Committee's Secretary.

The Committee's examination of the issues will, of course, extend beyond the response we receive from the public. We are in the process of identifying and collecting materials on both subjects. We will also be conducting independent research.

We look forward to hearing from you.

Vancouver, British Columbia
November 1, 1983

Paul Fraser, Q.C., Chairman
Susan Clark
Mary Eberts
Jean-Paul Gilbert
John McLaren
Andrée Ruffo
Joan Wallace

II. THE COMMON ELEMENTS

Separate consideration is given in this paper to each of the two areas the Committee has been asked to examine. However, it is apparent that there are a number of common elements in the consideration of pornography and prostitution as areas of possible law reform. In this section of the paper we try to identify and, where necessary, explain the nature of those common elements.

The first and most obvious is the framework provided by the Constitution of Canada. Canada is a federal state, with legislative power divided between the Federal Parliament in Ottawa and the ten provincial legislatures. That division has important implications insofar as possible legislative responses in the areas of pornography and prostitution are concerned.

"Criminal law" is a field over which Parliament has been given exclusive jurisdiction. If the Committee were to recommend the continued use of the criminal law to deal with pornography and prostitution, Parliament would be free to act on those recommendations. But it is clear that the criminal law is not the only mechanism for dealing with pornography and prostitution. Licensing arrangements are also a possibility.

However, the power to regulate local businesses has been held to be a power which only the provincial legislatures possess. If the Committee were to recommend the enactment of licensing schemes - for example, with respect to prostitutes or adult book stores - action by the provincial legislatures would be necessary.

Clearly related to, but nevertheless distinct from, the division of legislative power provided for in the Constitution of Canada, is the question of policy as to whether national or local legislation, or perhaps some combination of the two, is required in these two areas. To what extent is uniformity important? To what extent is it necessary or appropriate to allow for local control? The Committee looks forward to hearing the public's views on these questions.

The Constitution of Canada also contains a Charter of Rights and Freedoms. In the Charter, express protection is given to such rights and freedoms as the right to liberty, the right to equality, and freedom of expression. It is also provided in the Charter that those rights and freedoms are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". To the extent that the Committee recommends that any or all of the rights and freedoms in the Charter should be

limited, Parliament and the provincial legislatures will have to be sure that such limitations are justified.

Another question common to both issues is the question of the extent to which law should enforce morality. The answer to this question may depend on how one defines "morality" in this context. Some see "morality" as meaning sexual morality or sexual purity. If this view is adopted, the debate about whether the law should enforce morality focuses on the question of whether the law should be used to impose a particular code of sexual behaviour. There are, of course, strong advocates of the position that the law should be so used, and advocates equally convinced of the opposite position.

However, there are also many who believe that morality need not be seen in such narrow terms. They argue that moral values such as non-violence, truthfulness, personal dignity and equality, if not essential to a healthy society, at least make society a place which better serves human needs. And, on the basis of this broader concept of morality, it is argued, it is appropriate for law to enforce morality.

For many people the law itself must ultimately be justified on moral grounds. Even when the law is concerned only with prohibiting behaviour which causes direct harm to others, a moral determination must be made as to which harm to

tolerate and which to suppress. Moreover, it is said, the distinction between direct and indirect harm can never be clearcut. Inevitably, a moral evaluation must be made to determine where the line should be drawn.

The Committee considers the question of the extent to which law should enforce morality to be a particularly important one and looks forward to hearing the public's views on it.

Another element common to both issues is the question of the proper role of the criminal law. One view of that role is that enunciated in a recent publication of the Federal Department of Justice entitled The Criminal Law in Canadian Society. In the preface to that publication, it is stated that "this document sets out the policy of the government of Canada with respect to the purposes and principles of the criminal law." That purpose is later defined in the following terms:

"The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society."
[emphasis added]

First amongst a number of principles which are to be applied in achieving this purpose is the following:

"The criminal law should be employed to deal only with that conduct for which other means of control are inadequate or inappropriate and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose." [emphasis added]

The Committee looks forward to hearing the views of the public on these statements as they apply to the areas of pornography and prostitution.

Concern for the well-being of children is an important common element for the Committee to consider. By "child" we mean everyone who is not an "adult" in law. That means all those under 16 and in some provinces, 17 or 18 years of age. Within the past several years Canadians have begun to witness the separate phenomena of pornography involving children and child prostitutes.

We will appreciate receiving views on whether there should be special legislation to protect children from pornography and prostitution.

Other questions, relating specifically to the issues of pornography and prostitution, are canvassed in the succeeding chapters of this paper.

III. PORNOGRAPHY

A. INTRODUCTION

1. The Facts

Pornography has existed throughout the course of civilization, but a greater variety of pornographic material is available today than ever before. Virtually every medium can be used to communicate pornographic images, including films, video tapes, satellite relays, magazines, photographs, telephone, records, drawings and live stage shows, and, as technology continues to develop, no doubt this list will expand even further. Men, women, and children are portrayed engaging in every conceivable form of heterosexual and homosexual activity. Violence is becoming more and more common. Much of this material is sold by vendors who deal exclusively in sexually explicit material, usually in adult bookstores and theatres, but there has been a growing tendency for businesses catering to the general public to handle pornographic material. Moreover, general release films and popular magazines and books have become increasingly candid in their treatment of sexual subjects.

Information about who participates in the production of pornographic materials and why will be of interest to the Committee. The psychological and emotional impact on the participants in both the short and long term is at the moment largely unknown. We are also anxious to find out, for example, whether persons who are involved as children in the production of pornography or who are child prostitutes are more likely to get involved as adults in the production of pornography.

The consumers of pornography appear to be predominantly male. However, it is clear that more information about the consumers - who they are, what their backgrounds are, why they are consumers of pornography, what effect it has on them, etc. - is necessary and the Committee looks forward to receiving such information from the public.

The Committee wants to have information also about the business of pornography in Canada. How much pornography is produced in Canada? How is pornography imported? How is it distributed? How profitable is it? Who is involved in the business?

2. The Law

Pornographic materials have become more generally available in spite of a variety of laws regulating and

prohibiting the production and dissemination of these materials. The Criminal Code contains a number of provisions governing pornography, although the word pornography itself is never used. These provisions generally refer instead to material which is "obscene", "indecent", "immoral" or "scurrilous", or some combination thereof. Under Section 159, it is an offence to publish or distribute "obscene" matter, although subsection 159(3) permits the defence of serving "the public good". Section 160 permits the seizure, forfeiture and disposal of "obscene" material. Section 161 prohibits distributors from requiring retailers to accept, for sale, "obscene" materials along with non-pornographic materials (so-called tied sales). Section 163 prohibits the presentation of or participation in an "immoral, indecent or obscene" theatrical performance. Finally, Section 164 makes it an offence to use the mails to send "obscene, indecent, immoral or scurrilous" material.

An "obscene" publication is defined in Subsection 159(8) as "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". The words "immoral", "indecent" and "scurrilous", used in the other sections noted above, have been left to the Courts to define.

In determining the "dominant characteristic" of a publication and whether the "exploitation" is "undue", the courts consider the work as a whole, the author's or artist's purpose, and the literary or artistic merit of the work (R. v. Brodie, Dansky and Rubin). However, the key factor in determining whether a work is "obscene" is whether the work offends against community standards of decency. Community standards reflect a "general average" of thinking and are neither the most prurient nor the most puritan tastes (R. v. Dominion News and Gifts Ltd.). Furthermore, community standards are not static, but evolve with society.

In determining "community" standards, Canadian courts have generally applied a national rather than a local standard.

In addition to the provisions of the Criminal Code, the Customs Tariff Act empowers the Crown to seize and destroy imported goods of an "immoral or indecent character". This is thought to encompass not only all obscene material within the meaning of the Criminal Code definition, but also material which is not obscene since "immoral or indecent" is generally thought to impose a lower standard than "obscene". However, it has apparently been the practice of the Customs Department to base its standards upon the Criminal Code obscenity cases.

Further federal control of pornography is found in the regulations made pursuant to the Broadcasting Act, which prohibit the broadcasting of obscene programmes.

Provincial legislatures have attempted to control the specific problem of pornographic films through film censorship and classification. The exact form of the legislation varies from province to province, but generally a board is established which reviews all films to be commercially shown in the province. The board may prohibit the showing of a film, or it may order that the film be edited. If a film is approved, the board classifies the film by designating the permitted or appropriate audience.

Finally, there is legislation at the municipal level designed to regulate the operations of local distributors of pornographic magazines, books, video cassettes, etc. This legislation normally takes the form of a licensing or zoning scheme.

Each of these legislative approaches to the dissemination of pornography has been criticised, on the one hand for being vague and arbitrary and on the other for being ineffective, especially from the perspective of protecting children. A more specific criticism, that the existing law is unacceptable because it is targeted at sexual representations

in general and not at the more serious problem of representations which degrade the human person, has gained a measure of public support. So, too, has the criticism of the requirement that, in order for violence, cruelty, horror and crime to be "obscene", they must be combined with sex. In response to these criticisms, the Minister of Justice has proposed that the Criminal Code definition of "obscene" be changed to include the notion of degradation and to eliminate the requirement of sex in addition to violence, cruelty, horror and crime in order to complete the definition of "obscene".

3. Defining Pornography

Pornography is notoriously difficult to define. Indeed, some commentators and judges have argued that pornography cannot be defined. Certainly no one has yet come up with a definition that has satisfied everyone.

To many people, pornography is associated only with sex. Such an association is consistent, it might be noted, with the origins of the word pornography. The first part of that word, "porno", comes from the Greek work for harlot or prostitute.

However, many other people understand the term pornography to include violence. No doubt this is attributable

to the increasing amount of violence found in modern films and magazines and the fact that much of that violence is related in some way to sexual relations, whether heterosexual or homosexual.

The Committee acknowledges the rising concern about the depiction of violence and, in particular, violence that is in some way related to sexual relations. It is hoped, therefore, that the submissions to the Committee will address the matter of violence as well as the matter of sex.

The greatest difficulty in defining pornography concerns the kinds of sex or violence that are to be included. There are very few people who would say that all sex and all violence is pornographic. Generally speaking, people use the term pornographic to refer to material that causes offence or some other kind of harm.

The problem, of course, is that people have different conceptions of offensiveness and harm. Whether or not certain material is offensive is clearly a personal and subjective assessment. It is a reflection of individual experiences, the thinking of common interest groups, as well as moral and religious values. While a fair degree of consensus is no doubt possible in some instances, disagreement over what is or is not offensive is to be expected.

The concept of harm appears to provide a more objective standard, but again, what is thought to constitute harm will to some degree depend upon the purpose of the inquiry and the personal views of the person conducting it. To some, a harm is anything which is morally wrong or sinful. For example, a number of religious faiths teach that sexual arousal is inherently sinful and, hence, harmful, unless it is in the context of sexual activity in marriage. Others view harm as a much narrower concept, one which is generally independent of the prevailing morality of society. This view, generally attributable to John Stuart Mill, limits harm to those actions which are demonstrably injurious to the rights and interests of others.

The situation is further complicated by disagreement over whether certain kinds of sexual representations are inherently offensive or harmful, or whether the harm or offense depends upon the circumstances surrounding the sexual representation. According to the latter view, what is or is not pornographic may depend upon the mode in which the sexual representation is conveyed, the context in which it appears and the audience to which it is communicated.

The Committee looks forward to hearing the views of the public on the following kinds of questions:

- (A) Is it possible for the same sexual behaviour to be pornographic when presented in the form of a live show and yet not be pornographic when portrayed in pictures, films or video cassettes?
- (B) Is it possible for sexual behaviour to be pornographic when depicted and yet not be pornographic when merely described?
- (C) Can the offensiveness or perceived harm of a representation be mitigated by the literary or artistic merits of the work considered as a whole?
- (D) Does it make a difference if the sexual behaviour portrayed is condemned rather than condoned?
- (E) Does it make a difference if the people in the representation are not portrayed in a demeaning or degrading manner, but in such a way that their behaviour is seen to be an expression of affection between consenting adults?
- (F) Can it be said that a representation which might in general be classified as pornographic is unobjectionable when it is used for educational, scientific or therapeutic purposes?

- (G) Is it possible that a sexual portrayal which is thought to be harmless to a normal adult is nevertheless harmful to children and certain susceptible adults?
- (H) Is there a distinction to be drawn between the public display and the private consumption of sexual material?
- (I) Can it be said, for example, that, when the sexual behaviour is publicly displayed, the degree of offensiveness is the important consideration, whereas when the portrayal is communicated in private to consenting adults, harm is the only relevant consideration?
- (J) Are there any kinds of sexual representations which are inherently offensive or harmful?
- (K) In particular, are pictures of nude children in suggestive poses inherently offensive or harmful?

B. IDENTIFYING THE HARM

Pornography is said to give rise to a wide range of harm. For the sake of order and convenience, this harm has been categorized here in terms of who it is that allegedly suffers from it.

1. Harm to Society

Pornography is seen to cause harm to society at large in three ways. First, it is argued that exposure to pornography will lead directly to an increase in sexual offences, violent crimes and aggressive anti-social behaviour. Second, it is argued that exposure to pornography will diminish the dignity and status of women. Third, it is argued that, over the long run, exposure to pornography will undermine values that are thought to be essential or important to society, which in turn will lead either to the ultimate disintegration of society or at least to a less desirable kind of society.

The Committee regards these questions to be among the most important it must consider and the views of the public will be particularly valuable in these areas.

The claim that there is a direct causal link between exposure to pornography and criminal or anti-social behaviour is based on essentially two arguments. One is that sexual arousal through exposure to pornography which cannot be satiated by normal sexual activity creates an aggressive state of mind which can be translated into overt aggressive behaviour. Thus, it is said, exposure to pornography will increase the likelihood of a given individual engaging in violent behaviour.

Another argument is that individuals who have been sexually aroused by pornography will seek to satisfy themselves by emulating the sexual behaviour they have been studying. Since they will generally be unable to find a willing partner, they will be inclined to coerce an innocent party into becoming their partner. Thus, it is said, exposure to pornography will lead to an increase in crimes involving sexual assaults.

Support for these arguments is said to be found in three kinds of evidence: anecdotal accounts, experimental studies and statistical studies of crime rates and the availability of pornography.

Anecdotal evidence consists of those observed instances in which exposure to pornography is thought to be connected with the commission of a crime. Some have argued, however, that this kind of evidence suffers from a number of defects. First, it is said, it is often impossible to show a causal link between the exposure to pornography and the commission of the crime. Second, even when the nature of the crime appears to have been influenced by exposure to pornography, it is said, it cannot be concluded that pornography created a disposition to commit the crime rather than merely affecting an existing disposition. Finally, it is said, crimes have been attributed to a variety of stimuli, not all of which society would want to suppress. For example, the

scene of a woman dancing about the golden calf in Cecil B. DeMille's movie The Ten Commandments is reputed to have triggered the actions of the rapist and mass slayer of women, Heinrich Pommerenke.

Concerns have also been expressed about the reliability of experimental and statistical studies. The chief criticism of experimental studies is that they cannot precisely reproduce conditions as they actually occur in society. The problem with statistical studies, it is argued, is that, even if a correlation can be found between the prevalence of pornography and the rate of violent crime, the two may still not be causally related. It is conceivable that both have been influenced by some third factor.

The Committee looks forward to receiving evidence regarding the relationship between the viewing of pornography and the commission of crimes and other anti-social acts. It also looks forward to hearing the public's views on the reliability of such evidence.

It may be that the empirical evidence will neither positively prove nor disprove the existence of a causal connection between exposure to pornography and criminal or anti-social behaviour. If that is the case, the issue will be

how probable the connection must be if pornography is to be suppressed.

The second perceived harm of pornography to society at large is in the form of a general undermining of social values. The greatest concern here is expressed about pornography which contains explicit scenes of sadism in which the violence is condoned or the victim is seen to enjoy his or her pain and suffering. It is feared that, even if such material does not directly lead to violent behaviour, it serves to create an environment in which violence is seen as a legitimate means of achieving ends or expressing feelings. Moreover, it is said, people will become desensitized to violence and our collective resolve to oppose violent behaviour will be eroded.

Another concern here is that much pornography is openly hostile to women. Emphasis is placed on the fact that the gagging, beating, chaining, raping and even killing of women is a standard feature of much of the material that is available today. It is also noted that women are often depicted in this material as enjoying, or at least tolerating, such violence. The image of women that is conveyed, it is said, is extremely negative - they are subservient to men; they exist solely to satiate the sexual desires of men; they are masochistic; they are, in a sense, less than fully human.

Those who view pornography from this perspective often draw an analogy between it and the hate literature that is currently the subject of criminal sanction in Section 281.2 of the Criminal Code. The only difference, they say, is that the target of the hate here is not one of the racial or ethnic groups that is protected by the Code provision, but women.

Whether or not this analogy is accepted, many argue, it is wrong for society to tolerate material that portrays women in such a negative manner. If our society is to be a healthy and productive one, it is said, such material cannot be permitted to circulate.

A number of other concerns have been expressed about the long term effects of pornography on social values. Pornography, some people argue, may create an obsession with sexuality which may result in a decreased interest in other pursuits. Moreover, it may encourage deviant sexual behaviour either by triggering latent predispositions or by actually creating a taste for deviant sex.

It is also feared that the portrayal of impersonal sexual relations, divorced from love and affection, will undermine the normal development of intimate and private relationships. It is argued that this will be accompanied by a

decline in compassion and respect for the dignity of other human beings.

As with all harm attributed to pornography, the validity of the above concerns is difficult to assess. It is argued, with some force, that to deny that exposure to pornography affects values and attitudes is to deny that the physical environment, reading, teaching and observation have an effect on the development of personality and values. However, it is also argued that changing moral values and social attitudes are not exclusively, or even primarily, the result of increasing exposure to pornography. Pornography is, according to this view, more likely a reflection of a society which has changed under the influence of a multitude of factors.

It must also be noted that it has been argued that pornography performs a number of socially desirable functions. For example, it is said that pornography provides those with potentially aggressive sexual tendencies with an alternative, and far preferable, outlet for those tendencies. It is also said that pornography, by bringing sex out into the open, helps to reduce misunderstandings about sex and sexual practices, thereby encouraging healthier sexual relations generally.

In addition to causing harm to society at large, pornography is said to cause harm to the neighbourhoods in which it is distributed.

In commercial areas, it is said, businesses not catering to the pornographic market tend to suffer. Many of their potential customers are apparently offended by the presence of pornographic vendors, or feel uncomfortable being in such areas, particularly with their families, and are therefore inclined to go elsewhere to conduct their business.

In residential areas, parents are concerned that the environment often associated with pornographic vendors is unhealthy for children. They fear that exposure to pornographic material, either through public displays or discarded material, will adversely affect their child's development.

Furthermore, there appears to be a general concern that the presence of pornographic shops will attract people engaged in undesirable activities, such as sexual deviants, prostitutes, drug peddlers, and others involved in criminal activities. This in turn, it is said, will increase the incidence of crime and hence further destroy the desirability of the neighbourhood.

There are those who believe, however, that it is easy to overstate the role of pornographic vendors in the decline of a neighbourhood. There is a variety of causes of urban decline, it is argued, most of which are unrelated to the existence of pornographic shops and movie houses. Indeed, they say, the decline of the neighbourhood is generally already underway before there is a significant concentration of pornographic vendors. For this reason, a concentration of pornographic vendors is more likely to be an effect of urban decay than a significant cause. While their presence may exacerbate the situation, so too may other businesses, such as drinking establishments and pawn shops.

2. Harm to the Participants and Consumers

Pornographic films, photographs and live performances require the participation of models who actually engage in, or simulate, the sexual behaviour portrayed. There is a perception that these people are exploited and otherwise harmed in the production of this material.

An important question is the extent to which the work of those involved in the production of pornography is performed under duress. Instances in which the model is coerced from the outset may well be rare, but cases where the model is pressured

into engaging in activities not initially agreed to may be more common.

In addition to suffering a loss of personal freedom and dignity, an unwilling model may be forced into engaging in sadistic acts leading to actual physical harm. The frequency with which actual physical harm is suffered is, however, unclear.

The fear of harm to the participants is particularly strongly felt when child pornography is considered. Although there appears to be little actual empirical evidence, it is generally thought that children will be psychologically, if not physically, harmed by sexual activity. But apart from the issue of direct harm, it is said, children are simply too immature to make a reasoned decision as to whether or not to participate in the production of pornography, and, therefore, there can never be true consent on their part. Moreover, there may be situations in which children participate unwittingly in the production of pornography, for example when they are photographed in circumstances where they have no knowledge or no ability to understand the real reason for the picture being taken.

The concern for the physical health of people who participate in the production of pornography extends beyond the

fear that they may be injured. Another danger mentioned is the possibility of contracting venereal disease. However, it seems unclear as yet whether participants in the production of pornography are at greater risk in this regard than sexually active adults generally.

There is concern as well for the mental health of the participants. The danger to mental health involves a belief that the participants in pornography suffer alienation and social ostracism. It is said that they may have difficulty establishing meaningful relations with others because they have developed distorted and anti-social values. This concern is particularly acute in the case of children.

It is difficult to assess the merit of these concerns. Some would argue that, to a large degree, they may simply reflect a moral perception that those involved in the production of pornography are somehow tainted. If pornography was legalized would those involved in its production and performance be viewed with the same distaste?

Some commentators have concluded that individual consumers of pornography may suffer harm. Constant exposure to pornography, it is said, may instill a warped view of humankind, one in which people are seen as nothing more than sources of sexual gratification. It may promote solitary

sexual gratification, thereby misdirecting the consumer from more positive sexual activities. These consequences are said to be harmful by inhibiting the consumer's ability to develop normal affectionate relationships, thus causing isolation and alienation from society.

Special concern is expressed about the potential impact of pornography on children. It is argued that children are particularly vulnerable because they have no stable attitudes toward sexuality. Pornography, with its frequent use of violence and its distorted view of sexual conduct and of community standards, will stunt the growth of socially desirable habits and attitudes. Society, it is said, must provide a healthy moral environment for its young if they are to become normal, productive adults.

It is clear that pornography is deeply offensive to many people. They react to it with feelings of shock, disgust, anger and revulsion. There are two distinct circumstances in which people may be offended by pornography. An individual may willingly be exposed to pornography only to find that he is offended or an individual may be offended when he is involuntarily exposed to pornography. The latter circumstance is clearly of greater concern.

3. Summary

The Committee hopes to receive submissions relating to the true nature and extent of the harm discussed in this paper. In particular, it looks forward to receiving submissions which address the following issues:

(A) With respect to society,

- (1) to what extent, if at all, does exposure to pornography lead to an increase in sexual offences, violent crimes and aggressive anti-social behaviour?
- (2) to what extent, if at all, does pornography undermine the following social values?
 - (a) abhorrence of violence?
 - (b) equality of women?
 - (c) healthy sexual relations?
 - (d) healthy personal relations generally?
 - (e) healthy environment for children?
- (3) to what extent, if at all, does pornography provide an outlet for aggressive sexual tendencies?

- (4) to what extent, if at all, does pornography encourage healthier sexual relations?
 - (5) to what extent, if at all, does the distribution of pornography harm the neighbourhoods in which it occurs?
- (B) With respect to the participants and consumers,
- (1) to what extent, if at all, are the participants required to perform against their will?
 - (2) to what extent, if at all, are the participants subject to actual physical harm?
 - (3) what special harms, if any, are suffered by children who participate in the production of pornography?
 - (4) to what extent, if at all, are the participants exposed to higher than average risk of contracting sexually transmitted diseases?
 - (5) to what extent, if at all, do the participants suffer psychologically and emotionally as a result of being involved in the production of pornography?

- (6) to what extent, if at all, do consumers of pornography suffer in terms of
- (a) their view of other human beings?
 - (b) their ability to develop normal personal relationships?
- (7) what special harms, if any, are suffered by children who are exposed to pornography?
- (8) to what extent, if at all, are people offended by pornography in public places?

C. DEVISING THE APPROPRIATE RESPONSE

In the last section the harm associated with pornography was considered. In devising the appropriate response to this harm, society, and in particular its elected representatives, must be sensitive to a number of other factors. This is especially true when consideration is being given to using the law, particularly the criminal law.

The factors that will be considered here are as follows:

- (A) the fundamental rights and liberties that might be put at risk by legislation;

- (B) the extent to which law should enforce morality;
 - (C) the limitations of the law, and particularly the criminal law, as a social control mechanism; and
 - (D) whether or not the issue should be dealt with by local governments or by the national government.
1. Fundamental Rights and Liberties
- (a) Personal Liberty

There is a firm tradition in this country of upholding the right to personal liberty. Many of the rights embodied in the concept of liberty are expressly guaranteed in Canada's new Charter of Rights and Freedoms. Others have been recognized in statutes and at common law. In general, personal liberty exists when the State defers to the individual on matters concerning personal well-being and self-interest. It can be said to include freedom from all substantial arbitrary or purposeless restraints. It is a recognition that the State must demonstrate a significant need before it can infringe upon certain private interests.

Thus, the individual is permitted to engage in certain activities purely for pleasure, even if such activities may be

harmful. People are free to smoke, consume alcohol, hang-glide and participate in contact sports. There are, however, some instances where the State prohibits activities even though they directly harm only the individual who engages in them. The consumption of certain drugs is prohibited, for example, and one cannot consent to being murdered or to suffering grievous bodily harm. The question in respect of pornography, of course, is, to the extent that it involves self-inflicted harms, on which side of the line does it fall?

When the exercise of personal liberty leads to harm to the rights and interests of others, the State is, of course, justified in restricting personal liberty, not only to mitigate that harm, but also, and perhaps more importantly, to emphasize the importance of social responsibility. The questions here are, what kinds of harm to the rights and interests of others is caused by pornography and, to the extent that such harm is caused, is it sufficiently serious to warrant legislative or other governmental response?

(b) Freedom of Thought, Belief, Opinion and Expression and Freedom of the Press

These freedoms, like personal liberty, have for some time been recognized as fundamental rights in our society. They are now explicitly guaranteed in Section 2 of the Charter of Rights and Freedoms.

Are these freedoms at stake in the case of pornography? In particular, is freedom of expression at stake? It is often argued that pornography is not true expression because it does not convey an idea or information. In response to that argument, it is said that, if pornography did not convey an idea, it would not possess the power to shock and offend. If what is really meant is that pornography does not convey a rational idea, it is said that the argument misconceives the true nature of freedom of expression, for expression does not lose its value when it ceases to be a tool of rational discourse. Freedom of expression, it is said, is also concerned with the communication of emotions. Which of these arguments is the better one?

Freedom of expression is, of course, not absolute. It is restricted by truth-in-advertising laws, laws against defamation, coercion, sedition, hate propaganda, inciting to riot and many other laws. The important question is whether it is appropriate to further restrict freedom of expression by prohibiting pornography.

2. Law and Morality

The general nature of the debate about the extent to which law should enforce morality was described in the Common Elements part of this paper. Given the fact that some of the

harm attributed to pornography is of a moral nature, it will be necessary for the Committee to give considerable attention to the views expressed on each side of this debate.

3. Limitations of the Law

Even when legal controls are justified in principle, there may be pragmatic considerations which limit the use of the law. One such consideration is the likely consequences of enforcing legal sanctions. If enforcement produces greater harm than the legally restricted activity, legal controls have failed to achieve their purpose.

Experience suggests that, when legal sources of a product cease to exist, the demand may well be met by illegal sources, usually at an enormous profit. The people dealing in illicit products tend to become highly organized and there is a ripple effect as they broaden the scope of their illegal activities. When breaches of the law become widespread, uniform enforcement may become very difficult. Punishment tends to be meted out in a selective and hence unjust manner. And, unless there is a strong consensus to the effect that the law is necessary, the imposition of sanctions may well be seen to be disproportionate to the crime and the law quickly falls into disrepute.

To what extent, if at all, are these concerns realistic in the case of pornography?

Another consideration is the social and economic cost of enforcing the law. The resources of the legal system are limited. To enforce sanctions against one offence must either detract from the enforcement of other, perhaps more serious, offences or lead to an overall increase in the cost of law enforcement. What weight, if any, should be given to this consideration here?

As well, law enforcement does not simply affect those who break the law. On occasion, those involved in the administration of the law may interfere with the privacy, security, rights and freedoms of innocent citizens. How significant a consideration is this in the case of pornography?

Finally, it is generally believed that laws should be capable of sufficiently precise formulation that an individual can, with reasonable certainty, determine in advance whether or not his or her activities will be in breach of the law. A complaint that is frequently made in respect of the existing Criminal Code provision regarding obscenity is that this requirement is not met. Some would say that there is a very real question whether it can ever be met in this area. Is that concern well-founded? If so, what weight should be attached to

the likelihood that any definition of obscenity is likely to be imprecise?

4. The National versus Local Question

Constitutional considerations aside, it is essentially a matter of policy as to whether a perceived problem is better dealt with nationally or locally. Where uniformity is considered to be necessary or appropriate, national legislation is to be preferred. Where provisions specially tailored to meet local concerns are considered to be necessary or appropriate, local legislation is to be preferred.

The Committee looks forward to hearing the views of the public on the question of whether national or local legislation, or some combination thereof, is appropriate in the area of pornography.

The Committee welcomes the views of constitutional lawyers and others on the question of the limits of the powers of the federal and provincial orders of government in the area of pornography.

D. OPTIONS

The purpose of this section is not to present detailed legislative schemes for dealing with pornography, but rather to indicate the general nature of the available legislative options. These options are grouped under the headings (1) criminalization, which involves the use of criminal sanctions (although not necessarily the Criminal Code); (2) legalization, which involves the use of regulatory schemes; and (3) decriminalization, which involves the repeal of existing criminal legislation.

The difficulty in devising a satisfactory definition of pornography is compounded by the fact that each option may require a unique definition since it will, in general, be directed at the prevention of a particular harm. Different modes of presenting sexual representations may also require different combinations of legislative options.

1. Criminalization

If certain sexual representations are found to be inherently harmful in all circumstances, the most direct approach is a complete ban on their sale and distribution. Thus, if materials depicting the infliction of actual physical harm or of sexual behaviour with minors are found to pose a

serious threat to the models, or to give rise to some other serious harm, these materials could be strictly prohibited. Similarly, the explicit representation of certain sexual acts may be found inherently harmful and be prohibited.

The advantage of this approach is its simplicity. The prohibited material is identified solely by its contents, irrespective of the context in which it is viewed, or the mode of its communication. Thus, a reasonably precise definition of pornography could be expected.

If some sexual representations are found to be harmful only in certain contexts, it may be difficult to justify completely prohibiting them. However, it might be possible to limit the scope of the prohibitory legislation to those contexts in which the representations are thought to be harmful. For example, if it were decided that actual sexual activity in a live stage show is harmful while the same activity is harmless when portrayed in a photograph, it might be appropriate to proscribe the former and not the latter.

Prohibitions against pornographic material may be enforced in two ways. Vendors could be subject to prosecution for selling prohibited material or a system for pre-screening the material before sale could be established. A system of pre-screening is said to have a number of advantages:

- (A) generally the law would be applied with greater certainty and consistency since, presumably, the material would be pre-screened by a permanent board;
- (B) ambiguities in the definition of pornography would be less serious because vendors would not be subject to a penalty if their material was found to be unacceptable for distribution;
- (C) pre-screening also provides more effective control since it prevents objectionable material from becoming available at all, rather than trying to discover and retrieve it after it appears on the market;
- (D) during the screening process, allowable material could be classified according to the nature of its contents, as is now done with films, thereby providing a uniform standard which could assist consumers who wish to avoid exposure to certain kinds of material.

However, even in the area of pornography, the notion of prior restraint is unpalatable to many people. There are several reasons for this:

- (A) the process involved is generally less open than a criminal prosecution and therefore the merits of each decision to prohibit material are less subject to public scrutiny;
- (B) the notion that certain people are qualified to judge what is acceptable for others to see amounts to elitism;
- (C) the cost of pre-screening all material which might be pornographic may be seen to be unacceptably high.

Many have argued that, whatever the form, we have long recognized, as a corollary to personal liberty and privacy, the right of an individual to be free from unwanted exposure to offensive material when in a public place or the privacy of the home. Thus, public sexual activity, nudity and the use of obscene language have all been prohibited because they affront individuals who have a right to the use of public areas. It might be appropriate, therefore, to prohibit the public display of sexual material which may be offensive.

The difficulty is in deciding which material should be prohibited. Should we seek to protect the most sensitive or vulnerable individuals likely to be exposed, for example children? If so, how could we reconcile such a standard with

the protection of freedom of expression? Alternatively, we could adopt a test based on the hypothetical reasonable person to determine offensiveness. Or perhaps there are some sexual representations which are inherently offensive?

Finally, it is not clear what constitutes public dissemination. How improbable must involuntary exposure be before the standard of offensiveness becomes irrelevant?

2. Legalization

Legalization would seek to mitigate the harm associated with pornography by regulating its sale and distribution. This would be done primarily by a system of licensing and zoning. Vendors who deal in a particular class of material (which again would have to be defined) could be required to obtain special licences. These licences could, for example, require vendors to post signs warning of the nature of the goods for sale in their premises and indicating that minors are prohibited from entering. They could also require vendors to label their goods to forewarn unsuspecting customers of their contents. Other restrictions could be imposed to limit the hours of operation, the contents of window displays and advertising and the general operation of the business.

The potential harm to neighbourhoods presented by pornographic vendors could be controlled by local zoning laws. These laws could be used to prevent the concentration of pornographic vendors in a given area, or they could be used to exclude them from residential neighbourhoods.

3. Decriminalization

It may be found that the perceived harm of some material containing sexual representations does not justify any legal control. For example, it might be found that material produced for private consumption should, in the interests of privacy, be unrestricted. Furthermore, material which possesses serious artistic or literary merit might be thought to deserve protection. The problem, of course, is that exceptions based on aesthetic judgments are extremely difficult to apply.

The decriminalization approach would, of course, allow for the possibility of civil actions by private citizens in appropriate circumstances. In the State of California, for example, private citizens have resorted to bringing nuisance actions against the owners of adult bookstores who display obscene material in their windows. Given the present state of the law of nuisance in Canada, such actions are not feasible.

Provincial legislation is presumably necessary to permit such actions to be taken.

This approach would also allow for self-regulation by the industry. The Committee will be interested to hear what standards the industry thinks it would impose on itself if decriminalization occurred.

IV. PROSTITUTION

A. INTRODUCTION

1. The Facts

Prostitution can be defined, in simple terms, as the provision of sexual services for financial reward. Men, women and children are known to work as prostitutes in Canada. Their customers, it seems, continue to be almost exclusively male. It is clear that homosexual as well as heterosexual services are being provided.

The business of prostitution is conducted in a variety of ways. The most visible of these is solicitation on the streets. However, some prostitutes rely on the phone and word of mouth and operate discreetly in private surroundings, either in a group or on their own. In some instances, "fronts" such as massage parlours and steam baths are used.

The Committee welcomes statistical data as well as other information on the various ways in which prostitutes conduct their business.

The Committee is anxious to receive information on the numbers of prostitutes in Canada and the breakdown of those numbers as between men, women, boys and girls. We want to try and determine whether the number of prostitutes is actually increasing.

Information about customers - who they are, why they use prostitutes, etc. - will also be important.

2. The Law

Prostitution itself has never been a crime in Canada. However, various activities associated with it, such as street solicitation, the operation of bawdy-houses, procuring and living off the avails, have been, and are still, the subject of criminal sanctions.

With the exception of the provisions directed against bawdy-houses, the criminal law's concern has been the public manifestations of prostitution. Prostitutes who practise their trade off the streets are generally free from interference by the law, and insofar as they are free to operate within ostensibly legitimate commercial enterprises, such as massage parlours or steam baths, their activities may be seen as subject to a regulatory or licensing, rather than a criminal law, regime.

The activities currently prohibited by the Criminal Code include: keeping, being an inmate of, being found without lawful excuse in, and allowing a place to be used for the purposes of, a common bawdy-house (Section 193); transporting or directing, or offering to transport or direct, another person to a common bawdy-house (Section 194); many of the activities associated with pimping (for example, procuring and living off the avails) (Section 195); and soliciting in a public place for the purpose of prostitution (Section 195.1). It is to be noted that, as a result of a recent amendment, males as well as females can be prostitutes.

The soliciting offence has been severely restricted in scope by the Supreme Court of Canada. In the Hutt case, decided in 1978, the Court ruled that the behaviour of the prostitute must be "pressing or persistent" in order for it to constitute soliciting for the purposes of Section 195.1. It was also indicated in that case that a private car on a public thoroughfare did not constitute a "public place".

In another case, Regina v. Whitter and Galjot, decided in 1981, the Court ruled that the requirement of "pressing or persistent" behaviour was not met by showing that a prostitute had approached a number of different men in succession.

It should be noted that, in June of 1983, the Minister of Justice proposed changes to Section 195.1 to make it clear that the customer, as well as the prostitute, could be charged thereunder and to expand the scope of the term "public place".

In the last few years, a number of cities in Canada passed by-laws designed to control street solicitation. However, the Supreme Court of Canada ruled in January of 1983 in the Westendorp case that the by-law passed by the City of Calgary was unconstitutional on the ground that it constituted "criminal law", a field of exclusive Federal jurisdiction. The validity of all such by-laws is therefore open to serious question.

Section 193 of the Criminal Code makes the keeping of a common bawdy-house an indictable offence. A "common bawdy-house" is defined in Section 179(1) as a place that is "(a) kept or occupied, or (b) resorted to or by one or more persons, for the purposes of prostitution or the practice of acts of indecency". The Supreme Court of Canada has given a restrictive interpretation to the term "bawdy-house" by holding that proof of frequent or habitual use of the premises for prostitution or indecency is required (R. v. Patterson). At the same time the Ontario Court of Appeal has given the term a broad interpretation by convicting a prostitute under Section

193 for using her own residence for purposes of prostitution
(R. v. Worthington).

The question of whether prostitution should be "decriminalized" or "legalized" has been asked for centuries. In the context of the present law in Canada, the real questions should perhaps be whether the various activities associated with prostitution should be "decriminalized" or "legalized", and whether prostitution should be "criminalized".

B. IDENTIFYING THE HARM

Prostitution is alleged to cause various kinds of social harm. If the Committee is to make recommendations about prostitution it is necessary at this early stage to identify what this harm is or may be and who suffers from it.

1. Harm to Society

Many people believe that prostitution attracts organized crime and generates a good deal of serious related criminal activity. The most prevalent of these attendant crimes are said to be theft, assault, drug trafficking and break-ins. However, the link between these crimes and prostitution is not yet clear. Some studies dispute the proposition that a criminal subculture thrives around

prostitutes. And, even if there is a higher incidence of criminal activity surrounding prostitution, it is said, this higher incidence may not be the inevitable result of prostitution as such, but may be caused by its quasi-illegal status, which, it is said, forces prostitutes into a deviant lifestyle.

To many, prostitution poses a threat to society's moral standards, and in particular to the sanctity of the family unit. Some argue that the law must reflect society's moral standards. Otherwise, they say, there will be no recognizable public agreement about good and evil and society as we know it will disintegrate.

Another view is that prostitution quite specifically harms society by harming women. It is seen as but one expression of a contemporary society which dehumanizes human beings and turns sexual encounters into commodities. Those who hold this view say that society must protect itself not by stringent prostitution laws, but by a wholesale correction of attitudes towards women and sexuality.

One of the harms attributed to prostitution is an increase in sexually transmitted diseases. Studies suggest, however, that the number of venereal disease cases which can indeed be traced to female prostitutes remains constant and

below 5% of the total. Although this evidence has been gathered in the United States, it seems unlikely that the experience in Canada would be markedly different. It may be, therefore, that female prostitution does not represent a significant health risk in Canada today.

There is reason to believe, however, that male prostitution does represent a significant health risk, particularly because of the risk of transmitting AIDS through sexual contacts.

Special concern is expressed about the effect of street solicitation on the neighbourhoods in which it occurs. Apart from presenting an attack on the quality of life in a neighbourhood, soliciting by prostitutes is said to cause economic harm to both businesses and homeowners.

It is also alleged that street solicitation causes public nuisance problems including harassment, obstruction of streets and sidewalks, litter, graffiti, the use of private and public property for indecent acts, increased vehicular traffic and a higher noise level. How many of these are attributable to prostitutes and how many to the customers and on-lookers is not entirely clear, but it is apparent that the prostitutes are by no means solely responsible for them.

Neighbourhood women and children are seen as particular victims in residential areas where street soliciting occurs. In large urban centres, it is said that women are often mistaken for prostitutes and are harassed, verbally abused or otherwise inconvenienced by men shopping for sexual services.

2. Harm Suffered by the Participants and Customers

Physical abuse of prostitutes by their customers has been extensively documented. Some studies suggest that up to 70% of prostitutes are raped by customers on an average of 8 to 10 times a year. This problem is said to be compounded by the fact that the perpetrators remain largely insulated from prosecution, either because very few of the victims actually lay charges or because, for one reason or another, such charges are not pursued.

Pimps are also accused of abusing prostitutes. Some of this abuse is said to be physical while some of it is said to be psychological and emotional.

The extent of the financial harm which prostitutes suffer at the hands of their pimps remains largely a matter of speculation. Some observers maintain that pimps take as much as 90% of a prostitute's income. It is unclear, however, how

many prostitutes actually have pimps. Moreover, some people argue that much of the money that is paid over to a pimp may well be within the limits of reasonable remuneration, since pimps provide a number of valuable services ranging from providing bail to ensuring that the children of prostitutes have babysitters.

Considerable concern is expressed about the effect on prostitutes of general social attitudes towards prostitution. It is said that a double standard is applied as between customers and prostitutes with the result that the purchasing of sexual services is seen as normal and acceptable behaviour, while the provision of such services is deemed deviant. While their customers continue to enjoy the advantages of social prestige, prostitutes are not only denied these advantages but, paradoxically, are also much maligned for the company they keep.

Whether or not the customers of prostitutes can be said to suffer any harm is unclear. Some people suggest that the use of prostitutes results in an unhealthy view of sexual relations. Others suggest that customers of female prostitutes at least will tend to develop an unhealthy view of women as well.

3. Children:

The incidence of child prostitution in larger urban centres appears to be increasing. To many Canadians this is both the most notorious and urgent aspect of the prostitution issue. The harm which adult prostitutes are thought to suffer is, of course, more devastating to children. The Committee hopes that it will receive some submissions that particularly address the problems and concerns that surround prostitution by children.

4. Summary

The Committee hopes to receive submissions relating to the true nature and extent of the harm discussed in this paper. In particular, we look forward to receiving the public's views on the following issues:

(A) With respect to society,

- (1) what relationship, if any, is there between prostitution and the incidence of sexually transmitted diseases?
- (2) what relationship, if any, is there between prostitution and organized crime?

- (3) what relationship, if any, is there between prostitution and serious criminal activity?
- (4) what are the effects, if any, of prostitution on marriage and the family unit?
- (5) what are the effects, if any, of prostitution on society's perception of women and of children?
- (6) what, if any, are the economic effects of street solicitation?
- (7) what, if any, are the public nuisance effects of street solicitation?
- (8) what relationship, if any, is there between street solicitation and acts of violence in the neighbourhood?
- (9) what, if any, are the effects on women in the neighbourhood?
- (10) what, if any, are the effects on children in the neighbourhood?
- (11) what, if any, are the effects on family and social life in the neighbourhood?

(B) With respect to the participants,

- (1) what physical abuse, if any, do prostitutes suffer as a result of being prostitutes?
- (2) to what extent, if at all, are prostitutes exploited by pimps and others?
- (3) to what extent, if at all, do prostitutes suffer psychologically, emotionally or otherwise as a result of the social attitudes towards prostitution?
- (4) in what way, if at all, do each of the above affect child prostitutes?

C. DEVISING THE APPROPRIATE RESPONSE

Even more difficult than identifying and quantifying the social harm associated with prostitution is deciding how to eliminate, or at least alleviate, this harm.

Is legislation the most appropriate response? If so, what kind of legislation? In particular, is it appropriate to use the Criminal Code?

In order to answer these questions intelligently, at least four basic considerations must be addressed:

- (1) the fundamental rights and liberties that might be put at risk by legislation;
- (2) the extent to which law should enforce morality;
- (3) the limitations of the law, and particularly the criminal law, as a social control mechanism; and,
- (4) whether or not the issue should be dealt with by local governments or by the national government.

Each of these considerations will now be addressed in turn.

1. Fundamental Rights and Liberties

(a) Personal Liberty

There is no need to repeat what was said in the pornography part of this paper about the importance our society attaches to personal liberty.

Of course, the State is justified in restricting personal liberty when its exercise results in harm to others, not only to mitigate that harm but also, and perhaps more importantly, to emphasize the importance of social responsibility. To the extent, therefore, that the personal liberties of the prostitute and/or the customer can be said to result in harm to others, the State may well be justified in acting. The questions for the lawmaker are whether or not an alleged harm is the kind of harm with which the law (and particularly the criminal law) should concern itself and, if so, whether or not the harm is sufficiently serious. These questions will have to be asked in respect of each of the activities associated with prostitution as well as prostitution itself if there is support for legislating directly against it.

(b) Equality

One of the complaints frequently heard about the existing Criminal Code provisions relating to prostitution is that they are discriminatory. This complaint relates both to the content of the legislation and to the manner of its enforcement. For example, under the current soliciting provision, the B.C. Court of Appeal has held that only the prostitute can be charged. This means that, in British Columbia at least, the customer and the prostitute are not treated equally by the law itself. On the other hand, in

Ontario, where that province's Court of Appeal has ruled that the customer as well as the prostitute can be charged with street soliciting, it is alleged that, in fact, many more prostitutes are charged than customers.

As we mentioned earlier, the proposed amendments to Section 195.1 will make it clear that the customer can be charged with soliciting.

The concern for equality is not based solely on a desire to see customers treated in the same way as prostitutes. It is also based on a desire to see street prostitutes treated no differently from more prosperous and sophisticated prostitutes. This is one reason advanced by some groups as an argument in favour of removing the prohibition against street solicitation from the Criminal Code.

2. Law and Morality

To the extent that the harm associated with prostitution can be said to be moral in nature, it is necessary to determine whether or not it is appropriate for the law to respond to it. This would be particularly important if consideration were to be given to making prostitution itself a crime.

3. Limitations of the Law

The concern here is obvious.

Will the law be effective in eliminating or at least substantially reducing the harm associated with prostitution?

Will it give rise to other harms more serious than those it is aimed at?

Can society afford the cost of enforcement?

Will the manner of enforcement be such that the law will be brought into disrepute?

Clearly the law will have difficulty achieving its purpose when there is a heavy and widely distributed demand for the services of prostitutes. It is worth noting that prostitution continues to flourish in the United States even though it is prohibited in all but one state. And, while the evidence suggests that they were certainly more effective in controlling street solicitation than the Criminal Code provision has been, by-laws in cities like Calgary and Vancouver did not eliminate the activity entirely while they were being enforced (although the absence of the power to arrest is said to have been a contributing factor in that).

A steady demand for the services of prostitutes is not the only reason for doubting the effectiveness of anti-prostitution legislation. Some observers have expressed the view that prostitutes who are either fined or imprisoned are virtually compelled to return to prostitution as soon as possible in order to recoup their losses, since that is the way they can most easily earn a living.

The cost factor is one of the major reasons given by those who believe that the controls on prostitution related activities should be tightened. The tighter the controls, they argue, the easier it will be for the police to lay charges and the less costly the enforcement process will be. This, no doubt, is true. The larger questions, however, are whether society wants to spend tax dollars enforcing legislation aimed at prostitution as a priority, and whether the same money would not be better spent if it were directed to alleviating the causes of prostitution?

Although perhaps not a major consideration, the manner in which the law would be enforced is also relevant in deciding whether or not to legislate on the matter of prostitution. Mention has already been made of the concern that legislation aimed at prostitution tends to be enforced discriminatorily. It is also worth noting that the standard method of enforcing street soliciting legislation has been to have police officers

masquerading as customers. In some instances, policewomen masquerade as prostitutes. These practices not only must be offensive to the police but also resemble "entrapment" as that term is popularly understood.

Advocates of the use of the criminal law to tighten the existing controls on prostitution will wish to consider whether such use is consistent with the approach to criminal law outlined in The Criminal Law in Canadian Society, referred to in the Common Elements part of this paper.

4. The National Versus Local Question

If prostitution is to be dealt with by legislation, is it better dealt with by national legislation or by local legislation?

The difficulty with prostitution, and in particular with the street soliciting aspect of it, is that, the nature of the problem does not clearly point to either one of these two responses as being the more desirable.

On the one hand, if one focuses on the broader concerns to which prostitution gives rise, in particular the concerns about moral standards, the effect on society's perception of women, the effect on children and the right of

people to live free from fear of violence, a strong case can be made for uniform national legislation.

On the other hand, if one focuses on the narrower concerns relating to increased noise and traffic, an equally strong case can be made for specially tailored local provisions. And the fact that a number of cities across the country are experiencing prostitution-related problems at the moment does not necessarily weaken the case for such specially tailored local provisions. For there is reason to believe that some of the cities are experiencing quite different kinds of problems. In Vancouver, for example, the problems appear to stem from the fact that prostitutes have invaded residential areas; in Niagara Falls, the problems appear to stem from the influx of prostitutes from across the border.

One compromise or solution that has been suggested would be a combination of national and local legislation. National legislation would deal with the broader concerns, while local legislation would be designed to deal with the narrower concerns. This would ensure uniformity in some respects and allow for specially tailored provisions in others.

Of course, it is not policy alone that determines whether a perceived problem is to be handled nationally or locally, or by some combination of the two. The division of

lawmaking power between Parliament and the Provincial Legislatures is also important. And there is no doubt that the ability of local governments to deal with prostitution is limited as a result of the recent decision of the Supreme Court of Canada in the Westendorp case. In striking down Calgary's street solicitation by-law, the Court made it clear that prohibitory legislation aimed directly at prostitution or prostitution-related activities constituted "criminal law" and was beyond provincial (and hence municipal) jurisdiction.

Whether or not local governments can control prostitution-related activities other than by enacting prohibitory legislation aimed specifically at those activities, remains unclear. Some have suggested that general nuisance by-laws might be permitted. Others have said that all that is left to local governments is regulatory legislation along the lines of licensing schemes or zoning by-laws.

The possibility that Parliament might be able to delegate its power over "criminal law" to the municipal governments in this one area has also been discussed. However, whether or not such a scheme would be constitutional remains unclear.

D. OPTIONS

The options for dealing with prostitution will be discussed under these headings: (1) criminalization, which involves the use of criminal sanctions (although not necessarily the Criminal Code); (2) legalization, which involves the use of regulatory schemes; and (3) decriminalization, which involves the repeal of existing legislation (thereby leaving prostitution and its related activities to be governed by the general provisions of the Criminal Code and other legislation).

The following is a sampling of some of the choices which may be available to the Committee. They are organized into the broad options. Two of these options are taken directly from proposals made to the Standing Committee on Justice and Legal Affairs during the course of its recently concluded consideration of the issue of how to deal with the matter of street soliciting for the purpose of prostitution. One of the options is that recommended by the Standing Committee itself.

1. Criminalization

As examples of the criminalization approach, one has the following:

(a) The Position before the decision in Regina v. Hutt

The pre-Hutt position involves the same prohibitions as are now in the Criminal Code minus the interpretations of s.195.1 given by the Supreme Court of Canada in Hutt, in particular the requirement that the prostitute behave in a "pressing or persistent" manner. More than one witness before the Standing Committee on Justice and Legal Affairs suggested this as a reasonable option, at least insofar as street soliciting was concerned.

(b) The Standing Committee's Recommendations

These were directed specifically at the problem of soliciting for the purpose of prostitution and were as follows:

- (1) That, whatever changes are made to s.195.1 of the Criminal Code, it should be amended to remove the uncertainty as to whether clients are liable to prosecution;
- (2) That a new offence be added consisting of the offering or the acceptance of an offer to engage in prostitution in a public place [subject to a lesser punishment than the existing s.195.1];
- (3) That the definition of "public place" be amended to include vehicles in public places, and private places open to public view;
- (4) That a new offence of offering or accepting an offer to engage in prostitution with a person under 18 be enacted, punishable either on summary conviction or by way of indictment;

- (5) That the operation of the proposed amendments be reviewed by a committee of the House of Commons within three years of their coming into force.

It is clear from the report of the Standing Committee's proceedings that there was support for a tightening of the law as it relates to the role of pimps. Had the Standing Committee's terms of reference been broad enough, it seems likely that a recommendation to that effect would have been forthcoming. However, there are some who argue that, at least insofar as the offence of living off the avails is concerned, the law should be relaxed to take account of the fact that, in many instances, the relationship between a prostitute and a pimp can be truly voluntary and free of abuse.

It will be noted that the Standing Committee recommended the enactment of a special provision in the area of street soliciting to protect children. Serious consideration would presumably have to be given to the enactment of similar provisions to protect children in all aspects of prostitution.

2. Legalization

The basic thrust of this approach is regulation which normally takes the form of a licensing scheme. Such a scheme could license prostitutes or the establishments where prostitution takes place, or both.

The arguments commonly advanced in favour of a licensing scheme include:

- (A) easier law enforcement than in the case of criminal prohibitions;
- (B) improved health standards;
- (C) the cleaning up of the streets;
- (D) reduction in the need for pimps;
- (E) increased tax revenue;
- (F) an improved self-image for prostitutes.

However, it is said that there are several disadvantages to such an approach as well:

- (A) the State is seen to endorse, and even to institutionalize, prostitution;
- (B) the State appears to play the role of pimp;
- (C) the prostitutes lose the freedom to decide where and when they work and with whom they contract;

- (D) there would still have to be legislation, presumably prohibitory in nature, to govern prostitution that is conducted without the required licence.

There is reason to believe that the licensing approach appeals to a significant portion of the Canadian public, at least insofar as female prostitutes are concerned. Serious consideration was apparently given to it by the City Council of Calgary. However, there are many who are opposed to this approach because of its implication that society approves of women being viewed as products to be purchased by men.

The amount of public support for the licensing approach as far as male prostitutes are concerned is unclear. It may be that there would be less support than in the case of female prostitutes. If this proved to be true, would it be constitutionally possible to employ the licensing technique only for female prostitutes?

We find it almost impossible to imagine that there can be any support in Canada for the licensing of child prostitutes.

3. Decriminalization

The decriminalization approach to prostitution is directed towards the repeal of existing laws governing

prostitution-related activities. If adopted, it would mean that the decriminalized activities would fall within the general law. For example, street soliciting would be governed by the Code provisions relating to such matters as causing a disturbance (s.171(1)(a)), loitering and obstructing others (s.171(1)(c)), disturbing the peace (s.171(1)(d)) and trespassing at night (s.173), while the problems associated with the operation of bawdy-houses would be dealt with by provincial landlord and tenant and nuisance laws.

A good example of the decriminalization approach is provided by one of the proposals made to the Standing Committee on Justice and Legal Affairs. That proposal entailed the following:

1. Section 195.1 of the Criminal Code, soliciting for the purposes of prostitution, ought to be repealed.
2. In the alternative, Section 195.1 ought not to be amended with a view to cancelling the effect of R. vs. Hutt S.C.C. It is doubtful, and we doubt, that soliciting which is pressing and persistent is sufficiently harmful to properly constitute a crime; however, it is clear that soliciting which is not pressing and persistent is not sufficiently harmful, and should not constitute an offence.
3. Section 193, Keeping a Common Bawdy-House, ought to be repealed.

4. The problems raised by the phenomenon of street prostitution, insofar as they would remain if recommendation 3 were adopted, should be regarded as problems of public order. They are properly dealt with by legal remedies other than criminal sanctions aimed specifically and exclusively at the prostitutes. For example:
 - (a) Existing provincial residential tenancy legislation protects the right to quiet enjoyment of one's residential premises. In the event that section 193 is repealed this legislation, along with well developed common law, is available to deal with any nuisances arising from the operation of bawdy-houses.
 - (b) Motor vehicle legislation, municipal zoning by-laws and similar regulatory legislative controls can be used to control any nuisance problems resulting from street prostitution.
 - (c) Insofar as serious nuisance problems that amount to criminal behaviour manifest themselves, enforcement of existing sections of the Criminal Code can be relied upon. Specifically, section 171 (Causing a Disturbance, Indecent Exhibition, Loitering, etc...), section 169 (Indecent Acts), section 305 (Extortion), and section 381 (Intimidation) could be used.
5. The social problems which result in the existence of underage prostitutes are properly dealt with by provincial social service agencies. Insofar as the Criminal Code needs to be used, Section 166 (Procuring Defilement) is available. (Sections 166 to 168 are being considered for amendment by the Justice Committee of The Parliament of Canada via Bill C-53).
6. Miscellaneous other sections of the Criminal Code may need amendment to secure consistency with these recommendations.
7. Funds should be made available for a wide variety of social service and educational programs for women and youth in distress.

Advocates of decriminalization rely on essentially three lines of argument to support their position.

First, they claim that laws prohibiting activities engaged in by prostitutes are so abusive of, and unfair to, the prostitutes that these laws trigger more social harm than they prevent.

Second, they argue that sexual relations between consenting adults are a private affair and should be left untouched by the law.

Third, they emphasize the savings in time and effort and hence tax dollars that will flow from decriminalization.

Opponents of decriminalization argue that experience has shown that the general provisions of the Criminal Code, at least as presently worded, cannot be used to control street soliciting. One of the major reasons for this is said to be that members of the public are reluctant, for obvious reasons, to lay charges.

It might also be said in response to the first two arguments advanced in support of decriminalization that they could equally well be made against the use of the general Code provisions to control prostitution related activities.

Proponents of decriminalization see a vital distinction between it and legalization. Decriminalization, they argue, involves no value judgment on the part of the State insofar as prostitution is concerned, while legalization does. This, however, is a subtle distinction and one which may not be appreciated by the public. The public's view may be that the very act of removing the existing prohibitions constitutes some kind of state approval of prostitution.

V. CONCLUSION

We hope that this discussion of the issues and questions involved in problems related to pornography and prostitution has been useful. We also hope that the choices we have referred to will be helpful to those whose opinions and views we seek. We have no doubt that there are other questions to be considered and other choices to be pondered. Both issues have, after all, concerned and confounded thoughtful persons for centuries.

It would be unrealistic to expect that we will be able to provide any perfect solutions. We do hope and expect, however, that Canada will benefit from the opportunity we have been given to provide a forum for a dialogue among its citizens.

CITATION OF CASES REFERRED TO:

- R. v. Brodie, Dansky and Rubin [1962] SCR 681
- R. v. Dominion News and Gifts Ltd. [1964] SCR 251
- R. v. Hutt (1978) 1 CR (3d) 164
- R. v. Whitter and Galjot (1981) 129 DLR (3d) 577
- R. v. Westendorp [1983] 2 WWR 385
- R. v. Patterson (1968) 3 CRNS 23
- R. v. Worthington (1972) 22 CRNS 34

(Members of the public interested in reading these decisions will find them in any courthouse library or law school library.)

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