

PRESENTATION OF PAPER

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I think defining pornography is a very difficult task. None of my predecessors undertook that task. I had hoped they would so that I would not have to do it. What the feminist critique of pornography is most concerned about is the degrading and subjugating dimension of pornography. Preferably, it should not be confused with erotica or obscenity but the problem of actually drawing lines of demarcation between those various categories is no easy task and it is one with which the law has great difficulty. I think that is one of the major reasons why suggesting some sort of legal proscription is really not the most desirable way to go at this stage because the law can deal only with tangibles and as I pointed out at the beginning of my paper, we had that absurd situation in the '60s until the early '70s where police officers as the custodians of our morality, counted the number of pubic hairs in pictures and that sort of thing. I am certainly not suggesting that we return to such a situation. I am concerned about pornography in terms of the way that it eroticises dominance and portrays women in a degrading manner as objects to be sexually exploited and manipulated, to use the definition given by Karen Jacobs.

I am not concerned about violence *per se* or sexuality *per se* but really it is the triad of power, sexuality and violence that is of concern to women. It is not just physical, and I disagree with Dr Wilson there about the focus upon violence as physical injury, for the concern is also with the psychological harm that it does to women as a class. The increase in pornography has undoubtedly contributed to this particular concern. It is the cumulative effect of this great mass of pornography that is now being distributed that constructs sexuality in a particular way, so we are not talking about something that is neutral. It is wrong to see sexuality as simply something natural that is outside state regulation - sexuality is, in fact, being constructed by the state. There are particular norms of sexual expression which are associated with violence for men and passivity for women. That women are depicted in pornography as enjoying degrading and humiliating acts and providing instantaneous sexual gratification for men renders the current official rhetoric of equality between men and women as somewhat hollow. The other problem in terms of the threshold definitional question is posed by sexist advertising and so on, because the depiction of women on television generally also degrades women.

We have difficulty in terms of legal responses because the approach adopted by the law generally has been an atomistic one, that is looking at a particular problem in terms of an actor and an act, an *actus reus* - that nexus has to be established whether one is talking about crime or tort and the tendency has been to separate or divorce the particular incident from its societal context.

If we are talking about pornography, we are not just looking at that simple notion of linear causation but at something which is much more pervasive and insidious, much more difficult to regulate in other words. It is no good just talking about the *mens rea* if we are trying to apply the criminal law because, if you are focusing upon the state of mind of a particular actor, you are not looking at the act.

Feminists are concerned with the other side of it, about the harm that is done to women. The law in terms of criminal activity is less concerned with the act than with the state of mind of the actor.

So I am suggesting that we might have to re-conceptualise the way that we have looked at notions of injury and criminal harms in the past, and civil wrongs too. Indeed the history in this area is not encouraging. Our law has had proscriptions in respect of obscenity where the focus has been on some notion of moral pollution and it has not been concerned with the degrading effect on women at all. Obscenity law has been abused in the past. It has attempted to make over-inclusive categories and the problem of the subjectivity of legal standards has been such that the law has preferred to wash its hands of that whole area. It has tended to treat sexual expression as a private matter, beyond the realm of the state, but feminists would argue that in staying out of the area the law has, in fact, effectively legitimised misogyny.

The newer areas of environmental law and discrimination law are, I think, most helpful in focusing upon the actual injury rather than the actor. Indirect discrimination complaints, for example, seem to be perhaps particularly apposite. Direct discrimination complaints simply mean a complainant makes a complaint about discrimination based on a harm in a way which is really very similar to a traditional tort. Indirect discrimination goes beyond that and is able to take cognizance of practices which may appear to be neutral on their face but have a deleterious impact on an individual or a group of individuals, and that seems to me quite a significant development because it does take account of the societal context. It is not taking the particular atomistic wrong that has occurred and divorcing it from society as a whole. Affirmative action law goes even beyond that because it doesn't start off by looking at the harm *ex post facto*, but it endeavours to take a prophylactic approach so that there is an attempt to actually prevent the harm occurring. That is an innovative approach that we should be thinking about in this area. Perhaps instead of negative regulation one might adopt a more positive approach, providing incentives to deter the dissemination of pornography.

Racial vilification laws, I think, are also interesting and we are presently considering a bill in New South Wales where the focus is upon the harm that has occurred to a group or to an individual by virtue of his or her membership of a particular group. That law also includes both criminal and civil dimensions so that it is both punitive and compensatory. I think that that is also something which has been developed in the U.S. in looking at pornography and trying to re-conceptualise the way the law looks at harm.

But our law has great difficulty in taking account of what I see as the essential harm, since the law represents, by and large, the interests of the powerful. In this case we are talking about men but there are also capitalist interests because pornography, after all, is a multi-billion dollar industry. I haven't seen figures in Australia but I have seen some American material which indicates that pornography is actually worth more than the entire film and record industry combined in the U.S.,

which gives some idea of the extent of capitalist interests involved. Of course, those vested interests have endeavoured to argue in favour of the retention of pornography not in such a crass way, but using the free speech argument. 'Free speech' suggests that one is talking about equality of ideas within the marketplace - some notion of neutrality: that all ideas are equally valid when they are out there, and if one side puts forth one point of view so long as the other side has some notion of equal time to put forward a competing view they are then balanced, and one is free to choose which is the most compelling. It suggests that speech is neutral. Well I disagree with that. Free speech is largely the prerogative of the powerful. If we look at the oppressed aborigines in Australia as an obvious example to start with, we see that speech has been anything but free if one happens to have been an aboriginal person in Walgett for example. The voice of such individuals is significantly less than that of the powerful white interests in the town. So I am suggesting that free speech is a social construct. It operates in the interests of the powerful, in the interests of men when we are talking about pornography, and in the interests of capitalist interests too. Free speech has been developed in such a way to present some sort of carapace to immunise pornography against challenge.

However, I would like to challenge the free speech argument on an even more fundamental point and that is I do not think pornography *is* speech. It is not about the free interchange of ideas. It is material which acts as a sexual stimulant. The imagery of violence is designed for physical titillation and speech and acts are simply not synonymous. In other words, whilst I agree that free speech is a concomitant of a democratic society, the entire free speech debate which pervades this area, particularly in the U.S., although it has been voiced here even though we don't have a constitutional guarantee of free speech as such, acts as a smoke screen. It is not a legitimate argument.

So what are we to do about pornography? The use of the law is problematic for women. The law has been obtuse about harms that have been done to women. Within our legal system there are particular legal standards and legal positivism has been proud of the fact that these standards are universal, that is they apply to everyone regardless. It is only when we look at them more closely do we find that these standards are male standards. Women have complained for a long time about sex specific harms such as rape, sexual harassment and now pornography. The focus has been on the physical, on violence, because men can understand that. They cannot understand the psychological injury that accrues to women as a result of these harms. For men, pornography represents pleasure, entertainment. There is a false belief that it is about love, desire, and intimacy. But for women, it represents pain and I don't just mean physical pain for those who might be participating, but a psychological pain which attaches to all women who are depicted as mere sex objects.

The law also has displayed a general ineptitude in the past in dealing with sexuality and desire, but if we rush in to regulate there are the problems that Dr Wilson and others have mentioned. It also means that feminists are aligned with the Reverend Fred Nile '& Co' and I think that there are quite different interests there. We are looking at a repressive morality, over-zealousness, over-inclusiveness and

there is no concern within those interests with a dominance dimension that I have endeavoured to stress in my paper. So before we leap into outright proscription, I think we have a little more to talk about.

Law, on the other hand, is symbolically important. A proscription does represent the disapprobation of this conduct on the part of society, but there is no point in relying on the outdated moralism of obscenity law. That is why I think we have to focus on reconceptualising this whole area of law so that we take account of the harm that occurs to women and I think that is where social scientists, criminologists, and others really must take seriously feminist concerns about the impact of pornography, although we can't establish that simple nexus, as Dr Wilson pointed out, between pornography and acts of rape and so on. I think that that is really quite simplistic. We can understand, I think, a broader societal harm, a societal injury, that does accrue to women and demean us generally within the society. Obviously this forum is an important first step in developing a discourse around this topic and I hope this isn't the end of it.