JUDGING OBSCENITY: A CRITICAL HISTORY OF EXPERT EVIDENCE, CHRISTOPHER NOWLIN (MONTREAL: MCGILL-QUEEN'S UNIVERSITY PRESS, 2003)

Back in the days when the human sciences had not been tainted by eugenic experiments, the American legal realists imagined a rosy future for sociological jurisprudence. Their dream did not come true, however, either in the U.S. or in Canada: parts of the legal system were certainly transformed by scientific or technical expertise, but *social* science has rarely had much influence on legal developments. Nevertheless there are still people, inside and outside the legal system, who persist in imagining that our poor old common law system has become totally dominated by "experts" — a category that, in Christopher Nowlin's *A Critical History of Expert Evidence*[1] as in other simplistic accounts of the issue, does not differentiate between the traffic engineers who influence our seat-belt laws and the cultural sociologists who sometimes appear in court as "expert witnesses," but whose voices are rarely given much weight.

If mixing together all manner of technical and academic knowledges into the analytically sloppy category of "expert" is a key problem marring Nowlin's book, an even more serious problem (more serious insofar as he lets himself be described as a "barrister" on the back cover) is the assumption that "law" is all of a piece. Evidence about the influence of social science knowledges on American labour law in the 1920s is placed alongside numerous quotes from the unusual pro-social science U.S. Judge Jerome Frank. That in turn is placed beside long descriptions of Canadian cases in which social scientists have testified — descriptions which often end up admitting that the court in question either trivialized the evidence in question, rejected it, or failed to mention it, but with these admissions being made so quickly and in passing that one could easily miss them.

An example of Nowlin's misleading approach is his discussion of the key 1997 indecency case *R. v. Mara*,[2] in which Sopinka J., in one of his last judgments, gave his final word on the famous "risk of harm" test that he himself had developed in the better known 1992 obscenity case, *R. v. Butler*.[3] The *Mara* text, which is still the law of the land, put an end to any illusions that social scientists, feminists, and some judges might have had about the "risk of harm" test, meaning that courts would now hear from either experts or community groups about what kind of harm is or is not actually attributable to representations and performances. Justice Sopinka stated clearly that harm to women who perform in the sex industry, "while obviously regrettable,"[4] had nothing to do with the risk of harm test. This meant that feminist or other sociologists who study sex work would no longer be welcome experts. Justice Sopinka also rejected the utilitarian interpretation of the harms of sex work given in the earlier *R. v. Tremblay*[5] case, which Nowlin discusses at length,[6] as if its interpretation of "risk of harm" had not been overturned by *Mara*. That indecency law is almost totally independent of social science evidence is well known to the few Canadian scholars — mostly unknown to Nowlin — who have studied this. But then, indecency law is not the best known area of law.

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1 (Montreal: McGill-Queen's University Press, 2003).
2 [1997] 2 S.C.R. 630 [*Mara*].
3 [1992] 1 S.C.R. 452 [*Butler*].
4 *Mara*, *supra* note 2 at para. 37.
5 [1993] 2 S.C.R. 932.
6 Nowlin, *supra* note 1 at 218-19.

Less forgivable is the fact that obscenity law is seriously misconstrued. Nowlin fails to mention that experts — who are often artists, gallery directors, and film festival programmers, not the ivory-tower academics that Nowlin loves to trash — have only had influence on one bit of obscenity law, namely, the artistic exception. To prove that film X or gallery show Y are indeed art and hence able to benefit from what is labelled as an exception, one uses experts. But this expertise is strictly about art. The work of Customs officers holding things up at the border or the work of police who walk through Canada's downtowns warning porn shops about possible charges is not at all affected by the acquittal of a few celebrated highbrow producers.

But Nowlin is so absorbed in playing the legal Don Quixote that he goes further than merely mistaking small sociological windmills for giants. An example: in her 1985 *R. v. Towne Cinema*[7] decision, Wilson J. firmly rejected the slightly more sociological approach to obscenity favoured by Dickson J. In a phrase that would later be inserted into the text of the *Butler*[8] decision — thus giving judicial discretion renewed power within the new "risk of harm" paradigm — Wilson J. wrote that evidence *of any kind*, expert or otherwise, is not at all necessary, the community standards test notwithstanding, since all that matters is the judge's view of what communities need or want or think.[9] Incredibly, Nowlin gives the following summary of Wilson J.'s decision in *Towne Cinema*:

> Judges were being encouraged, but not ordered, to abandon their pretenses to knowledge of community standards and to canvass instead the informed opinions of others, usually experts or authority figures. Wilson suggested that such an approach would not only "inspire greater confidence in the result" but possibly enhance "uniformity".... In a broad sense, Wilson was also proposing that the kind of information relevant to Canadian anti-obscenity [*sic*] prosecutions was beyond the purview of a narrowly situated judiciary.[10]

Nowlin's ability to read has clearly been clouded by his contempt for experts (whom he describes as motivated either by greed, or, if giving evidence without payment, then by a desire for "the limelight"[11] — as if lawyers wished neither payment nor fame). But he also writes with arrogant contempt for judges who dare to contemplate giving some limited weight to social science evidence. He trashes Jessup J. of the Court of Appeal for Ontario for his "naïveté"[12] and for being "in the dark" about research[13] just because Jessup J. sensibly suggested that such evidence needed to meet "approved statistical methods," "fair sampling,"[14] and so on:

> Jessup seems to be as much in the dark about representativeness as Dickson when he suggests that "an opinion with respect to the [Canadian community] standard in only a segment of such national community is irrelevant."[15]

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7 [1985] 1 S.C.R. 494 [*Towne Cinema*].
8 *Butler*, *supra* note 3 at paras. 44-46.
9 "I do not consider that there must be evidence, expert or otherwise.... It is the opinion of the trier of fact on the community standard of tolerance with which we are concerned"(*Towne Cinema*, *supra* note 7 at para. 54).
10 Nowlin, *supra* note 1 at 119.
11 *Ibid.* at 78.
12 *Ibid.* at 100.
13 *Ibid.*
14 *Ibid.*
15 *Ibid.*

This is sheer nonsense. Social scientists — including myself — have argued that to impose a *national* standard distorts the whole idea of "community," since in our usage, which in this case coincides with popular usage, communities are always particular, always different from the nation-state. But the Court of Appeal for Ontario was hardly in a position to change the community standards test. It is silly to criticize a provincial court of appeal judge for holding that, given that the standard is national, therefore, national information is what is relevant.

Nowlin then goes on to trash Dickson J., who in the relevant decisions expressed a thoughtful and even-handed attitude toward social science evidence. He calls Dickson J.'s attempt to provide some rules of evidence "authoritarian"[16] for no good reason and adds: "Jessup in *Times Square Cinema* and Dickson in *Prairie Schooner News* were obviously groping in the dark regarding the heuristic [*sic*] fruits of social science survey evidence in obscenity cases."[17] The reader cannot but conclude that someone who does not know what "heuristic" means should not be criticizing either experts or judges grappling with the issue of social science evidence. But Nowlin's legal logic is not much better. Throughout the book he conflates "admissibility" with "weight." The fact that there has been an increase in the number of experts testifying in constitutional cases is treated as *ipso facto* proof that they are having a tremendous influence.

If Nowlin is so exercised by social science evidence as to totally exaggerate the extent of its influence, and even to cast arrogant aspersions on some of Canada's most thoughtful judges, what is the real goal of his crusade? What does he favour?

Here is where the book is at its most slippery. Citing John Dewey's paean to democracy at length,[18] Nowlin gives the impression that law would automatically return to its democratic and commonsensical roots if only experts were to be expelled. And by discussing at some length an unusual *American* case in which a jury — a grand jury, actually — was involved in a case related to obscenity,[19] he manages to sweep under the rug the large inconvenient fact that juries have no role at all in any Canadian obscenity (or indecency) prosecutions. Expert evidence, as stated above, has only been influential in proving that something is art rather than obscenity, so expelling experts would make very little difference to the average porn shop owner or strip dancer. In Canadian law, the only alternative to social science or other generalized evidence in cases concerning pornography and other sexual representations is hardly the "democratic government" that Nowlin goes on about in an odd conclusion that cites only U.S. writers Jerome Frank and John Dewey.[20] Given that the ordinary people who buy or sell or work in pornography do not speak in court, and given that juries are not involved, the only real-world alternative to socially sensitive social science is nothing but good old, Hicklin-type, judicial discretion. Which is hardly what Jerome Frank or John Dewey, not to mention the numerous Canadian thinkers on democracy and law whose work Nowlin has not read, would see as an improvement.

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16 *Ibid.* at 98.
17 *Ibid.* at 101.
18 *Ibid.* at 44-45.
19 *Ibid.* at 77-79.
20 *Ibid.* at 224-25.

One can only lament that the important topic of social science evidence has, in Canada, received no detailed scholarly attention other than in Nowlin's book. Equally lamentable is the fact that a good university press has put its name on the cover — although it is obvious that nobody looked at the manuscript closely. The word "anyways" appears here uncorrected;[21] and elsewhere we read: "This could not likely have been the case."[22] Huh? The lawyers, social researchers, and judges who have for some years now been developing mainly informal and as yet unco-ordinated rules about the admissibility and the weight of social science evidence deserve much better.

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21 *Ibid.* at 223.
22 *Ibid.* at 78.