1963

Federalism and the Administration of Criminal Justice: The Treatment of Obscenity in the United States, Canada and Australia

Bernard Green

University of Toronto

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Comparative and Foreign Law Commons, and the Constitutional Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol51/iss4/6

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Federalism and the Administration of Criminal Justice: the Treatment of Obscenity in the United States, Canada and Australia

By Bernard Green

Within the last ten years there have been important legislative\(^1\) and judicial\(^2\) attempts at a solution of the insoluble problem of obscenity\(^3\) in the United States, Canada and Australia.

---

\(^0\) Assoc. Prof., University of Toronto Faculty of Law.

\(^1\) The United States: (a) federal—see the 1958 amendment in the mail statute, 18 U.S.C. \$1461 (1961); (b) state—see e.g., W Va. Code \$6066 (1963).

\(^2\) Canada: 1959 (Can.) c. 41, ss. 11 & 12; see infra, pp. 683-7 for a discussion.

\(^3\) Australia: e.g., South Australia: Police Offences Act (1953-1961); New South Wales, Obscene and Indecent Publications Act (1901-1955); Queensland, Objectionable Literature Act (1954).

---

The basic assumption of this paper is that the state not only has the constitutional power to suppress obscene matter but that it is necessary that the state do so. Although the writer has very grave doubts that obscene or even hard core pornographic matter have, on balance, any deleterious effect on its consumers, see Green, Obscenity, Censorship and Juvenile Delinquency, 14 U. Toronto L.J. (1962), it is necessary for the state to intervene to prevent greater damage to civil liberties by private action. If it were possible to start with a "clean sheet" in this field, much could be said in favor of a system that allowed completely unrestricted dissemination of all types of matter (yes, even hard-core pornography) to adult consumers. Gone would be the problem of defining what types of matter the state can constitutionally suppress. Gone would be the even more difficult philosophical problem of justifying state action in an area that is

(Continued on next page)
The problem of obscenity is not one problem but two. To what types of matter should the state deny free circulation in its territory? By what methods should the state seek to achieve its goals?

It is the purpose of this article to examine how each of three countries—the United States, Canada and Australia—has tried to solve these problems in the context of their particular circumstances. These countries whose obscenity law and practice we discuss have much in common: each is, in the main, English speaking, each derived its basic legal concepts from England, each has a federal system of democratic government. Thus, to the usual difficulties involved in any grappling with the problem of obscenity, is added the peculiar difficulties that arise in the working of any federal system. We consider first, then, the federal structure of these countries, secondly the test of obscenity current in each and finally, the operation of the obscenity law by their police and Attorney-General's departments.

I. THE FEDERAL STRUCTURE

A. The United States

The American Constitution, the oldest of the three we discuss, was designed to achieve certain purposes. Primarily, the Constitution and the federal system it created was a device whereby the individual states which had obtained their independence from England could work together for their material benefit with a minimum amount of control from the top by a central government. Therefore the central government is given certain powers, but all powers not expressly given to that government are

---

(Footnote continued from preceding page)

essentially one of private morality. Why the state should be concerned with the poor chap of 35 who obtains sexual release with the assistance of filthy pictures is not readily apparent. Or is thus a problem similar to that of homosexual activities between consenting adults in private in that we (society) hold certain feelings so strongly that we will force them on everyone? Compare the views of Devlin, The Enforcement of Morals (1959), with those of Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963).

The writer agrees with Henkin that completely free dissemination of publications justifiably can be limited because of their obscenity for only two reasons—to protect an individual against psychic shock resulting from unwilling exposure to distasteful matter and to assist parents in educating their children. His only reservation to enrolling in Professor Henkin's army is that this army carries the flag of constitutionality. What should be substituted in its stead is the banner of desirability. In other words the relevant decision maker should be the legislature rather than the court. Compare Schwartz, Morals Offences and the Model Penal Code, 63 Colum. L. Rev. 669, 671 (1963).
reserved to the states. One of these reserved powers—the police power—allows the states to legislate in the field of criminal law. Although the national government constitutionally can use criminal sanctions to enforce legislation that is within its competence, basic control over primary human activity is in the hands of the states; the federal government enters the battle against obscenity only in relation to importation of matter into the country and the dissemination of that matter in the mails.

The American system of government has been called one of checks and balances, the most important being the constitutional limitation on the power of both nation and state that prevents them from infringing certain civil rights. One of the major concerns of this article will be to determine whether the protection of these civil rights (which ultimately are enforced by a federal appellate tribunal) requires a uniform national test of obscenity. Does the protection of these civil rights require government to stay its hand except against matter that is "hard-core pornography"?

B. Canada

The British North America Act—Canada's basic constitutional document—was drafted at a time when the American experiment seemed to be a failure. This failure, exemplified by the Civil War, was thought to have been the result of the American system's weak central government. To remedy this defect, the central government of Canada was given a much wider grant of powers than had the federal government in the United States. And then, to further buttress the position of the central govern-

---

4 U.S. Const. amend. X.
5 Because of the allocation of power in the American Constitution the American reader is likely to be confused when he comes to examine Canada's Constitution, which allocates to the federal government legislative power in relation to the criminal law. For present purposes it is sufficient to suggest that the criminal law power allows a government to enact a typical state criminal code.
8 The Comstock Act, 18 U.S.C. §1461 (1950); The Mail Block Acts, 49 U.S.C. §§4006, 4007 (1951). It is within the federal government's constitutional power to prohibit the dissemination of obscene matter across state lines.
9 U.S. Const. amend I (prohibiting national interference with free speech); Amend. XIV (prohibiting state interference).
10 See infra, pp. 680-8 for a discussion of the problem.
11 See infra note 15.
12 The British North America Act, 30 & 31 Vict. c. 3 (1867).
13 See infra note 15.
ment, it was given all powers not expressly granted to the provinces. In keeping with this centralizing policy, the national government was given exclusive legislative power in relation to criminal law and criminal procedure. Although the scope of the criminal law power has not been definitively delimited, it is clear that the central government is competent to deal with obscenity and has in fact made the distribution of obscene matter a criminal offence even though that matter does not cross provincial boundaries.

Thus, it would seem that the provinces have no power to control obscenity. But this view is not completely accurate. For complete accuracy two factors must be considered, one constitutional, the other judicial. Although the central government is given exclusive legislative power in relation to criminal law, the provinces are allocated control over the administration of criminal justice within their territories. This constitutional grant of powers to the provinces would surely not support their entry into the field; their power over property and civil rights within the province as well as their power to use criminal sanctions to enforce legislation within their competence may justify provincial action.

---

14 The British North America Act s. 91, s. 91 (29).
15 In the course of the debates on Confederation, John A. Macdonald, Attorney General, Canada West, said: "It is of great importance that what is a crime in one part of British America should be a crime in every part. It is one of the defects in the United States system that what may be a capital offence in one state may be a menial offence, punishable slightly in another. But under our Constitution we shall have one body of criminal law operating equally throughout British America. I think this is one of the most marked instances in which we take advantage of the experience derived from our observation of the defects in the constitution of the neighbouring Republic (Hear, hear)"
18 See infra, Appendix C, for the current statutory provisions.
19 British North America Act, s. 92 (14.) As a result of this grant of power to the provinces the uniform national criminal law is dependent, in the end, for its enforcement by the provincial attorneys general. See infra pp. 694-99 for a more detailed discussion of this point.
20 British North America Act s. 92 (13).
21 British North America Act s. 92 (15).
22 In Attorney General for Ontario v. Koynok [1941] 1 D.L.R. 548 (Ontario S.Ct.), a trial judge held unconstitutional a provision in a provincial statute which authorized an injunction to restrain publication of obscene matter. Notwithstanding this decision, many provinces have established motion picture censor boards. See, as an example, The Theatre Act, R.S.O. 1960, c. 396, s. 26 and its accompanying regulations, R.R.O. 1960, reg. 554, ss. 59 & 60. Neither the statute nor the regulations indicate the standards to be used by the board in exercising its function.
An examination of the British North American Act discloses that there has been no modification of the English practice of parliamentary supremacy: legislation, whether of the central government or of the provinces in relation to a subject matter over which the enacting body has constitutional competence, is binding. In other words, in the Canadian system there is no Bill of Rights built into the basic framework of government protecting the citizen from overreaching by his government. Recently, a Canadian Bill of Rights was enacted.\textsuperscript{22} However, by its terms, it is limited solely to federal legislation\textsuperscript{23} and even in this area the Bill of Rights creates, not a bar to governmental overreaching, but a presumption against it which, of course, can be legislatively rebutted.\textsuperscript{24} The general consensus of opinion, both academic\textsuperscript{25} and judicial,\textsuperscript{26} is that the Bill of Rights is of no great significance. Although several provinces have also legislated in the field of civil liberties\textsuperscript{27} their statutes, too, have no significance for our purposes.

C. Australia

In 1900, when the founders of the Australian nation drafted their constitution,\textsuperscript{28} they followed the American pattern rather than the Canadian. Thus the individual states have legislative power in the field of criminal law\textsuperscript{29} and the national government censorship functions. As far as can be determined no constitutional challenge to the authority of those boards has ever been made. However, in the light of such cases as Reference re s. 92(4) of the Vehicles Act, 1957 (Saskatchewan) c. 93, [1958] S.C.R. 608 15 D.L.R. 2d 225 (S.Ct. of Can.), and O'Grady v. Sparling [1960] S.C.R. 804, 25 D.L.R. 2d 145 (1961) S.Ct. of Can.) it may yet be possible for the provinces to do what they were prohibited from doing in Attorney General for Ontario v. Koynok, \textit{supra}. For an extremely mild and humane analysis of what to this writer are the incomprehensible decisions in the Reference Re the Vehicles Act and O'Grady v. Sparling, see Laskin, \textit{Occupying The Field: Paramountcy In Penal Legislation}, 41 Can. Bar Rev. 234 (1963).

\textsuperscript{22} Canadian Bill of Rights, 1960 (Can.) c. 44.
\textsuperscript{23} Id. at s. 5(2).
\textsuperscript{24} Id. at s. 2.
\textsuperscript{26} Louie Yuet Sun v. The Queen [1961] S.C.R. 70; 26 D.L.R.2d 63 (Sup.Ct. of Can.).
\textsuperscript{27} See e.g., the Saskatchewan Bill of Rights Act, R.S.S. 1953 c. 345 especially s. 4 (free speech).
\textsuperscript{28} The Commonwealth of Australia Constitution Act, 63 & 64 Vict. c. 12 (1900).
\textsuperscript{29} The Commonwealth of Australia Constitution Act, 63 & 64 Vict. s. 107 (reserving powers held by states prior to formation of the Commonwealth).

(Footnote continued from preceding page)
plays only an interstitial role in the control of obscenity. However, the Canadian pattern was followed to the extent that legislative supremacy prevails: in Australia as in Canada there is no Bill of Rights acting as a constitutional brake on governmental overreaching.

II. TESTING OBSCENITY. LEGISLATIVE FORMULATION AND JUDICIAL INTERPRETATION

A. The common background

In all three countries the basic concept of obscenity is derived from the common law. Until 1727, obscenity was treated as a moral offence punishable only by the ecclesiastical courts. This concern with morals is evident in the case that has effected the jurisprudence on this subject everywhere. The case is, of course, Regina v. Hicklin, where Cockburn, C.J., suggested that, "the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." The problems implicit in this formulation have troubled subsequent courts. What type of evidence is necessary to prove a causal relationship between the matter alleged to be obscene and the depravation and corruption of the reader? Is matter obscene because it is likely to deprave and corrupt the young even though it is unlikely to have any effect on adults? What is the significance of the literary merit of the matter alleged to be obscene?

B. The United States

Notwithstanding some judicial criticism, the Hicklin test was applied in all its rigor by federal as well as state courts until quite

---

30 See, e.g., The Post & Telegraph Act, 1901-1950 s. 107 (b) & (c) and The Customs Act, 1901, ss. 50 & 51.
31 Rv. Curl, Str. 788, 93 E.R. 849 (K.B. 1727) overruling Reg. v. Read, Fort 98, 92 E.R. 777 (K.B. 1708) is the origin of the common law misdemeanor of publishing an obscene libel.
32 Reg. v. Hicklin, L.R. 3 Q.B. 360 (1868). This was a prosecution under Lord Campbell's Act of 1857, but the statute did not alter the meaning of obscenity at common law. We are told that this legislation "was intended to apply exclusively to work written for the single purpose of corrupting the morals of youth and of a nature calculated to shock the common feelings of decency in any well-regulated mind." Ernst & Seagle, To The Pure (1928).
recently. This meant that a jury could convict on the basis of isolated passages in a book; that a book which would not likely deprave or corrupt the morals of an adult could be held obscene because it would likely have a deleterious effect on juveniles; that evidence of the author's bona fides and standing was inadmissible or of little weight; that lack of evidence showing a causal relationship between the matter alleged to be obscene and a reader's subsequent behavior was irrelevant.  

The first turning point was the decision clearing *Ulysses* of the taint of obscenity. To Augustus Hand, J., in the Court of Appeals:

> [T]he proper test of whether a given book is obscene is its dominant effect. [T]he same immunity should apply to literature as to science where the presentation, when viewed objectively, is sincere and the erotic material is not introduced to promote lust and does not furnish the dominant note of the publication.

This decision, important as it was, did not bind other courts. Those courts, whether state or federal, were free to refuse to follow a decision on a federal statute by a federal court—and often they did refuse. Only a judgment of the Supreme Court, based upon the provisions of the Constitution, would be determinative in every court in the land.

Less than twenty-five years after *Ulysses*, and within a time span of seven years, the Supreme Court delivered not one, but three, full-scale decisions which have almost settled all the legal problems inherent in a definition of obscenity. The significant aspect of the decisions and those that interpret them is that the definition of obscenity—the test of what kind of matter can be subjected to governmental interference—has constitutional

---

35 Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 53-65 (1938), and see cases cited infra n. 38.

36 United States v. One Book Called 'Ulysses' 5 F. Supp. 182 (S.D.N.Y. 1933), aff'd., 72 F.2d 705 (2d Cir. 1934). In none of the cases cited did the governing statutes define obscenity.

37 Id. at 708.


40 See infra. pp. 674-81 for a discussion of the recent cases.
implications. Whether the judges be the so-called absolutists or so-called pragmatists, all realize that because of the free-speech provisions in the Bill of Rights no government, municipal, state or federal, has the constitutional power to interfere with or suppress matter merely because a majority of its citizens decide to do so.

Although counsel in these cases argued that government should not have the power to suppress communications until the state proved a clear and present danger to it caused by the communication, the Supreme Court has declined to use that onerous test. In rejecting clear and present danger in this area the Court has acted soundly. That test was formulated in cases where the crucial issue was the power of government to interfere with the advocacy of ideas. Because of the social importance of a free exchange of opinion the clear and present danger doctrine has been in this type of case that the test was applied.

The development of the test of obscenity currently applied by American courts has an interest of its own. In Butler v. Michigan—the Court held invalid a provision of the Michigan Penal Code which made it a crime for "any person to sell (etc.) any obscene [matter] tending to incite minors to immoral acts, manifestly tending to the corruption of the morals of youth"—Frankfurter, J., delivering the opinion of the Court,

---

43 For a more libertarian analysis of the due process clause and the free speech provisions of the first Amendment, see Henkin, Morals and The Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 891 (1963), and Emerson, Toward A General Theory of The First Amendment, 72 Yale L.J. 877 (1963).
44 In a case now before the Court, Jacobellis v. Ohio, 383 S.Ct. 28 (1963) (probable jurisdiction noted) appellant's factum puts the clear and present danger test in the forefront of his argument.
47 Similar provisions exist even now in other state codes. See e.g., W Va. Code §6066 (1969), and cf. State v. Miller, 112 S.E. 2d 472 (W Va, 1960).
pointed out that the legislation was "not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." Thus was the death knell for Hicklin sounded. matter is not obscene because it is likely to deprave and corrupt the young if it is unlikely to have any effect on adults.

Of the problems that still remained unanswered the most important was when could government constitutionally intervene. The Supreme Court addressed itself to this question in Roth v. United States. In an opinion by Brennan, J., the Court held that obscenity was not utterance within the area of protected speech and press. Obscene material was then defined as "material which deals with sex in a manner appealing to the prurient interest", and "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" Thus the Supreme Court made it improper for courts or legislationers to test the obscenity of matter by the effect of isolated passages. Although Roth was criticized because of its seemingly restrictive approach, in several per curam opinions the Court indicated its new views. These reached mature expression in its latest decision, Manual Enterprises Inc. v. Day. The case involved a refusal by the Post Office to transmit magazines containing photographs of nude and near nude male models which were admittedly designed to appeal to the prurient interest of the magazines' homosexual audience. Applying the test of Roth these magazines were obscene and the Post Office was therefore justified in its conduct. The judgment of the Court dissipates

---

52 In a dissenting opinion, Douglas, J. (Black, J. concurring) argued in favor of the clear and present danger test. Id. at 514.
53 Id. at 487, per Brennan, J.
54 Id. at 489, per Brennan, J.
55 Note, 7 De Paul L. Rev. 111, 113 (1957); note, 60 W Va. L. Rev. 89 (1957).
58 There was no opinion of the Court. Harlan, J., delivered the judgment of the Court and an opinion in which Stewart, J., joined; Black, J., concurred in the result; Brennan, J., (Warren, C.J., and Douglas, J. concurring) would have decided the case on other grounds.
the ambiguity of Roth—obscene matter can be distinguished by the combined presence of the elements of patent offensiveness to community standards of candor and the appeal to prurient interest. Because there was lacking in this case the element of patent offensiveness to community standards of candor, the Post Office's conduct was held unconstitutional.

But the never-ending battle between those in favor of state power in this area and those opposed to that power had not yet been determined. In Manual Enterprises the Court, in a cryptic aside, commented that “[W]hether 'hard-core pornography or something less be the proper test” implying that the Roth test, even as elaborated by Manual Enterprises, was not conclusive. And the hint was taken by federal and some state courts which have held that only “hard-core” pornography can constitutionally be suppressed. These courts, are with respect, in error.

The leading case in favor of the hard-core pornography test, People v. Richmond County News, Inc., concerned a prosecution for the sale and distribution of a “girlie” magazine—Gent—


60 The major private group in favor is the Citizens for Decent Literature; the major private groups opposed are the publishers and the American Civil Liberties Union. See Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 7-11 (1960).


63 People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681 (1961). Attorney General v. Book Named “Tropic of Cancer” 154 N.E.2d 328 (Mass. 1962), is distinguishable on the ground that Tropic of Cancer is a work of recognized literary merit by a world-famous author. Tropic” may be raw, it may be a paen of praise for the pleasures of the senses, but it cannot be said to have been written with the purpose of appealing to the prurient interest of its readers.
contrary to the New York Penal Code. A three-judge trial court convicted; the appellate division reversed on the ground of lack of scienter; on appeal by the state a strongly-divided court of appeals held that Gent—even though it was dedicated to coarse sensuality—was not obscene. For the majority two opinions were written, one by Fuld, J., in which Van Voorhis, J., concurred, the other by Desmond, C.J., in which Dye, J., concurred.

Fuld, J., argues that three factors require the court to use the hard-core pornography test. Relying on Roth, he refers to "the constitutional necessity to open the door barring state intrusion into this area only the slightest crack necessary". This constitutional necessity by itself cannot be said to require a restriction of state power to the extent suggested by the judge. What of the other factors? One may approve the desirability "of erecting a standard which embodies the most universal moral sensibilities and [which] may be applied objectively," but is there a necessary coincidence between desirability and constitutionality? Could a hard-core pornography test be applied any more objectively than the test formulated in Roth? If material which has as its dominant note an appeal to the prurient interest of the average member of the community is without redeeming social value why should not the state be entitled to suppress it?

---

64 See note 160 infra for a comment on the effect of the due process requirement of scienter dictated by Smith v. California, 361 U.S. 147 (1959) on ease of securing convictions.

65 People v. Richmond County News, Inc. 9 N.Y.2d 578, 580, 175 N.E.2d 681, per Fuld, J.

66 Id. at 581, 175 N.E.2d at 685.

67 Id. at 581-582, 175 N.E.2d at 685.

68 Fuld, J.'s citation of Winters v. New York, 333 U.S. 507, (1945), is not relevant on the issue of social value. In that case the Court held, over a powerful dissent of Frankfurter, J., with whom Jackson and Burton, JJ., concurred, that a New York statute which penalized distribution of publication containing collections of criminal deeds so massed as to become vehicles for inciting violent and depraved crimes against the person was unconstitutional on the ground of vagueness. The statement by the Court in Winters is that "[w]e do not accede to appellent's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." Id. at 510. But then Reed, J., who delivered the opinion of the Court added, "They are equally subject to control if they are lewd, indecent, obscene." Ibid. That Reed, J., did not in this context view obscenity as a synonym for hard-core pornography is evident in his discussion of the crucial issue of vagueness. "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious."

"Id. at 518. Reed, J.'s opinion was written in 1948. How many American courts had at that time held "obscene"-hard-core pornography?"
One may agree with the Chief Justice’s view that “law in a pluralist society does not regulate literary standards or give expression to the loftiest virtues” 69. But does agreement with this noble view require the state to stay its hand except against hard-core pornography? Roth as interpreted by Manual Enterprises can give full play to all the needs of a pluralist society which is organized in a federal system without “regulating literary standards or giving expression to the loftiest virtues”.

One of the major purposes of a federal system is to permit the widest possible freedom for diverse sentiments and customs of the citizens of its constituent parts.70 In the context of formulating a test for obscenity the problem is: what is the relevant community whose standards of candor cannot be unduly exceeded—local, state or national?

Roth and the Model Penal Code do not answer the question. However, a case decided in the same volume of the United States Reports,—Kingsley Books, Inc. v. Brown,71—even though it was not concerned with a test of obscenity, is relevant. There the Court upheld New York legislation which provided for injunctive proceedings prior to the sale of an allegedly obscene book. Under the legislation, once a court found the book to be obscene, it could enter an injunction with state-wide effect. In his opinion for the Court, Frankfurter, J., does not discuss this last point. This is a surprising failure for the author of the opinion in Butler v. Michigan. Wherein is the constitutional difference between the Michigan legislation which penalized the normal adult reader to protect the juvenile and the New York legislation which prohibited dissemination of proscribed matter to all readers in the state, even though to some readers that matter could not be obscene?72 The inference from Kingsley Books is, then, that the community whose standards of candor cannot be unduly exceeded is the state rather than the local unit.73

---

73 In Smith v. Calif., 361 U.S. 147, 164-165 (1959), Frankfurter, J., concurring argued that, "The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity..."
This inference was shown not to be completely accurate in subsequent federal and state decisions. Harlan, J.,'s expressed fears of national censorship in Roth indicate that in his view a national standard is improper for use in a case involving state legislation. Several years later, in Manual Enterprises he stated his views on the relevant community in a case involving federal legislation. "The proper test under federal statute[s] reaching as [they] do to all parts of the United States is a national standard of decency." Although the other members of the Court did not consider this issue, it is clear that Harlan, J.,'s views are sound. If a contrary conclusion had been reached, a book publisher in New York would not be allowed to use the mails to send Edmund Wilson's Memoirs of Hecate County to readers in California and Illinois.

The national standard, was, it is submitted, applied incorrectly by state courts in proceedings involving state legislation. In a state proceeding for violation of the state obscenity statute
the issues are whether the defendant unduly exceeded the standard of candor customary in the community to which his communication is addressed and whether that communication was designed to appeal to the prurient interest of its likely audience. If a vendor displays photographs of nudes in provocative poses on his newsstand in a strait-laced community how can he appeal to a possibly more liberal national standard?

We are told that he can because of the Supreme Court's determination in Roth "that the inhibition of the First Amendment applies with equal force to the federal government and the several states, [the Court] has implicitly indicated that the standard to be applied is that of the national community." Surely this is to draw implications from the void. Because the inhibitions of the first amendment apply with equal force to the states as well as to the nation the same standard of obscenity must be used in testing state and federal legislation. But this does not mean that in determining whether a defendant has violated a state obscenity statute the jury must be instructed to decide if defendant's matter has unduly exceeded the customary standards of candor of the national community. Such an approach does not sufficiently advance the cause of free speech to justify this interference with state rights. In other words, when the court must strike a balance between the claims of federalism and the claims of civil liberties it should not sacrifice those of federalism if to do so will be of no significant benefit to civil liberties.

C. Canada

Because of the important amendment to the Criminal Code in 1959, the full effect of which has not yet been determined by the courts, it is necessary to discuss the Canadian test of

---

81 Cf. Roth v. United States, 354 U.S. 476, 504-508 (1957), per Harlan, J.
82 One of the major practical problems is that publishers look upon the nation as one market. A holding that the relevant community is that of the state or of the locality bifurcates this market to an impossible extent: the publisher is forced to consider whether his communication is substantially in excess of the customary standards of candor of Missouri as compared to those of Montana; very large undertakings may produce regional issues but this would be financially difficult if not impossible for the ordinary publisher. Cf. letter from Benjamin E. Winston, Esq., Attorney, New York City, counsel for some publishers, March 14, 1963.
83 See infra, pp. 682-87.
obscenity in two stages: first, the law before 1959, and second, present judicial views.

From 1892\textsuperscript{84} until 1959\textsuperscript{85} the Criminal Code of Canada made the dissemination of obscene matter a penal offence.\textsuperscript{86} Although the Code did not provide a definition of obscenity it declared, in terms reminiscent of the defence of self-defence, that

No person shall be convicted if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.\textsuperscript{87}

Thus, subject to whatever qualifications were made necessary by this defence of serving the public good, the Criminal Code imported the common law Hicklin test of obscenity.

It is fair to say that the Canadian courts applied Hicklin in a manner having the most restrictive effect on the dissemination of reading matter. To the problems posed earlier\textsuperscript{88} the courts, with the Ontario Court of Appeal in the forefront, gave answers that aroused the almost unanimous criticism of the commentators.\textsuperscript{89} Thus, in Regina v. National News Co. Ltd.,\textsuperscript{90} the Ontario courts held obscene Erskine Caldwell's Tragic Ground for the reason that it had a tendency to corrupt and deprave the young, a group into whose hands the book may come. Several years later, in Regina v. American News Ltd.,\textsuperscript{91} the novel Episode, which described the plight of a mentally-ill soldier and his treatment in various institutions was held obscene by the trial court. Expert

\textsuperscript{84} 1892 (Can.) c. 29 s. 179.
\textsuperscript{85} 1953-4 (Can.) c. 51, s. 150.
\textsuperscript{86} The best survey of the pre-1959 Canadian law of obscenity is that of Mackay, The Hicklin Rule and Judicial Censorship, 36 Can. Bar Rev. 1 (1958).
\textsuperscript{87} Criminal Code, s. 150(3), 1953-4 (Can.) c. 51. Section 150(4) declared that, "for the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the act did or did not extend beyond what served the public good."
\textsuperscript{88} Supra, p. 672.
\textsuperscript{89} Supra, note 36, at 3; Note, 12 Toronto Fac. of Law Rev. 577 (1954).

evidence, later held madmissible by the Court of Appeal, had been introduced to prove the book's informational and literary qualities, but this was ruled of no significance. Several members of the Court were prepared to accept the test formulated by Stephen that it was a defence if publication was "necessary or advantageous to religion or morality, to the administration of justice, the pursuit of art, of other objects of general interest." The book in question, was of course, not able to meet these rigorous standards rigorously applied. One commentator accurately and concisely summarized the pre-1959 law in this fashion:

[A] book is obscene if it is available to and has a tendency to deprave or corrupt those whose minds are susceptible to immoral influences, evidence that the book has no such tendency is madmissible [as] is [expert testimony] attesting to the literary and other merits of the book; the sincerity and legitimacy of the author's purpose must be completely ignored and, as a result of all the foregoing eliminations, the book is to be judged obscene according to its sexual passages and its dominant effect in terms of other values is completely immaterial. Furthermore, the book itself is to be judged in the abstract, evidence as to the contemporary nature and character of other books in circulation being also declared madmissible.

That this result—one of the prime examples of a failure of the judicial process—was not mescapable has been demonstrated by such decisions as *Ulysses* and *Martin Secker Warburg Ltd.* Our problem is to determine whether the 1959 amendments to the Criminal Code has liberated the Canadian communicator from mediaeval restrictions.

For the amendments to have a liberating effect they should abolish *Hicklin*. The question then, is whether in fact the *Hicklin* test is no longer law in Canada. This depends upon an interpretation of the 1959 legislation which for the first time provides a statutory definition of obscenity: "[A]ny publication a dominant

---

92 Stephen, Digest of Criminal Law 173 (9th ed.)
94 United States v. One Book Called “Ulysses,” 72 F.2d 705 2dCir. 1934).
96 1959 (Can.) c. 41 ss. 11 & 12. See Appendix “C”
characteristic of which is the undue exploitation of sex, or of sex and any one of the following subjects, namely, crime, honor, cruelty and violence, shall be deemed to be obscene.”

In Regina v. Brodie, the first case interpreting the amendment to come before the Supreme Court of Canada, that Court, by a divided vote, reversed the decision of the Court of Queen's Bench of Quebec which had affirmed a trial court’s finding that Lawrence's *Lady Chatterley's Lover* was obscene. Unfortunately, there was no clear majority holding that the new statutory definition of obscenity was exhaustive. Because neither *Brodie* nor the only subsequent appellate decision since *Brodie* decides the question, an examination of the legislative history of the 1959 amendments may be valuable before we consider in detail the judgments delivered in the Supreme Court.

These amendments, in common with most legislation, were the result of conflicting pressures. There had been widespread public distaste of certain publications on the newsstands which were deemed detrimental to juveniles; there was evidence that distributing companies were forcing vendors to accept material that the vendor felt was unsuitable; there was dissatisfaction with the application of *Hicklin* by the courts. Because Canadian statutes are often a copy or modification of their Commonwealth counterparts, perhaps the most important clues to legislative meaning can be found in the obscenity statutes of England and other Commonwealth countries.

---

97 Cr. Code s. 150(8) (introduced by 1959 (Can.) c. 41 s. 11.
99 Two members of the Court felt that s. 150(8) was not exhaustive; see per Fauteux and Ritchie, JJ. [1962], S.C.R. at 697-8 and 707-9; 32 D.L.R. 2d at 519-22 and 529-31, Locke, J., did not consider the question; Cartwright and Fauteux, JJ., mentioned the problem without deciding it; see [1962] S.C.R. at 689 and 692-3, 32 D.L.R. 2d at 515. Thus only four members of the Court squarely held that *Hicklin* is no longer relevant.
100 Regina v. Dominion News & Gifts Ltd. [1963], 2 C.C.C. pt. 2 (Manitoba C. A.), decided March 14, 1963. This case arose out of forfeiture proceedings brought against named issues of *Dude* and *Escapade* On appeal, counsel for the Crown agreed that s. 150(8) was exhaustive and the Court decided the issue of obscenity on that basis but left the question open for the future.
101 There was a definite legislative response. See Criminal Code s. 150 B. See Appendix “C” infra p. 701.
After much debate and controversy aroused by the prosecution of reputable booksellers, the English legislature moved to the rescue with the Obscene Publications Act.\[^{103}\] Despite its purported liberalizing intent, the statute adopted as a test of obscenity a modified formulation of *Hicklin.*\[^{104}\] The closest analogy to the Canadian provisions is found in the statutes of the Australian states. Although these statutes often contain language similar to s. 150(8),\[^{105}\] they avoid the problem by declaring that the statutory definition is “without prejudice to the generality of the meaning of the word obscene”\[^{106}\] Resort to possible precursors of s. 150(8) would not be necessary if the court were allowed to consider the statement of the Minister of Justice introducing the amendments in the House of Commons.\[^{107}\] That personage said, “the *Hicklin* definition which is not superseded by the statutory definition”\[^{108}\]

It is beyond the scope of this article to analyze the techniques whereby four members of the Supreme Court concluded that s. 150(8) was exhaustive and two decided that *Hicklin* was still alive. As all the members of the Court purported to decide whether *Lady Chatterley* was obscene within s. 150(8), the crucial issue emerges: what meaning is to be attributed to the words “a dominant characteristic of which is the undue exploitation of sex”?\[^{109}\]

To Kerwin, C.J., the answer was clear. One applied a mathematical formula, ascertaining the percentage of sexual to other matter.\[^{109}\] *Lady Chatterley* was full of sex, therefore it unduly emphasized sex. Taschereau, J., also dissenting, was more sophisticated. “‘Undue means unreasonable’ It conveys


\[^{104}\]Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, s. 1(1) declares that “an article shall be deemed to be obscene if its effect 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 the matter contained in it.”

\[^{105}\]See, for example, South Australia, Police Offences Act, 1953-1961, s. 33(3) & (5).

\[^{106}\]See e.g., New South Wales, Obscene and Indecent Publications Act, s. 3(2) 1901-1955.

\[^{107}\]This statement would be inadmissible in evidence. Gosselin v. The King, 33 S.C.R. 255 (S.Ct. of Can. 1903).

\[^{108}\]Hon. Davie Fulton [1959], 5 H.C. Debs. 5517.

the idea that what is said goes beyond what is appropriate or necessary to prove the proposition that one endeavors to demonstrate to the public." It is surprising, therefore, to find Taschereau, J., in dissent until one discovers his view of what Lawrence's proposition is—"to dissolve the clouds of social evils hanging over the skies of England". If Taschereau, J.'s analysis of Lawrence's philosophy is sound, one can sympathize with his complaint that the novelist has described "with unholy satisfaction more than fifteen adulterous scenes".

Fortunately, Judson, J., had a better understanding of Lawrence's aims. The test he formulates is both simpler and more sophisticated than that of Taschereau: "What I think is aimed at is excessive emphasis on the theme [of sex] for a base purpose". In other words, the test is the motive and sincerity of the author. Since Lawrence's aim in writing Lady Chatterley was not to provide "an invaluable stimulant to the vice of masturbation," it was not obscene within s. 150(8).

One of the important factors that led to the acquittal of Lady Chatterley was its literary reputation. In Canada, as in the United States, the current battleground involves "girlie" magazines. They were the subject matter of the prosecution in Regina v. Dominion News and Gifts (1962) Ltd., the latest appellate decision interpreting s. 150(8). It was conceded on appeal by counsel for the Crown that s. 150(8) was exhaustive.

---

110 Id. at 691-692, 32 D.L.R.2d at 517 (Taschereau, J., dissenting).
111 Ibid.
112 Id. at 690, 32 D.L.R.2d at 515.
113 In an earlier passage, see supra, note 110, the learned judge illustrates his confusion when he says "nobody would seriously think that this novel could be shown on television." Surely the issues are different. (1) Reading a book is normally done in private, television viewing is often done in the company of others. (2) Television has a greater potential impact than does reading and depends far less for that impact on the imagination of its viewers. Even on the most liberal interpretation of censorship laws it would be extremely difficult to transfer, as an example, Norman Mailer's The Time of Her Time, to the screen.
114 Id. at 704, 32 D.L.R.2d at 527-528, per Judson, J. (Abbot and Martland concurring) (emphasis added.)
115 It is simpler than Taschereau's because it does not require judges to become literary inquisitors; it is more sophisticated because its simplicity will lead to greater certainty in judicial application of s. 150(8).
116 Cf. Sillotti, Book Censorship in Massachusetts: The Search For a Test For Obscenity, 42 B.U.L. Rev. 476, 491 (1962), and Cr. Code s. 150(5) which declares that "for the purposes of this section the motives of an accused are irrelevant."
117 Lawrence, Pornography and Obscenity 41 (1930).
and by counsel for the accused that sex was the dominant characteristic of the magazines which had no literary or artistic merit. Perhaps relying on some American cases, counsel for the defendant argued that the statute was intended to eliminate "hard-core" pornography. Monnn, J.A., delivering the opinion of the Court, rejected this argument: "Obscene is not synonymous with pornography much less with hard-core pornography, whatever the last means. Pornography is not the only type of obscenity toward which the section is directed, otherwise Parliament would have used just those words." Were the magazines then obscene? Yes. "Sex predominated throughout: it was suggestive, provocative for no useful purpose and overlapped the bounds of judgment and goodwill which ordinary persons would tolerate."

Of the five judges, only Freedman, J.A., dissented. In language reminiscent of Cardozo he suggested that "risque the magazines are, but not obscene," a conclusion with which one can agree. But why are they not obscene? Because "they treated [sex] in a normal and not a perverted fashion." If the dictionary is any guide, what Freedman, J., is suggesting is that the magazines were not sufficiently offensive to be termed obscene.

In the course of the trial, evidence had been introduced that the magazines alleged to be obscene circulated freely in other major metropolitan areas of Canada and were in those communities not deemed offensive to prevailing standards of decency. Thus the issue of the relevant community was posed in clear-cut fashion. Brodie was not decisive. In Brodie, it is true, evidence had been admitted of the usages of contemporary novelists but in none of the judgments was the relevant community defined. Since the proceedings in Brodie were instituted in the City of Montreal, in the Province of Quebec, it is possible that the relevant community was either of those places. If this were so, however, the opinions expressed by the Quebec courts should

---

117 See notes 61 & 62 supra and accompanying text.
119 The Shorter Oxford Dictionary defines "risque" as "involving suggestions of or verging upon what is improper or indecent" and "obscene" as "offensive to the senses or the mind; disgusting, filthy."
have been entitled to practically conclusive weight that *Lady Chatterley* was offensive to these community standards of decency because of the book's emphasis on sex. It is reasonable to conclude as a result of the reversal of the decisions of the Quebec courts by the Supreme Court, that the Court decided the case on the basis that the relevant community was a national one.

This, perhaps, was the approach adopted by Freedman, J.A.\textsuperscript{121} However, the majority judges seemed to take a different tack.\textsuperscript{122} It is, therefore, desirable to digress for a moment to consider the instructions a court should give to a jury on this question. Because Canada, notwithstanding its federal system of government, has opted for uniformity rather than diversity in the field of criminal law,\textsuperscript{123} the test for obscenity must be a national one. But the use of a national uniform test does not require the courts to ignore local feelings and sensitivities. Perhaps the closest analogy is the Criminal Code's penalization of criminal negligence.\textsuperscript{124} The elements of the crime of criminal negligence must be and are the same throughout the country; nevertheless the court is entitled, and may even be obligated to consider specifically local facts. Thus, in the trial of a charge of criminal negligence arising out of a motor vehicle accident, evidence of prescribed speed limits at the place of the accident would be admissible.

D. Australia

Australia is unique in that, of the federal systems we are examining, it is the only one that has neither a national criminal law as in Canada, nor a Bill of Rights as in the United States, to establish national basic standards. Discussion of the Australian approach is, however, possible within a reasonable compass.

\textsuperscript{121} "Community standards must also be local. In other words, they must be Canadian. In applying the definition in the Criminal Code we must determine what is obscene by Canadian standards" per Freedman, J.A., dissenting in Reg. v. Dominion News & Gifts (1962) Ltd.
\textsuperscript{122} Monnn, J.A., delivering the opinion of the Court suggested that "the trier must be presumed to know something about the customs, tastes, standards, habits and morals of the community in which he resides."
Shultz, J.A., who delivered a long concurring judgment argued that "having regard to the type of administrative machinery set up by s. 150 A [it is clear] that Parliament intended to allow for some degree of local autonomy, [and, therefore, the relevant community was the] immediate local area."
\textsuperscript{123} See note 15, *supra*.
\textsuperscript{124} Criminal Code, s. 191.
because most of the states have similar provisions dealing with our problem. We turn, then, to an examination of one of the latest of these statutes, The Police Offences Act of South Australia.

A first reading reveals that the Australians have felt the necessity for legislative guides much more strongly than either Canadians or Americans. It would seem that what the legislature had in mind was this: matter of artistic or literary merit was not to be held obscene despite its sexual content unless such sexual content was unduly emphasized; matter without artistic or literary merit was to be held obscene if, because of its sexual content, it had a tendency to deprave or corrupt the persons by whom it was likely to be seen. If this be a correct view of the statute two problems immediately become evident. What is meant by unduly emphasizing sexual material? This problem we have examined in its context in the Canadian statute and our purpose here is to compare the Australian interpretation of that seemingly simple phrase. The other problem is more difficult. Is matter without literary or artistic merit to be held obscene because its sexual content would tend to deprave and corrupt juvenile readers who are likely to see it although the matter is primarily directed to an adult audience which would not be adversely affected?

125 Police Offences Act, 1953-1961 (South Australia). The crucial provisions are s. 33(1), which declares that: "indecent matter includes any painting, painting, carving, or other representation or matter of an indecent nature but does not include books and other matter of artistic or literary merit or books and other matter published in good faith for the advancement or dissemination of medical science," and section 33(3), which directs the Court in determining whether any matter is indecent to regard

"(a) the nature of the matter; and
(b) the persons, classes of persons and age groups to or amongst whom it was or was intended or was likely to be published, distributed, sold, exhibited, given, or delivered; and
(c) the tendency of the matter to deprave or corrupt any such persons, class of persons or age group."

The purpose of the last subsection, we are told, is "that matter shall be held indecent when it is likely in any manner to deprave or corrupt any such persons notwithstanding that persons in other classes or age groups may not be similarly affected." Still fearful, the legislature then provided in section 33(5) that: "Notwithstanding anything in subsection (1) the Court shall not hold that books or other matter do not fall within the definition of indecent matter because of their literary or artistic merit, if such books or matter describe with undue detail, or emphasize coition, unnatural vice, or other sexual, immoral or lascivious behaviour, or the organs of generation or excretion."

126 The legislation is not a model of clarity. One can't be too sure.
An examination of the Australian and New Zealand cases discloses an unusually restrictive and punitive approach by their courts. For example, in Close, a reputable author was convicted of publishing an obscene libel although it was admitted that the novel had literary merit. Fullagar, J., interpreted the legislative provision in this fashion: "There is no obscene libel unless what is published is both offensive according to current standards of decency and calculated or likely to have the effect described in Hickin." And, in a subsequent passage, he elaborated by way of a supposed charge to a jury:

There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing and capable of justly applying those standards. What is obscene is something which offends against those standards. Do you think that the publication now before you is one in which these matters [sex relations] are dealt with artistically and with whatever frankness, cleanly? Or do you think that there are passages in it which are just plain dirt and nothing else, introduced for the sake of dirtiness and from the sure knowledge that notoriety earned by dirtiness will command for the book a ready sale.

This is almost an ideal charge. One is consequently surprised to see Close cited to support the suppression of internationally famous books.

Perhaps the best example of the restrictive approach of the courts can be found in two decisions, one of the New Zealand Court of Appeal, the other of the High Court of Australia. Lolita, which had stirred some controversy in the United States, was considered by the customs of New Zealand unfit for entry.
into that land of the pure. The decision of the customs was affirmed by the trial court and by the Court of Appeal. A proper appraisal of the judicial process in this instance requires a brief description of the impugned work. It may be recalled that Lolita is concerned with the infatuation of Hubert Humbert for his lovely nymphet, Lolita, and their resulting mutual destruction. To the ordinary reader the book would stimulate laughter—perhaps, compassion—perhaps, lust—most unlikely.

The majority judges recognized that Lolita was not pornographic. But, in their view, this was irrelevant because the provision dealing with “matter which unduly emphasizes matters of sex” indicated that the legislature intended to suppress more than pornographic literature. These judges therefore had to answer two questions. What is meant by unduly emphasizing matters of sex? Did Lolita do so?

To the first question the answer was, a book unduly emphasizes matters of sex if it “deal[s] with matters of sex in a manner which offends against the standards of the community.” Does Lolita deal with matters of sex in an improper manner? “Yes”, say these judges. “But how?”, is the reasonable reply. To this the rejoinder is: “The selection of a particular theme relating to sexual matters itself might result in a book being held to unduly emphasize sex.” One reads and rereads the judgments; the shock diminishes but does not die. Applying this test, a novelist is prohibited under danger of criminal sanction from writing a novel whose theme is the sexual problems of a newly-married couple. Would such a book have a tendency to deprave and corrupt the young? “Yes,” says the court.

---

133 Critical opinion ranged from the ecstatic to the moderately disapproving, 202 Atl. 78 (Sept. 1958), 187 Nation 97 (Aug. 30, 1958); it was generally agreed that Lolita was an important work.
134 It was clear that the author did not intend to stimulate the reader sexually nor was he likely to when the love object was a physically immature girl. The reader of this article is invited to test the validity of the preceding statement by reading Lolita or by reading the description of the homosexual orgy in Karpman’s, The Sexual Offender and His Offences 425 (1954).
136 Ibid. Cf. the more rational approach of Gresson P. dissenting, id. at 548.
137 On the test enunciated by the majority, Lady Chatterley’s Lover is clearly obscene. Reading about the love making of a mature woman who reciprocates, finally, her lover’s passion would seem to be more sexually stimulating than reading the story of Hubert Humbert’s tragic involvement with Lolita.
138 “I find it difficult to see how a novel which does unduly emphasize matters

(Continued on next page)
After the tragi-comedy of *Re Lolita* it is a pleasant change to discuss the pure farce of the case of the romance magazines. An administrative tribunal established under a Queensland statute had prohibited further issues of a publication in the nature of a true romance magazine and their decision was upheld by a majority in the Supreme Court of Queensland. We are told that "this literature [was] considered unduly to emphasize matters of sex and exhibit a tendency to deprave because the lovers are depicted as loving passionately; their kisses, though pure are full and perhaps prolonged." By a bare majority the High Court of Australia allowed high school students and frustrated housewives to continue to buy their escape from reality.

The essence of the majority position was summed up in one passage by The Chief Justice. This does not appear to be within the range of any reasonable application of what is meant by the phrases unduly emphasizes matters of sex and likely to be injurious to morality Every distinction between man and woman may be said to be a matter of sex but obviously it is in no such general sense that the expression is used. No doubt direct reference to the physiological distinctions or to actual physical relations are in the contemplation of the phrase, wherever the purpose or effect is amoral or perverted.

Nevertheless he was unable to convince McTiernan, J., who felt that the magazines were "calculated to infect those who are sweethearts with brutish standards of behavior, unworthy of the

(Footnote continued from preceding page)

of sex in the way this book does, can do other than have a tendency to deprave or corrupt the young." *Re Lolita* [1961] N.Z.L.R. at 566, per North, J.

In this passage the judge neglects to consider the primary audience to whom the book is addressed. Unless young adolescents in New Zealand are grossly different from those in North America, it is hard to visualize them obtaining the book to read the one or two passages that may be considered to have a miniscule erotic effect.

140 Objectionable Literature Act, 1954.
141 Recall that neither the federal nor the state legislatures are controlled by any Bill of Rights. See *supra* pp. 670-2.
143 *Id.* at 117-118. It should be noted that the Queensland statute is the most restrictive of any that have been examined. See Objectionable Literature Act, 1954, s. 5(1), especially clauses (ii)(iii) and (iv) thereof.
custom of courtship and the institution of marriage.”

Pure but prolonged kisses unworthy of courtship? Perhaps in Australia. In North America where the high schools are troubled by 15 year old unmarried mothers these magazines are tame stuff.

Surprisingly, considering that Australia is a federal jurisdiction, only rarely has the issue of the relevant community been discussed by the courts. In one of the few cases that considered the problem, Khyte-Powell v. Heinemann Ltd., the Supreme Court of Victoria held it irrelevant that the book which was alleged to be obscene had been removed from the prohibited list of Australian customs after being banned for 15 years. The implication of this decision is, therefore, that in Australia the state courts applying state legislation are not required to consider national community standards.

Khyte-Powell leaves undecided the question whether the relevant community is then the state or a local one. Although there is no express decision on point, the inference from the Court's statement in Associated Newspapers Ltd. v. Wavish, is that the community is a local one: “Unduly emphasized matters of sex should be construed as dealing with matters of sex in a manner which offends against the standards of the community in which it is published.” (Emphasis added.)

III. OBSCENITY LAWS IN OPERATION

At this stage we are interested in the various mechanisms and operating procedures that in the end have perhaps as much effect on what the community can read and see as the standard of obscenity formulated by the legislators and elaborated by the courts. Although private pressure groups have had a significant impact, especially in the United States, we do not consider...
them except to the extent that they have affected the official power holders in the criminal justice system: the police, prosecuting attorneys, and state or provincial attorney general.

These private groups operate not only by the blatant techniques of picketing and blacklisting, but also by the more proper method of exerting pressure on the primary unit in the enforcement of the law of obscenity—the police.\(^{150}\) Although there are many similarities in the methods of operation, the police forces in the countries under study are organized on different lines. In the United States\(^ {151}\) and Canada\(^ {152}\) each large metropolitan center has its own force; state or provincial police usually play only an interstitial role ranging from law enforcement in areas that do not have municipal government to enforcement of highway regulations.\(^ {153}\) Thus, subject to the express provisions of any governing legislation, each individual municipal force can adopt its own approach to the control of obscene material. In Australia, however, the state police are the police force of the municipality. Since there are only six states\(^ {154}\) it is possible within each state to have uniform enforcement and within the country as a whole to have only six varying standards of enforcement.

We are told by one of the leading scholars in the field\(^ {155}\) that "where the policy of the particular department of the law is a matter of acute public controversy, the police may rid themselves of embarrassment by taking a middle course, neither seeking of their own volition to put the law into motion, nor refusing to act when called upon.\) This is generally the policy


\(^{154}\) Australia consists of six states and the Northern Territory. This latter unit is very sparsely populated and does not contain any urban area with a population of more than 25,000 persons.

\(^{155}\) Glanville Williams, Discretion in Prosecuting [1956] Crim. L. Rev. 222, 226.
with regard to obscenity [in England].” However much this may be true of England, it is not true of the United States, Canada or Australia.

In no city\textsuperscript{156} in any of the latter three countries did the police rely solely on private complaints.\textsuperscript{157} Despite its atypical size and its elaborate internal organizational development, the Chicago police department\textsuperscript{158} can be examined as an example of the approach of a modern police force to the problem of obscenity. That department is organized into several divisions, one of which—the organized crime division—has as its primary function the repression of vice. This division in turn is divided into several units, the relevant unit for our purpose being the obscene matter and prostitution section.

The men assigned to the Section make city-wide inspectional investigations and upon the finding of a violation relay the information to the (proper) police district. The district must within a stated period of time act on the reported violation and if positive action is not taken by the district officers, a re-check is made and immediate action is then taken.\textsuperscript{159}

On-view arrests are made only in cases of hard-core pornography; in all other cases arrests are made under warrant.\textsuperscript{160} In determining whether a publication is obscene the advice of the

\textsuperscript{156} Information on police practices in the United States, Canada and Australia was obtained by a questionnaire sent to the police departments of a number of cities in those countries. See Appendix “A,” p. 701 infra for a list of these cities.

\textsuperscript{157} Cf. the comment in a letter from Charles D. Black, Lieutenant, Vice Control Bureau of Cincinnati Police Department, Jan. 29, 1963: “For the police to take action upon complaints of citizens would be an undesirable [course] to follow as the opinions of the average citizen relating to obscene literature is of such controversial nature. Who is qualified to determine what literature is obscene? Whether or not the police agency is qualified to do this is debatable, but it appears that if any action is to be taken against obscene literature it will have to be initiated by the police.

\textsuperscript{158} The information upon which this description is based was given in a letter from Walter A. Maurovich, Director, Organized Crime Division, Chicago Police Department, Jan. 31, 1963.

\textsuperscript{159} Cf. the operating procedure of the Kansas City, Mo., police force under the statute held unconstitutional in Marcus v. Search Warrants, 367 U.S. 711 (1961).

\textsuperscript{160} Cf. the operating procedure of the Kansas City, Mo., police force under the statute held unconstitutional in Marcus v. Search Warrants, 367 U.S. 711 (1961).

Despite the supposed lack of guidelines in the opinion of the Court in Smith v. California, 361 U.S. 147 (1959), the police and prosecution are still able to secure convictions notwithstanding the due process requirement of scienter. See State v. Andrews, 186 A.2d 548 (Conn. 1963).
office of corporation counsel is sought and obtained. Perhaps the major difference between the methods of the Chicago force and the police forces in Canada and Australia is that the police in these countries do not seem to be as active in ferreting out obscene matter.

Typically, the police force seeks guidance from the prosecuting attorney who plays an important role in every jurisdiction. The significance of his role stems not only from his official powers, but also from his method of appointment and class bias. Whereas members of the police force are always appointed, in the United States the prosecuting attorney is as a general rule an elected official.

As many commentators have recognized, perhaps the most important aspect of the criminal process is its invocation. And, as we have seen, in the control of obscene material the invocation of the process depends upon the police force. Those police forces which do not have specialized units must rely on the ordinary patrolman for enforcement of the obscenity law. Despite the attempts at professionalization, the ordinary patrolman, at least in the large cities of the United States and Canada, is a relatively poorly-educated person from the lower socio-economic

---

161 Every police force replied, in answer to a question on the matter, that no elected municipal official affected their approach to the control of obscene material.

162 One Canadian police department described its operation in this manner: "Our morality section handles investigations. They seldom check newsstands. We have a number of retail outlets who will seek our advice when they suspect obscenity. The distributors are very cooperative and will recall books which, in our opinion, fall within the definition of obscenity. Letter from A. G. Cookson, Chief of Police, Regina, Saskatchewan, Jan. 28, 1963.

Several months after the decision in Reg. v. National News Co. Ltd., note 90 supra and accompanying text, the writer was able to obtain a copy of the condemned book in a store less than a mile from the court where the case was first heard. The bookseller disclaimed notice of the condemnation and insisted that there had never been trouble from the police. This hands-off policy was not the result of any bribery because the profits of the trade were too low to warrant such expenditures.

However, the Montreal Police Department engages in a program fully as active as that of Chicago. The Montreal department has a juvenile bureau consisting of ten officers whose duties include a daily inspection of books and magazines offered for sale to the public. Letter from J. A. Robert, Director of Montreal Police Department, March 6, 1963.

163 Baker, The Prosecutor—Institution of Prosecution, 33 J. Crm. L. 770 (1932). In Canada and in Australia the local Crown attorneys are appointed officials. See for example, Crown Attorneys Act, R.S.O. 1960, c. 82.


165 The use of private prosecutions is discussed infra, p. 696.
classes, and it is this type of person who tends to have the most restrictive approach to freedom of expression in matters of sex. On the other hand, prosecuting attorneys, as members of the legal profession feel themselves to be of the middle and upper middle class and as a result have a different attitude to the problems involved in the control of obscenity.

The police, theoretically, are immunized from improper pressure because they hold appointed positions. The prosecuting attorney in the United States, on the other hand, being an elected official must, if he has hopes of re-election or of higher office, carefully weigh the effect of his actions on public opinion. And yet, in one regard, the American prosecuting attorney is in a stronger position than his appointed counterpart in Canada or Australia. In many states he is the only person authorized to institute a criminal prosecution, a restriction unknown to either Canadian or Australian law. The resulting position seems to be that in states where the prosecuting attorney has the sole power to prosecute, no criminal sanctions can be invoked if he refuses to lay a charge, while in the other states and in Canada and Australia private persons (and this would include police) can invoke the criminal process. However, the local prosecutor in every jurisdiction can nolle prosequi the charge laid by the private individual.

If one compares the American system of the administration of criminal justice with that of Canada and Australia one is

---


168 E.g., Kentucky, Oklahoma, Minnesota. In only one state, Pennsylvania, did the attorney general's department have knowledge of any private prosecution.


170 See note 175 infra for a discussion of the special provisions common in the various state statutes in Australia.


impressed by the tremendous weight accorded local rights in the former.\textsuperscript{172} Not only are the police forces and prosecuting attorneys in the United States locally controlled, but the state attorneys general have little or no control of the local prosecuting attorney.\textsuperscript{173} On the other hand, the prosecuting attorney in Canada and Australia is a member of the staff of the provincial or state attorney general's department, and he is, therefore, subject to central legal control.\textsuperscript{174} In those jurisdictions where there is a central legal control, it should be possible to ensure uniformity of law enforcement within the individual state or province. However, there is not a department in the United States, Canada or Australia that has developed a policy which it has communicated to the local prosecutor.\textsuperscript{175}

We have been examining law enforcement by the individual state and provinces because the federal enforcement agencies...
are active in two areas only—the post office and customs. At this point we are concerned with the effect that determinations of obscenity or no obscenity by administrative or judicial officers in post office or customs proceedings have in subsequent state or federal prosecutions. Is a finding of obscenity in a forfeiture proceeding by one federal judge conclusive on that book’s obscenity in a subsequent forfeiture action in another area of the country? Is that finding conclusive in a criminal prosecution against the vendor of the book for violation of either the federal mail statute or a state obscenity law? Some, at least, of these questions have been answered. In the *Marred Love* case, Judge Woolsey held that a prior judge’s decision in favor of the admissibility of the book into the country “established the book as having an admissible status at any point around the customs barrier of the United States.” This conclusion, based

(Footnote continued from preceding page)


Many state attorneys general have provided advisory opinions for the local prosecuting attorneys. E.g., Paul L. Adams, then attorney general of Michigan, in a memorandum of June 17, 1960, reviewed the leading cases and recommended the use of the civil procedure made available by M.S.A. s. 27, 1401(1). Perhaps the most important aspect of the memorandum was its concluding paragraph: “In this area we are dealing with probably our most basic freedom—freedom of speech. Therefore, a prosecuting attorney must be careful to direct his attention only to those publications which are truly ‘smut.’ The line between protecting the public from such obscenity and freedom of speech is at best a thin one. Historical precedent suggests that in close cases, freedom of speech shall be the primary consideration.”


Australia: Post & Telegraph Act, 1901–1950, s. 107(b) and (c).


Canada: Customs Tariff Act, R.S.C. 1952, c. 60, s. 12 and Schedule C, Item 1201.

Australia: The Customs Act, 1901, ss. 50, 51. Here, too, local enforcement agencies play no part.


179 Id. at 823.

The problem discussed in the text has never arisen in Canada or Australia. There has been no reported case in either jurisdiction where the decision of the customs has been contested by the importer.
on the in rem nature of forfeiture proceedings, raises some difficulties if the time factor is considered. Suppose Edmund Wilson's *Memoirs of Hecate County* had been published in England and that a federal judge in 1956 held that the book should be forfeited. Is this decision of a single judge binding on all subsequent federal judges into eternity?^{180}

The more interesting question is whether a federal judge's decision in a forfeiture proceeding binds another federal judge in a prosecution for violation of the mailing statute\(^1\) or a state judge in a trial for violation of a state statute. Clearly in the latter situation the doctrine of res judicata would not apply because the parties are different.\(^2\) The recent amendments to the Canadian Criminal Code provide an interesting solution to the problem: the consent of the Attorney General is required for further action involving a particular publication once a court has made an order in forfeiture proceedings against that publication.\(^3\)

In the only Australian case on point, *Khyte-Powell v. Heinemann*, the state court in an obscenity prosecution held that the book's clearance by customs did not preclude a conviction. This conclusion is sound for the reasons suggested by the Court: the standards to be used by the Minister in enforcing the statute were not formulated in the statute; furthermore, the state court was enforcing a state act.\(^4\)

---


In *Yudkin v. Md.* the court of appeals merely held that a Post Office ruling on mailable was admissible in evidence.

\(^3\) Criminal Code s. 150A (7): "Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, no proceedings shall be instituted or continued in that province under section 150 with respect to those or other copies of the same publication without the consent of the Attorney-General."

In at least one state an obscenity prosecution against the same book—Henry Miller's *Tropic of Cancer*—was unsuccessful in one county and was successful in another. Letter from Arlo E. Smith, Chief Assistant Attorney General of California, Feb. 13, 1963.


*Cf.* the comment in a letter from the Chief Commissioner of the State of Victoria police, March 21, 1963:

"With regard to the importation into Australia of publications believed to be..."
IV CONCLUSIONS

We have examined the test of obscenity currently applied in three federal systems. In all there is agreement that the state should impose some limitations on the free dissemination of communication. But the criteria for these limitations vary from the liberal American (primarily the work of the courts) to the strict Australian (the work of the legislature assisted by the courts). In the United States, the various agencies in the administration of criminal justice have been relatively active in suppressing allegedly obscene matter and in this way have lessened the impact of recent decisions; in Australia the police have been more quiescent. True to the middle-of-the-road nature of Canadian life, Canada has, in the matters we have discussed, taken a middle position.

It was suggested that in any formulation of a test of obscenity local feelings were entitled to consideration. And yet, if local feelings are to be fully protected, an undue obstruction to the distribution of the product of the mass media may result. The writer is unable to resolve satisfactorily this dilemma of federalism. He can, therefore, appreciate the sentiments expressed by a commentator on the subject.

If the reward for all the complexities and inconveniences and difficulties of living in a federal state is the extra element of cultural richness and diversity and the widened opportunities for social experimentation, it can also be said that the very necessity of working with and adjusting to the complicated governmental and constitutional machinery of a federal state is in itself an educational and ultimately a humbling experience.¹⁸⁵

¹⁸⁵ McWhinney, Comparative Federalism 100 (1962).
APPENDIX A. QUESTIONNAIRES TO POLICE CHIEFS

- Indicates a reply

A. UNITED STATES

- Atlanta, Ga.
- Baltimore, Md.
- Birmingham, Ala.
- Boston, Mass.
- Buffalo, N.Y.
- Chicago, Ill.
- Cincinnati, O.
- Cleveland, O.
- Dallas, Tex.
- Denver, Colo.
- Detroit, Mich.
- Houston, Tex.
- Indianapolis, Ind.
- Jacksonville, Fla.
- Kansas City, Kans.
- Lexington, Ky.
- Los Angeles, Calif.
- Miami, Fla.
- Nashville, Tenn.
- New Orleans, La.
- New York, N.Y.
- Phoenix, Ariz.
- Portland, Maine
- Portland, Ore.
- Richmond, Va.
- San Francisco, Calif.
- Santa Fe, N.M.
- Seattle, Wash.
- St. Louis, Mo.
- Washington, D.C.
- Ottawa, Ont.
- Quebec City, P.Q.
- Regina, Sask.
- Toronto, Ont.
- Vancouver, B.C.
- Windsor, Ont.
- Winnipeg, Man.

B. CANADA

- Edmonton, Alta.
- Halifax, N.S.
- Hamilton, Ont.
- Montreal, P.Q.
- New South Wales
- Adelaide
- New South Wales
- Sydney
- Tasmania (Hobart)
- Victoria (Melbourne)
- West Australia (Perth)

C. AUSTRALIA

- Queensland (Brisbane)
- South Australia (Adelaide)
- New South Wales
- Sydney
- Tasmania (Hobart)
- Victoria (Melbourne)
- West Australia (Perth)

APPENDIX B: QUESTIONNAIRES TO ATTORNEYS GENERAL

A. UNITED STATES

- Alabama
- Alaska
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- Florida
- Georgia
- Hawai'i
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Mississippi
- Missouri
- Montana
- Nebraska
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virginia
- Washington
- West Virginia
- Wisconsin
- Wyoming

B. CANADA

- Alberta
- British Columbia
- Manitoba
- New Brunswick
- Newfoundland
- Nova Scotia
- Ontario
- Prince Edward Island
- Quebec
- Saskatchewan

C. AUSTRALIA

- New South Wales
- Queensland
- South Australia
- Tasmania
- Victoria
- West Australia

APPENDIX C. RELEVANT PROVISIONS OF THE CANADIAN CRIMINAL CODE

s. 150(1)(a) Every one commits an offence who makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever.

(2)(a) Every one commits an offence who knowingly, without lawful justification or excuse, sells, exposes to public view or has in his possession for such a
purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,

(b) publicly exhibits a disgusting object or an indecent show.

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

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

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

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

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

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

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

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

(4) If the court is satisfied that the publication is obscene or a crime comic, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is obscene or a crime comic, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, no proceedings shall be instituted or continued in that province under section 150 with respect to those or other copies of the same publication without the consent of the Attorney General.

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

s. 152(1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

(2) Every one commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

s. 153 Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, but this section does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection (4) of section 151.

s. 154(a) Every one who commits an offence under section 150, 150B, 152, or 153 is guilty of an indictable offence and is liable to imprisonment for two years, or

(b) an offence punishable on summary conviction.