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‘The Law Is a Ass’: Obscenity, Blasphemy and Other Literary Offences after Lady Chatterley

Martin A. Kayman

A ban on a play which was claimed to be blasphemous has been lifted by a council in Northern Ireland. Members of the artistic board at Newtownabbey, Co Antrim reversed an earlier vote, allowing the Reduced Shakespeare Company to now stage The Bible: The Complete Word of God at Theatre at the Mill, which is run by Newtownabbey borough council. The artistic board voted last week to ban the play when some Unionist members, including the mayor ..., claimed it mocked Christianity. Councillors who backed the play claimed the ban made them look like a laughing stock.
(The Guardian, 28 January 2014)

In memoriam Stuart Hall (1932–2014), Terry Hawkes (1932–2014)
and Richard Hoggart (1918–2014)

In an article explaining the theoretical background to this volume, Ralf Grüttemeier and Ted Laros (2013: 205) argue that ‘literary trials can be taken to register the acceptance of certain poetical standpoints in non-literary circles. Given the central function of the law and the courts in the field of power as Bourdieu sees it, judicial practice can be taken to manifest a kind of crystallisation of ideas on poetics within non-literary elites’. In particular, they claim, the application of a doctrine of *exceptio artis* can be viewed as ‘a decisive step towards the formation of a relative autonomous literary field’. My contribution will address the *dearth* of literary trials for either obscenity or blasphemy in the half-century or so since the Lady Chatterley trial. What does this tell us, not only about attitudes to literature but equally about the pressures on, and preoccupations of, law in postmodernity?

The essay will articulate a number of claims. First, I shall challenge the dominant view of the *Lady Chatterley* case by arguing that if, in one sense, it did consecrate the autonomy of literature, it at the same time presaged transformations in its constitution that undermined the robustness of that position. The narrative of changes in the contours of literature opened up by this account, and the implications for its role in law, lead to the second claim. Here, the decline in trials is read against the background of the criminalization of new forms of literary offensiveness in the multicultural UK of the late twentieth century. In this context, I argue, the sort of concerns that the courts had negotiated in their dealings with literature have been displaced by issues which address contemporary law's relationship with religion. In doing so, these issues bring into question the foundations of law's claims to a monopoly of jurisdiction in a multicultural and globalized world. In examining how a liberal conception of law has been reasserted in response to these challenges in Britain (as in the episode recounted in my epigraph), my final claim, then, will be to uncover the fragility and divisiveness behind the apparent confidence of that position, and to point to the persistence of fundamental issues of the sacred at the heart of law.

In making its way to these conclusions, the essay will necessarily take a different approach to relations between law and literature to that articulated by Grüttemeier and Laros. Thinking historically, the struggles in the English courts to define the legal concept of literary property initially created by the first legislation on copyright (1709) were certainly an important contribution to the establishment of the modern concept of literature (cf. Rose 1993). However, as the excerpt above from Grüttemeier and Laros reminds us, in Pierre Bourdieu's account the pre-eminence of the law is a given. In 18th-century Britain, on the other hand, the traffic was not only one-way: the incipient autonomy of literature was relative to that of a legal regime which was itself engaged in consolidating the ideological supremacy of the rule of law that characterizes modernity. As I have argued elsewhere (Kayman 1996: 795), at this point of expansion in parliamentary statute as the primary source of law-making, the courts' demarcation of literature as original, imaginative and subjective expression implicitly constructed the written law as immune from such 'literary' qualities, and hence supported its modern character as the impersonal source of sovereign justice.

Today too, the 'force of law' (Derrida 1990) continues to rely on aesthetics, as well as violence, to renew and sustain its position (cf. Douzinas and Nead 1999; Sherwin 2011); and it needs constantly to disavow both in order to maintain its

consensual authority. By 'aesthetics' here I am referring not simply to the literary qualities, imagery, ceremony and fictions of law but to what Jean Rancière theorizes as 'the distribution of the sensible' achieved by such means. Such 'common sense' involves both 'the system of self-evident facts of sense perception that ... establishes at one and the same time something in common that is shared and exclusive parts' (Rancière 2004: 12), and 'a distribution of what is visible and what not, of what can be heard and what cannot' (Rancière 2010: 36). I start, then, with a focus on the crime of obscene libel because it plays a fulcral role in separating a concept of literature as aesthetic writing from law which, in this way, maintains its distance from aesthetics. Thus, the preamble to the 1959 Obscene Publications Act declares a double purpose: both 'to strengthen the law concerning pornography' and 'to provide for the protection of literature'. When, twenty years later, the Committee on Obscenity and Film Censorship chaired by Bernard Williams recommended that all written material be excluded from the act (Williams 1979: 102), the home secretary firmly reasserted the privileges of a strictly aesthetic understanding of the literary. Sir Patrick Mayhew rejected Williams's recommendation on the grounds that not all published writing was 'literature'; the committee's blanket exclusion ignored 'pornographic novelettes, with no literary pretensions, known to the police as "readers"' (Hansard 1981: 492). In abandoning any legal distinction between literary and pornographic reading materials, Williams's proposal threatened to dismantle the conceptual barrier that separated the corrupting sensuousness of pornography not just from literature but from all other bodies of writing. On the other hand, designated as the lawful space for the improving pleasures of reading, literature acts here as a buffer between pornography and other writing that, while not literary itself, was thereby protected from being 'obscene', that is, likely to have a harmful aesthetic influence. It is the business of the obscenity laws, then, to police the borders of the sensuous aesthetic.¹

By making literary merit a defence against obscenity and admitting the expert testimony of literary critics in court, the Obscene Publication Act can be seen as the legislative embodiment of Bourdieu's relative autonomy of the literary field (cf. Kirchhofer, *infra*), and the trial of *Lady Chatterley's Lover* (*R. v. Penguin Books* 1961) as its triumphant enactment. The failure of the prosecution has been followed by what Paul Kearns (2007: 667) has called an 'ineluctable decline of obscene libel' and, consequently, of the use of the literary defence. Although the law has resisted proposals to abolish the statutory distinction that relies on an exceptional field of aesthetic writing, literary authors are nowadays more

likely to risk condemnation by the judges of the *Literary Review*'s 'bad sex award' than prosecution for obscenity in a court of law.² So, why, while maintaining the legislation in place, has the law all but ceased to engage in trials of the literary over the lawful limits of the aesthetic? My response has two components. In the first place, as indicated above, I shall read the *Lady Chatterley* trial not as the triumph of the autonomy of literature but as the announcement of an imminent destabilization of the ideological and social structures which had supported this status. Both a radical opening up of the boundaries of the literary and changes in its critical readership have weakened the utility of literature in policing the aesthetics of language. In the second place, we will find that the pressure on law from aesthetics that had been managed hitherto through obscenity has been displaced by the emergence of another issue at the intersection of literature and law, that of religious belief.

The first movement I shall be describing can be illustrated through the stark contrast between the high legal concepts of obscenity and literature mobilized in 1961 and the issues at stake in the most dramatic obscenity trial since the turn of the century, *R. v. Peacock* (2012). The sensational nature of the depictions of violent gay sadomasochistic practices purveyed over the internet by Michael Peacock ensured wide publicity for the case. Although the Crown Prosecution Service's criteria clearly mandated prosecution, Peacock was acquitted by the jury. Like many others, Nichi Hodgson's report (2012) invoked the precedent of *Lady Chatterley's Lover*, but there is little relation between the literary heterosexual buggery of Lawrence's artistic novel and the graphic fisting of Peacock's commercial DVDs. Indeed, the defence here did not rely on aesthetic value at all. The aesthetic appeared only in the more fundamental terms of the difference between the practice of consensual violence and its depiction on screen – in Rancière's terms, what may be visible and shared. When literature did make its appearance at the trial, it was emphatically in a minor key. According to one observer:

Whilst the prosecution had turned to a Woody Allen quote in their summing up, the defence referred to the book and film *The Da Vinci Code*. The Dan Brown story features scenes of flagellation, and the prosecution rhetorically asked whether this suggested it was OK for religion, but not sex. Then – and to the delight of academics and theorists following the trial on Twitter – the defence quoted the French postmodern theorist, Foucault: 'if you are not like everybody else, then you are abnormal, if you are abnormal, then you are sick', but these terms are mistakenly conflated when they are in fact three different

things – different, abnormal and sick. To be merely different does not denote 'sickness'. (Ashford 2012)

Neither argument seems particularly substantial, but the choice of literary exempla from the realms of popular culture, the references to the interface of writing and film and to social media, and the citation from critical theory point to exactly the sort of transformations that I shall be tracking from the Lady Chatterley trial and which have undermined the capacity of literature to support the law in configuring the boundaries of the aesthetic.

The prosecution's question contrasting sex and religion will prove equally apposite. Bourdieu's critique of taste – an influential contribution to the changes I am alluding to – mobilizes a metaphor that denounces 'culture' as the 'present incarnation of the sacred' (1984: xiii). However, this figure was to be challenged by the eruption of the sacred in its literal sense within the trials of literature. In 1977, the writ of blasphemous libel – unused since 1922 – was resurrected against *Gay News* for publishing James Kirkup's 'The Love that Dares to Speak its Name' (*Whitehouse v. Lemon* 1979). While this case may have felt to most contemporaries like a reactionary hangover, the demands of the sacred arose more problematically in the most notable literary trial *not* to take place in Britain, *in re* Salman Rushdie's *The Satanic Verses* (1988). If obscenity trials implicitly settle issues of law's relation to sensuous aesthetics, then blasphemy trials address the ethos of the two kinds of law, state and religious. While one strain in the law-and-literature movement stressed the literary as the exemplum of the imbrication of aesthetics and ethics (cf., White 1985; Nussbaum 1995), the law avoided trying this issue on the ground of literature. As we shall see in the last section of the essay, in the absence of literary merit as a robust buffer, English law has hitherto responded somewhat nervously to the challenge from religion, pointing to what I shall conclude is an as-yet unresolved crisis in the authority of modern law in a postmodern, globalized environment.

Unsettling the contours of literature: The rise of cultural studies

I am proposing, then, that the prosecution of *Lady Chatterley's Lover* remains key to the British narrative of law and literature not because, in Bourdieu's terms, it confirmed the autonomy of the latter – which, in jurisprudential

terms it clearly did – but because it simultaneously signalled the erosion of the boundaries which had secured the consensus about the nature and value of literature required to support its exceptional status in law. In particular, the new law brought professional literary critics into the courtroom to testify to the nature and quality of the literary text at the very point that the authority and views of the professional reader were to undergo a period of significant change which was radically to diminish the capacity of literature to play its confident aesthetic function in court.

The most frequently mentioned witness here is Richard Hoggart, himself a representative of a new style of working-class academic from a recently founded university (Leicester), which was part of a sector that was to gain twenty-five institutions in the course of the 1960s. Reflecting on the trial in his autobiography, Hoggart (1992: 52) commented that ‘one might have expected that it would attract today no more than a footnote... Instead, it has echoed loudly down the decades.’ The repercussions of the case have however had little to do with the legal recognition of the integrity of the literary work, the aesthetic merit defence, or the role of literary critics as expert witnesses. Rather, what echoes in the cultural memory is the question – ‘quoted in every discussion of the trial I know’ (Hoggart 1992: 55) – posed to the jury by Melvin Griffith-Jones QC: ‘Is it a book that you would even wish your wife or your servants to read?’ (Rolph 1961: 17) Anachronistic as the question appeared in the 1960s, Christopher Hilliard (2013) has pointed out that the potential reader had been at the heart of obscenity law since *R. v. Hicklin* (1867) established that the key issue in obscene libel was the effect on those ‘into whose hands a publication of this sort may fall’. According to Hilliard (2013: 654): ‘The *Lady Chatterley’s Lover* trial was the last sortie of a convention that had held since the nineteenth century: that material the authorities would ban if it were produced for a mass audience did not necessarily warrant prohibition if it was directed toward a privileged readership in whose judgment the courts could have more faith.’ In this sense, the cultural legacy of the trial has had less to do with literary aesthetics than with democracy: the universe of ‘persons likely to read’ literature, in the words of the statute.

The crucial consideration in the case was hence the fact that *Lady Chatterley’s Lover* (Lawrence 1928, 1932, 1933, 1956) had been issued as a Penguin paperback (1960). Founded by Allan Lane in 1935, the Penguin project was to put modern fiction into the hands of the public at large, priced at the same level as ‘a packet of cigarettes’ (*About Penguin: Company History*). The trial of *R. v. Penguin Books*

thus reflected the profound changes underway in access to the literary and to a literary education and, consequently, in the attitudes and practices of reading, both professional and popular, associated with literature by witnesses and jurors. In that sense, something like *The Dark Sun* (1956), an acclaimed study of Lawrence's novels by the first witness for the defence, Graham Hough, is of less use in understanding the cultural significance of the trial than Hoggart's *The Uses of Literacy* (1958) – which, the author later claimed, Allan Lane had regarded as 'exactly the kind of book he had hoped to publish when he founded the Pelican list' for non-fiction two years after Penguin (Hoggart 1992: 5). Hoggart's study of 'aspects of working-class life, with special reference to publications and entertainments' (to cite the sub-title) was a foundational document for that transformation of the study of English Literature in the UK that is signalled by the name 'cultural studies'. Hoggart's text asked the reader to attend critically not, as F.R. Leavis argued, to the complex moral vitality of a literary canon but to that of the popular culture of the working classes. The first half of the book used a literary-critical approach to document and analyse the persistent features of traditional working-class life, while the second discussed changes to that culture resulting from the expanding industries of popular literature and music. In this way, the literary and its methodologies became embedded in the popular and the multimodal and, as with Hoggart's equally influential contemporary, Raymond Williams (cf. 1961), within a holistic notion of culture.

The Centre for Contemporary Cultural Studies (CCCS) founded by Hoggart at the University of Birmingham in 1964 was designed as the academic embodiment of this project. Penguin Books provided a grant to help establish the Centre, funding Hoggart's research assistant and successor, Stuart Hall. In his inaugural lecture as Professor of English Literature at Birmingham, Hoggart had made 'the case for widening the boundaries of English as it was offered at universities' (Hoggart 1992: 93). The Centre would achieve this by drawing on sociology and social psychology alongside literary criticism in a way that, in the words of its first report, 'will ... fall into line with the best critical work done in schools of literature, while at the same time extending this work in scope' (1964: 3–4). As CCCS developed after 1968 under Hall, its methodological focus engaged with and contributed to the broader theoretical turn occurring in English and other subjects in Britain – as represented, for example, by the Essex Sociology of Literature conferences that ran between 1976 and 2001, the 'New Accents' monograph series (1977–2003), under the general editorship of Terence Hawkes (2007), and *Textual Practice*, the journal Hawkes established in 1987.

Although Hoggart's project was originally conceived within the discipline of English Literature, English and Cultural Studies drifted apart, in large part over the balance of literary and sociological approaches. Nonetheless, a dynamic had been firmly established: thus, while the CCCS was transferred from the Department of English to Birmingham's Faculty of Social Science in 1988, the institutional impetus continued the following year with the founding, by a group including Hawkes, of the Centre for Critical and Cultural Theory (CCCT) within the Cardiff School of English, Communication and Philosophy. In sum, while the experiment started by Hoggart led to the emergence of distinct disciplines in the study of popular culture and media, it had still played a central role in a process that has transformed understandings of what is included within English Literature and literary criticism. Without documenting the debates that have taken place over the last half-century, one can, I believe, state with confidence that the landscape within which even traditional approaches to English are carried out has been transformed. Most of all, one might say, the assumed boundaries and contours of English Literature have been questioned and opened up in terms not only of the canon of strictly literary texts and genres but equally in relation to the media, histories, geographies, and subjects within its purview, with especial attention to the disempowered and subaltern – what used to be regarded as 'wives and servants', if one likes. Assumptions regarding aesthetic value and institutional autonomies have been challenged by a holistic view of culture and an awareness of the intricate interdependencies of expression, representation, and power – as reflected, for example, in the law-and-literature movement in which this essay situates itself.

Changes in critical readership: The rise of the book club

A key insight from cultural studies and critical theory has been the active contribution of the reader/viewer to the work. The opening up of the theoretical and methodological constitution of literature in the UK is one side of a process that, as I indicated above, included changes in the structure of its critical readership. Here, arguably the most interesting symptom of change has been the growth of the book club or reading group. I am not referring to the commercial book club but to the appropriation of the model by social enterprises, like public libraries, or, most commonly, by informal groups of friends who get together regularly to socialize by talking about books which they select for discussion

themselves. Having started in the United States, informal, non-commercial book clubs have burgeoned in the UK since the late 1990s.³

In her pioneering survey of the phenomenon, Jenny Hartley estimated in 2001 that some 50,000 groups existed in the UK at that point, and growing (Hartley 2001: vii). Hartley notes the role of campaigns by the Orange telecommunications company (1997) and the *Mail on Sunday* (1998), and the creation of BBC Radio 4's 'Bookclub' (1998) as important impulses for the revival and expansion, in modern form, of what is in fact a long-standing social practice. Informal reading clubs have existed throughout the modern period, be they circles of aristocratic women, aspirational Dissenters in the provinces, or political reading groups formed by working men in industrial cities. The revival at the turn of the twenty-first century is, as one would expect, more heterogeneous. Membership of a reading group would appear to be connected with the expansion of the university sector from the 1960s, with Hartley (2001: 33–4) reporting the majority of members, particularly among younger readers, having had some form of tertiary education. The groups are predominantly constituted by women, although mixed groups made up over a quarter of the 350 clubs studied (Hartley 2001: 25–6). Notably, though, some 80 per cent of respondents met in members' homes (2001: 15). Such feminized, domestic, neighbourly communities (as Hartley [2001: 14] puts it: 'The group is itself a micro-neighbourhood') do not replace professional literary criticism, but they have the capacity to reconfigure the practices and objects of literary reading.⁴ For the producers of Radio 4's 'Bookclub', '[a] reading group is a halfway house between' solitary reading and the way professional critics read (Flynn and Guttridge). More broadly, Wendy Griswold, Terry McDonnell and Nathan Wright (2005: 134) have argued that book clubs offer a praxis that embodies the contemporary theoretical recognition of reading as a social, rather than individual, activity. In their numbers, the book clubs collectively exert influence on publishers' lists; moreover, they generate and disseminate their own reading practices and understandings of literature which do not necessarily see themselves in alignment with professional literary criticism.

While only a limited amount of sociological research on reading groups is, as yet, available in relation to the United Kingdom, they are a sufficiently recognizable and significant feature of everyday life to have themselves become the object of fiction. The first novel to employ the reading group as a setting was... *And Ladies of the Club* (1982) by the 87-year-old Helen Hooven Santmyer. The 1,334-page novel used the book club as a social focus and a narrative

mechanism through which to chronicle the changes in a fictional mid-American town between 1864 and 1932. Santmyer's work had only moderate success on publication by the Ohio State University Press, but its adoption by the Book-of-the-Month Club two years later turned it into a best-seller. The first appearance in British popular culture was the comic Channel 4 television series *The Book Group* (2002). Appropriately for a practice imported from the United States, the protagonist who founds the group is a recent arrival from Cincinnati. During the second half of the decade, book clubs became enough of a social reality to be introduced into the popular soap operas *Coronation Street* (in 2005) and *EastEnders* (2009). In fiction, book clubs are not merely a device for bringing diverse characters together and creating social communities around reading; by thematizing their reading practice, they provide a metacommentary on literature in people's personal and social lives. By taking the form of the genres they mainly read – romantic comedy and crime fiction – book club novels engage reflectively with the role of popular narratives of love and death in their characters' lives; a creative mode of cultural study, one might say.⁵

Julie Highmore's enticingly named novel, *Pure Fiction* (2003), celebrates a full emancipation of the book club by affirming the capacity of 'reader power' to actually control the social narrative. Stylistically, the novel presents itself as a romantic comedy in which the characters' membership of the club saves them from their individual plots of adultery, abandonment and sexual exploitation by providing a new network of sentiment and solidarity. Zoe's narrative is both functionally and ideologically central. Zoe is a highly-strung, lonely and attractive 31-year-old who commutes to London for her office work and to see her lover, Ross Kershaw. An MP and also a popular novelist, Kershaw is a representative of 'law-and-literature' – in his case, one with a taste for troilism and drug-taking. After Zoe has been abandoned by him, another member of the group, Donna, an aspiring working-class single mother of two, takes her place and suffers the same treatment. This precipitates the denouement in which the other members of the group, learning of his behaviour towards their fellow-readers, re-name their book club 'The North Oxford Literary Society' and invite the MP to give a talk to them on his novel, *Out for the Count*. When Kershaw appears, they literally knock him out and use the threat of exposure to force him to resign from Parliament. The Club hence serves as the comic mechanism which allows a narrative of isolation and abjection to be transformed into a fantasy of popular revenge by a group united by reading against the corrupt male legislator and author.

At the same time, *Pure Fiction* asserts the value of its own conventions, as life comically follows art. Thus, while Zoe's romance with Kershaw ends sordidly, her motivation for joining the club – the fact that she has 'lots of time to read on trains and couldn't bear another God-I-really-want-a-husband book' (Highmore 2003: 78) – becomes her own 'rom com' plot. It is precisely her gift to a fellow commuter of a copy of *Middlemarch*, which she has just finished reading for the Club's next meeting, that brings them together and leads to their marriage.⁶ The novel thus thematizes the role of reading and of fiction in the sexual and social lives of the individuals and, within the modalities of a romantic comedy, asserts the potential of a community built around reading literature as a social, rather than individual, act.

If reader power here has only the confidence of comedy, it is nonetheless firmly asserted at the expense not only of the corrupt legislator/author but of the professional critic. In many ways, besides Kershaw, the most significant male character in the novel is not the principal narrator and struggling author of genre fiction, Ed, but Gideon, the lower-middle-class, middle-aged lecturer in English Literature. As a member of the club, Gideon's pretentious, facile, second-hand 'lit. crit.' views render him a ridiculous and uncooperative reader.⁷ At the same time, his presence alerts us to the fact that, while the novel is set in Oxford and the club's reading list would not disgrace an undergraduate course in English Literature, the University is all but absent from the narrative.⁸ Gideon is a lecturer in a second-rate technical college and the only literary scholar to be mentioned in the text other than the famous authority on Dylan Thomas, Professor Thomas Thomas, who dies in the course of the narrative. On the other hand, the uneducated Donna joined the group because she saw it as a way of getting 'some practice' to help her realize her 'ambition...to get an English degree' (Highmore 2003: 122–3) and the novel ends with her on her way to her desire, a star student in her evening class, evidenced by her ability to identify George Eliot as an 'omniscient narrator' (239).

While Donna embodies a democratic vision of an English degree that includes students of her own class, Gideon's professional life also reflects the changing understanding of literature that I have been referring to. At the start of the novel, Gideon is responsible for the college's nineteenth-century novel course, which he prides himself on delivering in a traditional manner, 'rather than the all-encompassing, let's-deconstruct-sauce-bottle-labels "English Studies"' (Highmore 2003: 133).⁹ However, later in the novel he finds himself required to teach 'a course that encompasses African, African-American, Afro-Caribbean

and Asian writers' (201), so as to reflect the cultural mixture of the college's students. This is not a demographic that has other than a marginal presence in *Pure Fiction*. But it is here that the changing readership of literature in Britain signified by the prosecution's anachronistic question in the *Lady Chatterley* trial was to meet the theoretical transformations discussed above, with a hard edge.

The obituary for Stuart Hall in the *Guardian* reminded readers that he was known as 'the godfather of multiculturalism' (Butler 2014). This is not a term that Hall favoured but the appellation links the change in the ethnic and racial make-up of the UK population over the period and the consequent expansion in the visibility of diverse cultural and aesthetic forms with an ideological response based on respect for cultural difference. The latter of course owed much to the defamiliarizing and queering of the 'proper' and 'normal' and the valuing of alterity that had been a central theme in the work pioneered in the UK by CCCS, CCCT and many others. It was, then, within the dynamic of multiculturalism that the encounter between the democratic opening of literature and its readers, and the return of the sacred in a literal sense, gave rise to what I have been pointing towards as a new fault-line for law.

Taking offence: Race, ethnicity and religion

The fault-line manifested itself through something common to the subjective experience of both obscenity and blasphemy and which, in its literal sense, is at the very heart of crime: offence. While prosecutions for obscenity are frequently motivated by a sense of outrage, offensiveness *per se* is not the test for obscenity but the tendency to 'deprave and corrupt'. Remedy against offensiveness relies rather on the common-law writ of 'outraging public decency'. The parameters of this writ were also reviewed in the early 1970s, driven, as was to be the case with Peacock and Kirkup, by gay sexuality. In upholding an appeal by the publishers of a magazine against a conviction for publishing adverts for gay prostitutes, Lord Reid defined the offence as covering any display 'which an ordinary decent man or woman would find to be shocking, disgusting and revolting' (*Knulier v. DPP* 1973: 458); however, he insisted, the display in question had to be open to the public gaze. Material contained within the closed pages of a magazine, the court held, did not constitute a 'public exhibition'. Hence, besides benefiting from its privileged standing in relation to obscenity, literature also enjoyed the protection against offensiveness granted to all material published

under covers. Nonetheless, the capacity of literature to cause (an) offence did become a challenge in the late twentieth century in a way that, as we shall see, left law problematically exposed to the issue of the sacredness not of culture but of religion, and hence, I shall argue, of itself.

Reid's ruling on public decency shared the liberal spirit informing legal attitudes to obscenity post-*Lady Chatterley*. However, at the turn of the 1990s, the prosecution of Michael Butterworth and David Britton introduced a new dimension at the margins of obscenity and offensiveness. In one sense, this is just a story of the crude use of the powers granted to magistrates under section 3 of the Obscenity Act to confiscate obscene material without the benefit of jury trial. The case is important, however, not just because it was the last occasion (at the time of writing) on which a book was banned under the statute but because the ultimate failure of the prosecution focused attention on a new territory of offence beyond the established parameters of obscenity and public decency.

The straightforward account is as follows. As a centre for avant-garde culture, the bookshops founded in Manchester in 1976 by Butterworth and Britton soon became a target for a moral campaign led by the new Chief Constable, James Anderton, a militant Christian and renowned homophobe (see Weeks 2012: 382). First charged with selling obscene material in 1982, the owners of Savoy Books were convicted in 1991 for publishing an obscene novel entitled *Lord Horror* (Britton 1989) and a related comic book, *Meng and Ecker No.1* (Britton and Guidio 1989). Savoy's cause was taken up by the campaigning group, Article 19, and the following year the verdict was overturned in the Crown Court (*R. v. Britton & Butterworth* 1992). If, in *Lady Chatterley*, readership was the subtext, here it was the key issue, explicitly outweighing considerations of literary value. As reported by Julian Petley (1996: 165), although the court did not concede any 'approval' to the content of *Lord Horror*, it felt that the novel presented little risk since, as the judge put it, 'no-one is prepared to read this work unless they are willing to digest large amounts of philosophy and complex argument'. On the other hand, the court upheld the conviction of the comic book on the grounds that it was 'luridly bound' and far more likely than the novel 'to attract attention from the less literate' (Petley 1996: 166). The judge concluded that the comic presented 'a glorification of racism and violence. It contains pictures that will be repulsive to right-thinking people, and could be read – and possibly gloated over – by people who enjoy viciousness and violence.'

However, the overturning of the conviction for obscenity on the grounds of the likely readership does not disarm the novel's capacity to offend in ways that

may not be protected by law. Be it in the form of prose, graphic novel, or, indeed, 'talking book', this is, frankly, difficult material.¹⁰ The figure of Lord Horror is based on the executed Nazi collaborator 'Lord Haw Haw' (William Joyce), while *Meng and Ecker* refer to Auschwitz's 'angel of death', Josef Mengele, and the co-founder of the Nazi party, Dietrich Eckart. More than the explicit depictions of sex and violence, it was the anti-Semitic content of Britton's work that disturbed both the court (see Kerekes 1995) and the press (cf., e.g., the leader in the *Independent*, 31 July 1992). Finding Anderton's widely publicized comments on gays spoken by a character called Anderson, with 'Jews' replacing the word 'homosexuals' (Petley 1996: 164), no doubt makes for uncomfortable reading; however, readers are likely to find the articulation of Nazi ideology, the stylish presentation of its imagery, and the virulent anti-Semitic passages in the novel, like the one in which Lord Horror dismembers and eats a Jew (Britton 1989: 94), even more disturbing. In the appeal, Geoffrey Robertson QC argued that *Lord Horror's* offensiveness was aimed at shocking readers into repulsion towards Nazism and its contemporary manifestations (Anthony-Woods and Mitchell 1995). However, this classic realist defence does not do justice to the aesthetic challenge of the texts and their images.

Indeed, as Benjamin Noys argues, *Lord Horror* presents a 'profoundly ambiguous and profoundly disturbing' engagement with what Susan Sontag had diagnosed in 1974 as the contemporary resurgence of 'fascinating fascism' (Sontag 1996; Noys 2002: 309). Through their treatment of Nazism as carnival and their attack on the traditional narrative of British resistance to Hitler, the texts deliberately undermine 'the political positions that have formed around our ability to distribute collective actors into the categories of perpetrators, bystanders and victims' (Noys 2002: 316). In sum, 'the *Lord Horror* graphic novels...force us to face the question of fascinating fascism without any possibility of evasion' (Noys 2002: 307); their potential offensiveness derives from the absence of a position from which we can sit comfortably in judgement on the Nazi culture presented in the works.¹¹ Here, then, the common conflation of 'obscene' and 'offensive' takes on the particular colour of racism. As Joylon Jenkins (1991: 37) was not alone in pointing out, if the predominant character of the offensive material was its anti-Semitism, then it should be prosecuted not under the Obscene Publications Act but under the Race Relations Act.

Whether a prosecution under the latter for publishing 'threatening, abusive or insulting' words likely to stir up racial hatred (Race Relations Act 1976: IX. 70 [5A]) would have succeeded is moot. In any case, it is possible that recent events

weighed on the failure of the Director of Public Prosecution to proceed against Britton on these grounds. The publication of *Lord Horror* had come a year after Rushdie's *The Satanic Verses* (1988), the most notorious literary prosecution that 'did not bark in the night'. Together, the cases link the decline of obscenity and blasphemy trials to the emergence of new classes of offence in multicultural Britain. While, with *Lord Horror*, there was at least a possibility of addressing the offensiveness of anti-Semitism within a legal framework, the Rushdie affair revealed the existence of a legal aporia regarding offences to religious belief.

The aporia arises for two reasons which reflect the problematic legal position of religion in a multicultural society. In the first place, although *The Satanic Verses* did cause offence among many members of specific ethnic and racial groups in Britain, recourse to the Race Relations Act was not an option since the law did not include religion amongst the protected classes: 'colour, race, nationality or ethnic or national origins' (Race Relations Act 1976: I. 3 [1]). The Act had been a theoretical option with *Lord Horror* only because Judaism, like Sikhism but unlike Islam, is seen as mapping onto ethnicity. Secondly, the traditional legal framework for criminalizing offences to religion – blasphemous libel – also proved to be inapplicable. The recent history of blasphemy trials in the UK is even more conspicuously a history of absence and decline than the stuttering series of obscenity cases since *R. v. Penguin*. As I have already noted, no public prosecutions for blasphemous libel have taken place since 1922, and the verdict in the private prosecution against *Gay News* was overturned on appeal in 1979. When Christian Voice sought to bring another private prosecution in 2007 against *Jerry Springer: the Opera*, the judge refused to issue a summons. The blasphemy laws were repealed the following year.

Abdul Hussain Choudhury's attempt to have Rushdie and Viking Penguin prosecuted for blasphemous libel was an important contribution to abolition. The key factor in the appeal court's decision to uphold the magistrate's refusal to issue a summons was the recognition that the offence applied only to blasphemies against Christianity. The court agreed that 'There can be little doubt that the contents of the book have deeply offended many law-abiding Muslims who are United Kingdom citizens' (*R. v. Chief Metropolitan Stipendiary Magistrate* 1991: 309); but its review of 'the long history of blasphemy in our criminal law' (311) concluded that it was only legally possible to blaspheme against the established religion of the country. Lord Scarman had already suggested in the *Gay News* trial that 'there is a case for legislation extending [the libel] to protect the religious beliefs and feelings of non-Christians. ... In an increasingly plural society such

as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt' (*Whitehouse v. Lemon* 1979: 658). However, the judges in the case brought by Choudhury declared that they supported the recommendation made in 1985 by the Law Commission to abolish the blasphemy laws. Although the court ruled that, under existing jurisprudence, fiction was no defence against blasphemy (*R. v. Chief Metropolitan Stipendiary Magistrate* 1991: 310), Robertson had again argued for the freedom of the literary work to be offensive. But the law did not need to adjudicate between the rival claims of literature and religion since it declared that it had no jurisdiction over alleged offensiveness to Islam and wished to have none in any case. In a sense, then, the bullet was dodged.

Nonetheless, for theoretical as much as social reasons, the law cannot simply disclaim any jurisdiction over offences to religion. Here was a conflict not between two distinct institutions like law and literature but between two institutions each claiming the violent force of law – in Robert Cover's sense, two rival *nomoi* (Minow, Ryan and Sarat 1992: 95–113) – each of which were offensive to the other here. Although *The Satanic Verses* did not undergo a trial in the UK, Rushdie was, notoriously, the object of a judicial ruling which effectively constituted an incitement to a serious offence under British law. The fatwa issued by the Ayatollah Khomeini drew attention to how globalization had opened up the national borders which had previously constrained the existence of plural *nomoi* and jurisdictions in the world. Resolution of tensions had hitherto worked in one direction only: through imperial law and, since the Second World War, the globalization of human rights legislation including, of course, the right to freedom of expression. The Rushdie affair precipitated a confrontation between the universal values modern Western law ascribes to itself and the global assertion of a religiously-based jurisprudence, a sacred law. In this case, secular law asserted its pre-eminence by avoiding bringing the matter to trial and using the agent of lawful violence, the police, to protect the author from violence sanctioned by the religious ruling.

Literature can only operate as a buffer between law and religion so long as culture remains 'the incarnation of the sacred', as Bourdieu put it. When the sacred re-asserts itself in its literal, religious sense, law is faced directly with the question of its claim to pre-eminence as the guardian and enforcer of norms – its own sacredness, in fact. *The Satanic Verses* had precipitated a confrontation, as John Berger (1989) put it, between "Two Books and Two Notions of the

Sacred' – the sanctity of holy writ and what he referred to as the 'sacred cause to the European world' of 'freedom of expression'. Whichever notion was more worthy of legal protection (Berger and Rushdie took opposite positions), it was less difficult for literature to draw a line than it was for law. When Rushdie addressed the issue in a lecture entitled 'Is Nothing Sacred?' (Rushdie 1990), he distinguished the mode of reading implied by fiction from that mandated by the religious word, between, as one might say, the 'willing suspension of disbelief' and the will of belief. But what of law? If we believe in freedom of expression as a 'sacred' principle, it can only be as a sacred *juridical* principle. Law could not mark its difference from religion here on the ground of fiction v. devotion but only on the contested terrain of belief in, and allegiance to, what Cover called 'the sacred narratives of jurisdiction' that 'ground judicial commitments' and justify the law's violence (Minow, Ryan and Sarat 1992: 177–8). When confronted by a sentence based in Koranic law – or, for that matter, Old Testament (cf. Kayman 2011) – secular law is obliged to distinguish the grounds and nature of the commitment it demands from individuals to its scripture from that of religious belief – lest law indeed reveal itself as the new 'incarnation of the sacred' rather than the positive democratic consensus of reasonable people it claims to embody.

As with literature, the 'common sense' of the pre-eminence of law is normally achieved by its offering protection to religion. Although the Human Rights Act (1998) declared a commitment to the freedom to manifest and practise one's religion, the abolition of the blasphemy laws in 2008 would have left religious belief outside legal protection from offensive words afforded to other characteristics of difference in a multicultural society, were it not for the introduction of the Racial and Religious Hatred Act in 2006. However, the incorporation of religion into this legislative framework was far from untroubled and involved a compromise that, as I shall now argue, is the focus for secular law's nervous negotiation of its relations with the sacredness of religious belief in multicultural Britain, and hence of its own status relative to religion.

Taking a joke

The problem with the inclusion of religious alongside racial hatred was played out in terms of the parameters of offensiveness: what sorts of hateful words might constitute an offence in these cases? The original proposal was simply

to insert 'or religious hatred' into the clause regarding 'threatening, abusive or insulting' words that defined incitement to hatred on the grounds of race, colour, ethnicity or national origin in the existing law. However, following a two-year campaign in the media, the terms 'abusive or insulting' were removed from the offence of stirring up religious hatred, which became a distinct article, limited to 'threatening' words only (Racial and Religious Hatred Act 2006: 29B). The matter did not rest there. The expression 'threatening, abusive or insulting' originated in the Public Order Act of 1936 as a generic offence relating to breaches of the peace in the light of demonstrations by the British Union of Fascists and was retained when a new general offence of 'harassment, alarm or distress' was introduced into the act in 1986. Nonetheless, in 2012, a second campaign led to the removal of the word 'insulting' here too. In the cases of religion and sexual orientation (added to hatred legislation in 2008), insult and abuse have been exempted from the offence of inciting hatred, and insult from the general offences of harassment and causing distress to someone. On what grounds?

The campaigns to decriminalize insults united religious organizations and secularists, liberal lawyers and right-wing conservatives in the cause of freedom of speech. But, as I indicated earlier, the issue was not played out now on the traditional terrain of high literature. Rather, Rowan Atkinson, the comedian who had gained fame as 'Mr Bean' and 'Blackadder', emerged from the start as the popular face of both campaigns. He became the leading spokesperson for a case that relied on two distinctions. In the first place, as he put it: 'To criticize a person for their race is manifestly irrational and ridiculous, but to criticize their religion, that is a right' (Hall and Branigan 2004). Additionally, he maintained that 'the right to offend is far more important than any right not to be offended'. Both campaigns were successful, and, while 'insulting and abusive' was removed from the category of offending words or behaviour, the conflation of criticism and offensiveness was consecrated in a clause explicitly exempting 'discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse' of particular religions or belief systems from the terms of the act (Racial and Religious Hatred Act 2006: 29J).

Atkinson was a member of a generation of stand-up comedians that came to public notice following the first 'Secret Policeman's Ball' in 1979 and the start of the more abrasive 'alternative' stand-up scene at the London Comedy Store in the same year. A key effect produced by his prominence was that words that might be abusive or insulting about religion became, essentially,

a joking matter. Headlines reporting Atkinson's launch of the campaign on 7 December 2004 included: 'Comedian stands up for right to joke about religion' (*Guardian*); 'Blackadder backs right to poke fun' (*Express*); 'Mr Bean defends the right to laugh' (*Daily Mail*). Po-faced and pious objections raised in 1979 to Monty Python's *Life of Brian* were likewise resurrected. Casting the issue in terms of humour took the sting out of 'insult' and 'abuse' – and entirely begged the question of the ethics of critical debate. In the 2012 campaign, where examples of religious satire were joined by anecdotes involving views on sexual orientation and personal ridicule in general, an association was forged in the media, as in debates in Parliament, between the criminalization of insults and abuse, and the lack of a sense of humour. Typically for discussions in the UK to do with 'political correctness', the 'evidence' overwhelmingly featured a small set of examples of the ridiculous over-zealous application of the legislation – such as the much-cited case of the English Literature graduate arrested in 2005 for suggesting that a police horse was gay.¹²

In that spirit, consider the epigraph to this essay: the attempt of members of a faith group to block the performance of a comedy based on the Bible by a theatrical company which made its reputation through their 90-minute comic cut-down of the complete works of Shakespeare. The councillors' inability to take a joke has made them join Shakespeare and the Bible as 'laughing stock'. In the same way, in the campaigns around 'insulting words', the exemplary case for freedom of expression became the (offensive) joke and hence, by failing to show that it had a sense of humour, the law risked exposing itself to ridicule. On the other hand, by decriminalizing insults of a non-racial character, including religious and homophobic ridicule, the law demonstrated that it shared the national 'common sense' in these matters, as expressed in the robust register of popular comedy.

Thus, by aligning with a culture of comedy, the law humanizes itself, distinguishing its good-humoured ethos from that of a religion that might challenge it, by casting those offended by criticism of their beliefs as humourless zealots – in the same way that feminists and gay rights campaigners are often described in quasi-religious terms as 'puritanical'.¹³ The law thereby disavows any proximity between its texts and institutions and the dogmatic modalities of religion and assures its pre-eminence in the global stakes of competing *nomoi* on the basis of its embrace of the comic and popular. I nonetheless characterized this resolution above as 'nervous'. The characterization does not rely simply on the notion that the comic is often a sign of temporarily unresolved tension. While

law must not take itself too seriously, it is of course, no laughing matter. An anxiety about humour is hence fundamental to its negotiations with aesthetics.

The anxiety becomes visible if we return not to trials of literature in the courts but to the representation of trials in literary works. Comedy looms large in the best-known examples. The most famous would no doubt be *The Merchant of Venice* – where the Jew confronts the Christian in a comedy about ethnicity, gender, sexual orientation and cross-dressing. Both Mr Pickwick's trial for breach of promise (Dickens 1836) and *Jarndyce v. Jarndyce* in *Bleak House* (Dickens 1853) remain in the popular imagination as by-words for the absurdities, comic or not, of the law. However, perhaps the reference to legal proceedings in English literature that most reverberates here is Mr Bumble's response to Mr Brownlow's explanation of the technicalities of the legal fiction of marriage from that other novel which courts anti-Semitism, *Oliver Twist* (1838). At the denouement, when the destruction of the evidence linking Oliver to his true origins is revealed, Mr Bumble claims that it had been his wife's fault:

'That is no excuse,' replied Mr. Brownlow. 'You were present on the occasion of the destruction of these trinkets, and indeed are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction.'

'If the law supposes that,' said Mr. Bumble, squeezing his hat emphatically in both hands, 'the law is a ass – a idiot. If that's the eye of the law, the law is a bachelor ...' (Dickens 1838: 279)

On the one hand, this may be read as just a moment of harmless English music-hall misogyny providing light relief from the dreadful narrative that Brownlow is reconstructing. On the other hand, 'If the law supposes that ... the law is a ass' is, I suggest, a charge that haunts the law in the UK – supplemented, as here, by the fear that it will at the same time be revealed to be a 'bachelor' – a man ignorant of women.

This is what makes the present accommodation of law and religion fragile. Law has articulated its pre-eminence in relation to religion and at the same time avoided becoming a laughing stock, like the good counsellors of Newtonabbey, by allowing religious belief, along with homosexuality, to be objects of insult and abuse, covered by the deployment of the aesthetics of comedy. The pressure has emerged from the claims of multiculturalism in the context of a globalized rule of law, but, as we all know, there are few things harder to translate – and, therefore, to share – than a joke.¹⁴

Notes

- 1 The law underwrites the same argument, *mutatis mutandis*, for the legitimization of knowledge by science.
- 2 The 'Bad Sex Award' has run annually since 1993, and appears to have gained increasing ribald exposure on mainstream news media.
- 3 The Book-of-the-Month Club was founded in the USA in 1926 as part of a strategy to promote bookselling through mail order. The television-based Oprah Winfrey club was founded in 1996 and imitated in the UK by Richard and Judy in 2004. By 2006, the *Observer's* literary editor, Robert McCrum (2006), had made the latter first in his list of 'Our top 50 players in the world of books.'
- 4 For a curmudgeonly response to the phenomenon from a writer and critic, see Will Self's comments in the *Guardian* (3 October 2014).
- 5 Examples of the first are the *Jane Austen Book Club* (Fowler 2004), where each of Austen's novels in turn provides the background for the sentimental adventures of the group's members, and the *Dirty Girls' Book Club* (Fox 2013), where an erotic novel provides a parallel narrative to the sexual education of a young widow. An example of the crime genre is Paul Bryers' *The Used Women's Book Club* (2003) – the title resulting from a mistyped invitation to join a 'women's used book club'.
- 6 Ironically, *The Middle Class Handbook* website identifies *Middlemarch* as one of the '5 Ways to Kill Your Book Club' ('Sharon T.' 2012).
- 7 Cf. the tiresome graduate student, Barney, to whom no one listens in C4's *The Book Group*: 'God, an expert!', as Kenny says at the first meeting.
- 8 The club reads (or fails to read) *Ulysses*, *Jane Eyre*, *Middlemarch*, *Heart of Darkness*, and *Crime and Punishment*; also *The Unbearable Lightness of Being*, *White Teeth*, *The Color Purple*, *The Shipping News*, *The Beach*, *The Accidental Tourist*, *The Collected Short Stories of Roald Dahl*, and a non-fiction work, *Never Cry Wolf*.
- 9 The reference is no doubt to Roland Barthes' *Mythologies* (1972), but it could just as well gesture to a scandal in the popular press in the 1990s about the practice in the Cardiff English department of teaching students to analyse a package of Kellogg's Corn Flakes (Masters 1995).
- 10 *Lord Horror* was the first of an on-going series of publications: the novels *Motherfuckers: The Auschwitz of Oz* (1996), *Baptised in the Blood of Millions* (2001), and *Invictus Horror* (2013); the comics collected as the *Lord Horror* series (1–7) (1989–90) and *Reverbstorm* 8–14 (1994–2000) (2012). Besides Meng & Ecker, *Lord Horror* also spawned *La Squab* (2012). The 'Talking Book' version of the first, difficult to obtain, novel, was performed by the disgraced pop singer, P.J. Proby (Britton 1999).
- 11 For an updated account of Britton's work, see Noys (2013).

- 12 See the examples given of 'victims' of legislation on the movement's 'Feel Free to Insult Me' website, <http://reformsection5.org.uk>.
- 13 By permitting insults and abuse of sexual orientation, the law also of course reasserts its heterosexual normativity and disavows its own homosocial tendencies. The essay does not seek to minimise this aspect of the debate, which it is not difficult to correlate with the issue of religious authority.
- 14 The essay was written before the attacks on the offices of *Charlie Hebdo* on 7 January 2015 and on the café in Copenhagen where Lars Vilks was to speak on 15 February. It would be glib and improper to shoe-horn these atrocities into this essay, so close to the events, and without due regard to the different cultural and jurisprudential traditions of France and the UK. I nonetheless feel bound to balance the opening 'in memoriam' for the literary and cultural critics who passed away in the course of composing the text by remembering here the victims of the murderous violence ostensibly provoked by the cartoons. Without compromising this expression of respect, I would, however, also register concern at the strident assertion of the unconditional pre-eminence of the law of freedom of comic expression that has dominated responses to the events across the West. The emotional force of the internationally adopted slogan 'Je suis Charlie' has threatened to smother the position of others whose deep offence at such cartoons does not become a pretext for murder. Furthermore, it has also diminished the visibility of the victims and causes of the anti-Semitic attacks on the supermarket and the synagogue that followed the assaults on the cartoonists in each case. They too should be remembered here.

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