VIII. PORNOGRAPHY

*Ronald Sklar**

A. *Introduction*

In 1978 the Standing Committee on Justice and Legal Affairs in a Report to the House of Commons declared that in the preceding ten years the country had "seen a dramatic increase in sexually explicit material [which had] become more widespread and more easily available throughout Canada".[1] A central feature of this material, according to the Report, was the exploitation of women either through their portrayal "as passive victims who derive limitless pleasure from inflicted pain, and from subjugation to acts of violence, humiliation, and degradation [or] as sexual objects whose only redeeming features are their genital and erotic zones".[2] The Report also expressed concern about the influx of material that exploited children by "depicting and describing the participation of children in sexually explicit acts either alone, with other children, with adults, or with animals and objects".[3]

The effect of such sexually explicit material, the Report continued, "is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. . . . It promotes values and behaviour which are unacceptable in a [Canadian] society committed to egalitarian, consensual, mutual and non-violent human relationships."[4]

I do not doubt the accuracy of the Standing Committee's description of the obscenity problem (which has probably worsened since 1978) and I accept, for the purpose of this article, its contention concerning the unhealthy message such material communicates. Indeed, it is the precise function of the lawmaker to make such judgments and then, if required, to fashion remedies. My quarrel is with the reliance upon the criminal law process as a weapon in the struggle.

The criminal law process is one of society's most limited resources. It is expensive, unwieldy, heavy-handed and of dubious effectiveness as

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[1] REPORT ON PORNOGRAPHY, 123 H.C. Jo., No. 86, at 533 (1978) [hereafter cited as STANDING COMMITTEE REPORT]. The Chairman of the Standing Committee, Mr. Mark MacGuigan, was the Minister of Justice who introduced the Criminal Law Reform Bill.

[2] *Id.* at 533.

[3] *Id. See* New York v. Ferber, 102 S. Ct. 3348, at 3350 n. 1 (1982), where the Court noted that "[o]ne researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct".

[4] STANDING COMMITTEE REPORT, *id.* at 533-37.

a general preventive of undesired behaviour.[5] Its mechanisms should therefore be used sparingly. Unfortunately, it also has two qualities that make it extremely attractive to the lawmaker confronted with conduct that, like pornography, is offensive and unacceptable to a substantial segment of the public: it is, compared to other remedies, ridiculously easy to set in motion, that is, just draft, introduce and pass, and it gives the impression to the portion of the public concerned of actually doing something.

This latter quality fulfils two important functions, one political and the other psychological. Politically, it relieves the pressure on the lawmaker to take effective action and gains the goodwill of the group exerting the pressure. Psychologically, it relieves the frustration of those people agitated by the conduct in question and, furthermore, gives *them* a sense of accomplishment.

There is nothing inherently wrong with either of these two functions. If no more were involved, one could accept with equanimity the invocation of the criminal law process, imperfect though it may be, against conduct like the dissemination of pornography. However, more *is* involved. We waste the criminal law when we use it in this fashion and, as the Law Reform Commission of Canada and others have observed, we pay a price for our excess.[6]

One can endure the system's imperfections when the conduct in question threatens or actually does harm to interests traditionally protected by the criminal law, that is, the person, property, public order and the administration of justice. Social scientists might prove to us that prohibiting murder, rape (now "sexual assault"), theft or bribery adds almost no effect to the existing prohibition against such anti-social acts imparted by one's genes, family upbringing and environment. Others might prove to us that it takes so much manpower, time and money to administer the criminal law process that the process is "cost-ineffective" and that the prison experience further alienates the offender from society's behavioural norms. Nevertheless, we would continue to include all of the traditional crimes in our Codes and to finance our law enforcement establishment and prisons. The conduct is wrongful and plainly harmful; few would want to live in a society that did not denounce it publicly and punish the offender when caught. Call that feeling

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[5] On the limitations inherent in the criminal law process, *see generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 249 *passim* (1969). On the criminal law's preventive role and the many variables influencing its potential effectiveness, *see generally* J. ANDENAES, PUNISHMENT AND DETERRENCE (1974).

[6] LAW REFORM COMMISSION OF CANADA, LIMITS OF CRIMINAL LAW — OBSCENITY: A TEST CASE, WORKING PAPER 10, at 39-40 (1975) [hereafter cited as WORKING PAPER 10]. *See generally* N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 38-39 (1970); H. PACKER, *id.*, at 259-60; Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967), as excerpted in CRIMINAL LAW AND ITS PROCESSES 63 (3d ed. S. Kadish & M. Paulsen eds. 1975).

"retribution" or call it "justice" but, whatever its name, it runs very deeply through the individual and the collective psyche.

Obscenity is different. Though offensive and antithetical to values characteristic of Canadian society, it is merely comprised of words, pictures or ideas; the fact is, no one has yet proven that it causes actual harm, that it leads to the commission of violent acts or to actual impairment of essential values. In other words, no one has proven that its message has been received.[7] Until there is proof of "a clear and present danger",[8] we are wasting the criminal law's limited resources unwarrantably in committing them to a war on obscenity.

In the absence of rigorous, consistent enforcement, the criminal law's prohibition against obscenity is unlikely to have any significant preventive effect, a fact the Standing Committee itself acknowledged.[9] One cannot expect the purveyor of such material to be influenced by the denunciation of the conduct alone, unlike the case of some prohibitions that are expressive of strong, deeply-grained community disapproval, such as that against incest,[10] for example. Notwithstanding sporadic and ineffective enforcement, such prohibitions arguably yield a degree of preventive effect "through 'strengthen[ing] moral inhibitions', both at the conscious and unconscious levels".[11]

The history of the obscenity prohibition[12] has been anything but one of rigorous, consistent enforcement. Instead, as is commonly known, enforcement has been sporadic and selective, if not totally arbitrary, with the occasional seizure of impugned material, "raid" or "crack-down". There are obvious reasons for this. Law enforcement officials, more

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[7] The frequently cited case in which the search of the home of a rapist or other perpetrator of violence against women uncovers pornographic material of a violent sadistic nature only indicates that such violent individuals are also attracted to pornographic material of a violent nature. It does not prove the existence of a cause and effect relationship between the material and the violence.

At a meeting of the American Psychological Association, held in Toronto, researchers reported that results indicated that repeated viewings of films portraying violent acts against women make male viewers more callous toward violence, and toward rape in particular. However, one researcher added "that while violent pornography seems to harden men's attitudes toward women, it has yet to be shown that it leads them to acts of sexual violence": The New York Times, 28 Aug. 1984, at section C-1, col. 4.

[8] H. PACKER, *supra* note 5, at 318-19; WORKING PAPER 10, *supra* note 6, at 44-45.

[9] STANDING COMMITTEE REPORT, *supra* note 1, at 541.

[10] *See* Sklar, *The Criminal Law and the Incest Offender: A Case for Decriminalization?*, 7 BULL. AM. ACAD. PSYCH. & LAW 69 (1979).

[11] *Id.* at 74 & n. 60.

[12] The original provision enacted as s. 179 of the Criminal Code, S.C. 1892, c. 29 and based on s. 147 of the English Draft Code, 1879 as found in REPORT OF THE ROYAL COMMISSION TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENCES, 20 BRIT. SESS. PAPERS 217 (1878-79), contained no definition of obscenity. Instead, the definition employed by the courts was laid down in R. v. Hicklin, L.R. 3 Q.B. 360, at 371, 11 Cox C.C. 19, at 26 (1868): "whether the tendency of the matter charged as

pragmatic than lawmakers, are conscious of the man-hours and expense involved in any program of law enforcement and the competing demands made on these resources. They cannot be expected to place obscenity as high on their list of enforcement priorities as crimes against the person, state or property, nor to have the same emotional commitment to enforcing the former as the latter. The inherent vagueness of the definition of obscenity further discourages them as there is no certainty that arrests and seizures will lead to prosecution or to conviction.[13] Thus, calls for "a concentrated campaign of detection and prosecution of offenders"[14] are likely to fall on deaf ears.

Poor enforcement has consequences beyond a lack of preventive effect. The public can see that prohibited conduct is flourishing and that prosecutions are rare. This entails a painfully inescapable contradiction. "Moral adjurations vulnerable to a charge of hypocrisy are self-defeating no less in law than elsewhere."[15] It does not take long for the public's initial feeling of psychological well-being and of satisfaction with the enactment of the prohibition to turn to one of cynicism, bitterness and disrespect for the process, when it sees that these prohibitions are not being enforced. These are emotional responses that the system can ill-afford.

B. *The Proposed Amendment*

The amendment introduced appears in clause 36 of Bill C-19.[16] It involves the repeal of the present subsection 159(8) defining "obscenity"[17] and its replacement with the following:

> For the purposes of this Act, any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of any one or more of the following subjects, namely, sex, violence, crime, horror or cruelty, through degrading representations of a male or female person or in any other matter.

The new subsection 159(8) would accomplish three changes in the existing law, each recommended in the 1978 Report. "Matter or thing"

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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". It was a definition that "proved to be vague, difficult and unsatisfactory to apply": Brodie v. The Queen, [1962] S.C.R. 681, at 702, 32 D.L.R. (2d) 507, at 525. The present definition in sub. 159(2) was enacted in An Act to amend the Criminal Code, S.C. 1959, c. 41, s. 11.

[13] STANDING COMMITTEE REPORT, *supra* note 1, at 537.

[14] *Id.* at 541.

[15] Kadish, *supra* note 6, at 64.

[16] Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl., 2d sess., 1983-84 (1st reading 7 Feb. 1984) [hereafter cited as Bill C-19].

[17] Present sub. 159(8) reads: "For the purpose 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."

would replace "publication" so that "video-cassettes, satellite projections and other technological devices, not just printed matter, can fall within the scope of obscenity laws".[18] In addition, it would no longer be necessary to link the undue exploitation of "sex" with one of the other subjects, namely, "violence, crime, horror or cruelty". In other words, under the amendment "obscenity" and "pornography" would no longer be interchangeable. Finally, "degrading representations of a male or female person" would be added to the definition, according to the Explanatory Notes accompanying clause 36, as a further means of "undue exploitation". The Minister's intent on this point, however, is obscure. As the amendment reads, the "undue exploitation" of "sex, violence, crime, horror or cruelty" would violate the section only when it occurs either "through degrading representations of a male or female person or in any other manner". The provisions recommended in the 1978 Standing Committee's Report, however, envisaged "undue degradation" as a ground of obscenity separate from "undue exploitation" of sex, violence and the like,[19] broadening the definition considerably. If that was also the intent of the amendment, the language chosen is inapposite. Clarification is needed.

Unlike the 1978 Report, which considered the exploitation of children in sexually explicit material to be especially troubling, the proposed amendment does not deal separately with "kiddie porn".[20] A prohibition on the depiction or description of children in actual or simulated sexual acts, if not drafted too broadly,[21] would raise fewer problems than a general prohibition against obscenity. A child porno-

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[18] News Release, Minister of Justice and Attorney General of Canada (7 Feb. 1984).

[19] STANDING COMMITTEE REPORT, *supra* note 1, at 537 reads:

> 159(8) For the purposes of this Act, a matter or thing shall be deemed to be obscene where
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> (a) a dominant characteristic of the matter or thing is the undue exploitation of sex, crime, horror, cruelty or violence, or the undue degradation of the human person. . . .

[20] *Id.* at 533.

[21] The proposed child pornography subsection in the STANDING COMMITTEE REPORT, *id.* at 537, reads:

> 159(8) For the purposes of this Act, a matter or thing shall be deemed to be obscene where
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> . . . .
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> (b) the matter or thing depicts or describes a child
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> (i) engaged or participating in an act or simulated act of masturbation, sexual intercourse, gross indecency, buggery or bestiality, or
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> (ii) displaying any portion of its body in a sexually suggestive manner.

It should be noted that this subsection would *not* require "undue exploitation". As proposed, it would seem to cover any such act, simulation or display of a child's body within otherwise non-obscene material. It would, for example, seem to cover the Louis Malle film *Pretty Baby* and Nabokov's *Lolita*. It goes far beyond the New York child pornography statute upheld in New York v. Ferber, *supra* note 3, and was not included in Bill C-19.

graphy provision is not likely to be particularly vague and so does not involve the same degreee of difficulty in enforcement. The criminal law, furthermore, has traditionally exercised a *pater familias* role toward children,[22] as the Law Reform Commission of Canada has observed,[23] and, more important, the argument of actual harm seems strongest where immature, developing minds are concerned.[24] Until a child pornography provision is submitted, however, further comment would be premature.

1. *Obscenity Defined: A Study in Vagueness*

"One of the most muddled parts of Canadian law today is undoubtedly that relating to the definition of obscenity."[25] That is not an opponent of the criminalization of obscenity speaking, but rather the Standing Committee in its 1978 Report. If anything, it is an understatement. One account of the judiciary's attempt in the United States to formulate a reasonably clear definition of obscenity reads like a comic opera.[26] It is reported that each Justice on the United States Supreme Court has his own personal working definition of obscenity.[27] Mr. Justice Potter Stewart's comment on the subject in a 1964 judgment is famous: "I shall not today attempt further to define the kinds of material I understand to be embraced within [the *Roth* definition[28]]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .".[29]

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[22] *See, e.g.*, New York v. Ferber, *id.* at 3354-55. The main example of this approach within the criminal law is that of consensual sexual intercourse which, when committed with a female person under the age of 16, is an indictable offence under the Criminal Code, R.S.C. 1970, c. C-34, s. 146. The question of the proper scope of the *parens patriae* doctrine as applied to children was recently canvassed in *Re* Family Relations Act of British Columbia, 40 N.R. 206, 131 D.L.R. (3d) 257 (S.C.C. 1982).

[23] WORKING PAPER 10, *supra* note 6, at 25-26, 42-43.

[24] *See* the research collected in New York v. Ferber, *supra* note 3, at 3355-56 nn. 9 & 10.

[25] STANDING COMMITTEE REPORT, *supra* note 1, at 535. For comments in a similar vein, *see* D. SCHMEISER, CIVIL LIBERTIES IN CANADA 232 (1964): "If one had to choose the most muddled law in Canada today, there is no doubt that the law relating to obscenity would be a top contender"; Lambert, Comment, 59 CAN. B. REV. 423, at 432 n. 44 (1981): "The law, in short, is a mess", referring to the state of the law on obscenity in the United Kingdom; Sharp, *Obscenity: Prurient Interest and the Law*, 34 U. TORONTO FAC. L. REV. 244 (1976): "The criticism [section 159] has attracted . . . is probably unrivaled in any other Canadian legislation".

[26] B. WOODWARD & S. ARMSTRONG, THE BRETHREN 192-204, 244-53 (1979).

[27] *Id.* at 192-94.

[28] In Roth v. United States, 77 S. Ct. 1304, at 1311 (1957), it was stated that obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests".

[29] Jacobellis v. Ohio, 84 S. Ct. 1676, at 1683 (1964). B. WOODWARD & S. ARMSTRONG, *supra* note 26, at 198, reports that during screenings of allegedly obscene films in obscenity cases being appealed to the United States Supreme Court clerks of the Justices often mockingly call out in the darkened room: "That's it, that's it, I know it when I see it."

The proposed subsection 159(8) perpetuates the imprecise terminology of the present subsection: "a *dominant* characteristic" is the "*undue* exploitation" of "sex, violence, crime, horror or cruelty". As indicated above, it aims to sever the heretofore necessary linkage between "sex", the only term in the potpourri with reasonably defined boundaries, and the other topics named and it introduces the concept of "degrading representations". The proposal does nothing to "unmuddle" the existing definition. Rather, it adopts a blunderbuss approach to the problem.[30] In his eagerness to deal with the problem of sado-masochistic pulp magazines, crime "gazettes" and films like *The Texas Chainsaw Massacre*, the Minister would have us adopt a definition that could, in the wrong hands, envelop Anthony Burgess' *A Clockwork Orange*. Detached from "sex", terms like "violence" and "cruelty" float too freely and too dangerously for a society that values freedom of expression and distrusts open-ended police power. The protection afforded by the courts to "a work of genuine artistic and literary merit",[31] which presumably would continue under the amendment, is too subjective and too flimsy to adequately guard against the possibility of official abuse.[32] In any event, it offers protection only at the *trial* level, that is, after the work in question has been seized and pre-trial deprivations, such as arrest and search, have occurred.

The newcomer to the definition is "degrading representations of a male or female person". Whether interpreted as a wholly separate means of "undue exploitation", as the Standing Committee intended, or as only one means of the "undue exploitation" of sex, violence or the other items named, as the proposal seems to read, the notion of "degrading representations of a male or female person" constitutes a new height of imprecision. We know from the Standing Committee's Report that the Committee was chiefly concerned with the degradation commonly featured in "sexually explicit material". However, neither that Report nor Bill C-19 anchor the "degrading representation" to such material. It too would float freely, with untoward consequences. For could it not be said that the stranded children were "degraded" by the savagery in William Golding's *Lord of the Flies*? Are not blacks "degraded" by the stereotypes in *Little Black Sambo* and the military by anti-war movies, such as *Apocalypse Now*? Was the young girl not "degraded" in *Carrie* or in the Louis Malle film *Pretty Baby*? Many substantial works of fiction centre upon human relationships "degraded" by sex, violence or cruelty. Can one imagine a more indefinite term than "degraded"? Can

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[30] This contrasts with regulation of obscene materials in the United States through state criminal statutes which are "carefully limited . . . to works which taken as a whole, appeal to the prurient interest in sex, [and] which portray sexual conduct in a patently offensive way . . .": Miller v. California, 93 S. Ct. 2607, at 2614-15 (1973).

[31] Brodie v. The Queen, *supra* note 12, at 705, 32 D.L.R. (3d) at 528 (Judson J.); Miller v. California, *id.* at 2614-15.

[32] *See, e.g.*, the divided opinions on the subject in the *Lady Chatterley* case, *i.e.*, Brodie v. The Queen, *id.*, proving that judges are better as judges than as literary critics.

one therefore imagine a more dangerous tool in the hands of the government and the censor? From whose perspective is the determination of degradation to be made? Is it to be made from the perspective of the general contemporary Canadian community, as is the case under the present statute regarding the test of "undue exploitation of sex",[33] or from that of the members of the group allegedly degraded, for example, homosexuals? Degradation, like obscenity in general, "is in the eyes of the beholder".[34]

What consequences flow from the presence in criminal statutes of vague language, aside from headaches for the judiciary and potential Charter issues? Sporadic and ineffective enforcement was singled out in the Standing Committee's Report,[35] but there are other equally serious consequences. First and foremost, vague statutes provide enormous scope for the exercise of police and prosecutorial *discretion*, the euphemism for selective discriminatory enforcement. Vagueness in a criminal statute not only fails to impart to potential offenders a standard by which to gauge their conduct and to decide whether they are risking arrest and prosecution, but also leaves them wholly at the mercy of the enforcement establishment. It supplies the grist for bribery and extortion as well as for arrests and prosecutions that are based on whim, expediency, community pressure or on more odious grounds, such as race, sexual persuasion and degree of "co-operation" with police.

The possibility of discriminatory enforcement and of decisions based on bias and corruption is always present. "Drug busts" are notoriously arbitrary and selective, for example. However, the offender usually *knows* when he is engaging in the prohibited conduct and, consequently, running the risk of legal and perhaps arbitrary consequences. The potential obscenity offender does not. Vague language allows the enforcement establishment to cast the net as widely or as narrowly as it pleases. Conduct, previously untouched, may become criminal under new prosecutors or police chiefs or under "re-evaluations of policy" frequently pressed upon the enforcement establishment by one or more interest groups. It is dangerous to have a criminal provision that is enforced only when the police feel like it.[36]

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[33] R. v. Sudbury News Serv. Ltd., 18 O.R. (2d) 428, 39 C.C.C. (2d) 1 (C.A. 1978); R. v. Prairie Schooner News Ltd., 1 C.C.C. (2d) 251, 75 W.W.R. 585 (Man. C.A. 1970). The test in the United States allows reference to local community standards: Miller v. California, *supra* note 30, at 2618-20.

[34] *See* A. DERSHOWITZ, THE BEST DEFENSE 191-92 (1983).

[35] STANDING COMMITTEE REPORT, *supra* note 1, at 536-37.

[36] H. PACKER, *supra* note 5, at 290 states:

> If police or prosecutors find themselves free (or compelled) to pick and choose among known or knowable instances of criminal conduct, they are making a judgment which in a society based on law should be made only by those to whom the making of law is entrusted. For the rough approximation of community values that emerges from the legislative process there is substituted the personal and often idiosyncratic values of the law enforcer.

Cf. Smith v. Goguen, 94 S. Ct. 1242, at 1246-47 (1974).

Vaguely worded statutes also lead to enforcement policies and practices that vary from province to province and from municipality to municipality. For example, in regard to a drug crime, there is at least consistency across boundaries as to what the crime *is*. Cocaine will not be a narcotic in one jurisdiction and a medication in another. Obscenity cases, on the other hand, are the paragon of inconsistency. The film *Carnal Knowledge* was prosecuted as obscene in only one American jurisdiction.[37] *Last Tango in Paris* was prosecuted in but one Canadian jurisdiction,[38] where it produced a split judgment.[39] Both films, incidentally, were critically acclaimed.[40] The criminal law loses face and the public's respect when it cannot agree with itself.

2. *Vagueness and the Charter*

Because of the Charter's infant status, discussion of the constitutional questions raised by the obscenity provision must draw largely on American cases and sources.[41] In the United States, criminal statutes can be challenged constitutionally under the Fifth or Fourteenth Amendments,[42] the "due process" clauses, for failure to define clearly the prohibited conduct, the so-called "void-for-vagueness" doctrine.[43]

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[37] A conviction at the trial level in Jenkins v. State was upheld by the Georgia Supreme Court in 199 S.E. 2d 183 (1973); it was unanimously reversed by the United States Supreme Court in 94 S. Ct. 2750 (1974).

[38] R. v. Odeon Morton Theatres Ltd., [1974] 3 W.W.R. 304, 45 D.L.R. (3d) 224 (Man. C.A.). *Last Tango* was also banned in Nova Scotia by the provincial censorship board: Nova Scotia Bd. of Censors v. McNeil, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1. The latter case is analyzed in Price, *The Role of Choice in a Definition of Obscenity*, 57 CAN. B. REV. 301, at 303-06 (1979).

[39] While arguing that the film in the *Odeon* case, *id.* at 320-21, 45 D.L.R. (3d) at 241-42, was obscene, Monnin J.A., in dissent, became a movie critic:

> The manner in which the story is told is fragmentary (with great use of the flashback method) and relies on isolated scenes. Paul wishes to prove his virility and for so doing, debauches and degrades his own partner. In my view there is no logical connection between the various scenes and no clear motivation except the sex meanderings of a deranged, mumbling, inarticulate, middle-aged man. . . . Technically, it is interesting, and the photography is no doubt of great quality. Visually, it is beautiful and Brando has performed an acting tour de force. . . .

[40] Merit and quality are factors in determining obscenity, note 31 *supra* and accompanying text; however, they are not controlling, according to the *Odeon* case, *id.* at 314, 45 D.L.R. (3d) at 235 (Freedman C.J.M.): "Last Tango in Paris is a film which has evoked high praise and strong criticism. But the issue is not whether it is a good film or a bad film but rather whether it is obscene under the Criminal Code."

[41] The one obscenity case to date under the Charter involved the validity of the censorship provisions of the Theatres Act, R.S.O. 1980, c. 498, paras. 3(2)(a), (b), ss. 35, 38, and the exercise by the Ontario Board of Censors of powers under the Act: *Re* Ontario Film & Video Appreciation Soc'y and Ontario Bd. of Censors, 41 O.R. (2d) 583, 147 D.L.R. (3d) 58 (Div'l Ct. 1983), *aff'd* 45 O.R. (2d) 80 (C.A. 1984).

[42] U.S. CONST.

[43] *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 867-72 (2d ed. 1983); Todd, *Vagueness Doctrine in the Federal Courts*, 26 STAN. L. REV. 855 (1974); Amsterdam, Note, 109 U. PA. L. REV. 67 (1960).

Under this doctrine some statutory definitions of obscenity have been struck down, while others have managed to survive the attack.[44] In Canada, the impugning of a criminal statute for vagueness would normally be attempted under section 7 of the Charter, which affirms the right of persons not to be deprived of life, liberty or security "except in accordance with the principles of fundamental justice". The developing controversy whether "fundamental justice" guarantees more than fair procedure, that is, whether it extends to supporting a challenge to the "substantive" content of a legislative enactment,[45] should not detain us. The principal vice of vague language in a criminal statute is the resulting "failure . . . to give fair notice of what acts will be punished",[46] which together with the possibility of arbitrary, selective and discriminatory enforcement, clearly violates an accused's right to fair procedure. Moreover, since obscenity statutes draw lines between permissible and impermissible forms of expression, and thus potentially discourage the exercise of a fundamental freedom,[47] vagueness in any such statute invites challenge under "freedom of expression" in subsection 2(b).

Whether the proposed subsection 159(8) would fall before a challenge under section 7 and subsection 2(b) is a constitutional question whose detailed consideration is beyond the scope and purpose of this article. It is enough to say that the answer will depend on whether the proposed section's qualifying terms, *dominant* characteristic and *undue* exploitation,[48] provide a sufficiently definite standard for determining whether the treatment of sex, violence, crime, horror or cruelty or the degrading representation in question has crossed the line and become

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There are, in reality, two constitutional doctrines, one forbidding "vagueness" and the other forbidding "overbreadth"; the latter is a statute "that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected . . .": J. NOWAK, R. ROTUNDA & J. YOUNG, *id.* at 867-68. Obscenity statutes potentially involve both of these doctrines.

[44] *Cf.* Winters v. New York, 68 S. Ct. 665 (1948) and Butler v. Michigan, 77 S. Ct. 524 (1957), where state obscenity statutes were respectively struck down as being unconstitutionally vague, to New York v. Ferber, *supra* note 3, where a New York child pornography statute was upheld after being challenged as "overbroad". The effect of the vague statute in Butler v. Michigan, *id.* at 526, was "to reduce the adult population of Michigan to reading only what is fit for children".

[45] *Compare* Reference *re* Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, 42 B.C.L.R. 364, [1983] 3 W.W.R. 756 (C.A. 1983), where a challenge on substantive content was permissible under s. 7 of the Charter, to R. v. Hayden, 36 C.R. (3d) 187, [1983] 6 W.W.R. 655 (Man. C.A.), where such a challenge was not permissible. *See generally* Garant, *Fundamental Freedoms and Natural Justice*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS — COMMENTARY 258, at 278 *passim* (W. Tarnopolsky & G. Beaudoin eds. 1982).

[46] Winters v. New York, *supra* note 44, at 667; *see also* Smith v. Goguen, *supra* note 36, at 1246-47.

[47] *Id. See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 43, at 871-72.

[48] *See* the discussion of "undueness" in Brodie v. The Queen, *supra* note 12, at 704-06, 32 D.L.R. (3d) at 527-29.

unallowable expression. Even if one is prepared to accept that any obscenity standard has a "penumbral margin",[49] it is hard to imagine how the proposed language of subsection 159(8) could be said to provide "sufficient warning to one bent on obedience that he comes near the proscribed area"[50] or adequate protection against arbitrary, selective and discriminatory enforcement. In particular, as already observed, the phrases "undue exploitation of . . . violence, crime, horror or cruelty", which are similar to language in a New York statute that was struck down by the United States Supreme Court,[51] and "degrading representation of a male or female person", adopt a blunderbuss approach to the problem. They leave "open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against".[52] These terms constitute a restriction on a fundamental freedom, and in my opinion render the section fatally overbroad and vague.

The "constitutional issue", however, should not be allowed to obscure the principal question confronting Parliament. Indeed, one drawback of entrenched Charters or Bills of Rights is that the lawmaker tends to view all legislation declared constitutionally acceptable as good legislative policy. The two in fact have little in common. Constitutional doctrines set minimums only, and say nothing about policy. Policy concerns are the province of the legislature. As a matter of policy, the fact that words, pictures or ideas are offensive to the majority of people and alien to values that society holds essential is not sufficient reason to invoke the costly, imperfect criminal law process.

C. *Conclusion*

Obscenity presents the lawmaker with a serious dilemma. The easy solution, enacting a broadened prohibition with no change in enforcement policy, fools no one and eventually breeds contempt for the system. Any such enforcement operates arbitrarily and discriminatorily, and does not enhance prevention. The answer recommended by the Standing Committee, a "concerted campaign" of enforcement backed up by

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[49] Winters v. New York, *supra* note 44, at 675 (Frankfurter J.).

[50] *Id.* at 681.

[51] That language, as interpreted by the New York Court of Appeals in Winters v. New York, forbade, in the words of the Supreme Court, *id.* at 669, "the massing of stories of bloodshed and lust in such a way as to incite to crimes against the person". The statute was struck down, *id.* at 672, because:

> [e]ven though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted. . . , we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications.

[52] United States v. L. Cohen Grocery Store Co., 41 S. Ct. 298, at 300 (1921).

substantially increased penalties,[53] would enhance prevention but at a cost too great for the system to bear. Enforcement takes manpower, time and money, all of which are commodities in short supply: "We simply can't afford to take the criminal justice sledgehammer to every nut."[54] There is also the problem of court time. Obscenity cases tend to drag on, with arguments over the meaning and application of the statute's terms, evidence from "experts" on community standards[55] and opinions as to literary merit being presented by both sides. An already overburdened court system should not be asked to take on this albatross.

A rigorously enforced and hefty obscenity prohibition would also provoke a constitutional crisis. The danger is that individuals, fearing arrest, prosecution, seizure of impugned material and imprisonment, would limit their contact with *potentially* obscene material and that the bookseller or film distributor would in effect engage in self-censorship, particularly since "ignor[ance] of the nature or presence" of the obscene material is expressly withdrawn as a defence to a charge under the statute.[56] Under the amendment's vague terminology, there is a substantial risk that the legitimate would be censored with the obscene so that "the free dissemination of ideas [might] be the loser".[57] The freedoms of expression and of the press are not absolute in either Canada or in the United States;[58] however, an imprecise criminal statute that

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[53] STANDING COMMITTEE REPORT, *supra* note 1, at 541. It was recommended, at 540, that the current s. 165, which provides for a maximum of two years' imprisonment, be amended to read:

(1) Every one who commits an offence under section 159, 161, 162, 163 or 164 is guilty of
(a) an offence punishable on summary conviction, or
(b) an indictable offence and is liable
(i) for a first offence, to imprisonment for five years, and
(ii) for each subsequent offence, to imprisonment for ten years,
or to a fine in the discretion of the court.

[54] WORKING PAPER 10, *supra* note 6, at 40.

[55] A recommendation in the STANDING COMMITTEE REPORT, *supra* note 1, at 536, not included in Bill C-19, was the abolition of expert testimony on "contemporary community standards" because their testimony on the issue is "left largely to their hunches, impressions, and subjective judgments": *id.* at 536-37. Furthermore, the question is one for the jurors to answer as *they* "see and feel" these community standards, not as the experts do: *id.* at 538.

[56] Present sub. 159(6). The possibility of such "self-censorship" under a statute punishing possession of any obscene writing or book without proof of knowledge, that is, under strict liability, was precisely the reason a California ordinance was struck down as violating freedom of the press in Smith v. California, 80 S. Ct. 215 (1959).

[57] Smith v. California, *id.* at 217-18.

[58] *See, e.g.*, s. 1 of the Charter, *i.e.*, the reasonable limits clause; Attorney General of Canada v. City of Montreal, [1978] 2 S.C.R. 770 at 796-98, 84 D.L.R. (3d) 420, at 438-40; *Re* Ontario Film & Video Appreciation Soc'y and Ontario Bd. of Censors, *supra* note 41, at 589, 147 D.L.R. (3d) at 64; Konigsberg v. State Bar of California, 81 S. Ct. 997, at 1006-07 (1961); Roth v. United States, *supra* note 28, at 1307-08. *See generally* Beckton, *Freedom of Expression*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS — COMMENTARY, *supra* note 45, at 75.

potentially restricts our reading and viewing material encroaches on our liberties more than a free and democratic society, and its courts, should be willing to tolerate.

The most effective, and perhaps the most difficult, solution is for the lawmaker to admit the shortcomings of the sledgehammer approach and to fashion a remedy that limits the use of the criminal law and extends the use of the administrative process. First of all, there is a major difference between the distribution and consumption of obscene material for private purposes and its public display, which is offensive to those who want to avoid it. The right to be protected from such displays and the right of parents to control the exposure of their children to such material are no less important than that of others to their private indulgence; the law, including its criminal sanctions, is there to protect each of these interests. This was one of the recommendations of the Law Reform Commission of Canada.[59] In their view public obscenity should be treated as a "public nuisance".[60]

Any prohibition, even one limited to public displays, encounters the vagueness problem. However, narrowing the use of the criminal law would reduce the impact of that problem. For instance, the "penalty" for a violation would normally consist of removing the display and paying a fine, with no seizure. Enforcement difficulties would be minimized as the violation by definition would be out in the open. Thus, there would be no need to obtain search warrants and to invade the privacy of a home or office as is necessary in dealing with private obscenity. It would be a "defensive" rather than an "aggressive" war.[61]

There would also be a problem in defining "public" obscenity. Offending posters, billboards and magazine displays in public areas would come within the term, while private distribution of material and showings in movie theatres (without lurid advertising) would not. But what about broadcasts on privately-owned cable TV stations? Careful distinctions would have to be made and the proverbial fine line drawn, but the regulatory process should be capable of that.

The amendment focuses on the insoluble problem of private obscenity rather than on the soluble problem of "nuisance", and by imprecisely and dangerously widening the definition of obscenity makes a bad thing worse. It should be rejected.

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[59] WORKING PAPER 10, *supra* note 6, at 47-49. *See* the favourable analysis of this recommendation in Sharp, *supra* note 25, at 252-54.

[60] WORKING PAPER 10, *id.* at 47. *See* H. PACKER, *supra* note 5, at 324-27.

[61] H. PACKER, *id.* at 325.