

## THE LAW AND OBSCENITY

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## THE LAW AND OBSCENITY

**I**N the eighteenth century, Englishmen used to speak of their liberties. Concrete things they appear to have been: a liberty to do this, and a liberty to do that. With one notable exception, religious criticism, the State did not concern itself very closely with the moral guardianship of its citizens. Bureaucracy was not sufficiently hatched to be counted a political fact.

Came the French Revolution, with its cry for Freedom, and hot on its heels came Philosophy, always eager to give a well-defined meaning to the demands of the ordinary man. Out of the cry for Freedom was born the concept of Freedom, and very soon the child ceased to have any real resemblance to its parent. Its growth was a subtle process, and in the end the German philosopher of the nineteenth century, Hegel, was able to explain away the apparent conflict between individual freedom and State control. True freedom, he argued, does not mean doing as and what you like. It means

realising your truest self. The individual is but a part of a larger whole, the State. In the organic life of the State is to be found the highest expression of the moral life. The State is "the fly-wheel of our moral life." Its function includes the moral guardianship of its members, and the highest life to which the members can attain is that of obedient citizenship. This was the ultimate fate of Rousseau's doctrine that man must be forced to be free. So it came about that "the liberties of the individual" was withdrawn from the currency of political thought and displaced by "the freedom of the higher moral life." In claiming many of our ancient liberties we may find ourselves suffering the penalty of taking liberties.

No doubt the facts of history do not all fit in with this view. But it is a view which receives much support from the evidence of philosophical thought and the development of many legal institutions. At any rate, it is a fitting preface to a review of the English law of obscenity. The history of that law is the history of a change from the liberty of the individual to indulge in any literary or artistic expression to a condition of affairs in which the State, through its judiciary, determines in what manner and degree he may indulge such expression.

Prior to the eighteenth century, if there was a

law of obscenity it does not appear to have been put into operation. The unrestricted expression of literature during the Elizabethan age and the age of the Reformation testifies to the freedom of authors from the interference of a judicial censor. Only where it was blasphemous did the law condemn the product of poet or artist. Possibly this was the case because it would come to the notice of only a cultured minority whose well-balanced minds could be calculated to resist any immoral stimulus. Whatever the reason may have been, the Courts had not yet found in the words of poets or the pictures of painters such a titillation of depraved passions as would or might "undermine the true government of society."

But let us take a jump from those days of spiritual freedom to the enlightened twentieth century. Let us enter the Old Bailey on February the 8th, 1932, and witness one De Montalk standing in the dock charged with uttering an obscene libel, a crime for which he may be either fined or imprisoned for a term of any length and either with or without hard labour. He is a lecturer and a poet. He has been charged with publishing an obscene libel, to wit, a poem. He is alleged to have done so by taking the manuscript to a printer for the purpose of having it printed for private circulation among a limited

circle of literary friends. The prosecution do not allege any commercial aim on his part. In effect they admit that the document is the literary experiment of a poet. But this avails him nothing. The learned Recorder addresses the jury saying that a man must not say that he is a poet and be filthy; he has to obey the law just the same as ordinary citizens, and the sooner the highbrow school learn that the better for the morality of the country. The jury returned a verdict of guilty without retiring, and his Lordship, after stating that no decent-minded jury could have come to any other conclusion than that the defendant had attempted to deprave our literature, passed sentence of six months' imprisonment on him. The Court of Criminal Appeal refused to interfere with the verdict or sentence, when moved to do so.

Clearly, the poem was revolting to judge and jury. It called forth no æsthetic reaction in either. They could see in it only the product of a lewd and filthy mind. Accordingly they could not, and did not, pierce through the apparent obscenity of the poem to the genuine æsthetic purpose which its author may or may not have succeeded in effecting. That there was some such purpose in his mind is an inference which must in justice to him be drawn from the fact that no commercial gain was ever alleged

against him. He was at least sufficiently interested in words, the material with which poets record their precious experience, to experiment with them. His interest in the words he used was disinterested. He may have failed dismally, and the result of his efforts may have been a mere collection of words bearing a filthy and nauseating meaning. But a bad poet is still a poet, one striving, however hopelessly, after the sublime experience of his kind. That is why those who value the purpose for which he works, the end he seeks, above the satisfaction of an unæsthetic public are shocked by the barbarity of the sentence on de Montalk, and the impropriety of the existing law of obscene libel which makes such a sentence possible in the year of our Lord 1932.

The history of this law is an object lesson in its real nature. The earliest recorded prosecution appears to be *R. v. Curl* in 1729, in which the defendant was charged with publishing an obscene libel, a book entitled *Venus of the Cloister*. He was found guilty. His counsel tried to argue in arrest of judgment that the Court had no jurisdiction. It was a question of morals with which only the spiritual courts could deal. Counsel referred to the earlier case of *The Queen v. Read*, in which a similar objection had been taken by the defence, and had received strong support from Holt, C.J., with the



result that the prosecution was dropped. In answer to this defence, the prosecution put forward two arguments, one of which was to become the basis of the future law of obscene libel. In the first place, it argued that the book was derogatory of religion, and that if it reflected upon religion, "that great basis of civil government and society," it was a temporal as well as a spiritual offence. Secondly, it argued that the book was destructive of morality. "Destroying that is destroying the peace of the Government, for Government is no more than publick order, which is morality." The Court accepted these arguments.

The significant point about this case is, that the Court recognised the need of showing that the offence was a breach of the King's peace. A sound juristic point of view, which held forth promise of a sounder and saner law than was to develop in later days. But it was soon to pass from the Courts.

It should be observed that the obscenity to which the Courts were objecting was a kind of impiety, an offence against religion, and that meant against the Christian religion. Mere obscenity in itself would not have been a crime. The law was as yet not concerned to protect the sensibilities of a puritanical public. It was concerned to protect the

binding force of religion. This would be the reason why a few years later, in 1733, the prosecution failed to obtain the conviction for obscenity of a lady who had graced the public highway with her presence, almost naked.

In 1768, the law of obscenity as proclaimed in *The Queen v. Curl* had taken such root that the objection to the jurisdiction of the temporal courts was not even taken in the celebrated case of *R. v. John Wilkes*.

But it was, as might be expected, in the nineteenth century that the law of obscene libel developed into the thing we know. Impiety ceased to be an essential ingredient of the offence, and the criterion of obscenity became a purely moral one. The accepted test of obscenity was that laid down in *R. v. Hicklin* by Cockburn, C.J.,—"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." It was no longer a question of proving a breach of the peace, or a probability of such breach. The State had passed beyond the ancient limits of its functions when it concerned itself only with protecting the King's peace, which meant the physical quiet of social life. Only by the same sophistry as that used by the

prosecution in *R. v. Curl* could the courts have explained their attitude to obscene publications as a protection of the King's peace. In truth, and in fact, they had gone beyond the King's peace and were determined also to protect the soul's peace. In the nineteenth century, the age of moral guardianship by the State had set in. The State had begun to punish obscenity in itself because of its tendency to deprave. Nor had the obscenity to consist of a written document. It could be a picture or vicious and immoral words spoken publicly.

The grim determination of the Courts to give this law an unlimited application is shown by a long list of cases during the nineteenth century, in which they proved themselves the loyal allies of a puritanical and intolerant public. Perhaps the most striking example is the case of *R. v. Carlile*. An officer of the Society for the Suppression of Vice purposely went to the prisoner's shop and asked to see some unbound prints. He was shown several by the prisoner in a back room, of which he bought two in order to found a prosecution thereon. This was held a sufficient publication to sustain the charge.

The Courts had decided to give obscenity no quarter. It must be rooted out. The minds of those who are too weak to resist its depraving effects must be protected from obscenity. But what

should they do when the motive of the author was of the highest and most disinterested? This problem confronted the Courts in the case of *R. v. Hicklin*. The Protestant Electoral Union had published a book called *The Confessional Unmasked*, intended to expose the abuses of the Roman Catholic discipline and to promote the spread of the Protestant religion. The Court admitted that the motive of the publisher was innocent, and possibly even praiseworthy. But it found that many passages were obscene and condemned it as an obscene libel.

Accordingly, any reference to the intent or motive of the publisher or author became henceforth irrelevant to the question whether a publication was obscene. It was simply a question of the intrinsic character of the publication itself, and this character was to be ascertained by reference to its possible effects on the minds of those whose morals might be adversely affected by it.

This was the law of obscene libel which the Victorian age left as its legacy to the twentieth century. It also left many deep-rooted conventions which began to weaken before the Great War, and were swept away during and after that great liberating explosion. But if youth became frank about a thousand things which brought a blush to Victorian

cheeks, the law of obscene libel remained unaltered, and the courts echoed the language of their Victorian precedents.

The existence and unwavering judicial support of that law has been emphatically reaffirmed in two recent prosecutions. In the one case, the victim of a sensational press and an offended Bench was the *Well of Loneliness*. In the other case, the press brought the works of D. H. Lawrence within the clutches of the law. The latter case is an admirable illustration of the operation and consequences of the law. The defendants were summoned under the Obscene Publications Act of 1857 for exhibiting certain obscene pictures and reproductions thereof in colour in a book. That book was the work of D. H. Lawrence, and it had been seized under a search warrant. The commissioner of police supported the summons, and except for the comments of the prosecution the only evidence which it offered was that of policemen. These officers of the law were the authors of that information on which the search warrant was granted, and they, in their discretion, took possession of the alleged obscene works. As the Inspector said under cross-examination: "it was in my discretion as to what I took possession of." Following this statement there transpired a passage in the evidence of the Inspector

which is in itself the most eloquent testimony to the real character of the procedure that led to the trial.

*Mr. Hutchinson (Defending)*: You put it (one of the books at the Exhibition which was not seized) on one side and it was pointed out to you that this book had drawings by William Blake, who was possibly one of the finest draughtsmen that the British School had ever produced. Was that pointed out to you?

*Detective-Inspector Hester*: I think it was.

*Mr. Hutchinson*: Perhaps you felt your instructions did not go as far as seizing William Blake's books?

*Mr. Muskett (Prosecuting)*: Possibly it did not convey anything to him.

*The Magistrate (To Witness)*: Have you ever heard of William Blake?

*Detective-Inspector Hester*: No.

Yet it was in the discretion of these officers of the law, who could not be expected to have, as, in fact, they did not have, any intimate knowledge of the world of art, to seize the works of an artist who at least had induced the respectful attention of people like the late Arnold Bennett. That is in itself

enough to invite the gravest fear that under our law the future of art and literature may be determined by the criticism of policemen. But the more serious aspect of the matter is, that the Courts do not promise any correction to the possible æsthetic errors of policemen. When Mr. Hutchinson submitted that the pictures of Lawrence were comparable with pictures in the Dulwich Gallery, and that if the former were indecent so also must be the latter, the learned Magistrate retorted that the comparison was a very serious thing. Mr. Hutchinson submitted it was a matter of taste. To this the Magistrate replied: "It is a matter of taste." And that sums up the real nature of the proceedings. The books containing Lawrence's pictures did not accord with the taste of the Court. They were accordingly condemned.

The insurmountable hurdle of the prosecution's conscience appears to have been the indiscreet exhibition by Lawrence of the pubic hair. Hear Mr. Muskett in his opening speech:

"For generations past now—I can speak with an experience of over forty-five years in this class of case—it was always, in my young days, and has been ever since, the test of obscenity in this class of case, whether there was a gross and unnecessary exposure of the private parts of the male and female, and if

the pubic hair was represented in any pictures, or paintings, or engravings, or the like. That was an almost invariable test that they were to be regarded as obscene, and I do not suppose, although my ideas on these matters may be very mid-Victorian, there is very much difference that could be applied to-day to this class of filthy production, as I call it."

The Victorians permitted painting in the nude, and, indeed, it appears to have been very fashionable. But, as Mr. Muskett indicated, they were careful to avoid the exhibition of the pubic hair. That remained a phenomenon of nature to which no decent artist dared to react æsthetically. Nature had committed an indiscretion to which Art must turn a blind eye. No matter that Lawrence might be a creative artist; no matter that his intention may have been to record faithfully through the medium of paint his reaction as an artist to an incontrovertible fact of nature; the creative spirit of the artist must be subservient to the demands of a preventive moral discipline. If it conflicts with the protection of the public from its own moral weaknesses, then the creative artist must be sacrificed on the altar of moral discipline. At least, in consideration of a curbed creative spirit we will have a curbed sexual passion. Truly, in this prosecution the dead hand of the law



fell with a resounding slap upon the whole of creation.<sup>1</sup>

We are now in a position to define the social theory implied in our law of obscene libel. Its basic proposition is this. The State is intimately and directly concerned with the moral welfare of its citizens. Men and women vary in the kind and degree of their reactions to literature and art. Whereas some may be able to contemplate a picture of a nude woman without lascivious thought or passion, others will see in it nothing but the object of a crude sexual reaction. The artist who painted the picture may have had no lewd or even sexual feeling or purpose in its making. That does not matter. It is the product in itself that matters. Is this product

<sup>1</sup> Cf. Havelock Ellis in his *Studies in the Psychology of Sex*, vol. vi. p. 94: "The omission of the pudendal hair, in representations of the nude (in classic art) was, for instance, quite natural, for the people of countries still under Oriental influence are accustomed to remove the hair from the body. If, however, under quite different conditions, we perpetuate that artistic convention to-day, we put ourselves into a perverse relation to nature. There is ample evidence of this. 'There is one convention so ancient, so necessary, so universal,' writes Mr. Frederick Harrison (*Nineteenth Century and After*, August 1907), 'that its deliberate defiance to-day may arouse the bile of the least squeamish of men and should make women withdraw at once.' If boys and girls were brought up at their mother's knees in familiarity with pictures of beautiful and natural nakedness, it would be impossible for any one to write such silly and shameful words as these."

such as will, if published, be likely to corrupt some one's morals? If it is such, then it is obscene and must, in the public interest, be destroyed. But, it may be objected, is not the law concerned only with the actions of men, not with their minds or hearts? The answer of the law is the sophistical argument of the prosecution in *R. v. Curl*. The peace of government, which is the ultimate aim of law, depends upon the morality of the people. To ensure this peace, the law must actively protect and promote the good morality of the people.

Before letting the full force of criticism loose on this inviting victim, it is important to recognise the element of truth which it purports to express but so badly distorts. Undoubtedly, the peace of society does in the last resort depend on the sense of moral obligation in its members. No one will argue that men obey the law merely and solely because they fear its punishment. On the contrary, men will flagrantly disobey the law when they cease to respect and believe in it. Witness the widespread disregard of our lottery laws. Truly the "Irish Sweep" has become an English national institution. Every class of the community revels in it, and the Press openly stimulates interest in it. Yet the law changes not. It still regards those who buy or sell tickets in such sweeps as rogues and vagabonds,

and it has not refrained from branding them as such in a number of recent prosecutions. This simply shows how obedience to the law depends upon a conviction in the individual that the law should be obeyed. He obeys it because he sets a moral value upon it.

At first sight this would seem to be an argument in support of the theory that the law is intimately concerned with morals. Accordingly, it would appear to justify our law of obscene libel. But, as we shall see, only a very uncritical view can fail to discover its fallacies.

The courts have wisely refrained from attempting any definition of obscenity. Even the International Conference on the Suppression of the Circulation and Traffic in Obscene Publications, which was held at Geneva, readily admitted that the term obscenity was not capable of definition, and proceeded to discuss their problems without such a definition. This is not strange. Our courts have likewise no definition of obscenity; yet they do not seem to experience any difficulty in deciding what is and what is not obscene. The reason for this absence of any definition of obscenity is a logical one. Obscenity cannot be defined. It is a relative term. It signifies no objective reality but the quality of a reaction of the human mind to the objects of

its experience. It depends accordingly not merely upon the thing experienced, but also on the quality, character, and point of view of the mind which experiences it. It is essentially subjective. Try to define obscenity, and the result will merely be such a conglomeration of epithets as may lead you into the dock of the Old Bailey on a charge of attempting an obscene definition. A certain picture is obscene to me because my mind reacts to it in that way. The same picture is not obscene to you because your mind does not react to it in that way. A surgeon will read a work on anatomy with the dispassionate calm of a scientist. The same work in the hands of a smutty youth may be the object of purely sexual reactions. Any and every work of art or literature in which the human body is somehow referred to may be said to be open to either of these kinds of treatment, and the Bible perhaps more than most other books.

One would expect this rather obvious truth to prove disarming to those who plead the cause of our law of obscene libel. But, in fact, it does not seem to worry them. Not that they have any real escape from it. They simply do not face its challenge but turn their backs on it, and take refuge in those semi-rational operations of mind known as the conventions of decent society. Obscenity, they admit,

cannot be defined, but any decent person knows what is obscene. In *De Montalk's* case, the court did not trouble to refer to any objective standard of obscenity. His Lordship, however, found himself able to state that "any decent-minded jury" would have come to the same conclusion. This all means that obscenity is not something which can be correctly defined. The consciousness of it lives and operates by way of the constant stream of criticism which the mass of society brings to bear on the questions of social conduct.

Vague as this force may seem, it is something which we all know. It is that power behind the throne of our lives which constantly represses us, and whispers "it is not done." It is the voice of custom and habit.

Now, we do not deny the sociological importance of this body of customs and conventions. No doubt they are essential to the continuity of social life and action. They are the links which form the chain of history. But they are not all that make up the equipment of society as a living body of sentient individuals. Life means creation, change, movement. If life is to continue, customs and habits must give place to new forms of thought and action. Is the law to be indissolubly bound up with the cause of established custom and habit?

Or is it to permit the invention of new thoughts and feelings? Is it to admit progress and change in literary and artistic work, or is it to repress all that? Truly, it would seem as if the answer of our law is, "Yes, in the interest of morality."

Here then is the first disturbing fact about our law of obscenity. It operates as the exclusive ally of convention and the suspicious enemy of change. The reason is, as we have seen, because it does not and cannot apply an objective standard of obscenity flexible and tolerant enough to admit adventures of the spirit beyond the pale of time-honoured convention. Its standard is necessarily the taste of the magistrate, judge, or jury, as the case may be. Here might be interposed a few reflections on the peculiar qualifications of these arbiters of decency and art appointed by our law.

With the greatest respect for the intelligence and integrity of our Bench, are magistrates and judges fitted for the task of determining whether a work is art or obscenity? Those who know the law in practice will know that it is as far removed from the emotional world of the artist as could be. The preoccupation of the lawyer is essentially with formal logical questions. He does not concern himself directly with the vital stream of life; he studies and applies but a formal aspect of it. That

aspect is essentially negative and repressive. The unworldliness which judges so often appear to affect may well be a fact. Certainly it may be said that the courts are frequently well behind public opinion. The ponderous moralisings of the divorce court sound more like an echo of the past than an affirmation of popular beliefs in the present. It is not surprising if the courts prove to be still more out of touch with the living world of creative art.

That in many cases the court will have the support and guidance of a jury does not offer much consolation. Why should the average jurymen be fit to assess the æsthetic qualities of a work of art? Because he knows what he likes? We are really up against the old familiar view that every one and any one is a perfectly good judge of art. The man in the street who has never bought a picture in his life, who has never even troubled to go into a picture gallery, is, when suddenly called upon to do so, perfectly equipped to appraise the art value of a work on which the painter has perhaps bestowed the results of years of effort to create the beauty he seeks.

But even if we do not stop to stress the inability of judges and juries to understand the matter which they are called up to judge, there remains a grave objection to letting them act as arbiters of what is

pure art and what is mere obscenity. Judges and juries, like all human beings, vary in their views. The reason why law is laid down in statutes and precedents is that the judge has to apply the law, not his own opinion. Yet in the law of obscene libel he is asked to apply it without being given any definite standard of obscenity. It is left to his own taste, and to the taste of the jury if there is one.

We have seen recently how Mr. Justice McCardie treats those who are charged with committing abortions. He has bound over such defendants, and expressed himself in forceful language as out of sympathy with the law. It is a very different fate that awaits the illegal operator before most of our other judges. If such a divergence of views can develop in the case of a criminal offence clearly defined and provable beyond doubt, what should we expect in the case of a law against something of which there is no definition, and of which the offence will depend upon whether the taste of judge and jury is offended? The answer is—a, Star Chamber of Art and Literature.

Strong as the above objections may be, they are not as striking as those which appear if we do no more than attempt to apply the law of obscene libel faithfully and vigorously.

In his striking essay on *The Revaluation of Obscenity*,



Mr. Havelock Ellis points out that the obscene means literally "off the scene," and refers to those sexual or excretory processes which are not ordinarily referred to in decent conversation. When the courts condemned Lawrence's pictures and *The Well of Loneliness* they did so because they regarded these works as inducing such a concentration on sexual matters as would tend to corrupt the minds of those open to such influences. This means those minds which are capable of such an association of ideas as would bring in its train that contemplation of sexual or excretory processes as general convention regards as bad taste and immoral. But what must happen if this attitude to obscenity is forced to its logical conclusion?

Any and every mind is capable of the association of ideas by which the presentation of the human body in a picture or a book leads to the consciousness of sexual or excretory processes. Indeed, it is doubtful whether such an association is not merely a matter of degree and emphasis in all cases where the mind is made conscious of the human body. At any rate, so long as a man is endowed with the full inheritance of his natural existence, he would sorely resent the suggestion that he is incapable of this association. If this is so—and we need not trouble to develop the point further—then surely

the law should, if it is to be logical, condemn all literature and art in which the human body plays a rôle. Even if it be clothed to the ankle and dedicated to the purest chastity it is still matter in which we are liable to find an object of those thoughts and passions which the law regards as obscene. Nor is such a logical treatment of the subject unknown. It is the treatment which ascetics attempt.

But those who support our law of obscenity will not be willing to entertain such a ruthless logic. They will vow that literature and art are the noblest concerns of the human mind. The law against obscenity is intended only to ensure a clean and wholesome literature and art. A worthy aim, but we shall have to disillusion those who think that our law is able or likely to achieve it. That law disregards the motives and intentions of the author or painter. It only considers the possible effect of their work on minds susceptible to obscene influences. Is it in this connection anything more than a sophistical dichotomy to distinguish between a picture of a naked woman and a diagram of her in a medical treatise, between a book such as *The Well of Loneliness* and a psycho-analytical treatise on Lesbianism, between the suggestive ankle of Victorian dress and the frank leg of modern fashion? They are one and all sources from which the obscene

mind may draw equally well the matter of its fancies. Therefore let the law banish them all. By that alone will it faithfully achieve its real aim. This is the *reductio ad absurdum* of the law to which a faithful application of it would lead.

Not only do the courts avoid any such sweeping protection of our tender morals. They dare not attempt it. All that they have done is periodically to select some work, usually destined for the consideration of a small and exclusive literary or artistic clique, and make it the object of its holy anathema. The ostrich hiding its head might truly say to the law, "*Tu quoque, brother.*" The films are flooded with the most pernicious suggestions of lewdness, half our plays are designed simply to give the audience a sexual thrill, the average novel is distinguished by the emphasis which it gives to the titillation of the reader's sexual appetite. These million and one things which the law should logically condemn as obscene go unmolested, while the law remains content to strike down the odd unhappy victim of some newspaper's publicity stunt.

After all, what was the net result of the *Well of Loneliness* case? The law moved under the pressure of a press publicity. The book became the most notorious book of the day. Dealers did not cease to stock it. They only put up its price. Bright

young things made a bee-line for it. Less bright but equally susceptible suburbia got to it with indirect but equally sure steps. Lesbianism for the time being became a dominant subject of discussion, and no doubt many young women became for the first time aware of a possible world of pleasure of which they had never dreamt. The reader will permit an anecdote, for the truth of which the writer can vouch.

When the prosecution was begun, a book-dealer offered the writer a copy of *The Well of Loneliness* which he then had in stock. He was afraid to stock it, and was willing to part with it at half the price. The writer did not require the book, but advised the dealer to keep the book, as its value and the demand for it would increase greatly. During the lunch hour it is the habit of the boys of a neighbouring school to rummage among the books in his shop, and it happened that they alighted on *The Well of Loneliness*. The dealer found a group of them, apparently fully aware of its character, eagerly searching for the lewd passages which they expected to find. The dealer seized the book and hid it from their sight. Later that afternoon, a master of the same school came in, asked for and bought the copy of the book. The moral to the story is clear. In so much as you condemn, so

much do you give publicity to what you condemn, and the only part of the nation which benefits is the press.

Had there been no prosecution *The Well of Loneliness* would have remained unknown to any but a select literary clique. Nor would these have found in it what the moral press found. They would have treated it as the genuine literary effort that so many think it is, and not as the lewd story which only a prurient prudery could have found in it.

The same tale might be told about D. H. Lawrence and his works. Thanks to the prosecution and the publicity it entailed, his works are legion among those who otherwise would probably have thought he was an aircraftsman or a soldier of Arabia. It is, at least, a significant fact that so often essentially unsophisticated people, who are ignorant of the very names of our greatest novelists, show a surprising familiarity with *Lady Chatterley's Lover*, Joyce's *Ulysses*, and *The Well of Loneliness*. These books may truly be said to owe their universal popularity to the unintentional and untiring recommendation of the law and the press.

In other words, the law of obscene libel is not only bad jurisprudence, it is bad psychology. It gives to that which it seeks to destroy the haunting

flavour of forbidden fruit. Many libraries, especially those in provincial towns, have certain caged shelves on which are kept books which will be lent to subscribers only if they are doctors, or persons similarly supposed to be immune from an obscene interest, or to those who support their application with the recommendation of a responsible professional man. Those caged shelves invariably set the seal of popular desire on the books they contain. A fact of great importance in this connection is that it is just on the very young and immature, who are those whom the law is primarily concerned to protect, that the lure of the forbidden book is most potent. When the prohibition is not merely the result of a library committee's fears, but due to the command of the law, backed by the advertising condemnation of the press, it can be relied on to whet the literary and probably the obscene appetites of us all.

It is, furthermore, a serious matter for the law to conflict so strongly with a large body of public opinion, especially when it is the opinion of an educated and thinking section of the public. It does not, as we have seen, stop that public from following its own convictions and contravening the law any more than our Lottery Laws stopped the progress of the Irish Sweep in this country, or the

eighteenth amendment the consumption of liquor in America. Such conflict with and flagrant disobedience to the law can have only one effect in the end. It produces a general disrespect for law itself. It may prove to be the first step towards a more general lawlessness. The United States of America are a striking illustration of this great danger.

It should now be tolerably clear that the law of obscene libel provides its own nemesis as soon as it is put in operation. The ultimate reason for this is that it is not a law which any sound jurisprudence can permit. All jurists are agreed that law governs the external life of man, his actions, and not his thoughts or feelings. Any belief among jurists that it could and should govern the latter died with the Inquisition or very soon after. In the present day, the law will punish only those who blaspheme with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary. Note the difference from the law of obscene libel. The intent of the accused is an essential element in the crime of blasphemy. Lord Coleridge, C.J., in *R. v. Ramsey and Foote* laid it down that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel." In *R. v. Burdett* it

was said by Best, J., that "every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country." "The law visits not the honest errors, but the malice of mankind." Accordingly, it may be said that we have attained personal liberty in the matter of religious thought and argument. From a different point of view it may be said that the law has in this particular respect been put in its proper place. It has been restricted to its proper functions, the preservation of the public peace, not the guidance of man's soul.

But in the matter of obscenity it has failed to develop the same good sense. Probably this is so because the nineteenth century was an age of excessive moral discipline, when popular religion practically meant morality. That age was so impressed with the need of morality that it readily sought to impose it by law. It was, moreover, an age of sex repression, and morality in the popular sense came very near to meaning sexlessness. The recognised decencies of conversation made any reference to sex and sexual matters taboo. They sought to keep the decencies of public life untainted by the indecencies of the bedroom. Victorian fathers were wont to refer to the facts of sex as "the secret of life." It *was* that to their children, and by general consent



it seems to have been deliberately kept a secret by Victorian parenthood. Little wonder that the law of obscene libel found an ardent lover in the Victorian conscience.

This really gives us the clue to what operates so strongly in the minds of those who support the law of obscene libel. It is their conviction that secrecy about sex is a desirable thing. A very simple psychology have we here. Sex is a dangerous thing. It gets the better of people. Therefore, remove it from the mental horizon as much as possible. Do not induce any more concentration on it than is absolutely necessary. Repress it.

In the last century it would have been necessary to reply to this argument at very great length. For not only was it an argument dear to the people of that age, but the psychological foundations of its criticism were little known. Thanks to the progress and dissemination of modern psychology, it is hardly necessary to object that such repression of thoughts and desires does not eradicate them from the mind. It thrusts them back into the deepest recesses of the mind where they become cankers of mental disturbances, smouldering fires of spiritual discontent. Nor do these "complexes," as the psycho-analyst calls them, merely produce a disturbed and distorted mental life. They frequently

also produce a perverted sexual desire. Sexual desire will out. Refuse it its normal expression, its clear and conscious recognition as a natural fact, and you may induce it to find satisfaction in other ways. Those who preach the cause of sex secrecy and ignorance are unwittingly opening the path to masturbation and homo-sexuality.

A practical illustration will help. It is one with which the reader will probably be able to associate some memory of his early youth. Picture the little boy at school. He has been kept rigorously "pure" by his parents. They will with pride claim that their little Johnny is "so innocent." If a fear assails them that they have not discharged a duty to tell Johnny about sex and prepare him for the time when Nature will assert herself, or more still when smutty youth will whisper smutty suggestions, then they excuse themselves by saying that it seems "such a shame to spoil him." Now follow Johnny to school. Another little boy has made certain discoveries which he communicates to Johnny. Poor Johnny is ignorant. He has no armour with which to ward off the temptation. He cannot even conceive of any other use to which the organ of which he is suddenly made conscious might be put: a spirit of curiosity combines with a certain pleasurable sensation and the irresistible temptation of doing

something which has to be done "on the sly." The result is that he becomes at a cruelly tender age the devotee of masturbation and homo-sexual practices.

It is this same ignorance of sex, this conscious avoidance of it, that the law of obscene libel is concerned to effect. The strong manner in which it is applied by the courts is no doubt due to the prevalence of the psychology of repression among those who apply the law. We have considered some striking illustrations of this fact. Another, and perhaps more striking one, is worthy of our notice as a monumental mark in the history of human sex repression. On the 6th of October 1930 at the Hendon Police Court a young man was fined £10 for indecency. The young man was sun-bathing, and two young ladies with whom he was discussing the subject said it was "not decent." Thereupon the exuberant apostle of sun-bathing dropped the towel which hung round his waist and exclaimed: "If I am not decent I will be indecent!" Unfortunately for the young man his audience was shocked and the proceedings before the magistrate followed. The learned magistrate, Mr. Robinson, took up the cudgels of sex repression and struck hard with the words: "Take this as a warning, otherwise you will soon find yourself in prison, the proper

place for people holding such views as you do. I sincerely hope you will get rid of these extraordinary views as soon as you can. You will not be allowed to continue to practise these views unless you want to be in the clutches of the law." This was truly an amazing statement in the year 1930. Sun-bathing is a practice which has earned the support of a large body of educated and sensitive people. It is no longer the eccentricity of an odd individual. It is practised by many organised bodies all over the civilised world. Mr. Robinson's reference to the "extraordinary views" of the young man is evidence of that so-called "other worldliness" of the Bench which, when it does exist, is merely a synonym for complete ignorance of actual facts. It shows that Mr. Robinson was actuated by a thoroughgoing Victorian view of sex. It is a disgusting thing for two naked human beings to stand unabashed and unashamed in each other's presence. It is a far healthier state of affairs where these same human beings must hide the well-known parts of their anatomy in order that they might stand unabashed and unashamed in each other's presence. The legal mill grinds sometimes slowly because its power is antiquated.

The arguments which we have put forward have been a plea that the law of obscene libel should be

abolished because it is bad jurisprudence and bad psychology. Before passing to our final observations it is desirable to note a compromise which is sometimes suggested by those who fear the total abolition of the law. It is suggested that if the courts were to receive and act upon the expert evidence of authors and artists, that would meet the case. At first sight this suggestion appears inviting. But it is really impracticable, and does not evade those evil consequences of the law which we have considered. The diversity of literary and artistic taste is so great that, no doubt, famous artists could be found to give evidence for and against any particular book or picture. Mr. Bernard Shaw is of the opinion that D. H. Lawrence's works are immoral. The late Arnold Bennett was of the opposite opinion. Can it be said after such an extraordinary divergence in the views of two such distinguished authors that the question of obscenity in literature or art can safely be left to the opinion of authors and artists? In any case, the objection would remain that the law, even if so applied, cannot effectively stem the flow of literary and artistic life. That life will express itself, and the law, if it attempts to crush that life, will only serve to advertise it.

So far our arguments have been negative and destructive of the law of obscene libel. It remains

to consider what legal protection, if any, society should have against a vicious obscenity. The answer was supplied long ago when our law of obscene libel was in its infancy. The test of whether the law has a right to interfere and restrain author or artist is this:—does the work complained of cause or threaten to cause a breach of the peace? To this question it will not do to reply with the sophistry that morality is the foundation of the peace of government, therefore any immorality must be a breach of the peace.

The question is a straightforward, practical one, and the answer must be determined by practical considerations. If the work is such that it actively offends a person or persons who are *compelled* by the author or artist to contemplate it, so that a breach of the peace is thereby caused or threatened, the law has a right to interfere and must do so. For example, if Lawrence had exhibited his lady with the pubic hair in the market-place and thereby caused a breach of the peace, the law in the interests of government and the King's peace would have been justified in restraining such an exhibition. But when his pictures were not so forced upon the public gaze, but only offered to the view of those who might choose to go out of their way to see them, it could not be reasonably said that their exhibition

was calculated to cause a breach of the peace. If a prudish busybody or a reforming press chooses to inform against such an exhibition, in the view of the law which we have advocated, such an informer would himself be liable to prosecution for causing or attempting to cause a breach of the peace.

So long as men do not assault each other physically, or wrongfully interfere with each other's property, the criminal law must be content. It has no mission beyond the preservation of physical quiet. The peace of the soul is not its concern. That is the object of free individual effort. The protection of the young and the weak lies not in the "clutches of the law" but in the armour of a full knowledge of the facts of life. Obscenity is the product of repression and secrecy. Its enemies are knowledge and experience. In the full and frank dissemination of knowledge will man attain to that purity of which the moralist dreams, and which our law of obscene libel so effectively defeats.