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**Legislating Morality: The Case of
Obscenity Legislation in Canada**

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and Research, University of Ottawa, in
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LIST OF ABBREVIATIONS

1. C.C.C. - Canadian Criminal Cases
2. C.C.C. (2nd) - Canadian Criminal Cases; Second Series
3. C.L.T. - Canadian Law Times
4. C.R. - Criminal Reports
5. C.R.N.S. - Criminal Reports; New Series
6. C.S. - Rapports judiciaires officiels du Québec - Court Supérieur
7. D.L.R. - Dominion Law Reports
8. E.R. - English Reports
9. F.2d - Federal Reporter; Second Series
10. L.R. - Law Report
11. Mod. - Modern
12. M.P.R. - Maritime Provinces Report
13. Q.B. - Queen's Bench
14. R.L. - Revue légale
15. R.L.N.S. - Revue légale; nouvelle série
16. Sid. - Siderfin
17. Stra. - Strange
18. V.L.R. - Victorian Law Reports

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INTRODUCTION

We find it difficult to believe that in a world so full of temptations as this, any gentleman whose life would have been virtuous if he had not read Aristophanes or Juvenal, will be vicious by reading them (c.5; p.812)

There are no moral phenomena, there is only a moral interpretation of these phenomena. (18; p. 149)

The debates over criminal laws forbidding certain types of sexual conduct have, in the last few years, focussed interest in the limits of criminal law and its sanctions. These debates have ranged from the establishment of legitimate public concerns over sexual matters and the legislation of these concerns into law, to the detailing of the manner in which sex offenders are to be handled once they have been found guilty.

Some types of sexual deviancy have traditionally been controlled by legislation in general and by the criminal law in particular. However, these legal constraints on sexual behaviour are not universally endorsed by the public they are supposed to protect.

There exists, for instance, consensus for the legal control and sanction of acts such as rape and indecent assaults. There are, however, sexual activities and sex-related activities for which no such consensus can be found; many people feel that such activities are best left to subjective and individual control, and the control of these activities should be eliminated from the criminal statutes.

Such activities, they would argue, are questions of morality and should remain within the purview of less formal social controls such as religion and education. These people contend that morality should not be legislated.

Obscenity is one such activity for which legal constraints and sanctions have been an area of major controversy.

Section 159(8) of the Criminal Code of Canada states that any publication, a dominant characteristic of which is the undue exploitation of sex, or the combination of sex and crime, horror, cruelty or violence is deemed to be obscene. Although the constituent elements of the Criminal Code definition are understood, the definition of obscenity remains obscure and the translation of these elements into operational terms remains difficult.

Obscenity has been and still is one of the most contested legal issues because of the difficulties in defining the term obscenity. This is so "because it is largely dependent on a subjective weighting and ordering of values, both personal and societal, and thus raises the problem of determining a sufficient rationale for state intervention through criminal law or otherwise in a domain in which a variety of strongly felt personal attitudes come into conflict" (16; p. 2). In fact, obscenity has been found to be as much a moral as a legal issue.

The study will first describe the origins of the law of obscenity. In order to properly situate the evolution of obscenity within its historical context, its genesis will be set out along with a general examination of the development of the criminal law and the criminal law's historical relationship to morality. The broad legal philosophical views opposing and supporting the legal enforcement of morality will also be reviewed.

This study will seek to provide a timely airing of a problem that has been and remains a thorny question in Canadian legislation -- the problem of legislating morality. This dissertation will analyze this problem through an examination of obscenity laws in Canada.

The evolution of Canadian laws on obscenity from 1892 to 1980 will be analyzed with special attention being paid to the amendments to the Criminal Code. The legislative process will also be examined with a view to exploring the intentions of the legislators in amending these laws. It is hoped that this exploration will reveal information concerning the social framework within which these amendments were made.

Next, the more important reported cases in which persons were tried for obscenity will be analyzed in an endeavour to determine how these laws were applied and what impact these cases had on the evolution of the law.

Finally the major considerations which are involved in adopting obscenity legislation in a free and liberal society will be explored.

CHAPTER I
Legislation and Morality - the Case of Obscenity

1. History of Obscenity Law

The Christian Church, its sense of morality and ethics, and its ecclesiastical courts played an important part in the development of the English legal system. From the time when early English society was first exposed to the Church and its canon law, until before the arrival of William the Conqueror in 1066, no clear separation of secular and canon law and of lay and ecclesiastical courts existed. This meant that much of the civil court's business was ecclesiastical in nature and vice versa. Consequently, much of the Church's morality permeated early English law as some of the examples from Jeffrey's work on the development of crime in early England illustrate:

Men living in illicit union shall turn to a righteous life repenting their sins, or they shall be excluded from the communion of the Church. (Wihtraed 3.)

He who has intercourse with a nun, unless he makes amends, shall not be allowed burial in consecrated ground anymore than a homicide. (Edmund. 1.)

Priests know full well that they have no right to marry. (Aethelred V.9.)

(14; p. 658)

With the advent of the Norman Conquest came the introduction of a strong central government. With such a government, William was capable, over time, of drawing together the major departments of administration - legislative, executive and judicial. He also initiated the separation of Church and State which resulted in the creation of a dual system of courts and laws in England. Although both types of courts and laws were separated, they continued to function, as Jeffrey points out,

as an interdependent system. The moral code of the Church was made an important part of the common law. The legal system borrowed a great deal from the Church in those areas concerning marriage, sexual practices, morals, wills, property rights and so forth. (14; p. 664)

It should be stressed that during the early Middle Ages, the criminal law's function as the protector of societal values and the keeper of social peace was considerably different than what it was to be later on. Criminal behaviour or wrongs were dealt with primarily through various forms of settlements agreed on by the individuals, the families or the clans concerned. The settlements were essentially of a private nature, were frequently reached through the use of third parties or arbitrators and usually resulted in the imposition of fines or in the form of acceptable retribution.

State intervention and state punishment were of little use in a system based on fines and retribution. The state's and the criminal law's involvement in regulating individual behaviour were consequently almost non-existent. As Rusche and Kirchheimer (20) point out, social order in early medieval times was not maintained through the use of the criminal law and its sanction but rather by tradition, by a social system in which the relationships between lords and serfs and between economic and social equals were clearly known and by religious beliefs.

The large movements of population from the rural areas to the towns coupled with the changes in the socio-economic and political conditions of medieval English society brought about important developments in the criminal law. The central authorities were struggling to increase their power and control over the population. As the centralized authority's influence grew, the state consolidated its control over judicial rights. The state thus began to exact a share of the fines being paid by offenders to their victims, which accelerated the role of the state in criminal justice. As Rusche and Kirchheimer noted:

The administration of criminal law was a fruitful source of income rather than a financial burden. Far from involving expenditures, the administration of justice

brought in a considerable revenue in the form of confiscation and fines ... the attempt to extract revenue from the administration of criminal justice was one of the principal factors in transforming criminal law from a mere arbitration between private interests, with the representative of the public authority simply in the position of arbitrator, to a decisive part of the public law.

(20; p.10)

The state's financial interest in criminal justice largely served to change the criminal law's private character. The state's new found interest in the administration of criminal justice no doubt led to the transfer of "the initiative in criminal matters from the kindred of the injured man ... to the king as the public prosecutor" (14; p. 662). By obtaining control of prosecutions for crimes, of course, the state augmented considerably its power over its subjects.

During the Middle Ages, the ecclesiastical courts of England were said to have jurisdiction in four areas: (a) a penal or corrective jurisdiction exercised over all persons on questions of morality and faith; (b) jurisdiction in matrimonial affairs; (c) jurisdiction in affairs pertaining to the personal property of deceased persons; and (d) jurisdiction over members of the clergy. Some of the offences found in the ecclesiastical penal courts' jurisdiction

included defamation, adultery, incontinence, incest, witchcraft and drunkenness. (5, 15).

The Church's jurisdiction continued through to the sixteenth century, although it was modified to some extent by the actions of the royal courts in the fourteenth and fifteenth centuries, where judges would issue writs of prohibition forbidding the ecclesiastical courts from maintaining, or from receiving certain actions.

The Reformation saw the creation of the Church of England separate from the Roman Church; the King of England was declared head of both Church and State.

The jurisdiction of the ecclesiastical courts was not directly affected by the Reformation. However, after the Restoration and the growth of religious tolerance in the seventeenth and eighteenth century, the Church's penal jurisdiction over the laity with respect to questions of faith and morals diminished and gradually disappeared.

While legal historians are agreed that the ecclesiastical courts held corrective jurisdiction over the laity on matters of morality in mediæval England, it seems that the Church, as St. John-Stevas explains, "concerned itself with heresy and not obscenity and although the faithful

were warned against the writings of heretics, an ecclesiastical censorship was not instituted until after the Reformation at the Council of Trent" (21; p. 5). Moreover, censorship, as Foster points out, was initially directed against heretical literature, then seditious writings and finally obscene texts. (8)

Typical of the Church's approach to censorship was the banning in 1559 of Boccaccio's The Decameron. The book was banned, not because of its obscenity but because it ridiculed the clergy. The Church subsequently authorized an expurgated version after the unflattering references to the clergy and the saints were removed; the "obscenities", however, were allowed to remain.

With the increase in literacy and in the production of books in the fifteenth and sixteenth centuries, a series of licensing decrees was issued by the Crown. In 1559, Queen Elizabeth introduced the first effective system of licensing books; the system was controlled by the Star Chamber and the Church of England. However, neither of these authorities interfered with literature. Licences were very rarely withheld because of a book's obscene content.

While the Church and its courts used their jurisdiction sparingly in containing obscenity offences, the

common law courts simply did not recognize them at all. This attitude was demonstrated in 1708, in the case of R. v. Read where the Crown tried to have the author charged with writing an obscene book. The Court found that:

A crime that shakes religion as profaneness on the stage, etc. is indictable; but writing an obscene book, as that intitled "The Fifteen Plagues of a Maidenhead" is not indictable, but punishable only by the Spiritual Court. (c.3; p. 953)

The common-law courts refused to entertain charges of obscenity, because they maintained that all these charges came under the jurisdiction of the ecclesiastical courts. This situation endured until 1727, when the case of R. v. Curl (c.1) was decided by the King's Bench. This case is generally considered to be the first definite obscenity case (although there was an earlier prosecution in 1663 of Sir Charles Sidley (c.4) who had showed himself naked to the populace thereby causing a minor riot. In the Curl case, the common-law courts overruled the Read case thereby taking over the jurisdiction to hear obscenity cases. Curl was condemned for publishing an obscene book entitled Venus in the Cloister or the Nun in Her Smock. The Attorney General convinced the court with the following argument:

What I insist upon is, that this is an offence at common law, as it tends to corrupt the morals of the King's subjects,

and is against the peace of the King. Peace includes good order, and government, and that peace may be broken in many instances without actual force.

1. If it be an act against the constitution or civil Government;
2. If it be against religion; and
3. If against morality. (c.1; p. 850)

The Attorney General went on to explain how obscenity was an act against morality:

As to morality. Destroying that is destroying the peace of the Government is no more than publick order, which is morality ... I do not insist that every immoral act is indictable, such as telling a lie, or the like, but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offence of a publick nature ...

The Spiritual Court punish only personal spiritual defamation by words; if it is reduced to writing, it is a temporal offence. (c.1; p. 850)

The argumentation was accepted by the court with the Chief Justice commenting:

Certainly the Spiritual Court has nothing to do with it, if in writing; and if it reflects on religion, virtue, or morality, if it tends to disturb the civil order of society, I think it is a temporal offence. (c.1; p. 850)

And thus was laid the cornerstone which would become the foundation of the law on obscenity. However, the case provided no definition of obscenity nor did it establish any

guidelines for determining what was obscene. This situation lasted for almost a century and a half. During that period most cases of obscenity originated in publications repulsive or odious to religion. (7)

By the eighteenth century, the state's absolute right to prosecute under the criminal law was firmly established. Unfortunately, this absolute right to prosecute very often led to the absolute right to persecute. Von Bar (22) speaks of the witchcraft trials and of the ensuing torture and slaughter of hundreds of people under the banner of the criminal law and of the despotic, repressive and uncertain manner in which criminal justice was being generally administered. The administrators of the criminal law frequently differentiated victims according to their status, wealth, age or sex. The central authorities adopted autocratic criminal laws and frequently interfered in the trial and decision of individual cases. The agents of the criminal justice, the judges, prosecutors and police, were given tremendous latitude in dealing with offenders accused and convicted of crimes. Due process of law was unknown as public officials deprived persons of their freedom, property and life. However, the eighteenth century, the Age of Enlightenment, saw the beginning of a movement against the uncertainties, the arbitrariness and the abuses of the criminal law.

Foucault (9) and Rusche and Kirchheimer (20) explain that the arrival of a new economic group, the bourgeoisie or middle class, and its ability to form capital accumulation, to gather wealth and acquire property resulted in the restructuring of the old economic relationships. The bourgeoisie, with its increased power based on capital and property, directed its energy to protecting itself and its property from the arbitrary powers of the courts. Foucault points out that:

It became necessary to get rid of the old economy of the power to punish based on the principles of the confused and inadequate multiplicity of authorities ... punishments that were spectacular in their manifestations and haphazard in their application. It became necessary to define a strategy and techniques of punishment in which an economy of continuity and permanence would replace that of expenditure and excess. (9; p. 87)

The intelligensia of the time, often representing the new middle class, vigorously opposed the existing criminal justice system. They proposed that the courts' almost unlimited power and arbitrariness along with the severity of its punishments be strictly limited. The severity of the courts' punishment had to correspond to the offence committed. Slowly there emerged a separation of law from ethics and a legal formulation strictly outlining the procedural and substantive criminal law. Thus the state's

absolute power in the area of criminal law was reaffirmed but its power had to be exercised in moderation, with consistency and within the parameters of a clearly defined substantive law.

The legal definition, or more precisely the test by which courts were to determine the obscenity of a given publication was established in 1868 by Chief Justice Cockburn in R. v. Hicklin. (c.2) A pamphlet entitled The Confessional Unmasked, Showing the Depravity of the Romish Priesthood; the Iniquity of the Confessional and the Question put to Females in Confession had been seized and an order for their destruction had been made under the Obscene Publication Act (Lord Campbell's Act) of 1857. The Act, which had been introduced by Lord Campbell, allowed the magistrates to order the seizure and destruction of books, pamphlets and other publications, if, in their opinion, the material was obscene, if it was being distributed for sale and if the act of publication was a misdemeanor and could be prosecuted as such.

Although the Court was not asked to, nor did it determine the obscenity of the pamphlets, it did set down what has since been referred to as the "Hicklin Rule" or "Hicklin Test".

The "Test" of obscenity, simply put, is this:

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

(c.2; p. 371)

In defence of the appellant's action, it was brought forth that "his purpose was not to deprave the public mind" but to "expose the errors of the Roman Catholic religion" (c.2; p. 371). The Chief Justice clarified his position by stating that one cannot commit an offence against the law in order to attain some superior motive, even if this motive be of an honest and laudable nature. Thus, an honourable intention is immaterial in assessing obscenity.

The "Test", despite its obvious shortcomings such as its vagueness and subjectivity, was seized upon by subsequent courts to the extent that it was used in England, Canada, the United States and the Commonwealth generally, as the criterion of determining the obscenity of a particular work.

2. Legislation and Morality

The dichotomy between law and morality in the West has, in recent times, been primarily concerned with sexual mores. In the last few decades, sparked by the British Report of the Departmental Committee on Homosexual Offences and Prostitution, generally referred to as The Wolfenden Report

(1957), the debate has centered on the following question: what are the appropriate areas for permitting criminal law intervention in controlling behaviour which is considered by important segments of the population to be a matter of personal and private morality?

While it is obvious that The Wolfenden Report did not create the dichotomy between law and morality, it did focus the public's attention on the issue. It also led to the famous Devlin-Hart debate of the mid-sixties.

The Committee's purpose was to examine the existing criminal laws of England dealing with homosexuality and prostitution and to make the necessary recommendations to change those laws.

The Wolfenden Committee based its recommendations on its views of how the criminal law should function. In this respect the Committee felt that the function of the criminal law was

... to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence.

(23; par. 13)

The Committee went on to point out that:

It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined. (23; par. 14)

Certainly one of the Committee's most contentious and controversial recommendations was that "homosexual conduct between consenting adults and occurring in private should no longer be considered a criminal offence" (23; par. 62). The Committee felt that the state ought to differentiate between private morality and immorality, where there is no need for the criminal law, and public peace, order and protection of others from violence or personal injury where the criminal law has a justifiable reason to be involved.

In making the above recommendation, the Committee felt that:

Unless a deliberate attempt is to be made by society, acting through the agency of law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. (23; par. 61)

The Committee's assertion that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business" is highly reminiscent

of John Stuart Mill's Essay on Liberty where he announced his famous principle that the law must be used only to prevent harm to others. The principle states that:

... the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others to do so would be wise, or even right. (17; p. 15)

Mill's position on the application of law is in keeping with other British utilitarians of the eighteenth and nineteenth century.

Roscoe Pound describes English utilitarian jurists as belonging to the English Analytical school of jurisprudence (19), a school belonging to legal positivism. This school of thought postulated "that law must be strictly severed from morality" (10; p.656). The notion of morality in this instance generally meant all non-legal standards by which human behaviour may be judged. This, as Lon Fuller explains, means that "notions of right and wrong based on religious belief, common conceptions of decency and fair play,

culturally conditioned prejudices - all of these are grouped together under the heading of "morality" and are excluded from the domain of law" (10; p.635).

Two of the most important contributors to the Analytical school of jurisprudence were John Austin and Jeremy Bentham.

Throughout their writings, both men insisted that laws be distinct from justice and that the law be separate from any notions of good or evil.

In The Province of Jurisprudence Determined, Austin states:

The existence of a law is one thing: its merits or demerits are another thing. Whether a law be, is one inquiry: whether it ought to be, or whether it agree with a given or assumed test, is another and distinct inquiry. Although it disagree with a given or assumed test, a law set by the state, or a law imposed by opinion is a law which the state has set, or a law which opinion has imposed. (1; p. 233)

Austin followed this statement by attacking Blackstone's suggestion that natural law was dictated by God and therefore was superior to the laws of Parliament and should be universally binding on all nations. He pointed out that someone using Blackstone's approach would have to

conclude that "no human law which conflicts with the law of God is obligatory or binding; or (changing the expression) that no human law which conflicts with the law of God is a law imperative and proper" (1; p. 234). Austin rejected this conclusion, preferring the supremacy of the sovereign's (i.e., the state's) command. He felt that whatever the sovereign commands and can enforce is the law; there can be no appeal to a law of nature or Divine law.

Bentham, an individualist utilitarian, believed in individual initiative and freedom of action. He also rejected the whole concept of natural law.

His utilitarian philosophy was summed up in his Theory of Legislation where he states that:

Nature has placed man under the empire of pleasure and pain. We owe to them all our ideas; we refer to them all our judgements, and all the determinations of our life. He who pretends to withdraw himself from this subjection knows not what he says. His only object is to seek pleasure and to shun pain ... These eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The principle of utility subjects everything to these two motives. (2; p. 2)

Using as a premise that man's actions are motivated by the desire to escape pain and secure pleasure, Bentham developed a measure or standard of utility for calculating the

amount of pleasure in an individual by using a series of determinants - intensity, duration, certainty and remoteness. (3; chap. IV)

Having stated his premise and having established a method for measuring the degree of pleasure, it became a simple step for Bentham to link pleasure with good and pain with evil and declare that the task of law was to serve the good and avoid the evil. The test of a good law then became its utility, that is, its ability to produce benefit, advantage, pleasure, good or happiness. Bentham thus believed that the ultimate goal of law was the greatest happiness for the greatest number of individuals in a given society. It was not surprising to see him assert that:

That which is comfortable to the utility, or the interest of an individual, is what tends to augment the total sum of his happiness. That which is comfortable to the utility, or the interests of the community, is what tends to augment the total sum of the happiness of the individuals that compose it. (2; p. 2)

He conceived that the means of reaching the greatest happiness of the greatest number was to ensure the maximum of freedom of action and as much free self-assertion as possible for each individual. Removal of limitations on individual activity was the main function of law.

J.S. Mill, as mentioned earlier, taught that legal coercion must be used only against those who would cause harm or injury to others or would disturb the public peace, order and security and that the law must not involve itself in the protection of society's moral values or moral order.

Professor H.L.A. Hart, a modern supporter of Mill's theories and a jurist who endorsed legal positivism agreed with the principles enunciated by the Wolfenden Report.

Hart defended the Wolfenden Committee's recommendations in a series of papers, articles and essays which culminated in an extensive discussion on law and morality in a book entitled Law, Liberty and Morality. In criticizing Devlin's attack of the Wolfenden recommendations, Hart held that a distinction should be made

between inducing persons through fear of punishment to abstain from actions which are harmful to others, and inducing them to abstain from actions which deviate from accepted morality but harm no one.

(13; p. 57)

Hart, however, was willing to soften his position by allowing that the principle that no individual may be coerced for his own good be tempered by what he called "paternalistic legislation"; such legislation would employ legal coercion and punishment to protect the willing or voluntary victim, that is, to protect individuals against physical injuries to which

they might voluntarily submit. He was also ready to compromise his support of legal positivism by permitting the criminal law to "protect people from enforced public confrontation with activities repugnant to their moral feelings" (4; p. 178).

Hart conceded that though legality and morality overlapped at times, "that certain provisions in a legal system are necessary" (12; p. 622). He presented two fundamental instances where he thought that basic moral principles overlapped, or at least coincided, with the rules of a legal system.

This first, he felt, were rules of natural necessity. These rules restricted the free use of violence and allowed for the minimum of property "with its rights and duties sufficient to enable food to grow and be retained until eaten" (12; p. 623). It is difficult to disagree with Professor Hart when he states that the absence of those basic rules in a legal system would make the existence of any other rule in that same legal system irrelevant. Such rules he indicates:

... overlap with basic moral principles vetoing murder, violence and theft; and so we can add to the factual statement that all legal systems in fact coincide with morality at such vital points ... necessarily so. (12; p. 623)

The second instance mentioned by Professor Hart is found in the application of law. Justice in the administration of the law demands that the rules of a legal system be applied equally to cases similar in nature. The principle of "treating like cases alike" (12; p. 624) is a form of morality demanding the application of the principles of objectivity and impartiality in the administration of the law.

The Wolfenden Committee's recommendations, however, were not wholeheartedly endorsed by the legal community in its entirety. The Committee's main detractor and certainly its most famous critic was Lord Patrick Devlin. From the outset, Devlin criticized both the recommendations and the theory the recommendations were based on. Lord Devlin's attack upon the Wolfenden recommendations created much interest among legal philosophers. As a result many jurists reacted to Devlin in the form of replies or rebuttals.

Devlin's main antagonist was Professor Hart as mentioned earlier. Hart's responses, of course, led to a continuing debate between himself and Lord Devlin. The debate generated a renewed interest in the theories of legal positivism in general and on the appropriateness of enforcing morality by law in particular.

One individual who criticized Hart for his insistence on keeping sharp the distinction between law and morality was Lon L. Fuller, a professor at Harvard Law School. Fuller contended that Professor Hart had avoided discussing the nature of the fundamental rules which made law possible. These fundamental rules, Fuller insisted, were not rules of law but of morality because

They derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary. They can hardly be said to be law in the sense of an authoritative pronouncement since their function is to state when a pronouncement is authoritative. (10; p. 639)

This general acceptance translates into an external morality of law. Fuller maintained that the "authority to make law must be supported by moral attitudes that accord to it the competency it claims" (10; p. 645). Thus, a law will be observed only if it is perceived to be just, right and necessary.

However, Fuller demonstrated that law possessed more than an external morality. He explained that a parallel could be drawn between law and "good" law and order and "good" order. Unqualified law corresponded to simple order, that is, the functioning of society according to some standard. "Good"

law, on the other hand, equated to good order, that is, order which "corresponds to the demands of justice, or morality, or men's notions of what ought to be" (10; p. 644). Fuller explained that law, even unqualified law, that was thought of as simple order contained an implicit moral element which he called internal morality. He reasoned that law without this internal morality would lead to chaos and confusion but certainly not to order.

Internal morality consisted of two basic concepts. The first involved the notion of striving to reach excellence, of "proper and fitting conduct, conduct such as befits a human being functioning at his best". The second dealt with basic societal rules, rules "without which an ordered society is impossible" (11; p. 5).

Using these concepts as a base, Fuller arrived at a series of demands that characterized the internal or inner morality of law. Briefly these demands were as follows:

- 1) in order to subject human behaviour to a set of rules, there must be rules;
- 2) the rules that are to be observed must be promulgated, publicized or at least made available to those who are expected to observe them;
- 3) rules ought to be prospective and not retroactive in effect;
- 4) they should be clear in their meaning; rules that lack clarity are generally

not understood and cannot be observed; 5) rules must avoid contradicting one another; 6) rules should not demand the impossible from those who are to obey them; 7) rules should maintain a certain constancy through time: if rules change frequently, they lead to general confusion; and 8) those who administer the rules must act in congruence with those rules; there should be no discrepancies between the law as enunciated and the law as administered. (10)

Fuller, it may be summarized, thought that law generally possessed an external morality which was expressed by the general support, or at least the lack of active resistance to it, but that in any event all law contained an internal morality without which it could not be considered law.

As mentioned earlier, the severest criticism of the Wolfenden Recommendations was provided by Lord Patrick Devlin.

The Wolfenden Report's major recommendation that "homosexual conduct between consenting adults in private should no longer be a criminal offence" (23; par. 62) was based on the Millian concept that the law's sole function was to prevent harm to others and that consequently the law was not to concern itself with the morality or immorality of individual acts nor with the ethical aspects of society.

Devlin, on the other hand, ardently believed that law and morality simply could not be nor should be separated and that law had a moral function to perform. Devlin supported his views in several lectures, papers and essays; he summed up his arguments in his most widely known work, his book entitled The Enforcement of Morals. Lord Devlin's major argument is that society has a right to defend itself and therefore law is justified in entering the realm of private morality. Devlin points out that although individuals may adopt various differing moral principles, society, as expressed by the opinion of its majority, has a right to impose standards of morality, the transgression of which it will not tolerate. Such standards of societal morality are found in the imposition of restrictions on its members in the area of suicide, abortions, incest etc.

In concluding that the law, both civil and criminal, "claims to speak about morality and immorality generally" (6; p. 7) Devlin posed three basic questions dealing with the law's concern with morality:

(1) Has society the right to pass judgement at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgement?

(2) If society has the right to pass judgement, has it also the right to use the weapon of the law to enforce it?

(3) If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish? (6; p. 7)

Lord Devlin answers the first question in the affirmative. He points out that society is made up of a community of ideas "not only political ideas, but also ideas about the way its members should behave and govern their lives" (6; p. 9). Hence, the make up of a society is found in its shared political and moral ideas. Devlin suggests that the institution of marriage is a striking illustration of shared political and moral beliefs. Marriage, he says, is a clear case of the relation between politics and morals, since it "is a part of the structure of our society and is also the basis of a moral code which condemns fornication and adultery" (6; p. 9). However, public morality is not restricted to supporting institutions. Devlin returns to his concept of society being a community of ideas:

without shared ideas on politics, morals and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement, about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate.

(6; p. 10)

Lord Devlin also answers the second question, should morals be enforced, in the affirmative. He reasons that if the answer to the first question is in the affirmative, that is, that society has the right to pass judgement on matters of morality, then it follows that society has the right to "use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence" (6; p. 11). Consequently, it becomes impossible to impose theoretical limits to the authority of the State to legislate against immorality.

Devlin strongly disagreed with the Wolfenden Committee's view that there must remain a sphere of private morality and immorality which was not the law's business. He felt that

"the suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity. It is wrong to talk of private morality or of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice.. There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality.

(6; p. 14)

However, in answering the third question, which deals with how to exercise legal sanctions, Devlin felt that society's right to punish vice and immorality should be exercised only against certain types of vice and immorality. He proposed certain general restraining principles which would maintain the "balance between the rights and interests of society and those of the individual" (6; p. 15). The most important principle was the notion of "toleration of the maximum individual freedom that is consistent with the integrity of society" (6; p. 16). This was felt to be a principle which prevailed in all matters of conscience. Other principles are that: the limits of tolerance shift - society tolerates, - from generation to generation, certain variations from the moral standard; privacy should be respected as much as possible; and lastly, the law is concerned with a minimum standard of behaviour and not a maximum.

Taken together, these principles require that caution be exercised before concluding that a particular type of behaviour or specific act be considered gravely immoral. The law should refrain from intervening when it sees that society tolerates a certain type of behaviour; but the law should not hesitate to condemn when it sees a general abhorrence and notes that society has reacted with

"intolerance, indignation and disgust" (6; p. 17) to a given act.

Several phases are discernible in the development of obscenity law. The first phase covers the period up to the eleventh century. The criminal law as a legal system was for all intents and purposes non-existent. The Church's morality and society's traditions were the criteria by which a person's conduct was measured. Obscenity as a concept did not exist. The next phase, the period covering the Middle Ages, saw the state gradually assume control of the criminal law. Its control eventually became absolute and its power in administering criminal justice was unchecked. The law was applied unevenly and in an autocratic and despotic fashion. The Church's penal jurisdiction with respect to morals gradually disappeared. It was during the late Middle Ages that the concept of obscenity emerged, although it was very rarely used. The last important phase coincides with the eighteenth and nineteenth centuries. Demands were made by a new powerful class, the bourgeoisie, to restrain and rationalize the application of the criminal law. Punishment, it was thought, had to relate directly and proportionally to an offence which in turn had to be clearly identified and defined. There was also a push for the attenuation and elimination of punishment for religious and moral offences.

Obscenity came to be recognized by the common-law courts as a crime against the state and was finally defined by the courts in the mid-1800's.

The debate on the division between law and morality is centered on two major schools of thought. The first suggests that a distinction should be made between law and morality, that the two should be kept separate, and that legislation should not be used to enforce morals. The other line of thought is that not only should legislation enforce public morality but that it is the law's duty to do so in order to protect society from vice and immoral activity.

The rest of this study will examine the development and application of obscenity legislation in Canada as an example of the problem of legislating morality.

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- c.4 Roy (Le) v. Sidley (1663) 1 Sid. 168; 82 E.R. 1036
- c.5 United States v. Roth 237 F. 2d 796

CHAPTER II Methodology

As mentioned in the previous chapter, attitudes on the legal enforcement of morality appear to be generally divided into two fairly distinct views.

On the one hand there is the position that law and morality should clearly be separated; that the legislators should refrain from dealing with matters of morality such as sex and obscenity, that the legislator, in fact, should interfere with human behaviour and human activity as little as possible. On the other hand, there is the view that law and morality ought not to be separated and that in order to prevent antisocial behaviour and to protect the nation's moral fibre and therefore its social fabric, the legislator has the right, and some would say the duty, to legislate on such matters as sex and obscenity.

This study proposes to look at the issue of legislating morality by examining the development and application of obscenity law in Canada.

The Canadian law on obscenity is incorporated mainly in a handful of sections of the present Canadian Criminal

Code. Undoubtedly the most important of these is Section 159. Although this section does not deal exclusively with obscenity, it does provide the cornerstone for the law on obscenity in Canada. Section 159(1)(a) states that:

Every one commits an offence who makes, prints, publishes, distributes, circulates or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, photograph, record or other thing whatsoever.

Section 159(2)(a) declares that:

Every one commits an offence who knowingly, without lawful justification or excuse, sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, photograph, record or other thing whatsoever.

Of singular importance in this section is sub-section (8) which elaborates on the constituent elements of what is deemed to be obscene. This sub-section states:

For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one of more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

The other sections of the Criminal Code involved in outlining the substantive elements of obscenity are sections 163, 164, and 165.

Section 163 provides that:

Every one commits an offence who, being the leasee, manager, agent, or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

Section 163(2) makes it an offence to take part in any manner in the above performance. Section 164 makes an offence of making use of the postal services for transmitting or delivering anything that is obscene. Lastly, Section 165 provides the penalties for anyone found guilty of the above mentioned offences: up to two years imprisonment if found guilty of an indictable offence or up to six months imprisonment and/or 500 dollars fine if found guilty of a summary offence.

The other sections of the Criminal Code concerning obscenity are procedural in nature and will not be dealt with in this study.

Legislative references to obscenity also exist in other federal statutes. The Customs Tariff Act, for example,

prohibits the importation of indecent or obscene publications or matter. Similar references, sometimes explicit, sometimes not, may be found in other federal statutes and regulations such as the Trade Marks Act and the Regulations passed under the Broadcasting Act. However, this study will not deal with these other statutes; it will concentrate exclusively on the issue of obscenity as found in the Criminal Code.

Several questions come to mind when examining obscenity legislation: how did such legislation come about? how did it evolve? what reasons, if any, were given for adopting such laws? how have the courts reacted to such laws? what effects have court decisions had on obscenity legislation? These and other questions concerning obscenity laws may be regrouped into two broad questions:

1. How has Canada's present obscenity legislation come into being?
2. What interpretations have the courts made of this legislation?

This study will attempt to answer these two and other related questions concerning the subject of legislating obscenity in the following manner.

- The question of how Canada's obscenity legislation came into being will be dealt with by describing the evolution of the law on obscenity from 1892, the year that offences relating to obscenity were made a part of the Criminal Code, to 1970, the year that the Criminal Code's obscenity provisions were last amended. This section of the study will examine the original statutory provisions and the ensuing amendments to those provisions. Furthermore, an attempt will be made to answer ancillary questions such as why the legislators decided to include obscenity provisions in the Criminal Code, and what their reasons were for amending those provisions. To answer these questions, an examination of official public documents such as the House of Commons Debates, the minutes of various House of Commons and Senate Committees concerned with legal affairs, and the reports from these Committees will be carried out.

- The matter of how Canadian courts have interpreted the obscenity laws will be explored by providing a descriptive and analytical review of judicial interpretation and application of the law on

obscenity. This part of the study will review reported cases from 1892 to the present. Since few obscenity trials were reported before 1960, the review of cases from 1892 to 1959 inclusively will be exhaustive in nature. Consequently, trials heard at both first instance and appeal levels will be examined. However, because the number of obscenity cases since 1959 has increased considerably, an exhaustive review of those cases is almost impossible and certainly unnecessary for the purposes of this study. For these reasons, the survey of obscenity cases heard from 1960 to the present will be limited to the most significant cases. Case law and the more important interpretations of the law are usually developed at the appeal level, hence the examination of post-1959 cases will concentrate mainly on cases heard at the appeal level. Although all the reported cases from 1960 to the present have been verified for their importance and their relevancy, only cases having a direct impact on the development and the interpretation of the obscenity provisions of the Criminal Code will be included in this study.

CHAPTER III Law and Interpretation of the Law

As mentioned in Chapter II, two important issues arise when investigating obscenity legislation: how such legislation has come about and how the courts have reacted to it.

This Chapter will explore both problems. The first part of this Chapter will examine the evolution of obscenity legislation. In doing so, it will describe the relevant amendments made to the Criminal Code from 1892 to the present. Moreover, the rationale for bringing forward these amendments will be investigated by analysing, whenever possible, the legislators' intent as expressed in the House of Commons Debates and in the various Committee minutes and other official documents.

1. Evolution of the Law on Obscenity

Offences relating to obscenity have not always existed in Canadian criminal law. Unlike other offences such as murder, assault and theft which had existed in legislative forms long before the advent of Confederation in 1867, crimes relating to obscenity do not make their legislative

appearances until 1875 and even then only in an indirect manner, as a misdemeanor in a statute regulating the postal services.

It was not until 1892, with the introduction of Canada's first Criminal Code (5) that the law on obscenity was legislated. The Criminal Code of that period contained only two offences relating to obscenity and both were contained in Part XIII - Offences Against Morality, along with several other sex-related offences such as incest, sodomy and gross indecency. This grouping of offences, however, was only one of several other such groupings found under Title IV of the Criminal Code entitled Offences Against Religion, Morals and Public Convenience.

The Criminal Code of 1982 was, by and large, a consolidation and reorganization of existing statutes dealing with the criminal law. Thus it comes as no surprise to discover that most of the offences provided for under Title IV of the Code had already existed. For example, the Revised Statutes of Canada of 1886 contained a statute dealing with offences against public morals and public conveniences (3) as well as a statute on offences against religion (4). It is within this context that the origins of Canada's obscenity laws are situated.

One of the two obscenity offences introduced in the Code had previously existed in another statute. This was section 180 which dealt with obscene material and the use of the Post Office. This section, in fact, was appropriated from the statute regulating the postal services. The law governing the Canadian Post Office had been enacted in 1867 (1) and had been amended in 1875 (8). This amendment to the Post Office Act introduced the offence of having obscene matters transmitted or delivered through the postal services. This offence was incorporated into the Criminal Code as section 180 and was subsequently dropped from the Post Office Act in the Revised Statutes of 1906. (7)

Section 179, the other section concerned with obscenity, was new. This section made it an offence to publish or publicly sell or expose to the public any obscene printed or written matter or pictures or any other objects which tended to corrupt morals. Section 179, however, did not relate exclusively to obscenity offences. It included a sub-section prohibiting the sale or advertisement of any material, medical or otherwise, which was meant to prevent conception or cause abortions. The section also provided a legal defence for someone charged with this offence by stating that an accused would not be convicted if he could show that the acts he was charged with had served the public good.

Lastly, this section made it clear that an accused's motives were irrelevant in all cases.

Anyone found guilty of offences falling under either section 179 or 180 was guilty of an indictable offence and was liable to two years imprisonment.

The legislators, in creating the section 179 obscenity offence, were largely inspired by section 147 of the English Draft Code found in the Appendix of the Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences. (30) The Commission, the fifth of its kind appointed by the British government, inquired into the desirability and practicability of reducing the written and unwritten criminal law of England into one code. The Commission's section on obscenity was drawn from the provisions of the Obscene Publications Act of 1857. (28) With respect to the offence of publishing, exhibiting or selling obscene matter, section 147 of the Draft Code and section 179 of the Criminal Code of 1892 were almost identical. The Draft Code version, unlike the Criminal Code, provided for the offence of obscene libel. With reference to obscene publications, the Royal Commissioners, in their report, mention that section 147

expresses the present law, but it puts it into a much more definite form than at

present. We do not however think it desirable to attempt any definition of obscene libel other than that conveyed by the expression itself. (30; p. 390)

It must be assumed that the Commissioners' comments were meant to apply equally to the term "obscene matter" found in their section 147.

The Criminal Code (or Bill No. 7 as it was identified before it was accepted by Parliament) was sponsored by Sir John Thompson, the Minister of Justice. When the House resolved itself into Committee to consider the Code, Sir Thompson and another member both commented on the purpose of including section 179. While responding to a remark made by a member of the Committee, the Minister of Justice went on to say that legislation of this kind was necessary in order to prevent indecent shows and pictures and that "the object is to put a stop to that kind of business" (16; p. 2969). Another member pointed out that the importation of obscene pictures was allegedly becoming a common practice among photographers who were then reselling these pictures to the public, and that the intention of section 179 "was to stop that practice" (16; p. 2970).

It should be noted that in both the "postal services" section and the newer Criminal Code section on obscenity, the term "obscene" as well as the phrase "obscene

matter" remained undefined. There is reason to believe that this omission was not an accident nor an oversight on the part of the legislators. Hansard reveals that some members of the Committee studying Bill No. 7 were concerned that the obscenity provision as found in section 179 was too broad and too sweeping in nature. The members' apprehension, however, seemed to have been relieved by the Minister of Justice when he stated that legislation dealing with indecent offences required a certain "vague character" (16; p. 2969).

In summary, the Criminal Code of 1892 made mention of obscenity in only two instances, the publishing, exposing or selling to the public of obscene material, and the transmission or delivery of obscene matter by the Post Office. Both offences were indictable in nature and both provided up to two years imprisonment.

Several amendments to obscenity offences were made between 1892 and 1906 and were reflected in the Revised Statutes of Canada of 1906. Such modifications as renumbering the sections or making editorial changes to the offence were minor in nature. Some of the other more important changes refer to the substance of the offences.

Section 179, which was renumbered as section 207 in the Revised Code, was significantly amended in 1900. (2) The

amendment broadened the application of the section to include not only the sale or exposure of obscene material to the public but also the manufacture, circulation or distribution of obscene matter.

The amendment caused a great deal of discussion among the members of the committee of the House studying the matter. The discussion, however, centered more on sub-section 2 of section 179 concerning indecent shows to which no modification was implemented, rather than on the changes actually brought forward by the Solicitor General, the Honourable Charles Fitzpatrick. Certain members, during the discussions, indicated their concern that indecent plays then being performed were having a debilitating effect on the morals of the country in general, and on those of the young in particular. The other members, including the Solicitor General felt that the existing provision was more than sufficient to prevent indecent plays from being performed on the stage; one of their main arguments against expanding on the word "show" was the fear that the addition of terms such as drama, spectacular, entertainment and the like would limit the interpretation of the sub-section to the terms found exclusively in the enumeration and in any case could not prevent people from attempting to discover ways around such an enumeration. (17; p. 7403)

The actual change which broadened the scope of the offence was not commented on at all.

Another important change to the obscenity law occurred in 1903 (9). A new section, dealing with obscenity in the performing arts, was enacted.

Charles Fitzpatrick, now Minister of Justice, had been subjected to effective pressures exerted by the recorder and other municipal officials of the City of Montreal for the introduction of such a section. (18; p. 95) Mr. Fitzpatrick, a member of Parliament from Quebec City, had certainly become more receptive to the idea of amending the Criminal Code with respect to obscene plays than he had been three years earlier when a member of the Opposition had suggested a similar change. (17; p. 7403)

An odd thing occurred to the amendment which should be noted. The original amendment made no mention of "obscene" plays; rather, it addressed only "indecent and immoral" forms of entertainment. It was at the insistence of Sir Charles Tupper, a member of the Opposition, that the Minister of Justice agreed to remove the words indecent and immoral and insert in their place the term obscene. Tupper was afraid that the terms indecent and immoral were too broad and would prove not only difficult to define but dangerous to apply. He

also feared that a section such as originally suggested would be used to suppress great literary works and plays simply because some segments of society, where extreme views in these matters were held, might think them immoral. Whether or not he was swayed by these arguments, the Minister of Justice agreed to the change and made a motion to that effect, to which the members of the committee agreed. The modified amendment was subsequently agreed to by Parliament. When the amendment was placed in the statute books of 1903, however, it was inexplicably written up to include all three terms - immoral, indecent and obscene.

The amendment, numbered 179A and renumbered as section 208 in the Revised Statutes of 1906 brought about two new obscenity-related offences.

The first offence made it a crime for anyone to be an agent, a manager or a person in charge of any theatre which presented an immoral, indecent or obscene play, opera, concert or any other type of performance or representation. The penalty provided, upon indictment, up to one year imprisonment or a fine of up to 500 dollars or both, or upon summary conviction, up to six months imprisonment or 50 dollars fine or both.

The second offence stated that anyone taking part in or appearing as an actor, performer, or assistant in any capacity, in any of the obscene performances or representations mentioned above was guilty of a summary conviction offence and liable to three months imprisonment or a twenty dollar fine or both.

There were only two amendments affecting the sections on obscenity between 1906 and the promulgation of the Revised Statutes of 1927; only one of them actually had an impact on the development of the law of obscenity in Canada.

This was the amendment to section 207 (old section 179) enacted by Parliament in 1909 (10) which again widened the application of the obscenity law by making it an offence for anyone to make obscene material. However, the amendment's main impact was in declaring that anyone found possessing obscene matter for sale, distribution or circulation or assisting in the making, manufacture etc. was guilty of an offence.

The amendment was introduced by the Honourable A.B. Aylesworth, the Minister of Justice. The Minister, in introducing the amendment, referred to what he considered an important case which had recently been heard relating to

the manufacturing and circulating of obscene materials. It seemed to him that section 207 concerning obscenity needed to be broadened because it appeared

that the provisions of the statute in that regard as they stand at present are possibly not wide enough to cover some of those who would participate in those offences... (19; p. 4632)

Although the Minister did not identify the case he was alluding to, he most likely was referring to the case of R. v. Graf. (c.25) The likelihood of the Minister referring to this case is based on the fact that the case was heard in Toronto which is sufficiently close to the Minister's home riding of York North for him to have been made aware of it.

The defendant in this case had been tried and convicted by a police magistrate of the City of Toronto for selling obscene books and pictures. Unfortunately the details of this case are not available in any law report; only the defendant's subsequent application for his discharge from custody, in which the original trial is occasionally referred to, is reported.

When the House resolved itself into Committee to examine the amendment to section 207, R.L. Borden, member for Halifax, related information to the Committee which led him to

believe that there existed a high rate of distribution of obscene literature and pictures. He thought that, given the volume of distribution of obscene material, the Minister should consider making simple possession of obscene matter prima facie evidence that the possession was for the purpose of selling it. The Minister responded by saying that he did not think that the behaviour of an individual who was corrupting his own morals was as serious as that of a person corrupting other people's morals. He felt that someone possessing obscene literature for his own consumption hurt no one but himself and therefore would not agree to Mr. Borden's suggestion (20; p. 6391)

Thus in 1927, section 207 of the Criminal Code, as found in the Revised Statutes (6), read as follows:

207. Every one is guilty of an indictable offence and liable to two years imprisonment who knowingly, without lawful justification or excuse,

a) makes, manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated, or has in his possession for sale, distribution or circulation, or assists in such making, manufacture, sale, exposure, having in possession, distribution or circulation, any obscene book or other printed, type-written or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals, or any plate for the reproduction of any such picture or photograph;

Sections 208 and 209 concerning obscenity on the stage and mailing obscene matter respectively remained unchanged until the revision in 1953-54 of the Criminal Code.

Section 207 was amended one last time, in 1949, (11) before the appearance of the 1953-54 version of the Criminal Code.

The amendment to section 207 was initially introduced as a private member's bill by Mr. D. Fulton; its purpose was to curb the publication, sale and circulation of crime comics in Canada. The bill proposed to accomplish this by adding a fourth category of acts - that of being involved in the trade of crime comics, which, if committed, would render a person liable to a penalty under section 207. (21)

The Minister of Justice, the Honourable Stuart S. Garson, participating later in the debate raised several serious issues relating to the bill. He pointed out that the only effect of Mr. Fulton's bill was to bring the trade of crime comics under section 207, thereby creating a new offence. He explained that successful prosecutions under section 207 were extremely difficult because of the way the section was written. He pointed out that the source of the difficulties lay in the terms "who knowingly, without lawful

justification or excuse" found in the opening paragraph of section 207. Those words, he explained, were making prosecutions so difficult that any deterrent effect the section had was completely lost. The Minister believed that the loss of the deterrent effect was largely responsible for the then existing flourishing trade in obscene material, and that there was every reason to believe that a similar fate awaited the proposed bill on crime comics.

Having raised these points, the Minister explained that Parliament was faced with an unfortunate dilemma: removal of the terms "who knowingly ..." would result in an absolute prohibition thus imposing an unfair burden on the bookseller who could not be held responsible for the contents of the thousands of books he sold; failure to remove the terms, however, would mean that effective prosecutions under section 207 would remain almost impossible.

The Minister of Justice then suggested that no immediate changes to section 207 be made, and that Mr. Fulton's bill remain in committee until such time as opinions and suggestions from provincial prosecutors and provincial law enforcement agencies had been secured.

Several weeks later, the Minister reported back to the Committee, indicating that he had received responses from

the Attorneys General of the provinces and from most of the provincial law enforcement agencies. The overall concensus was that section 207 could not be properly enforced as long as the terms "who knowingly ..." remained. Having examined the responses and the suggestions that had been submitted to him, the Minister introduced a series of amendments to section 207 which he felt reconciled all views which he has recently received and incorporated Mr. Fulton's suggested amendment on crime comics.

The obscenity amendments brought to section 207 read in the following manner:

207 (1) Every one is guilty of an indictable offence and liable to two years imprisonment who,

a) makes, prints, publishes, distributes, circulates, or has in his possession for any such purpose any obscene written matter, picture, model or other thing whatsoever;

(2) Every one is guilty of an indictable offence and liable to two years imprisonment who knowingly, without lawful justification or excuse;

a) sells, exposes to public view or has in possession for any such purpose any obscene matter, picture, model or other thing whatsoever;

(7) It shall be no defence to a charge under subsection one that the accused was ignorant of the nature or presence of the matter, picture, model, crime comic or other thing.

The changes may have appeared cosmetic in nature but such was not the case. Section 207 was streamlined by breaking it into two subsections and by rewriting both subsections in a simpler and more direct fashion. The legislators also introduced significant changes to the nature of obscenity offences.

In committee, the problem of avoiding penalizing booksellers while controlling the publishers of obscene matter was discussed. The committee believed that a publisher was much more responsible and accountable for what he published than was the bookseller for the books he sold. By isolating the terms "who knowingly ..." such that they applied only to those selling or exposing obscene matters to the public, the Minister of Justice believed that all concerns had been met. The amendment protected the bookseller who inadvertently sold obscene matter because the prosecutors would still have to show that the vendor had acted knowingly; and the publisher of any obscene material faced an absolute prohibition. Anyone who published such material was guilty of an indictable offence; in these cases, the prosecutor did not have to prove that such a publisher had acted knowingly. Parliament's intent in this area was further reinforced by adding subsection (7) which made it impossible for a publisher

charged under subsection (1) to plead ignorance of the nature of the material he was publishing.

The concern created by the distribution and general availability of obscene matter was far from over. Public resentment over the increase in indecent material appearing on newsstands across the country after the end of the Second World War was rising. Mounting public pressure as perceived and voiced by Mr. D. Fulton and others was undoubtedly the reason behind the appointment of a special Senate Committee in 1952 to investigate the sale and distribution of salacious and indecent literature.

The Committee's terms of reference were to examine

all phases, circumstances and conditions relating to the sale and distribution in Canada of -

1. Salacious and indecent literature;
2. Publications otherwise objectionable from the standpoint of crime promotion, including crime comics, and treasonable and perverse tracts and periodicals;
3. Lewd drawings, pictures, photographs and articles whether offered as art or otherwise presented for circulation.

That without limiting the scope of its inquiry, the Committee be authorized and directed to examine into -

- (a) sources of supply of the above items;
- (b) means and extent of distribution thereof;

- (c) relative departmental responsibility for entry or transmission;
- (d) sufficiency of existing legislation to define terms in relation thereto;
- (e) relative responsibility for law enforcement and effective legal measures of dealing with this problem. (13)

Testimony before the Committee confirmed the public's growing resentment against the recent surge of obscene and indecent material. The testimony also pointed to a growing sense of frustration towards the courts' and law enforcement agencies' inability or reluctance to enforce or to apply the law.

It was in his testimony to this Senate Committee that Mr. Fulton first voiced his desire to arrive at a more manageable and more practical definition of the term "obscene" than the vague and uncertain definition provided in the Hicklin test. The evidence given by Mr. Fulton was to the effect that the existing obscenity provisions of the Criminal Code were inadequate. The Minister of Justice, Mr. Garson defended these same provisions, pointing out that the difficulties existed not because the provisions were vague and uncertain but rather because the law enforcement agencies were not inclined to enforce them.

Unfortunately, the Senate Committee failed to reach any decision or conclusion on this matter. The Committee was

never reappointed and was consequently unable to complete its report.

The 1953-54 revision of the Criminal Code had very little effect on the substance of the law on obscenity. The sections on obscenity were somewhat reorganized and were renumbered. Offences against public morality and public convenience were regrouped with sexual offences under Part IV of the Criminal Code and labelled Sexual Offences, Public Morals and Disorderly Conduct. The sub-part which had been called Offences Against Morality was changed to Offences Tending to Corrupt Morals.

The articles on obscenity were renumbered such that section 207 became 150, section 208 was changed to 152, and section 209 as section 153. All references to penalties were regrouped into one section, section 154, and applied to all offences relating to obscenity.

Substantively, only two amendments were worth noting. The element of "possession for any such purpose" was made explicit by changing it to the phrase "possession for the purpose of publication, distribution or circulation". Of greater importance was the introduction in section 154 (penalties) of the possibility of having obscenity offences punishable on summary conviction as well as by indictment.

Mr. Fulton's campaign for more effective obscenity provisions (as well as crime comics provisions) in the Criminal Code continued during the debate on the 1953-54 amendments. His suggestion during these discussions was to impose a minimum penalty of \$10,000 on corporations found guilty of committing obscenity offences.

Mr. Garson, however, reiterated his beliefs that these sections were well written and did not require to be "tinkered around" with. (22; p. 3605) He again stressed that all Parliament could do was to enact proper laws but that Parliament could not enforce them. He pointed out that the difficulties with the obscenity provisions were not problems of draftmanship but of enforcement.

The Minister of Justice's views were undoubtedly strengthened by the conclusions reached by J.W. Mohr (27) in his study of obscene and indecent literature. Mohr reported to the Committee on Obscene and Indecent Literature which had been appointed by the Ontario government to obtain information on what the residents of Ontario considered offensive literature. Mohr concluded that

the study definitely indicates that there is no major concern in regard to obscene and indecent literature in Ontario at the present time

(27; p. 48)

The continuing debate between Mr. Fulton and the Minister of Justice over the effectiveness of the obscenity provisions was decided by the 1957 elections in which the Conservative Party was elected. Mr. Fulton was appointed the Minister of Justice in the newly formed government and he launched an examination of the obscenity provisions of the Criminal Code.

In 1959, Mr. Fulton introduced in Parliament what was to become historically the most significant amendment to the law of obscenity.

For the first time, Parliament attempted to define the term "obscene". This was done by adding to section 150 the following sub-section:

(8) For the purposes of this Act, any publication, a dominant characteristic of which is the undue exploitation of sex, or sex and any one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene.

(12)

In introducing the amendment to the House of Commons, Mr. Fulton explained that

The object of this clause is to make a statutory extension of the definition of obscenity so as to make it perfectly clear that the law of obscenity does apply to a

certain type of objectionable material that now appears on the newsstands of Canada and is being sold to the young people of our country with impunity.

(23; p. 5517)

Mr. Fulton also expressed the belief that this new definition could be easily applied, and that many of the difficulties occasioned by the absence of a statutory definition would disappear.

We believe we have produced a definition which will be capable of application with speed and certainty, by providing a series of objective tests in addition to the somewhat vague and subjective test which was the only one formally available. The tests will be: does the publication complained of deal with sex, or sex and one or more of the other subjects named? If so, is this a dominant characteristic? Again, if so, does it exploit these subjects in an undue manner?

(23; p. 5517)

Mr. Fulton tried to explain away the fears that the new definition was too broad in scope and that it would bring about government censorship by stating

We have been careful in working out this definition not to produce a net so wide that it sweeps in borderline cases or cases about which there may be genuine differences of opinion. In our efforts, we have deliberately stopped short of any attempt to outlaw publications concerning which there may be any contention that they have genuine literary or artistic merit. These works remain to be dealt with under

the Hicklin definition, which is not superceded by the new statutory definition.
(23; p. 5517).

The Minister hoped that, by adding this amendment to the existing obscenity provisions, he was supplying the courts with an objective test by which to judge obscenity. He believed that by making the test more objective, offenders would be more easily prosecuted and convicted. He did allow, however, that the new test carried some aspects which required a subjective assessment on the part of the judge: a judge would have to decide whether or not the exploitation of sex was a dominant characteristic of the publication being considered and further, whether that exploitation was undue.

Along with the new definition, the Minister of Justice introduced a new in rem procedure which allowed for a quick and objective method of dealing with the question of whether or not a publication was obscene by bringing a charge against the publication rather than against the individual. This procedural amendment made it possible for a law-enforcement officer, by way of a seizure, to have the offensive material brought before a court, and have that court determine whether or not the material was obscene. If the material was found to be obscene, the police officer could then lay a charge.

No further amendments were made to the substance of the Criminal Code sections dealing with obscenity. The Revised Statutes of 1970, however, did modify the numbering of these sections: section 150 became section 159, section 152 was changed to 163, and section 153 to 164.

The examination of the evolution of Canada's obscenity legislation and its amendments provides useful information in understanding what Parliament intended to accomplish and how it proposed to achieve its purpose. The next step involves analysing the judicial interpretation and application of those statutory provisions.

2. Judicial Interpretation of Canadian Obscenity Law

The purpose of this section is to provide a description and analysis of judicial interpretations and applications of the law of obscenity from 1892 to the present.

As mentioned earlier in Chapter 2, the jurisdiction to deal with cases of obscenity was wrestled away from the Ecclesiastical Courts in England in 1727 in the case of R. vs. Curl, where a common law court held that it and not the Ecclesiastical Courts had the authority to hear cases relating to obscenity.

The term "obscene", however, remained beyond legislative and judicial definition. The absence of a definition was to remain until 1868, when England's Court of Queen's Bench heard the case of R. vs. Hicklin. In his judgment of this case, Chief Justice Cockburn let fall as obiter dictum the now famous definition which was to guide all future cases of obscenity. This definition stated the following:

... whether the tendency of the matter is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. (c.28; p. 371)

Although this definition was seized upon by subsequent justices as the sole legal measure of "obscenity", it was frequently criticized for its shortcomings. One of the most obvious defects was its vagueness, its lack of clarity. One of the fundamental tenets in criminal jurisprudence is that the nature and constituent elements of an offence be strictly delimited, otherwise the offence would be subject to the vagaries of personal interpretations. It is in this context that the definition falls short. In examining the definition it becomes obvious that the term "to deprave and corrupt" requires a subjective and greatly speculative interpretation on the part of the presiding judge. The expression "tendency of the matter" also evokes innumerable possibilities of personal qualitative connotations with almost

limitless applications. The phrase "whose minds are open to such immoral influences and into whose hands a publication of this sort may fall" raises the whole problem of identifying the individuals who are susceptible of being affected by this sort of publication. It becomes obvious from the legal ambiguities built into the definition that, hypothetically, the definition could be administered in such a way as to ban most literature on the basis of obscenity simply because it appeared objectionable to its reader.

In spite of its imperfections, Justice Cockburn's definition was the only standard being applied by the courts when Canada enacted its Criminal Code of 1892. And, as it will be seen, the courts have, by and large, shown judgement and restraint in dealing with obscenity cases by generally confining the application of the Hicklin rule to material designed to promote, or designed as channels for, filth.

Very few obscenity cases were brought before the courts between 1892 and 1920. In fact there were only ten reported cases. It appears that the courts were quite satisfied in applying the Hicklin test in toto.

The first two recorded cases of obscenity appeared in 1904. (There had been an earlier case in 1894 (c.22) but it was rejected on a technicality). The first case, R. vs.

McAuliffe (c.33), was heard in Halifax after the Criminal Code Amendment Act of 1903 introduced the new offence of obscene performance. McAuliffe, the manager of a theatre, was charged with presenting an indecent performance. The judge referred to the Hicklin test and suggested that if the test were applied to theatrical representations, it would have to be shown that the play had a tendency to deprave or corrupt those whose minds were open to such immoral influences. The judge dismissed the case finding that the performance presented by the defendant had no such tendency.

In the same year, the case of R. vs. Beaver (c.8) was heard in the Court of Appeal for Ontario. Beaver was charged under section 179 of the Criminal Code for distributing and circulating certain obscene printed matter tending to corrupt morals. The accused had circulated an "obscene" document entitled To the Public; The Evil Exposed; The Plot against Prince Michael Revealed, in which certain municipal officials were attacked. Both judges agreed that the documents being circulated might have a tendency to corrupt morals and affirmed the conviction set out in the lower court. One of the judges declared that the language complained of was

... so foul and disgusting that it would prove repulsive to most persons reading it, and is so gross that there would be no danger of its corrupting their morals. But

unfortunately there are others susceptible to lustful ideas upon whom it would have precisely the opposite effect.

(c.8; p. 422)

The judge stated that this interpretation was in keeping with the true rule expressed in the Hicklin case.

The next case was heard in 1909 in the Supreme Court of New Brunswick. In this case, King vs. MacDougall (c.4), the defendant was charged with distributing and circulating obscene printed matter tending to corrupt morals. The accused had published and circulated accusations of adultery against certain parties. He was found guilty as charged; the judges found that the works published and the circumstances in which they were published were such as to offend decency and modesty in a manner and to a degree which tended to corrupt morals. Without referring to it, in fact, the judges applied the Hicklin test.

In the same year, the Supreme Court of Alberta, in the case of R. vs. McCutcheon, (c.34) found the defendant guilty of having purchased obscene pictures which tended to corrupt morals and of having in his possession those same obscene pictures with a view to circulating and delivering them to others. The accused was found guilty in spite of the evidence showing that he had not exhibited them to anyone.

In 1910, the case of R. vs. L'Heureux (c.31) was heard in Québec City's Cour des Sessions de la Paix. The presiding judge in referring to Hicklin and Beaver found that a moving picture representation of a prize-fight, however brutal and vulgar, was not obscene.

In 1912, the Court of Appeal for Ontario heard the case of R. vs. Britnell. (c.11) The accused, who owned a bookstore, was charged with knowingly exposing for sale and selling obscene books. It was found during the trial that the defendant was unaware of the sale of the book, and that the book itself was not exposed but was kept in stock in the cellar. Furthermore the court was of the opinion that the Crown had to establish that the vendor must have knowledge of the content and character of the material being sold in order to be convicted of the offence. The defendant was acquitted because the evidence failed to show that he had knowingly sold or exposed obscene materials. Interestingly enough, one of the judges, in evaluating the evidence before him, made the following comment:

Although neither his (the accused) reputation, nor the character and extent of his business, is a reason why he should not be convicted, and punished, if guilty, yet they are not things without weight, and very considerable weight, in considering the probabilities of the truth of the charge against him ...

(c.11; p. 87)

In the following year, the same court had to deal with the case of R. vs. St. Clair. (c.42) The defendant, a clergyman, was accused of committing an offence under section 207 of the Criminal Code, i.e., of knowingly circulating obscene material without lawful justification. The evidence showed that St. Clair had published and distributed to his fellow clergymen a description of an indecent performance with the intention of bringing the scurrilous activity to their attention. The court, referring to the Hicklin test and to its application in Canadian obscenity cases, found that the circular was obscene because it tended to corrupt and deprave morals. The court admitted that its concern was not with the effect of the material on the morals of the clergymen who had read it, but with the possible effect that the material might have if it fell into the hands of someone more susceptible.

As with the previous cases, the court felt that the defendant's motives were immaterial. With respect to St. Clair's motives, the court declared:

Neither a good nor a bad motive can alter the character of the act, in such a case as this. If unlawful, a good motive will not make it lawful, nor, if lawful, will a bad motive make it unlawful; good motive and good character may make some things more, rather than less harmful- give them weight when inherently they have less or none.

(c.42; p. 352)

The criterion set out in Hicklin was applied again in the case of R. vs. Ballentine. (c.7) Although he was only charged with breaking a municipal by-law by using obscene language in public, the court found that the appellant's language had been coarse, vulgar and rough but had not been obscene as defined in Hicklin and quashed the appellant's earlier conviction.

The first reported case dealing with the transmission of obscene material by mail was heard in 1916 by the Supreme Court of Saskatchewan. In this case, R. vs. Goyer (c. 24), the accused had sent an indecent letter of a private nature in the course of a correspondence with another party. The judge found that section 209 referred only to publications and other like matter issued for public circulation and not to the words in the letter itself. The judge also declared that

... where the person to whom such a letter is written is a consenting party to the transmission, there is no offence unless the obscene matter is on the outside or envelope of the letter.

(c.24; p. 11)

In the years between 1920 and 1950, only four cases of obscenity were reported as appearing before the courts. In the first three cases, R. vs. Descotes (c.19), R. vs. Davidson (c.18) and R. vs. American News (c.5), the judges were content

to refer to the Hicklin test and to the manner that Hicklin had been applied in previous Canadian cases.

However, R. vs. Conway (c.16), the fourth case, heard before the Québec Court of King's Bench in 1943 was of significant importance. It draws its importance from the fact that it was the first case to seriously modify the application usually made of the Hicklin test. The case is also often cited (14, 23, 24) as being the case which started the re-evaluation of the Hicklin rule in Canada.

The appellant was a stage producer who had made use of actresses appearing in the nude from the waist up to portray living statues as a background for a scene. The court quashed the conviction. The relevance of the case is found in the appeal judge's decision for quashing: he stated that since the intention of the accused was to create an artistic background and not an immoral scene, there was no tendency to deprave. The judge found that the accused had no criminal intent and concluded that

... in presenting the tableau "Spin a Web of Dreams" on the stage of the Gayety Theatre, the appellant had no intention of presenting an immoral or obscene show but rather a background, more or less artistic, let us say, but not in itself indecent.
(c.16; p. 537)

The importance of the judge's decision lies in his considering the author's purpose as relevant in evaluating the nature of the author's product. This of course was contrary to the criteria set out by Justice Cockburn in the Hicklin case where it had been stated that the author's laudable purpose and honest intent were irrelevant.

Another decision which went contrary to the Hicklin rule was handed down in 1951 by Montreal's Cour des Sessions de la Paix in the case of R. vs. Stroll (c.45). The judge felt that something that was technically obscene would not be subject to a criminal offence unless the matter tended to corrupt the morals by exciting the passions and inciting immorality. In dismissing the complaint, the court found that there was nothing in the representation of silhouettes of nude women on neckties that could lead a normal person to immorality. In fact, the judge declared that the purpose of the law was to protect the modesty of normal persons, not to "bridle the imagination of the hot-blooded, vicious or overly-scrupulous person" (c.45; p. 172). This decision went against the Hicklin criterion which stated that the law existed not only for the protection of the normal mind but also for the protection of the abnormal mind. The tendency of obscene material to deprave and corrupt would not be found by considering its effect on the "reasonable man" but on those

whose minds were more easily influenced such as the young, the feeble-minded and the abnormal person.

Unfortunately, the liberalizing impact of the two previous cases on the application of the Hicklin test was not emulated by subsequent court decisions across the country. All of the cases (c.27; c.38; c.32; c.17; c.35; c.6; c.30; c.9) heard up to 1959 inclusively show that the judges found the definition of obscenity, as set out by Justice Cockburn, to be unobjectionable and that they were content in applying the criteria set out in the definition.

Two of the eight cases heard during that period are worth noting.

The first case, R. vs. National News Co., (c.38) heard in 1953 before the Ontario Court of Appeals, stands out because the courts, notwithstanding the fact that it affirmed the accused's previous conviction, declared for the first time that morality and moral standards were subject to change. Chief Justice Pickup in the majority decision and Justice Mackay, dissenting, both agreed that the Hicklin test was the proper test to apply; however, both agreed that that which tended to corrupt and deprave in one generation could conceivably have no such effect in another generation.

The second case, R. vs. American News Co., (c.6) heard in 1957, was undoubtedly the most important obscenity case heard in Canada at that time. The decision was the most comprehensive and thorough judgment thus far handed down by a Canadian court on the question of obscenity. The decision covered in detail every aspect, procedurally and substantively, of an obscenity trial from start to finish.

The facts of the case were as follows: the American News Co. had been charged with and convicted by the County Court of having possession of obscene written matter for distribution purposes. The obscene material in question consisted of copies of an American novel entitled Episode. The book dealt with the plight of a mentally-ill American soldier and his treatment in mental institutions in the United States. The novel also contained some sexually explicit incidents. The defence presented evidence by way of expert witnesses as to the book's scientific and informational value and its high literary merit.

Acting Chief Justice Laidlaw and Justice Schroeder examined section 150 from both the procedural and substantive perspectives and summed up the defences possible in obscenity cases, the elements which must be established by the Crown, and the admissible evidence in such cases. The relevant

sections of the Criminal Code with which the two Justices were concerned stated

150(1)(a) Everyone commits an offence who makes, publishes, distributes, circulates or has in his possession for the purpose of publication ... any obscene written matter

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the facts that alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the act did or did not extend beyond what served the public good.

With respect to the above sections, both Justices agreed that no crime was committed if the defence could show that the public good had been served by publishing the obscene material and that the material did not go beyond what the public good required. Whether or not the public good was served must be determined as a question of law by the judge. Moreover the defence must demonstrate that the publication did not exceed the requirements of the public good, a question of fact which must be decided by the jury.

If the accused satisfies both these conditions, he must be acquitted. However, if the defendant fails to meet

the first condition of the statutory defence, the case is immediately referred for a decision on the substantive issue of obscenity. The burden of proving the substantive offence rested, of course, on the Crown.

If the public good was found to have been served, the court must then decide whether or not there is evidence that the publication might have exceeded that which served the public good. This decision is also a question of law and must be resolved by the judge.

If the court decides that there is no evidence to show that the publication went beyond the public good, the accused must be acquitted. If, on the other hand, the judge finds that there exists such evidence, then the question of whether in fact the publication is excessive and goes beyond serving the public good is left to the jury (or the judge exercising the functions of the jury) along with the question of whether the material is obscene.

Justice Laidlaw also addressed the problem of defining the term "public good" and of proving that it had been served. Pointing out the inherent difficulty of finding anyone who could authoritatively say that the public good had been served by a publication which tended to deprave or corrupt the minds of some classes in society, Justice Laidlaw

confessed his inability to resolve the problem. He stated, however, that the presiding judge in an obscenity case would decide the matter in accordance with the particular circumstances of the case. He suggested, on the other hand, that the term "public good" be limited to the words appearing in Justice Stephen's submission, that is, that which is "necessary or advantageous to religion, or morality, to the administration of justice, the pursuit of science, literature or art or other objects of general interest" (c.6; p. 166).

Justice Laidlaw also summarized the Hicklin decision and subsequent decisions on obscenity and felt that the following propositions emerged:

- 1) the essence of the test of obscenity is whether or not the act has "a tendency to deprave and corrupt";
- 2) while the tendency to deprave and corrupt may change, the test of obscenity, that is to say its application, remains the same;
- 3) evidence to show opinions that the obscene material has no "tendency to deprave and corrupt" is not admissible;
- 4) the question of whether or not the obscene material has a tendency to deprave and corrupt is a question of fact, and must be determined by a jury or a judge exercising the functions of a jury;
- 5) a criminal intention to commit an offence of obscenity may be inferred from the doing of the act and it is not necessary for the prosecution to prove that intention by other evidence;
- 6) evidence that the intention was pure or that the purpose of doing the act alleged

to be obscene was wholesome or salutary is not admissible;

7) evidence of the literary merits or medical or psychological value of a matter charged as obscene is not admissible;

8) there is no certainty as to the meaning of the words "deprave and corrupt"; nor is there certainty as to the class of persons whose minds are open to immoral influences or into whose hands obscene material may fall;

9) lastly, evidence of circumstances touching the issue of into whose hands obscene matter may fall is admissible.

With respect to the substance of obscenity, the court was uncertain and more ambiguous. Justice Laidlaw believed that it was unnecessary for obscene matter to be lewd or unsavory and conversely, repulsive and disgusting material need not necessarily be obscene. He felt that a book which was calculated to deprave and corrupt might fall within the test of obscenity even if its contents were inoffensive. He also indicated that the tendency to deprave could consist of impure and libidinous suggestions; or that the tendency might be to influence someone to commit impure and unchaste acts; or it might be to endanger the prevailing standards of public morals.

The court, however, was much more certain as to whom this tendency might influence:

The tendency of a matter charged as obscenity to deprave and corrupt is not found by a consideration of its effect on a fictitious creature of the law such as "the

reasonable man", nor can the Court create for the purposes of the test a "normal person". I have no doubt that the object of the law is to protect the youth of the nation and to guard them against the danger of their morals from exposure to impure matter ... the test of obscenity is stated explicitly to be applicable to persons "whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". Thus the test embraces adults and youth, and persons who might be described as "normal" as well as those who might be regarded by some others as "abnormal". (c.6; p. 157)

With respect to the matter at hand, the court rejected as irrelevant and inadmissible most of the evidence brought in by the defence to show that the book Episode was sincere and that it had literary and educational value. The court was satisfied that the jury had reached its verdict after proper and full instructions by the trial judge and therefore could not substitute its findings for that of the jury.

Having found that counsel for defence had not established the statutory defence provided by section 150, and that the jury had not erred in its verdict, the court dismissed the appeal.

As mentioned earlier, the decision was hailed as a landmark because of its comprehensiveness and its thoroughness. It appeared that the decision was the measure

by which all subsequent obscenity cases would be judged. The case itself was not precedent setting because it simply applied the Hicklin test; it had, on the other hand, justified its place in the jurisprudence by bringing forth the most authoritative decision up to that time on the problem of obscenity in Canada.

Just as it appeared that the existing confusion and the conflicting decisions had been cleared up, and that the Hicklin test had been established as the method by which a particular matter was determined to be or not to be obscene, Parliament amended the obscenity law in 1959. Sub-section 150(8), a statutory definition of what was deemed to be obscene, was introduced.

The definition stated:

For the purposes of this Act, any publication, a dominant characteristic of which is the undue exploitation of sex, or sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

(12)

The effects of this amendment on the courts were not long in being felt. The confusion that had disappeared because of the American News decision returned as the judiciary was once again embroiled in the problematic issue of

determining obscenity. The situation was, however, considerably different from that which existed before the American News case. No longer were the courts struggling to determine how the Hicklin test should apply; the new problem was in determining, the new definition notwithstanding, whether or not Hicklin applied at all. Was the recent definition to be considered as the exclusive and exhaustive measure in resolving obscenity cases or were the courts to determine obscene matter through the use of both the definition and the Hicklin test?

Parliament never fully examined the question of whether or not the new definition was to replace the Hicklin test or whether the courts were to apply both definitions. Although Mr. Fulton, the Minister of Justice, indicated on several occasions that the new definition was meant to supplement the Hicklin rule (23; pp. 5517, 5530, 5542), the legislature simply failed to provide the courts with a clear indication of legislative intent.

At least two cases (c.37; c.44) were resolved on the basis that the definition was not exhaustive and that the Hicklin test was still applicable. In 1962, however, the Supreme Court of Canada in R. vs. Brodie (c.12) rendered a decision which, in some respects, settled the problem of

whether or not the statutory definition was exhaustive. In Brodie, the first obscenity case ever to reach the Supreme Court of Canada, the court was faced with three appeals from a judgement of the Québec Court of Queen's Bench, Appeal Side, affirming an order to confiscate copies of the novel Lady Chatterley's Lover by D.H. Lawrence. The Supreme Court was asked to determine whether or not the book was obscene. In arriving at its decision on the issue of obscenity, several judges commented on whether or not the definition was exhaustive, and discussed the effect of the recent definition on the application of the Hicklin rule.

Three of the five Justices giving the majority judgements were of the opinion that section 150(8) contained the exhaustive definition of obscenity, and that the Hicklin definition and all the jurisprudence based on it was rendered obsolete; one of the Justices assumed that it was exhaustive but reserved the right to consider the matter at another time; the last Justice of the majority view felt that it was not exhaustive. Furthermore, two of the four Justices of the minority opinion seemed to lean towards the view that the statutory test was exhaustive.

In writing the majority decision, Justice Judson stated that all the jurisprudence under the Hicklin test was

rendered obsolete by the enactment of the new and exclusive definition of obscenity. The majority opinion in the Brodie case was to the effect that the novel was not obscene. The new test for obscenity was considered by Justice Judson to be the following:

Under this (statutory) definition it must be found that all four elements of obscenity are present before there can be a condemnation of the book. There must be a characteristic which is dominant and this dominant characteristic must amount to an exploitation of sex which is undue. If any of these elements is missing, the charge fails.


(c.12; p. 178)

Judson went on to state:

... I think that the new statutory definition does give the Court an opportunity to apply tests which have some certainty of meaning and are capable of objective application and which do not much depend as before upon the idiosyncrasies and sensitivities of the tribunal of fact, whether Judge or jury.

(c.12; p. 179)

Although there was no clear majority of the Supreme Court supporting Justice Judson's decision with respect to the Hicklin rule being obsolete nor with his view that the new definition was exhaustive, the lower courts have generally adhered to Judson's line of thought. The lower courts have also adopted Judson's opinion concerning the presence of the



four elements in obscenity cases, although the courts have generally regrouped these elements into two groups - dominant characteristics and undue exploitation.

With respect to these elements, Justice Judson felt that the undue exploitation of sex must be proven. The undue exploitation did not have to be the most, or only, dominant characteristic of the whole book. He emphasized that this dominant characteristic had to be in relation to the whole work and not a dominant characteristic of isolated parts or of passages taken out of context.

In searching for a dominant characteristic and for the undue exploitation of sex, Judson stressed that the author's purpose as well as the work's literary or artistic merit should be taken into account. This, of course, was contrary to what had been laid out in the Hicklin case and restated by Justice Laidlaw in American News Co. Ltd.

With respect to the author's purpose, Judson made the distinction between a serious literary purpose and a base purpose:

The use of the word "undue" recognizes that some exploitation of the theme (sex) is of common occurrence. What I think is aimed at is excessive emphasis on the theme for a base purpose. But I do not think that there is undue exploitation if there is no

more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness.

(c.12; p. 181)

Concerning literary or artistic merit, Judson stated:

... the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work ... must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation. I agree ... that measured by the internal necessities of the novel itself, there is no undue exploitation.

(c.12; p. 181)

The internal necessities of the work itself determined or measured the merit of the work which in turn helped to evaluate the elements of dominance and undueness.

Judson also referred to community standards when trying to measure undue exploitation. In responding to the appellants' suggestion that the exploitation of sex was not undue if measured by the usages of contemporary novelists, Judson sought to determine what the existing standards of acceptance in the community were. He referred to the case of R. vs. Close (c.15) of New Zealand, where the judge directed the jury on how to determine the fact of "undue exploitation" with respect to community standards. The judgement in that case was to the effect that obscenity was that which offended

the general instinctive sense in the community of what is decent and what is indecent.

The matter of community standards in determining whether or not a work is unduly exploiting sex was further clarified in the case of Dominion News and Gifts Ltd. vs. R. (c.3) in which the Supreme Court of Canada unanimously accepted Justice Freedman's dissenting view.

In a minority judgement, Justice Freedman, of the Manitoba Court of Appeal, had commented on community standards in the following way:

Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered.

(c.2; p. 116)

Moreover, Freedman pointed out that ideas and values changed with the times, and indicated therefore, that these community standards must be contemporary; he also stated that these standards must be Canadian in scope.

Every court referring to community standards after Brodie and Dominion News adopted the formulation described above without any modifications.

The test to determine obscene matter as prescribed by Brodie and Dominion News can be summarized in the following manner: a publication that has undue exploitation of sex as a dominant characteristic, keeping in mind the work as a whole, is obscene. The criteria which determine that which is "undue" and "dominant" are the purpose of the author, the artistic merit of the work and whether the matter is offensive to the normal community standards of decency. As mentioned previously, the formulation of community standards developed by Justice Freedman in Dominion News has not been changed since it was first introduced. However, in recent years, the relevant Canadian community standard has been defined to be the standard of tolerance and not the standard of acceptance. In the Brodie case, Justice Judson in discussing community standards referred to "standards of acceptance in the community" (c.12; p. 181). The concept of acceptance was modified over the years.

The idea of a standard of tolerance appears as early as 1966 in R. vs. Duthie Books (c.20) where Justice Bull, in directing himself, indicates that he must consider as best as he can "the standards of decency and measure of tolerance in the Canadian community" (c.20; p. 263). The notion of a standard of tolerance is repeated thereafter in several cases. (c.13; c.26; c.40).

In 1971, in R. vs. Goldberg and Reitman (c.23), Justice McGillivray coined the phrase "exceeds the accepted standard of tolerance in the community" (c.23; p. 180). This phrase has been utilized repeatedly by the courts when dealing with the issue of community standards.

In the last two years the courts have reaffirmed the notion of a standard based on tolerance. In R. vs. Sudbury News Services Ltd. (c.46), Justice Howland stated that the test "is whether the accepted standards of tolerance in the contemporary Canadian community have been exceeded" (c.46; p. 6). This view was reiterated in the more recent cases of R. vs. Penthouse International Ltd. et al. (c. 39) and R. vs. Benjamin News (Montréal) Reg'd. et al. (c.10). In this last case the judge stated that he must

... determine whether, by contemporary Canadian community standards, the book is tolerable in the sense that the general average of community thinking would entail no objection to the book being read and seen by those members of the community who wished to do so. The question is not whether personal standards are affronted but whether community standards would tolerate the publication being seen and read by others. Notice should be taken of the extent to which the exploitation of sex is tolerated by contemporary Canadian community standards in movies, television shows, theatrical performances, books, advertising, and other magazines.

(c.10; p. 403)

The effect of the above line of judicial thought, of course, is to limit the application of obscenity legislation to public exposure defined as exposure to a public which has not chosen to view the material, or more restrictively, to a public which has chosen not to view the matter.

This line of thought, though generally accepted by courts of appeal across the country, is not as sound, or at least as secure as it appears. The precariousness of its position originates in the fact that the concept of a standard based on what people will tolerate rather than a standard based on what the public will accept has not been applied or accepted by the Supreme Court of Canada. Moreover, the two originating decisions, Brodie and Dominion News, on which the entire concept of community standards rests, make no distinction whatsoever between a community standard of tolerance and one of acceptance. If anything, the Supreme Court of Canada, in Brodie, implied a standard based on what the community would accept.

Two basic questions still remain with respect to determining whether a given matter is obscene: is the statutory definition exhaustive and has the Hicklin test been effectively rendered obsolete?

As mentioned earlier, at least two cases prior to the decisions handed down in Brodie and Dominion News held that the definition was not exhaustive and that the Hicklin test was still applicable.

The fact that no consensus was reached by the Supreme Court of Canada on these two questions was not lost on the lower courts. Courts hearing obscenity cases immediately subsequent to the Brodie and Dominion News decisions invariably discussed the relevancy of the Hicklin test and its application in determining obscenity. Often, however, the courts declined to make a final decision or an authoritative finding on the use and application of the Hicklin test. On the other hand, the statutory definition was found to be exhaustive by several courts.

The Ontario Court of Appeal, in R. v. Cameron (c.13), as well as various court levels of British Columbia (c.36; c.29; c.21; c.20) and of Newfoundland (c.41) indicated that Justice Judson's reasoning should be followed, and that the definition should be considered as exhaustive.

Both issues remained somewhat unsettled until recently, when the Supreme Court of Canada again addressed itself to the question of obscenity. In 1977, in the case of Dechow v. R. (c.1), the Supreme Court was asked to determine

whether the statutory definition provided the sole test of obscenity where exploitation of sex is concerned, regardless of whether or not a "publication" is involved. It had been indicated in several cases (c.29; c.14; c.43) that the Brodie decision was concerned with "publications" which were deemed to be obscene, and that where the charge did not relate to publications, there was no binding decision requiring the application of the statutory definition.

The Court was unanimous in deciding that in relation to publications, the Hicklin test was obsolete and that the statutory definition was the exclusive test. However, only a minority of four Justices, including the Chief Justice, held that the definition is the exhaustive definition and exclusive test regardless of whether or not a publication is involved. In writing the decision for the minority, Chief Justice Laskin stated:

I am not only satisfied to regard s.159(8) as prescribing an exhaustive test of obscenity in respect of a publication which has sex as a theme or characteristic but I am also of the opinion that this Court should apply that test in respect of other provisions of the Code ... in cases in which the allegation of obscenity revolves around sex considerations. Since the view that I take, in line with that expressed by Judson, J., in the Brodie case, is that the Hicklin rule has been displaced by s.159(8) in respect of publications, I would not bring it back under any other sections of

the Code to provide a back-up where a sexual theme or sexual factors are the basis upon which obscenity charges are laid and the charges fail because the test prescribed by s.159(8) has not been met.
(c.1; p. 30)

Unfortunately, the majority of the Court declined to consider what test is applicable where a publication is not involved.

The situation as it now stands with respect to publication is as follows: the Hicklin test has definitely been rendered obsolete, and the statutory definition is the exclusive test with which to determine obscenity. Although the Supreme Court of Canada failed to consider the application of the test in matters other than publications, there is no reason to believe that the minority view of the Court that the statutory test is exhaustive and is to be applied in all cases of obscenity, where the exploitation of sex is concerned, will not be adopted by the lower courts.

The problem of obscenity and its regulation presents the legislator with a series of difficulties of judgement. This is due mainly to the numerous and complex factors which must be taken into account. This study, having examined the evolution, interpretation and application of obscenity legislation, will now proceed to examine the underlying assumptions behind the legislator's attempt to control obscenity.

3. Obscenity - Effect and Control

The tremendous power exercised by the written word has always invited intervention by governmental authorities. The control of obscene literature was no exception to governmental regulation, although this control was initiated relatively recently in history. The law of obscenity in Canada did not assume any great importance or interfere greatly with literature until the latter half of this century.

As the first two sections of this Chapter demonstrated, the law of obscenity did not greatly preoccupy the legislative arm of government or the judiciary until the late 1940's and early 1950's. From 1892, when obscenity offences were first introduced into the Criminal Code, to 1950 or so, Parliament was content to make minor amendments to the existing legislation. The judiciary reacted accordingly; prosecutions were few and far apart. The courts, when faced with obscenity cases, were satisfied to apply the Hicklin test, a test which was set out in an English court in the middle of the nineteenth century. The test consisted in determining whether or not the material tended to corrupt and deprave those who might read it.

The late forties saw a large increase in the importation of published material from the United States.

This influx of publications included a sizeable proportion of "objectionable" material. The outcry directed against what was perceived by the some as an increase in obscenity sparked Parliament to review the obscenity legislation. After considerable debate, Parliament enacted in 1959 a new statutory definition of obscenity with the hope that this new definition would provide a more effective weapon for controlling the publication, sale and distribution of obscene literature. Again the criminal justice system reacted accordingly; having actively participated in the creation of the new definition, the law enforcement agencies renewed their efforts to restrain the traffic of obscene publications, and the Crown, armed with the new obscenity provisions, renewed their efforts to prosecute transgressors of this new legislation. The definition of obscenity provided the courts with a new criterion by which they could judge obscenity. Since the creation in 1959 of the definition of obscenity, the courts have attempted to explain the meaning of certain terms in the definition such as "undue exploitation" and "a dominant characteristic". In their many attempts to provide clarification of these terms, the courts have referred to the purpose of the legislation as expressed by Parliament and as perceived by themselves, and have consistently declared that the statutory provision concerning obscenity is an attempt to protect and preserve public morality. The courts have assumed

that morality is affected when thoughts of a sexual nature are aroused in the reader's mind, or that the reader is likely to be encouraged to antisocial sexual, criminal, or immoral behaviour when faced with impure and unchaste imagery.

The examinations carried out in the first and second sections of this Chapter raised several very important issues: Parliament's great concern in protecting the Canadian people's morals, and the legislature's subsequent interest in wanting to control the public's accessibility to obscene material; the difficulties the law enforcement agencies have in enforcing legislation of this kind; the problems facing the courts when interpreting and applying the definition of obscenity.

Parliament's interest in controlling obscenity and preserving Canada's moral standards has often been stated in the House of Commons. That interest was perhaps best illustrated by the comments of Mr. R. Eudes in 1959 when the new statutory definition was introduced:

Our own responsibility as law makers is mainly to seek more efficient legislation to prevent and to stop the circulation of obscene matter. Legislation, indeed, is necessary to ensure the preservation of morality.

(23; p. 5299)

Parliament's solicitude with respect to the Canadian public's morals and its concern with obscenity is based on several possible assumptions: that exposure to sexual imagery results in psychological and physiological excitement; that exposure leads to antisocial or criminal sexual conduct; that it arouses strong feelings of disgust and revulsion; and that it encourages improper sexual morals or values. Parliament's fears, then, are that the effects of obscenity can only be detrimental to society.

Are these assumptions accurate? Does exposure to obscene matters affect the individual in the short term? in the long term? In the short term, does obscenity lead the viewer to feel sexual stimulation or to commit antisocial acts? Are the effects of obscenity in the long term such that they will cause the viewer to become a sexual deviant or cause him to commit criminal sexual acts?

With respect to short term effects, studies generally indicate that exposure to erotic material will lead to immediate sexual stimulation. Studies undertaken by the U.S. Commission on Obscenity and Pornography (29) as well as Carns, Paul and Wishner's (14) analysis of empirical research into the effects of psychosexual stimuli have pointed out that a large number of individuals were sexually aroused by being

exposed to "erotica". However, these studies also suggest that in many instances long periods of exposure to obscene material gradually led to a point of saturation and a loss of desire. In other instances, exposure to sexually explicit material led to revulsion and disgust rather than to sexual stimulation. Given society's present tolerance towards eroticism and sexual suggestiveness as found in today's art, dress, advertisements, etc., the argument that obscene matter leads to harmful sexual thoughts and aroused is hardly convincing. Moreover, sexual stimulation from exposure to obscenity does not deal directly with the real problem, that of whether or not there is a relationship between sexually explicit literature and certain forms of behaviour which society wishes to eliminate.

The rationale for controlling obscene literature is based on the notion that sexual thoughts and sexual arousal resulting from exposure to obscene material leads to socially unacceptable acts. Much of the evidence supporting a direct short-term relationship between obscenity and immediate criminal behaviour comes from police officers and judges involved in sex-crime trials at the first instance level. The information usually originates from the case histories of sex offenders who were found to have read sexual material immediately preceding the commission of the crime or who were found to possess large quantities of obscene publications.

Unfortunately, information of this kind is inconclusive. Cases histories of this nature, although frequently dramatized and sensationalized by the media, simply do not present convincing evidence of a correlation between users of obscene literature and sex offenders. The circumstances which lead a sex-offender to commit his crime may also lead him to seek out obscene literature. More importantly, the question of whether a reduction in the accessibility of obscene publications would reduce the amount of socially unacceptable behaviour cannot be resolved by non-empirical information gleaned from such sources.

With respect to empirical evidence, the studies to date on the short term effect of obscenity have been equally inconclusive. Research undertaken by the U.S. Commission on Obscenity and Pornography shows that an increase in the sexual behaviour of a large number of subjects occurs shortly after exposure to obscene material. Those increases, however, were no greater for sex offenders than for non-criminals. The data, in fact, suggested that sex offenders are no more stimulated by sexually explicit material than the general population. At this point in time, no causal relationship between obscenity and antisocial sexual behaviour has been proven.

On the other hand, there exists strong evidence in support of the lack of a causal relationship in the "Danish

experience". In 1967, Denmark abolished the sale of pornographic literature to adults and in 1969 Denmark moved to eliminate all restrictions on the sale of pornographic pictures to adults but maintained the prohibition on displaying such pictures in public places. Kutschinsky (24) examined the reactions to the elimination of these two restrictions on pornography. He noted that business activity with respect to the pornographic industry increased dramatically. He also noted, however, that the police had registered during that same period, a sizeable decrease in the number of sex crimes. The largest decreases occurred in the number of cases of voyeurism, exhibitionism and indecent advances toward females. Kutschinsky attempted to determine the cause behind the decrease in registered sex offences. He analyzed the decreases to verify whether they could be ascribed to changes in the reporting techniques of statistics on criminality, changes in the criminal legislation, variations in the subjective definition of sex crimes, etc., or whether in fact the number of persons subjected to sex crimes had actually diminished.

Kutschinsky's conclusions, although only tentative, suggested that the increase in availability of pornographic material may have had an impact on the significant decrease in the number of sex offences such as voyeurism and indecent

advances toward females. His conclusions supported the hypothesis that obscenity may constitute a safety valve for those people whose sexual urges could result in a criminal act. Implicit in Kutschinsky's study is that an increase in accessibility to sexually explicit material did not increase the number of sex crimes in Denmark.

With respect to the long term effects of exposure to obscenity, attention has generally been focussed on the impact of obscene literature on juvenile behaviour. The great fear, as expressed by politicians, law enforcement agencies, the clergy and so forth, is that the juvenile who is exposed to obscenity runs the very grave danger of becoming sexually deviant and socially dangerous. This fear is not based on any known scientific information. Studies engaged on behalf of the Commission on Obscenity and Pornography indicated that the proportion of juvenile delinquents who had been exposed to obscene material was not materially different from the proportion of non-delinquents who had had similar exposure to obscene matter. Unfortunately, scientific information in this area is sadly lacking. To date, the evidence as to long term effects remains inconclusive.

It would appear then, that the assumption that exposure to obscenity leads to criminal behaviour is based on

nothing more than an intuitive grasp of the elements involved in the cause-effects of obscene material on human behaviour; moreover, it seems that the above assumption all but evaporates when subjected to vigorous scientific examination. Unfortunately, the most that can be said with any degree of certainty about the effects of obscenity on behaviour is that the existing data remain inconclusive.

The notion that obscene material is repulsive and disgusting is undoubtedly realistic. It should be remembered though that such sentiments are subjective in nature, and that a certain proportion of the population will invariably be offended by this kind of matter, regardless of the "degree of obscenity" of the material concerned. Legislative control based on the thought that obscene material arouses disgust and revulsion seems a very severe approach to dictate the public's taste. This is especially so in the case of a voluntary audience, an audience that has taken the necessary steps to come into contact with this type of material. Even in the case of an involuntary audience, an audience which is accidentally exposed to obscenity or has this kind of material thrust upon it, the use of the criminal law appears somewhat overreactive. A problem such as the affront to good taste could just as easily be controlled by nuisance laws and the imposition of fines.

The final hypothesis is that exposure to sexually explicit material will lead to a deterioration in the public's morals and values, resulting in dramatic changes in sexual conduct which society would find unacceptable, including premarital sex, extramarital sex, sexual perversion, etc. Considerable disagreement exists as to the harm of these types of conduct. The view supporting the hypothesis that exposure to obscenity will invariably lead to a lowering of society's moral standards suggests in the broadest of terms that that which is regarded as offensive, unsavory, and dangerous today may become accepted and normal in the future, thus eroding attitudes towards family love, or respect for human beings, or culture etc. The view rejecting the above hypothesis states that there have been no significant studies in this area which could justify the state's intervention. Moreover, the argument is presented that society stands to gain in the long-run from sexual openness and the breaking down of many taboos regarding sex. In spite of arguments for and against the thought that exposure to obscenity leads to a lowering of moral standards, there is much less of a consensus that this issue is a societal problem than there is for more obvious sexual crimes such as rape and indecent assault.

The problem of enforcing the obscenity provisions of the Criminal Code before the new definition came into being

seems mainly to have been attitudinal in nature. As mentioned in the first part of this Chapter, the police became aware of the difficulties in obtaining successful convictions because of the courts' continual application of the Hicklin test. Faced with the prospect that their work would lead to nothing concrete, the law enforcement agencies were understandably less than enthusiastic about enforcing the obscenity law. The new definition of obscenity along with the dramatic rise in the traffic of obscene materials served to change the police's view on the enforcement of the obscenity law. The police's renewed concern with the obscenity provisions resulted in a significant increase in the number of obscenity trials in the last 20 years. The police more currently face the problem of enforcing what could be viewed as an unpopular law. Sexual mores were considerably liberalized through the 1960's and 1970's; this liberalization process increased the public's tolerance, and to some degree, its acceptance of having sexually explicit material available in bookstores and newsstands. Tolerance and acceptance of this nature has led large sectors of the public to question the usefulness of obscenity laws. If, in fact, the law is as unpopular as it appears to be, there is the risk that the police will be perceived as a repressive force rather than as agents of society assigned to protect the common good.

Part two of this Chapter points out that the judiciary's main difficulty before the advent of the new definition was in applying a criterion which was extremely subjective. Terms like "tendency ... to deprave and corrupt" and "those whose minds are open to such immoral influences" as found in the Hicklin rule were open invitations to the judiciary to apply extremely subjective and personal values when evaluating obscene material. With the creation of the statutory definition, the problem became one of trying to find objective meaning for new terms such as "dominant characteristic, undue exploitation of sex" etc. In applying these terms, the courts held that the literary or artistic merit of the work, the author's purpose in creating the work, and the offence to community standards of decency must all be considered before any material can be declared to be obscene. The problems the courts must currently resolve are in determining the existence of literary or artistic merit, of defining the author's purpose and of evaluating accurately the community standards of decency.

Permeating the criminal justice system's involvement with the issue of obscenity is an attitude which is very paternalistic in nature. Parliament's legislation limiting or restraining the individual's ability to read or view literature or pictures of his choice are almost always clothed

in well-meaning phrases. The legislature wishes to protect the individual's morality from what it perceives to be that individual's self-destructive urges. It wants to safeguard the young by sheltering them from sexual thoughts and to defend the public from itself and thus adopts legislation prohibiting obscenity. However, what the legislator is implicitly telling the nation, specifically the adult population, is that in matters such as obscene literature, it knows better than the adult population and that its guideline should be adhered to. This suggests that the views and opinions of adults who chose to read obscene literature are being brushed aside as being uninformed, immature, childish or unimportant. Legislation of this nature then forces the police and the courts into the role of the good father who has to chastize his child because he has been looking at "dirty pictures". This view of law enforcement agencies and of the judiciary can only lead to an erosion of the faith that the public has in these institutions.

The questions surrounding the problem of obscenity remain. Is there a causal relationship between exposure to obscene matter and criminal behaviour? Science, as of yet, has been unable to resolve this problem. Does the regulation of repugnant, distasteful or repulsive material warrant the intervention of the criminal law? Does the state, through the

use of the criminal sanction, have a role to play as custodian
of public morality?

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- c.46 R. v. Sudbury News Services Ltd. (1978) 39 C.C.C. (2nd) 1.

CONCLUSIONS

The relationship between law and morality has long been a controversial subject. In this paper, the two opposing views, that law and morality should not mix and that law has a duty to up-hold or enforce morality, have been examined. The case of obscenity legislation has also been reviewed. Its history, its evolution in the Canadian context and its interpretation and application have all been investigated. These examinations have resulted in several facts coming to light.

Historically, the crime of obscenity is relatively recent. The common law offence of obscenity dates back to the early eighteenth century in England while the statutory offence was introduced in the middle of the nineteenth century. In Canada, the Criminal Code offence of obscenity initially appeared in 1892.

Obscenity was first regarded as a problem that fell within the Church's penal jurisdiction over morality. This perception gradually changed as the state assumed more and more of the Church's penal responsibilities, including the control of obscene literature.

From the time the state involved itself with issues of morality, legal philosophers and social thinkers have been

unable to come to any understanding with respect to what could be stated as an acceptable degree of intervention in moral affairs.

The definition of obscenity has grown in complexity over the years. From a fairly simple, albeit very subjective, definition created by the courts, the term "obscene", through legislative engineering, has become a highly complex concept. The state and the judiciary, in an attempt to make the test of obscenity as objective as possible, have set up a series of criteria by which any alleged obscene matter must be judged before a determination of obscenity can be made. The increase in complexity of obscenity as a legal concept may or may not have been responsible for the remarkable increase in the number of obscenity cases appearing before the courts. The uncertainty concerning the cause of the increase in the number of cases stems from the fact that the new definition was introduced at the same time as the importation and traffic of sexually explicit material were on the increase; it is thus unclear if the rise in the number of court cases is due to the enforcement of the new definition or if it is the result of a greater amount of obscene material on the market. Moreover, a simple examination of the material available in today's newsstands indicates that the legislator's attempt to control obscene publications has been far from successful.

One of the main arguments supporting the control of obscene material is that exposure to such material is a factor in or can lead to juvenile delinquency. As mentioned in the previous chapter, there have been no empirical studies showing that obscenity has a causal effect in juvenile criminality. The question thus remains: should the youth of the nation be protected from this sort of matter? On the whole, it would seem that the answer is yes. Certainly religious leaders, educators, legislators etc. support the view that state intervention in this area is necessary. Assuming that the threat to the moral values of the young is real and assuming further that governmental regulation is desirable, then serious consideration should be given to whether the criminal law and its many appendages are the appropriate protective and controlling devices. If the aim is to protect the young, then the protective mechanism that is developed should allow for the relatively free circulation of "obscene material" to the adult population desirous to view or read such material. A system of classification based on age would perhaps provide juveniles with the necessary protection and still allow adults access to obscene material if they so wished.

The continuous struggle to keep freedom of thought and speech from being curtailed by censorship by police officials, private groups, provincial boards, and

commissioners has resulted in an increasing number of court decisions. If anything, these have further added to the complexity of what is and what is not obscene. Despite certain important decisions that have provided some guidance as to the interpretation of the term "obscene", what will be considered obscene in any particular court remains somewhat unpredictable. Because of this vagueness, it is always difficult for a lawyer to predict for a writer, publisher or producer what will be deemed obscene by a court. It is equally difficult for writers, artists and other creators of artistic and literary forms to know where the bounds of art and obscenity begin and end. This state of uncertainty has in the past led some authors to suppress publication of their books or has caused their work to appear only in excised and bowdlerized version or has simply made authors extremely reticent to write on matters which might have been of concern to their readers. This form of curtailment of the freedom of expression does not appear presently to be of great concern. However, the possibility of the present obscenity law becoming a menace to creative and scholarly writings remains; it is a ready weapon in the hands of authoritarians and a constant temptation to abuse by puritanical types. Censorship can only lead to an eventual infringement of literary and artistic values.

Parliament's rationale for maintaining legislative control of obscene material is based on the desire to protect the public from the effects of obscenity. Parliament has persevered in its intent to shelter the public, and, it appears, will continue this protection, in spite of scientific research showing that empirical evidence remains inconclusive with respect to establishing any relationship between exposure to obscenity and antisocial behaviour from those who have been so exposed. The legislator's persistence in wanting to protect through the use of the criminal law, a part of the population which largely does not need nor want to be guarded can only lead to a disintegration of the efficiency of the law as a controlling agent. As Packer states:

The criminal sanction is the best available device we have for dealing with gross and immediate harms and threats of harms. It becomes less useful as the harms become less gross and immediate. It becomes largely inefficacious when used to enforce morality rather than to deal with conduct that is generally seen as harmful. Efficacy aside, the less threatening the conduct with which it is called upon to deal, the greater the social costs that enforcement incurs. We alienate people from the society in which they live. We drive the enforcement authorities to more extreme measures of intrusion and coercion. We taint the quality of life for free men.

(1; p. 365)

Canada does not appear ready to duplicate the Danish experience and liberalize the prohibitions concerning obscenity. If the current political and economic climate is any measure, society seems to be adopting or turning towards conservatism. This swing towards the right should not deter the legislator from removing the heavy hand of the criminal law from enforcing what is obviously a problem of morality. Parliament should consider decriminalizing that part of the Criminal Code dealing with obscenity and limit itself to regulating obscenity through non-criminal legislation.

If the legislator is determined to control obscenity, then thought should be given, as a first step, to its regulation through the use of civil laws and regulations. Criminal trials would be eliminated, and jail sentences would be replaced by fines. Offenders will have avoided coming into contact with the criminal justice system and will have avoided being subjected to the ramifications and consequences of being labelled a criminal.

On the whole, it would seem that some form of control of obscenity is desirable. However, the subjectivity involved in interpreting obscene matter, the lack of evidence demonstrating the dangerousness of obscenity, and the controversy over the intervention of the state in moral

affairs do not justify the regulation of obscenity by the criminal law.

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THESIS SUMMARY

The question of legislating morality has been a continual source of controversy in recent history. Nowhere has this been more visible than in the field of criminal law. The criminal law's involvement in the enforcement of morality, especially in the area of sexual and sex-oriented activities, has been frequently criticized in recent years. This study examines the development and application of obscenity legislation in Canada as an example of the problem of legislating morality.

Several phases can be distinguished in the development of obscenity legislation. The first phase finds that religion and tradition were the existing social controls. The criminal law was of little use and the concept of obscenity was non-existent.

The next phase shows the emergence of the criminal law and the gradual control of criminal justice by the state. It was a period in which the Church's penal jurisdiction, with respect to morals slowly disappeared. It was at this time that obscenity emerged as a social concept.

The last phase finds constraints being imposed on the administration of criminal justice. Demands were made

to eliminate punishment for religious and moral offences. It was during this period that obscenity was recognized and later defined by the common-law courts.

The offences of obscenity were first introduced in Canada in 1892 when Parliament enacted the first Criminal Code. The obscenity provisions were enlarged and amended over the years, but the legislators failed to define the term "obscene".

Not having the benefit of a statutory definition, the courts were compelled to use as their yardstick for evaluating obscenity a common-law test developed in England in the mid-1800's. The test, however, was generally criticized as being too subjective.

The frequent criticisms aimed at the test, along with the legislator's desire to further control the increase in the trade of obscene material resulted in Parliament introducing, in 1959, a statutory definition of the term "obscene". The definition has remained unchanged to this date. The resulting confusion in the courts with respect to which criteria to apply, the old test or the new definition or both, was gradually eliminated as the higher courts handed down their decisions on matters relating to obscenity.

Parliament's interest in controlling obscenity is largely based on the assumption that exposure to this sort of material will lead anti-social behaviour. Scientific evidence, however, is inconclusive with respect to the cause-effect relationship of exposure to obscenity. It appears then that the legislator's intention to control individual behavior through the use of criminal law in this area is basically instinctive and emotional rather than based on fact. Rather than risk an erosion in the credibility and efficiency of the criminal law, Parliament should consider decriminalizing obscenity offences and attempt to control obscenity through non-criminal legislation.