The Evolution of Obscenity Standards in the Common Law World

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In much the same way plant and animal species evolve to select traits most beneficial to their continued survival, legal standards must adapt to societal changes to maintain relevance. Thus, to understand how the law in a particular area changes over time, it is advantageous to view it as an evolutionary process. While this approach would be useful in understanding the evolution of the law in any area in the common law world, obscenity law serves as an exemplar of this. Judges (through common law) and legislators (through statutory law) have constantly struggled to find a proper standard for defining obscenity. Modifications and transformations of standards for defining obscenity have proliferated since the genesis of the concept,[1] through the development and widespread adoption of the Hicklin test,[2] and the creation of modern approaches, many based on the concept of community standards.[3]

In evolutionary biology, there are four mechanisms of evolutionary change, each of which has parallels in the development of legal standards: mutation, migration, genetic drift, and natural selection. Mutation occurs when there is a change in the genetic material of an offspring causing it to differ in some way from its parents. In the law, standards mutate each time a judge makes an alteration, however small, to extant case law. As with changes in animal species, significant change occurs primarily as a culmination of many small changes. However, a significant mutation can occasionally facilitate major change in a short period of time often through a landmark decision, overturning a key precedent, or otherwise introducing a dramatic change in the law. Migration involves the movement into one population of individuals from a different population with different characteristics. This occurs in common law when a court in one jurisdiction borrows from decisions of another jurisdiction. Genetic drift refers to changes that occur from one generation to another due to purely random factors that prevent parents with one set of characteristics

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1 While specifically dealing with a breach of the peace involving indecent exposure, Manchester identifies the case of *Le Roy v Sedley*, 1 Sid 168 (1663), as 'the first step on the way towards the recognition of obscene publication as a common law offense.' Manchester, C (1991) 'A History of the Crime of Obscene Libel' (12) *Journal of Legal History* 36 at 37.

2 *R v Hicklin*, L.R 2 Q.B. 360 (1868).

3 See eg *Roth v United States*, 354 U.S. 476 (1957); *Miller v California,* 413 U.S. 15 (1973); *R v Brodie,* [1962] S.C.R 681; *R v Butler*, [1992] 1 SCR 452.

from producing as many offspring as parents with different characteristics. Again, legal change contains an analogous situation. If we consider precedents to be the parents of future decisions, then the tendency for some precedents to be preferred over others by future courts, despite great similarities among the parents, represents the legal equivalent of genetic drift. Finally, natural selection is the process by which environmental factors cause certain traits to give some individuals in a population an advantage over others. The advantages lead these individuals to survive longer, thereby increasing their probability of passing their genetic material to future generations. Similarly, courts choose to rely upon those precedents consistent with their views of what is most acceptable to the standards of society (oftentimes the standards of society's elites) or those best aligned to accommodate shifts in the political environment.

Having provided explanations of the core concepts necessary to understand changes in obscenity law over time through an evolutionary framework, this article proceeds in four sections. First, a discussion of the genesis of the common law crime of obscenity is provided, tracing its development in the British common law courts in the 17th and 18th centuries and subsequent adoption in the US courts through the mechanism of legal migration. The next section focuses on the first significant mutation in obscenity law in *R v Hicklin* and its impact on the development of core definitions and doctrines in this area in Britain, the US, and Canada. The third section looks at the shift away from *Hicklin* in the US and Canada in the 20th century as these countries developed their own unique subspecies of obscenity law through the four evolutionary mechanisms discussed above. Finally, the article concludes with a note regarding expectations of future changes in this legal area.

THE GENESIS OF A COMMON LAW STANDARD FOR OBSCENITY

Traditionally in the UK, issues involving question of morality were primarily within the jurisdiction of the ecclesiastical courts.[4] This began to change in the 17th century.[5] In *Sedley's* case, the Court of the King's Bench declared that it was the 'custos morum de touts les subjects le Roy.'[6] The case involved an incident where Sedley exposed himself to a group of people on a public street from a balcony and proceeded to throw urine filled bottles at the crowd while shouting profanities.[7] In holding Sedley guilty for a breach of the peace for a offense against the public morals, the decision could have ushered in a sea change in the use of the common law as a weapon against obscene actions and even obscene publications, yet later courts interpreted the decision in a rather limited fashion focusing on the specifics of Sedley's actions as assault.[8]

[4] Manchester 'History' supra note 1.

[5] Robertson, G (1979) *Obscenity: An Account of Censorship Laws and their Enforcement in England and Wales* Weidenfeld and Nicolson at 21.

[6] Sedley supra note 1 at 168.

[7] As English courts did not have an official reporter, the specific facts of the cases were reported differently in the two most commonly cited reports of the case. In Sedley, the description of the incident was rather vague with few details ('monstre son nude corps in un balcony in Covent Garden al grand multitude de people & la fist tiel choses & parle tiel parolls &c.'). Another reporter provided a bit more detail, stating that the accused engaged in 'throwing down bottles (pist in) vi & armis.' *Sir Charles Sydlyes Case*, 1 Keble 620 (1663).

[8] See *R v Read*, Fort. 98 at 99 (1708) and Justice Fontescue's comments in *R v Curl*, 2 Str 788 at 791 (1727). However, in *Curl*, the Court downplays this focus, calling the use of force 'but a small ingredient in the

By shifting moral crimes to the common law courts, *Sedley* exists as the progenitor of modern obscenity law despite not directly defining or even explicitly categorizing certain behaviours or items as obscene. Yet, after *Sedley* obscene literature remained a 'moral question properly cognizable only by ecclesiastical, and not the common-law, courts' for many years despite a tradition of early censorship by the Star Chamber of books deemed 'blasphemous or heretical, [or] seditious or treasonous.'[9] The earliest case in which a major common law court dealt with the question of whether obscene literature constituted a libel came in 1699 in *R v Hill*, where Hill was indicted for the publication of obscene poems 'tending to the corruption of the youth.'[10] In the course of his trial, the defendant fled leaving the outcome somewhat inconclusive and limiting its impact,[11] although the Court of the King's Bench in *Curl* appears to have accepted the argument of the Attorney-General that Hill's actions implied that his counsel thought him guilty of a libel.

As late as 1708, there remained doubt in the English courts over whether obscene publications represented an indictable offense under common law. The first significant mutation in obscenity law came in the case of *R v Read*.[12] Here the Court of the Queen's Bench heard the appeal of an indictment for obscene libel for the printing and publication of *The Fifteen Plagues of a Maidenhead*. While rather tame by modern standards, this collection of poems was written from the perspective of a female virgin decrying her continued virginity and discussing her desire for, and fantasies about, sexual relations. In granting Read's appeal, the Court used two complimentary streams of reasoning. First, both Lord Chief Justice Holt and Justice Powell found that there existed no law or precedent to support the punishment. In doing so, they ignored *Hill* and distinguished *Sedley*, with Powell specifically noting that *Sedley* involved more than 'shewing his naked body in the balcony,' considering it vi et armis as 'he piss'd down upon the peoples heads.'[13] Second, Powell asserted that a libel required a specific target, stating that while the material in question was 'bawdy stuff,' it could not be charged as a libel as it 'reflects on no person, and a libel must be against some particular person or persons, or against the Government.'[14] It is important to note that the Court in *Read* did not express acceptance of this type of material, nor did it imply that this material was afforded any particular protection under the law. Rather, the Court's reasoning in *Read* was based more on a limited view of its own role. Justice Powell made his distain for the material in question clear noting that 'There is no law to punish it, I wish there were, but we cannot make law; it indeed tends to the corruption of good manners, but that is not sufficient for us to punish.'[15]

While *Sedley* was in many ways responsible for creating a foundation for future criminalization of obscene materials, the mutations occurring through the muted impact of *Hill* and the limited reading of *Sedley* in *Read* stifled evolution in this area. It took more than 60 years before the Court of the King's Bench in *R v Curl* formally recognized obscene

judgment of the Court.' Curl at 792.

9 *United States v 12 200 ft Reels of Super 8MM Film*, 413 U.S. 123 at 134-135 (1973) (Douglas, J., dissenting).

10 Mich. 10 W 3 (1699).

11 See Manchester 'History' supra note 1.

12 *Read* supra note 8 at 99.

13 Ibid (Powell's reference to the specifics of Sedley's actions may be somewhat incorrect due to the differences in how the facts of the case were stated by the two reporters).

14 Ibid.

15 Ibid.

libel as a common law offense.[16] *Curl* involved the publication of an English translation of the French book *Venus in the Cloister or the Nun in her Smock*, described by one modern historian as being among the most sexually explicit books available in Britain at that time.[17] The arguments before the Court centred over whether the decision in *Read* should be followed, placing punishment within the jurisdiction of the ecclesiastical courts, or if *Sedley* should be read to imply that any action against religion or morality can be viewed as a breach of the peace even absent the use of actual force.[18]

In accepting the second argument, the Court took a step that the *Read* Court was unwilling to make. Rather than taking a limited view of its own authority, the Court expanded on its role as the 'censor morum of the King's subjects.'[19] Reasoning that the publication of obscene materials could be punished at common law, as 'an offence against the peace, in tending to weaken the bonds of civil society, virtue, and morality.'[20] Moreover, to further clarify the demarcation from past precedent, the Court noted in its unanimous decision that 'if *Read's* case was to be adjudged [again], they should rule it otherwise.'[21]

Curl represents a case of genetic drift in the evolution of a standard for defining obscenity. Abandoning the logic of *Read* in favour of an expansive reading of *Sedley*, the Court significantly impacted the direction of obscenity law's future evolution. Moreover, unlike *Read* where the Court discussed the danger of obscene material to society but held itself powerless to offer a remedy, the *Curl* Court based its reasoning largely on its self-appointed role as censor morum. *Curl's* focus on the societal consequences of the material at issue had a massive impact in the courts of Britain and in early US state courts in expanding the role of courts to include a responsibility for moral policing, yet the decision provided little guidance in terms of what standard was to be used for determining whether something was obscene. This task was left to future courts and led to a diversity of outcomes based in large part on the value judgment of individual judges. For example, in *R v Gallard*, the Court cited *Curl* in quashing an indictment contra bonos mores against a woman 'for running in the common Way naked down to the Waist'[22] with the sole justification for that decision being that 'nothing appears immodest or unlawful.'[23] Conversely, the Pennsylvania Supreme Court adopted the reasoning from *Curl* in an 1815 case upholding a criminal conviction for charging individuals to view an indecent picture.[24] The Pennsylvania Supreme Court focused heavily on the role of the common law in protecting public morals, citing *Curl* in announcing that,

> where the offense charged, is destructive of morality in general; where it does or may affect every member of the community, it is punishable at common law [...] The corruption of the public mind in general, and debauching the manners of youth in particular by lewd and obscene pictures exhibited to view, must necessarily be

[16] Some references to this case spell the name Curll. However, Curl is the spelling used in the most commonly cited report of the case, so that is what is used herein.

[17] Lyons, C (2012) *Sex among the Rabble: An Intimate History of Gender and Power in the Age of Revolution,* Philadelphia, 1730-1830 University of North Carolina Press at 131.

[18] Manchester 'History' supra note 1 at 38-40; Robertson *Obscenity* supra note 5 at 22-24.

[19] *Curl* supra note 8 at 792.

[20] Ibid at 791.

[21] Ibid.

[22] W. Kel. 163 (1733).

[23] Ibid.

[24] *Commonwealth v Sharpless*, 2 Serg. & Rawle 91 (1815).

> attended with the most injurious consequences, and in such instances Courts of Justice are, or ought to be, the schools of morals.[25]

Other decisions from US state courts in the early part of the 19th century adopted the same logic used in *Curl* and *Sharpless* with respect to a common law authority to punish crimes against the public morality and in viewing courts as schools of morals or as moral censors. The Massachusetts Supreme Court in *Commonwealth v Holmes*[26] and *Commonwealth v Allison*[27] held that obscene printing was an offence at common law. In a clear example of legal migration, the *Allison* Court explicitly relied on both *Curl* and *Sharpless* as authorities. Additionally, while not specifically citing *Curl*, an early case from the Supreme Court of Judicature of New York also echoed its sentiments in upholding a conviction against an individual for publicly shouting, 'Jesus Christ was a bastard, and his mother must be a whore.'[28] Explicitly declining to reject other relevant British precedents, the Court declared that 'We stand equally in need, now as formerly, of all the moral discipline, and of those principles of virtue, which help to bind society together.'[29]

These decisions opened the door for more vigorous attempts to prosecute individuals for printing, publishing, and selling pornographic or indecent materials. This, combined with a movement among some elites in British society to promote greater morality in society,[30] increasing literacy rates, and a 'secularization of moral values' among the masses,[31] provided fertile ground for the Society for the Suppression of Vice and the Encouragement of Religion and Virtue (hereinafter: Vice Society) that was founded in the early 19th century. The Vice Society engaged in a systematic campaign against the printing and selling of obscene materials, among other things.[32] As it was common at the time for aggrieved private parties to bring prosecutions under common law,[33] the Vice Society used this as its primary vehicle to achieve its goals.[34]

While the courts gave the Vice Society many victories during the first half of the 19th century, they still failed to provide a functional definition of obscenity. Moreover, Parliament failed to add significant clarity on the matter. Upon discovering the ease and affordability with which obscene material could be obtained, Lord Campbell pushed Parliament to adopt the Obscene Publications Act of 1857.[35] Consistent with Victorian era morality, Lord Campbell 'declared [obscenity] to be a "disgrace to the country" and

[25] Ibid at 103.
[26] 17 Mass. 336 (1821).
[27] 227 Mass. 55 (1917).
[28] *People v Ruggles*, 8 Johns. 290 at 292-293 (1811).
[29] Ibid at 294. See also *Knowles v State*, 3 Day 103 at 108 (Connecticut Supreme Court 1808) holding that 'Every public show and exhibition, which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law.'
[30] See Manchester, C (1981) 'Obscenity Law Enforcement in the Nineteenth Century' (2) *Journal of Legal History* 45.
[31] Alexander, JR (2008) 'Roth at Fifty: Reconsidering the Common Law Antecedents of American Obscenity Doctrine' (41) *John Marshall Law Review* 393 at 427.
[32] Robertson *Obscenity* supra note 5 at 28; Manchester 'Law Enforcement' supra note 30 at 45-47.
[33] Alexander `Roth at Fifty' supra note 31.
[34] The Vice Society was quite aggressive in this, bringing 159 prosecutions (with all but five successful) between its founding in 1801 and 1857. Robertson *Obscenity* supra note 5 at 26-27; Manchester 'Law Enforcement' supra note 30 at 47.
[35] 20 & 21 Vict. c. 83 (1857).

proclaimed that it was "high time that an example should be made."'[36] The Act provided police with greater powers of search and seizure combined with the authority to destroy obscene materials they confiscate.[37] Police, encouraged by the new powers and public support thereof, built on the successes of the Vice Society and engaged in numerous raids of shops dealing in obscene materials in the years immediately following the Act's passage.[38] This Act and its impact provide 'a clear example of that recurrent Victorian pastime — the attempt to legislate morals.'[39] Moreover, it exemplified the preference for leaving the definition of obscenity to the ad hoc moral judgment of the evaluator rather than to some more objective standard.

Despite the fact that this early obscenity jurisprudence was in many ways 'confused and often ludicrous,'[40] by the end of the 1850s obscenity in British and US case law had reached a period of stasis. The decisions following *Curl* had introduced some minor mutations, but they had universally adopted the general notion that publications could be deemed an obscene libel if the material constituted an injury to public morals and that courts played a key role as guardians of that morality. However, still missing at this point was the lack of any sort of test for, or definition of, obscenity that could be applied in future cases beyond a subjective assessment of a given material's threat to virtue or morality. This was to be the next step in the evolutionary process.

R V HICKLIN AND THE FIRST COMMON LAW DEFINITION OF OBSCENITY

In the evolution of plant and animal species, long periods often pass with little change. These periods, or equilibria, are occasionally interrupted by punctuations where new species evolve.[41] Applying this theory to the domain of public policy, Baumgartner and Jones observe that the policy process is defined in a similar way with relatively long periods of stasis interrupted occasionally by significant change.[42] Similarly, this theory has been applied to shifts in legal policy.[43] In the evolution of obscenity law, no single case better exemplifies such a punctuation than the 1868 decision of the Court of the Queen's Bench in *R v Hicklin*.[44] In contrast to the approach taken in *Curl* and its progeny focusing on the relationship between the material in question and its threat to religion, morality, or the King's peace, Chief Justice Cockburn's opinion in *Hicklin* provided a seminal definition of obscenity that would quickly migrate throughout the common law world beginning its evolution into a common ancestor for all the modern subspecies of obscenity law in place in the countries of the common law world today.

[36] Manchester, C (1988) 'Lord Campbell's Act: England's First Obscenity Statute' (9) *Journal of Legal History* 223.
[37] Robertson *Obscenity* supra note 5 at 28-29; Manchester 'Law Enforcement' supra note 30 at 50.
[38] Ibid at 51-52.
[39] Roberts, MJD (1985) 'Morals, Art, and the Law: The Passing of the Obscene Publications Act, 1857' (28) *Victorian Studies* 609 at 611.
[40] McKean, WA (1965) 'The War against Indecent Publications' (1) *Otago Law Review* 75.
[41] Gould, SJ and Eldredge, N (1972) 'Speciation and punctuated equilibria: an alternative to phyletic gradualism' in Schopf, T. (ed) (1972) *Models in Paleobiology* Freeman Cooper 82.
[42] Baumgartner, F and Jones, B (2010) *Agendas and Instability in American Politics* (2nd ed) University of Chicago Press.
[43] Robinson, R (2013) 'Punctuated Equilibrium and the Supreme Court' (41) *Policy Studies Journal* 654.
[44] L.R 3 Q.B. 360 (1868).

The case itself dealt with a prosecution for the publication of an anti-Catholic pamphlet containing detailed accounts of 'sexually suggestive questions allegedly asked of young women in the confessional.'[45] The disposal of this matter was rather simple with the Court finding the material clearly obscene and punishable by law irrespective of the defendant's intent. Unlike many prior cases, the *Hicklin* Court avoided basing its decision on its own moral judgment. Instead, it relied on the reasoning that the material was obscene under the Obscene Publications Act of 1857 and the publisher was guilty regardless of intent. The lasting significance of the decision came from obiter dicta where Cockburn provided the first definition of obscenity in English jurisprudence: '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.'[46] Commonly referred to as the *Hicklin* test, this standard became the dominant lens through which nearly all common law courts around the world would view obscenity for nearly 100 years.

The emphasis of the *Hicklin* definition, and the source of much of the later criticism of it, was the impact of the material (its 'tendency […] to deprave and corrupt') on those groups most susceptible to such effects. From language in the decision itself that specifically references the impact the material could have on the thoughts of 'the young of either sex,'[47] it seems that Cockburn was clearly referring to young people in this part of his definition. The focus on the material's ability to affect young persons came with the caveat of availability, as both Cockburn's opinion and the concurrence of Justice Blackburn focused significant attention on the defendant's failure to control the distribution of the material.[48] Cockburn provided a counterexample of an illustrated medical treatise where the images 'may, in a certain sense, be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited by anyone, boys or girls, to see as they pass.'[49] Yet, this exception appeared to be a quite limited one in the eyes of the Court, as the intent of the publisher was not considered to be relevant in determination of obscenity outside of limited contexts such as the medical text example. As Cockburn explained, 'if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and of an honest character.'[50]

While the *Hicklin* decision was in many ways the most significant mutation in the history of obscenity law in the common law world, the decision itself was not that remarkable given the social and political atmosphere in which it evolved. The crusade against obscenity by the Vice Society, the push by Lord Campbell and other members of Parliament to enact strict obscenity regulations, and the support of the courts as revealed by the high success rate in obscenity prosecutions combine to reflect the dominant view of British elites in the Victorian era.[51] Moreover, some have argued that this was in part

[45] Gey, SG (1988) 'The Apologetics of Suppression: The Regulation of Pornography as Act and Idea' (86) *Michigan Law Review* 1564 at 1567.
[46] *Hicklin* supra note 44 at 369.
[47] Ibid.
[48] Gillers, S (2007) 'A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II' (85) *Washington University Law Review* 215 at 228-231.
[49] *Hicklin* supra note 44 at 367.
[50] Ibid at 369.
[51] Manchester 'Law Enforcement' supra note 30 at 47.

simply a manifestation of 'entrenched social and psychological anxieties among respectable property owners about the potential animality of the working class.'[52] This is reflected in the differentiation that elites at this time made between classic literature that contained passages of questionable decency and modern books and pamphlets read by the masses. One scholar's observation that Lord Campbell and his supporters in Parliament during debates of the Obscene Publications Act, 'could not easily conceive of a state of society in which such culturally based distinctions and immunities would not be respected,'[53] was clearly held by the courts as well and *Hicklin* made the continuation of such 'distinctions and immunities' exceedingly convenient.

Hicklin's Application in Britain

The *Hicklin* definition quickly became the standard for British courts. In its early application, British courts followed its content in terms of how obscenity was to be defined, and also its spirit by viewing obscenity as a moral problem facing society. Only four years after the decision, the Court of Common Pleas utilized this standard and its focus on the material's repercussions for young persons in *Steele v Brannan*,[54] holding that the intent of the publisher was irrelevant if the content was obscene. In their judgements, Bovill, C.J. and Keating, J. both highlighted the needed for obscenity laws for the protection of society from material of a 'most shockingly filthy description,'[55] that was such that 'any mind of ordinary decency must revolt.'[56]

Additionally, the Court of the Queen's Bench reaffirmed support for the standard in *R v Bradlaugh and Besant*,[57] while also highlighting the importance of judging the effects of the materials independent of intent. British courts were still emphasizing that *Hicklin* was the standard for deciding obscenity questions in the mid-20th century, maintaining a long period of evolutionary status with only minor and trivial mutations. This consistence is highlighted in *R v Reiter*, where the Court of the Queen's Bench declared, 'the law is the same now as it was in 1868.'[58] Acknowledging that 'nowadays, novelists and other writers mention things which they would not have mentioned in the reign of Queen Victoria,'[59] the Court nonetheless rejected the notion that *Hicklin* should be abandoned to fit modern standards.

By the 20th century, elites in Britain had 'almost universally acknowledged that there were […] serious defects in the existing law relating to obscene publication,'[60] and a new statute, the Obscene Publications Act of 1959,[61] was passed, replacing the common law offense of obscene libel with a criminal statute covering obscene publications. The act

[52] Roberts 'Moral' supra note 39 at 612.
[53] Ibid at 617
[54] L.R 7 C.P. 261 (1872).
[55] Ibid at 266.
[56] Ibid at 269.
[57] L.R 2 Q.B. 569 (1877), reversed on other grounds L.R 3 Q.B. 607 (1878). In reversing, the decision, Bramwell, L.J. emphasized that 'I wish it to be understood that we express no opinion whether this is a filthy and obscene, or an indecent book.' L.R 3 Q.B. at 625.
[58] [1954] 2 QB 16 at 19.
[59] Ibid.
[60] Williams, JEH (1960) 'The Obscene Publications Act, 1959' (23) *Modern Law Review* 285.
[61] 7 & 8 Eliz. 2 Ch. 66.

provided the first statutory definition of obscenity in Britain, with its first section setting out the test of obscenity: 'an article shall be deemed to be obscene if its effect […] taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.'[62] On its face this appears to be a simple codification of *Hicklin*, but it also represents a significant mutation. The new act was in large part a response to a push by the Society of Authors begun in 1954 to ensure that specific parts of a work were not considered in isolation, to allow for expert testimony at trial, and to add a public good exception that explicitly protected scientific, artistic, and literary works.[63] Yet, the changes in the new act were not universally liberal, as it also expanded the search and seizure powers of police and introduced heavier penalties for violations. As Roy Jenkins, the M.P. who introduced the bill noted, 'The promoters of the Bill were far from getting all they wanted.'[64]

An early test of the new law came in the famous trial of the publisher of D.H. Lawrence's *Lady Chatterley's Lover* in *R v Penguin Books Ltd*.[65] In providing instructions to the jury under the new law, Justice Byrne cautioned 'the mere fact that you are shocked or disgusted, the mere fact that you hate the sight of the book when you have read it, does not solve the question as to whether you are satisfied beyond a reasonable doubt that the tendency of the book is to deprave and corrupt.'[66] The Court of Appeal pushed the interpretation of the new law in an even more liberal direction in *R v Calder and Boyers, Ltd*.[67] While avoiding any general pronouncements regarding whether the specific book in question was obscene or whether the public good justified its publication,[68] the decision showed a clear shift away from the view that courts were to have a role as moral censors. Here the emphasis was that the new law had significant impact on the instructions that trial judges must provide to juries. Specifically, the Court held that in obscenity cases 'the jury must consider on the one hand the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity or corruption; on the other hand, they should assess the strength of the literary, sociological or ethical merit which they consider the book to possess.'[69] In weighing these factors, the jury should then determine whether 'the publication is proved to be justified as being for the public good.'[70]

However, more conservative interpretations of the new statute maintaining the vitality of *Hicklin's* influence were still being put forth in the British courts. In interpreting the 'deprave and corrupt' language in Obscene Publication Act, Lords Wilberforce, Pearson, and Cross of Chelsea put forth a more traditionalist view of the dangers to society from

[62] Ibid.
[63] See Williams 'Obscene Publications' supra note 60 at 286.
[64] Ibid.
[65] [1961] Crim LR 176.
[66] Robertson *Obscenity* supra note 5 at 47.
[67] [1969] 1 QB 151.
[68] While recognizing the potential impact of the case, the Court intentionally limited the impact of the decision to jury instruction in similar cases. As it observed, 'it has been said on behalf of the appellants that the determination of this appeal may affect the whole future of literature and the right to free speech in this country. This court does not, however, propose to express any opinion whether this book or books like it are obscene; still less, whether their publication is justified as being for the public good. These questions are not for this court to decide; they are wholly within the province of a jury.' Ibid at 152.
[69] Ibid at 154.
[70] Ibid.

such material, questioning both the focus on the number or proportion of people affected and the focus on an assumed target audience in the case of *Director of Public Prosecutions v Whyte*.[71] Directly challenging the decision in *Calder and Boyars*, Lord Pearson asserted that the focus should be its effect on 'some persons' rather than a specific number or proportion of persons. Additionally, all three questioned the assumption that the target audience for such materials was only middle class males and that the question should be whether the material in question had a tendency to deprave and corrupt members of that group, with Lord Cross of Chelsea specifically noting that even if such an assumption was reasonable, no evidence was provided to support it.[72] Even more pointedly, Lord Wilberforce noted that even if such a target audience could be assumed, it was not relevant to the question, arguing that the focus was not solely on 'the once for all corruption of the wholly innocent,' but also to protect even 'the addict from feeding or increasing his addiction.'[73] Yet, even with the more conservative interpretation of the Obscene Publication Act, there was no discussion, direct or implied, of courts maintaining a role as moral censors.

The common law charge of obscene libel is essentially a vestige of a prior time as nearly all media that could potentially be charged as being obscene now falls under the statutory provisions of the Obscene Publications Act.[74] While the spirit of *Hicklin* clearly lives on through the codification of its core definition in the Obscene Publications Act, its conservative application is largely as much a dead letter as the common law offense of obscene libel, as judicial application of obscenity law in Britain today has largely moved away from the more conservative views espoused in *Whyte*. While the Supreme Court has yet to hear an obscenity case, recent lower court decisions show that the societal standards used by modern juries in determining what will deprave and corrupt have evolved significantly. This is exemplified by the heavily publicised 2012 case of *R v Peacock*.[75] Here a jury acquitted an individual charged under the Obscene Publications Act for publishing hard-core pornographic DVDs involving acts between homosexual males including fisting and urination, finding that the DVDs did not constitute material that would deprave and corrupt. While British society has changed in terms of what material it considers likely to deprave and corrupt, as demonstrated by the jury decision in the *Peacock* case, it is important to note that recent court decisions have not been universally liberal in applications of the Obscene Publications Act. For example, the Court of Appeal recently held that an individual could be prosecuted for sending an obscene message to a single individual via online chat messages, as those one-to-one communications constitute a publication under the meaning of the Obscene Publications Act.[76]

[71] [1972] AC 849.
[72] Ibid at 858.
[73] Ibid at 864.
[74] See Manchester 'History' supra note 1 at 51 (noting that stage plays as the only exception to this, but that they would be covered by the Theatres Act).
[75] The case was heard on 6 January 2012 in Southwark Crown Court, London, UK. While unreported, the case received substantial media coverage. See eg Hodges, N (6 January 2012) Michael Peacock's Acquittal is a Victory for Sexual Freedom The Guardian available at: <http://www.theguardian.com/commentisfree/libertycentral/2012/jan/06/michael-peacock-obscenity-trial>
[76] *R v GS*, [2012] EWCA Crim 398.

Hicklin's Application in the United States

The migration of *Hicklin* into the decisions of US courts was swift and thorough. *Hicklin's* obscenity standard was first adopted in the US in 1879 by the Circuit Court for the Southern District of New York in *United States v Bennett*,[77] only six years after the passage of the first federal obscenity law.[78] This new law was in many ways a product of elites' 'fear of (and fascination with) sexualized information and images traveling out of cities, spreading into hinterlands and across state lines, and bringing a contaminated public culture into the sanctity of the private sphere.'[79] In response to this, 'Moral reformers, like Comstock, waged war to keep the vices of the streets removed from "proper" homes, at a historical moment when such homes supposedly needed protection and buttressing.'[80] Thus in many ways, the social and political atmosphere in the US at the time mirrored that of Great Britain.

The *Bennett* case involved the appeal of a conviction for violating a federal statute prohibiting the use of the mail to distribute obscene materials for mailing the book *Cupid's Yokes, or the Binding Forces of Conjugal Life*, which the Court deemed 'so lewd, obscene and lascivious' that it would be improper to put its contents on record.[81] In affirming the conviction the Court relied on *Hicklin* and its British progeny *Steele v Brannan*, explicitly adopting Cockburn's definition of obscenity, the principle that intent of the publisher did not matter if the material was obscene, and the use of the potential impact on 'boys and girls' as the yardstick for measuring whether the material can elicit 'impure thoughts and desires.'[82] In the twelve years after the *Bennett* decision, at least three US district courts used the *Hicklin* definition in obscenity cases, further cementing it as the standard obscenity definition in US law.[83] Additionally, between 1879 and 1900, at least five state appellate courts adopted the *Hicklin* definition of obscenity directly,[84] positively cited it in affirming an obscenity conviction,[85] or adopted its principle that criminal intent was not an essential element of a crime in other areas.[86] Thus, by 1900 *Hicklin* was firmly established

[77] 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879).

[78] The Comstock Act, 17 Stat. 598 (1873).

[79] McGarry, M (2000) 'Spectral Sexualities: Nineteenth Century Spiritualism, Moral Panics, and the Making of U.S. Obscenity Law' (12) *Journal of Women's History* 8 at 17.

[80] Ibid.

[81] *Bennett* supra note 77 at 1095. For additionally discussion see also Gillers 'Tendency' supra note 48.

[82] Ibid at 1105.

[83] See *United States v Clarke*, 38 F. 732 (US District Court for the Eastern District of Missouri 1889); *United States v Harmon*, 45 F. 414 (US District Court for the District of Kansas 1891); *United States v Smith*, 45 F. 476 (US District Court for the Eastern District of Wisconsin 1891).

[84] In *State v Muller*, 96 N.Y. 408 (1884) the New York Court of Appeals explicitly adopts the *Hicklin* standard in upholding the conviction of a bookstore owner for selling photographs of obscene paintings.

[85] In *State v Van Wye*, the Missouri Supreme Court positively cites *Hicklin* in affirming the conviction of a newspaper seller for selling publication that consisted of 'scandals, whorings, lechery, assignation, intrigues between men and women, and immoral conduct of persons, against the peace and dignity of the state.' 136 Mo. 227 at 231-232 (1896).

[86] See *State v Engle*, 156 Ind. 339 (Supreme Court of Indiana 1900) (removing baggage from a boarding house in violation of statute with no intent to defraud); *State v Kelly*, 54 Ohio St. 166 (Supreme Court of Ohio 1896) (selling adulterated foods); *Halsted v State* 41 N.J.L. 552 (Court of Errors and Appeals of New Jersey 1879) (indictment against the director of a county board of freeholders for violating a statutory prohibition against occurring debts in excess of the specific appropriation); but see *The King v Grieve* 6 Haw. 740 (Supreme Court of Hawaii 1883) (manager of a newspaper not guilty for a printing of obscene material in his paper in a language he did not understand).

in American law either through direct reliance on the decision itself as an authority or via *Bennett*.[87]

The earliest US Supreme Court obscenity cases dealt principally with the question of whether the exclusion of the potentially obscene matter in question from the indictment rendered the indictment invalid. In *Rosen v United States*[88] and *Price v United States*,[89] the Court held that it did not without the need to define obscenity. However, the Court in *Rosen*, in addressing the petitioner's secondary claim that it was error for the trial court to have left the question of whether the material was obscene to a jury, held that the trial court was correct 'when it charged the jury that the test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall.'[90] Additionally, in *Price* the Court utilizes a sort of tautology in assuming that material is obscene because it is stated to be obscene: 'No one denies that there are degrees of obscenity […] but when a book is stated to be so obscene that it would be offensive if set forth in full in an indictment, such allegation imports a sufficient degree of obscenity to render the production […] obscene under the statute.'[91] While the US Supreme Court never formally adopted the *Hicklin* standard,[92] *Rosen* and *Price* revealed implicit support for it to a sufficient extent that some future US courts cited *Rosen* as authority for applying the *Hicklin* test.[93]

Although the adoption of *Hicklin* by US courts occurred rather quickly and with remarkable ubiquity, it did not take long until small mutations began to occur as US courts began to question and alter elements of the standard on two related and overlapping fronts: the focus on the material's effect on the most incorrigible members of society and the evaluation of isolated portions of a work with no consideration for its overall value. The earliest divergences from *Hicklin* focused on the second of these factors. Two of the first decisions by US courts to deviate from allowing works to be deemed obscene based on isolated passages came from cases in the Seventh and Eighth Circuit Courts of Appeals, both of which held that in an obscenity trial the defendant was entitled to have the entirety

[87] At least one additional US District Court and two state high courts relied on *Bennett* in obscenity cases without directly citing *Hicklin*. See *United States v Janes*, 74 F. 545 (US District Court for the District of California 1896); *Republic of Hawaii v Ben*, 10 Haw. 278, (Supreme Court of Hawaii 1896); *Thomas v State*, 103 Ind. 419 (Supreme Court of Indiana 1885).

[88] 161 U.S. 29 (1896).

[89] 165 U.S. 311 (1897).

[90] *Rosen* supra note 88 at 43 (internal quotation marks omitted).

[91] *Price* supra note 89 at 314-315.

[92] No Supreme Court obscenity case includes an application of the *Hicklin* test in determining the obscenity of material, nor do any note the formal adoption of the standard. The closest the Court came to formal adoption was the above mentioned dicta in *Rosen* that sanctioned — but did not require — the use of language from *Hicklin* in jury instructions. Further, while a lengthy list of cases where American courts adopted *Hicklin* is provided in *Roth v United States*, 354 U.S. 476 at note 25 (1957), none are the Court's own precedents. This list of cases is not exhaustive, but it seems likely that Justice Brennan would have not simply included any relevant Supreme Court cases, but given them a place of primacy, were there any to include.

[93] See eg *MacFadden v United States*, 165 F. 51 (3rd Circuit Court of Appeals 1908); *Griffin v United States*, 248 F. 6 (1st Circuit Court of Appeals 1918); but see *United States v One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2nd Circuit Court of Appeals 1934) (explicitly rejecting the notion that *Rosen* adopted the *Hicklin* test, noting 'The citation of *Regina v Hicklin* and *United States v Bennett*, was in support of a ruling that allegations in the indictment as to an obscene publication need only be made with sufficient particularity to inform the accused of the nature of the charge against him. No approval of other features of the two decisions was expressed' 72 F.2d at 708).

of the book submitted for consideration by a jury.[94] In *Konda v United States*, the Seventh Circuit Court of Appeals explicitly questioned the validity of determining obscenity based on isolated passages declaring 'it was wrong to base the decision on the untested assumption that the excerpts truly gauged the scope and character of the pamphlet.'[95] The Eight Circuit Court of Appeals echoed that logic in *Clark et al. v United States*, specifically focusing on the impact of examining only isolated passages on the ability of the accused to received a fair trial, reasoning that 'it is placing a defendant at a great disadvantage to have the jury compelled to consider only such passages as the prosecutor deems obscene.'[96]

A related approach was to focus on the literary value of the work. The New York courts were among the first to take this view, with the Appellate Division of the Supreme Court of New York in *The St Hubert Guild v Quinn* reversing a bookseller's conviction, holding that 'The rule against the sale of immoral publications cannot be invoked against those works which have been generally recognized as literary classics.'[97] This decision was followed by a prominent decision by the New York Court of Appeals in *Halsey v The New York Society for the Suppression of Vice,*[98] involving the appeal from a malicious prosecution action brought by a bookseller acquitted of violating New York's obscenity statute for selling the French novel *Memoirs of Mademoiselle de Maupin*. In affirming the judgment, the Court focused heavily on the literary value of the work, despite acknowledging that it included 'many paragraphs, however, which taken by themselves are undoubtedly vulgar and indecent.'[99] In doing so, the Court reasoned that 'No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio or even from the Bible. The book, however, must be considered broadly as a whole.'[100] The *Halsey* Court also recognized the absence of a universal morality or a role for the courts for policing morals, reasoning instead that it was important to consider that the determination of values and morality vary across individuals making a diverse jury the most appropriate evaluator,[101] and also noting that moral values are different across time and place.[102]

One of the harshest early critiques of *Hicklin* sprang from the pen of then District Judge Learned Hand, in *United States v Kennerley*.[103] While noting that there existed significant acceptance of the obscenity test from *Hicklin* such that he could not disregard it, he continued to put forth a vigorous objection to its continued use setting the groundwork

94 *Konda v United States*, 166 F. 91 (7th Circuit Court of Appeals 1908); *Clark et al. v United States*, 211 F. 916 (8th Circuit Court of Appeals 1914).

95 *Konda* ibid at 92.

96 *Clarke* supra note 94 at 222.

97 64 Misc. 336 at 341 (New York Supreme Court Appellate Division 1909).

98 234 N.Y. 1 (New York Court of Appeals 1922).

99 Ibid at 4.

100 Ibid.

101 Ibid at 6 (noting that a book can effect different individuals in different ways, the court highlights the divide nature of its own decision, noting that 'The conflict among the members of this court itself points a finger at the dangers of a censorship entrusted to men of one profession, of like education and similar surroundings. Far better than we, is a jury drawn from those of varied experiences, engaged in various occupations, in close touch with the currents of public feeling, fitted to say whether the defendant had reasonable ground to believe that a book such as this was obscene or indecent').

102 Ibid ('It is possible that the morality of New York city to-day may be on a higher plane than that of Paris in 1836').

103 209 F. 119 (US District Court for the Southern District of New York 1913).

for what would follow. Explicitly arguing for the abandonment of a standard based on an out-dated moral code and the replacement of it with one more in line with his view of modern standards, Judge Hand wrote:

> I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time [...] I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few [...] If there be no abstract definition, such as I have suggested, should not in the case the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?[104]

While these early mutations from the rigid adherence to *Hicklin* may have had some impact, it was a pair of cases from the Second Circuit Court of Appeals that began to signal the beginning of its end in US law. First, in *United States v Dennett*,[105] the Court acknowledged that the *Hicklin* standard was commonly adopted in obscenity cases by US courts, but that it should not be applied to materials designed to provide youth with an appropriate education on the subject of sex. Due to its significant publicity, *Dennett* served as a vulcanizing force in the movement against government censorship, generating public hostility against the practice and encouraging the American Civil Liberties Union to pursue a more aggressive course in this area.[106] Second, and perhaps more impactful, the Second Circuit four years later in *United States v One Book Entitled Ulysses by James Joyce*[107] applied the logic of *Dennett* to works of literature. After discussing the reaction to the book by literary critics and mirroring the argument made in *Halsey* that numerous works of classic literature could be banned under the logic of judging specific portions of the text in isolation, the Court went on to declare that 'the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work is the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence.'[108]

In a clear example of the legal equivalent of genetic drift, many US federal and state courts began to abandon *Hicklin*, *Bennett*, and their progeny, relying instead on decisions such as *Dennett* and *Ulysses* to justify a different approach to obscenity.[109] Perhaps most

[104] Ibid at 120-121.
[105] 39 F.2d 564 (2nd Circuit Court of Appeals 1930).
[106] Weinrib, LM (2012) 'The Sex Side of Civil Liberties: United States v Dennett and the Changing Face of Free Speech' (30) *Law and History Review* 325 at 327.
[107] 72 F.2d 705 (2nd Circuit Court of Appeals 1934).
[108] Ibid. at 708.
[109] See eg *United States v Levine,* 83 F.2d 156 (2nd Circuit Court of Appeals 1936); *Parmelee v United States,* 113 F.2d 729 (District of Columbia Circuit Court of Appeals 1940); *Walker v Popenow*, 149 F.2d 511 (District of Columbia Circuit Court of Appeals 1945); *Commonwealth v Isenstadt*, 318 Mass. 543 (Supreme Judicial Court of

significant in this respect were a trio of Supreme Court cases that served as a prelude to *Hicklin's* final authoritative rejection in *Roth v United States*. First, in *Hannegan v Esquire, Inc*,[110] the Court ruled against the Postmaster General's revocation of a magazine publisher's second-class mail permit, holding it beyond his authority to determine what materials contribute to the public good. In doing so, the Court positively cited *Ulysses* in reasoning that 'Under our system of government there is an accommodation for the widest varieties of tastes and ideas' in the realm of literature and art, and a requirement that such works 'conform to some norm prescribed by an official smacks of an ideology foreign to our system.'[111]

Next, in *Butler v Michigan*,[112] the Court introduced the notion that different standards of obscenity exist for adults and children, what later became known as the variable obscenity doctrine.[113] In striking down a Michigan law that echoed the *Hicklin* standard, Justice Frankfurter, writing for the majority, analogized that 'quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence [...] is to burn the house to roast the pig.'[114] Finally, in *Winters v New York*,[115] the Court held that statutes so vague as to leave people to guess at their meaning were invalid, thus requiring a significant degree of specificity in what types of materials were being regulated to ensure that only those outside of the First Amendment's umbrella would be impacted.

Taken together, *Hannegan*, *Butler*, and *Winters* show the US Supreme Court's view of the role of courts in the arena of obscenity law. Rather than guardian of traditional morality, the Court positioned itself as protecting free speech and press rights against encroachment in the name of moral policing. As Justice Reed wrote for the majority in *Winters*:

> We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.[116]

Massachusetts 1945); *Adams Theatre Co. v Keenan*, 12 N.J. 267 (Supreme Court of New Jersey 1953); *American Civil Liberties Union v Chicago*, 3 Ill. 2d 334 (Supreme Court of Illinois 1954); *United States v One Unbound Volume of a Portfolio of 113 Prints Entitled 'Die Erotik der Antike in Kleinkunst und Keramik'*, 128 F. Supp. 280 (US District Court for the District of Maryland,1955).

110 327 U.S. 146 (1946).

111 Ibid at 157-158.

112 352 U.S. 380 (1957).

113 See Calvert, C (2011) 'Of Burning Houses and Roasting Pigs: Why Butler v Michigan Remains a Key Free Speech Victory more than a Half-Century Later' (64) *Federal Communications Law Journal* 247 at 260.

114 *Butler v Michigan* supra note 112 at 383.

115 333 U.S. 507 (1948).

116 Ibid at 510. Similar language can be found in *Hannegan* supra note 110 at 156 ('grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever.'), and *Butler v Michigan* supra note 112 at 383-384 ('The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual […] that history has attested as the indispensable conditions for the maintenance and progress of a free society.')

As in the earlier period, US obscenity law in the late 19th century largely evolved through the migration of the decisions of British courts with minimal mutations. However, this began to change in the 20th century. This change begin in a gradual fashion with US courts questioning the reliance on *Hicklin*, and later more swiftly through genetic drift as those decisions were given greater weight by other US Courts than *Hicklin* or its progeny. What explains this divergence in the evolution of obscenity law in the US and Britain? Much like the evolution of plants and animals, survival of a species depends heavily on the ability to adapt and change to fit the conditions of the environment. However, rather than adapting in response to changes in the natural environment, the law's evolution is directed by judges through their interpretation in light of their perception of shifts in the cultural, social, and political worlds in which they operate. Like their British counterparts, US courts in the early to mid-20th century shifted away from an interpretation of the role of courts as moral police and began to move the scales in a liberal direction when balancing the need to protect society from obscene material against potential encroachments on constitutional rights.

Hicklin's Application in Canada

While the Canadian Supreme Court never explicitly adopted the *Hicklin* standard for obscenity, it was used by lower Canadian courts beginning in the 1950s. Most notably, the Ontario Court of Appeals explicitly affirmed the use of the *Hicklin* standard as the appropriate test for obscenity in a pair of cases. First, in *R v National News Co*[117] the Court emphasized the long application of the *Hicklin* test and its continued viability despite criticism and the movement toward other standards in the courts of other countries, emphatically declaring that the *Hicklin* test 'has been followed in the Courts of England and in this country for many years. I do not think the Court should formulate some new test, or adopt some other test used in other countries [...] I see nothing wrong with the test.'[118]

Four years later, the Ontario Court of Appeals again applied *Hicklin* in *R v American News Co*,[119] applying its test of obscenity while echoing the parts of the decision that were already facing criticism in the courts of the US. Specifically, the Court highlighted the irrelevance of literary merit in determining obscenity, reasoning that 'However great the literary merit or value of it may be, if it has a tendency to deprave and corrupt within the specifications in the test prescribed in law, then it must be declared obscene. A work of the highest literary quality may thus be condemned in law for obscenity by the application of the test.'[120] The Court also adopted *Hicklin's* logic of evaluating obscenity in terms of the potential impact of the materials on young persons. Here the Court directly rejected alternative interpretations, stating that

> The tendency of a matter charged as obscenity to deprave and corrupt is not found by a consideration of its effect on a fictitious creature of the law such as "the reasonable man"; nor can the Court create for the purposes of the test a "normal"

[117] [1953] O.R 533, 106 C.C.C. 26, 16 C.R 369.
[118] Ibid at [13].
[119] [1957] O.R 145, 118 C.C.C. 152, 25 C.R 374.
[120] Ibid at [7].

person […] the law is to protect the youth of the nation and to guard them against the danger of exposing their morals to impure matter.[121]

However, all Canadian courts did not universally accept the use of *Hicklin* during this period. In *R v Stroll*,[122] Judge Proulx of the Quebec Court of General Sessions of the Peace noted – after providing two dictionary definitions of the word obscene – 'a thing may be obscene technically, but it can be made subject of a criminal offence only if it tends to corrupt the morals by exciting the passions and inciting to immorality.'[123] While the Court does not directly compare this standard to *Hicklin*, or any contemporary cases from other Canadian provincial courts, British courts, or courts of the US, it appears to be a more liberal standard than those decided by the Ontario Court of Appeals. Implying that obscenity should be evaluated in terms of the effect of the material on a 'normal person,'[124] the Court concludes that if the material in question, two ties with silhouettes of nude women, 'are suggestive, then it would be necessary to put brassieres on cows and diapers on dogs.'[125]

Revisions to Canada's criminal code in 1959 introduced a more precise definition of obscenity. Specifically, the code provides that 'any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence, shall be deemed to be obscene.'[126] Although contemporary commentators felt that the changes to the criminal code would have little impact on obscenity law and that 'the test will, in fact, still revolve around the syllogistic principle of *R v Hicklin*,'[127] in its first case arising under this new law, *R v Brodie*,[128] the Supreme Court of Canada declared the end of the *Hicklin* standard in Canadian law with respect to publications,[129] declaring it and all cases relying upon it obsolete. In contrast to the US where a slow evolution away from *Hicklin* occurred through a series of minor mutations and genetic drift processes where courts weighted decisions such as *Stroll* more than those like *National News Co* and *American News Co,* the change to the criminal code combined with the *Brodie* decision represented a punctuation in the evolution of Canadian obscenity law facilitating a quick and dramatic shift.

MODERN APPROACHES TO OBSCENITY LAW

Hicklin was unique in its impact on the evolution of obscenity law in the common law world, in that its migration to other countries was swift and its adoption almost universal.

121 Ibid at [9].
122 100 C.C.C. 171 (1951).
123 Ibid at [3].
124 Rather that applying *Hicklin's* test of the material's effect on youth, the Court explicitly counters that 'The law is made to protect the modesty of normal persons, not to bridle the imagination of the hot-blooded, vicious or overly-scrupulous person.' Ibid at [8].
125 Ibid at [7].
126 Criminal Code of Canada, sec. 150, subsec. 8.
127 Mewett, AW (1962) 'Morality and the Criminal Law' (14) *University of Toronto Law Journal* 213 at 218.
128 [1962] S.C.R 681.
129 Some lower courts in Canada continued to apply *Hicklin* in obscenity cases that did not involve 'publications.' See eg *R v Carty* [1972] 6 C.C.C. (2d) 248 (Alberta District Court)(case dealt with whether sex toys were obscene), *R v Lambert* [1965] 47 C.R 12 (British Columbia Supreme Court)(case dealt with the separate crime of mailing obscene materials).

No single subsequent event in the evolution of obscenity law would mirror its impact. Rather, by the early to mid-20th century, each country's obscenity law had morphed into a distinct subspecies possessing traits reflecting its common ancestry, but exhibiting unique features due to mutations reflecting variation in that country's cultural and political factors. While no other mutation in obscenity law would have the impact of *Hicklin*, community standard based approaches had (and continue to have) significant impact in both the US and Canada and represent the beginning of a dramatic divergence in domestic subspecies of obscenity law.

The United States and Contemporary Community Standards

While the concept of community standards in obscenity law was first used in earlier decisions from lower courts in the US and Australia,[130] its formalization as an alternative to *Hicklin* as a test of obscenity first crystalized in *Roth v United States*.[131] In *Roth*, and its companion case *Alberts v California*, the Court dealt with challenges to the constitutionality of the US and California obscenity statutes in the context of booksellers convicted for mailing circulars advertising obscene materials.[132] In holding both statutes valid, the Court reinforced the notion that obscenity lacks protection under the First Amendment. Equally important was its focus on where the dividing line was to be drawn between materials that were obscene, thus lacking constitutional protection, and materials that were protected. Rejecting the *Hicklin* test as insufficient due to its focus on 'the effect of isolated passages upon the most susceptible persons' which would result in 'material legitimately treating with sex' as being labelled obscene,[133] the Court instead introduced a new test: 'whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interests.'[134]

While a landmark decision, *Roth* cannot be thought of as a major mutation in obscenity law. Rather, each element of the new test was taken from earlier decisions and *Roth* was simply the first attempt to bring all of these smaller mutations together into an amalgamated test. Moreover, it is clear that the Supreme Court is building on the logic in *Hannegan*, *Butler*, and *Winters*, in continuing to view the role of courts in obscenity cases as striking a balance between legislative statutes designed to protect society from these materials and ensuring that the application of those laws does not infringe upon constitutionally protected rights. Chief Justice Warren's concurrence in *Roth* explicitly highlights this view, as he observes:

> That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight States as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of

[130] See e.g. *R v Close* [1948] VLR 445.
[131] 354 U.S. 476 (1957).
[132] Additionally, Roth's conviction involved the mailing of an obscene book and Albert's involved 'lewdly keeping for sale obscene and indecent books.' Ibid at 481.
[133] Ibid at 489.
[134] Ibid.

> government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.[135]

This illustrates the larger point of how domestic obscenity law in the US had, by this point, truly developed into a unique subspecies. While vestiges of its ancestral origins remained, decades of small mutations diverging from the central tenets of *Hicklin* combined with genetic drift towards those precedents critical of *Hicklin* and its British and American progeny had created a uniquely American approach to obscenity law.

This conceptualization of *Roth* as a culmination of many smaller mutations should not detract from its impact on the evolution of obscenity law. While many US federal and state courts had shifted away from *Hicklin* by the 1950s, its influence was not completely dead and there was a clear lack of uniformity in the law in this area. Thus, simply by putting all the pieces together and declaring this test to be the only appropriate test for obscenity in US constitutional law, it is logical to conceptualise *Roth* as a punctuation in US obscenity law. Moreover, *Roth* represented the first use of a community standards based approach by the US Supreme Court, and while it was destined to be short lived, the centrality of community standards in evaluating whether material is obscene still remains a core part of obscenity law in the US.

In contrast to the long term impact of *Roth* in permanently shifting the US to a community standards based definition of obscenity, its immediate impact was to add as much confusion as clarity. Over the next two decades, the Supreme Court would hear a significant number of obscenity cases in an attempt to elucidate parts of the *Roth* test or otherwise explain precisely what statutory schemes may exist for the regulation of obscene materials without running afoul of the Constitution. With respect to the latter, the Court tended to have greater success in some respects, holding that sexual immorality did not equate to obscenity,[136] that informal censoring boards constituted an administrative prior restraint,[137] that non-obscene advertisements for obscene materials lacked constitutional protection,[138] and that the possession of obscene materials for purely personal use inside one's own home could not be regulated.[139]

Conversely, the Court's more general attempts to further clarify the *Roth* test tended only to muddy the constitutional waters. In *Jacobellis v Ohio*, the Court defined the community in community standards as the nation as a whole, stating that 'It is, after all, a national Constitution we are expounding.'[140] This was problematic as it 'presupposes that the same standard for the types of material that are acceptable can and should be the same in New York City as they are in rural Georgia.'[141] Similarly, the Court's attempt to clarify

135 Ibid at 495.

136 Banning a film simply because it portrays adultery as appropriate behavior is an unconstitutional prohibition against advocacy of ideas. *Kingsley International Pictures Corp v Regents of the University of the State of New York*, 360 U.S. 684 at 688 (1959).

137 *Bantam Books Inc v Sullivan*, 372 U.S. 58 (1963).

138 *Ginzburg v United States*, 383 U.S. 463 (1966).

139 *Stanley v Georgia*, 394 U.S. 557 (1969).

140 378 U.S. 184 at 195 (1964).

141 Fix, MP (2016) 'A Universal Standard for Obscenity? The Importance of Context and Other Considerations' (37) *Justice System Journal* 72 at 74.

the last part of the *Roth* test in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v Massachusetts* by declaring that material must be 'utterly without redeeming social value to be obscene,'[142] was never able to garner the support of more than three justices. These efforts at clarification were so unsuccessful in garnering the support of a majority of the justices that by the late 1960s this approach had been almost entirely abandoned. Even Justice Brennan, who authored the majority opinion in *Roth* and the plurality opinions in *Jacobellis* and *Memoirs*, declared in dissent in *Paris Adult Theatre I v Slaton*, that *Roth* 'cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and [...] time has come to make a significant departure from that approach.'[143]

This lack of consensus eventually led to the practice of 'redrupping,' which developed beginning with the case of *Redrup v New York*.[144] This common practice involved deciding obscenity cases via short per curium opinions when five of the justices agreed regarding the suppression of the materials regardless of the standard used by each.[145] These post-*Redrup* decisions not only provided little in terms of guidance for lower courts, but they provided little insight into the views of the justices with respect to how obscenity should be defined or the role of the courts in making that determination as these per curiam opinion stated nothing beyond the grant of certiorari and the reversal or affirmance of the lower court decision, while providing a citation to *Redrup* as justification for this approach.[146]

This doctrinal confusion eventually led to the abandonment of the *Roth* test altogether. Recognizing the problems inherent in the national community standards approach along with the need for something both more transparent and palatable to a greater number of the justices than the 'utterly without redeeming social value' standard, the Court in *Miller v California* adopted a new test of obscenity:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[147]

In rejecting the notion of a national community standard, the *Miller* test recognized variation in the views of 'individuals in culturally distinct areas' with respect to what is obscene,[148] returning to the original understanding of community standards as first proposed in cases like *Kennerley*. While the evolutionary path in the US from *Hicklin* to

[142] 383 U.S. 413 at 419 (1966).
[143] 413 U.S. 49 at 73-74 (1973).
[144] 386 U.S. 767 (1967).
[145] Smith, R (1985) *Liberalism and American Constitutional Law* Harvard University Press at 108-109; Strub, W (2013) *Perversion for Profit: The Politics of Pornography and the Rise of the New Right* Columbia University Press at 76-77; Dionne, EH (2007) 'Pornography, Morality, and Harm: Why Miller Should Survive Lawrence' (15) *George Mason Law Review* 611 at 668 (this practice was so common during this period that a total of thirty-five obscenity convictions were reversed in this manner in just eighteen months following Redrup).
[146] See eg *Books, Inc v United States*, 388 U.S. 449 (1967), *Aday v United States*, 388 U.S. 447 (1967), *Avansino v New York*, 388 U.S. 446 (1967), *Ratner v California*, 388 U.S. 442 (1967).
[147] 413 U.S. 15 at 24 (1973).
[148] Fix 'Universal' supra note 141 at 74.

Miller via *Roth* involved a few evolutionary dead ends (e.g. the concept of a national community standard from *Jacobellis*), it culminated in a distinct subspecies of obscenity law build around the notion of community standards and offering protection for material with 'serious literary, artistic, political, or scientific value.' This new standard brought together many of the earlier criticisms of *Hicklin* by US courts that highlighted how its core components were antithetical to modern societal norms and values.

Importantly, the majority in *Miller* continued to focus on the need to balance the protection of free speech rights with allowing legislative bodies freedom to regulate obscenity,[149] but to do so in a way that abandoned the ad hoc approach of *Redrup* in favour of an 'attempt to provide positive guidance to federal and state courts alike.'[150] In doing so – and partially in response to the strongly worded dissent of Justice Douglas[151] – the Court defended the drawing of a clear bright line division between protected materials and those that lack protection, asserting that 'The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.'[152]

While the Court in *Miller* avoided discussion of the rationale for excluding obscene material from the umbrella of the First Amendment, the Court returned to this topic later in the term in *Paris Adult Theatre I v Slaton*.[153] Here, Chief Justice Burger, writing for the same five justice majority as in *Miller*, provided a more rigorous justification for allowing states to prohibit obscene materials, reasoning that 'there are legitimate state interests at stake in stemming the tide of commercialized obscenity […] These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.'[154] Moreover, in continuing the dialogue regarding the role of courts in obscenity cases, the Court declined to adopt a role in determining whether such justifications had a basis in fact noting that even if 'there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society […]' the role of the Court was not 'to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution.'[155] In doing so, the Court conceded that absent 'conclusive proof of a connection between antisocial behavior and obscene material' it was perfectly valid 'that a legislature could legitimately act on such a conclusion to protect the *social interest in order and morality*.'[156]

[149] In explicitly declining to adopt an 'anything goes view of the First Amendment,' the majority justifies their approach as one that avoids 'arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day.' *Miller* supra note 147 at 29.

[150] Ibid.

[151] In dissent, Justice Douglas completely questions whether court ought to even play a role in determining obscenity, stating that 'Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts.' Ibid at 41 (Douglas, J., dissenting).

[152] Ibid at 34.

[153] 413 U.S. 49 (1973).

[154] Ibid at 58.

[155] Ibid at 60.

[156] Ibid at 61 (emphasis in original, internal quotation marks omitted).

While not without it criticism,[157] the *Miller* test and its reliance upon contemporary community standards remain the standard in U.S obscenity law today, creating a long period of stasis in its evolution. Despite recent cases that have forced the Court to confront new obscenity questions in the face of technological advances, it has continued to rely upon *Miller* as the standard for obscenity.[158] Simultaneously, the Court has avoided multiple opportunities to take a more expansive approach in defining what types of material can be classified as obscene, instead relying heavily on historical traditions to make 'clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of sexual conduct.'[159]

Canada's Multifaceted Approach to Obscenity

Unlike the US, Canada had very little in the way of criticism of *Hicklin* in domestic case law in its federal or provincial courts. Rather, the Supreme Court's complete re-evaluation of their obscenity standard followed significant alterations to the national criminal code. In abandoning the *Hicklin* test as incompatible with the new statutory definition of obscenity in *R v Brodie*,[160] another case involving Lawrence's *Lady Chatterley's Lover*, the Court reasoned that the new law allow it 'to apply tests which have some certainty of meaning and are capable of objective application and which do not so much depend as before upon the idiosyncrasies and sensitivities of the tribunal of fact, whether judge or jury.'[161] To do this, the Court developed two separate and distinct tests. The first focused on 'internal necessities,' examining the work in its entirety rather than focusing on isolated passages. Here the Court defined the phrase 'undue exploitation of sex' from the statute as an 'excessive emphasis on the theme for a base purpose,'[162] noting that undue exploitation did not exist where 'there is no more emphasis on the theme than is required in the serious treatment of the theme in a novel with honesty and uprightness.'[163] The second test focused on community standards. Perhaps somewhat surprisingly, in adopting a community standards based test, the Court facilitated the migration of decisions from Australian and New Zealand courts into Canadian law,[164] but did not cite or otherwise acknowledge US case law on the subject.

In addition to the adoption of new test for determining obscenity under Canadian law, the Court in *Brodie* also signalled a shift away from the moralistic judgments that dominated earlier obscenity cases. The judgement of Abbott, Martland, and Judson, JJ., as

[157] See eg *Salt Lake City v Piepenburg*, 571 P.2d 1299 at 1300 (Utah Supreme Court 1977) (analogizing the use of the literary, artistic, political or scientific value standard 'to find technical excuses' to allow questionable material to 'a dog that returns to his vomit in search of some morsel in the filth which may have some redeeming value to his own taste').

[158] See eg the continued use of *Miller* in evaluating Congressional attempts to regulate access to internet pornography in *Reno v American Civil Liberties Union*, 521 U.S. 844 at 872-873 (1997) and virtual child pornography in *Ashcroft v Free Speech Coalition*, 535 U.S. 234 at 246 (2002).

[159] *Brown v Entertainment Merchants Association*, 564 U.S. 786 at 792-793 (2011, quoting from *Miller*).

[160] [1962] S.C.R 681.

[161] Ibid at 702.

[162] Ibid at 704.

[163] Ibid.

[164] The only case cited specifically in this regard is *R v Close*, [1948] VLR 445 (Supreme Court of Victoria), but he Court noted that 'Offence against the standards of the community as a test of "undueness" as outlined by Fullagar J. seems to have been accepted in subsequent cases in Australia and New Zealand.' Ibid. at 706.

well as the judgements of Cartwright, J. and Ritchie, J. attempted to evaluate the question of obscenity in a clinical manner without resort to language about moral values that dominated obscenity decisions under the *Hicklin* regime. However, this shift in tone was far from universally accepted, as this language made its way into many of the dissents. For example, in Justice Taschereau's dissent, he provides the following description of why he considers the book obscene:

> The author then minutely describes with unholy satisfaction more than fifteen adulterous scenes in the hen-house, the brush wood of the nearby fields, or the living quarters of the game keeper. Nothing is left even to the most vivid imagination. All the episodes are brutally described, and the conversation between the two lovers is of a low and vulgar character. Words are used that no decent person would dare speak without, in my view, offending the moral sense of anyone who believes in the ordinary standards of decency, self-respect and dignity.[165]

The Court twice passed on the opportunity to harmonize the two tests in *R v Dechow*[166] and in *R v Towne Cinema Theatres Ltd*.[167] In the former, the Court dismissed the application of *Hicklin* in areas of obscenity law not related to 'publications,' holding that the tests from *Brodie* were an 'exhaustive test of obscenity in respect of a publication which has sex as a theme or characteristic [… and] that this Court should apply that test in respect of other provisions of the code […] in which the allegation of obscenity revolves around sex considerations.'[168] In the latter, the Court ignored the internal necessities test finding that no argument could be made regarding the film's artistic merit,[169] and focused solely on the community standards test. The Court held community standards to be 'a standard of tolerance, not taste […] What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.'[170] The Court further noted that this standard was dependent upon the film's intended audience and the specific circumstances (such as time and place) of its exhibition.

The first attempt to integrate the tests came in *R v Butler*,[171] where the Court added a third test focused on degradation or dehumanization derived from several lower court decisions.[172] The third test stems from the argument that portrayals of sexually degrading or dehumanizing treatment is harmful to society in general, and women in particular, irrespective of the appearance of consent. In combining the three tests into a unified framework, the Court starts by classifying types of pornography to determine whether they constitute an undue exploitation of sex under the community standards and

165 Ibid at 690.
166 [1978] 1 S.C.R 951.
167 [1985] 1 S.C.R 494.
168 *Dechow* supra note 166 at 962. Some lower courts had read *Brodie* as applying only to publications and not to other items such as sex toys, eg *Carty* supra note 129.
169 The case involving the film *Dracula Sucks*, one of many pornographic parodies of gothic novels, Elliott, K (2008) 'Gothic—Film—Parody' (1) *Adaption* 24 at 25.
170 *Towne Cinema Theatres* supra note 167 at 508.
171 [1992] 1 S.C.R 452.
172 See eg *R v Doug Rankine Co*, 9 C.C.C. (3d) 53 (Ontario County Court 1983); *R v Ramsingh*, 14 C.C.C. (3d) 230 (Manitoba Court of the Queen's Bench 1984); *R v Wagner*, 43 C.R (3d) 318 (Alberta Court of the Queen's Bench 1985).

degradation or dehumanization tests. In doing so, the Court concludes that 'the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated […] unless it employs children in its production.'[173]

The Court then notes that the application of the internal necessities test is only necessary when the other tests find the material contains undue exploitation. If that is the case, then the internal necessities test requires that the work be considered as a whole to determine whether 'undue exploitation of sex is the main object of the work or […] essential to a wider artistic, literary, or other similar purpose.'[174]

In its reasoning for the adoption of this framework, the Court recognizes that obscenity is an issue on which contemporary society has a wide range of diverse opinions, observing that 'Some segments of society would consider that all three categories of pornography cause harm to society because they tend to undermine its moral fibre. Others would contend that none of the categories cause harm. Furthermore there is a range of opinion as to what is degrading or dehumanizing.'[175] The framework it adopts, the Court continues, is appropriate 'because we do not wish to leave it to the individual tastes of judges, we must have a norm that will serve as an arbiter in determining what amounts to an undue exploitation of sex. That arbiter is the community as a whole.'[176]

This framework continues to be the standard in Canadian courts, as the Supreme Court reiterated as recently as 2000 in *Little Sisters Book and Art Emporium v Canada*.[177] Here the Court reaffirmed the principle that 'The national community standard of tolerance relates to harm, not taste, and is restricted to conduct which society formally recognizes as incompatible with its proper functioning' and that 'concern for minority expression is one of the principal factors that led to adoption of the national community test in *Butler* in the first place.'[178] The Canadian approach, while unique in its specifics, reflects the modern trend in other countries. Instead of evolving through the migration of a standard developed in another country, the Canadian courts facilitated the evolution of a unique subspecies of obscenity law ideally suited to their cultural values and political environment leading to a new stasis in its evolution.

CONCLUSION

The obscenity standards have evolved from their genesis in British common law in the *Sedley* case to a diverse array of legal subspecies found in Britain, the United States, and Canada today. The first significant point in the diversification of obscenity doctrines came with the *Hicklin* decision in Britain and its migration to other countries. While the US, Canada, and many other common law countries adopted the *Hicklin* standard to some degree, it was not long until further mutation began to occur as the courts of each country sought to develop an obscenity doctrine that fit their own cultural, legal, and political

[173] *R v Butler* supra note 171 at 485.
[174] Ibid at 486.
[175] Ibid.
[176] Ibid.
[177] [2000] 2 S.C.R 1120 (holding the *Butler* framework applies to material intended for a homosexual audience).
[178] Ibid.

environments. This evolutionary process led the courts of each of the countries to develop a unique obscenity standard germane to their individualized needs, yet reflecting a common ancestry.

This process is far from complete. Much as animals and plants are constantly facing new challenges to the continuation of their species, the obscenity law in each country must also adapt to new challenges. This is especially true today as courts confront new issues arising from modern technological advances. Courts across the common law world are already adapting to deal with novel issues such as online pornography and the regulation of computer generated imagery. While this article does not offer a crystal ball to predict the details of these future legal changes, it does offer insight into how they will come about. Legal change in the area of obscenity has always followed the same mechanisms that define evolution in the natural world. There is no reason to expect this will change. While many of these countries have entered a period of stasis with the evolution of their unique subspecies of obscenity law, as their courts begin to address these new issues, their obscenity standards will continue to evolve. Understanding the mechanisms that have driven their evolution to this point should generate expectations that future evolution in the domestic obscenity law of these countries will occur by selecting precedents best suited to survival in the new environment (natural selection), adapting the standards from those older decisions to fit the new situations (mutation), borrowing from the case law of other countries that have already addressed these issues (migration), and through the inherent randomness in the process that causes some precedents to be lost to time while others live on (genetic drift).