LIMITS OF CRIMINAL LAW A REACTION

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Like Papal encyclicals, which are unmistakably pontifical, Canada Law Reform Commission Working Papers are beginning to project their own personality and style. It strikes me as the style of an academic, probably an English one, conducting an extended Socratic monologue with intelligent high school students. This raises my hackles. Yet I find it hard to say why; possibly it is because I am not a high school student. That such should be the effect, especially of Working Paper 10, is unfortunate, because I find myself struggling with an urge to quarrel with aspects of the paper, while agreeing, on the whole, with its conclusions. [1] I am bothered by such trivia as paragraphs beginning with the word "but". Long, long ago, to begin a sentence or paragraph with "but" was considered bad grammar. I think of it as a useful but limited rhetorical device which does not bear too frequent repetition. Out of curiosity I checked and found that over twenty per cent of the parapraphs in the paper began in that way—and the French version apparently followed the English slavishly.

Why get hot and bothered? Well, I think the subject of the paper, at least the general subject—the limits of criminal law—is probably the most important that the Canada Law Reform Commission has tackled yet, especially in view of the stated objective of the chairman, Mr. Justice Hartt, and of the other members of the Commission, to evolve, if possible, a philosophy of law reform or at least a general approach well founded in science and human experience. How they handle that purpose, in dealing with a very important aspect of a very important department of law, could well be of great importance to the rest of us. I think, in fact, that they have come to some quite sensible and sound conclusions, and I regret that the argument and the conclusions are so expressed that the expression itself is an obstacle to understanding and acceptance. It can well be, however, that my reaction is as idiosyncratic as I find the style of the paper to be.

The authors begin with a widely accepted proposition: criminal prohibitions cannot be imposed and criminal sanctions cannot be exacted without a cost to the offender, to society and frequently to the victim. "[G]iven the price entailed by criminal law, what justifies our paying it? Put it another way, what should come within the criminal law and what should not?" [2]

To answer this we adopt the following strategy. We examine the

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

[2] *Id.* at 4.

> notion of obscenity. We next inquire what is wrong with obscenity and what makes it the business of the criminal law. This opens up a general discussion about such matters as immorality, harm, values and the overall aims and purposes of criminal law. Such general discussion leads us to formulate criteria to determine what ought to be prohibited by criminal law, and these criteria we use to indicate what we think should be today the law's objectives with obscenity. [3]

I find it difficult to take this at face value. Was this, in fact, the method used to work out the general principles that the authors eventually arrived at, or is it not rather that obscenity is probably the most useful example to which the general principles evolved by a more wide-ranging discussion could be applied? The latter is obviously the more usual and plausible *modus operandi*, and there is some internal evidence that it has been followed. There is, for example, a passing reference or two to the Devlin-Hart debate, which presupposes a rehearsal of the points made by those learned doctors of the law. Again, in a set of questions asked on page one, there appears to be an underlying assumption that law must be simple and that standards must be uniform, certain and objective. Again, I find hints of a certain strain that seems to obtrude occasionally, possibly because the lighter forms of indecency can occasionally be uproariously funny, even to quite pure-minded people. It could be a real problem in a composition such as this whether the amusing element should be eliminated entirely or, if expressed, to what extent. I noted at least three instances of this that puzzled me until I thought of the difficulty just mentioned. Thus, the paper refers to the world of pornography as "a world where men are always virile and erect", [4] and I queried whether this was an intended double meaning or whether the word "erect" had suffered such a sea-change in the modern novel (which I hardly ever frequent) that it could have only one meaning, the one given by the French text, "en érection". It struck me as a false note, but that may be due to my ignorance of contemporary letters.

I detected another false note in two references to urine. The first [5] is highly amusing; it is the second [6] that I find repellant. Both, however, are a little too strong for the points made and show the difficulty of deciding what is suitable, a difficulty arising from the strains imposed by the topic.

The Limits of the Criminal Law

The authors summarized their conclusion on the aims of criminal law as follows:

> The criminal law serves partly to protect against harm but more importantly to support and bolster social values. Protection against harm it seeks to achieve through deterrence, rehabilitation and—most successfully—prevention. Support of social values it manages through the "morality play"

[3] *Id.* at 4-5.
[4] *Id.* at 9.
[5] *Id.* at 23.
[6] *Id.* at 25.

> technique—by reassuring, by educating and above all by furnishing a necessary response when values are threatened or infringed. And this on the face of it suggests using criminal law only against conduct causing harm or threatening values. [7]

Later, the reference to values is qualified when the scope of the criminal law is limited to the protection of essential or important values.

Now this is essentially Lord Devlin's position, [8] and as such I have no quarrel with it. Sufficient deference is paid, in fact, to Hart's idea [9] that modern pluralistic society is composed of mutually tolerant minorities, without conceding to him that there is no core of values sufficiently widely accepted by the dominant elements in society to constitute its cement. The conclusion rejects rightly, I conceive, the proposition advanced by J. S. Mill [10] and supported by Hart, that the harms controlled by criminal law should be those only where there are palpable victims or obvious disruptions of order. The paper does, however, go some way to this extreme in accepting the "clear and present danger" guide with respect to sedition and private obscenity. This is done in the name of maximizing liberty, and it is arguable.

Where I would wish to qualify the descriptions and conclusions of the Paper is in its classification of harms against which the criminal law has been and can reasonably be directed. These are grouped in five classes: (1) physical and moral violence, exemplified by assaults, murder and blackmail; (2) tangible losses such as those involved in theft, fraud, wilful damage and the like; (3) nuisances, such as arise from offensive sights, smells, sounds and unpleasant conduct; (4) interpersonal trouble-making, such as arises from defamation and tale-bearing; and (5) conduct that affects society as a whole, such as sedition, treason, hate-mongering and the like.

I am unable to find in the Working Paper any real consideration of the traditional view that conduct is rendered criminal primarily by its social effect rather than its effect on individuals. The old maxims that "crime is an offence against the state" and "crime is a public wrong" have sufficient historical backing at least to require refutation if they are to be eliminated from the picture. I do not think they have been refuted by the Working Paper, and the idea that the criminal law may be employed to defend essential or important social values is even an incomplete and rather oblique version of the principle. While I think the principle is clearly applicable to the conditions in modern society without reference to history, it would be interesting to determine whether history supports it. It is my impression, admittedly a vague one, that economic and social cooperation arises in primitive societies before any working system of criminal justice appears, and criminal justice in its most primitive forms is concerned only with the things that grossly disturb peace and good order, *i.e.*, treason, murder, rape

[7] *Id.* at 38.
[8] P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).
[9] H. L. A. HART, LAW LIBERTY AND MORALITY (1963).
[10] Mill, *On Liberty*, *in* UTILITARIANISM 126 (M.Warnock ed. 1962).

and robbery. There is at least something to be said for Stephen's aphorism, echoed later by Holmes, that "the criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite", [11] by which both mean to suggest that the criminal law is, in fact, a substitute for the social disorders that go with vendetta. That is why, it seems to me, the criminal law is concerned with intentional or reckless harms, these being the kind of injuries that inspire feelings of revenge. That it has been expanded in our day to include such things as drunk driving merely reflects a broadening of the ambit of public order.

One curious conclusion that has occurred to me as a result of re-reading Hart, Devlin and Mill, as well as the Ouimet Report [12] and Professor Fox's study paper on obscenity, [13] is that Lord Devlin, whatever his personal morality, is a positivist in his legal philosophy, unlike Stephen but like Holmes, while Bentham, Mill and Hart all appeal to a meta-morality or "critical morality" as it is called in utilitarian circles. That is, these utilitarian philosophers all appeal to a higher critical principle, utilitarianism, in order to weigh ordinary accepted morality in the balance. In this way their Canadian exponents can examine a legal system such as apartheid and judge it wrong, while supporting our own hate propaganda laws. I find it odd that they should fall on the side of the fence that they do, since positivism is often associated with limiting the scope of the criminal law.

Obscenity

The authors sum up their view of the offence of obscenity as follows:

> Obscenity, then, is in our view socially and indirectly harmful by conflicting with and threatening values essential or important for society. It runs counter to our values on violence, freedom and human dignity. In particular, public obscenity and the exposure of children to obscenity, conflict with individual freedom. [14]

They make out a plausible case for these conclusions. I think the paper does a lot of swithering about the traditional view that people are indeed affected in their intellectual and moral outlook by what they read, see and hear, as well as by the attitudes of others and social attitudes generally. The authors tend to think there may be something to it, but the evidence is unclear. Surely this is a case where, in the absence of good and conclusive empirical studies, the traditional wisdom should be given some weight. Indeed, the citations from the studies made in conjunction with *The Report of the Commission on Obscenity and Pornography* [15] in the United States

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[11] O. W. HOLMES, THE COMMON LAW 36 (M. Howe ed. 1963).

[12] REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS (Ouimet, J., Chairman, 1969).

[13] R. FOX, OBSCENITY (1972).

[14] *Supra* note 1, at 33.

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

seem to support the idea that obscenity has a definite impact, although not always, of course, the impact predicted by *a priori* reasoning. [16]

The paper suggests that a distinction be drawn in criminal law between public obscenity, which should be banned in all important cases, and private obscenity, which should only be banned where it presents a clear and present danger to essential or important values. In that case it may be better to drop the word "obscenity". While I do not agree with the suggestion that obscenity was not a matter of concern in ancient times—classical authors use the word quite frequently in the modern sense—there is a tendency to attach individual meanings and connotations to it that make it almost useless as a technical word. (I have, however, no particular difficulty with the meaning of obscenity in connection with the *Criminal Code*, section 159(8). [17] I think the case law clearly establishes that it is to be interpreted as pornography as defined by the Kronhausens. [18])

The reason for making such a distinction is that the purposes of the law in banning public obscenity and private obscenity are different. The aim in banning public obscenity is to prevent nuisances and to protect the right to privacy and the rights of parents to control the education of their children, especially in sexual matters. This implies that the scope of the ban must relate not only to pornography but to mere indecency, which covers a much wider field.

The difference is rather difficult to describe, but it rests on a traditional concept of sexuality that is often ignored. Indeed, the texts persist in describing the traditional view of sexuality in what can only be called Manichean terms. This, with Gnosticism, was one of those old heresies that held that the body was the principle of evil and that the object of life was to achieve release from the evil grip of matter and become pure spirit. While this world outlook undoubtedly influenced Christianity, it was decisively rejected by the official bodies of the Church in the first centuries, and the orthodox teaching remains that man is a single creation in which sexuality and bi-sexuality are both good. [19]

The Manichean view has persisted throughout history, even in quite orthodox circles. Saint Paul's defence and championship of consecrated virginity, though not Manichean, gave it aid and comfort. If consecrated virginity is viewed as a repudiation of sex because it is bad, then that is a perverted view of sex, one which we find recurring throughout the Christian ages. It is a view which finds expression in W. E. H. Lecky's *History of European Morals*. [20] This opinion has been endlessly repeated without

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[16] *Supra* note 1, at 30.
[17] R.S.C. 1970, c. C-34.
[18] E. & P. KRONHAUSEN, PORNOGRAPHY AND THE LAW 145-50 (1959).
[19] *See, e.g., Genesis* 1:26-31, 2:22-25.
[20] Vol. 1, at 102-09 (1955).

critical examination.[21] Such a point of view, however, is not the true basis of consecrated virginity, which is rather the sacrifice of a good in order to achieve a special purpose that is conceived of as more important for some particular person. Chesterton is the modern author that has best dealt with this point of view.[22]

The Bible explained the ban on nakedness as originating in Adam's and Eve's sin and shame, but there are ample sociological grounds for the kind of reticence and even mystery that accompanies ordinary human sexual conduct. In man, unlike the other animals, sexuality is intermixed with a great many emotional and cultural concomitants that require privacy and, to some extent, the restriction of sexual display. The mere fact, for example, that the human female has no estrus, as have other animals, makes a vast difference in human sexuality and the conduct that is socially appropriate to it. This evolution of human sexuality has imposed conditions of privacy, intimacy and decency upon its expression that cannot rationally be ignored. That is why I find it rather naive for the Working Paper to express the following rather Greek view of sexuality. "The law concerns itself with 'undue exploitation of sex', but may not the real problem be something else—our society's reluctance to be open and direct in dealing with sexual matters? Sex is a basic human drive but also something calling for maturity."[23] Surely this is a very simplistic view of the incredibly complex structures of attitudes and customs that have grown up with respect to sex throughout the world.

"Indecent" is the appropriate word to describe an invasion of the privacy, intimacy and mystery of sex that our culture rightly values, and it is reasonable to prevent, to some extent, such invasions by invoking the criminal law. An attack on private obscenity is a more difficult matter, however, because it is more difficult to prove that private obscenity is a danger to the social order. I think a case can be made for banning pornography as inculcating an attitude towards sex that threatens human liberty and dignity as well as being a thoroughly false portrayal of human values. Such a case would obviously be based on a philosophical position that some people might challenge, although I think comparatively few. However, different points of view are obviously possible here. For example, Professor Ian A. Hunter in a recent article defines pornography as "material whose principal theme is sexual activity between other than consenting adults: primarily depicting violence, bondage or torture of unwilling victims for sexual gratification; or sexual activity involving other than consenting adults (necrophilia, sexual activity with children, bestiality, etc.)".[24] It is not

[21] See E. MONTGOMERY HYDE, A HISTORY OF PORNOGRAPHY (1964) and, in an otherwise very competent paper, Charles, *Obscene Literature and the Legal Process in Canada*, 44 CAN. B. REV. 243, at 280-81 (1966).

[22] *See, e.g.*, G. K. CHESTERTON, ST. FRANCIS ASSISI 16-18, 131-34 (23d ed. 1943); G. K. CHESTERTON, ST. THOMAS AQUINAS ch. 4 (1933).

[23] *Supra* note 1, at 45.

[24] Hunter, *Obscenity, Pornography and Law Reform*, 2 DALHOUSIE L.J. 482 (1975).

difficult, however, to find examples of descriptions of conduct between consenting adults that are merely "erotic stimulation" and nothing more. Chief Justice Freedman, an eminent authority on this branch of the law, quotes an example in a recent decision. [25] The example corresponds almost exactly to the definition of pornography used in the Working Paper. [26] I find the latter an acceptable description.

To conclude, I would reiterate that while I accept many of the proposals of the Working Paper, I think there are important distinctions to be made in some aspects of the two themes studied and that the most important theme, the limits of criminal law, requires further examination. In fact, it is probably idle to hope to achieve a consensus on a legal philosophy in this respect. All law must be to some extent a Hegelian reconciliation of opposites, even if only of opposing temperaments. The practical compromise is not likely to fit perfectly in a particular theory, except possibly a theory of compromise itself.

[25] Regina v. Prairie Schooner News Ltd., 1 C.C.C. (2d) 251, at 256-57, 75 W.W.R. 585, at 590-91 (Man. 1970).

[26] *Supra* note 1, at 9.