WORKING PAPER 10
LIMITS OF CRIMINAL LAW: OBSCENITY: A TEST CASE

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This Working Paper, the second from the Canadian Law Reform Commission addressing "general principles" of criminal law,[1] chooses obscenity as a test case to illustrate the limits of the criminal law. Obscenity was chosen for three reasons: (1) perceived public concern; (2) continuing criticism of present obscenity legislation; and (3) because it "raises numerous interesting questions. How can we simplify the law? How best define obscenity? How reconcile the need for uniform standards with actual variations over space and time? How bring certainty and objectivity into an area of such subjectivity and vagueness? How best devise a means of control of distribution and consumption of obscene material? And finally, how far should the criminal law be used against it?"[2]

Admittedly these are interesting and important questions. Unfortunately, the Working Paper never satisfactorily answers the central definitional question which must be clarified before the others can be resolved: *viz.*, what is obscenity? It is difficult to assess the efficacy of recommendations when one is not sure to what precisely they are directed. Of course "obscenity" is a slippery eel that has defied many past attempts at definition; still, to be told only that obscenity is "[s]omething too vague perhaps to be defined, one of those elusive terms we use but can't explain—like civilisation"[3] is conceding defeat rather too quickly. In the absence of definition, which all too often does lead only to a proliferation of synonyms of equally vague import, can one not at least suggest, by specific example, what kinds of publication one envisages being caught in the net? Is the Commission's concern with the ubiquitous "nudie" magazines (readily available in supermarkets and drugstores—*Playboy*, *Penthouse*, *Viva* and their imitators), or harder core magazines depicting violence, bondage, torture—the stock in trade of the "Adults Only" bookstore, or publications dealing with "perversions" (if one may use what has today become a decidedly old-fashioned word)—homosexuality, bestiality, necrophilia, *etc.*? If one cannot define, one should at least distinguish by example so that the reader may have a

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[1] The first was THE LAW REFORM COMMISSION OF CANADA, CRIMINAL LAW: THE MEANING OF GUILT, WORKING PAPER 2 (1974).

[2] THE LAW REFORM COMMISSION OF CANADA, LIMITS OF CRIMINAL LAW, WORKING PAPER 10, at 1 (1975).

[3] *Id.* at 7.

rough idea of what sort of publication would be affected by the Commission's recommendations. [4]

Moreover, when the Working Paper does attempt to suggest answers to the above catalogue of "interesting questions", it does so in such a general and jurisprudential way that it is difficult to foresee how the recommendations would be translated into specific legislation. It would be unfair to criticize the Working Paper too strenuously for this because the Commission makes it clear that they focus on obscenity, not for itself, but rather "as a test case to illuminate the general question of the proper scope and ambit of the criminal law". [5]

This approach is both frustrating and courageous. Frustrating, because the Canada Law Reform Commission has already acquired an, at least partially deserved, reputation for a rarefied "academic" approach to law reform devoid of much practical significance. Their reports and working papers are redolent of common room talk over sherry, what the Toronto Globe and Mail called a "searching philosophical methodology into how citizens should live together", [6] to the exclusion of the sweat and clamour of the "real" world.

Courageous, because the Commission, counting the cost, has doggedly resisted the obvious tempting alternative—to "tinker" at law reform. Instead it has stuck to its own conception of its mandate—to challenge its constituency, whether politician, judge or citizen, to engage in a process of discerning and re-evaluating first principles, the cornerstones on which our legal edifice rests. For its courage, the Commission has paid the price of being frequently ignored, particularly by those in positions of authority to implement proposed reforms, and this paper is unlikely to prove any exception to the dismal prognosis. And that is a shame, for there is much to be learned from the Commission's perceptive analysis of the social cost of invoking the criminal law to deal with any kind of human behaviour. As it happens, I find myself in disagreement with what I regard as a fundamental premise of the paper—moral relativism—and, hence, unsympathetic to some of the analysis. Nevertheless, the Working Paper is lucid, concise (forty-nine pages in English) and thought-provoking, and deserves wide readership.

Chapter I begins by emphasizing the fact too often overlooked that the use of the criminal law to deal with any perceived problem has a three-fold cost: (a) to those convicted—punishment; (b) to the law-abiding members of society—diminution of human liberty by proscription of one more human activity; and (c) to the general, tax-paying public—the cost of enforcement. To offset this three-fold social cost requires a similarly three-

[4] In a paper prepared for the Law Reform Commission, I suggested a method of distinguishing between "obscenity" and "pornography" depending on the nature of the sexual activity depicted: *see* Hunter, *Obscenity, Pornography and Law Reform*, 2 DALHOUSIE L.J. 482 (1975).

[5] *Supra* note 2, at 48.

[6] Beaufoy, *Nobody listens to the Law Reform Commission—not even its creator*, The Globe and Mail (Toronto), December 16, 1975, at 4, col. 1.

fold demonstration: (a) that a problem, of serious proportion, exists; (b) that, absent criminal proscription, harm will be caused; and (c) that the anticipated benefits of criminal proscription and enforcement outweigh the social cost. Given the three-fold cost, is it sensible to use the criminal law to control obscenity?

Before that question can be satisfactorily resolved, one must first clarify the threshold question: "What is obscenity?" Chapter II never does this. It says only that obscenity "has to do with revealing things we don't like seeing, for reasons which perhaps we can't explain—it just offends, we feel it inappropriate".[7] With respect, this comment obscures rather than clarifies the issue. Better to say nothing at all about obscenity than to imply that objections to it derive only from inarticulate prejudices. To illustrate the inadequacy of the Commission's explanation consider this case: Suppose I, a Protestant, do not like seeing cathedrals adorned with crucifixes —I cannot explain why, it just offends me, I feel it inappropriate. Are the crucifixes obscene? If I persuade a majority of members of Parliament (perhaps all Protestant) to share my idiosyncratic bias against crucifixes and proscribe them, would this, in the Law Reform Commission's view, be an analogous *raison d'être* to the *Criminal Code* obscenity sections? I believe my crucifix analogy is fair to the Commission in pointing out the vacuity of their groping attempt at "The Meaning of Obscenity" (which is what Chapter II is called); it is also historically apposite because obscenity prosecutions were originally concerned with heresy—blasphemy, not sex, was first objected to and prosecuted as obscene.[8] The Law Reform Commission's inability either to define or particularize by example what they understand to be embraced within the term "obscene" is unfortunate and flaws the rest of the report. Worse still is the clear implication that one cannot articulate rational, cogent and considered objections to obscenity.[9]

Chapter II demonstrates the Commission's ambivalence in distinguishing between obscenity and pornography and treating each on its own merit (or, more precisely, lack of merit). At one point the Working Paper criticizes the present *Criminal Code* definition of obscenity ("undue exploitation of sex") as "overlooking" important distinctions between obscenity and pornography: "The distinction may be important, though, since many people object far more to hard-core pornography than to ordinary ob-

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[7] *Supra* note 2, at 9.

[8] As late as 1868, in the famous *Hicklin* case, L.R. 3 Q.B. 360, 18 L.T.R. (n.s.) 395 (1868), from which the common law definition of obscenity derives, the prosecution concerned a sexually explicit but also anti-religious pamphlet entitled "The Confessional Unmasked": *see* Hunter, *supra* note 4, at 483-89.

[9] A very fine book doing just this is THE CASE AGAINST PORNOGRAPHY (D. Holbrook ed. 1972). *See also* PORNOGRAPHY: THE LONGFORD REPORT (Lord Longford, Chairman 1972).

scenity." [10] But elsewhere in the Working Paper, [11] and even in Chapter II itself, [12] the Commission also seems to overlook the distinction and to treat "obscenity" and "pornography" as interchangeable terms roughly synonymous in meaning. Inevitably, then, the Commission's eventual recommendation of "decriminalizing much obscenity" [13] means that the hardest core pornography will be "decriminalized" also. Indeed, the paper specifically acknowledges this. [14] In the unlikely event that the Commission's recommendations are acted upon, the welfare of Canadian society would be better served if the Commission preserved the distinctions between obscenity and pornography throughout the Working Paper and in their eventual recommendation.

Chapter III recognizes that obscenity is "inappropriate" and "distorts" human experience and relations. But so also, the report argues, does theatre ("Where can we find off-stage a three-walled room?" [15]), ballet ("What adult ever pirouettes in real life?" [16]) and plays. "Yet no one wants to outlaw opera, ballet and plays." *Mutatis mutandi*, the reader is expected to conclude the same about obscenity. But are the suggested analogies apt? Does *Swan Lake* or *King Lear*, in fact, "distort" human experience, or are they acclaimed as classics precisely because they validate human experience? True, their appeal is to a deeper, more imaginative level of understanding than mere recall of one's own, perhaps prosaic, experience. But memorable drama affirms rather than distorts the great truths of life and the human condition. It is not analogous to obscenity; it is, in fact, a polar opposite. To compare in terms of "inappropriateness" ballet and drama to the scum that the Commission obtained and perused in preparing this report—magazines like "Women in Bondage" explicitly depicting rape, bondage and torture or "Animal Passion" and "Donkey Love" extolling bestiality—demonstrates stunning naiveté. It is also evidence of the unreality that pervades liberal thought about obscenity. The charitable assumptions about human nature and the optimistic expectations of human destiny from which liberalism derives, require contrary evidence, including the continuing voracious market for the most degrading and brutalizing pornography, to be submerged. Thus, the Commission's response to this uncomfortable datum is to trivialize it by ludicrous analogies to pirouetting ballerinas and three-walled rooms.

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[10] *Supra* note 2, at 9.

[11] For example, the paper states that "private obscenity in our view should no longer be a crime . . . . In practical terms this would mean decriminalizing much *obscenity*. In detail it would mean that *pornography* stores, pictures, and so on carefully restricted to 'adults only' would be allowed": *id.* at 48 (emphasis added).

[12] Chapter II concludes: "Quite clearly today's *obscenity problem* isn't the occasional Fanny Hill, it is the continuous outpouring of a multi-million dollar industry. The "*pornography explosion*" has swept pornography beyond the horse and buggy stage": *id.* at 9 (emphasis added).

[13] *Id.* at 48.

[14] *Supra* note 11.

[15] *Supra* note 2, at 11.

[16] *Id.*

A society that lacks the will to proscribe barbarism, including sexual barbarism, will in time become barbaric. When the threat is resistible, liberals vacillate; when they are horrified, it is too late. As a starkly realistic antidote to this section of the Commission's Working Paper, I recommend Hilaire Belloc's warning who, as I recall, said:

> We sit by and watch the barbarian. In the long stretches of peace we are not afraid. We are tickled by his irreverence, his comic inversion of our old certitudes and our fixed creed. We laugh.
>
> But as we laugh we are watched by large and awful faces from beyond; and on those faces there is no smile.

In Chapter V, the Commission rejects "immorality" as a sufficient justification for criminal prohibition of obscenity. Why should immoral conduct not, *ipso facto*, be criminal conduct? Two reasons are suggested: first, taking their cue from the Wolfenden Commission, [17] the paper asserts that there exists "an area of private morality that isn't the law's business". [18] Despite Lord Devlin's penetrating attacks on this assertion, [19] it re-emerges unscathed in this paper. Second, how do we know what is immoral? "We don't even know there is a God let alone what offends him. These things are matters of belief, and no one, we hold in Canada, is entitled to impose his religious beliefs on others." [20]

Yet surely there is a difference between imposing one's religious beliefs

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[17] REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (Sir J. Wolfendon, Chairman 1963).

[18] *Supra* note 2, at 15. The Working Paper also asserts the dictum: "Everyone is entitled to go to Hell in his own fashion so long as he does no harm to others": *id.* at 15-16. This sentence typifies the self-indulgent nihilism which characterizes this report and, unfortunately, much contemporary political thought and practice. The once noble and challenging conceptions of the potentiality of the State are reduced to a demand that it not place obstacles in the way of its citizen's slide into Hell.

Such expressions purport to find their origin in John Stuart Mill's "one very simple principle" of liberty that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection": THE SIX GREAT HUMANISTIC ESSAYS OF JOHN STUART MILL, ON LIBERTY 135 (A. W. Levi ed. 1963).

It is arguable, however, that Mill would be most unsympathetic to the invocation of his "one principle" in defence of obscenity. Mill sought freedom from the "social tyranny" of conformity to majority opinion; the pornographer seeks license to portray conduct violating the basic norms which make civilized society, and hence both conformity and non-conformity, possible.

Russell Kirk has written of history's "refutation" of Mill's simplistic faith that uncoerced human conduct would lead to human betterment and elightenment: "It is consummate folly to tolerate every variety of opinion, on every topic, out of devotion to an abstract 'liberty'; for opinion soon finds expression in action, and the fanatics whom we tolerate will not tolerate us when they have power": THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 (to be published) *as printed in* NATIONAL REVIEW, December 5, 1975, at A-10. Lord Devlin similarly questioned the applicability of Mill's "one very simple principle": "In short the great majority of our fellow citizens may be as high-minded as Mill expected them to be but we have not yet got rid of the troublesome minority who will yield only to compulsion": P. DEVLIN, THE ENFORCEMENT OF MORALS 105 (1969).

[19] P. DEVLIN, THE ENFORCEMENT OF MORALS (1969).

[20] *Supra* note 2, at 16.

by law on others, and legislating against human conduct which those beliefs teach to be immoral. To legislate that all people must attend mass would be to impose religious belief; to legislate that one may not disrupt mass, or desecrate the cathedral, is to proscribe conduct which believers and non-believers alike would find offensive. I fail to see how proscribing obscenity "imposes religious beliefs" on anyone.

Later in the Working Paper, where the Commission rejects "retributivism" (which I take to be a fancy name for retribution) as a legitimate aim of criminal law, the report again stresses man's finite and imperfect conception of morality: "Retributivism supposes some sort of supernatural or metaphysical accounts sheet, which crime or sin puts out of balance and which accordingly its punishments set straight again." [21] Such accounting "may well be an appropriate enterprise for a deity" but, the report concludes, "not for mere human beings". [22]

If immorality is indecipherable to all but a deity (whose very existence is questionable) and therefore its suppression is not a legitimate aim of the criminal law, the Commission is removing the heart of the criminal law and it behooves us to examine carefully what is being transplanted in its place: "So our conclusion on the aim of the criminal law is this. The criminal law serves partly to protect against harm but more importantly to support and bolster social values." [23]

What values? And from whence derived? The Commission suggests four basic values, apparently derived from inductive logic, "necessary for society": (1) "non-violence or peace"; (2) "truth"; (3) "some vestigial [*sic*] respect for property"; (4) "some respect for order and regularity—some preference for orderliness over anarchy". [24]

We are expected, apparently, to jettison the accumulated wisdom of centuries, as taught by Judæo-Christian morality and reflected throughout our criminal law, for a new screed of value preferences. Leaving aside the very obvious point that all of these "values" ultimately derive from moral conceptions and depend just as much for their enforcement on a shared social morality as do criminal proscriptions of obscenity, what intrigues me is the Commission's insistence upon the terminology of "values" in place of "morals", and the moral relativism this implies. In the realm of human conduct, I should have thought it easier to get social consensus on what is "moral" or "immoral" than on what is or is not "valuable". However, since the Commission explicitly affirms that "everyone is entitled to go to hell in his own fashion", [25] perhaps my concern for the morality, or failing that at least the utility, of human conduct is an antiquarian prejudice.

I submit that criminal law cut off from moral absolutes is a code of conduct for a self-indulgent and debased people. It drains law of any link

[21] *Id.* at 33-34.
[22] *Id.*
[23] *Id.* at 38.
[24] *Id.* at 21-22.
[25] *Supra* note 18.

with transcendence. "All human law is nourished by One which is divine", wrote Heraclitus. Cut away the moral basis of the criminal law, replace it with law based upon "value preference" and law will soon wither from lack of nourishment. [26]

So long as society accepts that it can distinguish what is moral from what is immoral, that this is not a function reserved only to the omniscience of the Deity, then it can strive to legislate accordingly, confident that, over time, law will conduce to human betterment. Our perception of morality will no doubt to the end of time be imperfect, since we see but through a glass darkly, but we shall at least have fixed stars by which to set our course, however dimly we perceive them. Take that away and substitute moral relativism, law designed to bolster values that, by their nature, are mutable and circumstantial (for example, how important a social value is "non-violence and peace" in wartime, or "truth" when a member of the resistance is being interrogated as to the identity of his compatriots?) and you have stolen the cornerstone of the criminal law and left in its place but shifting sand.

Implicit in the Commission's moral relativism is a rejection of natural law, and a denial of legitimacy to those who would use the criminal law to enforce moral imperatives which they regard as absolute. [27] Yet, it is probably the case that a majority of Canadians are, at least nominally, Christians or Jews, both of whom believe in a God to whom morality is neither relative nor unknown. The Law Reform Commission may profess ignorance as to "what offends him" but they have only to turn to scripture to be enlightened. Moses did not, as I recall, proclaim "ten suggested values" on tablets of stone. Are the majority to be forbidden to use the criminal law to "teach values" [28] central to them?

Chapter VI, "The Harm Feared", addresses the perennial question whether exposure to obscenity causes or contributes to anti-social behaviour. The Working Paper acknowledges that the evidence is "inconclusive" and shrewdly notes that "failure to find a causal link doesn't mean there isn't

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[26] "The one essential condition of human existence is that man should always be able to bow down before something infinitely great. If men are deprived of the infinitely great, they will not go on living and will die of despair": Stepan Trofimovich Verkhovensky in F. DOSTOYEVSKY, THE POSSESSED 656 (1953).

[27] The Law Reform Commission, exuding the spirit of the age, sets great store by "pluralism" and diversity: "there is a need to be free to experiment, to try new things, to be different, since this is what makes people individuals, each one unique, instead of all the same like minted coins": *supra* note 2, at 22.

The Commission apparently places higher value on being "unique" than on being moral. This notion is foreign to much classical political philosophy. Aristotle taught that the good citizen was not "different" or "unique" but was everywhere and always the same: "The good man is a man so called in virtue of a single, absolute excellence": ARISTOTLE III-IV POLITICS 102 (E. Barker transl. 1958).

[28] "These values which we hold are values which we have to learn and go on learning—values we have to be taught. For this we need various teaching and socializing agencies. Such agents hopefully might be our families, schools and churches. But one such agent, and one all the more important as those others gradually abdicate their teaching role, is the criminal law": *supra* note 2, at 37.

one".[29] Nevertheless, the Commission concludes: "the evidence there is doesn't provide too firm a basis for calling into play the criminal law. A firmer basis must be sought elsewhere."[30]

As I write this comment, a coroner's jury in Ottawa has just concluded its inquest into the death of a 17-year old girl, whose body was found handcuffed to a bed, raped, tortured and burned to death by an 18-year old boy who subsequently took his own life. In his bedroom police found "hundreds of girlie magazines and pornographic books, many of them dealing with bondage and torture".[31] Also discovered was a diary which chronicled the young man's fascination with obscenity, his increasing corruption by it, and his debilitating descent into barbarism. As it happens, the "Adults Only" smut store from which he obtained his pornography and the handcuffs used (sold under the euphemism "Love Aids") is located just three blocks from the Law Reform Commission offices. Admittedly this is not the controlled, empirical evidence which social scientists crave; perhaps it is not "evidence" at all, but it was sufficient to convince the laymen on the coroner's jury to recommend stricter criminal controls on pornography.[32]

What "evidence" in fact would convince social scientists of a causal connection between what one reads or views and what one does? What, in this context, is meant by "proof"? If men are free (in the sense that they deliberate and choose among alternative courses of conduct), it is doubtful that such a causal nexus could ever be "proved". At most one can hypothesize that some people's conduct may be affected by exposure to obscenity, other's not. Broken store windows or a police strike will tempt some to loot, others not. Some people overcome temptation better than others. To suppose that one can predict human behaviour from one isolated variable is unduly deterministic. But do not common sense and past experience suggest that exposure to obscenity may be one, perhaps among several, causal factors in some people's behaviour?

Our educational system rests largely on the assumption that exposure to good literature will have a formative civilizing influence, elevating man's vision and tempering his instincts. But if the affective potential of good literature is readily acknowledged, why is the affective potential of base literature so readily disputed?

Few contend that literature alone can make a person virtuous; similarly, few contend that pornography alone can cause criminal acts. Reading de Sade is not sufficient to make one a sadist, perhaps not even necessary. But it does not follow that reading him has no effect. From the fact that not all readers of the Bible become Christians or act as such, and that some non-

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[29] *Id.* at 18.

[30] *Id.* at 20.

[31] *Pornography in youth's room, inquest is told,* The Globe and Mail (Toronto), December 2, 1975, at 1, col. 6.

[32] The deliberations of the coroner's jury, and their recommendations, are reported in The Globe and Mail (Toronto), December 2-4, 1975, inclusive.

readers do, few people would conclude that the Bible has no influence on human behaviour.

The real question, which the Law Reform Commission never asks, is: Given the causal uncertainty, what risks should society run in allowing the most brutal pornography to circulate unchecked? What countervailing "public good" is being served? What is its redeeming social value? And, meanwhile, in our uncertainty what weight do we attach to the life of a 17-year old girl?

Chapter VI concludes by relating a specific recent incident in Ottawa when peep show machines were installed in a variety store adjacent to several schools. The Working Paper states that, for 25 cents, children could watch "the sex show of your choice—normal sex, abnormal sex, sadism and even incest. The message of the incest seemed to be: 'You too can get your daddy to do this with you'." [33] It then recounts how, when parents objected, police seized and destroyed the machines, and finishes up by asking: "Can we be sure the parents weren't correct?" [34]

I rank this rhetorical question among the most breathtaking I have ever read. It demonstrates, in a nutshell, the moral relativism which suffuses this Working Paper. Must Canadian parents search their consciences before telling their children that incest is immoral? Must we commission a conference or study (perhaps by the Law Reform Commission) to ascertain whether or not incest contravenes our "values"? Should parents engage in Socratic introspection before summoning police to prevent their children from being encouraged to incest? If the Commission's rhetorical question is a true indicator of our current state of moral confusion, then law reform offers scant hope for Canadian society.

"Can we be sure the parents weren't correct?" I am incredulous. As an alternative to the Commission's handwringing dubiety, [35] I prefer Dr. Samuel Johnson's impatience with haggling over obvious truths; the conviction of intuitive knowledge provoked Dr. Johnson to growl: "Why, sir, we *know* the will is free, and there's an end of it." [36]

The rhetorical question reflects this Working Paper as surely as the Working Paper reflects our contemporary dilemma. We no longer agree, either as individuals or as a society, on what is right and what is wrong. We have lost a conception of what the "good" man is and how he lives. Perhaps our old morality was primitive, perhaps simplistic, but it gave purpose and design to life and hence to law. With no standard by which to take our bearings, no shared conception of good and evil, it becomes impossible to speak of virtue and vice, elevation and depravity, civilizing influences and

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[33] *Supra* note 2, at 19-20.

[34] *Id.* at 20.

[35] "He who doubts from what he sees
Will ne'er believe, do what you please.
If the sun and moon should doubt,
They'd immediately go out."—William Blake, *Auguries of Innocence.*

[36] J. BOSWELL, 2 LIFE OF JOHNSON 82 (2d ed. G. Hill 1964).

corrupting influences. If such concepts are relative, each person's preference is as good as his neighbour's. Some people prefer Shakespeare and the Bible; others, "Donkey Love" and "Women in Bondage". The only absolute rule remaining is that one must not impose one's tastes on others; resist, not evil, but value judgments: "Different people, different preferences. In the ultimate analysis each man must choose his own priorities . . . ." [37]

I submit that the Law Reform Commission has transformed self-indulgence into a legislative creed.

Chapter VIII inquires into the social values threatened by obscenity, and here the analysis is trenchant and realistic. The Working Paper wisely desists from plumbing sewage in the hope of turning up some nugget of redeeming social value. Instead, the paper fairly concludes that obscenity is "socially and indirectly harmful by conflicting with and threatening values essential or important for society". [38]

Yet, with the exception of public obscenity (billboards, public exhibits, *etc.*) and exposure to children, [39] the Commission recommends that obscenity and pornography be "decriminalized", which, of course, is but a euphemism for "legalized". Why? For two reasons: first, their conclusion is ineluctably compelled by the moral relativism I have earlier criticized ("adults should be free to choose obscenity if they want"); [40] secondly, because in the end, the Commission concludes that obscenity poses an insufficient threat to justify the three-fold cost of invoking the criminal law. The flame would not be worth the candle.

I am not unsympathetic to the Commission's eventual conclusion, though I deplore the moral relativism which impels it. Let me suggest two alternative considerations. While I regard the enforcement of morality as a legitimate, indeed essential, aim of the criminal law, enforcement of obscenity is admittedly administratively difficult. It is also time-consuming and costly, and unless one is prepared to implement a scheme which will shift the cost of enforcement from the public to those who profit from obscenity, [41] the anticipated benefit may not be worth the cost. My first consideration, then, is strictly pragmatic. My second is rather more

[37] *Supra* note 2, at 42. Of course the Working Paper quotes Thoreau about "marching to a different drummer", perhaps forgetting that this ultimately makes marching impossible, as uncontrolled individualism ultimately makes civilized society impossible.

[38] *Supra* note 2, at 33.

[39] The Commission's recommendation is consistent with John Stuart Mill's exemption of children from the application of his "one very simple principle":

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law fixes as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injuries: ON LIBERTY, *supra* note 18, at 135-36.

[40] *Supra* note 2, at 44.

[41] I have elsewhere suggested a scheme which might accomplish this: Hunter, *supra* note 4.

pessimistic: I wonder whether uncontrolled obscenity could further "deprave and corrupt" us (to use the old *Hicklin* terminology) beyond our present state of corruption. What Justice Learned Hand wrote about the spirit of liberty is equally true of the spirit of morality:

> [I]t lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it, and while it is alive it needs no constitution, no law, no court to save it. [42]

A cohesive public morality is impossible in a society given over to self-indulgence, one whose only guiding axiom is "different strokes for different folks". Our individual and collective behaviour increasingly bespeak the same sad truth: that we have lost a shared morality—an intuitive certainty that this is good and that is evil. We have forfeited a moral heritage vouchsafed to us for centuries, and I am sceptical that the Law Reform Commission's "basic values" can adequately replace it.

This Working Paper is simply the latest evidence that we have lost our way, and with no fixed principles to live by, we flounder in darkness. Like flies of a summer night, we buzz about aimlessly, while above us are illumined the unequivocal truths of the universe, of which we catch but glimpses as we slide deeper into the abyss created by our own uncontrolled appetites.

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[42] L. HAND, THE SPIRIT OF LIBERTY 144 (I. Dilliard ed. 1959).