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OBSCENITY IN LITERATURE: CRIME OR FREE SPEECH

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> Of all the inanimate objects, of all men's creations, books are the nearest to us, for they contain our very thoughts, our ambitions, our indignations, our illusions, our fidelity to truth, and our persistent leaning toward error. But most of all they resemble us in their precarious hold on life.[1]

Some years have passed since the majority of the Australian States revised existing legislation in order to impose more stringent controls on the publication of material alleged to be "obscene" or "indecent".[2] Importation of such material had been controlled by customs legislation since the inception of the Commonwealth and before. The 1961 conference between Commonwealth and State authorities—under the rather doubtful auspices of Lady Chatterley—presumably sought to secure some uniformity of approach, but no official report has yet been issued.[3] Both Commonwealth and State laws have, to some extent at least, a common point of origin in the common law. This being so, a time when the English law has been revised by the Obscene Publications Act, 1959, and when American law has been fully considered by the Supreme Court, seems appropriate to assess the extent to which the local law has affected and will in the future affect "the precarious hold on life" of literary works.

A recent Australian publication[4] takes the view that "arguments against

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[1] J. Conrad, *Notes on Life and Letters*, 5.

[2] A brief survey of State legislation in the period 1953-1955 is contained in the Note, J. A. Iliffe, "The Australian 'Obscene Publications' Legislation of 1953-1955" (1956) 2 *Sydney L.R.* 134.

[3] It was agreed that the States would not proceed against publications approved by the Customs authorities, without prior consultation. P. Coleman, *Obscenity, Blasphemy, Sedition* (1962) 183.

[4] *Op. cit.*

censorship are on the whole sound" and "the crusade (against Government censorship) is now almost over". If these statements are correct, and fully accepted by the community, there is little to be gained in any further examination of the law relating to censorship. The fact is, however, that the author's assumption as to the soundness of arguments against censorship is by no means accepted by the whole—or even the larger part—of the Australian community; and arguments for the tightening up or more effective application of obscenity statutes are by no means infrequent.[5]

If the measure of the "success" of the campaign against censorship is a startling reduction of the number of worthwhile books on the proscribed list—then indeed the opponents of censorship have achieved a victory; as Mr. Coleman has demonstrated there has been in the past few years a very marked liberalisation of the official attitude to literary works, marred only by a few "anomalies". There is, however, no reason to suppose that the worldwide reaction of the early 1950's against "indecent or obscene" works will not be repeated and it may then be found that our existing legal framework of censorship law is capable of being exploited in a most illiberal fashion. It is hard to accept the "short list" of proscribed books as a satisfactory measure of the effect of Australian law on literature. The list does not include works not sought to be imported, nor does it include those works which have been refused publication or "bowdlerized" to avoid any risk of prosecution of the publishing firms.

For those who do not accept the argument against censorship the position is equally unsatisfactory. The "so-called *Hicklin* test", which even today dominates both statute and common law in Australia, is "little better than a fictitious formula"[6] which gives rise to so many uncertainties that prosecutors are reluctant to initiate proceedings and juries reluctant to convict.

A brief survey of the main arguments for and against censorship, the past and present law, and the more obvious defects of "obscenity" as an aspect of criminal law is seen as a pre-requisite to the consideration of possible reform.

History of Censorship Outlined[7]

Development of censorship in English law may be traced from a licensing decree issued in 1538 through the Court of Star Chamber. It was not completely effective and further decrees were issued throughout the Tudor period and into the Stuart period. The object of licensing was the control of political and religious works; and the literary works of the times were extremely uninhibited even by today's standards. If the conciliar courts had jurisdiction to deal with obscene works, it was a jurisdiction that was seldom exercised. When the Star Chamber was abolished, licensing was re-introduced by the Long Parliament in 1643. Again the object was primarily religious and political writings, and literature enjoyed considerable freedom—or licence—

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[5] See, e.g., *Good Literature, a Pastoral Statement by the Catholic Bishops of Australia* (1961).

[6] G. L. Williams, *Criminal Law, The General Part* (2 ed. 1961) 70.

[7] For the first time the 1960 edition of Wade and Phillips' standard work on *Constitutional Law* includes a chapter (Ch. 39) dealing with obscenity. English law is dealt with more fully in N. St. John Stevas, *Obscenity and the Law* (1956). Much of the voluminous American material is collected in Emerson and Haber, *Political and Civil Rights in the United States* (2 ed. 1958). P. Coleman's book *(supra)* contains an admirable survey of Australian developments.

during almost the whole of the seventeenth and eighteenth centuries. The licensing laws finally lapsed in 1695, and were never to be re-imposed.

From 1640 until 1727 all obscene offences were regarded as being within the jurisdiction of the ecclesiastical courts, although it has been asserted that on the abolition of the Star Chamber, the Court of King's Bench had cognisance of offences against public morality as "custos morum".[8] However, it was held by that Court in 1708 that the printing of a "lascivious and obscene libel" was not punishable in a temporal court.[9] In 1727 in *R.* v. *Curl*,[10] the Court of King's Bench finally assumed jurisdiction and established the common law crime of "obscene libel"; but not without some misgivings, for Mr. Justice Fortescue said: "To make it indictable there should be a breach of the peace or something tending to it of which there is nothing in this case."[11]

Despite the prosecution of Edmund Curl, there was little interference during the eighteenth century with works of literary merit. No definition of obscenity had emerged and even pornographic and horror novels circulated freely.[12] The early part of the next century saw the emergence of Bowdler and his followers, and the Society for the Suppression of Vice. This was also the time when books of all types became more readily available through inexpensive printing and the establishment of circulating libraries.[13] Although prosecutions were few, Keats, Byron, Shelley, the Brontes, Eliot, Meredith, Swinburne, and many others suffered accusations as to the moral standards of their works.

In 1853 the Customs Consolidation Act incorporated the first prohibition on the importation of pornography and Lord Campbell's Act[14] followed in 1857. This Act provided that justices could issue a warrant for seizure and destruction of publications if they were satisfied on oath:—

(i) that the publications were obscene,
(ii) that they were distributed for sale, and
(iii) that the publication was a misdemeanour and fit to be prosecuted as such.

During the passage of the Bill it was objected that "it was an attempt to make people virtuous by Act of Parliament". Nevertheless the Bill was passed and the stage was set for an attempted definition of obscenity just ten years later.

Henry Scott, a Wolverhampton metalbroker, had published and sold copies of a pamphlet entitled *The Confessional Unmasked*. The pamphlet contained extracts, alleged to be obscene, which Scott stated were taken from Roman Catholic publications. The Wolverhampton magistrates issued a warrant for seizure of a number of the pamphlets and ordered their destruction. An appeal to Quarter Sessions was successful, and the matter came before the Court of Queen's Bench. In the course of finding the material obscene, Cockburn, C.J. stated: "I think the test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are

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[8] *R.* v. *Davies* (1906) 1 K.B. 32 at 39.
[9] *R.* v. *Read* (1708) Fort. 98; 92 E.R. 777.
[10] *R.* v. *Curl* (1727) 2 Stra. 789; 93 E.R. 849.
[11] As will be seen these remarks foreshadowed doubts expressed in American courts in more recent times.
[12] N. St. John Stevas, *Obscenity and the Law* (1956) 25ff.
[13] The significance of these developments is underlined by the agitation for more rigid censorship which followed the mass-production of paper-backed books particularly in the last decade.
[14] Obscene Publications Act, 1857.

open to such immoral influences, and into whose hands a publication of this sort may fall".[15] This definition was to be decisive for almost a hundred years, and it is unfortunate that it should have arisen, not from a literary work at all, but from a pamphlet which was "a blatant instrument of propaganda for a protestant society".[16] The Chief Justice considered that certain paragraphs of the pamphlet were so "obscene" as to inspire "thoughts of a most impure and libidinous character", and further he opined "if there be an infraction of the law, the intention to break the law must be inferred".[17]

The *Hicklin* test remained the standard test for obscenity in English law, and its influence permeates the new Obscene Publications Act, 1959. Only seven years ago, Lord Goddard declared "the law is the same now as it was in 1868".[18] The test was imported into Australian law and the new statutory definitions appear merely to supplement it.[19]

Obscene libel as a common law offence was established in American law in 1821[20] and soon afterwards the *Hicklin* test was adopted. In 1913 Judge Learned Hand objected that the rule "however consonant it may be with mid-Victorian morals does not seem to me to answer to the understanding and morality of the present time"; nevertheless he felt impelled to follow it.[21] The first federal law proscribing the importation of obscene matter was passed in 1842, and this was followed by omnibus legislation dealing with importation, distribution in federal territories and control of obscene matter through the mails. In 1879 a *Hicklin* gloss was placed on the postal statute.[22]

Even before Judge Learned Hand's criticism, the New York courts had been ignoring the *Hicklin* test where works of literary value were involved,[23] but the major break with the past came in 1934 in the *Ulysses Case*.[24] Judge Augustus Hand formulated a more liberal test as follows:

> While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.[25]

The application of this test meant that from 1934 onwards, the United States courts, with some exceptions, were applying the standards now given statutory force in England by the Obscene Publications Act, 1959. Firstly, the particular literary work at issue was to be read as a whole—it was no longer possible to reach a judgment based on isolated excerpts; secondly, literary

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[15] *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360 at 371.
[16] L. M. Alpert, "Judicial Censorship of Obscene Literature" (1938) 52 *Harvard L.R.* 40 at 51.
[17] *Supra*, n. 15 at 370.
[18] *R.* v. *Reiter* (1954) 1 All E.R. 741 at 742.
[19] As to introduction into New South Wales, see M. Z. Forbes, "Obscene Publications" (1946) 20 *A.L.J.* 92.
[20] *Commonwealth* v. *Holmes* (1821) 17 Mass. 336.
[21] *U.S.* v. *Kennerley* (1913) 209 Fed. 119.
[22] *U.S.* v. *Bennett* (1879) 24 Fed. Cas. 1093.
[23] W. B. Lockhart and R. C. McClure, "Literature, the Law of Obscenity and the Constitution" (1954) 38 *Minnesota L.R.* 295 at 326. "Obscenity in the Courts" (1955) 20 *Law and Contemp. Problems* 587 at 589.
[24] *U.S.* v. *One Book Entitled "Ulysses"* (1934) 72 F. 2d. 705.
[25] *Id.* at 708.

values were to be taken into account as assessed by expert witnesses.

The Arguments For and Against Censorship

Anyone concerned with the law as to the censorship of obscene literature is likely to become bewildered, or biased, if he essays to survey the arguments *pro* and *con* this form of control. It is, however, relatively simple to attain a fairly impartial viewpoint through sheer pressure of uncertainty and lack of knowledge as to the possible harmful effects of such literature. The majority of writers in this field are by no means uncertain, however, and I propose to trace the main arguments.

It has been pointed out that at the root of the controversy is the existence of two opposed philosophic attitudes to freedom.[26] One view is that freedom consists in the ability to do as one pleases, irrespective of whether one does as one ought; this is the attitude adopted by Aristotle, Locke, Bentham, Mill and others. The second view is that a man is not free when he acts under the influence of erroneous ideas or passions; this is the approach expressed by such men as Plato, St. Augustine, Hegel and Bergson. Proponents of either view of freedom might be found on either side of the fence dividing those for or against censorship of obscene literature, but present day arguments for censorship are largely based on the second view. "Censorship is proposed as a means by which to prevent the degradation of the individual virtues, the cultural values and the common security of democracy."[27]

The clearest argument for "no censorship" is probably that of Bertrand Russell. In an article published in 1954 he said:

> For my part, if I had my way, I should abolish all legislation on the subject. Perhaps for the first year or two after such abolition there would be a flood of "filthy" pictures, but if there was no ban on them, people would soon get tired of them—except for a few with an exceptionally strong bent in this direction. At present a taste for pornography is about universal among boys, but I think it is created by secrecy and tabu. If they were taught about sex in school, they would soon find it as dull as Caesar's Commentaries. However, I cannot hope that so extreme a measure as the total repeal of the laws against censorship could possibly be carried.[28]

After a careful and thoughtful study in a recent publication[29] the conclusion is reached that censorship is unsound, impractical and undesirable on philosophic grounds. Power is seen as being essential to censorship, and there is, it is asserted, no practical way to distinguish the considered judgment of officials who are wise and good from the arbitrary judgment of officials who are unwise and bad. "Power tends to corrupt, in censorship, as in other modes of its exercise."[30]

Emphasis on the impracticability of censorship being conjoined with an awareness of literary values is a common theme of writers. The impracticability of censorship boards was argued by Professor Alpert over twenty years ago.[31]

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[26] McKeon, Menton and Gellhorn, *The Freedom to Read* (1957) 3ff.
[27] *Op. cit.* at 5.
[28] B. Russell, "Virtue and the Censor", *Encounter* (July 1954).
[29] *Supra*, n. 26 at 5.
[30] *Op. cit.* at 8.
[31] L. M. Alpert, "Judicial Censorship of Obscene Literature" (1938) 52 *Harvard L.R.* 40 at 72.

He doubted whether any man or woman of fine intelligence would serve on such a board. Moreover, he considered it to be beyond the capacity of an average judge to apply the "absurd" laws of obscenity to works of literature. The values of literature are seen as the "interpretation, intensification and clarification of experience",[32] and since love, desire and jealousy are the basis of human emotion giving rise to the conflict and tension essential to fiction and poetry, any attempt to censor their expression is said to jeopardise social values.

It is immediately obvious from examination of any listing of censored books that the primary object of the censor is to eradicate any reference to departures, or alleged departures, from the accepted "parochial patterns" as to sex conduct.[33] In fact such perusal would indicate that description of normally accepted sex behaviour and any pictorial portrayal of the human body has been frequently banned in the past. (In recent years, "horror" comics and novels have also been proscribed but this field has always been of secondary importance to the censors.) The critics of censorship doubt whether the possibility that such descriptions and portrayals incite normal sexual passion, is sufficient to justify suppression. The more serious harm to be foreseen is that frankness in literature might result in stimulating sexual conduct contrary to accepted community standards—particularly in the case of juveniles. The "no censorship" school point out "that 'evil manners' are as easily acquired without books as with books; that crowded slums, machine labour, barren lives, starved emotions and unreasoning minds are far more dangerous to morals than any so-called obscene literature".[34] In an outspoken attack on censorship in the *Roth Case*,[35] Judge Frank sought to refute the well-known assertion by Dr. Wertham[36] that reading did have an appreciable effect on juvenile delinquency.

D. H. Lawrence has frequently been cited as an opponent of censorship in every form; certainly the attacks made on him would make such an attitude understandable. However, Lawrence would make a distinction between "obscenity" and "pornography". He defined pornography as that which "insults sex and the human spirit". The distinction appears a valid one, but even this would not be acceptable to some opponents of censorship. It is argued: "As long as an exception is made for the indefensible or even the detestable—'Freedom for everybody except Communists and pornographers'—there will be people prepared to state that you or I are Communists or pornographers, or their dupes, until we prove to the contrary. It is at such times one remembers why freedom has been said to be indivisible".[37]

Judicial criticism of censorship has not been lacking in the United States. Judge Frank's approach has already been mentioned; in addition to his doubts as to the effects of allegedly obscene material, he attacks the whole concept of censorship on constitutional and practical grounds. In the following Supreme Court decision,[38] Black and Douglas, JJ. adopted the absolute

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[32] W. B. Lockhart and R. C. McClure, "Literature and the Law of Obscenity and the Constitution" (1954) 38 *Minnesota L.R.* 295 at 370.
[33] E.g., see N. St. John Stevas, *Obscenity and the Law* (1956) Appendix V.
[34] *Supra* n. 31 at 74.
[35] *U.S.* v. *Roth* (2nd Cir. 1956) 237 F. 2d. 796.
[36] F. Wertham, *Seduction of the Innocent* (1954).
[37] E. Larrabee, "The Cultural Content of Sex Censorship" (1955) 20 *Law and Contemp. Problems* 672 at 681.
[38] *U.S.* v. *Roth* (1957) 354 U.S. 476.

approach to the free speech problem that might have been expected from them. Mr. Justice Douglas said: "I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics or any other field". An even more recent comment of Mr. Justice Black is that: "Censorship is the deadly enemy of freedom and progress".[39]

A brief Australian plea for "no censorship"[40] utilises the community criticism argument put forward by Mr. Justice Douglas.

The arguments for censorship are almost exclusively based on the premises that freedom to read means freedom to read only what is good, that to read about sex is immoral, and that such reading does have a degrading influence on man. In an American discussion of Catholic Church Law,[41] it is asserted, "people can be influenced to evil as well as to good by what they read". The function of authority, whether ecclesiastical or temporal, is seen to require regulation of the "exercise of freedom by those subject to their jurisdiction so as to aid them to observe God's law". It is said that: "Uncritical claims for the unlimited defence of liberty of any sort actually places that liberty in danger of being lost".[42]

The position of Judge Frank in the *Roth Case* is assailed as being illogical.[43] His proposition that no one can show with any reasonable probability that obscene publications tend to have any effects on the behaviour of normal average adults, is stated to be tantamount to saying that free speech has no value in any event. "Why should anyone want to read at all if reading is a jejune and sterile experience."[44] Sociological research to establish proof that obscenity leads to crime and juvenile delinquency would, it is suggested, possibly be worthless because "human beings are free and are not determined by causes to definite effects in those free interior decisions which give rise to crime and juvenile delinquency".[45] Nevertheless it is asserted that "Church and civic groups have volumes of statistics, case histories and expert testimony of sociologists and psychologists to prove the material harm being done"[46] by "obscene" literature.

With few exceptions those who favour censorship are concerned to prohibit works dealing with sexual passion. Indeed many efforts made to define obscenity are concerned with this aspect. "The libidinous effect of the work—of which both the moralist and the law speak—can always be determined by an investigation of the tendency of the work to stimulate sexual passion . . . if the object is of such a nature that it generally does so arouse (the viewer to sexual passion) then for practical purposes we have a 'law' for determining the obscene."[47]

One of the most outstanding and influential arguments for censorship

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[39] *Smith* v. *California* (1959) 361 U.S. 147 at 160.
[40] J. O. C. Fellows, "Letter to the Editors" (1954) 27 *A.L.J.* 562.
[41] F. J. Connell, "Censorship and the Prohibition of Books in Catholic Church Law" (1954) 54 *Columbia L.R.* 699.
[42] Good Literature, *A Pastoral Statement by the Catholic Bishops of Australia* (1961) 9.
[43] Schmidt, "A Justification of Statutes Banning Pornography in the Mails" (1957) 26 *Fordham L.R.* 70.
[44] *Op. cit.* at 74.
[45] At 81.
[46] R. I. Doggett, "Recent Decisions Approve Decency Statutes" (1958) 27 *Univ. of Cincinatti L.R.* 61.
[47] H. C. Gardiner, "Moral Principles Towards a Definition of the Obscene" (1955) 20

is implicit in Dr. Wertham's book *Seduction of the Innocent.* Many examples are given of the adverse psychological effects on children of the unhealthy combination of sex and violence in comic books which, he concludes, do affect children's tastes "for the finer influences of education, for art, for literature, and for the decent and constructive relationships between human beings and especially between the sexes". Dr. Wertham bases his findings on case studies and detailed examination of comic book material; the book is certainly concerned primarily with children, but has, no doubt, a relevance to the immature adult.

The judicial approach opposed to that of the "no censorship" school is adequately summarised in the comment that obscene speech and writing "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth, that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality".[48]

Characteristically in our civilisation the more general approach to censorship is a "middle of the road" view. Although aware of the dangers implicit in censorship, most of us probably would agree "that the law must draw some line between decency and indecency, a line between permitted art, and art that can be punished and suppressed".[49] The difficulty here is apparent. Where is the line to be drawn? The classic distinction is between "literature" and "pornography",[50] and a famous judicial attempt at drawing this distinction was seen in the summing up of Stable, J. to the jury in *R.* v. *Martin Secker & Warburg.*[51] Another distinction is made between conventional obscenity (the quality of work which attacks established sexual patterns) and Dionysian obscenity (excessive sexualism and exuberant delight in life) on the one hand, and perverse obscenity, and the pornography of violence on the other.[52] The latter categories would, in this view, be those without redeeming literary value.

If it be accepted that control over pornography and the "pornography of violence" are necessary, and even the most outspoken critics of censorship agree that it is politically necessary, it behoves us in Australia to seek the form of control which will place the minimum restriction on worthwhile literary expression. One useful standard of comparison is to be found in the present law of England and the United States.

Modern English Law

The development of English law to the passing of Lord Campbell's Obscene Publications Act and the establishment of the *Hicklin* test has been outlined. The letter of the law remained virtually unchanged until 1955 when the Children and Young Persons (Harmful Publications) Act was passed.[53] This Act has created the criminal offence of printing, publishing or selling books, magazines or other like works, which are of a kind likely to fall into the

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Law and Contemp. Problems 560 at 565ff.

[48] *Chaplinsky* v. *New Hampshire* (1941) 315 U.S. 568 at 571ff.

[49] Z. Chafee, *Free Speech in the United States* (1948 ed.) at 529.

[50] E.g., see N. St. John Stevas, *Obscenity and the Law* (1956) Ch. IX.

[51] (1954) 2 All E.R. 683.

[52] A. Kaplan, "Obscenity as an Esthetic Category" (1955) 20 *Law and Contemp. Problems* 544.

[53] There were a number of statutes dealing with obscene offences of which the more significant were the Post Office Act, 1953, s. 11, and the Customs and Excise Act, 1952, s. 44. The *Hicklin* test was applied in application of these Acts, but in the English scene they never became as important as the common law offence of obscene libel, and proceedings under the Obscene Publications Act, 1857.

hands of children or young persons, and consist mainly of stories told in pictures (with or without the addition of written matter) being stories portraying the commission of crimes or acts of violence or cruelty, or incidents of a repulsive or horrible nature, such that the work would tend to corrupt a child or young person into whose hands it might fall. There can be no prosecution without consent of the Attorney-General. The Act has been criticised for its incorporation of the *Hicklin* test and its possible area of operation; its life is limited to ten years. There is no doubt as to the efficiency of the Act in suppressing "horror" comics of the type condemned by Dr. Wertham, and there has been no attempt to use its provisions to interfere with adult literature. So long as there exists the slightest reason to suppose that "horror" comics do have harmful effects on the young, there is little difficulty in justifying such an Act.

Early in the 1950's a much greater threat to literary expression began to take shape. For reasons which are somewhat obscure[54] there began a series of prosecutions both for the common law misdemeanour of publishing an obscene libel and under Lord Campbell's Act.[55] Included among the publishing firms prosecuted were such well-known and reputable companies as Hutchinson & Co. Publishers Ltd. and William Heinemann Ltd.

To establish the misdemeanour of publishing an obscene libel, it was necessary to establish firstly that there was publication and secondly that the writing, photograph, print, etc., was "obscene". The test of "publication" was held to be no more stringent than in the case of an ordinary libel.[56] The more difficult aspect was the concept of "obscenity". The Courts were bound to adopt the test of whether there was a "tendency" to "deprave and corrupt" those "whose minds are open to immoral influences", and "into whose hands the publication might fall". That this test might have vastly different application as explained by different judges became very apparent. The suggested weaknesses of the test could be summarised as follows:

(i) the indication that the standard was to be applied to persons particularly susceptible to "immoral influences";

(ii) the conclusion drawn in some cases that isolated passages extracted from the whole work could be the criteria;

(iii) the conclusion also drawn in some cases that where there was publication and obscenity there was an irrebuttable presumption of intention;

(iv) no defence of public good was available and as a concomitant no evidence was admissible as to literary or other merit (there was some argument to the effect that this was a defence at common law).[57]

To these disadvantages a further one needed to be added when proceedings were taken under the Obscene Publications Act, 1857. These proceedings, which could result in an order for the destruction of books, were heard before a magistrate, and neither the author nor the publisher might be permitted to appear or to give evidence.

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[54] N. St. John Stevas, *Obscenity and the Law* (1956) 111ff.

[55] E.g., *Cox* v. *Stinton* (1951) 2 K.B. 1021; *Paget Publications* v. *Watson* (1952) 1 All E.R. 1256; *Thomson* v. *Chain Libraries Ltd.* (1954) 1 W.L.R. 999; *R.* v. *Martin, Secker & Warburg Ltd.* (1954) 2 All E.R. 683; *R.* v. *Reiter* (1954) 2 W.L.R. 638, and numerous unreported cases.

[56] *R.* v. *Montalk* (1932) 23 Crim. App. R. 182.

[57] G. L. Williams, *Criminal Law* (2 ed. 1961) 726.

With regard to the first three weaknesses, it was clear that a major consideration would be the character and approach of the judge before whom the prosecution was heard. The liberal approach[58] was exemplified by the charge to the jury of Mr. Justice Stable on the prosecution of Martin Secker & Warburg Ltd. for its publication of *The Philanderer*.[59] He reminded the jury that its verdict was of the utmost consequence to the community in relation to the future of the novel in the civilised world. He also indicated that the *Hicklin* test was to be applied, but asked:

> What exactly does that mean? Are we to take our literary standards as being the level of something that is suitable for a fourteen year old schoolgirl? Of course not. A mass of literature, great literature, from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public.

It was clear that the standard was to be a present day one of the "average decent well-meaning man or woman".

On the question of sexual passion, Mr. Justice Stable pointed out[60] that the book dealt "with the realities of human love. The Crown says that is sheer filth. Is it? Is the act of sexual passion sheer filth?" He explained:

> There are some who think with reverence that man is fashioned in the image of God, and you know that babies of either sex are not born into this world dressed up in a frock coat or an equivalent female garment. This book, as I venture to think you will have already appreciated, is a book which obviously and admittedly is absorbed with sex, the relationship between the male and the female of the human species. I, at all events, approach that great mystery with profound interest, and at the same time a very deep sense of reverence. We cannot get away from it. It is not our fault that but for the love of men and women and the act of sex, the human race would have ceased to exist thousands of years ago.

After such a summing up the jury's verdict of acquittal was to be expected. The other side of the coin was shown by the prosecution of Hutchinson Ltd. for the publishing of *September in Quinze* by Vivian Connell.[61] The Recorder expressly contradicted Mr. Justice Stable's summing up, and made no reference to contemporary standards. The jury convicted. When the judges are in such a dominant position it is apparent that the real censors are the judges themselves—and the Director of Public Prosecutions.

Agitation for reform began in November 1954, and a fully drafted Bill was made public in 1955.[62] The Bill sought to substitute a new statutory offence for that of obscene libel, and to consolidate the numerous statutory offences. Intention in publication was to be made relevant, and in considering whether a work was obscene, the court was to be required to take into account a number of factors including the dominant effect and literary merit. After a deal of manoeuvering the whole question was referred to a Select Committee in 1957. The Committee reported in 1958[63] and a draft Bill designed to

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[58] An approach said to come close to evasion of the *Hicklin* test, C.D.L. Clark, "Obscenity, the Law and Lady Chatterley" (1961) *Crim. L.R.* 156 at 158.
[59] *R.* v. *Martin, Secker & Warburg Ltd.* (1954) 2 All E.R. 683.
[60] *Id.* at 687.
[61] Unreported.
[62] See Appendix II Stevas, *Obscenity and the Law* (1956).
[63] H.C. 123-I of 1958.

implement its recommendations was introduced by a private member. Despite some Government opposition to certain clauses, the Bill was forced through and became the Obscene Publications Act, 1959.

The definition of "obscenity" is still based on the old *Hicklin* test—because the Select Committee was of the opinion that judicial interpretation has removed some of its uncertainty. The full definition is as follows:

> For the purposes of this Act an article (this includes a book) shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effects of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[64]

This definition clearly establishes that any literary work is to be read as a whole, but it seems to preserve all the old ambiguities as to the area of publication—for who can say that a child or adolescent is not likely to read any published work. The Select Committee sought to preserve the approach of Mr. Justice Stable, and it seems likely that adult contemporary community standards will be applied except where distribution or publication is obviously aimed at minors.

The Obscene Publications Act, 1857, is repealed by the new Act and a statutory offence of publishing an obscene article replaces the common law misdemeanour. Other statutory offences are not affected. The powers of the police have been extended. A search warrant may be issued on a sworn information that obscene articles are kept for publication for gain, and it is no longer necessary to allege sale or other publication. However, in proceedings for forfeiture before a justice of the peace or magistrate, it is expressly provided that the distributor, owner, author or maker of the allegedly obscene article may appear before the court to show cause against forfeiture. This remedies another major defect of the old law. It is also a defence to a charge of publication that the person charged had not examined the article in question and had no reasonable cause to suspect that it would make him liable to conviction. Penalties for the offence of publishing an obscene article are fixed at a fine not exceeding £100 or imprisonment up to six months, in the case of summary conviction, and a fine of unlimited amount or imprisonment up to three years, or both, on conviction on indictment.

The major reform accomplished by the Act is in the provision in s.4, which makes available a defence that publication is for the public good in the sense that it is in the interests of science, literature, art or learning, or of other objects of general concern. Coupled with this is the vital provision that the opinion of experts as to the literary, artistic, scientific or other merits may be admitted either to establish or negative the defence of public good.

The only major test of the new Act which has yet come before the courts was the notorious prosecution of Penguin Books for the publication of a paper-backed edition of *Lady Chatterley's Lover*.[65] The defence made full use of the provisions of s.4 of the new Act, and paraded a galaxy of literary giants to testify to the literary worth of Lawrence's novel. The prosecution was overwhelmed, and the jury not unexpectedly returned a verdict of "not guilty".

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[64] Obscene Publications Act, 1959, s. 1(1).
[65] *R.* v. *Penguin Books Ltd.* (1961) *Crim. L.R.* 176.

It is not, of course, possible to ascertain whether the book was found "not obscene" under the new definition, or whether it was found "obscene", but saved by the defence of public good. What is certain is that the publication in a cheap edition was not a "relevant circumstance" attracting the narrower standards applicable in the case of children or adolescents.

Modern American Law

The development of American Law away from the *Hicklin* test was finally crystallised in the *Ulysses Case*. In the lower court, Judge Woolsey held "whether a particular book would tend to excite such (sex) impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*".[66] On appeal, Judge Hand added "that the proper test of whether a given book is obscene is its dominant effect".[67] Evidence is usually admitted relating to the author's seriousness of purpose, and as to the reputation of the author, and the persons publishing or distributing the work.[68] The views of professional critics may also be admitted.[69]

Criminal penalties pertaining to obscene literature are provided for in all States except New Mexico. Most statutes are directed against commercial activity but some also punish procurement or possession. The decision as to obscenity is normally required to be made by a jury.

A federal statute also provides for criminal sanctions for the mailing of obscene books, pamphlets, pictures, papers, letters, etc.[70] In addition federal law enables the postmaster to exclude from the mails all obscene material.[71] Until recently the Post Office was wont to seize books without even giving a hearing, and in exercising this power it seized books by Hemingway, Salinger, James Jones, Steinbeck, Mailer, Maugham, Tolstoi and Dumas, as well as *Life* and *Esquire* magazines. Hearings are now given, and an order to exclude mail must be limited to material found to be obscene and must not include further distribution of new material.[72]

The importation of obscene matter is controlled by customs. Provision is made for the seizure of obscene or criminal books and articles, and for criminal penalties.[73]

Almost exactly paralleling events in England, the impact of rapidly mounting sales of paper-covered books brought a new wave of prosecutions in the 1950's—albeit that 80% to 90% of the books were reprints.[74] It was then inevitable that the Supreme Court would be called upon to rule on the constitutional issues involved, and a series of cases began in 1957.

The major case was the *Roth Case*.[75] Two convictions under the obscenity

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[66] *U.S.* v. *One Book Called "Ulysses"* (1933) 5 F. Supp. 182 (S.D. N.Y.).
[67] *U.S.* v. *One Book Called "Ulysses"* (1934) 72 F. 2d. 705 (2d. Cir.).
[68] *Attorney-General* v. *The Book Named "Forever Amber"* (1948) 323 Mass. 302.
[69] *Besig* v. *United States* (1953) 208 F. 2d. 142 (9th Cir.).
[70] 18 U.S.C. s. 1461.
[71] See generally E. de Grazia, "Obscenity and the Mail. A Study of Administrative Restraint" (1955) 20 *Law and Contemp. Problems* 608; Paul and Schwartz, "Obscenity in the Mails" (1957) 106 *Univ. of Penn. L.R.* 214.
[72] *Summerfield* v. *Sunshine Book Co.* (1954) 221 F. 2d. 42 (C.A.D.C.).
[73] 19 U.S.C. s. 1305 and 18 U.S.C. s. 1462.
[74] See W. B. Lockhart and R. C. McClure, "Literature and the Law of Obscenity", (1954) 38 *Minnesota L.R.* 295 at 303. For American statistics as to book publishing and the reading public see Blanshard, *The Right to Read* (1955) Ch. 1.
[75] *Roth* v. *United States*; *Alberts* v. *California* (1957) 355 U.S. 476.

laws were challenged. Firstly, the conviction of Roth under the criminal provisions of the postal statutes; and secondly, the conviction of Alberts under the standard type obscenity statute of California. The main challenge was based on the free speech guarantee of the First Amendment[76] to the Constitution in the case of Roth, and on the same guarantee in the case of Alberts to the extent that it is incorporated in the Fourteenth Amendment.[77] Both convictions were affirmed.

Mr. Justice Brennan delivered the majority opinion. His starting point was that "expressions found in numerous opinions indicate that the Court has always assumed that obscenity is not protected by the freedoms of speech and press", and he compared the law of libel. It was, he said "implicit in the history of the First Amendment", that obscenity was to be rejected "as utterly without redeeming social importance", the rejection being mirrored in the international agreement of over fifty nations. It had been argued that the statutes offended against the constitutional guarantees because they sought to punish incitement to sexual "thoughts", and no proof was required that obscene material would create a clear and present danger of anti-social conduct. The majority avoided this issue by its holding that obscenity was not protected speech. However, Mr. Justice Brennan did formulate a test for the obscene in terms of "material which deals with sex in a manner appealing to prurient interest", and he clearly required the test to be applied to the "average person, applying contemporary community standards".

Mr. Justice Harlan rejected the Court's "sweeping formula" as a question begging approach. He attacked the assumption that obscenity is "a peculiar genus of 'speech and press' which could be denied constitutional protection". He considered the question of obscenity in every case to present a "constitutional judgment of the most sensitive and delicate kind". This is an insistence on constant review by the Supreme Court. Mr. Justice Harlan also found a difference in the degree of protection afforded by the First and Fourteenth Amendments. The latter gave narrower protection and allowed for the different States to have different standards. There would be no overwhelming danger to freedom by the suppression of a borderline book in one of the States, but the idea of nation-wide suppression was intolerable. Justices Black and Douglas considered any test turning on "community standards" to be much too loose and capricious to be squared with the First Amendment guarantee.

It is probably true that the *Roth Case* added little to the American law beyond establishing authoritatively that the *Ulysses* principles must be applied to satisfy the free speech guarantee. This position was reinforced in *Butler* v. *Michigan*[78] where a statute framed to prevent general dissemination of reading matter "tending to incite minors to violent or depraved or immoral acts" was held to be unconstitutional. Mr. Justice Frankfurter was not prepared to allow the legislature "to burn the house to roast the pig". More recently the Court

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[76] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

[77] In part: "No State shall make or enforce any law which shall abridge the privileges or amenities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[78] (1957) 352 U.S. 380.

held that the constitutional guarantees were sufficient to invalidate a State statute which imposed criminal liability on a bookseller for mere possession in his shop of an obscene book.[79] Mr. Justice Brennan writing for the majority pointed out that the holding in the *Roth Case* did not "recognise any State power to restrict the dissemination of books which are not obscene", and this particular statute "would tend seriously to have that effect, by penalising booksellers even though they had not the slightest notice of the character of the books sold". The Court specifically refrained from indicating the precise degree of *scienter* required. Mr. Justice Frankfurter took the opportunity to emphasise that a determination of what constitutes obscenity should not be "a merely subjective reflection of the taste or moral outlook of individual judges or individual jurors". The literary, psychological or moral standards of the contemporary community should be established by evidence directed to that end.

Another constitutional issue is the problem of "prior restraint". It is said that the First Amendment (or the Fourteenth Amendment in the case of the States) forbids the Government to impose any system of prior restraint, with certain limitations, in any area of expression that is within the boundaries of the amendment.[80] In other words, although certain proscribed conduct in the free speech area may be punished after it occurs, it may not be restricted (e.g. by injunction or administrative order) in advance. The doctrine is clearly based on the premise that the First Amendment was intended to foreclose any system of licensing or censorship on the seventeenth century English model. Of course, if the majority holding in the *Roth Case* is to be taken literally, "obscenity" is an identifiable genus of speech which is not within the area of protection. A marginal case divided the Court in 1957,[81] but it is probable that in any clear case the present court would strike down any prior restraint even of matters alleged to be obscene.

Although arrived at by a different route, the American law today presents a striking similarity to the position achieved in England by the Obscene Publications Act, 1959.

Modern Australian Law

Censorship of obscene literature in Australia is dominated by the circumstance that the majority of all literature is imported. Local publication is by no means negligible, and is now considerably augmented by the production of paper-backed editions. Nevertheless, Commonwealth censorship over importation under the Customs power is now, and is likely to be in the foreseeable future, the most significant limitation on the "right to read".

Censorship is now maintained under the Customs Act, 1901-1957, and the regulations made thereunder. Section 50 of the Act empowers the Governor-General to prohibit by regulation the importation of goods into Australia; this prohibition may be absolute or conditional. The Customs (Prohibited Imports) Regulations made under this power[82] include four Schedules; importation of goods in the First Schedule is prohibited absolutely, and goods listed in the

[79] *Smith* v. *California* (1959) 361 U.S. 147.
[80] T. I. Emerson, "The Doctrine of Prior Restraint" (1955) 20 *Law and Contemp. Problems* 648.
[81] *Kingsley Books Inc.* v. *Brown* (1957) 354 U.S. 436.
[82] Commonwealth Stat. Rules Vol. II 1782ff. as amended by Rule No. 82, 1962 and Rule No. 26, 1963.

Second Schedule may be imported only if the Minister has granted permission in writing. Until last year the importation of blasphemous, indecent or obscene works or articles was prohibited by a listing in Item 7 of the First Schedule. This prohibition was backed up by a Second Schedule listing in Item 22 of:

> Literature which, by words or pictures or partly by pictures, in the opinion of the Minister:—
>
> (a) unduly emphasises matters of sex, horror, violence or crime; or
>
> (b) is likely to encourage depravity.

Amendments to the regulations were made in September, 1962. The First Schedule listing was omitted and a new Item 5A was included in the Second Schedule, reading as follows: "Blasphemous, indecent or obscene works or articles and advertising matter relating to blasphemous, indecent or obscene works or articles". The amendments were designed to legitimise a practice whereby the Minister could allow the importation of proscribed books for use by academics, members of the professions and students. Objections were raised to the Second Schedule listing and yet another amendment in March, 1963, inserted a new regulation 4A which removed the category of blasphemous, indecent or obscene works or articles and advertising matter from the schedules altogether. Regulation 4A still prohibits their importation but authorises the Minister to grant permission to import after he has obtained a report from the Chairman of the Literature Censorship Board or from the Director-General of Health. This permission may be subjected to conditions as to custody, use, reproduction, disposal or destruction of the goods. The Second Schedule listing in Item 22 is not affected by these amendments.

By the Customs (Literature Censorship) Regulations,[83] a Literature Censorship Board is established to whom the Minister or the Comptroller-General may refer any literature imported to ascertain whether it is "blasphemous, indecent or obscene" within the meaning of Regulation 4A. It is claimed that all books of literary pretension are referred to the Board.[84] The Board comprises four members, including a Chairman and a Deputy Chairman; decisions of the Board are by majority vote, and if there is equality of voting, the Chairman has a casting vote in addition to a deliberative vote. Where the Board is of the opinion that a particular work is within the prohibited categories, application may be made that the literature be submitted to the Literature Censorship Appeal Board. This second Board consists of a Chairman and two other members. Decisions are given by majority of the members present and voting. It is to be noted that these Boards are concerned only with literature prohibited by Regulation 4A. This situation arose originally because the Censorship Board was first established in 1937, and the Second Schedule listing was not included until 1949. The opportunity was open to rectify this situation when the Appeal Board was established in 1960, but the Government evidently preferred to maintain the Minister's unfettered discretion. Theoretically it would be possible for a book to be prohibited under the Second Schedule listing where the reviewing Boards had recommended admission under Regulation 4A. This does not appear to have been done in any recent case and such a course is unnecessary when the Minister is under no obligation to accept the Board's recommendations.[85]

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[83] *Id.* at 1769, as amended by Rule No. 50, 1960.

[84] P. Coleman, *Obscenity, Blasphemy, Sedition* (1962) 31.

[85] The Minister did not accept the Board's recommendations as to the importation of the Penguin edition of *Lady Chatterley's Lover.*

The Censorship Board was in 1957 required to re-examine the books then on the prohibited list. The total number of prohibited books was reduced to about two hundred and a complete list was published in the Commonwealth Gazette in 1958; additions to the list are published in the Gazette from time to time.

In reaching decisions as to whether books are indecent or obscene, presumably both the Boards and the Minister are required to apply the common law—which means the *Hicklin* test. It seems certain however, that the Boards are applying the test in the sense in which it was explained by Mr. Justice Stable in *R.* v. *Martin Secker & Warburg.*[86] The Minister's final decision, taken either with or against the advice of the Boards, to prohibit the importation of a particular book could be challenged most conveniently by means of an action for a declaration that the book is not within the proscribed categories. The same issue could be raised as a defence to a prosecution under the Customs Act, and an action in tort might be possible in a suitable case.[87] The chances of a successful challenge are so remote that no attempt has ever been made.

Where importation of literature is prohibited under the Second Schedule the discretionary power vested in the Minister is such that only the most flagrant abuse could attract intervention by the courts. It would be necessary to establish complete lack of good faith or the exercise of the power to achieve improper purposes,[88] or perhaps that the decision was such that the Minister did not understand what he had to decide.[89] Again, quite understandably, there has been no challenge to the Minister's decision.

So far as importation of literature is concerned, the Minister, as advised by the Censorship Boards, is in an almost unassailable position as the arbiter of what the Australian may read. If this position has not been abused in recent years, it is a tribute to the character of the holders of the Ministerial office, and to the effectiveness of possible political sanctions, rather than to the reviewing powers of the courts.

It is an offence to send "indecent or obscene" works through the mails, and such works may be impounded and destroyed.[90] The Postmaster-General may also refuse mailing facilities to an "immoral, indecent or obscene business".[91] The powers have never been used as a base for comprehensive censorship on the American model and are comparatively unimportant.

During the early 1950's the worldwide reaction against obscene literature extended to Australia, and all the States, with the exception of Western Australia, took steps to tighten up legislation dealing with the problem.[92] Prior to this, the general pattern of State law was broadly comparable to the English law. Publication, sale, possession, etc. of obscene material was punishable at common law, under the Criminal Codes, or under specific legislation aimed at obscene literature.[93] The *Hicklin* test was the dominant test as to the

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[86] (1954) 2 All E.R. 683.
[87] *Baume* v. *The Commonwealth* (1906) 4 C.L.R. 97.
[88] *Associated Provincial Picture Houses* v. *Wednesbury Corporation* (1948) 1 K.B. 223.
[89] *R.* v. *Australian Stevedoring Industry Board; ex p. Melbourne Stevedoring Co. Ltd.* (1952) 88 C.L.R. 111; *ex p. Jackson re Fletcher* (1947) 47 S.R. (N.S.W.) 447.
[90] Post and Telegraph Act, 1901-1950 (Cwlth.) ss.41, 44 and 107.
[91] *Id.* s.57.
[92] For a brief summary of the legislation see J. A. Iliffe, "The Australian 'Obscene Publications' Legislation" (1956) 2 *Sydney L.R.* 134.
[93] E.g., Obscene and Indecent Publications Act, 1901-1946 (N.S.W.); Indecent Publications Act, 1902 (W. Aust.).

meaning of "obscenity", and provision was usually made for seizure and destruction of obscene publications on the lines of the English Obscene Publications Act, 1857. Although there were considerable variations in detail, particularly in the case of Victoria, where the definition of obscenity was extended in 1938[94] to include works "unduly emphasising matters of sex or crimes of violence", the State laws exhibited a substantially uniform approach.

This essential uniformity has now been lost, and the six States have divided into three groups. In the first group are New South Wales and Victoria. Both of these States have retained the common law offence of publishing an obscene libel. In addition, persons who "knowingly keep" obscene articles, or in whose premises such articles are seized, or who sell, make, publish, etc. obscene material, are made liable to summary prosecution.[95] In both States the common law definition of "obscene" (that is, the *Hicklin* definition) is retained, but it is extended to cover undue emphasis on matters of sex, crimes of violence, gross cruelty or horror.[96] In determining whether particular material is obscene by application of this extended definition, the courts are required to take into account the nature of the material and the persons, class of persons and age groups to or amongst whom it was intended, or likely to be published, distributed, sold, etc. It is specifically provided that material shall be held to be obscene if it is likely to deprave or corrupt persons in one class or age group, notwithstanding that other classes or age groups might not be similarly affected. A defence of scientific or literary merit is allowable in the two States, but is qualified by restrictions as to the area of publication, similar to those to be taken into account in establishing whether the material is obscene.

The most controversial provisions in the Victorian and New South Wales Acts are those providing for the registration of distributors and publishers.[97] Distributors (defined to include publishers, other than publishers of newspapers and printed matter of a religious, professional, social, trading, etc. character) are forbidden to sell or distribute any printed matter unless duly registered; and their registration may be cancelled or suspended if they are convicted either of the indictable offence of publishing an obscene libel, or of an offence under the Acts. The object of the provisions is to compel the publishers and distributors to engage in self-censorship.

The second grouping comprises Queensland and Tasmania. In these two States, sale or exposure for sale of an obscene book or other obscene matter is punishable under the Criminal Codes.[98] Publishing or printing of such matter is also punishable summarily by other statutes.[99] A defence of public good is available. New ground has been broken, however, by the establishment of administrative censorship by Boards of Review.[100] In Queensland "The Literature Board of Review" is empowered to prohibit the distribution of "objectionable" literature. In deciding whether literature is "objectionable", the Board is required to have regard to the "area of distribution" in a way similar to

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[94] Police Offences (Obscene Publications) Act, 1938 (Vic.).
[95] Obscene and Indecent Publications Act, 1901-1955 (N.S.W.), ss.15-16; Police Offences Act, 1958 (Vic.) s.166.
[96] N.S.W. Act s.3(2); Vic. Act s.164.
[97] N.S.W. Act ss.20-29; Vic. Act 5 ss.181-186.
[98] Queensland Act s.228; Tasmania Act s.138.
[99] Queensland, Vagrants Act, 1931, s.12; Tasmania, Police Offences Act, 1935, s.26.
[100] Queensland, Objectionable Literature Act, 1954; Tasmania, Objectionable Publications Act, 1954.

the Victorian and New South Wales courts, and to its tendency to deprave and corrupt if it:

(a) unduly emphasises matters of sex, horror, crime, cruelty or violence; or

(b) is blasphemous, indecent, obscene, or likely to be injurious to morality; or

(c) is otherwise calculated to injure the citizens of the State.[101]

Literary merit is also to be a factor.[102]

The Tasmanian Act requires the "Board of Review" to examine and review publications, including those referred by the Minister, with the object of preventing the distribution of "objectionable" publications. In the case of a publication consisting in substantial part of pictures (with or without the addition of words) the Board may determine that it is objectionable, and prohibit distribution, if it is indecent, or suggests indecency, or portrays acts or situations of a violent, horrifying, criminal, or immoral nature.[103] The circumstances and area of publication and literary or other merit are to be taken into account. There is a right of appeal to the courts in Queensland, but none in Tasmania. In both States it is an offence to distribute, sell, etc. any literature prohibited by the Boards.

In the final grouping, South Australia and Western Australia provide penalities for the sale or exposure for sale of obscene materials.[104] South Australia introduced amended legislation in 1953[105] which required the courts to apply the "area of operation" addendum to the *Hicklin* test introduced in most other States, but the basic definition of "indecent" and "obscene" matter was not otherwise extended. Western Australia has not found it necessary to amend its legislation which in essence continues to be based upon the *Hicklin* test and the English Obscene Publications Act, 1857. In neither State are there provisions for registration or administrative review.

The avowed object of introducing self-censorship by publishers and distributors has been almost completely achieved in New South Wales—judging by the dearth of prosecutions under the amended legislation. The Chief Secretary's Department, which administers the legislation, does conduct periodical checks of comic books; although some borderline material has been discovered, none has been so offensive as to warrant prosecution. In the case of books, the Department reviews those which are drawn to its attention by complaints from the police and the general public; again there have been no recent prosecutions. It is insisted that the publishers must form their own judgment as to whether or not a particular book might be considered obscene, and the Department refuses to give advisory opinions.

The new legislation has been subjected to judicial scrutiny in other States, and before the High Court. In 1956, Associated Newspapers Ltd. were prosecuted for publication of an article in the magazine *People*, entitled "Love in the South Seas", by Bengt Daniellson. In a brief opinion refusing special leave to appeal from a decision of the Victorian Supreme Court, the High Court merely underlined the effectiveness of the extended definition of

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[101] *Id.* s.5.
[102] *Id.* s.4.
[103] Tasmanian Act s.8.
[104] South Australia, Criminal Law Consolidation Act, 1935, s.270; Western Australia, Criminal Code, 1913, s.204; Act to Suppress Indecent and Obscene Publications, 1902.
[105] Police Offences Act, 1953.

obscenity.[106] The Chief Justice, speaking for the Court, had no doubt that the article in question was clearly within the definition. Rather fuller consideration was given to the Queensland legislation in a case heard the same year.[107] The Literature Board of Review had prohibited the distribution of a number of publications, the nature of which is indicated by such titles as *Real Love, Romance Story,* and *Real Romance.* On appeal the Queensland Supreme Court upheld the Board's determination that the publications were objectionable because they unduly emphasised matters of sex. The High Court reversed this finding and held the books to be not objectionable. It was said that the finding of undue emphasis on sex was based on "love scenes in which the parties kiss and embrace and display an ardent passion one for another". The Court considered the connotation of the phrases "unduly emphasises matters of sex" and "likely to be injurious to morality" to be not very definite; but from the context they would relate to "obscenity, indecency, licentiousness or impudicity". The stories in question were outside the definition, being an insult to the intelligence rather than to morals.

The Court ruled that no evidence was admissible as to the content and nature of the particular publication. This "the Court can see for itself and must judge accordingly".[108] It was thought possible that evidence could be found in admissible form to prove amongst what people the literature was intended, or likely, to be distributed. Expert evidence might also be admitted to a limited extent, to show the characteristics, responses or behaviour of special categories of persons. Generally there was obvious concern to draw the boundaries of admissible evidence as narrowly as possible to avoid "a flood of controversial argument as to the effect and desirability of the publication which will be advanced in the guise of expert testimony". The contrast with the modern English and United States approach is obvious.

The most recent decision of the High Court[109] was concerned with the defence that the publication at issue was a "work of recognised literary or artistic merit".[110] Four copies of Erskine Caldwell's *God's Little Acre* were seized from the premises of William Heinemann Ltd. and a Victorian magistrate ordered their destruction. He found the work to be of literary merit but was of the opinion that its general distribution was not justified in the circumstances of the particular case. The Victorian Supreme Court held the magistrate was entitled to find the book obscene because it placed undue emphasis on matters of sex, and was also justified in making the destruction order having regard to the persons, class of persons, or age groups into whose hands it was intended or likely to come. In a brief opinion the High Court held that once it is affirmatively established that a work is of recognised literary or artistic merit, then it is excluded from the penal provisions as to obscene publications unless the magistrate is satisfied positively on evidence that the publishing, etc. was not justified. In this case it appeared that the magistrate was so satisfied, primarily because the book was an inexpensive paper-backed edition.

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[106] *Associated Newspapers Ltd.* v. *Wavish* (1956) 96 C.L.R. 526.
[107] *Transport Publishing Co. Pty. Ltd.* v. *The Literature Board of Review* (1956) 99 C.L.R. 111.
[108] *Id.* at 119.
[109] *William Heinemann Ltd.* v. *Kyte Powell* (1960) 34 A.L.J.R. 82.
[110] Police Offences Act, 1958 (Vic.), s.180.

Two further State court decisions are of some interest. In a Queensland case[111] the Supreme Court reviewed a prohibition imposed by the Literature Board of Review on distribution of a publication known as *Dragnet*. The book bore a striking resemblance to the television series with the same title and comprised "crime stories from U.S. Police Files" told in words and pictures. The Court upheld the prohibition primarily because the publication did unduly emphasise matters of crime and would have a tendency to deprave or corrupt persons of immature mind (whether juvenile or adult) amongst whom they were intended or likely to be distributed. It was emphasised that the tendency to deprave and corrupt must be present,[112] as well as the circumstance that the publication fell in one of the special categories in the definition of "objectionable" (for example, undue emphasis on matters of crime). The onus of proof was placed on the Board but it was to be satisfied by the ordinary civil standard.

A prosecution of Gordon & Gotch (Australasia) Ltd. for distribution of the English magazine *Reveille* in Victoria was the issue in the second case.[113] The defendant was convicted by a Court of Petty Sessions and appealed to the Supreme Court. The appeal was unsuccessful. Sholl, J. followed the High Court's exhortation that he must form his own opinion as to the question of obscenity. He accepted that "unduly emphasising matters of sex" meant dealing with them in a manner which offended against the standards of the community. The standards which must be ascertained by the Court were not to be narrow or puritanical, but on the other hand obscenity could not be minimised in order to show tolerance and broadmindedness. The particular publication blatantly emphasised sex by dealing with promiscuous sexual intercourse, illegitimacy, nudism, etc. and was therefore obscene even by "the most liberal of Australian" standards.

Obscenity and the Criminal Law

The individual's approach to the problem of whether or not the publication or dissemination of obscenity should be punished criminally depends, it seems, on his attitude to the whole question of censorship. If he is in favour of censorship, he tends to assume firstly that "obscenity" is a clearly defined genus of speech, secondly that it causes untold social harm, and thirdly that the persons responsible merit punishment, both on a theory of "guilt" and on a theory of "social defence". If he is against censorship he would reject all three assumptions.

The root problem in this area is expressed in the maxim *Nullum crimen sine lege, Nulla poena sine lege,* usually discussed as "the principle of legality". There is said to be no "logical" reason why any law must be specific; the principle could be merely "punish socially dangerous conduct by any means which the judge deems proper".[114] The excesses to which such an exhortation could lead were clearly demonstrated in Nazi Germany, and most legal systems are concerned to put strict limitations upon arbitrary extension of the criminal

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[111] *Literature Board of Review* v. *Invincible Press; ex parte Invincible Press and Truth & Sportsman Ltd.* (1955) S.R. (Qld.) 525.

[112] Professor Glanville Williams' comment *(supra)* as to the fictional nature of this test is relevant here. All that is necessary he claims is that the writing should shock the tribunal of fact.

[113] *Mackay* v. *Gordon & Gotch (Australasia) Ltd.* (1958) A.L.R. 953.

[114] J. Hall, *Principles of Criminal Law* (2 ed. 1960) 27.

law by officialdom. That judicial legislation in the common law of crimes has become increasingly crystallised is shown by the uproar which resulted from an English court's creation of the crime of public mischief.[115] In most jurisdictions the criminal law has become largely statutory and the tendency is toward more specific definition. It is noteworthy that the crime of publishing an obscene libel emerged at a time when the courts freely exercised their discretion to treat as criminal any conduct which was "contra bonos mores".[116]

There are two aspects to the principle of legality. Firstly, it is a direction to the court to adhere to the authoritatively established definition of the criminal conduct. Secondly, it is a guide to the individual for:

> The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for a breach of that law is purposeless cruelty. Punishment in all its forms is a loss of rights or advantages consequent on a breach of law. When it loses this quality it degenerates into an arbitrary act of violence that can produce nothing but bad social effects.[117]

To what extent does the law of obscenity meet these requirements?

Professor Chafee was of the opinion that no precise definition could be framed by legislation and remarked that such vagueness is avoided by "other parts of the criminal law".[118] An American court has said: "Obscenity is not a legal term. It cannot be defined so that it will mean the same to all people, all the time, everywhere. Obscenity is very much a figment of the imagination".[119] Addition to the definition of such phrases as "unduly emphasises matters of sex" and "likely to be injurious to morality" does not apparently assist, for our own High Court has pointed out that the connotation of these phrases "is not very definite" and that "any attempt to give them greater definition than the legislature has chosen to do would be hazardous".[120] Judge Frank considered the definitions of obscenity to be markedly uncertain as a guide to judges, jurors, or citizens—much more so than "reasonable man" standards in prosecutions for criminal negligence or the like. He characterised verdicts in such cases as being "a small bit of legislation *ad hoc*".[121]

The opposed view is that the word "obscene" is no more vague than other terms used in the courts.[122] In the *Roth Case* [123] the argument as to vagueness, which would have spelled unconstitutionality, was summarily dismissed by the majority, despite an admission that obscenity statutes are not precise. The court had previously indicated that words such as "obscene, lewd, lascivious" were sufficiently understood through long use in the criminal law to avoid the vice of vagueness.[124] The test was whether a man of "common intelligence" must guess at the meaning. One could be pardoned for assuming that any man of "common intelligence" would find extreme difficulty in predicting whether a particular book would be held to be obscene or not;

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[115] *R.* v. *Manley* (1933) 1 K.B. 529.
[116] E.g., see *Jones* v. *Randall* (1774) 98 E.R. 706 for a statement by Lord Mansfield to this effect.
[117] G. Williams, *Criminal Law, The General Part* (2 ed. 1961) 575.
[118] Z. Chafee, *Free Speech in the United States* (1948) 531.
[119] *State* v. *Lerner* (1948) 81 N.E. 2d. 282 (Ohio C.P.).
[120] *Transport Publishing Co. Pty. Ltd.* v. *The Literature Board of Review* (1956) 99 C.L.R. 111 at 117.
[121] *U.S.* v. *Roth* (1956) 237 F. 2d. 796.
[122] G. P. Schmidt, "A Justification of Statutes Banning Pornography in the Mails" (1957) 26 *Fordham L.R.* 70 at 94.
[123] *Roth* v. *U.S.* (1957) 354 U.S. 476.
[124] *Winters* v. *New York* (1948) 333 U.S. 507.

even a lawyer would be hard-pressed to make a reasonable prediction in such a case.

It may be true, as Mr. Justice Holmes has suggested, that "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree",[125] but it is submitted that Judge Frank's estimation that the obscenity standard is very much more vague than reasonable man standards in negligence is correct.

Professor Glanville Williams suggests that where it is impossible to draft a clear prohibition, then the better practice is to allow for an administrative ruling before the conduct is embarked upon. He recognises the difficulty in sedition and obscenity cases, and comments that the insecurity of the present law (in England) is to be preferred to censorship and press licensing. "In this context political and literary liberty are at odds with maximum security under the law; elsewhere the two generally go hand in hand."[126] This comment is appropriate only if one assumes that control is necessary and there are no alternatives to the criminal law—administrative censorship dichotomy.

Another doubtful aspect of the criminal law of obscenity is whether *mens rea* is necessary to constitute the offence. Despite some doubts, Professor Glanville Williams has advanced the opinion that the *mens rea* required for obscenity under the law, as it was before 1959, was the same as for sedition, that is, there must be some foresight of harmful consequences.[127] The opponents of all control argue that no harmful consequences flow from the publication of obscene material, and foreseeability is therefore impossible. The fact is that the inherent vagueness of the obscenity standards leads to the application of strict liability. For how can any individual writer or publisher form a criminal intention to write or publish matters "appealing to a prurient interest" or "tending to deprave or corrupt", when no one can define what type of material has such an effect? Whatever justification there may be for the "public welfare" offences, where strict liability is imposed, it is submitted that there is no warrant for extension into a sensitive area of free speech where even the possible harmful effects have yet to be proved.

In view of the possibility—or even probability—that the legality principle is not met, and the difficulties which arise as to intent, it must be doubted whether it is proper to impose punishment under the criminal law. Mere seizure of published material found after trial or administrative hearing to be obscene, could be an effective remedy as well as a sanction. Perhaps nothing more than this could be justified. Nevertheless, despite the satisfaction expressed in some quarters at the liberalisation of censorship in Australia, there is probably little prospect of abolition of criminal penalties.

Conclusion

In weighing the merits and demerits of the Australia-wide system of censorship and control of literature, the lawyer is immediately face to face with the basic controversy in this field. Is any possible reform to be in the

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[125] *Nash* v. *United States* (1913) 229 U.S. 373 at 377.

[126] G. L. Williams, *Criminal Law, The General Part* (2 ed. 1961) 579.

[127] *Op. cit.* at 70. It has been suggested that under the 1959 Act "Obscenity depends on the article and not the author" (*R.* v. *Shaw* (1961) 2 W.L.R. 897 at 902-3), and that the new defence of "public good" does not refer to the intention or purpose of the publisher. Professor Glanville Williams hopes that a final decision on the point will not create another crime of absolute prohibition.

direction of liberalising the national approach, or vice versa? One current authoritative view is that "conventional legislation" in Australia should be clarified with a view to eliminating "loopholes", and that "some method should be devised whereby the intention of legislators, seeking to restrain the flood of immoral publications, should not so often be stultified in the execution of the law".[128] An opposite view is implicit in a recent comment.[129]

From a practical viewpoint it is apparent that the legislative judgment that continued controls are necessary must be accepted—and this is not an acceptance of minority or pressure group opinions, for it is probable that a majority, even of those fully aware of the dangers to literary values inherent in censorship, would agree that outright pornography should be excluded from the Australian scene. It then becomes a question of seeking the most efficacious method of controlling pornography with minimum impediment to free literary expression and the least possible violence to the principles of criminal law.

In Australia we now have a mixed system of administrative and judicial control. Importation control under the Customs Act is primarily administrative, with the remote possibility of judicial intervention in doubtful cases. State censorship in Queensland and Tasmania is largely administrative, but in Queensland there is a right of appeal to the Courts. The remaining States have placed their faith in the Courts as arbiters of literary standards. The heavy emphasis on judicial review is itself perhaps a tradition we should view with caution. It is possibly something of a legal conceit that judges are the best persons to rule upon literary values in contemporary society—particularly when they are wont to exclude the evidence of experts in order to avoid controversial argument. On the other hand, even though the recent decisions of the Commonwealth Boards indicate a fairly enlightened approach to literary values, there is a tendency for such administrative boards increasingly to adopt a paternalistic attitude to their own society, and become a law unto themselves.

So far as Commonwealth control of imports is concerned, there appears to be no practical alternative to the present administrative system—though it is to be hoped that there will not in the future be any repetition of the Minister's action in overruling the advice of the Boards. Such control may become progressively less significant as local publication is expanded. The risk of criminal prosecutions is avoided, (except, of course, where the prohibition is flouted), and the potential importer runs no risk of punishment. Even though Australia is a substantial market, especially for English publications, the closing off of that market when other markets are available, cannot be said to place any severe inhibitions on literary expression. What, it is suggested, should be resisted, is any tendency to extend Commonwealth standards throughout Australia, in the sacred cause of uniformity. While "community standards" may not vary from State to State in Australia as much as they do in the United States, there should, it is submitted, be room for variations here, as so earnestly recommended by Mr. Justice Harlan in the *Roth Case*.

Despite reservations as to the value of judicial review, it must probably be conceded that the community would in most circumstances prefer such review to uncontrolled Ministerial discretion, even if such discretion be tempered by the recommendations of academically qualified administrative

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[128] *Good Literature, A Pastoral Statement by the Catholic Bishops of Australia* (1961).
[129] "Current Topics" (1961) 35 *A.L.J.* 237 at 238.

boards. From the points of view of both supporters and opponents of censorship the Commonwealth control of imports could be improved by an effective right of appeal. The first step would need to be deletion from the Customs Regulations of the Second Schedule listing of literature which may not be imported if, in the opinion of the Minister, it unduly emphasises matters of sex, horror, violence or crime. The material sought to be covered by this provision could be adequately controlled by adoption of a definition of obscenity based on the English Obscene Publications Act, 1959, or the American Law Institute Model Penal Code.[130] Review could be made effective by requiring the reviewing court to admit expert evidence to establish the literary merit, or otherwise, of the work subject to appeal and the likely effect, if any, on the persons to which the publication was directed or who were likely in normal circumstances to see or read it. It should certainly be made clear that adult standards are to be applied to serious literary works and the responsibility for ensuring that children should not be permitted to read such works, if indeed there is any danger to children, is that of the parents and not the State.

State administrative censorship on the Queensland model also avoids the criminal law problem. The tendency is to prosecute only for publication in breach of the Censorship Board's prohibition. Whether such a system constitutes any real threat to literary values must depend solely on the propensities of Board members, and the judges of the reviewing courts. Experience so far does not encourage reliance on such a system.[131]

Traditional control of obscene publications by criminal prosecutions before the courts, which will inevitably be continued in the majority of the States, leads just as inevitably to the problems of definition and breach of the basic principles of criminal law. The uncertainties of definition in particular lead to criticism from both sides of the censorship "fence". From a literary standpoint, it is doubtless quite absurd that magistrates and judges, many with no literary pretensions, should be called upon to rule on artistic and literary merits without benefit of expert advice. The New South Wales and Victorian registration provisions can only be considered an anachronism. They would be unconstitutional in the United States and would never be accepted by the United Kingdom Parliament because they represent a restriction far more severe than almost any other type of censorship. The threat of de-registration is intended to induce the publishers to "clean their own houses". Because of the uncertainties of the law this must lead to refusal to publish all borderline material. It can hardly be doubted that many contemporary novels, perhaps great novels, now published in other countries would never reach print in New South Wales and Victoria—and so the precarious hold on life of books is lost.

It is submitted that the following considerations should be taken into account in drafting new laws to control publication of obscenity in the States.

(1) The existing definitions of "obscenity" have proved virtually unworkable. The statutory extensions to the *Hicklin* test have only increased the "fictional nature" of the test. A new definition should be drafted. One solution would be adoption of the new English definition. This would, at the least, give the advantage of making English interpretive decisions relevant in Australia.

An alternative would be adaptation of the definition in the American

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[130] See later discussion of this definition.
[131] P. Coleman, *Obscenity, Blasphemy, Sedition* (1962) 172ff.

Law Institute Model Penal Code,[132] which to the writer appears to prescribe more definite standards. It avoids the much criticised phrase "tendency to deprave and corrupt" and offers considerably more guidance to the courts.

> A thing is obscene if considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . . Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such audience. In any prosecution for an offence under this section evidence shall be admissible to show:
>
> (a) the character of the audience for which the material was designed or to which it was directed;
>
> (b) what the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on behaviour of such people;
>
> (c) artistic, literary, scientific, educational or other merits of the material;
>
> (d) the degree of public acceptance of the material in this country;
>
> (e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;
>
> (f) purpose and reputation of the author, publisher or disseminator.
>
> Expert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall be admissible.

The only major adaptation the writer would suggest would be to insert the word "violence" in the first sentence. This is, of course, a personal preference.

(2) The notion that the judges are to be the real censors should be avoided as far as possible (Mr. Justice Frankfurter's comment that a determination of obscenity should not be a subjective reflection of the taste or moral outlook of individual judges is relevant here). The admission of evidence on the British or United States pattern would do much to avoid this difficulty. There would also seem little need in Australia to retain the procedure for summary prosecution before magistrates. The comparatively few cases which would arise could be heard before a Supreme Court judge, sitting preferably with a jury.

(3) Registration or licensing of publishers should be abandoned completely. There is a surface attraction in the imposition of "self-censorship" but the effect on literary works can be disastrous.

In the opinion of the writer, even improved forms of control could not be justified if sociological inquiries can establish that there is no causal relationship between reading and anti-social conduct, for:

> To vest a few fallible men—prosecutors, judges, jurors—with vast powers of literary or artistic censorship, to convert them into what J. S. Mill called "a moral police" is to make them despotic arbiters of literary

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[132] Tentative Draft No. 6 (1957).

products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too plentiful, should be cherished not stifled. An author's imagination may be cramped if he must write with one eye on prosecutors or juries; authors must cope with publishers who, fearful about the judgments of governmental censors, may refuse to accept the manuscripts of contemporary Shelleys or Mark Twains or Whitmans.[133]

[133] Per Frank, J., in *United States* v. *Roth* (1956) 237 F. 2d. 796.