THE PLACE OF LAW IN THE FIELD OF SEX

The Beckly Lecture for 1972

by

The Rt. Rev. John A. T. Robinson, Ph.D., D.D.

Fellow and Dean of Trinity College, Cambridge, and Chairman of the Sexual Law Reform Society

Sexual Law Reform Society
32 Shaftesbury Avenue
London W1V 8EP

20p

PREFACE

What follows is the text of the Beckly Lecture for 1972 delivered on 5th July at the Derby Road Methodist Church, Long Eaton, Nottingham. I used the opportunity offered by the Trustees of this annual lectureship in the field of Christian social ethics to try to do some fundamental thinking on the principles involved. I fully expected that my listeners would be bored rather than upset. Judging from their attention, I don't think that either was the case. But certainly no one in that fairly typical church audience could, I think, have imagined that I was urging the immorality that was later to be attributed to me!

Knowing that this is the kind of subject that the Press loves to exploit, I went to some trouble, with the efficient help of the Sexual Law Reform Society and the Methodist Church Press Service, to release a full text beforehand, together with a balanced summary. What happened? One paper, *The Guardian*, devoted a whole page to a carefully edited version of the lecture—for which I am most grateful, though I could have done without the sexy picture, which seems *de rigeur* these days to catch attention. For the rest, a single point was isolated under headlines like " 'Sex at 14'. Call by Church Leader". This was not unwitting distortion by ignorant reporters, but the work of sub-editors who know perfectly well what they are about. And if any says he did not realise it would be taken to mean that I was *advocating* sex at 14, I would ask, Just who is being naive?

I would prefer to say no more and let the lecture speak for itself, rather than add to the imbalance by focusing further on the relatively minor issue of the age of consent, though the more I ponder the matter the more I think we should consider substituting an age of *protection.* "Consent" is too personal and subjective to be determined by an arbitrary age. But there must be a line below which society has an absolute duty to assume responsibility for protection of the immature. As will become clear to the reader, I was very divided and uncertain at this point. In fact in the first draft of the lecture I favoured a general age of 16 (as opposed to the ridiculous age of 21 for male homosexuals—which was the context of my remarks). I was persuaded to stress the arguments for a lower limit as a result of discussion with some of those most in touch with the young people concerned (doctors, youth counsellors, solicitors and probation officers), who urged the advantages of maximum flexibility.

The only issue is *how* most effectively do we protect the young. Is it by declaring all early teen-age sex illegal, and then discrediting the law by not enforcing it? The existing law does not seem to be being very successful in *preventing* sex-relations among young people and it makes advice and protection against their consequences more difficult. Would it not, I was asking, perhaps be more honest and constructive to remove the fiction that all such people are (by definition) indulging in criminal activity, and substitute effective and selective protection under, say, the Children and Young Persons Act for those whose immaturity really is being exploited by older men (or women)?

Of course the arguments are not all on one side (and I have had letters from people with similar qualifications and opposite opinions). If the advantages of 16 as an age of consent for all sexual activity could be had without the disadvantages, I should be happy. Indeed I should prefer it, as obviously most children are not ready for sex and its responsibilities at 14. In any case, it is clear that public opinion needs preparing for any change—though as a result of opening up the issue I would hope that some anomalies and injustices might be remedied. But since the

case for lowering the age still seems to be largely uncomprehended, I might perhaps quote three comments.

The first is from Lord Devlin, the great protagonist of the view I was combatting, that the law's job is "the enforcement of morals". Remarking on such court cases, he said this: "The object of the law, as judges repeatedly tell juries, is to protect young girls against themselves; but juries are not impressed".[1] In other words, the layman knows perfectly well that in all too many cases the law does not correspond to realities. And this is bad for the law. It is not simply that it is a good law disobeyed; it is an unrealistic law not respected.

And the same point comes through my second comment, this time from a woman doctor who is also a deaconess of the Church of England: "I break the law regularly on the matter of advice to young people and both the girls and I find that this is absurd, and difficult. I also have sympathy with the men who find themselves in court."

The third comes from a specialist social worker on the other side of the argument, who believes that the real offenders are getting off far too lightly. In an analysis of 40 cases of illegal sexual intercourse with girls under 16 known personally to her, no action was taken in 31 cases. In the majority of these she agreed that action was either undesirable or impossible. But the cases she detailed fell without exception into the kind for which I was arguing there should be *increased* protection (either because of lack of consent, mental retardation, or the need for care and protection). What is happening at the moment is that people are not being protected who should be protected, because the law is too blunt an instrument to be pressed home.

As the President of the Methodist Conference, Harry Morton, said at the time (and I am most grateful for his courageous support when everyone else seemed to be baying for my blood) "The real question is: are we sufficiently of an adult society, in the church and the world, to discuss this matter to our mutual benefit? I would like to think we were, and I think we should be given the chance to demonstrate we were. I do not want as a church leader at this moment to do anything to cast doubt on that until it is proved otherwise. I don't take the view that we are lacking in adulthood. My view is that if you trust the people in the nation and the church to be adult, most of the time they live up to your expectations".[2]

I fully agree, though it is hard sometimes to believe it at the receiving end of the sort of post one gets on these occasions. But I remember exactly the same kind of response on capital punishment, homosexual law reform, obscenity legislation, etc. And, as one looks back, one takes heart from the progress made. But on almost all fronts (and especially the latter two) these is still much to be done. Above all, we have a long way to go in weaning ourselves from the paternalistic assumption that the function of law in this field is to police morals rather than to protect persons. In a characteristic comment, the *Church Times* wrote (without apparently having taken the trouble to read my text) "It may be that he did not intend to advocate the immorality which he was suggesting that the law of the land should condone". Quite apart from what I was advocating, I was not suggesting that *the law* should condone *or* condemn immorality as such. For that it not its role. If a quiet and considered reading of this lecture convinces even a few people of this crucial distinction, I shall not consider that it has been in vain.

JOHN A. T. ROBINSON
January 1973

[1]*The Enforcement of Morals* (1965), p. 21
[2]*The Guardian*, 7th July, 1972

THE PLACE OF LAW IN THE FIELD OF SEX

This is a lecture with a limited theme—albeit a vast one and one where as a non-lawyer I should properly fear to tread. But at least let me begin by delimiting its range. I am not here proposing to speak on the place of moral law in relation to love.[1] I want to speak on the place of criminal law in relation to sex.

This, as I said, is a much more limited theme, but one nevertheless that tends quickly to spill over into wider and more diffuse areas. Thus, when we are confronted with something of which we deeply disapprove (especially if we have not thought deeply about it), there is an instinctive reaction to say, "There ought to be a law against it". But this is to equate the place of criminal law with that of moral condemnation. Clearly, once we do think about it, this simple equation cannot be sustained. That way leads to the regimentation of morals and the police state. Yet so pervasive is the assumption that if you do not approve of something (for instance, pornography) you must wish to prohibit it and, even more, conversely, that if you permit it you must therefore approve it, that it is desirable to begin by doing a bit of sorting out.

Let us then draw out the implications of the phrase, "There ought to be a law against it".

In the first place, the function of the law is primarily being seen as negative. We all know that you cannot (regretfully) make people good by Act of Parliament, but at least, it is argued, you can stop them straying too far. The function of law then is to keep them within the straight and narrow, to prohibit undesirable deviation. And this, of course, is the popular image of the officer of the law with his hob-nailed boots: "Well, well, now. And what's going on here?". If it isn't quite "Find out what Johnnie's doing and tell him to stop it", it is something very near it. And the charge against the permissive society is that the controls have slipped: things are being permitted that ought not to be permitted.

And the second implication is that society or its leading members have the right to control, to say what shall be permitted. In all this talk there is a "you" and a "them" ("You cannot make people good, but . . ."). And the function of law in such a paternalistic understanding of society is by its sanctions to promote the values, to enforce the morality, of those who know best, whether this is an oligarchy of self-appointed guardians or what John Stuart Mill called "the tyranny of the majority". Its function, as he said, in this way of thinking, is that of "moral police", to prescribe what it is good for us to read or think or do and to proscribe what it is not. Originally this function covered (and in most countries of the world still covers) all areas dangerous to the unity or stability of society—religious (or ideological), political and moral. Indeed, as Lord Devlin put it in his classic presentation of this view, *The Enforcement of Morals*, "the suppression of vice is as much the law's business as the suppression of subversive activities".[2] But, though we still have blasphemy (and of course security) laws on the statute book and though proponents of a radically alternative society are far from unharrassed, it is, at any rate in peace-time in the United Kingdom (outside Ulster), only in the moral field, curiously narrowed

[1]I tried to do this in my *Christian Morals Today* (1964), reprinted in a revised form in my *Christian Freedom in a Permissive Society* (1970).
[2]*Op. cit.*, pp. 13-14.

down to the sexual, that the censor, the negative guardian, now operates. In fact when the real thrust of the attack is social or political (as was arguably the case in the *Oz* trial) the Establishment is compelled to go in under the cover (all too easily provided) of obscenity.

But I do not want to get involved at this point in the debate about censorship. I simply instance it as the one surviving feature still backed by the criminal code, as opposed to other social pressures, of the paternalistic concept of the function of law. According to this concept the place of law in the field of sex is potentially unlimited—as indeed one can see from the fact that still under the Sexual Offences Act of 1967 anal sex between husband and wife in the privacy of their bedroom is in theory punishable with life imprisonment. For this is the "abominable crime" of buggery, and quite consistently if it is morally abominable it must be legally prohibited. But it is to America, the land of the free, that you must go for the full outworking of this theory. There, with the sole exception of New Mexico (where, as a late arrival to statehood, they evidently did not do their prep), every possible sexual activity with the exception of "normal" conjugal union and solitary masturbation (and even in Indiana the latter!) has been declared criminal in one state or another and usually in most.[1] This applies to prostitution (in all states), adultery and even fornication. No doubt much of this is dead wood, though in Boston as late as 1954 the sex laws were reported to receive "normal" enforcement, and in 1948 there were 248 arrests for adultery in that city.[2] Indeed, it has been estimated that, on the evidence of the Kinsey Report, 95% of the American people should have been in jail for sexual offences alone! But unenforced or unenforcible law is bad law; and if law is to be respected here or anywhere else it should be commendable on the ground that "you *know* it makes sense".

I have quoted these rather extreme instances not for the sake of presenting a *reductio ad absurdum* or of settling by ridicule what is a perfectly serious issue. I quote them because it becomes increasingly clear to me that if we are to have sexual laws that make sense it is not merely a question of trimming away dead wood, or the more absurd growths, but of looking again at the tree that was capable of producing such fruits. For they were entirely logical growths. If the function of law is the public enforcement of private morals, then if you *can* prohibit what you think is morally wrong or offensive, you should.

I wish to argue in this lecture that this whole theory is fallacious and that we shall not get our sexual laws right until we can detach ourselves from it and start again. But I am well aware that there is a powerful emotional investment in this theory amongst "right thinking" people (in both senses); and this is increased if, like me, they are middle-class and middle-aged. The temptation, if you see something you abominate, to reach for the gun of prohibition is almost irresistible. But it is a sobering thought (if that is the right word) that this is also what the great American people tried to do in the 'twenties with Prohibition with a big "P". The effects of prohibition, as of all forms of censorship, can be notoriously counter-productive. Like other forms of authorized violence (such as internment or the resort to criminal sanctions in industrial conflict), it can merely feed the problem rather than solve it. Nevertheless, I find it difficult to convince people that it is precisely because I am

[1]Cf. The American Law Institute, Model Penal Code, Tentative Draft No. 4 (1955), pp. 204-10; and J. Fletcher, "Sex Offences: An Ethical View" in *Moral Responsibility: Situation Ethics at Work* (1967), pp. 92-111.

[2]H. L. A. Hart, *Law, Liberty and Morality* (1963), p. 27, quoting The American Law Institute, *op. cit.*, p. 205, note 16.

against pornography that I want (with the conditions I shall mention later) to permit it rather than prohibit it. Yet I assume that there would be very few in this audience, however much they oppose alcohol, or for that matter smoking, who would think the sensible way to achieve their end was to make it illegal. Similarly the last thing the Josephine Butler Society wants in its fight against prostitution is that it should be made into a crime.

All this is partly a matter of thinking through the issue far enough to see the consequences. Hence it is those who have thought most about capital punishment or suicide or homosexuality or obscenity (instead of relying, with Mr. Nixon, on "centuries of civilization and ten minutes of common sense") who have tended to come out on the side of loosening rather than tightening the law—including, impressively, the American Presidential Commission on Obscenity and Pornography, whose 640-page Report (however one may dispute its judgment) cannot be accused of skipping its homework. But it is also, more importantly, a matter of recognizing that **the function of law in society is not to prohibit but to protect, not to enforce morals but to safeguard persons, their privacies and freedoms.**

This, of course, is no new doctrine. It received its classic and oft-quoted expression in John Stuart Mill's essay *On Liberty:*

> The only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others.[1]

He indeed stressed the last two words "to others" with a devotion to *laissez faire* that strikes us in a socialized society as magnificent but quixotic:

> His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.[2]

It would seem to most of us that society has the right, and indeed the duty, to protect the individual against himself in the matter, say, of provenly noxious drugs (if only because in the complexity of modern life the individual is usually in no position to assess the danger, and to prevent him becoming a liability upon the community). Nevertheless, in a country where suicide is no longer a crime, while aiding and abetting it is, Mill's distinction cannot be dismissed. Moreover, a man can be so protected against himself (particularly morally) that he ceases to be free (and therefore capable of morality).

But on the main issue, however difficult we may find it, like Mill, to be wholly consistent, I am convinced that he was vitally correct. The function of criminal law and "the only purpose for which power can rightfully be exercised over any member of a civilized community against his will" is the positive one of preventing harm to others. This may, of course, *involve* prohibition or restriction—effective gun-laws are an obvious case in point—but the *raison d'etre* of the law is protection not prohibition. **And where there is no need for protection it should not intervene.** It is not there to express what Charles Davis has called "the anger of morality", however "abominable" may be the object of its disapprobation. It is there as far as possible to *enable* people to be free, mature, adult human beings, or what the New Testament calls "sons". Of course, it cannot *make* people sons. But it has a role, a limited role, in hindering the hindrances. It is limited because the free processes of influence, education, example and persuasion are so much more productive. But as a last

[1]*Utilitarianism, Liberty and Representative Government* (Everyman ed., 1910), p. 72.

[2]*Op. cit.*, p. 73.

resort if a person refuses to respect the freedom of another there must be provision to compel him to do so.

With this as a principle I should like to look specifically at the field of sexual law—though if we could abolish the "sexual offence" as we have abolished the "marital offence" there would, I believe, be a great gain in perspective. For it is the *person* —not his sexuality—that the law is there to protect. And many sexual offences are relatively minor as "assaults" (often involving no violence) but are blown up out of all proportion by being labelled "indecent". The "sex offender" finds himself branded for life. If such trespasses upon the liberty of others could be subsumed under "offences against the person" this might be a real step in the direction of eliminating the peculiar vindictiveness which our society—sometimes represented by the magistrate—reserves for sexual aberrations and deviations.

Within the sexual area one could take as a starting point the statement of the Report of the Wolfenden Committee on Homosexual Offences and Prostitution,[1] which, as Professor Hart has pointed out[2], is strikingly similar to the principle enunciated by Mill. The function of criminal law, it says,

> is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

On this basis the Committee proceeded to ground its recommendations to obviate the offensive public manifestations of prostitution (though not to make it illegal) and to remove from the area of criminality homosexual acts between "consenting adults in private". This last, now famous, phrase provides in fact a convenient three-sided boundary to what the Report described[3] as that "realm of private morality and immorality which is, in brief and crude terms, not the law's business". *Per contra* we can use it as a guide to where the law has a right and a duty to protect the citizen—that is to say:

(1) Where there is not true consent;
(2) Where there is not adult responsibility;
(3) Where there is obtrusion on the public.

Let us consider each of these in turn, and we shall find that they get progressively more difficult to determine.

(1) The first presents relatively little trouble, though consent is clearly a matter of degree, especially among those of diminished responsibility or in a state of "physical, official or economic dependence". Offences against consent would obviously include rape, enticement, deception, blackmail, and some (but not all) forms of prostitution—however much all forms of prostitution (and for that matter some marriages) may be judged morally, though not legally, exploitative. But if an adult freely and knowingly consents to sell himself or herself for sexual purposes then the law has no right to intervene, though here as elsewhere it can properly protect against abuse the conditions of the market. But although this first condition is relatively simple, it is fundamental to the preservation of persons as persons. Each of the others must presuppose it as essential.

(2) The second condition raises the question, "What is the age of consent?", or, "Who is a responsible adult?" One perfectly true answer to the latter might be,

[1]Cmnd. 247, para. 13.
[2]*Op. cit.*, p. 14.
[3]Para. 62.

"None of us is". But clearly this cannot be taken as the basis of legal definition. Ideally, too, and more convincingly, one could argue that there should be no fixed age of consent. Wherever you draw the line, especially at the variable, and changing, age of puberty, it is bound to be arbitrary; therefore each case must be judged on its merits. But obviously an adult before having sexual relations with a boy or girl must know in advance whether he is breaking the law: it is no protection for a judge afterwards to opine that the young person was not old enough to give consent. A line must be drawn, however arbitrarily.

But a line for what? Under the law a person is deemed legally to be capable of different things at varying ages—for instance, of committing rape at 14, of getting married at 16, of voting at 18, of homosexual relations (if a man) at 21. In this connection, we are dealing not with the age at which we think young people *morally should* have sex relations, but with the age at which they *legally can* consent to what they are doing. And clearly this is potentially lower than for marriage, which involves heavier commitments and responsibilities.

Two things can, I think, be said straight away. First, the age for homosexual and heterosexual relations ought to be the same, since it is capacity for personal consent which is at issue and not sexual proclivity—unless, of course, one applied the previous argument and said that since heterosexual relationships imply the possible procreation of children the age of responsibility for them should be higher. Second, the present age of consent for male homosexual relationships is absurdly high. It was fixed at a time when the age of majority in general was 21, though even then the evidence presented to the Wolfenden Committee by the Church of England Moral Welfare Council[1] recommended an age of consent of 17 for both sexes. Since female homosexual relationships have never been illegal no age of consent for them has been defined.

I suggest that we start from the proposition that the legal age of consent for all sex relationships should be 16. Indeed, I believe that the only real argument is whether or not it should be lower. For two things follow from the age of consent: (a) Below it liability for criminal prosecution automatically arises, and few would want to see a teen-aged boy sent to jail for fathering the child of a 15-year old he intends to marry (as I gather can actually happen in permissive Denmark, where a girl under age is legally required to state the name of the father and thus expose him to prosecution!); (b) It is, technically, aiding and abetting a criminal offence to prescribe contraceptives for those below the age of consent. But, alas, we know that it is precisely these who are at greatest risk. To be compelled to break the law in order to protect them and their potential unborn babies is a heavy responsibility and merely helps to bring the law into disrepute. And it also, of course, deters the young from seeking advice.

I do not find it easy to make up my mind on this issue. On the one hand, there is no doubt that the line drawn by the law does have a deterrent effect and protect children of school age who might otherwise be exposed to relationships for which they are not ready and responsibilities which they are in no position to carry. Yet the criminal law is a very blunt instrument for this purpose and is in danger of being discredited if it is not implemented, or even respected, except in particularly blatant cases.

Those I have consulted who are actually dealing with the young people concerned would plead above all for the greatest scope for flexibility, taking into account not

[1]Ed. D. S. Bailey, *Sexual Offenders and Social Punishment* (1956).

simply an arbitrary age but all the attendant circumstances. On this basis I think I am persuaded that probably the most creative, and as well as the most realistic, solution would be to lower the legal age of consent to 14, so that no one having intercourse with a person above that age should automatically be committing a criminal offence, but then to provide additional protections. There could properly for this purpose be a period, say, from 14 to 18 when, under the Children and Young Persons Act, care and protection proceedings (with their dual criteria of admitted offence and need) would be available; and legislation could be designed to safeguard minors against adults exploiting or corrupting them through, as Wolfenden put it, their "inexperience". Though a girl might "consent" to prostitution at 16 or even 14, it could be a criminal offence for her to be employed in that relationship under 18. The same could apply to engagement for sexual displays and photography. Equally it should be possible (though it would be more difficult to frame or enforce the law) to provide additional protection for minors (through action initiated by a parent or guardian or others) against undesirable homosexual *or* heterosexual relations with older persons.

But here, as elsewhere, the place of criminal law is a limited one. Indeed, to introduce its scrutinies and its sanctions may often do more harm than good. Speaking of the effect of sexual experience on children, a former probation officer[1] has said this in a letter from which he has allowed me to quote:

> "Harm" results much more from the tension between an individual's experience and that of his reference-group than from the experience in itself. Some research on childhood "victims" of sexual offences would appear to bear this out in that it is the subsequent parental horror, police investigation, etc., which are significantly more disturbing than the offence. Consequently the best protection we can afford children is the extension of what experience or behaviour we can embrace, survive and ultimately be enriched by. Vis-à-vis *this* concept of protection I think law may well need to have a declaratory and educative function as well as merely a constraining one.

These are wise words, with broader application.

Finally, under this second condition of adult responsibility, it is clearly possible and desirable to include special protection of the young in any regulations made on the subject of censorship, film classifications, television timings, etc.—though one is bound to add that the evidence of the young actually being corrupted by, or even interested in, the kind of sex controlled or uncontrolled by such legislation is less than overwhelming. On the contrary, there is strong evidence, as I was being told in Denmark recently, that the vast majority of the patrons of pornography are married men between 45 and 55 and that most of the stuff is bought in remarkably large quantities by remarkably few people. But this issue of censorship and control brings us to the third and even more contentious line, that between private and public.

(3) As the Wolfenden Report recognized, the point at which it becomes the law's business to intervene is when the legitimate privacy of the individual requires protection against intrusion. This cuts both ways. First, the individual requires protection against the police, the press, informers, blackmailers, etc., bringing into the public realm what is essentially his private affair. But, equally, the individual member of the public can expect protection against having forced upon him through hoardings, advertisements, window-displays, unsolicited mailings, public entertainments and the mass-media, what invades his privacy by being, in the etymological sense of the words, "indecent" or "obscene", that is, inappropriate to the

[1]Mr. John Nicholson, now Warden of Dartmouth House, Blackheath.

time or place or (if this is the ultimate derivation of obscenity) having presented on stage what should be off.

Let us consider each of these aspects of privacy.

Under the first there is still a good deal of tidying up of the law to be done, especially in bringing legislation (and still more its implementation) into line for heterosexual and homosexual relationships. The definition of privacy for homosexuals (if male) is still much more restricted than it is for heterosexuals. They cannot with security show the usual signs of affection in public, and even in a private house no other person may be present during homosexual relations. As the recent House of Lords judgment has confirmed[1], they may not use the press to make contact with one another for non-criminal purposes—a liberty not, as far as I know, denied to any other of Her Majesty's subjects. And this, of course, threatens the freedom also of those in the churches or elsewhere who seek to promote social facilities and support-groups for them and generally to help the lonely break out of their isolation and establish regular relationships.

As a positive principle one might say that any discrimination between the sexes should itself be made illegal. And this goes also for the inequality of penalties (e.g., for indecent assault on a man—10 years; for indecent assault on a woman—2 years). Penalties for homosexual offences were actually increased (partly under ecclesiastical pressure) beyond the recommendation of the Wolfenden Report as a condition of its acceptance, and they have added to the jungle of anomalies in this field arising from piecemeal sexual legislation and uncoordinated by-laws. There is still no consent or privacy at all guaranteed under the law for male homosexuals in Scotland and Northern Ireland, the armed services or the merchant navy. Moreover, the implementation of the Act remains disconcertingly uneven, with varying police policies and unpredictable interpretations of such vague concepts as a "breach of the peace" or "insulting behaviour". It should surely be accepted that homosexuals should be harrassed and prosecutions initiated only when public decency is palpably outraged or actual annoyance caused to specific persons.

Finally, under this heading of safeguarding civil liberties, careful attention needs to be paid to the law regarding "incitement" under which a person can be prosecuted for encouraging others to do something which is not unlawful but "which might be said to be immoral",[2] and to growing recourse by the judiciary to common law charges, especially the vague and oppressive charge, first invoked in 1960 and still embodied in no legislation, of "conspiracy to corrupt public morals". According to Lord Reid's concurring judgment in the *International Times* case, in which the latter was most recently and notoriously used, there have been "at least thirty and probably more convictions of this crime in the ten years that have elapsed" since its creation. As Bernard Levin has powerfully pleaded in *The Times*,[3] this is one of the areas calling for the most urgent clarification and parliamentary redress.

Since the *International Times* case related to obscenity and public decency, it brings us to the other part of this section, namely, the protection of members of the public against having *their* privacies invaded or susceptibilities offended.

In approaching the complex issues of censorship,[4] let me first restate the general

[1]Knullar (Publishing, Printing & Promotions) Ltd. *v.* Director of Public Prosecutions (The *International Times* case). See *The Times* law report, 15th June, 1972.
[2]Sir Peter Rawlinson, then Solicitor General, *Hansard*, 7th July, 1964.
[3]20th and 22nd June, 1972.
[4]See also my earlier "Obscenity and Maturity" in *Christian Freedom in a Permissive Society*, pp. 68-82.

principle that it is not the job of the law to try to make people pure or to stop them being prurient—though it has frequently attempted the latter. The function of any kind of legal restriction is not the enforcement of a code of morality or a standard of taste, whether it be of the majority or of a minority that knows best, but the protection of freedoms, whether again of the majority or of a minority. Specifically in regard to sexual obscenity one could say that **the aim of the law should be not to prohibit those who want pornography** (which is largely what it has bent its energies to doing) **but to protect those who don't.** In private, persons should be free and protected to read or see what they like—even if others dislike or disapprove of it intensely. In public, persons must be free and protected, within limits, from having forced upon them what they find indecent or objectionable. I say "within limits", firstly, because persons can, again, be so protected that they cease to be free; secondly, because there is a severe limit to what can be enforced by law, and a law which is unenforcable is bad law; and, thirdly, because any restriction is a limitation of someone else's freedom and is justifiable only if, in the words of a sub-committee of the Society of Conservative Lawyers, the material is "grossly offensive to the public at large".

This phrase, "grossly offensive to the public at large", is taken from their recent report, *The Pollution of the Mind*, and constitutes the definition of what they believe should be a new offence of "public indecency". It would specifically provide control *only* over material displayed in a public place. But they also wish to recommend further restriction under a new definition of obscenity. "We had no difficulty", they say, "in rejecting the present definition which includes the test of 'tending to deprave and corrupt' ", adding that experience had shown that "the present definition and Acts are virtually unworkable". They propose substituting the following:

Any material shall be obscene if—

1. It grossly affronts contemporary community standards of decency, and
2. The dominant theme of the material as a whole
   (a) appeals to a lewd or filthy interest in sex or
   (b) is repellent,

adding the proviso that there shall be no conviction if the material can be proved nevertheless to be in the public good.

This is certainly a move in the right direction. A tendency to deprave or corrupt is virtually indemonstrable. Offensiveness, on the other hand, is an integral part of what it means for something to be obscene (and the obscene, unlike the erotic or the pornographic, has no necessary connection with sex, but covers ugliness, noise, stench, etc.). But equally by definition it must offend someone. To the person who is not affronted by it the material is not obscene—however ugly, filthy, or repellent it may be to other people or *we* may think it should be to the person concerned. Unless therefore someone else's susceptibilities are violated by his having it forced on him there is no case for obscenity as such being criminal, however morally or aesthetically repugnant we may judge it to be. In other words, there has to be someone to object (and object in reasonable numbers and with reasonable seriousness) because his privacy is being invaded. But then we are back at the charge of public indecency. And if this is properly applied, I see the need for no further criminal offence.[1]

[1]This is the point at which I should most wish to dissent from the recommendations of the Longford Commission, whose Report appeared subsequently to my lecture.

Indeed, paradoxically, if there is no further criminal offence, it is easier to enforce public decency. If people have the freedom to see or do what they like as long as they are not disturbing others, then one can be a good deal tougher in enforcing the limits than if what is objectionable to the majority is suppressed in private. Moreover, the line of public decency can be drawn more widely. There are many things about sex which are not obscene in themselves and don't have to be defined as such (indeed the Christian must assert that the erotic is positively good) but which can reasonably be objected to if paraded or placarded in public. Sex is essentially an intimate area of life and to have it foisted upon one even in a quite unobscene form on any or every occasion is an unwarrantable intrusion. Privacies must be respected and protected. But the corollary is that there should be freedom where no one is forced to share it.

Let me draw out the point with an analogy. I happen to dislike *having* to breathe in tobacco smoke. I would not go as far as James I in describing smoking as "a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs, and in the black stinking fume thereof nearest resembling the horrible Stygian smoke of the pit that is bottomless".[2] Let me merely say that I prefer when travelling to look out a non-smoking compartment. But when I have sat in one and someone starts lighting up, I am adamant; and I find myself assuming the role of law-enforcement officer as I seldom would elsewhere. But I can be firm only because I know there is another compartment along the corridor to which he can perfectly well go and indulge his pollution to his heart's content. The last thing I wish to do is to ban smoking or start prosecutions against it. Such procedures would merely make even more people want to smoke.

I would take the same line with regard to the so-called "pollution of the mind". I think it is noxious and thoroughly uninviting, and I don't want to have to breathe it. The real charge against pornography is that it is *anti*-erotic—destructive of what God saw and, behold, it was very good. Fortunately, however, satiety sets in a good deal sooner than it does with either tobacco or alcohol. When you have seen the lot, you've seen the lot; and, as the American presidential report showed, there is a law of rapidly diminishing returns. I would prefer to speak of hard-bore rather than hard-core. The amount of actual damage it does is certainly a good deal less than that of either of the other two legalized commodities I have mentioned. This is not to say that its effect is negligible or that pornography does no harm—far from it—and, as with tobacco and alcohol, we must protect (especially the young) against the *abuse* of sex where we can. But the damage is paradoxically probably the opposite of what most people seem to fear. It is not the heightening or intensifying of the drive that is likely to result from a distorted sexual environment but its crippling and constricting. This is even more true of the effect of damaging personal *relationships*—one bad encounter may permanently impair a person's sexual development. But you cannot ultimately protect against these by law. And distorted books and pictures about sex are likely to have attraction in the long term only for those whose sex-*relations* have been a failure. In other words, pornography appeals *in an enslaving or addictive way* only to those who, for reasons that go much further back into childhood and adolescence, are sexually sick or lonely. They are depraved because they are deprived, and should be pitied rather than prosecuted—and above all helped. In so far as pornography, like excessive smoking or drinking, is a symptom of a sick society, let us apply all the cures and dissuasives we know. But censor-

[2]*A Counterblast to Tobacco* (1604).

ing the symptoms is not only useless but counter-productive. For Freud should have taught us that, as a recent writer has put it,[1] "our repressed impulses are often far more violent *because* they are repressed than they would be if they were allowed expression".

And this is fully borne out in the field of sexual legislation by the experience of Denmark. Although, unlike other pilgrims, I was there recently for quite different purposes (lecturing, in fact, on the New Testament), I took the opportunity, as chairman of the Sexual Law Reform Society and a member of its working party, to talk to a number of people, almost all of them Christians, about their reactions to the abolition of censorship. *No one* I talked to had any wish to go back on this, and the kind of backlash and moral crusading we have here was apparently negligible. For the legal changes had been put through (incidentally by a Conservative administration) not in order to satisfy a lust for licence but precisely, as I have been advocating, to protect public decency against invasions of privacy. As long as the only weapon for securing this was the blunt one of suppressing "obscenity", the law was becoming a laughing-stock. For, as everyone has found at the end of the road, an objective definition of obscenity is legally impossible, and prosecutions whether successful or unsuccessful merely stimulate the demand. Now, by allowing people to read or see anything in private, the heat has been taken off, and what is public is a good deal cleaner in every way (which would not be difficult) than in many English cities. The Danes do not appear to suffer from what D. H. Lawrence called "sex in the head", and after the first much-publicized flush the surviving sex-shops and live shows (the latter of which have never been public entertainments and require 24-hours club membership) are struggling to keep going on the tourist trade. With the lid of repression lifted, crimes of sexual violence (and not merely, as has been asserted, crimes that are no longer offences) have certainly dropped, as indeed (against the trend of all other crime) they may have begun to do in this country, where in 1971 they were 2% down, in contrast with 14% up for those of violence against the person. Just as New Mexico, for all its absence of immorality laws, is apparently no more libidinous than any other American state, so the abolition of censorship in Denmark does not promote lewdness (except among neighbouring nationals!)—rather, if anything, the opposite. The last thing a far-sighted peddler of pornography should want, if he knows which side his bread is buttered, is the legalisation of complete sexual freedom in private. Indeed, even Soho can see that far. The news that Scotland Yard, under its new Commissioner, Robert Mark, intended to act merely on complaints from the public in place of a seek-and-destroy policy was not exactly received with elation by the book-shop managers. According to a *Sunday Times* report,[2] one pessimist frankly admitted that he expected legalized porn to follow—with "the catastrophic drop in prices that would mean".

This sounds so paradoxical and to most people such rot that the logic behind it needs spelling out further. Indeed there is concealed here a perfectly intelligent objection, and intelligible fear, namely that to legalize is *ipso facto* to license. One of the main functions of the law, it is said, is to "set a good example". What is lawful is what society approves: to make lawful what has hitherto been unlawful is equivalent to giving it the stamp of social approbation. It is a way of saying, "You have said that I can".

Now there is an area where this logic applies. A de-restriction sign on the roadside says precisely this. Of course, it does not say that you *should* immediately drive

[1]Ann Faraday, *Dream Power* (1972), p. 245.
[2]30th April, 1972.

at seventy miles an hour, but it says that you can. This, though, is because we are here dealing with a department of life that for reasons of safety has to be fully regulated by law. But mercifully this is not true of all life, or we should be living in a society where, as was said of the Kaiser's Germany, everything was compulsory that was not *verboten*. In most areas of living there is a wide margin of tolerance—and the more mature the society the wider it will be—where the individual is free to make moral choices without the law being involved. And to de-restrict it legally does not imply that it is morally to be encouraged. Such a step may merely be an acknowledgement that the law has been an ass or has ceased to correspond with social realities. Thus, to remove suicide from being a criminal offence is not to set society's approval upon it. And there is no reason to suppose that more people now attempt suicide *because* it is legal and therefore "all right". If they do, it is because modern life has greater strains. To reimpose the law would lessen none of them, merely add to them. Equally, the suppression of homosexuality by law solves nothing. To free it (in situations where others are not forced or offended) is not to promote it. Rather it is to remove fear and to afford the facilities for coping with it constructively.

In actual fact the force of law as a power for good in these areas is a good deal weaker than we tend to suppose. It is not the law that alters social attitudes so much as social attitudes the law. It is not because the law has changed—it hasn't—that more illegally conceived (and not merely illegitimate) babies are being born to girls under 16. It is because of a change of social mores and and the half-arrival of contraceptives. To stiffen the law would not staunch the flow: it would merely make advice and protection more difficult.

Yet people have a deep-set fear that if you lift the legal controls anything could happen and probably would. There is a catastrophic expectation of unlimited indulgence. For a time, no doubt, with pornography there would be a private boom—though in public I trust things might be a good deal better. But social controls, quite apart from what people actually *want* to read and see, would by the usual checks and balances soon reassert themselves. The notion that "anything goes" just because the law allows it reflects the paternalistic assumption that it is the function of law to tell people what is good for them and that what is not prohibited is thereby promoted. But it is precisely a sign of a civilized society that it progressively substitutes the free processes of social judgment for the sanctions of penal suppression.

In this lecture, I would stress again, I have been concerned with the place and the role of criminal law. This does not in the least mean that other pressures and educative processes have not a vital, and indeed an increasing, function. The current publicity-campaign against smoking, albeit conducted with one arm tied behind the back by commercial interests, is an example of what can be mounted. In this campaign law has a perfectly valid place in enforcing warnings and controlling advertisement: not taking away people's freedoms, but respecting and instructing them. We are not shut up to a choice of prohibition *or* indifferentism. Indeed, if we could let the law mind its own business, the field would be freer for other forms of social suasion, voluntary self-discipline and professional restraint. At present we do little because we are led to suppose that the only available action is legal action—which every time there is an obscenity trial (whatever the outcome) merely inflates the problem. How many, for instance, in this country would ever have heard of *Last Exit to Brooklyn*, let alone toiled with its turgidities, if it had not been for the misguided zeal of Sir Cyril Black? There are so many more intelligent ways of doing good.

Yet let me in closing re-emphasize the positive, and quite indispensable, function

of law in the sexual field. It is to protect the assaulted, the young and feeble-minded, and to guard the privacies of the individual, whether in private or in public. If we can reform it to do that effectively and constructively in a manner that commands consent and therefore respect, we shall have done a great thing. For the rest, the way is open, now more than ever, for the immense corporate task laid upon all of us helping to transform ourselves from a paternalistic society, through the adolescent pains and follies of a permissive society, *towards* a more genuinely mature society.

This of course does not mean a society consisting of totally secure people. There are, and always will be, persons in need of special care and protection, immature adults, neurotic adults and dangerous psychopaths. What matters is our direction and our aim. And for a statement of that I cannot do better than end with a quotation from Dr. Faith Spicer, medical director of the London Youth Advisory Service, whose concern for the whole person in the field of sexual counselling is an example to us all. In a forthcoming book, *Sex and the Love Relationship*, she writes this:

> I hope we are a shade more honest, a shade more compassionate. I hope we gradually, by learning *why* people behave as they do, will learn to help them, and how to prevent the early damage that may be responsible for their actions, so that . . . we can at least have a society in which we know whom to protect, and in what way to protect them, so that the rest can feel free to trust their own judgment, and find their own way to a real and lasting love relationship.

Printed in Great Britain by T. H. Brickell & Son Ltd, The Blackmore Press, Gillingham, Dorset