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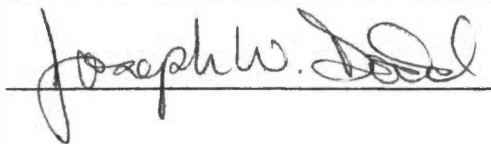
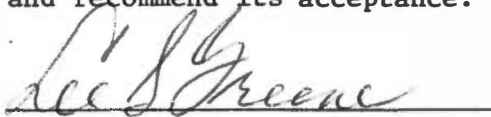
To the Graduate Council:

I am submitting herewith a dissertation written by Ronald Edward Dean entitled "Obscenity Standards in Canada and the United States: A Comparative Study in Constitutional Law." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.



Otis H. Stephens, Jr.,
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We have read this dissertation
and recommend its acceptance:



Accepted for the Council:



Vice Chancellor
Graduate Studies and Research

OBSCENITY STANDARDS IN CANADA AND THE UNITED STATES:

A COMPARATIVE STUDY IN CONSTITUTIONAL LAW

A Dissertation

Presented for the

Doctor of Philosophy

Degree

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Ronald Edward Dean

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ABSTRACT

The purpose of this dissertation is to study the comparative constitutional development of obscenity law in Canada and the United States. The research focuses on analysis of case law with particular emphasis of Supreme Court decisions in the two countries. Obscenity law is not static, but is, rather, an active and on-going area of constitutional law.

The central problem in the legal approach to obscenity has been the development of a definition. The original conceptualization of obscenity for both Canada and the United States came from an English decision in 1868, which dominated the field until the late 1950's. The United States Supreme Court rendered its first obscenity decision in 1957, rejecting the old English rule, and embarking on the development of its own obscenity definition. The Dominion Parliament of Canada in 1959 wrote its definition in statute form which led to the Canadian Supreme Court's first obscenity ruling in 1962. While the English rule was not officially abolished in Canada, its controlling influence was undermined.

The definitions of obscenity in these two countries, although developing from different sources, have been interpreted and applied similarly. One significant difference, however, has developed since the rulings of the United States Supreme Court in June, 1973. While Canada applies a national standard for determining obscenity, the United States now considers the question of obscenity based on state or local community standards.

The trend of the law in Canada and the United States appears to be somewhat different. The Canadian Supreme Court, although rendering only a very few decisions on obscenity, has tended to ease the restrictions which had existed prior to 1959. The United States Supreme Court followed a similar trend until 1973, but since then has tended to move back toward a more restrictive application of obscenity law.

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CHAPTER I

INTRODUCTION

On June 21, 1973, the United States Supreme Court rendered five decisions¹ on the question of obscenity. These decisions represented the Burger Court's first full-scale attempt to redefine the concept of obscenity. This action brought into focus once again the paramount problem in the legal approach to obscenity, i.e., defining what is obscene.²

The area of study for this dissertation is the comparative constitutional development of obscenity law in Canada and the United States.³ This is an active and on-going area of constitutional law, posing values of freedom of expression against demands for government censorship. Recent United States Supreme Court decisions on obscenity

¹Kaplan v. California, 37 L Ed 2d 492; Miller v. California, 37 Ed 2d 419; Paris Adult Theatre I v. Slaton, 37 L Ed 2d 446; United States v. Orito, 37 L Ed 2d 513 (1973); United States v. 12 200-Ft. Reels, 37 L Ed 2d 500. For a discussion of these cases, see infra, Ch. V.

²See generally William B. Lockhart and Robert C. McClure, "Obscenity Censorship: The Core Constitutional Issue--What Is Obscene?" Utah Law Review, 7 (Spring, 1961), 289-303; D. A. Schmeiser, Civil Liberties in Canada (London: Oxford University Press, 1964), pp. 232-235.

³Even though the primary attention will be focused on Canada and the United States, it is interesting to note that the English courts also used the Hicklin rule until the enactment of the Obscene Publications Act of 1957. In fact, as late as 1954 in the case of Regina v. Reiter and Others, 1 All E.R. 741, Chief Justice Goddard in considering the

underscored the fact that this area of the law is not static. The state of obscenity law in Canada is no more concrete than in the United States. In fact, one writer characterized the law of obscenity as in contention for the title of "the most muddled law in Canada today."⁴ Thus the ultimate concern of this dissertation is with the current trends in both countries regarding obscenity. The law of obscenity is, of course, only a part of the legal setting of either Canada or the United States. Nevertheless, this research should be of importance in a broader perspective. In essence, obscenity law in this study is viewed as a vehicle through which detailed and thorough comparisons of the two legal systems may be made.

For the English speaking common law countries, the first definition of obscenity came in 1868 from an English decision, Regina v. Hicklin,⁵ in which Chief Justice Cockburn announced by way of dictum:⁶

I think 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.⁷

This Hicklin rule formed the basic conceptualization of obscenity for

Hicklin test held "that the law is the same now as it was in 1868" (p. 742). For additional information, see J. E. Hall Williams, "The Obscene Publications Act, 1969," Modern Law Review, 23 (May, 1960), 285-290.

⁴Schmeiser, op. cit., p. 232.

⁵L.R. 3 Q.B. 360 (1868).

⁶R. S. MacKay, "The Hicklin Rule and Judicial Censorship," The Canadian Bar Review, 36 (March, 1958), 11.

⁷L.R. 3 Q.B. 360, p. 371.

both Canada and the United States. The courts of both countries have been struggling with the concept of obscenity and its definition since the formulation of the common law approach in 1868. The Supreme Courts, however, became involved with this area of the law only within the last 15 years. Although there were some attempts to break with the Hicklin rule,⁸ it remained as the primary basis for obscenity decisions until 1957 in the United States when the Supreme Court announced its own definition of obscenity,⁹ and until 1959 in Canada when the Dominion Parliament defined obscenity by way of statute.¹⁰ These changes in obscenity definition did not, however, terminate the judicial struggle with the concept. Both Canadian and United States courts have continually attempted to clarify these definitions as well as their application. Controversy has paralleled these judicial efforts resulting in much disagreement as to their success. This disagreement has come from legal scholars and other judicial observers as well as from the judges themselves. The Burger Court's recent decisions attempted to correct what the majority felt were misapplications of past obscenity rulings. Congress and many state legislatures have also been critical of the judicial handling of obscenity. The change in the Canadian Criminal Code in 1959 reflected the Dominion Parliament's dissatisfaction with the manner in which obscenity prosecutions were proceeding.

⁸See e.g., United States v. One Book Called "Ulysses," F. Supp. 182, aff'd., 72 F.2d 705 (1934).

⁹Roth v. United States, 345 U.S. 476 (1957).

¹⁰Canadian Criminal Code, S. 150 (1)(A), 1959; as revised, S. 159 (8), 1970.

Another problem in this area of the law has been the development of standards for judging the obscenity of questioned materials. This issue is two-fold: which individual is to be considered as the point of reference and which community is to be applied. Various individuals have at different times been selected to form the basis for determining obscenity. These have included children, normal adults, deviants, and the "most corruptible." The question of community standards has been primarily debated in terms of a "national" standard as opposed to some small geographical unit--state or province or perhaps even some smaller area. Select communities, such as a university, have not, however, been considered as appropriate for developing a standard for deciding the issue of obscenity.

Private possession and use of obscene material has also been deliberated. This has produced discussion of possible societal harm and the right of society to protect itself. Neither side in the controversy has a totally compelling argument. Considerable disagreement exists from reputable sources. The need is for a balancing of interests, but this is made difficult through judicial decisions which refuse legal protection for so-called obscene materials. These and other issues relating to the entire concept of obscenity are discussed, particularly in relation to decisions of the judiciary.

Political science has long been concerned with the analysis of judicial decisions. This research, of course, involves a significant amount of appellate court decision analysis. In addition, the role of the two judiciaries in the development of policy receives close attention. The use of comparative examination and analysis should further

expand the usefulness of this study. The ultimate aim of this research is to provide greater understanding of two distinctly different but related systems of government.

This study is based primarily on examination of case law and related commentaries. Analysis of the major obscenity decisions is emphasized with particular attention to decisions at the federal Supreme Court level. Also of importance are the relevant statutes and constitutional provisions of each country. The research includes coverage of secondary sources, consisting chiefly of books and journal articles dealing with various aspects of obscenity law. Initial chapters are historical, examining the background and analyzing the development of the law of obscenity. Then the study turns to a comparative analysis of this area of constitutional law in Canada and the United States.

A growing interest in comparative law and comparative politics has evolved, although concern for comparative studies has long been a part of political science. Often, however, the traditional focus on individual systems has been retained.¹¹ In addition to considering separately the development of obscenity law in Canada and the United States, this dissertation does provide limited cross-national comparisons of the two systems.

Canada and the United States are appropriate for a comparative study in the area of obscenity. Both share the same common law background¹² including the same specific common law definition of

¹¹See, e.g., Glendon Schubert and David J. Danelski (eds.), Comparative Judicial Behavior (New York: Oxford University Press, 1969).

¹²Although French influence has had an impact upon Canadian

obscenity. The two judiciaries have also rendered decisions on similar publications and issues.¹³ The differences in federalism as well as judicial structure and operation also allow another dimension of comparison. The position and use of the Bill of Rights by each country is important. These types of comparative concerns will be incorporated into the final sections of this dissertation.

To facilitate a detailed analysis of obscenity, the governmental structures of Canada and the United States are outlined in Chapter II, with particular emphasis on the elements of federalism and judicial structure and operation which are pertinent to this study. Regina v. Hicklin which provided the basic common law rule regarding obscenity is examined in detail in Chapter III. Additionally, the impact of the Hicklin rule on the judicial decisions of Canada and the United States prior to the changes in 1959 and 1957, respectively, is included here. The constitutional development of Canada's obscenity law from 1959 to 1973 is analyzed in Chapter IV, and the period from 1957 to 1974 in the United States is covered in Chapter V. The comparative aspects of this research are considered in Chapter VI. In the concluding chapter, the

culture, British influence has dominated the legal and political setting in Canada.

¹³For example: Canada--Regina v. Brodie, 32 D.L.R. (2d) 507 (1962); United States--Kingsley Pictures v. Regents, 360 U.S. 684 (1959). Both of these cases involved D. H. Lawrence's Lady Chatterley's Lover. The Canadian case dealt with this work in its published form while the United States case dealt with it as a motion picture. In addition, the English courts also ruled on this work in Regina v. Penguin Books, C.L.R. 176 (1961). For additional information on the English court action, see Charles D. L. Clark, "Obscenity, the Law and Lady Chatterley," Criminal Law Review, 1961 (March, 1961 and April, 1961), 156-163 and 224-234.

findings of this research are presented in summary fashion and conclusions are stated. Problem areas are examined as well as indications for the future of obscenity law in both countries.

CHAPTER II

LEGAL FRAMEWORK

To obtain a clear understanding of the law of obscenity, one must first have some knowledge of the system of government under which the law developed. Consistent with this requirement, the major features of the governments of Canada and the United States, particularly those that relate to the subject of this dissertation, are examined in this chapter.

Nature of the Constitution

Canada

The foundation for the Canadian constitutional system was provided by the Imperial Parliament of the United Kingdom¹ in 1867. The British North America Act² and subsequent acts and amendments under it form what is considered to be the Canadian Constitution. Thus, the fundamental law of Canada is a product of the British Empire and was not directly drafted by Canadians themselves.

¹Paul Gerin-Lajoie, Constitutional Amendment in Canada (Toronto: University of Toronto Press, 1950), p. 4.

²British Statutes, 30-31 Victoria, Chapter 3 (1867); hereafter cited as the B.N.A. Act. For a complete text of the Act, 1867 to 1930, and related materials, see Maurice Ollivier, British North America Act and Selected Statutes (Ottawa: Queen's Printer, 1962).

On December 11, 1931, the Imperial Parliament passed the Statute of Westminster.³ This statute established that "no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion." The Statute of Westminster also acknowledged that any provision enacted by a Dominion Parliament after the adoption of the Act should not be considered to be void on the ground that it was repugnant to the law of the United Kingdom. The Act further stated that the Dominion Parliament should have the power to repeal or amend an act or rule which was part of the law of that Dominion.⁴ This means that the Dominion Parliament of Canada may amend or repeal any act of the Imperial Parliament which applies to the Dominion of Canada.

One major exception to this power of repeal, however, is listed in the Statute of Westminster. The Statute states that "nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder."⁵ This provision expressly recognized what had previously existed: that the B.N.A. Act and subsequent acts under it are basic constitutional laws of Canada.

The Canadian courts played a large role in the development of the constitutional system by selecting "those English laws and precedents

³British Statutes, 22 George V, Chapter 4.

⁴Ibid., Section 2:2.

⁵Ibid., Section 7:1.

which seemed applicable to the young colonies."⁶ The courts also defined the principles of the common law which were to apply in Canada. The Canadian courts have continued in their development of the Constitution through their application of the B.N.A. Act as well as general laws, particularly through the determination of the division of powers between the Dominion Parliament and the provincial legislatures.⁷

United States

The foundation for the constitutional system of the United States is, of course, the Constitution of 1787 and its subsequent amendments.⁸ This document provides the legal base on which all other governmental structures and actions must be grounded. The importance of the Constitution, however, is broader than the legal system, for, symbolically at least, it provides the foundation for the society as a whole.

The key to understanding the Constitution is found in its interpretation, and the United States Supreme Court receives primary consideration in this role. The importance of the Court is especially

⁶ Robert MacGregor Dawson, The Government of Canada, revised by Norman Ward (fifth edition; Toronto: University of Toronto Press, 1970), p. 64.

⁷ Ibid., pp. 60-64.

⁸ For a concise history of the formation of the United States Constitution and a broad outline of its provisions, see Carl Brent Swisher, American Constitutional Development (second edition; Cambridge: Houghton Mifflin Company, 1954), pp. 28-45; see also C. Herman Pritchett, The American Constitution (second edition; New York: McGraw-Hill Book Company, 1968), pp. 16-30.

evident when the term "constitutional law" is applied since these formal rules developed mainly from judicial decisions. The other two major branches of government (Executive and Legislative) also add considerably to the Constitution. Congress, in addition to making its own constitutional interpretations, is charged with providing many of the structural details of the national government. Likewise, the President must interpret his area of authority under the Constitution, and some presidential practices have become firmly grounded in the constitutional system.⁹

Custom and usage, therefore, are very important in acquiring an understanding of the United States Constitution. These informal elements along with the official actions of the organs of government provide flexibility. Consequently, the Constitution has the ability to change informally as each generation makes its interpretations.

Federalism

Canada

Canada operates under a federal system of government. The distribution of powers between the Dominion Parliament and the provincial legislatures is found in the B.N.A. Act, 1867.¹⁰ Within the area of competency of each legislature, the authority is immense. The courts

⁹J. A. Corry and Henry J. Abraham, Elements of Democratic Government (fourth edition; New York: Oxford University Press, Inc., 1964), p. 89.

¹⁰See Sections 91 and 92.

have upheld the right of a legislature within its established area of competency to enact any type of legislation without restriction.¹¹

The failure of an authorized legislature to act in a given area does not permit the transfer of jurisdiction to the other. Neither level of government may exercise legislative authority within the granted jurisdiction of the other. Likewise, neither the Dominion Parliament nor the provincial legislatures may delegate authority to the other. The Supreme Court of Canada has held that although Parliament and the provincial legislatures can delegate legislative authority to subordinate agencies, they cannot do so to each other.¹²

The powers granted to the Dominion Parliament include not only the original 29 (since expanded to 31) enumerated provisions in the B.N.A. Act, but also the power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." It would appear that the intention here was to grant to the Dominion Parliament the residual power. That is, the B.N.A. Act granted explicit powers to the provincial legislatures, with all remaining powers to be given to the Dominion Parliament. The above statement in the Act has been described as "an isolated and supplementary

¹¹Florence Mining Co. v. Cobalt Lake Mining Co. (1909) 18 O.L.R. 275, p. 279, in which Justice Riddell stated, "In short, the Legislature within its jurisdiction can do anything that is not naturally impossible, and is restrained by no rule human or divine."

¹²See A.G. of Nova Scotia v. A.G. of Canada (1951) S.C.R. 31; see also J. R. Mallory, The Structure of Canadian Government (Toronto: Macmillan of Canada, 1971), pp. 349-355.

grant of Dominion authority, but deprived of most of its applicability by the indiscriminate inclusiveness of property and civil rights in section 92."¹³ Therefore, this grant of power over property and civil rights to the provincial legislatures has become the most important legislative power. This is partially due to the fact that almost every law enacted affects the property and civil rights of the residents of the provinces.¹⁴

The judicial interpretation of the property and civil rights section of the B.N.A. Act has resulted in a shift of residual power from the Dominion Parliament to the provincial legislatures. The judiciary did interpret the "Peace, Order, and good Government" clause in the B.N.A. Act as containing emergency power which could be used by the Dominion Parliament in time of national necessity. In this case, this clause would stand supreme and override any power of the provinces which would be restrictive of the national interest.¹⁵ A valid exercise of authority, however, by both the Dominion Parliament and the provincial legislatures in the same area results in the supremacy of the Dominion legislation if no determination of authority can be established.¹⁶ As a result of the distribution of legislative powers

¹³Dawson, op. cit., p. 92.

¹⁴Frederick P. Varcoe, The Distribution of Legislative Power in Canada (Toronto: The Carswell Company, Limited, 1954), p. 104.

¹⁵Dawson, op. cit., pp. 89-96.

¹⁶See A.G. for Canada v. A.G. for British Columbia (1930) A.C. 111, p. 118, as quoted in Schmeiser, op. cit., p. 10, in which Justice

between the Dominion and the provinces, one Canadian writer has characterized the position of the Dominion Parliament by saying, "In Canada, there is a constitutional division of legislative authority so that our federal Parliament is the Parliament of Canada only in the sense that it is the legislature of our federal government."¹⁷

One area of particular concern for a study of obscenity is the jurisdiction over criminal law. The B.N.A. Act assigns jurisdiction over criminal law exclusively to the Dominion Parliament.¹⁸ The Canadian courts have interpreted this provision to be firm in its delegation of authority. Thus, for example, an attempt on the part of the province of Quebec to establish a public morals statute was held to be outside the jurisdiction of the provinces.¹⁹

The exclusive grant of Dominion authority over criminal law is, however, tempered somewhat by the exclusive grant of provincial

Tomlin stated, "There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail."

¹⁷Louis-Philippe Pigeon, "The Bill of Rights and the B.N.A. Act," The Canadian Bar Review, 37 (March, 1959), 66.

¹⁸Section 91:27 which reads: ". . . the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects . . . The Criminal Law except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

¹⁹Montreal Newsdealer v. Bd. of Cinema Censors and A.G. of Quebec (1969) C.S. 83, in which Judge Batshaw stated at p. 89: "The legislation under review, however, deals with public morals and this is a field which has always been deemed to be an aspect of criminal law, which in turn, of course, falls within the exclusive jurisdiction of Parliament."

authority over the administration of justice.²⁰ This means that primary responsibility for law enforcement and criminal prosecution falls mainly on provincial and local authorities. The B.N.A. Act thus creates a divided authority rather than a continuous or even concurrent one as is the case in the United States. The provinces do not have the power to enact criminal law, but they do have the responsibility to determine the manner of enforcement.

United States

The Constitution of the United States created a federal system of government although the terms "federal" or "federalism" were not incorporated into the document. Also the Constitution does not contain an enumeration of powers which are granted to the state governments. Unlike the B.N.A. Act, the enumeration of powers relates only to the national government. The first three Articles of the Constitution extend general powers of government for the three branches with the specific delegations of authority granted to Congress. This delegated authority combined with the concepts of "implied powers" and "national supremacy" form the basic federal power framework.²¹

Some powers are expressly forbidden by the Constitution from exercise by either the national or state governments. A few powers are shared by both levels of government. These concurrent powers relate primarily to taxation, the ability to borrow money, and the establishment

²⁰Section 92:14.

²¹Both of these concepts were given judicial approval in McCulloch

of courts. The states may normally legislate in congressional areas of authority provided that Congress has either not acted or that the state enactments do not conflict with national law. If, however, there is a conflict between state and national law in areas of national competency then the state law or action must terminate because of national supremacy.

The powers of state government are primarily those which are neither delegated to the national government nor prohibited to the states. This position of the states, vis-a-vis the national government, is expressed in Amendment X.²² Since the Constitution does not list the powers of the states, there is perhaps a tendency to fail to recognize that important powers are left to the states. These powers which are often called "reserve powers" include, but are not limited to, the following: power to establish and operate the educational system, conduct elections, regulate intrastate commerce (with some limitations), establish local units of governments, and to protect and promote the health, safety, and welfare of the people of the state. This latter power, known as the "state police power," is very broad in scope and very important.

Jurisdiction over criminal law is not specifically delegated in the United States Constitution to either level of government in contrast with the Canadian arrangement. Authority to enact and enforce criminal

v. Maryland, 4 Wheat. 316 (1819). See Pritchett, op. cit., pp. 116-122 and 151-157.

²²Amendment X was described by Justice Stone as a "truism," i.e., a description of the federal system and not a delegation of power in United States v. Darby, 312 U.S. 100 (1941).

statutes is held by both the national and state governments within the limits of their constitutional jurisdiction. However, the bulk of criminal law is found at the state level even though this area has expanded in recent years at the national level.

Criminal law statutes relating to obscenity would most likely be found at the state or local level. National statutes on obscenity are designed for specific circumstances such as importation, transportation in interstate commerce, broadcasting, and mailing.²³ The enforcement and prosecution of obscenity laws would fall to the proper authorities of each level relating to their own statutes. Statutes of both jurisdictions must, of course, conform to the requirements of the United States Constitution, and any questions relating to this conformity would be decided by the judiciary.

Judicial Structure and Operation

Canada

The basic structural guidelines for the Canadian judiciary are provided by the B.N.A. Act. The role of the judiciary and its functions are grounded in English history.²⁴ Though Canada has a federal system,

²³According to The Report of the Commission on Obscenity and Pornography (New York: Bantam Books, 1970), p. 42, there are currently five federal obscenity statutes plus the 1968 Anti Pandering Act (39 U.S.C., section 3008) which permit postal patrons to request that mailings which they deem sexually offensive not be sent to them and prohibit mailers from ignoring such requests.

²⁴See R. I. Cheffins, The Constitutional Process in Canada (Toronto: McGraw-Hill Company of Canada Limited, 1968), pp. 111-138.

there exists a single integrated judicial hierarchy thus avoiding the dual court pattern.²⁵ The provinces are granted the power for the

. . . Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.²⁶

The Dominion has the power to establish the procedure in criminal cases.

The Dominion also has the power of appointment and removal as well as the payment of salaries of judges to many of the provincial courts.

Appointments are made for life with the limitation of a mandatory retirement at age 75. Removal is possible only by a joint action of the Senate and the House of Commons. Fixed salaries are to be provided by the Dominion Parliament.²⁷

The Dominion via the B.N.A. Act is granted the power to

. . . provide for the Constitution, Maintenance, and Organization of a General Court of Appeals for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.²⁸

²⁵See Bora Laskin, "The Constitutional Systems of Canada and the United States: Some Comparisons," Buffalo Law Review, 16 (Spring, 1967), 592, where the author states: "A dual system of courts is constitutionally possible in Canada, but the duality would not permit the application of both federal law and local (provincial) law in the federal court as is the case in the United States. Any federal courts established in Canada (excluding the Canadian Supreme Court) . . . are constitutionally limited to the application of federal law only."

²⁶B.N.A. Act, Section 92:14.

²⁷Ibid., Section 91:27; Sections 96-100. The provincial courts included here are the Superior, County, and District courts. See Dawson, op. cit., pp. 386-395; see also Mallory, op. cit., pp. 295-298.

²⁸B.N.A. Act, Section 101.

The Dominion exercised its right of court creation in 1875 with the establishment of the Supreme Court of Canada and the Court of Exchequer. Originally these two courts were closely related with original jurisdiction granted to the Exchequer Court while the Supreme Court heard only cases on appeal. In 1887 these two courts were separated, with the Exchequer receiving

. . . original jurisdiction concurrent with the provincial courts in cases involving the revenues of the Crown (which implies an extensive jurisdiction in matters of taxation) and exclusive jurisdiction over suits brought against the Crown in federal affairs.²⁹

With the separation of the two courts and the granting of the special area of jurisdiction, the Exchequer Court remained not fully integrated into the Canadian judicial structure. In 1970 the Parliament of Canada restructured the Exchequer Court, renaming it the Federal Court of Canada. The new court contains both trial and appeals divisions. The judges of the Federal Court travel around the country hearing cases. The primary purpose of this restructuring is to provide better facilities for cases in which the Dominion is a party and to aid in the development of a coherent body of administrative law.³⁰

The Supreme Court of Canada may hear cases on appeal from the Federal Court and from provincial courts when large sums of money are involved, when constitutional interpretation is involved, and when the

²⁹Dawson, op. cit., p. 391.

³⁰Ibid., pp. 389-392; Mallory, op. cit., pp. 293-294. It is interesting to note that this new court was created with a new mandatory retirement age of 70 for its judges.

validity of Dominion or provincial statutes is disputed. The conditions under which appeals are allowed are determined by the Parliament of Canada, and no provincial legislature has the power to define or restrict the conditions. The Supreme Court is composed of nine judges appointed by the Governor-General-in-Council for life with compulsory retirement at age 75.³¹

The Supreme Court of Canada did not function in the role of the highest appellate court until 1949. Prior to that date, appeals could be taken to the English Privy Council. It was even possible for appeals to go from the highest provincial courts to the Privy Council and bypass the Supreme Court of Canada altogether. Obviously, the repeal of possible appeals to the Privy Council greatly increased the importance of the Supreme Court.

The Federal Court and the Supreme Court are the only Canadian courts which may be properly called Dominion courts. The remaining courts are at the provincial level although, as indicated, the higher provincial courts are subject to Dominion influence: judicial appointments, removals, salaries, and procedure in criminal matters. This structure reflects the requirement that provincial courts are responsible for administering both federal and provincial law.³² It should be noted that no court was established by the B.N.A. Act itself. All Canadian

³¹Dawson, op. cit., pp. 389-391; Mallory, op. cit., pp. 292-293.

³²Peter H. Russell, "Constitutional Reform of the Canadian Judiciary," Alberta Law Review, 7, No. 1 (1969), 122-123.

courts are thus the creation of either the provincial legislatures or the Dominion Parliament and as such are not immune from ordinary legislative change both in terms of structure and jurisdiction.³³

The Canadian court system has neither a strict division of provincial and federal courts nor a unitary plan. The structure was designed as an attempt to solve the problems which result from each of the other two mentioned systems. The prevailing view is that the judicial system should be extensive enough to provide adequate judicial relief, but not so complicated as to produce confusion.³⁴

Judicial review. Canada inherited the basic English constitutional theory which holds that "it is for Parliament, not the Courts, to determine matters of public policy and convenience, and the Courts are not to sit in judgement over Parliament's decisions."³⁵ The federal structure of Canada, however, produced a different role for the judiciary than had existed in England. The Canadian judiciary has always exercised the power to declare acts of any parliament of Canada to be ultra vires, due to the lack of authority of a legislature to act in a specific area, i.e., according to the distribution of power contained in the B.N.A. Act.³⁶ Neither the Dominion nor provincial parliaments have the power

³³Cheffins, op. cit., p. 114.

³⁴Edward McWhinney (ed.), Canadian Jurisprudence--The Civil Law and the Common Law (Toronto: The Carswell Company Limited, 1958), pp. 302-304.

³⁵Schmeiser, op. cit., p. 7.

³⁶J. Grant Sinclair, "The Queen v. Drybones: The Supreme Court

to overrule the judicial interpretation of legislative competency.³⁷

Consequently, any change in the B.N.A. Act or its interpretation by the judicial branch requires an amendment to the Act.

The trend in Canada in recent years has been moving away from a strict application of the English constitutional theory beyond that required for federalism. The doctrine of judicial review in a broader sense, i.e., the power of a court to declare legislation invalid because it conflicts with certain fundamental or basic norms, has been given more consideration as opposed to the doctrine of parliamentary supremacy. Evidence of this trend can be seen in the Canadian Bill of Rights³⁸ which instructs the courts that:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights or freedoms herein recognized and declared . . .

of Canada and the Canadian Bill of Rights," Osgoode Hall Law Journal, 8 (December, 1970), 603, where the author notes that "the Courts in Canada always have considered it to be their proper function to review the exercise of legislative power of Parliament and declare ultra vires any laws which fall outside its competence."

³⁷Rodney W. J. Seyffert, "A Study of the Supreme Court of Canada as an Institution of Constitutional Law Reform," Faculty of Law Review, 28 (August, 1970), 17.

³⁸8-9 Elizabeth II, Chapter 44 (1960)--official title "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms" which is known as the Canadian Bill of Rights and is so designed in Part I of the Act. For a detailed study of the Bill of Rights, see Walter Surma Tarnopolsky, The Canadian Bill of Rights (Toronto: The Carswell Company, Limited, 1966); see also W. S. Tarnopolsky, "The Canadian Bill of Rights from Diefenbaker to Drybones," McGill Law Journal, 17, No. 3 (1971), 437-475.

This language implies the power of judicial review. One Canadian scholar in discussing this aspect of the Bill of Rights, has said:

Since the Bill itself is a federal statute and does not form part of the Constitution, and since the Bill itself provides that Parliament may declare it to be inoperative, Parliament undoubtedly has retained its prerogative over the Courts. At the same time, the possibility of any oppressive legislation, or its enforcement has decreased.³⁹

Thus, this section of the Bill allows for the courts to "stand between the government and the individual, protecting the latter when the former has overstepped its proper functions." The B.N.A. Act provides no assistance here because it does not contain a list of individual guarantees.⁴⁰ This power of judicial review places the Canadian judiciary in a very influential position with regard to the effectiveness of the Canadian Bill of Rights. The Bill will be discussed later in this chapter.

United States

The judicial structure of the United States developed from the concept of federalism combined with a decision at the Constitutional Convention to allow for a separate federal court structure. This produced the so-called dual court system which consists of separate and independent state court systems operating concurrently with the federal system. The United States Constitution in Article III created the United States Supreme Court and gave to Congress the authority to

³⁹Schmeiser, loc. cit.

⁴⁰Ibid., p. 23.

create inferior courts. The First Congress enacted the Judiciary Act of 1789 which provided the basic pattern for the federal system. The federal hierarchy now consists of two levels below the Supreme Court--the Courts of Appeals and the District Courts. All aspects of the establishment, maintenance, and operation of the federal court system are carried out at the national level of government. Thus, the federal system is independent of the state court structures which, conversely, are handled entirely at the state level with each state forming its own structure.

The Constitution does not grant exclusive jurisdiction to the federal courts, although Congress by statute has granted exclusive jurisdiction in some highly specific areas.⁴¹ Jurisdiction is defined by the Constitution in two categories: subject matter and nature of the parties involved in disputes. The Supreme Court is granted original jurisdiction, although it is not mandatory, in cases involving "Ambassadors, other public Ministers and Consuls" and when a "State shall be Party." Otherwise, the jurisdiction of the Supreme Court is appellate which is left to Congress to regulate. Most of the case load of the Supreme Court comes to it via the writ of certiorari which is a discretionary writ granted only when four or more members of the nine-member court agree to hear the case. The Courts of Appeals exercise only appellate jurisdiction while the District Courts are granted original jurisdiction for cases arising under federal law. The District

⁴¹J. A. C. Grant, "Judicial Review in Canada: Procedural Aspects," The Canadian Bar Review, 42 (May, 1964), 195.

Courts also hear cases brought from a state system into the federal system.

Therefore, the judicial system of the United States contains two complete and separate sets of courts. Since both exercise their authority over the same people and the same territory, there is a potential for serious conflicts of jurisdiction. This is avoided, in general, because "the federal courts interpret and apply federal laws, and the state courts interpret and apply the state laws."⁴² And the United States Supreme Court is paramount in the judicial system functioning as the "umpire of the federal system."⁴³ The Court has provided a major role in the operation of United States government through its interpretations and reinterpretations under the Constitution.⁴⁴

Judicial review. The concept of judicial review became accepted early in the history of the United States. The Constitution did not define the power but it was implied in both Article III and Article VI. Judicial review became established and the concept defined when Chief Justice John Marshall rendered the decision in Marbury v. Madison.⁴⁵

⁴²Corry and Abraham, op. cit., p. 570.

⁴³Ibid.

⁴⁴See generally John R. Schmidhauser, The Supreme Court as Final Arbiter in Federal-State Relations, 1789-1957 (Chapel Hill: The University of North Carolina Press, 1958).

⁴⁵1 Cranch 137 (1803).

The United States judiciary, particularly the United States Supreme Court, clearly has the power to declare government acts (legislative, executive, administrative, and lower judicial) invalid because they conflict with the Constitution.

Bill of Rights

Canada

The Dominion Parliament on August 10, 1960, enacted the Canadian Bill of Rights. Prior to this, the Canadians followed the same basic structure as the English system for the protection of civil liberties. The English constitution does not describe in any formal comprehensive statement the civil liberties which are guaranteed to its people. Likewise, the B.N.A. Act does not detail the scope of civil liberties for Canadians. The English system relies mainly upon "parliamentary restraint in legislation, bureaucratic restraint in administration, and a strong tradition of personal freedom among the citizens generally."⁴⁶ Another part of the English system is the guarantees for individual liberties which were developed within the body of the common law.

Following the Second World War, Canadian opinion changed with regard to the system for the protection of civil liberties primarily because of a number of abuses of freedoms by both the Dominion Parliament and the provincial legislatures. Support began to develop for a system similar to that of the United States in order to produce a more effective

⁴⁶F. R. Scott, Civil Liberties and Canadian Federalism (Toronto: The University of Toronto Press, 1959), p. 13.

guarantee of civil liberties.⁴⁷ This change in attitude ultimately resulted in the enactment of the Bill of Rights.

The Bill is not an amendment to the Constitution but rather a federal statute passed by the Dominion Parliament of Canada. Consequently it is subject to alteration or repeal by any subsequent act of the Dominion Parliament. Also the Parliament may overrule any interpretation given to the Bill by the Canadian courts. In addition, the form of the Bill results in its application only to the Dominion, but this does cover the Dominion's jurisdiction over criminal law which includes obscenity.

The effectiveness of the Bill will be determined by the attitude of the Dominion Parliament concerning the importance of the Bill and also by the interpretations given to the Bill by the Canadian judiciary. Initially, the courts were reluctant to use the power of judicial review delegated by the Bill to the judiciary. The courts also tended to view the Bill as not changing any existing legislation at the time of its enactment.⁴⁸ Consequently, many scholars began to consider the Bill of Rights virtually useless.⁴⁹

⁴⁷See W. Glen How, "The Case for a Canadian Bill of Rights," The Canadian Bar Review, 26 (May, 1948), 759-796; see also Scott, op. cit., pp. 36-37.

⁴⁸See Regina v. Fulmer (1960) 129 C.C.C. 142, and Regina v. Gonzales (1961) 37 W.W.R. 257, aff'd. (1962) 32 D.L.R. 290.

⁴⁹See, e.g., Peter Bret, "Reflections on the Canadian Bill of Rights," Alberta Law Review, 7, No. 2 (1969), 294; Bernard Green, "Federalism and the Administration of Criminal Justice: The Treatment of Obscenity in the United States, Canada, and Australia," Kentucky Law Review, 51 (Summer, 1963), 671; John Hucker and Bruce C. MacDonald, "Securing Human Rights in Canada," McGill Law Journal, 15, No. 2 (1969), 223.

The Canadian Supreme Court in 1970 rendered a decision in Régina v. Drybones⁵⁰ which declared as "inoperative" a section of the Indian Act of 1952 because of the prohibition in the Bill of Rights against discrimination by race and also because of the requirement of equality before the law. This decision appears to have given new life to the Bill of Rights because in so ruling the Court no longer viewed the Bill as an act of interpretation but rather as a statutory declaration of fundamental human rights.⁵¹ Following the precedent of Drybones, two lower courts have held other legislation to be inconsistent with the Bill of Rights.⁵²

With regard to the question of obscenity, the Bill of Rights does provide for freedom of speech and freedom of the press. The courts have so far been reluctant to interpret these sections of the Bill as having any substantive meaning. In the most recent interpretation of these sections a unanimous British Columbia Court of Appeal held that the terms "freedom of speech" and "freedom of the press" must be given the

⁵⁰(1970) S.C.R. 282.

⁵¹F. M. Auburn, "Trends in Comparative Constitutional Law," The Modern Law Review, 35 (March, 1972), 130; see also Paul Cavalluzzo, "Judicial Review and the Bill of Rights: Drybones and its Aftermath," Osgoode Hall Law Journal, 9 (December, 1971), 511.

⁵²Re Lavell & A.G. of Canada (1972) 22 D.L.R. (3d) 188 (Fed. Ct. of Appeal), rev'g. (1972) 1 O.R. 390 (Ont. Dist. Ct.); and Bedard v. Isaac (1971) 25 D.L.R. (3d) 551 (Ont. High Ct.). For a discussion of these cases, see D. E. Sanders, "The Bill of Rights and Indian Status," University of British Columbia Law Review, 7 (Summer, 1972), 81-85.

same meaning which is that they are freedoms governed by law.⁵³ Thus, the criminal code does not interfere with freedom of expression and consequently does not interfere with the Canadian Bill of Rights.

United States

The original Constitution of the United States did not contain a list of guaranteed freedoms; however, the First Congress adopted 10 amendments to the new Constitution which were ratified in 1791. These amendments, or more specifically the first eight amendments which enumerate specific rights, became known as the Bill of Rights. These guarantees were developed to restrict the national government, and the Supreme Court made it clear in 1833 that the Bill of Rights restricted only the national government and not the states.⁵⁴ Following the ratification of the Fourteenth Amendment in 1868, efforts began to bring the states under the same restrictions that were imposed upon the national government. Ultimately the United States Supreme Court held that parts of the Bill of Rights were incorporated and made applicable to the states through the Fourteenth Amendment, thus placing many of the same restrictions on state governments which had previously existed only at the national level.⁵⁵

⁵³Regina v. McLeod (1971) 1 C.C.C. (2d) 5.

⁵⁴Barron v. Baltimore, 7 Pet. 143 (1833).

⁵⁵See Henry J. Abraham, Freedom and the Court: Civil Rights and Liberties in the United States (second edition; New York: Oxford University Press, 1972), pp. 29-88; see also Pritchett, op. cit., pp. 396-398 and 592-597.

The portion of the Bill of Rights relevant to the question of obscenity is the First Amendment with its provisions for "freedom of speech" and "freedom of the press." Freedom of expression along with the other guarantees of the First Amendment (freedom of religion, freedom of assembly, and freedom of association) has often been designated as a "preferred freedom" and as such has been closely guarded by the United States Supreme Court.⁵⁶ The law of obscenity relates directly to this issue.

Summary and Conclusions

It has been possible only to review in a very limited fashion the elements of the governments of Canada and the United States. Nevertheless, it should be evident that there are many similarities and differences between these two countries. Canada and the United States have much in common such as the English language, basic legal concepts derived from England, and a federal system of democracy. Federalism in Canada, however, does not affect the judiciary in the same manner as does federalism in the United States. This is, of course, true also of the criminal justice system in Canada which places jurisdiction concerning criminal law in only one level, i.e., the national government. Studies have been made concerning possible changes in the Canadian judicial and criminal justice systems.⁵⁷ The current systems were

⁵⁶ See George W. Spicer, The Supreme Court and Fundamental Freedoms (second edition; New York: Appleton-Century-Crofts, Inc., 1967), pp. 25-28.

⁵⁷ See "Comment--Constitutional Law--Federalizing the Judiciary," The Canadian Bar Review, 44 (September, 1966), 674-679.

devised after studying and analyzing the system in the United States prior to 1867. During the debates on Confederation for Canada, the Attorney General of Canada West, John A. Macdonald, made the following statement:

It is of great importance . . . that what is a crime in one part of British America should be a crime in every part. . . . It is one of the defects in the United States system . . . that what may be a capital offense in one state may be a menial offense in another. But under our Constitution we shall have one body of criminal law . . . operating equally throughout British America. . . . I think this is one of the most marked instances in which we take advantage of the experience derived from our observation of the defects in the constitution of the neighbouring Republics.⁵⁸

Actually this structure has received both praise and criticism. It is claimed that a uniformity is produced in Canada through the Criminal Code while uniformity is lacking in the United States because of the split in jurisdiction. With few exceptions, however, the responsibility of enforcing the Code lies with the attorney general of the provinces although the Code is created by the Dominion. This has often resulted in "double hesitation" rather than "double concern" on the part of the provinces and the federal government due to a lack of coordination.⁵⁹ Thus the difference in structure creates different types of problems rather than avoiding problems.

⁵⁸Parliamentary Debates on Confederation of British North America Provinces, 3rd Sess. Provincial Parliament of Canada, Quebec, 1865 (Ottawa, 1951), as quoted in Green, op. cit., fn. 15, p. 670.

⁵⁹M. L. Friedland, "The Process of Criminal Law Reform," The Criminal Law Quarterly, 12 (April, 1970), 154-155; Cheffins, op. cit., p. 113.

One should also be cognizant of the fact that differences between the two countries which appear in the formal outline may not in reality function so differently. For example, Canadian federalism essentially grants the reserve powers to the Dominion as opposed to the granting of reserve powers in the United States to the states. As previously indicated, however, the Canadian courts have so interpreted the B.N.A. Act that in reality the provinces exercise the reserve powers. In contrast, the constitutional framework of Canada which was enacted by the British Parliament appears quite different from the United States Constitution. The B.N.A. Act, however, functions similarly and maintains basically the same importance as does its United States counterpart.

This discussion is not intended to develop a thesis that the two countries are either alike or not alike. Canada and the United States are two distinct and distinctly different countries. Even where similarities exist (e.g., the Bill of Rights) the means of producing the similarity may be different resulting in divergent manners of operation. Nevertheless, one needs to be aware of the similarities and differences in the formal structure as well as the reality of both in terms of its impact upon the functioning of government. As this study progresses, many substantive differences with regard to the law of obscenity will become evident, and they need to be understood first in relation to their own setting in order to make full use of the comparative examination which is especially utilized in Chapter VI.

CHAPTER III

THE HICKLIN RULE AND ITS AFTERMATH

The central problem area of the law of obscenity is definitional in character.¹ What is meant by the word and how is such a concept to be applied in relation to guarantees of civil liberties? The first approach to the problem was produced by the English common law which ultimately had a tremendous impact on the legal approaches to obscenity in both Canada and the United States. Therefore, consideration in this chapter is first given to the common law background for obscenity with particular emphasis on the Hicklin rule. Then the attention focuses on the influence exerted by the common law on each of the two countries.

The Common Law

The earliest recorded case which involved consideration of obscenity under the common law occurred in Rex v. Sedley² in 1663. Sedley was convicted on a charge of "appearing nude on a balcony, shouting blasphemies, and pouring bottles of urine on the people below."³ His

¹For a philosophical discussion of obscenity and its meaning, see J. C. Dybikowski, "Law, Liberty, and Obscenity," University of British Columbia Law Review, 7 (Summer, 1972), 33-54; see also Joseph Weiler, "Controlling Obscenity By Criminal Sanction," Osgoode Hall Law Journal, 9 (November, 1971), 415-417.

²83 Eng. Rep. 1146 (reported as Sir Charles Sydles Case) (K.B. 1663).

³"Notes--Book Censorship in Massachusetts: The Search for a Test for Obscenity," Boston University Law Review, 42 (Fall, 1962), 476.

conviction, however, appears to have been based on the blasphemy charge, since a subsequent decision, Regina v. Reed,⁴ held that obscenity was not an indictable offense under the common law. Rather, Lord Holt declared obscenity to be a spiritual crime and thus subject to the jurisdiction of the ecclesiastical courts. This decision remained until 1727 when it was overruled by Rex v. Curl.⁵ At this point, obscenity was officially admitted into the English common law, but no definition of the term was provided.

The basic conceptualization of obscenity under the common law came in 1868 in Regina v. Hicklin.⁶ This case developed as a prosecution under Lord Campbell's Act of 1857 which was designed to protect youth from immoral influences.⁷ In question was a pamphlet published by Hicklin and distributed by him at cost attacking the Catholic practice of confession.⁸ A lower court held the pamphlet to be obscene and ordered it destroyed. On appeal the decision was reversed because

. . . although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the prosecution, yet that the immediate intention of the appellant was not so to affect the public mind, but to oppose the practices and errors of the confessional system in the Roman Catholic churches.⁹

⁴88 Eng. Rep. 953 (Q.B. 1708).

⁵93 Eng. Rep. 849 (K.B. 1727).

⁶L.R. 3 Q.B. 360.

⁷See Green, op. cit., p. 672.

⁸See Schmeiser, op. cit., p. 235.

⁹L.R. 3 Q.B. 360, p. 370.

The case was then appealed by the Crown to the Court of Queen's Bench where, by a unanimous decision, the appellate judgment was reversed and the conviction upheld even though the Court indicated that they accepted the motive for publication as "honestly and bona fide to expose the errors and practices of the Roman Catholic Church in the matter of confessions."¹⁰ Nevertheless, Lord Cockburn wrote:

I think that if there be an infraction of the law, and an intention to break the law, the criminal character of such publication is not affected or qualified by there being some ulterior object, which is the immediate and primary object of the parties in view, of a different and of an honest character. It is quite clear that publishing an obscene book is an offense against the law of the land.¹¹

Lord Cockburn then identified the term obscenity which became the common law foundation for both Canada and the United States as well, of course, for England.

. . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.¹²

Continuing, Lord Cockburn characterized the publication in question in the following manner:

Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.¹³

This Hicklin definition of obscenity has been subject to much criticism. Consequently, attempts have been made to develop a new

¹⁰Ibid.

¹¹Ibid., pp. 370-371 (emphasis added).

¹²Ibid., p. 371.

¹³Ibid.

definition or at least to modify the old one. At least one scholar has suggested, however, that the real problem with the Hicklin rule is in its application rather than its definition.¹⁴ Four major problem areas exist for the application of any test of obscenity including the Hicklin rule. (1) Should the intention or purpose of the work be considered and, if so, to what degree? (2) Is the standard of reference to be a child, an average adult, or an abnormal person? (3) What weight, if any, should be given to the literary and/or scientific merit of the work or is this inadmissible as evidence? (4) Is the work to be judged as a whole or on the basis of isolated sections?¹⁵

The Hicklin rule addresses itself to only the first two of the above questions. Nevertheless, consideration is often given to the latter two in relation to the Hicklin rule due to the subsequent application of this test by the judiciaries of England, Canada, and the United States.¹⁶ Consequently, some confusion about the Hicklin rule as it was originally announced has developed. With regard to the first question, Lord Cockburn held that the publication was to be judged itself and the intention of the author so determined.¹⁷ With regard to the second question, the inference from the Court's ruling is that the standard of reference is to be the young. Lord Cockburn, after

¹⁴See Schmeiser, op. cit., pp. 233-237.

¹⁵Ibid.

¹⁶Ibid., p. 235.

¹⁷See supra, Chapter III, note 11.

indicating that obscenity is the "tendency to corrupt," noted that "it is quite certain that it would suggest to the minds of the young."¹⁸ There is also an indication from the Courts, however, that the circumstances of publication and distribution may be considered. For example, argument in the case produced the following:

Kydd, for the appellant: What can be more obscene than many pictures publicly exhibited, as the Venus in the Dulwich gallery?

Lush, J.: It does not follow that because such a picture is exhibited in a public gallery, that photographs of it might be sold in the streets with impunity.¹⁹

And Lord Cockburn later added:

A medical treatise, with illustrations necessary for the information of those for whose education or information the work is intended, may, in a certain sense, be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited for anyone, boys and girls, to see as they pass. The immunity must depend upon the circumstances of the publication.²⁰

The Hicklin rule does not answer questions three and four relating to admissibility of evidence and whether the work should be judged for its dominant effect. As the English common law subsequently developed, it appears that evidence relating to scientific merit, but not literary merit, was admissible. Most English decisions also favored considering all works as a whole for purposes of determining obscenity even though many judicial rulings based on the Hicklin rule allowed determinations of obscenity based on isolated passages--particularly early decisions in the United States.²¹

¹⁸See supra, Chapter III, notes 12 and 13.

¹⁹L.R. 3 Q.B. 360, p. 365.

²⁰Ibid., p. 367.

²¹Schmeiser, op. cit., p. 237.

In England, the Hicklin rule received a strong reaffirmation as late as 1954.²² The Criminal Court of Appeal by a unanimous decision upheld a conviction for obscenity even though the charge to the jury was to consider the definition of obscenity in light of Hicklin and nothing was said of contemporary standards. The appellate court, in agreeing with the lower court decision, held that:

. . . the law is the same now as it was in 1968. . . .
If that is the test, the jury today have to consider whether, today, these books have a tendency "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. . . ." The jury have to consider whether or not, looking at these books as a whole, people would be corrupted.²³

The reference by the Court to "books as a whole" should be noted. The Court continued and concluded that "(w)hen considering whether books have a tendency to deprave and corrupt, everybody's mind goes to the depraving or corrupting of young people into whose hands they may fall."²⁴ Therefore, the Court found that obscenity was not determined by isolated passages but in the work's entirety. The reference point for making the determination, however, was still greatly associated with youth.

In the same year as the Reiter decision, the major judicial opposition to the Hicklin rule in England was delivered in Regina v. Martin Seeker Warburg, Ltd.²⁵ In charging the jury, Judge Stable

²²Regina v. Reiter and Others (1954) 1 All E.R. 741.

²³Ibid., p. 742 (emphasis added).

²⁴Ibid.

²⁵(1954) 2 All E.R. 683; see Mackay, op. cit., pp. 20-23.

emphasized that present rather than 1868 standards were to be applied in judging the work. This meant that the jury was to consider the changes in attitudes toward sex. With regard to the intention of the author, the judge stated:

You will have to consider whether in this the author was pursuing an honest purpose and an honest thread of thought or whether that was all just a bit of camouflage to render the crudity, the sex of the book, sufficiently wrapped up to pass the critical standard of the Director of Public Prosecutions.²⁶

Next Judge Stable considered the reference point for obscenity and concluded:

Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? Or do we go even further back than that and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offense for making those works available to the general public.²⁷

Thus, Judge Stable shifted the emphasis from the publication itself to the intention or purpose of the author. Also the reference for judging obscenity was to be the average adult and not the child or the abnormal person. This decision did not, however, gain support among the English judiciary.²⁸ Nevertheless, these two decisions along with a changing attitude in England with regard to sexual matters brought about a

²⁶Ibid., p. 688.

²⁷Ibid., p. 686.

²⁸See Schmeiser, op. cit., p. 238.

legislative change in the Hicklin rule when Parliament in 1959 enacted the Obscene Publications Act.²⁹ The result of this legislative action was a modification rather than a termination of the Hicklin test, for the act states:

For the purposes of this Act an Article shall be deemed to be obscene if its effects or (where the article comprises two or more distinct items) the effect of any one of its items is taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.³⁰

The Act also states that:

A person shall not be convicted of an offense . . . if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.³¹

In addition, the Act makes it clear that:

. . . the opinion of experts as to the literary, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or negative the social ground.³²

Therefore, the Obscene Publications Act allows for a work to be reviewed as a whole considering those most likely to see it and to be evaluated by expert witnesses before a determination of obscenity is made. It does not, however, answer the question as to whom the reference shall be for such a determination to be made. And it is left to the courts to decide if the public good is served by the work's artistic or scientific value and thus should receive greater

²⁹7-8 Eliz. II, Chapter 66; see Williams, op. cit., pp. 285-290.

³⁰Ibid., Section I (I).

³¹Ibid., Section IV (I).

³²Ibid., Section IV (II).

consideration than the obscene tendency of the work.³³

Canada and the Hicklin Rule

The first statutory provisions in Canada relating to obscenity were outlined in the Criminal Code of 1892.³⁴ From 1892 until 1959 the Canadian Criminal Code made the distribution of obscene matter a penal offense. No definition of obscenity, however, was provided. The Code was based on the Draft Code of the English Royal Commission of 1789 which contained no definition of obscenity because the Royal Commissioners felt that it was unnecessary to define the term beyond that "conveyed by the expression itself."³⁵ Therefore, since no statutory guidelines were established, the courts usually followed the Hicklin decision. Prior to 1944, however, the number of decisions on obscenity in Canada were few and often inconsistent.³⁶ The Hicklin test was applied quite severely by the courts. As a result materials were condemned on the basis of isolated passages. In addition, the courts often failed to consider the motive or intention of the author.³⁷ This was true even though the Criminal Code, as amended, provided that:

³³The most important obscenity decision in England since the enactment of the Obscene Publications Act came in Regina v. Penguin Books, C.L.R. 176 (1961), p. 177, where D. H. Lawrence's Lady Chatterley's Lover was found not to be obscene. Judge Byrne in his charge to the jury indicated that the book was to be considered as a whole and that the accused was to be acquitted even if the book were obscene if its merits were greater than its obscenity; see Schmeiser, op. cit., p. 240.

³⁴W. H. Charles, "Obscene Literature and the Legal Process in Canada," The Canadian Bar Review, 44 (May, 1966), 244.

³⁵Ibid., p. 245.

³⁶Schmeiser, op. cit., p. 240.

³⁷Charles, op. cit., p. 246.

No person shall be convicted . . . if he establishes that the public good was served by the acts that are alleged to constitute the offense and that the acts alleged did not extend beyond what served the public good.³⁸

Thus, the Hicklin rule was allowed to function in Canada with this one exception of the "public good" which did not restrict the application of the common law test. The courts tended to focus on the isolated passages of a book which might tend to "deprave or corrupt" rather than to consider its redeeming values in light of its dominant characteristics.³⁹

The judicial acceptance in Canada of the Hicklin rule appears to have come in 1904 in The King v. Beaver⁴⁰ where the Ontario Court of Appeal held on the basis of isolated passages that materials which had a possible tendency to corrupt or deprave could be considered obscene even if most people would be disgusted rather than corrupted by the material.

The Supreme Court of Ontario soon followed the Beaver decision with an even greater restrictive application of the Hicklin test. In question was a description of an indecent performance which the author sent to clergymen in hopes of gaining their support to stop the practice. The letter, however, was held to be obscene and the author's conviction was upheld by the appellate court. In rejecting the defense of "public good" the five-member court with only one dissent held:

³⁸Canadian Code, S. 150 (3), 1953-4 (Can.) c. 51. Section 150 (4) declared that "for the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the act did or did not extend beyond what served the public good."

³⁹Charles, loc. cit.

⁴⁰(1904) 9 C.C.C. 415; see Rex v. St. Clair (1913) 12 D.L.R. 710, Maclarer, J. A., dissenting.

The motive of the man is quite immaterial on the question of the act. . . . Neither a good nor a bad motive can alter the character of the act. . . .⁴¹

The onus of proving that the public good was served by the publication of this obscene pamphlet was upon the accused; he must excuse his obscene publication.⁴²

The Court acknowledged that its concern was based upon the possibility that the material might fall into the hands of more susceptible individuals rather than concern for the morals of the clergymen to whom the material was addressed.

Some judicial efforts, however, were directed at reducing the harshness of the Hicklin rule. In Conway v. The King⁴³ the Quebec Court of King's Bench acquitted an accused on a charge of presenting an obscene theatrical performance. Although the performance featured motionless girls nude from the waist up, the Court felt that the intention was to produce an artistic effect and consequently the show was not obscene.

In 1951 the Montreal Court of Sessions of the Peace⁴⁴ held that men's ties which featured mermaids and women in topless bathing suits were not legally obscene due to the artistic nature of the items. Judge Proulx, in a very concise and somewhat humorous opinion, held that:

. . . a thing may be obscene technically, but it can be made the subject of a criminal offense only if it tends to corrupt the morals by exciting the passions and inciting to immorality.
. . .

⁴¹(1913) 12 D.L.R. 710, p. 712.

⁴²Ibid., p. 713.

⁴³(1944) 2 D.L.R. 530.

⁴⁴Rex v. Stroll (1951) 100 C.C.C. 171.

There is absolutely nothing suggestive in these figures, nothing that tends to corrupt the morals by exciting the passions or inciting to immorality.⁴⁵

Judge Proulx also noted in this decision, which has been described as probably the best common sense approach to obscenity,⁴⁶ that what was involved here was:

. . . an artistic semi-nude, exactly half of what one sees in museums all over the world, including the Vatican.

If these ties are suggestive, then it would be necessary to put brassieres on cows and diapers on dogs.⁴⁷

The judge held that the reference point for deciding obscenity was the normal person. He concluded his opinion with the following:

In my humble opinion, I do not see anything at all in these figures that can lead a normal person to immorality. The law is made to protect the modesty of normal persons, not to bridle the imagination of the hot-blooded, vicious or overly scrupulous person.⁴⁸

This liberalizing trend in the application of the Hicklin test appeared to be continuing when the Ontario Court of Appeal rendered its decision in Regina v. National News Co.⁴⁹ Although a conviction for obscenity was sustained,⁵⁰ the Court attempted to evaluate the effect of

⁴⁵Ibid., p. 171.

⁴⁶W. F. Bowker, "Basic Rights and Freedoms: What Are They?" The Canadian Bar Review, 37 (March, 1959), 49.

⁴⁷100 C.C.C. 171, pp. 171-172.

⁴⁸Ibid., p. 172.

⁴⁹(1953) 106 C.C.C. 26.

⁵⁰The Court held: "If a person has in his possession obscene matter for the purpose of distribution, I do not think it matters whether the means of distribution be sale, consignment for sale, free distribution or otherwise," 106 C.C.C. 26, p. 28.

the materials upon a normal segment of the society. This normal portion of society did include normal youths as well as adults with the latter less susceptible presumably than the former.⁵¹ Thus, the test for obscenity was liberalized somewhat, but the reference was still the effect of material upon youth.

The Court did, however, acknowledge that the Hicklin rule was not developed as an inflexible doctrine which could not account for the change in time and conditions. The Court, speaking through Chief Justice Pickup, concluded:

It may be that what would tend to corrupt and deprave in one generation may not in another generation, but that is a question of fact. It does not require the formulation or adoption of some new or different test because the test laid down by Cockburn C.J. always involves consideration of the tendency to deprave and corrupt, which must, no doubt, be related to the time when the test is applied.⁵²

In 1955 the Quebec Court of Queen's Bench⁵³ unanimously dismissed a charge of selling obscene photographs because no evidence was introduced at trial which supported the charge. Although it was disclosed that the accused had in his possession a number of photographs of nudes, some of which were considered to be obscene, there was no evidence that they were intended to be sold or distributed.

The application of the Hicklin rule in its more liberal fashion came to an abrupt end in 1957 when the Ontario Court of Appeal rendered its decision in Regina v. American News Co.⁵⁴ Speaking through Justice

⁵¹Ibid., p. 30.

⁵²Ibid., pp. 29-30.

⁵³Clouture v. The Queen (1955) 114 C.C.C. 303.

⁵⁴(1957) 118 C.C.C. 152.

Laidlaw, who had concurred with Chief Justice Pickup in the National News case, the Court now with three new members applied the Hicklin rule in a much more restrictive fashion. First, the Court held that the intention or purpose of the material was irrelevant. Justice Laidlaw stated:

. . . the literary merit of a work is not a relevant consideration in finding whether or not a matter is obscene according to law. However great the literary merit or value of it may be, if it has a tendency to deprave and corrupt within the specifications in the test prescribed in law, then it must be declared obscene. A work of the highest quality may thus be condemned in law for obscenity by the application of the test.⁵⁵

Second, the reference for judging the effect of the material was to be the young and abnormal as well as the old and normal.⁵⁶ Third, the Court held that evidence relating to the literary or scientific merit of the material was inadmissible.⁵⁷ The only concession to the more liberal application of the Hicklin rule came with the continued acceptance of the idea that the susceptibility to corrupting influences may differ from generation to generation. Consequently, this one aspect of the National News case was continued. Justice Laidlaw, in making this restrictive ruling, particularly pointed out the "judicial misreading" by the English judge in the Martin Secker Warburg case while at the same time noting the correct holding in the Reiter case which had concluded that the Hicklin test remained the same for the present as it did when first announced in 1868.

⁵⁵ Ibid., p. 157.

⁵⁶ Ibid., pp. 157-158.

⁵⁷ See ibid., pp. 164-166.

The result of the American News decision was that even though some liberal trends had developed in Canada, basically the Hicklin test remained as a "very severe limitation upon creative, literary expression."⁵⁸ The Canadian Parliament, however, was at work considering the issue of obscenity and particularly the confusion associated with the lack of a statutory definition of obscenity. It should also be noted that prior to the change in legislative definition which occurred in 1959, the Canadian Supreme Court had not entered the area of obscenity. The amended Criminal Code, its application, and the entrance of the Supreme Court into the area of obscenity is the subject matter of Chapter IV.

The United States and the Hicklin Rule

Concern with obscenity in the United States can be traced back to the colonial period where anti-obscenity statutes, for example, appeared in Massachusetts in 1714. Many of these early statutes were designed to prohibit blasphemy and profanity⁵⁹ as was the case in England during this time period. Probably the first actual conviction for obscenity occurred in Pennsylvania in 1815 for exhibiting an obscene painting.⁶⁰ This action was soon followed in Massachusetts with the judicial determination that John Cleland's Memoirs of a Woman of Pleasure

⁵⁸Charles, op. cit., p. 250.

⁵⁹William E. Ringel, Obscenity Law Today (New York: Gould Publications, 1970), pp. 85-86.

⁶⁰Commonwealth v. Sharpless, 2 S & R 91 (1815) (Pa. Sup. Ct.); see Ringel, op. cit., p. 86.

was obscene.⁶¹ The bulk of legislative and judicial attention to obscenity developed after the Civil War, particularly as a result of efforts by Anthony Comstock. Comstock campaigned against obscene literature from 1872 until his death in 1915. He was especially concerned with the effect of obscenity upon children. Comstock's efforts led to the enactment of regulatory legislation by both the national and state governments.⁶²

Following the Hicklin ruling in 1868, courts in the United States also began to apply this philosophy. The earliest federal case in which the Hicklin test was adopted appears to be that of United States v. Bennett⁶³ in 1879⁶⁴ in which the Circuit Court upheld the lower court's finding of obscenity. The appellate court applied the basic conceptualization of the Hicklin decision, i.e., "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences." In addition, the Court affirmed that only those passages which had been marked by the district attorney as obscene could be considered by the jury.

⁶¹Commonwealth v. Holmes, 17 Mass. 336 (1821); Thomas I. Emerson, The System of Freedom of Expression (New York: Random House, 1970), p. 468; Ringel, loc. cit.

⁶²See Justice Douglas's dissent in Ginsberg v. New York, 390 U.S. 629 (1968), for a review of Comstock's efforts and excerpts from his "Traps for the Young" in Appendix I, pp. 650-656; see also Pritchett, op. cit., p. 490; Emerson, loc. cit.

⁶³24 Fed. Cases 1093, No. 14,571.

⁶⁴See Terrence J. Murphy, Censorship--Government and Obscenity (Baltimore: Helicon Press, Inc., 1963), p. 43; see also Regina v. Coles (1964) 49 D.L.R. (2d) 34, p. 36.

The restrictive application of the Hicklin rule was continued in United States v. Males.⁶⁵ After restating the same philosophy used in the Bennett case, the judge added:

The writing need not use words which are in themselves obscene, in order to be obscene. Courts have regard to the ideas conveyed by the words used in the writing, and not simply to the words themselves. Obscenity is that form of indecency which is calculated to promote the general corruption of morals.⁶⁶

State courts were also rendering similarly restrictive decisions. Only two examples will be examined here, both are from Massachusetts and both were unanimous decisions. They are representative, however, of the types of decisions by state courts during this time period.⁶⁷ In Commonwealth v. Buckley,⁶⁸ the Supreme Judicial Court of Massachusetts, in upholding a lower court decision, accepted the same philosophy as had the federal court in the Bennett decision. The appellate court found that the lower court had properly charged the jury with the following:

It is entirely immaterial whether other books are as bad or worse or better than this. You cannot compare them in that way. You are not trying any book except this, and only such parts of this as the government complains of; . . . it makes no difference what the object in writing this book was, or what its whole tone is. . . .⁶⁹

In Commonwealth v. Friede,⁷⁰ the same court emphasized the importance of

⁶⁵51 Fed. Rep. 41 (1892).

⁶⁶Ibid., p. 42.

⁶⁷For a detailed coverage of obscenity cases in Massachusetts and New York from early 19th Century to 1938, see Leo M. Alpert, "Judicial Censorship of Obscene Literature," Harvard Law Review, 52 (November, 1938), 40-76.

⁶⁸200 Mass. 346 (1909).

⁶⁹Ibid., pp. 350-351.

⁷⁰271 Mass. 318 (1930).

youth in the consideration of obscenity. In upholding the lower court conviction, the appellate court stated:

The seller of a book which contains passages offensive to the statute has no right to assume that children to whom the book might come would not read the obnoxious passages or that, if they should read them, they would continue to read on until the evil effects of the obscene passages were weakened or dis-
apated with the tragic denouncement of a tale.⁷¹

Thus, due to the very restrictive application of the Hicklin rule by both federal and state courts in the United States, obscenity convictions could result from consideration of isolated passages in a book. Indeed, juries were allowed only to consider the passages which the state had deemed to be obscene in bringing the legal action. Materials which would not tend to corrupt or deprave adults could be held obscene because of the possible effects on youth. Evidence showing the intent or purpose of the author was either inadmissible or given little, if any, weight. And a lack of evidence showing a causal relationship between the alleged obscene materials and the reader's subsequent behavior was considered irrelevant.⁷²

Even though the Hicklin rule was well grounded in both state and federal courts, judicial reaction against this test of obscenity did begin to appear. An early protest against the rule was delivered by Judge Learned Hand in United States v. Kennerley⁷³ in 1913. Although he

⁷¹Ibid., pp. 322-323.

⁷²Green, op. cit., p. 673; see also Alpert, op. cit., pp. 53-65.

⁷³209 Fed. 119.

noted that the rule was so well accepted that it would not be proper for him to disregard it, he did, however, very strongly question the validity of the rule with the following:

. . . the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, "obscene, lewd, or lascivious." I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of the one most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interests in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few. . . .

Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.⁷⁴

One of the most celebrated decisions⁷⁵ to reject the Hicklin rule came in United States v. One Book Called "Ulysses."⁷⁶ The United States District Court held this work by James Joyce not to be obscene and the decision was affirmed by the Circuit Court of Appeals. Although this

⁷⁴Ibid., pp. 120-121.

⁷⁵Several scholars suggest that this decision marks the beginning of the end for the Hicklin rule in the United States; see Green, op. cit., p. 673; Mackay, op. cit., p. 18; Schmeiser, op. cit., p. 249.

⁷⁶5 F. Supp. 182 (1933), aff'd., 72 F. 2d 705 (1934).

decision did not reject the Hicklin rule completely, it did significantly alter the application of the rule.

The difference between the Hicklin rule as had previously been applied in the United States and the test announced in Ulysses can be outlined in three areas. First, it is the predominant nature of the work taken "as a whole" which was the basic consideration in Ulysses.⁷⁷ The Hicklin rule, however, had been applied in such a fashion as to prohibit a publication as obscene on the sole basis of isolated words or passages⁷⁸ taken out of context.⁷⁹

Second, the Ulysses test, in considering a publication obscene only if its objectionable aspects control the entire effect of the work,⁸⁰ requires a complex evaluation of the material in terms of its overall values--scientific, educational, and literary--and also the relevancy of the objectionable portions.⁸¹ Under the Hicklin rule, however,

⁷⁷72 F. 2d 705, p. 707, ". . . the effect of the book as a whole is the test." (Circuit Judge Augustus N. Hand.)

⁷⁸It should be remembered, however, that the Hicklin court specifically stated that "(t)he mere use of obscene words, or the occurrence of obscene passages, does not make the work obscene," L.R. 3 Q.B. 360, p. 363. Thus, the Court in Ulysses was rejecting the United States application of the Hicklin rule, as was demonstrated in United States v. Bennett, for example.

⁷⁹See Mackay, op. cit., p. 19.

⁸⁰5 F. Supp. 182, p. 183, ". . . where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what was called, according to the usual phrase, pornographic, that is written for the purpose of exploiting obscenity." (District Judge Woolsey.)

⁸¹72 F. 2d 705, p. 707: "It is settled, at least so far as this court is concerned, that works of physiology, medicine, science, and

a publication may be obscene "if any passages therein may have an unfortunate tendency toward genital commotion in some adolescent reader."⁸²

Third, the Hicklin rule takes its obscenity standards from the point of view of the young and corruptible,⁸³ whereas the Ulysses test does not.⁸⁴ The basis for the Ulysses test is whether the book would tend to "stir the sex impulses or to lead to sexually impure and lustful thoughts . . . [by] a person with average sex interests."⁸⁵

Thus, the Ulysses ruling rejected a considerable portion of the Hicklin rule, but the Court, nevertheless, retained (if not in fact, certainly by implication) the fundamental assumption on which the Hicklin rule was based, i.e., that exposure to certain types of expression could have a profound social impact⁸⁶ and consequently the government could be

sex instruction are not within the statute, though to some extent and among some persons they may tend to promote lustful thoughts. . . . We think the same immunity should apply to literature as to science, where the presentation when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication." (Circuit Judge Augustus N. Hand.)

⁸²Mackay, loc. cit.

⁸³Ibid., where the author describes the question which the Hicklin test raises concerning the material under consideration as, ". . . might it adversely affect some unknown degenerate who might read it and think that portrayal requires emulation."

⁸⁴Ibid., p. 20.

⁸⁵5 F. Supp. 182, p. 184 (emphasis added).

⁸⁶See Robert B. Cairns, James C. N. Paul, and Julius Wishner, "Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence," Minnesota Law Review, 46 (May, 1962), 1009-1041; see also Earl Finbar Murphy, "The Value of Pornography," Wayne Law Review, 10, No. 4 (1964), 655-680.

justified in regulating to a certain degree the public assimilation of published materials.

Two years after Ulysses the same three judges reaffirmed their stand on modifying the Hicklin test in United States v. Levine.⁸⁷

This action resulted in even greater support for the new test. With these two decisions, Hicklin had been replaced in the United States with three new standards for determining obscenity: "the work as a whole" considering "its dominant effect" with respect to "the average person." These new conceptualizations of obscenity became known as the federal or modern standards.⁸⁸

The decisions of Ulysses and Levine were not reviewed by the United States Supreme Court, and the new conceptualizations of obscenity remained unaltered. The first case to reach the Supreme Court involving obscenity produced no decision because the Court divided four to four.⁸⁹ It was not until 1957 that the United States Supreme Court rendered its first obscenity decision.⁹⁰ The development of obscenity law in the

⁸⁷83 F. 2d 156 (1936).

⁸⁸See Terrence Murphy, op. cit., pp. 51 and 257.

⁸⁹Doubleday & Co. v. New York, 335 U.S. 848 (1948).

⁹⁰The United States Supreme Court in Burstyn v. Wilson, 343 U.S. 495 (1952), did hold that motion pictures, which had previously been considered to be primarily entertainment, were mediums for communication and thus received protection under the First Amendment. However, the censorship in question was reversed because the word "sacrilegious" was too vague to meet due process requirements. The question of obscenity censorship was left open.

United States from 1957 to 1974 is the subject matter of Chapter V.

CHAPTER IV

CANADIAN OBSCENITY LAW, 1959-1973

In 1959 the Dominion Parliament of Canada amended the Criminal Code thereby providing the first statutory definition of obscenity along with a summary procedure for the seizure of obscene publications.¹ The amended Code now provides:

For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.²

The new Code provisions do not indicate whether the legislative definition of obscenity is to replace the Hicklin rule or whether it is to operate in addition to the old rule. Consequently the courts were called upon to answer this question. The legislative history of the amendments provide some indication of the Parliamentary intention,³ particularly the statement of Mr. D. E. Fulton, Minister of Justice, at

¹7-8 Eliz. II, C.41, ss. 11 and 12; the amendments include sections 150(8) and sections 150(A) and 150(B) which have since been recast as sections 159, 160, and 161, R.S.C. 1970, c. C 34; see the Appendix for the text of the relevant provisions of the Canadian Criminal Code to this study.

²Canadian Criminal Code, section 150(8). Although this section and many others have now been renumbered as a part of the Revised Statutes of Canada, the old numbers will be used throughout this study to avoid confusion, particularly since this has also been the practice of the courts in Canada as the revisions did not go into force until July 15, 1971 even though approved in 1970.

³See Charles, op. cit., pp. 251-268, for a thorough coverage and analysis of the legislative history.

the time the proposed amendments were introduced into the House of Commons. Mr. Fulton stated:

We have been careful in working out this definition not to produce a net so wide that it sweeps in borderline cases or cases about which there may be genuine differences of opinion. In our efforts we have deliberately stopped short of any attempt to outlaw publications concerning which there may be any contention that they have genuine literary, artistic or scientific merit. These works remain to be dealt with under the Hicklin definition, which is not superseded by the new statutory definition.⁴

Thus, the answer to the question as to whether Hicklin was to still be applicable in Canada seemed obvious. Such statements as the one above by Mr. Fulton, however, are not admissible in evidence.⁵ Therefore, the Canadian courts were required to give their interpretation of these amendments to the Criminal Code.

The first case to develop following the changes dealt not with the definition of obscenity but with the meaning of the word "circulation" in section 150 (1)(a) which reads:

Everyone commits an offense who makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever. . . .

In Regina v. Berringer⁶ the Nova Scotia Supreme Court in a split decision held that circulation of obscene matter "involves the bringing of the obscene image to the attention of another."⁷ Therefore, the appellate court

⁴(1959) House of Commons Debates (Can.), p. 5517, as quoted in Charles, op. cit., p. 254 (emphasis added).

⁵See Gosselin v. The King (1903) 33 S.C.R. 255.

⁶(1959) 122 C.C.C. 350.

⁷Ibid., p. 350.

reversed the lower court's acquittal. The accused had taken some obscene pictures from his home and had shown them to a friend. The Court indicated that "(s)howing the obscene material to a single person constitutes 'circulation'" and this action met the prohibition in section 150 (1)(a) against possession for the purpose of circulation.⁸

One year later in Regina v. Munster⁹ the Nova Scotia Supreme Court was required to consider the intention of section 150 (8) with regard to its effect on the Hicklin rule. Munster had been charged under 150 (1) (a) for making nude photographs of his sons which he indicated were for purposes of his art work. Without consideration of the Hicklin rule, the trial judge found the photographs not to be obscene under the Criminal Code. On appeal a new trial was unanimously ordered with the direction that the trial judge consider the photographs in light of the Hicklin rule as well as the Criminal Code. The Nova Scotia Supreme Court stated that "(m)atter not included in its [Code] provisions may nevertheless be obscene and whether such matter is obscene or not is to be determined by the Hicklin test."¹⁰ Thus, the judgment of the Court seemed to suggest that the Code covered only those publications which had "a dominant characteristic of which is the undue exploitation of sex" and that other materials must be tested in terms of Hicklin.

In 1962 the first obscenity case, usually identified as Regina v. Brodie,¹¹ came before the Supreme Court of Canada. This is, of course,

⁸Ibid.

⁹(1960) 129 C.C.C. 277.

¹⁰Ibid., p. 279.

¹¹Technically the full title of the case is Regina v. Brodie,

an extremely important decision in the law of obscenity. Unfortunately the Court was badly divided on the several points which were considered, resulting in seven separate opinions from the nine justices with fluctuating groupings concerning the different issues before the Court. In question was D. H. Lawrence's Lady Chatterley's Lover which had been found obscene by the courts of Quebec. The Supreme Court of Canada in a five to four decision held that the work was not obscene under the Code provisions.

In deciding that the book was not obscene, the majority speaking through Justice Judson in regard to the requirements of section 150 (8), stated:

The enquiry then must begin with a search for a dominant characteristic of the book. The Book may have other dominant characteristics. It is only necessary to prove that the undue exploitation of sex is a dominant characteristic. Such an enquiry necessarily involves a reading of the whole book with the passages and words to which objection is taken read in the context of the whole book. . . . No reader can find a dominant characteristic on a consideration of isolated passages and isolated words. Under this definition, the book must be taken as a whole.¹²

Judson then indicated that such an inquiry also involved a consideration of the author's purpose as well as an examination of the literary or artistic value of the work. Consequently evidence to determine the value of the material is admissible. While noting that the Hicklin test had traditionally rejected such evidence, he concluded that a dominant characteristic of a book could not be determined without such an examination. The only test of admissibility would be whether the

Regina v. Dansky, and Regina v. Rabin (1962) 32 D.L.R. (2d) 507.

¹²Ibid., pp. 525-526.

evidence presented was relevant to the determination of a dominant characteristic in the book.¹³ Although there was only a plurality acceptance of the admissibility of evidence, only one of the nine judges indicated that evidence should not be admitted. One of the four who accepted the admissibility concept felt that this would also be true under the Hicklin test. Of the remaining four justices, three did not consider this aspect in their opinions, and one raised some question about the weight which should be given to such evidence without deciding the issue.¹⁴

The dominant characteristic at which the Code was directed was one of "undue exploitation of sex." The word "undue" seems to recognize that some exploitation does and will occur which would not be obscene. Justice Judson attempted to clarify this aspect of the Code with the following:

What I think is aimed at is excessive emphasis on the theme for a base purpose. But I do not think that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness.¹⁵

This point on the meaning of the word "undue" caused the most opposition from the minority on the Court. Typically, the minority considered the

¹³Ibid., p. 526.

¹⁴Judson, Abbott, and Martland accepted admissibility; Richie accepted admissibility under either the Code or Hicklin; Locke and Cartwright did not consider the question and Kerwin indicated that it was not necessary to decide it; Taschereau questioned the weight given to such evidence; and Fauteux rejected the admissibility of such evidence.

¹⁵32 D.L.R. (2d) 507, pp. 527-528.

word to mean "unreasonable" and then pointed to the 15 adulterous scenes in the book. This, more than any other aspect of the book, caused the minority to consider Lady Chatterley's Lover obscene. "What in my view is objectionable, is not the aim pursued by the author . . . but the means employed for the demonstration of his thesis."¹⁶

Two other principle issues were considered by the Court in Brodie: (1) whether section 150 (8) was "exhaustive" in regard to the definition of obscenity and thus had replaced the Hicklin rule in Canada and (2) the standards to be used to apply the concept of obscenity as defined in the Code. With regard to the question of the continuing validity of the Hicklin test, again a plurality of the Court held that "(a)ll the jurisprudence under the Hicklin definition is rendered obsolete by the enactment of the new and exclusive definition of obscenity." The Court again speaking through Justice Judson along with Abbott and Martland as before and joined now by Chief Justice Kerwin who had dissented on the question of the obscenity of the work concluded that if both the Code and the Hicklin definitions were to operate then:

. . . the legislature must define the two standards of obscenity and tell the Court that the charge is proved if the work offends either standard. . . . Otherwise, why define obscenity for the purpose of the Act, if it is still permissible for the Court to take a definition of the crime formulated 100 years ago and one that has proved to be vague, difficult and unsatisfactory to apply?¹⁷

Consequently, these four justices disapproved of the Munster decision.

Two justices, Richie and Fauteux, held that both tests were still valid and

¹⁶Ibid., p. 517 (Justice Taschereau, dissenting).

¹⁷Ibid., p. 525.

that the Code definition was not intended to be exhaustive of the definition of obscenity. The remaining three justices, however, did not decide the issue.¹⁸

With regard to the standard for measuring obscenity or the "undue exploitation of sex," the Court agreed that contemporary community standards must be applied.¹⁹ Yet none of the justices indicated precisely what the term "contemporary community standards" meant. Therefore, this issue along with the question of the validity of the Hicklin test was left for consideration in subsequent decisions.

While the decision in Brodie²⁰ is somewhat disappointing in terms of making a clear definitive ruling, the decision is extremely valuable in better understanding obscenity law in Canada particularly with regard to the admissibility of evidence. On this question the decision was quite strong in supporting the use of evidence both to determine the literary or artistic value of a work and also to determine the intent or purpose of the author. Thus, the decision in Brodie overrules the 1957 decision in the American News case.²¹ And regardless of what the justices said with regard to the status of the Hicklin test, the impact of Brodie

¹⁸Taschereau and Cartwright felt it unnecessary to consider the question of exhaustion and Locke made no reference to the issue.

¹⁹See 32 D.L.R. (2d) 507, pp. 528-529 and 532.

²⁰For a more detailed examination of this decision, see Charles, op. cit., pp. 261-272; Green, op. cit., pp. 683-685; Tarnopolsky, The Bill of Rights, pp. 131-137.

²¹See Schmeiser, op. cit., p. 247.

has been significant on cases dealing with obscenity. Neither Brodie nor most of the subsequent obscenity decisions in Canada, including the two leading cases immediately following Brodie, applied the Hicklin test.

One year after Brodie, the Manitoba Court of Appeal by a four to one decision²² affirmed the lower court finding of obscenity against two "girlie" magazines because they were publications which had as a dominant characteristic the "undue exploitation of sex" as proscribed in section 150 (8). The counsel for the defendants argued that section 150 (8) was designed to restrict "hard-core" pornography, but the Court rejected that idea. The majority concluded that obscenity was not synonymous with either pornography or "hard-core" pornography and that section 150 (8) was not designed to restrict pornography alone or else the legislature would have used the word pornography rather than obscenity.²³

On appeal to the Canadian Supreme Court, the decision of the Manitoba Court of Appeal was unanimously reversed.²⁴ The new Chief Justice Taschereau, who had dissented in the Brodie case, wrote a very brief statement for the seven participating justices accepting entirely without additional comment the dissenting opinion of Justice Freedman of the Manitoba Court of Appeal. Justice Freedman, as in Brodie, indicated that it was not necessary to decide the question whether section 150 (8) exhaustively defined obscenity or whether the Hicklin test could still be applied. Since both the Crown and the accused had argued the case based upon the concept that section 150 (8) was exhaustive, he considered the

²²Regina v. Dominion News & Gifts (1963) 2 C.C.C. 1.

²³Ibid., p. 121.

²⁴Dominion News & Gifts v. The Queen (1964) 3 C.C.C. 1.

case in that light leaving open for the future a final determination of the issue.²⁵

Justice Freedman, noting that the charge placed against the two magazines was that they had "a dominant characteristic of which is the undue exploitation of sex," held that the magazines were not obscene. He indicated that obscenity had to be judged on the basis of "contemporary community standards." This had already been declared in Brodie, but Freedman then explained the term as follows:

Community standards must also be local. In other words, they must be Canadian. In applying the definition in the Criminal Code we must determine what is obscene by Canadian standards, regardless of attitudes which may prevail elsewhere, be they more liberal or less so.²⁶

Thus, with the acceptance of this dissent by the Supreme Court of Canada, the determination of obscenity in Canada was to be based on contemporary national community standards.

Justice Freedman also cautioned judges against incorporating their own personal tastes and prejudices into legal principles.²⁷ He indicated that in borderline cases tolerance would be better than proscription, for he concluded that:

To suppress the bad is one thing; to suppress the not so bad, or even the possibly good is quite another. Unless it is confined to clear cases, suppression may tend to inhibit those creative impulses and endeavors which ought to be encouraged in a free society.²⁸

Apparently one of the major differences between Justice Freedman's decision and that of his four colleagues was the evaluation of the

²⁵2 C.C.C. 103, p. 115.

²⁶Ibid., p. 117 (emphasis added).

²⁷Ibid., p. 116.

²⁸Ibid., p. 117.

material in question. The majority seemed to pay little attention to the testimony of witnesses concerning the publications in question. Freedman, however, indicated his agreement with the expert testimony and emphasized that the publications must be viewed as a whole. He concluded his opinion with the following assessment:

The Witness Arnold Edinborough described them as flippanant and saucy, and noted that when they dealt with sex they treated it in a normal and not perverted fashion. I would agree. Risque the magazines are, but not obscene.²⁹

Justice Freedman did imply in his opinion that if sex had not been treated in a normal fashion or if the nude or semi-nude women had been pictured with men the result might have been different.³⁰

In the same year as the Supreme Court's decision in Dominion News, the Ontario Court of Appeal in Regina v. Coles³¹ had to consider the publication by John Cleland, Memoirs of a Woman of Pleasure--otherwise known as "Fanny Hill." By a three to two decision the Court overturned a lower court decision and held that the publication was not obscene under section 150 (8). What is of importance, however, in this case is that both the majority and the dissenting justices agreed that the Hicklin test did not apply, but rather an objective determination must be made under section 150 (8) considering the author's purpose, the merit of the work, and community standards.³²

²⁹Ibid., p. 118.

³⁰See Charles, op. cit., p. 274.

³¹(1964) 49 D.L.R. (2d) 34.

³²See Weiler, op. cit., p. 421.

The majority noted that neither the decisions of the United States nor England could provide assistance to Canadian judges because the Criminal Code had created a new definition of obscenity.³³ And later the majority concluded that "the Hicklin case does not apply, and the present section is exhaustive."³⁴ Relying heavily on Freedman's opinion in Dominion News, the majority evaluated the importance of freedom of expression:

The freedom to write books, and thus to disseminate ideas, opinions, and concepts of the imagination--the freedom to treat with candour of an aspect of human life and the activities, aspirations and failings of human beings--these are fundamental to progress in society. In my view of the law, such freedom should not, except in extreme circumstances, be curtailed.³⁵

Thus, the Ontario Court of Appeal strongly supported the idea of freedom of expression and the cautious note of Justice Freedman. The Court also was the first to state clearly that Hicklin was no longer valid and this decision, of course, became binding on all lower Ontario courts.³⁶ The Ontario Court of Appeal affirmed its decision in Coles concerning the exhaustive nature of the Criminal Code in Regina v. Cameron.³⁷

In 1970 the County Court of Vancouver, British Columbia, in rejecting a charge of obscenity, held³⁸ that "the test of obscenity in

³³49 D.L.R. (2d) 34, p. 37.

³⁴Ibid., p. 40.

³⁵Ibid.

³⁶See Regina v. Salda (1969) 3 C.C.C. 64 (Ontario Magistrate's Court).

³⁷(1966) 58 D.L.R. (2d) 486.

³⁸Regina v. Georgia Straight Publishing Ltd. and McLeod (1970) 5 C.C.C. 31.

the Hicklin case . . . has once and for all been laid to rest."³⁹ This decision, as did Coles, relied heavily on the ruling by Freedman in Dominion News and emphasized the need to judge materials as a whole based on community standards. The Court also cautioned judges against what it termed becoming immersed "in the subjective realms of moral philosophy."⁴⁰ And the Court concluded, again similar to Coles, "that section 150 (8) is exhaustive of the legal definition of obscenity in Canada."⁴¹

Not all decisions in Canada, however, have agreed with the determination that the Hicklin test is no longer valid. In Regina v. Adams⁴² the County Court of the County of Halifax, Nova Scotia, held that the Hicklin rule was still valid and that it did not represent a conflict with either the Criminal Code or the decisions of the Canadian Supreme Court.⁴³ The decision, however, was reversed on appeal due to an improper warrant and consequently the question of the validity of the Hicklin rule was not considered by the appellate court.⁴⁴

The County Court of Vancouver, British Columbia, in 1972,⁴⁵ considered a charge of obscenity against a theatrical performance. The judge indicated that he was required to determine whether the Hicklin

³⁹Ibid., p. 43.

⁴⁰Ibid., p. 39.

⁴¹Ibid., p. 43.

⁴²(1966) 4 C.C.C. 42.

⁴³Ibid.

⁴⁴Re Regina and Adams (1969) 2 C.C.C. 21.

⁴⁵Regina v. Small and four others (1972) 6 C.C.C. (2d) 195.

test was to apply to plays on the stage or whether the term "performance" was included within the meaning of the word "publication" of section 150 (8) of the Criminal Code. The judge decided that "performance" was included within the term "publication" and thus made his decision on the basis of the Criminal Code. Nevertheless, the clear implication was that there are certain areas not covered by the Code which would still be governed by the test of obscenity described in Hicklin.

In Regina v. Duthie Books Ltd.,⁴⁶ the British Columbia Court of Appeal, in a unanimous decision, questioned the use of the phrase "for a base purpose" as used by Justice Judson in the Brodie case. Justice Bull, speaking for the Court, stated that his interpretation of both Brodie and the Code indicated that even a high standard of artistic or literary merit would not remove the illegality of an otherwise obscene publication. He stated: "To my mind it is equally 'base' to treat sex in a vulgar, repulsive and ugly manner for the purpose of encouraging people to think of it and treat it as something less than beautiful and normal . . ."⁴⁷ This statement would seem to agree with that of Justice Freedman in Dominion News which stressed the importance of the presentation of normal sex. Justice Bull concluded that even if he had misinterpreted Judson's position that his Court was not bound by the views expressed in Brodie until the Supreme Court provided a more definitive ruling on obscenity.⁴⁸

⁴⁶ (1966) 58 D.L.R. (2d) 274.

⁴⁷ Ibid., p. 280.

⁴⁸ Ibid., p. 281.

The Supreme Court of Canada was once again involved with questions of obscenity in 1967.⁴⁹ This time, however, the Court was concerned with sections 150 (1)(a) and 150 (2)(a) of the Criminal Code rather than with the definition of obscenity. In a very technical decision the Court confirmed that the difference between sections 150 (1)(a) and 150 (2)(a) was the requirement in the latter of "knowingly" selling or exposing obscenity to the public. Section 150 (6) excludes ignorance as a defense under section 150 (1)(a).⁵⁰ The Court held that section 150 (1)(a) was designed to apply to production or the wholesaler of obscenity and section 150 (2)(a) was to apply primarily to booksellers. The latter provision was designed, according to the Court, to cover cases where a bookseller may have only a few obscene books among many others on his shelves.⁵¹ Possession is the key to both sections but the motives for possession distinguish the two. And it is the burden of the Crown to prove that the accused had knowledge of the nature of the materials to sustain a conviction under section 150 (2)(a).

Two years later the Supreme Court was again confronted with section 150 (1)(a) only this time concerning the meaning of the word "circulation." This question had previously been considered in the Berringer case which resulted in a very broad interpretation of the term. The

⁴⁹Fraser v. The Queen (1967) 59 D.L.R. (2d) 240.

⁵⁰See the Appendix for the text of these sections of the Canadian Criminal Code. For a complete text of the Code, see Tremeeear's Annotated Criminal Code (sixth edition; Toronto: The Carswell Company, Limited, 1971).

⁵¹59 D.L.R. (2d) 240, p. 245.

Supreme Court held⁵² that "circulation must be of a public and not a private nature,"⁵³ thus rejecting the Berringer ruling. Rioux had been charged with showing an obscene movie to a number of friends in his home on at least three different occasions. The charges had been dismissed by the trial court, affirmed by the Quebec Court of Appeal, and the decision was unanimously affirmed by the Canadian Supreme Court. Justice Hall, speaking for the Court, relied mainly on the opinions expressed in the two lower courts in presenting his views. The decision by Justice Hall, using the words of Justice Pratte of the Quebec Court of Appeal, summarized the position of the Supreme Court with the following:

I would therefore say that showing obscene pictures to a friend or projecting an obscene film in one's own home is not in itself a crime nor is it enough to establish intention of circulating them nor help to prove such an intention. If, for example, it was established in this case, that Rioux had projected these films in the hope of finding a purchaser or a lessee, the charge would be proven. But this is not the case. The fact that Rioux had these films in his possession for many months suggests that he projected them for his own pleasure and that of his friends rather than with the intention of circulating them.⁵⁴

The first part of the above statement, i.e., "showing obscene pictures to a friend," was directed specifically at the ruling in Berringer which had held such action as meeting the requirements of section 150 (1)(a). Thus the Canadian Supreme Court refused to accept the position that the Canadian Criminal Code could be used to interfere with the private possession and use of obscene materials, including showing of such

⁵²Regina v. Rioux (1969) 10 D.L.R. (3d) 196.

⁵³Ibid., p. 196.

⁵⁴Ibid., p. 198.

materials to others, provided the intention was not to find a buyer.

Three lower court decisions relating to prosecutions under section 150 (2)(a) have all followed the decision of the Canadian Supreme Court in Fraser. In Regina v. Yip Men,⁵⁵ the Vancouver County Court, British Columbia, held that the owner of a confectionery store should have been charged under section 150 (2)(a), if at all, rather than under section 150 (1)(a). In referring to the holding in Fraser, the judge concluded that not all "sales" were "distributions" within the meaning of the Code. Evidence showing knowledge of possession of obscene materials would have to be shown and this was not the case here. Consequently, the conviction for possession of obscene matter for purposes of distribution was reversed.⁵⁶ In Regina v. Lee⁵⁷ the British Columbia Supreme Court reversed the conviction of a Chinese owner of a neighborhood grocery store which had occurred under section 150 (2)(a). The Court noted that the man could neither read nor write English and there was no other evidence that he had been informed in any way that the one book in question was obscene. The Court added that while honest ignorance was a defense that willful blindness to the nature of obscene materials would support the inference of knowledge. Such was not the case here.⁵⁸ Finally in Regina v. Dorosz,⁵⁹ the Ontario Court of Appeal reversed the conviction

⁵⁵Regina v. Yip Men (1970) 4 C.C.C. 185.

⁵⁶Ibid., pp. 189-190.

⁵⁷(1971) 3 C.C.C. (2d) 306.

⁵⁸Ibid., pp. 306-308.

⁵⁹(1971) 4 C.C.C. (2d) 203.

of a small grocery store owner under section 150 (1)(a). Referring to Fraser, the Court held that section 150 (1)(a) applied to wholesalers while section 150 (2)(a) applied to retailers who "sell without distributing" and receive the benefit of the defense of no mens rea.⁶⁰

The issue of community standards in determining obscenity, which was raised in Brodie and amplified somewhat in Dominion News in terms of a Canadian community standard, has received considerable judicial attention in courts below the Canadian Supreme Court. Primarily considerations have related to the importance of community standards in making a determination of obscenity and how the determination is to be made as to what is in fact the community standard.

In Regina v. Cameron⁶¹ the majority considered community standards to override the literary or artistic merit of a work if there was an offense against community standards. The opinion indicated that community standards were not to be determined by those who had an intense interest in art but rather from the "middle path of interest and tolerance."⁶² In dissent, however, Justice Laskin noted the difficulty of determining and applying community standards. Since the criminal law in Canada is national in origin, then, he concluded, one must determine and apply a national community standard. Such a standard cannot come from the most sophisticated or resistant to prurient appeal nor from those most susceptible or corruptible.⁶³ Neither will a mathematical

⁶⁰Ibid., p. 209.

⁶¹(1966) 59 D.L.R. (2d) 486.

⁶²Ibid., p. 487.

⁶³Ibid., p. 513; Justice Laskin also noted that "the Hicklin

formula for averaging community sentiment provide the standard. Rather the standard "must come from experience of art" and not from a vacuum. Change and progress must be considered in setting such standards.⁶⁴

Justice Laskin indicated the importance of applying a national standard whether the trial involved a jury or not. Noting that both judges and juries may be limited in the geographical range of exposure, he concluded that:

Expert evidence to assist the Judge or Magistrate or Judge and jury is accordingly indispensable. I think that such evidence would always be necessary to support the case for the Crown as well as to support the defense. . . .⁶⁵

The position of Justice Laskin, particularly relating to the need for expert evidence, has not received much support. In Regina v. Great West News Ltd.,⁶⁶ an appeal was taken to the Manitoba Court of Appeal primarily on the basis that no evidence was admitted at trial in order to make a determination of community standards. The appellate court in upholding the lower court conviction for obscenity held that it was not necessary for the court to hear expert evidence before deciding a case based on community standards. The Court states that such evidence is admissible and perhaps desirable, but it is not essential.⁶⁷

The Manitoba Court of Appeal following the Great West News case was confronted with the use of public opinion surveys⁶⁸ as an aid in

rule is not to be reintroduced through the back door," pp. 513-514.

⁶⁴Ibid., p. 514.

⁶⁵Ibid., p. 515.

⁶⁶(1970) 4 C.C.C. 307.

⁶⁷Ibid., p. 314.

⁶⁸See John M. H. Lamont, "Public Opinion Polls and Survey

determining community standards. In Regina v. Prairie Schooner News⁶⁹ the Court upheld the lower court's refusal to admit the survey as evidence at trial. The Court did indicate, however, that such evidence could be admissible if the survey were properly administered and introduced in evidence by an expert. This was not true of the survey which was under consideration in this case. The Court did note that survey results could be "deceptively simple and frequently misleading" and should be carefully evaluated by the judge before giving credit to the results in making the determination of community standards.⁷⁰

In Regina v. Times Square Cinema⁷¹ the Ontario Court of Appeal had a similar situation as had existed in the Prairie Schooner case only in addition to refusing to admit the survey results, the trial judge had also refused to allow expert testimony relating to the surveys. The appellate court ordered a new trial because expert testimony could not be excluded from the trial, but the Court did not decide the issue of whether survey results could be admitted. The three-judge panel split with one opposing the introduction of survey results, one supporting such evidence as admissible, and one refusing to rule on the question since the new trial could be ordered on the refusal of the trial judge to allow expert testimony.

Evidence in Obscenity Cases," The Criminal Law Quarterly, 15 (February, 1973), pp. 135-159, for a thorough discussion of this issue.

⁶⁹(1970) 1 C.C.C. (2d) 251.

⁷⁰Ibid., p. 266. The Court held the results of polls or surveys as not inadmissible due to the hearsay rule apparently because such evidence falls within the hearsay exception relating to "statements as to state of mind, attitude, or belief"; see Lamont, op. cit., p. 148.

⁷¹(1971) 4 C.C.C. (2d) 229.

Then in Regina v. Pipeline News,⁷² the District Court of Alberta held that results from opinion surveys were admissible as well as expert testimony relating to the community standards based on the surveys. The Court did note, however, that strict procedures must be followed for such evidence to have validity and that if it were shown that professional standards were not followed that such evidence would not be given any weight. Such action would result in the Court's applying what it considered to be the Canadian community standard.⁷³

In Regina v. Goldberg and Reitman⁷⁴ the Ontario Court of Appeal rejected the position that within the university community the standards for determining obscenity should be different than those outside the university. In sustaining a conviction for showing an obscene movie⁷⁵ (an admission fee was charged), the Court held that the standard to be applied was a contemporary Canadian community standard with no exceptions allowed for segments of the society which might be deemed to have different standards from those of the community in general.⁷⁶

⁷²(1971) 5 C.C.C. (2d) 71.

⁷³Ibid., p. 77.

⁷⁴(1971) 4 C.C.C. (2d) 187.

⁷⁵For a discussion of motion pictures and the administrative structure designed to control or regulate obscene motion pictures, see Stan Makuch, "Controlling Obscenity by Administrative Tribunal: A Study of the Ontario Board of Cinema Censors," Osgoode Hall Law Journal, 9 (November, 1971), 387-413.

⁷⁶4 C.C.C. (2d) 187, pp. 190-191.

Finally, in Regina v. Kiverago,⁷⁷ the Ontario Court of Appeal, in the most recently reported obscenity case in Canada, refused to reverse the decision of the trial judge even though he had held that a poster was obscene based on the local community standards. While the appellate court agreed that the trial judge had misdirected himself and was thus in error, the decision was not reversed or remanded because the three appellate judges felt that the poster was obscene when considered in light of the national community standards.⁷⁸ This determination was, of course, made without benefit of expert testimony.

Summary

It would appear that two legally recognized tests for determining obscenity now exist in Canada: the definition in section 150 (8) of the Criminal Code and the definition of the Hicklin rule. The Hicklin test is not being applied in Canada, but it has not been formally rejected since the Canadian Supreme Court has refused to decide the question of exhaustion, i.e., whether the Code definition superseded the Hicklin rule. This condition has resulted in the participating counsel agreeing to have the matter heard under either the Code or Hicklin. Consequently, the Hicklin test has been basically excluded from consideration.⁷⁹ This situation will apparently remain in limbo until either Parliament or the Supreme Court settles the issue.

The definition of obscenity as provided in the Code has not been applied in the same fashion as the Hicklin test had been. Consideration

⁷⁷(1973) 11 C.C.C. (2d) 463.

⁷⁸Ibid., pp. 464-466.

⁷⁹See Charles, op. cit., pp. 286-287.

of obscenity relates to "a dominant characteristic" which produces an "undue exploitation of sex." This, then, requires that "publications" must be examined as a whole considering the purpose of the author and the literary or artistic merit involved. Then a "national community standard" must be applied and only that which goes beyond the "tolerance" of the community may be considered obscene. Thus, material which exploits sex, but does not do so with "undueness" may not be considered obscene. The national community standard, however it is to be computed, is to be representative of the community at large. Neither the "most corruptible" nor the art enthusiast is to provide the standard. Likewise, the evaluation is not centered on youth as had been the case with the Hicklin test. In fact, Justice Richie, who in Brodie supported the position that both Hicklin and the Code definitions were valid, specifically rejected the interpretation and application of the Hicklin rule which accepted youth as its standard of measurement.⁸⁰

The decisions of the Canadian Supreme Court do not affect the defense of public good as described in the Code at section 150 (3) and 150 (4). However, these sections provide a contradiction in terms. A publication may be obscene but it may be permitted to "circulate" if it is for the public good.⁸¹ Much criticism has been leveled against this

⁸⁰32 D.L.R. 507, p. 531. "I do not think that this Court is bound by, nor would I follow, those authorities which have tended to construe the Hicklin definition as meaning that literature available to the community is limited by the standard of what is considered to be suitable reading material for adolescents. . . ."

⁸¹See Schmeiser, op. cit., pp. 248-249.

concept in the Code, perhaps best expressed by the following:

The statutory defense that exempts from prosecution the publication of obscene literature which coincides with the public good is, to say the least, patently anomalous. How can obscenity ever be in the public interest? Obviously something is wrong. Either the public has a perverted sense of what is good for it or the definition of what constitutes obscenity is perverted. Obscenity cannot be for the public good. Literature which serves the public good cannot be obscene. . . .⁸²

The problem of the defense of "public good" is further complicated in that no definition of the term is provided in the Code, i.e., no description of what might be considered to serve the public. Neither the Canadian case law nor the English common law provides any assistance for an understanding of the concept. Realistically, an accused probably cannot support such a defense.⁸³

Finally, it is important to note that the Canadian Bill of Rights has not been significant in the consideration of obscenity. In the three important decisions after the Code revision in 1959, Brodie, Dominion News, and Coles, the Bill of Rights was not even considered.⁸⁴ These cases were, of course, decided shortly after the enactment of the Bill. Later cases also have not involved the Bill of Rights even though many decisions have made reference to the need for freedom of expression.

⁸²Mackay, op. cit., p. 8.

⁸³Ibid., pp. 8-9.

⁸⁴See Brett, op. cit., p. 295, where the author suggests that the failure to consider the Bill of Rights in these important obscenity cases expresses the lack of acceptance of the Bill by the legal profession.

The only obscenity case which attempted to challenge a conviction on the basis of the Bill of Rights was Prairie Schooner in 1970--10 years after the enactment of the Bill. The Court in a very brief paragraph rejected the idea that the Canadian Bill of Rights was even relevant because it was designed to protect freedoms and not obscenity.⁸⁵ No serious consideration was given to the Code to determine if it met the requirements of the Bill of Rights.

Therefore, in the 15 years since the enactment of the Code definition of obscenity, considerable change has occurred in the determination of obscenity in Canada. The Canadian Supreme Court, however, has not been greatly active in the area having heard only four obscenity cases during this time period. Many questions concerning the definition of obscenity and its application are still pending.

⁸⁵₁ C.C.C. (2d) 251, p. 271.

CHAPTER V

UNITED STATES OBSCENITY LAW, 1957-1974

In 1957 a unanimous Federal Supreme Court rendered a brief but historic decision when it ruled for the first time specifically on the subject of the censorship of books. In the case of Butler v. Michigan¹ the Court struck down a state statute which "made it a misdemeanor to sell to the general reading public any obscene book, tending to incite minors to violent or depraved or immoral acts; or tending to corruption of the morals of youth."² The effect of this decision was indirectly a rejection of the Hicklin rule³ in that it refused to use youth as the standard of reference to form the basis of obscenity regulation. Justice Frankfurter, speaking for the Court, noted that "(t)he incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."⁴

The Butler decision marked the beginning of what was to become a difficult and continuing struggle by the United States Supreme Court with the concept of obscenity. The question of legislative control of obscene

¹352 U.S. 380 (1957).

²M. Glen Abernathy, Civil Liberties Under the Constitution (second edition; New York: Dodd, Mead and Company, 1972).

³See "Notes--The Roth Test and its Corollaries," William and Mary Law Review, 8 (Fall, 1966), 123.

⁴352 U.S. 380, p. 383.

materials was considered only in the limited context of the Michigan statute. The general question of legislative control was squarely placed before the Court four months later.

In the combined cases of Roth v. United States and Alberts v. California,⁵ the Court was confronted with both a federal and a state statute regulating obscene materials. Here the Court held that the history of the First Amendment rejected obscenity "as utterly without redeeming social importance,"⁶ and consequently obscenity was not within the guaranteed protections of speech and press.⁷ The Court, however, speaking through Justice Brennan, made it clear that "sex and obscenity are not synonymous." The Court defined obscene material as that "material which deals with sex in a manner appealing to prurient interest," i.e., "material having a tendency to excite lustful thoughts."⁸ The Court specifically noted that the portrayal of sex in art, literature, or scientific works would not be sufficient reason to deny the protections of the First Amendment.⁹

The Supreme Court also considered the question of the validity of the Hicklin rule. After noting the rejection of the Hicklin test by some United States courts, the United States Supreme Court accepted the test which had been substituted in the place of Hicklin, i.e., that the

⁵354 U.S. 476 (1957); hereafter referred to as Roth.

⁶Ibid., p. 484.

⁷Ibid., p. 485.

⁸Ibid., p. 487.

⁹Ibid.

determination must consider "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."¹⁰ The application of the Hicklin rule was thus rejected. The Supreme Court concluded that:

The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedom of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.¹¹

The Court, while limiting the application of obscenity regulation, nevertheless upheld the convictions in both cases being considered. There was not, however, complete agreement among the members of the Court. The majority opinion by Justice Brennan represented five justices with Chief Justice Warren concurring in the judgment. Justice Harlan concurred in the affirmation of the state convention but dissented from the conviction under the federal statute. He viewed the two jurisdictions separately and concluded:

I do not think it follows that state and federal powers in this area are the same, and that just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same.¹²

Justice Douglas, joined by Justice Black, dissented because he considered the standards announced to allow punishment "for thoughts

¹⁰Ibid., p. 489.

¹¹Ibid.

¹²Ibid., p. 503.

provoked, not for overt acts nor anti-social conduct."¹³ Justice Douglas considered such a test as improper under the First Amendment. He also was severely critical of the use of "community standards" to determine what material could be regulated. "Any test that turns on what is offensive to the community standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment."¹⁴

The approach taken in Roth by the Supreme Court was based on the "two-tier theory"¹⁵ which had been developed earlier in freedom of speech cases.¹⁶ According to this theory, only speech which has some social utility or ideological content is eligible for protection under the First Amendment. Since obscenity has "no redeeming social value," it has no constitutional protection. The use of this concept enabled

¹³Ibid., p. 509. Justice Harlan also agreed that one's thoughts should not be the criterion on which the determination of obscenity is made. He stated that "(t)he Federal Government has no business, whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of 'thoughts,'" p. 507.

¹⁴Ibid., p. 512.

¹⁵See Alan Silber, "The Supreme Court and Obscenity: The Ginzburg Test--Restrictions of First Amendment Freedoms Through Loss of Predictability," Rutgers University Law Review, 21 (Fall, 1966), 57; see also, "Casenotes--Constitutional Law--Obscenity: A Quick Look at Stanley v. Georgia," Tulsa Law Journal, 6 (August, 1970), 280-281; hereafter referred to as Tulsa.

¹⁶See Beauharnais v. Illinois, 343 U.S. 250 (1952), p. 266, and Chaplinsky v. New Hampshire, 315 U.S. 586 (1942), pp. 571-572.

the Court to develop a definitional approach¹⁷ to the issue of obscenity rather than using the more conventional "clear and present danger" or "balancing" test.¹⁸ The Court in accepting a definitional approach found obscenity to be an inherent characteristic of the material, as determined by the Court's enumerating standards. Although the Roth rule was criticized for being restrictive of free expression, the new position was followed in several per curiam opinions.¹⁹

In 1959 the Supreme Court unanimously reversed a New York decision which had refused a license for the showing of the motion picture version of the book Lady Chatterley's Lover.²⁰ Although the Justices were divided on the reasons for reversal resulting in six concurring opinions, the majority held that to deny a license on the ground that it portrayed sexual immorality as acceptable was a violation of freedom of expression. The Court speaking through Justice Stewart,

¹⁷See Henry P. Monaghan, "Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod," The Yale Law Journal, 76 (November, 1966), 128; see also John E. Semonche, "Definitional and Contextual Obscenity--The Supreme Court's New and Disturbing Accommodations," UCLA Law Review, 13 (August, 1966), 1175.

¹⁸See Schenck v. United States, 149 U.S. 47 (1919); and Dennis v. United States, 341 U.S. 494 (1951).

¹⁹Sunshine Books Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc. v. Olesen, 355 U.S. 371 (1958); Mounce v. United States, 355 U.S. 180 (1955).

²⁰Kingsley Pictures v. Regents, 360 U.S. 684 (1959).

stated that the guarantee of the First Amendment "is not confined to the expression of ideas that are conventional or shared by a majority."²¹

Kingsley narrowed the concept of obscenity by excluding from consideration materials which do not produce lustful thoughts. This conception of obscenity has been classified as thematic or ideological obscenity and the position taken in this case has not been seriously challenged.²²

Limitations were also placed on obscenity prosecutions by the Supreme Court in Smith v. California.²³ In question was a state law which imposed absolute criminal liability on a bookseller for possession of obscene books. The law did not require an element of scienter, i.e., knowledge of the contents of the books, in order for conviction. The Court invalidated the law because its application would tend to restrict constitutionally protected expression since booksellers would only be willing to make available to the public materials with which they were personally familiar. In addition, the Court noted that the defense of mens rea was "the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."²⁴

²¹Ibid., p. 689.

²²See Emerson, op. cit., p. 475; see also Harry Kalven, Jr., "The Metaphysics of the Law of Obscenity," The Supreme Court Review, Philip Kurland, editor (Chicago: The University of Chicago Press, 1968), pp. 5-7.

²³361 U.S. 147 (1959).

²⁴Ibid., p. 150.

As with Kingsley, the Justices were divided on the reasons for invalidating the state law. Three concurring opinions were written with only Justice Harlan writing a concurring and dissenting opinion. Justice Black protested against the establishment of censorship which he classified as "the enemy of freedom and progress."²⁵ Justice Frankfurter in his concurring opinion considered the need for making a determination of community standards and he concluded that:

The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity . . . to enlighten the judgment of the tribunal regarding the prevailing literary and moral community standards.²⁶

Justice Frankfurter added, however, that the ultimate determination of obscenity must be made by the judiciary and not the experts.²⁷ Justice Black concluded that this view of community standards as well as similar views which had been previously expressed in Kingsley referred to local community standards. Such a concept was rejected by Justice Black because it would require the Supreme Court to undertake an inappropriate role, i.e., a sort of super censorship board for the United States.²⁸

In addition to the case described above, the United States Supreme Court developed a series of procedural safeguards in the area of distributor prosecution. Through a number of cases the Court also made it clear that the determination of obscenity was a matter for the judiciary

²⁵Ibid., p. 160.

²⁶Ibid., pp. 164-165.

²⁷Ibid., p. 165.

²⁸Ibid., p. 157.

and not for the law enforcement officials or movie censors.²⁹ The basic position formulated held that only through strict enforcement of procedural standards would protected material be freely available. In order to provide the fullest constitutional immunity for protected material, the Court recognized the necessity that movie distributors, "publishers, authors, and booksellers have no fear of stocking the controversial."³⁰

In 1962 the Supreme Court in considering the censorship action of the United States Post Office added to the Roth test the concept of "patent offensiveness." In Manual Enterprises v. Day,³¹ the Court, speaking through Justice Harlan, reversed the decision of the Post Office to refuse mailing rights to magazines containing photographs of nude males. Even though the magazines were admittedly designed to appeal to homosexuals, the Court rejected the charge of obscenity for the following reason:

For we find lacking in these magazines an element which, no less than "prurient interest," is essential to a valid determination of obscenity. . . . These magazines cannot be so offensive on their face as to affront current community standards of decency--a quality that we shall hereafter refer to as "patent offensiveness" or "indecenty." Lacking that quality, the magazine cannot be deemed legally "obscene," . . .³²

²⁹See, e.g., Bantam Books v. Sullivan, 372 U.S. 58 (1963); Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1967); Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); see also, "Notes--Procedural Problems in the Seizure of Obscenity," Albany Law Review, 37, No. 1 (1973), 203-227.

³⁰Silber, op. cit., pp. 57-58.

³¹370 U.S. 478 (1962).

³²Ibid., p. 482.

In addition, Justice Harlan concluded that the relevant community standard which must be applied under federal legislation "is a national standard of decency."³³

The difficulty in applying the Roth concepts became more apparent in the 1964 decision of Jacobellis v. Ohio³⁴ which produced several varied opinions. In addition to a basic recapitulation of the Roth standards, the Court expanded or clarified its reference to "community standards" in Roth. The Court, speaking through Justice Brennan, described community standards to mean "national community standards."³⁵ The Court opinion, however, represented only Justice Goldberg and Justice Brennan with Justice White concurring in the judgment and even Justice Goldberg wrote a separate concurring opinion. Justice Brennan rejected the idea of local community standards as an inadequate First Amendment safeguard. He also affirmed the position of Justice Harlan that obscenity cases may involve expression protected under the First Amendment,³⁶ and consequently acknowledged that the Court could not avoid "an independent judgment on the facts of the case as to whether the material involved is constitutionally protected."³⁷

³³Ibid., p. 488.

³⁴378 U.S. 184 (1964).

³⁵Ibid., p. 195.

³⁶See Manual Enterprises, 370 U.S. 478, p. 488; or Roth, 354 U.S. 476, pp. 497-498.

³⁷378 U.S. 184, p. 190.

Justices Black and Douglas concurred in the result but stressed their objection to censorship under the First Amendment. Justice Stewart in his concurring opinion concluded that under the Roth test that criminal liability was limited to "hard-core pornography." He then added:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.³⁸

Chief Justice Warren, joined by Justice Clark, dissented, particularly on the question of "national community standards." The Chief Justice believed the Roth test referred to local community standards and he added that there is "no provable 'national standard.'"³⁹ Justice Harlan in a separate dissenting opinion restated his Roth position that "the States are constitutionally permitted greater latitude in determining what is bannable on the score of obscenity than is so with the Federal Government."⁴⁰

On March 21, 1966, the United States Supreme Court rendered three decisions on obscenity. This trilogy--A Book Named "John Cleland's

³⁸Ibid., p. 197.

³⁹Ibid., pp. 200-201. See "Comment--The Scope of Supreme Court Review in Obscenity Cases," Duke Law Journal, 1965 (Summer, 1965), 597-607, for a discussion of the "Warren--Clark View" and the "Brennan--Goldberg View" of community standards; see also, Richard H. Seaton, "Obscenity: The Search for a Standard," University of Kansas Law Review, 13 (October, 1964), 117-124.

⁴⁰378 U.S. 184, p. 203.

Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,⁴¹
Ginzburg v. United States,⁴² and Mishkin v. New York,⁴³ supplemented the
 traditional-definitional approach with a new concept--variable
 obscenity.⁴⁴ This concept allows for materials which would not normally
 be considered to be obscene to be treated as such because of the "cir-
 cumstances of production, sale and publicity."⁴⁵

The decision rendered in Ginzburg clearly exposes the new concept
 of variable obscenity. Prior to this decision, the Court had only con-
 sidered the materials in determining obscenity. Here, however, Justice
 Brennan viewed the publications (Eros, The Housewife's Handbook of
Selective Promiscuity, and Liaison) "against a background of commercial
 exploitation of erotica solely for the value of their prurient appeal."⁴⁶
 The advertising campaign which promised sexual candor became the element
 of importance and that which proved the "appeal to prurient interests."
 As a result, the Court was able to circumvent the social-value test of

⁴¹383 U.S. 413 (1966); hereafter referred to as Memoirs.

⁴²383 U.S. 463 (1966).

⁴³383 U.S. 502 (1966).

⁴⁴Variable obscenity is also identified as "contextual obscen-
 ity" and "obscenity per quod." For a discussion of the concept, see
 Tulsa, loc. cit.; Monaghan, loc. cit.; Semonche, op. cit., p. 1173.

⁴⁵Monaghan, loc. cit.

⁴⁶383 U.S. 463, p. 466.

Roth and Jacobellis by noting that the circumstances of publication could cause a reader to look for titillation rather than saving intellectual value. Under these circumstances, the material had no social value, even though taken by themselves the publications were not obscene. This introduced a new element identified by the Court as "pandering," which is defined as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."⁴⁷ This Ginzburg test would appear to be a basic acceptance of Chief Justice Warren's concurring opinion in Roth in which he stated: "It is not the book that is on trial; it is the person. The conduct of the defendant is the central issue, not the obscenity of the book or the picture."⁴⁸ Justice Brennan did note, however, that the narrow holding of Ginzburg may be useful in determining the nature of material in close cases. The "pandering" concept would allow the Court to attack those who exploit sex for profit while at the same time to provide protection for material dealing with sex under other circumstances.⁴⁹ It is possible, however, that the Ginzburg rule may have been effectively limited to its facts,⁵⁰ an assumption supported by the fact that no

⁴⁷See 354 U.S. 476, pp. 495-496 (Chief Justice Warren concurring in Roth); also quoted by Justice Brennan in Ginzburg, 383 U.S. 463, p. 467.

⁴⁸354 U.S. 476, p. 495.

⁴⁹See Silber, op. cit., pp. 60-62.

⁵⁰See "Recent Decisions--Obscenity--Obscene Publications--Pandering," Case Western Law Review, 19 (April, 1968), 748; Alexander M. Bickel, The Supreme Court and the Idea of Progress (New York: Harper & Row Publishers, Inc., 1970), p. 54; see also Redrup v. New York, 386 U.S. (1967), infra, p. 94.

subsequent obscenity decision has been decided on the basis of the "pandering" test.

The decision in Memoirs was to a large extent a transitional one. Basically, the formula outlined here combined the Roth definition with subsequent decisions. The Court stated that the Roth rule as it developed in subsequent cases required that:

. . . three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.⁵¹

In addition, the Court considered whether the lack of social value was an independent element of obscenity and concluded that "(e)ach of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness."⁵² The Court also referred to the "pandering" concept applied in Ginzburg, but held that the material in question did not fall into either the Roth or Ginzburg categories for proscription and, therefore, reversed the state court's decision to ban the book.

The concept of variable obscenity was applied in still another manner in Mishkin. The Court in upholding three convictions for "hard core pornography"⁵³ focused attention on the intended audience of the

⁵¹ 383 U.S. 413, p. 418.

⁵² Ibid., p. 419.

⁵³ For a discussion of "hard core pornography" see, for example, C. Peter Magrath, "The Obscenity Cases: The Grapes of Roth," The Supreme

material which it concluded was a select group of sexual deviates.

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement . . . is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.⁵⁴

This rationale had been previously used by the United States District Court in United States v. 31 Photographs.⁵⁵ The District Court held that photographs which were being shipped to the Kinsey Institute at the University of Indiana, had been improperly confiscated by the customs inspector because they did not appeal to the prurient interests of the group for whom they were intended. This select and restricted group presumably would not be improperly affected by the photographs which under other circumstances would most likely have been considered obscene.

The development of variable obscenity made it possible for the Supreme Court to accept a scheme for classifying materials in terms of their obscenity differently for minors and adults. In 1968 in the decision of Ginsberg v. New York,⁵⁶ the Court held that some materials may be obscene for minors which would not be obscene for adults.⁵⁷ Therefore, a statute prohibiting the sale of material defined as obscene to minors under the age of 17 was upheld as a reasonable regulation regardless of whether the material would be obscene to adults. The Court,

Court Review, Philip Kurland, editor (Chicago: The University of Chicago Press, 1966), pp. 69-77; see also Lockhart and McClure, op. cit., pp. 296-303.

⁵⁴383 U.S. 502, p. 508.

⁵⁵156 F. Supp. 350 (1957).

⁵⁶390 U.S. 629.

⁵⁷See "Casenotes--Constitutional Law--Minors and Variable

however, did not examine the magazines in question to determine their obscenity with regard to minors. Because the defense counsel did not raise the obscenity question, the majority opinion considered only the validity of such legislation to restrict material to minors. The failure to determine the obscenity of the magazines was severely attacked by Justice Fortas in dissent.⁵⁸

Prior to 1967, the United States Supreme Court had consistently held that obscenity did not receive the protection of the First Amendment's coverage of speech and press. The Court, however, introduced a new element into the evolution of the law of obscenity with its decision in Redrup v. New York.⁵⁹ In a brief per curiam opinion, in which three convictions were reversed, the Court held that erotica in public commerce is protected by the First and Fourteenth Amendments provided that it is not "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."⁶⁰ The Court also noted that there was no evidence of the sort of "pandering" which had been present in Ginzburg.⁶¹ Thus,

obscenity," Loyola Law Review, 15, No. 1 (1968-69), 103; see also Samuel Krislov, "From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation," The Supreme Court Review, Philip Kurland, editor (Chicago: The University of Chicago Press, 1968), pp. 152-197.

⁵⁸390 U.S. 629, pp. 672-673.

⁵⁹386 U.S. 767 (1967).

⁶⁰Ibid., p. 769.

⁶¹Ibid.; Cf. Milky Way Products, Inc. v. Leary, 395 F. Supp. 288, p. 294, aff'd. per curiam, sub nom. New York Feed Company v. Leary, 397 U.S. 98 (1970), in which the lower federal court held that the Memoirs formula is not to be considered to have a fourth element--pandering.

Redrup weakened the Roth rule by creating a conditional privilege to sell obscene materials.⁶² This position was reaffirmed by the Court in another per curiam opinion in Books, Inc. v. United States.⁶³

The Supreme Court continued to apply the Redrup philosophy in Potomac News Co. v. United States.⁶⁴ In question were magazines which displayed photographs of nude males which the lower court had determined were primarily designed for homosexuals. Since the appeal was primarily to a deviant group the Supreme Court could have affirmed its Mishkin ruling but instead chose to reverse the lower court decision only citing Redrup as controlling.

The impact of Redrup was also evident in a second decision, Bloss v. Dykema.⁶⁵ The Supreme Court reversed the decision of the Michigan Court of Appeals which had found magazines containing photographs of nude females to be obscene under Roth without any consideration of Redrup. The circumstances in selling the materials in question probably aided the Court in its decision. The materials were sold in a store restricted to persons over the age of 18. The type of business was also quite evident

⁶²See Tulsa, op. cit., pp. 277-282. It is important to note, however, that the Court in Redrup found that the materials in question were not obscene. See "Comment--Obscenity Vel None!" Law and the Social Order, 1972, No. 2 (1972), 300-312.

⁶³388 U.S. 449 (1967). It should be noted that a year later in Ginzburg, Justice Brennan, speaking for the majority, reiterated the Roth position that "(o)bscenity is not within the area of protected speech or press," 390 U.S. 629, p. 635, while Justice Fortas would have reversed the conviction on the basis of Redrup and Ginzburg, 390 U.S. 629, p. 675.

⁶⁴389 U.S. 47 (1967).

⁶⁵398 U.S. 278 (1970).

thus forewarning persons wishing to avoid such material.

The per curiam decisions by the Supreme Court in both Potomac and Bloss were based solely upon the philosophy outlined in Redrup. The evidence in both cases suggested that there was no "pandering," no invasion of privacy, and no need to protect juveniles. The Court, therefore, found no reason to suppress the materials involved.

The new judicial attitude seemed to continue to its next logical step in Stanley v. Georgia.⁶⁶ The Court in a unanimous decision (although only six of the Justices agreed with the basic reasoning of the Court opinion), speaking through Justice Marshall, made it clear that neither Roth nor any other decision could go so far as to prohibit all constitutional protections. This conclusion was based on two fundamental rights identified by the Court as relating to the question of obscenity. The first is the right to receive information and ideas.⁶⁷ The second is the right to be free from "unwarranted governmental intrusion into one's privacy."⁶⁸ Justice Marshall relied on the dissent of Justice Brandeis in Olmstead v. United States⁶⁹ and on the majority opinion of Justice Douglas in Griswold v. Connecticut⁷⁰ to develop these rights.

This case developed following a search of the house of one Robert E. Stanley in Atlanta, Georgia. The search, under the authority of a warrant issued for alleged bookmaking activities, was conducted by both federal and state agents. Little, if any, evidence was found relating to

⁶⁶394 U.S. 557 (1969).

⁶⁷Ibid., pp. 563-564.

⁶⁸Ibid., p. 564.

⁶⁹277 U.S. 438 (1928), p. 478.

⁷⁰381 U.S. 479 (1965).

bookmaking, but the agents discovered three reels of eight millimeter film which they viewed (for some 50 minutes) using the appellant's projector and screen. The films were seized by the state agents and the appellant was charged with knowingly possessing obscene materials in violation of Georgia law. Subsequently, he received a jury trial and was convicted. His conviction was unanimously affirmed by the Georgia Supreme Court,⁷¹ holding that under a valid search warrant any unlawful item could be seized and that criminal intent (to sell, expose, or circulate) was not necessary, only possession, for indictment.⁷²

Justice Marshall, speaking for himself, the Chief Justice, and Justices Harlan, Douglas, and Fortas, rejected the invasion of personal liberties guaranteed by the First and Fourteenth Amendments due to the mere classification of the films in question as "obscene." Regulation of obscenity does not justify an interference with the privacy of one's own home.⁷³ "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."⁷⁴ Justice Marshall continued, noting that our constitutional heritage rejected any attempt by government to control men's minds--an individual's private thoughts. "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."⁷⁵ The Court reversed

⁷¹Stanley v. State, 161 S.E. 2d 309 (1968).

⁷²Ibid., pp. 310-311.

⁷³394 U.S. 557, p. 565.

⁷⁴Ibid.

⁷⁵Ibid., p. 568.

the Georgia decision and remanded the case for further proceedings in conformity with this decision.

Justice Black concurred with the opinion of the Court noting that "mere possession of reading matter or movie films whether labeled obscene or not, cannot be made a crime by a State without violating the First Amendment" ⁷⁶ Justice Stewart, joined by Justices Brennan and White, also wrote a concurring opinion in which he emphasized the requirements under the Fourth Amendment for searches and seizures. Justice Stewart believed that the violation of the Fourth and Fourteenth Amendments as a result of the illegal seizure of the films in question due to an improper warrant (Mapp v. Ohio) ⁷⁷ caused the evidence to be inadmissible at the appellant's trial and the judgment should be reversed accordingly.

Stanley v. Georgia by no means amounted to the termination of Roth. The Court explicitly distinguished the two by noting the public distribution involved in Roth as compared to the "mere private possession" in Stanley. The Court stated clearly that "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." ⁷⁸

One additional point covered by this decision should be examined. The Court noted that Georgia raised the issue of deviant sexual behavior or sexual crimes which could result from exposure to obscenity. The

⁷⁶Ibid., pp. 568-569.

⁷⁷367 U.S. 643 (1961).

⁷⁸394 U.S. 557, p. 568.

Court suggested that this issue may have been raised because of the recognition by the State of its insecure position constitutionally of attempting to regulate one's private thoughts. The Court asserted that there was apparently little empirical evidence to support a relationship between obscenity and sexual violence.⁷⁹

This long standing approach to obscenity was rather superficially dismissed by the United States Supreme Court. The right to possess obscene materials even in the home, of course, is not absolute. The Court referred to the need for controlling antisocial behavior and suggested that the appropriate means would be through education and through punishment for law violations. The Court added, however, that current knowledge would not justify the State's prohibition of obscene materials in one's home.⁸⁰

The impact of the new Supreme Court philosophy seemed to vary from federal to state courts. The lower federal courts tended to expand the new approach while the state courts tended to ignore the new attitude and focused instead on the Roth test.

A three-judge federal district court in Stein v. Batchelor⁸¹ unanimously declared a Texas obscenity statute to be unconstitutional stating that the Roth rule had been "significantly modified" by Stanley so that in non-public circumstances obscenity does receive the protection of

⁷⁹Ibid., p. 566.

⁸⁰Ibid., pp. 566-567.

⁸¹300 F. Supp. 602 (1969), vacated and remanded on procedural grounds, sub nom. Dyson v. Stein, 401 U.S. 200 (1971).

the First Amendment. In fact, the Court indicated in a footnote that Stanley could be read "as supporting the proposition that obscenity is fully protected by the First Amendment . . ."⁸² The Court added, however, that the First Amendment did not grant absolute immunity from regulation. "The State may regulate even non-obscene expression if there is a legitimate state interest."⁸³ The Stanley majority, however, failed to recognize a legitimate state interest for regulating the private possession of obscenity.

A second decision, and perhaps a more important one in terms of its potential far-reaching impact, was Karalexix v. Byrne.⁸⁴ This case, also a ruling from a three-judge federal district court, used Stanley in a broader sense than private possession. Circuit Court Judge Aldrich, writing for the Court in a two to one decision, overturned a Massachusetts trial court decision which prohibited the public showing of a motion picture, "I Am Curious Yellow," on the ground that it was obscene. Judge Aldrich assumed that the film was obscene but he could have followed another federal court decision which had determined the film in question not to be obscene.⁸⁵

Judge Aldrich then began to consider the extent to which the Stanley ruling could be applied. He noted that the United States Supreme

⁸²Ibid., p. 606.

⁸³Ibid.

⁸⁴306 F. Supp. 1363 (1969), vacated and remanded on procedural grounds, 401 U.S. 216 (1971).

⁸⁵See United States v. A Motion Picture Film, 404 F. 2d 196 (1968).

Court had stated that the Stanley decision did not impair Roth. Judge Aldrich, however, disputed that point, and he wrote:

Yet with due respect, Roth cannot remain intact, for the Court there had announced that obscenity is not within the area of constitutionally protected speech or press . . . whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was "devoid of any ideological content" was irrelevant. . . . We think it probable that Roth remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned.⁸⁶

Judge Aldrich also questioned the equality of the Stanley decision and concluded that: "If a rich Stanley can view a film, or read a book in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone."⁸⁷

This case further explained Stanley as granting a right which is not absolutely confined to one's private home. Undoubtedly the scheme of presenting this motion picture was very important. The advertising had not been handled in a "pandering" fashion, but the public had been informed that the picture might be offensive. The theater had also established a strict policing system in order to ensure that no children would be admitted. It was in this respect that the Court in the statement reported above used the term "restricted distribution, adequately controlled."

Not all courts, however, took this broad view of Stanley. In Florida v. Reece,⁸⁸ the state supreme court held, in spite of Stanley,

⁸⁶306 F. Supp. 1363, p. 1366.

⁸⁷Ibid., p. 1367.

⁸⁸222 So. 2d 732 (1969).

that prosecution for possessing obscene materials "could be maintained because it was possible that possession had not been in the home, but somewhere else."⁸⁹ The appellate court relied heavily on Roth and other cases prior to Stanley. It did not rule out the possibility of a defense based on the Stanley decision, but it viewed that decision as relating only to private possession in the home.

The United States Supreme Court was given an opportunity to evaluate the interpretation and application of the Stanley decision by the lower courts in United States v. 37 Photographs.⁹⁰ This case was appealed to the Supreme Court from a three-judge federal district court which had blocked the enforcement of the federal pornography embargo under what it called "the narrowest construction of Stanley." The lower court reasoned that the federal law "reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected."⁹¹ The lower court also noted that the federal statute did not meet the procedural requirements of Freedman v. Maryland⁹² for a "prompt judicial review." The Supreme Court, however, reversed the lower court stating that the statute could be construed as requiring administrative and judicial action within specified time limits so that the constitutional issue presented by Freedman would be avoided. The Court also held that the power of Congress to prohibit obscene materials from the channels

⁸⁹Ibid., p. 736.

⁹⁰402 U.S. 363 (1971).

⁹¹309 F. Supp. 36 (1970), p. 37.

⁹²380 U.S. 51 (1965).

of commerce was unimpaired by the Stanley ruling.

That the private user under Stanley may not be prosecuted for possession in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home.⁹³

The Court, speaking through Justice White, noted that it was not the normal practice to rewrite statutes. Nevertheless, White then proceeded to spell out the specific procedural requirements which must be considered as part of the statute. By contrast, the Court had refused to rewrite a statute relating to postal censorship in Blount v. Rizzi⁹⁴ earlier in the same judicial term. Justice Brennan, speaking for eight members of the Court in Rizzi, held that the statute in question violated the First Amendment since it did not provide for a prompt judicial determination of obscenity.

The Supreme Court was again confronted with a lower court decision declaring a federal statute unconstitutional because of Stanley in United States v. Reidel.⁹⁵ The statute prohibited the use of the mails for delivering obscene materials which the lower court felt interfered with the right of possession for private use outlined in Stanley. The Supreme Court reversed the lower court action stating that Roth was the controlling test and that Stanley in no way altered the application of Roth.

Justice Black, joined by Justice Douglas, wrote a strong dissenting opinion applying to both Reidel and 37 Photographs which were decided the

⁹³402 U.S. 363, p. 376.

⁹⁴400 U.S. 410 (1971).

⁹⁵402 U.S. 351 (1971).

same day. Justice Black, in the last of many dissents in obscenity cases during his tenure on the Court, criticized the majority opinions because no plausible reason had been offered to distinguish private possession from importation for private use. He also stated his disappointment in the Court's revival of Roth because of the extreme difficulty for both judges and laymen to decide what is obscene. Justice Black then evaluated Stanley in light of the new judicial rulings:

. . . I can only conclude that at least four members of the Court would overrule Stanley. Or perhaps in the future that case will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.⁹⁶

Justice Black then continued with his assessment of the Court's actions and concluded his dissent with the following:

I do not understand why the plurality feels so free to abandon previous precedent protecting the cherished freedoms of press and speech. I cannot, of course, believe it is bowing to popular passions and what it perceives to be the temper of the times. As I have said before, "Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political administration into temporary power. . . ." In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten. I hope, however, "that in calmer times when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society. . . ." ⁹⁷

The three decisions discussed above mark what has been called the "emergence of the Burger Court"⁹⁸ in the area of obscenity. The Burger

⁹⁶402 U.S. 363, p. 382.

⁹⁷Ibid., p. 388.

⁹⁸See Philip B. Kurland, "1970 Term: Notes on the Emergence of the Burger Court," The Supreme Court Review, Philip Kurland, editor (Chicago: The University of Chicago Press, 1971), p. 290.

Court's philosophy was not yet consistent as evidenced by the decisions in Rizzi and 37 Photographs. Chief Justice Burger also found himself in a minority position in several cases prior to June, 1973. The dissenting opinions by the Chief Justice, however, provided clues as to what would come when a firm majority could be formed. Two cases will serve as examples for identifying the attitude of the Chief Justice. First, in Cain v. Kentucky⁹⁹ the Court in a per curiam opinion reversed on the basis of Redrup the state decision banning a motion picture. Chief Justice Burger, in dissent, stated the following:

In my view we should not inflexibly deny to each of the States the power to adopt and enforce its own standards as to obscenity and pornographic materials; States ought to be free to deal with varying conditions and problems in this area . . .¹⁰⁰

Second, in Walker v. Ohio¹⁰¹ the Chief Justice again dissented against the reversal by the Court of an Ohio determination of obscenity. He stated that:

I find no justification, constitutional or otherwise, for this Court's assuming the role of a supreme and unreasonable board of censorship for the 50 States, subjectively judging each piece of material brought before it without regard to the findings or conclusions of other courts, state or federal. That is not one of the purposes for which this Court was established.¹⁰²

Another hint concerning the Burger Court's approach to obscenity appeared in a per curiam reversal of a state court's conviction for publishing an obscene poem. In Kois v. Wisconsin¹⁰³ seven members of

⁹⁹397 U.S. 319 (1970).

¹⁰⁰Ibid.

¹⁰¹398 U.S. 434 (1970).

¹⁰²Ibid.

¹⁰³33 L Ed 2d 312 (1972).

the Court held that a poem describing sexual intercourse was an attempt at serious art and was not designed primarily to appeal to prurient interests. The Court emphasized the statement from Roth that "sex and obscenity are not synonymous," and, therefore, concluded that the poem was constitutionally protected.

On June 21, 1973 the United States Supreme Court rendered five decisions on obscenity. Each case was decided by a five to four majority with Chief Justice Burger writing the opinion in which Justices White, Blackmun, Powell, and Rehnquist joined. In each case also, Justice Brennan wrote a dissenting opinion in which Justices Stewart and Marshall joined, and Justice Douglas wrote a separate dissenting opinion. These decisions represented the first consistency in the new Burger Court attitudes toward obscenity.

The first case, and perhaps the most important one in terms of outlining the new approach, was Miller v. California.¹⁰⁴ The defendant was convicted for mailing unsolicited brochures which contained explicit depiction of sexual activities. The case was tried on the basis of the Memoirs test with "community standards" identified as those of the state. The Supreme Court vacated and remanded the case for further proceedings in order that it might conform to the new concepts announced by the Court.

The majority concluded that the Memoirs test moved away from the Roth rule. Since the Court considered Roth to be controlling, the Memoirs test was abandoned. Thus, Miller specifically rejected the

¹⁰⁴37 L Ed 2d 419.

"utterly without redeeming social value" test of Memoirs. In place of the old test, the Burger Court substituted a new "seriousness" test. "At a minimum, prurient, patently offensive depiction of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection."¹⁰⁵ In addition, the Court held that the determination of "seriousness" may be based upon state standards. "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact."¹⁰⁶

The Court in attempting to refute charges by the minority that the new decisions would result in suppression of free expression noted that state statutes must be "carefully limited" to "works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed."¹⁰⁷ Because of this restriction the Court concluded that:

. . . no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law . . .¹⁰⁸

Subsequently the Court described the protection available under the Constitution for freedom of expression, noting that:

The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority

¹⁰⁵Ibid., pp. 431-432.

¹⁰⁶Ibid., p. 435.

¹⁰⁷Ibid., p. 430.

¹⁰⁸Ibid., p. 432.

of the people approve of the ideas these works represent.¹⁰⁹

The Court, however, distinguished the presentation of "hard core" pornography for its own sake and for profit from the serious discussion of ideas. Nevertheless, the Court concluded that "(s)ex and nudity may not be exploited without limit . . ."¹¹⁰ Consequently, the Court saw no threat from governmental censorship to free expression due to the regulation of commercial exploitation of sex. Such fears, the Court continued, are produced from the incorrect assumption "that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material."¹¹¹

Justice Douglas in his dissent attacked the ex post facto quality of the new decisions and contended that at least a civil proceeding to determine obscenity must precede a criminal prosecution. He concluded that, "To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process."¹¹²

In the second decision, Paris Adult Theatre v. Slaton,¹¹³ the Court in considering the question of "adult theaters" held that no constitutional immunity was acquired because obscene films were exhibited for "consenting adults only."¹¹⁴ The Court also rejected the

¹⁰⁹Ibid., p. 437. This acknowledgment of constitutional protection for unconventional ideas reaffirmed the position taken by the Court in Kingsley Pictures v. Regents, 360 U.S. 684; see supra, p. 84.

¹¹⁰Ibid., p. 431.

¹¹¹Ibid., p. 438.

¹¹²Ibid., pp. 442-443. This type of concern was one also frequently expressed by Justice Black. See, e.g., his dissent in Ginzburg, 383 U.S. 463, pp. 480-481.

¹¹³37 L Ed 2d 446.

¹¹⁴Ibid., p. 456.

idea that the only legitimate state interest in regulating obscene materials was in protecting juveniles and unconsenting adults. The Court identified other interests of the public including equality of life, the total community environment, the quality of commerce, and perhaps public safety. In regard to the latter interest, the Court referred to the minority report of the President's Commission on Obscenity which argued that a connection existed between crime and obscenity--a conclusion rejected by the majority of the Commission.¹¹⁵ The Court then evaluated the state's response to considerations of public safety by noting that:

Although there is no conclusive proof of a connection between antisocial behavior and obscene materials, the legislature . . . could quite reasonably determine that such a connection does or might exist . . . a legislature could legitimately act on such a conclusion . . .¹¹⁶

Finally, the Court considered the idea of a right of privacy associated with obscene materials. It concluded that no blanket protection could be found in the First Amendment as evidenced by the narrow ruling in Stanley which was confined to the privacy of the home. The Court stated further that "we have declined to equate the privacy of the home relied on in Stanley with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes."¹¹⁷

Justice Brennan attached his major dissenting opinion to this case charging that the actions of the Court served to increase what he termed "institutional stress" because of a lack of guidelines for lower

¹¹⁵Ibid., p. 457.

¹¹⁶Ibid., p. 459.

¹¹⁷Ibid., p. 462.

federal and state courts. He acknowledged that the new test developed in Miller may have only academic differences from the Memoirs test. Justice Brennan, however, expressed concern that the rejection of the "utterly without redeeming social value" test might result in jeopardizing the analytical foundation for the whole scheme, since Roth and its subsequent interpretations were based upon that assumption. Consequently, the ultimate effect, whether intended or not, might well be that "of permitting far more sweeping suppression of sexually oriented expression, including expression that would most surely be held protected under our current foundation."¹¹⁸

The third case, Kaplan v. California,¹¹⁹ added that at trial there was no need for the prosecution to introduce expert testimony once the materials alleged to be obscene were placed in evidence. The Court noted, however, that the defense should be free to introduce expert testimony.

The fourth case, United States v. 12 200-Ft. Reels of Film,¹²⁰ announced that the standards outlined in Miller were equally applicable to consideration of federal legislation. The Court also stated that Congress could constitutionally prohibit the importation of obscene materials even if such materials were designed exclusively for private,

¹¹⁸Ibid., p. 480.

¹¹⁹37 L Ed 2d 492. This decision affirms the position of Justice Frankfurter in Smith v. California, 361 U.S. 147, in regard to expert testimony; see supra, p. 86.

¹²⁰37 L Ed 2d 500.

personal use and possession. And in the fifth and final case, United States v. Orito,¹²¹ the Court held that the right to possess obscene materials in the privacy of one's home did not create a correlative right to transport such material.

Four days later on June 25, 1973, two more decisions were rendered on obscenity by the Supreme Court. In Heller v. New York,¹²² the Court, with the same personnel alignment as in the five earlier cases, held that the seizure of a film without an adversary hearing was constitutionally acceptable provided that it was for the bona fide purpose of preserving evidence, that a proper warrant had been issued, and that subsequently a prompt judicial hearing was held. In Roaden v. Kentucky¹²³ the Court unanimously reversed a conviction for showing an obscene film. Chief Justice Burger, speaking for the same five members, held that the seizure of the film without a warrant was unconstitutional and, therefore, the conviction must be reversed because the improperly acquired film was introduced into evidence. The remaining four Justices concurred in the reversal on the ground that the obscenity statute in question was unconstitutional.

The reaction of state courts to the new rulings was mixed. In Art Theater Guild v. Tennessee,¹²⁴ for example, the state supreme court

¹²¹37 L Ed 2d 513.

¹²²37 L Ed 2d 745.

¹²³37 L Ed 2d 757.

¹²⁴Art Theater Guild v. Tennessee, ____ Tenn. ____, February 18, 1974.

unanimously invalidated the state's obscenity law because it failed to specify the sexual conduct to be proscribed. As a result, a previous state obscenity conviction was reversed by the Tennessee Supreme Court.¹²⁵ These two actions came as a direct result of the Miller decisions.

In contrast, the Georgia Supreme Court in Jenkins v. State¹²⁶ sustained an obscenity conviction for showing the motion picture "Carnal Knowledge." Although this decision was rendered after Miller, the Georgia courts applied a statute which was identified as based on Roth and Memoirs. The state supreme court considered the statute more restrictive of prosecution than the new Miller test. This decision provided the United States Supreme Court with the opportunity to rule further on the new approach to obscenity.

On June 24, 1974, one year after Miller, the Supreme Court announced two more obscenity decisions. The same personnel alignment which existed in Miller continued in both cases with Justice Rehnquist speaking for the Court. In the first decision, Jenkins v. Georgia,¹²⁷ the Court reversed the state conviction concluding that "Carnal Knowledge" was not obscene under the standards announced in Miller. The Court emphasized that although the determination of obscenity was essentially a question of fact, "it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is

¹²⁵Knoxville Bookmart v. Tennessee, ____ Tenn. ____, June 5, 1974.

¹²⁶26 Ga. L. Rptr. 726 (1973).

¹²⁷42 LW 5055 (1974).

'patently offensive.'"¹²⁸ The Court also restated its Miller position that prosecution could occur only when patently offensive "hard core sexual conduct" was involved. This requirement was not met by occasional scenes of nudity which occurred in "Carnal Knowledge."

In the second decision, Hamling v. United States,¹²⁹ the Court sustained a conviction for mailing an obscene advertising brochure. This case did not, however, involve a pandering conviction as in Ginzburg because the brochure contained 15 pictures which were determined to be obscene. This decision made more explicit the Miller position concerning community standards. A state may establish a "statewide" standard, but this is not a constitutional requirement. A state may instead choose to define obscenity in terms of "contemporary community standards." Under this latter description, the Court concluded that:

A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.¹³⁰

Additionally, Justice Rehnquist stated that a federal obscenity case may be tried on local community standards. This conclusion was based on the holding in United States v. 12 200-Ft. Reels of Film¹³¹ which made the Miller standards applicable at the federal level.

Justice Brennan sharply criticized the majority for continuing

¹²⁸Ibid., p. 5057.

¹²⁹42 LW 5035 (1974).

¹³⁰Ibid., p. 5040.

¹³¹37 L Ed 2d 500 (1973).

to apply the Miller concepts. He charged that protected expression was placed in jeopardy because of the uncertainty associated with the new standards. Justice Brennan again stated his belief that under the new approach materials cannot be identified as obscene with any certainty until at least five members of the Court have so ruled. Consequently, he maintained his earlier position that where there was no distribution of obscene materials to juveniles or obtrusive exposure to unwilling adults that the First and Fourteenth Amendments prohibited the States and Federal Government from suppressing sexually oriented materials because of their alleged obscene contents.¹³²

Summary

A new approach for the determination of obscenity exists in the United States. This at least means an end to the per curiam reversals which developed with Redrup. The Chief Justice expressed strong disapproval of this method. The new approach by the Burger Court is in reality a modified version of the old Roth test and its subsequent interpretations (Roth-Memoirs). The Miller test, like Roth, takes a definitional approach for the determination of obscenity. It may well be that the assessment by Justice Brennan, that the differences between the two are only academic, is correct.¹³³ Chief Justice Burger, however,

¹³²42 LW 5055, p. 5058.

¹³³See "Casenotes--Constitutional Law--Obscenity--The Definitional Dilemma," Georgia State Bar Journal, 10 (November, 1973), 327-335, in which the new approach is assessed as a clarification of Roth; see also "Comment--New Prosecutorial Techniques and Continual Judicial Vagueness: An Argument for Abandoning Obscenity as a Legal Concept," UCLA Law

considered the new approach as providing "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."¹³⁴ Conversely, Justice Brennan considered the new approach as only adding to the vagueness of the standards in the obscenity area.

Both the old Roth-Memoirs approach and the new Miller approach are based on a three-part test for the determination of obscenity. First, Roth-Memoirs required that "the dominant theme of the material taken as a whole appeals to a prurient interest in sex." Miller required that the determination be based on "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." These two requirements are virtually the same. Second, Roth-Memoirs required that "the material is patently offensive because it affronts community standards relating to the description or representation of sexual matters." Miller required the determination based on "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." The main difference here is that Miller requires the statute to specifically define the area to be proscribed. There is also a change in wording from "sexual matters" to "sexual conduct." The Burger Court identified two illustrations of such offensiveness:

Review, 21 (October, 1973), 181-241, where the new approach is described as not departing from Roth.

¹³⁴ 37 L Ed 2d 419, p. 434.

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.¹³⁵

Third, Roth-Memoirs required that "the material is utterly without redeeming social value." Miller required that the determination be based on "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." This third element and the concept of community standards appear to be the major differences between the two approaches. Many of the terms used by the Burger Court, however, have not been defined any more precisely than were the old guidelines. The application of the new approach still needs further clarification. Chief Justice Burger summarized the ruling of the Court in Miller as follows:

. . . we (a) reaffirm the Roth holding that obscene material is not protected by the First Amendment, (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is "utterly without redeeming social value," and (c) hold that obscenity is to be determined by applying "contemporary community standards," . . . not "national standards."¹³⁶

In the 17 years since the first obscenity decision by the United States Supreme Court, considerable variation has occurred in the approaches taken in the determination of obscenity. The role of the Court has been paramount in the development of the law of obscenity. This legal area is, however, still unsettled and will undoubtedly require more consideration by the United States Supreme Court.

¹³⁵ Ibid., p. 431.

¹³⁶ Ibid., p. 438.

CHAPTER VI

COMPARATIVE ANALYSIS

This chapter provides comparative analysis of Canada and the United States as related to this research. In addition to comparing the law of obscenity in the two countries, attention is given to a comparison of the function of each country's judiciary and its role in developing the law of obscenity. The purpose of the comparative approach is to further understanding by examining the similarities and differences between Canada and the United States.

Court structure in Canada and the United States is quite different. Canada operates with a single integrated judicial hierarchy influenced considerably by the national government. Only two Canadian courts, the Supreme Court and the Federal Court, may be properly called federal courts. The national government, however, has the power to appoint and remove judges to the highest provincial courts which include the Superior, County, and District courts. The national government also provides the salaries for the judges in these provincial courts. Since there are no separate federal courts to administer federal law, the provincial courts are required to administer both federal and provincial law. The criminal procedure, as well as criminal law, is, however, designated by the national government.

The United States, in contrast, operates with a dual court structure. A system of state courts parallels the federal structure. Both the federal and state governments handle their own statutes, judgeships,

salaries, and procedures. While the jurisdictions of the two levels overlap, basically the state courts interpret and apply state law and the federal courts interpret and apply national law.

A national supreme court forms the apex of the judicial structure in both Canada and the United States. The Canadian Supreme Court was created by the Dominion Parliament in 1875, although it did not become the highest appellate court until 1949 when appeals to the English Privy Council were terminated. The United States Supreme Court was created by the United States Constitution in 1789, thus making it the highest court during the entire history of the country.

As the previous examination of the law of obscenity has shown, the United States Supreme Court has been far more active in the development of the law than has the Canadian Supreme Court. While the former has rendered numerous decisions on the issue of obscenity, the latter has decided only four with one of these decisions accepting the reasoning of the lower court's lone dissenter rather than providing a separate opinion by the Supreme Court.¹ Consequently, the development of obscenity in Canada has been more a shared responsibility of the entire appellate court system than in the United States where the role of the Supreme Court has been paramount.

The Canadian judiciary has been criticized for adopting English precedent rather than developing its own body of law relevant to the

¹See Dominion News & Gifts v. The Queen (1964) 3 C.C.C. 1, rev'g. (1963) 2 C.C.C. 103.

Canadian society. The Canadian judges also hold strongly to the idea of legislative supremacy. The result in Canada has been to produce a "static and mechanical" operation of the judiciary.²

The Dominion Parliament in 1960 enacted the Canadian Bill of Rights which instructed the judiciary to interpret and apply federal legislation in relation to the requirements of the Bill. The judges, however, were reluctant to use this delegated judicial review. Consequently, the Bill of Rights was initially accorded little importance. In 1970, however, the Canadian Supreme Court for the first time in Regina v. Drybones³ rejected federal legislation which did not conform to the Bill of Rights. This decision has produced new interest in the Bill and its potential for the future.⁴ Nevertheless, the Bill has so far been unimportant regarding obscenity law, since the Supreme Court has failed to consider obscenity in relation to the Bill of Rights. Only the Manitoba Court of Appeal has so far been confronted with a challenge to an obscenity conviction based on the Bill, and that challenge was summarily rejected by the Court. Without any attempt to analyze the relationship between the Code and the Bill, the Court simply noted that the

²See Horace E. Read, "The Judicial Process in Common Law Canada," The Canadian Bar Review, 37 (May, 1959), 266-280.

³(1970) S.C.R. 282.

⁴See J. C. Smith, "Regina v. Drybones and Equality Before the Law," The Canadian Bar Review, 49 (May, 1971), 163-187; see also Cavalluzzo, op. cit., pp. 511-551.

question was irrelevant because obscenity was unprotected.⁵

In the United States the Bill of Rights--specifically the First Amendment--is very important in considering the law of obscenity. Even though the Roth rule,⁶ as well as the more recent Burger Court decision in Miller,⁷ indicated that obscenity was not constitutionally protected, laws which attempt to censor obscenity must be careful not to interfere with freedom of expression guaranteed by the First Amendment. Thus, for example, the United States Supreme Court refused to allow a conviction in Kois v. Wisconsin⁸ for the publishing of a poem describing sexual intercourse. The Court concluded that the poem was an attempt at serious art and was therefore protected under the Bill of Rights.

The differences between Canadian and United States federalism are sharply evident when considering criminal law. In Canada the B.N.A. Act granted exclusive jurisdiction over criminal law to the national government. There are no local or provincial obscenity statutes in Canada. The United States Constitution, conversely, does not grant exclusive jurisdiction over criminal law to either level of government. In matters relating to national affairs the Congress may enact obscenity statutes. This basically means three areas: use of the mails, importation, and transportation in interstate commerce. Otherwise, the jurisdiction over

⁵See Regina v. Prairie Schooner News Ltd. (1970) 1 C.C.C. (2d) 251.

⁶354 U.S. 476 (1957).

⁷37 L Ed 2d 419 (1973).

⁸33 L Ed 2d 312 (1972).

obscurity lies with the state governments provided, of course, that state or local laws conform to the requirements of the United States Constitution. The United States Supreme Court, therefore, is quite often concerned with state laws, but the Canadian Supreme Court is only confronted with national law relating to obscenity. This means, of course, that one statute prevails for all of Canada while many varied statutes exist in the United States.

Perhaps the most significant difference between the two countries with regard to obscenity is the form in which the definition of obscenity is contained. The Canadian Criminal Code enacted by the Dominion Parliament in 1959 announced the definition which was to apply in Canada. In the United States the basic definition of obscenity was provided by the judiciary. The United States Supreme Court announced its definition in 1957 in the Roth decision. The recent Miller case and its subsequent decisions purport to have reestablished the Roth rule. Thus, the Canadian definition is statutory while the United States definition is judicial in nature. This difference is, however, lessened perhaps by the fact that the Canadian judiciary in interpreting the legislative definition of obscenity must do so without considering the legislative intent as evidenced by the legislative debates and other materials. The concept actually applied in Canada, therefore, is the judiciary's interpretation of the legislative definition. In the United States the legislation enacted either by Congress or the states must conform to the requirements defined by the Supreme Court regarding the element of obscenity.

The original definition of obscenity for both Canada and the United States was provided by the English judiciary in 1868. The Hicklin rule provided that obscenity was that which tended "to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."⁹ The Hicklin rule remained as the controlling definition of obscenity in Canada until the enactment in 1959 of the Canadian Criminal Code. In the United States the Hicklin rule was specifically rejected in 1957 when the Supreme Court rendered its decision in Roth. The English rule had received severe criticism by the lower federal courts prior to 1957, particularly in the Ulysses¹⁰ decision, and the Supreme Court had suggested the inappropriateness of Hicklin earlier in 1957 in its Butler¹¹ decision.

The Dominion Parliament of Canada in 1959 enacted through the Criminal Code a new definition of obscenity which stated that:

. . . any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.¹²

The Code did not state whether the Hicklin rule was still valid or if the

⁹Regina v. Hicklin, L.R. 3 Q.B. 360, p. 371.

¹⁰United States v. One Book Called "Ulysses", 5 F. Supp. 182 (1933), 72 F. (2d) 705 (1934).

¹¹Butler v. Michigan, 352 U.S. 380 (1957).

¹²Canadian Criminal Code, section 150 (8); 1970 R.S.C., c. 34, section 159 (8).

new definition was to displace the old rule. The legislative debates suggest that the intention of Parliament was to provide an additional means of attacking pornography rather than providing a substitute definition for the Hicklin rule.¹³ Since the legislative debates were declared inadmissible into judiciary proceedings by the Supreme Court in 1909,¹⁴ the Canadian courts were required to interpret the new Code provisions without the benefit of legislative intent. Although the question of the application of the Hicklin rule has not yet been fully answered by the judiciary, the presumption quite often is that it does not apply. Frequently the opposing parties agree to have their case tried exclusively under the Code without consideration of Hicklin. The result has been that since the enactment of the Code definition in 1959, the Hicklin rule has been of very limited importance in the consideration of obscenity in Canada.

The United States Supreme Court in its Roth decision explicitly rejected the Hicklin rule because it was unconstitutionally restrictive of freedom of expression. The Court then replaced Hicklin with its own definition which declared obscene material to be that: ". . . material which deals with sex in a manner appealing to prurient interest . . . [i.e.] material having a tendency to excite lustful thoughts . . . [but] sex and obscenity are not synonymous."¹⁵ Although this Roth rule has

¹³ See supra, Ch. IV, pp. 56-57.

¹⁴ Gosselin v. The King (1903) 33 S.C.R. 255.

¹⁵ 354 U.S. 476, p. 487.

undergone many reinterpretations, and its precise application is still questionable, nevertheless, the Roth decision clearly terminated the application of the Hicklin rule in the United States.

One element of the Canadian definition appears to be implied in the Roth rule. The Canadian Criminal Code emphasizes the concern for an "undue exploitation of sex." The United States Supreme Court in its Miller decision stated that "(s)ex and nudity may not be exploited without limit."¹⁶ Apparently both definitions accept some exploitation of sex which would not render a publication obscene. For the Canadian Supreme Court the point at which exploitation would become obscenity is when there is excessive emphasis on sex for a "base purpose." The Court cautioned, however, that emphasis on sex required for "serious treatment" in a publication would not render the work obscene.¹⁷ The United States Supreme Court ruled similarly in Miller holding that prosecution could occur only when the "materials depict or describe patently offensive 'hard core' sexual conduct." Likewise, the Court held that materials which depict sexual matters and which have a serious literary, artistic, political, or scientific value receive protection under the First Amendment.¹⁸ The two definitions, as interpreted and applied, are therefore, very similar with respect to materials which are protected or proscribed.

¹⁶37 L Ed 2d 419, p. 431.

¹⁷See Regina v. Brodie (1962) 32 D.L.R. 2d 507, pp. 527-528.

¹⁸37 L Ed 2d 419, pp. 431-432.

The Supreme Courts of both Canada and the United States have also held similarly on the procedural requirements for the prosecution of booksellers for selling obscene publications. In both countries the defense of mens rea is valid, i.e., the prosecution must prove that the bookseller had knowledge of the contents of the publication in order for conviction.¹⁹

In considering the standard for judging obscenity, both the Canadian and United States courts concluded that the contemporary community must be the reference. In the determination of which community, the two countries now differ sharply. The Canadian Supreme Court accepted completely the reasoning of Justice Freedman in Dominion News²⁰ that national community standards must be applied in Canada. This requirement seems to follow logically from the fact that the definition of obscenity was enacted by the national Parliament. Obscenity is a criminal matter which is an area of law assigned exclusively to the national government by the B.N.A. Act.

The United States Supreme Court made reference in Roth to judging obscenity in terms of community standards but failed to clarify the meaning of "community." In the opinion announced by the court in Jacobellis v. Ohio²¹ in 1964, the community to be considered was the "national community." This plurality decision, however, was severely

¹⁹See, for Canada: Fraser v. The Queen (1967) 59 D.L.R. (2d) 240; for the United States: Smith v. California, 361 U.S. 147 (1959).

²⁰Dominion News & Gifts v. The Queen (1964) C.C.C. 1, rev'g. (1963) 2 C.C.C. 103.

²¹378 U.S. 184.

criticized by three members of the Court for applying a national standard while three other Justices did not directly consider the issue. Nevertheless, the reference for judging obscenity was generally assumed to be the national community. Then in 1973 the Burger Court in Miller concluded that the First Amendment did not require the application of a "hypothetic and unascertainable" national standard. The Miller decision made reference to application of "contemporary community standards" and also to the specific requirements of state law necessary in regulating obscenity. It still remained unclear whether the contemporary community was to be the state or whether it could be some smaller local community. The Court attempted to clarify this point in Hamling v. United States²² by noting that although the state could specify a standard, none was required. Consequently a juror is entitled to determine the "community standards" based on his own area. In addition, Justice Rehnquist, speaking for the five-member majority, concluded that even in cases involving national law, a juror would still be entitled to draw upon his understanding of his own community for deciding the question of obscenity. This interpretation of "community" in the concept of community standards places Canada and the United States in quite different positions.

The question of community standards has been debated extensively in the United States, and it will likely continue, particularly in light of Miller and Hamling. It is interesting to note that these most recent decisions by the United States Supreme Court will not necessarily be accepted by state and local judges. A number of state and local judges

²²42 LW 5035 (1974).

have been on record in support of national community standards. For example, Judge William E. Ringel of the Criminal Court of the City of New York wrote in 1970:

In spite of the legal debate as to state versus national standards test for obscenity, there seems to be little doubt that in cases involving speech (pure and symbolic), books, and other publications, motion pictures and television, that by virtue of the First and Fourteenth Amendments, national community standards should be the gauge to measure obscenity. The reason for this rule is that these items have an actual or potential national audience and thus the federal constitutional guarantees are applicable.²³

And Justice Brennan in his Hamling dissent suggested that to try a federal obscenity case on the basis of local standards served neither the United States Constitution nor the Congressional intent.

Both in Canada and the United States evidence is admissible to determine community standards. This, of course, would be the basic responsibility of the defense. The use of survey results has been allowed in both countries but generally limited to evidence derived from rigidly conducted surveys. In Hamling the lower court refused to allow testimony from a witness who had conducted a survey of community attitudes toward obscenity. Justice Rehnquist noted that the testimony should have been allowed but held that the failure to do so did not constitute reversible error. In both countries expert testimony is also admissible to aid in the determination of literary or artistic value. Ultimately the decision in both Canada and the United States concerning obscenity must be made by the jury and/or judge based upon their conceptions of community standards.

²³Ringel, op. cit., p. 111.

One other area of obscenity law has been closely considered by both countries--private possession of obscene materials. Private possession of obscenity is permitted in Canada and the United States but for different reasons. In Canada the Criminal Code does not prohibit private possession but only "circulation" of obscene materials. The Canadian Supreme Court in Regina v. Rioux²⁴ held that the showing of an obscene photograph to a friend or even the showing of an obscene motion picture to a group of friends in one's home did not constitute "circulation" under the Code. The Court stressed the public element necessary to allow for conviction. The United States Supreme Court in Stanley v. Georgia²⁵ held that obscenity did receive constitutional protection in the privacy of one's home. The Burger Court has tended to interpret Stanley very narrowly, stressing the idea of obscene materials "in the privacy of one's home." Both Canada and the United States have refused to recognize a right to procure obscene materials even though private possession is not prohibited. The general tone, however, in the United States, particularly from the Burger Court opinions, appears to be somewhat more restrictive in this area than do the corresponding Canadian opinions. This is true even though the United States Supreme Court still recognizes a conditional protection for obscenity and the Canadian courts do not.

In viewing the role of the Supreme Court in each country, the most striking contrast is found in the number of opinions by the highest

²⁴(1969) 10 D.L.R. (3d) 196.

²⁵394 U.S. 557 (1969).

courts. The Canadian Supreme Court has rendered only four decisions in the area of obscenity. Two decisions related to the definition of obscenity, but only one presented an opinion from the Supreme Court itself. Regina v. Brodie is the only decision by the Canadian Supreme Court which provides a discussion of the concept, its definition, and application. The remaining two decisions by the Supreme Court dealt with procedural matters under the Code concerning obscenity. The first obscenity ruling by the Court came in 1962. This was followed the next year with the only other decision relating to the definition. The two procedural cases came in 1967 and 1969. Obviously the Canadian Supreme Court has not been overly active in providing leadership in the area of the law of obscenity. Consequently, some lower courts have refused to follow completely the positions expressed in Brodie until the Supreme Court provides more definitive rulings on obscenity.²⁶

The definition in the United States was provided by the Supreme Court in 1957. From that time to the present, the Court has been active in the area of obscenity. The Court has been willing to consider the concept and its application and to modify or reinterpret its past decisions. This willingness was made clear by the Burger Court with Miller and its aftermath.

This difference in activity between the two Courts can perhaps partially be explained by the type of definition of obscenity which exists in each country. Since the Canadian definition was provided by

²⁶See, for example, Regina v. Duthie Books Ltd. (1966) 58 D.L.R. (2d) 274.

the Parliament through the Criminal Code, the need for the Court to act in this area has been less. The concept of parliamentary supremacy has also been strong in Canada. The result has been a reluctance on the part of the judiciary to undertake judicial review even under the delegated authority of the Bill of Rights. The United States Supreme Court, however, has not been similarly tied to the concept of legislative supremacy. The Bill of Rights is a very functional part of the United States Constitution, and the Supreme Court is ordinarily not reluctant to consider and apply these Amendments.

Even though the roles of the two courts have been quite different, the resulting concepts of obscenity are much more closely related. With the exception of the national standard in Canada, the two countries have similar definitions, concern for exploitation, concepts of community standards and private possession, and procedural requirements. The type of federal structure in Canada obviously produced the importance of national standards. Otherwise, neither the structural and political variations nor the two distinct forms of obscenity definition have resulted in significant differences for approaching the law of obscenity in either Canada or the United States.

CHAPTER VII

CONCLUSION

In reviewing the development of obscenity law in both Canada and the United States, two major stages become evident. The first stage was dominated by the Hicklin rule¹ which was adopted from the English common law. The Hicklin test was criticized particularly for its failure to consider the purpose of the accused and for judging obscenity by considering youth and those in the society who were the most corruptible. Although judges of both countries questioned the validity of Hicklin and some judges actually refused to apply the rule, the importance of the test remained until the late 1950's.

The second stage in the development of obscenity law began first in the United States in 1957 when the Supreme Court rendered its first decision concerning obscenity. This was soon followed by the Roth rule² which explicitly rejected the application of Hicklin. In Canada this stage began in 1959 with the enactment of the Canadian Criminal Code. Subsequently the Supreme Court rendered its first decision on obscenity in Brodie³ in 1962. Unlike the United States Supreme Court, the Canadian Supreme Court did not reject Hicklin, but rather concluded

¹Regina v. Hicklin, L.R. 3 Q.B. 360 (1868).

²Roth v. United States, 354 U.S. 476 (1957).

³Regina v. Brodie (1962) 32 D.L.R. (2d) 507.

that it was unnecessary to decide at that time whether the Code displaced Hicklin. No subsequent decision has decided this question.

The basic Canadian test applied in determining whether a publication is obscene is quite different from the old Hicklin rule. The major element stressed by the Supreme Court for the determination of obscenity has been the "undue exploitation of sex." In order to decide if such exploitation is involved, the publication must be examined as a whole. Exploitation must be the dominant characteristic. A judgment of obscenity could not, therefore, be made on the basis of isolated words or passages. In addition, the purpose of the author, as well as the literary and artistic value, must be considered. Evidence may be introduced at trial to aid in the determination of these elements. Obscenity must also be judged on the basis of contemporary community standards. The community has been identified as a national one. This means that the same test must be applied to all of Canada.

The United States Supreme Court also moved sharply away from the Hicklin rule in its Roth decision and its subsequent interpretations. The new test stressed the element of an "appeal to a prurient interest in sex." In order to determine this necessary dominant characteristic the material must be considered as a whole and not selectively according to isolated passages. Additionally, the material must be judged to be offensive to contemporary community standards. The community was originally defined as a national one, but Miller⁴ and Hamlin⁵ have

⁴Miller v. California, 37 1 Ed 2d 419 (1973).

⁵Hamling v. United States, 42 LW 5035 (1974).

redefined this term to mean state or local community standards. The test for obscenity which was applied prior to June, 1973, required also that the material be "utterly without redeeming social value." This element was dropped by the Burger Court in Miller and in its place was substituted a "seriousness test" which requires an evaluation of the material in terms of its serious literary, artistic, political, or scientific value.

The state of obscenity law is not static. This is perhaps more evident in the United States because of the Burger Court decisions, but the same is also true in Canada. Many elements concerning the definition of obscenity or the tests to be applied for such a determination are unclear. Neither judiciary has sharply identified the point at which exploitation of sex becomes too great thus causing the materials to become obscene. Canada has failed to decide with certainty whether the Hicklin rule may still be applied while this point seems clear in the United States. In contrast, the acceptance of a national standard in Canada is perhaps the most concrete part of the concept while in the United States the recent Burger Court decisions raised many new questions concerning the community by which judgments of obscenity are to be made. The holding in Hamling that even federal cases may be tried by some local standard raises serious questions about the application and enforcement of federal law. Does this mean, for example, that materials may be imported into the United States in one part of the country while in another more restrictive area the same materials could not be brought in? If this be the case, the intent of the Congressional legislation would appear to have been significantly altered.

The United States Supreme Court following the Redrup⁶ and Stanley⁷ decisions appeared to be moving away from the case by case determination of obscenity which had characterized the earlier rulings based on the Roth test. The Burger Court, however, seems to have reverted to the previous case by case approach. This was particularly evident in Jenkins v. Georgia⁸ which reversed the state court's finding of obscenity. The Canadian Supreme Court has not, of course, been involved in many obscenity decisions, but the lower courts have followed a similar case by case approach.

The case by case approach has produced a lack of clarity concerning the application of obscenity law. The problem has occurred because the obscenity of questioned materials is uncertain until a ruling by the highest appellate court. This lack of clarity on the part of both judiciaries has been severely criticized by judges and legal scholars. Justice Douglas, for example, has consistently attacked the ex post facto character of United States obscenity law. A similar retroactive effect is produced in Canada largely due to the failure of the Supreme Court to give thorough consideration to the whole area of obscenity. And the new Burger Court test also lacks what was previously missing in both Canada and the United States--advance notice that specific materials are obscene.

The difficulty in providing advance notice of obscenity is related to the fact that both Canada and the United States hold that obscenity is

⁶Redrup v. New York, 386 U.S. 767 (1967).

⁷Stanley v. Georgia, 394 U.S. 557 (1969).

⁸42 LW 5055 (1974).

not constitutionally protected. While the Stanley decision in the United States offers some protection for obscenity in private, the Burger Court has chosen to interpret Stanley very narrowly. In Miller Chief Justice Burger reemphasized the attitude of Roth that obscenity received no guarantees under freedom of expression. The Canadian courts have refused to recognize any protection for obscenity or even any relationship between obscenity legislation and the Bill of Rights. Governmental regulation of obscenity could be accepted as an alternative to refusing protection. Such a position would require a balancing of interests and would thus subject obscenity to the same requirements as other classes of expression.⁹ The government would appear to have a legitimate interest, for example, in protecting children and unwilling adults from exposure to obscene material. If such a position were accepted, the role of the judiciary would no longer be to determine obscenity but to insure protection for all concerned, including children, unwilling adults, the publishers and their publications, and those interested in so-called obscene materials. This type of position has been strongly advocated by Justice Brennan of the United States Supreme Court.¹⁰

Part of the difficulty of handling the issue of obscenity also relates to the varied assumptions about obscenity and the reasons for

⁹See David E. Engdahl, "Requiem for Roth: Obscenity Is Changing," Michigan Law Review, 68 (December, 1969), 201.

¹⁰See, for example, Justice Brennan's dissenting opinions in Paris Adult Theatre v. Slanton, 37 L Ed 2d 446, pp. 467-491; and Jenkins v. Georgia, 42 LW 5055, pp. 5057-5058.

proscriptive statutes. It is widely assumed that obscenity causes anti-social behavior either in the form of sexual offenses or other non-sexual criminal actions. Consequently, legislation designed to prohibit obscene materials is viewed as providing protection for the society. Some believe that obscenity statutes reflect instead the religious background of the country and the conviction that government should assume the responsibility for the "morality" and "decency" of the community.¹¹ Still others, in contrast, believe that obscenity is beneficial. The following statement presents a concise summary of the potential positive aspects of obscenity.

. . . I have suggested that obscenity may be positively valuable in a number of ways: through its contribution to self-knowledge about our sexual nature; through its release of the pressures of sexual anxiety or guilt; and through the opportunities it offers for the imaginative, as distinct from the actual, enactment of our sexual fantasies.¹²

Obscenity law also assumes that either a judge or the combination of judge and jury should be the final arbiter of what is obscene and ultimately what materials should be available to the public. Since obscenity is basically a moral problem which is of concern to both literary and cultural interests, one may question whether courts are adequate to decide the matter.¹³ Some judges have been critical of their roles

¹¹See Louis Henkin, "Morals and the Constitution: The Sin of Obscenity," Columbia Law Review, 63 (March, 1963), 391-414.

¹²Dybikowski, op. cit., p. 54.

¹³See Schmeiser, op. cit., pp. 232-235; see also Kalven, op. cit., p. 230.

in the area of obscenity. This attitude is perhaps best expressed by Judge Struble of Ohio: "Obscenity is not a legal term. It cannot be defined so that it will mean the same thing to all people, all the time, everywhere. Obscenity is very much a figment of the imagination."¹⁴

A majority of Canadians responding to an attitude survey conducted by their Senate Committee on Salacious and Indecent Literature in 1952 indicated that they were concerned with obscene material because such materials might cause improper thoughts, anti-social behavior, and ultimately reduce the moral standards of the viewers of obscenity and the society in general.¹⁵ Similarly, the United States Supreme Court indicated in Miller that a state may conclude that obscenity is harmful to the society and thus seek to remove such materials. The Court acknowledged, however, that there was no proof that obscene materials were harmful to society.

In the late 1960's the President's Commission on Obscenity and Pornography undertook the most comprehensive study of the subject yet made. The majority of the Commission rejected the idea that obscene materials present either an immediate or long range threat to society. The Commission found that the public generally thinks that obscenity does produce undesirable effects on behavior. With regard to the individual respondent's own experience, however, the results of exposure to obscenity were identified as either neutral or even desirable.¹⁶

¹⁴Ohio v. Lerner, 81 N.E. 2d 282 (1948).

¹⁵See Charles, op. cit., pp. 279-280.

¹⁶The Report of the Commission on Obscenity and Pornography (New

Difficulty is also found with regard to the understanding of the obscenity decisions and the willingness to try to meet the requirements which the courts have described. The impact literature in this area is somewhat limited. Stephen Wasby's studies, however, indicate that generally lower courts attempt to conform to the decisions of the Supreme Court, although some notable exceptions are evident.¹⁷ Thomas Barth surveyed state and local officials and discovered that district attorneys and other local policy makers were often either unfamiliar with or lacked an understanding of the obscenity decisions of the Supreme Court. Not one of the district attorneys surveyed could correctly answer all the survey questions.¹⁸ James Levine surveyed booksellers in 1967 and found that 42 percent of those responding to the questionnaire were not familiar with Roth. Another 32 percent indicated that they had heard of the case but knew few of the details.¹⁹ Thus, the understanding of obscenity decisions by those directly involved with this area of the law has been shown to be very limited. While no similar studies have been undertaken with regard to the general population, the inference is that the level of understanding would be no greater and would, in all likelihood, be far less.

York: Bantam Books, Inc., 1970), p. 47.

¹⁷Stephen L. Wasby, The Impact of the United States Supreme Court: Some Perspectives (Homewood, Ill.: The Dorsey Press, 1970), pp. 136-145, 5.

¹⁸Thomas E. Barth, "Perception and Acceptance of Supreme Court Decisions at the State and Local Level," Journal of Public Law, 17, No. 2 (1968), 330-332.

¹⁹James P. Levine, "Constitutional Law and Obscene Literature: An

In attempting to assess the trend of obscenity law in Canada, one must remember that the Canadian Supreme Court has not rendered an obscenity decision since 1969, and that the last decision by that Court relating to the application of a test for obscenity came in 1963. While both lower court judges and legal scholars have called upon the Supreme Court to refine its previous rulings and to answer unresolved questions, the Court has apparently been willing to let the lower courts handle the matter. This inaction has produced some inconsistencies in the application of the law of obscenity and also some refusals by lower courts to apply Supreme Court decisions until further action is taken.²⁰ Each decision of the Supreme Court concerning obscenity has tended to reduce the harshness of the Hicklin era and to consider less restrictively the issue of obscenity. No reason has appeared to suggest that future decisions of the Court would be decided differently from this trend.

In the United States the trend since the Miller decision appears to be moving toward a more restrictive application of Roth and away from the decisions of Redrup and Stanley. The Burger Court has concluded that it is impossible to determine and apply a national community standard. Therefore, the emphasis turns somewhat to the state and local governments that will draw up the statutes and ordinances. The Court, however, has definitely not removed itself from a paramount

Investigation of Bookseller Censorship Practices," The Impact of Supreme Court Decisions, Theodore L. Becker, editor (New York: Oxford University Press, 1969), p. 141.

²⁰Cf. Regina v. Georgia Straight Publishing Ltd. and McLeod (1970) 5 C.C.C. 31, and Regina v. Small and four others (1972) 6 C.C.C. (2) 195; see also Regina v. Duthie Books Ltd. (1966) 58 D.L.R. (2d) 274.

position in this area of the law. Conversely, the ruling in Jenkins which required Supreme Court viewing of the motion picture in question before a decision could be made, suggests that the Court's importance will not be diminished at all by the new rulings. Rather, it means that the Court, case by case, must ultimately rule on the obscenity of challenged materials.

The trend of the law of obscenity must also be considered in terms of enforcement. Excluding statutes concerning importation, use of the mails, and interstate commerce, the bulk of enforcement activities are to be found at the state and provincial levels and their local governments. In the 1960's the general assessment of enforcement in the two countries was that the United States was more active in enforcement which tended to offset the somewhat more restrictive attitude and judicial decisions in Canada.²¹ Recent decisions in the United States, however, have tended to become more restrictive. Some evidence exists which suggests that there is a lessening of enforcement in the United States.²² Consequently, the approach to obscenity in Canada and the United States appears to be moving closer together. To determine whether this trend will continue will require future observation.

The law of obscenity requires continued investigation and study since this area of the law is not a settled or static one. In Canada the new attitude expressed by the Supreme Court toward the Bill of

²¹Not only are obscene materials prohibited in Canada but crime comic books as well. See Schmeiser, op. cit., pp. 251-253.

²²See Green, op. cit., pp. 697-700.

Rights may be important for future consideration of obscenity. The Court in its Drybones²³ decision held that a federal statute was invalid because it conflicted with the Bill of Rights. Although the Court has previously failed to consider obscenity in relation to the Bill, the potential impact on obscenity could be extremely important. Considering that the Bill has only been in force for 15 years, it is not surprising that the Court in the Drybones case changed its previous position. The United States Bill of Rights was, for the most part, viewed restrictively during the early history of the country. The Canadian courts expressed the need for caution in interpreting the Bill. Soon after its enactment Supreme Court Justice McLean in Regina v. Gonzales stated: "I am persuaded that it is better to let jurisprudence under this Act develop step by step as the problems arise."²⁴ It is therefore not unreasonable to expect that the Canadian judiciary will develop a more liberal philosophy concerning the Bill of Rights, resulting in a stronger guarantee for fundamental freedoms in Canada. New decisions by the Canadian Supreme Court concerning obscenity will also be important, particularly in providing answers to previously unanswered questions and greater depth to past decisions.

In the United States it is, of course, important to observe the aftermath of the Miller decision, including further elaboration of the new rationale by the Supreme Court itself, and the responses of lower

²³Regina v. Drybones (1970) S.C.R. 282.

²⁴(1962) 32 D.L.R. (2d) 290, p. 292.

state and federal courts. State legislatures must decide on state or local standards and write appropriate statutes. The way in which these statutes and ordinances will be drawn and their enforcement may be extremely important in the further development of obscenity law in the United States.



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APPENDIX

APPENDIX

Canadian Criminal Code, sections 150, 150A, and 150B. (1970 R.S.C.

c. C 34, sections 159, 160, 161, respectively.)

Offences Tending to Corrupt Morals

150A. (1) Every one commits an offence who

- (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or
- (b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic.

(2) Every one commits an offense who knowingly, without lawful justification or excuse,

- (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,
- (b) publically exhibits a disgusting object or an indecent show.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

(6) Where an accused is charged with an offense under sub-section (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(8) For the purposes of this Act any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror,

cruelty and violence, shall be deemed to be obscene.

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

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

(3) The owner and the author of the matter seized and alleged to be obscene or a crime comic may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

150B. Every one commits an offence who refuses to sell or supply to any other person copies of any publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other person is apprehensive may be obscene or a crime comic.

(Relevant Provisions of the Canadian Criminal Code Only)

VITA

Ronald Edward Dean was born in Clifton Forge, Virginia, on July 28, 1943. He attended elementary schools in that city and was graduated from Clifton Forge High School in 1961. The following September he entered Emory and Henry College, and in May, 1965 he received a Bachelor of Arts degree. In the fall of 1965, he entered The University of Tennessee, and began study toward a Master's degree. He received this degree in August, 1967, and was employed as an Instructor of Political Science at Emory and Henry College in Virginia.

He returned to The University of Tennessee in September, 1970, where he held a Graduate Assistantship, Graduate Teaching Assistantship, and taught for the Evening School. He received the Doctor of Philosophy degree with a major in Political Science in December, 1974. Following completion of the degree requirements in August, 1974 he accepted a position as Assistant Professor of Political Science at Eastern Kentucky University. He is a member of the American Political Science Association, the American Society for Public Administration, Pi Sigma Alpha, and the Southern Political Science Association.

He is married to the former Elizabeth Ann Bensey of Harriman, Tennessee.