

# OBSCENITY AND CENSORSHIP RE-EXAMINED UNDER THE CHARTER OF RIGHTS

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## Introduction

Adherence to the concept of parliamentary supremacy in Canada negated the need for the Canadian judiciary to openly engage in a process of balancing conflicting interests. The legislatures and Parliament have traditionally determined which interests are worthy of protection and which interests must be limited. With the proclamation of the *Charter of Rights and Freedoms* legislative supremacy has been reduced, though not extinguished.<sup>1</sup> It is the judiciary who have been given the task of enforcing the guarantees made in the *Charter*. Since none of these rights are absolute, and nowhere are the limitations upon them clearly defined, the courts now face the difficult task of balancing state or societal interests against individual rights.<sup>2</sup> State and societal interests are not mutually exclusive so the court may be balancing one or the other; as well in some instances societal and individual interests may be mutually exclusive. What now surfaces under the *Charter* is a complexity of conflicting and overlapping interests with the courts assigned the role of arbiter.

The complexity of the court's task is apparent in the recent controversy which has arisen in Canada over the introduction of Playboy material on the First Choice pay television channel.<sup>3</sup> When companies began advertising the availability of pay television channels, part of First Choice's drawing card was their announcement of the Playboy weekend programming. This announcement immediately sparked a storm of protest. While First Choice was the focus of the debate, the concerns expressed were much broader than the impact of Playboy weekend programming shown on the First Choice channel. The debate was framed in terms of concern for the impact of "obscene" material on individuals who are exposed to it and the effect of censorship on a democratic society. In this paper the term "obscene" is used to also encompass what is in some articles and treatises referred to as pornography.

Debates of this nature are not new; for centuries mankind was grappled with moral dilemmas arising from fears of the impact of ideas, speech or action on the functioning of society. What is new to Canada, however, is the manner in which the issues arising from the debate must be resolved. In the past, the legislators could have responded to the protestors by enacting laws forbidding the broadcasting of this material, particularly if the protest was made by a majority or a strong minority who had a sufficient political impact. Now any limitations placed upon the dissemination of "obscene" materials must be examined in the context of the freedom of

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1. *Constitution Act, 1982*.

2. *Ibid.*, at s.1. While section 1 makes it clear that all of the rights are subject to limitation, it does not define the ambit of the permissible limits.

3. The debate began in January 1983 and was widely reported in newspapers and by the electronic media across Canada.

expression guarantees in section 2 of the *Charter*.<sup>4</sup> Unless the legislatures or Parliament exercise their override power found in section 33, it is the courts which will determine whether any limitations are valid.<sup>5</sup>

The purpose of this paper is not to extensively probe the pay television issue but rather to use it as the focus for an examination of the "obscenity"-pornography problem in the context of the guarantees in the *Charter of Rights and Freedoms*. As mentioned above, section 2 of the *Charter* guarantees the right of freedom of expression and other media of communication. While "obscenity" may consist of expression or action, although the demarcation between them is often unclear, the primary focus here is on obscenity as a form of expression. How is the court to resolve the issue when the state purports to restrict or ban materials it has classified as obscene?

### The Morality Debate

Central to the question for the courts when grappling with obscenity issues is the interrelationship between law and morality. Should the law be used to enforce moral values? If so, should a consensus be required with respect to the moral value before the law should be utilized or is a consensus necessary to justify legal intervention? Obviously there are no simple answers to these questions. There is no doubt that the law has an important role with respect to enforcement of moral values. For example, few would dispute the law that prohibits the killing of another human being unless there is a justification such as self-defence or a state-imposed death penalty following a fair trial of the accused person. Without enforcement of this prohibition it would be very difficult for a society to function effectively. It is also possible to justify laws which enforce moral values where clear harm would result from an absence of enforcement. When a moral consensus is apparently lacking or the harm is not so apparent the role laws play becomes more obscure and uncertain. It is clear that law should not simply be used to create the moral person. For example, while our religious training may require us to love and honour our parents it would be unsuitable for the law to try to enforce this moral precept. What is not clear is where the boundary exists between the state's use of the law and the responsibility of other societal institutions such as the church or the education system. It is particularly unclear when dealing with obscenity since a moral consensus does not exist, nor is it certain that real harm results to society from the uncensored existence of obscene materials for adults. Yet the courts must draw boundaries pursuant to section 1 of the *Charter*.

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4. *Supra*, n. 1, at s.2 which states:

Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

5. *Supra*, n. 1, at s.33(1) and 33(2) which state:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

This is not, however, a new concern. Society for centuries has grappled with the state's use of law as a tool to solve or ameliorate societal problems such as the existence of obscenity.<sup>6</sup> Despite centuries of debate there is no consensus as to the limits of the use of law as a mechanism to enforce morals. The role of law as it relates to sexual morals has been one of the more controversial and provoking debates about freedom of expression versus the need or desire to protect society from sexual immorality. The most recent debates originated with the ideas of John Stuart Mill, one of the greatest advocates of liberty in recent history.<sup>7</sup> He articulated the "market-place idea" to support the maximum protection of freedom of expression.<sup>8</sup> Mill was fully convinced that the only way truth could emerge was through natural selection in a free market of ideas. In his theory he maintained that individuals would accept the good ideas and reject the bad. Thus in this manner harm would never result from the dissemination of bad ideas because individuals were quite capable of discerning untruths.<sup>9</sup> While Mill's belief in the average individual's ability to separate the "wheat from the chaff" was naive, his suspicion of the repressive tendencies of human nature was very astute, since he was gravely concerned with the nature and limits of power which can be legitimately exercised by society over the individual. He believed that people have an inherent tendency to repress views and ideas that are contrary to their own otherwise it makes them feel insecure. His foundational principle on liberty, which is vital to the debate on sexual morality, reflects this suspicion.

[T]he sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good either physical or moral is not a sufficient warrant.<sup>10</sup>

His theory applied to both speech and action. Thus before the state can interfere with an individual's freedom it must demonstrate that harmful consequences would result from a failure to take such action. Underlying this premise is the assumption that there is a basic right to individual freedom and an individual must be left free to develop into a more valuable person, more valuable to himself and to others; if the state unnecessarily interferes with his liberty this will inhibit his individual development and society will also suffer from the lost potential.<sup>11</sup> Certainly attempting to impose conventional sexual values on all members of society without a demonstration that failure to do so would cause harm would have the effect of inhibition of the development of many individuals whose values were incompatible with the conventional ones. Mill seemed to assume that the

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6. For several recent books which focus on this debate see generally, Richard Wasserstrom (ed.), *Morality and the Law* (1971); Harry Glor, *Obscenity and Public Morality* (1969); Thomas Grey, *The Legal Enforcement of Morality* (1983); Lon L. Fuller, *The Morality of Law* (1964).

7. His theory was articulated most fully in his book *On Liberty* (1869).

8. See *Ibid.*, at 33-106 which is his chapter on the "Liberty of Thought and Discussion" where he fully articulates his theory on the marketplace of ideas.

9. See, e.g., *Ibid.*, at 41-42.

10. *Ibid.*, at 23.

11. See *Ibid.*, at 107-143 where he extolls the virtues of individuality as one of the necessary elements of well-being in any society.

state could play no role in guiding the individual through the use of law to become a better person, such as creating a sexually "moral" person. Presumably this could occur through the "marketplace of ideas", since to allow state action may invite the state to be unnecessarily restrictive and to extend beyond its role in society. During Mill's century, government did not play the expansive role that it does in the twentieth century welfare state. In fact, Mill seemed to regard it as a necessary evil. Expanded state involvement in the lives of individuals today, however, does not by itself justify the use of the law to enforce conventional sexual values.

Interestingly when expanding upon his harm theory, Mill maintains a distinction in the realm of sexual morality between acts done in private and acts done in public.<sup>12</sup> He accepts the basic proposition that some actions would not cause harm when done in private but, if done in public would be offensive to others and therefore may be prohibited. This seems to suggest that he would regard acts that offend others' sensibilities to be harmful, although it is not clear how many individuals would have to be offended. It is enough that a few would be offended or does there have to be a majority? These questions demonstrate that his theory is more complex than appears at first glance. It is not easy to determine what constitutes harm and what degree of harm is required before the state is justified in placing limitations upon liberties. Mill it seems, would require some degree of harm and not simply a mere dislike of the speech or action. Mill assumed in his essay that the interests of society and the state are co-extensive. While the state may have the broadly defined interest of ensuring that society functions effectively, this does not answer the problems of how the internal workings of a society affect the state interest. For example, what influence do the views of a majority or even a strong minority of society have on the actions of the state? What is the state's role vis-à-vis protection of society as a whole? Is it necessarily related to the views of the most vocal, which is very relevant when dealing with sexual values? While Mill left many such questions unanswered, his theory touched off a spark of controversy that was to be rekindled in the middle of the twentieth century.

While Mill wrote his treatise on liberty in 1859, the greatest debate over his harm principle did not surface until the proposed introduction of the Model Penal Code in the United States,<sup>13</sup> and in 1957 in England, with the report of the Wolfenden Committee on homosexuality.<sup>14</sup> The Wolfenden Committee had recommended the repeal of the statute which made homosexual acts, even between consenting adults, an offence. Implicit in the committee's report was the assumption that state interest and majoritarian societal interests are not co-extensive. In their recommendations, the committee observed that the state could only use the criminal law as a tool for the preservation of public order, the protection of the citizen against offence

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12. See *Ibid.*, at 144-180 for a full discussion of his theory concerning the limits of the authority of society over the individual.
  13. The Model Penal Code of the American Law Institute (1962) was in its drafting stage at about the same time that the Wolfenden report was published. For a discussion of the Model Code and morality see, Louis B. Schwartz, "Moral Offences and the Model Penal Code" (1963), 63 Columbia L. Rev. 669. Schwartz's article was published as a companion piece to Louis Henkin, "Morals and the Constitution: The Sin of Obscenity", (1963), 63 Columbia L. Rev. 391.
  14. United Kingdom. Parliament. *Report of the Committee on Homosexual Offences and Prostitution* (1957), Cmnd. 247 (Sir John Wolfenden, C.B.E.).

or injury and the safeguarding of children and other especially vulnerable groups against exploitation.<sup>15</sup> While society does have a role in the general enforcement of morality the state must not use the mechanism of the law to enforce all aspects of morality. In essence, the state should not follow the dictates of a majority of the members of a society but must act only to protect vital interests. The committee emphasized "the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality" concluding that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."<sup>16</sup> The effect of the recommendations would be that the state's role was limited but, members of society would not be precluded from using other mechanisms for enforcement of moral values despite the call for tolerance. The recommendations of the committee and the drafters of the Model Code rekindled the flame of the debate concerning the state's use of law in the enforcement of morality.

In England, Lord Devlin initiated the debate when he delivered the Maccaabaeen Lecture in Jurisprudence, followed shortly thereafter by the publication of his book, *The Enforcement of Morals*.<sup>17</sup> In his book, assuming in his argument that a moral consensus had been achieved, he maintained that there are moral standards in a community which the majority place beyond toleration and impose sanctions upon those who dissent. He disagreed vehemently with the Wolfenden report's assertion that criminal law exists only for the protection of individuals, maintaining that the law must also protect societal institutions and values, otherwise the society would not survive.<sup>18</sup> Included was the requirement that the law concern itself about the morality of its individual members since society may suffer from a failure to do so. He argued that there are no theoretical limits on the state's power to legislate against immorality.<sup>19</sup> While Devlin maintained that there must be tolerance of the maximum individual freedom that is consistent with the integrity of society,<sup>20</sup> he argued that no society can do without "intolerance, indignation and disgust."<sup>21</sup> He used those feelings as society's justification for prohibiting any form of action or speech which invokes those feelings. In his hypothesis he maintained that this intolerance was sufficient justification for limiting the freedom of individuals, there being no need to examine the legitimacy of these moral feelings since society must restrict them to protect itself from disintegration. Underlying his argument is the belief that there are external absolutes of right and wrong which can be discerned by right thinking men; once they have been ascertained then the state has the obligation to enforce those values even without a demonstration that society would be harmed without this enforcement. He seemed to rely heavily upon religious tenants of good and evil although he denied that sin alone justifies legislation. Even if a consensus could be found, is

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15. *Ibid.*, at para. 13.

16. *Ibid.*, at para. 61.

17. Lord Patrick Devlin, *The Enforcement of Morals* (1959).

18. *Ibid.*, at 18.

19. *Ibid.*, at 14.

20. *Ibid.*, at 16.

21. *Ibid.*, at 17.

that alone sufficient justification for the state using law to enforce sexual values? Certainly Mill would have disagreed, as did H.L.A. Hart who wrote in response to Devlin's views.<sup>22</sup> Hart supported a modified version of Mill's original principle that harm must be shown before intervention is acceptable.

Hart maintained that there is no evidence that the preservation of society requires the enforcement of morality as such. According to his thesis, enforcement of morality brings human misery and the restriction of freedom which are evils in themselves.<sup>23</sup> For example, the laws which made it an offence to engage in homosexual activities have left a legacy of pain long after their repeal. Many individuals have been persecuted, fired, ridiculed and made miserable because of their sexual preference. Hart refused to accept the proposition that the preservation of social morality accepted by a majority necessarily outweighs its cost in human misery and deprivation of individual freedom. In his book he castigated Devlin for his views that a change in a society's morality is tantamount to its destruction and therefore it is justified in enforcing its morality,<sup>24</sup> because this did not recognize that a society can change without being destroyed. Furthermore, he rejected Devlin's thesis that there are ascertainable eternal truths. Devlin's theory would also permit the state to enforce conventional sexual norms when actions are conducted in private, even though it could not be shown that harm would result — unless it is harmful to attempt to change societal norms or because it disturbs others when they think of such acts being performed in private.<sup>25</sup> He argued that Devlin failed to recognize that in the realm of morality we are not forced to choose between "deliberate coercion and indifference,"<sup>26</sup> a crucial statement to the analysis of the current issues surrounding the introduction of pay television. While Hart's main thrust is a criticism of the writings of Lord Devlin and the Victorian judge and criminal historian James Stephen, he did support Mill's central thesis that the state's incursions upon the liberty of an individual must be justified and in order to be justifiable there must be a demonstration of harm.

In his analysis, Devlin assumed that there is such a thing as a common morality which every right thinking person approves of and even those who do not approve of the standard would recognize that its enforcement is a social necessity.<sup>27</sup> While this may exist in a utopia or a perfectly homogeneous society, in a pluralistic society such as Canada, it would be difficult to arrive at a consensus as to a common morality pertaining to sexual norms. Furthermore, his theory advocates that the societal interest must, of necessity, override the individual interest, despite the failure to demonstrate such a need. It seems more realistic to argue that since our society operates more on an interest-oriented basis with majorities seeking to impose their views on a minority, or strident and vocal minorities seeking to impose their views

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22. H.L.A. Hart, *Law, Liberty, and Morality* (1963).

23. *Ibid.*, at 83.

24. *Ibid.*, at 50-51.

25. *Ibid.*, at 52.

26. *Ibid.*, at 76.

27. *Supra*, n. 17, at 24.

on the majority, the state has no moral consensus which it can enforce through the mechanism of the law. In such a society the legislators must not bow to the dictates of any pressure group, but must attempt to balance the interests involved and only use the law where harm would result from a failure to protect or limit an interest.

The entrenchment of the *Charter of Rights and Freedoms* places particular emphasis on justification of any limitations on the guaranteed rights. Section 1 requires the government to justify any intrusion upon the guaranteed rights, while the courts bear the responsibility to ensure that the government complies with the guarantees. In essence, two arms of the state must be involved in the process of assessing what values are to be protected and where the balance lies when the interests conflict. Therefore, it can be argued that section 1, with its statements of "demonstrably justified", "prescribed by law" and in a "free and democratic society", embodies an approach similar to that advocated by Mill and Hart. Before any limitation is justifiable it must be necessary to the maintenance of a free and democratic society and thus the state's use of the law to enforce morals can only be justified when there is risk of harm to the society or the state that overrides individual freedom.

In 1979 the report of the British Committee on Obscenity and Film Censorship adopted a version of Mill's harm principle emphasizing that in any recommendation pertaining to censorship the presumption was in favour of freedom of expression.<sup>28</sup> This presumption could only be overruled by overriding considerations of harm that would result from publication of the form of expression. In their report, the committee adopted the principle that the alleged harm must meet the test of proof beyond a reasonable doubt. In addition, if a class of publications is to be banned "the harms have to be ascribable to that class of publications."<sup>29</sup> While those principles are lauded, the ultimate recommendations made by the committee reflect a failure to totally abide by them.

A valuable contribution from the report to the debate, is the assessment of who judges whether harm is caused to an adult by exposure to obscene materials. There was no dispute with respect to Mill's assumption that his principles only applied when dealing with fully cognizant adults. The committee was of the opinion that the consuming adult is the best judge of whether he or she has been harmed. Implicit in the report was the recognition that when the state vests fallible individuals, such as judges, prosecutors, jurors or censorship boards, with broad powers of censorship, it creates despotic arbiters of sexual norms. Then it is the censor boards and not the democratic body that determine what material does not significantly deviate from conventional values. Furthermore, the board does not have to justify its decision, in most instances, except by use of vague, general language. While the committee spoke of censorship as being in the nature

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28. United Kingdom. Parliament. *Report of the Committee on Obscenity and Film Censorship* (1979), Cmnd. 7772 (Bernard Williams).

29. *Ibid.*, at 60.

of a "blunt and treacherous instrument,"<sup>30</sup> nonetheless, they recommended the existence of a board to censor movies. This board would have broadly stated criteria for classifying or completely rejecting the issuance of a license for any film to be shown.<sup>31</sup> In the final analysis, the committee's recommendations did not fully reflect the theoretical principles espoused by them, since they accepted some notion of retaining censorship without the adequate demonstration of harm advocated earlier in the report.

### Defining Obscenity

As of yet the philosophical debates have not resolved the problems associated with censorship of obscene material, nor have attempts to apply them, as demonstrated by the British Committee report. While it may be possible to philosophically analyse the role of law, the courts and the public have never been able to totally rationalize censorship of obscene material with individual freedom. Emotionalism tends to be strong as Lord Devlin recognized and incorporated into his theory. In the face of an emotional response to materials perceived as a threat to conventional sexual values it has been difficult for the courts or the legislatures to evolve a rational system for balancing society's and the state's interest in enforcement of some moral values while still maintaining individual rights. In part, this dilemma stems from the inability to define what constitutes obscenity. Often those who act as censors or sit in judgment upon the censor's actions acknowledge this problem when they admit their inability to precisely define obscenity, but maintain that they know it when they see it.<sup>32</sup> There have been innumerable attempts to define what material falls within the ambit of the terms obscenity and pornography. Terminology such as depraved, vulgar, lustful, dirty and filthy have been deployed by judges and authors — but none of them are capable of precise definition.<sup>33</sup> Obscenity has sometimes been regarded as a lesser evil than pornography. The latter has been considered to be the worst in obscenity by the United States Supreme Court in *Roth v. U.S.*, where it regarded pornography as "utterly without redeeming social importance."<sup>34</sup> Some regard obscenity and pornography as separate,<sup>35</sup> whereas others regard them as co-extensive.<sup>36</sup> For example, the *Canadian Criminal Code* uses the term obscenity and defines it in section 159(8) as:

any publication a dominant characteristic of which is the undue exploitation of sex or sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence should be deemed to be obscene.

30. *Ibid.*, at 56.

31. *Ibid.*, at 151.

32. *See, e.g.*, Stewart J. in a concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, (1962), at 197 said:

I shall not today attempt to define the kinds of material that I understand to be embraced within that shorthand description; and perhaps I can never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

33. *See, e.g.*, Schultz, J.A. in *R. v. Dominion News and Gifts*, [1963] 2 C.C.C. 103 at 107 (Man. C.A.) citing *R. v. Brodie*, [1962] S.C.R. 681 at 704-5, where the majority of the court described obscenity as "dirt for dirt's sake".

34. 354 U.S. 476, (1957), at 484 (hereinafter referred to as *Roth*).

35. *See, e.g.*, Ian A. Hunter, "Obscenity, Pornography and Law Reform" (1975-76) 2 Dal. L.J. 482; David Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment" (1974-75), 123 U. of Penn. L. Rev. 45.

36. *See generally*, Henry P. Monaghan, "First Amendment 'Due Process'" (1969-70) 83 Harv. L. Rev. 518; John Finnis, "Reason and Passion": The Constitution Dialectic of Free Speech and Obscenity" (1967-68), 116 U. of Penn. L. Rev. 222; the Kronhausens in their book *Pornography and the Law* (1959), at 18 describing pornography as "hard core obscenity".



None of the existing definitions are truly satisfactory, nor is it likely that a uniformly acceptable definition can be found since individuals differ with respect to what they consider to be obscene or pornographic. If it were possible to discover a true societal consensus as to a conventional morality, then obscenity might be capable of definition. In Canada, the problem is complicated by the existence of the *Charter*. Since section 2 guarantees freedom of expression, if obscenity is broadly defined and prohibited it may unnecessarily infringe upon the guaranteed right. In this regard, the courts could use a form of the American overbreadth doctrine which requires legislatures to restrict the breadth of the limitation when placing otherwise acceptable limitations on rights.

A recent Ontario court decision accepted this approach when they held that sections 32(a), 32(b), 35 and 38 of the Ontario *Theatres Act* were unjustifiable restrictions on the guarantee of freedom of expression in section 2 of the *Charter*.<sup>37</sup> While the court accepted that some limitations were permissible, they held these provisions were not prescribed by law since there were no criteria for censorship. In other words, the board of censors could refuse to permit films to be shown for reasons which would not be demonstrably justifiable in a free and democratic society. If prescribed by law is interpreted in this manner the results would be similar to those dictated through the use of the overbreadth doctrine. It is certainly relevant when dealing with obscenity and its continuing problem of definition.

What is more important than a perfect definition of obscenity — which appears unattainable — is that a theory of enforcement of morals be developed. To prevent the dangers of emotionalism, obscenity must be dealt with in as rational a manner as possible. Even in the United States, where freedom of expression is considered a preferred freedom, the courts have failed to achieve this rational approach. In fact, it can be argued that the courts failed miserably with their responsibilities in the area of sexual values to the point of being repressive in some cases. In *Chaplinsky v. New Hampshire*,<sup>38</sup> the United States Supreme Court excluded obscenity, as a category, from the protection of the First Amendment. Murphy J. stated:

There are certain well-defined and narrowly limited classes of speech the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or fighting words . . . It has been well observed that they have such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>39</sup>

In the first major decision on obscenity, the Supreme Court affirmed the broad statements in *Chaplinsky*.<sup>40</sup> In *Roth*, the majority stated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." As a result of this, the court concluded that the clear and present danger test would not apply, thus there

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37. *Ontario Film and Video Appreciation Society v. Ontario Board of Censors*.

38. 315 U.S. 568, (1942).

39. *Ibid.*, at 571-72.

40. *Roth v. U.S.*, *supra*, n. 34.

was no need to demonstrate any harmful affects before imposing restrictions on obscene expression. By concluding in advance that obscenity was not worthy of protection the court seemed to be accepting an approach close to that of Lord Devlin because it was supporting state intervention without a showing of any overriding state or societal interest beyond protection of conventional moral values. This approach was a complete antithesis of the courts' general approach when dealing with purported infringements of First Amendment values. In general, the court has narrowly interpreted state limitations in order to protect the interests of individuals. The court normally requires the societal or state interest to be paramount before overriding the individual interest in free speech.<sup>41</sup> However, by adopting this approach, there was no need to balance interests nor to recognize that there were legitimate individual interests in freedom which were infringed by permitting the state free reign to repress obscenity. The test for determining whether anything was obscene, which the court agreed upon in 1973 in *Miller v. California*,<sup>42</sup> had the effect of making the average person and local community standards determined through the wisdom of judges — arbiters of what all individuals would be permitted to say, see or do.<sup>43</sup> This test permits emotionalism to predominate and individual liberties to be crushed beneath the moral concerns of the mythical average person applying community standards. Demonstrative of the lack of a general theory was the Supreme Court's position in *Stanley v. State of Georgia*<sup>44</sup> that the First Amendment protected the simple possession of admittedly obscene material in the privacy of one's own home. This was compatible with the concern demonstrated by the court in the past for the sanctity of the home. However, the courts have refused to limit the state's control of obscene material in the same manner as other areas of protected speech.<sup>45</sup> Thus while it is constitutionally permissible to possess the material the seller of the material may be convicted of an offence. The courts have never satisfactorily explained this inconsistent approach. Part of the dilemma stems from the court's developed principle of privacy, its lack of general principles relating to obscenity and its deviation from its notion of neutral principles of constitutionally by permitting majority or strong minority views to dominate.<sup>46</sup>

Excluding broad categories of expression, in the American manner, from the protection of constitutional guarantees is unacceptable, particularly in light of the failure by the courts and the legislatures to achieve any kind of meaningful definition of obscenity. The effect of such an exclusion in the United States was to distort the meaning of the freedom of speech guarantees, since in general the states were required to justify their regulation of free speech. It also permitted majority or vocal minority views to determine the extent of First Amendment protection. With this approach

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41. See generally, J. Nowak, R. Rotunda and N. Young, *Constitutional Law* (1978), at 711-847.

42. 413 U.S. 15, (1973).

43. *Ibid.*, at 24.

44. 394 U.S. 557, (1969).

45. See, Richard, *supra* n. 35.

46. *Ibid.*, at 80.

the state could restrict access to obscene material without any justification. The courts, however, conscious of the past censorship of classic literature, were compelled to evolve principles that would exclude the classics from the long arm of censorship. This was apparent in *Roth* when the court defined obscene materials as "material which deals with sex in a manner appealing to prurient interest", while the mere portrayal of sex in art, literature, scientific works and similar forms "is not itself sufficient reason by deny materials the constitutional protection of freedom of speech and press."<sup>47</sup> Further confusion resulted with the articulation of this test by the majority since it tended to be vague when attempts were made to apply it. In addition, it has been impossible for the courts to arrive at a consensus on approach, with major dissents in many of the leading cases.<sup>48</sup>

Canadian courts now facing this problem can benefit from the mistakes made by the American court. Prior to the *Charter*, Canadian law had been somewhat similar in approach. In general, following the creation of the definition of obscenity in section 159(8) "of *Canadian Criminal Code*," the courts had adopted a community standards or level of tolerance approach.<sup>49</sup> Prior to the entrenchment of the *Charter*, Freedman J. as he then was, described the standard to be discovered as "[s]omething approaching a general average of thinking and feeling . . ."<sup>50</sup> The courts in Canada were not required to balance the individual right to liberty against the state's and society's concern for the maintenance of moral values. It could be said that the judicial approach in Canada also reflected the theories of Lord Devlin, since the court was looking for a community consensus (although it was not the same kind of consensus that Devlin envisaged). Again the courts experienced all of the difficulties in trying to arrive at a consensus on community standards since there are few appropriate methods for ascertaining this information.<sup>51</sup>

One method was to examine the evidence of experts. Since there are no true experts in obscenity these tended to be persons expert in art if it was an art item, or literature if the material in question was literary.<sup>52</sup> However, the courts in general have not given extensive weight to the testimony of experts.<sup>53</sup> Instead, the courts have remained the ultimate judges of what are community standards as evidenced through the degree of tolerance in the community. Since it is the judge who determines the level of tolerance in many instances, a single judge may act, in effect, as censor for the community where he or she presides.

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47. *Supra* n. 34, at 487.

48. See, e.g., *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. A.G. of Massachusetts*, 383 U.S. 413, (1966) where there were three separate concurring opinions and three dissents; *Ginsburg v. United States*, 383 U.S. 463, (1966); *Jacobellis v. Ohio*, 378 U.S. 184, (1964); and *Manual Enterprises v. Day*, 370 U.S. 478, (1962).

49. See, for a detailed discussion, Morris Manning, *Rights, Freedoms and the Courts* (1983), at 642-664.

50. *Supra*, n. 33, at 116.

51. In *Dechow v. the Queen* (1977), 35 C.C.C. (2d) 22 the Supreme Court of Canada made it clear that the evidence of experts was permissible. In *R. v. Prairie Schooners News Ltd. v. Powers* (1970), 1 C.C.C. (2d) 251 the Manitoba Court of appeal said opinion polls could be used provided proper research techniques were used.

52. See, e.g., *R. v. Delorme* (1973), 15 C.C.C. (2d) 350 (Que. C.A.).

53. *R. v. Cameron* (1966), 58 D.L.R. (2d) 486 (Ont. C.A.) appeal dismissed by the Supreme Court in (1967) 62 D.L.R. (2d) 328, where the court chose to rely on the opinion of several police officers rather than the well known fine art experts who testified for the defence.

54. See, C. Beckton, "Freedom of Expression — Access to the Courts" (1983), 61 Can. Bar Rev. 101, for further analysis.

Under the *Charter*, the Canadian courts must depart from their past approach in relation to obscenity. In this regard the American history will serve as a warning of the consequences of a failure to achieve a rational approach to morals problems. The *Charter*, by virtue of sections 1 and 2, requires a balancing of interests approach. The courts must start by enunciating first principles with respect to the section 2 guarantees of freedom of expression. This includes a theory of protection of freedom of expression which recognizes that it is valuable not only to the democratic process but as an end in itself. Freedom of expression is vital to the development of an individual who must be free to express himself or herself in both the political and social environment. If this is accepted then it becomes clear that limitations placed upon free expression are only justifiable when demonstrated societal or state rights override the need for free expression. It is not then sufficient to say that a mere societal concern for enforcement of conventional morality overrides an individual's right to liberty. There must be a demonstration that harm will result to society or the state if the limitation is not placed upon the right. No right is absolute but, without sufficient justification to abrogate or limit, it should be given full sway.

A test which is reflective of Mill's general thesis would be appropriate under section 1 of the *Charter*. It can be argued that the terms "reasonable limits demonstrably justifiable in a free and democratic society" require the use of a Mill rather than Devlin approach. If one of the foundations of a democratic society is the liberty of its individual members, then that liberty must be fostered and preserved. Thus a limitation is only reasonable and justified if it can be shown harm would result to democratic society or the state; in effect an overriding societal or state interest requires the limitation to be placed upon an individual right. This approach would have the effect of reversing the presumption that obscenity causes harm and would place the onus upon the state to demonstrate harm. It would not be sufficient if the harm was vague or fanciful. It would require a demonstration of real harm that could justify the state's limitation of an individual's rights. A carefully developed foundational principle would have the advantage of being applicable to all attempted limitations of freedom of expression, including obscenity. There can be no legitimate reason for separating obscenity from other aspects of expression, as can be demonstrated in the following discussion of harms.

### Harms

To justify the exclusion of obscenity as a class would require proof that all obscenity causes harm to society or the state interest. Since it is virtually impossible to find an acceptable definition of obscenity a general statement of harm is inadequate reason for excluding an entire category. Furthermore, sexual norms appear to be in a state of flux so the approach must be one that will permit rational analysis in the face of changing community tolerance. Society's current conventional wisdom about acceptable sexual norms should never be a justification for infringing upon individual liberty, unless it can be shown that real harm would result from behaviour that deviates from the conventional. Such an approach ensures that neither the majority nor even a strident minority can force their views upon the remainder of society.

One of the harms that is often paraded by proponents of censorship is that exposure to obscene material provokes the commission of crimes of violence and of a sexual nature.<sup>55</sup> Some proponents of censorship allege that exposure to obscene material causes sexual arousal which may be gratified by the commission of a sex crime or a crime of a violent nature.<sup>56</sup> Even if this exposure *per se* does not lead to a direct commission of crime, the atmosphere created by the availability of obscene material leads to commission of crimes. Often statistics or individual examples are cited in support of this proposition. Usually the latter are cited in the form of the police-found obscene material in the home of the person charged with a crime of a sexual nature.<sup>57</sup> Most of these cases are inconclusive. For one thing, there is no evidence that without exposure to the obscene material the person would not have committed a crime. Other studies have shown that sex offenders did not have any more exposure to obscene material than non-sex offenders.<sup>58</sup> In fact, some studies showed sex offenders were less stimulated by exposure to obscenity.<sup>59</sup> Furthermore, even if a few individuals are driven to commit sexual crimes from exposure to obscenity this is not a sufficient justification for banning exposure for all adults. Individual liberty should not be limited because of the weaknesses of a few members of society. This argument, taken to its logical conclusion, could be used to ban the Bible, since there are documented instances where passages of the Bible have caused individuals to commit crimes or groups to repress others. But few have suggested, in modern times, that the Bible should be censored.

There have been a number of research studies which were undertaken to study the effects of exposure to obscene material. However, the studies are all inconclusive since most take place in a laboratory style environment. They are not necessarily studying those who committed the violent acts or sex acts, but rather simulating conditions of exposure to obscenity.<sup>60</sup> Since it is impossible to accurately simulate responses to exposure to obscenity the results are tenuous at best. As well, the research studies often have conflicting conclusions, perhaps reflecting the bias of the researchers or the manner in which the conditions were set. Some studies have dealt with the effect of mass media on increases in violent behaviour while others have focused on films or movies.<sup>61</sup> Some results tended to show there was an

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55. A number of authors and reports deal with the question of harm caused. See, e.g., Canada. Law Reform Commission. *Criminal Law — Obscenity* (1973), Working Paper 10 (Hon. Patrick E. Hart); United Kingdom. Parliament. *Report of the Committee on Obscenity and Film Censorship* (1979), *supra* n. 28; Burton M. Leiser, *Liberty, Justice and Morals* (1979); Morris L. Ernst, Alan U. Schwartz, *Censorship — The Search for the Obscene* (1964); Robert A. Liston, *The Right to Know — Censorship in America* (1973); Jay E. Daily, *The Anatomy of Censorship* (1973); Norman S. Care & Thomas K. Trelogan (eds.), *Issues in Law and Morality: Proceedings* (1973); Stuart Hampshire (ed.), *Public and Private Morality* (1978); United States. *Report of the Commission on Obscenity and Pornography* (1973), (William B. Lockhart).
56. *Supra*, n. 28.
57. United States. *Commission on Obscenity and Pornography*, *supra*, n. 55, at 191.
58. See, e.g., Gebbard, Gagnon, Pomeroy and Christenson, *Sex Offenders — An Analysis of Types* (1965); R.B. Cairns, J.C.N. Paul, J. Wishner, "Sex Censorship: The Assumption of Anti-Obscenity Laws and Empirical Evidence" (1962), 46 *Minn. Law Rev.* 1009 in which the authors indicate that the effect of exposure will depend upon the circumstances in which they are viewed. See also, the study by Eberhart and Phyllis Kronhauser, *Pornography and the Law — The Psychology of Erotic Realism and Pornography* (1959).
59. See, e.g., United States. Congress. House Committee on the Judiciary. Special Subcommittee on Reform of Federal Criminal Laws (1973), Working Paper no. 1; James G. Wilson, "Violence, Pornography and Social Science" in R.C. Rist (ed.), *The Pornography Controversy* (1975) at 255.
60. See, e.g., *supra*, n. 57 and n. 58.
61. See, e.g., *supra*, n. 55.

effect from exposure to obscene material whereas others show that such conclusions would be difficult to make.<sup>62</sup> On the whole, the evidence of research studies is not an adequate basis for a conclusion that exposure to pornography leads to the commission of crimes of violence.

Statistics are often another weapon used by both sides of the controversy. It is hard to draw concrete conclusions from statistics since it is difficult to correlate any rise in sex or violence related crimes to an increase in availability of obscene materials.<sup>63</sup> There are no adequate studies or statistics which show the kinds and numbers of available obscene material. This absence of statistics stems from the fact that the market for obscene goods is substantially a non-public one. Furthermore, there is not necessarily a correlation between a rise in crimes statistics and a rise in actual crimes. If victims report more crimes this will change the statistics even though the actual incidence of crimes remains static. Following the de-criminalization of obscene material in Denmark, the statistics seemed to indicate a decrease in the number of sex-related crimes.<sup>64</sup> As times passed there was also a dramatic decrease in sales of obscene material, according to the statistics. Since statistics can show a decrease in crime from liberalisation of censorship laws, use of them alone cannot justify condemnation of obscene material.

Another oft-cited harm is that without adherence to common moral standards, society will gradually disintegrate.<sup>65</sup> This argument seems to follow the basic philosophical position adopted by Devlin. Obscene material promotes deviance from the common moral standard which will ultimately lead to licentiousness and moral breakdown. This is without doubt one of the weakest arguments as Hart points out in his criticism of Devlin.<sup>66</sup> Because moral values change does not mean that a society disintegrates. In fact, changing moral values may enhance a society rather than undermine it. To accept the moral disintegration thesis suggests beliefs in eternal truths about moral values. Part of it is also a reflection of the traditional resistance to change in most societies. There is absolutely no evidence to substantiate the argument that society will crumble from its failure to adhere to a common morality.<sup>67</sup> This form of harm is too remote for the court to consider when assessing the potential impact that would result from permitting the sale or distribution of obscene materials. It may be that more permissiveness is beneficial because it permits tolerance of behaviour that deviates from the norm, thereby reducing the anguish of those otherwise condemned because their preferences do not coincide with the norm. Fears of societal disintegration are also premised upon the assumption that the majority of members of society will change their views because of the accessibility of obscene materials. This view expresses a tremendous lack of faith in the ability of

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62. See, e.g., *supra*, n. 57 and n. 58.

63. See, e.g., *supra*, n. 55.

64. See, Kutschinsky, *Studies of Pornography and Sex Crimes in Denmark, Copenhagen* (1970).

65. See generally, *supra*, n. 55. See also, R.C. Rist, "Pornography as a Social Problem -- Reflections on the Relation of Morality and the Law" in Rist (ed.), *The Pornography Controversy* (1975).

66. *Supra*, n. 22 at 69-77.

67. See, Alan Burns (ed.), *To Deprave and Corrupt* (1972). These are edited and abridged versions of the technical reports of the United States Commission on Obscenity and Pornography. They include studies on the origins of some of the anti-pornography fears.

most adult members of society to reject many of the ideas expressed in the obscene material.<sup>68</sup>

Another harm put forward, and this one was strongly urged in the recent First Choice controversy, was that obscene material tends to be degrading to women because it portrays them as objects who enjoy whatever is happening.<sup>69</sup> The proponents of this argument also suggest that this leads to more sexual assaults on women, although there is little evidence to support this proposition. Unfortunately, obscenity may not only be degrading to women but also to the men who consume it and who participate in the creation of obscene material. But is this a sufficient justification for banning it? Much of our advertising tends to put women in a subservient or sexual role, but there is no suggestion that all advertising of this kind should be prohibited. Any attempt to ban this material raises definitional questions such as "who will be the censors?" It is also questionable whether censorship can change views, which is what is required if this attitude about women's sexual role is to be changed. In some ways, censorship may have the opposite effect and promote adherence to the undesired behaviour because of the traditional lure of the forbidden.

One final argument that is often raised is that obscene material has a tendency to cause sexual arousal.<sup>70</sup> Those who express this fear seem to regard sexual arousal in itself as a sin. Even if one could accept that sexual arousal is a sin, that is not in itself a sufficient justification for censorship since the role of law should not be to prohibit people from sinning unless there is real harm to other values that results. Sin seems to be a topic that is best left to the individual and his or her church. Hart and Mill would regard law enforcement to prevent sin as merely enforcement for morality's sake, something that they strenuously opposed as it requires no justification and permits the state to readily infringe upon the liberty of its individual subjects.

The above arguments bring us full circle to the original question. Should law be used to enforce moral values — in particular to enforce sexual morality? In addition, does section 2 of the *Charter*, which guarantees freedom of expression, limit the legislatures' ability to prohibit access to obscene materials?

One question that can be posed initially is "does censorship achieve its stated aim?" The short answer is no.<sup>71</sup> Despite laws prohibiting the sale or dissemination of obscene material, it is readily available. Despite past laws prohibiting homosexual relations they continued to exist. For centuries societies have attempted to "stamp out prostitution", yet a visit to any city in North America or Europe will reveal that prostitution continues to flourish. When the Christians were fed to the lions it didn't stop the spread of Christianity. If anything, it hardened the resolve of those who professed

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68. See, Leiser, *supra*, n. 55 at 181-183.

69. See, *supra*, n. 28 at 88.

70. See, *supra*, n. 28; United States. *Report of the Commission on Obscenity and Pornography*, *supra* n. 55.

71. See, e.g., Hart, *supra*, n. 22 and The British Committee Report, *supra*, n. 28.

faith in Christ. It could be argued that as long as members of society profess a desire to obtain obscene material no law is going to prevent its distribution. The effect of censorship may simply be to increase the non-public sale of obscene material and make it more appealing to those who find the forbidden fruit irresistible. Censorship, because it may result in arbitrary decisions and selective enforcements, creates disrespect for the law.<sup>72</sup> Furthermore, censorship may repress creative ideas in the drive to prevent exposure to what are regarded as destructive material.<sup>73</sup> Censorship can also permit a small group of individuals to impose their preferences on the remainder of society and is therefore destructive of individual rights.

Dislike or even abhorrence of ideas is not in itself a sufficient justification for restraining their dissemination or punishing their occurrence. In many areas, unpopular views are permitted. For example, while many Canadians may deplore the views of avowed communists or even separatists, the law does not repress or punish these views unless imminent harm can be shown. Sexual norms, however, arouse such feelings of passion that society seems less willing to tolerate deviant ideas and actions. Yet if freedom of expression is to continue as a fundamental value separate principles cannot be used simply because the subject matter is one that lends itself to emotionalism. Freedom of expression guarantees are subject only to limits that are reasonable and demonstrably justifiable, which is only possible in a democratic society where other interests override it. It is not sufficient to say the government has made a rational policy choice to place other values or interests above freedom of expression in this instance. The courts must determine if the policy choice was justifiable in the context of the *Charter* guarantees.

To advocate this position is not to condone obscenity but to praise freedom. It is not to support the total unrestrained availability of obscene materials but to suggest that there may be alternatives to censorship of obscene materials which are in the best interests of society as a whole. This approach recognizes the other interests that are affected by the availability of obscene materials. While everyone is entitled to freedom of expression, this requires a balancing of interests to ensure that one person's freedom does not unduly restrict another's freedom. Many people would be offended by the complete availability of obscene materials and may not wish to be exposed to material that offends them. Everyone must accept exposure to events or people or material in their lives that they do not find pleasant or even repellant, since individual views or preferences differ. Society could never remove offensive material from the presence of all who object to it. Freedom of expression, however, does not require uncontrolled dissemination of obscene materials, for several reasons. One is that adults can have free choice to expose themselves to obscene materials without having it available everywhere. Secondly, children are vulnerable and may be in need of protection since their reasoning is not fully developed. While the state cannot guarantee the complete choice of exposure because of varying tastes,

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72. See, Walter Buns, "Beyond the (Garbage) Pale, or Democracy, Censorship and the Arts", Rist (ed.) *supra*, n. 65.

73. *Supra*, n. 55. See also, Rist (ed.) *supra*, n. 65.



it can establish warning signals for those who choose not to be exposed. Simply because there is a legitimate and compelling state and societal interest in protection of children, does not require suppression of adult choice and preference. There must be compromises made so that freedom is given the maximum protection without seriously infringing on other valued rights. It is one thing, however, to prohibit the display of obscene material on a public bus and it is quite another to suggest prohibition on a free choice medium such as pay television. An acceptable compromise might be that pay television may show obscene material, but with restrictions as to the timing and a requirement of warnings to viewers. The sensitivities of some should not override the choice of others when exposure can simply be prevented by turning a television set off or refusing to purchase this completely voluntary medium of communication.

The general premise of an alternate approach is that the state is not justified in regulating for the sole purpose of precluding consenting adults from acquiring, viewing, or reading sexually explicit material. However, the state may regulate with respect to a valid state interest so long as it does not unreasonably interfere with access by adults. In such an approach discretion is the key word. Consenting adults should be permitted to have obscene materials in their homes and have access to it without necessarily inflicting their preferences on those who choose to avoid it. This is compatible with the harm principle since it recognizes other interests in a manner that does not unnecessarily infringe upon freedom of expression.

It may be possible to use zoning by-laws to ensure that shops selling obscene material are located away from prime residential areas and areas where children frequent. Furthermore, the law may forbid window displays to protect children who could be prohibited from entering shops in the same manner that they are barred from access to taverns and lounges, although the American approach would not be acceptable here. In the United States, the Supreme Court has permitted the use of zoning legislation to dictate where theatres showing "adult" movies may be shown.<sup>74</sup> The material need only be adult, not necessarily obscene. In *Young v. American Mini Theatres Inc.*, the court permitted zoning by-laws which specified that adult theatres be located within a specified distance of other theatres or regulated establishments.<sup>75</sup> The court, while permitting use of the by-laws, emphasized that the theatres could not be barred simply because they were showing adult movies and no attempt must be made to suppress ideas. Unfortunately this approach opens a Pandora's box since the location of a theatre is determined by what it plans to show. Since some movies may be adult even in a regular theatre this creates a nightmare of classification. It would be more desirable to have a classification system for the sole purpose of alerting viewers and preventing children from being exposed to obscene material without parental guidance. This still requires decisions for the purposes of setting classifications but it has the benefit of permitting access by all

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74. *Young v. American Mini Theatres Inc.*, 421 U.S. 50, (1976). See also, *In Paris Adult Theatre I v. Slaton*, 413 U.S. 493, (1973).

75. *Young v. American Mini Theatres Inc.*, *Ibid.*

adults, and at the same time protecting children and adults who do not wish to be exposed to adult materials.

While open access is preferable this does not mean that all acts are permitted. Few would suggest that "snuff" movies or movies that sexually exploit children or advocate harm to others should be permitted. These can be attacked, however, at the source by applying murder laws to those who make "snuff" movies and special laws aimed at protection of children to those that would exploit children. In either situation the harm test would be met and the state would be justified in preventing such behaviour. These measures are merely examples of possible alternatives that are less drastic than censorship and are not meant to be an exhaustive list but simply to raise possibilities for future consideration.

There are other ways of dealing with obscenity if segments of society disapprove. Since everyone has the right to freedom of expression each person or groups of individuals are free to carry out campaigns which condemn the sale or publication of obscene materials, pointing out to the listeners what is inherently wrong with the ideas expressed in them. Women's groups can lobby against organizations that seek to exploit women or to treat them as objects. This approach may be far more effective than censorship laws and certainly what Mill envisaged occurring in his "marketplace" of ideas. To censor obscenity would not change the negative approach taken by many to women's role in society. Society must be reeducated through the schools, churches etc. as to the role of women and the inherent worth and dignity of each individual. If that can be accomplished, there should be no need to fear the adverse affects of obscene material. If this is a common portrayal of obscene material it must, to a certain extent, reflect societal views. To strike out obscene materials may not resolve the problem but merely eradicate one element of it while unduly restricting freedom of expression. This restriction on free expression may be too high a price to pay.

### Conclusion

Law and morals have been the subject of discussion for centuries. Disagreement is particularly prevalent where it relates to the sexual morality of a society. Sexual values tend to be fraught with emotionalism and irrationalism and where society has traditionally been tolerant in other areas of expression, it has been particularly intolerant with respect to sexual values. In the past, the Canadian courts have left policy choices to the legislatures. With the adoption of the *Charter*, these policy choices must be assessed in the context of the guaranteed rights contained therein.

Freedom of expression is a right that is fundamental to our society. Limitations that are placed upon it should be justified by overriding harm to other interests as advocate by Mill and Hart. Courts in the United States have traditionally followed this approach when interpreting First Amendment values, however, they have made substantial departures from first principles when interpreting limitations placed by obscenity legislation. The court departed from their harm principle and adopted early the approach that obscenity was constitutionally unprotected speech. As a consequence, obscenity regulation has been complex and in many ways irrational and inconsistent.

The Canadian courts must re-examine the entire obscenity controversy and evolve first principles that will apply no matter what category of speech is in question. These principles should give a preference to freedom of expression values because they are fundamental to our democracy and should only permit overriding harm to other interests to prevail. Under this approach, adults would have free access to obscene materials, but not necessarily in the location of their choice when they seek access outside the privacy of the home. Instead of censor boards, classification boards would be justifiable for theatres and even for television. If classifications are established, adults who have been warned in advance can choose whether to see a film or television movie. It prevents children from exposure to obscene material in theatres where parental control may not be adequate, and it permits the parents to make such choices in their homes. Magazines, books and sexual aids could be available in stores, but window displays could be limited. Liquor is controlled through regulations which control access to minors but still permit free adult choice. Similar reasons apply to obscenity. After all, in most instances there is no demonstration that obscenity is any more harmful than alcohol.

