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Abstract
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CENSORSHIP AND OBSCENITY: JURISDICTION AND THE BOUNDARIES OF FREE EXPRESSION

BY NEIL BOYD*

In this study of the Federal Government's control of obscenity through criminal sanctions and its relationship with provincial censorship powers — particularly as practised in Ontario, British Columbia, Quebec and Nova Scotia — Professor Boyd traces the public's evolving attitudes towards the question of what obscenity is. He also provides a brief review of studies concerning the effects of pornography on society.

I. INTRODUCTION

Censorship is a difficult area to discuss with a detached rationalism. The task that confronts the student of legal control is that of both separating and connecting imagery and reality. On the one hand, there is a fear that freedom of expression may be curtailed by both the prior restraint of provincial censorship and by the federal criminal control of obscenity.[1] On the other hand, the images that "pornography" projects are generally "ugly, shallow and obvious."[2]

Definitions of obscenity have been evolving federally since 1892,[3]

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The views expressed are those of the author. The present and future policies of the Ministry of Justice are not presumed to be reflected in the analysis which follows. An earlier accounting of this research was published by the Dept. of Justice, N. Boyd, Working Paper #16, Research and Statistics, Ottawa, 1985.

[1] For a most recent judicial discussion of this issue in the federal sphere, see *R.* v. *Red Hot Video* (1983), 6 C.C.C. (3d) 331 (B.C. Prov. Ct.); for a consideration of provincial powers of censorship, see *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* [hereafter *Ontario Film & Video*] (1983), 147 D.L.R. (3d) 58, 141 O.R. (2d) 583 (Ont. H.C.).

[2] *Report of the Committee on Obscenity and Film Censorship*, Bernard Williams, Chairperson (1979) at 96.

[3] *The Criminal Code*, S.C. 1892, c.29.

while the provinces have practised prior restraint of film since 1911.[4] These legacies are instructive, revealing fundamental changes in the nature of public concern. With expansion in the type, scope and intensity of the media, and with changing mores, the sexually explicit images of 1985 would be incomprehensible to the Canada of 1892 or 1911.

II. DEFINING THE INTOLERABLE: THE GENESIS OF CENSORSHIP AND OBSCENITY

Inappropriate sexual arousal has always been at the heart of the criminal offence of obscenity and, until 1959, Canadian courts relied upon Cockburn C.J.'s definition:

> . . . the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.[5]

Although this test met with considerable judicial and academic criticism, its political life in Canada spanned almost seventy years.[6]

Changes in the federal criminal process, statutes and the common law have not had a direct impact on provincial censorship policies. Thus, while evolution of obscenity law is best understood by case analysis, the evolution of censorship is best understood by examining the tenure of successive censor boards.

While judicial decisions have built upon existing case law, successive censors have set distinctive and, often, discontinuous models of censorship and classification. This need not be regarded as philosophically or practically repugnant, however, since provincial autonomy in the control of public exhibitions cannot necessarily be expected to yield a chronological consistency.

Omri J. Silverthorne — the "very model of a modern censor"[7] — was Chairperson of the Ontario Censor Board for almost forty years, during which time his thought shaped the structure of the Board's decision making, weathering the storms of censorship and its critics. In 1971 he told a conference of Canadian censors:

> . . . the outcry . . . in Ontario over the censoring of such films as *Elmer Gantry* and *Saturday Night and Sunday Morning* is proof enough that we frequently go

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[4] *The Theatres and Cinematograph Act*, S.C. 1911, c. 73.

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

[6] See Charles, "Literature and the Legal Process in Canada" (1966) 44 Can. Bar Rev. 243. For an early indication of judicial discontent with *Hicklin*, see *R.* v. *Stroll* (1951), 100 C.C.C. 171 (Montreal Sess. Ct.).

[7] Dean, *Censored Only in Canada* (1981) at 138-48.

> too far in our work. . . . [P]erhaps the time has come to start considering the abolition of censorship by government fiat in Canada. . . . I would like to see censorship as it is presently being practised abolished in Canada within the next two years.[8]

While Silverthorne's first twenty years in office were relatively uneventful, the realities of the "sexual revolution" in the late sixties and early seventies were increasingly reflected in films. Censor boards in Ontario, Quebec, Nova Scotia and British Columbia were compelled to respond to new boundaries of tolerance regarding the role of *sexuality* in the public domain.[9] Taboos, such as the display of pubic hair and genitalia, were re-examined and ultimately abandoned, albeit at different times and in different contexts in the four provinces.

In Quebec, the early years of censorship reflected not only a moral, but also a social and political agenda. This circumstance was most pronounced during Duplessis' premiership, with the *Padlock Act*[10] of 1936 being the epitome of the times. Although ultimately rejected by the Supreme Court as a repugnant restriction upon freedom of expression, the Act exerted dominance for over twenty years. The statute's expressed purpose — to protect the province from Communist propaganda — infused the work of Quebec's censors; films supportive of trade unionism becameclear targets for prohibition.[11]

In addition, the twin concerns of inappropriately depicted violence and *sexuality* were dominant in Quebec during this period.

> Allusion to divorce in dialogue was permitted in films, but divorce was never to be presented attractively. . . . In crime films, the use of firearms [was to] be restricted to essentials.[12]

This restrictive era in Quebec's censorship practices ended with the appointment of Andre Guerin as president of the Board in 1962; Guerin and his successors fashioned a stewardship of film which has often been critically acclaimed for its thorough analysis of the medium.[13] Criticisms of the Quebec Board of Cinema Censors had led the provincial government to form the "Provisory Committee for the Study

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[8] *Ibid.* at 147.

[9] In this article, *sexuality* means the portrayal in any publicly-available medium of any form of sexual activity, singly or in any combination.

[10] *Padlock Act*, S.Q. 1936.

[11] Interestingly, recent decisions in *Ontario Film and Video*, *supra* note 1, and *Re Nova Scotia Board of Censors et al and McNeil* (1978), 84 D.L.R. (3d) 1 (SCC) suggest a continuing *judicial* concern with unfettered provincial powers of prohibition.

[12] Dean, *supra* note 7 at 159.

[13] See "Andre Guerin et Son Bureau Unique Au Monde," *LaPresse* (10 Jan. 1981) at C1-C2 and Blackman, "How The Censors Judge the Movies," *Montreal Gazette* (19 Jan. 1983) B1.

of Film Censorship"[14] in 1961, and this committee was unequivocal in its denunciation of Quebec's practice to that date:

> There is only one way to describe both the practice of this institution and the spirit which animates it: it is completely archaic and the Committee believes it to be beyond recall.[15]

While the early years of Ontario's censor board reflected the liberalism of Silverthorne's administration, Quebec's early censors were more restrictive in the spirit of their rhetoric and the substance of their actions.

In British Columbia and Nova Scotia, both of which enacted film censorship legislation within a few years of the Ontario-Quebec-Manitoba initiative,[16] the early years of censorship were marked by restrictive application of existing statutory provisions. The twin concerns of images of *sexuality* and of violence were again evident, albeit at different times within the provinces. In British Columbia, *A Law Unto Himself* was prohibited for amounting to ". . . nothing but gun-play, robbery, violence and gruesome scenes, with no redeeming features";[17] in Nova Scotia, *Who's Afraid of Virginia Woolf* was prohibited for its "obscenity", "blasphemy", "four-letter words" and "colloquial references to copulation".[18]

In both provinces, a restrictive era of censorship resulted in increasing criticism and was followed by entrance into a more liberal era. In British Columbia, the appointment of Ray MacDonald as chief censor in 1954 marked this change of style; in Nova Scotia, Provincial Secretary Gerald Doucet's 1966 call for a study of film censorship marked the end of a more restrictive period of operation. Yet the history of film censorship in Canada reveals few consistent patterns, either across time or across the four provinces; the ebb and flow of liberalism vs. restriction are, arguably, testimony to the value of provincial autonomy in the matter of prior restraint.

The federal power over obscenity has had a similar ebb and flow, at least insofar as the appropriate target for the criminal law is concerned. During the late forties and early fifties open discussion and depiction of *sexuality* became more prominent, leading to the formation by the Senate of a committee to study

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[14] The "Regis Committee".

[15] Quoted in *The Democratic State and Its Attitude to Film and Publications*, unpub'd address to Directors of the Greater Quebec Area Police Depts. (1969) at 4.

[16] *An Act to Regulate Theatres and Kinematographs*, S.B.C. 1914, c.75; *An Act Respecting Theatres and Cinematographs*, S.N.C. 1915, c. 36.

[17] Dean, *supra* note 7 at 118.

[18] *Ibid.* at 134.

this new prominence.[19] Case law from this period reveals both increasing tolerance of *sexuality* in public view and increasing public concern over this development.

Conway v. *The King*[20] was representative of this dichotomy. The court was asked to rule on the legality of a performance where six young women, apparently naked from the shoulder to the waist, stood motionless during a scene of *Spin a Web of Dreams*. Although the evidence led established that the women wore ". . . brassieres or bust bodices made of a very light material,"[21] it was held that ". . . it may be said that the performance in question boldly displayed persons of the fair sex so scantily clothed that it was immoral, indecent or obscene."[22] The conviction was overturned on appeal because:

> Since the actresses could neither move nor speak, but sought to represent statues, it seems quite evident to me that the object was not to suggest obscenity [but] the intention was to create an artistic background and not an immoral scene.[23]

The decisions in the trial at first instance and on appeal represented public reaction to changing conceptions of both nudity and *sexuality*; the very real images of film, stage and print photography were reflections of a changing social order and were, in turn, serving to structure more permissive attitudes. The Senate Committee of 1952 was constructed in an attempt to speak to the tensions that had arisen.

The report of the proceedings of the Committee reveals that the developing *sexuality* of Canadian youth, as well as adults, was central to all agendas. The report concluded:

> . . . [T]hose who print, import, distribute or exhibit for sale salacious and indecent publications will feel the force of this public opinion and be made to realize that they are doing a filthy, immoral and nasty thing to the detriment of Canada in its present position [and] anything that undermines the morals of our citizens and particularly of the young, is a direct un-Canadian act.[24]

The rhetoric was specific, with submissions to the Committee complaining of "positions calculated to arouse lascivious emotions" and "highly coloured illustrations of would-be provocative nudes."[25] The Ottawa Catholic Parent Teacher Associations suggested the prohibition of records

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[19] The Senate of Canada, *Proceedings of the Special Committee on Sale and Distribution of Salacious and Indecent Literature* (1952).

[20] [1944] 2 D.L.R. 530 (Que. K.B.).

[21] *Ibid.* at 533.

[22] *Ibid.* at 535 per Cloutier, J. Sess.

[23] *Ibid.* at 536 Lazure, J.

[24] Senate of Canada, *supra* note 19 at 246.

[25] *Ibid.* at 38.

> . . . sold to teenagers for teenage parties, which are, to say the least, frankly suggestive and intended to attend the "Smooch Session" when the lights are low. . . . We may add that we are not unaware of the filthy films and records purveyed to adult audiences; but of these we prefer not to speak here.[26]

This distant rhetorical framework notwithstanding, there are criticisms that *are* enduring. The Special Committee heard complaints of pornography's ignorance of the spiritual aspects of human relationships — what we now term the commodification or objectification of sexuality.[27] Another suggestion was that

> [l]urid sex literature in the hands of the very young is not apt to excite the emotion and animal instincts . . . but [it does] colour their attitudes towards society and so tend to undermine the family unit on which our society is based.[28]

The family unit has certainly been subject to rapid change in both structure and composition since that time; what is still unclear are the complementary roles played by pornography: its ability to both reflect the social order and to influence it.

The Special Committee found the *Hicklin* test "explicit" and "enforceable", noting that "[n]o cases have been brought to the attention of the Department of Justice in which prosecutions have failed through any vagueness in the law. The law is quite explicit."[29] The Committee did, however, acknowledge existing complaints:

> The Department of Justice further adds that if, after experience with the enforcement of this law, it is shown that it is not enforceable, the Government of Canada will be willing to again consult with the provincial authorities to that end, and revise existing legislation.[30]

E. Davie Fulton,[31] however, told the Special Committee in 1952 that the *Hicklin* test was purely subjective, and that "more workable" legislation was necessary.

> The offensive type of publication which Mr. Fulton had in mind included pulp and pocket magazines as well as magazines featuring nude or half nude females. These magazines were dangerous, Mr. Fulton suggested, because youngsters would try to imitate the actions described in the magazines and would thus have their morals perverted.[32]

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[26] *Ibid.*

[27] For a controversial discussion of commodification and objectification, see Greer, *Sex and Destiny* (1984).

[28] O'Brien, Chairperson of Provincial Committee on Good Literature, in *supra* note 19 at 201.

[29] Senate of Canada, *supra* note 19 at 246.

[30] *Ibid.* at 246.

[31] Then newly-appointed Minister of Justice; he had been an outspoken opponent of the *Hicklin* test.

[32] Charles, *supra* note 6 at 251.

Fulton himself stated, during the debate on Bill C-58:

> We believe we have produced a definition which will be capable of application . . . in addition to the somewhat vague subjective test. . . . The tests will be: does the publication complained of deal with sex, or sex and one or more of the other subjects named? If so, is this a dominant characteristic? Again, if so, does it exploit these subjects in an undue manner?
>
> . . . .
>
> In our efforts we have deliberately stopped short of any attempt to outlaw publications concerning which there may be any contention that they have genuine literary, artistic or scientific merit. These works remain to be dealt with under the *Hicklin* definition, which is not superseded by the new statutory definition.[33]

This analysis was not shared by the Supreme Court. In its first obscenity case after the 1959 amendment, the Court considered Lawrence's *Lady Chatterley's Lover* using the new s. 159(8) as the relevant definition of the offence, and did not so much rule out the *Hicklin* test, but displaced it as the operative standard.

Of importance was the existence of concerns for freedom of expression (mentioned frequently during the debate on Bill C-58). The opposition quoted approvingly from Underhill of the University of Toronto:

> The point that I am trying to make is that modern literary artists, in their concentration on sex, violence and societies in decay are not just exploiting these themes for the sake of vulgar notoriety and best-seller profits. They are trying, seriously and intensely, to say something significant about the condition of man in our day. . . . If they look on the black side, and present painful or repulsive pictures of human beings in action, can anyone blame them who has been sensitive to the experience of our age.[34]

While it is difficult to assert that much of today's pornography attempts "seriously and intensely, to say something significant", nevertheless, then, as now, we can see reflections of the social order; the present reality of *sexuality* is that we have "painful or repulsive pictures of human beings in action"; pornography remains a real reflection and commentary upon the times in which we live.

The 1959 statute did, however, produce significant changes in the structure of legal control of obscenity. The judiciary quickly developed the range of the new standard, with the Supreme Court stating that Canadian courts must look to the serious purpose of the author or producer, to the artistic merit of the matter in dispute and to community standards[35] — a distinct departure from the *Hicklin* test. As Freedman

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[33] Canada, *House of Commons Debates*, 6 Jul. 1959 at 5517.

[34] *Ibid.*, 30 Jun. 1959, at 5314.

[35] *Brodie* v. *R.* (1962), 132 C.C.C. 161 at 182 (SCC).

J.A. pointedly remarked:

> [A] large readership is . . . not always an entirely irrelevant factor, it may have to be taken into account when one seeks to ascertain or identify the standards of the community in these matters. Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered.[36]

These remarks were affirmed by the Supreme Court in 1964[37] and, in the years since, the judiciary has further defined the concept: it is a national community standard that defines obscenity, not that of a university community, city or province.[38]

The *Hicklin* test, in its use of the words "deprave" and "corrupt", necessitates a demonstration of harmfulness; the community standards test requires no demonstration of harm — it is sufficient that the publication in question exceeds the accepted standard of tolerance. The implications of this conceptual framework for provincial censorship are far reaching. Censor board decision makers view themselves as answerable to the provincial community; they are influenced by discussion concerning the potential harm that pornography may impose, but they are ultimately bound by a standard of community tolerance, the issue of social harm notwithstanding.

Public discussion of obscenity and censorship is nevertheless centred upon the issue of harm. While retrospective analysis may reveal fears that have been overstated, the hypothesis of harm is always present. In 1959, there was a fear that young men "would have their morals perverted" by looking at photographs of naked women; now, a growing body of empirical literature focuses on specific kinds of harm flowing from images that may promote or condone sexual violence.[39]

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

[37] [1964] S.C.R. 251.

[38] *R.* v. *Goldberg* (1971), 4 C.C.C. (2d) 187 (Ont. C. A.); *R.* v. *Kiverago* (1973), 11 C.C.C. (2d) 463 (Ont. C. A.); *R.* v. *MacMillan Company of Canada Ltd.* (1976), 31 C.C.C. (2d) 286 (Ont. Co. Ct.); *Dominion News, supra* note 36; and see Price, "The Role of Choice in a Definition of Obscenity" (1979) 57 Can. Bar Rev. 301, who notes:

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

[At 312. Emphasis in original; footnote omitted].

[39] Perhaps the most comprehensive and analytic discussion of this research is Nelson, "Pornography and Sexual Aggression", in Yaffe & Nelson, eds., *The Influences of Pornography on Behaviour* (1982). Also relevant are Malamuth & Donnerstein, "The Effects of Aggressive-Pornographic Mass Media Stimuli" (1982) 15 Advances in Experimental Soc. Psy. 103, and McCormack, "Machismo in Media Research: A Critical Review of Research on Violence and Pornography" (1978) 25 Soc. Probs. 544-55.

The issue of harm thus remains the centre of public concern. "Obscene" material is, itself, constantly being redefined through case law, legislative amendments notwithstanding.

> [T]he allegedly obscene pages in *Lady Chatterley's Lover* appear extremely tame in light of the type of explicit sexual material that is available in the 1980s. . . . When . . . Shaw's *Pygmalion* was originally produced . . . there was a public outcry when Eliza Doolittle uttered the line "not bloody likely". . . . When the movie *Gone With The Wind* first appeared some forty years ago, there was considerable public disapproval of Rhett Butler's immortal "Frankly, my dear, I don't give a damn". From today's perspective it is difficult to imagine why there was such public consternation in relation to these utterances.[40]

Definitions of "obscenity" are more closely related to changing social structure and its related case law than to changing legislative enactments.

Indeed, the state of the legislative definition remains a subject of debate today. Before the Supreme Court in 1977, when the issue was whether sexual aids ("stimulators") were publications within the meaning of s. 159, counsel for the accused contended that, since the sexual aids in question were not publications, *Hicklin* could not apply because s. 159(8) provided the sole definition of obscenity, while the Crown argued that *Hicklin* applied to any obscenity even if it was not a publication. The majority decision was that the sexual aids were publications; hence, it was unnecessary to speak to the exhaustiveness of the s. 159(8) definition of obscenity.[41] Laskin C.J., concurring, accepted the dual contentions of the defence: that the sexual aids were not publications and that s. 159(8) is the exhaustive test of obscenity in Canada.[42] Bill C-19 now suggests that the intention of the government is to make the statutory definition of obscenity exhaustive; the word "publication" has been replaced with the words "matter or thing".[43]

More salient in the development of social policy is the role that restrictions on access play in determining obscenity, with the courts clarifying the relative nature of the legal concept of obscenity.[44] With

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[40] Verdun-Jones, *Disc Course* (1984) at 43.

[41] *Dechow* v. *The Queen* (1977), 35 C.C.C. (2d) 22 (S.C.C.).

[42] *Ibid.* at 2.

[43] *Criminal Law Reform Act*, 1984.

[44] In *R.* v. *Harrison* (1973), 12 C.C.C. (2d) 26 (Alta. D.C.), it was held that there was no exposure to "public view", per S. 159(2)(a), hence no obscenity, when a film had been shown in a community hall where a notice indicated a private party was in progress. In *R.* v. *Murphy* (1971), 5 C.C.C. (2d) 259 (N.S. C.A.) the court was influenced by the fact that audiences were limited to adults who had been clearly informed of the nature of the "entertainment". In *R.* v. *MacMillan Company of Canada Ltd.* (1976), 31 C.C.C. (2d) 286 (Ont. Co. C.), the court noted that packaging and pricing limited readership of *Show Me* to adults.

the emergence of *sexuality* in the public domain, the issue is often one, not of prohibition, but of the regulation of access through the medium of the criminal process.[45]

Similarly, the role of the expert witness in determining obscenity has been developed by judicial pronouncements. The question of whether material exceeds a national standard of tolerance is one that can be informed by empirical test.

> [T]he "community" whose standards are being considered is all of Canada. The universe from which "the sample" . . . is to be selected must be representative of Canada and not be drawn from a single city.[46]

The Ontario Court of Appeal has ruled[47] that public opinion surveys are irrelevant and it is ultimately the duty of the Court to determine the legal question of community tolerance. While the Canadian community's standard of tolerance is amenable to empirical test, both Crown and defence counsel have been reluctant to enter the fray in a systematic manner. The judiciary's requirement of strict methodologies and the consequent costs of empirical study have worked against routine introduction of opinion survey evidence. Implicit in such judicial analysis is the notion that research capable of methodological criticism cannot be of assistance to the court; the judiciary has often declined the role of evaluating social science data. Given the ability of counsel on both sides to call expert testimony to assist the Court, this seems an unnecessary reluctance.

Nonetheless, the community standards test remains problematic. While the *Hicklin* test required that the judiciary believe an alleged obscenity to be harmful, the present statutory provision mandates criminalization on the criterion of offensiveness. The Toronto Area Caucus of Women and the Law has suggested that

> [o]bscenity is vague and changeable. As sado-masochism becomes more commonly portrayed throughout our society, the "community standards of tolerance" would no doubt be said to increasingly accept sado-masochism. In contrast, we think that violence against women is inherently unacceptable.[48]

This point is well taken insofar as it critiques the logic on which

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[45] "[A] line of judicial authority . . . has developed in recent years to give effect to circumstances of exposure . . . to distinguish between what the public will accept for its own viewing and what the public as a whole will tolerate being viewed by those of its members who wish to do so."Price, *supra* note 38 at 324.

[46] *R.* v. *Prairie Schooner News Ltd.* (1970), 1 C.C.C. (2d) 251, 75 W.W.R. 585 at 599 (Man. C.A.), per Dickson J.A.

[47] *R.* v. *Pink Triangle Press* (1980), 51 C.C.C. (2d) 485 (Ont. C. A.), *rev'g* (1979), 45 C.C.C. (2d) 385 (Ont. Co. Ct.).

[48] Toronto Area Caucus of Women and the Law, *Pornography: The Law and Women's Rights*, (1984 unpub'd manuscript) 27.

the criminalization of obscene matter rests. The criminalization of obscenity must be more than an index of community intolerance; the issue of social harm should not be allowed to escape from judicial comment. A 1979 survey revealed that, while 61 per cent of Ontarians would cut or ban "explicit sexual intercourse" and 61 per cent "vividly portrayed scenes of violence," 67 per cent would cut or ban "sex between two women or two men."[49] Thus, the standard of community intolerance may demonstrate a lack of consistency in the morality that it espouses.

III. CENSOR BOARD DECISION MAKING: CONSTRUCTING COMMUNITY STANDARDS

Unlike the federal power over criminal law, provincial control by prior restraint is more properly subject to the "community standards" test. This is not so much a matter of prohibition, but of determining the context in which access can occur. With the classification of *public* exhibitions, community intolerance provides a useful guide for an essentially regulatory function. Access to *private* exhibition is, to this date, beyond the ambit of censor board powers in British Columbia, Ontario, Quebec and Nova Scotia.[50]

Section 6 of the British Columbia *Motion Pictures Act*[51] provides that ". . . every film intended for public exhibition shall first be submitted to the director for approval." The director's powers, as specified in s. 4, include, *inter alia*, the power to ". . . approve, prohibit or regulate exhibiting or displaying of a film in the Province."[52]

In Ontario, s. 38 of *The Theatres Act*[53] dictates that "[n]o person shall exhibit or cause to be exhibited in Ontario any film that has not been approved by the Board" and "exhibit" is defined as ". . . to show film for viewing for direct or indirect gain or for viewing by the public . . . ." This is more inclusive than British Columbia's Act, which exempts federal and provincial governments, universities, film societies and certain educational institutes from the operation of the statute.[54] The powers of Ontario's censors are ". . . to approve, prohibit or regu-

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[49] Market Facts of Canada, *A Study of Attitudes in Ontario: Movie Censorship and Classification* (1979) at 19.

[50] It is nonetheless difficult to draw this line between the public and the private sphere. It is not clear that the standard of prohibition should be markedly different in these two instances. See text, *infra* headed *Obscenity and Censorship: A Question of Focus.*

[51] R.S.B.C. 1979, c. 284.

[52] *Ibid.*

[53] R.S.O. 1980, c. 498

[54] R.S.B.C. 1979, c. 284, s.1.

late the exhibition of any film in Ontario."[55]

Quebec's new *Cinema Act* requires that "[n]o person may . . . exhibit a film to the public unless the print of the film has been stamped in accordance with this Act to show the classification assigned to the film."[56] An exception to the norm is provided in s. 77: "The Regie may, on such conditions as it may determine, issue a special authorization permitting the films it indicates to be exhibited to the public at a diplomatic event, a festival or any other similar event."

In a marked departure from the statutory language of the other three provinces examined, the powers of the *Regie du Cinema*, as defined in s. 81, include ". . . if [the Regie is] of the opinion that the content of the film does not endanger public order or good morals, in particular that it does not condone or promote sexual violence, [it] shall assign one of the three following classes to the film, according to the sector of the audience to which it is directed . . . ." The Act requires, then, that there be a demonstration of harmfulness in the event of prohibition of public exhibition. While classifying is used to regulate the potential offensiveness of the film medium, prohibition depends upon *endangering* morals or *condoning* or *promoting* sexual violence. The prevention of potential harm is at the heart of Quebec's control and supervision of the film medium, at least insofar as statutory language is concerned.[57]

Under Nova Scotia's *Theatres and Amusements Act*, the Board has ". . . power to permit or to prohibit . . . the use or exhibition . . . for public entertainment of any film . . . or any performance in any theatre. . . ."[58] "Performance" is defined as ". . . any theatrical, vaudeville, musical or moving picture performance or exhibition for public entertainment."[59]

Each of the four provinces has empowered its censors to classify films according to the age of the audience; a comparison is given in Table I.

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[55] R.S.O. 1980, c. 498, s. 3(2)(b).

[56] Quebec, Bill 109, 1983, not yet proclaimed. Although the *Cinema Act* is not yet operative, I have chosen to use it here as the best expression of the province's policy at present.

[57] *Ibid.*, s. 81.

[58] R.S.N.S. 1967, c. 304, s.3.

[59] *Ibid.* s. 1(g).

TABLE I

Comparison of Provincial Restrictions

Classification:	Ontario	Quebec	British Columbia	Nova Scotia
General (suitable for all persons; family)	Terminology varies, but no basic differences.			
Adult	Restricted to 18 yrs. old or over	Restricted to 18 yrs. old or over	Unsuitable for or of no interest to persons under 18.	Restricted to 18 yrs. old or over
Parental accompaniment required	For 14-18 year olds.		If under 18.	If under 14.
Parental Guidance advised		For 14-18 year olds.		

The thorny issue of jurisdictional control over home video appears to be a matter of interest to all censor boards in the four provinces under study. While Ontario has served notice that it will move both to censor and to classify videofilms for home use,[60] the other three provinces have yet to follow suit, although Nova Scotia has made regulations under *The Theatres and Amusements Act* to provide for some control over the sales and rentals of videofilms, providing that "[e]very film exchange shall indicate . . . to its customers the classification and captions . . . given to the film by the Board and where the film has not been classified, it shall be indicated as unclassified." Thus, while this section does not compel distributors to submit their tapes for classification, it does require that the consumer be better informed regarding the status of any given "videocassette, videodisc, or videotape". While motion picture theatres are sources of publicly shared experiences, the private home is correspondingly the source of a private experience; yet it is difficult to separate the exhibition of film from the sale or rental of videofilm. Through classification and written warnings, the province may limit exposure to potentially offensive videofilm. Nova Scotia's *Regulations*[61] are a measured step in this direction. However, given that the criminal process can already be invoked against the distributors of videofilm, the exercise of provincial jurisdiction is, arguably, a costly duplication of existing controls.

[60] "Videotapes face censors in Ontario", *The Globe and Mail*, 5 May 1984, 1.

[61] *Regulations Respecting Film Exchanges*, 1984.

It is difficult, however, to evaluate the standards for prohibition of videofilm. The issue, quite simply, is: should a consenting adult be permitted to view material at home that could not be shown to the same person in a theatre at a price? Provincial prohibition has often been objected to on the ground of jurisdictional purity, that, by s. 159(8), the federal government occupies the field of censorship. Indeed, the decision to prohibit public access is essentially the decision made upon criminal conviction; some form of display in the *public* domain is a prerequisite for invoking the court process.[62]

The confusion here stems from a limited analysis of federal and provincial roles and responsibilities concerning obscenity and censorship. The provincial and the federal governments share responsibility for structuring the meaning of obscenity. The statutory language of s. 159 and Supreme Court decisions concerning this offence are not so detailed as to dictate the province's plan of action in the individual case.

There is no rigid demarcation of federal and provincial spheres of responsibility. It is in this context that the prohibitive powers of provincial censor boards can best be appreciated. If the boards did not possess the power of prohibition, obscenity would be more directly shaped by police interests, albeit within a federally established legislative and judicial framework. The repeal of provincial powers of censorship would eliminate the checks and balances implicit in censor board-police relations. Yet to speak only of jurisdiction is to fail to reach the essence of censor board decision making in practice. Legislation enabling censor board powers does not specify any rationales for making decisions to ban, to request eliminations and to classify. Indeed, it is this appearance of arbitrariness that concerned both the Divisional Court and the Court of Appeal in *Ontario Film and Video*.[63]

Each of the four provincial Boards strives to ensure some measure of community representation in procedures for screening films. In Ontario, panels of five to seven Board members view each film, and a majority verdict determines approval, eliminations and classifications. "[M]embers . . . represent a cross-section of the community in age, philosophy, background, lifestyle and ethnic origin."[64] Over 7,500 Ontarians were contacted by Board members in 1982-83; assessments

[62] Private possession of obscene materials is not generally the target of the law as written, but see *Re Hawkshaw and the Queen* (1982) 69 C.C.C. (2d) 503 (Ont. C. A.).

[63] *Supra* note 1.

[64] Ministry of Consumer and Commercial Relations, *Theatres Branch Annual Report*, 1982-83, at 13.

of community sentiment are presented at quarterly meetings of the full fifteen-member Board.

A similar model prevails in Nova Scotia. The province has nine board members who view each film in four-person panels. Members are appointed in accordance with the principle of community representation. There exists a diversity of opinion among Board members, although decision-making stresses consensus as opposed to majority opinion.[65] For censorship or classification issues that may be controversial or difficult, the full Board may be empanelled.

British Columbia has three appointed "classifiers" who, in most instances, see each film. Again, the decision-making model is one of consensus as opposed to majority verdict, but, while disagreements are said to occur with approximately ten per cent of classification decisions, a single statement of position ultimately emerges from the Branch.

Quebec's *Bureau de Surveillance du Cinema* has six appointed members, all of whom must have (1) a university degree in humanities or the social sciences; (2) a passion for the cinema, and (3) an involvement in community activities.[66] Again, as in British Columbia and Nova Scotia, consensus is predominant. A jury of two screens each film and, in the event of disagreement, there may be a twenty-four hour delay, but ultimately a single position will be taken. A third member may also screen the film to work toward a consensus. The *Regie du Cinema* will leave the present practice largely undisturbed; there is little reason to believe that the *Cinema Act* will herald a marked departure from the status quo.

In all these provinces, Censor Board process gives some degree of importance to the issue of community standards, but the issue remains problematic. Market Facts data reveal that over sixty per cent of Ontario's adults believe that films with explicit sexual intercourse should be prohibited; forty-nine per cent believe that the use of vulgar or profane language must be prohibited.[67] At the same time, the data indicate that only seven per cent of Ontarians are concerned about sex in movies.

There is a need to examine more closely the targets of prohibition; the community standards test does not, in itself, furnish the state with an adequate justification or explanation for prohibition. The provinces draw markedly different boundaries prohibiting, eliminating and classifying the public exhibition of film. Table II sets out available data on

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[65] Continuous involvement in the process requires shared tolerance with respect to decisions, whether consensus or majority decisions are the pattern.

[66] Personal conversation with Jean Tellier, *Bureau de Surveillance du Cinema* April 1984.

[67] *Supra* note 48 at 19.

the operations of the four boards. There is little consistency in record-keeping across the provinces, but the figures do contribute, albeit modestly, to an understanding of our processes of censorship and classification. The tables focus on feature length 35 and 16 mm films, excepting short subjects, trailers and the like; the feature film is essentially the target of public scrutiny. A lack of uniform data collection complicates and limits this attempt. Given coverage of different periods of time in the different provinces, as well as changes over time in bases of comparison, interpretation of these figures must be very circumscribed.[68]

TABLE II

Provincial Treatment of Feature Films

Province	Year	No. of films Screened	Films with Eliminations	Films Rejected
British Columbia	1979	764	45	3
	1980	672	14	3
	1981	580	18	3
	1982	561	21	2
	1983	531	89	1
Ontario	1978-79	1060	146	4
	1979-80	1339	141	4
	1980-81	1154	58 (35 mm only)	5
	1981-82	1112	82 (35 mm only)	46
	1982-83	1050	109 (35 mm only)	46 (35 mm only)
Nova Scotia*	1977-78	468		
	1978-79	382		
	1979-80	283		
	1980-81	247		
	1981-82	256		
Quebec*	1978-79	890		
	1979-80	841		
	1980-81	970		
	1981-82	910		
	1982-83	868		

* Data concerning eliminations & rejections not available.

Nonetheless, there are patterns that bear consideration. All provinces have experienced modest declines in the number of films screened; the size of each Board's operation is also reflected in the figures cited: Nova Scotia processes one film for every four processed by Ontario, with British Columbia and Quebec falling between, and the latter being closer to Ontario. The absolute number of eliminations and rejec-

[68] It is not presumed that there is any comparison of equivalent bases of data in these Tables; provincial autonomy precludes such analysis.

tions of film by the British Columbia and Ontario boards has increased significantly in the past few years.

The existing data must be placed alongside the reality of existing practice. Provincial thresholds of tolerance vary considerably. The question of prohibition is of primary
importance to those interested in governmental responsibilities for obscenity and censorship. Distributors, who are able to exercise a substantial degree of self-censorship, are sensitive to each Board's policies — different versions of the same film are sent to Boards of different sympathies. Some films are simply not considered for a general release to all provinces.

Mary Brown[69] has indicated that

> very graphic or prolonged scenes of violence, torture, bloodletting; explicit portrayal of sexual violence, explicit portrayals of sexual activity, undue or prolonged emphasis on genitalia and ill treatment of animals would normally be considered to contravene community standards and are scenes for which elimination would normally be requested.[70]

She rejects the notion that explicit *sexuality* can be tolerated as public entertainment, breaking here with her colleagues in British Columbia and Quebec.

Nonetheless, Brown's major concerns are with *sexuality* and children and with both violence and sexual violence. Study of requested eliminations reveals that *sexuality* and violence are seen, however, as independent problems. The Elimination Report of January, 1984, gives some sense of what Ontario prohibits; the Board issued the following instructions in six different films.

> Eliminate cutting of man's neck with knife; establish and shorten scene of axe being used to hack bodies of man and women; eliminate all views of copulation scene in which hips are visible and in motion; eliminate closeup of erect penis with a condom being rolled on; eliminate scene of tongue in rectum; eliminate scene of prolonged closeup of penis; eliminate scene of men being spanked on bare buttocks; eliminate graphic scene of mouth-nose at rectum.[71]

Insofar as the Board's role is simply to reflect majority will, its present eliminations appear, then, as a sensitive reading of community sentiment.[72]

British Columbia's standard for prohibition similarly flows from concerns about images of *sexuality* and violence. However, monthly re-

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[69] Ontario's Director and Chairperson of the Board of Censors.

[70] *Supra* note 63 at 15.

[71] Ministry of Consumer & Commercial Relations, *Theatres Branch Elimination Report*, Jan. 1984.

[72] *Supra* note 48.

ports reveal that "penetration", "ejaculation" and "violence" are the stated variables of concern. Mary Lou McCausland[73] suggests that these variables represent a kind of balancing of community tolerance. The Branch had been in the process of gradually allowing explicit sexuality between consenting adults, but became sensitive to adverse public reaction concerning the film *Caligula*. As a consequence, the Board has adopted a unique policy, permitting explicit scenes of both fellatio and cunnilingus while prohibiting scenes involving penetration or ejaculation. The monthly report of eliminations for April, 1984, indicates that fourteen of seventeen films were cut as a consequence of either penetration or ejaculation or both; three of the seventeen contained unacceptable violence.[74]

Nova Scotia's Amusements Regulation Board states that:

> The rejection of a film may occur when there is no real story but prolonged explicit portrayal of sexual activity, sexual exploitation of children, undue and prolonged scenes of violence, torture, bloodletting, ill treatment of animals, undue or prolonged emphasis on genitalia.[75]

Nova Scotia follows Ontario's example in not allowing explicit sexual activity as a form of public entertainment. Board Chairman Don Trivett notes that Nova Scotia is a smaller and somewhat more conservative province than Ontario, Quebec and British Columbia; the community standard of tolerance correspondingly reflects these structural differences. Nova Scotia does not provide the public with a statement of reasons for decisions concerning eliminations and rejections; the Board and the Department of Consumer Affairs suggest that their statement of policy[76] yields sufficient detail.

While Quebec, like Nova Scotia, does not provide a public statement of reasons for rejection of a film, the *Bureau de Surveillance du Cinema* is quite candid about its decisions. Explicit sexuality between consenting adults is viewed as an acceptable or tolerable form of public entertainment; *sexuality* per se is not a target for elimination — the presentation of films containing penetration and ejaculation are permitted. Images viewed as intolerable are those of sexual violence, within the genre of the "sexploitation" film. Jean Tellier explains that the *Bureau* must also be sensitive to the shifting nature of community standards, that specific and inflexible criteria are simply not realistic. The *Bureau* does not keep statistics regarding eliminations or rejections, ar-

[73] Member of the Branch since 1976 and a Director since 1978.

[74] B.C. Film Classification Branch, *Eliminations*, April 1984.

[75] N.S. Amusements Regulation Board, *Classification Parameters*, 1984.

[76] *Ibid.*

guing that the figures would be meaningless. A film may be rejected several times before ultimate acceptance; the number of rejections would then say little about *Bureau* policy. Tellier stresses that the *Bureau* does not request specific cuts; decisions regarding elimination are those of the film distributor.

These portraits of provincial standards for prohibition raise a number of interesting issues. All provinces are very much bound by the notion of a community standard of tolerance, and yet there is no systematic taking of the public pulse since Ontario's Market Facts survey of 1979.

It is difficult to analyze properly the role of community tolerance, however. Though the expression presumes a consensus of views within provincial boundaries, Ontario's survey confirms that there is no single definition of tolerance among adult residents. The issues can, perhaps, be better understood in terms of the notion of a critical mass. The more urbanized areas of Canada are tolerating, or have a demand for, exposure to film that elsewhere might be deemed pornographic. Were Nova Scotia to assent to public exhibition of explicit *sexuality* , such exhibitions might well encounter staunch resistance, the issue of harm notwithstanding. There is an understandable concern that the Amusements Regulation Board not act to *create* public controversy. The importance of community sentiment cannot be dismissed as a significant variable in decisions to prohibit public exhibitions of film. The creation of a community tolerance *test* remains a problem, but the often guiding hand of public reaction must be acknowledged.

The issue of censor board accountability can most fairly be raised in this light. The public ought to be able to discover what has been eliminated in a film and why.[77] With both a test of harmfulness and a test of community tolerance the public's right to know persists. Ontario and British Columbia's policies of public access are models to be emulated in this respect. Indeed, Ontario's presentation of policy is particularly explicit, precisely describing the scene to be eliminated. While Ontario's decisions, in themselves, are not above criticism, the province's public accountability does create a model for other jurisdictions. Quebec and Nova Scotia's present policies do not mandate public accessibility to the decision-making process, though public regulation should carry a corresponding burden of public accountability. It seems reasonable to suggest the development of policy geared towards providing more detailed information to the public, to enhance its scrutiny.

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[77] The concerns here are markedly similar to those raised in *Ontario Film and Video, supra* note 1.

However, the Boards in neither Quebec nor Nova Scotia are fairly criticized for failure to respond to public concerns — Quebec's *Bureau de Surveillance du Cinema* has been critically acclaimed for its sensitive and thoughtful response to community concerns; Nova Scotia's Amusements Regulation Board enjoys similarly strong community support.

In the final analysis, however, provincial Boards are judged by their decisions in individual cases. The films *Pretty Baby*, *Beau Pere*, *Caligula* and *Not a Love Story* are among the most controversial of the recent past. Table III indicates the manner in which the different boards responded to these features.[78] Although *Not a Love Story* (a documentary on the exploitive character of pornography) contains explicit sex — one scene involves both fellatio and penetration — the film's intention permitted presentation, and it was licensed in Ontario and Nova Scotia for educational purposes. Unhappily,

> "extensive use of hardcore footage" prevented the general commercial release of *Not a Love Story* in Ontario — the Board approved the National Film Board's original marketing plan to distribute and to exhibit it as an educational film.[79]

TABLE III

Provincial Responses to Specific Feature Films

Film	B.C.	Ontario	Nova Scotia	Quebec
Pretty Baby	Approved	Not Approved	Approved	Approved
Beau Pere	Approved	Not Approved	Not Submitted	Approved
Caligula	Approved (American version)	Approved (British version with cuts)	Not Approved	Approved (American version with cuts)
Not a Love Story	Exempted	Not Approved for comm. use	Not Approved for comm. use	Approved

[78] Table is based on Petruzzellis, *Compilation and Review of Notes, Theatre Branches Across Canada*, 1982, which compares *Pretty Baby*, *Beau Pere* and *Caligula*.

[79] Brown, *Letter to Dr. Robert Elgie*, (Minister of Consumer & Commercial Relations, Ont.) 21 Jun. 1982 at 3.

The section of the public that might be expected to benefit most from this stimulating polemic is excluded by this restricted method of distribution. Commercial release expands the available adult audience and hence the arguable utility of the film. While the concern in this case was undoubtedly not to define explicit sex as entertainment, the judgment is difficult to follow.

IV. OBSCENITY AND CENSORSHIP: A QUESTION OF FOCUS

In discussing the theoretical and practical boundaries of obscenity and censorship, the context of present enforcement provides a valuable backdrop for informed analysis. Figure I is an index of public concern regarding the criminal offence of obscenity. Although the data refer to the more general category of offences tending to corrupt public morals, discussions with a number of Crown counsel suggest that the overwhelming majority of charges relate to s. 159(8) of the *Criminal Code*. Consequently, these police reports provide a good approximation of patterns of obscenity enforcement for the past nine years.

Figure I
Patterns of Enforcement: Offences
Tending to Corrupt Public Morals,
1974 to 1982, Canada

Offences Reported or Known to Police

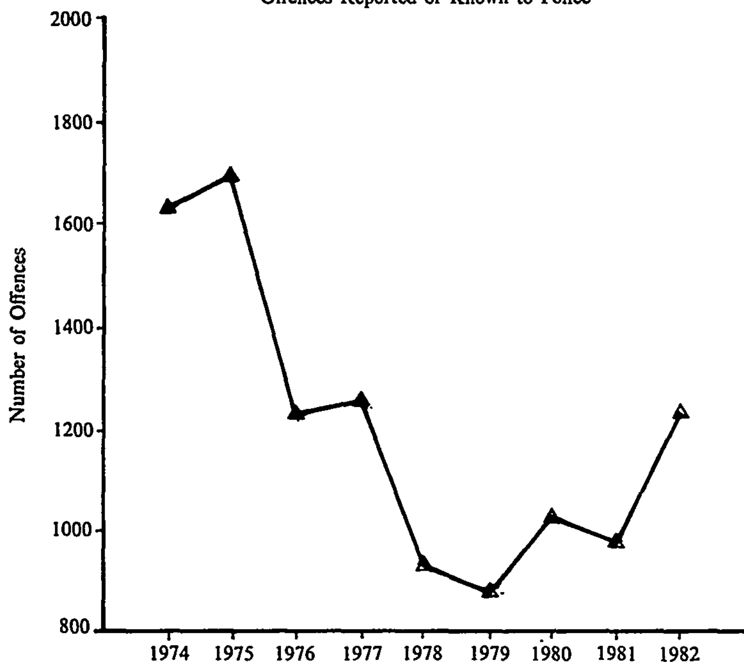


Figure II
Patterns of Enforcement: Offences
Tending to Corrupt Public Morals,
1974 to 1982, Canada

Offences Unfounded

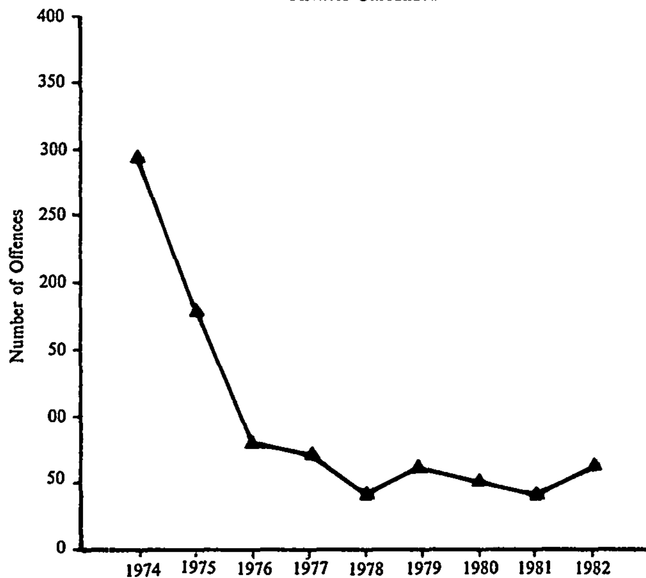


Figure II reveals a significant decrease in the number of reported offences considered unfounded by the police. Figure III details offences cleared—that is, offences in which a prima facie case has been established and either proceeded with, or abandoned for reasons unrelated to the sufficiency of the charge. This graph demonstrates consistent, moderate increases over the last five years.

Figure IV is perhaps the best index of control in the matter of obscenity. The past seven years saw an average of two hundred to two hundred and fifty Canadians charged each year with the offence. While an increasing centralization of the distribution of potentially obscene material might result in more offences and correspondingly fewer offenders, in human terms the control of the offence has been relatively static during this period.

Provincial control has not been similarly static. In the Maritimes and Saskatchewan, the number of persons charged has remained at a relatively minimal level during the past nine years. Ontario provides the lion's share of obscenity charges, accounting for over half of all charges against Canadians. With roughly comparable population numbers, Quebec preferred approximately one-quarter of the number of Ontario charges. As well, while the number of persons charged with

Figure III
Patterns of Enforcement: Offences
Tending to Corrupt Public Morals,
1974 to 1982, Canada

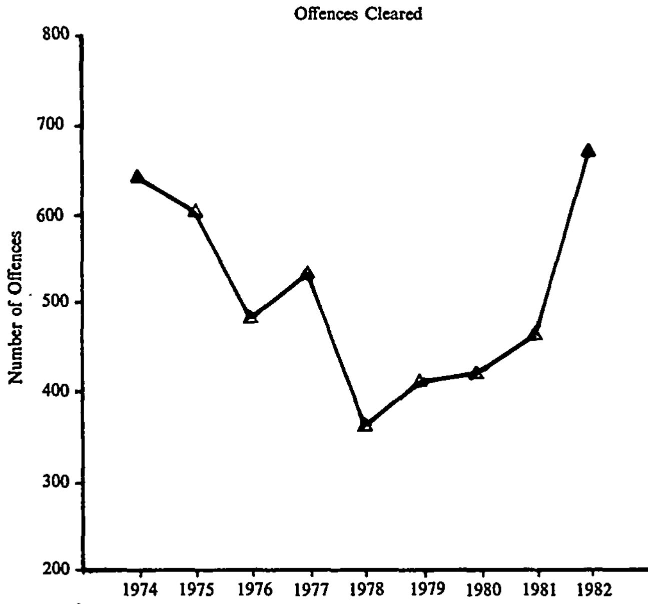
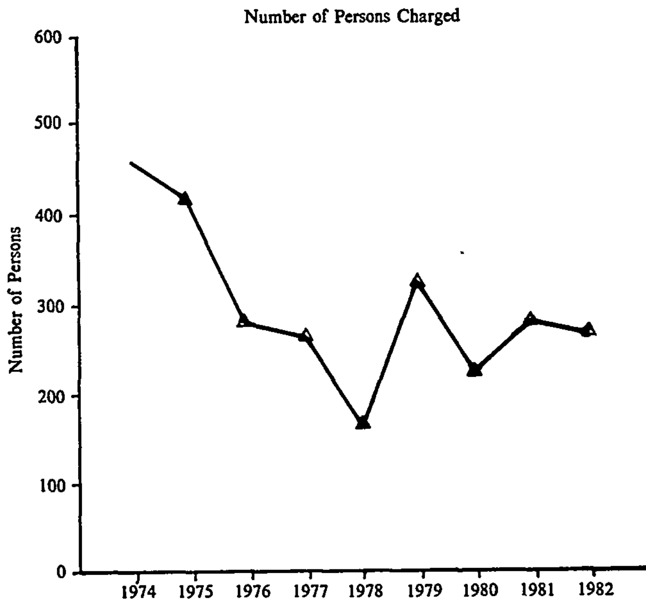


Figure IV
Patterns of Enforcement: Offences
Tending to Corrupt Public Morals,
1974 to 1982, Canada



obscenity has steadily decreased in Quebec for the past three years, the number of persons charged in British Columbia and Manitoba has shown a consistent increase.

These distinctive provincial patterns of criminal enforcement raise the question of a working relationship between censorship and obscenity. The Quebec and Ontario boards have markedly different perceptions of community tolerance; it is probable that the greater tolerance of the Quebec Censor Board is reflected in the decisions of law enforcement personnel, police and Crown counsel. Ontario's more restrictive criteria appear to be more similarly manifest in its greater tendency towards use of the criminal process. Given this hypothesis, then, provincial censor boards have significant roles both in structuring provincial patterns of enforcement and in providing a definitional context for s. 159(8) of the *Code.*

TABLE IV

Sentences, s.159, 1978-80

	Convictions	Fine	Probation	Imprisonment
1978	22	20	2	0
1979	26	23	2	1
1980	22	22	0	0
Total	70	65	4	1

Court data concerning the criminal offence of obscenity are very limited. Table IV presents data from only parts of British Columbia and Quebec, and only for the years 1978 to 1980.[80] Nonetheless, this gives a fairly clear picture of sentencing policy. A fine is almost invariably imposed upon conviction. Although the option of imprisonment does exist, it is very difficult to find judicial support for this response, the single imprisonment noted being something of a puzzle. A financial penalty typically appears as the state's symbolic response to the offender.[81]

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, and yet pornography, obscen-

[80] Parlor, Senior Analyst, Courts Programme of the Canadian Centre for Justice Statistics writes (personal communication)

> It must be emphasized that there are severe methodological problems with the data. In particular, the limited coverage (which varies by year), the completeness of reporting, and the different sampling methods are all matters of concern.

[81] Nadin-Davis & Sproule, *Canadian Sentencing Digest*(1982), 39-1, 39-2.

ity and censorship remain salient public issues, heightened by recent judicial decisions.[82] Of particular interest in the federal-provincial censorship-obscenity dialogue are the Trial and Appeal Court decisions in *Ontario Film and Video.*[83]

The practical effects of the decisions in this case are twofold. Firstly, all provinces must give serious consideration to drafting statutory or regulatory guidelines for censorship and classification; in the event that the Supreme Court upholds this decision, such legislation would appear to be a necessary provincial response. Secondly, the Court of Appeal's decision makes clear that the standards of prohibition and classification may continue to be a subject of judicial scrutiny, a more detailed legislative framework notwithstanding. The appropriate role for the province's censors and classifiers remains a subject of judicial debate.

The Supreme Court's most important pronouncement to date on the subject of provincial censorship was in *McNeil,*[84] where it was held that, while one regulation respecting prohibition of *indecent* theatrical performances was beyond the jurisdiction of the province, the legal structure of Nova Scotia's approach to film censorship was properly within the provincial sphere. It had been argued that the power of censorship itself was beyond provincial jurisdiction, that it was an exercise of the federal criminal law power embodied in s. 159 of the *Criminal Code.*

> There is . . . no constitutional barrier preventing the Board from rejecting a film for exhibition in Nova Scotia on the sole ground that it fails to conform to standards of morality which the Board itself has fixed, notwithstanding the fact that the film is not offensive to any provision of the *Criminal Code.*
>
> . . . .
>
> [T]here is no constitutional reason why a prosecution cannot be brought under s. 163 of the *Criminal Code* in respect of the exhibition of a film which the Board of Censors has approved as conforming to its standards of propriety.[85]

This suggests, then, that different standards of prohibition for the provinces and the federal government can be seen as constitutionally valid, and that provincial censorship is within ss. 92(13) and 92(16) of the

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[82] *Ontario Film Video, supra* note 1; *McNeil, supra* note 1; *Red Hot Video, supra* note 1; *R.* v. *Doug Rankine Company Ltd.* (1983), 9 C.C.C. (3d) 53 (Ont. Co. Ct.).

[83] "As to whether the Standards issued by the Board of Censors would be considered to be reasonable limits, we express no views. They may or may not be acceptable. . . ." On Appeal, however, it was stated: "We do not think, if they were purporting to enunciate a principle, that there is any such principle to be applied in the determination of what is "reasonable". . . . In approaching the question, there is no presumption for or against the legislation."*Supra* note 1.

[84] *Supra* note 1.

[85] *Ibid.* at 24; per Ritchie J. for the majority.

Constitution Act, 1867, since it concerns "property and civil rights" and "matters of a local and private nature".

Laskin's dissent in *McNeil* takes a markedly different course, arguing that the power of censorship in Nova Scotia is *not* rooted in provincial jurisdiction:

> [T]he Board is asserting authority to protect public morals, to safeguard the public from exposure to films, to ideas and images in films, that it regards as morally offensive, as indecent, probably as obscene. The determination of what is decent or indecent or obscene in conduct or in a publication, what is morally fit for public viewing, whether in film, in art or in a live performance is, as such, within the exclusive power of the Parliament of Canada under its enumerated authority to legislate in relation to the criminal law.[86]

Thus the implications of *McNeil* are somewhat confusing, clouded by a slim 5:4 verdict. It is still unclear whether a future Court will accede to the view that the provinces' prior restraint of the medium of film is constitutionally permissible. Nevertheless, the majority decision in *McNeil* upholds provincial powers of censorship and classification. Section 37 of the recently introduced Bill C-19[87] appears to give recognition to such provincial autonomy in the matters of censorship and classification. The section requires that any criminal prosecution of a provincially-classified film cannot proceed ". . . without the personal consent of the Attorney General."[88] A challenge to the prohibitive standard of the provincial Censor Board is posited as an exceptional circumstance, stressing the interlocking roles of federal and provincial jurisdictions.

Not only the constitutionality of provincial censorship is under scrutiny in Canadian courts. In *Red Hot Video*, counsel for the accused argued that the *Code*'s obscenity provisions contravene ss. 2(b) (the right to freedom of expression) and 7 (the right to "life, liberty and the security of the person") of the *Charter*, but it was held that

> the Crown has established that the provisions of ss. (1)(a) and (8) of s. 159 constitute reasonable limits as can be demonstrably justified in a free and democratic society . . . [and] . . . there appears to be some uncertainty as to how to determine what is or is not obscene. Whatever may be the cause of this uncertainty, it does not . . . result from a lack of clarity in the law. I think the law is sufficiently clear. . . .[89]

Yet the appropriate targets of prohibition remain a matter of debate, jurisdictional and constitutional arguments notwithstanding.

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[86] *Ibid.* at 14; per Laskin C.J.C.

[87] *Criminal Law Reform Act*, *supra* note 43.

[88] *Ibid.*

[89] *Red Hot Video*, *supra* note 1 at 353; per Collins, J.

This issue was specifically addressed in *Rankine*, a judgment which sets a new focus for judicial analysis:

> [C]ontemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse [and] would also tolerate the distribution of films which consist of scenes of group sex, lesbianism, fellatio, cunnilingus, and anal sex. However, films which consist . . . of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanise the people upon whom they are performed, exceed the level of community tolerance.[90]

Thus, while non-coercive explicit *sexuality* might be "artless", "insipid" and "boring", it was not deserving of prohibition.

Rankine is a reminder that the judiciary is ultimately sensitive to arguments regarding the purpose of prohibition. While the test of community tolerance is formulated and is determinative of the issue in dispute, it is the focus given to sexual violence that is most instructive. During the past decade, the issue of public harm has begun to displace the issue of public morality — it is now sexual violence that highlights our agenda. At the centre of much controversy are two American-based social psychologists, Malamuth and Donnerstein, whose laboratory and field research redirects our attention from the notion of community tolerance to the issue of pornography's social costs.

The task of obtaining sound empirical research on the social costs of pornography has long been a major problem. The subjects of study have changed over time; the concerns of the early 1970s differ from today's and from those of the post-War period. Correspondingly, the 1970 Report of the *President's Commission on Obscenity and Pornography* differs in its emphasis from the British *Williams Report* of 1979, the latter, perhaps, being better related to our present circumstances. A 1973 issue of the *Journal of Social Issues*[91] featured "pornography", its articles being concerned with "consumers of erotica", "explicit sexual materials" and "erotic films". There was no suggestion that the topic under study was that of images of sexual violence, the focus of current concern.

> It is the aggressive content of pornography which is the main contributor to violence against women. . . . [W]hen we take out the sexual content from such films and just leave the aggressive aspect we find a similar pattern of aggression and asocial attitudes. . . . The problem here is what we mean by pornography. Are we discussing just sexually explicit material? All the research to date would not suggest any harmful effects from such exposure.[92]

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[90] *Rankine*, *supra* note 83 at 163; per Borins, J.

[91] "Pornography: Attitudes, Use, and Effects" (1973) 29(3) J. Soc. Issues 1-227.

[92] Malamuth & Donnerstein, *supra* note 39.

This theme is echoed by Nelson:

> [R]esearch continues to emphasize the usefulness of discriminating between the effects of aggressive vs. non-aggressive sexual materials . . . [but] . . . even now it is reasonably clear that observing violent sexuality can facilitate aggression in the observer — altering the context in which aggression is viewed does not appear to change anything.[93]

The ability of the image to impact upon the reality of social relations seems well established. Nelson aptly describes this process, noting that

> the modelling of attitudes and behaviours which suggest that males are justified in their aggression toward females undoubtedly influences some males to disregard women's communications of non-consent and reinforces their beliefs about the appropriateness of using force or intimidation to make a woman do whatever they want her to do.[94]

Social scientists, particularly social psychologists, are now looking to the aggressive content of *sexuality* in both laboratory and field experiments. In a recent study involving one hundred and four males, one item on a questionnaire asked about the likelihood that the subject himself would rape if ". . . he could be assured of not being caught and punished." A five point scale was presented, ranging from "1" (Not at all likely) to "5" (Very likely). The subjects were then divided into two groups — sixty-two with low rape potential, having responded with a "1" and forty-two whose response had been "2" or higher on the scale. The subjects then listened to one of three tapes depicting sexuality, one showing a mutually consenting couple, one in which a rape victim becomes sexually aroused ("rape positive") and one of rape in which the victim abhors the assault throughout ("rape negative").

Both penile tumescence and self-reported arousal to these stimuli were measured. For all males, regardless of high or low rape potential, blood flow to the penis increased most markedly in the rape-positive outcome condition. Men were generally more physiologically aroused by violent sexuality than by consenting sexuality. In the case of *reported* sexual arousal, those with high rape potential indicated that they were as excited by rape "with a negative outcome" as by sexuality with mutual consent.

The study does not present a flattering view of male sexuality, although generalization to real world male behaviour is not without difficulty. Almost fifty per cent of the subjects indicated that they would consider sexually assaulting an unwilling woman if no adverse consequences could be assured. For almost fifty per cent of the subjects,

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[93] *Supra* note 39 at 236.

[94] *Ibid.*

then, women have been commodified as objects for male satisfaction; the male may often imagine stealing a woman much the same as the thief imagines stealing a bottle of scotch or a colour television set. The breasts and the vagina are the valued goods and the penis a willing weapon.

Yet these and many other researchers have been fairly criticized for what McCormack has termed "Machismo in Media Research". She notes that

> [a reasonable] research design would require subjects of both sexes, just as similar studies of racist content would include both black and white subjects. It is . . . significant that the experimental research on pornography has been carried out by men using almost exclusively male subjects.[95]

She also takes issue with the subject matter of much empirical effort to date and argues for a conceptualization of pornography "as an extreme form, almost a travesty, of sexual inequality in which women serve as sex objects to arouse and satisfy men and nothing more."[96]

In a field experiment, Malamuth and Check have obtained ". . . perhaps the strongest evidence to date to indicate that depictions of sexual aggression with positive consequences can adversely affect socially important perceptions and attitudes."[97] Some two hundred and seventy subjects were shown either *Swept Away* and *The Getaway* (two commercially released feature films which depict women as victims within both sexual and non-sexual contexts) or two neutral feature films. Questionnaires, assessing acceptance of violence against women, rape myth acceptance and belief in adversarial sexual relations, were completed several days after viewings. Comparisons between those who had seen *Swept Away* and *The Getaway* and those who had seen the neutral films revealed significant differences in expressed attitudes.

> Results indicated that exposure to films portraying aggressive sexuality as having positive consequences significantly increased male, but not female, subjects' acceptance of interpersonal violence against women and tended to increase males' acceptance of rape myths.[98]

The depiction of sexual violence, in itself, cannot be objected to — it is the message of the depiction that requires evaluation. There seems to be little empirical evidence to establish the social harm embodied in allowing the exhibition of explicit sexual relations.[99] It is rather the

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[95] *Supra* note 39 at 553.

[96] *Ibid.*

[97] Malamuth & Check, "The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment" (1981) 15 J. of Research in Personality 436-46.

[98] Malamuth & Donnerstein, *supra* note 39 at 115.

[99] Donnerstein, "Pornography: Its Effect on Violence Against Women", in Malamuth &

potential condonation or promotion of sexual violence that creates problems. In pornography, we see a reflection of the reality of male-female relations and a simultaneous structuring of expressed attitudes and potential for physiological arousal.

The debate concerning a causal link between the consumption of pornography and actual violence is not particularly crucial. While it is certainly difficult to establish such a causal connection unequivocally,[100] the criminal sanction is adequately premised on indications of social harm. Insofar as a medium of communications condones or promotes sexual violence or cruelty, it may fairly be said to be a form of hate literature and hence unsuitable for the public sphere. The images of film and those of other media have the power to affect male attitudes towards aggression against women and to reinforce coercive sexuality.

Sexual violence can be differentiated from the violence of the boxing ring or the hockey rink — there is no illusion here of the fair fight. Yet the vagueness of the standard is a problem. The condonation or promotion of sexual violence or cruelty remains subjective, with the rigid line of criminal conviction difficult to draw.

It is, nonetheless, an appropriate focus for concern. The provincial power to refuse public exhibition is not an inherently onerous limitation upon freedom of speech, and the criminal processing of obscenity allows debate on the legitimacy of what is, essentially, hate literature in the sexual sphere. Should guilt be established, only a financial penalty will typically be imposed. Sexuality in the private sphere is not a focus of control.[101]

Ultimately, though, the more general issue of *sexuality* and violence is probably best understood in public education and discussion; the images of controversy are real reflections of social life. To the extent that males and females view each other simply as commodities to be obtained, they entrench apredatory conduct in interpersonal relations.

Images of *sexuality* and violence are a barometer of the condition of human relations. As much a reflection of changing social structure as a social force, they do not comfortably succumb to definitive pronouncements. We place the pleasure of sexuality alongside the pains of dominance and exploitation, and we simply weave a tangled web.

Donnerstein, eds., *Pornography and Sexual Aggression* (in press).

[100] See, *e.g.*, Kutchinsky, *Law, Pornography and Crime: The Danish Experience* (1978).

[101] For a case that espouses a somewhat contrary view, see *Re Hawkshaw and the Queen*, *supra* note 61.