obscene (i.e. depraving or corrupting) but their great significance might outweigh the harm they could do, and take them out of the prima facie criminal category established by section 1 of the Act.

In so far as the 1959 legislation was an endeavour to isolate 'pornography' as the class of writing which should be proscribed, it paralleled the objective of the United States Supreme Court two years before in *Roth's* case.[76] There the court decided that material which appealed predominantly to prurient interests, and which was devoid of intellectual content, did not qualify as 'speech' to which constitutional protection could be afforded. But on both sides of the Atlantic the distinction between 'pornography' and 'literature' was found to be much more elusive than had been imagined. The old formulae broke down entirely in the following decade when confronted by *Playboy* magazine's modish appeal to both intellect and instinct, by 'soft-core' journals offering medical and psychiatric advice on sexual problems in a deliberately titillating but arguably therapeutic style, and by the underground press with its flamboyant revolutionary celebration of sex as a means of baiting a prudish political establishment. These publications were neither 'pornography' nor 'literature', and whilst they did not particularly edify the public, there was not much evidence that they were prone to deprave or corrupt either. In consequence they flourished in this grey area between pornography and literature, between public good and public corruption, and when lawyers sought to intervene they often made an ass of the law. Pornography of the hardest core slipped effortlessly through the thin blue line and took a stand in Soho, while much that was undoubtedly serious writing was harassed and persecuted at vast public expense. The first trial – that of *Lady Chatterley's Lover* – was a case in point. Mr Roy Jenkins wrote to the *Spectator* claiming that the prosecution was a betrayal of an implied promise given by the police to the Select Committee that under the new Act they would confine prosecutions to 'pornography'.[77] But the Commissioner of Police had only promised indifference to 'borderline stuff', and the Select Committee had given him complete discretion to stake out the border. It should have known better: the police had catalogued *Lolita* and *The Ginger Man* as 'pornography' in a list submitted to the Committee as 'appropriate for prosecution'.

3
The definition of obscenity

A TENDENCY TO DEPRAVE AND CORRUPT

'Obscenity, Members of the Jury, is like an elephant. You cannot define it, but you know it when you see it.' With this despairing judicial aphorism, Old Bailey juries retired to consider their verdict on books and magazines in the 1970s. In 1959 Parliament *had* purported to define the indefinable: 'obscene' means 'having a tendency to deprave and corrupt'. But what, in turn, did that mean? In the forensic free-for-all which developed when pornographers pleaded 'not guilty', it meant whatever ten out of twelve arbitrarily selected jurors could be convinced that it meant by lawyers whose advocacy was unfettered by scientific or sociological footnotes. The consequences were unpredictable and often conflicting, as publications resoundingly condemned in one court were triumphantly vindicated in another. Reviewing the results from the vantage point of the House of Lords, Lord Wilberforce was moved to remark of the 'depravity or corruption' test that

> ... these alternatives involve deep questions of psychology and ethics; how are the courts to deal with them? Well might they have said that such words provide a formula which cannot in practice be applied ... I have serious doubts whether the Act will continue to be workable in this way, or whether it will produce tolerable results. The present is, or in any rational system ought to be, a simple case, yet the illogical and unscientific character of the Act has forced the justices into untenable positions.[1]

The results were not tolerable for any rational system of law, because they were uncertain and incompatible, largely hinging on the sexual outlook of the particular jurors who happened to be empanelled to

try each case. The formula of 'depravity and corruption' was loyally applied by the courts, but not without considerable confusion over the appropriate gloss which the English language could provide to assist jurors and justices in their task. In consequence, the definition has in recent years become a focus for law reformers; anti-pornography campaigners demand a change from the metaphysics of moral corruption to what seems to them to be the more comprehensible concept of sexual embarrassment or infringement of community standards, while the libertarian lobby, when it is not agitating for complete repeal of the laws, argues for a test which makes demonstrable harm a prerequisite of criminal liability. Meanwhile the pressure of new cases spins the definition like a catherine wheel, sparking off new irrationalities.

The Oxford English Dictionary offers 'filthy', 'repulsive', 'loathsome', 'indecent' and 'lewd' as synonyms for the word 'obscene'. Colloquially the word usually denotes images, not necessarily sexual, which shock or disgust. In law, however, the meaning is governed by the statutory definition, 'a tendency to deprave or corrupt'. The repulsive content of an article, which characterizes it as 'obscene' in the normal usage of that word, is insufficient to justify conviction. The 1959 Act paved the way for the courts to rule that any judicial reversion to the ordinary meaning of 'obscene' ('repulsive', 'filthy', 'loathsome', 'lewd', etc.) would amount to a misdirection of such gravity as would vitiate the conviction. The definition of obscenity originated in *Hicklin's* case, when Chief Justice Cockburn enunciated the test of 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall'.[2] The House of Commons Select Committee hoped that the definition in the 1959 Act would give legislative force to the jury direction by Mr Justice Stable in *The Philanderer* case.

> Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. Then you say: 'Well, corrupt or deprave whom?' and again the test: those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. What exactly does that mean? Are we to take our literary standards as being the level of something that is suitable for a fourteen-year-old schoolgirl? Or do we go even further back than that, and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public.[3]

The complete statutory definition of obscenity is contained in section 1 (A) (1) of the Obscene Publications Act:

> For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, in all the circumstances, to read, see or hear the matter contained or embodied in it.

Although the Select Committee wanted 'a tendency to deprave and corrupt' to mean more than 'a tendency to shock and disgust', it was at least open to the courts to read 'shock and disgust' back into the legal interpretation of the statute, by imparting notions of 'contrary to community standards' or 'offensive to right-thinking persons' which had been frequent judicial glosses on the *Hicklin* test prior to 1959. Indeed, the first case to come before the High Court, *R.* v. *Clifford*, did not bode well for the utilitarian view that a 'tendency to deprave and corrupt' must involve a reasonable prospect of harm. The publisher of an illustrated booklet called *Scanties* appealed against his conviction on the ground that the trial judge had not told the jury that they should be satisfied the article was 'something more than shocking or vulgar'. Lord Goddard said that it did not matter what the judge had or had not told his jury: one had only to pick the book up to feel 'quite certain that no jury could conceivably have failed to convict'.[4]

A few months later, in the *Lady Chatterley* prosecution, Mr Justice Byrne took care to include the sought-after instruction: 'the mere fact that you are shocked or disgusted, the mere fact that you hate the sight of the book when you have read it, does not solve the question as to whether you are satisfied beyond reasonable doubt that the tendency of the book is to deprave or corrupt'.[5] He declined, however, to echo defence counsel's contention that 'deprave and corrupt' necessarily included a tendency to change a reader's character for the worse in some *demonstrable* sense, e.g. to impel him to do something wrong which he would not otherwise have done, an approach which sought verifiable harm as justification of the criminal sanction. He adopted instead the Oxford English Dictionary definition of 'deprave' ('to make morally bad, to pervert, to debase or corrupt morally') and 'corrupt' ('to render morally unsound or rotten, or destroy the moral

purity or chastity of, to pervert or ruin a good quality, to debase, to defile').[6] Of the cases decided before the passing of the Act, he selected a passage from Mr Justice Devlin's remarks in 1954 when Hutchinson had been prosecuted for publishing *The Image and the Search:*

> Just as loyalty is one of the things which is essential to the well-being of a nation, so some sense of morality is something that is essential to the well-being of a nation, and to the healthy life of the community; and, accordingly, anyone who seeks by his writing to corrupt that fundamental sense of morality is guilty of obscene libel.... Of course, there is a right to express oneself, either in pictures or in literature. People who hold strong political views are often anxious to say exactly what they think, irrespective of any restraint, and so too a creative writer or a creative artist, one can well understand, naturally desires complete freedom with which to express his talents or his genius. But he is a member of the community like any other member of the community. He is under the same obligation to other members of the community as any other is, not to do harm, either mentally or physically or spiritually, and if there is a conflict between an artist or writer in his desire for self-expression, and the sense that morality is fundamental to the well-being of the community, if there is such a conflict, then it is morality which must prevail.[7]

This direction introduces the difficult question of locating a moral consensus in the community, but it does emphasize that harm – physical, moral or spiritual – was the mischief at which the law was directed.

Some years later the test of obscenity was considered by the Court of Appeal in two cases of major significance – *R.* v. *Calder & Boyars* (*Last Exit to Brooklyn*, 1967)[8] and *R.* v. *Anderson* (*Oz* magazine, 1971)[9]. In the *Last Exit* appeal the court confirmed that 'the essence of the matter is moral corruption'. It declined a defence initiative to define 'moral corruption' as making a reader *behave* worse than he would otherwise have done, on the pragmatic ground that otherwise 'it would perhaps be difficult to know where the judge ought to stop'. This does not, of course, preclude counsel from advancing it as a rational interpretation of the section. The court added the warning that 'when, as here, a statute lays down the definition of a word or phrase in plain English, it is rarely necessary and often unwise for the judge to attempt to improve upon or redefine the definition.'[10] This view proved fatal to the conviction in the *Oz* trial, in which the trial judge widened the definition by suggesting that the original Greek meaning of 'obscene' – something not fit to be shown on the stage – might still be retained in the Act, and that the statutory connotation of 'obscene' might include what is 'repulsive', 'filthy', 'loathsome', 'indecent' and 'lewd'. The Lord Chief Justice ruled that this constituted 'a very substantial and serious misdirection': for the future, there must be no widening of the formula to introduce colloquial notions of obscenity, or concepts imported from the less serious 'indecency' offences.[11]

By this time Mr Justice Stable's direction in *The Philanderer* was clear law in relation to the irrelevance of reactions such as shock or dismay. It then became the turn of judges in the House of Lords to consider further the ambit of depravity and corruption. The first case, *Knuller* v. *DPP* (1972), was an appeal by the editors of the underground newspaper *International Times*, who had been convicted of a conspiracy to corrupt public morals when they published contact advertisements by and for homosexuals. The Law Lords considered that the word 'corrupt' implied a powerful and corrosive effect, which went further than one suggested definition, 'to lead morally astray'. Lord Simon warned: 'Corrupt is a strong word. The Book of Common Prayer, following the Gospel, has "where rust and moth doth corrupt". The words "corrupt public morals" suggest conduct which a jury might find to be destructive of the very fabric of society.'[12] Lord Reid agreed that 'Corrupt is a strong word and the jury ought to be reminded of that.... The Obscene Publications Act appears to use the words "deprave" and "corrupt" as synonymous, as I think they are. We may regret we live in a permissive society but I doubt whether even the most staunch defender of a better age would maintain that all or even most of those who have at one time or in one way or another been led astray morally have thereby become depraved or corrupt.'[13] These dicta in *Knuller* emphasize that the effect of publication must be to produce real social evil, going beyond immoral suggestion or persuasion, and constituting a serious menace to the community.

Prosecutors derived more comfort from *DPP* v. *Whyte* (1973), a case involving a bookshop which dispensed pornography to 'dirty old men'.[14] The House of Lords asserted that erotic material might corrupt if its only influence was to stimulate sex fantasies which have no issue in overt sexual activity, but merely arouse 'thoughts of a most impure and libidinous character'. Depravity may be all in the mind, without ever causing anti-social behaviour. Lord Wilberforce thought that '... influence on the mind is not merely within the law but is its primary target....'[15] Lord Pearson added: '... in my opinion, the words "deprave and corrupt" in the statutory definition, as in the judgement of Cockburn CJ in *R.* v. *Hicklin*, refer to the effect of

pornographic articles on the mind, including the emotions, and it is not essential that any physical sexual activity (or any "overt sexual activity", if that phrase has a different meaning) should result.'[16] Lord Cross agreed that depravity and corruption were conditions of the mind, although he thought that 'evidence of behaviour may be needed to establish their presence'. It was a question for the jury to decide whether elderly men were corrupt when they bought erotic books in order to arouse sexual fantasies, and then proceeded to relieve themselves by masturbation in the privacy of their homes.[17]

The decision in *Whyte's* case meant that although corruption implies some change for the worse in the character of likely readers, that change need not be manifested in anti-social conduct. It can consist in some new mental orientation, such as a preoccupation with sexual fantasies, which need not be permanent nor necessarily result in delinquent behaviour. Most books published today would be obscene if 'corruption' meant merely the provocation of erotic imaginings; no books would be obscene if 'corruption' meant destroying the fabric of society. In *Whyte's* case the House of Lords was not laying down a hard-and-fast rule that all books which stimulated sex fantasies are obscene, but merely rejecting the opinion of local justices that 'depravity and corruption' must *necessarily* mean that readers will engage in anti-social behaviour. It leaves to the jury the almost unanswerable question of whether, in the circumstances of the particular case, erotic material may cause social, moral, psychological or spiritual damage.

THE AVERSION THEORY

One important corollary of the decision that obscene material must have more serious effects than arousing feelings of revulsion is the doctrine that material which in fact shocks and disgusts may *not* be obscene, because its effect is to discourage readers from indulgence in the immorality so unseductively portrayed. Readers whose stomachs are turned will not partake of any food for thought. The American judge and philosopher Jerome Frank first noted the irony: 'if the argument be sound that the legislature may constitutionally provide punishment for the obscene because, anti-socially, it arouses sexual desire by making sex attractive, then it follows that whatever makes sex disgusting is socially beneficial'.[18] In other words 'one vindicates a book by its capacity to induce vomiting'.[19] The argument, however paradoxical it sounds – and Lord Denning has described it as 'a piece of sophistry'[20] – has frequently found favour as a means of exculpating literature of merit. Publication in the United States of James Joyce's *Ulysses*, for example, was permitted by the courts in 1933 on the grounds that 'whereas in many places the effect of *Ulysses* upon the reader undoubtedly is somewhat emetic, nowhere does it tend to be aphrodisiac'.[21]

In England, too, the aversion argument first emerged in the defence of books of substantial merit. It was publicly propounded in 1949 by the Attorney-General, Sir Hartley Shawcross QC, when explaining to the House of Commons his decision not to prosecute Norman Mailer's war novel *The Naked and the Dead*: 'While there is much in this most tedious and lengthy book which is foul, lewd and revolting, looking at it as a whole I do not think its intent is to corrupt or deprave, or that it is likely to lead to any other result than disgust at its contents.'[22] In the trial of *The Philanderer*, Mr Justice Stable reminded the jury, as a point in the book's favour, that: 'the theme of this book is the story of a rather attractive young man who is absolutely obsessed with his desire for women. It is not presented as an admirable thing, or a thing to be copied. It is not presented as a thing that brought him happiness or any sort of permanent satisfaction. Throughout the book you hear the note of impending disaster.' If the good end happily, and the bad unhappily, no offence will be taken: the problem with scarlet women like Lady Chatterley, Fanny Hill and Linda Lovelace was that they failed to repent by the end of their stories. In 1974 treasury counsel explained that the most obscene passage in *Street Boy*, a book about the adventures of a London homosexual prostitute, was a suggestion that the hero had achieved greater fortune and happiness through a life of vice than he could have earned by remaining in his honest but unrewarding trade as assistant catering manager at a Midlands hotel.

Last Exit to Brooklyn presented horrific pictures of homosexuality and drug-taking in New York. Defence counsel contended that its only effect on any but a minute lunatic fringe of readers would be horror, revulsion and pity. It made the reader share in the horror it described and thereby so disgusted, shocked and outraged him that, being aware of the truth, he would do what he could to eradicate those evils and the conditions of modern society which allowed them to exist. Instead of tending to encourage anyone to homosexuality, drug-taking or brutal violence it would have precisely the reverse effect. The failure of the trial judge to put this defence before the jury

in his summing up was the major ground for upsetting the conviction. The Court of Appeal stressed that

> With a book such as this, in which words appear on almost every page and many incidents are described in graphic detail which in the ordinary, colloquial, sense of the word anyone would rightly describe as obscene, it is perhaps of particular importance to explain to the jury what the defendants allege to be the true effect of those words and descriptions within their context in the book. . . .[23]

The aversion argument was extracted from its literary context and elevated into a full-blown defence of crudity in the *Oz* case. The magazine contained a number of savage cartoon caricatures depicting unpleasant people engaging in deviate activities. The defence called a distinguished psychologist, who likened these drawings to the pictures which he used in aversion therapy to make patients feel disgust at anti-social activities to which they had hitherto been attracted. Once again the trial judge misunderstood the argument and failed to remind the jury of it, and once again the Court of Appeal was obliged to quash the conviction. The Lord Chief Justice accepted that 'the aversion theory', as he termed it, could be a complete defence under section 1 of the Act:

> One of the arguments was that many of the illustrations in *Oz* were so grossly lewd and unpleasant that they would shock in the first instance and then would tend to repel. In other words, it was said that they had an aversive effect and that, far from tempting those who had not experienced the acts to take part in them, they would put off those who might be tempted so to conduct themselves . . . the learned trial judge never really got over to the jury this argument of aversion, in other words, never put over to the jury that the proposition central to the defence case was that certain illustrations could be so disgusting and filthy that they would not corrupt and deprave but rather would tend to cause people to revolt from activity of that kind.[24]

Legal recognition of the psychological fact that behaviour will often react against, rather than strive to emulate, perceived actions is welcome, although paradoxically the court held that the very psychological evidence by which the aversion argument was explained to the jury in the *Oz* case was in fact inadmissible, so that it must henceforth be expounded by counsel as a matter of common sense rather than science. Since *Oz* it has been adopted as a defence for bizarre forms of hard-core pornography, on the basis that those who view grotesqueries will be 'averted' from the conduct depicted. But while it is fair to make the point that ordinary readers may be revolted, and

that their feelings of revulsion will confirm their existing moral outlook rather than work any undesirable change, such material is not produced for the average reader, but for minorities with the morbid curiosity or fetishistic desire to dilate over it. In *Mishkin* v. *New York* it was argued that sado-masochistic books would disgust and sicken, rather than stimulate, the average reader, and so would not appeal to his prurient interest. The US Supreme Court pointed out the fallacy: 'Where the material is designed for and purely disseminated to a clearly-defined sexual group, rather than the public at large, the prurient appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of members of that group.'[25]

Just as there is concern in some quarters about aversion therapy, one assumption of the aversion defence needs to be questioned. If the grotesque sexual caricature repels its viewer, and confirms his pre-existing prejudices, no harm has been done to him. But if its repulsiveness causes anxieties or neurosis or tends to put the viewer off healthy sex, there is a real prospect of harm. There is a difference between ugliness which is merely shocking or savagely satirical, and ugliness which can be mentally damaging to readers of a certain psychological make-up.[26] Material which arouses unwarranted fears and anxieties about sex may indeed cause harm, but not the sort of harm prohibited by the Obscene Publications Act.

The most valuable aspect of the aversion defence is its emphasis on the context and purpose of publication. Writing which sets out to seduce, editorials which exhort and pressurize the reader to indulge in immorality, are to be distinguished from those which present a balanced picture, and do not overlook the pains which may attend new pleasures. For over a century prosecutors thought it sufficient to point to explicitness in the treatment of sex, on the assumption that exposure to such material would automatically arouse the libidinous desires associated with a state of depravity. Now they must consider the overall impact, and the truthfulness of the total picture. Books which present a fair account of corruption have a defence denied to glossy propaganda. In deciding whether material depraves and corrupts, the jury must lift its eyes from mere details and consider the tone and overall presentation. Does the material glamorize sex, or does it 'tell it like it is'?

THE TARGET AUDIENCE

The Act defines obscenity as that quality in a publication which would tend to corrupt 'persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it'. The importance of considering this target audience was stressed by Lord Wilberforce in *DPP* v. *Jordan*:

> The main point to be noticed about this section is ... that it is directed at relative obscenity – relative, that is, to likely readers. (I use 'readers' to include other types of recipients.) In each case it has to be decided who these readers are and so evidence is usually given as to the type of shop or place where the material is, and as to the type of customer who goes there. When the class of likely reader has been ascertained, it is for the jury to say whether the tendency of the material is such as to deprave or corrupt them.[27]

The prosecution will normally adduce evidence of the circumstances in which the article was seized, of the location in cases of bookshops or cinema clubs, or of distribution arrangements in the case of a publisher. Police officers will have kept observation on the defendants' premises, and may give evidence of the kind of customer who frequented them, in terms of age, sex and social class. The environment is important: the prosecution may point to the likelihood of casual passers-by being attracted to the shop, or to the presence in the vicinity of schools, youth clubs or residential accommodation. The selling price of the article, the place and prominence of its display, and the composition of its cover or container are also factors for the jury to weigh in deciding the type of customer who might be minded to make a purchase. The defendant is entitled to describe his patrons, and to explain any restrictions he may have placed either on the availability of the article in question, or on access to his premises by members of the public. Evidence of his good repute may assist his contention that he has merchandized it responsibly to mature adults who have sought it out, and a sample of his clientèle may be called to explain their reasons for patronising his business. A publisher may give evidence of a book's sales, of his distribution system, and of any advertisements or reviews which may have brought it to public notice. Although expert evidence of the likely effect of an article is inadmissible, expertise may assist the jury to establish potential readership. The conclusions of a readership survey conducted by a magazine publisher prior to his arrest, an analysis of the social make-up of patrons of a cinema club, or evidence of custom and distribution patterns in the book trade would be relevant in appropriate cases.

The need to ascertain the target audience in prosecutions under the 1959 Act effects the most important shift in emphasis from the common-law definition, which looked not to the likely readership, but to the impact of the article on the most vulnerable members of society. In *R.* v. *Hicklin* the court considered that *The Confessional Unmasked* was obscene precisely because the book 'is sold at the corners of streets, in all directions, and of course it falls into the hands of persons of all classes, young and old, and the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains'.[28] Similarly, in the 1954 case of *Reiter*, the Lord Chief Justice stressed how, 'when one is considering the test of obscenity, one's mind naturally turns to depraving and corrupting young people into whose hands (these books) may fall. There are, no doubt, dirty-minded elderly people, but it is not to be expected that many elderly people would read these books. Younger people are more likely to, and we are told that they circulate in the Armed Forces.'[29]

The common law's concern for the young, the sexually immature and the psychologically abnormal loaded the dice against defendants, who were hard put to convince juries that erotic writing would not affect some little boy or girl, or some mentally disturbed adult, into whose hands it might conceivably fall. In *R.* v. *Martin Secker & Warburg*, Mr Justice Stable devoted much of his exculpatory summing up to offering the jury an answer to this dilemma:

> You have heard a good deal about the putting of ideas into young heads. Really, is it books that put ideas into young heads, or is it nature? ... it is the natural change from childhood to maturity that puts ideas into young heads. It is the business of parents and teachers and the environment of society, so far as is possible, to see that those ideas are wisely and naturally directed to the ultimate fulfilment of a balanced individual life.... The literature of the world from the earliest times when people first learned to write so far as we have it today – literature sacred and profane, poetry and prose – represents the sum total of human thought throughout the ages and from all the varied civilizations the human pilgrimage has traversed. Are we going to say in England that our contemporary literature is to be measured by what is suitable for the fourteen-year-old schoolgirl to read? You must consider that aspect of the matter.[30]

The fourteen-year-old schoolgirl, however, was precisely the person whom the common law sought to protect, and Mr Justice Stable's rhetoric, however much it represented common sense, was out of line with the decisions of higher courts in *Hicklin* and *Reiter*. The 1959 Act

gave legislative sanction to the Stable approach by adopting a relative definition of obscenity – relative, that is, to the 'likely' rather than the 'conceivably possible' readership. This was further emphasized by section 2 (6) of the Act, which provides that in any prosecution for publishing an obscene article, 'the question whether an article is obscene shall be determined without regard to any publication by another person, unless it could reasonably have been expected that the publication by the other person would follow from the publication by the person charged'. Similarly the 1964 legislation which created the offence of possession of obscene articles for publication for gain, requires that 'the question whether the article is obscene shall be determined by reference to such publication for gain of the article as, in the circumstances, it may reasonably be inferred he (the defendant) had in contemplation, and to any further publication that could reasonably have expected to follow from it, but not to any other publication' (section 1 (3) (b)).

These statutory provisions ensure that the publication in question is judged by its impact on its primary audience – those people who, the evidence suggests, would be likely to seek it out and to pay the asking-price to read it. They reject the 'most vulnerable person' standard of *Hicklin*, with its preoccupation with those members of society of the lowest level of intellectual or moral discernment. They also reject another standard employed frequently in the law, that of the 'average' or 'reasonable' man, and focus on 'likely' readers and proven circumstances of publication. A work of literature is to be judged by its effect on serious-minded purchasers, a comic book by its effect on children, a sexually explicit magazine sold in an 'adults only' bookstore by its effect on adult patrons of that particular shop.

In *R.* v. *Penguin Books* Mr Justice Byrne pointed out that the paperback price of 3s 6d would, in these days of 'high wages and high pocket money', put the book within the grasp of a vast mass of the population.[31] In that case, the jury had to consider the effect of the book on a reading public which would purchase it at a paperback price. The converse situation was met in *R.* v. *Barker*, where an explicit picture was sent to a photographer who kept it in a locked drawer. In that case the obscenity of the picture had to be judged by its effect on the individual concerned. The Court of Criminal Appeal emphasized that the issue was

> Whether the effect of the article is such as to tend to deprave and corrupt the individual to whom it is published ... a jury should obviously take into account the article itself and in addition they should have regard to the age and occupation of the person to whom the article is published, if such age and occupation is proved in evidence.... In many cases the person accused of publishing an obscene article may be wholly unaware of the age or occupation of the individual to whom it is published. In our judgment this factor is irrelevant. A person who sells potentially obscene matter to an unknown applicant takes the risk that the latter is someone whom the article would tend to deprave and corrupt. On the other hand, if the unknown applicant is not of that type, the accused's ignorance of the applicant's character cannot make the article obscene.[32]

The publisher was acquitted, because his customer was not the sort of man to be corrupted by the photograph. *Barker's* case was applied in *R.* v. *Clayton & Halsey*, where the proprietors of a Soho bookshop were charged with selling obscene material to two experienced members of Scotland Yard's Obscene Publications Squad. These officers conceded that pornography had ceased to arouse any feelings in them whatsoever. The prosecution argument that the pictures were 'inherently obscene', and tended of their very nature to corrupt all viewers, was rejected:

> This court cannot accept the contention that a photograph may be inherently so obscene that even an experienced or scientific viewer must be susceptible to some corruption from its influence. The degree of inherent obscenity is, of course, very relevant, but it must be related to the susceptibility of the viewer. Further, while it is no doubt theoretically possible that a jury could take the view that even a most experienced officer, despite his protestations, was susceptible to the influence of the article yet, bearing in mind the onus and degree of proof in a criminal case, it would, we think, be unsafe and therefore wrong to leave that question to the jury.[33]

Although judges sometimes loosely talk of material which is 'inherently obscene' or 'obscene *per se*', it is clear that this concept is irreconcilable with the legislative definition of obscenity. The quality of obscenity inheres whenever the article would tend to corrupt its actual or potential audience; the degree of that corruption becomes relevant when it is necessary to balance it against the public interest, if a 'public good' defence has been raised under section 4 of the Act. The rulings in *Barker* and *Clayton & Halsey* remain good law, and were confirmed by the Court of Appeal in *Attorney-General's Reference (No. 2 of 1975)* when it held that publication of *Last Tango in Paris* to the licensee of a cinema, who was not a person likely to be corrupted by the film, provided insufficient evidence to be left to the jury on an obscenity charge.[34]

The concept of 'relative obscenity' adopted by the Act received careful elucidation from Lord Wilberforce in *Whyte's case*:

> One thing at least is clear from this verbiage, that the Act has adopted a relative conception of obscenity. An article cannot be considered as obscene in itself: it can only be so in relation to its likely readers. One reason for this was no doubt to exempt from prosecution scientific, medical or sociological treatises not likely to fall into the hands of laymen, but the section is drafted in terms wider than was necessary to give this exemption, and this gives the courts a difficult task. For, in every case, the magistrates, or the jury, are called on to ascertain who are likely readers and then to consider whether the article is likely to deprave and corrupt them.[36]

Evidence of factual relevance to this question included the site of the bookshop (it was in an ordinary shopping-area, opposite a technical college, and near a block of council flats), the nature of other wares sold from the shop (it offered books of general interest, although no newspapers or comics), the arrangement of the offensive material (it was marked 'adults only' and confined to a special section of the shop, but it was on open display rather than in a closed cupboard) and the age and class of the customers (men of middle age and upwards, many of whom were regulars). These facts were all relevant to the issue of identifying likely readership in the circumstances of the case. This was required by 'the principle of relative "obscenity"; certainly the tendency to deprave and corrupt is not to be estimated in relation to some assumed standard of purity or some reasonable average man. It is the likely reader. And to apply different tests to teenagers, members of men's clubs, or men in various occupations or localities would be a matter of common sense.'[36]

The notion of 'variable' or 'circumstantial' obscenity has been developed along similar lines in the United States. In *US* v. *31 Photographs* the Kinsey Research Institute had imported Scandinavian pornography for research purposes. The court held that in the possession of the Institute the pornography was not obscene, even though identical material would have been held to be so had an ordinary citizen attempted its importation. The Government contention that some erotic material is 'obscene *per se*' was expressly rejected.[37] A corollary of this decision was the Supreme Court's refusal of constitutional protection to newsagents who sell soft-core erotica to children. One such unscrupulous merchandiser was upbraided by Justice Brennan: 'The "girlie" picture magazines included in the sales here are not obscene for adults.... The concept of obscenity ... may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.'[38]

The mere fact the pornographic material is merchandised only to adults does not mean that a bookseller is entitled to an acquittal. It is simply one of the circumstances to be taken into account by the tribunal. It was argued in *Shaw* v. *DPP* that purchasers of *The Ladies Directory*, on sale in Soho and Paddington, were likely to be already depraved, but the Court of Appeal pointed out 'the fallacy of this argument is that it assumes that a man cannot be corrupted more than once'.[39] In *Whyte's case*, the House of Lords accepted that the same fallacy had misled local justices when they acquitted a bookseller who peddled pornography to 'dirty old men' on the assumption that they were so far gone in corruption that another dose would make no difference. 'The Act is not merely concerned with the once-for-all corruption of the wholly innocent, it equally protects the less innocent from further corruption, the addict from feeding or increasing his addiction.'[40] If the target audience are 'addicts' of pornography, impelled to buy the books and feed their appetite, and their reading habits had been corrupted by the books in the first place, the tribunal could interpret this as evidence of guilt.

THE SIGNIFICANT PROPORTION TEST

The 1959 Act requires a tendency to deprave and corrupt 'persons' likely in the circumstances to read or hear the offensive material. But how many persons must have their morals affected before the test is made out? There is always a lunatic fringe of readers who might conceivably be damaged by exposure to particular works of literature, and any book or magazine circulating in the community could possibly fall into the hands of a child or a psychopath. The answer was given by the Court of Appeal in *R.* v. *Calder & Boyars*: the jury must be satisfied that a significant proportion of the likely readership would be guided along the path of corruption:

> The only possible criticism that can be validly made of this part of the summing-up is that the judge gave no guidance to the jury on the difficult question as to what section 1 meant by 'persons' who were likely to read that book. Clearly this cannot mean all persons; nor can it mean any one person, for there are individuals who may be corrupted by almost anything. On the

other hand, it is difficult to construe 'persons' as meaning the majority of persons or the average reader, for such a construction would place great difficulties in the way of making any sense of section 4. The legislature can hardly have contemplated that a book which tended to corrupt and deprave the average reader or the majority of those likely to read it could be justified as being for the public good on any ground. This court is of the opinion that the jury should have been directed to consider whether the effect of the book was to tend to deprave and corrupt a significant proportion of those persons likely to read it. What is a significant proportion is a matter entirely for the jury to decide. It has been persuasively argued by Mr Mortimer that in the absence of such a direction the jury may have thought that they were bound to hold the book obscene if they came to the conclusion that it tended to corrupt and deprave perhaps only four or five of the 13,000 persons who bought it. On the other hand, the jury may have thought that they could convict only if the book tended to deprave and corrupt the average reader or the majority of its readers.[41]

The 'significant proportion' test has been applied at obscenity trials ever since. It protects the defendant in that it prevents the jury from speculating on the possible effect of adult literature on a young person who may just happen to see it, but it does not put the prosecution to proof that a majority, or a substantial number, of readers would be adversely affected. This was emphasized by the House of Lords in *Whyte's* case, where local justices had mistakenly interpreted 'significant proportion' to mean 'the great majority'. Lord Cross accepted that the 'significant proportion' test was the standard which the justices were required to apply, but stressed that 'a significant proportion of a class means a part which is not numerically negligible but which may be much less than half'.[42]

Lord Simon remarked, 'It is true that the expression "significant proportion" does not appear in the statute, but was taken from *R.* v. *Calder & Boyars*. But the statute must be explained to a jury, and to use expressions like "*de minimis*" would merely confuse them. For the reasons given in the judgment of the Court of Appeal in that case, with which I respectfully agree, "significant proportion" is a helpful and accurate gloss on the statute.'[43]

Lord Salmon, who had given the judgement in *Calder & Boyars*, agreed with Lord Simon. The 'significant proportion' test is, in consequence, incorporated by judicial interpretation into section 1 of the Act.[44]

'TAKEN AS A WHOLE'

In obscenity trials before the 1959 legislation it was unnecessary for juries to consider the overall impact of the subject matter on its likely readers. Prosecuting counsel could secure convictions merely by drawing attention to isolated 'purple passages' taken out of context. If one passage was obscene, the whole book was condemned. In *Paget Publications Ltd.* v *Watson*, the Divisional Court held that where a magistrate had found that a book's cover was obscene, although its contents were innocuous, the contents must be destroyed along with the cover.[45] 'A publication may be obscene because part of it is obscene,' and a magistrate who had stumbled across one obscene page needed to read no further.

The Select Committee on the Obscene Publications Act had stressed the importance of considering the 'dominant effect' of the whole work:

> The contrary view, under which a work could be judged obscene by reference to isolated passages without considering the total effect, would, if taken to its logical conclusion, deprive the reading public of the works of Shakespeare, Chaucer, Fielding and Smollett, except in expurgated editions. We therefore recommend that regard should be paid in any legislation to the effect of a work as a whole.[46]

This recommendation was duly embodied in the 1959 statute, which provided that 'an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt. . . .'

In *R.* v. *Penguin Books* Mr Justice Byrne instructed his jury to consider the total effect of the work after reading it from cover to cover. 'You will read this book just as though you had bought it at a bookstall and you were reading it in the ordinary way as a whole.'[47] Less satisfactory was the trial judge's direction in *R.* v. *Calder & Boyars*, where he told the jury to 'read the book and read it as nearly as possible all the way through. I know we all do a bit of skipping and scamping, and some of us are better at it than others. But remember you are to form a view as a whole, and read it all, and do not form any opinion about it until you have heard the evidence.' Defence counsel took objection to the hint that 'skipping and scamping' was permissible, and the judge recalled the jury to direct them to read the book thoroughly: 'I certainly hope none of you thought that we expect you to skip any of it.'[48]

In 1971 the Court of Appeal discovered a serious defect in the drafting of the Act, which negatived the recommendation of the Select Committee in relation to magazines and anthologies. The case was *R.* v. *Anderson*, and the subject matter was *Oz* magazine, which comprised forty-eight pages of variations on the theme of 'schoolkids' liberation', interspersed with advertisements. The court decided that the effect of the disjunction in section 1 (i.e. '... or (where the article comprises two or more distinct items) the effect of any one of its items...') was that when magazines were prosecuted a single item, no matter how inconspicuous, could be plucked out and, if obscene when examined in isolation, would poison the whole issue:

> It is in our view quite clear from section 1 that where one has an article such as this comprising a number of distinct items the proper view of obscenity under section 1 is to apply the test to the individual items in question. It is equally clear that if, when so applied, the test shows one item to be obscene, that is enough to make the whole article obscene. Now that may seem unfair on first reading but it is the law in our judgment without any question. A novelist who writes a complete novel, and who cannot cut out any passages without destroying the theme of the novel, is entitled to have his work judged as a whole, but a magazine publisher who has a far wider discretion as to what he will, and will not, insert by way of items is to be judged under the 1959 Act on what we call the 'item by item' basis ... the proper course to be taken in future is the 'item by item' approach for magazines and other articles comprising a number of distinct items.[49]

This 'item by item' approach was elaborated in the *Oz* case because of the Lord Chief Justice's concern that one particular item – an advertisement for *Suck*, a sex newspaper produced in Holland – was so obscene that no reasonable jury could find it otherwise. Yet this item was printed in 6 point type in an inconspicuous 4 inch by 1½ inch box buried in an 8 inch by 11 inch page of classified advertisements. Most readers would have missed it entirely; all in all, it took up one seven-hundred-and-twentieth of the whole magazine. The 'item by item' test gives rise to a number of practical difficulties:

(a) Most editions of magazines and newspapers are conceived and produced as a totality by a regular staff, for a reasonably identifiable audience and with a distinctive character, theme and format. Very few are a potpourri of totally unconnected items. The overall 'tone' of the magazine – satirical, ironic, polemic etc. – will often govern the effect of any one item, whose message will be received and acted upon (if at all) in a way conditioned by the tone of the whole magazine. Thus the 'item by item' approach is unfair to the psychological realities of reading the magazine, in that it ignores the item's effect on the reader's mind *after* he has finished reading the whole magazine. In practice, whether the item will be memorable or not may also be conditioned by its prominence, the readability of its type face, the layout, whether it is promoted on the cover, in the editorial, or the table of contents, the quality of other articles in the same magazine, which may overshadow it, and so on. The crucial question in judging an item's potential for corruption should not be 'what will the reader think and do after reading the "item"' but rather 'what will the reader think and do after reading the *magazine* in which the item is published?'

(b) What is a 'distinct item' for the purposes of the section? Is the illustration to an article an 'item' to be judged in isolation from the article itself, or a single cartoon panel an 'item' to be judged without reference to the whole strip cartoon? The Court of Appeal judgment in *Anderson* gives no guidance. The 'item by item' approach must be adopted for newspapers, magazines and anthologies; it might arguably extend to a non-fiction work by a single author dealing with a number of distinct subjects, or to manuals with separate chapters on different aspects of sex. Unresolved difficulties were met in this respect during *R.* v. *Gold*, the trial of *In Depth* magazine in October 1972. The magazine boasted a regular feature entitled 'Sexual Arena', where readers' letters were published and answered by doctors or psychiatrists. The prosecution singled out one letter and claimed it constituted an 'item'. The defence insisted that the whole feature – the introduction, all the letters and all the answers – was the only 'item' involved. The judge, however, favoured a third interpretation: the single letter, in conjunction with the answer which it received, constituted an 'item'. Each of the three different approaches involved reasonable interpretations of the Court of Appeal's ruling. In 1971 the 'item by item' approach was applied to *The Little Red Schoolbook*, a 228 page instruction manual mainly concerned with educational issues. The book was found obscene because of a twenty-three-page chapter on sex, which had been considered in isolation. The court accepted the prosecution argument that, because the book had an itemized table of contents, readers would tend to select chapters which interested them rather than read the whole book from beginning to end. Such results mark a substantial inroad on the 'dominant effect'

principle established so confidently in the minds of legislators in 1959.

(c) It is not at all clear how the 'public good' defence could relate to a work which has been subjected to the 'item by item' approach. If a magazine is held obscene because of one obscene cartoon, can experts be called to testify that publication of the whole magazine was justified for the public good, or will they be confined to an opinion about the artistic merit of the single cartoon? If *The Times* published a classified column of London prostitutes, could it escape an obscenity conviction by pleading that it is for the public good to publish *The Times*? The wording of section 4 of the Act, which refers to the public good of 'articles', not 'items', forced the court in *R.* v. *Gold* to accept that the answer must be 'yes'.[50] Publication of magazines which contain worthwhile material as well as obscene items may thus be justified by expert testimony under section 4. In America, one enterprising publisher reprinted a boring Obscenity Commission Report interleaved with the most explicit Scandinavian pornography. Who could deny the public interest in reading the 'Illustrated Longford Report'?

(d) The Indictment Rules provide that 'Every indictment shall contain . . . such particulars as may be necessary for giving reasonable information as to the nature of the charge.'[51] It follows that in charging a magazine publisher with an offence under the Obscene Publications Act, the prosecution should particularize those sections of the magazine which it alleges to be obscene. In cases involving dozens, or even hundreds, of different magazines, this would be a major undertaking and is rarely insisted upon by the defence, no doubt because it would only serve to draw the Court's particular attention to more salacious items which might otherwise be glossed over by normal reading. Highlighting 'purple passages' only emphasizes the unsatisfactory nature of the 'item by item' test, which denies to newspapers and magazines one of the most important protections afforded to books by the 1959 Act, and is likely to cause great confusion in the juryroom. Suppose the twelve-man jury is unanimous that a magazine is obscene, but the jurors are hopelessly split on which of its items contains the moral poison – three jurors think an item on drugs is likely to corrupt, three different jurors conclude that the classified advertisements are the only objectionable feature, while the remainder are convinced that some salacious pictures are obscene but that the rest of the magazine is

tolerable. Although each juror believes the magazine is obscene, the verdict must be an acquittal, because there is not a sufficient majority agreement on the obscenity of any one item. Properly applied, the 'item by item' test would involve the trial judge taking a special verdict on every item singled out by the prosecutor – although even this approach would not exhaust the possibilities, because the jury would have a constitutional right to find an item obscene even though the prosecution made no complaint about it. The 'special verdict' procedure should be adopted in any case for the benefit of the defendant, at least if he is the publisher of a regular monthly magazine, because he is entitled to know the nature of his transgression so that he can edit his magazine accordingly in the future.

THE DEFENDANT'S INTENTION

The Obscene Publications Act is an exception to the general rule that criminal offences require a specific mental element. The *intention* of the writer, publisher or bookseller is beside the point. It matters not whether his purpose was to educate or edify, to corrupt or simply to make money. The *effect* of his work on the reading public is all that matters. In this respect the 1959 Act may be harsher for the defendant than the common law, which required an intention to corrupt, although this intention was normally inferred from the presumption that a publisher would appreciate the natural and probable consequences of his publication.[52]

In 1961 the Court of Appeal in *Shaw* ratified the change:

> If these proceedings had been brought before the passing of the Obscene Publications Act 1959, in the form of a prosecution at common law for publishing an obscene libel, it would no doubt have been necessary to establish an intention to corrupt. But the Act of 1959 contains no such requirement and the test of obscenity laid down in section 1 (1) of the Act is whether the effect of the article is such as to tend to deprave and corrupt persons who are likely to read it. In other words obscenity depends on the article and not upon the author.[53]

That obscenity is an offence of strict liability was confirmed by the Court of Appeal in *R.* v. *Calder & Boyars*. Lord Justice Salmon remarked that 'the intent with which the book was written was irrelevant. However pure or noble the intent may have been, if, in fact, the book taken as a whole tended to deprave and corrupt a significant

proportion of those likely to read it, it was obscene within the meaning of that word in the Act of 1959.'[54] These comments, of course, relate only to section 1 of the Act. Under section 4, the 'public good' defence, the author's intention may be highly relevant, and it may be discussed in evidence by experts called to make out or to rebut that defence. In *R.* v. *Penguin Books* Mr Justice Byrne directed that 'as far as literary merit or other matters that can be considered under section 4 are concerned, I think one has to have regard to what the author was trying to do, what his message may have been, and what his general scope was'.[55]

A limited defence is provided by the Obscene Publications Act for those defendants who act merely as innocent disseminators of obscene material. Section 2 (5) of the 1959 Act reads:

> A person shall not be convicted of an offence against this section (i.e. the offence of publishing obscene material) if he proves that he had not examined the article in respect of which he is charged and had no reasonable cause to suspect that it was such that his publication of it would make him liable to be convicted of an offence against this section.

Similarly, in proceedings for the offence of possessing an obscene article for publication for gain, section 1 (3) (a) of the 1964 Act provides that a defendant 'shall not be convicted of that offence if he proves that he had not examined the article and had no reasonable cause to suspect that his having it would make him liable to be convicted for an offence against that section'.

The onus of proof is placed on the defendant under these sections. He must show, on the balance of probabilities, both that he did not examine the article and that he entertained no suspicions about the nature of its contents. There has been no judicial interpretation of 'examine': is it sufficient to negative the defence to show that the defendant merely handled the book, or caught sight of its cover, or must the prosecution go further and show that the defendant actually read some of the contentious pages or even that he read it, as the Act requires, 'as a whole'? It is often possible to judge pornographic books by their covers, and a bookseller would probably fail if he admitted to catching sight of a provocative cover-picture or suggestive title. In *R.* v. *Love* the Court of Appeal quashed the conviction of a director of a printing company, who had been absent at the time a print order for obscene books was accepted, and who had no personal knowledge of the contents of those books.[56] Even though he had accepted general responsibility for his company's operations, and

would probably have agreed to print the books had the decision been referred to him, he could not be convicted unless he had been given specific notice of the offensive material. A defendant who had not 'examined', in the sense of personally inspected, the offending items might nonetheless be given reasonable cause to suspect obscenity by clandestine or unorthodox behaviour on the part of his supplier. Any evidence that, for example, a printer has specially increased his profit margin to cover a risk factor, would be fatal to a section 2 (5) claim. Conversely, if the accused can show that the material came to him in the normal course of business from a reputable supplier, he may have a defence. Cases on the liability of distributors for libels in newspapers emphasize the importance for this defence of establishing that the business – of printing, distributing or retailing – was carried on carefully and properly. The test is whether the unwitting distributor *ought* to have known that the material would offend.[57]

In practice, prosecuting authorities frequently distinguish between flagrant and deliberate breaches of the law and those where the defendant may not have intended offence, by prosecuting the former under section 2 of the Act but merely launching forfeiture proceedings against books stocked by innocent disseminators. There is no basis in the Act for this distinction: it is entirely a matter of prosecutorial discretion, and it is not always exercised in the manner suggested by the Solicitor-General in 1964, when he undertook to bring criminal proceedings only against those publishers who manifested an intention to publish irrespective of forfeiture orders.[58] Juries invariably take intention into account: they realize that individuals, not books, are on trial, and display a sympathy for genuine crusaders for sexual enlightenment which is notably lacking in verdicts on commercial traffickers. In the United States the concept of 'pandering', in the sense of aggressively salacious advertising to maximize profits, has been applied by the Supreme Court to deny constitutional protection to defendants who have deliberately and publicly exploited prurience.[59] It would be better to recognize reality by importing *mens rea* into the offence, and permitting the prosecution to adduce evidence of profiteering or anti-social motivation.

COMMUNITY STANDARDS — CURRENCY AND COMPARISONS

Juries at obscenity trials are enjoined to 'keep in mind the current standards of ordinary decent people'.[60] They 'must set the standards

of what is acceptable, of what is for the public good in the age in which we live'.[61]

If jurors embody or represent the standards of decency, they must be presumed to know, or at least to be able to identify, current community standards, without the assistance of evidence. The collective experience of twelve people, however arbitrarily chosen, should provide a degree of familiarity with popular reading trends, what is deemed acceptable on television and at cinemas, and the degree of explicitness which can be found in publications on sale at local newsagents. Judge and counsel can invite them to take notice of changes in the contemporary climate, and even point out that the test of obscenity was settled in 1868 by a court which had been told that nothing could be more obscene than the statue of Venus in the Dulwich Gallery.[62] But in considering the question of obscenity juries are not permitted to hear evidence about other publications, at least when it is introduced for the purpose of comparison. A defendant may not argue that he should be acquitted because his publication is less obscene than others which are freely circulated.

This rule was imposed by the Court of Appeal in *R.* v. *Reiter*,[63] which adopted the reasoning of the High Court of Justiciary in *Galletly* v. *Laird*:

> ... the character of the offending books or pictures should be ascertained by the only method by which such a fact can be ascertained, viz., by reading the books or looking at the pictures. The book or picture itself provides the best evidence of its own indecency or obscenity or of the absence of such qualities.... The character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, their quality in that respect cannot be made any better by examining other books, or listening to the opinions of other people with regard to these other books.[64]

The 1959 Act does, however, provide for two situations in which comparisons are both permissible and highly relevant. Under section 2 (5), it may be that a defendant has 'no reasonable cause to suspect' the obscenity of a book which he has not personally examined because books with similar or identical titles or themes have been acquitted, to his knowledge, in previous proceedings. And under section 4 it may be highly relevant to the jury's task of evaluating the merit of a particular book to compare it with other books of the same kind, and to hear expert evidence about the current climate of permissiveness in relation to this kind of literature. This exception was recognized by Mr Justice Byrne in *R.* v. *Penguin Books*, when he permitted expert

witnesses to compare *Lady Chatterley's Lover* with works by Lawrence and other twentieth-century writers, and to discuss the standards for examining sexual matters reflected in modern literature. At one point in the trial he agreed that 'other books may be considered, for two reasons, firstly, upon the question of the literary merit of the book which is the subject matter of the indictment, ... (where) it is necessary to compare that book with other books upon the question of literary merit. Secondly ... other books are relevant to the climate of literature.'[65] This ruling considerably mitigates the severity of the rule in *Reiter's case*. Where a 'public good' defence is raised, juries may be asked to make comparisons in order to evaluate the real worth of the publication at stake, and they may be told by experts about the state of informed contemporary opinion on subjects dealt with in those publications.

In cases where no 'public good' defence is raised, jurors must be guided by their own knowledge of the world outside the courtroom and by observations about contemporary standards which fall from judge and counsel. There have been occasions when judges have dismissed the 'current climate' as simply a creation of licentious artistic imaginations. In the 1971 trial of Paul Ableman's book *The Mouth and Oral Sex*, Judge King-Hamilton maintained that the real climate was not set by media fashions:

> They set the trend. The author may put four-letter words into his book, a play may have nude scenes, and a film may show an act of sexual intercourse. The fact that many people buy such a book, or see such plays and go to such films, does not necessarily mean that the general standard is set by these people.

The judge asked one witness if he knew 'as a historical fact' that 'Rome fell because of many years of decadence and immorality', and suggested that the British Empire might suffer a similar fate. Jeremy Hutchinson QC enjoined the jury to apply a different perspective.

> Was it permissive books that brought the Empire down, or was it something more important, something called Christianity? Was it an Empire we all want to preserve? People held in bondage without any rights, without any freedom? In Victorian times, what was the position? ... There were industrialists going to church, very proper and moral, when in their factories children were working fourteen to sixteen hours a day at the age of ten. In Leicester Square – you talk now about prostitutes – there were hundreds of prostitutes outside the theatres when the gentlemen came out of their reputable and honourable clubs in the evening.

When it is said that now we are decadent, therefore you, the jury, should stand up and find this gentleman here guilty of publishing this book, not because of the book's obscenity but because it will be in some way a protest against the decadence of our society, I ask you, first, not to act on that basis and, secondly, not to accept what is perhaps the inference as to whether this world we live in, in England, is in fact more decadent than it was a little while ago.[66]

The relevance of judicial nostalgia was firmly rejected by Lord Reid in *Knuller*:

We may regret that we live in a permissive society but I doubt whether even the most staunch defender of a better age would maintain that all or even most of those who have at one time or in one way or another been led astray morally have thereby become depraved or corrupt. I think that the jury should be told in one way or another that although in the end the question whether matter is corrupting is for them, they should keep in mind the current standards of ordinary decent people.[67]

The law of evidence prevents defence counsel from introducing comparative material, so jurors must draw on their own knowledge of the frontiers of permissiveness. Some of their decisions have acquitted purveyors of hard-core pornography, and in 1977 the Court of Appeal was driven to admit:

The difficulty, which becomes ever increasingly apparent, is to know what is the current view of society. In times past there was probably a general consensus of opinion on the subject, but almost certainly there is none today. Not only in books and magazines, on sale at every bookstall and newsagent's shop, but on stage and screen as well society appears to tolerate a degree of sexual candour which has already invaded a large area considered until recently to lie within the forbidden territory of the obscene. The jury's formidable task, with no other guidance than section 1 of the Act gives them (and that is precious little), is to determine where the line should be drawn. However conscientiously juries approach this responsibility, it is doubtful, in the present climate of opinion, whether their verdicts can be expected to maintain any reasonable degree of consistency.[68]

PUBLICATION

There are two separate charges which may be brought in respect of obscene publications. It is an offence to *publish* an obscene article contrary to the Obscene Publications Act of 1959, and it is an offence to *have an obscene article for publication for gain*, contrary to the Obscene

Publications Act of 1964. A charge under the 1959 Act requires some *act* of publication, such as sale to a customer or giving an obscene book to a friend. There must be some evidence connecting the defendant with movement of the article into another's hands. Mere possession of an obscene book will not satisfy the definition of publication in section 1 (3) (b) which governs both Acts:

For the purposes of this Act a person publishes an article who (a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or (b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it....

Commercial gain is irrelevant to the 1959 offence. The Act specifically refers to 'any person who, *whether for gain or not*, publishes an obscene article'. Gain is a prerequisite, however, for prosecution under the 1964 Act, which widens the ambit of the law by penalizing *possession* of an obscene article, without evidence that it has actually been distributed, provided that the defendant has the article in his ownership, possession or control with the intention of publishing it for gain. It matters not whether the profit goes to him or to some other person, and 'gain' includes advantages in kind as well as in cash. Private possession of obscenity remains legal, so long as the defendant intends to keep it solely to himself. Both crimes require the prosecution to prove that the defendant *intended* to publish – he cannot be convicted if obscene articles kept in a private drawer are stolen and find their way into general circulation. The 1964 Act was designed to close a loophole in the 1959 legislation revealed in the case of *Mella* v. *Monahan*, where it was held that a bookseller who displayed an obscene article in his shop did not thereby 'publish' it: he was merely inviting the public to treat, rather than offering it for sale.[69] The present legal position with regard to publication may be stated as follows:

1 Retention of obscene articles solely for personal use incurs no liability.

2 If those articles are deliberately disclosed, without charge, to sex partners, friends, business associates or any other restricted group, prosecution may be brought under the 1959 Act, but the jury will be confined to considering whether the articles have tended to corrupt that restricted class of persons.

3 If the articles are sold to others, prosecution may follow under either the 1959 or 1964 legislation.

4 If obscene articles are found in the defendant's possession in sufficient quantity to give rise to the inference of an intention to sell, but there is no actual evidence of distribution, prosecution may only proceed under the 1964 Act.

5 The defence may be raised, to both charges, that there was no intention of publishing the articles to any other person. It is a defence to the 1959 charge that no act of publication can be proven to have taken place, or if it can, that such publication was neither to the defendant's knowledge nor within his intention. It is a defence to the 1964 charge that the articles were not in fact in the defendant's possession or under his control, or that if they were, that he had no intention to take any form of commercial advantage from their distribution to others.

The statutory definition of 'publishing' goes on to exclude 'anything done in the course of television or sound broadcasting'. What is unclear is the point at which 'the course of' television or broadcasting begins. The protection, to be effective, should run from the time a writer commences work on a television or radio script: but the courts may limit the scope of the exemption to those responsible for putting the material on the airwaves 'in the course of' an actual broadcast. Writers, directors and actors would be protected, however, if at the time of their participation their intention was to produce an article which would not be 'published' in a way which could attract liability under the Act. An analogous defence succeeded for United Artists when that company was privately prosecuted for releasing the film *Last Tango in Paris*. The evidence established that the company had 'let on hire' a copy of the film to the licensee of a London cinema, who had in turn screened it to audiences made up of ordinary members of the public. At the time, the Obscene Publications Act provided an exemption for commercial film shows, as well as for television and broadcasting. The Court of Appeal, in *Attorney General's Reference* (*No. 2 of 1975*), confirmed that the act of screening a film in a public cinema was not a 'publication' for the purposes of the Obscene Publications Act, because the proviso then excluded cinematograph exhibitions.[70] United Artists had 'published' the film by 'letting it on hire', but only to the licensee of the cinema, who was not a person susceptible to corruption. The thousands who had flocked to his cinema had, of course, seen the film, but not as the result of any 'publication' to them within the meaning of the Act, and although they may have been in danger of corruption from this opportunity to 'see or hear the matter contained or embodied in it', they had not seen or heard it as a result of a 'publication'. This exemption for cinema films was subsequently repealed by section 53 of the 1977 Criminal Law Act.

Those who participate in or promote obscene publications are entitled to acquittal if they intend their work to be 'published' in a manner which falls outside the Act, either specifically (in the course of television or radio transmissions) or because they genuinely believe that distribution will be confined to a select group immune from corruption, or to those countries which do not have laws against obscene publications. A film producer, for example, who makes a 'blue movie' in England and then takes the negative to Denmark for development and ensuing commercial distribution commits no offence under English law, unless he is aware of plans to re-import copies for sale in Britain. Major English studios sometimes make two versions of feature films, a 'hard' edition for continental distribution and a 'soft' version suitable for home consumption. But the prosecution is not put to specific proof that obscene material is intended for publication in a manner which will infringe the Act, if such publication is a commonsense inference from the circumstances of production. In *R. v. Salter and Barton*, two actors were charged with aiding and abetting an offence under the 1964 Act by performing in an obscene movie. They had been paid £25 for their day's work, and they denied any knowledge of the producer's purpose or his distribution plans. The Court of Appeal held that ignorance could not avail them, although positive belief in a limited publication would have provided a defence:

> ... common sense says that if the evidence showed that these films were to be distributed generally for gain the vast majority of purchasers would be those who were either addicted to pornography or out of curiosity thought they would buy some pornographic films. If that was the market, inevitably there must have been some in that market who, if they bought the films, were likely to be depraved and corrupted ... Neither of (the defendants) sought to say that they thought the films were being used for the purpose of sociological research, medical investigation or anything of that kind, nor did they say that they thought the films were going to be shown in places where such showings did not come within the ambit of the Obscene Publications Act, 1959. Ignorance was the basis of their defence. In this case what the jury had to be satisfied about was that these two appellants both knew that the film was going to be distributed generally for gain, and, if they knew that, then such distribution was likely to bring the film to the notice of some who might be depraved and corrupted.[71]

In *Attorney General's Reference* (*No. 2 of 1975*) the Court of Appeal

confirmed that: 'The Act is not concerned with the obscenity of articles which are not published or intended or kept for publication. In a general sense to read, to see and to hear involve the publication of what is read, seen or heard to the person who reads, sees or hears.'[72] But the Act *does* concern itself with articles which are circulated in the most private and restricted circumstances. Anyone who 'gives' an article to another commits a 'publication'. A husband who shows his wife an obscene book, a couple who invite neighbours to watch erotic home movies, friends who swap their porn collections, are all within the ambit of the law. A prohibition on private distribution would be justified in cases where the defendant's purpose is to corrupt, but, since motive is irrelevant, the Act extends into personal areas which might be thought beyond the province of the criminal law. Canadian courts, defining the word 'publication' unfettered by statutory definitions, have ruled that its meaning does not cover non-commercial screenings of obscene films to guests in private houses.[73] An American statute similar to section 3 of the English Act, authorizing seizure of pornography from private houses, has been struck down by the US Supreme Court with Justice Marshall's forceful reminder that dislike of obscenity provides 'insufficient justification for such a drastic invasion of personal liberties . . . a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional history rebels at the thought of giving Government the power to control men's minds.'[74]

TIME LIMIT ON PROSECUTIONS

A limitation on prosecutions is contained in section 2 (3) of the 1959 Act, which stipulates that 'A prosecution on indictment for an offence against this section shall not be commenced more than two years after the commission of the offence.' One object of this provision was to avoid the uncertainty of some nineteenth-century cases, in which books circulating for decades were suddenly and arbitrarily selected for prosecution. The section is inadequately drafted for this purpose, because an offence is 'committed', not by first exposure of a book, but by an individual defendant, who may first stock the work many years after its initial publication. The Court of Appeal has now interpreted the section in a way which renders it inapt as a protection for writers, performers and publishers who have assisted in putting an article into circulation originally, but whose contribution to its

publication has effectively ceased more than two years prior to their arrest. The offences of 'publishing' and 'possessing for publication for gain' are *continuing* offences, and an individual contribution stays alive for as long as the article remains on the market. In *R.* v. *Salter and Barton*, the defendants' actual participation in the project of publishing obscene films had ended when they were paid at the conclusion of their performance, and more than two years elapsed before their arrest. Over that period they had made no contact with the film's producer, and were unaware of its wide distribution. The Court of Appeal held that section 2 (3) did not apply to bar their prosecution, because the defendants' original purpose had been to assist in the commission of an offence which they knew would be committed after their own contribution had concluded, and would continue for some time thereafter.

> On behalf of the Crown it was said that the offences charged against the principals, namely having for publication for gain and publishing for distribution for gain, were continuing ones and that they continued to be committed over a period of time. In relation to film production that must be so. When a film is made it is intended not only that it should come into existence for the purpose of publication when it is made but as long as that film is held it is being held for the purpose of showing it at a later date . . . those who aid and abet an offence which is a continuing one commit this offence on the same dates as the principals. . . . Those who help someone to commit a continuing offence run the risk, until they dissociate themselves from that continuing offence, that they may be found guilty of aiding and abetting its commission.[75]

How can actors, cameramen, writers, printers or publishers 'disassociate themselves' from a continuing publication? The Court of Appeal gave no guidance, other than indicating, by its decision, that some positive act of renunciation is required. The defendants had no further involvement with film production from the moment they were paid, so 'disassociation' must mean more than 'not associated with'. Would it have sufficed for them to request the producer to destroy the film, or were they obliged to go further and report the matter to the police? Does 'disassociation' imply an element of mind-change, satisfied by public recantation? Must they go further, in order to claim the protection of section 2 (3), and produce evidence that more than two years before their arrest they had endeavoured to destroy all available copies of the film? The decision in *R.* v. *Salter and Barton* requires legislative action if any force is to be given to section 2 (3) other than

as a mandate for police to keep articles seized under the Act for up to two years while deciding whether to prosecute.

DOUBLE JEOPARDY

It is a fundamental principle of criminal jurisprudence that a man must not be placed in 'double jeopardy' by suffering second trial for an offence of which he has previously been acquitted or convicted. Similarly, it is undesirable that an issue settled by one trial should be litigated over and over again. The Obscene Publications Act provides a stark exception to both of these basic precepts. A man who is acquitted of publishing an article to customers in one part of the country may subsequently be indicted for publishing the same article elsewhere. This result follows from the 'relative' concept of obscenity: an article is not obscene in itself, but only in relation to its particular audience, and every separate act of publication involves a separate set of circumstances and gives rise to the prospect of a different jury verdict. A defendant who is prosecuted a second time cannot avail himself of the plea of 'autrefois acquit', because he has been charged with a different offence – publishing the same article, but at a different time or place. Nor can he rely upon the doctrine of 'issue estoppel', a rule of civil law which precludes one party to litigation from raising any issue which has been conclusively determined in earlier proceedings. The House of Lords in *DPP* v. *Humphrys* held that this rule has no place in criminal law, with the consequence that the acquittal of one publisher for distributing a particular book does not stop the prosecution from proceeding against another in respect of the same work.[76]

Lord Salmon has suggested that trial judges possess an inherent power to halt prosecutions which are oppressive and vexatious, or which may 'smack of an attempt by a disappointed prosecution to find what is considered to be a more perspicacious jury or tougher judge'.[77] But it is unlikely that the court would exercise this power on behalf of a defendant who would be perceived simply as an inveterate pornographer who has been once lucky. 'Those who skate on thin ice', Lord Morris has warned, 'cannot be heard to complain if they fall in.'[78] Their only real protection lies in the sense of fair play exhibited by prosecuting authorities, who are generally unwilling to breach the spirit of the convention against double jeopardy. Their largesse is sorely strained in obscenity cases, because they suffer from reverse handicaps. 'Autrefois convict' is not available, and 'issue

estoppel' will not run against an incorrigible defendant. A long and costly trial, which results in the conviction of one individual for publishing an obscene book, does not preclude another individual from putting the prosecution to proof all over again, by republishing the same book. A defendant convicted in one town, or at one time, may recommence publication in another place, or in the same place at a later time, and argue that circumstances have changed in the interim. A book declared obscene in one year may be published in a more permissive climate a few years later. A conviction marks the beginning, and not the end, of the struggle.

These problems have been exemplified in litigation over the activities of a film director named John Lindsay. In 1972 he made a batch of blue movies which were sold through commercial outlets in Birmingham and London. In 1974 he was charged with conspiracy to publish obscenity, but was acquitted by a Birmingham jury. He returned to Soho, where he opened a shop which sold only those films which were the subject matter of the Birmingham indictment. His activities came to the notice of the Attorney-General who decided to waive the convention against double jeopardy and to direct another prosecution, this time against Lindsay alone for direct infringement of the Obscene Publications Act. At the trial it was argued that the judge should invoke his residual power to halt oppressive and vexatious proceedings, because Lindsay was effectively being tried a second time on the same allegation which had not been proved against him in Birmingham. This was rejected, because the relative definition of obscenity required the London jury to assess the consequences of Lindsay's new distribution arrangements. The prosecution moved that no reference should be made to the Birmingham proceedings, but Lindsay had packaged his films in boxes which referred to his previous acquittal, and had decorated his shop with posters made up from press coverage about the Birmingham trial. This publicity material was present to the eyes and minds of potential customers, and the judge ruled that it was admissible in evidence. Lindsay was again found 'not guilty', a verdict he celebrated by placing his twice-acquitted films on continuous show at a Soho cinema club, where he now awaits a third prosecution.

COMPLICITY

Those who agree to publish obscenity may be charged with conspiracy to contravene the Act, and those who facilitate publication (for

example, by advertising books known to be obscene) are guilty of aiding and abetting the offence. In every case where two or more persons are involved in possessing or publishing obscene articles it is theoretically possible to charge conspiracy as well as substantive offences under the 1959 and 1964 Acts, although the Court of Appeal has discouraged the addition of conspiracy counts in such cases unless 'charges of substantive offences do not adequately express the overall criminality'.[79] In 1977 the Court issued a Practice Direction requiring prosecutors to justify any inclusion of a conspiracy count overlapping with substantive charges, a tactic which would only be upheld where 'the interests of justice demand it'.[80] It follows that statutory conspiracy should only be resorted to in cases involving distribution networks which have operated over a long period of time, or to incriminate 'behind the scenes' organizers who have never taken obscene books into their possession, or else to catch pornography enterprises which have not commenced publication at the time of police action.

Those who knowingly assist the production or distribution of obscene articles – by procuring models, taking or processing photographs, printing magazines, or warehousing material – may be charged as aiders and abetters. In *R.* v. *De Marney* the Court of Appeal upheld the conviction of a magazine editor who had published advertisements for obscene books, thereby facilitating the advertiser's offence of publishing obscenity, although the advertisements were themselves unexceptionable.[81] Section 2 (4) of the Obscene Publications Act 1959 provides:

> A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene.

Although conspiracy was, until 1977, a common-law offence, the Court of Appeal in *R.* v. *Clayton & Halsey* ruled that section 2 (4) did not preclude a charge of conspiracy to contravene the Act, because the essence of such a conspiracy count is not the *publication* of obscenity but the *anterior agreement* to publish.[82] Actual publication is not a necessary element in the offence. The only effect of section 2 (4) is to abolish prosecutions for the common-law offence of obscene libel: publishers may still be charged with conspiracy to contravene the 1959 or 1964 Acts, or with conspiracy to commit the common-law offences of corrupting public morals or outraging public decency. In *Shaw* v. *DPP* the House of Lords rejected an argument that section 2 (4) barred

such prosecutions: 'The offence at common law alleged, namely, conspiracy to corrupt public morals, did not "consist of the publication" of the magazines, it consisted of an agreement to corrupt public morals by means of the magazines, which might never have been published.'[83] This analysis was approved, albeit reluctantly, in *R.* v. *Knuller*, where Lord Reid commented that 'technically the distinction ... is correct but it appears to me to offend against the policy of the Act, and if the draftsman of the Act of 1959 had foreseen the decision in *Shaw's* case he might well have drafted the subsection differently'.[84] Draftsmen of subsequent legislation, with hindsight of *Shaw's* case, have specifically excluded common-law conspiracies in respect of plays and films,[85] and the Law Officers have given Parliamentary undertakings that conspiracy to corrupt public morals would not be used so as to deprive publishers of the 'public good' defence.[86] It has been held that this defence may be raised by a defendant accused of conspiring to contravene the Act,[87] although it is difficult to see how it could operate if no 'article' were in existence, because the merits of any projected publication would be entirely hypothetical.

The decision to charge conspiracy rather than a substantive obscenity offence will provide some tactical advantage to the prosecution. Hearsay evidence may be received to suggest that the defendant agreed to commit the crime, and convictions may more readily be achieved through 'guilt by association'. The particularity normally required in criminal indictments does not affect conspiracy charges: they may refer to 'divers dates' over many years, and to agreement 'with persons unknown'. But these advantages may be more apparent than real. There is increasing evidence that conspiracy counts are counter-productive in the fight against crime. They tend to lengthen the trial, confuse the issues, and bewilder the jury. In some respects charges of conspiracy to contravene the Obscene Publications Act will be more difficult to prove than substantive counts of publishing or possessing obscenity for gain. The latter charges do not require proof of an intention to corrupt, but conspiracy does demand knowledge of the criminal consequence of the agreement. A defendant to a conspiracy charge would be entitled to argue that at the time he entered into the agreement to publish he believed that the articles concerned would not corrupt readers, or else that they would only be published in circumstances where they would have no deleterious effect. Participants in initial stages of obscenity conspiracies are not guilty if they believed any obscenity would be edited out prior to publication, or

else was intended for publication outside the jurisdiction of English courts, in countries where obscenity laws are more lax. Although they may have been aware that the finished product could corrupt, they would not have the requisite criminal intent if they genuinely believed that any obscenity would be redeemed by its literary or artistic value. These defences to conspiracy charges are left open by section 1 (2) of the 1977 Criminal Law Act, which provides that

> Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

Even if the defendants agree to publish an article which they hope or expect will be obscene, they cannot be convicted of conspiracy if the article, when published, turns out to be within the law.[88]

An individual commits no crime merely by deciding, on his own initiative, to publish a sexually explicit book. Thought is free. But if two or more persons put their heads together and come to the same decision, their mere agreement may be made the subject of a charge of conspiracy to publish or to possess obscene articles. Two heads, in conspiracy theory, are guiltier than one. This is an irrational result, but it has long been embedded in the common law, and is now given statutory life by the Criminal Law Act of 1977. Conspiracy theory has some social rationale in cases where criminal gangs are apprehended while planning violent crime, but it may be doubted whether publishers deserve to be prosecuted for plots which never thicken. A man on the verge of publishing an obscene article may be charged with an *attempt* to commit the substantive offence. If he organizes or encourages others to peddle obscenity, he is guilty of *inciting* the offence. If a conspiracy is nipped *after* it has budded, anyone who has aided and abetted or counselled and procured the publication may be convicted of complicity in the complete crime. Conspiracy is unnecessary, because the scope of attempt, incitement, or complicity, coupled with the wide terms of the 1959 and 1964 statutory offences, is ample for police intervention whenever public danger is realistically apprehended.

4
Enforcing the Obscene Publications Act

CASTING THE FIRST STONE

The predominant characteristic of English obscenity law is vagueness, with the consequence that a wide discretion is vested in prosecuting authorities. When books, films, or magazines have been seized by police, a decision must be made on the method of proceeding against their owner. There are two statutory alternatives: either a prosecution for a criminal offence under section 2 of the 1959 Act, or a civil forfeiture hearing under section 3. In the former case, a summons is issued against the occupier or any other person who may have assisted publication, and the trial proceeds either before a magistrate (who may sentence a convicted defendant to a maximum term of six months' imprisonment and/or a fine of £400) or, at the election of either party, before a Crown Court judge and jury, where the sentence may be as high as three years, and the fine unlimited. Section 3 forfeiture proceedings, on the other hand, involve no criminal charge or consequence other than destruction of the articles if a magistrate or a bench of lay justices is satisfied that they are obscene. The procedure differs in each case, and the decision as to which course to adopt will be made by police lawyers, in consultation with the office of the Director of Public Prosecutions.

Police action

The police formulate their own internal guidelines for action on obscenity, and these generally provide some extra-legal restraint on the powers of individual officers. In the London area, for example, a confidential memorandum was drawn up for police guidance in