LIMITS OF CRIMINAL LAW

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Delight is seldom found in legal writing. This Working Paper [1] is both enjoyable and stimulating. Obviously, fundamental reform of Canada's laws on obscenity is long overdue. The paper represents a clear, but unadmitted, push toward a regime similar to that found in Denmark. [2]

At the outset the paper asks what ought to be the scope of the criminal law. This is an essential question, and the example under discussion, obscenity, is apt. No doubt other topics could have been added or substituted. [3] This was not necessary. Obscenity generates enough debate, concern, ambiguity and muddled responses.

The paper unfortunately does not offer a finished product but rather a "continuing process"—not a very practical commodity. Nevertheless, its candour is appreciated. Moreover, the subliminal quest provides good food for debate. [4] Even if it falters along the way, the thrust of the paper goes in the right direction. As the Working Papers are directed towards the person in the street rather than towards legal scholars, the style is commendable and should not be adversely compared with other styles. [5]

As a point of departure, discussion correctly centres on the price of criminal law. It has long been clear that criminal law solves nothing completely and some things not even partially. In addition, the "ought-to-be-a-law" syndrome has gone far enough. There exists a human dynamic—an uncontrollable. In some areas criminal law must attempt regulation, if only with a view to upholding social values, possibly deterring crime and, at the least, preventing personal vengeance. Even rape and murder are true to this pattern. But there comes a point of dysfunction. The Commission, com-

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

[2] Penal Code 1967, §§ 232 & 234 (Denmark).

[3] *E.g.*, gambling, soft drugs, abortion and prostitution. These, for the most part, are treated similarly in discussions on decriminalization, despite slight inherent differences.

[4] It would seem that the Working Paper also relates to a narrower question than that of the scope of the criminal law. *I.e.*, given the existence of fundamental freedoms in Canada and the inability of the criminal law ever to come to grips with the problem of obscenity, is it not time to decriminalize the area, leaving only such minor exceptions as are necessary from the point of view of public aesthetics and the protection of the interests of children below an arbitrary age?

[5] This view is founded on experience gained in the preparation of THE LAW REFORM COMMISSION OF CANADA, PRINCIPLES OF SENTENCING AND DISPOSITIONS, WORKING PAPER 3 (1974), and THE LAW REFORM COMMISSION OF CANADA, RESTITUTION AND COMPENSATION AND FINES, WORKING PAPERS 5 & 6 (1974).

mendably, agrees. Moreover, it suggests that the point is reached *within* the topic of obscenity and not at either of its boundaries.

Another point well made is the waste of financial and police resources. For many activities of dubious moral turpitude, the criminal law is society's garbage can. Early American legislation prohibiting bowling is given as an example. State laws concerning fornication might also have been mentioned.

In any event, the police do see resources wasted, and it is fairly predictable that the average taxpayer, if asked, would never consent to funding enforcement of certain moral regulations, especially if he is a citizen whose home was burglarized during his last hard-earned vacation.

Next, the meaning of obscenity (the meaningless) is considered. Obscenity is incapable of definition. The present *Criminal Code* uses the expression "undue exploitation of sex". [6] In attempting to apply this label to the example given in the Working Paper (of a college play), [7] your guess, be you a legal scholar, lawyer, jurist or layman, is as good as mine. Subsequently, the paper suggests a recipient's definition, obscenity being "somehow inappropriately dealing with sex". One is as good, or as bad, as the other. Imagine an attempted reconciliation of the students' "freedom of expression" with a violation of a "somehow inappropriate" rule. The law can do without such embarrassment. [8] The Commission agrees.

One must disagree, though, with the Commission's unfair characterization of a "pornography explosion" sweeping past the horse and buggy stage. There is nothing new under the sun. [9] Surely one aspect of society cannot be faulted for the progress of the whole. This minor criticism is more than rectified by an honest concession: obscenity is in demand.

Later the philosophy of the paper wavers slightly. The assumption that "we can't allow the market place to regulate obscenity" is simply a derivative of the "ought-to-be-a-law" syndrome criticized earlier, and also an extension of the notion of "responsibility" frequently assumed by the executive levels of government without, in many cases, any request to do so. [10] This

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[6] Criminal Code, R.S.C. 1970, c. C-34, § 159(8).

[7] *Supra* note 1, at 7.

[8] *See, e.g.*, Director of Public Prosecutions v. Whyte, [1972] A.C. 849, [1972] 3 W.L.R. 410, which interprets the Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 1(1) (U.K.). The Act defines obscene as: an "article" which has a tendency to "deprave and corrupt", *inter alia*, readers. In this case the magistrates sitting at Southampton had acquitted a bookseller whose dubious material had been directed solely to "dirty minded" men. The House of Lords set aside the acquittal apparently on the ground that "dirty minded" men could possibly be further depraved and corrupted. Naturally, British journalists simplified the decision and suggested it stood for the proposition that "dirty old men", so called, could be further depraved and corrupted.

[9] When moving the second reading of the Betting and Gaming Act, 1960, 8 & 9 Eliz. 2, c. 60 (U.K.), Lord Kilmuir, in the House of Lords, observed that gambling can be traced as far back as the destruction of Pompeii, where dice made of ivory, porcelain and stone were found in the ruins. Naturally enough, when some of these ancient dice were analyzed they were found to be loaded: J. EDDY & L. LOEWE, THE NEW LAW OF BETTING AND GAMING 8 (1964).

[10] See *supra* note 1, at 13-14.

breeds a dangerous pattern of intrusion and is inconsistent with decriminalization. [11] It is not the function of the state or the producer to ask if obscenity, given its possible free thought and speech values, is any more wrongful than, for example, Catholicism.

Dealing with the matter of immorality, the paper accurately canvasses religion, ideals and personal convictions. [12] These are characterized as matters of belief and attitude and, it appears, not sufficient bases for criminal legislation [13]—particularly criminal legislation regulating the very subjects of religion, ideals and personal convictions.

Discussion of the harm feared is true to the evidence available as well as to practical considerations. The paper suggests that as far as adults are concerned, there is little evidence that obscenity causes any physical or psychological harm. [14] The United States Commission on obscenity and pornography, [15] following earlier Danish research, recently so concluded, and the same may be true of children, [16] based upon the Freudian assumption that sexual leanings are formed at a very early age. About this the Working Paper is quite frank: if we are wrong concerning the harm feared, then we simply don't know if there is any harm; of course there may be. The Commission properly suggests that criminal law cannot be based upon an unknown. The pragmatic approach is also used in discussing obscenity as it affects children. That is to say, the best that can be done here is to impose some restriction, because of the simple and total political unacceptability of relaxation—an intriguing constitutional question, given the assumption that certain incidents attach to the status of citizenship in Canada.

When the paper turns to an examination of the values threatened by obscenity, the discussion becomes even more problematic. Again, in discussing the topics of freedom, literature, taste and harmful consequences, the Commission canvasses abstract and difficult considerations. Nothing is resolved, and the possible development of a harmfully high tolerance of obscenity is seen as speculative at best. In the scheme of the Working Paper, a justification for criminal prohibitions in respect of obscenity is not yet achieved except *vis-à-vis* children and public display.

When examining the aims of the criminal law, the paper suggests that sin, from a Christian perspective, and the enforcement of morality (or the attempted enforcement by prevention) are not the function of the criminal

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[11] Decriminalization may be defined as the legislative process of making things lawful that were previously sanctioned by criminal law. *See, e.g.*, REPORT OF THE ITALIAN MINISTER OF JUSTICE PRESENTED TO THE VI CONFERENCE OF THE EUROPEAN MINISTERS OF JUSTICE 2 (The Hague, 1970).

[12] *Supra* note 1, at 15.

[13] In addition to the classic theory of John Stuart Mill, we have the brash assertion of N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 106 (1970): "Man has an inalienable right to go to hell in his own fashion."

[14] *Supra* note 1, at 17.

[15] REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (W. Lockhart, Chairman, 1970).

[16] *Id.* at 242.

law. The rationale of protection from harm is especially false and open to abuse when the harm is dubious. There remains, then, the articulation of social values. The Commission does not, at any point, surrender this fundamental consideration. Rather, it balances this consideration against the obvious limits of criminal law enforcement. This chapter is the high point of the paper. It spells out the total cost of the legislation in terms of finances, privacy and freedom. The suggestion that other informal and possibly more effective social sanctions lie in reserve is well taken. But missing from the paper's discussion are such considerations as: the erosion of the meaningfulness of criminal punishment; the fact that the procedural methods used to enforce Canada's unenforceable obscenity laws may reach the limit of the criminal procedure in a democratic society; and the financial and other harms caused to an accused person or an unfortunate distributor at the hands of laws lacking specificity.

Up to this point the Working Paper, as stated earlier, is stimulating and well oriented. However, the real deficiencies appear in the tenth chapter dealing with the true role of the criminal law. The paper draws a distinction between "public" and "private" obscenity but nowhere suggests definitions of these two terms. A debate cannot occur in the absence of basic guidelines. One would assume that a movie theatre, for example, would be treated as a private medium since consenting adults voluntarily attend. This could have been made clearer.

The discussion then drifts into more troubled waters. The Commission makes the dangerous assumption that criminal law is not the only legal mechanism available. It suggests that obscenity can be dealt with by other areas of law, such as administrative regulation, custom laws, planning laws and, finally, tax laws. This approach is indeed perilous. The administrative approach can only lead to legislation similar to the movie film censorship laws in force in several provinces at the present time. [17] Customs laws can only continue the non-judicial exercise of censorship by improperly equipped and unwilling customs officials; planning laws can breed such things as the Quebec Litter By-Law, [18] found to be arbitrary and unconstitutional, [19] or a

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[17] *See, e.g.*, Theatres and Amusements Act, R.S.N.S. 1967, c. 304, § 2(3):

> (3) The Board may in its absolute discretion revoke or suspend any license issued under the authority of this Act or of the regulations.

In addition, § 3(2) of the statute reads:

> (2) The Board shall have power to permit or to prohibit
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> (a) the use or exhibition in Nova Scotia or in any part or parts thereof for public entertainment of any film;
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> (b) any performance in any theatre;
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> (c) any amusement in a place of amusement or any amusement or recreation for participating or indulging in which by the public or some of them fees are charged by any amusement owner.

[18] City of Quebec, By-Law 184 (October 23, 1933).

[19] Saumur v. Quebec, [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641.

possible padlock law;[20] and tax laws can be used only as devices to achieve back-door remedies. Surely, the Income Tax Act[21] is not to be used for other than raising revenue and encouraging certain forms of enterprise. Hopefully, none of the foregoing areas of law need be employed as surreptitious devices designed to remedy that which is truly a matter of criminal law.

The Commission also suggests that voluntary consumption of obscenity could still be wrong in civil law in that contracts to put on obscene displays for private consumption would remain contrary to public policy and would therefore be unenforceable. Of course, this could only lead to the ludicrous situation of a contractual suit turning upon a determination of obscenity under the common law *Hicklin* test.[22] Canadian law would then retain a civil aspect in its obscenity litigation, and public policy considerations would continue to sanction legal activities.

There are two basic difficulties in leaving the question of obscenity to other areas of law. Firstly, that procedure fails to come to grips with and resolve the issue. Secondly, given Canada's constitutional structure in which matters of "criminal law" are exclusively the jurisdiction of the Dominion of Canada,[23] there is a very real danger in depenalizing[24] certain topics. These are no longer defined as "criminal" under federal legislation. There is then the real possibility of the provinces legislating in the same area, be it obscenity, gambling or abortion, under the pretext of dealing with "property and civil rights". Passing problem areas from one level of government to another fails to respond to the problem. Moreover, laws affecting fundamental freedoms in a democratic state should always be visible and uniform.

To conclude, the paper is adequate. However, it displays the pitfalls of conceptual law reform—it shows a real need for technical competence to authenticate its suggested reforms.

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[20] *E.g.*, the Act Respecting Communistic Propaganda, R.S.Q. 1941, c. 52, which was examined and held ultra vires in Switzman v. Elbling, [1957] S.C.R. 285, 7 D.L.R. (2d) 337.

[21] S.C. 1970-71-72, c. 63.

[22] The Queen v. Hicklin, L.R. 3 Q.B. 360, 18 L.T.R. (n.s.) 395 (1868) (*sub nom.* Scott v. Justices of Wolverhampton).

[23] B.N.A. Act, § 91(27).

[24] "Depenalization" is defined as: the legislative process of converting criminal offences into administrative or civil offences by replacing the existing penalty by a non-penal sanction. *See also, supra* note 11.