Understanding the Mechanisms Driving the Evolution of Obscenity Law in Five Common Law Countries

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> [G]overnment is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life.[1]

Wilson's observation about the nature of governmental evolution is reflected not simply in the laws produced by governments, but also in the interpretation of those laws and constitutional provisions already in existence. As much as societal change breeds a need for legislatures to revisit old ways of dealing with problems, so too does it require an evolution in the way judges interpret existing law. While it is not without its critics,[2] the notion that the law is designed to evolve as society grows and changes is neither a new idea nor exclusive to the United States. Rather, it is a fundamental principle in the common law world. The ubiquity of acceptance of the evolutionary nature of constitutions throughout the common law world is highlighted in the decision of the House of Lords, Judicial Committee of the Privy Council in *Edwards v Attorney-General for Canada*, where the Constitution of Canada was described as a 'living tree capable of growth and expansion within its natural limits.'[3] While focused on the narrow issue of whether the term 'persons' (for purposes of serving in the Senate) in the Canadian Constitution included women, the decision has been cited by the high courts of numerous common law nations as a core principle of constitutional interpretation.[4]

[1] Wilson, W (2002) [1908] *Constitutional Government in the United States* Transaction Publishers at 56.

[2] See eg Scalia, A (1988) 'Originalism: The Lesser Evil' (57) *University of Cincinnati Law Review* 849; Rehnquist, W (1975) 'Notion of a Living Constitution' (54) *Texas Law Review* 693.

[3] (1930) AC 124 at 136 (PC).

[4] See eg *Reference re Same-Sex Marriage* (2004) 3 SCR 698 (Canadian Supreme Court holding that marriage included same sex marriage); *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan Informant* (1931) HCA 34 (High Court of Australia noted: 'The Australian Constitution should receive the same large and liberal interpretation as that accorded by the Privy Council to the [Canadian Constitution]'); *Ajam Mohamed Loova Walla v Ebrahim Dawjee Jeewa* (1950) BurLawRp 128 (Supreme Court of Burma holding that: 'In interpreting the Constitution the provisions must not be cut down by a narrow and technical construction but must be given a large, liberal and comprehensive spirit, considering, the magnitude of the subjects involved. The construction

Interestingly, despite the pervasive use of analogies between legal doctrines and living creatures, scholars have largely ignored the utility of appropriating concepts from evolutionary biology for clarifying our understanding of how law evolves. This article uses concepts analogous to the core mechanisms in evolutionary biology that describe how plant and animal species change over time to better understand how obscenity law has evolved into the diverse array of specific forms it takes today.[5] Building on that framework, I stress that legal evolution is driven by choices made by those actors with power to determine how the law will change and that a key influence on those choices is whether the relevant actors view this as a democratic process (in the sense that standards reflect the true preferences of the masses) or one that should be driven by their own personal values or preferences. I then apply this to five culturally diverse common law countries—Australia, New Zealand, South Africa, India, and the Philippians—to show that while the same mechanisms are at work in each, the end result is a product of the specific needs of each society as interpreted by the elites making those decisions.

THE EVOLUTION OF THE LAW

Evolutionary biology provides a useful mechanism for understanding the mechanisms through which the law changes over time. In this framework, the law in a given area is viewed as changing over time in response to environmental factors. Specifically, prior work uses four specific concepts (mutation, migration, genetic drift, and natural selection) for which analogies exist in the legal arena to describe the evolution of obscenity law in Great Britain, the United States, and Canada.[6] The first of these, legal mutation, describes small changes to legal standards that occur as judges modify existing precedent or legislative bodies pass new laws in a specific legal area. Migration refers to the use of precedents or legal standards in the case law of one country that are borrowed from a foreign jurisdiction. Genetic drift is the somewhat random process among similar precedents by which some fall out of favour while others continue to be cited by future courts. Finally, natural selection is the adopting of standards that reflect the current state of society as interpreted by the relevant decision makers.

Shifting from the evolution of plants and animals to that of the law further requires recognition that the relevant environment driving change is not the natural one, but the political and social one. Here, it is those with the power to make and interpret the law that drives change through these mechanisms and shapes the new form it will take. This requires looking at the motivations of these actors to understand the impetus behind changes in the law. While it is possible that the needs or preferences of society as a whole are driving the decision making of the elites who shape the law's evolution, the degree to which this democratic approach to legal interpretation is used is likely to

most beneficial to the widest possible amplitude of its powers must be adopted and changing, circumstances must also be taken into account.'); *Prasad v Attorney-General of Fiji* (1994) FJHC 91 (Used by the High Court of Fiji to support the conclusion that: 'as a general rule Constitutional Codes enshrining Fundamental Freedoms are to be given a liberal interpretation.'); *The State of Madras v Gannon Dunkerley & Co (Madra) Ltd* 1959 SCR 379 (Indian Supreme Court finding that a particular constitutional provision is `flexible and elastic and should be so construed as to include the extended and wider meaning of the words used therein.').

[5] This article expands this theoretical framework originally developed in Fix, MP (2016) 'The Evolution of Obscenity Standards in the Common Law World' (11) *Journal of Comparative Law* 75 at 75-76.

[6] Ibid.

vary highly across time, space, and legal issue. In the area of obscenity law, this variation is likely to be quite high. Even in Great Britain, the United States, and Canada where there is a substantial level of shared cultural values, obscenity standards have evolved into remarkably distinct species.[7] Turning to even more culturally diverse countries, we should expect even greater variation in both the standards used to define obscenity and the degree to which those standards reflect the preferences of the masses versus those of elites either paternalistically (promoting what the elites truly believe is in the best interest of the masses) or egocentrically (promoting their own interests, often to the detriment of what the masses need, want, or both).

OBSCENITY LAW IN AUSTRALIA

The history of obscenity law in Australia begins while still under British rule. With the passage of the Australian Courts Act of 1828,[8] Parliament granted a great deal of local control to Australian courts, albeit with the possibility of appeal to the Privy Council.[9] The earliest obscenity case from a high level court shows a strong degree of independence, even while following English common law precedents. In *In re Collins*,[10] the Supreme Court of New South Wales applied the *Hicklin* definition of obscenity,[11] but acquitted an individual charged for the distribution of a pamphlet on birth control methods. In holding that the pamphlet was not obscene, Windeyer, J provided a rationale for the document's moral virtue rooted heavily in the ideas of social Darwinism that were popular among elites of the day:[12]

> let a case of consumptive parents be taken, or of parents, one of whom has developed symptoms of insanity. Who could suppose that any jury would regard any means adopted by them to prevent the procreation of a number of children, diseased and rickety, or certain to inherit a taint of insanity, would be otherwise than natural and right, and the adoption of any means that medical science could suggest to prevent it not only not immoral but laudable in the highest degree?[13]

While English courts had ten years earlier overturned an obscene libel conviction involving a book about birth control methods,[14] that decision was procedural (the writing charged as obscene was not introduced into evidence) rather than substantive (discussion of birth control is not obscene). Thus, the Australian court based its interpretation of what

[7] Ibid.
[8] (1828) 9 Geo 4 c 83.
[9] Twomey, A (2004) *The Constitution of New South Wales* Federation Press at 154-155.
[10] (1888) 9 NSWR 497.
[11] In Chief Justice Cockburn's opinion in *Regina v Hicklin*, LR 3 QB 360 (1868), he laid out the standard definition of obscenity that would be adopted and used throughout the common law world well into the twentieth century. This standard made the determination of whether material was obscene a question of, '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.' Viewing obscenity law through an evolutionary lens, we can view *Hicklin* as representing a common ancestor from which the law in each of the countries discussed herein can trace their lineage, see Fix supra note 5.
[12] Francis, M (1996) 'Social Darwinism and the Construction of Institutionalised Racism in Australia' (20) *Journal of Australia Studies* 90.
[13] *Collins* supra note 10 at 523.
[14] *Bradlaugh and Besant v The Queen* (1878) LR 3 QB 607.

constituted obscenity in the moral standard of local elites even while still under British rule.

After independence, *Hicklin* remained the legal standard for defining obscenity in Australia through its continued use by provincial high courts despite never being formally adopted by the High Court of Australia. This mirrored the evolution of obscenity law in the United States where *Hicklin* was widely utilized by lower courts despite never being formally adopted by the US Supreme Court.[15] Yet, Australian courts avoided adopting *Hicklin* in its purest form, despite continued reliance on the precedent. Rather, a small but significant mutation occurred as it evolved in Australian law. The decision of the Supreme Court of Victoria in *R v Close*[16] exemplifies this. *Close* involved the appeal of an obscene libel conviction for the sale of the novel *Love Me Sailor*, a book described by contemporary critics as one of the best Australian novels published in 1945.[17] While the Court upheld the conviction, it reduced the fine against the publisher and substituted a fine in place of the author's term of imprisonment, noting that 'this is a proceeding of a very unusual kind in Victoria, perhaps the first to be launched here [...] And in addition I might add that we are aware that it is not uncommon nowadays to find novels on sale, the tone and language of which would not have been tolerated in the past.'[18]

More impactful than the holding itself, was the carefully couched critique of a raw application of the *Hicklin* doctrine in the judgment of Fullagar, J. Discussing the *Hicklin* test, he wrote:

> For it is clear, in my opinion, that, if that is the whole test and the sole test, then a vast number of publications are obscene libels in law which no sane and educated person could possibly regard as obscene [...] For obviously a work of the highest artistic merit can suggest to the minds of the young thoughts of an impure character [...] The truth is, I think, that the [*Hicklin* test] was not intended to be isolated from all context and regarded as stating an exhaustive definition of what is "obscene" for the purposes of a prosecution for obscene libel.[19]

Fullager continued to discuss the consideration of literary and artistic value, dismissed in the separate opinion of Gavan Duffy, J, [20] and his belief that 'There does exist in any community at all times [...] a general instinctive sense of what is decent and what is indecent [...] and, when the distinction has to be drawn.'[21] This discussion culminated with an example of jury instructions in an obscenity case that mentions both the importance of considering literary merit and the standards of the community, both points that would later become central in Australian obscenity law.[22]

15 *Roth v United States*, 354 US 476 at note 25; Fix supra note 5 at 85-86.
16 (1948) VLR 445.
17 Green, HM (1946) 'Australian literature, 1945' (7) Southerly 211.
18 *Close* supra note 16 at 453.
19 Ibid at 462.
20 Ibid at 457 (Gavan Duffy, J clearly dismisses the applicant's claim of literary merit as a defense to a charge of obscene libel, writing: 'This is not the rule here whatever it may be in some of the States of America. Literature is not yet a sanctuary or an Alsatia').
21 Ibid at 465.
22 While most of the language in his opinion claimed to simply be interpreting *Hicklin*, Fullager's full proposed jury instructions, which he lays out in detail despite stating that he is 'very far from attempting to lay down a model direction,' are essentially the polar opposite of those proposed by Cockburn, CJ in *Hicklin*. The full text of his sample jury instructions reads:

While Fullagar's view that artistic and literary merit matter did not see immediate adoption by other Australian courts, two Victorian Supreme Court cases in the late 1950s dealing with the term 'unduly emphasizing matters of sex' cited approvingly his emphasis on community standards. The first of these, *Wavish v Associated Newspapers Ltd*,[23] even quoted Fullagar's proposed jury instruction in full noting that even though his decision dealt with the meaning of obscenity in a different statute, its emphasis on community standards was equally relevant in the present case. The latter, *MacKay v Gordon and Gotch (Australasia Ltd)*,[24] also viewed the concept of community standards as central for determining whether material is 'unduly emphasizing matters of sex.' Further, the *MacKay* Court noted that in determining for itself what those community standards are, it 'is not to be narrow or puritanical [...] it must allow for many tastes and many degrees and standards of education and of refinement, and for the grave lack of them in some quarters.'[25]

While the lower Australian courts had long emphasized a major role for community standards in determining what constitutes obscenity, the High Court largely avoided the question of obscenity until 1968.[26] In the case of *Crowe v. Graham*,[27] the High Court formally adopted a community standards based test that would serve as the core of Australian obscenity law. In many ways, this approach can be viewed as a more democratic approach to determining what is obscene rather than the elite centred approach of *Hicklin* or *In re Collins*. All four justices writing an opinion focused to some degree on the need to determine obscenity through the lens of the average member of the community. While the specific language used by each of the four differed — with Barwick, CJ referring to that which 'would offend the modesty of the average man or woman in sexual matters';[28] Kitto, J to whether 'the ordinary person in this community, picking up the copy and reading it as a whole, would regard it as a publication offensive to his or her modesty in regard to matters of sex';[29] and Windeyer, J and Owen, J adopting language directly from *Close*—the core principle was the same.

The High Court has not addressed the question of obscenity since *Crowe*, but other Australian courts have continued to utilize the community standards test. In one of the

> It would not be true to say that any publication dealing with sexual relations is obscene. The relations of the sexes are, of course, legitimate matters for discussion everywhere. They must be dealt with in scientific works, and they may be legitimately dealt with — even very frankly and directly — in literary works. But they can be dealt with cleanly, and they can be dealt with dirtily. There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing, and capable of justly applying, those standards. What is obscene is something which offends against those standards. Do you think that the publication now before you is one in which these matters are dealt with artistically and, with whatever frankness, cleanly? Or do you think that there are passages in it which are just plain dirt and nothing else, introduced for the sake of dirtiness and from the sure knowledge that notoriety earned by dirtiness will command for the book a ready sale? *Close* at 465.

[23] (1959) VR 10.
[24] (1959) VR 420.
[25] Ibid at 426.
[26] One earlier exception to this was *Transport Publishing Co Pty Ltd v Literature Board Of Review* (1956) HCA 73. Here the High Court determined that certain publications were not 'objectionable' under a definition provided in a Queensland statute in reviewing the action of the Queensland Objectionable Literature Board. There was no attempt by the High Court to define obscenity broadly in the context of this case.
[27] (1968) HCA 6.
[28] Ibid at 379.
[29] Ibid at 387.

first obscenity cases in a territorial supreme court post-*Crowe*, the Supreme Court of South Australia in *Romeyko v. Samuels*[30] attempted to clarify the High Court's decision. In *Romeyko*, Bray, CJ used key aspects from the opinions of Barwick and Windeyer in *Crowe* to summarize the test of obscenity in Australia as whether the matter offends the sexual modesty of the average man or the contemporary standards of the Australian community. While the decision of one territorial supreme court is not binding on the courts of other territories, the *Romeyko* decision has been heavily influential nonetheless as demonstrated by frequent citations in decisions of the supreme courts of other territories.[31]

Statutory changes in the 1970s and 1980s resulted in a classification scheme that served to make recommendations regarding the content of materials, while simultaneously building around the principle that 'adults should be able to read, hear and see what they want.'[32] In making its classification decisions, the Classification Board relies upon the 'reasonable adult test' that serves both as 'as a measure of community standards and also as an acknowledgment that adults have different personal tastes.'[33] It is important to note that while the standards used by the Classification Board in largely based on the High Court's decision in *Crowe* as set out in the National Classification Code, the only recourse for parties harmed by a decision of the Board is via administrative review at the Classification Review Board. There is no direct mechanism for judicial review in the relevant statute, even for those items that are `Refused Classification' and thus prohibited from being imported, sold, or advertised. Thus, what appears at first blush to be a relatively democratic standard for determining what constitutes obscenity is, in practice, a formal mechanism for elites to continue to determine what is acceptable for the masses in society.

OBSCENITY LAW IN NEW ZEALAND

New Zealand was among the earliest countries into which the *Hicklin* standard migrated. Predating any court decisions on the topic, the New Zealand Indecent Publication Act of 1910[34] largely adopted *Hicklin's* definition of obscenity, albeit with some significant mutations. The Act took into account the nature of the material, `the nature and circumstance of the act done by the defendant,' and 'the literary, scientific, or artistic merit or importance of the document or matter.'[35] While this was one of the earliest endorsements of literary and artistic value as a valid consideration in the determination of what constitutes obscenity, the practical impact of these qualifications seemed to vary significantly in the earliest relevant cases to come before the Supreme Court of New Zealand.

[30] (1972) 2 SASR 529.

[31] See eg *Vokalek v Commonwealth of Australia* [2008] SASC 256 (Supreme Court of South Australia citing *Romeyko* in a case dealing with the importation of pornographic DVDs) and *Gul v Creed* [2010] VSC 185 (Supreme Court of Victoria citing *Romeyko* in a case dealing with the use of indecent language in the course of stealing a chocolate egg).

[32] National Classification Code Sec 1(a).

[33] Williams, D (1997) 'From Censorship to Classification: An Address by the Attorney-General the Hon Daryl Williams AM QC' (1997) *Murdoch University Electronic Journal of Law* 29 at 67.

[34] 1 Geo V 1910 No 19.

[35] McKean, WA (1965) 'The War against Indecent Publications' (1) *Otago Law Review* 75 (quoting from Sec 5 of the Indecent Publication Act of 1910).

In the first obscenity case before the Supreme Court, the Court formally adopted the restrictive *Hicklin* standard,[36] finding that it was unnecessary to consider the artistic merit of the specific item in the case, a photograph of a famous painting of a nude female. However, the Court based its ruling more on the location in which the photograph was displayed (the window of a shop on a public street), rather than the nature of the image itself, even noting that 'if placed in an art gallery it would not necessarily be classified as an indecent picture.'[37] Only 21 years after that decision, New Zealand obscenity law underwent a significant mutation as the Court formally distinguished (but did not overrule) both *Clarkson* and *Hicklin* in holding that classical works of literature were not necessarily obscene despite problematic individual passages.[38] In doing so, the Court relied both on the qualification in Section 5 of the Indecent Publications Act and the importance of the audience, as well as the need to account for the fact that the 'trend of modern decisions establishes that the definition in *Hicklin's* case must be read with the qualification that the intention behind the publication is material.'[39]

Unlike in other countries that adopted and later abandoned *Hicklin* in their national case law, the shift away from *Hicklin* in New Zealand turned out to be only temporary. In an example of the legal equivalent of genetic drift, cases before the Supreme Court in the 1950s resulted in rulings much more in line with *Clarkson* and *Hicklin* than the Court's more permissive decisions like *Sumpter*.[40] As such, *Hicklin* is generally viewed as the dominant test of obscenity in New Zealand law prior to the passage of the current obscenity statute in 1963,[41] which developed a statutory scheme for classification of materials and created a board to review and classify materials. Yet, it is worth noting that in the last obscenity case to come before the Supreme Court prior to the passage of the Indecent Publications Act, the Court did incorporate significant mutations including the community standards approach utilized by Australian courts in *Wavish* and *MacKay* and the idea that the material must be considered as a whole rather than focusing on isolated passages.[42]

With the passage of the Indecent Publications Act of 1963,[43] a new regulatory body, The Indecent Publications Tribunal, was given authority to determine indecency in all books, magazines, and sound recordings. This was followed in the 1970s and 1980s by statutes regulating films and video recordings and the creation of two additional censorship bodies, the Chief Censor of Films and the Video Recordings Authority. Passage of the Films, Videos, and Publications Classification Act in 1993 created the Office of Film and Literature Classification to consolidated the powers of these agencies.[44] Under this statutory scheme, the New Zealand courts still maintain a limited role in the process as Section 58(1) grants authorized persons the right to appeal the Board's decisions regarding

[36] *Clarkson v. McCarthy* (1917) NZLR 624.
[37] Ibid at 628.
[38] *Sumpter v Stevenson* (1939) NZLR 446.
[39] Ibid at 244 (referencing the summary of all decisions on the topic in US courts in Alpert, LM (1938) 'Judicial Censorship of Obscene Literature' (52) *Harvard Law Review* 40.
[40] See eg *Kerr-Hislop v Walton* (1952) NZLR 267; *Technical Books Limited v Collector of Customs* (1957) NZLR 490.
[41] This is conclusion is reinforced by language in *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review* (2005) 3 NZLR 403 (the Court of Appeals noted, in reviewing the history of New Zealand obscenity law, that the '*Hicklin* test remained the sole test in New Zealand until the passing of the Indecent Publications Act [of] 1963.').
[42] *In re Lolita* (1960) NZLR 871.
[43] 1963 No 22.
[44] 1993 No 94.

question of law in court. The significance of this provision was crystalized in the landmark 1999 case of *Moonen v Film and Literature Board of Review*.[45] In *Moonen*, the Court of Appeals held that in classifying materials, the Office of Film and Literature Classification must never restrict freedom of expression unless essential for the protection of core values and that even then restrictions should 'constitute only such reasonable limitation on freedom of expression as can be demonstrably justified in a free and democratic society.'[46] The Court went further, holding that it was not sufficient for the Board to find that the material contained a 'Description and depiction [...] of a prohibited activity,' but that the material must include 'something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity' before the material could be censored.[47]

The impact of the *Mooney* decision can be felt through explicit reference to the above quoted language in many subsequent decisions by the Board when weighing the potential infringement on freedom of expression in its classification decisions.[48] One of the clearest examples of the Board's application of *Mooney* can be found in its classification of the gay zombie porn film *L.A. Zombie*.[49] In withholding an objectionable classification from the film when restricted to persons over 18, the Board directly applied the distinction between the description/depiction of an activity and the promotion/support of that activity from *Mooney* in the following statement of its reasoning:

> The Board accepts, without hesitation, that any film which normalises, or portrays as satisfactory or pleasurable, or in any other way supports or promotes sexual activity with dead persons, would be objectionable under the Act. This film however does not normalise the activity portrayed. On the contrary, it occurs within a context that is very clearly fantastic, implausible and incredible. Furthermore, it is at the heart of the film that the monster does not achieve any pleasure or satisfaction, beyond the direct sexual climax, from his actions. On the contrary, his sexual activities make him increasingly lonely, isolated and monstrous. For these reasons we do not consider that "LA Zombie" can be said to promote or support, or tend to promote or support, sexual activity with dead persons.[50]

This offers an interesting contrast to the Australian system both with respect to the specific example of *LA Zombie* and more generally. As the above quote illustrates, not only did the New Zealand Board allow the film, but did so using reasoning that clearly prioritized individual freedom of choice over censorship in the case of a hard-core pornographic film. In contrast, the Australian Classification Board refused classification of the same film, banning it from the Melbourne International Film Festival.[51] More generally,

[45] (2000) 2 NZLR 9.
[46] Ibid at [15].
[47] Ibid at [29].
[48] See eg *Playboy The Mansion Number 1* (2005) NZFLBR 6; *9 songs* (2005) NZFLBR 3.
[49] (2011) NZFLBR 2.
[50] Ibid at [23].
[51] While the Board did not issue a written statement on its refusal to classify the film and the decision was not appealed to the Classification Review Board, there was a great deal of media coverage of the decision. See eg Griffin, M (21 July 2010) 'Zombie Porn Director Delighted by Ban' *The Sydney Morning Herald* available at: <http://www.smh.com.au/entertainment/movies/zombie-porn-director-delighted-by-ban-20100721-10k8z.html> ; P Kalina, P (21 July 2010) 'Gay Zombie Porn Gets Festival Flick' *The Sydney Morning Herald* available

while the power of New Zealand courts to review classification decisions is limited and it is expected that deference will be given to the Board's expertise,[52] comparing it to the Australian system where even limited review is absent shows that it matters greatly in the balance between elite control and democratization of what materials are considered inappropriate for consumption by a country's adult population.

OBSCENITY LAW IN SOUTH AFRICA

Like New Zealand, *Hicklin* migrated into the case law of South Africa quite early in its history. In *Hardy v. Rex*,[53] an appellate court in the Natal region considered an appeal of a newspaper publisher convicted of public indecency for printing a criticism of scandalous practices in the region that included detailed descriptions of the incidents. While the Court's focus was on the common law crime of public indecency, the *Hicklin* test was adopted in rejecting the appellant's claim of a public good immunity.[54] However, unlike many of the English and US cases at that time, the Court's application of *Hicklin* incorporated an important mutation, in holding that the question of whether the accused `intended the probable and actual consequence of his act' should be considered.[55] Despite this early example, the South African courts did not hear many obscenity cases in the early twentieth century. In part, this lack of an extensive body of court rulings on obscenity reflected a long-standing statutory scheme of censorship in South Africa dating back to its time as a set of British colonies and continuing after independence.[56]

While South African statutes governing the censorship of morally questionable publications had been in place prior to independence, a significantly more extensive and detailed definition of obscene material was adopted in the Publications and Entertainment Act of 1963. The new law prohibited all material 'if it or any part of it is indecent or obscene or is offensive or harmful to public morals.'[57] The Act defined as obscene materials those offensive to the public morals as 'outrageous or disgustful,'[58] those dealing with subjects from an extensive list of vague topics in an 'improper manner,'[59] and those offensive to

at: <http://www.smh.com.au/entertainment/movies/gay-zombie-porn-gets-festival-flick-20100720-10jls.html>.

52 The Court of Appeals emphasized the limited role of judicial oversight in *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review*, holding that 'second guess[ing] the Board's decision [...] is not an appropriate role for the courts [...] The right of appeal is only on a question of law and the Board [...] is the expert body entrusted with classification decisions' (2005) 3 NZLR 403 at [112].

53 (1905) 26 NLR 165.

54 In providing an overview of obscenity jurisprudence in South African courts, *R v Bungaroo* (1904) 5 NLR 28, is also frequently referenced by courts (eg *Case and another v Minister of Safety and Security*, 1996 (3) SA 617) and commentators (see eg Mills, L (2007) 'Stop the Press: Why Censorship Has Made Headline News (Again)' (2007) *Potchefstroom Electronic Law Journal* 1) as an example of early adoption of the *Hicklin* standard by South Africa courts. While *Bungaroo* deals with the common law crime of public indecency like *Hardy*, it lacks even tangential discussion of obscenity or any reference to *Hicklin*.

55 Ibid at 170.

56 *Case and another v Minister of Safety and Security* 1996 (3) SA 617.

57 Publications and Entertainment Act of 1963, Sec 5(2)(a).

58 Ibid at Sec 6(2).

59 Ibid at Sec 6(3) (the specific list of topics included: 'murder, suicide, death, horror, cruelty, fighting, brawling, ill-treatment, lawlessness, gangsterism, robbery, crime, the technique of crimes and criminals, tippling, drunkenness, trafficking in or addiction to drugs, smuggling, sexual intercourse, prostitution, promiscuity, white-slavery, licentiousness, lust, passionate love scenes, homosexuality, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality, abortion, change of sex, night life, physical poses, nudity, scant or inadequate dress, divorce, marital infidelity, adultery, illegitimacy, human or social deviation or degeneracy,

public morals 'in any other manner subversive to morality.'[60] The definition of obscene in Section 6(1) of the Publications and Entertainment Act borrowed heavily from the one provided in *Hicklin* by maintaining the 'tendency to deprave or corrupt' language, although it did include a notable exception in evaluating that tendency only on those 'likely to be exposed to the effect or influence thereof.' In addition to providing a statutory definition of materials to be deemed obscene or offensive to the public morals, the act also created the Publications Control Board designed to review materials to determine their compatibility with the statute. While the South African courts retained limited judicial review over the Board's decisions, much like in the New Zealand system, the *Hicklin* standard continued to be applied by the Supreme Court of Appeal as late as 1965,[61] and was not fully abandoned until 1974 in *S v H*.[62]

The political and social environment dramatically impacted the evolution of obscenity standards in all common law countries, but these reverberations were most dramatic and multifaceted in the case of South Africa. Here the suppression of obscene materials was part of a direct attempt to impose a social order reflective of the morality of a minority of the population on all of society.[63] Historically, South Africa had long imposed tight controls over foreign publications with little public outcry, but this changed when some prominent Afrikaans writers began to portray sexual acts and use crass language in some of their writing. This lead to the appointment of a series of investigative committees and the eventual passage of the highly restrictive Publications and Entertainment Act of 1963 and Indecent or Obscene Photographic Matter Act of 1967.[64] This desire for moral control reflected a view by elites that 'most South Africans lack the mental maturity and aesthetic judgement to distinguish between dangerous, obscene and wholesome material.'[65] Moreover, there was a fear among South African elites that pornography consumption was part of a Communist plot to undermine morality in Western nations to weaken them.[66] Yet, the protection of morality was not the sole purpose behind this censorship regime. It was also designed to maintain the social order and to limit anti-government speech detrimental to the system of apartheid.[67]

In its first attempt to devise a test of obscenity under the new statutory scheme, the Supreme Court of Appeal in *S v H*[68] dismissed the notion that it was to determine whether the material in question has a tendency to deprave or corrupt the specific individual charged with its possession, instead declaring that 'What the Court has to decide is whether, as a matter of objective judgment, these photographs do or do not have a tendency to deprave

or any other similar or related phenomenon.'

60 Ibid at Sec 6(4).

61 See eg *Publications Control Board v William Heineman Ltd* 1965 (4) SA 137 (A).

62 1974 (3) SA 405 (T).

63 *Case* supra note 56.

64 See van Rooyen, K (1989) 'The Limits of Authority and Censorship in South African Publications Control' (10) *Ecquid Novi: African Journalism Studies* 4 at 6; Sonderling, S (1996) 'Knowledge and Power in the South African Debate on Pornography 1900s—1990s: A Discursive Critique' (22) *Communicatio* 2; Stemmet, JA (2005) 'From Nipples and Nationalists to Full Frontal in the New South Africa: An Abridged History of Pornography and Censorship in the Old and New South Africa' (31) *Communicatio* 198.

65 Ibid, Stemmet 'Nipples and Nationalists' at 204.

66 Ibid.

67 Sonderling 'Knowledge and Power' supra note 64.

68 1974 (3) SA 405 (T).

or corrupt.'[69] However, this standard proved to be short lived, as the Court replaced it the next year in *S v. Nunes*,[70] with one that relied on an 'objective' interpretation of the statute. As the Court noted: 'Dit is duidelik [...] dat die toets is vir 'n hof om te besluit of uit te maak, in elke geval wat voor hom kom, of die betrokke onbetaamlike of onwelvoeglike fotografiese material is in terme van Art1, en dit is 'n objektiewe toets.'[71] It is important to note that this new test, while more perhaps more objective than *Hicklin*, still represented a relatively repressive standard compared to that in place in many other common law countries at that time.

More recently, the South African Constitutional Court addressed the validity of the section of the Indecent or Obscene Photographic Matter Act of 1967 prohibiting possession of obscene material under the post-apartheid Constitution in *Case.* In holding the statutory provision to be unconstitutional on privacy grounds, the Court did not explicitly adopt a new test for the determination of obscenity. However, it did directly reject the approaches used by courts in the US and Canada that involve 'the formidably difficult task of drawing lines between different kinds of sexually explicit speech,' noting that such distinctions are 'primarily the task of the legislature.'[72] Rather, the Court focused solely on the issue of privacy, with Didcott, J stating forcefully:

> What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which [...] the interim Constitution [...] guarantees that I shall enjoy. Here the invasion is aggravated by the preposterous definition of "indecent or obscene photographic matter."[73]

The legislature responded to the *Case* ruling by passing the Films and Publications Act of 1996 that represented a substantial democratization of access to material that would likely have been banned under the prior system. Under the new law, the old censorship board was replaced with the Film and Publication Board tasked solely with rating, rather than restricting, most pornographic materials. Under this new system only very specific types of material could be banned outright, thus shifting South Africa from one of the most paternalistic common law countries in terms of controlling adult consumption of pornography to one in which adults 'had the moral authority and independence to decide for themselves and [...] the responsibility to do so.'[74] Moreover, the South African Constitutional Court moved this freedom even further in *Print Media South Africa and Another v Minister of Home Affairs*.[75] Here, the Court held invalid the portion of the new statute allowing for the exclusion of certain types of sexual content, leaving as constitutional valid only bans on material that incite war, violence, or harm on the basis of group membership or material that involves child pornography.

[69] Ibid at 407-408.
[70] 1975 (4) SA 929 (T).
[71] Ibid at 931 (this translates from Afrikaans as: 'it is obvious [...] that the test is for the court to decide, in any case that comes before it, whether the involved photos are indecent or obscene in terms of Art 1, and that is an objective test').
[72] *Case* supra note 56 at [48].
[73] Ibid at [91].
[74] Stemmet 'Nipples and Nationalists' supra note 64 at 208.
[75] 2012 (6) SA 443 (CC).

OBSCENITY LAW IN INDIA

The influence of *Hicklin* was effectively dead in most of the common law world by the 1960-70s. However, the counterexample of India illustrates the diversity in the development of national common law obscenity doctrines. *Udeshi v State of Maharashtra*[76] was the first case on the topic of obscenity to come before the Supreme Court of India post-independence. It involved a challenge to the constitutionality of India's obscenity law in the context of a dispute over the much-litigated novel *Lady Chatterley's Lover*, and required the Court to address whether the *Hicklin* standard used in colonial era case law and in the decisions of some regional high courts after independence remained the proper test for judging obscenity.[77] In maintaining *Hicklin*, the Court specifically repudiated the concept of evaluating a work as a whole rather than isolated passages, stating 'obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall.'[78]

In *Udeshi*, Court took great care in its decision to emphasize that the needs of Indian society and its own national standards should guide their decision rather than those of England and the United States. Among its many streams of logic in this vein, one of the more interesting ones was a literary defence for maintaining a restrictive definition of obscenity. The Court argued that:

> Today our national and regional languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court's determination is likely to pervert our entire literature because obscenity pays and true art finds little popular support. Only an obscurant will deny the need for such caution.[79]

Four years later in *Kakodar v State Of Maharashtra*,[80] the Court reaffirmed the use of *Hicklin*, but did allow for some evolution of the standard. Reinforcing the logic in *Udeshi* that the national standards of India should dominate determinations in this arena, the Court noted that 'The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society [...] a piece of literature in France may be obscene in England and what is considered in both countries as not harmful [...] may be obscene in our country.'[81] However, in the first major mutation in Indian obscenity law, the Court simultaneously recognized that all literature did not have to be tested against a standard acceptable for children. In language very similar to that used by the US Supreme Court in *Butler v Michigan*,[82] the Court went on to hold that a standard requiring 'that the adolescent ought not to be brought into contact with sex or that if they read any references

[76] (1965) 1 SCR 65
[77] See eg *In Re: B Chandrasekaran* 2 MLJ 559 (Madras High Court 1957).
[78] *Udeshi* supra note 76 at 76.
[79] Ibid.
[80] (1970) 2 SCR 80.
[81] Ibid at 86.
[82] (1957) 352 US 380.

to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults.'[83]

Later decisions of the Supreme Court would continue to rely on *Hicklin* for another 44 years. Yet, subsequent decisions would build on the first mutation in *Kakodar* by continuing to allow the standard to evolve in a manner that permits greater expressive freedom in art, literature, and film while accounting for Indian cultural values. For example, in *Samaresh Bose v Amal Mitra*,[84] the Court recognized that values change over time in a culture and that it was necessary to be attentive to contemporary attitudes in determining what is obscene. In reaching this decision, the Court held that the final determination of obscenity rested with the Court rather than a jury, that it was appropriate to consider the opinion of literary experts, that the whole of the work must be considered,[85] and that the judge should consider her perception of the author's intent. Thus, while the Court continued to state that *Hicklin* remained the proper standard for defining obscenity in Indian law, the standard described in *Samaresh Bose* was far removed from what Cockburn had in mind nearly 120 years earlier.

Another major step toward a more democratic standard for obscenity came in *Ajay Goswami v Union of India*.[86] Denying a petition requesting stricter standards to protect minors from sexual material in the press, the Court held that restrictions on the freedom of expression should not be allowed, 'unless the situations created by allowing the freedom are pressing and the community interest is endangered.'[87] However, it was in *Aveek Sarkar v State of West Bengal*,[88] that the Supreme Court put the final nail into *Hicklin's* coffin while revisiting the appropriate standard for obscenity in a case involving the publication of a nude photo of tennis player Boris Becker and 'his dark-skinned fiancé.' Exemplifying the legal equivalent of natural selection, the Court reviewed English, American, Canadian, and Indian case law to find the `*Hicklin* test is not the correct test to be applied to determine "what is obscenity"' in contemporary India, adopting in its place a test where 'obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.'[89] The Court devoted a substantial portion of the opinion to a discussion of the *Udeshi*, *Kakodar*, and *Samaresh Bose* decisions. In doing so, it painted a picture of a slowly evolving obscenity standard where the adoption of the new standard seemed a perfectly logical progression by careful highlighting language from each decision that made reference to how Indian standards were changing over time.

While this new standard represents a significantly more progressive and democratic view of what is obscene and therefore permissible for Indian citizens to consume under criminal statutes, it is still relatively restrictive and elite driven in its scope compared to other common law countries. The recent Supreme Court decision in *Devidas Ramachandra Tuljapurkar v State of Maharashtra*[90] makes this quite clear. While applying the community standards test from *Aveek Sarkar*, the Court held that 'Freedom of speech and expression

[83] *Kakodar* supra note 80 at 87.
[84] (1985) 4 SCC 289.
[85] This point was further expanded in *Bobby Art International & Ors v Om Pal Singh Hoon* (1996) 4 SCC 1, in the context of a nude scene in a film.
[86] (2007) 1 SCC 143.
[87] Ibid (quoting *S Rangarajan v P Jagjivan Ram* (1989) SCC (2) 574).
[88] (2014) 4 SCC 257.
[89] Ibid at [24].
[90] (2015) 6 SCC 1.

has to be given a broad canvas, but it has to have inherent limitations which are permissible within the constitutional parameters.'[91] In isolation, this passage mirrors decisions made in nearly all common law countries that use a community standard based approach for determining obscenity, as almost none grant all material that would be classified as obscene unfettered constitutional protection.[92] However, while most countries apply those exceptions only to the most offensive of hard-core pornographic materials, the Indian Supreme Court used this standard to deny protection to a poem that portrayed Mahatma Gandhi in an 'obscene way' concluding:

> When the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of degree comes in. To elaborate, the contemporary community standards test becomes applicable with more vigor, in a greater degree and in an accentuated manner. What can otherwise pass of the contemporary community standards test for use of the same language, it would not be so, if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene.[93]

OBSCENITY LAW IN THE PHILIPPINES

The Supreme Court of the Philippines first addressed the question of obscenity in the 1923 case of *People v Kottinger*, dealing with the question of 'whether or not pictures portraying the inhabitants of the country in native dress and as they appear and can be seen in the regions in which they live, are obscene or indecent'.[94] In its decision, the Court adopted two somewhat distinct tests. The first was a modified version of *Hicklin* derived largely from a series of US state and lower federal court decisions,[95] that determined obscenity as 'whether the tendency of the matter charged as obscene, is to deprave or corrupt those whose minds are open to such immoral influences and into whose hands a publication or other article charged as being obscene may fall.'[96] The second definition was simply that 'which shocks the ordinary and common sense of men as an indecency'.[97] However, the Court went on to declare that both tests must be evaluated with respect to the circumstances of the case and based upon the 'judgment of the aggregate sense of the community reached by it',[98] thus adopting a more democratic approach to the application of these tests than that found in many of the decisions from US courts that it relied upon.

[91] Ibid at [104].

[92] The one major exception to this is the US state of Oregon. In *State v Henry* (1987) 732 P 2d 9, the Oregon Supreme Court held that 'Obscene speech, writing or equivalent forms of communication are "speech" nonetheless [...] it is speech that does not fall within any historical exception to the plain wording of the Oregon Constitution that "no law shall be passed restraining the expression of [speech] freely on any subject whatsoever."'

[93] *Tuljapurkar* supra note 90 at [105] (internal quotation marks omitted).

[94] (1923) 45 Phil. 352.

[95] Eg *United States v Harmon* (US District Court for the District of Kansas 1891) 45 F 414; *United States v Males* (US District Court for the District of Indiana 1892) 51 F 41; *People v Muller* (New York Court of Appeals 1884) 96 NY 408. The heavy reliance on US precedents during this period is unsurprising given that the Philippines were not granted Commonwealth status until 1935 or full independence until 1946.

[96] *Kottinger* supra note 94 at 356.

[97] Ibid.

[98] Ibid at 359.

In the decade following independence, the Supreme Court attempted to clarify and redefine its obscenity standard in *People v Go Pin*[99] and *People v Padan y Alova*.[100] In *Go Pin*, the Court focused on the distinction between the display of artistic materials in proper venues for proper purposes and the use of materials for commercial purposes, reasoning that:

> If [nude] pictures, sculptures and paintings are shown in art exhibits and art galleries for the cause of art, to be viewed and appreciated by people interested in art, there would be no offense committed. However, the pictures here in question were used not exactly for art's sake but rather for commercial purposes [...] so that the cause of art was of secondary or minor importance. Gain and profit would appear to have been the main, if not the exclusive consideration.[101]

In *Padan y Alova* the Court expanded the *Go Pin* decision in finding that material that otherwise might be considered obscene can be saved via its artistic aspects. However, the Court was also clear to note that 'an actual exhibition of the sexual act, preceded by acts of lasciviousness, can have no redeeming feature. In it, there is no room for art. One can see nothing in it but clear and unmitigated obscenity, indecency, and an offense to public morals'.[102]

In 1985, the Movie and Television Review and Classification Board was created by Presidential Decree Number 1986 during the period of martial law under the Marcos regime. Censorship of the media was a common theme under Marcos for maintaining his power.[103] It is reasonably clear from language in the Decree creating the Board that this was a large part of the purpose here, as the first two types of problematic content were: 'Those which tend to incite subversion, insurrection, rebellion or sedition against the State, or otherwise threaten the economic and/or political stability of the State' and 'Those which tend to undermine the faith and confidence of the people in their government and/or the duly constituted authorities'.[104] Interestingly, the board remained after a return to democratic government much like the retention of a similar agency after the end of apartheid in South Africa. Today, the board uses a rating system similar to that of the Motion Picture Association of America, but with an X rating (as the MPAA used in the past) rather than an NC-17 rating (as the MPAA currently uses). Films given an X rating are not banned, but simply prohibited from public exhibition.

The Supreme Court again revisited the question of the proper test of obscenity in *Gonzalez v Kalaw Katigbak*,[105] involving review of a decision of the newly created Movie and Television Review and Classification Board. Here the Court ignored both *Go Pin* and *Padan y Alova*, holding that the clear and present danger test applies to motion pictures, while defining obscenity by adopting the test from the US Supreme Court decision in *Roth v United States*:[106] 'Whether to the average person, applying contemporary standards, the

[99] (1955) 97 Phil 418.
[100] (1957) 101 Phil 749.
[101] Ibid.
[102] *Padan y Alova* supra note 100 at 752.
[103] Haynie, S (1998) 'Paradise Lost: Politicization of the Philippine Supreme Court in the Post Marcos Era' (22) *Asian Studies Review* 459.
[104] Presidential Decree No 1986, Section 3(c)(i-ii).
[105] (1985) 137 SCRA 717.
[106] (1957) 354 US 476 (while the adoption of US precedent in not unusual in Philippian case law, it is interesting

dominant theme of the material taken as a whole appeals to prurient interest'.[107] The Court concludes by holding that in the case of motion pictures 'it is hardly the concern of the law to deal with the sexual fantasies of the adult population'.[108] However, in the case of television, standards would be 'less liberal' as children would be apt to be exposed to such programing and 'the State as parens patriae is called upon to manifest an attitude of caring for the welfare of the young'.[109]

However, only four years later the Court again abandoned the community standards approach in *Pita v Court of Appeals*,[110] criticizing both Philippine and US case law as lacking uniformity. Refusing to define obscenity, the *Pita* Court questioned the logic of the community standards approach holding that 'neither should we say that obscenity is a bare (no pun intended) matter of opinion [...] it is the divergent perceptions of men and women that have probably compounded the problem rather than resolved it'.[111] Rather 'than rushing to a perfect definition of obscenity, if that is possible'[112] the Court simply returned to the clear and present danger test.

In its most recent decision on the topic, the Supreme Court again returned to the community standards approach. In *Fernando v Court of Appeals*, the Court noted that 'there is no perfect definition of obscenity but the latest word is that of *Miller v California*'.[113] After listing the three prongs of the US Supreme Court's *Miller* test, the Court clarifies that the decision does not give 'the trier of facts [...] unbridled discretion'.[114] Moreover, echoing the dichotomy between commercial and non-commercial purposes in *Go Pin*, the Court adds the following caveat to its conclusion: 'We emphasize that mere possession of obscene materials, without intention to sell, exhibit, or give them away, is not punishable [...] considering the purpose of the law is to prohibit the dissemination of obscene materials to the public'.[115]

While the Supreme Court has vacillated between specific standards for defining obscenity, it has largely focused these efforts in the context of commercial purposes or other public exhibitions. For the most part, as emphasized in the quotation from *Fernando*, it has recognized that purely personal possession of obscene material is largely protected from punishment. This relatively democratic standard is further reflected by the fact that the country's classification board focuses on ratings for purposes of guidelines and prohibitions on public exhibitions, rather than bans on ownership or possession especially given the agency's authoritarian origins.

to note that the *Roth* test had been abandoned by the US Supreme Court more than a decade prior to the *Kalaw Katigbak* decision).

107 *Kalaw Katigbak* supra note 105 at 726 (quoting *Roth* ibid at 489).

108 Ibid.

109 Ibid.

110 (1989) 78 SCRA 362.

111 Ibid at 372.

112 Ibid.

113 (2006) PHSC 1146.

114 Ibid

115 Ibid

CONCLUSIONS

Today the standards for what constitutes obscenity in Australia, New Zealand, South Africa, India, and the Philippines share some commonalities, but are each unique legal species. While all share origins in English common law and each evolved via the same mechanisms, the end result in each country reflects the specific values of that society and the degree to which that country's elites desire to maintain a paternalistic view with respect to what is appropriate for adults to read and watch versus a more democratic one in which adults are free to decide such questions for themselves with the government providing, at most, some guidance in the form of ratings. Additionally, tracing the evolution of obscenity law in each country reveals that standards appearing nearly identical on paper can differ greatly in practice based on how they are interpreted and applied by relevant elite actors.

One of the limitations of the theoretical framework presented herein is that it cannot serve, nor is it meant to serve, as a specific predictor of future evolution. However, we can see certain trends over time and place that may offer some guidance. In general, we would expect that as societies become more open generally, they would adopt more permissive standards regarding the freedom of adults to consume a wider array of pornographic materials. However, even in relatively tolerant societies such as Australia, we see that such restrictions can still exist, and that institutional rules still matter a great deal.

So what does the future of obscenity law hold? A host of new legal questions are beginning to arise from technological advancement. Courts, legislatures, and bureaucratic agencies throughout the common law world are now starting to address issues related to internet pornography, sexting, 'revenge porn,' and an array of other novel developments. Clearly, it will be difficult for standards developed to deal with physical books and movies to deal with these new issues without refinement and evolution. While the theoretical framework presented here cannot tell us what the next stages in this evolution will look like in each of these countries, it can tell us that this evolution will follow the same mechanisms of gradual change through the evolutionary mechanisms of mutation, migration, genetic drift, and natural selection in a manner designed to achieve policy in line with that society's values as interpreted by its elites.