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News from the Front--The War on Obscenity and the Death of Doctrinal Purity

Alan Young
Osgoode Hall Law School of York University, ayoung@osgoode.yorku.ca

NEWS FROM THE FRONT - THE WAR ON OBSCENITY AND THE DEATH OF DOCTRINAL PURITY*

BY ALAN YOUNG**

**Professor, Osgoode Hall Law School, York University.

I. INTRODUCTION

In many parts of the world human life is sacrificed daily in never-ending wars. In North America we have been fortunate to escape the horrors of armed conflict, but here we fight another war. This decade has seen governments arming themselves for a frontal attack on an enemy that inspires fear in some and indifference in others. We have declared war on pornography – we have begun the battle against this intangible but redoubtable enemy.

The debate concerning the propriety of using state coercion to combat obscenity has been so thoroughly canvassed by others[1] that it needs no further exposition. Notwithstanding my views on the precarious legitimacy of using the criminal sanction to battle obscenity I do not wish to take this opportunity to recapitulate the arguments already presented regarding the legitimacy of the battle. Instead of attacking the legitimacy of the battle I choose rather to concede the inevitability of unjust wars, but hope to persuade others to abandon the combative enterprise by focussing the discussion upon the practical and theoretical effects of any war – the casualties.

To illustrate the problem of casualties of this legal war I will comment upon and criticize the most recent judicial pronouncement on the obscenity issue, *R.* v. *Metro News*.[2] It will hopefully become apparent that our judiciary is not serving its traditional task of

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[1]For a brief sampling of the literature see H. Clor, *Obscenity and Public Morality* (Chicago: Univ. of Chicago Press, 1969); J.C. Dybikowski, "Law, Liberty and Obscenity" (1972) 7 U.B.C. L.Rev. 38; I.A. Hunter, "Obscenity, Pornography and Law Reform" (1975) 2 Dalhousie L.J. 482; W. Berns, "Pornography vs. Democracy: The Case for Censorship" (1971) 22 Pub. Interest 3; D. Copp & S. Wendell, eds., *Pornography and Censorship: Scientific, Philosophical and Legal Studies* (Buffalo, N.Y.: Prometheus Books, 1983); S. Braun, "Freedom of Expression v. Obscenity Censorship: The Developing Canadian Jurisprudence" (1986) 50 Sask. L. Rev. 39; K.E. Mahoney, "Obscenity and Public Policy: Conflicting Values - Conflicting Statutes" (1986) 50 Sask. L. Rev. 75; K.R. Feinberg, "Pornography and the Criminal Law" (1979) 40 U. Pitt. L. Rev. 567 ; L. Lederer, ed., *Take Back the Night: Women on Pornography* (New York: Morrow, 1980); V. Cline ed., *Where Do You Draw the Line* (Provo, Utah: Brigham Young Univ. Press, 1974); J. Bakan, "Pornography, Law and Moral Theory" (1985) 17 Ottawa L. Rev. 1.

[2](1986), 53 C.R. (3d) 289 (Ont. C.A.); leave to appeal to S.C.C. dismissed, 57 O.R. (2d) 640.

operating as a moral brake[3] on the burgeoning legislative creation of criminal offences. Rather it is contributing to an unprincipled growth in criminal liability. In combatting a billion dollar pornography industry the legislature has amassed a vast arsenal of sanctions. This is an expected reaction from a law-making authority that responds on the basis of contingent policies and the ebb and flow of public opinion. We are in an era of pronounced public dissatisfaction with the distribution of obscene material and the legislature responds in a knee-jerk fashion – they rely on the panacea of increased criminalization. In the wake of these developments we must look to the judiciary to apply consistent and coherent principles that place some restraint upon overly rapid changes in the criminal law while still maintaining a modicum of doctrinal purity in the law.

Although it may be a product of misplaced idealism we do believe that the judicial branch of government is the best suited institution to guard against encroachments upon liberty.[4] Even if we assume that the legislature is justified in battling pornography by sanction, it must be agreed that there should be some constraints upon this activity. We may be in the midst of a war, but the peculiar nature of a legal battle precludes resort to the old adage that "all is fair in love and war." There are established principles of culpability that constrain the operation of the criminal law, and without the orderly development of these principles the legal battle is transformed into sheer domination. The *Metro News* case illustrates how a court can become immersed in the battle to such a degree that principles are replaced by politics. The autonomy of law may be a myth, yet this is no reason for abandoning the aspirational thrust of the myth.

In replacing principle with politics the courts have given birth to the first two casualties of this war. The first casualty is the innocent shopkeeper or magazine distributor who is convicted

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[3]The term is taken from G.P.J. McGinley, "An Inquiry into the Nature of the State and its Relation to the Criminal Law" (1981) 19 Osgoode Hall L.J. 266 and from P. Arenella, "Rethinking the Functions of Criminal Procedure" (1984) 72 Geo. L.J. 185 .

[4]Presumably this assumption forms the basis for the creation of constitutional guarantees that are enforced by the judiciary. See J.H. Choper, *Judicial Review and the National Political Process* (Chicago: Univ. of Chicago Press, 1980).

notwithstanding the absence of proof of culpability. The second casualty is considerably more abstract yet it provides the theoretical underpinning for the first. This casualty is legal doctrine itself. A coherent and internally consistent legal doctrine is sacrificed for expediency. In *Metro News* the relevant doctrines that are sacrificed for the "public good" are the related doctrines of mistake of law and officially-induced error.

In developing this theme of judicial complicity in a political battle it will be necessary to begin this paper by outlining some of the battles that have been fought in the political arena. In this initial portion of the paper it will be shown that the judiciary has been unable to refine and clarify the legislative norm — the process of clarifying the contours of the offence becomes an impossible task when a legislature undertakes to combat a problem without a clear consensus as to the harm that is sought to be avoided. Once it is shown that judicial refinement of the norm is an unattainable safeguard the focus of the paper will shift from considering the offence of obscenity to a consideration of sustantive criminal law defences that are commonly raised in the context of obscenity prosecutions. The aim of the discussion is to show how a court conceals its considerations of expediency behind a veil of a traditional normative analysis of culpability. In particular, the evolution of the law has been in the direction of relaxing the requirements for defences of mistake of law and officially-induced error; however, the battle cries that emanate from the legislative and executive branches of government have disturbed the orderly development of these defences.

A. *The Strategic Defence Initiative*

Governments are preparing themselves to attack an industry that "has gone from a low yield, covert business to a highly visible multi-billion dollar industry."[5] In the past two years the legislative response to the regulation of obscenity has been swift. In Canada the government has recently introduced bills that define pornography

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[5]See Commission, *infra*, note 17 at 1353; see Committee, *infra*, note 14 at 66.

so as to cover virtually every form of explicit portrayal of sex.[6] These all-encompassing definitions trigger offences with substantially increased penalties.[7] In the Parliamentary debates upon this new legislation the response to the criticism that this new statutory scheme places a "giant chastity belt over Canadian sexuality"[8] has been the assertion that "as legislators we have an onerous responsibility to enact legislation which will help protect the social and moral fabric of this country."[9]

The zeal with which governments respond to the problem of obscenity is in a perpetual state of ebb and flow. Obscenity appears to be the type of issue that falls in and out of vogue as a topic of discussion. It is difficult, if not impossible, to account for the wax and wane of moral intensity in this area; however, it is apparent that periodically government dons the garb of the moral entrepreneur in reaction to an incident or incidents of public notoriety. For example, after the brutal slaying of Kimberly Rabot by a teenager who had an elaborate collection of pornographic material depicting bondage and torture, the third session of the thirtieth Parliament presented no less than ten bills that recommended increased legal restrictions on obscenity.[10] What is curious about the current proposals in 1986 is that one cannot link the current initiative to a sensational incident that has drawn public concern. Both in the

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[6]Bill C-114, *An Act to amend the Criminal Code and the Customs Act*, 1st Sess., 33d Parl., 1984-85-86, cl.1. This bill was soundly criticized as being overbroad and was recently replaced by Bill C-54, *An Act to amend the Criminal Code and other Acts in consequence thereof*, 2d Sess., 33d Parl., 1986-7. This more recent bill has also attracted severe criticism as being far too drastic a response.

[7]For most of the offences the maximum penalty has been raised from two years to five years.

[8]H.C. Debates, vol.X, 1st Sess., 33d Parl., (16 June 1986), at 14443.

[9]*Ibid.* at 14530 (17 June 1986).

[10]For a discussion of the Rabot murder, see: "Human Rights May Need Curbs" *The [Toronto] Globe and Mail* (5 December 1975) at 8. A coroner's inquest into this incident led to a jury recommendation that "pornography should be defined as showing any part of the genital area of the human body with a complete ban on such publication." For a summary of some of the bills proposed after the Rabot incident see, Canada H.C., Standing Committee on Justice and Legal Affairs, "Report on Pornography" No. 18 (22 March 1978). The Fraser Committee notes that in the last decade some forty bills have been introduced in the House of Commons, see, Committee, *infra*, note 14 at 131.

United States and Canada there has been a complete volte-face in less than 15 years. The early 1970s exhibited a tone of restraint and mild tolerance to the proliferation of obscene materials. The Law Reform Commission of Canada adopted the Millian position that criminal law is a blunt instrument that should only be used in cases of demonstrated harm to others — the Commission exhibited pronounced skepticism as to the propriety of extensive criminalization of obscenity.[11]

The American position was clearly stated in the 1970 Report of the President's Commission on Obscenity and Pornography.[12] The majority of the Commission concluded that there is "no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of deliquent or criminal behaviour among youth or adults." [13] This report was an affirmation of conventional liberal values that stress government intervention only in the face of tangible harm to life, liberty, or security. By narrowly drawing the list of protected interests and recognizable harms the liberal position secures the individual from frequent government intrusion through legal regulation.

The tide has now turned. In June 1983 the Government of Canada established the Special Committee on Pornography and Prostitution to consider, *inter alia*, "the problems of access to pornography, its effects and what is considered to be pornographic in Canada."[14] Similarly, in the United States The Attorney General's Commission on Pornography was constituted in February 1985 to study, *inter alia*, "the dimensions of the problem of pornography." In 1985 the Fraser Committee released its report to the government of Canada and its recommendations can be described as moderate. The Committee was clear and emphatic in stating that it "is not

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[11]Law Reform Commission of Canada, *Limits of Criminal Law* (Ottawa: Information Canada, 1975).

[12]United States Commission on Obscenity and Pornography, *The Report of the Commission on Obscenity and Pornography* (New York: Random House, 1970).

[13]*Ibid.* at 32.

[14]Report of the Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada*, Vol. 1 (Ottawa: Dept. of Justice Canada, 1985) at 5.

prepared to state, solely on the evidence and research it has seen, that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or in the disintegration of communities and society."[15] Accordingly, the Committee did not recommend sweeping changes in the law, but it did recommend some vital amendments with a view to having the law regulating obscenity accommodate the interests of equality and dignity. Notwithstanding the temperate approach of the Committee, the government of Canada has put forward legislation that significantly expands the scope of the legal regulation of obscenity.[16]

In the United States, the Attorney General's Commission released their report in July 1986. Unlike the Fraser Report and the American Commission of 1970, this commission felt that pornography does bear a causal relationship to the primary harm of engendering criminal conduct. The 1986 Commission discounted the findings of its predecessor by claiming that the pornographic material available today is substantially more explicit and violent than the material circulating in 1970.[17] The commission did not recommend wholesale changes in the law, due to perceived constitutional constraints, but it did strongly recommend that high priority be given to the prosecution of obscenity,[18] that the judiciary begin to sentence offenders more harshly (i.e. suggesting incarceration for repeat offenders),[19] and that citizens involve themselves in the battle by protesting, picketing, and launching civil suits.[20]

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[15] *Ibid.* at 99.

[16] Not only has the Canadian government disregarded the moderate recommendations of a government-sponsored committee but in 1979 the British government ignored the recommendations of the Williams Committee which had for the most part adopted a regulatory approach, and not a prohibitory approach to the problem. For an interesting discussion of the fate of the Williams Committee in England see, A.W.B. Simpson, *Pornography and Politics: A Look Back to the Williams Committee* (London: Waterlow, 1983).

[17] U.S. Dept. of Justice, *Attorney General's Commission on Pornography, Final Report* (Washington, D.C.: U.S. Gov't. Print Off., 1986) at 324.

[18] *Ibid.* at 435-41.

[19] *Ibid.* at 441.

[20] *Ibid.* at 419-29.

These two reports have brought the obscenity issue back in the spotlight. For the most part, the response within the North American community (if it can be called such) has been to suppress and to toughen enforcement and sanctions. The reversal in attitude cannot be traced to sordid incidents, such as the Kimberly Rabot murder, nor can it be simply traced to a feeling of "enough is enough" in light of the increasing availability of pornographic material in the last fifteen years.

The re-emergence of pornography as a heated political and social issue may be partially attributed to recent claims that have been advanced by leading feminist scholars. This critical school of thought has rekindled interest in this issue by moving beyond the sterile debate between conservative advocates of legal moralism and liberal advocates of the Millian distinction between self- and other-regarding harm. The feminists have added a new component to the debate with their characterization of pornography as an insidious form of political ideology that contributes to the political and social subjugation of women.[21] Unlike the conservative school of thought that is looking to traditional moral values such as sexual modesty and promoting the family unit, the feminists perceive pornography as a form of hate literature that encourages the objectification and commodification of women that inevitably leads to substantive inequality in social and political institutions.

The feminist point of view has been influential having been recognized by the Fraser Report and in some cases,[22] but it is unlikely that the compelling arguments emerging from this critical school are responsible for the resurrection of the attack on obscenity. In fact, many feminists are clearly against the notion that increased criminalization is the answer to the problem.[23] It is far more likely that the current battle is more a product of the contemporary ascendency of conservative thought. Political and

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[21]See, e.g. A. Dworkin, *Pornography, Men Possessing Women* (New York: Perigree, 1981); C. Mackinnon, "Not A Moral Issue" (1983-84), Yale L. & Pol. Rev. at 321.

[22]See Committee, *supra*, note 14 at 18-27; S. Noonan, "Preferring the Feminist Approach of the British Columbia Court of Appeal to that of the Fraser Committee" (1985) 45 C.R.(3d) 61.

[23]See, V. Burstyn, ed., *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985).

social discourse has become infiltrated with notions of "community parochialism ... economic reductionism ... visionary materialism and civic passivity."[24] Most significantly, a conservative orientation invariably leads to reliance upon increased criminalization as conservative rhetoric commonly contains the imagery of crime control as war:

> Concerning conservatism, two points might be worth making, by way of illustration. Firstly, the increasing use of military metaphors and phrases by leading conservative writers and politicians has been noted. It is now "crime-fighting" rather than "peace-keeping", the "war" against crime and disorder, "battles" to be won and lost, "emergency" situations. "You here today are in the front line of the battle against crime," – as the Home Secretary declared in his speech to the Police Federation in 1984.[25]

The primary weapon in the war on obscenity remains the catalogue of offences found in Part IV of the *Criminal Code*. Section 159 prohibits the making, printing, publishing, circulating, selling, and exposing of obscene material. Section 160 does not contemplate prosecution but authorizes an *in rem* proceeding to determine if the obscene material is to be destroyed. Section 163 prohibits the giving of an immoral, indecent, or obscene performance. Other miscellaneous offences exist in this part of the *Code*,[26] but this extensive catalogue of criminal offences does not exhaust the available weapons. All levels of government, federal, provincial, and municipal have entered the battle.

On the federal level we find authority in the *Broadcasting Act*[27] empowering a commission to make regulations prohibiting the

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[24]B. Barber, "A New Language for the Left: Translating the Conservative Discourse" (Nov. 1986) Harper's Magazine at 47. Barber defines communal parochialism as the incompatibility between local community and universal justice; visionary materialism as meaning that national happiness and security can be bought; and civic passivity as requiring that democracy operate solely as the governing of clients by an elected elite.

[25]R.N. Berki, *Security and Society: Reflections on Law, Order and Politics* (London: Dent, 1986) at 232. The paradox of the conservative war on crime has been characterized as "in truth a community can no more wage war on its internal ills than an organism can wage war against its own constitutional weaknesses." See, E. Bittner, *The Functions of the Police in Modern Society* (Washington, D.C.: U.S. Gov't. Print. Off., 1970) at 48.

[26]Including s. 164 (mailing obscene material), s. 169 (committing indecent act), s. 170 (being nude in public).

[27]*The Broadcasting Act*, S.C. 1967-8, c. 25.

broadcasting of obscene, indecent, or profane language[28]. The *Canadian Post Corporation Act*[29] enables the Postmaster General to make prohibitory orders when he suspects that the mail is being used for the commission of criminal offences.[30] The *Customs Tariffs Act*[31] enables the Crown to destroy prohibited importations which include obscene material. There is even a provision in the *Trade Marks Act*[32] for the prohibition of trademarks for "scandalous, obscene and/or immoral word or device."[33]

At the provincial level legislation in all provinces deals with the classification and censoring of films and videotapes.[34] At the municipal level there has been a recent proliferation of bylaws attempting to regulate obscene material through zoning requirements and bylaws regulating the sale of obscene material.[35] The courts have approved of the efforts of provincial and municipal governments but often these efforts are thwarted by requirements of constitutional law. The municipal governments cannot duplicate the federal prohibitions for obvious constitutional reasons, and their

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[28]*Broadcasting Act Regulations*, C.R.C., Vol. IV, c. 379, at 2559; C.R.C., Vol. IV, c. 380 at 2582; C.R.C., Vol. IV, c. 381 at 2606.

[29]S.C. 1980-81-82, c. 54.

[30]*Ibid.* s. 41(1).

[31]*Customs Tariffs Act*, S.C. 1985, c.12.

[32]R.S.C. 1970, c. T-10.

[33]*Ibid.* s. 9(1)(j).

[34]In Ontario this process is governed by the *Theatres Act*, S.O. 1984, c. 56; for a discussion of provincial censorship laws see, N. Boyd, "Censorship and Obscenity: Jurisdiction and the Boundaries of Free Speech" (1985) 23 Osgoode Hall L.J. at 37.

[35]For a listing of relevant municipal by-laws see, Mahoney, *supra*, note 1 at 100, n. 132. Some cases that discuss the operation of these varied by-laws are *Red Hot Video Ltd.* v. *City of Vancouver* (1985), 18 C.C.C. (3d) 153 (B.C.C.A.); *Re Information Retailers Association of Metropolitan Toronto* (1985), 22 D.L.R. (4th) 161 (Ont. C.A.); *Re Hamilton Independent Variety & Confectionary Stores Inc. and City of Hamilton* (1983), 143 D.L.R. (3d) 498 (Ont. C.A.); *Re Shalmark Hotels Ltd.* (1981), 32 O.R. (2d) 129, 121 D.L.R. (3d) 415 (Div. Ct.); *Nordee Investments* v. *Burlington* (1984), 48 O.R. (2d) 13 D.L.R. (4th) 37 (C.A.); *Brockett* v. *Spokane Arcades, Inc.* 105 S. Ct. 2794 (1985); *American Booksellers Association Inc.* v. *Hudnut*, 598 F.Supp. 1316 (1984), 771 F. 2d 232; aff'd 106 S. Ct. 1172; *City of Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986).

attempts to carve out a unique jurisdiction for themselves have often resulted in bylaws being struck down as void for vagueness.[36] Nonetheless, the municipal governments have been persistent in their efforts to join the fight.

The vast arsenal of legislative sanctions rely upon disparate definitions of the targeted prohibited material – some statutes proscribe obscene material while others proscribe indecent, immoral, or scurrilous material. The inevitable result has been judicial decisions that are confused and inconsistent in their application of the varied statutory standards.[37] Not only has the legislature been unresponsive to the problem of judicial inconsistency, but it has also not been troubled by judicial pronouncements that standards such as immoral and indecent are devoid of meaning and unduly vague. The judiciary on many occasions has alerted the government to the problem of vagueness;[38] however, despite the implications that vague prohibitions have for the principle of legality and the rule of law, the legislature has not been moved to action in the absence of judicial invalidation of the statute.[39]

It may appear odd that a war could be conducted without effective coordination, but the legislatures seem to believe that inconsistent sanctioning is the best defence as presumably this uncertainty will keep the enemy offguard. The central question that must now be addressed is how the judiciary will respond to the public pressures to "get tough" with violators of the obscenity laws.

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[36]See cases cited *supra*, note 35.

[37]For a selection of cases struggling with different standards see, *Priape Engineering et. al.* v. *Dep. Min. of Revenue* (1979), 24 C.R. (3d) 66 (Que. S.C.); *R.* v. *Pei-Yuan* (1973), 20 C.R.N.S. 37 (B.C. Co. Ct.); *R.* v. *Daylight* (1972), 18 C.R.N.S. 369 (Sask. Mag. Ct.); *R.* v. *294555 Ltd.* (1978), 39 C.C.C. (2d) 352 (Ont. C.A.); *R.* v. *Pelletier* (1985), 27 C.C.C. (3d) 77 (Que. S.C.); *Johnson* v. *R.* (1974), 40 D.L.R. (3d) 215 (S.C.C.); *R.* v. *Pink Triangle Press* (1979), 45 C.C.C. (2d) 385 (Ont. Prov. Ct.), rev'd by 51 C.C.C. (2d) 485 (Co. Ct.) and 58 C.C.C. (2d) 505 (C.A.).

[38]See, e.g., *Pink Triangle, supra*, note 37; *R.* v. *Cinema International* (1981) 13 Man. R. (2d) 335 (C.A.); *R.* v. *Glassman* (1986) 53 C.R. (3d) 164 (Ont. Prov. Ct.); *R.* v. *Doug Rankine Co. Ltd.* (1983) 36 C.R. (3d) 154 at 173 (Ont. Co. Ct.).

[39]For example, in *Reference Re Luscher and Dep. Min. Rev. Cda.* (1985) 45 C.R. (3d) 81 (F.C.A.) the court invalidated a provision of the *Customs Tariff Act* that proscribed immoral and indecent material. Despite the usual "legislative inertia" Parliament was able to respond to this invalidation within 3 months by amending the legislation so that it incorporated the *Criminal Code* definition of obscenity.

Is it possible for the judiciary to remain neutral and impartial in the face of mounting pressure? How can the courts apply laws consistently when the laws are replete with legislative inconsistencies and unanswered questions?

II. THE HARM PRINCIPLE AS A LIMITING PRINCIPLE

The judiciary has three options to choose from in responding to the problem of applying obscenity laws. First, the courts could maintain a stance of complacency and merely apply the law without endeavoring to infuse consistency and coherency into the process. Second, the courts could undertake to refine the norm by clarifying the scope of the sanction and by providing guidelines as to when material falls beyond the pale. Third, the court could leave the norm intact in its rather confused state, but then offset the potential injustice that may arise by applying defences and interpreting culpability in a liberal and remedial manner. The first option is rejected for it fails to take the requirements of principled adjudication seriously. The third option is a viable one; however, it is best not to distort general principles of culpabililty for particular offences except as a last resort if clarification and refinement of the norm is impossible. Accordingly, it is necessary to discuss the potential success of the second option before turning to the discussion of defences.

The process of judicial refinement of a norm is not a mechanical exercise. For the most part we have abandoned the notion that adjudication is completely rule-governed in that all cases can be determinately resolved by a syllogistic application of rules.[40] We recognize that any given rule can give rise to a prenumbral area

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[40]There are few writers, if any, who would contend that law is a system of gapless, determinate rules. This belief was laid to rest by the legal realists. For a useful discussion of the realist movement and its progeny, see, J. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale L.J. 1; J. Stick, "Can Nihilism be Pragmatic?" (1986) 100 Harv. L. Rev. 332; G. Peller, "The Metaphysics of American Law" (1985) 73 Calif. L. Rev. 1151. But, one need not be a radical theorist to reject the theory of the determinancy of rules: see O. Fiss, "Objectivity and Interpretation" (1982) 34 Stan. L. Rev. 739 for a moderate view on the lack of determinancy within a body of law.

of uncertainty[41] and at this point the great debate sets in as to how judicial decisions are constrained in this area of boundless possibility. There may be many considerations that operate to constrain and structure judicial discretion and without claiming primacy for any given consideration it is submitted that adjudicative discretion is commonly constrained by the application of general principles that have been given weight through the process of historical accretion. The exercise is one of securing coherence of the rules within the gravitational pull of these principles.[42] Through such an exercise the courts may achieve the refinement and clarification of a legislative norm.

One principle that has an established historical pedigree, and that is directly relevant to the obscenity issue, may be called the "harm principle". Liberal political theory has constructed liberty-limiting principles to define the legitimate occasions for legislative proscription of conduct. Liberal legality advocates the harm principle, that is, that legislative intervention can only be justified on the basis of preventing harm. Harm is an elusive concept. It is naive to believe that Mill's dichotomy of self-regarding versus other-regarding harm[43] is an acceptable starting point. Harm may be defined deontologically as conduct impairing welfare interests or foundational interests that are not contingent upon social recognition.[44] Or harm may be defined in a utilitarian fashion as impairment of legally recognized interests that find recognition on the basis of social utility.[45] Under either formulation there have

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[41]H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 132.

[42]See, R.M. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 110-23; for a general discussion of coherence theories of moral and legal reasoning see M. Hanen, "Justification as Coherence" in M. Stewart. ed., *Law, Morality and Rights* (Hingham, M.A.: Klever Boston Inc., 1983); K.J. Kress, "Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity and the Linear Order of Decisions" (1984) 72 Calif. L. Rev. 369; Stick, *supra*, note 40.

[43]J.S. Mill, *On Liberty*, ed. by R. McCallum (Oxford: Blackwell, 1946) at 8-13.

[44]J. Feinberg, *Harm to Others* (New York: Oxford Univ. Press, 1984) at 31-43, 55-64; J. Kleinig, "Crime and the Concept of Harm" (1978) 15 Am. Phil. Q. 27.

[45]A. Eser, "The Principle of Harm in the Concept of Crime" (1965-66) 4 Duq. L. Rev. 345 at 376-417.

been four basic groups of harms that have been historically recognized: 1) violation of interest in retaining or maintaining what one is entitled to have (i.e. life, liberty, security, and property); 2) offences to sensibility; 3) impairment of collective welfare; 4) violation of some governmental interest.[46] The intractable problem presented by obscenity is that justification for the prohibition through criminal sanction has been presented by claiming that obscenity engages all, or some combination, of this group of four recognized harms.

It matters not whether we adopt Mill's conception of the harm principle or whether we expand his notion of liberal legality to encompass legal paternalism, legal moralism, or perfectionism.[47] Under any conception it is still necessary for the legislature to identify some discrete harm which can justify the use of state coercion. In the context of obscenity there are two approaches that the judiciary can adopt to insure compliance with the harm principle. Judicial review of legislation may be warranted if " a)... the outlawed conduct is essentially not capable or likely to do any harm to legal interests, and b) the outlawed conduct is generally capable of doing harm, but in the specific case at bar the proscribed harm was in fact not accomplished."[48] The first situation calls for judicial invalidation and the second situation is an interpretive exercise calling for the reading down of the statute so as not to capture the marginal conduct.

In this country it is debatable as to whether the judiciary is empowered to invalidate legislation that outlaws harmless conduct, but even if the courts could invalidate the obscenity provisions it is doubtful that they would find that these provisions refer to conduct that is essentially not capable of doing harm. Despite the lack of consensus on harm the court would probably adopt the deferential

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[46]H. Gross, *A Theory of Criminal Justice* (New York: Oxford Univ. Press, 1979) at 119-22.

[47]See Feinberg, *supra*, note 44 at 12-13 for definitions of these terms: legal paternalism -- "it is reasonably necessary to prevent harm to the very person it prohibits from acting, as opposed to others"; legal moralism -- "it is reasonably necessary to prevent inherently immoral conduct whether or not such conduct is harmful or offensive to anyone;" perfectionism (at 27) -- "it is always a good reason in support of a proposed prohibition that it is probably necessary for the improvement (elevation, perfection) of the character."

[48]Eser, *supra*, note 45 at 415.

approach of the U.S. Supreme Court regarding obscenity: "it is not for us to resolve empirical uncertainties underlying state legislation... from the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions."[49] The difficulty posed by obscenity is not the total absence of potential harm, but the myriad harms it purports to engage. It may not be the traditional function of a court to resolve the debate as to whether obscenity causes crime, or whether obscenity contributes to the subjugation of women, or whether obscenity endangers our moral fibre – but in interpreting the rather bald proscriptions contained in the *Criminal Code* and elsewhere is it possible for the judiciary to fasten upon one discrete harm to employ as an interpretive guide in determining whether or not a given fact situation is properly captured by the prohibition?[50]

An identification of the perceived harm that underlies a criminal prohibition is an essential requirement for principled adjudication that can extend beyond a sterile, formal application of the statute. It is the belief of some positivist theorists, that legislative rules operate rather independently of their justifying reasons, and as such the courts need not resort to examining the justifications for the creation of offences (i.e. the harm principle). Joseph Raz concludes:

> Thus norms have a relative independence from the reasons which justify them. In order to know that a norm is valid we must know that there are reasons which justify it. But we need not know what these reasons are in order to apply the norm correctly to the majority of cases.[51]

This formal approach to adjudication may be acceptable for offences that are simply formulated and which clearly identify the nature of the perceived harm. However, not all offences are framed

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[49]*Paris Adult Theatre I et. al.* v. *Slaton*, 413 U.S. 49, 60-1 (1972); see, also *R.* v. *Langevin* (1984), 11 C.C.C. (3d) 336 (Ont. C.A.) in which the court would not give effect to the argument that the dangerous offender provisions of the *Code* are unconstitutional in light of studies that show that it is impossible to have accurate psychiatric predictions of dangerousness.

[50]Although it may not be explicitly stated, the judiciary is constantly revising the scope of criminal offences to render them coherent with the harm principle. For example, see the reasoning in *Skoke-Graham et. al.* v. *R.* (1985), 17 C.C.C. (3d) 289 (S.C.C.) and *DiPietro and DiPietro* v. *R.* (1986), 25 C.C.C. (3d) 100 (S.C.C.).

[51]J. Raz, *Practical Reason and Norms* (London: Oxford Univ. Press, 1975) at 79.

in a canonical text that precludes any re-examination of its justifying reasons.

The definition of obscenity is so imprecise that review of its justifying reasons is necessary. Obscenity is currently defined as:

> 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.[52]

It is obvious that "dominant" and "undue" do not lend themselves to quantifiable analysis. Without the aid of some judicial algorithmic analysis the court will be faced with making evaluations that are not guided by discernable standards. Due to the fact that the activity prohibited – some form of publication – has a legitimate component, the court must recognize that this type of prohibition must be interpreted in an underinclusive manner[53] so as to insure that legitimate publications are not captured. To some, a distinction can be drawn between legitimate and illegitimate publications on the basis of artistic purpose, yet this is surely far too subjective and impressionistic a guide for making any meaningful separation. The court is not trained in aesthetic theory – it can only lay claim to training in legal theory. The only precise and justified barometer of legitimacy would be to interpret the definition in light of the harm principle – a publication is only to be prohibited if it gives rise to the possibility of harm. This task is easier said than done. How can the harm principle operate as a coherent adjudicative constraint when there is a choice of available harms? The interpretation of the definition will vary depending upon whether the court perceives the harm involved as causing crime, corrupting morals, advocating misogyny, or damaging the "tone of society, the mode, or...the style and quality of life."[54]

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[52]S. 159(8).

[53]Commission, *supra*, note 17 at 360-63.

[54]A. Bickel, "Concurring and Dissenting Opinions" (1971) 22 Pub. Interest 25-26.

A. *The Community Standards Test as a Proxy for Harm*

The phrase "dominant characteristic of which is the undue exploitation of sex" is not self-executing and requires further judicial elaboration. It is difficult to know how a court could elaborate upon this phrase without a firm understanding of the harm sought to be prevented. The older common-law definition of obscenity, which has been replaced by the statutory formulation of "dominant characteristic...", contained within its terms an indication of the perceived harm. The *Hicklin* test was as follows: "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall."[55] One may disagree with the assumption regarding the type of harm suggested by this test, but at least it was clear that the definition sought to protect against the harm of moral depravity in the hands of those who may be vulnerable to this influence. The *Hicklin* test was attacked and ultimately rejected for five reasons: 1) it was vague in meaning and thus subjective in application; 2) the test was only concerned with the effect on the most vulnerable individual; 3) expert evidence was considered inadmissable; 4) there was no defence of artistic merit and 5) in the application of the test, the judges needed only to look at part of the material, not the whole. An examination of the case law reveals that these five deficiencies are still inherent in the new definition.

The Supreme Court quickly attempted to give the statutory definition content that was capable of judicial application. Two tests emerged to elucidate the statutory test. In *R.* v. *Brodie*,[56] the *Lady Chatterley's Lover* case, the court created the "internal necessities test" and the "community standards test." The internal necessities test requires an examination of artistic purpose to determine if the treatment of sexual content is necessitated by the aesthetic design of the publication. Being uncomfortable with playing the role of

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[55] *R.* v. *Hicklin* (1868), L.R. 3 Q.B. 360.

[56] *R.* v. *Brodie* (1962), 132 C.C.C. 161, 32 D.L.R. (2d) 507.

literary or dramatic critic the courts have decided few cases on the basis of this test.

The true flavour of the obscenity prohibition is not found in the evaluation of artistic design but in the application of the community standards test. There had been some doubt as to the scope of the application of this test but recently the Supreme Court of Canada has confirmed that the community standards test is the appropriate standard for all manner of obscene material and performances that are proscribed by the *Criminal Code*.[57] In theory, the community standards test developed to provide some measure of what is considered "undue" exploitation for the purposes of the statutory definition of obscenity found in s.159(8). The test was designed to insulate the judiciary from the obvious criticism that their application of the statutory definition was just as subjective as their application of the common law *Hicklin* standard.

Judicial application of the standard is characterized by the recitation of endless platitudes used to demonstrate that the standard is objective and neutral. Judges have stated that "those standards are not set by those of lowest taste or interest"[58] and that "I am required to judge as objectively as possible, only on the basis of what I perceive the community standards of tolerance to be."[59] When a judge inadvertantly allows some suggestion of subjective application to slip into his reasons his decision will be subject to appellate reversal. In *Towne Cinema Theatres* v. *R.*,[60] the Supreme Court of Canada reprimanded the trial judge for commenting that "...I do not feel that I am imposing my own standards completely, although how can one help but be subjective in a case like this?"[61]

Few people are fooled by the self-serving assertions of objectivity. In light of the inconsistencies in judicial application of the standard it is not surprising that this branch of the law deserves

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[57] *Germain* v. *R.* (1985), 21 C.C.C. (3d) 289 (S.C.C.).

[58] *R.* v. *Dominion News and Gifts Ltd.* [1963], 2 C.C.C. 103 at 116 (Man. C.A.).

[59] *R.* v. *Ramsingh et. al.* (1984), 14 C.C.C. (3d) 230 at 240 (Man. Q.B.).

[60] *Towne Cinema Theatres Ltd.* v. *R.* (1985), 45 C.R. (3d) 1 (S.C.C.).

[61] *Ibid.* at 18.

the epithet of the "most muddled law in Canada."[62] Commentators are quick to point out that "however much the learned judges pay lip service to the jargon of artistic merit and community standards, they, in effect, merely decide the issues on their own gut reactions."[63] This form of criticism does not only emanate from the pens of expectantly critical academics but even members of the judiciary have had occasion to comment that "the lack of unanimity in the decision of the courts in obscenity suggests that the Canadian contemporary community standard may very well be a very elusive, not readily discernable, and ill defined standard."[64]

There are two approaches that the judiciary can adopt to ameliorate the vague and subjective nature of the standard. The court can arbitrarily designate specific depictions as obscene and through the designation achieve an underinclusive but certain category of obscenity. Alternatively, the court can employ the "harm principle" to delineate a class of material that should be suppressed.

The arbitrary designation of specified depictions is an attractive solution to problems of vagueness,[65] as arbitrary specification may be capable of instantiating the community standards test. There is little likelihood, however, of achieving judicial consensus as to what should be designated. Courts have readily agreed that depictions of juveniles or depictions of severe cruelty in the context of sexual acts exceeds community standards.[66] Outside of this narrow band of agreement the courts have failed to generate a consistent approach. A recent attempt to designate specific depictions that conform to the community standard went as follows:

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[62]D.A. Schmeiser, *Civil Liberties in Canada* (New York: Oxford Univ. Press, 1964) at 232.

[63]M. Tadman, "Obscenity, Civil Liberty and the Law" (1970-72) 38 Man. B. News 313 at 315.

[64]*Cinema International, supra*, note 38 at 342.

[65]In fact, this has been the approach of both the U.S. Supreme Court and the Fraser Committee. The U.S. Supreme Ct. requires legislation to specify types of sexual conduct that are presumed to appeal to the prurient interest and it is this specification that will salvage a statute from being struck down as constitutionally vague.

[66]Committee, *supra*, note 14 at 116.

> Contemporary community standards would tolerate the distribution of films which consist substantially in scenes of people engaged in sexual intercourse...scenes of group sex, lesbianism, fellatio, cunnilingus and anal sex.[67]

Some courts found this line-drawing convincing[68] and this augured well for the process of fleshing out the community standards test; however, other courts simply ignored this development and continued to apply their conception of the community standard. In one case the judge found obscenity to lie in a magazine "concerned with the sexual activity of a man and woman from foreplay to orgasm" even though they were "in no way unnatural or unlawful and, indeed... are a common part of the lives of Canadian men and woman."[69] It is common for courts to find material to exceed community standards in cases when it depicts the exact conduct that the court above deemed to be acceptable.[70] There is little hope of curing the vagueness of the community standards test by arbitrary designations so we must determine the viability of a more purposive approach.

This more purposive approach entails the application of the community standards test in a manner consistent with the harm principle. As indicated earlier, judicial application of the harm principle should result in the demarcation of a zone of legitimate publication and a zone of properly proscribed and presumably dangerous material. Courts have struggled with the interpretive weight to be given to the harm principle, but due to the lack of certainty regarding harm the courts have been unable to generate a constructive approach. The current elaboration of the community standards test does not explicitly incorporate the principle of harm

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[67] *R.* v. *Doug Rankine Co.* (1983), 9 C.C.C. (3d) 54, 70 (Ont. Co. Ct.).

[68] The *Rankine* case has been followed in *Ramsingh*, *supra*, note 59; *R.* v. *Video World* (1985), 32 Man. R. (2d) 41 (Man. Prov. Ct.), reversed on appeal 36 Man. R. (2d) 68, 22 C.C.C. (3d) 331 (Man. C.A.).

[69] *Reference Re Luscher and Dep. Min. Rev. Cda.* (1983), 149 D.L.R. (3d) 243 at 245 (B.C. Co. Ct.).

[70] For examples of cases in which obscenity was found in depictions of sexual activity of consenting heterosexuals see, *R.* v. *Video World* (1985), 22 C.C.C. (3d) 331 (Man. C.A.); *R.* v. *Wagner* (1985), 43 C.R. (3d) 318 (Alta. Q.B.); *R.* v. *St. John News* (1982), 47 N.B.R. (2d) 91, 124 A.P.R. 91 (N.B.Q.B.).

– the test merely serves as a substitute or proxy for a conclusive finding of harm. The test has recently been formulated by the Supreme Court of Canada as follows:

> The cases all emphasize that it is a standard of tolerance, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.[71]

The decision of what the community will tolerate may be based upon considerations that have little to do with harm to the community. It may be based upon a misguided sense of paternalism. Or, it may be based upon a Utopian vision of the ideal community. The development of a community standard of tolerance may be essential to defeat claims of subjective application of the law based upon individual tastes, but it has little to do with confining criminal prohibitions to protect against the harm for which the prohibition was established. The community standards test is not even an adequate safeguard against subjective application of the law because the Supreme Court of Canada has confirmed that the standard need not be proved by expert evidence[72] – trial judges are free to draw their own conclusions concerning a community's level of tolerance. At its worst this test is one of subjective application that is not confined to the purposes for which the legislation was designed.

Application of the harm principle is easier said than done because the obscenity prohibitions purport to be supported by a myriad of potential harms. Thus, a court is faced with the threshold question of which harm to choose for interpretive purposes. Nevertheless, the courts rarely engage in this threshold determination because they are inclined to dismiss the interpretive exercise as irrelevant. For example, the traditional liberal justification for obscenity prohibition is harm to others as based upon a narrow conception of harm, that is restricted to injury to life, liberty, security, or property; yet when a court attempted to resolve the issue of community standards by reference to this liberal

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[71] *Towne Cinema, supra*, note 60 at 17.

[72] In *Towne Cinema* 5 of 7 judges agree that it is not necessary to call expert evidence to prove the relevant community standard.

conception of harm it was reversed upon appeal. The Manitoba Provincial Court dismissed charges concluding that "there is no evidence before me as to any adverse societal influence the films before me have."[73] The Court of Appeal simply responded that "it is unnecessary for us, in this case, to consider the question of adverse societal influences."[74]

The traditional conservative justification for prohibition based upon perceived harm to the moral development of the community has not fared any better. It has been held that "it is neither helpful nor accurate to say that the community standard of tolerance is synonymous with the moral standards of the community."[75] Further, the Supreme Court of Canada has recently disapproved of a direction that states: "I consider that the following articles offered for sale by the accused are likely to offend the innate sense of morality of the average Canadian and constitute an undue exploitation of sex."[76] The courts may believe that it is justified for Parliament to proscribe conduct on the basis of harm to others or on the basis of the denigration of community morality, yet it is surprising that they are reluctant to employ these justifying principles to give further content to an amorphous prohibition.

Another justification for the proscription of obscenity equates obscenity laws with public nuisance law. Obscenity is to be prohibited because it may shock the unwilling observer and thus create unnecessary emotional upset. If this be the underlying rationale a more regulatory law is required. A distinction would be drawn between inherent and circumstantial obscenity[77] with the result being that some materials would be insulated from a finding of obscenity because they had only been distributed or viewed by willing participants. Not all courts drew this distinction but there are numerous judgments in which the courts refused to apply

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[73] *Video World*, *supra*, note 68 at 54.

[74] *Video World*, *supra*, note 70 at 342.

[75] *R.* v. *Penthouse Int. Ltd.* (1979), 46 C.C.C. (2d) 111 at 114 (Ont. C.A.).

[76] *Germain* v. *R.*, [1985] 2 S.C.R. 241 at 251, 21 C.C.C. (3d) 289.

[77] See R.G. Fox, *Obscenity*, (Ottawa: Law Reform Commission, 1972) at 45-49.

sanctions because the viewers were not upset by the presentation[78] or because the manner of distribution insured that the material would not be thrust upon a captive audience.[79]

Resort to the principle of offence to others lends some determinacy to the community standards test. It suggests that there is a zone of materials inherently obscene (and as suggested earlier, this would coincide with the materials for which there has been reached judicial consensus, such as depictions of juveniles and depictions of cruelty or violence and sex), and then for the bulk of material the test would require balancing of all the factors outlined by the Ontario Court of Appeal. Not only is this approach more structured but it coheres with the oft quoted judicial aphorism that "tolerance is to be preferred to proscription."[80] Unfortunately, this principle has also been peremptorily dismissed by the Supreme Court of Canada. In *Towne Cinema*, Wilson J. concluded that manner of distribution and exhibition is irrelevant because it introduces uncertainty into the law and detracts from the formation of a truly national standard.[81] More recently the Supreme Court of Canada recognized that there is a distinction between private and public obscenity but held that the *Towne Cinema* case precluded application of factors relating to distribution and the type of audience that is viewing the material.[82] The Court has even gone so far as to suggest that the making of a photograph with no further intention to publish or distribute is captured by the obscenity provisions.[83]

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[78] *R.* v. *Vigue* (1973), 13 C.C.C. (2d) 381 (B.C. Prov. Ct.); *R.* v. *Kleppe* (1977), 35 C.C.C. (2d) 168 (Ont. Prov. Ct.); *R.* v. *Heathcote*, unreported, Ont. Prov. Ct., July 1982; *R.* v. *Gray* (1982), 65 C.C.C. (2d) 353 (Ont. H.C.).

[79] *R.* v. *Seguin*, [1969] 2 C.C.C. 150 (Ont. Co. Ct.); *R.* v. *Reilly* (1970), 1 C.C.C. (2d) 24 (Ont. Co. Ct.); *R.* v. *MacMillan* (1977), 31 C.C.C. (2d) 286 (Ont. Co. Ct.).

[80] *Dominion News and Gifts*, *supra*, note 58 at 117.

[81] *Towne Cinema*, *supra*, note 60 at 29-30.

[82] *Germain*, *supra*, note 76 at 250.

[83] *Hawkshaw* v. *R.* (1986), 26 C.C.C. (3d) 129 (S.C.C.)

Despite the failure of the courts to endorse a particular conception of harm that can serve as a principle of interpretive value, the Supreme Court of Canada is painfully aware of the fact that the community standards test does not necessarily embrace the justification for having an obscenity prohibition. In *Towne Cinema*, Dickson C.J.C. commented:

> Ours is not a perfect society and it is unfortunate but true that the community may tolerate publications that cause harm to members of society and therefore to society as a whole. Even if, at certain times, there is a coincidence between what is not tolerated and what is harmful to society, there is no necessary connection between these two concepts. Thus, a legal definition of "undue" must encompass publications harmful to members of society, and therefore to society as a whole.[84]

The recognition of the lack of coincidence between a community standard of tolerance and the harm principle has not led the court to the conclusion that this standard must be rejected and replaced with a more apposite test. The judicial response has been to retain the current test and to supplement the test with another test that attempts to incorporate the newest perceived harm – the feminist conception of harm. Dickson C.J.C. indicated the nature of this supplementary test by stating:

> Even if certain sex-related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not "undue" in some other sense, for example, in the sense that they portray persons in a degrading manner as objects of violence, cruelty, or other forms of dehumanizing treatment.[85]

Other courts have followed the same road. The B.C. Court of Appeal has held that "explicit sex portraying human beings as having animal characteristics results in substantial harm to the community... (and it) tends to dehumanize and degrade men and woman in an excessive and revolting way."[86] Similarly, it is common now for courts to formulate the relevant test in terms of "degrading and

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[84] *Towne Cinema*, *supra*, note 60 at 14.

[85] *Ibid.* at 15.

[86] *R.* v. *Red Hot Video* (1985), 45 C.R. (3d) 36, at 59 (B.C.C.A.).

dehumanizing"[87] or portrayals of people as "having animal characteristics."[88]

The fact that the court has undertaken to supplement the current standard with another standard has led to the explication of current obscurities by resort to even greater obscurity. The court has adopted the legislative mentality of increasing the artillery instead of trying to justify current resources. It is unrealistic to expect the judiciary to be completely isolated from social and political developments; however, the current war on obscenity does not lend itself to active judicial assistance. The judiciary has been called upon to apply a law that is open-ended and textually muddled, and the courts should step back from the political objective of eradicating obscenity and take as its first responsibility the clarification and rationalization of the law.

The principle of legality or the rule of law demands that a law be ascertainable in order to serve the function of guiding citizens in conducting their affairs.[89] Can it be truly said that community standards of tolerance designates in an accessible way a pattern of behaviour to which the citizen can conform? By virtue of this standard we have a law that states that you are guilty of a criminal offence if the community decides that you have gone too far. The decision of the community as to what behaviour is manifestly criminal[90] may have reflected an accessible standard in days gone by, but in a pluralistic society of great social complexity can a community's assessment of behaviour deserving of sanction serve as an accessible and authoritative standard?

In response to the suggestion that the community standard test is unduly vague and cannot guide the citizen the court has responded by stating that "the fact of the matter is that in all cases

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[87] *Ramsingh, supra*, note 59 at 240.

[88] *Wagner, supra*, note 70 at 331.

[89] F. Hayek, *The Political Ideal of the Rule of Law* (Ann Arbor, Michigan: University Microfilms, 1955), Lect. III; J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard Univ. Press, 1971) at 235-43; J. Raz, *The Authority of Law* (New York: Oxford Univ. Press, 1979), ch. 11.

[90] See G. Fletcher, *Rethinking Criminal Law* (Toronto: Little Brown, 1978) at 115-235 for a discussion of the concept of manifest criminality.

cited to us by both counsel the courts found no difficulty in applying the community standards rule."[91] Surely, the issue is not the ease with which the court can apply the standard, but rather if the standard can be ascertained by the citizen in advance. Judges may jokingly endorse Potter Stewart's prophetic claim that "I know it when I see it";[92] yet, I am certain that the citizen accused and convicted of exceeding the community standard does not see the humour in a law that defies articulation and can only be applied through an intuitive response.

The inherent vagueness of the law has triggered constitutional challenges but the courts have generally adopted the position that the community standards test, though lacking in precision, is not so devoid of content as to be constitutionally invalid.[93] The validity of the law is upheld, the court conceding that "[t]he law is not perfect. We cannot do perfect justice."[94] Unquestionably the law is not perfect, nor will it ever attain perfection, but this does not mean that the court should not aspire to do "perfect justice." If the court is not willing to thwart the political battle by declaring the law unconstitutional, and if the court is unable to clarify the basic prohibitory norm, there still remains the judicial obligation to do justice by insuring that this imperfect law will only apply to those who are truly culpable.

The extent of judicial involvement in the political battle can only be ascertained by examining if the judiciary has offset the imperfect formulation of the law by countering with the protective shield of a coherent and rational application of defences. We can see that the second option, indicated above, of refining the norm is unattainable, so we must address the viability of the third option – the liberal and remedial application of defences. It has been said that the "maintenance of the state's authority will obviously be strengthened by an attitude of stringency towards defences and it

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[91] *Red Hot Video*, *supra*, note 86 at 42.

[92] *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964).

[93] *Red Hot Video*, *supra*, note 86; *Wagner*, *supra*, note 70; *Ramsingh*, *supra*, note 59.

[94] *Red Hot Video*, *supra*, note 86 at 57.

will be weakened by liberality towards them."[95] The failure to give effect to a defence that, without question negates the culpability of the accused suggests that the judiciary is more concerned with maintaining the authority and ambitions of the state. Conversly, the liberal application of excuses and justifications suggests that the judiciary is refusing to enter the political battle and is content to exercise its mandate of doing individualized justice. Accordingly, "it is important, therefore, for the purpose of gauging the strength of the force of authority within the state, to determine the extent to which the judiciary is willing to sustain a general defence."[96] With this in mind I now turn to the *Metro News* case to determine if the courts have been inclined to soften the impact of the political battle by restricting the application of the law to only those people who are truly culpable.

B. *The Battle of Sakura*

The December 1984 edition of Penthouse magazine contained a series of photographs by Japanese photographer, Akira Ishigaki. In *Metro News* the Ontario Court of Appeal described the photographs as depicting "young women bound by ropes with the genitalia displayed."[97] These same photographs were included in the March 1984 edition of Photo Magazine without complaint but their inclusion in Penthouse generated nation-wide prosecution. Opinion among experts was divided. Experts called on behalf of the Crown concluded that the bondage imagery and the "eroticizing of a brutal theme"[98] rendered the photographs offensive and obscene. Experts called by the defence spoke of fine artistry, extraordinary surrealist imagery, and a Japanese tradition of ritualized violence.

As would be expected, judicial decisions regarding the propriety of these pictures was divided. The *Metro News* case was

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[95] McGinley, *supra*, note 3 at 284.

[96] *Ibid.* at 286.

[97] *Metro News*, *supra*, note 2 at 296.

[98] *Ibid.* at 297.

one in which the jury convicted; presumably they found the pictures to exceed community standards. Subsequent to this case Jewers J. of the Manitoba Queen's Bench acquitted on the basis that the Crown had not discharged its burden of proving the nature of obscenity beyond a reasonable doubt.[99] In the course of his judgment Jewer J. commented on the discord amongst courts:

> In *Metro News* a criminal jury of 12 persons found the photographs to be obscene; in a criminal prosecution in Regina before a judge sitting without a jury, the photographs were found to be obscene; and in Quebec, a criminal jury could not agree as to whether the photographs were obscene.[100]

Some have argued that the laws relating to obscenity are not particularly harsh or burdensome:

> The criminal enforcement of obscenity does not reveal a particularly drastic or harsh measure of control. Less than three hundred Canadians are charged each year with the offence; those convicted are almost invariably fined for their conduct.[101]

Accordingly, without the jeopardy of punitive sanctions, such as imprisonment, some people may believe that we should not worry about individualized justice. I am certain that those accused of this crime do not find the matter to be trivial. Those who want to challenge the charge will invariably be faced with substantial costs of defence — think of the video storekeeper who has had 20-40 films seized (a common occurrence) and must pay fees for his lawyer to view the films and then at trial he must pay for the days it takes the judge to view the films. On top of this the fines meted out are not *de minimis* — for a defendant who pleaded guilty of distributing the Sakura edition of Penthouse a fine of $2000 was ordered.[102] In addition pornography has become a much debated and controversial topic and the increased visibility of conservative and feminist viewpoints may result in greater social stigma being attached to the conviction.

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[99] *R.* v. *Arena Recreation Ltd.*, unreported decision of Manitoba Queen's Bench (Jan. 20, 1987).

[100] *Ibid.* at 12.

[101] Boyd, *supra*, note 34 at 60.

[102] *R.* v. *Somerset Specialties Ltd.*, unreported decision of the Ontario District Court (18 November 1986).

It is not surprising that inconsistent results have been reached – the community standards test is a nebulous test that is not properly anchored by the harm principle. In academic debates inconsistency may be inconsequential, but in criminal trials a flesh and blood participant suffers adverse consequences at the hands of a law that defies consistent application. In the face of an imperfect law we can only aspire to perfect justice by insuring that the court takes into account all factors relating to the flesh and blood participant in determining whether or not the individual has culpably violated this open-ended law.

There are three types of individual that may be prosecuted for this offence – producers, distributors, and retailers. For the most part we do not initiate many prosecutions against producers or manufacturers (who are arguably the most culpable participants) – this may have nothing to do with an insidious exercise of police discretion, but may simply be a product of the fact that most obscene material is produced outside of Canada.[103] Distributors and the retailers who receive the materials from the distributors are the targets of obscenity prosecutions, and this class of defendant ranges from large-scale national distributors of periodicals and magazines to a clerk employed part-time at a convenience store. The *Metro News* case presents us with a fairly representative example of the type of circumstances that bear upon the culpability of both distributors and retailers.

Metro News is a corporation that distributes some 2,000 newspapers, magazines, and books – among them, Penthouse magazine. For this magazine a special procedure is adopted in which a "mock-up" of the magazine is submitted to the Prohibited Importations Branch of Canada Customs for approval. The Sakura edition of Penthouse was approved for distribution after four changes had been made as a result of objections from Customs.

In addition to seeking approval from Customs, *Metro News* has a practice of submitting "adult" magazines to the Ontario Advisory Committee. This Committee was established by the trade association, the Periodical Distributors of Canada, after the Attorney General refused to revive a government committee that had

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[103] Committee, *supra*, note 14 at 87.

previously served the function of screening adult magazines. This trade association committee had examined over 6000 publications since its creation in 1976,[104] and it approved the Sakura edition of Penthouse.

In Ontario there is a special police unit known as "Project P" that deals with pornographic material. A special arrangement had been reached between Project P and the Periodical Distributors of Canada to the effect that if the police were investigating a particular magazine it would notify the trade association so that the association could withdraw the magazine from circulation. In this case the police claimed that there were an unusual number of complaints regarding the Sakura edition so they seized the magazine and laid charges without first notifying the association of the investigation.

Clearly this accused exercised caution and restraint in the distribution of adult magazines. As Martin J.A. commented in the case:

> I think a fair reading of his evidence is that he realized that there were certain risks involved in the distribution of "adult" magazines. Mr. Neil also testified as to the steps taken by the appellant to encourage retailers to display "adult" magazines such as Penthouse in a responsible manner by placing them at least 5 feet above the floor behind other magazines or "blinders" furnished by the appellant, so that the full cover is not displayed.[105]

In light of these considerations can it be said that the accused deliberately and consciously violated the law? The normative assumption underlying the requirement that an accused act culpably is that "criminal liability is just only when it is for an intentional act that illegitimately poses a threat of harm with which the law has concerned itself."[106] Criminal law can be distinguished from tort law in a descriptive sense by the assertion that punishment for violation

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[104] *Arena Recreation*, *supra*, note 99 at 20.

[105] *Metro News*, *supra*, note 2 at 295-96.

[106] Gross, *supra*, note 46 at 139. In addition to this principle of culpability Gross sets out a principle of responsibility that states that "criminal liability is unjust if the one who is liable was not able to choose effectively to act in a way that would avoid criminal liability, and because of that he violated the law" (at 137).

of criminal law involves an element of moral condemnation,[107] and that morally objectionable behaviour of an accused flows from the fact that the individual has engaged in a deliberate violation of a state order or decree. We structure criminal liability on an assumption of free will or voluntary choice. Punishing individuals is rationalized "as a price justly extracted because the criminal had a fair opportunity beforehand to avoid liability to pay."[108] *Metro News* undertook to comply with the law and it is impossible to characterize their actions as deliberate defiance. Did the accused have a "fair opportunity to adjust their behaviour to the law"[109] or is this a case in which the accused, despite their best efforts to respect the law, must be sacrificed to the public interest in pursuing the war on obscenity?

Before turning to the response of the judiciary to this representative scenario, it must be mentioned that the executive branch has a role to play in mitigating the harshness of applying a vague law to an accused who may lack the requisite culpability that justifies the imposition of a criminal sanction. It is possible that the exercise of prosecutorial discretion can operate to divert accused persons from the criminal process in circumstances in which there are serious doubts as to their culpability. In fact this rarely happens because prosecutors are presented with the problem posed by the fact that these arguably innocent persons are still in possession of materials which are considered obscene. In light of this problem there is little pre-trial screening and the exercise of prosecutorial discretion is usually reserved for plea bargaining. If the accused person is not considered culpable or deserving of punishment the Crown is amenable to withdrawing the charge if it is still possible to

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[107] See generally, H. Hart, "The Aims of the Criminal Law" (1958) 23 Law and Contemporary Problems 401; M. Cohen, "Moral Aspects of Criminal Law" (1940) 49 Yale L.J. 987; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply & Services, 1987) at 103-18; J.F. Stephens, *History of the Criminal Law of England* (London: MacMillan & Co., 1883), vol. II, 75-93.

[108] H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968) at 23.

[109] *Ibid.* at 181: "thus a primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity to adjust his behaviour to the law its penalties ought not be applied to him".

convict the accused's company – charges are regularly withdrawn in consideration of guilty pleas by the corporate entity. This can protect some accused persons from the stigma of criminal conviction, but of course it can only be used for more economically sophisticated persons – this form of plea bargaining cannot assist the employees of retail stores who are arguably the least culpable of all potential accused.

A second mechanism that can be employed by the executive to deal with non-culpable offenders in possession of obscene material is to resort to the *in rem* proceedings contemplated by s.160 of the *Criminal Code*. This section allows for the seizure and ultimate destruction of materials that are determined to be obscene – this section operates without the requirement of charging any individuals and thus there is no need to determine the culpability of any individual. Recently Judge Borins commented upon the benefits of resort to s.160:

> The second purpose of s.160 is to avoid the criminal law becoming a trap. I have already spoken about the difficulties encountered by the courts in the application of the "community standards" test, which has come to form the central variable of the definition of obscenity in s.159(8). No member of the public can say with certainty that material is obscene until the court, applying somewhat obscure standards, has pronounced it so. However, criminal prosecutions could follow as, if and when someone defied a s.160 declaration of obscenity and persisted in marketing the obscene material. Under this regime a person would know when he was on dangerous ground... [u]nder the present regime, the criminal law has become a trap.... My view is that, until s.160 proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained.... For well over a century courts have had difficulty in defining obscenity with precision. To condemn people to the stigma of a criminal conviction for violating standards they cannot understand, construe and apply is a serious thing to do in a nation which, by its recent Charter of Rights, has affirmed its dedication to fair trials and due process.[110]

Despite its availability, s.160 is rarely invoked by the Crown. In consultations before the Fraser Committee, law enforcement officials claimed that because of limited resources they can only proceed against "the worst of the material and that in these cases, proceedings against the individual distributors or sellers seem more appropriate and more likely to deter others than proceeding against the material itself.[111] This response is surely disingenuous because

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[110] *R.* v. *Nicols* (1984), 43 C.R. (3d) 54 at 68-69 (Ont. Co. Ct.).

[111] Committee, *supra*, note 14 at 125.

limited resources would in fact be more efficiently employed in an *in rem* proceeding under s.160 in which there would be no need for a court to involve itself in a lengthy examination into the circumstances of the offender to determine if *actus reus* and *mens rea* had been established. It is submitted that the executive cannot be relied upon to employ protective mechanisms such as s.160 because they believe that "all is fair in love and war" – they have no institutional incentives directing them to employ the least restrictive and intrusive means. In *Metro News* the accused believed that it would have been fairer to employ s.160 and they wrote to the Attorney-General prior to the commencement of trial with respect to their submission on the preferability of proceeding under s.160. The response of the Attorney-General was curt and confrontational:

> You appear to take the view that because your company has followed certain management practices it would therefore be unfair or unjust for a court of law to decide the issue. I and my Ministry have made it clear, again and again, that your industry cannot exempt itself from the ordinary application of the Criminal Code of Canada.[112]

C. *The Decision in Metro News*

Metro News attempted to keep within the spirit of the law by submitting the Sakura edition to various government and non-government bodies, and upon receiving approval and in the belief that the magazine complied with the *Criminal Code* it then distributed. It is difficult to know what else the defendant could have done other than discontinuing its distribution of all adult magazines.

This would presumably insure that the company could not run afoul of the law, but this posture of self-censorship should not be the only safe method of insuring compliance with the law. If the government chooses to regulate a given industry by prohibiting certain aspects of the business it must clearly identify the undesirable aspects so that the industry can attend to its business concerns without fear of constant government intervention. A regulated industry should not be required to close down its

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[112] *Metro News*, *supra*, note 2 at 331.

operation simply because the government has chosen to regulate by employing a prohibition that is so vague that the industry cannot safely decide when it is being law-abiding and when it will encounter legal difficulties. If the government decides as a matter of public policy that it does not want magazine distributors to circulate any type of adult magazine it should precisely say so instead of hoping that this will be the result of regulation by vague prohibition. Of course, the government does not want to specifically outlaw all adult magazines because even with the growing public concern about pornography there would be little public support for such an over-inclusive law[113] and in fact such a law may even encounter resistance as the public may view this as an unacceptable act of state intrusion.

Metro News should have been allowed to plea as a defence to the criminal charge that it is not guilty because it did not intend to violate the law. The company can concede that the Sakura edition is obscene because it exceeds community standards, it can concede that the law has been broken and that a wrongdoing has occurred, but it should be permitted to claim that this wrongdoing should not be attributed to itself. The company is responsible in a causal sense for the wrongdoing but it is not responsible in the sense of moral accountability. In short, the company should be excused from liability.

Criminal liability is not determined by an open-ended inquiry into culpability, but rather conventional legal discourse demands that questions of culpability be artificially segmented into compartments such as incapacity, excuse, justification, and absence of *mens rea*. For obvious reasons, the categories of incapacity and justification are irrelevant to the company's plea and the category of excuse is problematic because of the general reluctance to admit ignorance of the law as an excuse. By default, it would seem that the company's plea would have the best chance for success by characterizing its situation as one lacking *mens rea*.

In effect the company would be required to argue that as a result of its diligent attempts to comply with the law it lacked a blameworthy state of mind. As a result of advice received and

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[113] Surveys conducted and noted in Committee, *supra*, note 14 at 89-92 and 103-05 suggest that most people view "soft-porn" as acceptable.

precautions taken the company would assert that it did not know that the material it was distributing was obscene. The company, however, was faced with a difficulty in making this plea due to the presence of s.159(6) of the *Criminal Code* which states:

> Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model...or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

Not only does this provision deem irrelevant the accused's knowledge of the precise legal characterization of the material but it goes further by removing any consideration of a *mens rea* component of knowledge or material awareness.

As would be expected, the company challenged the constitutional validity of this provision. Fortunately for the company, the Supreme Court of Canada had recently decided that it is a violation of s.7 of the *Charter* for Parliament to create an offence of absolute liability that carries a potential penalty of imprisonment upon conviction.[114] Section 159 is punishable by imprisonment and s.159(6) does introduce an element of absolute liability by removing consideration of the knowledge component of *mens rea.* The Court of Appeal for Ontario defined absolute liability as an offence "in which it is not open to the accused to avoid criminal liability on the ground that he acted under a reasonable mistake of fact...."[115] Once characterized in this manner, it was easy for the court to conclude that s. 159(6) converted the offence into one of absolute liability and as such it violated the requirements of fundamental justice under the *Charter.* Accordingly, s.159(6) was struck down and, as one commentator has said, "thus far, the judgment has everything to commend itself."[116]

With this impediment removed, the company then needed to establish that the *mens rea* requirement for this offence includes knowledge (or wilful blindness) that the publication exceeds community standards and is thus obscene. At a minimum, *mens rea*

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[114] *Reference re S.94(2) of the Motor Vehicle Act* [1985], 2 S.C.R. 486 48 C.R. 289 (S.C.C.).

[115] *Metro News, supra,* note 2 at 302-03.

[116] D. Stuart, "Metro News: Misplaced Objectivity" (1986) 53 C.R. (3d) at 333.

commonly includes knowledge of the circumstances that comprise the *actus reus*.[117] It had to be argued that the defining circumstances in this case included the assessment that the material exceeded community standards.

In dealing with the proposition that an accused must know that he is dealing in legally defined obscenity, the court decided:

1) *Mens rea* does not include knowledge that the photographs exceeded community standards. The proposition that *mens rea* does include this type of knowledge is not supported by the caselaw.

2) The only defence open to an accused is that of reasonable mistake of fact. Even if s.159 is considered a "true crime" it does not follow that the decision of the Supreme Court of Canada in *R.* v. *Sault Ste. Marie*[118] requires that this offence be placed in the highest category of offences which requires the Crown to prove full *mens rea* (including honest but unreasonable mistake of fact) beyond a reasonable doubt. The history of the provision and the present language employed (i.e. the omission of the word "knowingly") indicates "Parliament's clear intention to relieve the Crown of the burden of proof with respect to mens rea."[119] In other words, this offence is one of strict liability in which the doing of the act *prima facie* imports the offence and for this type of offence a mistake of fact must be reasonable.

3) In claiming a reasonable mistake of fact, it is not open to the accused to assert that he reasonably believed that the material did not exceed community standards. The issue of undue exploitation and community standards involves a "value judgement to which the doctrine of mistake of fact is inapplicable."[120] The accused's assessment of the applicability of community standards is

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[117] *Metro News, supra*, note 2 at 309; see also, *R.* v. *Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 at 381 (Ont. C.A.); *R.* v. *Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, at 362 (S.C.C.).

[118] *R.* v. *Sault Ste. Marie, ibid.*.

[119] *Metro News, supra*, note 2 at 316.

[120] *Ibid.* at 321.

a question of law and our criminal law does not admit of a defence of mistake of law or reasonable mistake of law.

4) An accused cannot assert that he has been subject to an abuse of process based upon the fact that a) the magazine was approved by Canadian Customs; b) the photographs had appeared earlier in a photography magazine without complaint or objection; c) the magazine was approved by the trade association committee; d) the Crown could have proceeded by way of a s.160 *in rem* proceeding instead of charging a criminal offence.

These four interrelated propositions raise issues relating to the doctrines of strict liability (#2), mistake of law (#1 and #3) and officially-induced error (described as an abuse of process in #4). The court's analysis of these three issues illustrates the intractable difficulty of maintaining doctrinal purity in the midst of an ongoing political battle.

III. STRICT LIABILITY

In the view of the Ontario Court of Appeal the offence of distributing obscene material is one of strict liability. This conclusion follows from the court's assertion that for this offence the Crown need not prove *mens rea* and that a defence of reasonable mistake of fact is open to the accused. Some mention is made of the three categories of offences set out in the *Sault Ste. Marie* case but never in the entire judgment does the court directly say that this offence is one of strict liability. Perhaps the court is embarrassed by its conclusion, or perhaps it just sounds too strained and odd to speak of strict liability and obscenity in the same breath. In light of the contemporary heated debate and the increasing political efforts to finally rid us of this menace, it is indeed strange to put the offence of obscenity in the same category as offences of trading in unregistered securities, driving a motor vehicle without insurance, failing to remit taxes withheld at source, and supplying liquor to one apparently underage.[121]

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[121] For a listing of offences classified as strict liability see, D. Stuart, *Canadian Criminal Law: A Treatise* (Toronto: Carswell, 1982) at 172-73.

As a result of the *Sault Ste. Marie* decision, we now operate in a framework of three types of offences: true crimes, strict liability offences, and absolute liability offences. The effect of the categorization is clear – a true crime requires proof of *mens rea*, strict liability presumes *mens rea* and allows conviction to be avoided upon the accused proving due diligence or reasonable mistake of law, and absolute liability removes virtually all pleas in defence except for those relating to the voluntariness of the act. The effect of the categorization may be clear; however, the threshold question of how to categorize has never been reduced to a clear and workable formula. Within *Sault Ste. Marie* there is an adumbration of the applicable formula but before turning to this case it is helpful to look at a miscellany of factors that have been relied on by the courts.

Often a distinction is made on the basis of the subject matter of the offence. A distinction is made between true crimes and public welfare offences with the latter occupying the categories of strict and absolute liability depending upon their statutory formulation. If an activity is subject to outright prohibition this suggests that the activity is considered intrinsically harmful and any violation may subject the actor to moral condemnation – this is considered a true crime. However, in the case of activities that are not intrinsically harmful and may be an aspect of a larger, socially useful enterprise then it is common to adopt a regulative approach to the activity in lieu of the inflexible approach of prohibition – these types of regulative offences are considered public welfare offences.[122] The dichotomy of prohibition and regulation may not be a watertight division[123] but it does suggest that the obscenity offence falls into the category of true crime. Obscenity is subject to absolute prohibition[124] and although it may be argued that prohibiting obscenity is one part of a larger enterprise of regulating

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[122]See analysis in *Hill* v. *R.* (1973), 14 C.C.C. (2d) 505 (S.C.C.).

[123]E. Colvin, *Principles of Criminal Law* (Toronto: Carswell, 1986) at 139.

[124]By rejecting the circumstantial approach to obscenity (see notes 35 and 122 accompanying text), the court cannot maintain that the provisions of the Criminal Code are merely regulatory provisions that dictate time, place and manner requirements for the distribution of obscenity.

the film and publishing industry this argument is easily defeated when one considers that the offence is included in a section of the *Criminal Code* titled "Offences Tending to Corrupt Morals" and that this section does not purport to regulate a discrete enterprise or industry.

A distinction based upon subject matter is sometimes drawn on the basis of a division of offences into *mala in se* and *mala prohibita*. The latter category concerns activity that is only considered harmful because a legislature has deemed it necessary to prohibit in pursuance of some economic or social objective, whereas the former category engages offences that are considered wrongful based upon a shared community consensus. The justifications commonly advanced for the prohibition of obscenity tend to support its categorization as *mala in se* but the division into *mala in se* and *mala prohibita* is too amorphous to be relied upon for the concrete and significant task of determining the scope of allowable defences.[125] The failure to enunciate clear and precise criteria for this distinction has resulted in a shift in focus from substantive distinctions between true crimes and strict liability to a focus upon formal distinctions. For example, "higher levels of penalty are likely to be associated with *mala in se* and the lower levels with *mala prohibita*."[126]

A formal criteria of classification based upon penalty level has been alluded to in a number of cases. Punishments involving mandatory prison terms or discretionary prison terms of two or five years have been construed as indicating a Parliamentary intention to designate the offence as a true crime requiring proof of *mens rea*.[127] The offence of obscenity is a hybrid offence that when processed as indictable is subject to a discretionary maximum of two years. One would have thought that the decision of the Supreme Court of Canada in *R.* v. *Prue*[128] would be controlling – in that case Laskin

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[125]Colvin, *supra*, note 123 at 140; Stuart, *supra*, note 121 at 162; Gross, *supra*, note 46 at 122-24.

[126]Colvin, *supra*, note 123 at 142.

[127]*Ibid.* at 143.

[128]*R.* v. *Prue*; *R.* v. *Baril*, [1979] 2 S.C.R. 547, 8 C.R. (3d) 68 at 73.

C.J.C. commented that "I should have thought that the fact that the offence may be prosecuted on indictment and carries in that respect a maximum two-year term of imprisonment would support the application of the general principle...."[129] (in that case the principle being that the offence of driving while disqualified is to be classified as a true crime).

Two additional factors must be mentioned with respect to penalty level. Firstly, the government has proposed legislation that would raise the maximum sentence to five years; surely the government would not even consider this quantum of sentence if it believed obscenity was merely a public welfare offence. Secondly, the courts have frequently looked at punitive consequences that indirectly attach to conviction when determining if a specified penalty is harsh enough to support a classification of an offence as a true crime.[130] For the offence of obscenity the relevant attendant consequences include forfeiture of material and some degree of stigma especially in light of mounting concern in the public domain. It would seem on the formal criteria of penalty level there should be little doubt that this offence falls into the first category of true crime.

Other formal criteria include reference to statutory location and constitutional origin. The former criteria refers to the presumption that if the offence is included in the *Criminal Code* then it is presumed to be a true crime requiring *mens rea*. As noted in *R.* v. *Prue*, most offences included in the *Criminal Code* are "outright prohibitions distinguishable from regulatory offences."[131] The latter criteria refers to the presumption that provincial legislation is commonly classified as strict or absolute liability because only the federal government is empowered constitutionally to enact true crimes. The upshot of these two presumptions is that "the main area of uncertainty is that of federal offences outside the

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[129] *Ibid.* at 553 or 72-73.

[130] For example, *R.* v. *Chapin*, [1979] 2 S.C.R. 121; *R.* v. *Pierce Fisheries*, [1971] S.C.R. 5.

[131] *Prue*, *supra*, note 128 at 553.

Code."[132] For provincial offences the usual debate revolves around the issue of whether the offence is strict or absolute liability, for non-*Criminal Code* federal offences the debate revolves around classification as true crime or strict or absolute liability, but for *Criminal Code* offences there is virtually no debate. Once again as indicated in the *Prue* case, "the inclusion of an offence in the *Criminal Code* by that very fact must be taken to import mens rea, and there would have to be a clear indication against it before a court would be justified in denying its essentiality."[133] Despite the weight of authority suggesting that the offence of obscenity is a true crime, the Ontario Court of Appeal believed that there was a clear indication to the contrary.

The court presented two reasons to support the surprising conclusion that a *Criminal Code* offense is one of strict liability. The reasons are loosely based upon some of the language used by the Supreme Court of Canada in *Sault Ste. Marie*; however they seem to be primarily based upon a misreading of this case.

First, the court held that "the act of distributing matter which is in fact obscene *prima facie* imports the offence"[134] and therefore it is unnecessary to require the Crown to prove a mental element that is self-evident. Reliance upon this assertion is nothing more than a conclusion and not a supporting reason as the assertion itself is nothing more than a description of the effect of classifying an offence as strict liability. In this portion of the judgment the Supreme Court of Canada was merely describing the fault requirements of the three categories of offences once a particular offence has been classified. The court was not suggesting that there are offences for which the doing of the proscribed act logically entails a concurrent presence of the required mental state. If such offences existed then most crimes of general intent[135] would fall into this category and thus most *Criminal Code* offences would be

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[132]Colvin, *supra*, note 123 at 145.

[133]*Prue*, *supra*, note 128 at 553.

[134]*Metro News*, *supra*, note 2 at 315.

[135]General intent is discussed in Colvin, *supra*, note 123 at 97; Stuart, *supra*, note 121 at 138.

reclassified as strict liability offences. The Supreme Court of Canada was not establishing a criteria of classification when it used the words "the act *prima facie* imports the offence" – the criteria of classification is actually found later on in the quoted portion of the judgment when the court says that "public welfare would *prima facie* be in the second category" unless there was language in the enactment that indicates that the public welfare offence was to be included in the category of true crime. If the offence under inquiry is held to be a public welfare offence that does not contain language suggesting elevation into the true crime category then and only then can the court conclude that the doing of the act imports the offence.[136]

Second, the court of appeal concludes that this offence must be strict liability because Parliament has omitted the word "knowingly" in the offence of distributing obscenity but retained this word in the companion offence of selling obscene material. There are three difficulties with this conclusion. First, it appears that this conclusion is also based upon a misreading of the test in *Sault Ste. Marie*. Dickson J. (as he then was) notes that the importance of words such as knowingly or willingly is that their presence may indicate that a strict liability offence is to be considered a true crime for which *mens rea* must be proved. He does not say anything about the absence of these words in a *Criminal Code* provision for obvious reasons. Most *Criminal Code* offences are silent with respect to their *mens rea* components and to place importance upon the absence of words triggering *mens rea* would result in the reclassification of many offences as strict liability.

The second objection to the approach of the court is aptly summarized by Glanville Williams:

> The judges frequently claim that the absence of the word "knowingly" in a statute is evidence that Parliament meant the offence to carry strict liability, but this is obviously a *non sequitur*. Parliament may have left out "knowingly" because it was

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[136] That the phrase "the act prima facie imports the offence" is not to be considered a criteria of classification but rather a statement of result is supported by Fletcher's claim that "an alternative theory of strict liability is that it is not strict at all, merely that an element of culpability need not be proven at trial ... because the occurrence of the objective event ... raises a presumption of culpable neglect by the supervisory personnel", see, Fletcher, *supra*, note 90 at 717-18. Fletcher's reference to *supervisory personnel* is illuminating as it suggests that a presumption of culpability is a necessary expedient only in the cases of offences committed by corporate entities.

> not bothering itself about the fault requirement... or Parliament may have meant that the offence can be committed knowingly or recklessly; or that it might have meant that the offence can be committed negligently.[137]

The third reason why the approach of the court is problematic is that it represents a departure from past decisions of the same court with respect to the issue of the significance of the omission of a triggering word such as knowingly or willingly. In *R.* v. *Buzzanga*,[138] Martin J.A. (who is also the author of the decision in *Metro News*) concluded that the omission of the word "willingly" in s. 281.2(1) of the *Criminal Code* must not be taken to evidence a legislative intention to oust the operation of *mens rea*, even though the companion section, 281.2(2) specifically employs the word "willfully." Martin J.A. states that "although no mental element is expressly mentioned in s.281.2(1)...*mens rea* is, none the less, required since the inclusion of an offence in the *Criminal Code* must be taken to import *mens rea* in the absence of a clear intention to the contrary."[139] Accordingly, in *Buzzanga*, it was decided that if one section omits reference to *mens rea* then a general form of *mens rea*, intentional or reckless conduct, will be read into the section, and that the companion section which employs the term "willfully" will be interpreted to include only intentional conduct so as to differentiate the *mens rea* components of a provision that mentions *mens rea* from a provision that omits it. Applying the logic of *Buzzanga* to the offence of distributing obscene material, the court should have concluded that *mens rea* should be imported into the section but in a form that is distinguishable from the *mens rea* component of "knowingly" that is specifically mentioned in the companion offence of selling obscene material.

When Martin J.A. expresses the opinion in *Buzzanga* that Parliament can oust *mens rea* if it clearly expresses such an intention he was not referring to the ambiguous omission of a word such as "knowingly" or "willfully". Clear expressions of an intention to oust

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[137] G. Williams, *Textbook of Criminal Law* (Toronto: Carswell, 1983) at 935.

[138] (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

[139] *Ibid.* at 381.

mens rea are accomplished by direct language that indicates that Parliament has turned its intention to this very issue.[140]

Not only does the court rely upon the omission of the word "knowingly" in s.159(1) to support its classification of this offence as one of strict liability, but it also makes mention of the presence of section 159(6). As previously discussed, this section specifically excluded the defence of ignorance of the nature or presence of the material, and the court invalidated this section as being contrary to the *Charter*. It seems rather strange to resurrect an invalidated provision for the purpose of ascertaining legislative intention. Even if it is not incongruous to resurrect this unconstitutional provision for interpretive purposes the court should not give effect to the literal meaning of the section – it was this literal meaning that violated the rights guaranteed by the *Charter*. This invalidated provision cannot be taken at face value but perhaps some significance could be given to its purpose, design, or spirit. It takes little imagination to conclude that this impugned provision was designed for the sake of administrative expediency as an aid to enforcement, and if this be its design then the issue is whether administrative expediency is a weighty enough reason to relegate an offence in the *Criminal Code* to the status of an offence of strict liability.

When the inclusion of s.159(6) was being debated in Parliament the focus of discussion was on the issue of whether requiring the Crown to prove knowledge would present itself as an insurmountable obstacle to the enforcement of the obscenity

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[140]Parliament is not unfamiliar with the technique of ousting mens rea - for example s.146 of the Code states:

> 146.(1) Every male person who has sexual intercourse with a female person who
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> (a) is not his wife, and
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> (b) is under the age of fourteen years,
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> whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life.

Similarly, Parliament has also had experience in successfully expressing its intention to limit considerations of mens rea to the defence of reasonable mistake of fact - for example, after defining the constituent elements of the offence of bigamy in s.254 of the Code Parliament clearly establishes that only the defence of reasonable mistake of fact will suffice:

> 254.(2) No person commits bigamy by going through a form of marriage if
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> (a) that person in good faith and on reasonable grounds believes that his spouse is dead.

provisions.[141] At the time the Minister of Justice undertook to consult with law enforcement agencies as to whether proof of *mens rea* would present enforcement difficulties. He reported back to Parliament with the conclusion that "the consensus is that section 207 as amended by the bill could not be enforced while the words 'knowingly, without lawful justification or excuse' remain, and that these words should be deleted".[142] One must question the wisdom of relying upon the self-serving conclusions of law enforcement officials as to the practical enforcement problems presented by traditional *mens rea* analysis, but even so one must also question the accuracy of these expressed concerns when one considers that at the time the prosecution of obscenity had a conviction rate of 96%.[143]

The courts have been reluctant to place much significance upon the factor of administrative expediency in carrying out their task of classifying offences. The Supreme Court of Canada has not spoken in one voice but the weight of authority suggests that perceived difficulty in enforcement is not a sufficient justification for restricting the allowable defences that may be pleaded. To permit the legislature to restrict the application of *mens rea* on the belief that forensic inquiries into culpability will thwart prosecutions is indeed a slippery slope – the concern over effective enforcement is applicable to each and every offence found in the *Criminal Code*.[144]

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[141]Canada, H.C. Debates, vol. 1, 1st Sess., 21st Parl., (21 October 1949) at 1036-43; vol. 3, 1st Sess., 21st Parl. (5 December 1949) at 2687-99; vol. 4, 1st Sess., 22nd Parl., (2 April 1954) at 3611-14.

[142]Canada, H.C. Debates, vol. 2, 1st Sess., 21st Parl., (5 December 1949) at 2688-89.

[143]Fox, *supra*, note 77 at 70.

[144]Unfortunately, the Supreme Court of Canada decision in *Strasser* v. *Roberge* [1979] 2 S.C.R. 953, 50 C.C.C. (2d) 129 muddies the water with respect to the significance of enforcement concerns. In this much criticized decision all seven members of the court agreed that a particular offence under the Quebec Labour Code required proof of *mens rea*; however, four members of the Court concluded that for a number of reasons this offence should be classified as strict liability. One of the reasons advanced related to administrative expediency: "In the great majority of cases to which the prohibition applies, it would be virtually impossible for the prosecution to establish the existence of intent except through proof of the material factor ... [i]f the prohibition is to be effective - and it must be assumed that the Act intends it to be – the only method is to reverse the burden of proof and impose on the accused the obligation of showing that he did not have the required intent and took reasonable steps to avoid committing the offence." (p. 980).

Administrative expediency is a dangerous justification because it is overinclusive – it is an argument that can be advanced with respect to any penal offence. One should approach considerations of administrative expediency with skepticism and caution, and the most recent decision of the Supreme Court of Canada on this issue echoes the need for this skepticism:

> Indeed, administrative expediency certainly has a place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person... will be sacrificed to administrative expediency.[145]

For these reasons, the Ontario Court of Appeal's classification of the offence of distributing obscenity as one of strict liability is an unjustified departure from contemporary doctrinal approaches to classification. The upshot of this erroneous classification is quite remarkable. By limiting the scope of allowable offence to reasonable mistake of fact the court has in effect stripped an accused of any viable defence because it is virtually impossible to plea reasonable mistake of fact to this offence. It is inconceivable that someone could make a factual mistake as to the act of distributing. A reasonable mistake of fact will only have practical application if one could successfully plea that one had an honest and reasonable belief that the material distributed did not exceed community standards; however, the court closed this door by holding that a belief concerning community standards is not a factual mistake but rather a mistake of law and as such the accused is barred from presenting his belief as an exculpatory factor. In their zeal to aid enforcement by classifying the offence as strict liability

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The minority of three judges endorsed the position earlier articulated in the *Chapin* case. Dickson J. stated that in the *Chapin* case "mere difficulty of enforcement was considered hardly enough to dislodge the offence from the category of strict liability and, in my view, the same approach ought to be taken where the debate is between a *mens rea* offence and strict liability. Mere difficulty of enforcement cannot justify the shifting of a burden of proof of the mental element to the accused, for if that were the case one could easily justify doing away with the presumption of *mens rea* and the presumption of innocence in criminal law proper" (p. 992). It is submitted that this approach is the correct one, and that the majority position carries little persuasive force. In fact, the majority had four reasons, other than administrative expediency, to support their conclusion that the offence was one of strict liability, and the decision should be limited to these other reasons.

[145] *Motor Vehicle Reference, supra*, note 114 at 321.

the court has gone beyond simply tilting the balance in favour of enforcement and has actually created an offence of perfect enforceability that can operate as an assembly line form of justice that need not take into account individualized standards of culpability.

IV. MISTAKE OF LAW

The judicial treatment of the defence of mistake of law, is also seriously flawed but unlike the skewed classification as strict liability, the error with respect to mistake of law does not necessarily warrant an accusation of craft failure or partiality. The court's approach to the issue of mistake of law is flawed not because of a cavalier disregard of existing and well-settled doctrine but because the court has chosen the path of least resistance by meekly endorsing the doctrinal status quo despite the existence of a persuasive body of literature that calls for reform of the doctrine. In other words the court can only be faulted for not being bold or perhaps, in a more disparaging tone, for being complacent.

The court rejected the accused's plea that it should not be convicted because it entertained an honest and reasonable belief that the material did not exceed community standards. It should be noted that the rejection of this plea would be applicable not only to distributor but also to retail sellers. The plea was disallowed for the following reasons:

1) Most of the caselaw supports the proposition that *mens rea* does not include knowledge that the matter alleged to be obscene exceeds community standards.

2) The invalidated provision, s.159(6), clearly indicates that Parliament intended that this plea not be allowed.

3) Knowledge of community standards does not engage a question of fact but rather it concerns a value judgement and as such it is more properly characterized as a question of law for which no mistake is excusable.

The third factor is the most relevant because it is this characterization as mistake of law that in turn lends support to the large body of caselaw that has rejected this plea. Ignorance of the law is no defence! This maxim may be one of the "sacred cows of

the criminal law"[146] but there is no need to apply it mechanically. In applying the maxim the court has forgotten that it is dealing with a vague prohibition and an accused that has taken good faith precautions to insure compliance with the law. Is this accused to be sacrificed to maintain the rigidity of the maxim or is the maxim sufficiently flexible to admit of exceptions that cover the arguably non-culpable conduct of this accused?

In an age of increasing statutory regulation the presumption that everyone knows the law appears absurd. The law has become increasingly inaccessible[147] and it could be said that if laypersons know anything about the criminal law it is that ignorance of the law does not excuse.[148] Critique after critique has been written condemning the maxim and in one recent article it was aptly stated that "the overwhelming consensus is that the harshness of the maxim that ignorance of the law is no excuse should be ameliorated in favour of the humane principle that those who are without fault should not be subject to the sanctions of the criminal law."[149] We have entered an era in which there is a widening gulf between statutory prohibitions and common notions of morality and as the gulf widens the expectation that everyone could and should know the law seems to be nothing more than a wistful fantasy. Fletcher accurately describes the transformation of the maxim into a relic of a past era:

> The tight moral consensus that once supported the criminal law has obviously disappeared. This has happened as a result both of the vast expansion of the criminal law into regulatory offenses and the disintegration of the Judeo-Christian moral consensus. In a pluralistic society, saddled with criminal sanctions affecting every area of life, one cannot expect that everyone know what is criminal and what is not. The problem is compounded in some fields, such as abortion and

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[146] A.T.H. Smith, "Judicial Law Making in the Criminal Law" (1984) 100 L.Q.R. 46 at 70.

[147] For two studies illustrating the inaccessibility of contemporary law see, M.L. Friedland, *Access to the Law* (Toronto: Carswell, 1975); Justice (Society), *Breaking the Rules* (London: Justice, 1980). See also, M.P. Furmston, "Ignorance of the Law" (1981) 1 Legal Studies 37 in which the author illustrates that the law is not only inaccessible to laypersons but that it presents problems even for practitioners.

[148] R. Singer, "On Classism and Dissonance in the Criminal Law: A Reply to Professor Meir Dan-Cohen" (1986) 77 J. of Criminal Law and Criminology 69 at 78.

[149] A.T.H. Smith, "Error and Mistake of Law in Anglo-American Criminal Law Review" (1985) 14 Anglo-American L.R. 3.

> obscenity, by constantly changing standards of permissible conduct. The "obscenity" that could send Ralph Ginzburg to jail for five years is now readily exhibited at adult theaters around the United States. Assuming that everyone who violates the law does so in disregard and disrespect of the law is obviously outdated. Maintaining that policy today verges on blindness to the problem of individual justice.[150]

The maxim that ignorance of the law is no defence is framed as a categorical imperative that admits of no exceptions, but in fact both the legislature and the judiciary have been carving exceptions that are slowly eroding the primacy of this maxim. The Ontario Court of Appeal could have easily allowed Metro News to plea lack of knowledge with respect to community standards without doing violence to the development of the law in this area.

In Canada, England, and the United States the courts have moved to reform the maxim with circumspection, yet some reform has been achieved. In all three jurisdictions the courts have recognized that no person should be convicted on the basis of unavailable or unpublished law.[151] This exception has now been formally recognized in legislative enactments in all three jurisdictions.[152] In a recent development, the Nova Scotia County Court has suggested that the maxim would not operate in circumstances of a duly promulgated, but obscure, piece of subordinate legislation that was generally inaccessible to the public.[153] The inaccessibility of some law, and the corresponding unfairness in convicting on the basis of this type of law, has been characterized by one judge as follows: "I'm saying to swim through these regulations is like being dumped into a bath of heavy oil, and I think you would drown before you could ever get across."[154]

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[150] Fletcher, *supra*, note 90 at 731-32.

[151] *Lambert* v. *California*, 355 U.S. Reports 225 (1957); *R.* v. *Lim Chin Aik* (1963), A.C. 160 (P.C.); *R.* v. *Ross* (1944), 84 C.C.C. 107 (B.C. Co. Ct.); *Re Michelin Tires* (1975), 15 N.S.R. (2d) 150 (N.S.C.A.).

[152] In England in the *Statutory Instruments Act* 1946 and Canada in the *Statutory Instruments Act*, S.C. 1970-71-72, c. 38. In the United States several states have adopted the provisions of the Model Penal Code, s. 2.04 (3)(a) dealing with a defence of mistake of law based upon laws that have not been published or promulgated.

[153] *R.* v. *Maclean* (1974), 17 C.C.C. (2d) 84 (N.S. Co. Ct.).

[154] *R.* v. *Tangen*, unreported decision of the Ont. District Ct. (May 16, 1986) -- as quoted in Appellant's factum filed on appeal to Ont. C.A. #518/86.

In addition the courts have retreated from their earlier position of rejecting a defence of mistake of law when it is based upon erroneous advice given by a government official. In a gradual incremental fashion the courts have begun to outline the scope of a defence of officially-induced error. The discussion of the emergence of this defence can be found later in this paper, but it is sufficient to note that in cases acknowledging this defence it is common for the court to comment on the disutility of the maxim: "it is our opinion that a blind application of such a rule would violate the principle of fundamental fairness implicit in our jurisprudence."[155]

Professor Meir Dan-Cohen has recently noted that the maxim "far from being an exhaustive statement of the law, is in reality a mere starting point for a complex set of conflicting standards and considerations that allow courts to avoid many of the harsh results that strict adherence to the maxim would entail."[156] The judiciary has undertaken the task of dismantling the rigours of the maxim, and in place of a rigid denial of the defence the courts have substituted "an endless array of decisional variables that give rise to almost endless permutations."[157] In the view of Professor Dan-Cohen a defence of mistake of law would be recognized by the courts if the following factors are present: 1) the offence is *mala prohibitum*; 2) the charge is based upon a regulation; 3) the subject matter is not likely to be legally regulated; 4) the statute in question does not serve an important purpose; 5) *mens rea* is negated by the ignorance of the law; 6) the offence charged is a specific-intent crime; 7) the ignorance pertains to a non-criminal law; 8) the defendant relied on an authoritative source of law; 9) the charge is based upon an omission.[158]

Once it is recognized by the courts that numerous exceptions must be placed upon the operation of the maxim an obvious

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[155] *State* v. *Davis*, 216 N.W. (2d) 31, 34 (1974) (Sup. Ct. Wisc.).

[156] M. Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1984) 97 Harv. L.R. 625 at 646.

[157] *Ibid.* at 647.

[158] *Ibid.* at 646.

question emerges — why not simply abrogate the maxim in its entirety? In his critique of the maxim Cass contends that:

> The crux of the case against ignorantia legis thus is embodied in this question: if it is inconsistent with basic notions of fairness to penalize one for an act that, because of the nonexistence, inaccessibility or vagueness of the law, the actor believed legal when done, why is it fair to punish one who is ignorant of the law for any other reason.[159]

It is utterly anomalous to presume that Metro News knew that the Sakura edition of Penthouse exceeded community standards. The denial of a defence of mistake of law in these circumstances results in the penalization of a citizen without a requisite finding of criminal culpability. When Blackstone and Hale made their oracular pronouncement that everyone is presumed to know the law their resort to this fiction may have served an apologetic function[160] (i.e. to obscure an unpleasant truth) or it may have served the function of reconciling a legal result with some expressed or assumed premise. In other words, as expressed by Lon Fuller, "the conclusive presumption that everyone knows the law is apparently, intended to escape an assumed moral principle that it is unjust to visit the legal consequences of an act upon a person who does not know the law."[161] The fiction served to mask the reality that the maxim was a departure from the accepted principle that culpability is an essential element of criminality; however, over the course of the past two hundred years the mask has been lifted and the injustice of convicting defendants like Metro News has been recognized, yet jurists continue to search for some rationale to preserve the maxim.

Some commentators and jurists have reframed the paradigm of imputed knowledge to transform the presumption of knowledge into an affirmative duty for citizens to discover their legal obligations.[162] The citizen cannot be presumed to know the law, but

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[159] R.A. Cass, "Ignorance of the Law: A Maxim Reexamined" (1976) 17 William and Mary L.R. 671 at 689.

[160] L.L. Fuller, *Legal Fictions* (Stanford, Calif.: Stanford Univ. Press, 1967) at 83-84.

[161] *Ibid.* at 53.

[162] G.L. Williams, *Criminal Law: The General Part* (London: Stevens, 1961) at 293; Smith, *supra*, note 149 at 24.

as Professor Williams suggests the citizen can be presumed "to maintain throughout life an active interest in his legal obligations" and be "willing to search the law out...."[163] In transforming the paradigm in this manner one has fundamentally transformed the maxim in that all reasonable mistakes of law (i.e. that follow from due diligence in ascertaining the law) should operate as a valid defence. In fact, many jurisdictions ranging from China to many Latin-American countries, have incorporated the reasonable mistake of law into their arsenal of criminal defences.[164] For example, section 17 of the German *Criminal Code* reads:

> If in the commission of the (criminal) act, the actor fails to perceive that he is doing wrong and if he could not have avoided the mistake, the actor lacks culpability. If he could have avoided the mistake, his punishment may be mitigated in accordance with para.49(1).

In light of this development on an international level the pertinacious tendency of common law jurisdictions to retain the maxim appears to be a "derelict on the waters of law."[165]

One cannot fault the Ontario Court of Appeal for failing to give effect to the wise and welcome developments in other jurisdictions. Notwithstanding the prescriptive analysis that has been outlined above, the Ontario Court of Appeal was still confronted with the elliptical and absolute prohibition found in s.19 of the *Criminal Code* which simply reads: Ignorance of the law by a person who commits an offence is not an excuse for committing that offence. It would indeed be a court of great temerity that would create a defence of reasonable mistake of law in the face of this unequivocal legislative provision. However, courts have disregarded the plain meaning of this type of prohibition and have managed to limit its operation by creating numerous exceptions. In addition to the factors listed by Professor Dan-Cohen there is another mechanism that the Ontario Court of Appeal could have employed to give effect to the plea of Metro News.

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[163] Williams, *supra*, note 137 at 292.

[164] P.K. Ryu & H. Silving, "Comment on Error Juris" (1976) 24 Am. J. Comp. L. 689-93.

[165] *Lambert*, *supra*, note 151 at 232 - this was the expression used by the dissenters to characterize what they believed was the holding of the majority to the effect that sanctions cannot be applied without giving the defendant fair notice of the prohibition.

In attempting to limit the operation of the maxim the courts in Canada, England, and the United States have employed a technique of statutory construction that Professor Fletcher has characterized as the "formal approach to the problem."[166] Under this approach the courts will examine the statutory language of the offence to determine if there is some phrase or grammatical construction that will support an inference that a mistake of law can negate the specific intent required by the offence. Without eroding the primacy of the maxim the court, in these special circumstances, will be able to rationalize the exculpatory effect of the maxim. In these cases the court need not even discuss the maxim but can simply assert that the mistake, although one of law, has negated a specific requirement of the offence.[167]

The formalistic approach looks for certain catchwords (i.e. fraudulently, corruptly, maliciously, willfully, etc...) and examines their grammatical placement to determine the effect of mistake of law. The most common example of this approach is found in the case of property offences that include the words "claim of right" in the statutory formulation of the offence. In Canada and England a *bona fide*, but erroneous, belief in ownership rights will operate as a defence to theft, robbery, and malicious damage.[168] Some commentators and jurists have characterized this formal approach by the proposition that ignorance of a mistake as to civil or non-penal law is an exception to the maxim.[169]

The formalistic approach is not to be warmly embraced – it is a technique of last resort. It suffers from a sense of artificiality because of its reliance upon the "fortuities of legislative drafting as

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[166]Fletcher, *supra*, note 90 at 736.

[167]An example of this technique can be found in *People* v. *Weiss*, 12 N.E. (2d) 514 (1938) (N.Y.C. App.) in which the court concluded that the grammatical placement of the word "intent" before the phrase "without authority of law" led to an inference that a defendant's intention must also be directed to his lawful authority, and accordingly a mistake as to legal authority negated the *mens rea* for the offence.

[168]See *R.* v. *Reed* (1842), Car. & Mar. 306; *R.* v. *Hall* (1828), 3 C. & P. 409; *R.* v. *Smith* (1974), Q.B. 354; *R.* v. *Howson*, [1966] 3 C.C.C. 348 (Ont. C.A.); *R.* v. *Carrol* (1975), 27 C.C.C. (2d) 276 (Ont. C.A.).

[169]R.M. Perkins, "Ignorance or Mistake of Law Revisited" (1980) 3 Utah L. Rev. 473 at 475-6; P. Matthews, "Ignorance of the Law is No Excuse?" (1983) 3 Legal Studies 174 at 175.

a way of resolving a particular case without confronting the broader theoretical issue."[170] Nevertheless, the Ontario Court of Appeal could have approached the *Metro News* case in the following manner:

1) The accused company was not pleading that it was unaware of the existence of the law prohibiting the distribution of obscenity. It was merely asserting that it did not believe that the material in question was obscene because it did not know that the material exceeded community standards.

2) The company's belief was premised upon reasonable reliance on official and non-official sources of information; accordingly, the company not only knew of the law but it endeavoured to comply. In short, one could conclude that the company was not acting culpably.

3) Parliament violated the *Charter* by including a provision that stated that it would not be a defence if the accused was "ignorant of the nature or presence of the matter."

This provision was struck down but the fact that Parliament felt it necessary to enact this exclusionary provision implicitly suggests that Parliament believed that knowledge of the nature and presence of the material is a requisite element of the offence. Knowledge of the nature of the material is synonymous with knowledge that the material is obscene.

Approaching the case in this manner is not inconsistent with the approach to other offences. The offence of fraud has been defined as requiring dishonest deprivation.[171] Dishonesty is an elusive concept but many courts have been content to define dishonesty in an open-ended manner that is similar to the definition of obscenity. That is to say, some courts define dishonest as conduct that would be considered dishonest in the eyes of "ordinary decent people."[172] The offence of fraud requires resort to a community standard of dishonesty. The necessity of evaluating the

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[170] Fletcher, *supra*, note 90 at 739.

[171] *R.* v. *Olan, Hudson and Hartnett* (1978), 41 C.C.C. (2d) 145 (S.C.C.).

[172] *R.* v. *Feely* (1972), 57 Cr. App. R. (C.A.); see discussion in D. Doherty, "The Mens Rea of Fraud" (1982-83) 25 C.L.Q. 348 .

accused's conduct by reference to a community standard has not resulted in an absolute rejection by the courts of a plea by the accused that he did not know that his conduct exceeded community standards. Although the point is far from settled in Canada,[173] it is clear that the courts in England have not encountered any difficulty in formulating the *mens rea* of fraud to require knowledge that the alleged fraudulent conduct would be considered dishonest in the eyes of the community.[174]

If an offence cannot be formulated with precision and it can only be defined with resort to the nebulous notion of community standards then the court must accept that community standards become an essential element of the offence to which *mens rea* must be directed. If fraud was defined as lying about the quality of goods or obscenity was defined as depicting an erect penis then surely the court would require that the accused know of the lie or of the erect penis. The court would not question whether this knowledge was as to fact or law but would simply state that *mens rea* can only be satisfied upon proof of knowledge of all essential elements of the offence. Why should it make a difference if the essential element is not an ascertainable element like an erect penis but is instead a more amorphous element like the community standard? An essential element of an offence does not vary depending upon the specificity of its formulation.

Recently, the Ontario Court of Appeal reversed the conviction of Nazi propagandist, Ernst Zundel, on a charge of "willfully publishing a statement, tale or news that he knows is false."[175] One of the grounds for reversal was that the trial judge directed the jury that they could only convict if the accused published the material with no honest belief in the truth of the assertions in the material. This was considered an erroneous

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[173]The issue was left unresolved in *R.* v. *Black and Whiteside* (1983), 5 C.C.C. (3d) 313 (Ont. C.A.).

[174]In *R.* v. *Ghosh*, [1982] 3 W.L.R. 110 at 118-19 the court indicates that after determining whether objectively the conduct is considered dishonest by community standards then "the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest".

[175]*R.* v. *Zundel*, (1987), 31 C.C.C. (3d) 97 (Ont. C.A.).

direction because the court held that the offence "requires proof of actual knowledge of the falsity of the statements. Recklessness as to the truth of the statements is insufficient."[176] Falsity of statement is an essential element of the offence – without the element of falsity the definition of the offence would not convey a "morally significant prohibition."[177] Similarly, the offence of distributing obscenity can only be considered a coherent and significant prohibitory norm if its definition includes as an essential element that the material is obscene by virtue of it exceeding the community standard of tolerance. Falsity or obscenity is the heart of either offence and there cannot be a violation of either norm if the actor is not aware that he is dealing with material that activates the prohibitory norm. If knowledge of falsity or obscenity is required then, as recognized in the Zundel case, "wilful blindness is, of course, the equivalent of actual knowledge."[178] Accordingly, an individual cannot hide behind a veil of blissful ignorance, and if he has reason to suspect that he has entered the domain of falsity or obscenity then he is obligated to insure that the material does not in fact violate the prohibitory norm.

The Court of Appeal resisted this line of reasoning and relied upon the assertion of Glanville Williams that "where a rule of law involves the making of a value-judgment, the doctrine of *mens rea* does not generally apply in respect of the value judgment."[179] If this be so then it should equally apply to the offence of fraud which has a component of value-judgment in the definition of dishonesty. William's assertion must be of questionable validity because the only examples he relies upon to prove the assertion are offences of negligence and justificatory defences. The notion of putative justification shares little in common with the process of delineating the essential elements of an offence and it is dangerous to infer that *mens rea* does not apply to elements of an offence that engage

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[176] *Ibid.* at 157.

[177] Fletcher, *supra*, note 90 at 695.

[178] *Zundel*, *supra*, note 175 at 157.

[179] Williams, *supra*, note 137 at 141.

value judgments from the fact that we do not allow an individual to plea that s/he mistakenly thought s/he was applying proportionate force on self-defence. The fact that offences of negligence do not admit of a plea that the actor mistakenly thought that he or she was acting in accord with the standard of the reasonable person also does not support William's assertion. For crimes of negligence, which is a category of offence that has many detractors, we are dealing with the culpability of inadvertence[180] and as such it is incongruous to argue from this that knowledge is not an essential element of crimes that deal in the culpability of material awareness. For true crimes inadvertence is not a sufficient barometer of guilt, and if the legislature chooses to include a value-judgment as an essential element of the offence then the actor's material awareness must extend to this element.

As previously mentioned, the Ontario Court of Appeal may be excused for not attempting to limit the operation of the maxim in the ways outlined above. It may be too much to ask of a court to disregard the conservative forces within the judiciary that cling to the maxim with the same tenacity as Blackstone. As recently as 1982 the House of Lords could still credibly propose that:

> The principle that ignorance of the law is no defence in crime is so fundamental that to construe the word "knowingly" in a criminal statute as not requiring merely knowledge of the facts material to the offender's guilt, but also knowledge of the relevant law, would be revolutionary and, to my mind, wholly unacceptable.[181]

In addition the Ontario Court of Appeal could find comfort in the recent decision of the Supreme Court of Canada in *R.* v. *Molis* in which the court concluded that the defence of due diligence meant "due diligence in relation to the fulfillment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation."[182] Whether right or wrong this statement is enough to close the door on the exculpatory plea of the accused company. Before turning to some concluding

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[180] On the culpability of inadvertence see, G. Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis" (1971) 119 U. Penn. L. Rev. 401; Hart, *supra*, note 108 at 151.

[181] *Grant* v. *Borg* (1982), 1 W.L.R. 638.

[182] *R.* v. *Molis* (1980), 55 C.C.C. (2d) 558 at 564 (S.C.C.).

observations speculating on the reasons why the court took the easy way out by allowing an anachronistic maxim to override an individualized assessment of culpability, there is one last and brief matter left to discuss. Even after the characterization of the offence as strict liability, and the rejection of a plea of mistake of law, there remained one last avenue open to the company.

V. OFFICIALLY-INDUCED ERROR

Slowly emerging from the ruins of the maxim is a defence known as officially-induced error. It has found legislative recognition in numerous American jurisdictions,[183] it has been endorsed by the Law Reform Commission of Canada,[184] and it has been recognized or approved of by a number of courts in Canada.[185] Most significantly, the Ontario Court of Appeal, a few months prior to the decision in *Metro News*, clearly established officially-induced error as a recognized defence. In *R.* v. *Cancoil Thermal*[186] the Ontario Court of Appeal decided that the defence will operate where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration of the particular law.

Not only must an accused rely upon the opinion or advice of an official but the accused's reliance upon the misstatement must be

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[183] For a listing of states which have incorporated this defence see, P. Robinson, *Criminal Law Defences* (St. Paul, Minn.: West Pub., 1984) at 389-94; for the historical development of the defence in the United States see, P.S. Cremer, "The Ironies of Law Reform: A History of Reliance on Officials as a Defence in American Criminal Law" (1978) 14 Calif. W.L.R. 48.

[184] Law Reform Commission of Canada, Working Paper 29, "Criminal Law, The General Part: Liability & Defences" (Ottawa: The Commission, 1982) at 77-84 - recently endorsed in their Report 30, "Recodifying Criminal Law" (Ottawa: The Commission, 1986) at 31-32.

[185] See discussion of cases in N. Kastner, "Mistake of Law and Officially Induced Error" (1985-86) 28 C.L.Q. 308; see, also *Cancoil* case, *infra*, note 186.

[186] *R.* v. *Cancoil Thermal Corp. and Parkinson* (1986) 52 C.R. (3d) 188 (Ont. C.A.); it must be noted that the Court stated that the defence will only apply for regulatory offences and as such it may not operate for the offence of obscenity; however, it must also be remembered that in *Metro News* the court classified obscenity as strict liability, therefore by two erroneous rulings (that is, that obscenity is regulatory and that the defence only applies to regulatory) there should not have been any bar to the court considering the defence in this case.

reasonable. Determining whether or not one's reliance upon official advice was reasonable would require an examination of factors such as: 1) the efforts made to ascertain the proper law; 2) the complexity or obscurity of the law; 3) the position of the official who gave the advice; 4) the clarity, definitiveness, and reasonableness of the advice given.[187] It would appear that *Metro News* satisfied the requirements of reasonable reliance – recall that: 1) the publication was approved by Canada Customs; 2) the impugned photographs had appeared in another journal six months earlier without any objection; 3) the publication had been approved by a trade association committee established with the approval of the Attorney General; 4) the police indicated that they would not charge unless they first warned the company to permit the company to withdraw the publication from circulation; 5) the Crown could have proceeded by way of an *in rem* proceeding under s. 160 instead of prosecution.

With the exception of the last-mentioned factor (which amounts to nothing more than wishful thinking), the advice received and the steps undertaken by the company were not only reasonable, but may have been all that the company could have done. The difficulty with the application of the defence stems from the limitation in the *Cancoil* case that the opinion or advice relied upon must have been received from an "*official who is responsible for the administration of the law.*"[188] Even prior to the establishment of this defence the weight of authority clearly suggested that advice received from Customs or provincial censor boards could not immunize a defendant from prosecution by the Attorney-General;[189] however, why is it necessary to restrict this emerging defence to *official* misstatements? This limitation indicates that the defence is based upon an estoppel rationale and not a culpability rationale. The estoppel rationale reflects the view that it is improper and unfair to allow a government that has caused a mistake by providing

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[187] *Ibid.* at 199.

[188] *Ibid.*

[189] For example, *R.* v. *McFall* (1975), 26 C.C.C. (2d) 181 (B.C.C.A.); *R.* v. *Prairie Schooner News Ltd. and Powers* (1970), 1 C.C.C. (2d) 251 (Man. C.A.); *Daylight* case, *supra*, note 37 and *294555* case, *supra*, note 37.

erroneous advice to then prosecute for conduct performed in accordance with that advice. Under this rationale there is no necessary connection between reliance upon the advice and the issue of the defendant's culpability or accountability. By focussing upon estoppel and avoiding discussion of culpability a court or legislature can also avoid dealing with the implications of culpability; that is, the abandonment of the maxim and its replacement with a defence of reasonable mistake of law.

The accused company could have tried to persuade the court to move towards a culpability rationale. In *Cancoil*, the court required reasonable reliance and it could be argued that this limitation sufficiently constrains the defence, and so long as the reliance is reasonable it need not matter whether the advice came from the appropriate official, the police, or the accused's lawyer. We need not worry about devious individuals trying to insulate themselves by relying upon advice given by those incompetent to do so because surely it would not be reasonable reliance to seek refuge in legal advice given by my plumber or mother.

The estoppel rationale is far too narrow and it is unclear as to which officials are empowered to mislead for the purposes of the defence. In this case, would the relevant official be the provincial Attorney-General, his agents (a Crown Attorney), the Federal Department of Justice, the police, or members of the judiciary? The most likely choice would be the provincial Attorney-General but in 1976 this official refused to establish a screening committee for questionable publications. The Crown Attorneys and the judges are unlikely to give advice because they do not see themselves in the business of giving advance rulings. The Federal Department of Justice is accustomed to giving advice but it is unlikely that this law and policy-making department would be considered an official responsible for the *administration* of the law.

When most people have legal difficulties they will consult with a lawyer, a low-level bureaucrat (especially if the problem concerns the filing of forms), or the police.[190] Lawyers and low-level bureaucrats are not officials involved in administering the law but arguably the police are, and in that capacity they can give advice

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[190] See Friedland, *supra*, note 147.

that should shield citizens from later prosecution. In this case the police informed the accused company that they would not prosecute until they first gave warning. No such warning was given and it was reasonable for the company to assume that the police had found nothing objectionable in the publication because no complaint or objection was launched six months earlier when the photographs first appeared in another magazine and the company had been told by a committee with valuable experience in this area that the material did not exceed community standards.

Even within the constraints of an estoppel rationale it would have been plausible to argue that the advice given by the police satisfied the requirements of official misstatement. Nevertheless, it is submitted that the estoppel is fundamentally flawed and should be replaced with a culpability rationale. Culpability presupposes a choice to violate legal imperatives and there is obviously no choice if one is actually misled into believing that there exists no such imperative. Assuming the reliance to be reasonable why should it be incumbent upon the citizen to check and evaluate the authority of the government official from whom advice is received? If the official has no authority, then he or she should refrain from giving advice or at least direct the citizen to the proper officials. Reliance upon a government official who is not authorized to give advice in a certain area of law has been recognized as sufficient to sustain a claim of estoppel. In *Robertson* v. *Minister of Pensions*, Lord Denning allowed an individual to rely upon an assurance given by an official in the wrong ministry. He stated:

> The War Office did not refer him to the Minister of Pensions. They assumed authority over the matter and assured the appellant that his disability had been accepted as attributable to military service. He was entitled to assume that they had consulted any other departments that might be concerned...before they gave him the assurance... In my opinion if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department

> itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also; and as the Crown is bound, so are other departments, for they also are but agents of the Crown.[191]

All of these arguments concerning the proper scope and interpretation of the defence of officially-induced error were not addressed in the appellate court. The problem of reliance was dealt with as an issue of abuse of process, and accordingly it was easy for the court to avoid examining the issues of culpability, the reasonability of reliance, and the appropriate official who could trigger a claim of estoppel. Once characterized as a question of abuse of process the court's focus would not be on the circumstances of the offender but instead the court would evaluate the conduct of the prosecution to determine if the proceedings were "vexatious or oppressive."[192] Abuse of process is reserved for the "clearest of cases"[193] and it is rarely successful as a plea in the absence of proof of *mala fides* or oblique motive on behalf of the Crown.[194]

When the issue is framed as an abuse of process the company's plea becomes tenuous. All the factors relied upon by the company have little or nothing to do with prosecutorial conduct. Accordingly, it is easy for the court to dismiss the claim by simply stating that "in my view none of the above circumstances, considered singly or cumulatively, constitutes the prosecution of the appellant an abuse of process."[195] The artificiality of this conclusion becomes evident if we change the facts slightly by examining the implications of introducing a Crown Attorney into the picture. If a Crown Attorney, instead of the police, indicated that they would not

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[191] *Robertson* v. *Minister of Pensions*, [1949] 1 K.B. 227 at 232; this proposition was criticized by the House of Lords in *Howell* v. *Falmouth Boat Construction Ltd.*, [1951] A.C. 837; the Canadian position on estoppel against the government is not clear but see, *Re Violi* (1965), 51 D.L.R. (2d) 506 (S.C.C.); *Re Citizenship and Holvenstot*, [1982] F.C. 279 (F.C.T.D.).

[192] *R.* v. *Young* (1984), 40 C.R. (3d) 289 at 329 (Ont. C.A.); *R.* v. *Jewitt*, [1985] 2 S.C.R. 128.

[193] *Ibid.*

[194] See *R.* v. *Keyowski* (1986), 53 C.R. (3d) 1 (Sask. C.A.); and see the distinction drawn by Lamer J. in *Mills* v. *R.* (1986), 26 C.C.C. (3d) 481 at 548-9 (S.C.C.) between abusive process and abuse of process with the latter being reserved for improper motive on behalf of the Crown.

[195] *Metro News*, *supra*, note 2 at 330.

proceed with a prosecution unless they had warned the company and given the company the opportunity to remove the publication from circulation then clearly this would constitute an abuse of process.[196] In *Re Smith and the Queen*[197] an arrangement had been made with the accused to the effect that if he would turn over marijuana no charges would be laid with respect to any marijuana turned in. This is analogous to an arrangement of no charges if a publication is removed from circulation. After turning in the narcotics charges were laid, but the court granted a writ of prohibition on the basis that:

> The ordinary man, having made such a deal with Crown counsel, would feel that he could walk in safety thereafter. He would be astounded and amazed if charges of conspiracy could be proceeded with. I think what occurred in this case constitutes oppression. The ordinary man is entitled to expect that the Crown will keep its word.[198]

If a Crown Attorney is not permitted to repudiate arrangements arrived at in good faith then the same considerations should apply to representations made by police officers. By framing the issue as one of abuse of process the court could avoid any examination of the conduct of the police force. The issue should have been explored in the context of the emerging defence of officially-induced error, and the accused should have been acquitted on the basis of reasonable reliance upon representations that made the illegal acts of the company non-culpable and not deserving of punishment.

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[196] For cases in which the courts have not allowed the Crown to repudiate any promises or deals made see *R.* v. *Agozzino*, [1970] 1 O.R. 480, 1 C.C.C. (2d) 380 (Ont. C.A.); *R.* v. *Betesh* (1975), 30 C.C.C. (2d) 233 (Ont. Co. Ct.); *Re Citizenship*, *supra*, note 191; also see *R.* v. *Skogman* (1984), 41 C.R. (3d) 1 in which the S.C.C. held that the Crown is bound to the position it takes upon an appeal.

[197] (1974), 22 C.C.C. (2d) 268 (B.C.S.C.).

[198] *Ibid.* at 272.

VI. CONCLUDING OBSERVATIONS

The ongoing political battle to curb the distribution of obscene material must have an impact on the adjudicatory function of courts of law. The *Metro News* case superficially resembles a conventional normative analysis of criminal law defences,[199] but one must wonder why the court resolved the case in an insipid manner that stunts the evolutionary growth of the defence of legal mistake. By comparing the demands of a normative theory of culpability and the legal conclusions reached by the court a conclusion could be drawn that the court has abandoned the enterprise of a principled elaboration of criminal liability for the sake of assisting the state in its battle against obscenity. The court's treatment of the issue of obscenity lends support to the critical approach that views the judiciary as just another state instrumentality. In another context Professor McGinley reached a similar conclusion:

> When one considers these meager defences and the standards under which they have been admitted, the judiciary rather than constituting a moral brake to the carriage of the state appear rather as its postilions stringently maintaining the velocity of its telos.[200]

The view of the court as a mere state instrumentality may appear far too deterministic or reductionistic. It is an ideological view that finds support in the analysis of the *Metro News* case, with its recurrent references to state enforcement needs, but it is a view that needs greater support than this analysis of judicial performance in the field of obscenity law. Stripped of its ideological component, the state instrumentality function can be restated in more neutral, and hence less controversial, terms. This more neutral view understands the court to be a weathervane that changes position in light of political developments and pressures. "Any which way the wind blows" becomes the informing principle of judicial

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[199] It has been said that the "function of law is to give each of us the impression that the system operates according to a normative law" - N. Gabel, "Reification in Legal Reasoning" (1980) 3 Research in Law and Sociology 25 at 29.

[200] McGinley, *supra*, note 3 at 299.

decisionmaking.[201] One need not advance some underlying conspiratorial agreement between the branches of government to prove that the courts "wag their tails for the ruling classes"[202]; the perspective of the court as weathervane is simply a reflection of the obvious fact that judges, like everyone else, read newspapers and watch television and are thereby influenced (or corrupted) by what they see happening around them.

Unfortunately, the weathervane metaphor is really only a concession that judges are human and as such it is too trite to have any real explanatory power. However, one does begin to see that the judicial weathervane is not an ordinary weathervane but is one with a mission. This observation becomes clearer upon noticing that obscenity law is not the only area in which the court has taken a restrictive stance with respect to the issues of strict liability and mistake of law. The courts have also had difficulty allowing the growth of culpability-based defences of legal mistake in the area of firearm, gambling, and narcotic offences.[203] What these offences all share in common is their characterization as *mala prohibitum*, and it may be that their lack of grounding in conventional morality has made the court hesitant to allow a defence of mistake of law when in fact the critical element in the continued existence of a *mala prohibita* offence is its assimilation into the legal awareness of citizens.

In an insightful article on mistake of law Professor Zupancic outlines the difficulty with admitting mistake of law for "extrinsic norms."[204] The core offences have an "organic extra-legal reference point" in that they create a tangible harm that, even in the absence of legal action, will produce "remedial lacunae." The core offences are norms that are dictated by life itself and as such are intrinsic

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[201] It is interesting to note that in the Netherlands, where the political and social climate is more relaxed with respect to pornography, the courts have taken a permissive, liberal approach to the interpretation of their obscenity laws - see, Committee, *supra*, note 14 at 251.

[202] M. Mandel, "Marxism and the Rule of Law" (1986) 35 U.N.B.L.J. 7 at 19.

[203] See *Molis*, *supra*, note 182 (re: narcotics); *R.* v. *Potter* (1978), 3 C.R. (3d) 154 (P.E.I.S.C.) (re: gambling); *R.* v. *Baxter* (1982), 6 C.C.C. (3d) 447 (Alta. C.A.) (re: firearms).

[204] B. Zupancic, "Criminal Responsibility Under Mistake of Law: The Real Reasons" (1985) 13 Am. J. Crim. L. 37, 43-45.

norms. Most other criminal offences are not dictated by life itself but are dictated by "somebody's will and power" and the "moral damage" caused by these crimes "cannot be objectively evaluated."[205]These extrinsic norms lead a precarious existence and they are in constant danger of being consumed by the demands of subjective guilt. As a result of lacking an objectively calculated assessment of harm these extrinsic norms move to a position of subjectification as a proxy for culpability: however, there must be limits to the process of subjectification because the "rising curve of subjectification threatens to destroy the very existence of the norm."[206] If we were to take all subjective considerations relating to the actor into account in assessing culpability it would be impossible to blame actors – as Fletcher has said: "it goes without saying that a person's life experience may shape his character. Yet if we excuse on the grounds of prolonged social deprivation the theory of excuses would begin to absorb the criminal law."[207]

Zupancic proposes that for extrinsic norms it is necessary to stop the subjectification process short of admitting legal mistakes. In his view "the existence of arbitrary extrinsic norms is precariously dependent upon rigid formalistic interpretation and consistent enforcement"[208] and without the concrete enforcement of these norms they lose their life-force. The resort to the subjectification of the norm by allowing a mistake of law to excuse positively destroys the norm by preventing the concretization of its objective meaning. For extrinsic norms it is a misconception to believe that the norm is extant because it was promulgated *in abstracto*. A scientific law may be disregarded and still continue to impact – an intrinsic norm embodied in tort law or a core criminal offence may be disregarded because its lack of enforcement still leaves something behind that cries out for vindication. However, the disregard of an extrinsic norm such as the obscenity law leaves nothing behind and inevitably

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[205]*Ibid.* at 37-38.

[206]*Ibid.* at 41.

[207]G.P. Fletcher, "The Individualization of Excusing Conditions" (1973-74) 47 Southern Calif. L.R. 1269.

[208]Zupancic, *supra*, note 204 at 45.

it annihilates the social morality that gave birth to the norm. It is conceivable that with increased normative integration (i.e. as the norm is supported by organic social support) we will not have to rely upon mechanical enforcement to guarantee the continued existence of the norm; however, until this point is reached it is necessary to limit considerations of subjective guilt as an approximation of culpability to maintain the objective normative impact of the rule.

This explanation suggests that the court as weathervane has as its mission the maintenance of the will and power of the state. Unlike the view of the court as a state instrumentality it is not necessary to prove a conspiratorial connection between state and court but rather the impulse to limit considerations of guilt flows from an unconscious understanding that the norm is too precarious to admit of all defences. The court's role in maintaining state authority is to deny any defence that threatens the continued existence of offences of dubious legitimacy. When the Supreme Court of Canada in *Molis* rejected a defence of due diligence in the ascertainment of a legal duty it was implicitly recognizing that drug offences could not survive if one could plea that he or she was not aware of the fact that the legislature had included a particular drug on a schedule of prohibitions.

As Professor Zupancic realizes, this limiting process invariably ends up sacrificing some innocent actors for the sake of maintaining authority. The punishment of subjectively innocent accused, such as *Metro News*, is not an easy task for a court to digest, and it has required the court to construct a rationalization for this action that is independent of the concern of maintaining the viability of state-promulgated norms. At the heart of decisions like *Metro News* there is an *ad hominem* justification for erroneous characterization of offences as strict liability and the rejection of any form of defence of legal mistake. Basically, the court seems to believe that the type of citizen who would rely upon a defence of legal error is not the type of citizen deserving of protection. This unjustified presupposition is reflected in evocative judicial metaphors such as: "those who skate on thin ice can hardly expect to find a

sign which will denote the precise spot where he will fall in"[209] or "it is not the function of the court to decide how close to dangerous waters it is possible to sail without being shipwrecked."[210] This *ad hominem* perspective on those who rely upon defences of mistake of law cannot soften the hardship of convicting the subjectively innocent. One may agree that a court cannot point to the exact point at which an individual may fall into icy waters but surely the court has the obligation to insure that the reckless individual is forewarned that the ice may be thin at spots. The court-formulated community standards test does not constitute sufficient warning or notice that an individual is skating on thin ice, and the court should not rely upon these evocative metaphors to disguise the fact that they are penalizing individuals who have done all that is possible to comply with their legal obligations.

There is great danger in a court becoming engaged in a political enterprise. Regardless of whether one views the court as actively engaged in the battle on obscenity or as being involved in the more modest task of maintaining the viability of extrinsic norms, the result of undertaking these types of political tasks does not augur well for an accused individual. The price of war can be counted by its casualties and Metro News is one of many casualties. In the attempt to ensure that the obscenity prohibitions are enforceable and effective the court has and will sacrifice innocent shopkeepers and distributors who want to conform to the law but find that in the ordinary course of running their business it is impossible to avoid the occasional infraction. These casualties of the war on obscenity are innocent victims because they lack the requisite culpability which forms the foundation of our justice system that gives the citizen "a fair opportunity to choose between keeping the law required for society's protection or paying the penalty."[211] Individual autonomy is maximized when the law serves to guide

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[209] *D.P.P.* v. *Knuller* [1973], A.C. 435 at 463.

[210] *Royal College of Nursing* v. *D.H.S.S.* (1981), 1 All E.R. 545, 560 (C.A.); cf., *U.S.* v. *Feola* 420 U.S. 671 at 685 (1975).

[211] Hart, *supra*, note 108 at 23.

citizens by increasing the individual's ability to predict when criminal sanctions will be applied.

It may be a reasonable price to pay for security and order to sacrifice the autonomy of some people here or there; however, the individual shopkeeper or distributor is not the only casualty. In order to sacrifice these individuals it is also necessary to sacrifice the principled development of doctrine. Metro News could only be convicted by distorting the law relating to classification of offences and by stunting the growth of the law relating to legal mistakes, abuse of process and officially-induced error. Perhaps this case will be seen as an aberration, a derelict on the water of law, but then again it is likely that the case will become firmly planted in the body of precedent that is regularly relied upon in our courts. Decisions in the area of obscenity, or public morality offences in general, have a tendency to become precedents for the application of the defence of mistake of law in other areas of criminal law. The decision of *R.* v. *Campbell*,[212] in which a defence of reliance upon an erroneous judicial decision concerning nude dancing was rejected, has become standard fare for law students – the decision is included in virtually every casebook and textbook available in Canada.[213] Every student of law learns to accept the harsh irony that "people in society are expected to have a more profound knowledge of the law than are the Judges."[214]

In fighting this battle, all that is gained is a pyrrhic victory. As Kant has said: "no state at war with another state should engage in hostilities of such a kind as to render mutual confidence impossible when peace will have been made."[215] When the interest in battling obscenity wanes, as it most likely will when it is no longer politically fashionable, we will have to live with the hostilities of the

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[212] *R.* v. *Campbell and Mlynarchuk* (1973), 10 C.C.C. (2d) 26 (Alta. D.C.).

[213] It is included in the three major casebooks presently available - D. Stuart and R.J. Delisle, *Learning Canadian Criminal Law* (Toronto: Carswell, 1986); D.A. Schmeiser, *Canadian Criminal Law* (Toronto: Butterworths, 1985); M.L. Friedland, *Cases and Materials on Criminal Law and Procedure* (Toronto: Univ. of Toronto Press, 1978).

[214] *Campbell*, *supra*, note 212 at 32.

[215] As quoted in N.H. Auden and L. Kronenberger, *Aphorisms: A Personal Selection* (Toronto: Penguin, 1985) at 304.

previous battle – the skewed doctrines and the bitterness of those wrongly convicted. The courts cannot operate in a vacuum, nor can they ignore the developments in the political realm, but they should follow the advice that they have set for themselves in the context of sentencing: "courts do not impose sentences in response to public clamour."[216] The court should not allow the law to vacillate with the ebb and flow of public opinion.

The value of adjudicatory law-making is found in its capacity for supplying continuity, stability, and incremental change. A court operates best when it tries to apply underlying principles instead of trying to resolve a case on the basis of contingent policy choices. Imperfections in the law arise from being out of harmony with underlying principles – principles which provide the contours for an open-ended adjudicative process that can only, and should only, obtain a minimum amount of guidance from legislation. Principles that are inherently framed in generality, operate to insure that no person, group, or political association can impose their conception of the good on others. They are a safeguard against momentary and arbitrary changes in the social order. In cases like *Metro News* the abandonment of principles of culpability in order to satisfy the interest of policy leads only to confusion and a form of assembly-line justice that can register many unjust convictions. This is not an achievement to celebrate on Armistice Day.

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[216] *R.* v. *Oliver* [1977] 5 W.W.R. 344 at 346 (B.C.C.A.); Recently, the Supreme Court of Canada in *R.* v. *Collins* (1987), 56 C.R. (3d) 193 had occasion to comment upon the propriety of taking into account public opinion in judicial decisionmaking (these comments arose in the context of interpreting the phrase "bringing the administration of justice into disrepute" as found in s. 24(2) of the Charter). The court approved of the following remarks taken from academic journals: 1) "the ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion"; 2) Judges should "concentrate on what they do best: finding within themselves, with cautionness and impartiality, a basis for their own decisions....he should not render a decision that would be unacceptable to the community *when that community is not being wrought with passion or otherwise under passing stress due to current events*" (emphasis added).