St. John-Stevas: Obscenity and the Law

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In this study on literary obscenity and the law in England the author has successfully linked his two interests in law and literature at their most significant point of impact today. Here an appreciation of the
importance of freedom to good literature is combined with an understanding of the social interests sought to be protected by the law of obscenity. A stimulating historical study of the periods when literary freedom was threatened in England provides a revealing background for the author's exposition of the development of obscenity law. He analyzes the difficult problems and objectionable features of the English law as currently administered, and proposes legislation designed to permit repression of writing aimed at commercial exploitation of sex without interfering with serious and creative writing.

Chapter VIII on the current Irish censorship board with power to ban books points out the methods and results that seem almost inevitable when a single board undertakes such a task, whether in the exercise of governmental power or private pressure through lists of banned books. The Board's secretary screens complaints and sends about fifty books monthly to the Board members, first marking the objectionable passages. A resigning Board member protested: "It is nearly impossible to report on general tendency after reading the marked passages. Even when one reads the book through afterward, one is under the influence of the markings. There is another reason. Here I speak for myself only. It is so terribly easy to read merely the marked passages, so hard to wade through the whole book afterward." (p. 2) And, as the author points out, it would be impossible for unpaid Board members with other full-time occupations to read fifty books monthly. The necessary result is that books are banned on the basis of marked passages, even though the law requires the Board to base its decision on the general tendency of the book. It is not surprising that, as a consequence, among the four thousand banned books are those of four winners of the Nobel Prize for literature and nearly every Irish writer of distinction. An Irish critic has labeled the Board's banned list "Everyman's guide to the modern classics." (p. 2)

The greatest immediate interest in this book will likely be its analysis of the problems of English law, and the proposal of the Herbert Committee, of which the author was a member, for modification of the law. Probably the most significant change proposed is to substitute intention to corrupt, or a recklessness with advertence to the corrupting consequences, for the much broader and more vague tendency to corrupt of the Hicklin rule. The author attacks the assumption of the English courts that proof of intention to corrupt is not necessary for conviction in obscenity cases. Despite his extended and well-documented argument that the tendency rule is undesirable on policy grounds and inconsistent with basic common

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2 The proposal is summarized in the Obscene Publications Bill reproduced at pp. 208-216 and introduced into the House of Commons in 1955. The bill lapsed with the dissolution of Parliament in May 1955.
law principles, it is so firmly established both in England and America that it is likely to be dislodged only by legislation such as the Herbert committee proposed.

Underlying the author's proposal to substitute intention for tendency is his belief that the state should interfere only with what he calls a "pornographic book," which he considers "easily distinguished from an obscene book": "A pornographic book, although obscene, is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac. An obscene book has no such immediate and dominant purpose, although incidentally this may be its effect. A work like Ulysses certainly contains obscene passages, but their insertion in the book is not to stimulate sex impulses in the reader but to form part of a work of art." (p. 2) This distinction may be a useful device to explain the author's views but to distinguish between pornography and obscenity is not particularly useful as a legal concept. Would it not be better to limit the undefinable term "obscenity" to those matters that violate the standards of the law? This is really what the committee does when it avoids the term pornography in its proposed statute but incorporates the author's idea by making the publication of any "obscene matter" an offense only if the accused has the requisite intent to corrupt or is reckless as to the corrupting effect of the obscene matter.6

The author denies that his proposal to make intention to corrupt the test of guilt would be unworkable. He would allow the jury to determine the intention by considering, among other matters, the general character and dominant effect of the book, the general character of the accused and the nature of his business, testimony by critics as to the book's literary qualities, and testimony of the accused as to his intention.6 If the character of the book, or of the accused's business, or the manner of sale and distribution belied his profession of innocent intent, the jury would be free to find the necessary guilty intent or recklessness. But today in England it is not even admissible for an author or publisher to testify concerning his intention or purpose. (p. 153) By contrast, in America the courts are gradually recognizing that an author's purpose may be a relevant, though not a conclusive, factor in determining guilt of obscenity. Here the reasoning appears to be, not that intent to corrupt is necessary for guilt, but that such intent readily establishes guilt, while sincerity of purpose is an important factor in an otherwise close case. Usually the author's purpose is inferred by resort to the book itself and to the testimony of expert

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3 Pp. 130-150. But for another English view seeking to explain the Hicklin rule on the basis of intention and recklessness, see G. E. Hall Williams, "Obscenity in Modern English Law," 20 LAW AND CONTEM. PROB. 630 at 635 (1955).
5 Section 1 of Obscene Publications Bill, p. 212.
6 P. 140. See Section 3 of Obscene Publications Bill, p. 213.
witnesses, but in a few recent cases authors themselves have been permitted to testify concerning their objects and purposes.\footnote{Lockhart and McClure, “Literature, the Law of Obscenity, and the Constitution,” 38 MINN. L. REV. 295 at 350 (1954); Lockhart and McClure, “Obscenity in the Courts,” 20 LAW AND CONTEM. PROB. 587 at 606 (1955).}

A second major change proposed by the author and the Herbert Committee is to make evidence of literary or artistic merit relevant in determining whether a book is obscene, and to make expert evidence admissible for this purpose. The proposed statute classifies opinion evidence on literary and artistic merit as admissible along with opinion evidence on the “medical, legal, political, religious or scientific character or importance” of the book.\footnote{Section 2(b) of Obscene Publications Bill, p. 213.} In England courts have sometimes admitted evidence on the scientific value of a book but have consistently excluded as irrelevant expert evidence on literary or artistic merit. (pp. 153-155) The author would thus achieve by statute a change that is gradually taking place in this country by judicial decision.\footnote{Lockhart and McClure, “Literature, the Law of Obscenity, and the Constitution,” 38 MINN. L. REV. 295 at 347 (1954); Lockhart and McClure, “Obscenity in the Courts,” 20 LAW AND CONTEM. PROB. 587 at 605 (1955).} This is, of course, more than a procedural proposal relating to evidence. It is a fundamental change, which would make the literary quality of a book the deciding factor in many cases.

A third proposed change would provide that the general character and dominant effect of the work must be corrupting.\footnote{Sections 2(a) and 3(b).} The purpose here is to eliminate the danger that a book will be considered obscene because of isolated passages, rather than to consider its effect as a whole. (pp. 134-136) In prosecutions the present English practice is to consider the book as a whole, but in destruction orders under the Obscene Publications Act recent cases have continued to approve the condemnation of a book on the basis of isolated passages. (p. 136) The proposed change would bring the law of England into harmony with the prevailing view in this country.\footnote{Lockhart and McClure, “Literature, the Law of Obscenity, and the Constitution,” 30 MINN. L. REV. 295 at 345 (1954); Lockhart and McClure, “Obscenity in the Courts,” 20 LAW AND CONTEM. PROB. 587 at 602-604 (1955).}

A fourth change would require consideration of the audience for which a book was intended. In America the growing tendency is to consider the intended audience in determining the probable effect of the book upon its readers. Under the current American modification of the Hicklin rule, only the normal adult reader is considered in the absence of a special audience.\footnote{Lockhart and McClure, “Literature, the Law of Obscenity, and the Constitution,” 30 MINN. L. REV. 295 at 340 (1954); Lockhart and McClure, “Obscenity in the Courts,” 20 LAW AND CONTEM. PROB. 587 at 600-602 (1955).} Indeed, under a recent Supreme Court decision\footnote{Butler v. Michigan, 352 U.S. 380 (1957).} only the normal adult reader can constitutionally be considered when a book designed for the general reading audience is sold to adults. If the intended audience
is a special one, made up, for example, of youth, it is likely the courts will still be permitted to consider the probable effect upon the intended audience. The proposed English statute specifies expressly that, in determining obscenity, evidence should be considered as to the intended or probable audience, and that the intent must be to corrupt that audience.\textsuperscript{14}

Lawyers concerned about the current wave of censorship in this country will find this book informative and helpful, both in its historical material and in its analysis of the problem. In addition, it should be heartening to know that able English lawyers are seeking to grapple constructively with the same problems that confront us here. Indeed, the similarity of our problems is dramatized by the author's proposal to include within the obscenity statute any matter that "unduly exploits horror, cruelty, or violence, whether pictorially or otherwise," whether or not related to any sexual content.\textsuperscript{15} The horror comics have arrived in England.\textsuperscript{16}

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\textsuperscript{14} Section 1 and 2(c) of Obscene Publications Bill, pp. 212, 213.  
\textsuperscript{15} Section 4 of Obscene Publications Bill, p. 213.  
\textsuperscript{16} In 1955 a statute was enacted dealing with this problem. For details see Williams, "Obscenity in Modern English Law," \textit{20 Law and Contem. Prob.} 630 at 643 (1955).