What is Criminally "Obscene"?

A SCIENTIFIC STUDY OF THE ABSURD JUDICIAL "TESTS" OF OBSCENITY.

BY

THEODORE SCHROEDER,

OF 63 EAST FIFTY-NINTH STREET, NEW YORK CITY,

Member of the Medico-Legal Society and of the New York Bar.

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The English Parliament, the Congress of the United States, and all the States of the American Union, have penalized "lewd, indecent and obscene" literature and art. All this legislation, and the judicial interpretation of it, proceeds upon the assumption (false assumption, as I believe) that such words as "obscene" stand for real qualities of literature, such as are sense perceived, and, therefore, permit of exact general definition or tests, such as are capable of universal application, producing absolute uniformity of result, no matter by whom the definition or test is applied, to every book of questionable "purity."

Under these laws, as administered in England and America, every medical book which treats of sex—and many which do not—are declared criminal, and their circulation even among professionals is a matter of tolerance, in spite of the law, and not a matter of right under the law. The infamy of such a statute has induced some American courts, under the guise of "interpretation," to amend the statute judicially, so as to exempt some medical book, otherwise "obscene," from being criminal if circulated only among some professional men. What the judicial legislation will be, must always depend in each case upon the court.

If an accurately definable character of the word "obscene" is not implied in all our laws penalizing the "indecent," then they do not prescribe a uniform rule of conduct, and are therefore beyond the power of any English or American legislature to enact. That such is the assumption, is further evidenced by the fact that no legislative definition or test is furnished, and courts assert that none is necessary, since these are matters of common knowledge. (96 N. Y, 410.)

That assertion, I believe, is based upon lack of psychologic intelligence, and it is here intended to outline an argument to demonstrate its falsity. Be it remembered, that this is a ques-

tion in the science of psychology. It is not a question of ethics, nor law, nor legislative expediency, but ever and always a matter of science, which must underlie all these. If my contention is correct, then present obscenity laws are a nullity, for want of a definition of the crime, and for the non-existence of that which the statute seeks to punish. I will prove that "obscenity" is ever and always the exclusive property and contribution of the reading mind.

Nothng will be herein contended for, which will preclude the passage of some other laws designed to accomplish some of the same ends, which some people think justify our present laws against "impure" literature. To illustrate: Except when done by parents, guardians, et al, it could be made a crime to sell, or transmit, etc., to any person under the age of consent, any book containing such word as "sex," or any picture of the sexual mechanism. In such a law, all the conditions of the crime would easily be prescribed with that exactness, which leaves no room for such objections as I am now going to make against the existing statutes.

Such a law would not, and should not, assume to decide, nor authorize a jury to decide, what is good or bad literature. It would simply assume the incompetence of children to judge for themselves what information they desired, and at the same time accord that rightful liberty to adults.

In 1661, the learned Sir Matthew Hale, "a person than whom no one was more backward to condemn a witch without full evidence," used this language: "That there are such angels (as witches), it is without question." Then he made a convincing argument from Holy Writ, and added: "It is also confirmed to us by daily experience of the power and energy of these evil spirits in witches and by them." (Annals of Witchcraft, by Drake, preface XI.)

With the same assurance, and no greater ignorance of science—as we hope to show—our courts now affirm that the differential tests of obscenity "are matters which fall within the range of ordinary intelligence," and, therefore, "everyone who uses the mails . . . must take notice of what, in this enlightened age, is meant by 'decency, purity and chastity in social life,' and what must be deemed obscene, lewd and lascivious." (U. S. vs. Rosen 161 U. S. 42.)

This appeal, to the consensus of opinion in "this enlightened age," has been made in support of every superstition that has ever paralyzed the human intellect. It would be more

reassuring if judges had given, or would give, us a test of obscenity, in terms of the objective, sense-perceived qualities of literature, *by which test alone* we could unerringly and with unavoidable uniformity, draw the same, exact, unshifting line of partition between what is obscene and what is pure in literature, no matter who applies the test. Until they furnish such a test to us, their dogmatic assurance that "this enlightened age," possessed such undisclosed knowledge of standards, is not very satisfactory. Without such a test, there is no uniform law to control our conduct, nor that of our courts or juries.

Whenever one affirms that obscenity is not a quality of literature or art, but solely a contribution of the unhealthy reading mind, and, therefore, opposes the obscenity prosecutions, or questions any other sex-superstition, he is promptly cowed into silence by an avalanche of vituperation, such as "impure," "immoral," "smut-dealer," "moral cancer-planter." Such epithets may be very satisfying to undeveloped minds, but they will not commend themselves very highly to any person wishing to enlighten his intellect upon the real question at issue. Again we say: This is a matter of science, which requires fact and argument, and cannot be disposed of by question-begging villification.

The courts are more refined, though not more argumentative nor convincing, in their manner of denouncing dissenters. The judicial formula is this: "When such matters are said to be only impure to the over-prudish, it but illustrates how familiarity with obscenity blunts the sensibilities, depraves good taste, and perverts the judgment." (45 Fed. Rep. 423.) Again we ask for fact and argument, not question-begging dogmatism. The statute furnishes no standard of sex sensitiveness, nor is it possible for any one to prescribe a general rule of judgment, by which to determine where is the beginning of the criminal "blunted sensibilities," or the limit of "good taste," and the law-making power could not confer this legislative authority upon a judge, though in these cases all courts are unconsciously presuming to exercise it.

Furthermore, it is not clear that "blunted sensibilities" are not a good condition to be encouraged in the matter of sex. Who would be harmed, if all men ceased to believe in the "obscene," and acquired such "blunted sensibilities" that they could discuss matters of sex, as we now discuss matters of liver or digestion,—with an absolute freedom from all lascivious feelings? Why is not that condition preferable to the dis-

eased sex-sensitiveness so often publicly lauded, when parading in the verbiage of "purity?" If preferable, and so-called "obscene" literature will help to bring about such "blunted sensibilities," would it not be better to encourage such publications? It requires argument and fact, rather than "virtuous" platitudes, to determine which is the more healthy-minded attitude toward these subjects. I plead for scientific research, not the brute force of blind dogmatism and cruel authority.

Assuming its existence as a quality of literature, the judicial "tests" for detecting the presence of obscenity, manifest such extraordinary ignorance of sexual psychology, that no man who is accused can reasonably expect to escape conviction by denying the character of his book. The unfailing verdict of "guilty" is not, as some flatter themselves, due to the wisdom of the prosecutors, but is wholly due to the judicial ignorance of science, and to the undefined and indefinable nature of the offense. Let us reason together about this.

If, in spite of the argument by vituperation, a person refuses, "with humble prostration of intellect," to submit to the demands of moral snobbery, he is cast from the temple of "good society" into jail. Then the benighted act as though by their question-begging epithets or jail commitment, they had solved the scientific problem which is involved. Let us examine if it is not as true of obscenity as of every witch that it exists only in the minds of those who believe in it.

My contention is this: "Obscenity" is not an objective fact, not a sense-perceived quality of literature or art, but is only distinguishable by the likeness of particular emotions associated with an infinite variety of mental images. Therefore, obscenity is only a quality or contribution of the viewing mind which, being associated with some ideas, suggested by a book or picture, is therefore *read into it*. This may be proven in many ways, and among these, by the resultant fact that "obscenity" never has been, nor can be, described in terms of any universally applicable test consisting of the sense-perceived qualities of a book or picture, but ever and always it must be described as subjective, that is, in terms of the author's suspected motive, or in terms of dreaded emotions of speculative existence in the mind of some supposititious reader.

With some knowledge of the psychologic processes involved in acquiring a general conception, it is easy to see how courts, as well as the more ignorant populace, quite naturally fell into the error of supposing that the "obscene" was a

quality of literature, and not—as in fact it is—only a contribution of the reading mind. By critical analysis, we can exhibit separately the constituent elements of other conceptions, as well as of our general idea of the "obscene." By a comparison, we will discover that their common element of unification may be either subjective or objective. Furthermore, it will appear that in the general idea, symbolized by the word "obscene," there is only a subjective element of unification, which is common to all obscenity, and that herein it differs from most general terms. In the failure to recognize this fundamental unlikeness between different kinds of general ideas, we will discover the source of the popular error, that "obscenity" is a definite and definable, objective quality of literature and art.

A general idea (conception) is technically defined as "the cognition of a universal, as distinguished from the particulars which it unifies." Let us fix the meaning of this more clearly and firmly in our minds by an illustration.

A particular triangle may be right-angled, equilateral or irregular, and in the varieties of these kinds of triangles, there are an infinite number of shapes, varying according to the infinite differences in the length of their boundary lines, meeting in an infinite number of different angles.

What is the operation when we classify all this infinite variety of figures under the single generalization "triangle"? Simply this: In antithesis to those qualities in which triangles may be unlike, we contrast the qualities which are common to all triangles, and as to which all must be alike.

These elements of identity, common to an infinite variety of triangles, constitute the very essence and conclusive tests by which we determine whether or not a given figure is to be classified as a triangle. Some of these essential, constituent, unifying elements of every triangle are now matters of common knowledge, while others become known only as we develop in the science of mathematics. A few of these essentials may be re-stated. A plain triangle must enclose a space with three straight lines; the sum of the interior angles formed by the meeting of these lines always equals two right angles; as one side of a plain triangle is to another, so is the sine of the angle opposite to the former to the sine of the angle opposite to the latter.

These, and half a dozen other mathematical properties belong to every particular triangle; and these characteristics, always alike in all triangles, are abstracted from all the infinite

different shapes in which particular triangles appear; and these essential and constant qualities, thus abstracted, are generalized as one universal conception, which we symbolize by the word "triangle."

Here it is important to bear in mind that these universal, constituent, unifying elements, common to all triangles, are neither contributions, nor creations, of the human mind. They are the relations of the separate parts of every triangle to its other parts, and to the whole, and these uniform relations inhere in the very nature of things, and are of the very essence of the thing we call a "triangle."

As the force of gravity existed before humans had any knowledge of the law of its operation, so the unifying elements of all triangles exist in the nature of things, prior to and independent of our knowledge of them. It is because these unifying elements, which we thus generalize under the word "triangle," are facts of objective nature, existing wholly outside of ourselves, and independent of us, or of our knowledge of their existence, that the word "triangle" is accurately definable.

We will now analyze that other general term, "obscene," reducing it to its constituent, unchanging elements, and we will see that, in the nature of things, it must remain incapable of accurate, uniform definition, because, unlike the case of a triangle, the universal element in all that is "obscene" has no existence in the nature of things objective. It will then appear that, for the want of observing this difference between these two classes of general terms, judges and the mob alike, erroneously assumed that the "obscene," like the "triangle," must have an existence outside their own emotions, and, consequently, they were compelled to indulge in that mystifying verbiage, which the courts miscall "tests" of "obscenity."

First of all, we must discover what is the universal constituent, unifying element common to all obscenity. Let us begin with a little introspection, and the phenomena of our everyday life. We readily discover that what we deemed "indecent" at the age of sixteen, was not so considered at the age of five, and probably is viewed in still another aspect at the age of forty.

We look about us, and learn that an adolescent maid has her modesty shocked by that which will make no unpleasant impression upon her after maternity, and by that which would never shock a physician. We know, also, that many scenes are shocking to us if viewed in company, and not in the least offen-

sive when privately viewed; and that, among different persons there is no uniformity in the added conditions which change such scenes to shocking ones.

We see the plain countryman shocked by the decollete gowns of our well-bred society women; and she, in turn, would be shocked into insensibility if, especially in the presence of strange men, she were to view some pastoral scenes which make no shocking impressions upon her rustic critic. The peasant woman is most shocked by the "indecency" of the society woman's bare neck and shoulders, and the society woman is shocked most by the peasant woman's exhibition of bare feet and ankles, at least if they were brought into the city woman's parlor. We see that women, when ailment suggests its propriety, quite readily undergo an unlimited examination by a male physician, while with the sexes reversed, much greater difficulty would be experienced in securing submission. This not because men are *more* modest than women, but because other social conditions and education have made them *differently* modest.

It would seem to follow that the universal qualities which we collect under the general term "obscene," as its constituent, unifying elements are not inherent in the nature and relations of things viewed, as is the case with the triangle. Taking this as our cue, we may follow the lead into the realm of history, ethnology, sexual psychology and jurisprudence. By illustrative facts, drawn from each of these sources, it can be shown to a demonstration that the word "obscène" has not one single universal, constituent element in objective nature.

Not even the sexual element is common to all modesty, shame or indecency. A study of ethnology and psychology shows that emotions of disgust, and the concept of indecency or obscenity, are often associated with phenomena having no natural connection with sex, and often in many people are not at all aroused by any phase of healthy sexual manifestation; and in still others it is aroused by some sensual associations and not by others; and these, again, vary with the individual according to his age, education and the degree of his sexual hyperaestheticism.

Everywhere we find those who are abnormally sex-sensitive and who, on that account, have sensual thoughts and feelings aroused by innumerable images, which would not thus affect the more healthy. These diseased ones soon develop very many unusual associations with, and stimulants for, their sex-

thought. If they do not consider this a lamentable condition, they are apt to become boastful of their sensualism. If, on the other hand, they esteem lascivious thoughts and images as a mark of depravity, they seek to conceal their own shame by denouncing all those things which stimulate sensuality in themselves, and they naturally and erroneously believe that it must have the same effect upon all others. It is essential to their purpose of self-protection, that they make others believe that the foulness is in the offending book or picture, and not in their own thought. As a consequence, comes that persistence of reiteration, from which has developed the "obscene" superstition, and a rejection—even by Christians—of those scientific truths in the Bible, to the effect that "unto the pure all things are pure," etc. We need to get back to these, and reassert the old truth, that all genuine prudery is prurient.

The influence of education in shaping our notions of modesty is quite as apparent as is that of sexual hyperaesthesia. We see it, not only in the different effect produced upon different minds by the same stimulants, but also by the different effect produced upon the same person by different objects bearing precisely the same relation to the individual. When an object, even unrelated to sex, has acquired a sexual association in our minds, its sight will suggest the affiliated idea, and will fail to produce a like sensual thought in the minds of those not obsessed by the same association.

Thus, books on sexual psychology tell us of men who are so "pure" that they have their modesty shocked by seeing a woman's shoe displayed in a shop window; others have their modesty offended by hearing married people speak of retiring for the night; some have their modesty shocked by seeing in the store windows a dummy wearing a corset; some are shocked by seeing underwear, or hearing it spoken of otherwise than as "unmentionables;" still others cannot bear the mention of "legs," and even speak of the "limbs" of a piano. Surely, we have all met those afflicted in some of these ways and others who are not.

Since the statutes do not define "obscene," no one accused under them has the least protection against a judge or jury afflicted with such diseased sex-sensitiveness, or against more healthy ones who, for want of information about sexual psychology, blindly accept the vehement dictates of the sexually hyperaesthetic as standards of purity. But whether a judge or a juror belongs to either of these classes, or rejects their

dictum as to what is pure in literature, in any and every such event, he is not enforcing the letter of a general law, but enacting and enforcing a particular *ex post facto law* then enacted by him solely for the particular defendant on trial. What that law shall be in any case depends on the experiences, education and the degree of sex-sensitiveness of the court, and not upon any statutory specification of what is criminal.

Among the more normal persons, we see the same difference as to what is offensive to their modesty, depending altogether upon whether or not they are accustomed to the particular thing. That which, through frequent repetition, has become common-place no longer shocks us, but that which, though it has precisely the same relation to us or to the sensual, is still unusual, or is seen in an unusual setting, does shock us.

Some who are passive if you speak of a cow, are yet shocked if you call a bull by name. In the human species, you may properly use the terms "men" and "women," as differentiating between the sexes, but if you call a female dog by name, you give offense to many. So, likewise, you may speak of a mare to those who would take flight if you called the male horse by name. With like unreason, you may speak of an ox or a capon to everybody, of a gelding to very many, but of a eunuch only to comparatively few, without giving offense. No one thinks that nudity is immodest, either in nature or in art, except the nudity of the human animal; and a few are not opposed to human nudity in art, but find it immodest in nature.

The Agricultural Department of the United States distributes information on the best methods for breeding domestic animals, and sends those to jail who advocate the higher stirpiculture, for the sake of a better humanity.

Likewise, Prof. Andrew D. White tells us that: "At a time when eminent prelates of the Older Church were eulogizing debauched princes like Louis XV., and using the unspeakably obscene casuistry of the Jesuit Sanchez, in the education of the priesthood as to the relations of men and women, the modesty of the church authorities was so shocked by Linnaeus' proofs of a sexual system in plants, that for many years his writings were prohibited in the Papal States, and in various parts of Europe where clerical authority was strong enough to resist the new scientific current."

Now, education has so reversed public sentiment, that one may write with impunity about the sexuality of plants, which

was formerly denounced as a "Satanic abyss;" but men have been, and would be, sent to jail for circulating in the English language the books of Sanchez and others like him.

It thus appears that the only unifying element generalized in the word "obscene," (that is, the only thing common to every conception of obscenity and indecency), is subjective, is an affiliated emotion of disapproval. This emotion under varying circumstances of temeprament and education in different persons, and in the same person in different stages of development is aroused by entirely different stimuli, and so has become associated with an infinite variety of ever-changing objectives, with not even one common characteristic in objective nature; that is, in literature or art.

This, then, is a demonstration that obscenity exists only in the minds and emotions of those who believe in it, and is not a quality of a book or picture. We must next outline the legal consequences of this fact of science. Since, then, the general conception "obscene" is devoid of every objective element of unification; and since the subjective element, the associated emotion, is indefinable from its very nature, and inconstant as to the character of the stimulus capable of arousing it, and variable and immeasurable as to its relative degrees of intensity, it follows that the "obscene" is incapable of accurate definition or general test, adequate to securing uniformity of result, in its application by every person, to each book of doubtful "purity."

Since few men have identical experiences, and fewer still evolve to an agreement in their ideational and emotional associations, it must follow that practically none have the same standards for judging the "obscene," even when their conclusions agree. The word "obscene," like such words as delicate, ugly, lovable, hateful, etc., is an abstraction not based upon a reasoned, nor sense-perceived, likeness between objectives, but the selection or classification under it is made, on the basis of similarity in the emotions aroused, by an infinite variety of images; and every classification thus made, in turn, depends in each person upon his prior experience, education and the degree of neuro-sexual or psycho-sexual health. Because it is a matter wholly of emotions, it has come to be that "men think they know because they feel, and are firmly convinced because strongly agitated."

Being so essentially and inextricably involved with human emotions, no man can frame such a definition of the word

"obscene" either in terms of the qualities of a book, nor such that, *by it alone,* any judgment whatever is possible, much less is it possible that by any such alleged "test" every other man must reach the same conclusion about the obscenity of every conceivable book. Therefore, the so-called judicial "tests" of obscenity are not standards of judgment, but, on the contrary, by every such "test" the rule of decision is itself uncertain, and in terms invokes the varying experiences of the testors within the foggy realm of problematical speculation about psychic tendencies, without the help of which the "test" itself is meaningless and useless. It follows that to each person the "test," which supposedly is a general standard of judgment, unavoidably becomes a personal and particular standard, differing in all persons according to those varying experiences which they read into the judicial "test." It is this which makes uncertain, and, therefore, all the more objectionable, all the present laws against obscenity.

This general argument can be given particular verification by a study of history, ethnology, general and sexual psychology, and judicial decisions, until we have produced demonstration amounting to a mathematical certainty that neither nature, common knowledge, science, nor the statute, has furnished, or can furnish, any tests by which to measure relative degrees of obscenity, or to fix the freezing point of modesty, as with a thermometer we measure relative heat and cold, or by chemical tests we determine the presence of arsenic.

If, then, neither nature, common knowledge, nor the statute, furnish so exact a definition of the "obscene" that, no matter by whom applied, it must uniformly and unerringly fix the same line of partition from that which is not "obscene," and if scientific research has furnished no tests by which, without speculative uncertainty, we may with mathematical accuracy classify every book or picture which, to the less enlightened, would seem to be on the borderland of doubtful "purity," then, it must follow that no general rule exists, applicable to all cases, and by which we can or do judge what is a violation of the statutory prohibition.

The so-called "tests," by which the courts direct juries to determine whether books belong to the "indecent and obscene," are a terrible indictment of the legislative and judicial intelligence, which could create and punish a mental crime, and determine guilt under it by such absurd "tests." Bereft of the magical, mystifying phrasing of moral sentimentalizing, the

guilt of this psychological crime is always literally determined by a constructive (never actual), psychological (never material or demonstrable), potential and speculative (never a realized) injury, predicated upon the jury's guess, as to the problematical "immoral tendency" (not indicating the rules of which school of religious or scientific morality are to be applied) of an unpopular idea, upon a mere hypothetical (never a real) person. No! This is not a witticism, but a literal verity, a saddening, lamentable, appalling indictment of our criminal code as judicially interpreted.

Under a law of such vagueness and mystical uncertainty, be it said to our everlasting disgrace, several thousand persons in America have already been deprived of liberty and property; unnumbered others have been cowed into silence, who should have been encouraged to speak; and almost a score have been driven to suicide.

If, then, it is true that a book or a picture can only be classified as to its obscenity, not primarily according to the substance of that which it reveals, but according to the motions thereby aroused, then, three conclusions irresistibly follow: First, there is no general test of obscenity capable of producing accuracy and uniformity of result in classifying books; second, for the want of such test, there never can be a conviction according to the letter of a uniform law, but every verdict expresses only a legislative discretion, wrongfully exercised after the act to be punished, and according to the peculiar and personal experiences of each judge or juror; and it is, therefore, but the enactment of a particular law, for the particular defendant then being tried, and applying to no one else. From these two follows the third, namely: That no man, by reading the statute, can tell whether a particular book is criminal or not, because the criminality does not depend upon the statute, but upon the incompetent jurors' speculative opinion about the psychological tendency of the book.

It is inevitable, from such an indefinable statute, that the determination of what is "obscene" should become a matter of juridical arbitrariness, even though a clouded vision—as to the difference between judicial interpretation and judicial legislation—should induce all courts to deny the fact. However, some judges, with the *naivette* which evidences their consciouslessness of what they do, quite freely admit that it is not a matter of law, but a matter of discretion, which determines

the character of a book, and, therefore, the "guilt" of its vendor.

One judge, after fumbling with those definitions of "obscene"—which define nothing—continued his instructions to the jury as follows: "These are as precise definitions as I can give. The case is one which addresses itself largely to your good judgment, common sense," etc. (38 Fed. R. 733.)

If "obscenity" means definable qualities of a book, how can guilt under this criminal law be made a matter of "good judgment," or a juror's conception of what is "common sense" upon the subject? The "good judgment" is for the legislature to exercise in passing the law, not for the jurors in determining its meaning, or its application.

In other cases jurors are instructed that: "If, in their judgment, the book was fit and proper for publication, and such as should go into their families, and be handed to their sons and daughters, and placed in boarding-schools, for the beneficial information of the young and others, then, it was their duty to acquit the defendant. . . . The jury were instructed that it did not matter whether the things published in the book were true and in conformity with nature or not." (Com. v. Landis 8 Phila. 453, and other cases.)

What is here plainly expressed is in every other case necessarily implied, because the statute has not created any general rule by which we can determine what is against the law. Every conviction is securable only by an exercise on the part of the jury of a legislative discretion, and not according to standards created by any general rule by which we can determine in advance what is and what is not prohibited, which can result in the suppression even of truth, and that discretion is personal to the jurors, and always this particular law of the jury is enacted *ex post facto* at the trial of the accused, and not before, and is not, and cannot be, binding upon any other jurors. Since the legislative power cannot be delegated to a jury, and cannot be exercised *ex post facto*, even by the legislature itself, it follows that our present laws against "obscenity" must be a nullity, and will yet be so declared, when this argument, properly elaborated, shall be presented to an intelligent court.

Nearly two hundred years ago Montesquieu, in viewing the tyrannies about him, wrote this: "In despotic governments there are no laws, the judge himself is his own rule. . . . In republics, the very nature of the constitution requires the

judges to follow the letter of the law. Otherwise the law might be explained to the prejudice of every citizen in cases where their honor, property or life is concerned." (Spirit of Laws, p. 81.)

Within the domain of literature, we have unintentionally, through psychologic ignorance, re-established, that irresponsible, arbitrary absolutism of the judiciary, which it took many ages of painful struggle to abolish. Shall it remain and be extended, or will we throttle this new despotism? Of jurisprudence it is said: "Its value depends on a fixed and uniform rule of action. From what has preceded, it follows that the statutes here in question are uncertain beyond all possibility of being made uniform guides for our conduct. As has been shown, this uncertainty never arises from any doubt as to the contents of the book to be judged, but the uncertainty always arises solely from the indefinable nature of that which the statute attempts to penalize.

It follows that convictions can only be had as antipathy or affection, caprice or whim, on the part of the jurors, dictates the result of their deliberations. For each, the foundation of his judgment of guilt is his personal experience, necessarily differing from the experience of other jurors, who, therefore, have other standards of judgment. It is no credit to the intelligence of the bar, that these matters have never been argued to any court. When adequately presented to an intelligent judge, with psychologic insight and an open mind, all present obscenity legislation will disappear. To that end, such a judge will do his plain duty by applying the old legal maxim: "Where the law is uncertain there is no law."

The short space remaining will be devoted to one of the many illustrations, which in this class of cases exhibit the colossal stupidity of judicial tribunals in "this enlightened age." The courts of America, with great uniformity, have followed the early English decisions in their attempts to define obscenity. Here is the judicial formula: "The statute uses the word 'lewd,' which means, having a tendency to excite lustful thoughts. . . . The test of obscenity is this—whether the tendency of the matter, charged as obscene, is to deprave and corrupt *those whose minds are open to such immoral influences* and into whose hands a publication of this sort may fall."

Here, we can take space to analyze but one of the numerous absurdities involved in this "test of obscenity." We will limit

ourselves to the phrase "those whose minds are open to such immoral influences." This, of course, includes those who, through long sex-suppression or disease, are afflicted with the most acute sexual-hyperaesthesia.

Kraft-Ebing, among many biographies of sexual psychopaths, gives one from which I will only quote a single paragraph. The patient says: "The thought of slavery had something exciting in it for me, and alike whether from the standpoint of master or servant. That one man could possess, sell or whip another, caused me intense excitement; and in reading 'Uncle Tom's Cabin' which I read at about the beginning of puberty) I had an —r—ct—n." (Psychopathia Sexualis, p. 105, from the translation of the 7th German edition.)

The explanation is not difficult. The stirring scenes depicted in "Uncle Tom's Cabin" produced a very intense general excitement, which, by its irritation of the—possibly abnormally sensitive sex nerve-centers, produced sexual excitement.

A jury of experts, knowing this and kindred facts, and applying the test of obscenity and lewdness prescribed in practically all the English and American decisions, must conclude that "Uncle Tom's Cabin" is an obscene and lewd book, within the statute. Only a jury very ignorant of the effect of such a book on "those whose minds are open to such immoral influences," could render a verdict of "not guilty," if trying a person charged with the "indecent crime" of sending "Uncle Tom's Cabin" through the mails.

But the courts who promulgated such stupidity as a "test" of obscenity, tell us that this is "within the range of ordinary intelligence." Yes, so *extraordinary* that my vocabulary is inadequate for the occasion, and, therefore, I close.

THEODORE SCHROEDER.

63 East 59th Street, New York City.

"We have been taught to believe that it was the greatest injustice toward the common people of old Rome when the laws they were commanded to obey, under Caligula, were written in small characters, and hung upon high pillars, thus more effectually to ensnare the people. How much advantage may we justly claim over the old Romans, if our criminal laws are so obscurely written that one cannot tell when he is violating them? If the rule contended for here

is to be applied to the defendant, he will be put upon trial for an act which he could not by perusing the law have ascertained was an offence. My own sense of justice revolts at the idea. It is not in keeping with the genius of our institutions, and I cannot give it my sanction. * * * The indictment is quashed, and the defendant is discharged." Judge Turner on a trial for depositing an obscene sealed letter in the Post Office. Dist Court West. Dist. of Texas. U. S. vs. Commersford 25 Fed. Rep. 904.