THE ROLE OF CHOICE IN A DEFINITION OF OBSCENITY

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Introduction

The entertainment which is available to us as a community is governed largely by public and private choice. That which entertains one person or group may offend another; that which one person chooses to see may be anathema to another. It is therefore desirable that our definition of obscenity, by means of which we prohibit the viewing[1] of certain entertainment, take account of the respective roles of public and private choice.

Offences involving obscenity and the offence of gross indecency have historically been included in the same category of offences against morality.[2] Recently, both have been placed at the threshold between public and private morality so that in each case, conduct becomes prohibited when the threshold is crossed and private choice encroaches upon the public domain.

Our law has not always been so. Gross indecency has been included in our Criminal Code since 1892.[3] Yet, it is only since 1968[4] that acts done in private between consenting adults have been removed from within the ambit of the offence. The publication and performance of obscenity have been a part of our Criminal Code since 1892[5] and 1903[6] respectively. Yet, it is only as recently as 1970[7] that the definition of obscenity has been interpreted in such a

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[1] Audio entertainment has been excluded from consideration here because it is chiefly regulated not by the Criminal Code, R.S.C., 1970, c. C-34, as am., but by the Radio Act, R.S.C., 1970, c. R-1, and particularly regulation S.O.R. 63-297, s.27(3), which prohibits the use of obscenity in broadcasting. There are no reported cases under that section that are known to the author. The Act does not include its own definition of obscenity and does not incorporate by reference the provisions of the Criminal Code relating to obscenity.

[2] The Criminal Code, 1892, 55 & 56 Vict., c.29, Tit. IV; Martin's Criminal Code (1978), Part IV, Tit. 4.

[3] *Ibid.*, s.178.

[4] The Criminal Law Amendment Act, S.C., 1968-69, c.38, s.7, adding s.149A to the Criminal Code.

[5] *Supra*, footnote 2, s.178.

[6] The Criminal Law Amendment Act, 1903, 3 Edw. VII, c.13, s.2.

[7] *R.* v. *Prairie Schooner News Ltd and Powers* (1970), 1 C.C.C. (2d) 251, 12 Crim. L.Q. 462, 75 W.W.R. 585.

way as to distinguish between the public and private choice of entertainment.

Our object of protecting the public with the least possible infringement upon the individual's freedom can best be achieved in the area of obscenity by developing the distinction between the respective roles of public and private choice in our definition of obscenity. In this way, the definition may be applied in a changing climate of public and private morality in such a way as to preserve the integrity of each.

I. *Two Approaches to Public Morality: Censorship and Obscenity Legislation.*

Public morality may be viewed either as the morality of the public in their private conduct or as the morality of their public conduct alone. Censorship, being simply the act of proscription, may affect public morality in both senses. In the absence of limitation upon its application, censorship could prevent exposure of material both to public and private view.

On the other hand, the very definition of obscenity results in its selective application. Either in Canada, where material is obscene which exceeds community standards of acceptance[8] or in England, where material is obscene which tends to deprave and corrupt those likely to view it,[9] the circumstances of exposure determine in part whether a matter is obscene.

In either Canada or England, the same material could be obscene where it is exposed to the public at large but not obscene where it is viewed only by a select group. Where censorship may control the existence of a matter, obscenity legislation controls the circumstances of its exposure.

Because of their distinct manners of operation, censorship and obscenity legislation may operate either simultaneously or alternatively. Where the obscenity of a matter is used as a basis for censoring it, then censorship may operate as an alternative to obscenity legislation. Where a criterion other than obscenity, such as political content, is used as a basis for applying censorship, or where censorship is applied to prohibit material in private circumstances where obscenity legislation would not apply, both forms of proscription may operate simultaneously.

In England prior to 1968, there existed no legislation proscribing obscene theatrical performances because censorship operated in the place of such legislation and satisfied such need as may have

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[8] See *infra*.

[9] See *infra*.

existed for it. By the provisions of section 12 of The Theatres Act[10] of 1843, a copy of every new stage play was required to be sent to the Lord Chamberlain at least seven days prior to its first presentation. By section 23 of the Act a stage play included every sort of entertainment of the stage. Under section 14 of the Act, the Lord Chamberlain had power to forbid any play:

> . . . wherever he shall be of opinion that it is fitting for the preservation of good manners, decorum, or of the public peace, so to do.

The Lord Chamberlain's Office, acting upon that mandate, censored material submitted to it where such material was seditious, libelous, slanderous, or obscene. Hence, there was no need for obscenity legislation equivalent to that which existed for publications in The Obscene Publications Act.[11] The only prosecutions that were undertaken then in relation to stage performances arose from the presentation of unapproved material.

In 1968, a new Theatres Act[12] was enacted in England which described itself in its first section as "an Act to abolish censorship of the theatre. . .". However, while section 1 of the new Act eliminated the censorship powers of the Lord Chamberlain, section 2 created a new offence of presenting an obscene performance. Section 2 provided a definition of obscenity similar to that which is provided in relation to publications in section 1(1) of The Obscene Publications Act. The new legislation substituted obscenity legislation for censorship and thus shifted the responsibility for guarding against liability from the Lord Chamberlain to the theatre manager, producer and director.[13]

The popular association of censorship with obscenity legislation as two forms of proscription often applied in similar circumstances to similar subject matter obscures the fact that there is no necessary relation between either the circumstances in which they are applied or the material which they proscribe. This confusion is capable of causing difficulty in the understanding of both censorship and obscenity legislation.

The difficulty which this confusion can cause in the understanding of censorship is illustrated by the Canadian case of *Re Nova Scotia Board of Censors et al. and McNeil*.[14] In that case, the provincial censorship board in Nova Scotia assigned to the film "Last Tango in Paris" a rejected classification without giving

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[10] 1843, 6 & 7 Vict., c.68.

[11] 1959, 7 & 8 Eliz. 2, c.66.

[12] 1968, 16 & 17 Eliz. 2, c.54.

[13] P.F. Carter-Ruck, The Theatres Act, 1968 (1968), 112 Sol. J. 647, at p. 649.

[14] (1978), 84 D.L.R. (3d) 1 (S.C.C.).

reasons for doing so. A newspaper editor sought an order from the court in the nature of a declaration as to the legality of the board's activities.

The legislation under which the board acted extended to the board an unrestricted authority to prohibit without reasons film exhibitions and theatre performances in the province. The Regulations under the Act provided for the enforcement of such prohibition by making it an offence to present in a theatre a performance or the exhibition of a film without the authorization of the board. Apart from the general power of the board to prohibit a performance or film exhibition without reasons, the Regulations also made it an offence specifically to permit an indecent or improper performance in one's theatre or to take part in such a performance. Here, the board was authorized to define what constitutes an indecent or improper performance within the meaning of the Regulations.

The Nova Scotia Court of Appeal[15] held in an unanimous judgment that the sections of the statute authorizing the board to prohibit performances and film exhibitions and those making it an offence to present unapproved indecent or improper performances and films were *ultra vires* the provincial legislature. One ground in which all the members of the court concurred, was that the legislation "in effect deals with public morals, a field that has always been deemed to be an aspect of the Criminal Law".

The decision of the Nova Scotia Court of Appeal was appealed to the Supreme Court of Canada, where the appeal was allowed in part in a five to four decision.[16] The court upheld the general power of the provincial board to prohibit performances and film exhibitions but declared *ultra vires* the Regulation making it an offence specifically to present or perform in an indecent or improper performance or to present such a film. The reasons given by the court bear close scrutiny.

Notwithstanding the fact that the board declined to give reasons for its rejection of the film, both the majority and minority in the Supreme Court agreed that the exhibition had in fact been prohibited on moral grounds. Both were also in agreement that that fact *per se* did not render the legislation invalid as being an encroachment upon the federal jurisdiction over criminal law, since morality and criminality are not co-extensive.[17] The minority pointed out, however, that, although morality was not exclusively within the federal domain, neither was it a basis for provincial jurisdiction so

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[15] *McNeil* v. *The Queen* (1976), 78 D.L.R. (3d) 46 (N.S.S.C., App. Div.).

[16] *Supra*, footnote 14.

[17] *Ibid.*, at p. 23, per Ritchie J.

that some basis other than morality had to be found to authorize the legislation.[18]

Both the majority and minority found some connection between the legislation and the provincial orbit of authority in regulating the use of property (that is films) within the province.[19] Laskin C.J., however, speaking for the minority, argued that the legislation exceeded this legitimate provincial concern. He noted that in upholding the plaintiff's standing to bring the action, the court had recognized that the legislation concerned itself not only with the interests of film exhibitors or theatre owners or operators but engaged the interests of members of the public and that this overriding authority could not be based on a tenuous connection with provincial concerns.[20]

Beyond finding the censorship power to be an integral part of the regulatory scheme properly enacted in relation to the film industry, the majority also upheld it on the basis of residual provincial authority since by applying a local morality, it was a matter of a local and private nature in the province.

The minority, on the other hand, asserted that this application of morality to public viewing is the exclusive domain of the federal government in relation to the criminal law.[21]

The majority departed from the common ground of the court and upheld provincial censorship in the presence of federal obscenity legislation in the following manner:[22]

> There is, in my view, no constitutional barrier preventing the Board from rejecting a film for exhibition in Nova Scotia on the sole ground that it fails to conform to standards of morality which the Board itself has fixed notwithstanding that the film is not offensive to any provisions of the *Criminal Code*; and, equally, there is no constitutional reason why a prosecution cannot be brought under section 163 of the *Criminal Code* in respect of the exhibition of a film which the Board of Censors has approved as conforming to its standards of propriety.

The majority upheld the power of the provincial board generally to apply its own local standards to prohibit performances and film exhibitions since the operation of such prohibition and the federal obscenity legislation were not mutually exclusive. On the other hand, it struck down Regulation 32 which made it an offence specifically to present an indecent or improper performance or film exhibition. It did so on the ground that the use of the word

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[18] *Ibid.*, at pp. 15-16.

[19] *Ibid.*, at p. 20.

[20] *Ibid.*, at pp. 5, 17-18.

[21] *Ibid.*, at p. 14.

[22] *Ibid.*, at p. 23.

"indecent" in both 1 and 2 of the Regulation and in section 159(2) of the Criminal Code was a common factor making the two enactments virtually identical.[23]

The minority sought to extend the finding of invalidity beyond the specific prohibition in the Regulation to the general power of the board to proscribe matter from public view. In doing so, they relied on the fact that both forms of legislation seek to proscribe matter from public view upon moral grounds.

The minority view illustrates the difficulty created for the interpretation of censorship legislation by the partial overlap in its object with obscenity legislation. The fact is, as the majority view suggests, that the two forms of proscription are based on different standards of morality (censorship applying a local standard where obscenity legislation involves a national one)[24] or reasons apart altogether from morality.

Just as the existence of obscenity legislation does not preclude the operation of censorship, neither does the existence of censorship preclude the operation of obscenity legislation. However, the same partial overlap which caused difficulty in the case of *Re Nova Scotia Board of Censors et al. and McNeil*, in the application of censorship legislation has also caused difficulty in the application of obscenity legislation. In this area, the difficulty is illustrated in cases where the sanctioning of a film by provincial or federal boards has been advanced as a defence to an obscenity charge.

In the 1972 Saskatchewan case of *R.* v. *Daylight Theatres Co. Limited*[25] the accused was charged with being the lessee of a theatre and presenting an obscene entertainment, namely a film, contrary to section 163(1). As a defence to the charge, it was argued that the approval of the film by the provincial censorship board amounted to the order of a *de facto* authority so as to constitute a defence under section 15 of the Criminal Code.

The Magistrates Court rejected this defence and held that the requirements of the Saskatchewan Censorship Board did not involve a determination with respect to obscenity and its approval based on

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[23] *Ibid.*, at p. 27.

[24] The standard is not one of a small segment of the community such as a university community: *R.* v. *Goldberg & Reitman* (1971), 4 C.C.C. (2d) 187, [1971] 3 O.R. 323 (Ont. C.A.).

The standard is not that of one city: *R.* v. *Kivergo* (1973), 11 C.C.C. (2d) 463 (Ont. C.A.).

The standard is that of Canadians in general, urban and rural, from coast to coast: *R.* v. *MacMillan Company of Canada Ltd* (1976), 31 C.C.C. (2d) 286, at p. 322 (York, Ont. Cty Ct).

[25] (1972), 18 C.R.N.S. 369 (Sask. Mag. Ct).

the fulfillment of those requirements did not purport to say affirmatively that an obscene film could be shown in the province.

On an appeal by trial *de novo*, the District Court judge allowed the appeal on the sole basis that, the accused having complied with the provincial censorship Act, section 15 of the Criminal Code spared him from the operation of section 163(1). On further appeal, the Saskatchewan Court of Appeal[26] reversed the finding of the District Court on the issue of the applicability of section 15 and remitted the case back to that court for determination on the merits.[27] Woods J.A., for the majority, stated that the provincial classification of a film had no bearing on whether or not it fell within the provisions of the Criminal Code and that the citizen was properly subject to both controls.

A similar conclusion was reached recently by the Ontario Court of Appeal in its decision in *R.* v. *294555 Ontario Limited et al.*[28] In that case the court held that the fact that customs officials permitted the entry of a film into Canada on the basis that the film did not offend against the provisions of federal customs legislation was no defence to a criminal charge under section 163. Like the Saskatchewan Court of Appeal in the *Daylight Theatres* case, the Ontario Court of Appeal found section 15 of the Criminal Code to be inapplicable in the circumstances and that the accused was required to meet both the restrictions of the customs legislation and those imposed by the Criminal Code.

The foregoing cases establish decisively that censorship and obscenity legislation will not ordinarily interfere with each other's operation or effectiveness. The exception, as illustrated by the Supreme Court's invalidating of Regulation 32 of the Nova Scotia censorship legislation, is where provincial legislation employs the same language as the Criminal Code, thereby making the two forms of proscription indistinguishable.

It is equally clear that both the federal and provincial legislatures may restrict our visual entertainment by the application of a standard of public morality. As is reflected in the judgment in *Re Nova Scotia Board of Censors et al. and McNeil*, provincial legislation applies a local standard of morality whereas the Criminal Code applies a national standard. But nothing need distinguish that standard other than the community from which it is derived.

The more important distinction between the two forms of proscription may be the circumstances in which either may be

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[26] (1973), 13 C.C.C. (2d) 524 (Sask. C.A.).

[27] (1972), 20 C.R.N.S. 317, (1972), 6 W.W.R. 481 (Sask. Dist. Ct).

[28] (1978), 39 C.C.C. (2d) 352 (Ont. C.A.).

applied and therefore the type of public morality which either may reach. This distinction arises, it is submitted, not from a constitutional division of authority but by the course which the interpretation of criminal obscenity legislation has taken. For while the decision in *Re Nova Scotia Board of Censors et al. and McNeil* does not restrict the circumstances of exposure to which the provincial legislation applies, a number of court decisions in recent years have limited the manner of exposure to which obscenity legislation may apply. Therefore, where censorship may affect public morality in the sense of the collective morality of members of the public in both their public and private conduct, obscenity legislation has been restricted to affect public morality only in the sense of public conduct.

II. *Obscenity Legislation: Confinement by Consideration of Circumstances of Exposure.*

A. *Confinement by Statute.*

Sections 159(1)(a) and 2(a) and (b) and section 163 of the Criminal Code[29] provide a statutory framework for restricting the exposure of entertainment to the public. These sections read as follows:

> 159(1) Everyone commits an offence who
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> (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever,
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> (2) Everyone commits an offence who knowingly, without lawful justification or excuse
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> (a) sells, exposes to public view or has in his possession for such purpose any obscene matter, picture, model, phonograph record or other thing whatsoever,
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> (b) publicly exhibits a disgusting object or an indecent show.
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> 163(1) Everyone commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.
>
> (2) Everyone commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

The application of these two sections is confined to the public exposure of entertainment by means of the words "publication", "public view" and "publicly exhibits" in section 159 and the word "theatre" in section 163.

The manner in which the word "publication" confines the

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[29] *Supra*, footnote 1.

operation of section 159 to the public exposure of material is illustrated by the 1973 Ontario Provincial Court decision in *R.* v. *Schell*.[30] The accused in that case was charged with making obscene matter, to wit, obscene photographs. It was admitted in an agreed statement of facts that the accused made the photographs in question and that the photographs were made and intended exclusively for private use by the accused.

The court first considered the words "for the purpose of publication" in section 159(1)(a) and found that these words modify the verb "possession" only and not the other verbs, including the verb "make" which was involved in this case. The court proceeded, though, to consider the definition of obscenity contained in section 159(8) which reads as follows:

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

The court concluded that the definition of obscenity requires an element of publication, in at least a suggested manner, and that that element was lacking in the case before it. An annotation that follows the case notes that a dismissal of a similar charge on the same basis was also the result in the 1962 British Columbia case of *R.* v. *Modenese*.[31]

The way in which the words "public view" restricts the application of section 159 to public exposure of material is illustrated by a number of decisions which have held the section to be inapplicable where material is exposed to the view of only those who are present at the express invitation of the person presenting it. The case of *R.* v. *Harrison*[32] involved an allegedly obscene film shown at a community hall to a group of some twenty-five male guests. On the outside of the room was a notice clearly indicating that a private party was in progress. The Alberta District Court held that the showing of the film was not a "public view" for the purposes of section 159 of the Code.

In the case of *R.* v. *Vigue*,[33] a British Columbia Provincial Court considered a similar case involving a film shown at a pre-wedding "stag" party at a public house. All but two of those who were present were invited guests. The two, accompanied by their wives, stopped for some beer and were asked by the person at the door if they wished to see some "stag films". The two proceeded

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[30] (1972), 23 C.R.N.S. 94 (Ont. Prov. Ct).

[31] (1962), 38 C.R. 45 (B.C. Prov. Ct).

[32] (1973), 12 C.C.C. (2d) 26, [1973] 4 W.W.R. 439 (Alta Dist. Ct).

[33] (1973), 13 C.C.C. (2d) 381 (B.C. Prov. Ct).

to view the films and one then told his wife to phone the police. The court held that because the two were not properly invited by the groom, the film was exposed to "public view".

In a similar manner, the word "theatre" in section 163 restricts the application of that section to the public presentation of a performance. The word "theatre" is defined in section 138 of the Criminal Code as follows:

> "Theatre" includes any place that is open to the public where entertainments are given, whether or not any charge is made for admission.

Just as the words "public view" excluded from the operation of section 159 a party at which all those who were present were guests by private invitation in *R.* v. *Harrison*, the word "theatre" in section 163 would exclude such a gathering on the basis that it is not "open to the public".

B. *Confinement by Judicial Interpretation.*

The application of sections 159 and 163 has recently been even more closely confined to the public exposure of material by an interpretation of the word "obscenity" itself to take specific account of the circumstances of exposure. This interpretation has been derived from the consideration of "community standards".

The "undue exploitation of sex" in section 159(8) of the Criminal Code was enacted in 1959[34] as a basis for the presumption of obscenity to replace the earlier *Hicklin* test[35] which had originated in 1868 and had been the subject of considerable judicial and academic criticism.[36] In *Brodie, Dansky and Rubin* v. *The Queen*,[37] the first case involving an allegedly obscene publication to be decided by the Supreme Court of Canada after the enactment of the new presumption basis, Judson J., with whom Cartwright, Abbott, and Martland JJ. concurred for a majority of those sitting, set out three considerations which he said were involved in determining whether the exploitation of sex in any given publication was "undue". These considerations, which have been adopted by many courts in subsequent decisions and have been analyzed in an excellent article[38] are 1) the serious purpose of the author or producer; 2) artistic merit; and 3) community standards.

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[34] An Act to Amend the Criminal Code, S.C., 1959, 7-8 Eliz., c.41, s.11, adding s.150(8).

[35] *R.* v. *Hicklin* (1868), L.R. 3 Q.B. 360, at p. 371, 11 Cox C.C. 19.

[36] Referred to by Laskin C.J.C. in *Dechow* v. *The Queen* (1977), 35 C.C.C. (2d) 22, at p. 28 (S.C.C.).

[37] [1962] S.C.R. 681, 32 D.L.R. (2d) 507, 132 C.C.C. 161.

[38] C.S. Barnett, Obscenity and s.159(8) of the Criminal Code (1969-70), 12 Crim. L.Q. 10.

In *Brodie, Dansky and Rubin* v. *The Queen*,[39] Judson J. advanced the proposition that there is at any given time a standard in the community; an instinctive sense of what is decent and what is indecent and recommended that the tribunal of fact consciously attempt to apply that standard.

The Supreme Court of Canada in *Dominion News & Gifts (1962) Ltd* v. *The Queen*[40] adopted the reasoning of Freedman J.A. in the Manitoba Court of Appeal[41] elaborating Judson J.'s guidelines in this respect, that the standards must be of an average of community thinking.

As has been noted earlier,[42] a number of decisions of the courts have established that in the consideration of community standards for the interpretation of obscenity legislation, it is national, not local standards, that apply. In applying that standard, the trier of fact must draw on his own experience in the Canadian community and while expert evidence is admissible, it is the decision of the court what weight to give to it and it may be rejected in its entirety.[43] Expert opinion on community standards has been rejected where it is not supported by reliable data[44] or where experts' testimony is not considered representative of community standards in the nation.[45]

It will be noted that in *R.* v. *Murphy*,[46] the court, while rejecting the opinion expressed by the experts, admitted their evidence as to their observations of performances elsewhere in Canada as relevant to the issue of community standards. Elsewhere, such evidence has been admitted with the observation that it may reflect an acquiescence on the part of public authorities.

A *caveat* might be applied, however, to the consideration of performances or displays of publications elsewhere in that the existence of such performances is relevant only where they do in fact reflect an acquiescence on the part of the public or their authorities. Such a *caveat* might be justified by the fact that the existence of such

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[39] *Supra*, footnote 37, at p. 182 (C.C.C.).

[40] [1964] S.C.R. 251, 42 C.R. 209, [1964] 3 C.C.C. 1.

[41] (1963), 40 C.R. 109, at p. 126, 42 W.W.R. 65, [1963] 2 C.C.C. 103 (Man. C.A.).

[42] *Supra*, footnote 24.

[43] *R.* v. *Sudbury News Service Limited* (1978), 18 O.R. (2d) 428, at p. 435 (Ont. C.A.).

[44] *R.* v. *Murphy* (1972), 3 C.C.C. (2d) 313 (Essex, Ont. Prov. Ct).

[45] *R.* v. *Campbell* (1974), 17 C.C.C. (2d) 130, at p. 136 (Ottawa, Ont. Cty Ct).

[46] *Supra*, footnote 44.

performances or displays is relevant only to the issue of the community's acceptance or tolerance of them.[47]

In recent years, the relevant Canadian community standard has been defined to be the standard of *tolerance* and not the standard of *acceptance*. The phrase "exceeds the accepted standard of tolerance in the community" was coined by McGillivray J.A. in his judgment in the case of *R.* v. *Goldberg and Reitman*[48] and has been applied in numerous judgments since.

In *R.* v. *Prairie Schooner News Ltd and Powers*, Dickson J.A. in the Manitoba Court of Appeal pointed out that many people would find personally offensive, material which they would permit others to read, and that Parliament would not have proscribed as criminal that which was "acceptable or tolerable" according to current standards of the Canadian community.[49]

In *R.* v. *The MacMillan Company of Canada Ltd*, the Ontario County Court considered a charge of publishing an obscene publication. The accused company had published a book entitled "Show Me" consisting of a text illustrated by explicit photographs of nude persons and genitalia. The defence successfully argued that because the book's price and distribution was such as to exclude it from indiscriminate exposure, the community would tolerate its selective use by parents in the sex education of their children. The court concluded that the issue was not so much whether the book was acceptable as whether it was tolerable; that is, whether "a general average of community thinking and belief would entail no objection to the book being seen and read by those members of the community who wished to do so".[50] The same reasoning was applied by the Ontario County Court to a stage performance in *R.* v. *O'Reilly et al.*[51]

The effect of the foregoing line of judicial authority is virtually to restrict the application of obscenity legislation to public exposure narrowly defined as indiscriminate exposure to a public which has not chosen to view it. Beyond the effect of the statutory provisions which prevent its application where exposure is limited to those persons expressly invited by the producer or exhibitor or chosen by the publisher, the judicial interpretation prevents its application where exposure is limited to persons who invite themselves to be

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[47] Even the acquiescence of public authorities was held to be a matter of no weight in *R.* v. *Provincial News Co. Ltd* (1973), 18 C.C.C. (2d) 202, at p. 208 (Alta Dist. Ct).

[48] *Supra*, footnote 24, at p. 190 (C.C.C.).

[49] *Supra*, footnote 7, at p. 269 (C.C.C.).

[50] *Supra*, footnote 24, at p. 299.

[51] [1970] 3 O.R. 429, at p. 444, 1 C.C.C. (2d) 24, at p. 39 (York, Ont. Cty Ct).

exposed to the material. For, though there may be much that the public would find unacceptable themselves, there is far less that they would not tolerate being viewed by other adults who chose to see it.

The substitution of a standard based on what the public will tolerate for one based on what the public finds acceptable is not without its difficulties. The distinction between a community standard of acceptance and one of tolerance does not originate in nor has it been applied by the Supreme Court of Canada. The judgment of Freedman J.A. in *Dominion News* makes no mention of the distinction and the judgment of Judson J. in *Brodie* seems to imply a standard of what the public would accept.

There are instances of judicial comment which suggest that the standard to be applied to what entertainment is *available* for the public to choose should be that of the public as a whole and not that of only those among the public who would in fact choose it. Among those comments is that of Aylesworth J.A., speaking for the majority of the Ontario Court of Appeal in *R.* v. *Cameron* who returns to the statutory measure of "public view" and points out that though only some of the public may choose to see an exhibit, all of the public are solicited to attend.[52]

This early judgment, which predates the line of authority referred to above, reflects a view that the circumstances of exposure are relevant only to the issue of whether or not the statutory requirement that the exposure be a public one is met. The later authority, which views the circumstances of exposure as relevant also to the issue of obscenity itself, might apply the lower standard of tolerance, as opposed to acceptance, if those who attended the display were only those who chose to see it. Thus, where the limited exposure to those who are expressly invited is exempt from the application of the sections by the interpretation in *R.* v. *Cameron*, also exposure to those who invite themselves is exempt by the more recent authority.

A more recent judgment in which the authority referred to immediately above is rejected in favour of the earlier one, reflected in *R.* v. *Cameron*, is that of the Ottawa-Carleton County Court in *R.* v. *Campbell*.[53] In that case the court considered whether the establishment where a performance was given was a theatre and concluded that since the general public was invited to the performance, the establishment was a theatre notwithstanding that an admission price was charged and juveniles were turned away.[54]

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[52] (1966), 49 C.R. 49, at p. 60 (Ont. C.A.).

[53] *Supra*, footnote 45.

[54] *Ibid.*, at p. 137.

Subsequently, referring to *R.* v. *Seguin* and *R.* v. *Murphy*, both of which distinguished between acceptance and tolerance, the court commented on what it said was the undue importance they placed on the fact that only a number of persons in the community chose to attend the performance and pay the admission price. The court concluded that the minority of the community who chose to attend the performances did not set the standard for the nation.[55]

It appears, however, from the recent decision of the Ontario Court of Appeal in *R.* v. *Sudbury News Service Ltd*,[56] that the distinction between a standard of tolerance and a standard of acceptance has been given recognition at least in that court by its reference, with apparent approval, to cases in which it has been applied. Indeed, the Ontario Court of Appeal suggests in its recent decision in *R.* v. *24555 Ontario Ltd*[57] that the standard of tolerance is what is to be conveyed by the phrase "standard of acceptance". Dismissing an appeal from a verdict which resulted when the trial judge treated the two phrases interchangeably, the court stated that the issue was whether the publications were tolerable according to current standards of Canadian thinking, and in that sense acceptable. We will return later to a consideration of whether this test is likely to be adopted by the Supreme Court of Canada.

In determining the community standard of tolerance, the manner and circumstances of the exposure have been held to be a relevant consideration.[58] A consideration of the manner and circumstances of exposure has resulted, in a number of cases, in the observation that the Canadian community may tolerate in a stage performance what it will not tolerate in media of wider exposure.[59] The Ontario Court of Appeal in *R* v. *Sudbury News* relates this principle to the fact that the audience of media such as television, billboards, or magazine covers is not limited to those who choose to view the particular subject matter.[60]

A critical aspect, then, of the manner and circumstances of exposure to be considered in determining the community standard of tolerance with respect to a live performance or a book, is the advertising which confines its audience to the select group of people who choose to view it. In *R* v. *O'Reilly et al.*, the court observed that a review of the play had been posted up near the box office "with the

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[55] *Ibid.*, at p. 142.

[56] *Supra*, footnote 43, at p. 437.

[57] *Supra*, footnote 28.

[58] *R.* v. *Sudbury News Service Limited*, *supra*, footnote 43, at p. 437.

[59] *Supra*, footnote 51, at pp. 444 (O.R.), 39 (C.C.C.).

[60] *Supra*, footnote 43, at p. 435.

intention of bringing to the mind of those who might approach the box office to buy tickets the content and nature of the performance''.[61] Later, in the same decision, the court after distinguishing between the standard of tolerance applied to television and that applicable to the theatre, relied on the fact that the audience was effectively limited to those who consciously chose to see the performance in finding that the community would tolerate the performance.

In *R* v. *Seguin*, another Ontario County Court observed that the theatrical performance involved there was well advertised so that those who attended did so of their own choice and concluded that this was ''less dangerous'' than a novel on public display which might fall into the hands of children.[62] Although the court in that case was applying the now obsolete test[63] from the *Hicklin* case,[64] it found the same consideration applicable. The judgment has been relied upon by other courts where the *Hicklin* test has been applied as either the exclusive test or as a relevant consideration.[65]

In *R* v. *Murphy*, the Ontario Provincial Court concluded its judgment, in which it applied the definition of obscenity in section 159(8) to a theatrical performance, by finding that the accused performer had not exceeded Canadian standards of tolerance. The court said that it was influenced in this finding by the fact that her performances were limited to audiences of adults who paid to see what was clearly advertised as burlesque.[66]

Finally, the same reasoning was applied in relation to a publication in *R* v. *The MacMillan Company of Canada Ltd* where the court concluded that while the book would offend community standards if it were intended and was in fact viewed by children without the guidance of their parents, the packaging and pricing of the book effectively confined its readership to adults and prevented

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[61] *Supra*, footnote 51, at p. 39 (C.C.C.).

[62] *R.* v. *Seguin*, [1969] 2 C.C.C. 150, at p. 156, [1969] 1 O.R. 233, 5 C.R.N.S. 154 (Middlesex, Ont. Cty Ct).

[63] The author takes the liberty of this conclusion based on the decision of the majority of the entire Supreme Court of Canada in *Dechow* v. *The Queen*, *supra*, footnote 36, where it was held that s.159(8) is the exclusive test in relation to publications and the decisions of the minority of four, including the Chief Justice, at p. 26 of the report, that s.159(8) is the exhaustive definition of obscenity regardless of whether or not a publication is involved. The majority of the court in that case declined, at p. 34 of the report, to consider what test is applicable where a publication is not involved.

[64] *Supra*, footnote 35.

[65] *R.* v. *Kleppe* (1977), 35 C.C.C. (2d) 169 (Ont. Prov. Ct); *R.* v. *Small et al.* (1973), 26 C.R.N.S. 77 (B.C.C.A.).

[66] *Supra*, footnote 44.

its being read by children except through the agency of their parents.[67]

It therefore appears that the foregoing line of judicial authority has virtually confined the operation of our obscenity legislation to the public exposure of material where the advertising and other circumstances do not restrict the audience to those adults who choose to be exposed to it. For, although there will be certain classes of subject matter, such as bestiality or necrophilia, which the public may not tolerate being exhibited even to those who choose to see it, the great majority of material would fall outside the scope of such a narrow proscription.

In Ontario, most, though not all, of the judicial authority subscribes to the distinction between what the public generally would accept and what the public would tolerate being viewed by some of its members. It remains to be seen whether this line of authority will be adopted generally by the courts of other provinces and by the Supreme Court of Canada.

Although the Supreme Court has not yet had occasion to direct itself to the issue, it has at least recognized it, albeit in another form. In the recent case of *R.* v. *Verette*,[68] the Supreme Court dealt with an appeal by the Crown from the judgment of the Quebec Court of Appeal quashing a conviction of a nude male go-go dancer for being, without lawful excuse, nude in a public place. The charge arose from the dancer's performance in a hotel where the audience had paid to see him perform. It was argued by the defence that the accused respondent did not fall within the statutory definition of nudity which is contained in section 170(2) of the Criminal Code as follows:

> For the purpose of this section a person is nude who is so clad as to offend against public decency or order.

It was argued that, because the patrons of the hotel who were present at the performance had chosen to see the performance knowing what sort of performance it was, the performance could not be said to be indecent or to "offend against public decency or order".

The Supreme Court was of the view that section 170(2) contained the basis for a presumption, as distinct from a definition, of nudity, and that because the respondent had been totally nude, it was not necessary for him to have offended against public decency in order to offend against the nudity section of the Criminal Code. The court found that the respondent's argument amounted to an allegation that he was not nude because he had not offended against public decency rather than simply an allegation that he had had a

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[67] *Supra*, footnote 24, at p. 321.

[68] (1978), 40 C.C.C. (2d) 273 (S.C.C.).

lawful excuse for being nude in that he was performing in a legitimate theatrical creation.[69] The court in fact was not called upon to decide whether or not such a submission would have been successful based on the respondent's argument because it found that proof of indecency was not required in instances such as this one where the respondent was completely nude, although it appears that some members of the court saw the charge as an attempt by the Crown to sidestep, by choosing this charge, its obligation to prove immorality, indecency or obscenity.[70]

Two observations may be made from the foregoing judgment. The first is that the court identifies the argument that the spectators could not be shocked by the performance, having known what to expect and having chosen to see it, as a submission that the performance had not offended against public decency. To turn this another way, the court recognizes the argument that if a performance is seen only by those who knowingly choose to do so, it may not be indecent.

This does not amount, of course, to an acknowledgment of the same issue in relation to obscenity. Although there had been previous judgments which held the words "immoral, indecent, or obscene" as used in section 163(2) to be synonymous,[71] the Supreme Court of Canada has more recently held in *Johnson* v. *The Queen*[72] that evidence or argument dealing with obscene or indecent performances was irrelevant at least in proving an immoral performance under the same section. It remains to be seen whether the same position will be taken to distinguish the obscene and the indecent.[73] The foregoing notwithstanding, it may now be observed that the court recognizes private choice as a limiting consideration in a determination of cases involving the application of public morality. Moreover, although the court is prepared to apply the nudity section as it finds it, at least some members of the court feel that cases involving public morality should be brought within section 159 or 163 specifically on order to meet such issues.

III. *Censorship Legislation: Confinement by Classification.*

We have noted in Part II, above, the statutory and judicial restriction of obscenity legislation in Canada to the public exposure of material. We have also noted in Part I that censorship is at least capable of

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[69] *Ibid.*, at p. 285.

[70] *Ibid.*, at p. 290.

[71] *R.* v. *Seguin*, *supra*, footnote 62, at p. 156 (C.C.C.).

[72] (1973), 13 C.C.C. (2d) 402, at p. 414.

[73] *R.* v. *Graham and Hewitt* (1977), 3 A.R. 303, at p. 305 (Alta S.C. App. Div.).

being applied more widely to the private as well as public exposure of material. What is in fact the direction of censorship legislation in Canada? Is there a tendency to confine it as well to public exposure and does it distinguish as does obscenity legislation between what the public will accept for its own viewing and what the public will tolerate being viewed by some of its members?

Chief Justice Laskin, speaking for the minority of the Supreme Court of Canada in *Re Nova Scotia Board of Censors et al. and McNeil*[74] surveyed existing provincial censorship legislation in Canada and concluded:

> I have referred to provincial censorship legislation in other Provinces not to pass judgment on any of it but simply to show the various ways in which movie censorship is being handled in the various provinces, the more recent legislation having moved to a classification scheme and to advertising control.

The observation of the Chief Justice is a significant one for the purposes of our discussion and bears some analysis. We may usefully illustrate his observation with the legislative history of censorship in Ontario.

The first Ontario censorship legislation, entitled The Theatres and Cinematographs Act[75] was assented to on March 24th, 1911, and together with similar statutes in Manitoba and Quebec, which were assented to on the same date, it became the first such legislation in Canada. Section 4(1) of the Act provided for the appointment of a Board of Censors with power "to permit the exhibition or absolutely to prohibit or reject all films which it is proposed to use in the Province of Ontario". Section 5 made it an offence to exhibit any films which had not been stamped by the Board of Censors.

As we have noted in Part I, there is nothing inherent in the notion of censorship which restricts its operation to the public exposure of material. Neither was there any statutory confinement to such exposure in the first Ontario legislation. It was not until 1975[76] that the Act was amended to provide the following definition of "exhibit":

> "exhibit", when used in respect of film or moving pictures, means to show film for viewing for direct or indirect gain *or for viewing by the public* and "exhibition" has a corresponding meaning.

Likewise, the first Act provided for no restriction of censorship owing to the circumstances of exposure. It was not until the Act was amended in 1953[77] that provision was made for a classification

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[74] *Supra*, footnote 14, at p. 17.

[75] S.O., 1911, c.73.

[76] S.O., 1975, c.60, s.1, italics added.

[77] S.O., 1953, c.104, s.26(1).

entitled "Adult Entertainment" whereby films which might formerly have been rejected as unsuitable for universal exhibition could be approved subject to prominent advertising of the adult classification. In 1960[78] the further classification of "Restricted" entertainment was added, barring all those under eighteen years of age. The present legislation[79] provides for these classifications in section 3(2) of the Act, which also provides the Board with power to approve, prohibit or regulate advertising in Ontario in connection with any film or the exhibition thereof.

Similar powers to classify films and, accordingly, to restrict the circumstances of their exposure is provided for in the legislation of Quebec,[80] Manitoba,[81] Saskatchewan[82] and British Columbia.[83] Of these, Manitoba, in 1972, removed the power of its censorship board to reject films and restricted the board's function to that of classification.[84]

It is evident from the history of Ontario censorship legislation and that of a number of the other provinces, that censorship in those provinces has been developed in such a manner as to restrict its operation to exposure of films to the public. By means of classification and control of advertising it is now possible for censorship boards to allow films which would be unacceptable for universal viewing by the community to be seen providing that the circumstances are such as to confine their exposures to those who knowingly choose to view them and who are considered to be of sufficient maturity to exercise their choice in a responsible manner.

IV. *The English Experience.*

We have noted that in Canada, obscenity legislation is generally confined to the public exposure of material by applying a more liberal standard to material which is shown only to those who choose to see it. A partial contrast to our approach to obscenity legislation is evident in English law.

In England, it is only in relation to published material that a statutory restriction to public exposure exists. Such restriction as there is stems from the use of the word "publication" itself in The Obscene Publications Act, 1959.[85]

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[78] S.O., 1960-61, c.99, s.12.

[79] R.S.O., 1970, c.459.

[80] An Act Respecting the Cinema, S.Q., 1975, c.14.

[81] The Amusement Act, R.S.M., 1970, c. A 70, as am.

[82] Theatres and Cinematographs Act, 1968, S.S., 1968, c. 76, as am.

[83] Motion Pictures Act, S.B.C., 1970, c.27.

[84] S.M., 1973, c.74. [85] *Supra*, footnote 11.

We have noted that the Ontario decision in *R.* v. *Schell*[86] was an acknowledgment that the word "publication" in section 159 of the Criminal Code rendered that section inapplicable to photographs made and intended exclusively for private use by the maker. In the English decision in *Reference by the Attorney General Under Section 36 of the Criminal Justice Act, 1972*,[87] the same conclusion is reached in relation to The Obscene Publications Act, 1959. In that case, the English Court of Appeal found that the necessary corrupting effect had to be found in relation to persons "likely to read, see, or hear as the result of the publication of the material".[88]

With respect to performances, there is in England no statutory restriction to public performances corresponding to that which exists in Canada in the definition of "theatre" in section 138 of the Criminal Code. In fact, the English Theatres Act, 1968[89] specifically prohibits both private and public exhibitions of obscene performances.

Whereas in Canada judicial interpretation of the definition of obscenity has itself further restricted the application of the legislation to the public exposure of material, judicial interpretation of the definition in England has not. In England, it is the perceived effect of the exposure of material and not its acceptability that determines whether or not it is obscene, and so the fact that people have chosen to be exposed to it is not given the importance that it is in this country.

Section 1(1) of The Obscene Publications Act 1959 provides:[90]

> For the purposes of this Act an article shall be deemed to be obscene if its effect . . . is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

A similar presumption of obscenity is provided in relation to theatrical performances by section 2 of The Theatres Act 1968.[91]

In the application of these presumptions, the critical determination is the effect of the material on "persons who are likely" to be exposed to it. The court is directed to have "regard to all relevant circumstances" and these are the same circumstances of exposure which have been extended judicial recognition in Canada in determining who are likely to be exposed to the material. However,

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[86] *Supra*, footnote 30.

[87] (1976), 62 C.A.R. 255 (C.A.).

[88] *Ibid.*, at p. 262.

[89] *Supra.*, footnote 12, s.2(2).

[90] *Supra*, footnote 11.

[91] *Supra*, footnote 89.

whereas in Canada that determination is then related to the further issues of whether the exposure is public[92] and whether it is tolerable,[93] in England it is related only to the issue of whether the material tends to deprave and corrupt.

We have noted that in Canada the determination, from the circumstances of exposure, whether the exposure is tolerable depends in some measure on whether the exposure is confined to those who choose to see it. In England, the determination of whether the exposure is depraving or corrupting has been held not to depend on whether the exposure is so confined, since even those who choose to be exposed to an article or performance may be corrupted by it.

In England, the nature of the audience to whom material is exposed does in some circumstances have relevance to the issue of whether the material has a tendency to corrupt. In *D.P.P.* v. *A. and B.C. Chewing Gum Ltd*[94] it was established that the persons who were likely to read "battle cards" sold with bubble gum included children of five years and upwards. Upon that fact being established, the prosecution was permitted to call expert psychiatric evidence of whether the effect of such cards on that class of persons was to deprave and corrupt.

In the foregoing case, expert evidence was admitted to show that the material *would* have a corrupting effect on a *class* of persons which it might *not* have on the *general public*. However, the courts in England are generally not prepared to allow evidence to show that the material *would not* have a corrupting effect on a *class* of persons which it *would* have on the *general public*, unless it is shown that the exposure is predominantly to that class of persons. In *D.P.P.* v. *Jordan*,[95] the defence sought to introduce expert evidence of a therapeutic effect of pornography which the court found would ultimately be inconsistent with a finding that the material's tendency was to corrupt. In ruling such evidence inadmissible, the House of Lords referred to the exception made in *D.P.P.* v. *A. and B.C. Chewing Gum Ltd* to the general rule excluding expert evidence of the effect of an article or performance and concluded that the exception did not apply in the case before it because the evidence was not directed to showing that the class of likely readers consisted of or as to a significant number included, sexual abnormals or deviants.[96]

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[92] *R.* v. *Cameron*, *supra*, footnote 52.

[93] *R.* v. *Sudbury News Service Limited*, *supra*, footnote 43.

[94] [1968] 1 Q.B. 159 (Q.B. Div.).

[95] [1976] 3 All E.R. 775, (1977), 64 Cr. App. R.33 (H.L.).

[96] *Ibid.*, at p. 42 (Cr. App. R.).

Assuming that the English courts are prepared to consider a special effect of material in relation to a particular class of persons, it is only where the exposure is effectively confined to that class of persons that the court would be likely to avoid the finding of obscenity which would result from the material's effect on the general public. For wherever there is a tendency to corrupt a "significant proportion" of persons likely to be exposed, and what is a significant proportion is a matter left entirely for the jury to decide, a finding of obscenity must follow.[97]

Yet, the fact that a particular class of persons are those most likely to choose to be exposed to material will not result in the court's concluding that persons outside of that class do not represent a significant proportion of persons likely to be exposed. In *D.P.P.* v. *Whyte and another*,[98] the trial court made findings as to the likely readers of books that were the subject of prosecution under The Obscene Publications Act, 1959. They were, that young persons were possible but not probable readers and that the persons "likely" or "most likely" to purchase them were males of middle age and upwards. After noting these findings, Lord Wilberforce, speaking for the majority in the House of Lords, rejected the validity of an approach which seeks the "most likely readers" and then rejects other than the most likely as not likely. He then pointed out that the Act neither requires nor permits the identification of a category of most likely readers.[99]

Even if the court were prepared to characterize those persons who were likely to read a publication or watch a performance as a peculiar class subject to a distinct standard of corruptability, it appears that it would not conclude that because they chose to be exposed to the material they were not likely to be corrupted, or further corrupted, by it. Lord Wilberforce, in *D.P.P.* v. *Whyte* also remarked on the proposition that those who were regular patrons of the store were less likely to be affected by the books by saying that the Act was equally concerned with protecting the less innocent from further corruption.[100]

Not only is the court not prepared to find that those persons who choose to be exposed to material are less likely to be affected by it, it is also unwilling to entertain evidence from the actual viewers or readers as to the effect the material had upon them. This was the

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[97] *R.* v. *Calder & Boyers Ltd*, [1969] 1 Q.B. 151, [1968] 3 W.L.R. 974, [1968] 3 All E.R. 644 (C.A.).

[98] (1973), 57 Cr. App. R. 74, [1972] A.C. 849 (H.L.).

[99] *Ibid.*, at p. 80 (Cr. App. R.).

[100] *Ibid.*, at p. 82 (Cr. App. R.).

result in *R.* v. *Stamford*[101] where the defence sought to call the addressees of material that was alleged to be indecent under the Post Office Act.[102] The ruling of such evidence as inadmissible was approved of by Viscount Dilhorne in his judgment in *D.P.P.* v. *Jordan*,[103] where he placed such evidence in the same category as expert evidence in relation to prosecutions under The Obscene Publications Act, 1959 and held it to be equally inadmissible.

The foregoing survey of judicial authority should not cause one to conclude that because the effect of an article or performance determines whether or not it is obscene, the community standard of acceptance or tolerance has no bearing in England upon the issue of obscenity. It has been noted above that apart from cases in which a peculiar class of persons is involved, expert evidence is not admissible on the issue of whether the effect of a matter is to deprave and corrupt. Indeed, the judicial policy of leaving that issue to the jury unassisted by expert evidence has been the subject of judicial comment[104] and academic criticism.[105] Yet, it is precisely the importance accorded to community standards which prevents the issue of whether the material's tendency is to deprave and corrupt from becoming the subject of expert evidence and which keeps it strictly within the purview of the jury.

In *D.P.P.* v. *Knuller Ltd*,[106] Lord Morris of Borth-y-Gest said that Parliament, in assigning to the jury the task of deciding whether an article tends to deprave and corrupt, had "doubtless done so with the knowledge that there is every likelihood that the collective view of a body of men and women on a jury will reflect the current view of society". In *D.P.P.* v. *Jordan*, Bridge L.J. in the Court of Appeal, after observing that society appeared to tolerate a greater degree of sexual candour than it did in the past, concluded that it was the jury's task "to determine where the line should be drawn".[107]

In the foregoing passages, the courts in England have recognized that community standards of acceptance or tolerance are at least implicitly a guiding force in arriving at a determination of what is obscene. However, in England those standards are not, as they are in Canada, a criterion in themselves, but must be applied through an

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[101] *R.* v. *Stamford*, [1972] 2 W.L.R. 1055 (C.A.).

[102] 1969, c.48, as am.

[103] *Supra*, footnote 95, at p. 45 (Cr. App. R.).

[104] *D.P.P.* v. *Neville et al.* (1972), 56 Cr. App. R. 115, at p. 123 (C.A.).

[105] F. Bates, Pornography and the Expert Witness (1977-78), 20 Crim. L.Q. 250.

[106] (1972), 56 Cr. App. R. 633, at p. 649, [1973] A.C. 435, at p. 462 (H.L.).

[107] *Supra*, footnote 95, at p. 39 (Cr. App. R.).

ostensibly objective determination of whether the tendency of a matter is to deprave and corrupt.

On the one hand, expert evidence is not permitted on the issue of whether there is such a tendency, because the real issue is one of community standards. On the other hand, the courts are unable to elaborate the issue of community standards because ostensibly the issue is one of the material's effect.

It is the view of the author that the absence of an equivalent "objective" issue in Canada has allowed on the one hand, expert evidence as to the real issue of community standards and, on the other, an elaboration of community standards into what is acceptable to the public at large and what the public will tolerate being viewed only by those of its members who choose to do so.

Conclusion

The purpose of the foregoing discussion has been to examine the definition of obscenity and the way in which that definition is capable of taking account of the respective roles of public and private choice in the application of public morality to our various forms of entertainment. We have noted a line of judicial authority which has developed in recent years to give effect to the circumstances of exposure so as to distinguish between what the public will accept for its own viewing and what the public as a whole will tolerate being viewed by those of its members who wish to do so.

It is the view of the author that that line of judicial authority is a constructive one which gives effect to community standards in such a way as to protect the public with the least possible infringement upon the individual's freedom of choice. Its benefits are highlighted by the British experience in which the evolution of community standards has not been given as explicit a judicial recognition as it has been in Canada since the replacement of the *Hicklin* test with the definition of obscenity contained in section 159(8) of the Criminal Code. Finally, it is the observation of the author that this trend in the application of obscenity legislation is consistent with and shares a common direction with the development of censorship in Canada.