OBSCENITY LAW IN CANADA

by

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INTRODUCTION

This topic has been the subject of many cases, articles, reviews, and treatises due to the broad scope of substantive law, sociology, criminology and civil rights involved in its discussion.

The word "obscenity" has many connotations and is most vulnerable to subjective interpretation. This element of subjectivity is unfortunately not restricted to the layman's discussion, for judicial subjectivity is still the key to today's codified definition of the word.

An important aspect of all laws is that they should provide some guidance for social conduct, but when the judiciary is uncertain as to the standard of conduct acceptable under the obscenity sections of our Criminal Code, the predictive element becomes only a theoretical ideal.

This topic will be examined both as to the substantive law, through a historical development, and the sociological evaluation of whether these "morality sections" should be included in a criminal statute. Presumably all sections in our Criminal Code have a purpose which is met by the proper regulation and enforcement thereof. The effecting of the purpose of S. 159 (8) of the Criminal Code will be examined in this paper.

This examination is divided into three sections, two of which develop and evaluate the substantive law while the concluding section deals with the merits of imposing criminal sanctions on moral questions.

I. Historical Development of the Case Law

This area of the law has had a long, much encumbered development with the first prosecutions in the early seventeen hundreds[1] and the first important statutory prohibition[2] in the mid-eighteen hundreds. Not long after this statute the landmark case of *R.* v. *Hicklin* laid down the Hicklin test, where Cockburn, C.J. stated:

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1 *R.* v. *Read* (1709), 11 Mod. Rep. 142; 88 E.R. 953
R. v. *Curl* (1727), 2 Stra. 788; 93 E.R. 849.

2 Lord Campbell's Act [The Obscene Publications Act] (1857) (U.K.) 20-21 Vict., C. 83.

> 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.[3]

Not withstanding the many criticisms[4] of the above rule, it survived as law in Canada for nearly a century.

It is interesting to note that the Draft Criminal Code (Indictable Offences) prepared in 1879 by an English Royal Commission headed by Sir James Stevens, did not contain a definition of the word "obscene". It was felt by the Commissioners that the word should be allowed to adopt the meaning that the word itself conveys.[5] The code prepared by Stevens was rejected in England but was later accepted in Canada, passed in 1891 and became law in 1892. Thus Canada had its first statutory regulation of criminal law, which included controls on the publication of obscene material.[6]

This area of the law developed very slowly with only five cases from 1900 to 1940[7], all of which followed the test laid down in the *Hicklin* case. It was not until 1944 and the case of *Conway* v. *The King*[8] that the *Hicklin* test was first challenged and altered by the introduction of the element of mens rea into the test by Lazure J. Professor Laskin (as he then was) regarded this a welcome addition to the test, although he questioned the logic in arriving at such a conclusion.[9]

This case led the way for change in Canada, but it was not a true pioneer for it fell in line with the earlier American decision of *U.S.* v. *The Book Ulysses.*[10]

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3 (1868), L.R. 3 Q.B. 360, at p. 371.

4 (1954), 32 Can. Bar Rev. 1010, at p. 1011; (1966), 44 Can. Bar Rev. 243, at p. 245; these are but two of the numerous criticisms of the *Hicklin* test.

5 Report of the Royal Commission (1879), at p. 22.

6 S.C. 1892, C. 29, S. 179.

7 *The King* v. *McAuliffe* (1904), 8 C.C.C. 21 (Co. Ct.).
The Queen v. *Jourdan* (1904), 8 C.C.C. 337 (Mtl. Rec. Ct.).
R. v. *Beaver* (1904), 9 C.C.C. 415 (Ont. C.A.).
R. v. *MacDougall* (1909), 15 C.C.C. 466 (N.B.S.C.).
R. v. *St. Claire* (1913), 21 C.C.C. 350 (Ont. C.A.); and see (1966), 44 Can. Bar Rev. 243, at p. 246, footnote 14.

8 [1944] 2 D.L.R. 530.

9 (1944), 22 Can. Bar Rev. 553.

10 (1933), 5 F. Supp. 182; aff'd (1934), 72 F. 2d 705.

This liberal approach to the *Hicklin* test was continued in Canada in the case of *R.* v. *National News*[11] where the Court, in considering the effect of four novels and seven magazines on the public, considered a normal segment of the public which was particularly sensitive to moral influences. The logic in this qualification is sound, for in no other area of the law do we consider the general public as being sensitive or fragile, nor do we use these individuals as the guidelines for our laws.

The antiquity of the *Hicklin* test is also noted in the courts decision where in *dicta* it was stated that that which may corrupt and deprave one generation may not do so to another generation.[12] The logic in such a statement is sound and is captured by later cases.

The development of the *Ulysses* case in the U.S. and the *Conway* case in Canada culminated in the English decision of *R.* v. *Martin Secker Warburg Ltd. & Others.*[13] This case deals with the novel entitled *The Philanderers*, (distributed in Canada as *The Tightrope*)[14] which depicted the infidelity of a man obsessed with his desire for women.

Stable, J. in his decision imposed two important qualifications on the *Hicklin* test: (1) the element of contemporariness was added and, (2) he stated that the book was to be considered as a whole. With respect to the first qualification his opinion is well illustrated by the following:

> Because that is a test laid down in 1868, that does not mean that what you have to consider is, supposing this book had been published in 1868 and the publishers had been prosecuted in 1868, whether the court or the jury, nearly a century ago, would have reached the conclusion that the book was an obscene book. Your task is to decide whether you think that the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose hands the book may fall in this year, or last year when it was published in this country, or next year or the year after that.[15]

Although the second qualification made by Stable, J. was a new departure in Canada, it merely followed earlier American case law on the point.[16] This development was essential for the develop-

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11 (1953), 106 C.C.C. 26.

12 *Ibid.*, at p. 29.

13 [1954] 2 All E.R. 683; see Mackay's discussion in (1954), 32 Can. Bar Rev. 1010.

14 (1954), 32 Can. Bar Rev. 1010, at p. 1016.

15 [1954] 2 All E.R. 683, at p. 685.

16 *Commonwealth* v. *Buckley* (1909), 200 Mass. 346; 86 N.E. 910
Commonwealth v. *Friede* (1930), 271 Mass. 318; 171 N.E. 472.

ment of both law and literature, for in the past isolated extracts were examined to determine the question of obscenity with no attempt or possibility of evaluating the literary merits of the work in question.

It appeared that progress was being made and the old *Hicklin* rule was being modified to meet the changing time, but the case of *R.* v. *American News Co. Ltd.*[17] extinguished this spark of hope. In considering the novel entitled *Episode*, Laidlaw, J.A., giving judgment in the Ontario Court of Appeal,[18] rejected the *Warburg* case and rested his decision on *R.* v. *Reiter*,[19] which was decided a month prior to *Warburg*. By his action Laidlaw, J.A. restored the *Hicklin* test to its position prior to the *Warburg* case with its two very important qualifications.

In an article entitled *"The Hicklin Rule and Judicial Censorship"*,[20] Mackay discussed this case in light of the statutory defence of "public good" under Section 150 (3).

> 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.[21]

It is clear that the decision in *American News* and *Warburg* are not compatible. And one must be rejected. If *Warburg* is rejected we are placed back in the position of selecting isolated passages from publications for the purpose of determining the obscenity question. Such an approach is clearly wrong for it eliminates any hope of evaluating the literary merits of a work, which should be of prime concern to society.[22]

In light of the anomalous nature of the defence of "public good" as pointed out by Mackay,[23] it is paradoxical that this defence will never be available under the *American News* case. The reason this defence will never be available is that the whole publication cannot be examined and therefore its literary merits cannot be determined; and it can never be considered to be for the public good.

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17 (1957), 118 C.C.C. 152.

18 *Ibid.*, at p. 160.

19 [1954] 2 Q.B. 16.

20 (1958), 36 Can. Bar Rev. 1, on the defence of "Public Good"; see also (1962) 20 U. of T. Faculty of Law Rev. 5, at p. 16.

21 *Ibid.*, at p. 8.

22 (1958-59), 1 Osgoode Hall L.J. 69, at p. 71. Discussion on *R.* v. *American News.*

23 (1958), 36 Can. Bar Rev. 1, at p. 8.

Laidlaw, J.A. did make one concession to liberalism in following Pickup, C.J.O.'s dicta in the *National News* case: that the susceptability to corrupting and depraving material may change from generation to generation.[24]

In his decision in *American News* Laidlaw, J.A. was not without criticism of the *Hicklin* test for he found the test to be vague and impossible to apply objectively. Such judicial sentiment, supported by post-World War II pressure to reduce the flood of what many felt was objectionable material, led to the appointment of a Special Committee of the Senate in 1952 to consider obscenity. The committee's recommendations were introduced to the House of Commons in 1957 by Hon. E.D. Fulton in the form of Bill C-58.[25] The passing of this Bill resulted in the amendment to Section 150 and the addition of subsection (8), which defined the word "obscene".[26]

At the same time as the above mentioned amendment a new *in rem* procedure based on the old Lord Campbell's Act[27] was added in the form of Section 150 A.[28] Since its debut this section has received much attention, both as to its efficacy and its interpretation.

The introduction of these amendments was not without discussion and in its course the element of confusion was anticipated. Senator Roebuck pointed out that the legislature had not made it clear whether or not the new subsection (8) of Section 150 was intended to be in addition to or a substitute for the long standing *Hicklin* test.[30]

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24 (1953), 106 C.C.C. 26, at p. 29.

25 5 H.C. Deb. (Can) 5541 (1959).

26 S.C. 1959, C. 41, S.C.C.

27 The Obscene Publications Act, (1857) (U.K.) 20-21 Vict., C. 83.

28 S.C. 1959, C. 41, S. 12.

29 For a discussion of S. 150 A see the following:
(1964-65), 7 Cr. L.Q. 187
Mueller v. *McDonald* (1962), 37 C.R. 336, 133 C.C.C. 183
R. v. *Dominion News & Gifts Ltd.* (1963), 40 C.R., [1963] 2 C.C.C. 103 rvs'd [1964] S.C.R. 251.
R. v. *Mid-Western News Agency* (1966), 47 C.R. 227, 52 W.W.R. 119 (Sask)
R. v. *Adams*, [1969] 2 C.C.C. 21 (N.S.)
This list is not intended to be exhaustive on the discussion of this section.

30 (1966), 44 Can. Bar Rev. 243, at p. 256, footnote 61 [(1959), Deb. of the Sen. (Can.), p. 996].

In his presentation of this bill, Mr. Fulton had stated that his intention was to eliminate the "*trash*", the cause of public pressure, from the newstands. To fulfill this purpose he was introducing the new subsection. His intention was for the objective test to be used for the "*trash*" while reserving the *Hicklin* test for publications and productions with literary merit. The irony of this intention is that after the *American News* obscenity with respect to texts was judged by the examination of isolated passages which made any intention to weigh literary merit impossible.

Aside from the problem of whether *Hicklin* was a dead issue in Canada the new test of obscenity was much criticized both for its vagueness and its conservatism. The latter point is well made by Leon Getz.

> The result is a test which reflects the views of the unimaginative and faceless, the death-knell of the creative writer. A test is created that is barely more sophistocated than under the Hicklin rule. For instead of allowing the range of available reading matter to be determined by the tastes of an impressionable fourteen-year-old girl — as it was under Hicklin — we will have substituted the tastes of, say, the middle-aged, conformist white-collar worker desperately trying not to be difficult.[31]

Now the courts were faced with the problem enunciated by Senator Roebuck, to decide what effect this new legislation had on the *Hicklin* rule. The courts were faced with a difficult problem for they had to determine the intent of the legislature by examining the section itself and then apply this to the stated problem. It was impossible for the courts to speculate on intent from the bare legislation and the recognized aid of examining the history of legislation was not available for there was no history. For this reason Quebec courts ignored the rule which prohibits the court from using legislative history as evidence of legislative intent and introduced into court Mr. Fulton's presentations to the House of Commons.[32]

The Quebec case in question was that of *R.* v. *Standard News Distributors Inc.*[33] where, with Mr. Fulton's assistance, the court concluded that *Hicklin* was still to be considered in Canada. The Supreme Court of Nova Scotia, in *R.* v. *Munster*,[34] came to a simi-

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31 (1964-66), 2 U.B.C.L. Rev. 216, at p. 228 (Much criticism has been leveled against this new test from the civil rights viewpoint, but that matter will be developed in Part III of this paper.).

32 (1966), 44 Can. Bar Rev. 243, at p. 260.

33 (1961), 34 C.R. 54.

34 (1960), 129 C.C.C. 277; 45 M.P.R. 157 (N.S.S.C.).

lar conclusion stating that *Hicklin* had survived the legislative amendment. Ilsley, C.J. concluded that *Hicklin* not only survived but, by implication, was the true test of obscenity, for the new legislation did not purport to be a definition of the term.[35]

The issue of *Hicklin's* survival had been adjucicated but the final answer had not been determined, nor has it been today. The beginning of this long debated question was *Brodie, Dansky and Rubin* v. *R.*[36] where for the first time the Supreme Court of Canada was presented with the question. The decision has been much discussed on the point of whether the new sub-section (8) was an exhaustive definition of obscenity or whether *Hicklin* complemented the new amendment.[37] There have been several interpretations of

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35 *Ibid.*, at p. 279.

36 [1962] S.C.R. 681; (1962), 32 D.L.R. (2d) 507.

37 The following is a list of the cases since *Brodie* which dealt with the status of Section 150 (8) and the *Hicklin* rule.

R. v. *Modenese* (1962), 38 C.R. 45; (1962-63), 5 G.L.Q. 259 (B.C. Mag. Ct.) — used both S. 150 (8) and *Hicklin* test as a precautionary measure; *Rex rel Rose* v. *Marshall* (1962), 48 M.P.R. 64 (Nfld. Dist. Ct.) — S. 150 (8) is exhaustive; *R.* v. *Harte-Maxwell* (1962), 39 C.R. 172 (Ont. Co. Ct.) — used only S. 150 (8); *R.* v. *Dominion News & Gifts Ltd.* (1963), 42 W.W.R. 65; aff'd [1964] S.C.R. 251 (S.C.C.) open question as to whether *Hicklin* still applied, (probably no); *R.* v. *Fraser* (1965), 52 W.W.R. 712, at pp. 729-30; aff'd [1967] S.C.R. 39 (S.C.C.) S. 150 (8) is exhaustive; *R.* v. *Lambert* (1965), 53 W.W.R. 186 (B.C.S.C.) — S. 150 (8) is exhaustive — this case was rejected in *Georgia Straight* case; *R.* v. *C. Coles Co.* (1965), 44 C.R. 219 (Ont. C.A.) — S. 150 (8) is exhaustive; *Re Gordon Magazine Enterprises Ltd.* (1965), 46 C.R. 313 (Ont. C.A.) — used only S. 150 (8); *R.* v. *Adams* (1966), 48 C.R. 143; [1966] 4 C.C.C. 42 (N.S. Co. Ct.) — followed *Hicklin* test; *R.* v. *Cameron*, [1966] 2 O.R. 777 — followed *Brodie*; *R.* v. *Dutchie Books Ltd.*, [1967] 1 C.C.C. 254; 58 D.L.R. (2d) 274 (B.C.C.A.); — used only S. 150 (8); *R.* v. *Huot* (1967-68), 10 Cr. L.Q. 447 — *Hicklin* no longer applies; *R.* v. *Dequin* (1968-69), 5 C.R.N.S. 154, at p. 158 — *Hicklin* does not apply to charges under S. 150; *R.* v. *Salida*, [1969] 1 O.R. 203 — S. 150 (8) is exhaustive; *R.* v. *O'Reilly*, [1970] 3 O.R. 429 — S. 150 (8) is exhaustive; *R.* v. *Great West News Ltd.* (1970), 72 W.W.R. 354; (1969-70), 12 Cr. L.Q. 357 (Man. C.A.) — point not necessary to decide; *R.* v. *McLeod* (1970), 73 W.R.R. 221 (B.C. Co. Ct.), at p. 223 — *Hicklin* is dead; *R.* v. *Georgia Straight Publishing Ltd.* [1970] 1 C.C.C. 359 (B.C. Co. Ct.) — S. 150 (8) is exhaustive for publications; *R.* v. *Prairie Schooner News Ltd.*,[1971] 1 C.C.C. (2d) 251; (1970), 12 Cr. L.Q. 462 (Man. C.A.) — followed *Brodie; R.* v. *Goldberg and Reitman* [1971] 4 C.C.C. (2d) 187; [1971] 3 O.R. 323 — followed *Brodie*; *R.* v. *Pipeline News* (1972), 5 C.C.C. (2d) 71; [1972] 1 W.W.R. 241 (Alta) — used only S. 159 (8) (Note the change in section number); *R.* v. *Beaudoin*, [1972] 2 W.W.R. 140 (Alta) — used only S. 159 (8); *R.* v. *Johnson*, [1972] 3 W.W.R. 226 (Alta) — used only S. 159 (8); *R.* v. *Daylight Theatre Co.*, [1972] 3 W.W.R. 578 (Sask.) — S. 159 (8) is exhaustive; *R.* v. *Small* (1972), 6 C.C.C. (2d) 195 (B.C. Co. Ct.) — S. 159 (8) is exhaustive for publications; and *R.* v. *Carty* (1972), 6 C.C.C. (2d) 248 (Alta. Dist. Ct.) — used both tests.

this case by the courts and a great deal of criticism due to the cloud of ambiguity surrounding it.[38]

The problem posed by the *Brodie* case, whether subsection (8) of section 150 is an exhaustive definition of obscenity, is that there was not a majority of the nine supreme court justices deciding either in favor of or against this proposition. The actual result as to what each judge said on this point has seen at least four judicial interpretations with the consensus being that the issue is still an open one. There is no question that the position of the court was that *Hicklin* was dead; three judges were definite that subsection (8) was an exhaustive definition of obscenity while two more, by implication, agreed with this result.

The confusion mentioned above, and predicted by Senator Roebuck, continued in the first case following the decision in *Brodie*. In *R.* v. *Modenese*,[39] Orr, P.M. took the safe road, first rejecting his interpretation of *Brodie* as incorrect.

Orr, P.M. was not alone in his confusion, for in the next case, *R.* v. *Dominion News &Gifts Ltd.*, Freedman, J.A. in his dissent, which was later followed in the Supreme Court of Canada, also left the question open:

> I do not find it necessary in the present appeals to consider whether obscenity is exhaustively defined by Sec. 150 (8) of the Code or whether resort may still be had to the test enumerated in *Reg.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, 37 L.J.M.C. 89. As I read the judgments in *Reg.* v. *Brodie; Reg.* v. *Dansky*; *Reg.* v. *Rubin*, [1962] S.C.R. 681 there was no clear majority of the Supreme Court in favour of one view or the other. On the appeals before us, however, counsel both for the Crown and for the accused have argued the case on the footing that sec. 150 (8) is exhaustive. In these circumstances I propose to deal with the matter on that basis, reserving that question for decision in any subsequent case, if it should then be still open for consideration.[40]

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38 For criticisms of the Brodie case, see the cases in footnote 37 and the following articles:
(1964-66), 2 U.B.C.L. Rev. 216
(1966), 44 Can. Bar Rev. 243
(1962-63), 5 Cr. L.Q. 259
(1969-70), 12 Cr. L.Q. 10
This list is not meant to be exhaustive.

39 (1962), 38 C.R. 45; for a discussion on this point see (1962-63), 5 Cr. L.Q. 259.

40 (1963), 42 W.W.R. 65, at p. 79 reversed in [1964] S.C.R. 251 (S.C.C.).

The last words of this quotation are of particular importance because Freedman, J.A. states explicitly that he is not deciding the question as to whether the statute is exhaustive, and yet his judgment is cited in subsequent cases as an authority for this proposition.[41] At this point it is cogent to say that the development of this area of the law could incite the jurisprudential scholars.

As illustrated by footnote 37, the weight of the case law supports the proposition that the statutory definition of obscenity is exhaustive. Many of the cases use both tests and several decisions rest on such weak authority as Freedman, J.A.'s judgment in *R.* v. *Dominion News & Gifts Ltd.*

It is significant to note that only one judgment since the *Brodie* case rested solely on the *Hicklin* test, that of *R.* v. *Adams*. In that case O'Hearn, J., in an exhaustive survey of this subject, felt that the common law and the statutory definitions were complementary and were both required to cover the subject. Even this case, which gives *Hicklin* its strongest support held that where there is a conflict, *Hicklin* is pre-empted by the statute. As O'Hearn, J. stated:

> There is thus no clash between "obscene" as commonly understood and as defined in S. 150 (8) but where they differ in emphasis or otherwise, the latter governs, unless the law developed from the Hicklin case also plays some part.[42]

From the cases, it appears that *Hicklin* is of little more than historical significance, unless the approach taken by MacFarlane, J. in the case of *R.* v. *Lambert* is followed. In this view section 153 applied to more than publications and therefore subsection (8) of section 150 does not provide an exhaustive definition of the term. After quoting that subsection he stated:

> This subsection has been described frequently as a definition of "obscene". In my respectful opinion, it is not and does not purport to be a definition of that word. It says merely that a publication possessing certain characteristics is deemed to be obscene. A careful analysis of the reasons for judgment delivered in the Brodie case does not convince me that I am bound to hold otherwise and I do hold, accordingly, that sec. 153 does apply to things which are not publications.[43]

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41 *R.* v. *Fraser*, (1965), 52 W.W.R. 712.
R. v. *C. Coles Co.* (1965), 44 C.R. 219.

42 (1966), 48 C.R. 143, at p. 178 (N.S. Co. Ct.).

43 (1965), 53 W.W.R. 186 at pp. 189-90 (B.C.S.C.).

By stating that section 153 applied to things which are not publications, MacFarlane, J. was implying that subsection (8) of section 150 applies to publications while the *Hicklin* test is still applicable to non-publications.

The approach in the *Lambert* case, which was rejected in *R.* v. *Georgia Straight Publishing Ltd.*, is a seemingly logical one, in light of the intention of the legislature as to the complementary status of the two tests.

Unfortunately, the weight of the case law supports the proposition that the statute is an exhaustive definition of obscenity. The manner in which the courts have avoided the logical conclusion in both the *Adams* and *Lambert* cases is by extending the word publication, giving it a broader scope than the legislature intended.

Such an extension is evident from the following excerpt from Lodner, J.'s decision on the performance "The Beard" in the case of *R.* v. *Small*:

> As was said by Wilson, J. (now C.J.S.C.), in *R.* v. *Leong* (1961), 132 C.C.C. 273 at p. 274 37 C.R. 317, 38 W.W.R. 114: . . . where the word "publication" is used in a penal statute without definition, and with no context which would assign to it a special meaning it must be considered to bear the meaning it would bear in ordinary English speech or writing. Certainly, where crime is involved a court should not go out of its way to attribute to the word an extraordinary meaning involving the culpability of the accused, but should rather hew strictly to the line resolving any possible doubt in favour of the accused.
>
> The Shorter Oxford English Dictionary defines publication, inter alia, as "the action of publishing" and "publish" as, inter alia; "to make publicly or generally known; to declare openly or publicly; to tell or noise abroad, . . ."
>
> I find that the performance in question was a publication.[44]

In short, the present situation is as follows: Hon. E.D. Fulton, in 1957, introduced the amendment to section 150 to the House of Commons with the intention that it be used as a complement to the *Hicklin* test; to give the old rule new scope. It is unfortunate that Senator Roebuck's words of caution went unheeded for the problem he foresaw came to fruition and the courts have departed from Parliament's original intention, in most cases, by stating that the *Hicklin* rule is no longer applicable in Canada.

One final evaluation of the *Brodie* case and support for the view that the courts have left *Hicklin* to history is a statement by Bull, J.A. in the case of *R.* v. *Fraser*:

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44 (1972), 6 C.C.C. (2d) 195, at p. 203 (B.C. Co. Ct.).

> In the judgment in *Brodie, Dansky and Rubin* v. *Reg*, [1962] S.C.R. 681, 37 C.R. 120, C.C.C. 101, reversing [1961] Que. Q.B. 610, 32 C.R. 20B, the situation arose where three of the learned judges of five giving the majority judgments were of the view that sec. 150 (8) contained the exhaustive definition, one learned judge of the majority was of the negative view but reserved the right to consider the matter in another case. However, two of the four learned justices of the minority in view seemed to lean towards the affirmative position that the statutory test was exhaustive. The *Brodie* case was followed by *Reg.* v. *Dom. News & Gifts (1962) Ltd.* .... wherein Freedman, J.A., in a dissenting judgment, based his decision on the assumption that sec. 150 (8) was exhaustive, counsel having argued the case on that footing. The Supreme Court of Canada, sitting with a court of seven, unanimously affirmed the dissenting judgment of Freedman, J.A., adopting his "reasons in their entirety." It is consequently, my view that the Supreme Court has duly adopted or accepted the proposition that the said statutory definition of obscenity is exhaustive and replaces the tests in the Hicklin case. In the recent case of *Reg* v. *C. Coles Co.* (1965), 44 C.R. 219, reversing 42 C.R. 368, this view was accepted by the Ontario Court of Appeal.[45]

At this point I will leave the *Hicklin* case in its grave, although it has yet to be covered, assume that the statute is exhaustive on the definition of obscenity and proceed to an evaluation of this statutory definition.

II Evaluation of S. 159 (8)

In the course of this evaluation I will examine the cases since the amendment was introduced in 1959, in order to evaluate today's position. The sequence of events leading up to the 1959 amendment have been set down in Part I of this paper and need not be repeated.

The subsection has had a very short history, becoming law first in 1959[46] as 150 (8) and remaining unchanged, except for the section number, which became 159 (8) in 1970. It reads as follows:

> For the purposes of the Act, and publication a dominant characteristic of which is the undue exploitation of sex, or of sex and anyone or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.[47]

The problems that have arisen in interpreting these words have three focal points in this section, which will be examined in the order in which they appear in the subsection.

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45 (1965), 52 W.W.R. 712, at pp. 729-30; aff'd [1967] S.C.R. 38.

46 S.C. 1959, C. 41, S. 11.

47 1970 R.S.C., S. 34, S. 159 (8).

The first part of this subsection which has warranted judicial pronouncement is the phrase, "for the purpose of the Act". The reason this is noteworthy is that the word "Act" broadens the scope of this definition to other sections in the code. An example of this extension is seen in the case of *R.* v. *MacLeod*, where the argument was posed that this definition was restricted to the section in which it appeared. On this point Darling, C.C.J. stated:

> Since sec. 150 (8) specified that "for the purposes of this Act" obscenity is defined as therein set forth . . . this definition, covers, in my opinion, sec. 150 A cases . . .[48]

The broad application of this subsection provides support to the argument that *Hicklin* is no longer needed, because the definition therein set forth applies to all obscenity cases.

The proponants of retention of *Hicklin* agree that this definition applies to all obscenity cases but only as pertaining to publications, following the *Lambert*[49] case.

The next part of the subsection which has been the subject of interpretation is the word "publication".[50] To the layman it would seem strange that enlightened justices should have any difficulty interpreting such a word, but the development of the law in this area could hinge on this word. Since the *Hicklin* rule has been dispensed with, the scope of obscenity law in Canada now lies in, "what constitutes a publication".

The courts which have pronounced *Hicklin* dead are now, through judicial creativity, expanding the scope of "publication". As noted previously, the *Small* case has pronounced a theatrical production as a publication. This being so, it seems possible that the whole scope of conduct which previously fell within *Hicklin* will be considered in the future to come within the realm of a publication.

Each time the court expands the scope of "publication" it reinforces the judiciary's pronouncement that *Hicklin* is dead but at the same time it is expanding the statutory definition of obscene to cover the cases covered by *Hicklin* in the past.

The logic in such an approach is questionable but once the courts rejected *Hicklin* there was little choice available. It is evident at this point that what is needed is a legislative pronouncement in the form of a revision.

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48 (1970), 73 W.W.R. 221, at p. 231 (B.C. Co. Ct.).

49 (1965), 53 W.W.R. 186 (B.C.S.C.).

50 *R.* v. *Adams* (1966), 48 C.R. 143, at p. 158.

In view of subsection (1) of section 159, it is arguable that the extension of the meaning of "publication" in subsection (8) is without substance. The courts have given "publication" under subsection (8) a very broad scope and if this is the proper interpretation of legislative intent it would appear redundant for the enumeration of offences in subsection (1), of which "publication" is only one.

The courts have had little difficulty in determining what constitutes a "dominant characteristic"[51] under this subsection, which is perhaps some consolation to the legislator; but the last words to be examined, "undue exploitation"[52] more than compensate.

It has been stated in many cases that the exploitation of sex is not offensive *per se*. To be offensive the exploitation must be "undue". While it is difficult to determine with precision the meaning of "undue", it is agreed that it must be evaluated in accordance with "community standards".[53] When one considers the difficulties involved in determing such standards the scope of the problem becomes apparent.

The community standard concept was first introduced in the Australian case of *R.* v. *Close*[54] which was later followed in both Australia[55] and New Zealand[56] with *Brodie* being the first Canadian case on point.

The pertinent questions to be considered are: what constitutes the community standard?; how does one proceed with such an evaluation?; and finally, is this a question of law or a question of fact?

With respect to the first question, Freedman, J.A.'s much cited opinion in *R.* v. *Dom. News & Gifts (1962) Ltd.* provides some insight.

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51 *Ibid.*, at p. 159.

52 *Ibid.*, at pp. 161-62.

53 *Ibid.*, at p. 164; see also (1960), 37 Dicta 231; (1965), 2 U.B.C.I. Rev. 216; (1969-70), 32 L.Q. 10, at p. 16.

54 [1948] V.L.R. 445; (1972), 50 Can. Bar Rev. 315, at p. 316.

55 *Wavisia* v. *Associated News Papers*, [1959] Vict. L.R. 57; (1972), 50 Can. Bar Rev. 315, at p. 316.

56 *Re Lolita*, [1960] N.Z.L.R. 871; (1972), 50 Can. Bar Rev. 315 at p. 316.

> Community standards must be contemporary. Times change and ideas change with them . . . 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 the attitudes which may prevail elsewhere, be they more liberal or less so.[57]

It was stated in the *Brodie* case that undue exploitation was to be interpreted in terms of community standards and Freedman, J.A. in the *Dom. News* case stated that these standards must be both contemporary and Canadian. These qualifications by Freedman, J.A. make it clear that in every case the court must make a determination as to community standards, due to the fluid nature of this concept.

Let us turn now to the question of proof and the type of evidence accepted by the court in determining this standard. The first matter to be examined is the use of expert evidence. In the early development of the community standard concept the use of experts was questionable; their evidence was admissable, but it carried no more weight than that of the layman. As Martin, J. stated in the case of *Wavisa* v. *Asscoiated Newspapers:*

> . . . when the question is whether a book or article, judged by present day standards, . . . offends against the standards of the community, I consider that a magistrate or jury is just as capable of deciding if it is likely to have that effect as are psychiatrists or psychologists.[58]

This opinion was accepted in the cases immediately following: thus the early Australian cases support the view that determining the standard is the responsibility of the judge. This view remains much the same today as indicated by Dickson, J.A.'s survey of the cases in *R.* v. *Great West News* where he stated:

> This review of decisions of courts at the provincial level would seem to suggest — and I have been unable to find any case in which a different conclusion was reached — that the courts have not found it necessary to call upon expert testimony to describe the standards of the community. Such evidence is, of course, admissable but that is not the same thing as saying it is essential.[59]

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57 (1965), 42 W.W.R., 65 at p. 80. Freedman, J.A.'s dissenting judgment was followed in [1964] S.C.R. 251 (S.C.C.).

58 [1959] V.R. 57, at p. 63; (1972), 50 Can Bar Rev. 315, footnote 10.

59 (1970), 10 C.R.N.S. 42, at p. 49 (Man. C.A.).

In the course of his discussion on this point Dickson, J.A. found only one exception to the rule that expert evidence is not essential. That exception was Laskin, J.A.'s dissenting opinion if *R.* v. *Cameron.*[60] It is safe to conclude that expert evidence is of no special value. The layman's opinion carries equal weight.

Expert evidence of a particular type is required, however, in connection with the use of public surveys to determine public opinion. The reason experts are needed for the interpretation of surveys is obvious, for it requires expertise which the layman, including the judiciary, does not have.

The first problem faced with the introduction into court of surveys was the hearsay rule, and in *Building Products Ltd.* v. *B.P. Canada Ltd.*[61] such evidence was rejected. This problem was later overcome by the court determining that the prerequisites for the rule were not met. As Jessup, J. held in *R.* v. *Time Square Cinema Ltd.*

> . . . no question of inadmissible hearsay arises because the survey or poll is not offered to prove the truth of the statements it contains, but merely to show the foundation of the opinion of the expert on community standards.[62]

The case law on public surveys, with respect to community standards, has been reviewed in an article by Richard G. Fox,[63] with the case sequence contained therein.[64] It appears through this case development that the courts have reached the point of expecting experts to both conduct and interpret public surveys. With the increasing frequency of public surveys and their admissibility having become established, it is unfortunate that one must conclude that the subjectivity of the judge is still the ruling factor.

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60 [1966] 4 C.C.C. 273, 49 C.R. 49; as discussed *Ibid.*, at p. 48.

61 (1961), 21 Fox Pat. Ct. 130.

62 (1971), 4 C.C.C. (2d) 229, at p. 240.

63 (1972), 50 Can. Bar Rev. 315.

64 *Aluminum Goods Ltd.* v. *Registrar of Trademarks*, [1954] Ex. C.R. 79; 14 Fox Pat. C. 41.
Building Products Ltd. v. *B.P. Canada Ltd.* (1961) 21 Fox Pat. C. 120.
R. v. *Murray*, [1969] 4 C.C.C. 147; 3 D.L.R. (3d) 289.
R. v. *Prairie Schooner News Ltd.* (1971), 1 C.C.C. (2d) 251; 75 W.W.R. 585; (1970), 12 Cr. L.Q. 462.
R. v. *Times Square Cinema Ltd.* (1971), 4 C.C.C. (2d) 229; [1971] 30 R. 688.
R. v. *Pipeline News* (1972), 5 C.C.C. (2d) 71.

As Fox states the point in a review of the most recent Canadian case:

> There is an ultimate irony in the *Pipeline News* case for, having established that science was inadequate to assist him decide [sic] whether the material before the court contravened Canadian community standards, the trial judge, in accordance with well established principle, dutifully applied a standard based upon his own subjective experiences . . . the judge must, in the final analysis, endeavour to apply what he, in light of his experience, regards as contemporary standards of the Canadian community.[65]

With all the scientific advances in survey techniques and interpretive skills in recent years the community standards determination should be easily determined by expert evidence. This has not happened and the approach of Legg, D.C.J. in the *Pipeline News* case in the end result is similar to that of Martin, J. in the *Wavish* case. The court is ready to admit surveys and experts but in the final analysis the lawyer would be best advised to gain some insight into the judge's subjective attitudes.

The final question to be asked concerning community standards is whether it is a question of law or fact. This point, like most others on this topic, is dealt with in the *Adams* case. O'Hearn, J. in his analysis concluded "that the determination of contemporary Canadian community standards is a question of fact".[66] Support for this conclusion is found in the fact that with only one exception,[67] the Appeal Courts have reversed trial court findings rather than sending them back for a new trial. Two statutory provisions are also cited in support of his conclusion. The first, subsection (6) of section 150A, which enlarges the possibility for appeals on questions of fact and secondly, a specific provision in subsection (4) of section 150 which provides for a special case where a question of law is involved.

If O'Hearn J's conclusion is correct then judges would be better advised to be guided by the results of public surveys rather than imposing their own views on a question of fact.

The two matters which remain to be considered in this Part are *mens rea* and the defences against a charge under the obscenity sections of the Code.

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65 (1972), 50 Can. Bar Rev. 315, at p. 329.

66 (1966), 48 C.R. 143 at p. 164.

67 *R.* v. *Munster* (1960), 45 M.P.R. 157; 34 C.R. 47; 129, C.C.C. 277; cited in the *Adams* case, at p. 164.

Let us first consider the element of *mens rea*, the mental element of a crime. In this age of mass publication and circulation of printed matter it would seem harsh to prosecute the owner of a small bookstore for exposing for sale publications, the nature of which he was unaware. By removing this element of knowledge the result is one of strict liability which imposes a heavy onus.

A study of the "corrupting morals" section makes it evident that *mens rea* is an important issue to be considered in any discussion of a prosecution in this area. Section 159 contains two charging provisions, subsections (1) and (2). An important point of distinction between these provisions is that subsection (2) contains the word "knowingly" while subsection (1) does not. The significance of this distinction is made clear in the comments of Magistrate Honrahn in *R. ex rel. Burns* v. *Menkin* where he states:

> In *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918 a Divisional Court in England held the introduction of the word "knowingly" or a like word, into the description of an offence, proving guilty knowledge; while in its absence proof of absence of a guilty knowledge was on the accused.[68]

As regards the onus of proof, therefore, it is clear that under subsection (1) the accused must prove absence of guilty knowledge while under subsection (2) the burden is on the prosectuion.

Any doubt with respect to the absence of the mental element under subsection (1) is quickly displaced with an examination of subsection (6). There it is stated that the ignorance of the accused is not a defence to the charge. Thus we see that from the viewpoint of the burden of proof, it is most important under which section the Crown proceeds.

With two charging provisions in this one section and a procedural distinction of crucial importance it might be hoped that the two subsections would be mutually exclusive with the cases under each being easily discernible. Unfortunately this is not the case and the Courts have had some difficulty in categorizing the cases as being within one subsection or the other. For example, it may be argued that the word "distribution" found in subsection (1) includes all the cases under "sells" in the subsection, a sale being one of the means of distribution. The rebuttal to this argument is that this could not have been the legislative intent for it would defeat the purpose of paragraph (a) of subsection (2).[69] This point is more than of academic interest. It was discussed in the Supreme

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68 (1957), 118 C.C.C. 306, at p. 308.

69 *R.* v. *Yip Men*, [1970] 4 C.C.C. 185, 9 C.R.N.S. 389 (B.C. Co. Ct.).

Court of Canada in *Fraser* v. *R.*[70] where Ritchie, J. felt that those sales which constituted a distribution would fall under subsection (1) and the remaining sales would allow the accused to avail himself of subsection (2).

There are many more problems than the one discussed above with respect to determining whether subsection (1) or (2) applies, this being used only as an example of the problems which arise if *mens rea* is not treated consistently throughout section 159.

By this point the precarious position of the accused should be apparent; for he is unable to determine with complete accuracy into which section his case should fall and yet the subsection under which he is charged is crucial. The word "crucial" is appropriate because a charge laid under subsection (1) is approaching strict liability, with the onus on the accused to prove his innocence. This indication of strict liability is evident in *R.* v. *McAuslane*[71] where MacKay, J.A. affirming a conviction under section 150 (1) (a) gave little recognition to either *R.* v. *Beaver*[72] or *Proudman* v. *Dayman*[73], two important cases on this point that mistake of fact is a defence except where the offence is one of absolute liability. Reading subsections (6) and (1) together, the argument as to absolute liability is strengthened. Fortunately this conclusion and the *McAuslane* case have not gone without criticism[74] and this question can be considered an open one.

It seems appropriate to conclude this discussion of *mens rea* with a statement which well illustrates the confusion in this area:

> While mistake as to the law is not recognized as a *mens rea* defence, it is questionable whether obscenity legislation has the certainty that would qualify it as "law". Moreover, can it not be argued that the accused is really mistaken as to the facts in obscenity cases, because it is unlikely that he can read all the books that he sells, or films he distributes, and even if he did, it is unlikely that he could interpret the contents in any legal sense.[75]

Let us turn now to a consideration of the defence under section 159. The two defences which are by far the most apparent are found in the words of subsections (3) and (8). The former affords a defence to the accused if he can prove that a publication, though it may be obscene, serves the public good. (The paradox of such

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70 [1967] S.C.R. 38.

71 [1968] 1 O.R. 209 (Ont. C.A.).

72 [1957] S.C.R. 531.

73 (1941), 67 C.L.R. 356.

74 (1967-68), 10 Cr. L.Q. 373.

75 (1971), 9 Osgoode Hall L.J. 415 at p. 431; Joseph Weiler.

a defence has been the subject of some discussion, with the concept of public good being closely examined.)[76] The defence under subsection (8) is centered on the meaning of "publication", "dominant characteristic", and "undue exploitation", as used therein. This defence would seek to bring the case outside the statute. With the judicial extension of the scope of the work "publication", and the problems encountered in interpreting "dominant characteristic", the greatest scope for the defence lawyer would be found in the words "undue exploitation". Ultimately the defence under this subsection should be framed around the concept of community standards.

These two defences are exhaustive for the purposes of subsection (1), but not subsection (2), with its requirement for proof of *mens rea*. Together with the word "knowledge" appear the words "without lawful justification or excuse" which, if they have any significance judicially, would also indicate a possible defence.

A discussion of the defences should include a reference to the anomaly brought to light by *R.* v. *Prairie Schooner News Ltd.*[77] There the defence of mistake of fact, based on the fact that Customs had admitted books, was rejected.

This indicates that there may well be two independent standards as to what constitutes obscenity, thus rendering the element of prediction difficult and uncertain.

III IS THE INCLUSION OF SECTION 159 IN OUR CRIMINAL CODE JUSTIFIED?

This question might well be asked of all those Code provisions by which an attempt is made to define and control moral standards by criminal sanction. This is, of course, to the exclusion of sex crimes, and is restricted to those standards where the freedom of choice could provide adequate controls.

The literature in this area is voluminous because obscenity is very topical and has had a long history. The subject has been examined by professionals in all fields with no unanimity of conclusion. An attempt will be made here to highlight some of the conclusions of the American Report of a Presidential Commission on Obscenity and Pornography, a weighty authority giving direction to a confused concept.[78]

A criminal code provision may be justified as being necessary

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76 (1958), 36 Can. Bar Rev. 1.

77 (1970), 75 W.W.R. 585, 12 Cr. L.Q. 462; 1 C.C.C. (2d) 251 (Man. C.A.).

78 *The Report of the Commission on Obscenity and Pornography*; 1970, U.S. Government Printing Office, Washington, D.C.

for the protection of society or for the rehabilitation of the individual, or both. The social attitudes of today emphasize the rehabilitation aspect of control, but it is clear that this has not been reflected in our law in relation to obscenity.

Section 159 has ignored the individual by failing to consider his motivation, the most important element of a moral action, and by failure to recognize the distinction between legal and moral sanctions, the latter of which would seem more appropriate for a moral offence. This point is well illustrated by Norman St. John-Stevas in his book, *Law and Morals*, where he states:

> The most important and obvious difference between law and morality lies in the sanctions imposed. In law the sanction is essentially physical and external, consisting in a fine or the deprivation of liberty or even, in certain cases, of life itself. The sanction is imposed collectively in the name of society after a primarily interior and imposed not by the courts but the conscience. In morality much stress is laid on motives, but these are secondary where the law is concerned. The law requires the establishment of a criminal intention, but this is ascertained not by interior inquisition but by external evidence.[79]

From this it can be concluded that if the law is to be justified it must be on the basis of the protection of society. It is clear from the House of Commons Debates that the purpose of Section 159 is to protect society from exposure to publications which may weaken our moral standards. Protection being the objective of the law, it is well to recall that the degree of control desired by the legislature has not been enunciated clearly. This had led to the mistaken rejection of the *Hicklin* rule.

It appears to be generally believed that the members of society who are most in of protection from obscenity are the children. This concern for the protection of children is often emotionally charged and based on misconception rather than scientific data. Indeed, scientific research would seem to indicate that the concern is largely unfounded.

> It is commonly known in medical science, that sexual leanings are fixed at an early age, probably around 5-6 years old, and are in any case completely established by the end of puberty. It is therefore hardly likely that the reading of "obscene" writings or the sight of films, etc. will change the sexual leanings of an adult person.[80]

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79 *Law and Morals*, St. John-Stevas, Norman, at p. 17. Hawthorne Books, New York.

80 The Obscenity Laws, A Report by the Working Party set up by a Conference convened by the Chairman of the Arts council of Great Britain, Andre Deutch, London WCI, at p. 32.

The conclusion may be drawn that today's obscene publications and even hard-core pornography have little or no influence on "sexual leanings" of children. Support for this conclusion is to be found in the Report of the U.S. Presidential Commission.

> If a case is to be made against "pornography" in 1970, it will have to be made on grounds other than demonstrated effects of a damaging personal or social nature. Empirical research designed to clarify the question has found no relaible evidence to date that exposure to explicit sexual materials plays significant role in the causation of delinquent or criminal sexual behaviour among youth or adults.[81]

While it should be noted that the Commission was restricted from surveying very young children, it is to be presumed that such children would be protected from exposure to obscene publications in any event.

In the light of these findings one is led to ask; who needs the protection of section 159? With respect to adults the laws should not be directed to those who are particularly sensitive but to the common man. In both the British and American reports cited herein the conclusion was drawn that there is no reliable scientific data supporting the proposition that pornography contributes to the commission of sexual offences or that it breeds sexual deviants. Thus it may be concluded that while some adults may occasionally be shocked or offended by obscene publications they do not need the type of protection which section 159 seeks to provide. There exists, therefore, a strong argument in favour of amending, or indeed repealing, our present restrictive legislation.

The U.S. Presidential Commission reached the same conclusion in their recommendations for statutory reforms.

> The Commission recommends that federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed.[82]

This conclusion was reached after five years of research and is supported by an overwhelming amount of scientific data. It is not surprising in view of the trend to freedom and liberalism which has appeared elsewhere, particularly in Denmark where censorship was abolished in relation to adults, in 1969.

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81 *Supra*, fn. 78, at p. 139.

82 *Ibid.* at p. 51.

The problem of obscenity as it relates to children must again be examined. It has been indicated that children are not as susceptible to sexual influences as was once supposed and that a reasonable control by parents should suffice. While this might require some parents to employ a double standard many parents are experienced in such techniques and this added burden should not be an unreasonable one.

It is probable that the general concern for the protection of children will continue to be reflected in our legislation regardless of the reforms which might be effected. The following provision continues to apply in Denmark:

> Any person who sells obscene pictures or objects to any person below 16 years of age, shall be liable to a fine.[83]

Some indication as to the effect on society of the repeal of obscenity laws can be had by viewing the experience in Denmark. At the time of the U.S. Presidential Commission Report, insufficient data was available to draw any scientifically sound conclusions. There were, however, indications that abolition of restrictions on adults was having a very positive effect on society. Attitudes were changing so that reaction to pornography was more rational and less emotional. The shock was beginning to disappear. Each individual quickly reached his equilibrium, with this exposure having a stabilizing effect on society.

As a long recognized advocate of liberty, John Stuart Mill emphasized the need to continually re-evaluate laws in terms of their purpose in order to keep anomalies at a minimum. More importantly, he stressed the dangers of needlessly restraining individual expression which would result in an underdeveloped and premature society. His criticisms of undue restraint of society were meant to be constructive as well as instructive and in his most famous work, *On Liberty*, he defined what the guidelines of restraint should be:

> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose

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83 *Technical Report of the Commission on Obscenity and Pornography*, Volume II, Legal Analysis, at p. 135, U.S. Government Printing Office, Washington, D.C.

> for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[84]

Following these guidelines, it is clear that the provisions of the Criminal Code respecting obscenity would be rejected by Mill as unnecessary and unjustified restraints on the individual. The arguments posed by scholars such as Mill provide a firm foundation for the conclusion that these provisions should be removed from our Criminal Code.

J.C. Dybikowski accepts Mill's Liberal restraint guidelines and emphasizes that the onus for imposing restraints should be on the advocates thereof. He suggests that pornography has been subject to an unfounded criticism of presumed harm, thus placing the onus on the wrong party. Not only does he criticize the fact that the law is based on defrauded reasoning, he also suggests that obscenity may serve a healthy purpose.

> 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 imagination, as distinct from the actual, enactment of our sexual fantasies.[85]

The protection of society, considered by Mill as the only justification for a law, does not appear to provide a sufficient justification for our obscenity law. Any danger of corrupting those susceptible is far outweighed by the need for our society to recognize individual freedom and strive for sexual maturity.

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84 *Harvard Classics*, #25, *J.S. Mill*, P.F. Collier & Son, New York.

85 *Law, Liberty & Obscenity* (1972), U.B.C.L. Rev. 33, at p. 54.