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CONTROLLING OBSCENITY BY CRIMINAL SANCTION

JOSEPH WEILER*

Consideration of both rationale and process suggest that the criminal sanction, society's ultimate threat, inflicting as it does a unique combination of stigma and loss of liberty, should be resorted to only sparingly in a society that regards itself as free and open.¹

The sanction is at once uniquely coercive and, in the broadest sense, uniquely expensive. It should be reserved for what really matters.

It is the thesis of this paper that this advice as to the proper criterion of forbiddenness has not been followed in the area of obscenity law. The purpose of this paper is to explore some of the problems that confront the legislators and courts in their attempt to enforce morals in obscenity legislation through the utilization of the instrument of criminal sanction.

Our study will consist first (by way of introduction) of a brief summary of the classic philosophical debate as to the cogency and viability of legislating morality in general and obscenity in particular; secondly a statement as to the current statutory and common law form of obscenity law in Canada; thirdly, a philosophical critique of obscenity law with a view to assessing the 'legality' of such legislation using the analysis promulgated by Lon Fuller; fourth, from an institutional perspective we will examine the practical difficulties encountered by the adjudicative process in its Sisyphean labour of applying obscenity law as it is currently formulated, with some discussion as to the impropriety of such an enterprise; fifth, a brief analysis as to the cost of enforcing obscenity law, and sixth, conclusions.

I

THE PHILOSOPHICAL JUSTIFICATION FOR OBSCENITY LEGISLATION

Those who contend that the criminal law should not be used to enforce moral values cite a passage from John Stuart Mill's celebrated essay *On Liberty* to support their position:

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.²

Of course, it can be argued that there is no such thing as a harm to oneself that does not cause some harm to third persons (no man is an island), but Mill answers this charge by extending his concept of "harm to others" to include risk

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¹Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) 249-50.

²Mill, *On Liberty*.

of damage "to the interests of others". The question is not one of whether or not there will be harm done, it is one of the remoteness of probability of the harm, which leads to a weighing of benefits against detriments of criminalization.

With regard to . . . constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.³

Mill's 'harms test' was rejected by his contemporary James Fitzjames Stephen who felt that society had a right to outlaw behaviour that offended the moral consensus of the majority.⁴ Likewise, Lord Devlin has recently adopted a similar position in *The Enforcement of Morals* (1959),⁵ where he reasoned that since Christian morals act as a cohesive force in English society, the use of the criminal sanction to enforce public morality as such is justifiable and indeed essential to the existence of that society. In his "disintegration" thesis,⁶ Devlin sees no limit to criminalizing immorality, for the same reason as society is justified in prohibiting treason or sedition. Similar sentiments are reflected by Viscount Simonds in *Shaw v. D.P.P.*, [1962] A.C. 220 at 267.

There remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state.

Professor H.L.A. Hart, on the other hand, has refused to accept the view that the fact that conduct by common standards is immoral is sufficient to justify making that conduct prohibited by law. He asks "What evidence is there that a failure to enforce by law a society's accepted sexual morality is likely to lead to the destruction of all morality and to jeopardize the existence of society?"⁷ On the contrary, it has been suggested by Professor Wollheim that social identity and stability rest not with a uniform morality but in the "mutual tolerating of different moralities."⁸ Herbert Packer in suggesting that immorality is generally a necessary but not a sufficient condition for invocation of the criminal sanction, asserts that:

the extent of disagreement about moral judgments is an obvious reason for hesitancy about an automatic enforcement of morals. There have been monolithic societies in which a static and homogeneous ethnic, religious and class structure conduces to a widely shared acceptance of a value system. But that is hardly a description of the reality of twentieth century American society, or of its pluralistic and liberal aspirations. In a society that neither has nor wants a unitary set of moral norms, the enforcement of morals carries a heavy cost in repression.

The more heterogeneous the society, the more repressive the enforcement of morals must be. . . . Our moral universe is polycentric. The state, especially when the most coercive of sanctions is at issue, should not seek to impose a spurious unity upon it.⁹

The history of obscenity legislation presents us with a microcosm of the more extensive problem of the enforcement of morals discussed above. The controversial origin of the common law prohibition of obscenity exhibits similar arguments as those proffered by Hart and Devlin. In *Regina v. Read Powell J.* laments:

³*Id.*

⁴Stephen, *Liberty, Equality and Fraternity* (1873).

⁵*Id.*

⁶Devlin, *Enforcement of Morals* (London: Oxford University Press, 1959) 15.

⁷H.L.A. Hart, *The Use and Abuse of Criminal Law* (1961), 4 *Oxford Lawyer* 1, 12.

⁸Wollheim, *Crime, Sin and Mr. Justice Devlin* (1959), 13 *Encounter* 34.

⁹Packer, *supra* note 1, at 265.

There is no law to punish it (obscenity). I wish there were, but we cannot make law; it indeed tends to the corruption of good manners, but this is not sufficient for us to punish.¹⁰

On the other hand, the crime of obscenity was recognized in *Rex v. Curl* where Lord Hardwicke reasoned that:

Obscenity is an offence at common law, as it tends to corrupt the morals of the King's subjects, and is against the peace of the King . . . Destroying it (morality) is destroying the peace of the government, for government is no more than public order, which is morality.¹¹

In recent cases, a similar view has been candidly proclaimed by the Supreme Court of Canada as the purpose of obscenity legislation. Justices Taschereau and Fauteux in *Regina v. Brodie*¹² declared that the prohibition of sale and distribution of obscene literature is an attempt to protect and preserve public morality, assuming as did Lord Devlin, first that such is a legitimate use of the criminal sanction and secondly that public morals *are in fact* affected when lewd thoughts are likely to be aroused in the reader's mind. Likewise, in *R. v. Coles*,¹³ Roach J.A. suggested such a person is likely to be pushed to overt anti-social behaviour either of a criminal or merely immoral nature.

The assumption that lewd thoughts caused by reading obscene literature are conducive to anti-social behaviour has been challenged by both the judiciary and the recent President's Commission on Obscenity and Pornography.¹⁴ Libertarian-minded judges such as Curtis Bok and Jerome Frank, have sought to call the bluff of those who contend that the main thrust of obscenity law is to combat risk creation, or secular harm to others (rather than prohibit immorality as such), by seeking to adopt the "clear and present danger" test as a limiting criterion for the application of obscenity statutes. They would require a causal connection between the book and the criminal behaviour to be shown "beyond a reasonable doubt"¹⁵ (Bok J.), or else by "reasonable probability" (Frank J.).¹⁶ This approach, however, has not been followed either by legislators or courts who prefer to examine the material itself rather than the consequences that can hardly be demonstrated. It would seem that alleged long range harm is of necessity attenuated and ambiguous, and debates about its existence or seriousness are inevitably inconclusive, if for no other reason than that the illegality of the activity renders sustained, controlled and varied observation of its effects impossible.

However, in the most sophisticated and comprehensive study to date, the behavioural scientists of the Federal Commission on Obscenity and Pornography (1970) reached several conclusions from their empirical evidence, (which included a review of empirical literature, an analysis of crime statistics, and research commissioned by the Panel) that are of vital significance to our discussion in that they refute both the alleged short and long range secular harms

¹⁰*Regina v. Read* (1708), 92 E.R. 777 (K.B.) at 778, Fortescue 98 at 99.

¹¹*Rex v. Curl* (1727), 93 E.R. 849 (K.B.) at 850-51, 2 Strange 788 at 789-90.

¹²*Brodie; Sansky and Rubin v. R.*, [1962] S.C.R. 681.

¹³*R. v. Coles Company Limited* (1964) 42 C.R. 368, 49 D.L.R. (2d) 34.

¹⁴*President's Commission on Obscenity and Pornography*, (Washington, 1971).

¹⁵Bok J., *Commonwealth v. Gordon* (1949), 66 Pa. D. & C. 101 at 156 as discussed in Packer, *supra* note 1, at 319.

¹⁶Frank J. *United States v. Roth* (1956), 237 (2d) 796, 806, 826.

to society, as well as detract from the theory that obscenity tends to break down the moral fibre of the indulgent reader (or viewer).¹⁷

The Report claims that:

- (1) It cannot be demonstrated that pornography causes crime or delinquency nor that erotic materials constitute a primary or significant cause of the development of character defects.¹⁸
- (2) Public opinion does not support legal efforts to prevent adult Americans from reading or seeing whatever they like.¹⁹

The Commission found that while most Americans think that erotica has undesirable effects on people's behaviour, when this attitude is more carefully examined it appears that with respect to the respondent's own experience socially desirable or neutral effects of exposure to erotica predominate.²⁰

These discoveries of the Commission aligned with those findings of the psychologists and sociologists discussed above, would thus seem to dilute the already limp theoretical justification for the prohibition of obscenity (at least to consenting adults), leaving only the argument that it is valid to protect society's moral standards against the attraction of the immediate experience itself, for to lose control of one's personality to lustful pornography is an evil in itself requiring no added warrant in ulterior harms to justify criminal prohibition. When reduced to this flaccid vindication, however (apart altogether from any considerations as to the cost of enforcement of these laws), the proponents of legal moralism are treading on weak doctrinal ice.

II

THE PRESENT STATE OF THE LAW OF OBSCENITY IN CANADA

In most areas of criminal law the law itself makes the judgement regarding what particular conduct is to be penalized, and that conduct is described by the law with considerable specificity.

However, in the area of obscenity, the law is ill-defined and even potentially self-contradictory, for there exists not one but two legally recognized tests of obscenity, i.e., the common law *Hicklin* test and the recently enacted test in s. 159(8) of The Criminal Code.²¹ The *Hicklin* test of obscenity is:

Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.²²

This test has been severely criticized for three basic reasons: 1) it requires a subjective, speculative evaluation by the judge of the corrupting and depraving tendencies of the material (whatever this may mean) upon a group of unknown readers; 2) English, Canadian and American courts since 1868 have taken into account the possibility that certain publications might find their way into the hands of adolescents or emotionally unstable individuals and have declared

¹⁷*Supra* note 14.

¹⁸*Id.* as reported in Packer, *The Pornography Caper* (1971), 51 Commentary, no 2, 74.

¹⁹*Id.* at 74.

²⁰*Id.* at 74-75.

²¹R.S.C. 1970 c.c-33. [originally enacted as s. 150(8)]

²²R. v. *Hicklin* (1868), 3 Q.B.D. 360 at 371.

material to be obscene on *this* basis,²³ a result of giving the test this wide application being to impose an unduly restrictive standard of censorship upon creative literary efforts and upon freedom of speech and expression; 3) the fact that over the years a practice developed whereby the books have been declared obscene on the basis of isolated passages in them taken out of context.²⁴

In 1959, in response to a flood of "girlie magazines" that inundated the newstands (despite the apparent stringency of the *Hicklin* test), s. 159(8) was enacted, the rationale as expressed in the House of Commons debates being that the problem of controlling obscene literature had its roots in the fact that judges were reluctant to set themselves up as censors because of the purely subjective aspects of the *Hicklin* test. The expressed purpose of the legislation was to provide a series of simple objective tests *in addition to* the somewhat vague subjective test which was the only one formerly available. Mr. Fulton saw that application of the new test as "deliberately stopping short of any attempt to outlaw publications concerning which there may be any contention that they have genuine literary, artistic or scientific merit."²⁵ These works remain to be dealt with under the *Hicklin* definition which is not superseded by the new statutory definition.

Unfortunately, Parliament's intention as to the application of the two tests was not made clear in the statute, nor in the two cases on which the Supreme Court of Canada has had an opportunity to make an authoritative declaration as to whether they both can apply to every case, whether one applies to a specific genre of cases and not to another genre (as it seemed was the intention of the draftsman), or whether the new test is exhaustive. The latter interpretation has been the view adopted by most jurisdictions including the Ontario Court of Appeal in *R. v. Cameron*²⁶ and *R. v. Coles*²⁷ but there have been decisions that would still recognize the application of the *Hicklin* test, e.g., *R. v. Munster*,²⁸ *R. v. Adams*.²⁹ Thus it will remain a moot point until either Parliament or the Supreme Court responds to the challenge.

Of course, the problem of the existence of two tests is negated, if in its practical application, the statutory test does not provide the objective standard that it was purported to furnish. The section reads,

For the purposes of this Act, any publication, a dominant characteristic of which is the undue exploitation of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.³⁰

This test breaks down into two basic questions, both of which require some subjective evaluation by the trier of fact. First, he will have to determine whether or not the undue exploitation of sex was a dominant characteristic of the publication (this has not troubled the courts greatly) and secondly, the

²³See *R. v. American News* (1959), 118 C.C.C. 152.

²⁴W. Charles, *Obscene Literature and the Legal Process in Canada* (1966), 44 C.B.R. 243 at 245-6.

²⁵1959, 5 House of Commons Debates, Canada at 5517.

²⁶*R. v. Cameron* (1966), 2 O.R. 777.

²⁷*Supra* note 13.

²⁸*R. v. Munster* (1960), 129 C.C.C. 277, 34 C.R. 47.

²⁹*R. v. Adams* (1966), 4 C.C.C. 42.

³⁰The Criminal Code, R.S.C. 1970 c.c.-33, s. 159(8).

question of what constitutes undue exploitation. Mr. Fulton expressed belief that the courts were familiar with this term and suggested that it meant to them "generally something going beyond what men of goodwill and common sense would tolerate".³¹ However, this explanation is not very helpful because it does not answer the crucial and most important question which is, how are the courts to determine what people will tolerate?

Mr. Justice Judson in *R. v Brodie*,³² suggested that "undue" referred to an "excessive emphasis on a theme for a base purpose", an interpretation that would appear to involve two factors: 1) the emphasis on sex must be excessive; 2) the purpose of the author must be a base one. This determination was to be judged by the internal necessities of the work itself (the work taken as a whole, not just isolated passages) and was a decision which the judge had to make. However, both these questions ultimately require a subjective evaluation by the judge for there are no standards given by which the judge can decide what degree of emphasis on sex is necessary for the accomplishment of the author's purpose. Also, although Judson J. did indicate that detailed descriptions of sexual intercourse merely in order to stimulate and pander to the sensual appetites of his readers would be a base purpose, this does not answer whether *any* pandering, or what degree of pandering to the sensual appetites automatically condemns the book.³³

Perhaps due to the obvious subjective nature of these determinations, Judson J. introduced "community standards of acceptance" as a further test of "undue exploitation". Judson found this test in an Australian case, *R. v. Close*,³⁴ where it was propounded that there exists in every community a sense of decency, of what is clean and dirty, and that a jury is competent to discover and apply these standards.

Other judges of the Supreme Court offered their individual explanations of the phrase "undue exploitation", each of which demanded a personal evaluation by the judge. For example, Mr. Justice Taschereau suggested the phrase meant "going beyond what was appropriate or necessary to prove the proposition that one endeavours to demonstrate"³⁵ (a test similar to that of Judson J. with its emphasis upon the excessive use of sexual material, except that it does not refer to the author's purpose as an element to be considered³⁶) Fauteux J. was prepared to equate undue emphasis with the *Hicklin* test of tending to corrupt and deprave, while Ritchie J., apparently convinced that the legislature intended to provide a wider definition of obscenity and that the *Hicklin* test could continue to be used, felt that undue emphasis meant "that which was unduly shocking and disgusting".³⁷

³¹*Supra* note 25.

³²*Supra* note 12, at 704.

³³This analysis of *R. v. Brodie* draws heavily from that of Charles *supra* note 24, at 266-67.

³⁴*R. v. Close*, [1948] V.L.R. 445.

³⁵Taschereau J., *supra* note 12, at 692.

³⁶Charles, *supra* note 24, at 268.

³⁷*Id.* at 269-9.

In *R. v. Dominion News*,³⁸ the Supreme Court approved, in full, the dissenting opinion of Freedman J.A. of the Manitoba Court of Appeal³⁹ and in so doing impliedly supported his qualifications as to the applicability of the community standards test, factors relevant to that test, as well as the status of the *Hicklin* test. Concerning the latter, Freedman J. judged the case solely on the basis of s. 159(8) as counsel had agreed and noted that the status of the *Hicklin* test had not yet been decided. With regard to the community standards test, he noted that the large circulation of the "girlie" magazines in question was a factor in determining the standard of community acceptance. He also commented upon the fact that contemporary standards permitted a more candid discussion of sex than ever before and that such community standards are not to be set by the libertine taste nor the puritan taste but rather by the middle path of interest in the community; they must be contemporary and reflective of a national as opposed to foreign or provincial standards. He added his own personal view that suppression in borderline cases might tend to discourage creative efforts and therefore in such cases, tolerance was to be preferred to proscription.⁴⁰

These guidelines are helpful, but still not sufficient to salvage the hopes of Parliament that s. 159(8) would provide a simple and effective method of controlling the obscene. Perhaps the most effective illustration of the persistent confusion that surrounds obscenity law is the conflicting opinions reached in these cases.

For example in *Dominion News*, Freedman J.A. (and impliedly the Supreme Court of Canada) agreed with the literary expert that the magazines were flippant, saucy and risqué, but not obscene. The four other judges who either disagreed or disregarded the evidence of the literary expert, saw the material as a flagrant, suggestive and provocative appeal to sex.⁴¹

In *R. v. Coles*,⁴² both the majority and the dissent of the Ontario Court of Appeal, agreed that the *Hicklin* test did not apply, an objective test was to be used to determine whether there was "undue exploitation", and the author's purpose, literary merit of the book and community standards of decency were all relevant to the issue of "undue exploitation". Yet the decisions of each judge give the impression that they were talking about different books. The majority opinion, written by Porter C.J.O. (as did Freedman J. in *Dominion News*), emphasizing the preference of modern Canadians for candour in their reading and the necessity of giving a broad scope to the fundamental freedom to write about all aspects of life, were of the opinion that the author wrote the book (*Fanny Hill*) with the serious purpose of presenting an accurate picture of the seamy side of the life of the time, that the book had literary merit and had been written with humour, integrity and realism, and that it lacked an aura of morbidity or suggestive prurieny which would characterize it as obscene.⁴³

³⁸*R. v. Dominion News*, [1964] S.C.R. 251, [1964] 3 C.C.C. 1.

³⁹Freedman J.A., (1963) 40 C.R. 109, 42 W.W.R. 65 (Man. C.A.).

⁴⁰*Id.*

⁴¹*Supra* note 38.

⁴²*Supra* note 13.

⁴³Porter J. as interpreted by Charles, *supra* note 24, at 275-6.

The minority (Roach, J.A.) on the other hand, emphasizing that the purpose of the legislation was the need to protect public morals, saw the book as an attempt to deliberately flout the laws of decency by writing a book that would inflame and excite sexual passions; a book which wallowed in sex and could only be described as a "defecation of the phallus". He found no literary merit, no plot, but only a chronological sequence of sexual encounters.⁴⁴

In summary, it would appear that there still exists at least two legally recognized tests for obscenity in Canadian criminal law, i.e., the *Hicklin* test and s. 159(8) of the Criminal Code. It seems clear that the requirements of s. 159(8) to some degree depart from those in the *Hicklin* test (e.g. the requirement that the book be examined as a whole, not merely isolated passages taken out of context). However the test in s. 159(8) has received such a diverse interpretation by the judiciary that the other various considerations that have been considered relevant to a determination of obscenity depend upon the particular interpretation to be used. The one factor that is common to all tests is that each requires some subjective evaluation by the trier of fact.

III

THE 'LEGALITY' OF OBSCENITY LAW

Any discussion as to legality of a particular precept necessarily involves some inquiry into the notion of a definition of "law". As opposed to the realist or positivist theories of what law is [which we will refer to in the course of our discussion], we have adopted Fuller's variation of the natural law conception of the essential characteristics of a legal system, as our model.⁴⁵

Fuller defines law as the "enterprise of subjecting human conduct to the governance of rules."⁴⁶ As the word enterprise suggests, the legal system is conceived of as a process, a fluid system, something "more or less successful". Fuller believes that law is an activity, the legal system regarded as the product of a sustained purposive effort, a striving for justice.⁴⁷

This view of law is contrasted to the positivists who, in Fuller's opinion, treat law as a brooding omnipresence, a datum projecting itself into human experience and not as an object of human striving which consequently exists always as a matter of degree.⁴⁸

For Fuller, law is not something lying inert in statutes and precedents, but is instead a process, an activity of men's minds projected upon things that merely are. He denies validity to the theory that the essence of law is in a pyramidal structure of state power and that laws are merely the commands of a sovereign

⁴⁴*Id.* at 275-6.

⁴⁵Lon Fuller, *The Morality of Law*, Revised Ed., (New Haven: Yale University Press, 1969) 122.

⁴⁶*Id.*

⁴⁷*Id.* at 145.

⁴⁸*Id.* at 106-118.

habitually obeyed. For this analysis of law is but a mere description of institutional framework abstracted from the purposive activity necessary to create and maintain the system.

Hart's theory of law as a union of primary and secondary rules sought to rescue the concept of law from its identification (by the positivists) with coercive power, a notion which Hart conceives of as "the gunman situation writ large".⁴⁹ The essential feature of Hart's legal system is the rule of recognition (which in Hart's opinion, is an empirically provable thesis from the daily practices of government), whereby the sovereign is given authority to govern.⁵⁰

Fuller does not accept Hart's analysis because it contains no suggestion of any element of tacit reciprocity.⁵¹ Hart seems to read into his characterization the further notion that the rule of recognition cannot contain any express or tacit provision to the effect that the authority it confers can be lawfully withdrawn for abuses of it. Fuller criticizes this view that the reality of law is seen in the fact of an established law making authority, and that what this authority determines to be law, *is* law. For in this determination there is no question of degree; one cannot apply to it the adjectives 'successful' or 'unsuccessful'.

Fuller agrees with the sociologist Simmel,⁵² that there is a kind of reciprocity between government and the citizen with respect to the observance of rules. In effect, the government says to the citizen "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules. Fuller suggests that the "social contract" between government and the citizen is ruptured by government when it fails to "make laws", i.e., to create and maintain a system of legal rules, or as Fuller would phrase it, fails to "adhere to the demands of the inner morality of the law", the morality that in his opinion, makes law possible. It is this intrinsic relation between law and good law, law and morals that Fuller sees as the essence of a legal system and the root of the citizen's obligation of fidelity to law.⁵³

Fuller offers eight canons of the inner morality of the law, "a total failure in any one of these eight directions not simply resulting in a bad system of law, but resulting in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract".⁵⁴ Keeping in mind Fuller's conception of 'what law is', we can use these routes to assess the legality of obscenity "law" as it exists in Canada, the content of which we outlined *supra*.

Perhaps the most obvious feature of obscenity law that would violate the inner morality of law is its uncertainty or, phrased in other terms, the failure on the part of the government to make its laws understandable. The fact that

⁴⁹*Id.* at 139.

⁵⁰Hart, *The Concept of Law* (London: Oxford University Press, 1961).

⁵¹Fuller, *supra* note 45, at 139.

⁵²*Id.* at 39-40.

⁵³*Id.* at 42.

⁵⁴*Id.* at 39.

there exists two legally recognized tests of obscenity, a problem that is compounded by the fact that the statutory test has received a variety of interpretations which all ultimately require some subjective evaluation by the trier of fact, who in turn is liable to be influenced to some degree by personal bias as well as an idiocratic notion as to the purpose of obscenity legislation (e.g. *R. v. Coles*,⁵⁵ *R. v. Dominion News*),⁵⁶ creates a situation that is extremely villifying to the integrity of the rule of law. It is a serious mistake to assume that the legislative draftsman, who cannot convert his objective into clearly stated rules, can always safely delegate this task to the courts. Hayek condemns the practice of drafting legislation that requires standards such as "fair" or "reasonable" in the admonition:

One could write a history of the decline of the Rule of Law . . . in terms of the progressive introduction of these vague formulae into legislation and adjudication, and of the increasing arbitrariness and uncertainty of, and the consequent disrespect for, the law and the judicature.⁵⁷

While it may be said on behalf of this form of legislation that the nature of the subject matter determines the degree of clarity possible, we can still ask whether the apparent impossibility to achieve clarity in obscenity law is sufficient to excuse the citizen from fidelity to that law. It must be remembered that obscenity law is criminal law and as such the demand for clarity is even more acute due to the fact that the criminal sanction is society's ultimate threat; inflicting as it does a unique combination of stigma and loss of liberty, it should be used sparingly and in such a way that its application be perceived as right and just. Moreover, because criminal law seeks to impose and enforce duties, it is crucial that the citizen be able to understand and appreciate those duties, or else he will not be able to pattern his behaviour so to avoid the legally proscribed conduct. Yet with reference to the incredible differences of opinion in the *Brodie* case concerning the applicability of the *Hicklin* test, Professor Charles was forced to conclude:

The Supreme Court's confusion and ultimate indecisive conclusion on this point vividly illustrates the ever present danger of the legislature overestimating the ability of the judiciary, in the absence of a clear indication of legislative intention, to realize what the legislature had in mind.⁵⁸

The subjective nature of the obscenity test also serves to defeat that principle of the internal morality of the law that laws should not be changed too frequently. There is a danger that, due to the lack of objective standards by which the trier of fact can make his subjective evaluation of the material, each decision will take on an *ad hoc* appearance, will exhibit no logical consistency with other cases, but rather will vary with each material and each trier of fact, thus stamping obscenity laws as an area of bereft of any "rules" at all.

It can thus be said that:

. . . in actual practice, application of this test most often comes down to the trier's individual subjective judgment whether the particular work involved ought to be permitted in society, and that this judgment is frequently made primarily with reference to personal belief about the morality of certain sexual practices and the

⁵⁵*Supra* note 13.

⁵⁶*Supra* note 38.

⁵⁷F. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944)

⁵⁸Charles, *supra* note 24.

aesthetic appropriateness of publicizing or communicating about those practices. Hence, *law is made in each case by the judge or jurors who happen to try it.*⁵⁰ (emphasis added)

Perhaps the best illustration of this derangement is *R. v. Coles*⁶⁰ where the majority and minority of the Ontario Court of Appeal using the same statutory test, viewing the same evidence and recognizing the same factors as being relevant to the determination of obscenity, yet reached diametrically opposite opinions on every issue. In view of this type of judgment it is questionable whether obscenity law has reached the status of a "rule" as that term is understood by Fuller.

Fuller makes a profound observation that "infringements of legal morality tend to become cumulative."⁶¹ It is evident in obscenity law that the subjective nature of the obscenity test which necessarily detracts from the clarity of such law, affords the opportunity that such law change with every decision, lends *ad hoc* tincture to each judgment as well as breaks down the congruence between official action and the declared rule (the statute). This last canon of the internal morality of the law can be destroyed or impaired in several ways, including: mistaken interpretation, inaccessibility of the law, and lack of insight into what is required to maintain the integrity of a legal system. It is submitted that obscenity law exhibits all three of these faults.

The problem of interpretation reveals as no other problem can, the co-operative nature of the task of maintaining legality. For, if the interpreting agent is to preserve a sense of useful mission, the legislature must not impose on him senseless tasks. Likewise, if the legislative draftsman is to discharge his responsibilities he, in turn, must be able to anticipate rational and relatively stable modes of interpretation.⁶²

It is apparent that the draftsman has failed to perform his task in the attempt to legislate morality by means of obscenity law. The supposed objective nature of the statutory test has proven illusory and has served to defame the integrity of the legal system as a whole, not only the legislature, but also the courts and police. The fact that the legislation is criminal law and that the "external morality" or the substantive aims of obscenity law rest on such a shaky theoretical foundation, further reinforces the thesis that government at least in the sphere of obscenity law has failed to perform its role in the enterprise of subjecting human conduct to the governance of rules, and as such the citizen's obligation of fidelity to law is proportionately reduced.

IV

CAN THE ADJUDICATIVE PROCESS EFFECTIVELY HANDLE OBSCENITY CASES?

Assuming for purposes of the ensuing discussion that obscenity legislation enjoys the status of "law" under Fuller's definition, the question still remains whether courts, from an institutional standpoint, are adequately equipped to

⁵⁰*Supra* note 14, at 421.

⁶⁰*Supra* note 13.

⁶¹Fuller, *supra* note 45, at 92.

⁶²*Id.* at 91.

adjudicate obscenity cases, i.e., are competent to apply obscenity law. For, if ill-suited for such an enterprise, the efforts of the judiciary are not only futile but may serve only to detract from the integrity of that institution.

Briefly, the Canadian adjudicative system conceives of a judge as the adjudicator of specific, concrete disputes, who disposes of the problems within the latter by elaborating and applying a legal regime (established rules and principles) to facts, which he finds on the basis of evidence and arguments presented to him in an adversary process.⁶³ Fuller sees this characteristic, i.e., that the affected parties are guaranteed the right to prepare for themselves the representations on the basis of which their dispute is to be resolved, as the essence or distinguishing feature of the adjudication system. It follows that whatever heightens the significance of this participation lifts adjudication toward its optimum expression, and, conversely, whatever destroys the meaning of that participation, destroys the integrity of adjudication itself.⁶⁴

The adversary process also enables the arbiter to adopt a relatively passive pose, which enhances his ability both *to be* and *to seem* impartial. Such a "passive" stance helps the arbiter to avoid premature hypotheses and biases (which are counteracted by opposing biases) and as such his decisions are more likely to be right and proper. Moreover, these factors give a peculiar moral force to the decision, for the affected parties are more likely to voluntarily adhere to a decision that they perceive as "rightly decided".⁶⁵

However, impartiality is not the only feature of the adjudicative system that enhances the voluntary acceptance of its decision. Adjudication (as opposed to contract or democratic government), is a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. Fuller notes that in adjudication, where the only mode of participation consists in the opportunity to present proofs and arguments, the purpose of this participant is frustrated and the whole proceeding becomes a farce, if the decision that emerges makes no pretence whatever to rationality. "Rationality" here does not mean either of the two forms recognized by Hume (i.e. embraced by empirical fact or logical deduction) but describes a mode of reasoning whereby purposes (premises) are stated generally and then held in intellectual contact with other related or competing purposes, the end result being not a mere demonstration of what follows from a given purpose, but a reorganization and clarification of the purposes that constituted the starting points of the inquiry. Such an intellectual exercise is the essence of the "incremental" theory of adjudicative law-making.⁶⁶

However stated, this perceived 'rationality' of adjudicative decision-making is prerequisite to a voluntary acceptance and adherence to such decisions. But this 'rationality' can only be operative if there is available to the participants in the process a shared consensus about the standards to be utilized

⁶³P.C. Weiler, *Two Models of Judicial Decision-Making* (1968), 46 C.B.R. 406 at 409-10.

⁶⁴Fuller, *The Forms and Limits of Adjudication* (1963), (unpublished paper).

⁶⁵Weiler, *supra* note 63, at 413.

⁶⁶Fuller, *supra* note 64.

in making the decision. The practical implication of this affinity between the existence of standards and the workings of adjudication, has been assessed in the words "all other conditions being equal, the greater the availability of viable standards of decision, the more likely the process of adjudication will be successful."⁶⁷

There are several basic reasons for the requirement that there be standards in order to achieve rational adjudication. First, because the arbiter is not conceded the power of enactment but is under a duty to articulate a reasoned basis for his decision, it is necessary that he have a set of ordering principles to enable him to make sense of the situation and to abstract those relevant facets of it which can be organized into a reasoned argument.

Second, the arbiter needs standards or principles to enable him to single out the relevant, *problematic* facets of the situation, for if every aspect of every situation is always open to question (if in effect there is no principle of *stare decisis* at all), then the adjudicative process would be endless.

Third, the adversary quality of adjudication becomes meaningless unless the parties can know before their preparation and presentation the principles that the arbiter is likely to find relevant to his disposition of the dispute. Moreover, if the arbiter is to retain his passive, impartial stance, a high degree of rationality in his decision depends directly on the quality of the preparations and representations of the adversaries, who in turn need to have some shared consensus of standards in order to have an adequate "joinder of issue" of intelligent alternative positions.⁶⁸

Assuming that these features are the essence of the adjudicative process, is this system a suitable institution for its assigned task of applying obscenity law? It is immediately obvious from obscenity jurisprudence that several fundamental prerequisites to successful adjudication have not been met.

The confusion as to which test of obscenity is to apply in each case (whether the *Hicklin* test or s. 159(8) of the Criminal Code, with the multiple interpretations that have been given it), constitute the prime roadblock to successful adjudication. This difficulty is not simply solved by an authoritative declaration as to the proper test and relevant considerations to that test, because ultimately each determination requires some subjective evaluation by the trier of fact. Obscenity law is radically different from even those areas where the criminal law is less specific as to what conduct is prohibited (as with laws penalizing conduct which is "unreasonable" or "reckless"). For in those areas, the conduct prohibited is ordinarily deemed criminal because it creates an immediate threat of physical danger, and as such the trier of fact can judge the criminality of the defendant's act with respect to the actual dangers created by that act, and is aided by a core of common *objective* experience, for example, what kind of automobile driving conduct is reckless because it is unnecessarily productive of a great chance of injury to others.⁶⁹

⁶⁷Weiler, *supra* note 63, at 418.

⁶⁸*Id.* at 419-20.

⁶⁹*Supra* note 14, at 420.

The obscenity test, on the other hand, leaves to the trier of fact a vast judgmental function under a legal standard which does not call upon any common experience with *objective* phenomena but which relies, instead, upon "subjective, moral, aesthetic and even psychoanalytic determinations by those charged with application of the law."⁷⁰

This detracts from the adjudicative process in the following ways: first it precludes the existence of a sufficient degree of a shared consensus about the standards to be used in making the decision, for it is inconceivable that the parties to the dispute or, indeed, the trier of fact himself, would be aware of the factors that could effect the subjective judgment of the latter. Moreover, the parties' supposed guarantee that the dispute will be resolved on the basis of *their* preparations and representations, that the rationality of the final decision will be a reflection of the quality of *their* reasoned proofs and arguments, is illusory due to the nature of the decision that the judge is forced to make.

While effective joinder of issue is possible between Crown and defendant, due to *some* shared consensus as to relevant factors and principles, the fact that the ultimate decision is a subjective evaluation based on facts to which neither disputant has access and thus is, to some degree, left to the caprice of the trier of fact, might serve to deter the disputant from an intensive effort to arrive at the most rational argument available to him. As such, his sense of meaningful participation in the determination of his rights is proportionately reduced.

The peculiar characteristic of adjudication, that it assumes a burden of rationality not borne by other forms of social ordering, is also violated in obscenity cases. For while some degree of rationality is possible in the expression of the trier of fact's reasons for judgment, the premises or starting points that form the basis of his decisions are those subliminal moral, aesthetic, and psychological choices that are not amenable to rational analysis and would not appear in the written or oral decisions that could be used in later cases.

This lack of standards also contributes to an abridgment in the perceived impartiality of the arbitrator. Fuller notes that without some accepted standard of decision the requirement that the judge be impartial becomes meaningless, and he points to the tendency of the adjudicator to identify with one party in such a standards vacuum due to the desire to escape the frustration of trying to act as a judge in a situation affording no standard of decision.⁷¹

When one considers the sociological fact (as pointed out by Professor Amsterdam) that "trial judges, and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book",⁷² it is not difficult to guess with which side the trier of fact is likely to identify.

Thus the three elements that contribute to the voluntary acceptance and adherence to the decision of an adjudicative body, i.e., the rationality of the

⁷⁰*Id.*

⁷¹Fuller, *supra* note 64.

⁷²A. Amsterdam, *The Supreme Court and The Rights of Suspects in Criminal Cases* (1970), 45 N.Y.U.L.R. 785 at 792.

process, the perceived impartiality of the arbiter and the disputant's meaningful sense of participation in the determination of his rights, are undermined in obscenity cases.

Of course, it could be argued that I have stated the case too strongly against obscenity adjudications, by zeroing on each deficiency and taking the logical implications of these to the extreme. Yet, despite the truth of that observation, I would suggest that such is the duty of the legal philosopher in assessing an institution that purports to apply a criminal sanction. However, let us assume that obscenity jurisprudence authoritatively declares that the community's standards test is to be the major criterion of obscenity because more than any other test, it relies on an "objective" standard, and provides some certainty of meaning.

The obvious objection to the community standards test is that in fact there does not exist an "average Canadian sense of decency, or level of tolerance". Sociologists and political scientists assert that: ". . . our moral universe is polycentric, our society is neither monolithic nor static nor homogeneous but is rather pluralistic and liberal; and there exists in Canada significant regional and ethnic variations."⁷³

But even if we assume that there *is* a common sense of what is right or wrong, how are these common values to be brought to the attention of the Courts?

In *R. v. Close*⁷⁴ it is suggested that the jury are competent to apply the community standards test because they are a representative microcosm of the community. Yet in Canada, since 1959 most obscenity actions are brought under s. 160 of the Criminal Code, which requires that a judge alone decide whether the material is obscene. Whether the judge can truly reflect the "national average" of toleration, is doubtful, especially (at least in lower courts), due to his propensity to identify with the police.

Professor Getz would also deny that a jury is competent to accurately reflect a rational community standard, because of what he calls "the psychology of jury operations in a 'morals' situation"⁷⁵

It would not be unnatural in these circumstances for the jurymen to see himself in the role of 'pillar of the community', the guardian of the community's morals. He becomes, it is suggested, timid, conservative and 'respectable', eminently respectable—representing the Mother Grundys of this world, and not . . . 'the ordinary well-intentioned moderate individual'.⁷⁶

It is argued that outside evidence may be obtained as to the common body of values that marks a society's ethos. Judicial notice is not a useful tool for this purpose (*R. v. Cameron*)⁷⁷ because community standards are neither so notorious or capable of immediate accurate demonstration as to be acceptable without proof. Survey evidence has been accepted as admissible evidence on

⁷³S. Peter Regenstreif, *Some Aspects of National Party Support in Canada* (1963), 29 C.J.E.P.S. 59 at 72 as quoted in Getz, *The Problem of Obscenity* (1965), 2 U.B.C. L.R. 216 at 227.

⁷⁴*Supra* note 34

⁷⁵Getz, *supra* note 73, at 219.

⁷⁶*Id.*

⁷⁷*Supra* note 26.

this issue, provided that the court is satisfied that the survey has been carried out according to the best and most rigorous scientific practices, including the necessity that those who testify are properly qualified as expert witnesses. (*R. v. Prairie Schooner News*).⁷⁸

However, Getz points out that survey evidence is merely a quantitative and not a qualitative result. It assumes without proof that all respondents are applying a uniform standard of judgment based on equal knowledge and understanding, and that all opinions are entitled to equal weight. "The result is a test which reflects the views of the unimaginative and the faceless, the death-knell of the creative writer." Moreover, "once the standard is fixed, it decides all cases".⁷⁹

While the last statement is questionable, because a defendant in a later case could always initiate a new survey that might reflect a change in community standards, the monetary expense involved could be prohibitive.

This economic resource factor is another argument against the community standards test, for it unduly favours the established national publisher, producer or distributor as compared with his smaller, less established counterpart. The former, through widespread exploitation in the media, which has become recognized as capable of setting standards of taste, can actually *change* community standards for adults to a great degree by the time a prosecution is to be finally decided. The larger dealer could also better afford to conduct a nation-wide survey as to the level of acceptance of his material.⁸⁰ Thus it would seem that the community standards test, although the best method yet conceived to adapt the problem to the judicial function, cannot save obscenity law from the criticisms that it engenders. Getz concludes

There is no way in which a court can effectively deal with the problem as the law now stands, by any technique that accords with traditional notions of the functions of courts. For it does not lend itself to the kind of reasoning that our courts generally employ.⁸¹

V

A COST ANALYSIS

I have attempted to illustrate (1) the weak philosophical justification for obscenity law; (2) the limited degree of "legality" that obscenity law has achieved, and (3) from an institutional perspective, the immense difficulties in trying to adjudicate obscenity cases, and the "costs" involved in terms of the voluntary acceptance of the decisions of that institution.

I submit that we must further consider the "costs" of having obscenity law "on the books" and of trying to enforce it. While a detailed cost analysis is not possible, I would suggest that the existence of such a law can only demean the perceived 'rightness' of law and the legal system in general.

⁷⁸*R. v. Prairie Schooner News Ltd. & Powers*, 1 C.C.C. (2d) 251.

⁷⁹Getz, *supra* note 73, at 228.

⁸⁰*Supra* note 14, at 422.

⁸¹Getz, *supra* 73, at 230.

If the courts and legislature are unable to define obscenity, certainly the bookseller, or film distributor cannot be expected to assess with any degree of accuracy what is 'obscene'. Packer says that:

the rationale of criminal punishment requires that no one should be treated as a criminal unless his conduct can be regarded as culpable. The flouting of this requirement that takes place when offences are interpreted as being of a 'strict liability' contributes to the dilution of the criminal law's moral impact.⁸²

While mistake as to the law is not recognized as a *mens rea* defence, it is questionable whether obscenity legislation has the certainty that would qualify it as "law". Moreover, can it not be argued that the accused is really mistaken as to the facts in obscenity cases, because it is unlikely that he can read all the books that he sells or films he distributes, and even if he did, it is unlikely that he could interpret the contents in any legal sense? Thus, he is either being denied the defence of mistake of fact that should be available to him, or the analogy to a strict liability offence is not overly-tenuous and as such, Packer's warning as to the loss of moral impact is pertinent.

Obscenity, like any "victimless-crime", begets immense costs of enforcement. Due to the fact that there are few complaints about obscenity, the police are forced to search for obscenity violations, including all the undersirable tactics that this practice engenders. Moreover, like everyone else, they are in the dark about what constitutes obscenity, they also must make subjective value judgments as to when to seize such materials, and these factors contribute to a dangerous discretionary quality to obscenity law enforcement. Morality squad members must exercise such discretion, and may become objects of bribes from sellers of pornography who seek immunity from police raids and seizures. Value judgments by enforcement agencies inevitably involve some perceived discrimination on the part of those whose materials are impounded, especially if similar material is (as is often the case) available in other retail outlets. Moreover, the creative source whose works are seized also perceives himself as unfairly discriminated against, for he might believe there is nothing "wrong" with the material, or even that it is positively good and desirable and would see its suppression as merely another example of how the "Establishment" (or those with access to legal machinery), armed with the criminal law is enforcing *its* standards on the minority.

This leads to a loss of legitimacy or authority adhering in criminal law generally. It cuts away at the sense of voluntary acceptance of the law among significant groups within our society.⁸³

Finally, detection and enforcement of obscenity law also diverts valuable manpower and simple monetary resources from other more important areas. And all for the chimerical benefits of suppressing obscenity!

⁸²Packer, *supra* note 1, at 261.

⁸³P.C. Weiler, *The Criminal Sanction in the Just Society*, Living in the Seventies, A.M. Linden, ed. (Toronto: Peter Martin Associates Ltd., 1970) 70 at 73.

VI CONCLUSION

It is obvious that some radical surgery is needed on the ambit of the use of the criminal sanction in the prohibition of obscenity. The Report of the Commission on Obscenity and Pornography concluded that obscenity legislation is not satisfactory criminal law. Thurmon Arnold made the point most effectively:

The spectacle of a judge poring over the picture of some nude, trying to ascertain the extent to which she arose prurient interests, and then attempting to write an opinion which explains the difference between that nude and some other nude has elements of low comedy . . . the task is not one for which judicial techniques are adapted.⁸⁴

The Canadian Committee on Corrections has declared that "no conduct should be defined as criminal unless it represents a serious threat to society and unless the act cannot be dealt with through other social or legal means."⁸⁵ We have seen that the harms caused by obscenity to society are at best ambiguous and attenuated, by no means can be characterized as a 'serious threat' and that the costs involved in retaining the prohibition would seem to outweigh any conceivable gains. It would thus appear that present criminal legislation must be radically amended or even dropped, and that other social or legal means are to be utilized to control obscenity. Packer suggests that obscenity be characterized as a nuisance rather than a crime. He recommends a defensive rather than offensive war, whereby law enforcement officers would no longer have a roving commission to stamp out the unorthodox and avant garde but rather would merely keep the more obvious forms of public display (that might be offensive to the majority) under control, especially the exposure of such material to impressionable youth.⁸⁶

It has also been suggested that a censor board, armed with writs of injunction and prohibition, should review all material and that no criminal sanction could be applied to the unwary pornographer *before* such a review. However, this proposal still is plagued by the difficulty in defining obscenity while the net gain in freedom might be minimal.

Whatever the alternatives, the problems caused by obscenity law as it now exists, must be ameliorated.

⁸⁴Quoted in H. Kalven Jr., *The Metaphysics of the Law of Obscenity* (1960), S.C.R. 1 at 44, as seen in Getz, *supra* note 73, at 230.

⁸⁵Report of the Canadian Committee on Corrections (Ottawa: Queen's Printer, 1969) 12.

⁸⁶Packer, *supra* note 1, at 324-28.