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THE HICKLIN RULE AND JUDICIAL CENSORSHIP

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I.

On February 17th, 1956, the American News Company Ltd., a wholesale distributor of magazines, periodicals and pocket books, was convicted by a jury in the County Court of Carleton of having possession of "obscene written matter" for the purpose of distribution contrary to section 150(1)(a) of the Criminal Code.[1] The following day Kennedy J., the presiding judge, sentenced the accused to a fine of $5,000, which represented far and away the heaviest penalty ever imposed for an offence of this nature in Ontario, and probably in Canada. The obscene material in question consisted of several pocket book copies of a hard cover edition of a book entitled "Episode" by Peter W. Denzer, an American novelist. The story, which was fictional in the sense that people and places were imaginary, concerned the plight of a mentally ill American soldier and his treatment in various mental institutions in the United States. According to the evidence of an eminent neuro-psychiatrist, Dr. R. G. Armour,[2] who testified for the defence, the author gave an accurate and sound portrayal of the methods of psychiatric treatment and psychotherapy and of

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[1] Stats. of Can. 1953-54, c.51.

[2] The evidence of Dr. Armour and of five other expert witnesses called by the defence is summarized by Laidlaw J.A. in the report of the appeal, *R.* v. *American News Co. Ltd.* (1957), 118 Can. C.C. 152, at pp. 168-170.

the success achieved by modern methods in mental cases. He also gave as his opinion that the book served a very useful purpose by helping the general public to an understanding of an extremely critical and pervasive problem about which, by and large, it is deplorably uninformed and misinformed.

Following this authoritative testimonial to the book's scientific and informational values the defence called five more experts to testify as to its literary and other qualities. Mr. J. V. McAree, the distinguished columnist and noted book critic on the staff of the Toronto Globe and Mail testified that the novel in question "was an honest book about our own day and about our own kind of people" and that its literary merit was "very high". Further, "the author has certain effects he wishes to create in his book and in my judgment he has created them very properly and eloquently". With respect to certain sexual incidents in the book, which must have been the sole basis for the prosecution, Mr. McAree went on to say that they were not instances of gratuitous pornography but formed integral parts of the complete narrative.

Another witness was Professor Alexander, head of the English department of Queen's University, who declared that the book was "perfectly sincere . . . [and] of a very high level". This opinion was endorsed by another witness, Theresa Thompson, a writer and reviewer, and an executive of the Canadian Writers' Foundation. Hugh MacLennan, one of Canada's foremost authors and literary scholars, added his own emphatic praise of the book, and finally Blair Fraser, Ottawa Editor of Maclean's magazine, stated that if the author had been a Canadian the book might well have been selected for the award for the "Canadian Novel of the Year" and that certainly it would have earned a place in the top group of novels written during the year.

In short there was a unanimity of opinion among eminently qualified critics and judges that "Episode" was a book which embodied all the attributes of good literature and that from every aspect, scientific, educational, topicality, sincerity of purpose and literary merit, it constituted a first rate novel. It comes therefore as somewhat of a shock to find that not only was such a book the subject of a criminal prosecution (one would think there was enough out and out tripe around to better occupy the time of the Crown) but that a book which might have been the "Novel of the Year", if Denzer had been a local product, is labelled obscene and only fit for the legal bonfire. A second shock comes with the realization that any author, publisher or distributor who has the

temerity to concern himself with any literature, no matter how good, which contains any sexual interludes, no matter how apposite, is not only liable to be convicted but, on being convicted, severely punished to boot. Quite understandably the accused, confidently, no doubt, appealed. It did not do the accused the slightest bit of good as the Ontario Court of Appeal unanimously confirmed both the conviction and the sentence. In two long judgments, Laidlaw J. A. (J. K. Mackay J.A., as he then was, enthusiastically approving) and Schroeder J. A. (Aylesworth and LeBel JJ.A. concurring) set out the law relating to what constitutes obscene publications and the evidentiary rules, procedure and defences applicable to prosecutions under section 150 of the Code.

The decision of the Court of Appeal is a very valuable one for two reasons. Firstly, it is certainly the most comprehensive and thorough judgment ever handed down by a Canadian court on the question of obscene literature and it covers the whole ambit of an obscenity prosecution from start to finish, procedurally as well as substantively. In the result it furnishes a finely detailed and explicit "code within a code" which will serve as an excellent guide to the law *so long as the law remains unchanged.* Secondly, and in the view of this writer more importantly, the decision demonstrates that it is imperative that the law must be changed.

An analysis of the decision can be conveniently divided under two headings, the first relating to the procedural rules involved in a prosecution under section 150 and the second to the substantive definition of "obscenity" itself.

An examination of section 150[3] of the Criminal Code shows that the dissemination or possession for circulation of obscene literature is not an offence *per se.* The publication of obscene literature will be privileged and no crime is committed provided that the accused proves (a) that the "public good" was thereby served *and* (b) that such publication did not go beyond what the

[3] That part of section 150 of the Criminal Code which is relevant to the offence in question is as follows:

"S. 150 (1) (a) —Everyone commits an offence who makes, prints, publishes, distributes, circulates or has in his possession for the purpose of publication [etc.] 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 acts that are 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 acts did or did not extend beyond what served the public good."

public good requires. Whether or not the public good is served by the disputed publication is peremptorily created a question of law by the statute. Intrinsically of course it is really a question of fact. The second condition that the accused must satisfy, that the book does not *exceed* the requirements of the public good is a question of fact for the jury, once the court has concluded that there is evidence from which such excess might be properly inferred. If the accused establishes his defence by satisfying the onus relating to both these conditions then, of course, it does not matter whether in fact the book is obscene. No finding on that question is required as the publication is privileged in any event and the accused is entitled to an acquittal forthwith. However if the accused fails to establish the statutory defence then the issue of obscenity becomes crucial and an adverse finding by the jury means a conviction. Procedurally the sequence is as follows:

(1) The accused adduces evidence, the jury (if there is one) being present, that the alleged obscene book serves the public good. The prosecution may counter such evidence if it sees fit but the onus is upon the accused to establish the positive.

(2) When the evidence and arguments on the issue of "public good" have been concluded, the court decides (in the absence of the jury if there is one), as a question of law, whether the accused has established that the public good has been served. If the answer is no, as in the *American News* case, then the case proceeds directly to the jury (or to the judge exercising the function of the jury if he is sitting alone) on the substantive question of whether it is obscene, a question of fact, and the fate of the accused depends, in the absence of a statutory definition, on the application of the formula as enunciated almost a century ago by Cockburn C.J. in *R.* v. *Hicklin*.[4] The onus of proving the substantive offence, that the book is obscene, is, of course, upon the prosecution.

(3) If, however, the court concludes that the public good has been served by the publication of the book in question, then the case may proceed in either of two directions. The favourable finding by the court on the "public good" issue does not by itself mean that the accused is out of the woods for he must still prove the second condition that the book does not also extend beyond what suffices for the public good. Whichever direction the case now takes depends upon the preliminary adjudication by the

[4] (1868) L.R. 3 Q.B. 360, at p. 371. "And I think the test of obscenity 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".

court of still another question of law, i.e., whether or not there is any evidence that the publication extends beyond what is necessary for the public good. If the court decides that there is no such evidence, then the defence has been fully established and the accused must be acquitted at this stage and the case proceeds no further. If, on the contrary, the court decides that there is evidence that the book *might* be "excessive", then the question of whether in fact the book *is* excessive and goes beyond what is required by the public good, is left to the jury (or assumed by the judge if sitting alone) along with the issue of obscenity. A conviction *via* this route therefore requires the concurrence of two findings of fact, that the book is obscene within the meaning of the *Hicklin* definition and that it went beyond the public good.

So much for the procedural chain of events and alternative possibilities created by fragmentizing the issues at different stages of the trial into separate and various niches of law and fact. Certainly the conduct of an obscenity prosecution under the Criminal Code seems to be remarkably and unnecessarily complex. What it amounts to is that the judge and jury take turns picking up and carrying away a single stone at a time. This is in marked contrast to the English practice where the only issue in an obscenity trial is, reasonably enough, whether a book is obscene. In England the judge simply instructs the jury to carry away the whole load if they think it warrants removal. What complicates the matter in Canada is that obscenity can be justified in the name of the "public good". Although the statutory defence might seem to be an absurd inconsistency to the layman (who equates obscenity to dictionary definitions such as lewd, lascivious, salacious, etc. and would be puzzled to know just how any material of that nature could be reconciled with the public interest) nevertheless the fact that such a defence is sanctioned makes it necessary for a Canadian court to embark on considerations going beyond the simple issue of obscenity *versus* non-obscenity. Even so, surely whether or not the public good was served by the publication of a book, now a question of law for the judge, should be considered as a question of fact, which in essence it really is, and therefore within the province of the jury to decide along with the question of whether the book exceeded the public good.[5] If such a change were effected then all of the issues, obscenity and factors of justification, would go into the same hopper and be decided at one

[5] At one time the Code did make the question of "public good" a question of fact and not law. See *R.* v. *Palmer* (1937), 68 Can. C.C. 20.

and the same time by the jury alone without needless complications created by an arbitrary division of labour and an uncalled for transformation of a question of fact into a question of law. As the law now stands it is the same as if on a prosecution for murder, where the defences raised were alibi and self-defence, the trial judge took it upon himself to find out whether the accused was in fact acting in self-defence by killing the deceased (analogous to whether he acted in the public good) and, if he thought not, sending the case to the jury to decide the alibi issue, i.e., whether or not the accused killed the deceased (analogous to whether or not he published an obscenity); and if he thought there was self-defence, then, if he found no evidence of excessive force, immediately acquitting the accused or, if there was evidence that excessive force might have been used, instructing the jury to find whether there was excessive force used, provided they also find that accused killed the deceased. Such a rigamarole is neither expedient nor does it make any sense.

However, above and beyond a question of simple expediency there is a much more fundamental objection to be levelled at the designation of the "public good" question as a question of law. The jury, if there is one, hear all the evidence, not only that going to whether or not the book is obscene but also that going to the defence of privilege because it is still their function to decide whether the book exceeded the requirements of the public good, if the court decides that the book in fact serves the public good. Now if the judge decides, in the absence of the jury, that the public good was not served, that of course does not mean that the book is obscene or have any bearing, by itself, on whether the accused should be convicted. The obscenity issue must still be tried by the jury on their return. But when the jury return and the judge charges them on the law and tells them that they need not consider any question of privilege or whether there was an "excess" thereof because as a matter of law the publication does not serve the public good in any way whatsoever, the uncomplicated mind of the average juryman will probably take this to mean that the judge, in effect, is telling him that the book is worthless. Certainly, he would reason, a book which does no good for people cannot be seriously considered. From this, and remembering that juries tend to think in terms of simple equations, a worthless book = tripe (and moreover, having heard the Crown detail nothing but sexual passages) = tripe + sex^2 = obscenity. Nothing could be more prejudicial and much of the prejudice hearkens

back to the seemingly unimportant provision that whether or not the public good is served is to be considered as a question of law.

In the *American News* case Kennedy J. stated his decision that the book did not serve the public good in the following bare words:

> The book, which is fiction, deals with the imaginary life and delusions of a mentally ill American soldier and his imaginary treatment in mental hospitals in the United States, and I cannot conceive how the distribution of this book in Canada, having regard to the manner in which it is written, could be considered to serve the public good in Canada. *For the reasons stated* I must refuse the motion of counsel for the accused company.[6]

To the jury he subsequently charged:

> You have also heard witnesses testify whether the distribution of the book was for the public good. It is my duty to direct you as a matter of law and for a legal reason only, that the defence . . . which I have just read to you is not available in this case to the accused company. I have told you this because I was afraid you might wonder why I made no reference to [the defence of "public good"] in my charge. But . . . such direction does not in any manner whatsoever affect the question of whether the accused company is or is not guilty of the offence with which it is charged . . . .[7]

One may wonder two things: Firstly, the point already raised, whether the accused has not already been damaged beyond redress by the trial judge instructing the jury in advance that the book does not serve the public good, and secondly, because directly or indirectly the judge's decision on the "public good" issue may have a decisive bearing on the final result, what is the criteria for defining the "public good"? Certainly no hint is given by Kennedy J. unless we are to assume that books which have foreign locales and personalities (at least if they are American) are unfit for Canadian consumption. Such an insular and presumptuous test is just as inconceivable as Kennedy J. considering it inconceivable that the book in question could possibly serve any public good in Canada. Also the test surely cannot be that the book concerned itself with imaginary people and places (though only in the sense that the "real" names were not used) because that would rule out all novels and indeed most of our literature. Neither can the test be, surely, that a book which concerns itself with matters of sex is for that reason of no public value. Kennedy J. did have regard to the "manner in which it is written" but the evidence on that point was unanimous that "Episode" was very well written in-

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[6] *Supra*, footnote 2 at p. 189. [7] *Ibid.*, at p. 191.

deed. With nothing else to go on it is difficult to escape the suspicion that the reason why the book did not serve the public good was because Kennedy J. did not like it. If that is the real test and what, in the final analysis, "public good" actually boils down to, then it is no test at all and on this vital defence issue the application of the law is completely arbitrary. As such a state of affairs cannot be conceded either, the question still remains, what is the meaning of "public good"?

This brings the discussion to the meat of the whole problem, the substantive issues of obscenity and public good and what is meant, in law, by those terms. Section 150, as previously mentioned, does not make it an offence to publish obscene material but only unprivileged obscene material. Because of the insistence of the statute that the question of privilege or "public good" is a question of law, that point must inevitably be determined first even though it amounts to putting the cart before the horse. It would, of course, be more sensible to postpone a decision on the question of "public good" until it has first been established that the publication was obscene. As matters now stand the court must determine the question of "public good" first, in the abstract as it were, and hence a ruling that the publication did not serve the public good will involve a sheer waste of time if it subsequently develops that the publication was not obscene anyway. In any event the order of consideration required by the Code, however irrational, will perforce be the order adopted in this discussion.

II.

Proof of "Public Good"

As in the *American News* case itself the defence of "public good" can be disposed of rather summarily. The statutory defence that exempts from prosecution the publication of obscene literature which coincides with the public good is, to say the least, patently anomalous. How can obscenity ever be in the public interest? Obviously something is wrong. Either the public has a perverted sense of what is good for it or the definition of what constitutes obscenity is perverted. Obscenity cannot be for the public good. Literature which serves the public good cannot be obscene. It should be as simple as that. Leaving aside the paradoxical nature of the defence for the moment, the problem is what is meant by the "public good" and once defined how does an accused prove that a particular publication contributes thereto. The short ans-

wers are that there seems to be no definition of "public good" and, practically speaking, an accused cannot prove such a defence anyway.

The statute gives no definition of what might be deemed to serve the public good, certainly the *American News* case furnishes no clue, and the common law is silent upon the subject. One commentator, Sir James Fitzjames Stephen, "submits" in his *Digest of the Criminal Law* that the publication of an obscene book is justified if "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".[8] To this he couples a proviso similar to the one contained in section 150 of the Code that the publication must not exceed what the public good requires. Whether this is a workable definition or not is largely academic. Not only has it never been sanctioned by any significant judicial authority[9] but its terminology seems to require that a book must make a definite or positive contribution ("advantageous" is rather demanding when coupled with "necessary") in fields which, applying the *ejusdem generis* rule to "other objects" are largely professional in nature. In short, justification is extended to great works of literature and medical, scientific and anthropological studies etc., which are never challenged for obscenity in any event. Conversely such a narrow definition will be of little help to the great majority of books written today which do not, nor are they intended to make, such pretentious claims. Both Justices Laidlaw and Schroeder were prepared to assume some such limitation as was suggested by Stephen and both were satisfied that "Episode" could hardly claim to come within the meaning of "public good" as so rigorously and technically defined.

In the *Hicklin* case itself, Blackburn J. considered a possible defence arising under the English statute, being the Obscene Publications Act, 1857, in which section 1 provides, *inte. alia*, for prosecutions of obscene books which are "*proper to be prosecuted as such*".[10] Blackburn J. suggested that the defence implied by these words was to "guard against the vexatious prosecution of publishers of old and recognized standard works in which there may

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[8] (9th ed.) p. 173.

[9] In *R.* v. *De Montalk* (1932), 23 Cr. App. R. 182, it had been suggested by the Recorder of London in his summing-up that, although the matter was obscene, it would be a defence if publication were for the public good. However Lord Hewart C.J. in delivering the judgment of the Court of Criminal Appeal, dismissing accused's appeal, made no reference to such a defence and there is no judicial authority upon it.

[10] *Supra*, footnote 4 at p. 374.

be some obscene or mischievous matter". If that is the test to be imported into section 150 of the Code as defining what literature is for the "public good" it is even narrower than Stephen's formula. Shakespeare, it seems, is justified because his works have been around long enough to have become both old and recognized but if Shakespeare were alive and writing today, his "A Midsummer Night's Dream" would be liable to be banned, however "necessary or advantageous to . . . the pursuit of . . . literature or art" because it would not contain old or recognized obscenities. Furthermore even Justice Blackburn's test does not seem to have been applied as witness the constant efforts to suppress Boccaccio's *Decameron*.[11] In any event such a test only underscores the whole fatuity of the English Act and its Canadian equivalent for if a book is obscene at law then it is obscene no matter how illustrious the hand that wrote it.[12]

In the final analysis, therefore, there is either no recognized test for the defence of "public good" or if there is such a test it cannot possibly be applied to books which will be made the subject of obscenity prosecutions. In either case the practical result is that there is no defence available for publishers and distributors of books which are alleged to be obscene, assuming that the Crown exercises at least a minimum sense of discretion, except the defence based on the definition of obscenity itself.

It therefore does not really matter, as ordinarily it should, that all the expert opinion in the world, even of a calibre of the testimony in the *American News* case, is completely inadmissable on the issue of "public good" for the simple reason that opinion evidence is incompetent on a question of law. In other words it is really not important that an accused, for all practical purposes, is not allowed to establish his statutory defence because of evidentiary rules (how else can the existence of "public good", which is really a question of fact, be established except by the opinion evidence of witnesses qualified to attest to the fact) because it is practically impossible, in any event, for him to avail himself of the defence as a matter of definition. Hence it would not remedy the situation even if the question of whether the public good was served were to be made a question of fact so that opinion evidence would not be automatically barred. The basic hurdle would still remain; the inability to force general contemporary literature into a privileged category reserved for the Bible, Shakespeare, and Gray's Anatomy.

[11] St. John Stevas, Obscenity and the Law (1956), p. 112, citing several instances of successful prosecutions.

[12] Literature and the Law, 105 L.J. pp. 244, 246.

Furthermore, a secondary hurdle would be created. Even if, on a question of fact, expert opinion were admissible, the Court of Appeal in the *American News* case made it clear that it would be considered of little value, and even worthless, because the judge or jury, as the fact finding body, is entirely capable of drawing its own unaided conclusions and the book itself is the best evidence of what effect it will have. Hence the Court of Appeal declared that the evidence of McAree, MacLennan, Fraser et al, should not only not have been received at all, but that even if such testimony were admissible it would be a waste of time to listen to it.

For all or any of the foregoing reasons it is submitted that the so-called defence of "public good" should be dropped from the statute. In form it is paradoxical by suggesting that obscenity can be justified at all and in practice the privilege is accorded only to such literature as would never be prosecuted anyway. Procedurally it creates chaos and, ironically, it is more likely to be prejudicial to the accused than operate in his favour. Changing the question of "public good" from one of law to one of fact would obviate some of the objectionable procedural complexities of the present defence but substantively it would still remain a dead letter. It is submitted that the area of statutory defence should be shifted from a non-definable and unprovable "public good" to a realistic re-appraisal of obscenity itself. If a book is obscene according to a proper definition of that term then it can't be justified as serving the public good. The perverseness of the present law that insists that an obscene book may be privileged merely points up that it is the definition of obscenity which is perverse.

III.

Proof of Obscenity — The Present Law

Section 150 of the Code does not define what is meant by obscene. However, the common law has provided such a definition and that is the famous, or notorious, dictum (for it was only that) enunciated by Cockburn C.J. in the celebrated appeal in *R.* v. *Hicklin*.[13] The fact that Cockburn J.'s definition was purely gratuitous and that it is approaching its centenary has never bothered the English or Canadian courts or caused them to question either its legal pedigree or whether it properly reflects current ideas. Accordingly, in the *American News* case, the Ontario Court of Appeal repeated the shop-worn formula and defined obscenity as "whether the tendency

[13] *Supra*, footnote 4.

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". The definition of obscenity is vague, as meaninglessly vague (and therefore as unworkable) as the definition of "public good". Laidlaw J. A. admits that:

> The words 'deprave' and 'corrupt' as contained in the test of obscenity are *indefinite* and *uncertain* in meaning. It is not sufficient in law that a matter charged as obscenity should merely be disgusting or repulsive. Conversely, it is not necessary that the matter be salacious or unsavoury to be obscene. Indeed, for instance, a book may be inoffensive in its content, but *if* it is calculated to deprave and corrupt it *might* fall within the test of obscenity in law. I observe, too, that the effect of the tendency may vary in character. The tendency *might* be to 'suggest thoughts of a most impure and libidinous character', as pointed out by Cockburn C.J. in the Hicklin case; or it *might* be to influence certain persons to do impure acts; or it *might* be to imperil the prevailing standards of public morals . . . . [T]he 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 both adults and youth . . . 'normal' as well as . . . 'abnormal'. In each case the finding depends upon a consideration of the effect of the matter in question on persons into whose hands it may fall and whose minds are open to influences of a corruptive kind. The person into whose hands any matter charged as obscenity might fall is again *uncertain* in both theory and practice . . . . The question as to whose minds are open to corruptive influences is, again, a question to which there is *no certain or definite answer*. A tribunal called upon to consider that question must *imagine* a class of persons who in the particular circumstances of the case *may* be susceptive to immoral influences . . . . The Court can only *conjecture* in a judicial manner as to the class of persons who might fall within the description.[14]

This is a rather important admission because it means that the whole test of obscenity is uncertain and indefinite, the enumerated items so classed being the whole heart of the definition. By itself such an admission is a sufficient indictment of the "definition" of obscenity and of the basis upon which a criminal conviction lies. Surely it is an imperative and fundamental rule of criminal jurisprudence that the nature and ambit of an offence be strictly and rigorously defined. In effect the accused is asked to meet a charge which can and does mean something different to different people, judges and juries alike. The offence at present resembles the common-law offence of public mischief which left the field of criminal liability so vague that it was capable of being extended to anything that incurred the displeasure of the court.

[14] *Supra*, footnote 2, pp. 157-8.

As a consequence of criticism to that effect the offence of public mischief was explicitly defined in the revised Code where it now appears as section 120. No such improvement has been made with respect to the offence of obscenity and it still remains an offence which can apply to any literature that incurs the displeasure of the court even though this violates the injunction that if conduct is to be declared criminal it should be so declared by Parliament and not by the courts.[15] Furthermore, the imposition of heavy penalties, as in the *American News* case, forcibly indicates, if any indication was needed, that obscenity is not considered as if it were merely a regulatory or so-called public welfare offence. It is a serious offence, as indeed it should be, and that is all the more reason why it should be clearly defined. Moreover it is not just the accused who suffers. It is the reading public who are the real victims, for in the final analysis their liberty to read and their tastes in literature are at the mercy of, in Dicey's caustic words, "what twelve shop-keepers think it expedient should be written"[16] or of a judge who, for unstated reasons, does not like a particular book. Really, as will be seen, the only minimal requirement to support an obscenity verdict is that a book contain one sexual passage. Before considering in greater detail the extract just quoted from Justice Laidlaw's judgment it might be apt at this point to quote from a recent judgment of the United States Supreme Court, *Butler* v. *Michigan*,[17] which considered the constitutional validity of an enactment couched in similar language as that adopted by the *Hicklin* test. The constitutional issue in itself is not necessary to consider, but the language of the court in indicting the Michigan version of the *Hicklin* prohibition merits attention. With respect to section 343 of the Michigan Penal Code which provided that "any person who publishes, sells . . . any book, magazine . . . containing obscene, immoral, lewd or lascivious language . . . tending to incite minors to violent or depraved or immoral acts . . . shall be guilty of a misdemeanour", Frankfurter J. had this to say:

> The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig . . . . The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the . . . Fourteenth Amendment, that history has attested as the indispensable

[15] see *Frey* v. *Fedoruk* (1950), 97 Can. C.C.1; [1950] S.C.R. 517.
[16] Quoted by St. John Stevas, [1954] Cr. L. Rev. 817.
[17] (1957), 352 U.S. 412.

conditions for the maintenance and progress of a free society. We are constrained to reverse this conviction.[18]

Although our forefathers did not have the foresight to specifically guarantee the liberty of the individual as does the Fourteenth Amendment, surely the rights of Canadian readers should be equally respected.

Before we can arrive at any meaning to be ascribed to "obscenity" we must first consider what are the objectives desired by a prohibition against obscene literature. Obviously "obscenity" cannot be considered in the abstract but can only be given meaning in terms of what interests are sought to be protected. Justice Laidlaw in effect mentions four possible reasons for making obscenity a crime. Firstly, to protect the reader from naughty *thoughts*, more eloquently expressed by Cockburn J. as "thoughts of a most impure and libidinous character". The question immediately arises, what are "impure" thoughts? Does a book which advocates birth control measures lead to "pure" or "impure" thoughts assuming that the reader thinks at all? Does a book which concerns itself with childbirth or normal sex relations between married couples lead to "impure" or "pure" thoughts? Is the rule designed to protect readers against extra-marital sex thoughts or sex perversions? It would seem that only if a book advocated "unconventional" sex practices could it be said to create "impure" thoughts. Surely there must be a relationship between what is portrayed or expounded in a book and the thoughts of a reader, that is, that only such books as advocate "impure" ideas can be considered as leading to "impure" thoughts. A particular passage in a book may be "and as Doris donned her silk stockings she straightened the seams with a deft flick of the wrist". This passage may very well stir the sex impulses of some abnormal reader whose fetish happens to be female stockings. Yet we say we will ban a book to protect the abnormal. Yet it is also very clear that a book which contained nothing more than dreary passages like the one mentioned would never be banned. The only basis of reconciliation is that as the book does not express "impure" ideas it is not obscene whatever impure thoughts it may in fact stimulate. Then what are "impure" ideas? To say that *any* ideas relating to sex are "impure" is of course ridiculous. The creation of normal sexual thoughts and desires is neither immoral or contrary to accepted social behaviour. Without them, indeed, men and women

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[18] *Ibid.*, at p. 414.

would be abnormal.[19] Therefore a book designed to educate couples in sexual practises so as to make for a happier marital relationship cannot express "impure" ideas, and even though in fact some "abnormal" person immediately thinks of homosexuality or some "normal" person thinks of the woman next door, the book should not be classified as obscene even if the "impure and libidinous" test is adopted. However, quite apart from the difficulty of defining what constitutes the portrayal and exhortation of "impure ideas" in the first place, there is a more fundamental objection to adopting such a test or criteria at all. What is the matter with having "impure" thoughts so long as they are not translated into anti-social or immoral behaviour? Religious leaders might object to "impure" thoughts *per se* and require their flocks to think only noble thoughts of the spiritual and not of the carnal, but surely this is a job for religion and not for Parliament.[20] If we are going to ban books because they might provoke immoral thoughts then we should, to be consistent, pass laws prohibiting women from wearing tight sweaters or adopting the plunging neck-line.

Another possibility raised by Laidlaw J.A., but which he rejects, is that the obscenity laws may be justified as protecting the cloistered reader from that which is vulgar, repulsive or offensive. Professor Chafee has suggested that this is a legitimate aim of the obscenity laws in the same sense that it is legitimate to curb public drunkenness or profanity or smoking cigars in street cars.[21] However there is a clear difference. It may be necessary for an author to "shock" with blunt realism if that is the only way to adequately portray the character of his subjects, whereas the "shock" given by a public exhibition of profanity serves no social purpose whatsoever. Again the bystander cannot escape from the smelly cigar, whereas the shocked reader can protect himself simply by stopping reading. Any harm suffered by a reader will be relatively minor and temporary in any event and hence there is no point in legislating against vulgarity even if gratuitous and unnecessary for the author's purpose.

A third aim suggested by Laidlaw J.A. as a legitimate function of obscenity laws is to protect prevailing standards of community morality. This is just a dressed up way of saying that law must protect conformity and that freedom of speech does not include the right to dissent or the right to attack the existing order. Of

[19] Lockhart and McClure, Obscenity in the Courts (1955), 20 Law and Contemporary Problems pp. 587, 593.
[20] *Ibid.*, at p. 593.
[21] Chafee, Government and Mass Communication (1947), p. 196-7.

course there are many who attach to conformity the mantle of enduring truth and who, like the hostile critics of modern art, are opposed to any innovation. The first man who bared his chest on a public beach was probably arrested but societal standards change and can only change for the better if they reflect a free interchange of ideas and opinions. Certainly the requirements of free discussion demand that the "unpopular" or unconventional opinion be given its chance to be aired because it might very well develop that it is the very opinion which will establish the accepted standard of tomorrow.[22] Literature, in short, cannot be challenged on the ground that it has the temerity to concern itself with sex or joust with the existing order of things whether it be political, economic, moral or whatever. In any event, to use any such standard as "prevailing social morality" presupposes that such a concrete standard exists which is more than doubtful in a society whose statuary has glorified the male genitals for centuries but pretends to recoil at a woman's navel made visible by a Bikini; or where the difference between a classic nude and an obscenity is the representation of pubic hair;[23] or where fingers are pointed with alarm at the seductive female on the cover of a Mickey Spillane book and ignore the fact that she has a smoking gun in her hand and has obviously just committed *murder*.

If the aims of obscenity legislation are not or cannot be directed at preventing libidinous *thoughts*, shock, or criticism of existing moral standards, it must be aimed at *behaviour* of an immoral or perverted nature as a *result* of a mind which has become "depraved" or "corrupt". Certainly if a book is demonstrably likely to induce people, normal or abnormal, to engage in socially undesirable conduct it should be declared an offence to publish it. In other words "tendency to deprave and corrupt" in the *Hicklin* formula means that there is some likelihood that some reader or readers of a book will be induced or stimulated to engage in either extra-marital intercourse or perverted sexual relations *as a result* of reading the book. As in any other crime the prosecution must prove the factor of causation. But in no reported case is there a scintilla of evidence adduced by the Crown that the particular book in question, or any book for that matter, will likely cause unde-

[22] See judgment of Jackson J. in *Board of Education* v. *Barnette* (1942), 319 U.S. 624, at p. 642.

[23] "Characteristically, in the case of a 'living statue' display at the Chicago World's Fair, the law, with sensitive fidelity to the mores, decided that the exposure of both breasts was obscene but that the exposure of only one was 'art'." See Barre, Obscenity: An Anthropological Appraisal (1955), 20 Law and Contemporary Problems pp. 533, 539.

sirable sexual behaviour. It seems to be an article of faith, which no evidence is allowed to disturb, that there is a cause and effect relationship between obscenity and lowered morals, perversion or criminal behaviour. Furthermore, as the courts rigidly refuse to admit any opinion evidence as to whether a book, or any book, can have or is capable of having a depraving effect on the conduct of its readers, the assumption of a causal relationship rests on nothing more substantial then pure speculation. Although the whole structure of obscenity prosecutions rests upon an unproved assumption, and in spite of the fact that investigative studies indicate that there are grave and substantial doubts about the validity of the assumption,[24] no one has ever really challenged the Crown to prove its case. Rarely, if ever, has there been a witness who has testified that he or she was led down the primrose path by reading a book[25] and no one has ever shown that those who have embarked on the primrose path did so *because* of reading a book, pornographic or otherwise. Indeed in this age of mass sex-exploitation as symbolized by Marilyn Monroe and others whose qualifications for movie stardom definitely do not require acting abilities, and as represented by magazine and television advertizing of Playtex Living Girdles and other female undergarments which lay more stress on bosoms than the products to be sold, it is little wonder that if eventually we degenerate into a race of peeping Toms the contribution made by books to that low estate will be miniscule. The "fear" of books is more of a neurosis than legitimate, it seems,[26] but in any event unless and until there is something more than mere

[24] *Supra*, footnote 19, at pp. 595-6.

[25] In 1949, the dancer, Evelyn 'Treasure Chest' West was tried for inciting "lewd and lascivious" thoughts in Oklahoma City. Evidence was given by a Mrs. Schmidt that she had been excited in the manner required. Another witness, Miss Campbell, said she was not excited because she was over 45 years of age. The complaint was eventually dismissed. N.Y. Sunday News, April 10, 1949, p. 95, col. 4.

[26] At least if the following remarks of the patron saint of the censorial minded, Anthony Comstock, are any indication:

> "The effect of this business on our youth and society, no pen can describe. It breeds lust. Lust defiles the body, debauches the imagination, corrupts the mind, deadens the will, destroys the memory, sears the conscience, hardens the heart and damns the soul. It unnerves the arm and steals away the elastic step. It robs the soul of manly virtues, and imprints upon the mind of the youth, visions that throughout life curse the man or woman. Like a panorama, the imagination seems to keep this hated thing before the mind, until it wears its way deeper and deeper, plunging the victim into practices that he loathes. This traffic has made rakes and libertines in society—skeletons in many a household. The family is polluted, home desecrated, and each generation born into the world is more and more cursed by the inherited weakness, the harvest of this seed-sowing of the Evil one." Anthony Comstock, *Frauds Exposed* (1880).

speculation as to the effect of books the prosecution of publishers should be confined to books which are, and are intended to be, nothing but open sewers.

In recent years there has been a widespread judicial reaction to the orthodox test of obscenity as embodied in the *Hicklin* rule. This reaction is best exemplified by the celebrated *Ulysses* case, decided in 1933, in which the federal court simply refused to follow the *Hicklin* definition at all.[27] That case involved a finding by Woolsey J., upheld on appeal to the Circuit Court of Appeal, that James Joyce's work of that name was not obscene. The judgments of Woolsey J. and of Augustus Hand J. in the Court of Appeal are particularly illuminating. The latter laid down a new test for obscenity as follows:

> We believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.[28]

Woolsey J., at first instance, had already stressed "that 'Ulysses' is a sincere and honest book. . . . In many places it seems to me to be disgusting but although it contains . . . many words usually called dirty, I have not found anything that I consider to be dirt for dirt's sake. Each word of the book contributes like a bit of mosaic to the detail of the picture which Joyce is seeking to construct for his readers . . . [W]hen such a great artist in words, as Joyce undoubtedly is, seeks to draw a true picture of the lower middle classes in a European city, ought it to be impossible for the American public legally to see that picture? To answer this question it is not sufficient merely to find, as I have found, that Joyce did not

[27] *United States* v. *One Book Called "Ulysses"* (1933), 5 Fed. Supp. 182, aff'd., (1934), 72 Fed. 2d. 705.

[28] (1934), 72 Fed. 2d. 705, at p. 708. In addition, Augustus Hand J. went on to say "numerous long passages in 'Ulysses' contain matter that is obscene under any fair definition of the word . . . yet they are relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake . . . . The book as a whole is not pornographic, and while in not a few spots it is coarse, blasphemous and obscene, it does not in our opinion, tend to promote lust. The erotic passages are submerged in the book as a whole and have little resultant effect. It is settled . . . that works of physiology, medicine, science, and sex instruction are not within the statute, though to some extent and among some persons they may tend to promote lustful thoughts. We think the same immunity should apply to literature as to science where the presentation, when viewed objectively, is sincere and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication."

write 'Ulysses' with . . . pornographic intent. . . . I am . . . required to determine whether 'Ulysses' is obscene . . . as . . . tending to stir the sex impulses or to lead to sexually impure and lustful thoughts. . . . Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effects on a person with average sex instincts . . . . It is only with the normal person that the law is concerned. . . . Such a test is the only proper test of obscenity in the case of a book like 'Ulysses' which is a sincere and serious attempt to devise a new literary method for the observation and description of mankind."[29]

The differences between the *Ulysses* test, which has since been widely adopted in the United States, and the *Hicklin* rule can be summarized as follows: First, it is the *dominant* nature of the book taken *as a whole* which is considered in *Ulysses*, whereas the *Hicklin* test has been applied so as to permit a book to be condemned as obscene solely because of isolated words or passages ripped out of context. One abstracted sensuality may be sufficient[29A].

Secondly, because the *Ulysses* test considers a book to be obscene only if its objectionable features dominate the whole effect of the book, or if they are introduced purely as "dirt for dirt's sake", it is necessary to make a highly complex evaluation of the book in terms of its overall values, scientific, educational and literary, and in terms of the relevancy of the objectionable portions. Hence expert critical opinion is not only admissible but is persuasive evidence on the first score, and the purpose and sincerity of the author is clearly material to the issue of relevancy and "literary necessity" on the second, in order to judge the author's need to use whatever words and passages will produce the effect intended. The *Ulysses* test, unlike the *Hicklin* test, calls for a close appreciation of the nature and function of literature and although obscenity is still a question of fact the considerations involved require the application of special skills. Hence, under the *Ulysses* test, opinion evidenced is not irrelevant or superfluous on the ground that the judge or jury has the same knowledge or ability as any witness could have.

On the other hand, because a book is obscene under the *Hicklin* rule if any passages therein may have an unfortunate tendency towards genital commotion in some adolescent reader the only questions are, in effect, is a given passage smutty? and might it adversely affect some unknown degenerate who might read it and think that portrayal requires emulation? Obviously a juryman is

[29] (1933), 5 Fed. Supp. 182, at pp. 184-5.

[29A] Various illustrations of this practice are considered by the present writer in a case comment in (1954), 32 Can. Bar Rev. 1010.

just as capable and incapable respectively of answering these questions as anyone else and therefore the opinion of anyone else, including the author, is irrelevant and inadmissible.[30] Neither, under the *Hicklin* rule, is the sincerity or purpose of the author the least bit material.[31] The *Hicklin* rule escorts literature to the scaffold without a fair trial, by Star Chamber inquisition, and on the basis of very doubtful, and in any event, unproved, premises. One might also remark at this juncture that it is difficult to reconcile the *Hicklin* rule of excluding critical opinion with the established practice of excluding "classics" from the obscenity ban, because surely it is favourable criticism and acceptance that creates a classic. Surely evidence of modern critics as to the merits of contemporary work is to current literature what "reputation" is to older literature and if reputation is relevant to determine classics so should contemporary opinion be relevant to assess what might be modern classics.[32]

Thirdly, the *Ulysses* test does not take its obscenity standards from the standpoint of the young and disordered. The *Hicklin* rule does. In truth the *Hicklin* rule is geared to a standard which would call obscene anything which might corrupt the most corruptible.[33] In practice of course the good sense and discretion of the Crown officials should hold *Hicklin* in leash and that has generally been the case until the past few years. Judicial decisions like Stable J.'s in *R.* v. *Martin Secker Warburg Ltd. and Others,*[34] exhibiting commendable restraint and understanding, seemed to indicate a real desire to protect literature from the hysteria of modern day Anthony Comstocks and to recognize that it cannot

[30] See *supra*, footnote 2, per Laidlaw J.A. at p. 161.

[31] *Ibid.*

[32] See (1951), 35 Minn. L. Rev., 326 at p. 329.

[33] In a famous protest against the *Hicklin* rule, Judge Learned Hand stated: "I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few. . . .

Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy." *United States* v. *Kennerley* (1913), 209 Fed. 119 at p. 120-1.

[34] [1954], 2 All E.R. 683.

be sacrificed in the interests of the prurient and the abnormal if it is to prosper or even survive. Actually the *Warburg* case might be said to have been an English version of the *Ulysses* case. Stable J. followed the *Hicklin* definition (as of course he had to) but he put elasticity into its frame and found room for a new and larger philosophy within its stereotyped verbal boundaries. The following extracts from his charge to the jury are illustrative.

First of all he emphasized to the jury the critical importance and far reaching consequences of their decision extending beyond the particular fate of the novel in question:

> [T]he verdict that you will give . . . is of great importance in relation to the future of the novel in the civilized world and the future generations who can only derive their knowledge of how persons lived, thought, and acted from the contemporary literature of the particular age in which they are interested. Your verdict will have a great bearing on where the line is drawn between liberty, that freedom to read and think as the spirit moves us, on the one hand, and licence which is an affront to the society of which we are all members, on the other.[35]

In stating that in order for literature to function as a mirror of the society which it seeks to depict it must be frank even if sometimes the truth is unpalatable, Stable J. went on to say:

> Where should be we today if the literature of Greece, Rome and other past civilizations portrayed, not how people really thought and behaved, but how they did not think and how they did not speak and how they did not behave?. . . . This is an American novel . . . purporting to depict the lives of people living today in New York, and to portray the speech, the turn of phrase, and the current attitude . . . of life in New York. If we are going to read novels about how things go in New York, it would not be of much assistance, would it, if, contrary to the fact, we were led to suppose that in New York no unmarried woman or teenager has disabused her mind of the idea that babies are brought by storks or are sometimes found in cabbage patches or under gooseberry bushes?[36]

On the vital factor which is always overlooked or taken for granted in these cases, the causation problem of whether a book, any book, is likely to induce "depraved and corrupt" behaviour, Stable J. states:

> You have heard a good deal about the putting of ideas into young heads. Really, is it books that put ideas into young heads, or is it nature? . . . [I]t is the natural change from childhood to maturity that puts ideas into young heads. It is the business of parents and teachers and the environment of society, so far as is possible, to see that those ideas are wisely and naturally directed to the ultimate fulfillment of a balanced individual life.

[35] *Ibid.*, at p. 684.

[36] *Ibid.*, at pp. 685, 687.

In directing the jury to consider the book as a whole, and according to the view of "the average, decent, well-meaning man or woman" the court said:

> You will have to consider whether in this [book] the author was pursuing an honest purpose and an honest thread of thought or whether that was all just a bit of camouflage to render the crudity, the sex of the book, sufficiently wrapped up to pass the critical standard of the Director of Public Prosecutions.[37]

Finally, Stable J. asked the rhetorical question:

> Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? . . . . Of course not. A mass of literature, great literature, from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making those works available to the general public.[38]

In substance the jury were directed to consider the book as a whole, not carefully culled passages,[39] to look at its dominant effect and the purpose of the author and according to normal adult standards and in terms of objective values. In fact there are only two real differences between the *Warburg* charge and the *Ulysses* test. In the former case opinion evidence as to the merits of the book was still excluded. The other difference is more fundamental. Whereas the *Ulysses* test is widely accepted and followed in the United States the *Warburg* charge is undoubtedly not the law in England and Canada. It has been damned as being merely a "personal opinion"[40] and, as Laidlaw J.A. notes in the *American News* case, the standards laid down by Stable J. have subsequently been expressly repudiated *seriatim*.[41] Instead, the Ontario Court of Appeal adopted the views of Lord Goddard, C.J., in *R.* v. *Reiter*,[42] decided a month before the *Warburg* case, which are in strict accord with the orthodox interpretation of the *Hicklin* formula. Evidently then the *Hicklin* frame which Stable J. tried to

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[37] *Ibid.*, at p. 688.

[38] *Ibid.*, at p. 686.

[39] "After Mr. Griffith-Jones finished speaking, he produced a sheaf of typed copies of a list of passages from 'The Philanderer' to which the Crown took exception, and said that he intended to distribute them among the jurors. Mr. Winn [defence counsel] rose from his seat to object. The Judge sustained the objection, and then, turning to the jury with an agreeable smile, said, 'Would you mind reading it *from cover to cover*, . . . so far, things certainly seemed to be going in my favour". From Fredric Warburg's own account of his trial published in the New Yorker, April 20th, 1957, at p. 118.

[40] *R.* v. *Hutchinson Ltd. and Webb*, Sept. 17, 1954; St. John Stevas, *op. cit.*, *supra*, footnote 11 p. 116.

[41] *Supra*, footnote 2 at p. 160, referring to *R.* v. *Hutchinson and Webb*, *ibid.*; see also Warburg in the New Yorker, *supra*, footnote 39 at p. 123.

[42] *R.* v. *Reiter et al*, [1954] 2 Q.B. 16.

bend in order to maintain a sense of objectivity and a proper balance of values cannot be bent.

The law is unyielding and Laidlaw J. A. makes it plain that a book is obscene if it is available to and has a tendency to deprave or corrupt those whose minds are susceptible to immoral influences and embraces everyone including children and those who are disordered or degenerate; that evidence to show opinions that the book has no such tendency is inadmissible and likewise so are opinions attesting to the literary, educational and other merits of the book; that the sincerity and legitimacy of the author's purpose must be completely ignored and, as a result of all the foregoing eliminations, the book is to be judged obscene according to its sexual passages[43] and its dominant effect in terms of other values is completely immaterial. Furthermore, the book itself is also to be judged in the abstract, evidence as to the contemporary nature and character of other books in general circulation being also declared inadmissible.[44]

In 1954, this writer, in a burst of wishful thinking, and hoping one swallow might make a summer stated, on the basis of the *Warburg* case, that "The courts now conceive themselves as interested primarily in the defence of individual liberty of action, freedom to write and freedom to enjoy what is written . . . . The protection of genuine literature is now the concern of the courts and not the guardianship of the subnormal, prurient or disordered who will be hurt by it".[45] Brave words, but now proved to be completely false. Whatever the courts may conceive it is clear that the law forces them to ban genuine literature in the interests of fourteen year old girls and slobbering voyeurs who are stimulated into vicarious orgasms. So long as there is an over-zealous prosecutor to take advantage of the law the future of literature is bleak.[46]

Merely suggesting that a change is needed in the definition of obscenity and of the rules applying to prosecutions is, of course,

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[43] *Ibid.*, for an extreme case where a whole book was ordered destroyed simply because the cover was deemed obscene see *Padget Publications, Ltd.* v. *Watson*, [1952] 1 All E.R. 1256.

[44] *R.* v. *Reiter*, *supra*, footnote 42, adopting the Scottish case of *Galletly* v. *Laird*, [1953] S.C. 16.

[45] *Supra*, footnote 29A at p. 1018.

[46] "Mr. Griffith-Jones . . . used every trick of the mob orator to bring about my downfall, banging on the table, sneering, quoting the most succulent passages he could find, and, in general, giving a ham performance comparable to that of a third-rate villain in an old fashioned melodrama. . . . I must say that when at last, he . . . resumed his seat I felt it was not a moment too soon; a few more sallies and perhaps he'd have had the jury rushing out of the box to lynch me." Fredric Warburg, *supra*, footnote 39, at p. 120.

neither helpful or original. The formulation of anything approaching a workable definition of obscenity and rules to insure that every book, good, bad or indifferent, receives at least a fair trial on the merits presupposes a background knowledge of literature, morality, culture and so on which this writer does not remotely pretend to have. However it is submitted that certain more or less obvious generalizations can be made and these together with statutory experiments in other jurisdictions may perhaps furnish some guide to what the law ought to be. It would be a shame if, in 1968, we had to celebrate the hundredth anniversary of the *Hicklin* rule.

(To be continued.)

Some Legal Imagery

Mine Eye and Heart are at a mortal war,
How to divide the conquest of thy sight;
Mine Eye my Heart thy picture's sight would bar,
My Heart mine Eye the freedom of that right.
My Heart doth plead that thou in him dost lie,—
A closet never pierc'd with crystal eyes,—
But the defendant doth that plea deny,
And says in him thy fair appearance lies.
To 'cide this title is impannelléd
A quest of thoughts, all tenants to the Heart;
And by their verdict is determinéd
The clear Eye's moiety, and the dear Heart's part:
As thus,— mine Eye's due is thine outward part,
And my Heart's right thine inward love of heart.

(William Shakespeare, Sonnet XLVI)