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## DEPRAVITY, CORRUPTION AND COMMUNITY STANDARDS

Goddess, straight backed and straiter laced,  
Be thou my fort.  
Preserve me sober, grave and chaste  
Or else uncaught.

J. J. Bray, *Hymn to Respectability*, 1962

The decade in which John Jefferson Bray was Chief Justice of South Australia saw a marked change in the law relating to the control of obscene publications. An important evolutionary refinement of the common law took place soon after he assumed office in 1967 and this was followed by a major shift of legislative policy in the mid 1970's. It cannot be said that Bray was directly responsible for either; in this area of law the age of judicial innovation had passed more than a century before: the authorities were too restrictive and the Chief Justice too skilled a lawyer to allow a crude shattering of the mould. But for more than a decade, in his judgments and particularly in his extra-judicial writings, His Honour maintained a biting criticism of the deficiencies of the law which, if it did not directly shape, at least gave rational direction to the revamping which took place. His theme was twofold: first, in an age of moral pluralism diversity had to be tolerated. The law was not designed to make nor was it capable of making men virtuous. Its proper concern was not private morality but public propriety and decorum. Its aim was to define the minimum standards of citizenship and no more. Secondly, insofar as prohibitions had to be predicated on such shifting standards as the current level of public tolerance of sexual expression, the courts had to be open and receptive to the enlightenment of research and should not excessively rely for knowledge on intuition and introspection.

Bray had no truck with censorship before he came to judicial office in 1967. His fidelity to law could not suppress the scholar, littérateur and accomplished poet. In the 1960's the great censorship debates had turned upon the right of the state to hobble literature and the arts and Bray himself had willingly entered the lists in 1964, in an Adelaide Festival of Arts Writers' School, to lament at the irrationalities of the dichotomised Federal/State jurisdiction over publications and to protest at the repressed Puritanism and thinly veiled contempt for art and learning which had led, at various times, to the banning of such works as Balzac's *Droll Stories*, Joyce's *Ulysses*, Hemingway's *Farewell to Arms*, Huxley's *Brave New World* and Shaw's *Mrs. Warren's Profession*.<sup>1</sup> The Commonwealth Customs Act and Regulations prohibited the importation of blasphemous, indecent or obscene works or articles and of literature which, in the opinion of the Minister, unduly emphasised matters of sex, horror, violence or crime. But even works which had passed Commonwealth customs screenings remained vulnerable to State prosecution as obscene or indecent.<sup>2</sup> The common law offence of publishing an obscene libel relied on the classic definition of Cockburn C.J. in *Hicklin's case* in 1868 namely "whether the tendency of the matter is to deprave and corrupt those whose minds are open to such

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1. Bray "Censorship", (1964) 13 *Australian Library Journal* 60.

2. See generally, Fox, *The Concept of Obscenity* (1967), ch. IV.

immoral influences and into whose hands a publication of this sort may fall”<sup>3</sup> and, despite its somewhat circular nature, this judicial test of obscenity was given statutory expression in the anti-obscenity legislation of a number of Australian states including South Australia.<sup>4</sup> The reference to undue emphasis on sex etc. found in the Commonwealth regulations, also appeared as a test of obscenity in State legislation in Victoria, New South Wales and, to a lesser extent, South Australia. It was interpreted as meaning dealing with matters of sex in a manner which offended against the standards of the community in which the work was published and for a time the two tests co-existed uncertainly together.<sup>5</sup>

It was never clear whether the *Hicklin* test allowed for a defence of literary or artistic merit to a charge of publishing an obscene libel, but State legislation generally did so. Challenges to the works of writers such as D. H. Lawrence, Norman Lindsay, Erskine Caldwell, Henry Miller and that uniquely South Australian character, Ern Malley,<sup>6</sup> provided a battleground for the *literati* and philistines over the Australian survival of works of serious literary or scholarly intent. Experts were paraded before the courts to demonstrate (or refute) that the alleged obscenity was redeemed (rather than aggravated) by the author’s purpose or the publication’s inherent merit. Though not one to deny the value of literary criticism, Bray was not without his cynicism in assessing the style of such experts whose “pompous condescension” and “pedantic aridity” was at times to him “evocative of a constipated mouse delivering a report to a Congress of Rodent Dieticians on a particularly mouldy piece of cheese.”<sup>7</sup>

The remedy he saw for the situation as he perceived it before he assumed judicial office lay in the development of “an increasing maturity of taste and intellect and the adoption of civilised standards of values on the part of the Australian people”.<sup>8</sup> The climate in fact did change rapidly in the early 1970’s, but it was less the result of advancing cultural standards than of a wholesale shift to new media forms in the exploitation of sexual expression. The world-wide proliferation and the resultant influx into Australia of explicit pictorial erotica, particularly in the form of popular glossy colour magazines, attained such a momentum that they swamped the written word and by comparison books with even a marginal claim to literary, artistic or scientific merit had little difficulty in passing Commonwealth censorship screening. Though most of the new pictorial material could lay no claim to artistic or literary merit, some attempts were made to defend it on the ground that it possessed scientific merit in that it could be used for educative and therapeutic purposes by those seeking to improve their sexual functioning. By and large, however, the material was defended on the basis that, though lacking in merit, its content was not harmful and that, in the absence of evidence of harm, adults in a pluralistic society should be free to possess, read or view whatever they wished, regardless of the apparent lack of social value in the publications they sought. The common law had always answered this line of argument

3. *R. v. Hicklin* (1868) L.R. 3 Q.B. 361, 371.

4. Police Offences Act, 1953-1976 (S.A.), s.33(3)(c).

5. Police Offences Act, 1958 (Vic.), s.164(1); Obscene and Indecent Publications Act 1901-1968 (N.S.W.), s.3(2); Police Offences Act, 1953-1978 (S.A.), s.33(5); Fox, *op. cit.* (*supra* n.2), ch. VI.

6. *Ern Malley’s Poems* (Introduced by Max Harris) (Melbourne, Lansdown Press, 1961).

7. *Loc. cit.* (*supra* n.1), 70.

8. *Ibid.*

(after some initial hesitancy regarding whether such matters were of morality for the ecclesiastical courts or of propriety for the secular ones) by assuming jurisdiction on the basis that obscene writings tended to "deprave and corrupt" those who were exposed to them. For over 100 years the phrase was used as though the danger to the social order which it purported to describe was self-evident, but it was not.

In delivering the Third Wilfred Fullagar Memorial Lecture at Monash University in 1971,<sup>9</sup> Bray cast his critical eye over the juristic basis of the law relating to offences against public morality and decency. His Honour identified, as the original and continuing source of confusion in the law of obscenity, the failure of the courts, which claimed to be *custos morum* of all the King's subjects, to determine whether they were guarding public decency, or public morality, or both. Were they the guardians of the inner morals of the people or their outer manners? In the 19th century and later, and certainly at the time of *Hicklin*, the two concepts were poorly differentiated in the minds of the judges and in *Hicklin*, as might be expected in the noon of the Victorian era, the primary emphasis was placed on safeguarding morality.<sup>10</sup> The concept of moral corruption, Bray openly confessed, was one which always tended to elude him. How was it to be ascertained, he asked, or its degree to be gauged? Obscenity was an area in which *a priori* assumptions reigned supreme and Bray was not content to let them stand. He saw that Lord Cockburn's famous words were capable of encompassing any one of a number of speculative evils not all of which, even if real, would warrant the intervention of the criminal law. The alleged tendency to depravity and corruption included:

1. The risk that the allegedly obscene publication would induce people to commit crimes;
2. The risk that they would be induced to behave in some other reprehensible manner, particularly in respect of sexual behaviour, though this was not necessarily subject to criminal proscriptions;
3. The risk that they might abandon their acceptance of traditional codes of morality;
4. The risk that the publication would stimulate them erotically and pander to their "prurient interest".<sup>11</sup>

Though at various times the judiciary had accepted that one or more of these was the evil to be averted, Bray denied that any was based on a valid premise. The first was inadequately supported by scientific evidence, the second and third wrongly presumed a common homogeneous moral code to be protected and the fourth attempted the impossible task of either repressing all erotic thoughts and desires or, alternatively, identifying the mental processes which distinguished legitimate eroticism from unacceptable pruriency.

In *Popow v. Samuels*<sup>12</sup> the particular material alleged to be indecent comprised sex films sold to willing male purchasers over eighteen years of age. Did it tend to deprave or corrupt them? Bray articulated the implied dangers and, one by one, rejected them:

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9. Bray, "The Juristic Basis of the Law Relating to Offences Against Public Morality and Decency", (1972) 46 *A.L.J.* 100.

10. *Id.*, 103.

11. *Ibid.*

12. (1973) 4 *S.A.S.R.* 594.

“I think it was only intended to arouse and only likely to arouse erotic impulses in men. I do not think any of the material has a tendency to induce the commission of sexual crime. It does not incite to sadism or violence. I do not think that the arousal of erotic feelings in an adult male is itself an offence. Advertisements, films, literature at the present time notoriously, continuously, clamorously and blatantly appeal to the erotic instincts of men. I cannot think that that offends contemporary standards of morality. There would surely be louder and more effective protests if it did. I think that the tendency of this material is to induce erotic thoughts and impulses in adult males, these being the relevant audience. I think it would succeed with some, perhaps, if that is the test, with a significant proportion, of such males. It would undoubtedly fail to do so in many cases, either for reasons of good taste or because of the inadequacy of the material. The mere arousal of erotic impulses does not, in my view, in any relevant manner tend in itself to deprave or corrupt. There is, to my mind, something ludicrous about the application of such portentous words as “deprave” and “corrupt” to these trivial and insipid productions.”<sup>13</sup>

In the particular case he considered himself constrained by the statutory reference to depravity and corruption in s.33(3) of the Police Offences Act, 1953-1973 (S.A.) to give the concepts some meaning<sup>14</sup> even though he was conscious that the courts did not take the idea of depravity and corruption seriously. He suggested that, if it had to be used, it should be read as referring to a tendency to induce departure, to a substantial degree, from contemporary community standards of moral behaviour. But even so there were limits:

“No doubt . . . there was a time when anything tending to induce people to behave in a manner contrary to the Christian code of sexual ethics, and I mean by that absolute chastity outside monogamous marriage, or even to question the validity of that code, could be held liable to deprave or corrupt. That cannot, in my view, be said today. Not all sexual immorality within the meaning of that code can be said to deprave or corrupt . . . and I would add that “deprave” and “corrupt” are strong words, not apt to include what society would regard as indulgence in a reprehensible but excusable peccadillo.”<sup>15</sup>

He was particularly concerned to stress that the law should not be predicated on an over-rated view of the homogeneity of contemporary moral or ethical standards. He conceded<sup>16</sup> that general Christian views of morality, particularly sexual morality, mustered the support of many people; nevertheless he was compelled to deny that the law should enforce all Christian values. He characterized the community as partly Christian and partly pagan enjoying a great deal of variance on doctrinal and moral questions:

“. . . there are indications that belief in the wickedness of fornication, adultery, abortion and homosexuality may be following belief in the

13. *Id.*, 610.

14. The majority of the court (Walters and Zelling JJ.) did not consider reference to the “depravity or corruption” provision in s.33 essential to the determination of the case.

15. (1973) 4 S.A.S.R. 594, 608-609.

16. Bray, “Law Liberty and Morality”, (1971) 45 *A.L.J.* 452,457.

account of creation given in the Book of Genesis into the shadow of minority opinion. Nor is it reasonable to expect that the moral superstructure will stand for more than a generation or two after the decay of the metaphysical foundations on which it was erected.”<sup>17</sup>

He did not mean that morality was likely to disappear, only that the law catering for a population which subscribed to several standards of secular morality, most of them tinged with utilitarianism, and each co-existing with the traditional standards and values of Christianity. In Bray’s view it was impermissible, indeed impossible, for the law to seek to enforce a particular sectional morality:

“. . . its excursions into the moral sphere arouse intense resentment and that resentment is apt to rub off against the general principle of the law and an impression is created in the public mind that the law is some sort of Victorian father figure ingeminating nineteenth century views of life, and it is unwise for the law to endure that image, except in so far as it is absolutely necessary for it to do so. Of course, the law must protect people from inflicting . . . physical or economic harm on each other without legal justification, but every time a pronouncement is made from the bench in terms of nineteenth century philosophy, decorum and morality, the hearts of twenty or thirty undergraduates are alienated from the law as a whole.”<sup>18</sup>

In Bray’s view it was the affront to public decency rather than the violation of private morality which justified legal intervention and provided the proper juristic base for the control of offensive written or pictorial matter:

“I suggest that we should decide whether we really mean what we say when we talk about punishing people because their conduct tends to deprave or corrupt public morals. I suggest that we do not mean it, and if we do not, we should stop saying it. If we do mean it we should define the concept more closely . . . Or do we merely mean, as I suggest we do, something quite different? Do we mean no more than that conduct offending the susceptibilities of the citizen by violating the contemporary standards of decency in the community should be legally punishable, and, conversely, that conduct which does not violate those standards should not be punishable . . . ?”<sup>19</sup>

He found support for his view in Mr. Justice Windeyer’s 1968 discovery, in *Crowe v. Graham*,<sup>20</sup> that the depravity and corruption test was a legal fiction. Despite common law and statutory references to depravity and corruption, the courts had never actually required proof beyond reasonable doubt of a real tendency to deprave or corrupt. In prosecutions for obscene libel the rule had always been that the tendency of the publication was to be ascertained by the court itself from an examination of the publication as it stood, without any assistance from experts,<sup>21</sup> and this principle equally applied to prosecutions brought under statutes which relied on these concepts. Thus in *Wavish v. Associated Newspapers*<sup>22</sup> Martin J. declared that he considered magistrates or juries as capable as psychiatrists or

18. *Id.*, 463.

19. *Loc. cit.* (*supra* n.9), 108.

20. (1968) 121 C.L.R. 375,392.

21. *Galletly v. Laird* [1953] S.C.J. 16; *R. v. Reuter* [1954] 2 Q.B. 16.

22. [1959] V.R. 57,63.

psychologists of deciding the issue of depravity and corruption and in *R. v. Neville*<sup>23</sup> it was held that the prosecution was not bound to establish some identifiable person or class of person to whom the court, in judgment, could refer to as those likely to be affected before it could be held that a publication had a tendency to deprave or corrupt. The tendency to deprave or corrupt was merely inferred by the court as a matter of law from the publication complained of or, as Glanville Williams cuttingly observed:

“To put the matter in realistic terms, no such tendency is necessary, it being sufficient that the writing complained of goes so far beyond accepted standards as to shock the tribunal of fact.”<sup>24</sup>

In *Crowe v. Graham* the High Court was being called upon to interpret the concepts of indecency and obscenity under a New South Wales statute. The court held that the two terms were interchangeable and, in the course of expatiating upon their meaning, Windeyer J. explained the illusory operation of the *Hicklin* definition of obscenity:

“[The test] has only survived really because, although constantly mentioned, it and its implications have been ignored. Courts have not in fact asked first whether the tendency of a publication is to deprave and corrupt. They have asked simply whether it transgresses the bounds of decency and is properly called obscene. If so, its evil tendency and intent is taken to be apparent.”<sup>25</sup>

It was not to the point for a court to enquire whether the writing could lead from unchaste thoughts to evil actions since it was assumed incontrovertibly by the common law that obscene writings did deprave and corrupt morals. What then was the test? According to Chief Justice Barwick it was simply whether the matter in question would offend the ordinary modesty of the average citizen in sexual matters.<sup>26</sup> Publications which were disseminated in such a way as to offend the sensibilities of the average man were conclusively presumed to be liable to deprave and corrupt. Conversely, things which were not likely to so offend were not presumed to be harmful; the only real enquiry for the court was whether contemporary bounds of decency had been transgressed. Bray welcomed this development. It accorded with his conception of the proper function of the law and, incidentally, went a long way towards reconciling the *Hicklin* definition with the statutory “undue emphasis” test. He predicted that, though Windeyer’s interpretation still needed refinement, it was likely to mark the line of future developments and therefore its implications had to be carefully worked out.<sup>27</sup>

The major implication which Chief Justice Bray correctly apprehended from the remarks in *Crowe v. Graham* was that there could be no such thing as inherent obscenity. Particular four letter words (though not their Latin equivalents) could be punished as obscenities irrespective of the time and place of their dissemination. Writings which induced or incited readers to violate the tenets of a particular moral code (especially a code of sexual morality proscribing pre-marital intercourse, contraception and abortion) could, as in the past, be held obscene with minimal consideration of the

23. (1966) 83 W.N. (N.S.W.) 501,511.

24. Williams, *Criminal Law: The General Part* (2nd ed., 1961), 7.

25. (1968) 121 C.L.R. 375,392.

26. *Id.*, 379.

27. *Loc. cit.* (*supra* n.9), 108.

circumstances and setting of their presentation. Despite the popular conception that obscenity inheres in a definite class of objectionable material irrespective of the time, place and circumstances of dissemination, the law is more subtle. It is not the publication that is on trial; it is a person and the obscenity of sexual or scatological matter depends as much upon the circumstances of its availability as upon its internal qualities. Thus even the most dissolute publication may escape being accounted obscene if it is exposed to an audience immune from harm or at least not vulnerable to being offended by it. Bray saw that if the rationale of the law of obscenity was the protection of citizens from shock to their susceptibilities a distinction would have to be drawn between public and private offence so that persons could be protected against involuntary exposure to offensive material while, at the same time, those who willingly sought out erotica with advance notice of its nature would have no right to call for its suppression on the ground alone of their personal disgust:

“There is a widespread body of opinion now that there should be no interference with what adults choose to read or see in private and therefore no interference with material kept from juveniles and not obtuded on to those who do not want to see it. It could be argued that the contemporary standards of decency and modesty are not violated in such circumstances.”<sup>28</sup>

If the essence of obscenity was the violation of communal standards of decency, rather than the corruption of morals, how were the courts to inform themselves of such standards? It might have been thought that community standards were empirical phenomena which, although diverse, were capable of ascertainment with relative objectivity. Certainly Bora Laskin, the present Chief Justice of Canada, thought so. When he was serving on the Ontario Court of Appeal at the time the *Hicklin* formula was abandoned in Canada in favour of a test based on contemporary community standards, he remarked that:

“. . . the departure from [the *Hicklin* test] has meant not only a change in the legal test of obscenity but also a change in the kind of evidence, information and materials receivable by a court in that connection . . . it is important in this branch of the law that judges, especially when trying cases without a jury, and magistrates should be exposed to the persuasion of evidence and extrinsic materials to counter balance the ineradicable subjective factor residing in the application of any legal standard of obscenity, however objective it it purports to be.”<sup>29</sup>

Extrinsic studies of community attitudes and values have been conducted in Australasian<sup>30</sup> as well as Canadian contexts<sup>31</sup> and, though the courts are always entitled to reject expert opinion based on survey data as unpersuasive, biased, or of no probative value, such studies when properly undertaken can provide useful insights into prevailing feelings and attitudes, particularly in an age when standards are known to be in a state of flux. The High Court's view was precisely the opposite. Mr. Justice Windeyer had no doubt of the proper approach:

28. *Popow v. Samuels* (1973) 4 S.A.S.R. 594, 607.

29. *R. v. Cameron* [1966] 4 C.C.C. 273, 302.

30. Boshier and Goodall, "Language and the Law", [1973] *N.Z.L.R.* 117.

31. Fox, "Survey Evidence of Community Standards in Obscenity Prosecutions", (1972) 50 *Can. Bar Rev.* 315.

“No one would question that, however obscenity and indecency be understood as grounds for the condemnation of a publication, the question is to be related to contemporary standards; community standards. But of that the appointed tribunal of fact must be the judge. Evidence is neither needed nor permitted. Contemporary standards are those currently accepted by the Australian community.”<sup>32</sup>

Windeyer was strongly supported by earlier cases and Bray conceded that he was bound by this authority. Nevertheless he chafed at the assertion that evidence was not needed and saw the High Court’s belief in the existence of a “general instinctive sense of what is decent and indecent”<sup>33</sup> as representing one of the most conspicuous weaknesses in the law. He doubted that there really was a common set of community values in relation to the acceptable limits of sexual expression and called for a more objective guide for the ascertainment of community standards than the unaided intuition of the court.<sup>34</sup> The High Court approach was rendered even more unrealistic by its reference to *Australian* standards. It was difficult enough to intuit local standards without having to find national ones. In any event, since the court was interpreting State not Federal legislation, the appropriate standard should have been that of the relevant State. The standards of one part of the country are not necessarily identical to those of another and, as Bray put it, “diversity is the shelter of liberty”.<sup>35</sup> The U.S. Supreme Court’s recognition of the futility of searching for hypothetical national standards under its own definition of obscenity<sup>36</sup> and its reversion to “local standards”<sup>37</sup> should have put the High Court on its guard against invoking such unascertainable norms.

In *Romeyko v. Samuels* Zelling J. effectively demonstrated, with a few easily obtainable demographic indicators, how nonsensical it was to create a crime which turned on a breach of communal standards and then shut out evidence of what those standards were:

“It is often blandly asserted that Judges are easily able to decide for themselves without hearing evidence what those current standards are. With the utmost respect, that is an absurdity. According to the South Australian Year Book 1971, page 140, the mean or average age of the population of South Australia at the census of 1954 was 32.2 years, in 1961 it was 31.3 years and in 1966 it was 30.8 years. The age distribution of the population for South Australia is given at the same page. Some 15-17 per cent of the population of South Australia would be in the age group of the Judges of this Court and . . . a less percentage still in the case of the learned Special Magistrate from whom the appeal is brought. The judiciary is of necessity cut off to a certain extent from unrestricted intercourse with other members of the community, little as they may desire this to happen, and in any case their standards do not take in the standards of the young who comprise over 50 per cent of the

32. *Crowe v. Graham* (1969) 121 C.L.R. 375, 399.

33. *Id.*, 404. The phrase is taken from the judgment of Fullagar J. in *R. v. Close* [1948] V.L.R. 445, 465.

34. *Trelford v. Samuels* (1974) 7 S.A.S.R 587, 600

35. *Loc. cit.* (*supra* n.1), 70.

36. *Roth v. United States* (1957) 354 U.S. 476, 487, 489.

37. *Miller v. California* (1973) 93 S.Ct. 2607; *Kaplan v. California* (1973) 93 S.Ct. 2686.



community. I do not find the proposition anywhere in the law books that community standards are those commonly held by persons over the age of fifty years.”<sup>38</sup>

Bray entirely agreed. Moreover he warned that there was a very real risk that judges and magistrates called upon to decide what community standards were, without assistance, would fall into the trap of instead presenting their own notion of what the standards should be.<sup>39</sup>

One of the major weaknesses of the *Hicklin* test was that it defined obscenity by reference to the most vulnerable members of the audience to whom it was disseminated, i.e. “those whose minds are open to immoral influences”. Therefore it was not surprising that the attitude of the courts after *Hicklin* was generally that obscenity of a work was to be assessed in the light of its supposed effect on those members of society with the lowest level of intellectual and moral discernment — the young, the sexually immature and the abnormal. Very early on Bray had argued that this was unsatisfactory and that the standard of shockability should be that of a normally mature adult, “not a convent-bred schoolgirl of sixteen”.<sup>40</sup> The reinterpretation of *Hicklin* in *Crowe v. Graham* did much to bring this about and in *Attorney-General v. Huber*,<sup>41</sup> a case arising out of an injunction to restrain the Adelaide production of the sex comedy “Oh! Calcutta”, the Chief Justice was able to offer a description of the average man, against whose standards the legal concept of obscenity was to be measured, in the following terms:

“The man will be one with average attitudes to sexual matters in the context of a discussion about censorship with reference to those matters. He will not be a man given to thoughtless emotional reaction, but, on the other hand, he will not be one given to pedantic analysis and in the relevant respects will be neither conservative nor radical, intelligent nor stupid, naive nor cynical, prim nor libertine, imaginative nor dull, and in short whatever extremes may be mentioned he will be neither one side of the line nor the other, but right on it. This is a difficult concept to grasp and is made no easier by the fact that half the time the man will turn out to be a woman, but the person can be summed up by the word “moderate.”<sup>42</sup>

Bray’s own view was that a jury, being twelve members of the community picked at random, could be taken to represent a fair cross-section of the communal opinion and might be better able to approximate the general standard than a single magistrate or judge. However, the fact of the matter was that, in South Australia, except for prosecutions for the common law

38. (1971) 2 S.A.S.R. 529, 543.

39. (1971) 2 S.A.S.R. 529, 563. An example is found in the earlier hearing of *Crowe v. Graham* in the N.S.W. Court of Appeal: “. . . a modern magistrate or judge, to whom the task of determining indecency is still entrusted by the legislature, must do his best according to his own understanding and experience of everyday affairs and also, I think, according to his own beliefs in what are or *should be* the current standards of decency . . . I do not think that we should be reconciled to the acceptance of all modern trends with a shrug of the shoulders when called upon to perform the entrusted duty” *per* Wallace L.J. (1967) 85 W.N. (Part I) N.S.W. 438, 441. In the High Court McTiernan J. adopted this judgment as his own.

40. *Loc. cit.* (*supra* n.1), 68.

41. (1971) 2 S.A.S.R. 142.

42. *Id.*, 168. He was adopting the words of Wickham J. in *Mackinlay v. Wiley* [1971] W.A.R. 3, 25.

misdeemeanour of publishing an obscene libel,<sup>43</sup> jury trials were not available for obscenity offences.

It has remained uncertain whether the average man test is based upon a hypothetical person representative of the actual groups to whom the material is or is likely to be presented, or whether it depends on the standards of some wider composite audience which includes all elements in the community, young and vulnerable as well as old and salacious, even though the allegedly obscene matter is neither intended for nor likely to reach them all. In *Huber's* case the theatre management proposed to restrict ticket sales to persons over 18 years of age and to give them clear written warning of the nature and general content of the production. Similarly in *Popow v. Samuels*<sup>44</sup> the defendant went to considerable trouble to restrict access to the sexually explicit material in his shop to a voluntary adult audience only. Unless there has been indiscriminate distribution or display to the population at large should not obscenity be tested by reference only to its impact on a hypothetical person typical of the actual audience affected? When a work obviously has a limited impact both in area and in target audience, its potential effect on persons representing peripheral readers or viewers seems too remote a factor to warrant legal intervention. Though in *Trelford v. Samuels*<sup>45</sup> Bray defined the test of community standards in very broad terms — “an average struck over the whole community, young and old, white collar and blue collar, town and country, orthodox and unorthodox”,<sup>46</sup> he also impliedly approved the suggestion of Wickham J. in the Western Australian case of *Mackinlay v. Wiley*<sup>47</sup> that material published for and to a closed group of sexual deviates might be properly judged by the standards of that group and not by the standards of others. Wickham J. had also added the comment:

“. . . the assertion that this would lead to particular groups being able to satisfy their appetites for literature and drama on material forbidden to others does not itself seem to supply a reason [for not interpreting the community standards test in this fashion]. Unqualified egalitarianism is not yet a doctrine of the law.”<sup>48</sup>

*Crowe v. Graham* had recognised the circumstantial nature of obscenity by affirming that material could only be legally accounted indecent or obscene when disseminated so as to affront community standards. Wickham J. was going further by asserting that the community standards would tolerate the availability of explicit sexual material to the members of a restricted group who were willing recipients of it. That it might still be condemned as obscene if exposed to children or imposed upon an unwilling audience was irrelevant. Bray agreed with Wickham that the restricted nature of the audience was pertinent to the estimation of community standards, but other judges did not.<sup>49</sup> The Chief Justice felt very much the force of a complaint by defence counsel in *Trelford's* case that it was impossible, as the law stood, for a shopkeeper to know what he might safely sell when all he could be

43. See Criminal Law Consolidation Act, 1935-1978 (S.A.), s.270.

44. (1973) 4 S.A.S.R. 594; cf. the conduct of the defendants in *Trelford v. Samuels* (1974) 7 S.A.S.R. 587 and *Carter v. Samuels* (1974) 8 S.A.S.R. 1.

45. (1974) 7 S.A.S.R. 587.

46. *Id.*, 596. See also *Chance International v. Forbes* [1968] 3 N.S.W.R. 487, 490-491. [1971] W.A.R. 3.

47. *Id.*, 25.

49. See, for instance, the views of Helsham J. in *Chance International Pty. Ltd. v. Forbes* [1968] 3 N.S.W.R. 487, 490-491.

told was that his liability to a fine or imprisonment depended on whether his wares were held to be offensive "in the judgment of one man who might be anywhere between a profligate or a puritan and who is confined by the law to the guidance of the light within his own breast".<sup>50</sup> The common law had simply not provided meaningful guidelines to community standards and perhaps would never be able to do so. If the law would not allow elucidation of community standards by empirical means, the best advice Bray had to offer counsel was to look to the legislature for policy guidance:

"I can only say . . . that his clients must seek relief from this state of things from North Terrace, not from Victoria Square."<sup>51</sup>

Within the year the South Australian legislature had supplied the much needed guidance by enacting new legislation which expressly enunciated the general policy that adults in the State were entitled to read and view whatever they wished, subject to the right of members of the community to protection (for themselves and those under their care) from exposure to offensive unsolicited material.<sup>52</sup> This was a product of new Federal Government censorship policies spelt out by Labor in August 1973 and negotiated with the States at a January 1974 Commonwealth/State meeting of Ministers responsible for the enforcement of controls of obscenity.<sup>53</sup> By what is now the Classification of Publications Act, 1973-1977 (S.A.) South Australia, in common with a number of other States, introduced a scheme whereby publications dealing with "sex, drug addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a manner likely to cause offence to reasonable adult persons"<sup>54</sup> were subject to classification as restricted publications by the State's six member Classification of Publications Board. Such classification meant, at minimum, that persons under eighteen years of age were to be denied access to the material, but additional conditions could be imposed which controlled in varying degrees, the public display, advertisement and conditions of sale, of the publications. The degree of restriction imposed was Gazetted and had to be specifically marked on the covers and, upon sale, the restricted publication had to be delivered to the adult purchaser in an opaque wrapping. The key to the success of the legislation was the provision that if restricted matter was sold to adults in conformity with the terms of the restriction order it was to be granted immunity from prosecution under all State anti-obscenity laws. The Board could not ban any publication outright, but could refrain from classifying it thus exposing its disseminators to the risk of prosecution under residual provisions such as s.33 of the Police Offences Act, 1953-1976 (S.A.). In essence the legislation was articulating and giving effect to the Government's belief that contemporary community standards tolerated the discreet availability of pornography to adults willing to seek it out, provided that minors did not gain access to it and that others were not publically offended. This accorded exactly with what Bray had been saying:

"It would be ludicrous to contend that the use of the four letter words necessarily offends the modesty of the average South Australian man in all contexts. One would have to be blind, and, I am almost tempted to add, wilfully blind, to many obvious aspects

50. (1974) 7 S.A.S.R. 587, 595.

51. *Id.*, 596.

52. Classification of Publications Act, 1973-1974 (S.A.), s.12(2).

53. See generally, Fox, "Censorship Policy and Child Pornography", (1978) 52 *A.L.J.* 361.

54. S.13(1).

of daily life to think so. Indeed it is plausible to contend that the use of those words does not violate the contemporary standards of decency at all if they are not said or written by way of insult, not obtruded on those unwilling to read or hear them, and not uttered or published to, or in the presence of those under the age of eighteen . . . Much the same might be said about descriptions of sexual activities and sexual techniques and photographs of naked men and women . . .”<sup>55</sup>

One other change was required. In both *Simmons v. Samuels*<sup>56</sup> and *Popow v. Samuels*<sup>57</sup> he complained how under the South Australian legislation he was bound by the nineteenth century philosophy of the *Hicklin* test and that it was his duty as a judge to accept its implications loyally and find meaning for the concepts of depravity and corruption even though, in his non-judicial capacity, he was certain its sociology was suspect and its reasoning circular. In the year of his retirement Parliament acted to end all doubt that the misleading depravity and corruption test had no place in South Australian law. It repealed s.33(3) of the Police Offences Act<sup>58</sup> and by doing so, largely completed its reforms. At last the shopkeepers knew where they stood.

When John Bray assumed judicial office, literary and scholarly works were still under threat from the law of obscenity. He had hoped that reform would come when increasingly civilized values and standards brought greater maturity of taste. But his hopes were unrealized. It is true that when he left the Bench, literature had been freed from the clumsy oppression of the State, but it had been simply by-passed in the popular lust for the more effective (but more gross) pictorial erotica which reached Australia in the late 1960's. Though he must have personally abhorred the absence of redeeming merit in the material which was now being charged as obscene, he also understood how it fitted into the broader liberating changes in social attitudes towards sexuality which were occurring during that time. The debates on contraception, abortion and homosexuality and the demands for greater sexual freedom all marked the so-called permissive society in the context of which the courts were still being called upon to give meaning to words like “obscenity” and “indecenty”.

Rather than mount a rearguard action to defend the moral *status quo*, as some of his judicial colleagues had done, Bray tried to spell out a rational basis for the law relating to such offences. He insisted, first, that it acknowledge and take account of the diversity of ethical positions with respect to sexual behaviour which existed within society and limit its coercive intervention to the minimum required for social cohesion. His alignment was with Mill and Hart rather than with Stephen and Devlin. Secondly, he repeatedly demanded clarification of the actual social dangers sought to be controlled by the law and specifically denied that moral corruption, even if the term were meaningful, was a relevant social threat:

“I doubt the right to interfere to protect the individual from moral corruption. There is no general agreement about the existence or

55. *Trelford v. Samuels* (1974) 7 S.A.S.R. 587, 593.

56. (1971) 1 S.A.S.R. 397, 400.

57. (1973) 4 S.A.S.R. 594, 608-610.

58. Police Offences Act, 1978 (S.A.).

constituents or the causes or the effects of moral corruption. Men cannot be made virtuous by legislation. In an age where there is general disagreement on moral issues it adds considerably, and in my view unnecessarily, to the tensions of society if an attempt is made to enforce one particular system of morality on the whole community in the absence of harm or danger of harm to the person, reputation, or property of others.”<sup>59</sup>

If the law were to continue its prohibition, its base was more properly located in the area of public breaches of communal standards of sexual expression and, in a population not morally homogeneous, the experience of judicial office or the judge’s own conventional values were too poor a guide to the discernment of the appropriate standards. Bray was unquestionably correct, though he pressed the point without success, in insisting that the law would be advanced if it moved away from knowledge of standards gained by judicial intuition and speculation and became more willing to rely on information derived from science, research and systematic study. The judges might not like what they found but, as His Honour said, “where a choice has to be made between the dangers of ignorance and the dangers of knowledge there should be no doubt about the answer in a literate and egalitarian community”.<sup>60</sup> By the time Bray left office, the *Hicklin* test had finally been abandoned as the underlying justification of the law of obscenity. What was originally perceived as a grave threat to the established moral order was, with some critical nudging from the Chief Justice, finally recognized for what it really was — a minor public nuisance.

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59. *Loc. cit.* (*supra* n.16), 460-461.

60. *Loc. cit.* (*supra* n.1), 69.