

# A CRITIQUE OF A PROPOSAL BY RADICAL FEMINISTS TO CENSOR PORNOGRAPHY BECAUSE OF ITS SEXIST MESSAGE

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## I INTRODUCTION

Several groups have become increasingly critical of the present system's handling of allegedly pornographic books, documents, sound recordings, films and videotapes. In addition to traditional opposition to the graphic depiction of sexuality on grounds of immorality, a new approach has become both vocal and popular. This approach focuses on an alleged anti-female message inherent in pornography. Women Against Pornography, a Wellington-based organisation formed in 1983, is one of these groups. Although they have many criticisms of the present system,<sup>1</sup> the most serious concern the current censorship criteria. They have proposed a new definition for "pornography" which would invest the sexist message they allege it conveys with much greater significance in the censorship decision. They contend that available materials convey false and damaging messages about women and their sexuality, for example that women enjoy physical and mental cruelty and that they exist primarily or solely to gratify men sexually. They argue that the substance and offensiveness of the message should be the determinative factor in censorship decisions, rather than explicit sexual detail.<sup>2</sup>

There is evidence of receptivity to this viewpoint, which I shall label as the radical feminist position.<sup>3</sup> A minority report by Indecent Publications Tribunal members Barrington and Dick recently stated that they "intend to take judicial notice of the feminist arguments, and . . . would welcome

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1 They argue, for example, that censors are too lenient; that graphic videos are getting into the hands of young children; that the censorship process is inaccessible to interested members of the community; and that it is too costly to file a complaint.

2 See eg Women Against Pornography, *Submission on Video Recordings Bill* (1986) s 1.1.3 (on file at Otago Law Faculty); Women Against Pornography, *Submission to Justice and Law Reform Select Committee on Draft Bill of Rights* (1985) (hereafter *Bill of Rights Submission*) s 1.1.3 (on file at Otago Law Faculty).

3 I am hesitant to do so because of the pejorative connotations of the word "radical" but I am left without a more suitable descriptive term. Past practice has been to denote this as the "feminist" viewpoint (eg JL Caldwell, "The Video Recordings Act 1987" (1987) 12 NZULR 438, 439), but this approach is misleading as there is substantial disagreement within the feminist community over legal regulation of pornography. See eg T Reid, "Defending Porn and Other Unpopular Causes" (12 December 1987) NZ Listener 30; J Leo, "Pornography: The Feminist Dilemma" (21 July 1986) Time 44. See also V Burstyn (ed), *Women Against Censorship* (1985); B Faust, *Women, Sex, and Pornography* (1980); A Ryan, "Policing Pornography: A Repressive Strategy" (May 1988) Broadsheet 38.

the opportunity in the future to have these arguments fully tested".<sup>4</sup> The government also appears open to this position. Minister of Justice Geoffrey Palmer justified the formation of a Committee of Inquiry into Pornography, which has followed so quickly upon passage of the Video Recordings Act 1987, by stating that "[t]he worrying message implicit in some pornographic materials now available is that men are entitled to treat women with violence. [A]nd that women are the sexual subordinates or mere objects for the sexual gratification of men".<sup>5</sup>

The Committee of Inquiry's terms of reference require it to "examine the relevant legislation (including the Indecent Publications Act 1963, the Films Act 1983 and the Video Recordings Act 1987), paying special regard to: (i) the criteria for determining whether material should be prohibited or restricted . . .".<sup>6</sup> Women Against Pornography will presumably make a submission favouring legislative revision in accord with their views. Their submissions on the Video Recordings Bill and the draft Bill of Rights proposed a definition of pornography which departs radically from present censorship criteria. They advocated censorship of "[m]aterial which depicts women or children as sexual subordinates, or as mere objects for the sexual gratification of men, in a manner which misrepresents the nature of female sexuality and in a context which endorses that depiction".<sup>7</sup> This definition reflects their most recent position on censorship criteria. It will be taken as an illustrative example of the radical feminist approach.<sup>8</sup>

Current legislation is arguably broad enough (or vague enough) to encompass this approach within the statutory criteria of "indecency" and "injury to the public good". Whether viewed as a focus permissible under existing legislation or a proposal for legislative reform, it is important to consider the merits of the radical feminist approach and the desirability of its widespread application to New Zealand censorship decisions. This article considers the justifications for and desirability of the major tenets of Women Against Pornography's position. Part II briefly reviews the justifications they offer in support of heightened censorship and their criticisms of the present legislation. Part III evaluates the definition they propose. It is argued that the definition is overly broad and vague and that it does not achieve their stated purpose. Part IV examines the adequacy of analytical and research support for the proposed change. It is argued that radical feminists do not support their premises that characters in pornography are perceived as representative of all women, that pornography

4 *Re "Knave" and "Fiesta"* [1986] 6 NZAR 223, 225. This position was criticised on appeal. *Comptroller of Customs v Gordon & Gotch (NZ) Ltd* [1987] 6 NZAR 469, 482-483. See section IV 1(a) *infra*.

5 "Porn Inquiry to Be Launched" (16 July 1987) *Otago Daily Times*.

6 "Terms of Reference Released" (20 November 1987) *Otago Daily Times*.

7 *Submission on Video Recordings Bill* s 1.1.2; *Bill of Rights Submission* s 1.1.3.

8 I have endeavoured to discover whether they plan to advocate this definition before the ministerial Committee of Inquiry but have met with no success. They used it in submissions on the draft Bill of Rights as well as the Video Recordings Bill, in pamphlets and other material, and at a 1987 public address. A Women Against Pornography booklet discussing a definition only in the context of social science research used a similar but different formulation in a footnote. See C Atmore, *Pornography and Violence Against Women and Children* (Women Against Pornography 1986) (hereafter *Pornography and Violence*) at 35 (on the file at Otago Law Faculty).

presents a grossly distorted view of sexuality, and that use of pornography perpetuates sexual inequality, and causes aggression and negative attitudinal change. Part V considers the desirability of the proposed change in emphasis, and concludes that it would be disadvantageous by unduly restricting free speech and hindering the campaign for sexual equality by diverting attention and resources away from more important issues, causing a probable backlash, and returning to the notion that women require special legislative protection from men.

## II THE RADICAL FEMINIST APPROACH

### 1 *Alleged harms of pornography*

Radical feminists view pornography<sup>9</sup> as extremely dangerous. They contend that these materials foment violence against women and children, distort users' attitudes about women and their sexuality, and perpetuate sexual inequality.

The link between pornography and aggression figured in the Minister of Justice's announcement of the formation of the Committee of Inquiry. He stated that "[r]esearch suggests there is a connection between the portrayal of sexual violence and violent attitudes towards women".<sup>10</sup> Depictions of aggression against women are found in pornography, and Women Against Pornography argue that the context endorses such behaviour. They argue that use of pornography can cause violence against women and children, and develop a taste for sexual deviance which is ultimately acted out with unwilling partners. The Report of the US Attorney General's Commission on Pornography<sup>11</sup> is frequently cited in support of this proposition.<sup>12</sup> In marked contrast to earlier studies, this report concluded that there is a causal link between use of violent pornography and aggressive behaviour toward women, and that exposure to sexually explicit material that is not violent but that does degrade women bears "some causal relationship to the level of sexual violence".<sup>13</sup>

Women Against Pornography contend that in addition to engendering aggressive conduct by susceptible men in the nature of assault and rape, pornography causes widespread and insidious changes in attitude. Specifically, they argue that pornography implants the false ideas about sexuality that women are inferior objects whose sole or primary purpose is to please men, and that they enjoy being raped and abused. They contend that pornography misrepresents the nature of female sexuality by showing women acting in uncharacteristic ways, and that the context of the material

9 New Zealand statutes avoid use of the words "obscenity" and "pornography", preferring to refer to "indecent" books, sound recordings, documents, and videotapes, and films whose public display is not "in the public good". The radical feminist definition of pornography is not the common usage, and is subject to criticism. See section III *infra*. Nevertheless, for the sake of clarity use of the word in this article follows my understanding of their intended meaning.

10 "Porn Inquiry to Be Launched" *supra* n 5.

11 Attorney General's Commission on Pornography, *Final Report* (July 1986) (hereafter *US Attorney General's Report*).

12 See eg "Pornography: The Feminist Dilemma" *supra* n 3 at 44.

13 *US Attorney General's Report* at 324-325, 333-334.

treats the misrepresentation as fact.<sup>14</sup> For example, some films show women ecstatically acquiescing in rape after initial resistance. The radical feminists assert that this scene conveys a message that women's resistance is only feigned and that they respond positively to force.

The final justification offered by radical feminists for heightened restriction of pornography is its alleged role as an instrument of oppression. The feminist goal of sexual equality has not been reached yet. A Women Against Pornography handout stresses that "women in the world suffer disproportionately from physical hardship, from imposed intellectual constraint and from spiritual subjugation at the hands of men . . . . Our fight as feminists is to ensure that those bonds are smashed as soon and as thoroughly as possible".<sup>15</sup> Radical feminists contend that by lying about women, depictions in pornography reinforce women's inferior role in modern society. "Pornography, we are now coming to understand, is: . . . dangerous political propaganda which limits women's practical ability to be self-defining, self-determining or to make significant life choices."<sup>16</sup> They believe that it is necessary to eliminate pornography in order to allow women's voices to be heard, and ultimately to redress the imbalance of power.

## 2 Criticism of the present legislation

Current legislation contains two basic criteria for censorship determinations. The key question for the court or Indecent Publications Tribunal under the Indecent Publications Act is whether a book, sound recording or document is "indecent". Section 2 states that "unless context otherwise requires, — . . . 'Indecent' includes describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good".<sup>17</sup> The Video Recordings Act requires the Video Recordings Authority to determine whether submitted recordings are indecent using the same definition of indecency as the Indecent Publications Act. The other legislative formulation requires the Chief Censor to determine simply whether the exhibition of a film is or is not likely to be "injurious to the public good" under section 13 of the Films Act. The injuriousness of the material is thus central to the censorship of books, documents, periodicals, films, and sound and video

14 See generally *Pornography and Violence*, supra n 8; *Submission on Video Recordings Bill*.

15 *That Censorship is a Dirty Word* (Wellington 8 May 1985) at 1 (on file at Otago Law Faculty).

16 *Bill of Rights Submission*, s 4.3.2.

17 The express words of the definition do not exhaust the meaning, in particular because they "are introduced quite deliberately by the comprehensive word 'includes' " (*Howley v Lawrence Publishing Co Ltd* [1986] 6 NZAR 193, 195). At a minimum, Parliament also meant indecency to bear its ordinary meaning if the presentation is in a manner injurious to the public good. See *Police v News Media Ownership Ltd* [1975] 1 NZLR 610, 623-624; *Howley*, 6 NZAR at 198.

recordings.<sup>18</sup> In practice, the presence or absence of this element usually is the determinative factor.

A finding of injury to the public good must rest on more than mere conjecture as to harmful effects. Interpreting the Indecent Publications Act in *Howley v Lawrence Publishing Co Ltd*, Woodhouse P stated that “there is a clear statutory intention to withhold the censorship weapon from material which falls short of being actually injurious . . . . [M]aterial is not to be banned or become the subject of successful prosecution unless there is ‘discernible injury’ . . . a capacity for some actual harm”.<sup>19</sup> The result of this focus on actual harm has been an increasing liberality in materials available to the public.<sup>20</sup> As noted earlier, Women Against Pornography believe that pornography is demonstrably harmful and that the leniency of the present system is misguided.

In addition to disagreeing with the application of current criteria, they criticise the legislative formulations on two grounds. First, they argue that the present system is “anti-sex”. They base this conclusion on the fact that the censorship criteria include sex along with horror, crime, cruelty and violence, thus arguably implicitly equating them,<sup>21</sup> and on their analysis

18 There is a difference in the level of proof required by the legislative formulations: a film need only be “likely to be” injurious, whereas the definition of indecency covers only material that “is” injurious. But given Woodhouse P’s statement in *Howley* that indecency “requires demonstration that any relevant material has a capacity for some actual harm” (6 NZAR at 198 (emphasis supplied)), it does not appear that injury to the public good must be inevitable.

19 6 NZAR at 197-198. There is some dispute over whether Parliament intended the words “injury to the public good” to bear an equivalent meaning in the three Acts. Strictly, *Howley* only interpreted the meaning of that language in the Indecent Publications Act. Compare *Wheeler v Everard* unreported, High Court, Wellington, 22 October 1986, CP 284/86, Heron J at 29 (stating that the Films and Indecent Publications Acts are little different in approach and that *Howley* applies to the Films Act) with *Society for the Promotion of Community Standards Inc v Everard* unreported, High Court, Wellington, 23 October 1987, CP 616/86, McGechan J at 40 (holding that *Howley* was only of “some help” in interpreting the Films Act).

20 The calendars of nude men at issue in *Howley*, for example, probably would have been held to be indecent ten years ago. *Society for the Promotion of Community Standards* provides further evidence of increasing liberality. The two sexually explicit films involved, one depicting homosexual sex and the other heterosexual sex, were approved by the Censor for limited distribution. Former members of the Film Censorship Board of Review and the Indecent Publications Tribunal filed affidavits stating their belief that such films are injurious to the public good and would not have been approved for distribution in the past (*ibid* at 20-25).

But even though the trend is towards less censorship, it would be a mistake to conclude that the actual harm requirement precludes censorship. The full court of the High Court in *Comptroller of Customs v Gordon & Gotch (NZ) Ltd* held that the Indecent Publications Tribunal is allowed to rely upon its expertise in ascertaining whether material has the capacity for actual harm (6 NZAR at 478) and they, at least, seem willing to construe material for example which portrays female genitalia in a lewd way as having a capacity for actual harm. There must be an evidentiary foundation if the court determines that material is injurious to the public good. See *Collector of Customs v Hewitt* unreported, High Court, Dunedin, 3 July 1987, AP 70/86, Holland J at 15-16.

21 The inclusion of sex in lists containing crime and violence in s13(2)(c) of the Films Act suggests that “sex, of itself, is quasi-criminal. This both reflects and reinforces the moralist ‘anti-sex’ philosophy which is *in fact* the guiding principle of the Indecent Publications Tribunal [sic]” (*Bill of Rights Submission* s 4.3.3 (emphasis in original)).

of status quo censorship decisions. They disagree, for example, with the present system's editing of certain scenes in "Brideshead Revisted" and "A Voyage Round My Father" prior to broadcast on television, and assert that sex education materials written for children and homosexual literature are being improperly restricted.<sup>22</sup> They assert that the present system censors these beneficial materials but fails to censor videos depicting bondage and torture of women and children.<sup>23</sup> Radical feminists would replace this "anti-sex" approach with one stressing censorship of implicit messages advocating hatred and violence against women. "What needs to be guarded against is the denigration of human sexuality, and the sexual exploitation of women and children, not the depiction of sexual activity itself, nor sex education materials."<sup>24</sup> They promote the free availability of "erotica" which they define as "depictions of the sexual expression of love" or "non-exploitative depictions of human sexual arousal".<sup>25</sup>

Radical feminists' second criticism of the present system is that it is too broad and vague, and that as a result, censors have the discretion to allow distribution of degrading material. The Acts do not give exhaustive definitions of "indecent" or the "public good", and although they list various factors which must be considered, there is no indication of the relative weight to be given to any variable.<sup>26</sup> (This very breadth and

22 See *ibid* at ii; s 4.3.3. The restrictions on these materials must be kept in perspective. The Broadcasting Corporation of New Zealand edits many programs based on the likely viewing audience, but the full version is usually available on video tapes or in books. Access to sex education materials may be restricted to certain ages, depend on parental supervision, etc, but is seldom totally foreclosed. Restrictions on material with a homosexual theme have been relaxed following passage of the Homosexual Law Reform Act 1986. See eg *Society for the Promotion of Community Standards* at 46-47.

23 This contention is absurd but difficult to refute because Women Against Pornography do not refer to any specific censorship decisions approving of such materials, or give examples of films or videos with such content which have escaped restriction.

24 *Bill of Rights Submission* s 4.3.3.

25 *Ibid* at s 1.1.3.

26 Section 11 of the Indecent Publications Act specifies matters to be taken into consideration in determining whether a book, sound recording or document is indecent:

**11. Matters to be taken into consideration by Tribunal or Court —**

- (1) In classifying or determining the character of any book or sound recording the Tribunal shall take into consideration —
  - (a) The dominant effect of the book or sound recording as a whole;
  - (b) The literary or artistic merit, or the medical, legal, political, social, or scientific character or importance of the book or sound recording;
  - (c) The persons, classes of persons, or age groups to or amongst whom the book or sound recording is or is intended or is likely to be published, heard, distributed, sold, exhibited, played, given, sent, or delivered;
  - (d) The price at which the book or sound recording sells or is intended to be sold;
  - (e) Whether any person is likely to be corrupted by reading the book or hearing the sound recording and whether other persons are likely to benefit therefrom;
  - (f) Whether the book or the sound recording displays an honest purpose and an honest thread of thought or whether its content is merely camouflage designed to render acceptable any indecent parts of the book or sound recording.
- (2) Notwithstanding the provisions of subsection (1) of this section, where the publication of any book or the distribution of any sound recording would be in the interests of art, literature, science, or learning and would be for the public good, the Tribunal shall not classify it as indecent.

...

vagueness could permit the censors to adopt a radical feminist perspective without legislative change, although the courts do not regard that result as workable or desirable.<sup>27</sup>) Denigration of women, for example, is a factor which must be taken into account under the Video Recordings and Films

- (4) Where any Court is required to classify or determine the character of any document (other than a book) it shall take into consideration, with such modifications as are necessary, the matters set out in subsections (1) and (2) of this section.

The factors to be taken into account by the Censor under s 13 of the Films Act in assessing the public good are very similar to those listed in section 11 of the Indecent Publications Act for use in assessing indecency, as are the factors to be taken into account in making a determination of indecency under the Video Recordings Act. Section 13 provides in part:

- (2) In determining whether the exhibition of any film is or is not likely to be injurious to the public good, the Chief Censor shall consider the following matters:
- (a) The dominant effect of the film as a whole:
  - (b) The extent to which the film has merit, value, or importance in relation to artistic, social, cultural, or other matters:
  - (c) The extent and degree to which and the manner in which the film depicts, includes, or treats anti-social behaviour, cruelty, violence, crime, horror, sex, or indecent or offensive language or behaviour:
  - (d) The extent and degree to which and the manner in which the film denigrates any particular class of the general public by reference to the colour, race, or ethnic or national origins, the sex, or the religious beliefs of the members of that class:
  - (e) Any other relevant circumstances relating to the proposed exhibition of the film, including the places and times at which or the occasions on which the film is intended or is likely to be exhibited.
- (4) In addition to the matters referred to in subsection (2) of this section, in determining whether the exhibition of any film is or is not likely to be injurious to the public good, the Chief Censor may have regard to the number of films of a similar nature previously approved for exhibition under this Act or the Cinematograph Films Act 1976, and the likely cumulative effect of the exhibition of those films and the film being examined.

Section 21 of the Video Recordings Act provides in part:

- (2) In determining the classification of any video recording, the Authority shall consider the following matters:
- (a) The dominant effect of the video recording as a whole:
  - (b) The extent to which the video recording has merit, value, or importance in relation to artistic, social, cultural, or other matters:
  - (c) The persons, classes of persons, or the age groups of the persons, by whom the video recording is most likely to be viewed:
  - (d) The extent and degree to which and the manner in which the video recording depicts, includes, or treats anti-social behaviour or offensive language or behaviour:
  - (e) The extent and degree to which and the manner in which the video recording denigrates any particular class of the general public by reference to the colour, race, ethnic or national origins, sex, or religious beliefs of the members of that class:
  - (f) The particular purpose for which the video recording is intended to be used.
- (3) In addition to the matters referred to in subsection (2) of this section, in determining the classification of any video recording, the Authority may have regard to the number of video recordings of a similar nature which are available for supply to the public, and the likely cumulative effect of the viewing by the public of those video recordings and the video recording being examined.

27 See *Gordon & Gotch; Society for the Promotion of Community Standards*; section IV 1 *infra*.

Acts,<sup>28</sup> and which in theory could be taken into account in determining indecency under the Indecent Publications Act,<sup>29</sup> but the legislation does not require that it be determinative. Women Against Pornography complain that this legislation thus “seems based on the premise that some (unspecified) degree of denigration is tolerable”.<sup>30</sup> Injury to the public good is the sole conclusive factor under the present legislative scheme, and this term is not defined in the Acts — particularly, it is not defined in a radical feminist way — permitting censors to avoid using the feminist paradigm or making it controlling. Women Against Pornography argue that the legislation should specify what is injurious to the public good,<sup>31</sup> and that “the real danger to the ‘public good’ is not in depicting ‘sex’, but in depicting ‘the endorsed denigration of human sexuality’ ”.<sup>32</sup>

To rectify the failure of the present system to censor harmful materials, Women Against Pornography have advocated changing the legislative criteria for censorship to prohibit “[m]aterial which depicts women or children as sexual subordinates, or as mere objects for the sexual gratification of men, in a manner which misrepresents the nature of female sexuality and in a context which endorses that depiction”. Instead of explaining the meaning of this definition’s terms and how they combine, Women Against Pornography seek to explain its probable effect by offering their opinion as to examples of what it will cover, eg “ ‘girlie’ photos in the tabloid press, and in magazines” and “much sexist advertising on television and in print media”, and examples of what they do not think it will include, eg “materials which show nudity or sensuousness”, sex education materials for children, and homosexual literature.<sup>33</sup> This approach is untenable. Censorship authorities will have to interpret the meaning of specific words and phrases if this definition is adopted.

### III AN EVALUATION OF THE PROPOSED DEFINITION

The definition contains many vague terms and concepts. The first part refers to depictions “of women or children as sexual subordinates”. The

28 Films Act s 13(2)(d); Video Recordings Act s 21(2)(e). See n 26 supra.

29 In *Re “Fiesta” and “Knave”* the Indecent Publications Tribunal majority did not believe that they had jurisdiction to decide whether the materials conveyed a representational view of women which denigrated them because this standard was not encompassed by the statutory definition of indecency (6 NZAR at 221). The minority believed that the magazines fitted under the legislative definition by dealing “with matters of sex in a manner that is injurious to the public good because of the manner in which the female nude form is depicted” (6 NZAR at 225). The full court of the High Court sided with the minority on this issue, holding that the Tribunal were able to use their expertise in considering the possible injurious effect of materials on segments of the public, including women, although the judges expressed concern over the concept of a character being representative of all women (*Gordon & Gotch*, 6 NZAR at 471, 482-483, 489). See discussion at section IV 1(a) infra.

30 *Bill of Rights Submission* s 4.3.3.

31 Their submission on the Video Recordings Bill suggests a reworking of the public good concept to not only require that all materials meeting their definition of pornography be banned, but also to deem content such as “glorifying war or violence as a form of attaining ‘justice’ ” as injurious to the public good (ibid at s 2.2.5(2)).

32 *Submission on the Video Recordings Bill* s 2.2.3.

33 Ibid s 1.1.2, 1.1.3.



*Concise Oxford Dictionary* defines “subordinate” as “of inferior importance or rank, secondary, subservient” or a “person working under another’s control or orders”. This part of the definition could be interpreted narrowly to cover only situations approaching sexual slavery, or it could be interpreted broadly to cover situations in which, for example, a man tells a woman what he would like her to do.

The definition also refers to material which depicts women or children as “mere objects for the sexual gratification of men”. It is unclear exactly how this clause differs from the first. Surely a sex object is subordinate, ie of inferior rank or importance. The concept of being a “mere object” is quite vague and subject to many differing interpretations. Presumably, it is intended to refer to a perception of women as valuable for their physical and sexual attributes alone, rather than as people. Material might be perceived as depicting women as sex objects where two faceless strangers meet and couple,<sup>34</sup> or where the camera focuses primarily on the body rather than the face. Women Against Pornography’s discussion on the advertising which they find offensive makes it clear that they consider even full body photographs of clothed women to be pornographic if the pose is mildly suggestive. They intend this element to have a very broad meaning.

The next part of the definition concerns the misrepresentation of female sexuality. This formulation assumes that there is a “true” feminine sexual nature that is sufficiently uniform to serve as a measuring standard for pornography. This assumption is open to serious challenge,<sup>35</sup> but even if it were somehow established, it would yield a test which would be difficult to apply in practice. There is a very wide range of human sexual behaviour, all of which would need to be tested for conformity with the approved sexuality. It is ludicrous to imagine tribunals or the courts making precedent on proper sexual feelings and practices.

Then the definition refers to a “context which endorses that depiction”. This element also presents difficulties. Some material contains an explicit message, and in some it is fairly easy to determine that the author intended to convey an implicit message. But there is a wide latitude of material which fits neither of these categories, and is subject to such varying interpretations by different users that it is impossible to characterise as conveying any particular message. An examination of much of the radical feminist writing fosters the impression that what many would perceive as an ambiguous context, they would interpret as endorsement.<sup>36</sup> Rather than enquiring whether the context endorses the behaviour, they instead seem to be asking whether it condemns it. If it does not, they favour censorship.

Overall, the proposed definition suffers from three major defects. First, it is overly broad. The broader the definition, the greater the number of materials, eg advertising copy, that will need to be examined for

34 It is interesting to note that a contemporary female writer did not portray this type of situation, also known as a “zipless fuck”, in a negative manner (E Jong, *Fear of Flying* (Secker & Warburg 1974)).

35 See section IV 1(b) *infra*.

36 For example, radical feminists believe that characters in pornography are representative of all women. See section IV 1(a) *infra*. This characterisation illustrates their eagerness to look beyond specific content to implicit messages.

pornographic content. Censorship will become much more pervasive and widespread than under the present system, exacerbating the restriction on freedom of speech.<sup>37</sup> Second, it is vague and imprecise. The result of using this definition will vary considerably depending on the identity of the censor because the words used do not circumscribe a reasonably precise meaning. In this way it serves radical feminist purposes no better than the present definition. And irrespective of whether radical feminists approve of its application in practice, the definition's vagueness and ambiguity will make it difficult for others to predict outcomes and conduct their lives accordingly.<sup>38</sup>

Third, the wording of this definition is also poorly chosen because it does not cover materials which the radical feminists wish to ban. The definition contains three separate elements. First, the material must depict women or children either as sexual subordinates or as mere objects for the sexual gratification of men. Second, the depiction also must be in a "manner"<sup>39</sup> which misrepresents the nature of female sexuality. Third, the context must also constitute an endorsement of the depiction. On the face of the definition, it would appear that these are independent requirements. Adherence to the strict wording of their definition would surely exclude many of the cases they purport to cover. Child pornography involving young boys, for example, may present them as sexual subordinates or objects, but it would surely be just as repugnant (if not more so) if it were to show them instead as dignified equals to the adult men with whom they find reciprocal pleasures. Even if this scenario were to meet the first criterion, it is difficult to see how it could meet the second of misrepresenting the nature of female sexuality, as no women are involved. Sexual violence against women is another example radical feminists frequently cite as pornographic. This material might present women as subordinates or sex objects, but how does it misrepresent female sexuality? It is no answer to suggest that all depictions of women as objects or sexual subordinates are themselves lies about women's sexuality. Women Against Pornography state that depicting women as enjoying rape or bondage is a misrepresentation, so a scenario presenting women as subordinates but not lying about their sexuality could show women bound and terrified. From other writings,

37 See section V 1 *infra*.

38 Vagueness is a recurring problem with the censorship of pornography. Many have argued that pornography, indecency and obscenity are inherently ambiguous words which are impossible to define in sufficiently definite terms so as to permit purveyors to be prosecuted criminally. See eg *Paris Adult Theatre I v Slaton*, 413 US 49, 73, 84 (1973) per Brennan J, joined by Stewart and Marshall JJ, dissenting: "none of the available formulas . . . can reduce the vagueness to a tolerable level; . . . [a]lthough we have assumed that obscenity does exist and that we know it when [we] see it, . . . we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech".

39 Women Against Pornography's use of the word "manner" is curious because they seem to be referring to the substantive message (ie assertions about the nature of female sexuality) rather than to a manner or form of depiction (eg graphic, lewd, etc). Perhaps they should replace "and in a manner" with "and" so the relevant part of the definition reads: "material which depicts women or children as sexual subordinates, or as mere objects for the sexual gratification of men, and which misrepresents the nature of female sexuality . . ."

it seems clear that the group believes that to show women as the sexual subordinates of men or as mere objects in a context which endorses that depiction is sufficient to justify restriction. This definition thus requires redrafting to properly reflect the radical feminist position.

The proposed definition is poorly worded, extremely broad and vague, and it does not cover what the radical feminists would like. The rest of this article considers whether the radical feminists substantiate their case for this or a similar definition, and whether heightened restriction of pornography is desirable for the public and the women's movement.

#### IV THE INADEQUACY OF SUPPORT FOR THE RADICAL FEMINIST POSITION

In addition to problems in interpreting Women Against Pornography's definition, there are serious questions about the extent to which it is supported by analysis and research. Several of the underlying assumptions are inadequately substantiated, and thus do not support such a radical change to the present system.

##### *1 Assumptions about the nature of pornography and sexuality*

Most of the harms which radical feminists allege stem from use of pornography depend upon its conveying false messages to the audience. If it is devoid of such messages, or if users reject them, it would not tend to trigger aggression or change attitudes or perpetuate discrimination. Some materials undeniably contain messages repugnant to the radical feminists, eg that women are inferior and that they achieve sexual and human fulfilment only through submitting to men, their natural masters. John Norman has written a series of books which batters the reader with this very ideology on virtually every page.<sup>40</sup> But the radical feminists do not limit their attack to materials like Norman's which contain intentional, blatant messages about the nature of women and their sexuality; instead they condemn a much broader range of material. To support their position, they must show that these materials also convey biased messages. One of the ways they attempt to do this is by asserting that the female characters in pornography inherently represent all women, and that these representations are inaccurate and give rise to false beliefs. They further contend that these false beliefs hinder the advancement of sexual equality. These contentions are analysed in the following sections.

##### (a) Characters in pornography as representative of all women

Women Against Pornography view pornography as a medium which inevitably conveys a message about all women. Thus if people view a scene depicting certain behaviour, eg a woman acting subservient to a man or enjoying abuse, radical feminists argue that the viewers will generalise from

40 Eg J Norman, *Captive of Gor* (Ballantine 1972). The back cover gives the following synopsis of the plot: "Elinor Brinton of New York City — Beautiful, rich, spoiled, used to having her way with the men of Earth — is hunted down and abducted by alien beings to find herself a captive on Gor, where men are absolute masters, and women their complete slaves."

this depiction to a belief about the nature of all women. Their submission on the Video Recordings Bill stated that “pornography must be seen . . . in terms of what it *always* does to women, what is [sic] *always* says about *all* women”.<sup>41</sup>

The validity of the assumption that viewers will equate one or a handful of characters in pornography with the class of all women is doubtful. It denies individuality, and depends on a very dim view of public maturity. Characters in non-pornographic books and television are not widely believed to be representative of their genders; readers and viewers can recognise and distinguish different types. Indeed, it would require a schizophrenic perspective to see all characters as representative because they exhibit such marked differences. The radical feminists give no convincing reason why pornography as a medium is so very different that it precludes recognition of individuality.

The indecency of material alleged to contain a “representational view of women” which denigrates them was considered by the full court of the High Court in *Gordon & Gotch*. That case revolved around a jurisdiction question,<sup>42</sup> but the positions taken by the Indecent Publications Tribunal and High Court on the representational significance of the material are of note. The Tribunal had little difficulty with the concept of photographs of specific women assuming the role of representing all women; Judge Kearney wrote “I am in no doubt that there would be from the Tribunal a majority if not an unanimous decision that the material in question is plainly denigrating in that way [representing women as the sexual playthings of men] in respect of all women”.<sup>43</sup> The minority report went into more detail, noting that<sup>44</sup>

[s]ome of the portfolios of women in these magazines are injurious to the public good because of: the contrived positions the women are placed in — women are in full labial display presumably for male viewers; the surrounding context of the photographs, and the symbolic representation of the women depicted. Such portfolios promote social values which degrade, not just the single model posing, but all women as a social class. Women are portrayed as subordinates who are always sexually available and have limited choice.

The High Court expressed the view that the concept was too illogical to allow it a controlling influence under the Act. Jeffries J stated that “in no sense do [models, publishers or importers] seek to be [sic] representatives of all women. Such interpretation, or construction, moves away from the actual and real towards symbolism and questionable labelling . . . . I have the most serious doubts, and must express them, that any representational view of women within the broad realms of indecent publications could denigrate *all* women”.<sup>45</sup> Quilliam J noted that<sup>46</sup>

41 Section 2.1.3 (emphasis in original).

42 See n 29 supra.

43 6 NZAR at 221.

44 6 NZAR at 225.

45 6 NZAR at 483.

46 6 NZAR at 471.

the expressions “representational view of women” and “denigration of all women” are imprecise and not, in my view, capable of definition so as to form a logical and coherent basis for a decision as to the classification of a document. I do not accept that the magazines in question in the present case contain anything which can be regarded as representational of women generally, whatever that expression is really intended to mean. Nor do I accept that the contents of the magazines are capable of having any effect on all women.

In *Society for the Promotion of Community Standards*, McGechan J approved of the reasoning in *Gordon & Gotch*, adding that the “male mind by no means necessarily associates the women he sees in pornographic situations with all women, any more than it associates prostitutes with all women”.<sup>47</sup>

Even if pornography does convey a message about the nature of all women, Women Against Pornography do not explain convincingly why the audience is powerless to reject it. Pornography is generally recognised as masturbatory fantasy, and there is no reason that the fictional depictions it contains should be perceived as more illuminating than day to day interaction with real women. Presumably the radical feminists would argue that it is because some users have limited *sexual* contact with real women and lack other sources of information in a society where sex is not discussed openly that they rely on pornography. This response is not sufficient. First, it would reduce quite considerably the number of people who could be harmed by exposure to pornography. That segment of the population could be targeted with sex education, which would be a superior option to censorship as it would engender accurate perceptions of female sexuality instead of creating a vacuum which would leave these people wholly uninformed. And if this segment of the population has no sexual contact with real women, the significance of any misperceptions about female sexuality is diminished. Liberals argue that the law should not intervene where harm to others is absent.<sup>48</sup> In *On Liberty*, John Stuart Mill argued that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant . . . . Over himself, over his body and mind, the individual is sovereign”.<sup>49</sup> Thus if there is no immediate, cognisable harm to others stemming from a person’s use of pornography, he or she should be free to read it.<sup>50</sup>

A second problem with explaining the disproportionate influence of pornography by alleging that there are few other sources of sexual information is that many of the alleged messages in pornography of which radical feminists complain are more political than sexual, for example, the view that women exist primarily to please men or that they enjoy being

47 7 NZAR at 63.

48 Radical feminists have made use of this argument when it suits them. A slogan in the abortion area is “keep your laws off my body”; freedom to choose an abortion is seen as inalienable right. Yet they do not typically recognise other people’s “right to choose” to read pornographic materials.

49 J S Mill, *On Liberty* (D Spitz ed 1975) 10-11.

50 This harm must be to others as Mill does not accept that the government has a legitimate interest in saving a person from him- or herself. His position would freely permit a consenting adult to contaminate his or her mind by using disgusting pornography.

abused. Even if sex is not discussed openly, counter-examples and counter-statements on these issues abound.

(b) Pornography as lies about sex

Closely linked with the radical feminist belief that people will generalise from the behaviour of characters in pornography to the nature of all women is the further contention that the behaviour of characters in pornography is artificial and thus conveys false messages about the nature of that character's — and thus all women's — sexuality. Women Against Pornography state that “[i]n effect the pornographers claim that their materials are ‘the truth, the whole truth and nothing but the truth’ about women’s sexuality. In so doing, they *mis*-represent our sexuality, and denigrate the human dignity of all women, including the women depicted”.<sup>51</sup>

There are a number of flaws in this assertion. First, pornography is not intended to be nor perceived as an unbiased, accurate reflection of human sexuality. It is a fantasy medium which is dedicated to arousing the audience. The characters will generally be more attractive than in real life, and more willing to respond to the sexual advances of the character (typically male) with whom viewers are expected to identify. The orgasms will be bigger and better than the sometimes awkward and/or rushed encounters in the real world. Pornography, like other media, caters to the taste of the anticipated audience. Each material typically does not contain an accurate cross-section of human sexual behaviour, and this fact is understood by the users.

Second, sex does incorporate, at times, the elements found in the worst pornography, even the violent, disgusting, and deviant. If this were not the case, such materials would not appeal to users. There is overwhelming variety in sexual personality and corresponding style, rather than a uniform pattern. Given this variety of sexual response, anything can be characterised correctly as a misrepresentation of some female’s sexuality, and an accurate representation of another’s. The radical feminists ignore this natural diversity. As one commentator noted, “Women Against Pornography and feminists holding a similar position, have taken us into a realm where contradictions, ambiguity and confusion around sexuality and its representations do not exist.”<sup>52</sup> Thus even if the radical feminists were convincingly able to show that pornography gives rise to inferences about women’s sexuality, they would be unable to establish that pornography conveys a wholly distorted reality.

Women Against Pornography’s “true” nature of female sexuality is an idealised version of the way they would like sex to be, according to their personal tastes, rather than an accurate reflection of reality. Implicit in their argument that pornography presents a distorted view of sex is their assumption that tender and loving encounters are the true nature of female sexuality, and that other depictions are therefore lies. For example, they disapprove of depictions of submissive women catering to the desires of dominant and aggressive men. But as one feminist sociologist has explained,

<sup>51</sup> *Bill of Rights Submission* s 1.1.4.

<sup>52</sup> A Ryan, “Sex — Pleasure and Danger” (January/February 1988) *Broadsheet* 24, 26.

dominance and submission are currently part of sexual response (even if only because of socialisation), and triggers of arousal cannot be changed overnight merely by accepting the equality of men and women on an intellectual, political level.<sup>53</sup> An examination of romance novels written by women for women reveals many of the same themes of rape, dominance, and willing surrender to macho men, albeit in a different form, as pornography which may be written by men for men.<sup>54</sup> Another “misrepresentation” of women’s sexuality is the belief that women secretly desire to be raped. Yet female analyses of female sexuality indicate that this type of fantasy can be arousing.<sup>55</sup>

Whether it is the mixing of violence and sex, or the treatment of persons as sex objects, these themes are not properly classed as “lies” which can be expunged from literature in the fashion of defamatory falsehoods:<sup>56</sup>

I would suggest that we *are* members of the animal kingdom who have bodily needs and instincts and that something is awry if we try too desperately to hide or deny that fact. . . . Even the capacity for brutal violence, much as we may seek to curb it, is a fact of human experience that we are not likely to control successfully by pretending that it is not a part of our impulses. Many of us do treat each other as objects much of the time, and if that is reflected in the mirror held up to society by the mass media, the problem will not be solved by killing the messenger.

(c) Pornography as an instrument of oppression

Radical feminists contend that pornography is an instrument of oppression which perpetuates sexual inequality. This assertion is even more conjectural than those discussed previously. They do not explain the mechanism through which pornography accomplishes this end, or the reason that current legislation forbidding discrimination such as the Human Rights Commission Act 1977 is insufficient. Presumably, they base their assertion on the fact that men who are “taught” by pornography to view women as sexual toys are unwilling to credit their professional abilities. But they overlook the possibility of the more plausible reverse, ie that men who observe women’s value in the workplace will be unwilling to credit contrary characterisations in pornography. If there is a relationship, correlational evidence points to the opposite conclusion that pornography discourages sexual discrimination. According to Ira Reiss, a University of

53 *Idem*.

54 See eg R Rogers, *Sweet, Savage Love* (Avon 1974). The radical feminists attribute this fact to conditioning by men. See eg Women Against Pornography, *Speech to Executive of NZ Council for Civil Liberties – Wellington* (9 September 1985) (hereafter *Speech to Council for Civil Liberties*) 3 (on file at Otago Law Faculty): “For feminists, it is not a question of whether or not the materials turns [sic] us on – we do not underestimate the power of the colonisation [sic] we have undergone [sic] which can have us responding to rape-myth fantasies in some corrupt version of Pavlov’s experiments in training dogs.” But in doing so they undermine their contention that pornography is a “lie”.

55 See generally Shere Hite, *The Hite Report* (Dell 1981); Nancy Friday, *My Secret Garden: Women’s Sexual Fantasies* (Simon & Schuster 1973). It is only the fantasy which arouses, not the reality. Women can enjoy the rape fantasy without confusing it with reality; surely men can do the same with other fantasies they see dramatised in pornography.

56 F S Haiman, *Speech and Law in a Free Society* (1981) 173.

Minnesota social scientist familiar with pornography research, "the most permissive societies in the Western World . . . with respect to the availability of pornography have the greatest degree of gender equality both in attitudes and practice".<sup>57</sup>

## 2 Research support for the radical feminist approach

Not only is the radical feminist approach conceptually unsound, as was discussed in the preceding section, it is not supported by social science research. A thorough review and technical critique of research on the effects of pornography is far beyond the scope of this article, but a very brief review of the results of government study commissions will be made to demonstrate the lack of scientific consensus about the effects, harmful or otherwise, of pornography use.

There is substantial opposition to radical feminist dogma that use of pornography leads to negative behavioural and attitudinal change. Many believe that patterns of sexual behaviour are fixed long before using pornography could exert any influence.<sup>58</sup> Others argue that it may have a beneficial effect in certain cases.<sup>59</sup> The first major government study group to examine pornography from a social science perspective was the 1970 US Commission on Obscenity and Pornography. It concluded that<sup>60</sup>

empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquency or criminal behaviour among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crimes or sex delinquency.

The 1986 US Attorney General's Commission criticised this report for the absence of investigation of the effect of violent pornography.<sup>61</sup>

The British Committee on Obscenity and Film Censorship (the Williams Committee) did focus on the role of violence, and reached conclusions

57 P Brest & A Vandenberg, "Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis" (1987) 39 Stan LR (hereafter "Politics, Feminism and the Constitution") 607, 648.

58 Eg B Williams (ed), *Obscenity and Film Censorship: An Abridgement of the Williams Report* (1981) (hereafter *Williams Report*) 86. It can be argued that videos are getting into the hands of young children and thus are able to influence them in their formative years, but even if this contention is true it does not justify increased restriction of pornography to adults. It is far better to tighten prohibitions on passing materials to children but to allow adults to use them than to ban everything which is unsuitable for a child, thus reducing adults to reading which is fit for children.

59 "There may also be a useful function, even in healthy lives, for pornography, scatology, and fantasized violence, as evidenced by the fact that so many authors of great literature have indulged in the production of such material on the side (e.g., Balzac's *Droll Stories*)." *Speech and Law in a Free Society* at 174. Pornography may have a catharsis effect, replacing the need to resort to acting out harmful and abusive sexual practices (*Williams Report* at 87). It is used in the treatment of impotence and frigidity (*ibid* at 88). Some sex therapists even find very violent pornography useful for this purpose (eg testimony of Dr Brian Richards, quoted in *Pornography and Violence* at 1).

60 Commission on Obscenity and Pornography, *The Report of the Commission on Obscenity and Pornography* (1970) 223.

61 US Attorney General's Report at 905.



similar to those of the Commission on Obscenity and Pornography.<sup>62</sup> Experts testifying before the Committee concluded that “there is no consensus of opinion by the general public, or by professional workers in the area of human conduct, about the probable effects of sexual material”<sup>63</sup> and that “social science research has not been able unambiguously to offer any firm assurance that the mass media in general, and films and television in particular, either exercise a socially harmful effect, or that they do not”.<sup>64</sup> The Committee concluded that a vast amount of research had been done, but that<sup>65</sup>

such research tends, over and over again, to be inconclusive . . . . It would be stupid to claim that no future research could shed more light on these questions than past research has done. But we do strongly suspect, in fact, that what these questions need are not so much new facts, as new ideas; and further, that enquiries which will be helpful are more likely to be those directed to the study of human personality as a whole, rather than to specific questions about violence or sexual materials and their supposed effects.

The Canadian Fraser Commission reached a similar conclusion: “[T]he research is so inadequate and chaotic that no consistent body of information has been established. We know very well that individual studies demonstrate harmful or positive results from the use of pornography. However, overall, the results of the research are contrary or inconclusive.”<sup>66</sup>

The 1986 US Attorney General’s Commission reported the contrary findings that pornography was linked to aggression and attitudinal change.<sup>67</sup> This Commission has been criticised on a number of grounds, including the fact that six of its eleven members were already committed to fighting pornography prior to its formation.<sup>68</sup> It was poorly funded and commissioned no research.<sup>69</sup> It overtly relied upon morality, aesthetics<sup>70</sup> and

62 Not only did the Williams Committee consider sexual violence, they heard and considered the radical feminist arguments that pornography degrades women, presents a distorted view of human sexuality, and encourages deviant sexual demands by husbands of wives, and that those who participate in its production are victimised (*Williams Report* at 58-59). They also heard testimony from some of the researchers upon whom radical feminists rely, eg Eysenck. Compare *Williams Report* at 65, 67, with *Pornography and Violence* at 4, 6, 13.

63 *Williams Report* at 4 quoting Maurice Yaffé.

64 *Idem* quoting Stephen Brody.

65 *Idem*.

66 *Report of the Special Committee on Pornography and Prostitution* (1985) Vol 1 at 99.

67 See section II 1 *supra*.

68 “Sex Busters” (21 July 1986) *Time* 32, 39, citing a critique of the Commission’s report by American Civil Liberties Union member Barry Lynn. Mr Lynn attended Commission meetings and obtained copies of their internal papers. He concludes that the report is “little more than prudishness and moralizing masquerading behind social-science jargon” (*idem*).

69 *Ibid* at 39.

70 “An environment, physical, cultural, moral, or aesthetic, can be harmed, and so can a community, organisation, or group be harmed independent of identifiable harms to members of that community . . . . To a number of us, the most important harms must be seen in moral terms . . . . [W]e take the offensive to be well within the scope of our concerns” (*US Attorney General’s Report* at 303, 304). The Commission obviously adopted the views of Lord Devlin (see eg P Devlin “Morals and the Criminal Law” in D Spitz (ed) *On Liberty* (1975) 177-190).

“common sense”<sup>71</sup> in assessing the harmful effects of pornography. Two female members of the Commission, the director of the sexual behaviour clinic at a New York psychiatric institute who has specialised in treating victims and perpetrators of sexual crimes, and a journalist who has focused on women’s news and who edits a popular women’s magazine, wrote a minority report in which they listed a number of shortcomings. They point out that the Commission never agreed on a definition of pornography and that this fact “severely limited our ability to come to grips with the question of harm”.<sup>72</sup> They note that the Commission heard a paucity of certain types of testimony, including dissenting expert opinion, and that haste and the absence of significant debate flawed the Commission’s recommendations.<sup>73</sup> They further contend that the social science research examined did not follow the Commission’s categorisation,<sup>74</sup> that it was not designed to evaluate the relationship between exposure to pornography and the commission of sex crimes,<sup>75</sup> that it relied almost exclusively on male college student volunteers and thus lacks “generalizability”,<sup>76</sup> and that it did not establish whether negative attitudinal change is lasting or whether it might transfer into behavioural change.<sup>77</sup> They conclude that “[h]uman behaviour is complex and multi-causal. To say that exposure to pornography in and of itself causes an individual to commit a sexual crime is simplistic, not supported by the social science data, and overlooks many of the other variables that may be contributing causes”.<sup>78</sup>

To the extent that the research findings can be viewed as demonstrating anything, it is that violence is the causative factor. Edward Donnerstein, professor of psychology at the University of Wisconsin and a researcher of the effects of sexually violent material, stated in his testimony before the Attorney General’s Commission that some laboratory studies showed that exposure to certain materials resulted in an observed increase in aggressive behaviour. But the crucial variable was graphic violence, not sex. “If you take out the sex and leave the violence, you get the increased violent behaviour in the laboratory setting . . . . If you take out the violence and leave the sex, nothing happens.”<sup>79</sup> Murray Straus, one of the authors of a study on which the Commission relied, protested that they misinterpreted his research. He concludes that “[i]n general the scientific evidence clearly indicates that if one is concerned with the effects of media on rape, the problem lies in the prevalence of violence in the media, not

71 In addition to, or instead of, science, the Commission relied on “common sense” (*US Attorney General’s Report* at 325); “personal insight” (*ibid* at 333); and “intuition” (*ibid* at 338).

72 *Ibid* at 200 (separate statement of Becker and Levine).

73 *Ibid* at 201.

74 *Ibid* at 203-204.

75 *Ibid* at 204.

76 *Idem*.

77 *Ibid* at 205.

78 *Ibid* at 206. As Matthew Stark, executive director of the Minnesota Civil Liberties Union stated after passage of a highly controversial radical feminist anti-pornography ordinance: “Prior to the advent of the printing press, women were being raped. Attila the Hun couldn’t read, and his record is appalling” (“Politics, Feminism and the Constitution,” *supra* n 57 at 643).

79 “Sex Busters” *supra* n 68 at 39.

on sex in the media".<sup>80</sup> Even the Commission admitted that "it is unclear whether sexually violent material makes a substantially greater causal contribution to sexual violence itself than does material containing violence alone".<sup>81</sup> Radical feminists criticise current definitions of pornography for being concerned with sex rather than violence, but the same is true of their proposed definition. Indeed, it seems to have been drafted according to subjective perceptions of repugnant content, eg sexual subordination and objectification, and never refers to graphic sexual or non-sexual violence.

Even if the definition were amended to prohibit depictions of sexual violence, there is no proof that actual violence would decrease. Assuming for the sake of argument that the depictions of violence in pornography reinforce the impression that such behaviour is proper and accepted, so do war novels, detective magazines, violent films and television shows, and a multitude of other sources in our society. Decreasing the availability of sexually violent materials without limiting access to other violent materials will not have the desired effect of reducing sexual violence. There are a myriad of other potential triggers of violence. The Williams Committee observed that "[f]or those who are susceptible to them, the stimuli [to aggressive behaviour] are all around us".<sup>82</sup> Examples given by the Committee include a young man who attempted to kill his parents with a meat cleaver after watching *The Brothers Karamazov*, and a Jamaican in London who raped a white woman, saying that he was going to treat her as white men had treated black women, which was allegedly prompted by *Roots*.<sup>83</sup> Another commentator has observed:<sup>84</sup>

Heinrich Pommerenke, who was a rapist, abuser, and mass slayer of women in Germany, was prompted to his series of ghastly deeds by Cecil B. DeMille's *The Ten Commandments*. During the scene of the Jewish women dancing about the Golden Calf, all the doubts of his life became clear: Women were the source of the world's troubles and it was his mission to both punish them for this and to execute them. Leaving the theater, he slew the first victim in a park nearby. John George Haigh, the British vampire who sucked his victims' blood through soda straws and dissolved their drained bodies in acid baths, first had his murder-inciting dreams and vampire longings from watching the "voluptuous" procedure of — an Anglican High Church Service.

The Williams Committee concluded that "there is very little indication that pornography figures very significantly among these stimuli".<sup>85</sup>

In summary, the radical feminists do not make a convincing case for extending the censorship remedy. There is insufficient evidence for their contention that pornography causes significant harm. In the unlikely event of such proof's arising in the future, present legislation provides an adequate mechanism for further restricting its dissemination as contrary to the public good.

80 *US Attorney General's Report* at 206 (separate statement of Becker and Levine).

81 *US Attorney General's Report* at 328.

82 *Williams Report* at 64.

83 *Ibid* at 65.

84 *Speech and Law in a Free Society* at 175, quoting E F Murphy, "The Value of Pornography" (1964) 10 *Wayne L R* 655.

85 *Williams Report* at 64.

## V DISADVANTAGES TO HEIGHTENED CENSORSHIP

Not only are the radical feminists unable to substantiate their contentions that pornography induces the user to draw inaccurate and harmful generalisations about all women and produces aggressive behaviour, the disadvantages of denial of freedom of expression and hinderance of the campaign for sexual equality are independent reasons to reject their submissions.

### 1 *Limiting freedom of expression*

Freedom of expression is of central importance in a democratic state.<sup>86</sup> It fosters individual fulfilment through self expression, allows for democratic self government and helps create a more adaptable and stable community.<sup>87</sup> Perhaps its most important function is to advance knowledge and reveal truth. John Milton uttered the classic statement of this principle in *Areopagitica*:<sup>88</sup> "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?" The proper recourse in a case of disagreement is for each side to advocate their position and let the "marketplace of ideas" decide. If an approach is justified, people will come to recognise this fact.

Women Against Pornography's proposal denies freedom of expression by seeking to restrict access by adults to certain materials. In essence, they are attacking sexist messages in pornography, eg that women are inferior subordinates who exist merely to serve men. The very foundation of their argument is that it is the communication of anti-female ideas which makes pornography so objectionable. This type of limitation on content of the underlying message is a much greater infringement than restrictions on the forms of its expression because, if successful, the censorship stifles the idea and prevents the marketplace of ideas from operating.<sup>89</sup> In this respect, the radical feminist proposal goes beyond the strictures of the present system. Even the crime of blasphemous libel is limited to the form rather than substance: it is legal to utter in good faith any religious opinion whatsoever so long as decent language is used.<sup>90</sup>

Radical feminists draw an analogy between their proposal and current laws, and argue that their proposal is no greater an infringement on freedom of speech than the present system. Specifically, they liken their proposed restriction on materials falling within their definition of pornography to legislation forbidding group defamation and incitement of racial hatred. Yet these laws are not properly analogous. Group defamation requires that the plaintiffs *prove* that the words can be understood to relate to them;<sup>91</sup> Women Against Pornography *assume* that the characters in pornography

86 *A Bill of Rights for New Zealand: A White Paper* (1985) s 10.54.

87 *Idem*.

88 J Milton, *Areopagitica* — *A Speech for the Liberty of Unlicensed Printing* (1644).

89 See eg *Paris Adult Theatre I v Slaton*, 413 US at 67.

90 Crimes Act 1961 s 125 (3).

91 J F Burrows, *News Media Law in New Zealand* (1980) 48.

are representative of all women. Group defamation requires that the insulted group not be too large lest the harm be too diffuse;<sup>92</sup> Women Against Pornography allege that the class of "all women" is impermissibly harmed by each item of pornography. Sections of the Race Relations Act 1971 prohibit certain racist words and materials which hinder racial equality.<sup>93</sup> The argument that sexual equality is also important and deserves similar treatment has merit, although, unlike the race area, some people believe that there are genuine differences between the sexes.<sup>94</sup> But the racial hatred legislation does not extend into symbolic or hidden messages as the radical feminists would have pornography legislation. Little of the pornography and none of the sexist advertising complained of is *expressly* anti-woman in the same way that the pamphlets seized in the *King-Ansell* case were directly anti-Jew.<sup>95</sup> Subtle suggestions of racial inferiority, for example the subservient and stereotyped blacks in *Tom Sawyer* and *Gone With the Wind*, do not violate the Race Relations Act,<sup>96</sup> and this type of material is the true analogue to the pornography of which radical feminists complain. Thus their proposal represents a much greater potential infringement on free speech than the present system.<sup>97</sup>

If pornography misrepresents sexuality, permitting free expression will enable those who understand this fact to speak out and convince others of their position. The radical feminists criticise the operation of the marketplace of ideas, arguing that "more speech" is no answer because women cannot make their voices heard so long as pornographers are subject only to the restrictions of the present system. But the proper operation of the marketplace of ideas does not depend upon an equality of access to media resources. It is a battle of persuasion, and winning depends on the strength of one's argument rather than the number of times it is repeated. Second, on the facts the radical feminists are not being silenced. This contention is largely rhetoric, belied by the very existence of Women Against Pornography. Their voice is clearly being heard in government and the Indecent Publications Tribunal. Their real argument is not that they cannot make their voices heard, ie that the people remain unaware of their views, but rather that they are not gaining converts and that they are not allowed to force their views on people who disagree. They seek freedom

92 Ibid at 48, citing *Knupffer v London Express NP Ltd* [1944] AC 116.

93 Sections 9A, 25.

94 Some religious groups, for example, believe that men and women possess different attributes and best serve different roles in society. If they were persuasive in advocating this view, they might hinder sexual equality as Women Against Pornography would define it, but they surely would object to legislation which denied them the right to express this viewpoint.

95 *King-Ansell v Police* [1979] 2 NZLR 531.

96 The line drawn by the Race Relations Act sets a fairly high threshold for complaints based on negative stereotyping (see Human Rights Commission, *Exciting Racial Disharmony* (1984) 8).

97 In any event, the more profitable approach questions whether the proposed restriction of pornographic materials is desirable on its own merits. The fact that freedom of expression is not given absolute protection in New Zealand is no justification for ignoring it when considering proposals which would significantly increase censorship.

of expression for themselves, but wish to deny it to pornographers and their audience.<sup>98</sup> They state:<sup>99</sup>

When the power imbalances have gone, we may be able to abandon all constraints on freedom of expression. But, for the moment and for the foreseeable future the existence of those power imbalances — on the one hand permit the forms of censorship which we oppose; — and on the other, makes essential the forms of censorship [of pornography] which we promote.

Instead of competing in the marketplace of ideas, they are trying to deny the other side the right to express their views. They then expect to succeed once the debate becomes one-sided. This approach is unworthy, and inconsistent with the trust placed in the public in a democracy.<sup>100</sup>

Second, radical feminists argue that pornography does not contribute to the marketplace of ideas because it bypasses the process of conscious deliberation and conditions the audience by eliciting physical responses.<sup>101</sup> There is no support for this assertion. Pornography is not subliminal; no user is precluded from examining critically the underlying content. And if it truly were able to “condition” people into accepting its message, why do some men and women find pornography repulsive and disgusting? The upshot of this argument would be to give protection only to dry, boring dispassionate statements of opinion. Any message which is found to be persuasive would be suspect, and subject to attack on the ground that it is persuasive for the wrong reason, eg because it appeals to emotion, self interest or prejudice, or in the wrong manner, eg on a non-cognitive level, allowing the government to censor effective speech. The result would be a skewed marketplace of ideas with artificial restrictions influencing results. It would be better for Women Against Pornography to educate the public about this alleged subtle conditioning; aware of it, they could surely resist.

“More speech” is also a better way of meeting the radical feminists’ goals than censorship. There is no way to totally eliminate access to material

98 “[I]f a written Bill of Rights proceeds . . . , then any provisions relating to ‘freedom of expression’ must allow for the prohibition of pornography, yet protect other forms of expression, particularly other forms which relate to explicit or discursive materials on sexuality and sexual conduct” (*Draft Bill of Rights Submission s 2.1.2*).

99 *That Censorship is a Dirty Word*, supra n 15 at 1.

100 One commentator has noted:

“What is more, there is something contradictory about calling people to higher levels of humanity by limiting the range of experiences from which they may make their choices. If our problem is that we do not respect each other enough, that we exploit each others’ gullibilities, that we resort to violence too easily, that we lust too much and love too little, I do not understand how improvement will be achieved by the censorship of communication, which is itself a coercive tool that treats us as objects to be manipulated by the censors rather than as human beings with the capacity to learn and choose for ourselves what is better and what is worse. I go back once again to Justice Brandeis and his recommendation, appropriate here as elsewhere, that ‘the remedy to be applied is more speech, not enforced silence’ (*Speech and Law in a Free Society* at 173-174). For further rebuttal of the market failure argument, see C Baker, “Scope of the First Amendment Freedom of Speech” (1978) 25 UCLA LR 964, 981-985.

101 *Speech to Council for Civil Liberties* at 5-6.

meeting the feminists' definition,<sup>102</sup> or to prevent exposure to the sexist opinions it allegedly contains.<sup>103</sup> Radical feminists have noted that even a single exposure can corrupt the susceptible,<sup>104</sup> and if they unsuccessfully attempt to fully insulate people from a particular opinion, they will be instrumental in building a susceptible public. Judgement skills and critical analysis of the media atrophy when there is excessive censorship.<sup>105</sup> Those who are imperfectly sheltered lack the experience of regarding messages received in the media with scepticism. And if they are taught that exposure to certain materials pollutes or corrupts the viewer, it may become a self-fulfilling prophecy that leads viewers to believe that they don't have the power to reject a media message. A better (ie more successful) approach is to teach the public that the media has *not* been sanitised of all incorrect or repugnant views, and that they must question everything they see or hear.<sup>106</sup> Develop the judgement skills of the public and they will be selective about adopting media values and reject degrading images of women.

Closely related to the freedom of expression argument is the focus on the uncertainties of censorship. Assuming for the sake of argument that there are repugnant materials that deserve censorship, there remains the problem of finding a responsible censor to whom the public will gladly entrust the power to restrict dangerous or disgusting opinions.<sup>107</sup> The radical

- 102 Heroin is illegal, but still available for a price. This result is likely for pornography. Besides, there will be the prospect of exposure on overseas trips. And making pornography into "forbidden fruit" may increase the likelihood that it will be sought out.
- 103 Even if commercial pornography is not available to New Zealanders, there will still be hand-drawn cartoons and misogynist jokes similar to those derided by Women Against Pornography.
- 104 *Pornography & Violence* at 6, relying on Feshbach and Malamuth for the proposition that even one exposure to violence in pornography can significantly influence erotic reactions to the portrayal of rape. See S Feshbach & N Malamuth, "Sex and Aggression: Proving the Link" [1978] 12 *Psychology Today* 111.
- 105 Thus John Stuart Mill argued that even if an opinion is absolutely true, "unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds" (*On Liberty*, chapter II).
- 106 This approach is being tried with British school children. They are being taught to watch television without being influenced or "desensitised" by screen violence ("Classes Learn Not to Mimic Violence" (20 March 1988) *The Dominion Sunday Times* 28).
- 107 Even if Parliament adopts the exact definition advocated by Women Against Pornography, the identity of the censor will be very important. As argued in section III supra, their proposal is vague enough to permit many varied interpretations and applications. The line between pornography and erotica is particularly uncertain and subjective. *Society for the Promotion of Community Standards* provides a good illustration of differing interpretations of concepts such as denigration of women. "Pretty as You Feel", one of the films at issue, involved a clinic run entirely by women for men with sexual dysfunctions. A male "patient" who has difficulty becoming erect following an unhappy divorce consults a female doctor/therapist at the clinic. He wanders through the clinic, observing other patients and therapists engaged in different sexual activities. Finally the doctor directs him to engage in oral sex with her. He is cured. The epilogue notes that they marry. The Assistant Censor (who is a feminist) and McGechan J did not believe that any denigration of women was present as the women in the film were seen to be in charge and directing the action (at 19, 53). Nevertheless, submissions made by various people suggested that the film denigrated women by portraying them as sexual playthings (at 21); by portraying sexual activity for the gratification of males only (at 23); and by depicting women as commodities to be used for sexual gratification in abhorrent and deviant ways (at 25).

feminists would like to set themselves up as censors on the ground that they are the injured parties, but this perspective prejudices the issue.<sup>108</sup> Other groups which also oppose pornography, for example the religious right, are more numerous and arguably more likely to have control over the criteria and application of censorship decisions if Parliament accedes to calls for heightened restriction. And it is quite clear that religious groups will have very different ideas from the radical feminists about what to censor.<sup>109</sup> Even in the unlikely event that radical feminists are initially placed in charge of the censorship machinery, there is no guarantee that they will hold on to this coveted position through successive governments.<sup>110</sup>

They have much to lose if others control the censorship process. Radical feminists want to change public attitudes to favour healthy, dignified and human sex, and the free availability of literature describing homosexuality as an acceptable lifestyle, sex education materials, and erotica may be essential to this goal. Arguably, the best way to guarantee availability of these materials is to oppose censorship, rather than to support it with the naive hope that one's own criteria and interpretations will be accepted. Further, content-oriented censorship will set a dangerous precedent which may imperil the free speech which is a vital mechanism for achieving the goals of the women's movement. Radical feminists should not let their desire to eradicate demeaning pornography lead them into the mistaken support of censorship. As one feminist writer has explained:<sup>111</sup>

108 Instead of analytically justifying the supremacy of their injured self esteem over pornography users' freedom to read, for example, the radical feminists construct a paradigm which refuses to recognise the value of that freedom and so prejudices the issue. No one can doubt the intensity and sincerity of their views, but there are some very sincere people with other views, eg that freedom of expression is paramount, or that censorship is proper, but that lesbianism and sex education are morally wrong. Intensity and sincerity of belief are not accurate indicia of truth, and do not give partisans the right to limit everyone's freedom. The desirability of free access to pornographic materials is essentially a matter of opinion, on which reasonable people differ.

109 Not only will the disposition of erotica, sex education, and homosexually-oriented material be in question, but materials dealing with topics which are more central and important to the women's movement such as sexual equality and the right to abortion may be restricted. Censorship historically was used to silence women demanding equal rights, and materials advocating abortion fit into the current definition of indecency in that they deal with "matters of . . . crime" (Indecent Publications Act s 2).

110 Allowing radical feminists the power to control censorship is undemocratic. They do not argue that the present system is failing to give effect to the wishes of the majority, community standards, or Parliament. Instead, they admit that at present they represent the minority. They offer no justification, other than their rectitude, for placing an acknowledged minority in charge of censoring material for the majority. Their implicit argument seems to be that they have legitimacy as censors because they are the group that is being harmed by the material to be suppressed, and as such are the best judges. In fact, as such they are the group which is least likely to be objective or to take the interests of the majority into account.

111 Kaminer, "Pornography and the First Amendment" in L Lederer (ed), *Take Back the Night: Women on Pornography* (1980) 247. This comment dealt with the American legal system, but I would argue that it is equally applicable to New Zealand because the radical feminist position calls for a much greater intrusion by the government on freedom of expression than the present system.



Legislative or judicial control of pornography is simply not possible without breaking down the legal principles and procedures that are essential to our right to speak . . . . We must continue to organize against pornography . . . , but we must not ask the government to take up our struggle for us. The power it will assume to do so will be far more dangerous to us than the "power" of pornography.

The radical feminists' proposal will limit public access to materials and give the government increased power to censor. None of the grounds on which they argue that pornography should not be protected expression is convincing. In addition to restricting freedom of expression, this proposal will harm the movement for sexual equality and thereby the public.

## 2 *Hindering the goal of sexual equality*

Besides limiting the freedom of expression which is instrumental to adoption of feminist goals of equality, the anti-pornography crusade has the potential for hindering the women's movement in other important ways. First, it tends to divert attention and resources away from more important and profitable areas. Some feminist groups have become almost obsessed by the pornography issue. Pornography is a reflection of societal conditions, not a cause.<sup>112</sup> It is therefore imperative that feminists work to change the attitudes which direct its content. Working to ensure equal pay and to prevent discrimination are very important. An increasing number of women performing capably in responsible positions will be potent counter-evidence to any demeaning suggestion in pornography that women exist merely to serve the sexual desires of men, as actual contact has a more significant effect on attitudes than material acknowledged to be fantasies.

A second reason that the radical feminist approach on pornography may be disadvantageous to the women's rights movement is the likelihood of a backlash. Radical feminists acknowledge that the use of pornography is accepted by a large number of people.<sup>113</sup> Those people, as well as others who may agree with the radical feminists that pornography is disgusting but disagree that it should be banned, will feel that their rights have been infringed. If there were a consensus of opinion on the matter of pornography, or unassailable scientific knowledge concerning its effects, there would be less risk of a counter-productive backlash if Parliament were to enact strict new laws limiting availability. But there is no consensus among the public at large,<sup>114</sup> or even among feminists,<sup>115</sup> concerning its harms or benefits and the desirability of censorship. The magnitude of division of opinion has created a situation in which calls for heightened censorship can easily trigger a backlash. There are already signs of one, for example films showing stereotyped "feminists" being abused and degraded.<sup>116</sup> This situation is likely to become worse if Women Against

112 See eg E Hoffman, "Feminism, Pornography, and Law" (1985) 133 U Pa L R 497, 532.

113 See eg *Pornography & Violence* at 22-23.

114 See eg *Wheeler v Everard* at 20 (the court agreed with counsel that "when it comes to censorship of films, our society is sharply divided as to where the public good lies", and added that "that of course is not confined to film"); *Fiesta & Knave*, 6 NZAR at 223 (minority report) ("Indecency is a subject on which there is unlikely to be a consensus").

115 See n 3 supra.

116 See eg "Feminism, Pornography, and Law" supra n 112 at 515.

Pornography succeed with their plan for legislative reform. Backlash is detrimental to feminists because it is unlikely to be confined to disagreement with their pornography platform, but will also colour perceptions of broader campaigns for sexual equality. A bitter atmosphere created by unpopular censorship will surely not help the ultimate cause of eliminating sexism.

A third potential hindrance to the feminist goal of sexual equality stems from the fact that Women Against Pornography's approach represents a return to the view that women are vulnerable and need special legislative protection. This view is particularly evident in their argument that their voices can be heard only if the male-dominated pornography industry is silenced. Unlike the present system in which the denigration of women or men is a factor to be considered under the Films and Video Recordings Acts, the radical feminists' proposal will only apply to negative depictions of women and children. This protectionist philosophy is bad for two reasons: it reinforces perceptions of women's inferiority, and it reaffirms the legitimacy of paternalist motives, which in the past were all too often smokescreens for discrimination.<sup>117</sup>

## VI CONCLUSION

Women Against Pornography's perception that there is a great deal of offensive, degrading pornography available in New Zealand may be correct. The present system is imperfect, but heightened censorship is not the answer. The link between this material and negative behavioural and attitudinal change is tenuous, and the radical feminists overreact by assuming that pornography, which they define in a very broad and vague manner, contains implicit messages which distort the user's perception of female sexuality. If such claims are proven in the future, present censorship legislation which focuses on the public good can handle the problem. In the absence of such evidence, the liberal approach of the present system is appropriate. Heightened censorship would infringe freedom of expression, divert resources and attention away from more important issues, cause a backlash, and hinder perceptions of women's equality by suggesting that women are vulnerable and need special protection.

It is only fairly recently that sexual equality has become a widely accepted principle; the transition to an egalitarian society will take time. At most, pornography merely reflects the fact that this society is still largely male-dominated; it does not perpetuate this state. Women Against Pornography's campaign should be to educate and inform the public, not to change the law.

117 For example, the strictures of s 19(2)(a) of the Factory Act 1946 forbidding the employment of women in factory work at night were arguably "protection" of women, but later came to be viewed as discrimination against them. Women in the military and hazardous (but well paid) manufacturing and construction jobs are just some of those who stand to lose if paternalist legislation becomes fashionable again.