

**"Source: Limits of Criminal Law: Obscenity: A Test  
Case, Working Paper 10, 1975.  
Department of Justice Canada. Reproduced  
with the permission of the Minister of Public  
Works and Government Services Canada, 2006."**



# limits of criminal law



obscenity: a test case

Law Reform Commission of Canada

Working Paper 10

**limits of  
criminal law**



**obscenity: a test case**

© Crown Copyrights reserved  
Available by mail from Information Canada, K1A 0S9  
and at the following Information Canada bookshops:

HALIFAX  
1683 Barrington Street

MONTREAL  
640 St. Catherine Street West

OTTAWA  
171 Slater Street

TORONTO  
221 Yonge Street

WINNIPEG  
393 Portage Avenue

VANCOUVER  
800 Granville Street

or through your bookseller

Price: Canada: \$2.00  
Other Countries: \$2.40

Catalogue No. J32-J/10-1975

Price subject to change without notice

Information Canada  
Ottawa, 1975

## Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing within three months to:

Secretary  
Law Reform Commission of Canada  
130 Albert Street  
Ottawa, Ontario  
K1A 0L6

## Commission

Honourable E. Patrick Hartt, Chairman

Honourable Antonio Lamer, Vice-Chairman

Dr. J. W. Mohr, full-time member

Dr. Gérard V. La Forest, Q.C., full-time member

Claire Barrette-Joncas, Q.C., part-time member

### Secretary

Jean Côté, B.A., B.Ph., LL.B.

### Consultant

Patrick Fitzgerald, M.A.

### Research Personnel

Tanner Elton, B.A., LL.B., LL.M.

Mark Krasnick, B.A., LL.B.

Alan Reid, B.A., B.C.L., LL.M.

Louis Waller, LL.B., B.C.L.

## Table of Contents

	PAGE
Foreword .....	1
1. The Price of Criminal Law .....	3
2. The Meaning of Obscenity .....	7
3. Inappropriateness and Distortion .....	11
4. The Market and Externalities .....	13
5. The Immorality Involved .....	15
6. The Harm Feared .....	17
7. The Values Threatened .....	21
(a) The Value of Peace .....	22
(b) The Value of Individual Liberty .....	22
(i) Public Obscenity .....	23
(ii) Children .....	25
(c) Human Dignity .....	26
(i) Changing Values? .....	27
(ii) A Change for the Worse? .....	27
(iii) A Change Due to What? .....	30
8. The Aims of Criminal Law .....	33
(a) Retributivism .....	33
(b) Enforcing Morality .....	34
(c) Protection from Harm .....	35
(d) Underlining Values .....	36
9. The Limits of Criminal Law .....	39
10. The True Role of Criminal Law .....	47

## Foreword

This is our second Working Paper on General Principles of criminal law. Its predecessor, *The Meaning of Guilt*, asked what state of mind should be required for criminal guilt. This paper asks what ought to be the scope of criminal law.

It does so by focusing on a particular problem—obscenity. The light shed by such specific problems provides, we find, the best means of clearly viewing general issues.

Obscenity proved a good test case.\* First, there was evidently some public concern with the problem, as responses to our public questionnaire on our proposed research program revealed. So we began inquiries into obscenity. Second, the law on it has incurred criticism. And third, obscenity 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 criminal law be used against it?

This investigation leads from questions to quest. Our examination of obscenity law is really intended to search out the reasons that justify the use of criminal law. What are the things that criminal law can justifiably be used against? In a word the

---

\* A study paper on Obscenity was released in 1972 and further studies are in preparation.



specific problem of obscenity is used to throw light on a larger and much deeper problem—that of *charting the limits of the criminal law*. We saw this as a necessary preliminary to any meaningful inquiry into any particular question.

Our Working Paper, then, sets out to draw the basic map of criminal law. Instead of legal details it fastens on the fundamental general issue. Instead of cataloguing simple legal answers it raises deep and difficult moral and social questions. Instead of a finished product it offers a continuing process. It is a process of discovery about the criminal law, about its scope and limits, about its aims and purposes, about its value for the society that uses it—in short, a process of discovery about ourselves.

# 1

## The Price of Criminal Law

Nothing for nothing, goes the saying, and precious little for a penny either. The best things in life may well be free, the rest must all be paid for. In our world everything costs something, and law is no exception.

Like all else, law comes at a price—especially criminal law. This we forget when some new social problem makes us say “there ought to be a law against it”. As though having a law against it were always a perfect solution.

In fact, however, does criminal law solve anything completely? Take this example: Three hundred years ago some Dutchmen brought to North America a game called “ninepins”. It proved a hit. Soon everyone was playing it—in bars, in taverns, everywhere men gathered. It spread across the continent like a forest fire—a fire some authorities decided to extinguish because of the gambling it produced. They thought there ought to be a law against it. Connecticut passed such a law and so did New York State.

But look at the cost! It was a threefold cost which fell on different groups of people. Part fell on players charged, convicted, and fined or sent to prison—these paid in terms of punishment and suffering. Part fell on a wider group consisting of those who played or would have liked to play ninepins but found it was illegal—their cost was loss of liberty. And then there was an even wider group, the general public, who paid for law enforcement:

the more police time spent on ninepins, the less on murder, robbery and all the other crimes—unless the public paid more taxes.

There also was a further cost, a hidden cost, the sort of cost that fell two thousand years ago on King Xerxes, King of the Persians, during his invasion of the Greeks. When Xerxes built a bridge across the Hellespont, a storm blew up and washed his bridge away. At this the Great King in his wrath had the waters flogged three hundred lashes for their treachery. No doubt this made the King feel better, but as for solving the problem it was quite irrelevant.

Equally irrelevant was the anti-ninepins law. It never solved the real problem, for people were determined to go on playing this game if only they could find a way. They very soon discovered one. Seeing that the law only prohibited *ninepins*, they introduced an extra pin and made the game legal again. People started playing it once more and they have gone on playing ever since all over North America—we call it tenpin bowling. The game survived, the law it was that died. So much for criminal law prohibition!

“Crime always seems impossible in retrospect”, said Stephen Leacock. He meant from the offender’s point of view, but the same is also true from society’s point of view. In retrospect making the game a crime seems ridiculous. Will future generations say the same about some of our own present or recent crimes? About suicide for instance (recently abolished)? About narcotics crimes? About abortion? Or about obscenity?

Obscenity is a good test case. It is to some extent a crime without an obvious victim. It is also something which a lot of people think oughtn’t to be against the law. It therefore spotlights the most basic question about the criminal law: given 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?

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

## 2

### The Meaning of Obscenity

What is obscenity? Clearly something hard to talk about constructively. For one thing there is a problem of good faith. "Obscenity", said George Orwell, "is difficult to discuss honestly—people are too frightened of seeming to be shocked or of not seeming to be shocked". For another, there is lack of agreement about the definition of obscenity.

After all, what makes a thing obscene? Take a theatrical performance for example. Some college students once put on a play to open their college theatre. The opening had been widely publicized, the house was full and a lot of local dignitaries were present. The play itself passed off without remark until the final scene, which showed a burning at the stake: the stage completely dark, a solitary spotlight on the centre, and in the midst of the flames the victim standing absolutely naked. Some students giggled, some dignitaries walked out, one middle-aged woman told newspaper reporters afterwards: "I didn't know where to look". The college authorities made the students change the scene for subsequent performances.

But was the play obscene? Should there have been a prosecution and conviction with all this would have involved? Or if there had been a prosecution, should there have been an acquittal on the ground that the play was not obscene?

We come back to the question: what is obscenity? Something too vague perhaps to be defined, one of those elusive terms we use but can't explain—like civilization. "What is civilization?"

said Kenneth Clark; “I don’t know. I can’t define it in abstract terms—yet. But I think I can recognize it when I see it”. Some say the same about obscenity: “I know it when I see it”, said Justice Stewart in an American case.

But different people often see things differently. Some see obscenity in nude pictures, statues, ballets and so on. Others find less obscenity in these things than in the way the affluent nations live in a world where millions are dying of starvation. “Obscene” is clearly a pejorative term.

All the same, “obscene” isn’t the same as “wrong” or “bad”. Was it obscene of Cain to murder Abel? Or was the great train robbery obscene? Clearly obscenity is not identical with evil; it only covers a single segment of it. But what is that segment?

A look at the words “obscenity” and “pornography” suggests that it is a segment that didn’t worry people very much till relatively recently. Take the word “obscenity”. The original Latin meant “ill-omened, inauspicious”, as did its English counterpart at first apparently. In Shakespeare’s day, however, it meant primarily “offensive to the senses, filthy, foul, disgusting”. Only secondarily did it refer to what was offensive to modesty or decency. Compare the word “pornography”, derived from two Greek words meaning “harlot” and “writing”. Unlike “obscenity”, the word “pornography” is of later currency and doesn’t appear until the nineteenth century. It primarily referred to literature about prostitutes and their patrons, but slightly later came to embrace literature about “unchaste or obscene subject-matter”.

If language suggests that obscenity is a relatively recent worry, our law provides corroboration. Though censorship was known in English law quite early on, it wasn’t for obscenity but for heresy and sedition. Nor was obscenity prosecuted in England till the eighteenth century and even then the cases were limited to sexual material in the context of anti-religious works. Not till the beginning of the nineteenth century do we find prosecutions for obscenity by itself, nor did the common law define obscenity till the *Hicklin* case in 1868—itself a case about an anti-religious pamphlet with sexual contents.

In earlier times, then, people were disturbed, not by obscenity but by heresy. What worried them was not attacks on sexual

decency but attacks on religion. Today the very opposite is true: the problem isn't heresy but obscenity.

What lies then at the root of our present notion of obscenity? Two things, it seems. Obscenity somehow has to do with sex. It also 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.

Not that such revelations are always inappropriate. Nudes in art gallery paintings or in anatomy textbook illustrations don't offend. Is this because art and science have some redeeming value? Or is it that art and science both seek truth, while obscenity and pornography both distort the truth? Take pornography for example. Ostensibly it deals in sex. But sex is highly personal and therefore hard to market. So what pornography provides isn't real sex but an *ersatz* product. And what about the pornography world—a world where men are always virile and erect, where women never menstruate, where love and individualism are conspicuously lacking? Is this a true picture of reality or is this what makes it “undue exploitation of sex”?

“Undue exploitation of sex” is what criminal law in Canada prohibits. This is how our criminal law defines obscenity. In doing so, however, it overlooks some other distinctions. It doesn't for instance differentiate between “ordinary obscenity” and “hard-core pornography”, the first denoting the ordinary run of “girlie” magazines and the second denoting pictures, literature and so on that deals with rape, sadism, masochism, bestiality, necrophilia and other perversions. The distinction may be important, though, since many people object far more to hard-core pornography than to ordinary obscenity. Besides, hard-core pornography tends to be available only under the counter or through the mail.

Another distinction overlooked by our criminal law is the distinction between isolated instances of obscenity and the products of vast commercial enterprise. 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.

# 3

## Inappropriateness and Distortion

But why does obscenity offend? Can it be simply because of inappropriateness and distortion? Take the college students' play. Some in the audience found the burning scene inappropriate and false—inappropriate because the nudity distracted from the action, and false because the darkened stage highlighted the victim's private parts in a way a real execution wouldn't. Some took a different view: they found the nudity appropriate and realistic—appropriate in that the protagonist was stripped to the nakedness with which his life began, realistic in that this was how it really would have happened. The fact is, as so often with obscenity, the case is borderline.

But even suppose the nudity was inappropriate, what's wrong with inappropriateness? "In Prague last night", reported a music critic before the war, "we heard a little boy of three sing with a perfect bass voice but with no proper sense of the fitness of things". Should that have been a crime?

Alternatively, suppose the nudity was a distortion of reality, should such distortion be a criminal offence? Look where that would lead! We'd have to outlaw operas—whoever heard of people talking in song? And ballets—what adult ever pirouettes in real life? Plays too—where can we find off-stage a three-walled room? Yet no one wants to outlaw operas, ballets, and plays. No one would dare: they're too much in demand. So is obscenity!

Obscenity is very much in demand. It's very much in supply as well—supplied by a large and growing industry. This makes



for economic growth, presumably, and helps create employment. Does this conclude the matter? Or can we ask a further question: is this a worthwhile allocation of resources—a suitable avenue for channelling labour, money and materials? Or is this further question best left to the market?

# 4

## The Market and Externalities

So why not leave the question to the market? Why not allow everyone to decide for himself what books to read, what pictures to view, what movies to attend? Consumer sovereignty makes every individual the judge of what he ought to have. For what is the alternative? Who else can be the judge? What authority has anyone to lay down what anyone else should have?

“He who pays the piper calls the tune”. The right to choose, some say, belongs to the consumer because he bears the cost of the production. But does he? Does he always bear the total cost? What about the hidden cost that often falls upon third parties? The cost of manufacturing automobiles isn't just the cost of labour and materials, it's also the pollution this imposes on neighbouring residents—the *externalities*. This kind of cost is often hard to measure, affects a wide section of the public, and meets no organized objection. Till relatively recently, therefore, manufacturers have transferred it to the public. Today, however, we see more clearly that decisions at a micro-economic level are too short-term and too governed by self-interest to guarantee a rational decision at a macro-economic level: we realize that the public good is more than the sum total of a lot of private goods. We can't just let the market decide what is to be produced and distributed, for the market takes no account of the possible harm production and distribution does to third parties. Nor does it take account of the possible harm done to producers and consumers themselves.

So with obscenity. We can't just leave the issue to the market. For the market never asks if obscenity is bad for people. It never asks if obscenity is wrong.

# 5

## The Immorality Involved

Is obscenity wrong? “An interesting but irrelevant question”, you may say; “for though some think it’s wrong and therefore ought to be a crime, and others think it isn’t wrong and therefore shouldn’t be a crime, most people think it doesn’t matter whether it’s wrong or not. Wrongfulness isn’t enough to make an act a crime. With obscenity, as with homosexuality, its morality or immorality is immaterial”.

But how can this be? Morality can’t be utterly irrelevant to criminality. As Helvetius said two hundred years ago, “laws draw their strength from common morality”. An act that isn’t wrong in any way is one we should be free to do—it shouldn’t be a crime.

“Not even if it harms others?” But then the act is wrongful: one of the best reasons for holding an act wrongful is its tendency to cause harm to other people.

“But what about the converse? What about an act that is wrong but has no tendency to harm others? Surely the immorality of this sort of act isn’t enough to make it a crime.” Why not? For what sort of act could be wrong without harming anyone?

“An act known to be offensive to the Deity perhaps. Or one unworthy of a human being. That sort of act is wrong but doesn’t deserve to be a crime. That sort of act falls within an area of private morality that isn’t the law’s business. “There’s no place for the State in the bedrooms of the nation”. Everyone is

entitled to go to Hell in his own fashion so long as he does no harm to others”.

But can you go to Hell in your own fashion without a risk of harm to others? Mightn't you drag others down with you? As John Donne said, no man is an island. Sin against God and you may infect others and make them do the same. Or—to take the alternative approach—fall short of human standards and you may lead others to do likewise. Once grant that any act is wrong—in theological or other terms—and how rule out the possibility of harm to others? That's why so many thought we needed criminal laws against homosexuality. To show that “mere immorality” shouldn't be a crime we need a stronger argument.

Such argument is available. Take an act known to offend the Deity. How do we know this? 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.

Or take an act considered as falling short of human standards. Here too we are concerned with belief and attitude, not knowledge. For those condemning the act do so because of their own personal ideals. But these are strictly personal. Each of us is entitled to his own ideals so long as they involve no demonstrable harm to others. Or at least, we hold in Canada, no one is entitled to impose his own ideals on others.

So whether we believe obscenity wrong on religious or idealistic grounds—and many do—this isn't enough to warrant making it a crime. Religions and ideals are matters of personal commitment. They are insufficient grounds on which to base the criminal law.

# 6

## The Harm Feared

But what if obscenity were wrong, not simply on religious or idealistic grounds, but in that it causes harm? Would this warrant making it a crime?

But does obscenity cause harm? This is a difficult question. The answer doesn't just depend on evidence. It also depends on a value-judgment—it all depends on what we choose to count as harm. For "harm" is not just a descriptive term, it's also an evaluative one.

What then is harm? What sort of thing do we categorize as harmful? Things, we suggest, that make life poorer, nastier, less agreeable.

But these themselves are value-laden words. Whether you reckon something harmful depends both on the circumstances and on your preferences. Suppose I cut your leg off, do I do you harm? It all depends: not if I'm a surgeon and your leg needs amputating—here I perform a beneficial operation, for a life is generally considered more worth saving than a leg. But what if you're a ballet-dancer who would rather live a week with both legs than a century with only one? In this case you might well regard the act of amputation as a harm.

Or, to take another example, would something causing blindness always qualify as harmful? Surely sight is an advantage and blindness a misfortune. Yet take Brentano's case. The philosopher, Brentano, in his later years went blind. His friends commiserated

with him. "Blindness", he replied, "is a blessing in disguise—it makes me concentrate more fully on my philosophy". To him external sight meant less than inner vision.

All the same, the ballet-dancer and the philosopher Brentano are exceptions. The rest of us will usually agree on what makes life poorer and on what we count as harm. Violence, for example, is a paradigm case of harm—it causes pain and physical suffering. But there can be non-physical suffering too. And this is why we also count as harmful those traumatic occurrences—like black-mailing—which give rise to anxiety and reduce the ability to cope with life; as well as those acts—like theft and fraud—which cause distress through *loss* of something of value. A third type of harm, some would argue, consists of injury to sensibilities. So we may count as harmful such things as offensive smells, unpleasant noises and so on, which most of us can't tolerate because they nauseate, disgust and distract from other more interesting and more enjoyable aspects of life. A further kind of harm consists of things adversely affecting personal interaction. Since man is physically and spiritually a social creature, he must communicate and interact with other men. Anything, therefore, that impedes this by worsening personal relationships—for example, the lies Iago told Othello or, the hate propaganda against minority groups—must count as harmful. Lastly, things adversely affecting society in general constitute harms. These may be things that threaten the very existence of a society or things that make that society less worth living in.

But does obscenity cause these kinds of harm? First, take violence. Does exposure to sadistic literature make a man a sadist and make him put his reading into practice?

To start with, how do we find out? Some say we need empirical research. Such research was done at enormous cost by the U.S. Commission on Obscenity and Pornography, which reported that no evidence of any causal link between obscenity and violence had been found. Some social scientists, however, have criticised that research as inadequate, and other critics have pointed out that failure to find a causal link doesn't prove there isn't one.

Yet others remain unconvinced by any empirical research. They say it's only common sense that obscenity might lead to

violence. Couldn't it have been exposure to obscenity, they ask, which led to the Manson murders? After all, we know that man is by nature imitative. We also believe that good literature has a civilizing influence. So why should it be surprising if bad books have a detrimental influence? Such people would dismiss the Commission's Report in Lincoln's words and say: "People who like this sort of thing will find this the sort of thing they like".

The question about obscenity and violence, then, can't easily be settled. So what about the question whether obscenity causes non-physical harm? Some argue that it does so by causing sexual arousal or by giving rise to libidinous thoughts. And, not surprisingly, studies conducted for the U.S. Commission showed, that sexually explicit material can and does cause sexual arousal or stimulation in adults. But is such sexual arousal harmful? Some think, on religious grounds, that libidinous thoughts are harmful in themselves and a danger for salvation. But this of course rests on religious belief—belief not shared by all in our society, and therefore as we said before, not sufficient ground for criminal law.

But does obscenity result in psychological harm? Does it lead people to withdraw from reality into fantasy, to use pornography as a substitute for sex to prefer solitary masturbation to sexual intercourse? In short, does it arrest development? On this the evidence is inconclusive. Again, we can look to the U.S. Commission. Their studies show that exposure to sex stimuli increased the frequency of masturbation only among minorities of various populations and that the increase died down within forty-eight hours after the exposure. In other words, so far as adults go, there's little evidence that obscenity causes psychological harm.

What about children? Because of ethical considerations the U.S. Commission didn't fully study the effects of erotica on children and juveniles whose sexual behaviour was not yet fixed. It isn't that the evidence is inconclusive, it's rather that there is no evidence. Perhaps there is a risk to children. Who knows? Parents may well fear there is one: they did so in the following incident.

Not long ago an Ottawa variety store, quite close to several schools, installed peep-show machines. Pay twenty-five cents and you could see the sex show of your choice—normal sex, abnormal



sex, sadism and even incest. The message of the incest item seemed to be: "You too can get your Daddy to do this with you". Some parents vigorously objected. They sent for the police. The police investigated and got an order from the court, authorizing seizure and destruction of the machines. Clearly these parents were afraid of what exposure to such peep-shows might do to their children. They were afraid that it might give them a distorted view of sex and that this might militate against a healthy personal development. Can we be sure the parents weren't correct?

So does obscenity have a tendency to cause physical or psychological harm? The answer seems to be: we don't know. Some suspect it does, maybe with good reason. On the other hand, there isn't much empirical evidence. At any rate 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.

Is obscenity wrong by being harmful in a less direct and individual way? By being harmful in a more indirect and social way? By adversely affecting sensibilities, personal interaction or society in general? In other words, does it threaten our values?

# 7

## The Values Threatened

But why are threats to values worrying? Because, as Aristotle pointed out, man is a social animal. Physically he needs society to procreate, rear young and maintain the species. Spiritually he needs the company of other human beings. He has a natural need, then, for society.

But what is society, if not a co-operative venture? As such it can't succeed unless its members are committed to doing what will make it succeed and to avoiding what will make it fail. They have to be committed to certain values.

What are these values? It depends on the society in question, but only partly. Certain values are essential to any society. Without them no society could survive. Take, for example, the value of "non-violence" or "peace": without some acceptance of the notion that violence and killing are "off limits", a society would simply become a group of frightened, hostile individuals. Or take the value of truth: without some acceptance of the notion that lying and falsehood is "out", a society would turn into a group of separate non-communicating entities, for communication needs language and language only works on the basis that people are telling the truth—lying itself is a parasitic activity and only possible because we normally speak the truth. Then again, in any society there has to be some vestigial respect for property rights: whether a society holds all its property in common or is wedded to private ownership, it couldn't make satisfactory use of land and other items of property unless the user were given some security of possession

—some confidence that he won't suddenly lose the clothes off his back, the food on his plate and the spade in his hand. Finally, no society would be possible without some respect for order and regularity—some preference for orderliness over anarchy. These are the basic values necessary for society. Without them there can be no real co-operation and hence no real society.

Small wonder then that in most societies we find such basic values underlined in criminal law. This after all is society's fundamental law about right and wrong, and this is what lays down the groundrules of society. In any criminal law, then, we expect to find crimes of *violence* like murder, wounding and assault; crimes of *dishonesty*, like fraud and perjury; "crimes against *property*", like theft; and crimes of *disorder*, like riot, sedition and treason.

#### (a) The Value of Peace

Which of these values does obscenity threaten? The prime possibility is the value concerning violence? Obscenity can't be shown to result in increased violence, but certain brands of obscenity—the sado-masochistic brands—quite clearly run counter to our notion that violence should be restricted. At worst they glorify violence, at best they anaesthetise us to it, for the everyday becomes the normal and the normal becomes the norm. In this way violence comes to be accepted. Can this be healthy for society?

#### (b) The Value of Individual Liberty

And what about other values? Some values there are which, though not absolutely necessary to society, are nevertheless worth treasuring. Take for example the value of individual liberty. This clearly isn't essential to society: there have been, and still are, unfree societies. But liberty is one of the things that makes a society worth living in. Not simply that we resent being subject to the will of others. Rather 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.

“It takes all sorts to make a world” is more than a plea for tolerance—it is a tribute to the virtue of variety. To this variety individual freedom is essential.

Does obscenity threaten individual liberty? Public obscenity quite clearly does. So does obscenity distributed to children.

(i) *Public Obscenity*

No question but that obscene matter arouses powerful feelings of shock, shame, disgust and revulsion in many who are exposed to it. We know this from our own experience: a lot of people strenuously object to having obscenity thrust upon them. We also know this from research: the U.S. Commission studies found evidence that many people who have had experience with erotic material react with feelings of disgust. They object to being made involuntary viewers of obscenity, on billboards and on other materials on public display in public places. Obviously obscenity offends.

But, we might argue, isn't this just a matter of taste? Some like obscenity, some dislike it—isn't that the long and the short of it? There's no accounting for tastes. As Shakespeare said,

Some there are love not a gaping pig;  
Some that are mad if they behold a cat;  
And others, when the bagpipe sings i' the nose,  
Cannot contain their urine.

So why discriminate against those who like obscenity in favour of those who don't?

To this two answers can be given. The first is that to outlaw obscenity in public places isn't discriminatory. The second is that it is the only justifiable solution to a problem of incompatible and conflicting aims.

First, it isn't really discriminatory. For one thing, those who want to show or see obscenity in public may not want to do so all the time: they too may sometimes want an unspoiled view of a natural country vista or a city's streets; they too, therefore, could benefit from these laws. For another, public obscenity is in fact a type of public nuisance, and public nuisances arrive in many forms. Some

forms annoy some members of society, others annoy others: those who like obscenity may detest the noise of “souped-up” motor cars, and *vice versa*. So public nuisance laws, which aim to prevent all these kinds of annoyance, can confer a benefit on everyone. And public obscenity laws, which can be looked on as laws against one type of public nuisance, can therefore play their part in conferring a benefit on everyone.

Secondly, the problem of incompatible aims. How weigh against each other two incompatible aims? We do it often enough in ordinary life: I want the television on, you want it off; I want to use the lake for fishing, you for water-skiing. What principles do we use to weigh them? The following principles, we suggest:

- (1) freedom should be maximized;
- (2) the desires of the conflicting parties are not conclusive but must be justified;
- (3) preference of either party’s aim depends on its effect on those of others.

(1) First, *freedom should be maximized*. In any free society this principle is axiomatic. Unless an activity causes serious harm—something beyond mere trivial discomfort—people should be free to pursue it. The scales are tipped in favour of allowing an activity, against restraining it.

(2) Next, likes and dislikes aren’t enough to tip the scales the other way. If mere dislike on anyone’s part was sufficient ground for restricting your activity, then individual liberty and happiness would soon be at an end. At best we’d be at the mercy of puritanism; and “puritanism”, said Mencken, “is the haunting fear that someone, somewhere, may be happy”. At worst we could be prey to some more vicious ideology: the Nazis disliked Jews being around and killed them. As Shaw remarked, the ultimate form of censorship is assassination.

So mere dislikes are not enough to tip the scales against an activity. What’s needed is some *justified* dislike. Dislikes can be justified on two different grounds. They may be grounded in some physical fact of human nature: we object to certain smells because our make-up is such that they nauseate. Or else they may be

based on reasons: we may object to excessive advertising on the television because it interrupts the programme and this is what we really want to watch.

(3) Yet, even justified dislike is not enough to tip the scales against an activity. Where one man's aim is incompatible with another's, isn't the aim that should prevail the one that least conflicts with other aims? Suppose I want to fish, you want to water-ski, the lake's too small for both. If fishing is compatible with other activities, like swimming, paddling, boating and so on, but water-skiing rules out all other activities, then shouldn't my aim—fishing—take precedence? Giving priority to the aim compatible with the greatest range of alternative aims is simply maximising freedom: other things being equal, it leaves the greatest number of people free to pursue their own activities.

How do these principles apply to the problem of public obscenity? First, the objection to it isn't just a matter of taste. We can support it rationally. Obscenity offends because it conflicts with values those objecting to it seriously hold: the value they set on sex, on privacy, on human dignity, in short on man as something more than mere flesh and blood. Secondly, the desire for public obscenity would preclude many legitimate activities—quiet strolls, enjoyment of the view, and so on; the desire to frequent public places without exposure to obscenity would preclude but one thing—obscenity in public places. Meanwhile since obscenity could still be seen in private, doesn't this tip the scales against public obscenity and in favour of restricting it?

There is, however, a further aspect—the question of degree. How serious is the harm prevented by the law? Is it a significant affront to the values it conflicts with? Or is it just a trivial disregard of them? Whistling in a church, for instance, is far less serious than urinating on the altar. The greater the affront, then, the greater the justification for the use of criminal law.

#### (ii) *Children*

But obscenity conflicts with freedom in another way. This has to do with children. In our society we consider that children

should be brought up and educated in their own best interest—the welfare of the child is paramount. We also consider that when it comes to choosing the type of education, most suited to the child's best interest, the proper person to judge and make that choice—since the child is too young to do so—is the parent. Unless the parent's choice is demonstrably contrary to the interest of the child, society doesn't interfere.

Now when it comes to sex and similar matters, it follows that the proper person to decide how children should be introduced to such things is the parent, not the pedlar of obscenity. Public obscenity conflicts with this approach by exposing children to influences which their parents may well prefer them not to be exposed to. So does the sale and distribution of obscenity to children.

In these two ways obscenity lessens liberty. Those who protest in the name of freedom against any restriction on obscenity should reflect that freedom here works in two opposite directions. Freedom *for* obscenity is one thing, freedom *from* it is another. Which is the more important?

### (c) Human Dignity

But are there other highly important, if non-essential values that are threatened by obscenity? What about the value we set on human dignity? One heartening feature in our present society is a growing recognition of the dignity of man—and more particularly the dignity of *woman*. It is no accident that some of the strongest protests of women's lib have been against the use of women as sex-objects in advertisements, in obscenity and in pornography. To view women as mere objects of sexual gratification, such protestors rightly argue, is to degrade not only the women being used but also the men making use of them: it is to look on both as less than persons. And this, some say, is symptomatic of a general cultural and moral decline in values.

But has there been any such general, moral and cultural decline? Has there been a change in general values? Has it been for the worse? And is it due to obscenity?

(i) *Changing Values?*

First, are our values changing? There is certainly a change in the way we talk, the kind of books we read, and the kind of plays and movies we see. Take language: four-letter words, once taboo and never used in polite conversation or mixed company, are now used widely. "Not bloody likely"—Eliza Doolittle's famous line in Shaw's *Pygmalion*, the original of *My Fair Lady*,—caused a sensation in its time: today's audiences wouldn't lift an eyebrow.

Or take literature. "Bad money drives out good", says Gresham's law. Is there a similar law regarding books? Will obscene books drive less obscene ones from the marketplace? Not long ago *Lady Chatterley's Lover* sold like hot cakes; today it can't be found in sleazier bookstores—they're all too full of spicier wares like sodomy, flagellation, bestiality and other vices.

But what about our moral values? Has there also been a change in attitude to marriage, sex and privacy? Free love is more openly accepted, co-habitation without formal marriage more common and group sex more widespread. Privacy is less jealously protected: parts of the human form once kept hidden are now revealed in public; acts once considered strictly private are now performed in public view. And sex is increasingly commercialised. Not that sex hasn't always been on sale—the oldest profession is the prostitute's. All the same, wasn't there once a generally accepted, if unarticulated view, that certain things like friendship aren't really for sale? And didn't this to some extent apply to sex? Today we see sex or its counterfeit increasingly exploited, packaged and commercialised.

(ii) *A Change for the Worse?*

Is this change in moral attitudes and values a change for the worse? Are art and language any the poorer for the increase in sexual elements and in four-letter words? Or was our previous art and language unnaturally emasculated? For instance, was there something ridiculous about the way yesterday's adventure heroes, paling beneath their tan, used euphemisms because "bloody" was taboo? What about literary taste? "Good taste", as Emile Faguet



pointed out, “develops through reading bad books so long as you read good ones too”. And what about the earlier view on marriage and sex? Was it a sounder one, or was it on the contrary too imbued with hypocrisy? Are present day attitudes more liberated and more healthy?

Take first of all obscenity in language. The problem with four-letter words, for instance, is that their constant use impoverishes language. Sparingly used, words denoting sexual and excretory functions can serve two useful purposes: they can refer to the activities themselves or can be used to shock. Employed more frequently, they lose their purpose and simply distract from what is being discussed. Used constantly, as nowadays increasingly, they degenerate into boring ritualistic noises preventing more discriminating use of language. Our language has a million words. How sad to only use a mere half a dozen all the time!

Or take obscenity in books and plays and movies. The trouble is not that it exists, but that its success seems to require all other books and so on to conform to this particular pattern. Some authors have complained of being forced to include obscenity in order to get published. “Today”, said Shaw, “it is the sexless novel that should be distinguished; the sex novel is now normal”. This militates against variety, for if sex novels have their place, then so have sexless ones, or literature is impoverished.

What about ordinary morality? Do changes in our attitudes to sex, privacy and so on affect society for the worse? Lord Devlin, in a famous paper, argued that a society owes its existence less to its institutions than to the shared morality that binds society together, and therefore anything that affects that shared morality adversely is seriously harmful to society.

The thesis, though, is only partly true. As we have argued earlier, society couldn't exist without accepting certain basic values, principles and standards. On things like violence and truth a shared morality is essential. But this doesn't mean that all the values in our shared morality are basic and essential, or that decline in one value spells decline in all the rest. First, not all our values are essential. Our rules about property, for instance, aren't: some principles about property we have to have, as we have seen, but no

society need have those very property principles we have—the principle of private ownership, for instance. A society could own all property in common without ceasing to count as a society.

What about values concerning sex, marriage and privacy? Are these essential values? Some rules and principles about these things are clearly necessary. In order to continue its stock of members a society must take some provision for procreation and child-rearing, but not necessarily the provision we make. Again, sex is such a driving force that some rules and standards are needed, but again not necessarily the ones we have. Or again, maybe some principle of privacy is essential to our well being: maybe each person has a need for private space and private time, but again not necessarily in those matters where we want it. Societies could exist and have existed with quite different attitudes from ours to all these things. On these our shared morality is less essential than our shared morality on truth and violence.

But, does a change in non-essential values bring about a similar change in fundamental values? There's little evidence, in fact, that change in attitude to sex necessarily results in change in attitude to truth and violence. A loosening of older attitudes to sex is quite compatible with holding fast to older attitudes to these other things. Would those who constantly decry the present decline in moral values prefer earlier societies with their insensitiveness to violence, poverty and suffering? Our shared morality, as Professor Hart pointed out in criticism of Devlin, is not the seamless web this thesis makes it out to be.

All the same, the Devlin thesis isn't without appeal. Decline in moral attitudes to sex may be symptomatic of a general moral decline. We may today set less moral value on sex, not just because of change in attitudes to sex, but because we set less moral value of *anything*. Sincere change in moral attitude is one thing, mere growing indifference is another. And indifference about moral values generally, including those concerning truth and violence, is detrimental to society.

But is our change in attitude to sex in any case a decline? Perhaps not, but some would say that the pornography industry's view of sex as something devoid of individuality, personality and

intimacy, as something seen in standardized and purely physical terms, would, if taken seriously, reduce something magical to something at best animal and at worse mechanical. And this would be to lessen human dignity. Yet the less respect we have for human dignity, the less is our society worth living in. In the long run human happiness depends on self-respect and respect for others as individual persons. Obscenity and pornography, then, could produce a change for the worse in our attitudes regarding human dignity.

(iii) *A Change Due to What?*

But in so far as there is such a change in attitude, is it due to increased obscenity? Or has the increased obscenity resulted from our change in attitude? It's hard to tell. It's difficult to determine the relationship between obscenity and change in moral standards. So many complex factors influence these standards that we cannot isolate the impact of obscenity. Theory suggests, as we said earlier, that if decent books can inculcate acceptable attitudes and moral values, then equally, a person can acquire perverse attitudes and values from obscene writings. Empirical evidence however is inconclusive. The U.S. Commission's researches show that exposure to pornography makes people see less harm in such material and be less anxious to restrict it, and that those with more recent experience of erotic material tend to tolerate homosexuality, pre-marital intercourse and the non-reproductive functions of intercourse more than do those without experience. All the same, they don't prove that this is a consequence of that experience.

There is, however, another aspect of obscenity. The whole point of obscenity is either to shock or else to titillate. Chances are, the more obscenity we see, the more indifferent to it we become: familiarity breeds contempt. We know this from our own experience: loud music makes us deaf—we have to turn the volume up; brash advertisements makes us blasé, so they must grow increasingly aggressive; and obscenity dulls the capacity for shock, disgust and titillation. "Extensive exposure to sexually explicit material", the U.S. Commission's research confirmed, "leads to a satiation effect and a diminished desire for further viewing, even though the material is fully available".

Obscenity and pornography, then, are self-defeating. To keep on shocking or disgusting us, purveyors of obscenity must constantly extend the margin of the shocking and disgusting. To all things, though, there is a limit. Shock, disgust and titillation are no exceptions. Pornography, then, blunts our sensitivity to obscenity and leaves our appetite jaded. In one way, perhaps, this is no bad thing. Perhaps the Danes' increased lack of interest in obscenity since they legalized it is to be welcomed. Yet all the same, is lack of sensitivity—an inability to be shocked, disgusted or stimulated by obscenity—something to be complacent about?

## 8

### The Aims of Criminal Law

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.

Does this warrant calling in the criminal law? Does it make obscenity the business of the criminal law? And what would calling in the criminal law achieve?

First, when is any conduct the business of the criminal law? Some would say “when that conduct is wrong or immoral, quite apart from whether it harms or affects others.” To them the job of the criminal law is seeing to it that wrongdoing reaps its own reward—in a word, *retributivism*.

#### (a) Retributivism

The retributivist view, however, raises difficulties. One is this. Retributivism supposes some sort of supernatural or metaphysical accounts sheet, which crime or sin puts out of balance and which accordingly its punishment sets straight again. But how are we to understand this claim? How is it to be established? And how does the punishment set the balance straight?

But even if we could answer such questions, the claim presents a further difficulty. Making sin reap its own reward may well be

an appropriate enterprise for a deity, but—though there is something resembling it which we can properly do and which we consider later—not for mere human beings. If *you* do something wrong, does this give *me* a right to punish you for it? “Vengeance is mine; I will repay, saith the Lord”, wrote St. Paul and we respectfully agree.

### (b) Enforcing Morality

Another alternative claim is that the job of the criminal law is to see that people behave themselves—to *enforce morality*. This is like the retributivist claim in one respect: both views consider the repression of wrongful behaviour as an end in itself. But what concerns retributivism is the punishment of wrong, whereas what concerns morality-enforcement is its *prevention*. The morality-enforcement claim is that it is desirable and justifiable to use the criminal law against wrongful conduct, in order to prevent that wrongful conduct.

The morality-enforcement claim not only differs from retributivism. It is also more attractive than it. For one thing, the morality-enforcement claim avoids the problems involved in the retributivist notion of a heavenly balance sheet. For another, it focuses on something we do and have to do: we often have to punish in order to prevent wrongdoing simply because it is wrong—we do so with our children.

But how our children behave is obviously our business. Is it equally obviously our business how adults behave? Is it our business at all unless their acts affect us? Is it any concern of ours what Robinson Crusoe does to Man Friday when both are living isolated on a desert island? The answer you give to this theoretical question depends on whether you think you are your brother’s keeper. In the real world, however, systems of criminal law are intimately connected with the question of state jurisdiction. Most systems of criminal law, like ours in Canada, apply primarily to acts occurring in the territory of the relevant state and only in limited fashion to those occurring outside it. But this is how things stand today—no one can say it always will be so. Even in our own cen-

ture we have seen changes as our world has rapidly assumed the characteristics of the “global village”. We have seen the acceptance of the notion of “crimes against humanity”, acts which are criminal in international law, wherever and whenever committed.

So if Crusoe murders and tortures Friday, many would say this is our business even though we are thousands of miles away—unless some other state which is more connected with the event claims jurisdiction. But what if he merely picks Man Friday’s pocket and steals something inessential? Do we still feel this is our concern? And what if he is merely parading in the nude and offending Friday’s sensibilities? It may be wrong of him to do this but does that mean it’s up to us to stop him doing it? Does his act in anyway affect us here or do us any harm? In Molière’s words: “The thing that gives offence is public scandal; to sin in silence is no sin at all”.

Obscenity in Canada, however, does affect us. Some think it causes harm. It certainly offends. It also threatens some of our most important values.

### (c) Protection from Harm

So are we to use the criminal law to protect ourselves from harm? If we were sure obscenity did cause harm, would this entitle us to use the criminal law against it?

The basis of criminal law intervention on this ground is social self-defence. People in a society, runs the argument, must and may protect themselves against harm and against those who do them harm. Punishing wrongdoers provides this protection in various ways: by incapacitating wrongdoers, by making examples of them and by turning them into better citizens—the techniques of prevention, deterrence and reform.

The attraction of this view is that it bases the justification of criminal law and punishment on aims and goals which are obviously proper for human beings. If murders are happening in our midst, we clearly have a right to try and stop them. No metaphysical claims are here involved, nor any undue interference with

others. How people behave is our business if their behaviour causes us harm. No doubt at all that if Robinson Crusoe killed Man Friday in Halifax, Saskatoon or Vancouver, Canadians would rightly feel themselves affected and entitled to do something about it.

Small wonder then that the harm-protection view has proved a popular one. Unfortunately it too has its difficulties. First, the goal of self-defence against harm would be a clearer justification for the criminal law if it were more certain that deterrence and rehabilitation worked. As it is, research on deterrence indicates that it by no means works as simply or as well as is suggested by a naive Benthamite view of human behaviour. And research on rehabilitation indicates that how a convicted person is dealt with makes little difference to the likelihood of his recidivism. Meanwhile the volume of crime continues to increase. So how much protection does our tax dollar buy in terms of criminal law and punishment?

To this, in fairness, one could answer: these difficulties aren't necessarily insuperable—maybe we shall devise better techniques of rehabilitation and hit on ways of making deterrence more effective. We could also point out that there remains prevention—neutralising the harm by incarcerating the dangerous person or by destroying the noxious article. All the same, people musn't think that criminal law enforcement really solves the problem of crime. Nor should they be misled by the harm-prevention theory, with its emphasis on deterrence and reform, to concentrate unduly on offenders and potential offenders and to forget the rest of society. And this is why we are increasingly attracted to the "underlining of values" view of criminal law.

#### (d) Underlining Values

As we saw earlier, certain values are essential to any society. And there are others which, though not essential to any society, are necessary for our society—they help to make it the sort of society it is. So when such values are contravened and threatened we call into play the use of the criminal law.

When values are threatened, the criminal law serves various purposes: it provides a response, articulates the values threatened,



helps to inculcate those values, and provides the rest of us with reassurance.

First, criminal law is a *response*. To take an analogy, when someone—a friend or colleague—dies, we feel called upon to make some response. We behave gravely, stand in silent recollection, attend a burial service and so on. All this because death is a serious event in human affairs and one we feel a need to solemnise. It would be less than human to ignore it, as did the three bridge-players who, when the fourth fell dead at the bridge table, simply said: “We’ll just have to play three-handed bridge”. Likewise with crime. Once a serious crime is committed in our midst, we can’t just ignore it, we must do something. And criminal law is a means of doing something.

But more than this. Criminal law is more than a mere response to breach of values. After all, what does it mean to really hold a certain value? It means various things: it means we act in certain ways, conform our conduct to that value, commend those who despite temptation to the contrary stick to the value, and condemn those who contravene the value. So if we really hold that murder is “out”, then when one member of our society murders another the one thing we can’t do is nothing, because we have to *articulate* the fact that we really hold it. Prosecuting, trying, convicting, and punishing the murderer does just this. Just as medals for bravery, prizes for achievement and canonization for sanctity officially articulate our respect for exceptionally meritorious behaviour, criminal law officially articulates our condemnation of behaviour that is exceptionally bad.

There is another purpose, though. 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 socialising 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. As Morton wisely said, the criminal trial is a morality play which reiterates the lesson that murder, rape, robbery and so on are “out of bounds”. Such lessons help to *inculcate* the value threatened by the criminal.

They also serve a further purpose: they provide the rest of us with *reassurance*. They reassure us first by letting us see justice done. Suppose that while most of us refrain from violence and dishonesty, one or two resort to murder and robbery and nothing is done about it. The rest of us will feel that life is unjust. Of course life is never absolutely fair. In the words of the poem,

The rain it raineth every day  
Upon the just and unjust fellow,  
But more upon the just because  
The unjust hath the just's umbrella.

All the same, we want to minimize injustice. We want a society as just as it can be. Criminal law is one way of trying to satisfy that want: by bringing wrongdoers to justice it tries to see to it that justice is done. And this is the activity we properly engage in which closely resembles dealing out retribution.

But quite apart from the question of justice, there is another need for reassurance. If most of us refrain from violence and dishonesty even when it would suit us not to, and if one or two resort to murdering and stealing and get away with it, then the rest of us will grow cynical and disillusioned: we'll feel we're being "taken for a ride". Chances are too, we'll take the law into our own hands and resort to lynch law. Out of the window then goes peace, order and good government. Hence our need for criminal law.

So our conclusion on the aims of criminal law is this. 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" 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.

## 9

### The Limits of Criminal Law

In practical terms, however, how far does it make sense to use the criminal law against any act causing harm or running counter to our values? Take for example our test case of obscenity. How far should we use criminal law against obscenity? Even if obscenity offends, results in harm and threatens some of our values, do we really need to bring in the whole machinery of the criminal law?

The use of criminal law, we pointed out, imposes a cost. The convicted offender who is punished and the citizen who is forbidden to do the act prohibited both suffer a cost. One cost is a reduction of their freedom. Of course if the act in question is quite obviously a serious wrong, like murder, we are not worried by this loss of liberty. With Justice Holmes we reply: “your freedom to shake your fist ends where my chin begins”. On the other hand, the less serious the act, the more concern for freedom—one reason among others why acts in no way wrong shouldn’t be prohibited by criminal law and perhaps why even some immoral acts aren’t in fact prohibited by it.

After all, in Canada as in many countries, an act can be wrong without being criminal. Here attention always focusses on fornication, homosexuality and lesbianism. But these are poor examples. We don’t all agree that such things are wrong. Besides we can find much better examples of non-criminal wrongful acts. Two spring to mind: *lying and breaking promises*.

To tell a serious lie is clearly wrong. By this we mean a serious lie where there are no justifying or excusing circumstances. It is wrong because it militates against the truth-telling value, a

value which we saw was necessary to society. Why hasn't lying, then, been made a crime? It has been, but only in certain circumstances: (1) Where the lie amounts to fraud and (2) where it amounts to perjury. Short of cases where there is a danger of pecuniary loss or miscarriage of justice, liars are left to the informal sanctions of social intercourse.

The same with breaking promises. Again, breaking one's promise is clearly wrong. And here again by this we mean breaking a serious promise where there are no justifying or excusing factors. It is wrong because it militates against the highly useful social practice of promising. All the same, it hasn't generally been made a crime. At most the promise-breaker may be liable for breach of contract. And where he isn't even liable in contract, he too is left to the more informal sanctions of society.

One reason for not invoking criminal law in both these cases is the loss of liberty involved. This might well be too high a price to pay. All the more so, because of two extra factors. One is that lies and breaking promises range from very serious conduct down to relatively trivial behaviour and we wouldn't want every item of such trivial behaviour to set in motion the whole panoply of police, prosecutors, courts and prison officers. The other factor is that criminal law isn't the only way of bolstering truth and promising—there are other informal and possibly more effective social sanctions in reserve.

Another reason for not involving criminal law in such matters is the financial cost. We simply can't afford to take the criminal justice sledgehammer to every nut. Criminal law is a blunt and costly instrument best reserved for large targets—for targets constituting "clear and present danger"—which justify the monetary expense involved. Prosecute every simple lie or breach of promise and the game isn't worth the candle. How does this apply to obscenity?

Is it worth using criminal law against obscenity? Quite obviously obscenity itself won't ever be as significant a target for the criminal law as murder, say, or rape or robbery. Equally obviously, however, it isn't utterly without significance. Public obscenity clearly has significance—it annoys, disgusts, offends. As such it

merits just as much and just as little place within the criminal law as other species of nuisance. Loud noises, nauseating smells and so on aren't anything like as serious as murder. But still they do make life less tolerable and so we use the criminal law against them to a limited degree. Society thinks the cost is worth it. So may it be with public, or involuntary, obscenity.

But what about private, or voluntary, obscenity? "A problem left to itself", said the playwright N. F. Simpson, "dries up or goes wrong. Fertilize it with a solution and you'll hatch dozens". What problems might we hatch by trying to fertilize voluntary obscenity with a criminal law solution?

First, in order to prevent a person's private voluntary enjoyment of obscenity, we should be calling in law enforcement agents to invade his privacy and freedom. By this we should ourselves be contravening some of those very values which we are trying to protect by preventing obscenity. In order to foster freedom, privacy and human dignity, we should in fact be invading the offender's own privacy, dignity, and freedom—his freedom of speech, of expression and of living his life in his own way, as well as his freedom to be secure in his own home from the interventions of the authorities.

Of course there's nothing self-contradictory about this. It could be argued that the threat obscenity poses to these values and to the value regarding violence is such as to justify this invasion. Some indeed will say that the danger that voluntary consumption of obscenity will lead to Manson murders is sufficient justification. But is it? How clear and obvious is the danger? Obvious enough for us to want to deal with it by risking another danger—the danger of all our homes being open to entry, search and seizure on mere suspicion of obscenity? Obvious enough for us to want to divert law enforcement resources on to this potential harm and away from actual harms such as murder, rape and robbery? Is that the sort of society we want?

The art of politics, however,—and law is ultimately a branch of politics—is the art of the possible, the art of the practical. And is it really practical to use the criminal law against voluntary obscenity simply on account of the conflict between obscenity

and our taboo on violence? Not that there may not be other and better reasons for using the law against voluntary obscenity. After all, mightn't it be in the voluntary consumer's own best interest to use the law against him? Mightn't we be justified in using the law to protect him from himself?

But is it ever right to save a person from himself? Of course it is. A person might harm himself through ignorance, error or mistake: to stop him drinking something which, unknown to him, is poison is obviously justifiable—he would want us to. Or again, a person might harm himself through weakness of will or loss of selfcontrol: to stop him drinking himself blind on wood alcohol is clearly justifiable—he'd surely thank us afterwards. In both these cases the person we protect against himself will in general—though not at the moment of being protected—put his long-term welfare before his short-term preference.

But what if he prefers a moment of bliss to a lifetime's welfare? Of course he might not fully appreciate what is involved: he may have got his priorities wrong just now, but later come to see things as we do. But suppose, despite maturity, he just orders his priorities a different way. Suppose he really sets more store on a moment's ecstasy than on a long and healthy life. He's merely out of step with us, that's all. "If a man doesn't keep pace with his companions", said Thoreau, "perhaps it is because he hears a different drummer: let him step to the music which he hears, however measured or far away". Different people, different preferences. In the ultimate analysis each man must choose his own priorities: no one can choose them for him.

This isn't so with children. Children are a special case. We rightly stop toddlers playing with fire for their own good. Why can't we say the same about obscenity? For even though ultimately people should choose their own priorities and make their own commitments, they need maturity to do so. Children don't yet have this maturity, and exposure to obscenity could possibly prevent them reaching it. Free choice requires protection against influences militating against it: early brain-washing into some creed could rule out a full and free religious commitment later; early exposure to addictive drugs could preclude a freer choice of lifestyle in maturity; and early exposure to obscenity could possibly foreclose a

person's options afterwards. So a limited paternalism is not at odds with liberty; in fact it serves to buttress it.

Unlimited paternalism is a different matter. Treating children as children is one thing, treating adults as children quite another. On this point we agree with John Stuart Mill that a man's own good, either physical or moral, is not a sufficient warrant for exercising power over him against his will. With Montesquieu we hold that, "changing people's manners and morals mustn't be done by changing the law".

But may there not still be a reason for using the criminal law against voluntary obscenity? May it not be justifiable in order to prevent overall decline in values?

As we saw earlier, it isn't impossible that widespread obscenity could cause decline in general values. This helps to make it justifiable to use the law to prohibit involuntary public obscenity and exposure of children to obscenity. Would it also make it justifiable to go further and outlaw private, voluntary, obscenity?

This brings us back to the notion of shared values and morality as the cement that binds society together. So important are these values that they have to be protected. Indeed Devlin once suggested that acts contravening and therefore threatening such values are acts akin to treason.

At the root of the analogy is the claim that a society is entitled to protect itself against change and dissolution. Yet is a society entitled to use the criminal law to resist change? If it's entitled to use it to combat treason, why shouldn't it be similarly entitled to use it to combat change due to declining values? .

But why is society entitled to use the force of criminal law against treason? A paradigm case of treason is the use of force to overthrow the government or constitution. Why is this a crime? After all the new government or constitution might be an improvement. Even in Canada the constitution can't be perfect, otherwise why hold conferences to try and alter it? On the other hand, the new one might be worse. Or lots of people might consider it worse. And they of course would never have been consulted.

There is an obvious moral difference, then, between forcibly changing the government or constitution and doing this by peaceful means—by persuading society itself to change its institutions. Violent attack on these institutions, then, is rightly a crime, while non-violent attempts to bring about political changes are not. “Like may be repelled with like”, says common law principle. Violent attacks can justifiably be met with force—the force of the criminal law. Non-violent advocacy of change can justifiably be met only with counter-argument in favour of the status quo.\* Society can justifiably use the criminal law to stop itself *being changed* but not to stop itself *changing*.

What light does this throw on society’s right to use the criminal law to stop decline in moral values? If obscenity brings about decline by changing moral values, are society and its values simply changing or are they being changed? In one sense neither, in another both. Our moral values aren’t being changed by force—indeed it is hard to imagine how they could be. And yet we’re not just being asked to change them. Public obscenity, after all, tramples on values many hold and forces us, unless we yield our right to frequent public places, to see and become used to seeing obscenity; and this may lessen our sensitivity and may undermine our present values. To this extent society is entitled to use the criminal law against obscenity. But if the spectator has an option and consumes it willingly, society has less right to use the criminal law, for here the victim of obscenity is changing his values himself—another aspect of the argument that adults should be free to choose obscenity if they want.

But what if their voluntary consumption of obscenity weakens the values of society as a whole? Now is society entitled to use the criminal law against this risk? It depends how great the risk is to essential values. Suppose we could prove indubitably that individual consumption of pornography would thoroughly undermine the principle against violence. In that event it would be time to use the criminal law against such individual consumption. But that time hasn’t arrived. The threat to the anti-violence principle—and

---

\* Our law sometimes resists mere words with legal force: incitement to crime and hate propaganda are criminal offences, but neither of them advocate mere peaceful change.



we don't deny that there may be one—is uncertain, hard to assess and still a matter for speculation. A wholly clear and present danger hasn't been proved.

A further objection to using the criminal law against private consumption of obscenity by adults is the risk of increasing its profitability. Forbidden fruit, if not sweeter, is always dearer. Illegalising it adds an extra cost. It could be that those with most to lose from the legalising of obscenity may be the dealers who supply it. Certainly there is some evidence of this from Denmark.

Lastly, one final snag. Use criminal law against obscenity and perhaps we obscure the real problem. To take an analogy, our criminal law has concerned itself with non-medical use of drugs, but may not the real problem be the overall use of drugs in the modern “chemical” society? So with obscenity. 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.

Obscenity, however, is immaturity. Obscenity is at odds with personal growth. At best, as in a dirty joke or filthy postcard, it is, as Orwell pointed out, a sort of mental rebellion against a conspiracy to pretend that human nature has no baser side. At worse, it is, as D. H. Lawrence said, an attempt “to insult sex, to do dirt on sex”. Neither obscenity nor the law relating to it helps towards a maturer view of sex.

# 10

## The True Role of Criminal Law

So should obscenity be against the criminal law? In our view, yes, and no. Public obscenity—like other nuisances that give offence—can rightly be the subject of the criminal law. Private obscenity—which causes little, if any, harm and which doesn't threaten significantly—on the whole cannot. That's not to say that it can't be the subject of other types of law.

Criminal law, after all, is only one weapon in the arsenal of the law. Others are administrative regulation, customs laws, planning laws and finally tax laws. What may and what may not be published might best be dealt with by administrative control—a technique that is particularly appropriate perhaps to television and radio. Again, in so far as the pornography industry isn't home-grown, customs regulation is an obvious method of dealing with the problem. Or, if we accept that some obscenity is here to stay, mightn't a sensible approach be to use city planning to mark out certain areas for obscenity and to keep the rest obscenity-free? Or finally, if obscenity, like alcohol, is going to be always with us, why not use our tax laws to do two things—to siphon off some of the excess profit from the industry and at the same time to apply a measure of discouragement to the trade?

These questions, however, are outside the scope of this Working Paper. How far our objectives are best achieved by criminal or civil law techniques, how far criminal law enforcement against obscenity should allow for local varying standards, how far the present legal definition of obscenity should remain or be replaced

by something else and where precisely the line between public and private should be drawn—all these are matters calling for more detailed legal and empirical research than is called for by this inquiry which, though focussing on obscenity, does so primarily as a test case to illuminate the general question of the proper scope and ambit of the criminal law. Such an inquiry rather serves to indicate the proper goals or objectives of criminal law in connexion with the specific problem of obscenity, and so to indicate in general the reaches and the limits of the criminal law.

What, therefore, are our justified objectives with obscenity? As we have said, public obscenity can rightly be a crime. Public obscenity then should remain an offence. In practical terms this means continued prohibition against lurid posters, advertisements, magazines and so on being shown in public. It also means restricting what can be broadcast and televised.

Private obscenity too can rightly be a crime, as we have said, when it comes to children. In practice this means that things like the Ottawa peep-show discussed earlier remain against the law. It doesn't mean of course that children won't ever get obscenity. They will—just as they get cigarettes and alcohol and other things we try to guard them from. But retaining the criminal law may still have effect. In effect it will serve at least to keep obscenity out of the classroom and restrict it to the playground—and this can have two results: it may help to limit the amount of obscenity that children are exposed to, and it will give underlining support to the general view that obscenity is not for public consumption.

Apart from this, however, private obscenity in our view should no longer be a crime. In this context the criminal law can't properly be used either to save the individual or society from itself. Individuals should be free to choose their own life-style and society should be free to change. In practical terms this would mean considerable change. It 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.

On the other hand decriminalizing—"legalizing", as it is sometimes called—would not imply condoning. Chamfort spoke truly when he said: "It is easier to make things legal than legitimate".

In any case, voluntary consumption of obscenity could still be wrong in the civil law: contracts, for instance, to put on obscene displays for private consumption could still be contrary to public policy and so illegal. Besides, voluntary obscenity could still be dealt with, and surely better dealt with, by less formal sanctions, which after all are cheaper, and not only in monetary terms. The formal sanctions of the criminal law are in many ways too expensive.

In short, we must always bear in mind the price we pay for using criminal law. That price—in terms of suffering, loss of liberty and financial cost—sets limits to the proper use of criminal law. Acts of violence, acts of terror and acts causing serious distress can justifiably fall within that law. So too, occasionally, can obscenity when it gives serious offence and causes real annoyance by threatening fundamental values. This after all is what the criminal law is for—dealing with acts that threaten or infringe essential or important values.

Restrict the criminal law to these kinds of acts and we may hope that even in a world where we get nothing for nothing, at least we won't get nothing for our penny too.