OBSCENE LITERATURE AND THE LEGAL PROCESS IN CANADA

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> Obscenity is not a legal term. It cannot be defined so that it will mean the same thing to all people, all the time, everywhere. Obscenity is very much a figment of the imagination.[1]

Despite the conceptual difficulties involved, in 1959 Canadians were provided with their first statutory definition of obscenity.[2] The new definition, which declared that "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, war, cruelty and violence, shall be deemed obscene",[3] was the result of public pressure and the personal efforts of Mr. D. E. Fulton, Minister of Justice. Mr. Fulton, introducing the new definition to the Canadian House of Commons, explained that it was being enacted to provide the courts and law enforcement agencies with what he hoped would prove an effective weapon in the government's campaign against a certain type of objectionable material appearing in vast quantities on Canadian newsstands.[4] He expressed the belief that the newly created definition of obscenity could be, and would be, quickly and easily applied by the legal authorities and that many of the difficulties apparently occasioned by the use of the vague and uncertain common law definition would disappear.[5]

Unfortunately, Mr. Fulton's initial optimism, that a simple, easily applied test had at last been created, does not appear to have been warranted. Since 1959 the Supreme Court of Canada has twice been required to determine the question of obscenity in published material.[6] It has been requested to consider the matter for yet a

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[1] Struble J. in *State* v. *Lerner* (1948), 81 N.E. 2d 282 (Ohio), at p. 286.
[2] S. C., 1959, c. 41, s. 11.
[3] *Ibid.*
[4] (1959), 5 H. C. Deb. (Can.), p. 5517.
[5] *Ibid.*
[6] In the case of *Brodie, Dansky and Rubin* v. *R.*, [1962] S.C.R. 681.

third time but has refused to hear the appeal.[7] This is hardly convincing proof of the existence of a simple, easy to apply test such as was hopefully predicted by Mr. Fulton. What has happened? Why has the problem of obscene literature become such a frequent cause for adjudication by Canada's highest court?[8]

In attempting an answer to this question it will be necessary to review the manner in which Canadian courts, particularly since 1959, have dealt with obscene literature. I shall, in the process of studying the court decisions, explore the relationship between the legislature and the courts, or in other words, examine how the legal process operates within the limited field of obscene literature. In order to do this it will be necessary to make extensive use of legislative history in an attempt to show what the legislature was trying to do to combat the widespread publication and distribution of objectionable material. By comparing the legislative intention and plan with the manner in which the judiciary subsequently interpreted the legislative directive, I hope to cast some light on the manner in which these two important legal institutions interact and the effect of this interaction upon the attempt to provide a legal solution to an extremely difficult social problem. The nature of obscenity itself will be discussed and an attempt will be made to examine some of the underlying assumptions which have prompted Canada and other countries to prohibit the free circulation of obscene matter.

I. *The Law in Canada Prior to 1959. The "Hicklin Test" Applied.*

The first Canadian statutory provisions relating to obscene publications appeared in section 179 of the Criminal Code of 1892.[9] This section, which provided that the public sale or exposure for sale of any obscene book or printed matter would constitute an indictable offence, was based upon the provisions of the Draft Criminal Code (Indictable Offences), prepared by an English Royal Commission in 1879. The Draft Code did not contain a definition of the term "obscene" because the Royal Commissioners "did not

(1962), 32 D.L.R. (2d) 507, the Supreme Court found that the novel Lady Chatterley's Lover, by D. H. Lawrence, was not obscene. Two years later the court reached the same conclusion in a case involving "girlie magazines". See *Dominion News and Gifts, (1962) Ltd.* v. *R.* (1963), 40 C.R. 109, 42 W.W.R. 65 (Man. C.A.), rev'd [1964] S.C.R. 251, [1964] 3 Can. C.C. 1.

[7] Leave to appeal the judgment of the Ontario Court of Appeal in *Re Gordon Magazine Enterprises Limited* (1965), 47 C.R. 12, was refused on June 7th, 1965.

[8] Up until 1962 the Supreme Court of Canada had not been required to decide a single case involving the issue of obscene literature.

[9] S. C., 1892, c. 29.

think it desirable to attempt any definition of obscene libel other than that conveyed by the expression itself".[10] When section 179 of the Canadian Criminal Code was subsequently enacted it did not contain a definition of the term "obscene". As a result, when Canadian courts were later called upon to apply section 179, they found themselves without a statutory standard by which to be guided. The courts quickly solved the dilemma, however, by applying the definition of obscenity that had been enunciated in 1868 by an English judge, Chief Justice Cockburn, in the case of *R.* v. *Hicklin*.[11] The *Hicklin* test, as it came to be called, declared that "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".[12] This was the only test of obscenity applied by Canadian courts until 1959.

The *Hicklin* test, used by courts in England, the United States, Canada and the Commonwealth as the means for determining the obscenity of a given publication, has been subject to severe criticism by legal scholars in each jurisdiction.[13] The criticism has been directed primarily at three features of the test. Firstly, the test requires a subjective, speculative evaluation by the judge of the corrupting and depraving tendencies of the material (whatever this may mean), upon a group of unknown readers. Secondly, English and American courts since 1868 have taken into account the possibility that certain publications might find their way into the hands of adolescents or emotionally unstable individuals and have declared material to be obscene on this basis. The result of giving the test this liberal application has been to impose an unduly restrictive standard of censorship upon creative literary efforts and upon freedom of speech and expression. The third aspect of the test that has provoked critical comment concerns the fact that over the years a practice has developed whereby books have been declared obscene on the basis of isolated passages in them taken out

[10] Report of The Royal Commission (1879), p. 22.
[11] (1868), 3 Q.B.D. 360, at p. 371. [12] *Ibid.*
[13] The following list is representative but not necessarily exhaustive: Albert, Judicial Censorship of Obscene Literature (1937), 52 Harv. L. Rev. 40; Lockhart & McClure, Literature, The Law of Obscenity and The Constitution (1954), 38 Minn. L. Rev. 295; Symposium: Obscenity and The Arts (1955), 20 Law and Contemporary Problems 531; Lloyd, Obscenity and The Law, [1956] Current Legal Problems 75; St. John-Stevas, Obscenity and The Law, [1954] Crim. L. Rev. 817; MacKay, The Hicklin Rule and Judicial Censorship (1958), 36 Can. Bar Rev. 1; Edmondson and Wright, Canadian Obscenity Law—Archaic Trends (1958), 16 Fac. L. Rev. 93; Whitmore, Obscenity in Literature: Crime or Free Speech (1963), 4 Sydney L. Rev. 179.

of context. The courts have tended to concentrate upon the corrupting and depraving effects of these isolated passages instead of taking into account the redeeming features of the book and considering its dominant characteristics.

Relatively few cases concerning obscene literature came before Canadian courts in the period 1900 to 1940.[14] In the handful of cases that were dealt with, it seems fair to conclude that the *Hicklin* test was applied with all its vigour. Some publications were condemned on the basis of isolated passages, which were considered to have a possible tendency to corrupt and deprave a susceptible minority, even though most persons would be disgusted rather than corrupted by the material.[15] In all cases the author's intention or motive was completely disregarded.[16]

The judicial record does, however, provide a few instances of the courts striving to relax in some manner the legal straight jacket imposed by the *Hicklin* test. The Quebec Court of King's Bench in the case of *Conway* v. *The King*,[17] called upon to decide whether or not a stage production featuring motionless girls unclothed from the waist up was obscene, declared that the intention of the producer to create an artistic effect was important and that the show was not obscene for this reason. Eight years later a Montreal court[18] decided that ties, decorated with pictures of mermaids and women in tight bathing suits with uncovered bosoms, were not legally obscene. The court emphasized the artistic nature of the semi-nudes and noted that comparable artistic representations of the female were to be found in the Vatican. The court concluded by declaring that "it did not see anything in these figures that would lead a normal person to immorality".[19] The court also noted that

[14] The *Hicklin* test was applied in the following cases: *R.* v. *Beaver* (1904), 9 Can. C. C. 415 (Ont. C. A.); *R. v. MacDougall* (1909), 15 Can. C. C. 466 (Sup. Ct. N.B.); *R.* v. *St. Claire* (1913), 21 Can. C. C. 350 (Ont. C.A.). The test has also been applied to determine the nature of theatrical performances. See, for example, *The Queen* v. *Jourdan* (1904), 8 Can. C.C. 337 (Mtl. Rec. Ct.) and *The King* v. *M'Auliffe* (1904), 8 Can. C.C. 21 (Co. Ct.).

[15] *R.* v. *Beaver, ibid.*, at pp. 422 and 423.

[16] *R.* v. *St. Claire, ibid.*, is an extreme example of this practice. A description of an indecent performance, published and sent to clergymen with the intention of bringing the objectionable activity to their attention for ecclesiastical denunciation was held to be obscene. The court admitted that its concern was not with the effect of the material upon the morals of the clergymen who might read it but was based upon the possibility that the material might fall into the hands of more susceptible individuals. The court declared that the author's motive in publishing the material was irrelevant.

[17] [1944] 2 D.L.R. 530; see comment by Bora Laskin (1944), 22 Can. Bar Rev. 553.

[18] *R.* v. *Stroll* (1951), 100 Can. C. C. 171 (Mtl. Ct. of Sess.).

[19] *Ibid.*, at p. 172.

"the law was made to protect the modesty of normal persons, not to bridle the imagination of hot-blooded, vicious or overly-scrupulous persons".[20] In Quebec, at least, some members of the judiciary seemed to be setting an independent course insofar as interpretation of the *Hicklin* test was concerned. Their tentative steps were welcomed by those who deplored what they considered to be the detrimental effect of the *Hicklin* test upon creative literary efforts and upon the individual citizen's freedom to read.[21]

In 1953 the Ontario Court of Appeal,[22] called upon to consider the character of four novels and seven picture magazines,[23] also appeared to adopt a more liberal approach and to apply the *Hicklin* test in a more reasonable manner than had been done previously in that province. The court considered the effect of the material under review on that segment of the public which was neither immune to immoral influences nor already corrupted. In other words, the court tried to evaluate the effect of the material upon what it considered to be a normal segment of the community. By applying the test to this group the court was able to give the test a more reasonable application and to exclude the mentally unbalanced or lunatic fringe from within its scope. However, the normal portion of society envisaged by the court would include normal youths as well as adults and presumably the susceptibility of a normal youth to the corrupting and depraving effects of the publications in question would be greater than that of the normal adult. The test had been liberalized somewhat but the standard of obscenity was still governed by the effect of the material upon young people.

The Ontario Court of Appeal also seemed to be adopting a more realistic approach to the question of obscenity when it explicitly recognized the fact that what tends to corrupt and deprave in one generation may not do so in another. F. G. MacKay J. A., one of the two dissenting judges, expressed personal awareness of the fact that the modern trend was towards a freer discussion of social problems, including those involving sex and morals.[24] But in spite of what seemed to be a more liberal application of the *Hicklin* test the court still found that the publications in question were obscene.

[20] *Ibid.*

[21] R. S. MacKay, commenting upon *R.* v. *Martin Secker Warburg Ltd. and Others*, [1954] 2 All E.R. 683, noted, with satisfaction, the Quebec development. See note in (1954), 32 Can. Bar Rev. 1010, at p. 1016.

[22] *R.* v. *National News Co.* (1953), 106 Can. C. C. 26.

[23] The novels involved were: Women Barracks, Tragic Ground, Journey man and Diamond Lil. The seven picture magazines were: Paris Models, Peep Show, Gala, Eyeful, Titter, Wink and Beauty Parade.

[24] *Supra*, footnote 22, at p. 33.

Any hope that the Ontario Court of Appeal would continue to apply the *Hicklin* test, in what appeared to be a more liberal way was soon dashed to the ground when, four years later, the same court applied the test with all its historical harshness and found that a novel entitled *Episode* was obscene within the provisions of the Criminal Code.[25] Mr. Justice Laidlaw, in a comprehensive opinion in which he summarizes and criticizes the prior law, concluded that, in spite of the uncertainty involved, the court was required to consider the effect of the book upon abnormal as well as normal youths and adults. He further decided that opinion evidence concerning the depraving and corrupting tendency of the book was not admissible, nor was evidence as to the literary merit of the book, or of its medical or psychological value. The learned judge also concluded that the intention of the accused, who happened to be in this case the distributor of publications, was to be inferred from his actions, and evidence to explain his sincerity of purpose was not admissible. The publication in question was therefore found to be obscene and the *Hicklin* test appeared to have been brought back to the battle with all its vigour restored.

Mr. Justice Laidlaw seems to have made only one concession to a more liberal application of the *Hicklin* test when he admitted that susceptibility to corrupting and depraving material may change from generation to generation. In making this concession he remains consistent with his previous position in the *National News* case.[26] However, his expressed dissatisfaction with the *Hicklin* test, would not appear to have the same consistency. Four years before, Mr. Justice Laidlaw had concurred with Chief Justice Pickup that there was nothing wrong with the *Hicklin* test.[27] We can only speculate as to the reasons for his change of attitude within such a short period of time. One factor may very well have been the growing public concern with the widespread distribution of what was considered to be objectionable literature. This public reaction, which had begun in the late 1940's and was strongly expressed to the Senate Committee on Salacious and Indecent Literature during its hearing in 1952 and 1953,[28] seemed to reach its crest about the time the *American News* case was decided.

[25] *Regina* v. *American News Co. Ltd.* (1957), 118 Can. C. C. 152.

[26] *Supra*, footnote 22.

[27] In the *National News* case, *ibid.*, Chief Justice Pickup, referring to the *Hicklin* test, had said at p. 29: "This test has been followed in the Courts in England and in this country for many years. I do not think the court should formulate some new test, or adopt some other test used in other countries, in place of this test, which has been applied for so long in this country and in England. I see nothing wrong with the test."

[28] The Committee came into being as a result of a Senate Resolution

There is one further point about the *American News* case[29] that deserves to be mentioned. I have already indicated that in some of the earlier English and American cases publications appear to have been condemned on the basis of isolated passages taken out of context. The juries or the judges who decided the issue of obscenity were not given an opportunity to read the entire publications but were required, in reaching their decisions, to consider only the objectionable portions of the material that had been outlined to them by the prosecution. It is significant that in the *American News* case the jury were given the entire book to read and reached their conclusion on that basis.[30] This does not mean that by judging the book to be obscene they were necessarily saying that the entire book was objectionable. The decision of the jury probably means that they considered certain portions of the book to be obscene, in the sense that they might have had a tendency to corrupt and deprave certain individuals, and therefore the entire publication fell under the ban. But the fact that the jury judged the objectionable passages against the book as a whole does relieve the court from the charge that it applied this aspect of the *Hicklin* test in an unreasonable manner. It means that the court did evaluate the objectionable material against the ameliorating effect of the whole book. We can therefore conclude that in spite of what may have been the practice in earlier cases in other jurisdictions,[31] recent Canadian practice cannot be said to constitute an unduly strict

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passed on December 8th, 1952 which recommended: "That a special Committee of the Senate be appointed, authorized and directed to examine into 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 perversive 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 noted 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."

[29] *Supra*, footnote 25.

[30] The same procedure seems to have been followed in *R.* v. *Standard News Distributors Inc.* (1960), 34 C.R. 54 where the material was judged by a County Court Judge, although the report of the case is not entirely clear on this point.

[31] The most objectionable practice of permitting the jury to see only carefully selected portions of the work charged as being obscene is de-

application of this aspect of the *Hicklin* test.[32] However, the test is still very much more restrictive than the new statutory definition of obscenity which judges a publication by its dominant characteristics rather than the possible effect of certain portions of the book upon some readers.

I think we can safely conclude that up until 1957 Canadian courts applied the *Hicklin* test strictly but there were some liberalizing trends. In the later cases at least, the court considered the objectionable portions of the book against the background of the complete publication and recognized the fact that the tendency to corrupt and deprave was a variable factor which changed with the times. Basically though, the *Hicklin* test continued to constitute a very severe limitation upon creative, literary expression.

II. *The Fulton Test of Obscenity.*

> A statute rarely stands alone. Back of Minerva was the brain of Jove and behind Venus the spume of the ocean. So of the statute, it is the culmination often of long legislative processes, too rarely understood by the mere lawyer and too rarely studied to have been lifted from the contempt bred of ignorance. Such material frequently affords a guide to the intent of the legislature conceived of in terms of purpose.[33]

(1) *The Background—The Problem Defined—The Mischief.*

(a) *The Senate Committee Hearings: 1952-1953.*

Strange as it may seem, the new statutory definition of obscenity enacted a mere two years after the decision in the *American News* case, was not prompted by a desire to relieve literature and the reading public from the restricting aspects of the *Hicklin* test. Quite the contrary, the amendment was the final result of a growing public resentment against a flood of objectionable material that had begun to appear on the newsstands of our country after the conclusion of the Second World War and which has continued to make its way in ever increasing amounts into the hands of young Canadians ever since. It was public pressure for action against this predominantly sex oriented material that resulted in the appointment of a special Committee of the Senate in 1952 to consider the

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scribed by MacKay, *loc. cit.*, footnote 21, at p. 1014.

[32] It has been suggested that the present practice of English courts also has the jury examine the obscene portions of the publication in the context of the whole work. See Williams, Obscenity in Modern English Law (1955), 20 Law and Contemporary Problems 630, at p. 636.

[33] Landis, A Note on Statutory Interpretation, quoted in Read, MacDonald and Fordham, Cases and Other Materials on Legislation (1959), p. 998.

sale and distribution of salacious and indecent literature. The Committee met for the first time on June 3rd, 1952, under the chairmanship of the Honourable J. J. Hayes-Doone.[34] Testimony presented to the Committee established the fact that many people felt that the recent appearance of mass produced, cheaply priced material on Canadian newsstands was due to either the inability or the unwillingness of the courts, or the law enforcement officers, to apply and enforce the existing law and that this reluctance was caused by the unsatisfactory nature of the legal test of obscenity the authorities were compelled to use.[35]

Mr. Fulton himself, in his testimony before the Senate Committee, suggested that the problem of controlling obscene literature had its roots in the fact that judges were reluctant to set themselves up as censors because of the purely subjective aspects of the *Hicklin* test.[36] One solution he suggested, was to "get into our legislation a definition of what we really intend to include in this type of literature which we think is offensive and which is more workable than the single word obscene, to enable the courts to arrive at a decision as to whether the piece of literature complained of does fall within the definition. . .".[37] The offensive type of publication which Mr. Fulton had in mind included pulp and pocket magazines as well as magazines featuring nude or half nude females. These magazines were dangerous, Mr. Fulton suggested, because youngsters would try to imitate the actions described in the magazines and would thus have their morals perverted.[38]

The Honourable Stewart S. Garson, Q.C., the then Minister of Justice, in testimony before the Committee, defended the existing statutory provisions of the Criminal Code and pointed out that in order to make section 207 as enforceable as possible it had been revised in 1949 only after consultation with the provincial

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[34] For an outline of the Committee's terms of reference see *supra*, footnote 28.

[35] The *Hicklin* test was considered by the majority of witnesses who testified before the Committee to be too vague and uncertain. It was their opinion that the test failed to supply a clear standard by which to judge objectionable material. The result was to require the legal authorities to make a decision based entirely upon personal opinion and this, it was felt, they were apparently reluctant to do. Judicial criticism of the test has also been voiced by a member of the judiciary. Mr. Justice Laidlaw, in *Regina* v. *American News Co. Ltd.*, *supra*, footnote 25, at pp. 157 and 158, emphasized the vagueness and uncertainty of the test by pointing out that there was no certainty as to the meaning of the words "corrupt and deprave", the persons into whose hands a matter charged as obscene may fall, or the persons whose minds might be open so such immoral influences.

[36] Proceedings of the Special Committee on Sale and Distribution of Salacious and Indecent Literature, June 25th, 1952, p. 134.

[37] *Ibid.*, p. 135.

[38] *Ibid.*

Attorneys General. He argued that the problem was primarily one of enforcement and noted that no representation had been received from law enforcement office agencies to indicate that the present law was not enforceable. He further pointed out that none of those who had said that it was unenforceable had shown that they had invoked it and failed to secure a conviction because the law was unenforceable. Mr. Garson suggested that the present law was neither vague nor uncertain and was quite enforceable if the will to enforce it existed.[39]

The Senate Committee reached no decision except to suggest that the solution of the problem was not complete and that the Committee be reappointed during the next session of Parliament to further review the situation. The Committee was not reappointed.

(b) *The Years of Campaign and Debate: 1953-1959.*

In the years that followed the Senate Committee's Report Mr. Fulton continued his campaign as a member of the Opposition for a new, clearer definition of obscenity, one that would assist the courts in their determination of what was obscene. He suggested that it might become necessary, in order to establish a workable definition of obscenity, to classify the various new types of literature currently in circulation.[40]

Not everyone agreed with Mr. Fulton that a change in the law was necessary in order to rid the newsstands of the objectionable material. Mr. Garson, the Minister of Justice, continued to argue that the *Hicklin* test was adequate but complained that the law was not being enforced by provincial and municipal authorities.[41] Mr. Fulton himself produced statistics relating to prosecutions and convictions under section 207 of the Criminal Code which covered crime comics, obscene literature and other offensive matter defined in that section, apparently in an effort to show the need for a new definition. But the figures he produced suggest that the problem was one of law enforcement rather than a judicial failure to convict.[42] Mr. Garson's argument also received support from

[39] Mr. Garson's testimony takes the form of a memorandum included as Appendix H in the special supplement to the Committee's Report and can be found at pp. 249-252 of the Report.

[40] Mr. Fulton described the new material as "comics and literature masquerading in many cases in cheap editions under the guise of works of art and sociological studies, in gaudy colours". (1953), 2 H.C. Deb. (Can.), p. 1198.

[41] *Ibid.*, pp. 1200-1201.

[42] *Ibid.*, p. 1852. The statistics supplied by Mr. Fulton indicated that although there had been relatively few prosecutions in the preceding years (33 in 1950, 31 in 1951 and 30 in 1952) the percentage of convictions ob-

the conclusion of Dr. J. W. Mohr, Ph.D., who in 1958 reported to the Committee on Obscene and Indecent Literature operating under the auspices of the Attorney General's Department of the Province of Ontario, that there was no major concern in the Province of Ontario, nor generally speaking in any of the other Canadian provinces, in regard to obscene and indecent literature.[43] He expressed the view that the present legal provisions provided adequate legal protection against obscenity and indecency because the *Hicklin* test was so broad and inclusive that it would cover any marginal publication.[44] Further support for the argument that the existing legislation was adequate was received from the Conference of Commissioners on Uniformity of Legislation in Canada who pointed to the results in the *American News* case[45] as evidence that a new definition of obscenity was unnecessary.[46]

(c) *The Debates in the Legislature—The Legislative History.*

Although conflicting opinion continued to exist as to the necessity for a new definition of obscenity, the decisive factor proved to be the election results in 1957 which resulted in a victory for the Conservative Party. Mr. Fulton was appointed Minister of Justice in the new government and in the months following the election he was not allowed to forget his pre-election concern with obscene publications.[47] In due time the long awaited Bill C-58 was presented to the House of Commons by Mr. Fulton who explained its purpose in the following words:[48]

> 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.
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> We believe that we have produced a definition which will be capable of application with speed and certainty, by providing a series of simple objective tests in addition to the somewhat vague subjective

tained was extremely high (91% in 1950, 90% in 1951 and 96% in 1952). I have tried to secure figures showing charges and convictions under the present sections 150 and 150A of the Criminal Code but have been informed by the Dominion Bureau of Statistics that the statistics are not available at the present time.

[43] Report on a Study of Obscene and Indecent Literature dated April 18th, 1958, pp. 48 and 52.

[44] *Ibid.*, p. 53.

[45] *Supra*, footnote 25.

[46] Proceeding of the Conference of Commissioners on Uniformity of Legislation in Canada (1957), p. 32.

[47] See (1957-58), 1, 3 and 4 H.C. Deb. (Can.), pp. 125-126, 2472 and 3952-3953 and (1958), p. 21.

[48] *Op. cit.*, footnote 4.

test which was the only one formerly available. The test 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 the dominant characteristic? Again, if so, does it exploit these subjects in an undue manner?"

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 a genuine difference 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, artistic or scientific merit. These works remain to be dealt with under the Hicklin definition, which is not superseded by the new statutory definition.

Mr. Fulton acknowledged the fact that while the new test was primarily objective rather than subjective, some aspects of the test did require a subjective evaluation to be made. The judge or jury would be required, for example, to decide whether or not the exploitation of sex was a dominant characteristic of the publication and also whether the exploitation was undue. In spite of these subjective aspects of the test, Mr. Fulton expressed confidence that the courts would be able to apply the definition without difficulty; that the new test would cover "the kind of muck on the newsstands against which our main efforts in this definition are directed"[49] and would "exclude books otherwise meritorious but containing the occasional passage, which if torn from the context might be considered objectionable".[50] The Minister of Justice was certain it would be clear that medical text books or other books—including novels—in which such subjects as sex or sex and crime, horror, cruelty and violence "are dealt with in an honest fashion",[51] would not be covered by the definition.

Hand in hand with the new objective definition of obscenity Mr. Fulton proposed a new "in rem" procedure which involved the bringing of a charge not against the individual, but against the publication itself.[52] Law enforcement officers, it was hoped,

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[49] *Ibid.*, p. 5518. [50] *Ibid.* [51] *Ibid.*

[52] The new procedure, set out in section 150A of the Criminal Code, is based upon the provisions of the Obscene Publications Act, 1857 (U.K.), 20 & 21 Vict., c. 83. The relevant portions of section 150A provide as follows:

150A. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be

would now be able to deal quickly, fairly and objectively with the prohibited type of publication without bringing a criminal charge against the individual. It was apparently the opinion of those who proposed the new procedure that some of the judicial reluctance to apply the law to its fullest extent would disappear if the possibility of irreparable damage to the reputation of the accused, resulting from a charge of distributing obscene literature being brought against him, were removed.

The proposed amendments to the Criminal Code were not accepted without some criticism. The new definition was criticised for being incomplete[53] and one that muddied the waters of jurisprudence by being difficult to understand.[54] It was seen, somewhat prophetically, by members of the Opposition, as a source of income for lawyers because of its complexity.[55] It was also suggested that the test would be of not more help to the judiciary than the old *Hicklin* test because of its subjective aspects.[56] The phrase that later proved to be the vital part of the new definition, "undue exploitation", was not discussed to any extent by members of the legislature. Mr. Fulton briefly explained what he thought the word "undue" meant,[57] no one disagreed or questioned him further as to his explanation, and the discussion turned to other things. Even allowing for the fact that legislative history is not admissible in a court of law to explain the meaning of a statutory provision, some further clarification and explanation of what the word "undue" was intended to mean in this context would surely have been helpful. At least one member of the legislature did, however, suggest that the definition would prove difficult to apply because

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obscene or a crime comic may appear and be represented in the proceedings in order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is obscene or a crime comic, it shall make an order declaring the matter forfeited to Her Majesty in the right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is obscene or a crime comic, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired. For an outline of the mechanics of the new procedure see Vamplew, Obscene Literature and Section 150A (1964-65), 7 Crim. L. Q. 187.

[53] *Op. cit.*, footnote 4, p. 5520.

[54] Senator Roebuck (1959), Deb. of the Sen. (Can.), p. 996.

[55] Mr. Denis and Mr. Herridge both expressed this concern. *Op. cit.*, footnote 4, pp. 5317 and 5528.

[56] Senator Roebuck, *op. cit.*, footnote 54.

[57] To be more precise, Mr. Fulton actually explained how he thought a court would interpret the words. He said that the courts were familiar with the word "undue" and that it meant to them "something going beyond what men of good will and common sense would normally tolerate". *Op. cit.*, footnote 4, p. 5518.

it would require the courts to draw a line between due and undue exploitation of sex without giving them any direction as to how this line was to be drawn.[58] Although this astute observation did not provoke any further examination of the difficulties suggested, later cases confirmed its validity.

One of the very real problems created by the new amendments, which was to manifest itself in later court decisions, the question of whether or not the statutory definition provided by section 150(8) of the Criminal Code was intended to abolish the common law *Hicklin* test, was not discussed at all in the House of Commons. Members were apparently satisfied that the courts would realize that the intention of Parliament was to retain the *Hicklin* test, although no clear indication of this intention was conveyed in the wording of the amendment itself. Mr. Fulton stated several times during the debate on the Bill that the statutory test was meant to supplement the *Hicklin* test and was not intended to supersede it.[59] Perhaps he was relying upon the courts taking judicial notice of the legislative intention after reading Hansard.[60]

The question of the effect of the new definition upon the *Hicklin* test was finally raised by Senator Roebuck when Bill C-58 was discussed in the Senate. He pointed out that the legislature had not made it clear that the new definition was intended to be an addition to and not a substitution for the *Hicklin* test and urged that the Standing Committee of the Senate assigned to a study of the new amendment rectify the situation by an express declaration of legislative intention of this point.[61] The Bill, however, was returned from the Senate Committee without the clear expression of legislative intention for which Senator Roebuck had pleaded. Having failed to obtain the requested clarification the Senator could then only express his hope that "The wisdom of our judges is such that it will offset the stupidity of this section".[62] Whether or not this pious wish has been fulfilled is a matter of opinion. At the present time, after a great deal of discussion in the cases, Canadian courts are still waiting for the Supreme Court of Canada to make an authoritative declaration on this point.

(2) *The Purpose of the Legislation—The Remedy Provided.*

It seems fairly clear, in the light of events which preceded the

[58] Mr. Eudes, *op. cit.*, footnote 4, p. 5310.
[59] *Op. cit.*, footnote 4, pp. 5517, 5542.
[60] This appears to have happened in some cases. See, for example, *R.* v. *Lipson*, an unreported decision by Judge T. A. Fontaine, dated April 12th, 1960, and *R.* v. *Standard News Distributors Inc.*, *supra*, footnote 30.
[61] *Op. cit.*, footnote 54, p. 995. [62] *Ibid.*, p. 1047.

enactment of Bill C-58, that certain segments of the public were concerned with the ever increasing amount of objectionable material appearing on the newsstands of the country and finding its way into the hands of the younger generation. Many people, rightly or wrongly, felt that the existing legal processes were not adequate to deal with the offending material. The reluctance of the provincial police departments to enforce the existing law was thought to lie in the fact that the existing definition of obscenity was too difficult to apply and required too much personal, subjective assessment of the material by personnel charged with the enforcement of the law.

Mr. Fulton's position, insofar as the purpose of the new legislation was concerned, seems clear. He emphasized repeatedly during discussions in the House of Commons that he was only interested in driving a particular type of pulp trash off the newsstands and that the new objective test of obscenity he was proposing was intended to accomplish this purpose[63] and on several occasions stated that he did not wish to restrict the production of works of literary, artistic or scientific merit by the use of the new test and that these would remain to be dealt with by the *Hicklin* test.[64] Leaving aside any discussion of the present situation for a moment, it is fairly evident that Mr. Fulton envisaged the use of two tests to determine what material would be prohibited. One test, the new objective test, would be used and applied to works lacking any artistic or scientific merit, while the *Hicklin* test would be reserved for those publications having some redeeming features. The plan would result in certain categories of publications being tested by a simple, yet effective, objective test, while other material (having some merit) would be tested by a vague, uncertain and less effective test. Mr. Fulton recognized this but indicated that he was not as concerned with the major book type of publication as he was with the cheap, sex-oriented material and that the escape of one or two major books as a result of the *Hicklin* test being used did not greatly concern him.[65]

The Minister of Justice seems to have realized the difficulty of producing one general test of obscenity that would have to be applied to a great many types of publications dealing in a variety of ways with different aspects of sex. He therefore concentrated upon what appeared to him, and the country, to be one category of publications causing the most concern. He tried to formulate a test

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[63] *Op. cit.*, footnote 4, pp. 5517, 5518, 5541 and 5544.
[64] *Ibid.*, pp. 5517, 5518 and 5541.
[65] *Ibid.*, p. 5541.

in such a way as to cover the undesirable publications and yet leave untouched other types of materials having some merit. In order to accomplish this purpose Mr. Fulton endeavoured to construct a test that would eliminate, as far as possible, individual, subjective speculation and assessment by the judge, jury or law enforcement officer; ideally a test whereby if certain facts were established the publication would automatically be deemed obscene thus relieving the judge of any difficult personal evaluation of the material; judges would no longer be personal censors.

Unfortunately, as Mr. Fulton himself admitted, the test he was proposing did require some objective evaluation by the judge. First of all the judge would have to determine whether or not the undue exploitation of sex was a dominant characteristic of the publication. Mr. Fulton considered this to be a simple question to put to the courts and he seems to have been right. This aspect of the test has not troubled the courts greatly.

As to the second aspect of the test, which has proven of greater difficulty to the courts, the question of what constitutes undue exploitation, Mr. Fulton expressed the belief that the courts were familiar with this term and suggested that it meant to them "generally something going beyond what men of goodwill and common sense would tolerate".[66] This explanation, I suggest, is not very helpful because it does not answer the crucial and most important question, which is, how are the courts to determine what people will tolerate? In the absence of something like a Gallup Poll of public opinion, which would give a numerical yes or no reply to the question, the court itself will have to supply the answer. But how can the court decide what men of good will and common sense would tolerate unless the criterion by which the material is judged by the community is also known to the court? Unless the court's decision is to be based purely on their own instinctive reaction, as men of good will and common sense, to the material under review, the court will be forced to speculate about the standard by which the publication in question is to be tested. The phrase "undue exploitation" is not self-explanatory and does not indicate the standard by which the undueness is to be measured, nor does Mr. Fulton's explanation clarify the problem very much.

The Minister of Justice did, however, make a further effort to clarify the meaning of "undue exploitation" when he suggested, as an example, that medical text books or other books, including novels, might very well have sex as a dominant characteristic and

[66] *Op. cit.*, footnote 57.

yet not be classified as obscene within the new definition if the author's whole purpose and intention in writing the book and in dealing with sex was an honest one.[67] The word "honest", used in this context, apparently means dealing with sex only insofar as it is necessary to accomplish some other worthwhile purpose. This criterion obviously has its difficulties for it means that the adjudicator must first decide what constitutes a worthwhile purpose, then whether or not the author has such a purpose, and finally, what amounts to undue reference to sex in the light of that purpose. The question might well arise, as indeed it did in later cases, whether or not an honest purpose will permit the indiscriminate use of objectionable material. The answer to this question is not to be found in the debates of the House of Commons but I suggest that later cases, even with their emphasis upon the need for literary freedom, indicate that honesty of purpose will not save a publication from being characterized as obscene if, in the opinion of the court the author has gone too far. The excessive use of objectionable material could be looked upon as *prima facie* evidence of a dishonest purpose but, of course, the real problem is how to provide a statutory yard-stick that will clearly indicate when there has been an undue emphasis on sex in a particular publication.

Mr. Fulton also mentioned the fact that works of literary merit containing only a few passages with objectionable content would not be caught by the new definition because the dominant characteristic of the work would not be the exploitation of sex.[68] He did not, however, discuss the position of publications having literary merit in which sex was a dominant theme and sexual relations were discussed in great detail. Would the literary merit of the publication alone be sufficient to offset the use of objectionable material, or would it be necessary to also prove honesty of purpose as well in order for the publication to avoid being classified as obscene? These and other questions were left unanswered by the legislature and remained for the courts to decide.

I have presented this rather extensive examination of the events which led up to the amendment of section 150 of the Criminal Code and the provision of the statutory definition of obscenity because I believe it is essential to understand what the legislature was trying to do and how it was trying to accomplish its purpose. A clear understanding of the legislative intent is necessary if we are to take the next step and attempt an assessment of the effect of subsequent judicial interpretation and application of the statu-

[67] *Ibid.* [68] *Ibid.*

tory provisions upon the legislative plan. A comparison of the legislative plan with the judicial attempts to give effect to it should provide a useful illustration of the legal process in operation.

III. *The Cases.*

How the Courts Applied the Statute Law. Problems of Interpretation.

Shortly after the new amendments to the Criminal Code became law the courts were called upon to apply the new provisions in three cases. The courts of Quebec, in two separate cases,[69] were required to decide the fate of two different publications,[70] and a Nova Scotia court was required to pass on the nature of certain photographs.[71] The Quebec courts, in spite of the rule that prohibits the use of legislative history as evidence of legislative intent, made extensive reference to the explanation of the purpose of the new law provided by Mr. Fulton to the House of Commons. With this purpose before them they then noted that the publications in question lacked any literary merit and would be purchased by youthful readers. Without hesitation the Quebec courts concluded that the material was the very type that the new legislation was intended to prohibit and must therefore be deemed to be obscene. Both courts, however, specifically declared that the *Hicklin* test continued to exist and had to be considered by the courts in deciding the question of obscenity. No doubt the Quebec courts obtained guidance on this point from the legislative history as well.

The magistrate in the Nova Scotia case[72] concluded that the photographs were to be tested solely by the definition of obscenity outlined in section 150(8) of the Criminal Code. The Nova Scotia Court of Appeal disagreed and offered the opinion that section 150(8) does not provide a comprehensive definition of obscenity but merely declares that the publications, found to have the characteristics described therein, shall be considered to be obscene for purposes of the criminal law. In other words, the Court of Appeal was saying that written material that unduly exploits sex constitutes only one type of material that is covered by the concept of obscenity, but the term "obscene" can and does include other things as well.[73] Material that does not unduly exploit sex would

[69] *R.* v. *Lipson, supra,* footnote 60 and *R.* v. *Standard News Distributors Inc., supra,* footnote 30.

[70] The publications in question were: Midnight and Riroma.

[71] *R.* v. *Munster* (1960), 129 Can. C.C. 277, 45 M.P.R. 157.

[72] *Ibid.*

[73] An English court has recently reached the same conclusion. The court, asked to consider the definition of obscenity in the Obscene Pub-

remain to be tested by the *Hicklin* definition. This interpretation of the new legislation seems to be a correct one in view of the legislative intention already discussed.

So far so good. Mr. Fulton's new, clear, objective definition seemed to be working and catching the type of reprehensible publication it was intended to catch. But more difficult cases lay ahead. In 1959 a particular edition of *Lady Chatterley's Lover* by D. H. Lawrence was declared to be obscene. The judge signed an order for seizure under section 150A of the Code. His decision was appealed and it was argued before the Quebec Court of Queen's Bench (appeal side) that the lower court judge had erred in applying the *Hicklin* test instead of the new statutory definition.[74] Casey J. agreed with this argument and noted the trend towards an objective test for assessing and judging questions of this sort. He refused to comment upon success of the legislative attempt to provide such a test and contented himself with an expression of satisfaction that "It did give us elements that can be discussed in what at least approaches an objective fashion".[75]

The defence, for the first time, under the new procedure of section 150A, produced literary experts who testified as to the literary status of D. H. Lawrence, his philosophy of life and of the book's message. The Quebec Court of Appeal held, however, that these factors were completely irrelevant to a decision whether or not a particular publication was obscene. Casey J. was willing to concede the usefulness of the testimony as background material but pointed out that there was disagreement as to the literary merits of the book and its message[76] and that in any event none of this evidence helped the court to decide what standard was implied by the word "undue".

Counsel for the defence put forward the argument that an author could exploit sex to an unlimited extent if this were required for the exposition of his theme or to further some artistic purpose. In an opinion that is worthy of closer examination, Mr.

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lications Act, 1959, 7 and 8 Eliz. 2, c. 66, ss. 1(1), 4(1) and (2), stated that a book may be obscene if it highlights the favourable effects of drug taking and advocates such practices, and further, that obscenity is not confined to matters of sexual desire or behaviour. See *John Calder (Publications) Ltd.* v. *Powell*, [1965] 2 W.L.R. 138, [1965] 1 All E.R. 159 (D.C.). See also the recent decision of the British Columbia Supreme Court to the same effect in *Regina* v. *Lambert*, [1965] 47 C.R. 12.

[74] *Brodie* v. *R.*, [1961] Que. Q.B. 610, 36 C.R. 200.

[75] *Ibid.*, at p. 202.

[76] The conflicting views relied upon by the judge were expressed in England in 1928 and are collected in the book by Norman St. John-Stevas entitled Obscenity and the Law (1950).

Justice Casey pointed out that freedom of expression exists only to the extent that it does not conflict with other fundamental precepts of our Christian tradition, one of which is restraint in the field of morals. This restraint, he concluded, the people felt to be necessary for the preservation of their morals and their civilization and the law had been used to secure the necessary compliance. He contended that it was for the judiciary alone to decide at what point contemporary community opinion considered the restraint to be endangered and that this was not a function which could be performed by literary experts.

Mr. Justice Casey also recognized that the determination whether or not sex had been utilized in a manner that violated the self imposed restraints of the community involved a subjective evaluation by the judge, but this, he said, was an element in every judgment. In his decision on this important point the judge took into consideration the fact that standards of dress, speech and action change but he also emphasized the fact that this particular unexpurgated edition of *Lady Chatterley's Lover* was designed for widespread distribution to the masses and that the masses would read the book without the benefit of literary experts to point out the author's purpose or the artistic merit of the book. The average person he felt would read the book for its well advertised eroticism and for no other reason, and, in his opinion, the erotic descriptive passages violated the voluntary restaints which the community had imposed on freedom of expression. Mr. Justice Casey then weighed the need for freedom of literary expression against the effect of the book on the morals of the masses who would read the book looking only for the objectionable material and he concluded that the sexually stimulating passages would adversely affect their moral stability. The emphasis placed upon the motive of the reader is interesting because, if pushed to its extreme limits and made the only consideration in the court's assessment of a publication, could result in any publication, containing isolated passages of objectionable content, being condemned. No doubt the amount of erotic material is important and was considered in this case by the judge. It is also worth noting that Casey J. was concerned not with material that shocks and disgusts but with material that has an effect upon the existing moral standards of the majority of the people.

Justices Choquette and Larouche, unlike Mr. Justice Casey, tended to interpret the phrase "undue exploitation" in terms of "corrupting and depraving" and were reluctant to conclude that the

Hicklin test was not to be used in reaching a decision. Choquette J., in his consideration of the defence of literary merit also declared that there was no immunity for literary merit, or artistic merit outside the defence of public good granted by section 150(3). He was inclined to believe, however, that the defence of public good was not available in an action brought under section 150A of the Code. He confessed that he did not see how a work ceased to be an undue exploitation of sex because of its literary merit alone.

Counsel attempted in this case to base one ground of defence upon the argument that the Canadian Bill of Rights guaranteed complete freedom of expression. Mr. Justice Larouche quickly disposed of the argument by pointing out that a publication having a tendency to corrupt and deprave the mind of people could hardly be protected by the provisions of the Bill of Rights which in its preamble emphasizes that respect for moral and spiritual values is a national aspiration. The fact that the Bill of Rights argument has not been put forth as a defence to a charge of obscenity by defence counsel since would seem to indicate that members of the legal profession were impressed with the reasoning of Mr. Justice Larouche.

The decision by the Quebec Appeal Court was in turn appealed to the Supreme Court of Canada[77] and Canada's highest court, for the first time in its history, had to struggle with the legal definition of obscenity. Unfortunately, the relative unanimity of judgment and opinion that characterized the decision of the Quebec Court of Queen's Bench did not extend to the Supreme Court of Canada. In a decision that is impressive for the wide divergence of the views expressed, the court finally decided by a five to four majority that *Lady Chatterley's Lover* was not obscene according to the existing Canadian legal standard.[78] The decision settled the question as to whether or not the publication by D. H. Lawrence was obscene, but the law relating to obscenity in literary publications was far from settled and many questions remained unanswered. As one Canadian judge was to later remark "One could almost say that a dirty book had the effect of making the clean waters of jurisprudence somewhat turbid".[79] Perhaps a more accurate assessment of the situation would have been that the already murky waters of obscenity jurisprudence had merely become somewhat muddier.

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[77] *Brodie, Dansky and Ruben* v. *R., supra,* footnote 6.

[78] The majority included Justices Judson, Abbott, Martland, Ritchie and Cartwright. The minority consisted of Chief Justice Kerwin, Locke J., Fauteux J. and Taschereau J.

[79] Orr P. M. in the case of *R.* v. *Modenese* (1962), 38 C.R. 45, at p. 46.

While the Supreme Court of Canada did not provide Canadian legal authorities with a clear exposition of the law that had been hoped for, it did nevertheless perform a service by revealing the difficulties of interpretation and application that the new amendment to the Criminal Code had created for the courts.

The first question the Supreme Court had to decide was whether it would apply the new definition, the *Hicklin* test, or both definitions. Counsel tried to settle this matter for the court by agreeing between themselves that only the test in section 150(8) would be applied and then proceeded to argue the case on this basis. Mr. Justice Cartwright seemed to approve of the procedure because he then decided the case on the basis that the new statutory definition was exclusive. He declared, however, that he was reserving judgment as to whether or not the *Hicklin* test would be applied in future cases. Mr. Justice Fauteux, on the other hand, expressed disapproval of the procedure and went on to find that section 150(8) was not exclusive. An examination of the individual opinions expressed by members of the Supreme Court reveals that four members, Judson J., Abbott J., and Martland J. of the majority, and Kerwin J. dissenting, concluded that the *Hicklin* test was no longer to be applied. Two members of the court, Ritchie J. of the majority and Fauteux J., of the minority held that the *Hicklin* test was not excluded by the new statutory definition of obscenity, while two others, Cartwright J. of the majority and Taschereau J. of the minority, reserved judgment on this point. Locke J. expressed no opinion but applied section 150(8). Technically, the question as to whether or not section 150(8) is exclusive remains unanswered as a result of this case, but the court appeared to be leaning in favour of the new statutory definition as the sole test of obscenity.

Before leaving this aspect of the case it is worth noticing that the conclusion of Judson J., that the new statutory definition is exclusive, was influenced by his concern to maintain the principle that a person is entitled to know what the law is before he acts, particularly in criminal matters. The existence of an explicitly defined statutory test in section 150(8) accompanied by a common law test of obscenity lurking in the background, seemed to Mr. Justice Judson to provide a double standard, but, as he complained, only one of the standards was clearly enunciated in the statute while the other remained hidden in the case law. This, he thought, was an infringement of the fundamental principle of the citizen's right to a clear warning of what the law prohibits.

The interpretation of the new amendment by Mr. Justice

Judson, which may have eliminated the *Hicklin* test from Canadian jurisprudence, should recall to mind the warning given by Senator Roebuck in the Senate that some express provision should have been included in the new enactment which would clearly indicate that the *Hicklin* test was to remain in force.[80] The Supreme Court's confusion and ultimate indecisive conclusion on this point vividly illustrates the ever present danger of the legislature over-estimating the ability of the judiciary, in the absence of a clear indication of legislative intention, to realize what the legislature had in mind.

But perhaps Mr. Justice Judson was aware of the legislative intention to maintain the use of both tests and perhaps the position he adopted on this point is the result of an uncertainty in his mind as to how the tests were meant to be applied. Legislative history on this point is not very enlightening but Mr. Fulton did suggest that the Crown in bringing a prosecution could pick one definition or the other with which to test the publication charged,[81] thus indicating that he was relying upon the prosecution to select the appropriate test to apply to the material under review. Mr. Fulton also apparently foresaw the possibility that the wrong test might be chosen and that section 150(8), for example, might be used to judge a work of literary merit. Even so, the Minister of Justice thought that the test had been framed in such a way that its application to this type of material would not result in a conviction and that it would remain to be dealt with by the *Hicklin* test.

It is not clear what the Minister of Justice meant when he said that it would remain to be dealt with by the *Hicklin* test. Did he contemplate another trial using the *Hicklin* test, or did he anticipate the use of both tests in the same trial one after the other? Perhaps it was this uncertainty, as well as his concern for the principle of clear warning, that prompted Mr. Justice Judson, to apply section 150(8) exclusively and to demand that the legislature make its intention plain. In any event it seems clear that legislative action is needed to clarify the present uncertainty as to the test or tests to be applied and the procedure to be followed.[82]

How was the novel by D. H. Lawrence judged by the court? Of the majority, Cartwright J., Judson J., Martland J., and Abbott J., judged the book by applying section 150(8) exclusively while Mr. Justice Ritchie applied both the *Hicklin* test and the statutory test. Of the minority, Justices Kerwin, Taschereau and Locke applied 150(8) exclusively and Mr. Justice Fauteux applied both the *Hicklin*

[80] *Op. cit.*, footnote 54. [81] *Op. cit.*, footnote 4, p. 5530.

[82] In the *Dominion News* case, *supra*, footnote 6, the Supreme Court again left the question unanswered.

test and the statutory definition. Of the two justices who applied the *Hicklin* test, one found the book obscene while the other did not. Of those who applied the statutory definition, four found the book to be obscene and five did not. It may seem strange that there should be such a division among members of the bench applying the same test but the result is more easily understood if we examine the variety of explanations offered by the court as to the meaning of the phrase "undue exploitation", which is the heart and soul of the new statutory definition.

Mr. Justice Judson who delivered the majority opinion stated that the word "undue" referred to an "excessive emphasis on a theme for a base purpose".[83] This would appear to involve two factors, (1) the emphasis on sex must be excessive and (2) the purpose of the author must be a base one. According to Judson J., whether or not there is excessive emphasis on sex is to be judged by the internal necessities of the work itself and is a decision which the judge has to make. At this point we are left with the further difficult question, how does the judge decide what degree of emphasis on sex is necessary for the accomplishment of the author's purpose in writing the book? What standard is the judge to use in making this decision? Unfortunately these questions remain unanswered.

As to the second element of the test of undueness, Mr. Justice Judson seems to indicate that if an author were to include in his work detailed descriptions of sexual intercourse merely in order to stimulate and pander to the sensual appetites of his readers, that this would be a base purpose. But this explanation does not answer all the questions that can arise. Does it mean that any pandering to the sensual appetites automatically condemns the book or is the pandering only objectionable if done in a certain manner and to an undefined extent? As we will see in a later case,[84] it was argued that Mr. Justice Judson, in using the term "base", meant to confine its meaning to the use of material that was dirty, filthy and perverse, but this argument has as yet not been accepted by Canadian courts.

On the other hand, if the author is attempting to objectively portray a part of life in order to expound some non-sexual theme and in the course of so doing he includes objectionable material he will not, insofar as Judson J. is concerned, be deemed to have unduly exploited sex. However, I suspect that there are some limits

[83] *Supra*, footnote 6, at pp. 704 (S.C.R.), 507 (D.L.R.).
[84] *Dominion News and Gifts (1962) Ltd.* v. *R.*, *supra*, footnote 6.

beyond which the author cannot go even in the pursuit of an honest purpose. The problem, of course, is to define what the limits are in individual cases. Both aspects of the test seem to eventually depend upon a subjective evaluation by the judge of the author's purpose and the necessity of including objectionable material.

Perhaps it was the subjective aspects of the internal necessities test that influenced Mr. Justice Judson to suggest that a second test might also be applied. Counsel had urged the Quebec Court of Appeal to agree that undueness was to be measured by reviewing contemporary literary works, freely circulating in the community, and comparing them with the publication under review. If the treatment of sex in the book before the court differed to no great extent from the treatment accorded to it in contemporary literature then, it was argued, the book should be declared to be not obscene. Judson J. treated this test as equivalent to testing the material by the standard of acceptance prevailing in the community. In order to better explain what he meant by the community standards of acceptance he referred to the explanation of "undue" given by an Australian judge who had suggested that there exists in every community a sense of decency, of what is clean and what is dirty and that a jury were competent to discover and apply these standards.[85] Mr. Justice Judson, apparently troubled by the fact that the internal necessities test still required the judge to make a subjective evaluation of undueness, saw in the community standards test an objective test that could be conveniently applied and which would relieve the judiciary from the unwanted difficulties of personal evalution.[86] In so doing, he was following the same course that had been adopted previously by the American Supreme Court and for the same reason.[87]

The community standards test, however, was suggested by Fullagar J. as a test that could be used by representatives of the community, the jury, in reaching their decision. It was not neces-

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[85] Fullager J., in *R.* v. *Close*, 1948 V.L.R. 445.

[86] He expressed his concern in the following way: "Either the Judge instructs himself or the jury that undueness is to be measured by his or their personal opinion (applying the internal necessities test)—and even that must be subject to some influence from contemporary standards—or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think that the second is the better choice". *Supra*, footnote 6, at pp. 706 (S.C.R.), 529 (D.L.R.).

[87] The "community standards" test was first introduced into American jurisprudence by Judge Learned Hand in the case of *U.S.* v. *Kennerly* (1913), 209 F. 119, at p. 121 when the learned jurist suggested that the English rule might be replaced by a test which rested on "the present critical point and the compromise between candour and shame at which the community have arrived here and now".

sarily intended as a test for judges to use because the judge is not always an accurate reflection of prevailing community standards.[88] The fact that the community standards test was originally suggested as a test for the jury to apply is important because since 1959 the actions against obscene publications have been brought almost exclusively under section 150A of the Criminal Code.[89] This section requires a decision by a judge alone and there is no possibility of a jury deciding the issue. The result is that the judge, as a single member of the community representing a certain social class in that community will, if he applies community standards as the test, be forced to speculate as to whether the community would have considered the publication in question to be clean or dirty, decent or indecent.[90] The use of the community standards test in proceedings under section 150A of the Criminal Code would not appear to avoid the problem of the judge having ultimately to make a personal evalution and assessment of community sentiment in relation to obscene literature. Thus, I can see no great difference between the two tests. In the final analysis each forces the court to exercise personal judgment to a great extent.

Other judges of the Supreme Court offered their individual explanations of the phrase "undue exploitation". Mr. Justice Taschereaux suggested that the phrase meant "going beyond what was appropriate or necessary to prove the proposition that one endeavours to demonstrate".[91] This test is similar to Mr. Justice Judson's with its emphasis upon the excessive use of sexual material. It does not, however, refer to the author's purpose as an element to be considered. Mr. Justice Fauteux was prepared to equate undue emphasis with the *Hicklin* test of tending to corrupt and deprave while Mr. Justice Ritchie, apparently convinced that the legislature intended to provide a wider definition of obscenity and that

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[88] For example, the Kinsey studies show that the attitude towards premarital intercourse varies according to economic grouping and education and age level. The judiciary representing one economic, educational and age level of society will be guided by the attitude of the group to which they belong. See Kinsey, A. C., Pomeroy, W. B. and Marlen, C.E., Sexual Behaviour in the Human Male (1948).

[89] The *Standard News* case *supra*, footnote 30, and the recent case of *R.* v. *Fraser* (1965), 52 W.W.R. 712 are the only cases to date in which a charge has been brought under s. 150(1) of the Code.

[90] This difficulty has prompted the members of the Indecent Publications Tribunal of New Zealand to declare that "the tribunal's decision must be subjective and must necessarily be coloured in some degree by the predispositions of the members. Insofar as it was contended that the tribunal should attempt to assess the standard of the community in our view this would be an impossible task". The Evening Post N.Z., March 16th, 1964.

[91] *Supra*, footnote 6, at pp. 692 (S.C.R.), 517 (D.L.R.).

the *Hicklin* test would continue to be used, felt that undue emphasis meant that which was unduly shocking and disgusting. While the foregoing review of judicial opinions demonstrates the lack of agreement among the judges of the Supreme Court as to the meaning to be attributed to the key phrase in Parliament's new definition of obscenity, I would like to suggest that the different judicial explanations do have one common element; they all require in the final analysis a personal evaluation by the judge of the material charged as obscene. This fact together with a tendency to interpret undue exploitation in many different ways certainly contributed to the overall lack of agreement which characterizes the court's final decision.

However, the main difference between the majority and the minority views in the *Brodie* case[92] can be traced to the fact that the majority concluded that the merit of the book and its contribution to literature outweighed its erotic contents. They emphasized the honesty of the author's purpose and readily accepted the testimony of literary experts as to the value of the publication. The minority, on the other hand, were not convinced that the author had an honest purpose and they did not place any degree of importance upon the evidence of the experts as to the novel's literary value. The dissenting judges, who did concede that the book had some literary merit, nevertheless thought that this factor was over-shadowed by the harmful effects that the objectionable portions of the book would have upon its readers, either by shocking them or by affecting their morals. The material considered to be offensive consisted of numerous sexual interludes[93] brutally described in vulgar language. The effect of this material could not, in their opinion, be counterbalanced by the meritorious aspects of the work. As Mr. Justice Taschereau explained, "I never thought that the frame could make the picture".[94]

There are two aspects of the court's decision in the *Brodie* case which deserve further attention. First, some of the members of the court expressed the opinion that section 150(8) was effective to expand the definition of obscenity so as to include publications which merely shocked and disgusted people, but which did not necessarily corrupt and deprave anyone. I can only suggest that,

[92] *Ibid.*

[93] Taschereau J. declared that over three-quarters of the book or 250 pages dealt with obscene descriptions, *ibid.*, at pp. 692 (S.C.R.), 517 (D.L.R.). Mr. Justice Fauteux counted not less than fifteen pornographic and adulterous episodes, *ibid.*, at pp. 699 (S.C.R.), 523 (D.L.R.) and Kerwin C.J.O. described them as several: *ibid.*, at pp. 688 (S.C.R.), 513 (D.L.R.).

[94] *Ibid.*, at pp. 694 (S.C.R.), 516 (D.L.R.).

although the new definition might be interpreted in this way, it was not the intention of those who enacted the new legislation to prohibit material that was merely shocking or disgusting. The entire background of the amendment, I believe, clearly shows that the primary concern of the community and the legislature was with the corrosive effect of this material on the actions and thoughts of young people in particular. It is true that the tendency to shock and disgust has always been one element in the concept of obscenity but Canadian courts have always been careful to point out that material which only disgusts and shocks does not fall within the legal definition of obscene literature.[95] In one case the court suggested that the publication which shocks and disgusts cannot possibly corrupt the reader.[96] Perhaps those judges of the Supreme Court who thought that the new definition would include shocking material misunderstood Mr. Fulton when he said that the new definition extended the old law of obscenity or perhaps they were influenced by the American attempts to interpret the community standard test in this way. Mr. Fulton, in making these remarks, was trying to explain, I believe, that the new objective test, which required the court merely to establish certain facts in order to declare a publication to be obscene, would be more effective and that much material, escaping the legal net at that time because of the ineffective application of the *Hicklin* test would be caught by the new test. The objectionable qualities of the material, or the mischief, would remain the same but the simplicity of the new objective test, it was hoped, would enable courts to extend the ambit of effective legal control. In this sense the law relating to obscene literature would be extended.

The second aspect of the case that deserves further discussion in greater detail involves the community standards test which seems to have become part of Canadian jurisprudence as a result of the

[95] See, for example, *R.* v. *Beaver, R.* v. *St. Claire* and *R.* v. *MacDougall, supra,* footnote 14. The Supreme Court of the United States has, however, in recent years apparently made the disgusting quality of the material a necessary element in the test of obscenity in so far as federal constitutional law is concerned. Material, in order to be declared obscene, must (1) appeal to the prurient interest of the reader, (2) be patently offensive, and (3) have no redeeming social value. See *Roth* v. *United States* (1957), 354 U.S. 476, 77 S. Ct., 1304; *Manual Enterprises, Inc.* v. *Day* (1962), 370 U.S. 478, 82 S. Ct. 1432; *Jacobellis* v. *Ohio* (1964), 378 U.S. 184, 84 S. Ct. 1676 and *Ginzburg* v. *United States* (1966), 86 S. Ct. 942. In this latter case the Supreme Court of the United States held that in cases where a publication's obscene nature was in doubt the motive or purpose of the publisher or distributor was an important factor to be considered and that the circumstances of production, sale and publicity were relevant in determining that motive.

[96] Per McLaren J., in *R.* v. *Beaver, ibid.*

Brodie case.[97] I would like to suggest that the test is not based upon that which merely shocks and disgusts the community, although this is one element in it. It is true that Fullagar J. outlined the community standard of decency in terms of what is clean and dirty but he went on in his decision to explain that "the decency or indecency, the cleanliness or dirtiness, must depend upon the treatment, the handling of the subject-matter, on the general purport of the thing in question and the purpose which the thing itself discloses".[98] In his charge to the jury Mr. Justice Fullagar would have asked, "Do you think that the publication before you is one in which these matters are dealt with artistically and with whatever frankness, cleanly? Or do you think that there are passages in it which are just plain dirt and nothing else, introduced for the sake of dirtiness from the pure knowledge that notoriety earned by dirtiness will command the book a ready sale?".[99] The dirtiness mentioned by the Australian court would seem to be the same dirt that Mr. Justice Judson was talking about in his judgment in the *Brodie* case[100] and means the treatment of sex in a brutal, degrading manner for the sole purpose of appealing to the prurient interests. In other words, when Fullagar J. suggested the community standard of decency as a test of obscenity, he did not intend to equate decency with modesty and thus condemn publications that merely shock without having any other effect upon the community. I suggest that as originally conceived by Mr. Justice Fullagar, the community standard test was intended to take into account the author's purpose and to consider whether or not what he had written was meant to pander to the sensualist. This seems to imply that the purpose of condemning obscene literature is to prevent an appeal to the prurient interest of people, which is considered undesirable. In this sense the community standards test s very similar to Mr. Justice Judson's explanation of undue exploitation in the *Brodie* case. If Canadian courts are going to continue to apply the community standard as the test or one of the tests of undue exploitation, it is important that its origin be clearly understood so that any tendency to equate undue exploitation solely with modesty will be averted.

In 1962, the so-called "girlie magazines" were judicially tested

[97] *Supra*, footnote 6.

[98] *Supra*, footnote 85, at p. 465.

[99] *Ibid.*, at p. 465.

[100] Lady Chatterley's Lover was described as "having none of the characteristics that are often described in judgments dealing with obscenity — dirt for dirt's sake, the leer of the sensualist, depravity in the mind of the author with an obsession for dirt, pornography, an appeal to a prurient interest". *Supra*, footnote 6, at pp. 704-705 (S.C.R.), 528 (D.L.R.).

by the definition of obscenity in widely separated parts of Canada and in each case the magazines were found to be obscene and a forfeiture order was issued. In the case of *Playboy* and other magazines of the same type, a Newfoundland court applied the definition set out in section 150(8) exclusively and found the publications to be obscene.[101] The judge used the definition of undue exploitation that had been enunciated in the *Standard News* case [102] and found that the sole purpose of the publications was to provide material which would satisfy the tastes and inclinations of persons who were interested in sex. This he concluded was pandering to the sensualist and was dirt for dirt's sake. Contemporary standards of decency were also considered by the court but only as one factor in the determination of whether or not there had been undue exploitation of sex.

In Manitoba, the County Court judge having reached a similar conclusion, the matter was appealed to the Court of Appeal.[103] In a four to one decision the Manitoba court affirmed the decision of the County Court judge and held that the two magazines in question, *Escapade* and *Dude*, were obscene. Mr. Justice Freedman alone dissented. When the case was appealed to the Supreme Court of Canada, the court, in a short unreasoned judgment, reversed the decision of the Manitoba Court of Appeal and unanimously approved of Mr. Justice Freedman's dissenting opinion.[104] His opinion, therefore, represents at the present time the latest declaration by the Supreme Court of Canada on the issue of obscene literature.

Mr. Justice Freedman judged the case solely on the basis of section 150(8) as counsel had agreed, but noted that the status of the *Hicklin* test had not yet been decided. Since the Supreme Court of Canada approved his decision in full, we can only conclude that status of the common law definition of obscenity remains undecided as well. Feeling himself compelled to apply an objective test to the question of obscenity Mr. Justice Freedman professed to judge the magazines by the standard of the community. In so doing, however, he kept several factors in mind. He noted for example, that "girlie magazines" of the type in question succeeded in attracting a large number of readers but, as he explained, although this was not the test of acceptance by the community, it was not an entirely irrelevant factor either. The learned justice also

[101] *R.* v. *Marshall* (1963), 48 M.P.R. 64 (Dist. Ct).
[102] *Supra*, footnote 30.
[103] *Dominion News and Gifts (1962) Ltd.* v. *R.*, *supra*, footnote 6.
[104] *Ibid.*

commented upon the fact that contemporary community standards permitted a candid discussion of sex which in an earlier day would not have been tolerated. Finally, he added his own personal view that suppression in borderline cases might tend to discourage creative efforts and therefore, in such cases, tolerance was to be preferred to proscription. With these considerations in mind he then examined the magazine *Escapade* and observed that 15 of the 72 pages were occupied with pictures of half-naked females, unaccompanied by male companions, and that sex was treated in a normal way and did not pervade the entire issue. He found in *Dude* magazine the same pattern of photographs, articles, stories and advertisements of a general rather than a specifically sexual nature. He concluded his judgment by agreeing with literary expert Arnold Edinborough, that while both magazines were flippant, saucy and risqué, they were not obscene.

On the other hand, the four judges who found the magazines to be obscene apparently placed little weight on the evidence of Mr. Edinborough and found that sex was a predominant feature of the magazines, that it was suggestive, provocative, and used for no useful purpose. They further found that it overlapped the bounds of judgment and goodwill which ordinary persons in a standard community would tolerate.

Counsel for the defence argued that undue exploitation of sex must be interpreted to mean the use of sex for a base purpose as Mr. Justice Judson had interpreted its meaning in the Brodie case. It was then argued that "base" referred only to material that is dirty, filthy and perverse or pornographic. Justices Miller C. J. M., and Schultz, Guy and Monnin JJ. A. refused to restrict the definition of "undue exploitation" in this way and decided that section 150(8) was intended to cover a wider range of material, including the magazines in question, and that they were obscene within the meaning of this section.

There are several reasons why Mr. Justice Freedman and his four colleagues reached different conclusions. Firstly, his brother judges assessed the material differently. What appeared to them as a flagrant, suggestive and provocative appeal to sex Mr. Justice Freedman saw as a flippant, saucy and risqué attitude. Secondly Mr. Justice Freedman, by use of the word risqué, was acknowledging the fact that these magazines were on the borderline of the permissible[105] but he then allowed his concern for the principle

[105] Risqué is defined in the Oxford Dictionary as meaning hazardous, risky, bordering upon, suggestive of, what is morally objectionable or offensive.

of freedom of expression to tip the scales in favour of tolerance rather than proscription. On the other hand, the four dissenting judges were more concerned with what they considered to be an appeal to the prurient interest of readers that went beyond permissible boundaries and, apparently concerned with the effect of this type of material, they found the publication to be obscene. Mr. Justice Freedman and his colleagues also differed in their reactions to the testimony of literary experts concerning the nature of the magazines. Mr. Justice Freedman agreed with the evaluation given by Mr. Arnold Edinborough while the four dissenting judges obviously did not. Mr. Justice Schultz indicated that it was hardly worth considering at all.

As a matter of judicial technique it is interesting to note that Mr. Justice Freedman confined himself to a detailed examination of only *Escapade* and did not refer to the leading article in *Dude* which purported to be a review of, and appeal for, the publication of the autobiography of Frank Harris. The judges who found the magazine to be obscene placed considerable emphasis on this article with its descriptions of the gory details of sex and techniques of seduction. Presumably Mr. Justice Freedman did not find the article as objectionable as his brother judges did. His judgment does suggest, however, that if sex had not been dealt with in a mormal manner or if the semi-nude young ladies had been accompanied by male figures the result might have been different.

In 1964, after having dealt with cheap semi-newspaper trash,[106] girlie magazines,[107] and a novel of literary merit by an author of some stature,[108] the inevitable happened and the courts were forced to consider a case involving a book that has been described as a classical work of pornography.[109] To the courts of Ontario fell the dubious honour of passing judgment upon *Fanny Hill*.[110]

His Honour Judge Weaver, a judge of the County Court of the County of York, found that *Fanny Hill* had some of the characteristics of all obscene material, namely the leer of the sensualist, and an appeal to the prurient interest and he was able

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[106] *R.* v. *Lipson*, *supra*, footnote 60 and *R.* v. *Standard News*, *supra*, footnote 30.

[107] *R.* v. *Marshall*, *supra*, footnote 101 and *Dominion News and Gifts* v. *R.*, *supra*, footnote 6.

[108] *R.* v. *Brodie*, *supra*, footnote 6.

[109] Craig, The Banned Books of England (1962). H. Montgomery Hyde refers to Fanny Hill as "The first masterpiece of English pornography" in his book A History of Pornography (1964). But others classify the book as "quality erotica" rather than hard core pornography. See Drs. Eberhard and Phyllis Kronhauser, Pornography and The Law (2nd ed., 1964).

[110] *R.* v. *C. Coles Company Limited* (1964), 42 C. R. 368 (Ont. Co. Ct.).

without hesitation to decide that it was a pornographic work within the dictionary definition of that term.[111] Judge Weaver expressed two main objections to the novel. Conceding that the subject was skillfully and subtly dealt with, he nevertheless felt that a happy ending granted Fanny by the author would tend to glorify prostitution and to recommend it as a profession to his readers. This, in Judge Weaver's opinion, constituted a base purpose and one that was furthered by the author's detailed description of acts of lesbianism, voyeurism, flagellation, gross indecency and orgies.[112] The learned judge also expressed the belief that the detailed descriptions of perverted sexual activities would offend the reading public and parents in particular would not wish to have their children exposed to such material. The fact that the book may have had artistic, literary or historic value did not save it and Judge Weaver therefore found *Fanny Hill* to be obscene within the definition of section 150(8).

The Ontario Court of Appeal felt differently about the matter and in a three to two decision found that *Fanny Hill* was not obscene.[113] All the judges agreed that the *Hicklin* test did not apply and that *Fanny Hill* would be tested by section 150(8) only. All the judges seemed equally agreed that an objective test should be applied in order to determine whether or not there had been an undue exploitation of sex. Both Porter C.J.O., who wrote the majority opinion, and Roach J., who delivered the dissent, took into consideration the author's purpose, the literary merit of the book and the community standard of decency in applying the objective test of "undueness". It was at this point that a difference of opinion developed. Chief Justice Porter was of the opinion that the author wrote the book with the serious purpose of presenting an accurate picture of the seamy side of the life of the time. Mr. Justice Roach, on the other hand, saw the book as an attempt by the author to deliberately flout the laws of decency by writing a book that would inflame and excite sexual passions; a book which wallowed in sex and could only be described as a "deification of

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[111] Judge Weaver noted that the term "pornographic" is defined in the Oxford Dictionary as "of or pertaining to obscene literature and originally meant, in the Greek language, the description of the manners of prostitutes." *Ibid.*, at p. 375.

[112] The objectionable sexual acts were listed as "twelve that could be termed perversions, two acts of lesbianism, one of flagellation, three instances of observation or voyeurism, four acts during an orgy, one oral act of an almost grossly indecent nature and one seduction of a male imbecile". *Ibid.*

[113] (1965), 44 C.R. 219, (1964), 49 D.L.R. (2d.) 34.

the phallus".[114] The Chief Justice thought the book had literary merit and had been written with humour, integrity and realism. He found that it lacked an aura of morbidity or suggestive pruriency which would characterize it as obscene. Mr. Justice Roach, quite the contrary, could find no literary merit and no plot, only a chronological sequence of sexual encounters. While the majority emphasized the preference of modern Canadians for candour in their reading and the necessity of giving a broad scope to the fundamental freedom to write about all aspects of life, the minority were emphasizing the need to protect public morals, which they declared, was the purpose of the legislation.

The opinions expressed by Justices Porter and Roach give the impression that they were talking about different books. Both professed to use an objective standard to test "undueness" and both considered identical factors in applying the test, but each arrived at diametrically opposite conclusions. The court's decison that *Fanny Hill*, a recognized pornographic work of long standing, was not obscene and the strikingly different conclusions arrived at by judges using the same test could prove to be the final indictment of section 150(8) as a simple and effective method of controlling obscene literature.

In March of last year the Ontario Court of Appeal decided yet another case involving obscene literature.[115] In its latest decision, certain "girlie magazines" and pocket novels of a predominantly pictorial nature were judged to be obscene by the court using the test of obscenity in section 150(8). In a judgment that conveys the impression the court is either exhausted by previous deliberations about the same subject or is merely tired of the whole game, Chief Justice Porter tersely concluded that the publications in question treated exclusively with sex and matters relating thereto and that sex was the dominant characteristic to the extent that sex was unduly exploited.

The fact that the Supreme Court of Canada refused to hear the appeal might suggest that perhaps they too are suffering from over exposure to this type of case. The decision of the Ontario Court of Appeal seems to be an example of an approach advocated by Mr. Norman Arnold in a brief to the Supreme Court of Vermont.[116] Mr. Arnold suggested that the really objectionable material, which he classifies as hard core pornography,[117] is easily

[114] *Ibid.*, at pp. 236 (C.R.), 50 (D.L.R.). [115] *Supra*, footnote 7.

[116] Referred to in Kalven, The Metaphysics of the Law of Obscenity (1960), Sup. Ct. Rev. 1, at p. 43.

[117] Many attempts have been made to divide obscene material into

identified and that a court after making this identification should merely declare that the publication in question is obscene and avoid the fatal error of trying to explain why. The suggestion is certainly a tempting one but if followed could subject the courts to the same criticism that has been levelled at administrative tribunals who render decisions without giving reasons. But considering the apparent inability of Canadian judges to interpret and apply the existing law so as to yield a degree of agreement as to the nature of a given publication, the value of judicial explanations in individual cases involving particular publications might not be considered very significant in any event. Perhaps some knowledge of the basic assumptions concerning the effect of obscene literature that underlie the assumed need to censor this material might prove as useful as the judicial decisions themselves.

IV. *Obscene Literature—Underlying Assumptions.*

Until 1959, Canadian courts, when required to determine the question of obscenity in literature, tested the material under review by its tendency to corrupt and deprave those who might read

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different categories, thus suggesting that there are varying degrees of obsceneness. The most common division is made between pornographic publications and others. Hard core pornography, as it is called, can be described as material published for the sole purpose of making money and which, by means of sexually stimulating fantasies, appeals to the sexual instincts of the reader. The reader is regaled with imaginary sexual interludes in which the activities, normal and abnormal and including the physiological reactions of the parties, are described in detail. This type of material has been contrasted with that which represents an attempt by an author to truthfully describe the basic realities of life as he sees them. The latter type of publication has been described as erotic realism. It sexually stimulates the reader but does so only in passing. The main characteristics of hard core pornography have been described in detail by the Kronhauser's as follows: ". . . hard core pornography does not usually have much of a story line, and in so far as it does, this only serves as a flimsy frame on which to hang a series of erotic incidents. Hard core pornography also either neglects altogether or underplays characterization of the persons in the story, description of surroundings, philosophical or political discussion, and so forth, This is done to provide for maximum erotic concentration in the story. Furthermore, and most notably, hard core pornography is characterized by a calculated, progressive build-up of erotic tension. This is, as we have seen, achieved by a number of literary devices or tricks of the trade, based on the principle of appealing to that which is considered sexually taboo. Ranking high among these devices is the liberal use of four-letter words, which, through suppression, have become erotically super-charged. The same holds for descriptions of physiological detail, frankly sadistic defloration scenes, and for inclusion of sexually taboo personages in the story, such as parent figures, children, priests, nuns, clergymen, *etc.*, or taboo places. Following the same principle, appeal is made to the instinctual or animal side of sex by the inclusion of persons thought to be radically or socially inferior and acting in an animalistic manner, or by the inclusion of animals themselves in conjunction with humans." *Op. cit.*, footnote 109, pp. 306-307.

it. It is perhaps not too surprising that the use of such an indefinite test has produced legal decisions which do little to clarify the meaning of the test itself. One recent judicial observation has noted that the test might mean any one of several different things, such as, to suggest thoughts of a most impure and libidinous character, or to influence individuals to perform impure acts, or more generally, to imperil the prevailing standards of morality.[118] Other commentators have added their own suggestions as to what might be meant by depraving and corrupting. In their non-judicial view the legal test means that which brings about a change in the reader's character and leads him to indulge in sexual practices he would not have otherwise considered[119] or that which merely gives the reader an emotional thrill or pleasure.[120]

The creation in 1959 of a new statutory definition of obscenity provided the Canadian courts with a new test with which they had to become familiar and they have since that time occupied themselves with attempts to explain the meaning of the phrase "undue exploitation" which seems to be the essence of the new test. In their search for meaning the judiciary has on occasion referred to the purpose of the legislation and consistently declared that the existing statutory prohibition concerning the sale and distribution of obscene literature is an attempt to protect and preserve public morality.[121] In applying the new statutory tests our courts have assumed, as they did when they applied the *Hicklin* test, that public morals are affected when lewd thoughts are likely to be aroused in the reader's mind,[122] or he is likely to be pushed to overt anti-social behaviour either of a criminal or merely immoral nature,[123] and have interpreted undue exploitation with these assumptions

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[118] See the judgment of Laidlaw J.A., *Regina* v. *American News Ltd.*, *supra*, footnote 25.

[119] Mr. Gerald Gardner in the case of *Regina* v. *Penguin Books Ltd.* as recorded in the trial of Lady Chatterley, edited by C. H. Robb (1961), pp. 8, 29 and Walter Allan, the author of The Frontiers of Tolerance in the book To Deprave and Corrupt, edited by John Chandos (1962), p. 143.

[120] John Chandos, My Brother's Keeper, To Deprave and Corrupt, *ibid.*, p. 16.

[121] Justices Taschereau and Fauteux, in *Regina* v. *Brodie*, *supra*, footnote 6, at pp. 514, 519 (D.L.R.), 689 and 695 (S.C.R.). See also the decision of Mr. Justice Casey in *Brodie* v. *The Queen*, *supra*, footnote 74, at p. 208 (C.R.).

[122] Monty J., in the *Standard News* case refers to the publication Midnight as "suggestive", *supra*, footnote 30, at p. 59. Taschereau J., indicated that Lady Chatterley's Lover aroused "lewd" thoughts, *ibid.*, at pp. 691 (S.C.R.), 516 (D.L.R.).

[123] Roach J., referred to the tendency of Fanny Hill to "inflame and excite sexual passions to the extent that morality is dethroned and right judgment and conduct threatened", *supra*, footnote 113, at p. 236 (C.R.).

in mind. References to the shocking and disgusting effects of the literature can also be found.[124]

Judicial interpretation and application of the undue exploitation standard has, however, introduced a new element not previously considered by the courts who used the *Hicklin* test. The community standards test, used by the courts in Australia and the United States, has been seized upon by some members of the Canadian judiciary[125] in their search for a device that would produce a truly objective evaluation of obscenity in literature and has been used in part as the instrument by which the legislative standard of undue exploitation has been set.

If the courts continue to use the community as the yardstick by which to measure obscenity in literature some knowledge and understanding of community attitudes and the reasons for their development would seem desirable. But how is a court to discover the prevailing community attitude towards obscene literature and the underlying reasons for the development of these attitudes? If the issue is to be determined by a jury perhaps their decision, constituting as it does a very limited sampling of community opinion, would be adequate. On the other hand is a single judge or even several judges, a sufficiently accurate indicator of the prevailing community standard of decency or acceptance?[126]

As far as I have been able to determine the only attempt that has ever been made in Canada to officially canvass public attitudes towards obscene literature was made in 1952 when the special Senate Committee on Salacious and Indecent Literature[127] invited members of the public to express their views on this problem. An examination of the testimony reveals that the public, like the courts were concerned with literature that (1) might produce lewd thoughts or (2) induce overt anti-social conduct or (3) might generally affect the readers' moral standards and those of society or (4) might shock and disgust those who might read the material. But public testimony also reveals that Canadian citizens were concerned with other undesirable consequences caused by exposure to

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[124] Taschereau J., *supra*, footnote 6, at pp. 692 (S.C.R.), 517 (D.L.R.) in the *Brodie* case, and Justices Fauteux and Ritchie in the same case who felt that the new legislation permitted this aspect of obscenity to be considered. See also the opinion of Judge Weaver in the case of Fanny Hill, *supra*, footnote 110, at p. 376.

[125] Mr. Justice Judson in the *Brodie* case, *ibid.*, and Mr. Justice Freedman in the *Dominion News* case, *supra*, footnote 6.

[126] For a detailed discussion of the many problems created by the use of this yardstick see Getz, The Problem of Obscenity (1965), 2 U.B.C.L. Rev. 216.

[127] See *supra*, footnote 28, for the Committee's terms of reference.

obscene literature, consequences not mentioned by the courts in their decisions. Concern was expressed for the effects that the objectionable material might have (5) upon the personality and character of young people in particular and it was also felt that the same material could and would (6) give our young people a distorted view of life generally and the nature of man and his relation with the opposite sex in particular. These undesirable consequences, it was assumed, would follow if the reading public, and particularly the younger members, were subjected to a continuous, uncontrolled flow of obscene material. Two questions arise. One question frequently asked is whether reading obscene literature does in fact bring about the assumed detrimental consequences. The second question is why some of the assumed consequences are considered to be dangerous or harmful. I would like now to consider some of the answers and explanations that have been given in response to these questions.

There appear to be at least two explanations for the desire to prohibit publications that raise lewd thoughts in the reader's mind. Some individuals as a result of their religious beliefs look upon sexual activity as primarily a manifestation of man's base animal instinct for procreation. Influenced consciously or unconsciously by the Pauline doctrine of carnal sin [128] and concerned to emphasize the dignity of man, these individuals feel that the basic human instincts should not be deliberately aroused and that material producing this effect should be prohibited. As one author has put it "In principle the early church frowned on the whole business of sex, and treated it as one of God's more unfortunate mistakes which has somehow to be lived with until the imminent conclusion of all earthly matters".[129] Later church doctrine does not necessarily take this extreme stand but treats only the promotion of pleasurable feelings and satisfaction of sexual desires apart from any creative purpose as sinful.[130] To indulge in sexual relations either on the

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[128] The position of the Christian Church with regard to sexual morality rests primarily upon St. Paul's teaching on asceticism as expressed in the first Epistle to the Corinthians:

"I would that all men were even as I myself. . . . But every man hath his proper gift of God, one after this manner and another after that. I say therefore to the unmarried and widowed: It is good for them if they abide even as I. But if they cannot contain let them marry; for it is better to marry than burn."

For a commentary upon the Roman Catholic reaction to the doctrine see an article by Maurice Girodias, More Heat than Light, in the book To Deprave and Corrupt (1962), p. 134. See also Kraunhauser & Kraunhauser, *op. cit.*, footnote 109, p. 332.

[129] John Chandos, *op. cit.*, footnote 120.

[130] For a description of the position taken by the Roman Catholic

physical or mental plane purely for pleasure is considered sinful by many religious teachings. A legal prohibition resting solely on this basis would be, however, unreasonably broad and extremely difficult to enforce, however laudable it might be from a moral point of view.[131]

Another explanation put forth for avoiding the stimulation of lewd thoughts is based upon the assumed long range effect that this will have upon the community as a whole. Sexual thoughts are not considered, in this view, to be inherently undesirable or degrading but it is assumed that constant exposure to publications dealing with illicit sexual relations, which means sexual relations with someone other than the marriage partner, will eventually condition the reader so that he will come to accept such conduct as right and permissible, even though he might not engage in these activities himself. The material depicting immoral conduct will thus, it is assumed, eventually change the standards of the people as a whole and the moral fibre of the nation will be undermined.[132] The weakening of the moral fibre is seen as a threat to the continued existence of the nation. For the same reason any publication openly and expressly advocating adultery or prostitution or perversion as an acceptable mode of conduct will also be considered dangerous, and consequently prohibited.[133] If the necessity for a stable moral

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Church see the article by Father Harold C. Gardiner, Moral Principles Towards a Definition of the Obscene (1953), 18 Law and Contemporary Problems 564. See also the view expressed by the Reverend Dr. Donald Soper in a book entitled Does Pornography Matter?, edited by C. H. Rolph (1961), pp. 42 and 43. The Pauline doctrine is credited by some with influencing the development of a neo-Puritan spirit which declares that any act giving sensual pleasure is wicked and must be suppressed. See Chandos, *op. cit., ibid.*, p. 10.

[131] The Church of England Moral Welfare Council in testimony formally submitted to the Wolfenden Committee condemned as sinful all violations of Christian teaching on chastity. Yet the Council insisted that "There should be no departure in specific instances from the generally accepted principle that the British law does not concern itself with private irregular or immoral sexual relations of consenting men and women" and that "the action of the state should be therefore limited to the protection of the citizen from annoyance or obstruction". Quoted in D. S. Bailey (Ed.), Sexual Offenders and Social Punishment (1956), p. 62.

[132] As others have suggested, this may be the effect most feared by people generally. See Cairns, Paul and Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence (1962), 46 Minn. L. Rev. 1009. It is a fear that has also been expressed by the Supreme Court of the United States in an early case. The Supreme Court remarked that: "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history". *Trust* v. *Child* (1874), 88 U.S. (21 Wall) 441, at p. 450.

[133] However the Supreme Court of the United States declared in a recent decision that to refuse a licence to show the film version of Lady

code is accepted and the tenuous casual connection between lewd thoughts and the nation's morality is granted as well, then the danger in arousing lewd thoughts could be accepted by some people as a valid reason for prohibiting material having the effect described above.

The second assumption, and one that is emphasized by the law enforcing agencies particularly, declares that obscene literature leads to immediate wrongful action of a sexual nature, either from a desire on the part of youthful readers to imitate the activities described, or because the reader experiences loss of self-control and surrenders to his sexual impulses. The possible consequences in either case could include an upsurge in the number of illegitimate births and cases of venereal disease. Obscene literature is also considered by law enforcement agencies to be an important factor in the commission of non-sexual crimes. It is believed that the tension caused by obscene literature finds its outlet in anti-social behaviour of one type or another. Although scientific and statistical data does not at the present time support either of these assumptions,[134] they are nevertheless, strongly indulged in by a large segment of our society. If the assumptions are correct, the immediate danger to society is obvious.

Although the assumptions that obscene material will produce lewd thoughts and positive acts concentrate upon the immediate effect of the publication, they are ultimately concerned with the long range effect that these consequences will have upon the moral standards of the nation which are based primarily upon a Christian morality.[135] It is the belief of many people that any change in the

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Chatterley's Lover on the ground that it was immoral or would tend to corrupt morals because it portrayed the act of adultery as being right and desirable for certain people under certain circumstances, was unconstitutional. *Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York* (1959), 360 U.S. 684. For a comment upon this decision see Henkin, Morals and the Constitution: The Sin of Obscenity (1963), 63 Col. L. Rev. 391, at p. 399.

[134] The evidence, such as it is, does not disprove the assumption either. Should our desire to maintain the principle of freedom of speech impose on those who favour censorship the burden of proving some concrete danger to the community or certain groups within it? Or should we require those who wish to abolish censorship to prove the lack of causal connection between obscene literature and harm to society? For a comprehensive review of material concerning the effect of obscene literature see Cairns, Paul and Wishner, *loc. cit.*, footnote 132.

[135] The United States Government strongly stressed the long range effects of obscene material upon public morality when it argued that "The distribution of obscenity creates a substantial risk of inducing immoral sexual conduct over a period of time by breaking down the concept of morality as well as moral standards". Brief for the United States, p. 59, *Roth* v. *United States* (1957), 354 U.S. 476, quoted in Cairns, Paul and Wishner, *loc. cit.*, *ibid.*

Christian morality of our society will result in the eventual disintegration of the state itself. This belief of course, is not shared by all people.[136] Those who see danger in change support their argument with examples from the pages of history. Others, not convinced, point to the changes that have already taken place within the last several decades in fashions and morals and in a discussion of sex itself and note the fact that our society is still a reasonably stable one. The difference of opinion emphasizes the need to establish with some clarity the distinction between non-essential or unimportant rules of sexual conduct that are based only upon custom, habit, ignorance, superstition or misunderstanding, and rules that are based upon either a logical pragmatic base or firmly established ethical foundation.[137]

Both the courts and the public have expressed an opinion that there is a need to protect the sensibilities of the reading public from repulsive literature and this necessity is often referred to by legal writers as one of the reasons for censoring such material.[138] Whether or not the shocking nature of the material actually produces an immediate harmful physical or psychological effect upon the population in general, it is felt by some that the public has a right to be protected from literary indecent exposure in the same way it is protected from physical exposure of the same kind. This view seems to ignore the fact that exposure to physical indecency is normally involuntary while there is some greater freedom of choice as to whether a book or publication will be read. If a particular piece of literature is known to be obscene presumably those likely to be offended by it will not read it. The real fear seems to be that this repulsive type of literature will by accident fall into the hands of youthful readers who will suffer traumatically from the unprepared exposure to it.

[136] See 1 Chafee, Government and Mass Communications (1947), p. 192 and the discussion by Professor Henkin of the influence of religious morality upon the community and the development of the law, *loc. cit.*, footnote 133.

[137] At this point the words of George Bernard Shaw seem appropriate. "Whatever is contrary to established manners and customs is immoral. An immoral act or doctrine is not necessarily sinful; on the contrary, every advance in thought and conduct is by definition immoral until it has converted the majority. For this reason it is of the most enormous importance that immorality should be protected and jealously guarded against the attacks of those who have no standard except the standard of custom and who regard any attack on custom—that is on morals—as an attack on society, on religion, and on virtue." The Necessity of Immoral Plays from the Preface to the Showing-Up of Blanco Posnet. Quoted in Versions of Censorship, an anthology edited by John McCormic and Mairi MacInnes (1962), p. 355.

[138] See for example, Chafee, *op. cit.*, footnote 136, p. 199, and Lockhart and McClure, *loc. cit.*, footnote 13.

Concern for young readers is also evident in the assumption that the personality or character of the reader might be adversely affected by exposure to objectionable material, particularly if he happens to be an adolescent whose personality and character is in the formative stages. Stimulating young people sexually, it is thought, will increase the already disturbing tension produced by the conflict of their natural desire for procreation and the socially imposed restraints on sexual conduct, to a point where the reader will suffer mentally as a result. This has been the view of the drafters of the American Law Institute's Model Penal Code who have explained "the wall of secrecy with which society has surrounded sexual behaviour tends to build up in the individual strong feelings of the shamefulness of sexuality. Literary or graphic material which disregards the social convention evokes repression tensions, i.e., mixed feelings of desire and pleasure on the one hand and dirtiness, ugliness and revulsion on the other".[139] However we have to keep in mind that the effect of obscene material upon persons suffering from sexual guilt feelings may be quite different from the effect of the same material upon others who are normally adjusted.[140]

Many who testified before the Canadian Senate Committee were deeply concerned with obscene literature because they felt it would give young people a distorted view of the nature of man and a woman. The emphasis upon the sexual appetites of man, it was felt, would result in the grace and dignity of man being ignored. In the same way the repetitious portrayal of the relations of men and women as primarily physical in nature would give young people the erroneous impression that women were essentially immoral and worthy of no respect whatsoever. The Christian ethic, which requires respect for the spirit and body of man and woman would be overturned and the role of sex in human life would be unduly exaggerated and raised to a place of false importance.[141] In short, a Christian morality which postulates an attitude of respect and restraint towards sex and which prohibits illicit and perverse sexual activities was considered by many Canadians in the 1952-1953 period to be in danger of being undermined and swept away. It was assumed that since Canada had been built on a Christian

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[139] Model Penal Code, s. 207, 10, at pp. 29-31, Comment (Tent. Draft No. 6, 1957).

[140] Cairns, Paul and Wishner, *loc. cit.*, footnote 134.

[141] As one clergyman has remarked "pornography promotes lust at its worst and invariably tends to degrade the lives of those who indulge in it . . . it is unworthy of the true dignity of a human being." Rev. Dr. Donald Soper, Does Pornography Matter?, *op. cit.*, footnote 130, p. 43.

foundation that the nation itself would fall if the foundation were allowed to crumble.

If Canadian courts are going to utilize the community standards test as either the sole test of what constitutes undue exploitation or as one factor to be considered, it seems reasonable that they should have some appreciation of the existing community attitude towards obscene literature and the underlying reasons for the maintenance of that attitude. If the court is unable to obtain the information that would be required to enable it to estimate what the community standard of decency is at any given time then let it say so rather than continue to use the community standards test as a cloak for what is in reality still a personal and subjective decision by the court. If the judiciary were to make it clear that the statutory definition is unsatisfactory and fails to relieve the court from its troublesome task of rendering a personal opinion then perhaps a search for a truly workable objective test would be taken up once more or some other means of dealing with obscene literature adapted as it has been done elsewhere.[142]

V. *The Role of the Criminal Law.*

If we concede that obscene literature can have an effect upon the moral standards of young people in particular, and perhaps upon the standard of public morality that exists within Canada, is this an interest that should be protected by the criminal law? At the present time Canadian Criminal Code does not make adultery, fornication or prostitution a crime in itself. If this is so, why should publications be prohibited which directly advocate free love or abnormal sexual behaviour or do so indirectly by describing these activities in detail? The answer lies, I believe, in an explanation given by Professor Mewett as to the purpose of the criminal law.[143] If the aim of the criminal law is to prevent acts that are socially harmful, in the sense that "if allowed to continue they will make

[142] In New Zealand, for example, the legislature has created a tribunal of specially chosen people with experience in the field of education and literature whose decision could be expected to reflect the current standards and tastes of the community. It was apparently the legislative objective to remove from the courts of justice questions relating to the indecent character of literature and to commit them to the judgment of a tribunal that would be free to carry out its function untrammelled by the requirements of the strict legal process. The tribunal presently consists of a retired judge, a professor of English, a newspaper editor, a librarian and a married woman who teaches English and in collaboration with her husband writes books on social and religious topics, including marriage.

[143] Mewett, The Proper Scope and Function of the Criminal Law (1960), 3 Crim. L. Q. 371.

society as a unit unworkable",[144] then individual acts of fornication, adultery and prostitution do not constitute a danger to the stability of the social order.[145] But if these acts are indulged in by any significant portion of the community the danger to society sharply increases. With modern means of production and distribution it is now possible to advocate, by means of obscene literature, ideas relating to sexual behaviour that are contrary to our accepted Christian standards of morality. The result could be wholesale corruption of the morals of the population and thus, a direct threat to the nation as a whole. The anticipated danger to the nation, of course, rests upon the assumption and belief that an unchanging Christian standard of morality is indispensable to a properly functioning society. Not all people in Canada are prepared to make this assumption. But, even if we acknowledge changing standards of taste, modesty and morals, the declining force of religious beliefs, and some uncertainty as to the existence of eternal standards of morality, there still appears to be a large segment of society that believes a solid core of stable, moral standards to be absolutely necessary for our continued existence as a nation. These standards, it is believed, cannot be changed and any attempt to do so should be restrained by every means at our command. I do not intend to discuss the validity of the assumption or the rational basis for the fear. The fear is there and is recognized particularly in Part IV of the Canadian Criminal Code.

Conclusions—The Present Situation.

The new statutory definition of osbcenity was enacted to provide the courts with a simple objective test by which to judge a particular type of publication. The test was to be the instrument by which publications having no pretence to literary merit and whose sole purpose was to pander to the sensual instincts of their readers by extensive emphasis on sex might be driven from the newsstands. The common law *Hicklin* test remained to test publications having some redeeming features and written with a sincere intention to expound a theme and convey a message. Unfortunately, the legislative intention was not clearly expressed and the courts have shown a tendency to judge all publications by the new definition alone, including novels such as *Lady Chatterley's Lover*, which I submit was intended to be judged by the *Hicklin* test. Parliament's failure to make its intention clear has also resulted

[144] *Ibid.*, at p. 390.

[145] As Professor Mewett also pointed out in his article Morality and the Criminal Law (1959), 14 U. of T. L.J. 213.

in the development of an undesirable procedure whereby counsel agree as to the law that shall be applied to test the issue of obscenity. As we have seen, the agreement has been to apply the new definition to the exclusion of the *Hicklin* rule. Although in practice the *Hicklin* test is not being applied it has not been formally rejected. It will therefore remain in limbo until the legislature or the Supreme Court of Canada settles its fate.[146]

But if the legislature and Mr. Fulton have been surprised by the judicial interpretation of the new amendments so as to exclude the application of the *Hicklin* test, they must surely have been even more surprised by the results achieved by the judicial interpretation and application of the new statutory test. Designed to provide a more effective net by which to catch obscene material, the "undue exploitation" test in the hands of the judiciary appears to be a net that is always full of large holes. Several factors account for this. One extremely important new development is the court's consideration of the author's purpose in writing the book and its literary, scientific or artistic merit.[146A] The courts have discovered

[146] I would disagree with the recent opinion expressed by Mr. Justice Bull of the British Columbia Court of Appeal in the case of *Regina* v. *Fraser*, *supra*, footnote 89, at pp. 729 and 730 to the effect that the Supreme Court of Canada by its affirmation of the dissenting judgment of Freedman J.A. in the *Dominion News* case, *supra*, footnote 6, had adopted or accepted the proposition that the statutory definition of obscentity is exhaustive. Mr. Justice Freedman expressly stated the view that there had been no clear majority of the Supreme Court of Canada in the *Brodie* case in favour of one view or the other and that he was going to consider the case on the grounds to which counsel had agreed, namely that section 150(8) was exhaustive. By adopting his judgment in its entirety the Supreme Court presumably was agreeing with Mr. Justice Freedman's interpretation of the holding in the *Brodie* case on this point.

[146A] The United States Supreme Court has recently added yet another element in the test of obscenity by declaring that in doubtful cases the motive of the publisher or distributor, as revealed by the setting in which the publication is presented, is relevant in determining the nature of the publication in question. See *Ginzburg* v. *United States*, *supra*, footnote 95. The Supreme Court emphasized that the defendant, who was both publisher and distributor, had "deliberately emphasized the sexually provocative aspects of the material in order to catch the salaciously disposed" (p. 948) and that he "had proclaimed its obscenity" (*ibid.*). If the same reasoning were applied to Lady Chatterley's Lover, for example, it would be possible to find that the book itself *per se* was not obscene and yet if it were publicized in a manner that accentuated its sexual content rather than its theme it would become contaminated by the publisher's purpose. It was perhaps this failure to introduce evidence concerning the publication and distribution of Fanny Hill that enabled the Supreme Court of the United States to hold it had some redeeming social value and it was thus not obscene. See the judgment of Mr. Justice Brennan, *A Book Named John Cleland's Memoirs of a Woman of Pleasure* v. *Attorney General of the Commonwealth of Massachusetts* (1966), 86 S. Ct. 975, at p. 978. Canadian courts in the past have, in the process of applying the *Hicklin* test, concerned themselves with details of publication and advertising in addressing themselves to the question of into whose hands the material might fall.

that the simple objective test the legislature thought they had supplied is neither simple nor objective. Before it can be used it must be understood and this requires interpretation. The courts, proceeding to interpret the key phrase "undue exploitation" in terms of the internal necessities of the work and the community standards of decency, have discovered that judging a publication by these standards requires them to consider the author's purpose and the merits of the work, literary and otherwise. To aid in this task and following a practice adopted in proceedings under section 150A of the Criminal Code, the courts have listened to the testimony of literary experts although evidence concerning the author's purpose and the merits of the publication had not been considered relevant for purposes of the *Hicklin* test and had been ruled inadmissible by the courts.[147] Nor did Mr. Fulton think that such evidence would be needed in applying the new statutory test, which he thought would require the court to merely apply a number of factual tests in order to determine the nature of the material.[148] The new practice of considering the author's purpose and the literary, artistic or scientific merits of the publication would seem to suggest that the defence of the public good, which under the *Hicklin* test had been purely academic, is now being raised effectively in proceedings under the new amendment to the Code.

Other factors have also contributed to produce what appears to be a very liberal application of the law. The courts, since 1959, have strongly emphasized the need to protect the principle of free speech and have expressed an intention to give this principle full scope except in clear cases of obscenity. Judicial concern for freedom of speech in literary expression, together with the courts' recognition that society now accepts a greater degree of candour in discussion of sexual matters, has now restricted considerably the prohibited area of obscenity. All these factors, in combination,

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See for example the *American News* case, *supra*, footnote 25 and *R.* v. *Munster*, footnote 71. Several members of the Supreme Court of Canada in the *Brodie* case discussed the manner in which the book Lady Chatterley's Lover had been publicized and took particular notice of the fact that the advertising stressed that the edition was unabridged. See footnote 6, *supra*, judgments of Kerwin C.J.C. and Fauteux J.

[147] See, for example the *American News* case, *supra*, footnote 25.

[148] *Op. cit.*, footnote 4, p. 5542. In answer to a question by Mr. Pearson whether there would be any difficulty in having expert evidence as to the literary, scientific and other qualities of a work admitted, Mr. Fulton replied that "It is my view that this type of definition does not lend itself to the giving of opinion evidence by experts. If as was the case when the only definition we had was the Hicklin definition, your definition is almost entirely subjective, if it has to be interpreted in the light of what are its effects on certain individuals then I think there is much more room for opinion evidence."

have produced a test that is extremely liberal if applied to publications in which the courts can find some merit or honesty of purpose. A test that declares *Fanny Hill* to be unobjectionable cannot be described as harsh.

In cases involving material whose sole purpose is to emphasize sex and which is entirely without redeeming merit, the test seems to be more effective.[149] But even in these cases the test does not prohibit all pandering to an interest in sex. While the semi-newspaper publications with their reference to and discussion of normal, illicit sex relations, and perversions, and in many cases with their implicit approval of such actions, are banned, the pictorial pandering of the "girlie magazines" are not objected to if kept within bounds. The problem, of course, is to determine where the boundary lines are to be drawn.[150]

In the most recent case to come before Canadian Courts, *Regina* v. *Fraser*[151] the British Columbia Court of Appeal seemed to supply some further guidance as to where the boundary lines might be by declaring that booklets depicting sadistic and masochistic activities would be considered obscene within the Code definition and that novels having no literary merit which appeal solely to the prurient interest and deal exclusively with the infliction of pain, sexual intercourse and perversion would also be deemed obscene. It would seem to be the tendency then for the courts to prohibit material having no claim to literary merit which deals exclusively or otherwise with perverted sexual activities, for the sole purpose of appealing to the prurient interest of the reader. Pictorial nudity is obscene if presented in a manner that is considered to be unduly provocative and lacking in artistic qualities. The cases would suggest that naked men and women pictured together or naked women in posed positions suggesting intercourse or in action sequences suggesting the same thing would be considered to be unduly provocative. Pictorial concentration upon the reproductive organs is apparently obscene because of their ap-

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[149] See, for example, *R.* v. *Lipson*, *supra*, footnote 60; *R.* v. *Standard News*, *supra*, footnote 30; *R.* v. *Marshall*, *supra*, footnote 101; *Re Gordon Magazines*, *supra*, footnote 7 and *Regina* v *Fraser*, *supra*, footnote 89.

[150] The Supreme Court, through the judgment of Mr. Justice Freedman in the *Dominion News* case, *supra*, footnote 6, has indicated that it will draw the line at perversion (whatever this may mean). It is permissible apparently to provide sexually exciting half-clothed women but pictures of naked men and women together would be too suggestive—too suggestive of copulation. It is permissible, therefore, to describe the actual act of intercourse in a novel but a pictorial suggestion of similar conduct is prohibited.

[151] *Supra*, footnote 89.

peal to the prurient interest and their equally important lack of redeeming artistic qualities.

We have now seen the legal process in operation in an admittedly difficult area of social control. By virtue of the legislative failure to make its intention clear and the judicial interpretation and application of the legislative directive, an attempt to control the distribution and sale of objectionable literature has been largely frustrated. Instead of having two tests to use, one of which would be a strict, simple and objective test of fact involving little subjective opinion, we find ourselves with only one test, a statutory test, moulded by the judiciary until it presents a far more liberal test than the common law rule it was intended to supplement. Not a very encouraging example of the effectiveness of the legal process as a method of social control.

The social problem presented by obscene literature is by no means a simple one. A legal solution to the dilemma is complicated by the intermingling of emotionally charged moral and religious convictions. Lack of an effective objective legal test thus forces the courts to make what is essentially a moral rather than a legal judgment and to perform a task for which they are not suited and, have not been created. A review of legal decisions and the writing of legal scholars should make it abundantly clear that obscenity appears in many forms and is not as easily distinguished, recognized and classified as poison ivy is among plants.[152] It is not easily defined. Nor is it simply a matter of the court making a finding of fact and reaching an automatic conclusion on the question of obscenity.[153] Even if the courts could discover and were fully cognizant of the underlying assumptions and fears of the community about the harmful effects of obscene literature they would still be faced with the complicated task of weighing a variety of different factors in particular cases. The courts will be forced to consider a wide range of pictorial and non-pictorial material dealing with sexual relations in many different ways. Some of the publications will have some redeeming features in varying degrees while others will be completely lacking in these beneficial qualities. When judging the material the court will have to remain cognizant of its duty to interpret and apply the law so as to give adequate protection to the basic moral standards of the community. At the same time it must remain conscious of its equally important

[152] To use the colourful language of Mr. Justice Harlan in *Roth* v. *U.S.*, *supra*, footnote 135, at p. 497.

[153] "Obscenity is not really a question of fact but a question of constitutional judgment of the most sensitive and delicate kind." *Ibid.*, at p. 498.

duty to protect the fundamental right to freedom of speech. In the final analysis the court will have to decide whether or not a significant number of readers will be adversely influenced in either thought or conduct by the material in question and balance this speculative assessment against the overall benefit to the community of allowing the material to circulate.

The law demands that its commandments be set down clearly. It also demands that its application in a case involving a conflict of interests be logically explained. Both of these ingredients, desirable as they may be, are not always present in cases or legislation dealing with obscene literature. As an American judge has remarked: "The inexactness of the law as a science is never more pointedly instanced than here when it is sought to chisel from abstractions of legal survey precise and mathematical-like rules for the analysis and admeasurement of the concrete."[154] Perhaps we should comfort ourselves with the historical observation that even the wisest of man-made laws have seldom operated with complete perfection. Rarely have they inspired virtue by the mere force of their existence and more often than not have been ineffective to restrain vice. On the other hand, perhaps we should, in the light of the failure of the latest legislative attempt to provide an effective definition of obscene literature, seriously consider the suggestion put forward by Professor Glanville Williams that if the criminal law cannot be made specific enough then the better practice is to allow for an administrative ruling before conduct is embarked upon.[155] One thing is clear, the present state of the law

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[154] Robert F. Wagner in *People* v. *Seltzer* quoted in Ernest and Schwartz, Censorship The Search for the Obscene (1964), p. 67.

[155] At the present time two official "advisory" groups are in operation in Canada. In Ontario the Attorney General's Committee on Obscene Literature, established by the Attorney General, merely advises publishers and distributors as to whether or not material is likely to be declared obscene by the courts applying the legal test. The publishers and distributors then decide whether or not to withdraw the material. In most cases the material has been withdrawn from circulation if so recommended by the Committee. In certain instances, however, when the material is imported into Ontario, or in the case of these publishers and distributors who were and are intent upon selling obscene literature, the Committee has been less effective and has been forced to rely upon the law enforcement agencies to commence prosecutions under the Criminal Code. (Letter from R. A. Copeland, Chairman, Committee on Obscene and Indecent Literature, August 27th, 1965.) The second advisory group, the Alberta Advisory Board on Objectionable Publications, was formed by an Order in Council pursuant to the provisions of the Cultural Development Act. R.S.A., 1955, c. 73, as am. The Board has worked out an arrangement with all wholesale distributors of magazines, comic books and tabloids in the province whereby the distributors accept the Board's recommendations and voluntarily refrain from distributing material which the Board has declared to be objectionable. The Board, according to its present chairman Mr.

is unsettled and will probably remain so unless further legislative action is taken.

Donald V. Steele, with the co-operation of the magazine distributors in Alberta, has proved to be an effective method of coping to some extent with the problem of objectionable magazines in Alberta. (Letter from Donald V. Steele, Chairman, Advisory Board on Objectionable Publications, July 7th, 1965.).