



Controlling Obscenity: A Non-Legal Approach

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Commentary

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CONTROLLING OBSCENITY: A NON-LEGAL APPROACH.—In February, 1956, the Attorney-General of Ontario received some two hundred and fifty complaints about obscene literature allegedly in circulation in the province. Since then, one hundred and fifty additional complaints have been received. Of the four hundred complaints, about three hundred and fifty apparently have come from pressure groups. Not one complaint named a specific book; all expressed general dissatisfaction with the amount of salacious literature available, and the desire that something be done about it. All complaints were directed against paper back novels or “pocket books” and, strangely, only two issued from the Metropolitan Toronto area.

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The Attorney-General's Department responded in February, 1956, by appointing an informal committee, with members drawn from various parts of the Province, to study and report on the matter. Following the Committee's first meeting in the spring of 1956, Mr. W. B. Common, the Deputy Attorney-General, visited the United States on a "fact-finding" tour. At the next meeting, convened in the fall of 1957, the Committee found the matter of legal control of obscene literature so complicated that it decided to appoint a research consultant to gather basic data.

The man chosen for the job was Dr. J. W. Mohr, who is trained both as a philologist and a sociologist. Because the submitted complaints were vague, Dr. Mohr circulated four thousand questionnaires to fifteen hundred Home and School groups in the Province. Two main questions were asked: "During the past year, did you see a publication (magazine, book, comic, periodical, etc.) on display which was offensive to you?", and, "During the past year, did you see any publication available for, and in your opinion dangerous to, children? Have you seen any such offensive publication in the hands of your children?" The answers to these questions, together with information gained from Dr. Mohr's other research, will form the basis of a report which should be available in the near future.

Dr. Mohr's report will be organized under three heads: The first will consider the problem generally, with reference to the psychological, sociological and moral effect of salacious literature, and with particular emphasis on the influence of this literature on children; the second will show what allegedly salacious literature people are concerned about; this will include a statistical analysis of the complaints filed with the Attorney-General's Department together with the answers received in reply to Dr. Mohr's questionnaire; thirdly, there will be a review of the publishing industry's attitude to the problem. The wholesalers and distributors of periodicals in Canada are keenly interested in the question because they each keep in stock 1,000-1,500 titles, and, not unnaturally, find it impossible to familiarize themselves with the contents of each book.

Dr. Mohr believes that to exercise control over the distribution of obscene literature the publishing and distributing industry must voluntarily police itself. The Association of Distributors appears to approve this method. The procedure suggested is that upon the receipt of a complaint, the Attorney-General's Department would investigate the allegedly offensive material and issue a report to the appropriate distributor, setting forth the Department's opinion as to the validity of the complaint. The onus is then upon the distributor either to accept that opinion and cease distribution, or ignore it and face possible prosecution. The Attorney-General's Department, which appears to be in favour of preventative forms of control, also favours this plan, since public knowledge that a book is being prosecuted as an obscene work virtually insures a tremendous increase in circulation.

Dr. Mohr feels, in any event, that the influence of salacious literature is overestimated, and that motion pictures and television are capable of much more penetrating and harmful effects. To support this view he states that in three years of youth counselling in this city he has observed innumerable young men indulging in fantasies as a result of motion pictures or television, but only one case where a young man was harmfully influenced by a book. It is also his opinion that pictures are far more harmful than words where obscenity is concerned in that a certain amount of intelligence and imagination is required to derive salacious stimulation from the printed page. Dr. Mohr also feels that the amount of pornography in Canada is less than that available in any other country in which he has resided. But, he warns, in the same way that complete prohibition of liquor led to increased consumption and abuses, a complete ban on literature, from the demonstrably obscene, and on the one hand, to borderline material, on the other, would lead to a thriving black market in this material; the matter for sale would be free from any literary merit whatever, and pornography would become big business. There must be no outright censorship says Dr. Mohr, but rather a voluntary control by the industry, with the co-operation of the Attorney-General.

Although Dr. Mohr felt that some amendment to Section 150 of the Criminal Code might be desirable he did not suggest how extensive it should be. He indicated, however, that the Attorney-General's Department prefers preventative measures since Provincial legislation in this field may well be *ultra vires*. This view is inconclusively indicated in *Attorney-General of Ontario v. Koynok*¹ where the Attorney-General sought an injunction to restrain the publication of some allegedly obscene magazines under the seldom invoked provision in Section 16 of the Judicature Act.² The defendant questioned the validity of this legislation, but since the defendant agreed to cease publication of the offensive material, the Attorney-General withdrew his action.³

The test of what constitutes obscenity seems to be in for no legislative revision. As laid down in *R. v. Hicklin*:⁴

The test of obscenity is this, whether the tendency of the matter charged as 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.⁵

¹(1940) 75 CCC. 100; (1941) 1 D.L.R. 548.

²R.S.O. 1950, c. 190.

³In explanation, a trial was held and the Trial Judge dismissed the action ruling S. 16 (2) (3) (4), of the Judicature Act *ultra vires* as being legislation in relation to criminal law already covered by the Criminal Code. On Appeal the court, without giving reasons and without hearing argument on the constitutional issue, set aside the trial judgment and directed a new trial to determine whether the periodicals fell within the description set out in S. 16. The new trial was discontinued when publication of the material ceased.

⁴(1868) L.R. 3 Q.B. 360.

⁵*Ibid.*, at p. 371.

There appears to be a wide-spread feeling that this definition is not satisfactory⁶, but that to try to legislate a better definition would further confuse the issue.⁷

There is room for improvement in the admission of opinion evidence as to the intention of the publisher and author of a work charged as an obscenity. In the present state of the law, the formulation of an effective defence to the charge is nearly impossible. Section 150 (5) of The Criminal Code⁸ provides that the motive of an accused charged under this Section is irrelevant. The law presumes a man to intend the natural consequences of his act, and as the law now stands, if a person is found to have uttered an obscenity, he will be presumed to have intended to do so. The accused may not call witnesses to say, for example, that a book is well written, for this is rightly held to be irrelevant; certainly the fact that a book manifests good technique is not to say that the same book cannot be obscene. But neither may the accused call opinion evidence that the book has a "message", or relates "an accurate picture of our troubled times". All the accused can do is call evidence that the book in question served the public good, as provided in Section 150 (4) of The Criminal Code. This gives rise to the preposterous vision of an unending line of witnesses, impatient to testify that each of them is a better person for having read the book, or perhaps knows someone else who is.

The American Law Institute, in its Model Penal Code,⁹ has drafted a section defining obscenity, which appears to be an attempt to guide the development of new and more realistic legislation:

207.10 (2) *Obscene Defined: Method of Adjudication.* A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even if the obscenity is latent, as in the case of undeveloped photographs.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience. In any prosecution for an offence under this section evidence shall be admissible to show:

(a) the character of the audience for which the material was designed or to which it was directed;

(b) what the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on behaviour of such people;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in this country;

⁶ See especially R. S. MacKay, *The Hicklin Rule and Judicial Censorship*, 36 Can. Bar Rev. 1, for a discussion of the test found in *United States v. One Book Called "Ulysses"* (1939), 5 Fed. Supp. 182; aff'd. (1934) 72 F. d. 2d, 705.

⁷ *Ibid.*; See too, discussion of American Law Institute, Model Penal Code, Draft No. 7.

⁸ The Criminal Code, Statutes of Canada, 1953-54, c. 51.

⁹ American Law Institute, Model Penal Code, Draft No. 7.

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material.

Expert testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall be admissible.

The effect of such legislation would be to wipe out the test of obscenity established in *R. v. Hicklin*¹⁰ and honoured by ninety years' application. The offence would no longer arise from the tendency of the material to corrupt or deprave the morals of those into whose hands the material might fall, but rather the offence would arise from the appeal of the material itself, without reference to its effect on anybody. Furthermore, the accused would no longer be under a burden to prove that the work served the public good, as is now required by Section 150 (3) of The Criminal Code; instead, expert evidence would be admissible to establish the merit of the work. Also, the motive of an accused would be relevant, in direct contrast to the present Section 150 (5) of The Criminal Code, although the draft legislation goes on to put the burden of proving that the dissemination was non-criminal on the accused, and defines this as:

(a) dissemination, not for gain, to personal associates other than children under sixteen;

(b) dissemination, not for gain, by an actor below the age of 21 to a child not more than five years younger than the actor; and

(c) dissemination to institutions or individuals having scientific or other special justification for possessing such material.¹¹

It will be observed that the whole tone of the proposed legislation is more civilized and tolerant than that of The Criminal Code. Pending some change such as the above in the existing Canadian legislation, it is submitted that the best that can be done is to follow the suggestions of Dr. Mohr. For the present, the suppression of obscene literature can best be carried out by co-operation between the Crown and the publishing and distributing industry, not by arbitrary censorship, but by a reasoned attempt to determine what is obscene and to withdraw it from circulation with a minimum of sensationalism.

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