

**Thesis submitted for the degree of
Doctor of Philosophy
at the University of Leicester**

by

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The Protection of High Art in a Postmodern Age

**Abstract of thesis submitted for the degree of Doctor of Philosophy at the
University of Leicester by Dawn Elizabeth Watkins**

This project considers whether it is possible to define some works of literary or visual art as high art solely by virtue of their inherent qualities, or whether there are factors external to the work which are significant to this process of categorisation. Thereafter the project considers whether it is appropriate to argue that high art as a discrete category should be accorded a value of its own to be defended by the legal system alongside or in preference to other values (particularly freedom of speech), focusing initially upon non-legal arguments which have been put forward in this regard.

Thereafter, the project critically analyses the way in which the English legal system has dealt with such issues during the period 1780 to date; firstly by analysing the approach of the legislature towards the notion of high art and its protection and secondly, by analysing the approach of the courts in this area. Both the courts' role in enforcing statute law and administering the common law are assessed; and the extent to which the courts have acknowledged the free speech principle in relation to artistic and non-artistic matter is given particular consideration.

Finally, the project considers those international obligations which influence English law in this area, with particular reference to the European Convention on Human Rights and to the recent inclusion of Article 10, the right to freedom of expression, in the Human Rights Act 1998. The extent to which high art might be afforded greater protection under this new Act is considered, and conclusions are drawn as to whether greater protection should be sought for high art under English law and if so, upon what basis.

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Introduction

Is it possible to define high art
By factors that indwell? Or do other things
Exist which are also relevant in part?
Is high art incomparable? Or do experts bring
Their expertise to place high art at best
Of other works which by comparison
Are thought no better than the rest?
Can form, or rhyme or style be counted on
As evidence of unequaled merit?
Or is excellence found by those outside,
Who project those values they inherit
Into works in which they thence abide?
Such questions occupy this thesis hence
Such questions form its present sense.

This sonnet will be referred to subsequently in chapter one of this thesis as an example of a badly-written sonnet which is not, and never will be, considered high art. However, the question which it raises; “Is it possible to define high art by factors that indwell?” forms the basis of chapters one and two and provides a foundation from which this thesis then critically analyses non-legal arguments relating to the protection of high art.

Whilst the general notion of high art includes literature, theatre, music, ballet, opera and painting,¹ the scope of this thesis is limited to literature and the visual arts (the latter term referring to painting and to other forms of visual art such as sculpture or, more recently, installation, video, film and performance art, but excluding theatre, music, ballet and opera). Furthermore, whilst all of these visual art forms receive some attention, the focus of the thesis is upon non-motion visual art. Hence film is

¹ Seabrook J, *Nobrow*, (London, Methuen, 2000) p.17.

not discussed at length. This further limitation was considered necessary in order to ensure that the matters raised (particularly those concerning the nature and definition of high art) were discussed in sufficient depth, within the maximum word limit allowed.

The extent of this thesis is also limited in time to the period 1780 to 2001,² such limitation being considered both necessary³ and appropriate to the subject matter since, as will be discussed more fully in this thesis, ‘the Arts’ as they are now generally perceived did not come into being until the late eighteenth century, when “Art was separated from craft”⁴ and “became the term for a group of particularly imaginative and creative skills... *Art* came to stand for a special kind of truth, ‘imaginative truth’, and *artist* for a special kind of person”.⁵ Within this time period the approaches of the legislature and the courts to high art are considered separately, in chapters four and five. The decision to address these separately was made upon the basis that whilst the legislature and the courts together form that which is broadly termed the English legal system, each has a distinctive role within that system. Whereas the role of the legislature might be termed *proactive*, in that it is the body responsible for the creation of statute law, the role of the courts is more *reactive* in that they are responsible for applying the law (be it statute or common law) to the particular circumstances which are brought before them.

It has been correctly stated that “history has many times seen the suppression, in the name of sexual morality or protection against offence, of many works now acknowledged as great masterpieces or at least valuable contributions”.⁶ Examples of such works are discussed in this thesis (such as the works of Zola in 1888⁷ or the paintings of DH Lawrence in 1929⁸) but are placed within a context which places

² 31st March 2001.

³ Again, on account of the maximum word limit.

⁴ Pointon M, “Romanticism in English Art”, in Prickett S (ed.), *The Romantics The Context of English Literature*, (London, Methuen & Co, 1981), p.100.

⁵ Williams R, *Culture and Society 1780 - 1950*, (Chatto & Windus, London , 1958), p.xv

⁶ Schauer F, *Free Speech: A Philosophical Enquiry*, (Cambridge, Cambridge University Press, 1982) p.109.

⁷ Chapter five, p.163

⁸ Chapter five, p.175

particular emphasis upon the highly significant change which occurred in the arts from around the 1860s onwards, whereby high art became removed from the broadly moral or didactic purpose which it had formerly held⁹ (“the pictured morals of the work of art charm our minds, and, through our eyes, correct our hearts”¹⁰) and which had provided the basis for the Legislature’s promotion of high art during the early 1800s.¹¹ This change, initiated by the so-called art for art’s sake doctrine, also explains the increase in prosecutions of literary or visual works art on morality grounds following the implementation of the Obscene Publications Act 1857;¹² an Act which had been provided solely to strengthen common law powers against the sale of obscene or “poisonous publications,”¹³ which the Legislature considered to be the antithesis of high art at the time of its drafting.¹⁴

Hence the discussion of the English legal system’s approach to high art from the latter nineteenth century to the beginning of the twenty-first century may be viewed in part as the story of the law’s response to the changing nature of art; a story which is made all the more fascinating by the fact that the courts’ administration of the law, particularly in regard to the common law, has been grounded in the Christian tradition and includes the notion that the court has a duty to act as *custodes morum*, based upon a strictly conventional form of morality. A vital new ‘twist’ in the tale emerges in the form of the Obscene Publications Act 1959,¹⁵ which allows for the first time the court to consider the public benefit in publishing a work which might fall beyond the scope of conventional morality, yet be proved worthy of publication on purely artistic or literary grounds.¹⁶ This thesis challenges the notion that artistic or literary works should be judged according to their own merits,¹⁷ primarily upon

⁹ Chapter three, p.99

¹⁰ Sandby Sir W, *The History of the Royal Academy of Arts*, Vol.1 (London, Longman, Roberts & Green, 1862) pp.1-2.

¹¹ Chapter four, p.115

¹² (20 & 21 Vict.) c.83.

¹³ HL, Vol. CXLV col.102, May 11th 1857.

¹⁴ Chapter four, p.114.

¹⁵ 7 & 8 Eliz.2, c.66.

¹⁶ Obscene Publications Act 1959, s.4.

¹⁷ Contrasting particularly with the views of Kearns in this regard, as expressed in his *The Legal Concept of Art* (Oxford, Hart, 1998) and “Sensational Art and Legal Restraint” (2000) NLJ Vol. 150 No. 6962), 1776-7

the basis that such a practice elevates literature and the visual arts to a special position above society, which the writer considers to be inappropriate.¹⁸

In considering the likely impact of the Human Rights Act 1998¹⁹ upon this area of the law, this thesis considers both the approach of the English courts in relation to the free speech principle (prior to the implementation of the Human Rights Act) and the application of Article 10 of the European Convention on Human Rights by the European court and commission. Apparent in both is the priority afforded to political or journalistic speech when compared to artistic expression.²⁰ This thesis questions the basis upon which a distinction is drawn between these two forms of expression and sets out arguments in favour of upholding more strongly the right to freedom of artistic expression, whilst applying such arguments equally to those works considered to be high art and those which, like the writer's own sonnet, are far less likely ever to be considered so.

Therefore, to summarise: This project critically examines the idea that some creative works (be it literature or works of visual art) are, by virtue of their creative nature, inherently different from more prosaic works. The project looks at the notion that high art is a discrete category and challenges in particular the notion that high art is so inherently 'special' that it merits being defended by the legal system alongside (or in preference to) other values such as freedom of speech. The project looks at how the legal system has dealt with such issues to date and considers how it might deal with them in the future.

¹⁸ Chapter three, pp.102-104.

¹⁹ c.42, 1998. The Act came into force on 1st October 2000.

²⁰ Chapter six, p.227.

Chapter One

Defining High Art I - The Search for Inherent Attributes

Introduction

It is the purpose of this and the following chapter to define the term “high art”. A work of art which is ‘high’ is not, of course, that which is situated *physically* above other works; Charles Dickens’ *Great Expectations*¹ is not positioned six feet above Dick Francis’ *High Stakes*², but rather it is considered metaphorically to occupy a position which is superior to it. It is at the peak of this metaphorical hierarchy that high art is thought to exist. This thesis questions whether high art has been or is considered to be ‘great’ or greatly superior³ to other works because certain properties are present in high art objects which are absent, or present to a much lesser degree, in works of an apparently more prosaic kind. More particularly, in the first two chapters of this thesis, the following questions are considered:-

1. Is there any factor (or factors) intrinsic to a work of literary or visual art which can be identified and used as a means of determining whether or not it is high art?
2. How significant are factors external to the work, such as the role of the artist or author, the response of the reader or viewer, or more generally, historical, ideological and sociological factors, in its categorisation as high art?

The following analogy is made in order to illustrate this further: Suppose a person, X, is walking through a forest and catches a glimpse of a gleaming object on the ground which is almost totally covered in soil and decaying leaves. Upon removing the object, X finds that it is a heavy, golden-coloured, rectangular mass. X believes that she may have discovered a gold bar and she will be able to apply certain tests (or

¹ McMaster RD (ed.), *Great Expectations by Charles Dickens*, (Toronto & London, Macmillan, 1965)

² Francis D, *High Stakes*, (London, Pan Books, 1975)

³ The significance of the distinction between absolute and comparative greatness is discussed further below, pp.21-22.

at least request that a suitably qualified person carries out such tests on her behalf) in order to determine the inherent properties of the object, which will inform X indubitably whether she has or has not discovered gold. The next day X is walking through the same forest and finds a manuscript and a painting on canvas hidden beneath another pile of soil and leaves (the manuscript and the painting have miraculously, for the purposes of this exercise, not been damaged by the said soil and leaves). Is it possible for X, or indeed for an expert requisitioned by her, to read the manuscript and look at the painting and to identify within either work some attribute or attributes which will determine whether or not she has discovered high art? Or are there factors external to the works themselves which will be influential in determining their status?

The focus of this chapter is upon the work itself and upon those apparently inherent qualities that have been identified by various commentators at various times as being those which constitute high art. There are those which are of an immaterial and intangible nature, such as the so-called 'aesthetic', 'timeless' or 'expressive' qualities; and those which appear to be of a more tangible and substantial nature, such as 'form', 'style' or 'composition'. This latter category will be considered first, with the visual arts and literature being addressed separately.

Section One: Tangible or Substantial Qualities

(a) The Visual Arts

It is the so-called 'formal' qualities of visual art; the way in which lines, shapes and colours have been arranged and relate to one another within particular works which provide an adequate starting point for this attempt to identify within certain works factors which mark them out as high art, although the views put forward concerning the significance of form in the evaluation of visual art are as wide-ranging as their subject matter. Those who argue strongly in favour of defining high art in terms of its expressive or communicative qualities have denied that form has any significance

when value judgements are being made with regard to a particular work.⁴ Bell (1914) put forward the opposite view with equal vehemence; asserting that “significant form” is the single quality “without which a work of art cannot exist”.⁵ Writing with reference to form, Read (1972) states that “[t]he obvious necessity in a composition is simply that it shall cohere by some principle - in physical terms, that it should not distract the eye by its unease, or lack of balance” and theories as to what amounts to the perfect composition in painting have been put forward throughout history. Intellectually conceived formulas using mathematical ratios have been used, such as the placing of rectangular figures in 21:34 proportion (Fechner’s “golden section”),⁶ together with theories as to the use (and repetition) of certain mass shapes⁷ (Hogarth, for example, is said to have considered the pyramid as the most beautiful mass)⁸ and it is submitted that theories as to the formal qualities of works of art can be applied readily to static two-dimensional works such as paintings, etchings, drawings and photographs and to three-dimensional sculptures, as a basis from which to form an assessment of them.

Certain artists have exhibited in their work an outstanding capacity to achieve balance in composition. One example is Rembrandt van Rijn (1606 -1669). Rembrandt’s etching entitled *Christ Preaching* or *The Sermon of Jesus* (c.1652),⁹ an etching, where Christ is depicted preaching to a crowd of people, who are variously sitting, standing or reclining, is considered by Gombrich (1995) to be an example of “how much artistic wisdom and skill he uses in the arrangement of his groups” and an illustration of “the art of distributing a mass of people, in apparently casual yet perfectly harmonious groups”.¹⁰ Furthermore, this work provides us with an excellent example of a work which is composed in such a way as to lead the eye of the beholder constantly towards the central focus or principal subject matter of the work. The figures depicted are delineated and situated in such a way as to cause the

⁴ See below pp.23 and 26

⁵ Bell C, *Art* (ed. Bullen JB) (Oxford, Oxford University Press, 1987) (Orig. pub. 1914) pp.7-8. See further below p.30

⁶ Carritt EF, *An Introduction to Aesthetics*, (London, Hutchinson’s University Library, 1949) p.20.

⁷ Read Sir H, *The Meaning of Art*, (London, Faber Paperbacks, 1972), p.64

⁸ Carritt, n 6 above, p.20.

⁹ Hoekstra H (ed.), *Rembrandt and the Bible*, (Utrecht, Magna Books, 1990), pp.306-7.

¹⁰ Gombrich EH, *The Story of Art*, (London, Phaidon Press Ltd., 16th ed, 1995), p.427.

eye to be drawn to the central figure; Christ. It is possible for a painting, etching, drawing, photograph, or some other form of two-dimensional art to be constructed in this way by the use of lines, shapes and colours. Other works by Rembrandt cause the viewer to focus upon the principal subject matter particularly by the use of colour, whereby the impression is created that light is falling upon or emanating from it. An example of this is an oil painting entitled *The Raising of Lazarus* (1630).¹¹ Muller (1968) describes this as follows: “[a] light strikes the raised arm, instantly capturing the attention and leading the eye along the majestic vertical which extends right down to the edge of the tomb and the pallid figure of Lazarus. In this work, the light fulfills the sole purpose of illustrating what the artist wishes to say”.¹² Thus it is possible to see in Rembrandt’s works a number of qualities which have caused those works to be acclaimed as excellent examples of their kind. However, there is no particular formal quality or qualities which is common to them all; since these differ necessarily according to the subject matter of the work and the media with which it has been created.

It is possible to identify the use of other formal techniques within works of visual art, such as that known as ‘perspective’ which can cause a two-dimensional painting to appear to the viewer as three-dimensional; an effect which has been described as giving the impression to the viewer that he or she could walk into the painting.¹³ Having identified the use of the technique, it is possible to draw conclusions as to the quality of its application in certain works. The artist Paolo Uccello (1397-1475) has been critically acclaimed as “a great artist”,¹⁴ because, as well as showing balance of composition within a complex subject matter, his works such as *The Battle (or Rout) of San Romano* (c.1456)¹⁵ and *The Hunt* (c.1468)¹⁶ exhibit an advanced use of the technique of perspective; his work being described as “an

¹¹ Reproduced in Hoekstra, n 9 above, p.351

¹² Muller JE, *Rembrandt*, (London, Thames and Hudson, 1968), p.30

¹³ Wolfe T, *The Painted Word*, (London, Black Swan, 2nd ed, 1989), p.77-8

¹⁴ Pope-Hennessy J refers to Uccello within a category of “great artists” in his *Paolo Uccello Complete Edition* (London & New York, 2nd ed, 1969), p.25

¹⁵ Reproduced in Pope-Hennessy, n 14 above, plates 51-76. See also Borsi, F and S, *Paolo Uccello*, (London, Thames and Hudson, 1994), pp.212-231

¹⁶ Reproduced in University of Oxford, *Paolo Uccello's Hunt In The Forest*, (Oxford, Ashmoleum Museum, 1981), plate 8

important link in the development of *quattrocento* painting and...of particular significance for painters active during the final decades of the [fifteenth] century when balance and proportion were not so carefully cultivated".¹⁷ However, with regard to perspective, P and L Murray (1976) maintain that this now firmly established "quasi-mathematical system" can be "learnt by any moderately mathematical art-student in a few hours"¹⁸ and for this reason many artists have since chosen to paint in a 'flat' style which deliberately omits the use of this technique, such as in abstract art. Wolfe (1989) identifies this 'flat' style as a significant feature of Modernist painting, maintaining that "to the everlasting glory of Modernism - you couldn't walk into a Modernist painting and least of all walk into an Abstract Expressionist painting".¹⁹

If we were to take Uccello's use of perspective and the balance of composition exhibited in the two works cited above and to compare them to later works, such as *Derby Day* (c.1856-8)²⁰ or *The Railway Station* (1862)²¹ by William Powell Frith (1819-1909), then it might be argued that these factors identified in Uccello's works are of a comparatively low standard. Gaunt (1964) maintains in regard to Frith that "the technical skill which is brilliantly evident in the detail of *Derby Day*, and his ability to animate a crowded scene without confusion proclaim him a painter of rare gifts"²² and with regard to *The Railway Station*, Gaunt maintains that "[t]he composition...is handled in masterly fashion".²³ Yet Uccello's works have been highly acclaimed. Thus it appears that certain qualities can be identified within a work which are not significant *per se*, but which are relatively significant in that they exhibit something, such as a level of skill on the artist's part, which compares more favourably to that found in works produced in the same era. Thus it is submitted that by reference to some particular paintings, it has been possible to find within various

¹⁷ University of Oxford, n 16 above, section entitled 'Perspective' (pages not numbered).

¹⁸ Murray P and L, *The Penguin Dictionary of Art and Artists*, (Harmondsworth, Penguin Books, 4th ed, 1976), p.337.

¹⁹ Wolfe, n 13 above, pp.77-8.

²⁰ Reproduced in Gaunt W, *A Concise History of English Painting*, (London, Thames and Hudson, 1964), illustration 147.

²¹ Reproduced in Gaunt W, n 20 above, illustration 148.

²² Gaunt, n 20 above, p.189.

²³ Gaunt, n 20 above, p.190.

types of work formal qualities which mark out those works as being excellent examples of their kind. However, what is not possible is to identify a single characteristic, or a combination of characteristics, within all these works which distinguishes them as high art.²⁴

There are, of course, other apparently objective factors which might be considered in addition to the formal qualities discussed, such as the style of a work or even its subject matter. An example of one relevant 'stylistic' factor is the way in which paint has been applied to a canvas (or, to be more contemporary, to the acrylic carpet).²⁵ A distinctive characteristic in the work of the so-called Impressionist painters was their manner of working; described as "dabbing and brushing patches of paint onto the canvas"²⁶ not in a measured and considered manner, but quickly, freely and without deliberation, "caring less for the detail than for the general effect of the whole".²⁷ This technique was ridiculed by contemporary observers; for example, Manet's *Le Dejeuner sur l'Herbe* (1863) caused an outcry when first exhibited in the 1860s²⁸, yet the works of the Impressionists were to be highly acclaimed by future observers. Writing in 1995, Gombrich states that "[a]fter the lapse of a century it is hard for us to understand why these pictures aroused such a storm of derision and indignation. We realize without difficulty that apparent sketchiness has nothing whatever to do with carelessness but is the outcome of great artistic wisdom".²⁹ Here then is an obvious example of a stylistic factor which has become integral to the categorisation of a group of works as high art.

With regard to the subject matter of a work, it is difficult to identify any factors which can be used to draw comparisons between similar works without referring to

²⁴ See further below, p.22

²⁵ The writer refers to Richard Woods' *Renovated Carpet No.1(Burgundy)* a carpet upon which the artist has painted in gloss paint and PVA. See Arts Council, *Here To Stay Arts Council Collection Purchases of the 1990s* (London, Hayward Gallery Publishing, 1998), pp.56-57.

²⁶ Walther IF & R Metzger, *Vincent Van Gogh - The Complete Paintings*, Volume 1, (Koln, Benedikt Taschen, 1990), p.198

²⁷ Gombrich, n 10 above, p.518

²⁸ Macleod G, "The Visual Arts", in Levenson M (ed.), *The Cambridge Companion to Modernism*, (Cambridge, Cambridge University Press, 1999), pp.194-216, p.194.

²⁹ Gombrich n 10 above, p.521.

additional factors. Similar subject matter allows us to draw more easily comparisons between certain works, by referring to the manner in which the subject has been portrayed and by referring to some of the formal qualities and stylistic factors which have already been discussed. The realistic portrayal of subject matter might be a factor in certain works by which to judge their relative merits; for instance in regard to some of the works of the Pre-Raphaelite painters such as William Holman Hunt (1827-1910) and Dante Gabriel Rossetti (1828-1882) a common feature is the artist's minute observation of detail.³⁰ That which Grieve (1976) refers to as the "coarse realism" of Hunt's *The Hireling Shepherd* (c.1851) is an example of this - the subject matter being so realistically portrayed that it shocked contemporary observers.³¹ However, in more recent years, artists working in the Abstract style have created paintings and sculptures which have "no recognisable subject at all, presuming instead that formalism is the *sine qua non* of art".³² And thus abstraction as style rejects the long-held tradition that visual art reproduces or depicts persons or objects which are identifiable by the viewer. Thus whilst it is possible to refer to the style of the depiction of the subject matter of a work as one basis for forming a qualitative assessment of it, it is insufficient to use this as the sole criteria for most works, and impossible to use for some.

A further discussion of subject matter leads into a discussion of the more intangible qualities which high art has been thought to possess. For example, Greene (1952) asserts that "[i]f a work of art is to be truly great, its subject matter must give the artist an opportunity to express his most comprehensive philosophy of life".³³ He bases this view upon his belief that the judgement of the 'greatness' or 'profundity' of a work of art will depend upon whether the observer perceives that the work "mediate[s] a profound experience by expressing, *via* artistic form, some profound interpretation of its subject matter."³⁴ It is therefore the artistic interpretation of the

³⁰ Hilton T, *The Pre-Raphaelites*, (London, Thames and Hudson, 1970), p.57

³¹ Grieve AI, *The Art of Dante Gabriel Rossetti*, (Norwich, Real World Publications, 1976), p.33.

³² Rosenthal M, *Abstraction in the Twentieth Century: Total Risk, Freedom, Discipline*, (New York, The Solomon R Guggenheim Foundation, 1996), Introduction p.I.

³³ Greene TM, *The Arts and the Art of Criticism* (Princeton, Princeton University Press, 1952), p.465.

³⁴ Greene n 33 above, p.463

subject matter which is of crucial importance; indeed Greene asserts that, in theory, we might even contend that an artist “with the requisite insight and imagination should be able to select any subject-matter...and so interpret [it]...as to endow it with profound human significance”.³⁵ Whether or not it is possible for a work of art to ‘mediate a profound experience’ between the artist and the observer will be considered later in this chapter.

(b) Literature

The structural factors within literary works, being those which necessarily relate to the words on the page; how they are organised, juxtaposed and divided can be and have been used as a means of evaluating them. Notable in this regard is a method of analysing and assessing literary works which was developed in the early decades of the twentieth century, and which became known as “New Criticism”.³⁶ The New Critics emphasised form and “the importance of considering ‘the words on the page’ rather than factors such as the life of the author and his or her intentions”,³⁷ when making value judgements concerning any literary work. Eagleton (1996) describes the New Critics as being those who broke away from the “Great Man theory of literature”,³⁸ strongly disputing the relevance of the author’s intentions in any interpretation of literary texts.³⁹ Lynn (1998) describes how, if we follow this theory, then “[t]he purpose of giving attention to the work itself is ...to expose the work’s unity. In a unified work, every element works together toward a theme. Every element is essential. In addition, the “close reading” ...of literary work reveals its complexity. Great Literature, New Critics assume, contains oppositions, ambiguities, ironies, tensions; these are unified by the work - if it is successful by the standards of New Criticism”.⁴⁰

³⁵ Greene n 33 above, p.465.

³⁶ See further below, p.75.

³⁷ Bennett A & N Royle *An Introduction to Literature, Criticism and Theory: Key Critical Concepts* (Hemel Hempstead, Harvester Wheatsheaf, 1995), p.11

³⁸ Eagleton T, *Literary Theory An Introduction*, (Basil Blackwell, Oxford, 2nd edition, 1996), p.41.

³⁹ Ibid.

⁴⁰ Lynn S, *Texts and Contexts Writing About Literature With Critical Theory*, (Longman, New York, 2nd ed, 1998) p. 2.

Lynn (1998) states further that New Criticism “discriminates against works that are “poorly made...simplistic, single-sided, shallow, inarticulate, lacking in irony and self-consciousness” yet “champions works that repay our careful and imaginative attention”,⁴¹ thus making it attractive as a means of determining which literary works fall within the category of high art. However, Eagleton (1996) points out that the focus of New Criticism has been upon poetry primarily and he queries whether it is so successful a theory when faced with a wider genre of works.⁴² Certainly the poem lends itself well to a formalistic analysis. Lennard (1996) describes how certain forms “have become historically associated with particular kinds of poetry”⁴³ and he gives the example of the sonnet, which will consist of “fourteen lines of iambic pentameter..and approximately 140 syllables”, and the only variable is the rhyming scheme which has been adopted.⁴⁴ Saville (1982) maintains that “we are able to judge a sonnet, say, that it is flawed because its choice of theme is ill-matched to its formal constraints”⁴⁵ and provides one example of the possibility of making a qualitative assessment in respect of this type of work, based upon formal factors.

It would be more difficult (and a rather lengthier exercise) to analyse other forms of literature in such a closely structured manner, but other factors have been identified within other forms of work, which can be used as a means to judging their quality when compared to other works of a similar type. Q.D. Leavis maintained that a novel could fall within the category of high art only if it was, as Goodall (1995) later terms it, a “challenging intellectual experience”.⁴⁶ A formal factor which might contribute to the achievement of such an experience would be the construction of the plot; in a work of high art one would expect that the plot is more complex and less predictable than that which has been encountered in works of lesser quality. The example given at the beginning of the chapter referred to two novels. Charles

⁴¹ Lynn, n 40 above, p.29.

⁴² Eagleton, n 38 above, p.44.

⁴³ Lennard J, *The Poetry Handbook A Guide to Reading Poetry for Pleasure and Practical Criticism*, (Oxford & New York, Oxford University Press, 1996), p.23

⁴⁴ Ibid.

⁴⁵ Saville A, *The Test of Time An Essay in Philosophical Aesthetics*, (Oxford, Clarendon Press, 1982), p.197

⁴⁶ Goodall P, *High Culture, Popular Culture The Long Debate*, (St.Leonards, Allen & Unwin, 1995), p.10.

Dickens' *Great Expectations* produced in Q.D. Leavis the conviction that "it is a great novel, seriously engaged in discussing, by exemplifying, profound and basic realities of human experience",⁴⁷ whereas the novel by Dick Francis arguably provides a contemporary example of the type of work which Q.D. Leavis described, with some disdain, as a 'merely popular novel' or 'bestseller',⁴⁸ which entertains but does not challenge the reader in any way. In similar terms, F.R. Leavis (1962) considered the "major novelists"⁴⁹ to be those who are "significant in terms of the human awareness they promote; awareness of the possibilities of life".⁵⁰

The author's use of language in a literary work is another factor which can be identified as being one which indicates the perceived quality of the work. The works of Shakespeare have been highly acclaimed because they exhibit, amongst other things, Shakespeare's command of the English language and his ability to use 'ordinary' words to extraordinary effect, and extraordinary words to make more vivid 'ordinary' or recognisable thoughts and emotions.⁵¹ Cordelia's response to Lear; "Nothing, my lord" and her repeated "Nothing" in the opening scene of *King Lear* provide an example of the former effect.⁵² Cordelia's words are simple, yet in their context too simple for Lear and they are thus the source of great dramatic tension at the start of the play. One of the most familiar of Shakespeare's Sonnets provides an example of the latter effect; the poet describing his love and the object of this love as follows:

Shall I compare thee to a summer's day?
 Thou art more lovely and more temperate:
 Rough winds do shake the darling buds of May,
 And summer's lease hath all too short a date:

⁴⁷ Leavis QD and FR, *Dickens the Novelist*, (London, Chatto & Windus, 1970), p.278

⁴⁸ Leavis QD, *Fiction and the Reading Public*, (London, Chatto & Windus, 1932), chapter 3

⁴⁹ Leavis FR, *The Great Tradition*, (London, Chatto & Windus, 1962), p.2

⁵⁰ Ibid.

⁵¹ For example, Hobsbaum P states: "In Shakespeare we have the precise use of language which is an essential characteristic of a great writer" in *A Theory of Communication* (London, Macmillan, 1970) p.215.

⁵² Halio JL (ed.), *The New Cambridge Shakespeare -The Tragedy of King Lear* (Cambridge, Cambridge University Press, 1992), p.100.

Sometime too hot the eye of heaven shines,
And often is his gold complexion dimm'd,
And every fair from fair sometimes declines,
By chance, or nature's changing course, untrimm'd;
But thy eternal summer shall not fade,
Nor lose possession of that fair thou ow'st;
Nor shall Death brag thou wander'st in his shade,
When in eternal lines to time thou grow'st:
So long as men can breathe, or eye can see,
So long lives this, and this gives life to thee.⁵³

There are, of course, a vast number of poetic works which could be cited in addition to this one; the use of language which is separate from practical, everyday use being a particularly obvious feature of much poetry. By contrast, works in which ordinary language is used (by which the writer refers to those words which are instantly recognisable by the majority of readers as being those used in their everyday language) are often regarded as being of a lesser quality, as are works such as the writer's own sonnet, situated in the introduction to this thesis, which (among other things) fails to use ordinary words to extraordinary effect.

The use of linguistic features as a means to determining quality has not, of course, been confined to poetry: it has also been used to determine that which is *Literature*⁵⁴ among all types of fictional writing. Certainly the way in which language is used in high art, such as the practice of "making strange"⁵⁵ ordinary speech, can require an effort from the reader which more prosaic works will not induce. However, as Eagleton (1996) states, the obvious difficulty in using a linguistic approach to assess literary works is that language use varies widely and is by no means universal.⁵⁶ Thus whilst it may be possible in works of established high art to identify linguistic features

⁵³ Ridley MR, *Sonnets by William Shakespeare*, (London, JM Dent & Sons Ltd., 1934), p.8.

⁵⁴ Eagleton, n 38 above, Introduction.

⁵⁵ Eagleton, n 38 above p.5.

⁵⁶ Ibid. See also Ellis JM, *The Theory of Literary Criticism A Logical Analysis*, (Berkeley, University of California Press, 1974), p.27.

which may have caused such works to become highly acclaimed, it is a far more difficult exercise to conclude with certainty that a newly discovered manuscript, such as the one unearthed by X in this chapter's introduction, is high art on account of its linguistic features alone. The use of language in the manuscript may be such that it causes X to fully engage her mind in determining its meaning, but this need not necessarily be the case for other readers. There is, arguably, then, some other factor or factors which are requisite to the definition of high art and thus the search continues in this and the following chapter.

Can Inherent Factors be Identified in Contemporary or 'Postmodern' Works?

Lyotard (1984) has stated: "A postmodern artist or writer is in the position of a philosopher: the text he writes, the work he produces are not in principle governed by preestablished rules, and they cannot be judged according to a predetermining judgement, by applying familiar categories to the text or work"⁵⁷ and it is upon the basis that it is commonly stated that postmodern art "has rendered standards such as "serious...artistic...value" obsolete".⁵⁸ The "serious...artistic...value" to which Adler (1990) refers is, of course, the test applied under US obscenity law,⁵⁹ akin to the 'literary or artistic merit test' applied under English obscenity law,⁶⁰ when the court is deciding whether to preserve a particular work from censorship or destruction on account of its literary or artistic worth.

Before proceeding further, it is necessary to define that which is meant by the terms 'Modernist' and 'Post-Modernist' in this thesis. 'Modernity' is a word which is used to describe our present (and recent) times⁶¹ but the 'Modernist' era (also called 'Modernism') was a period dating from the mid/late nineteenth century to the early/mid twentieth century. Adler maintains that the period spans a century,

⁵⁷ Lyotard J-F, *The Post-Modern Condition: A Report on Knowledge*, (Manchester, Manchester University Press, 1984), p.81.

⁵⁸ Adler AM, "Post-Modern Art and the Death of Obscenity Law", *Yale LJ*, Vol.99, April 1990, 1359.

⁵⁹ As established in *Miller v California* 413 U.S. 15 (1973). See Adler, n 58 above, p.1361.

⁶⁰ Obscene Publication Act 1959 (7 & 8 Eliz. 2), c. 66.

⁶¹ Allen RE (ed.) *The Pocket Oxford Dictionary of Current English*, (Oxford, Clarendon Press, 7th ed, 1984), pp.472-3.

beginning in the 1860s and ending in the 1960s,⁶² whereas other writers have diminished this to a shorter period between around 1890 to 1930,⁶³ with its ‘peak period’ in England and America being from 1910 to 1925.⁶⁴ With regard to visual art and literature, the period saw dramatic changes in techniques and subject matter which had hitherto been accepted as appropriate⁶⁵ and was characterised by a belief in the separation of art from life⁶⁶ (“art for art’s sake”) and a separation in status between art of the highest quality, which was created and accessed only by the intellectual few, and that of ‘low’ quality which appealed to ‘the masses’,⁶⁷ a view which associated particularly with Q.D. and F.R. Leavis. This aspect of Modernism is discussed in more detail in chapter three.

The postmodern era is thought to have commenced in around the 1950s (although its impact upon various art forms is considered to have occurred at different stages from the 1950s onwards)⁶⁸ and continues to the present time. The terms ‘post-Modern’, ‘postmodern’ or ‘Post-Modern’⁶⁹ and their corresponding ‘ists’ and ‘isms’ have been used so widely and so variously as to make it “a standard move in the game of defining postmodernism to say that attempts at defining it are notoriously unsatisfactory”.⁷⁰ Theories which have been expressed in the post-modern era have been seen both as a response to Modernism (in the sense that postmodern views offer a challenge to pre-existing ideas) and as a development of Modernism (whereby postmodern views are seen as adding to existing ideas)⁷¹ - thus ‘post’ *after* ‘modern’ *Modernism*, rather than modernity. Yet it has been stated too that “there is

⁶² Adler, n 58 above, p.1363. Jencks C, *What Is Post-Modernism?* (London, Academy Editions, 4th ed, 1996), p.8 dates Modernism from 1840 - 1930.

⁶³ Levenson M (ed.), *The Cambridge Companion to Modernism*, (Cambridge, Cambridge University Press, 1999), p.6. Williams R, *The Politics of Modernism*, (London, Verso, 1989), p.32

⁶⁴ Bell M, “The Metaphysics of Modernism”, in M Levenson (ed.), *The Cambridge Companion to Modernism*, (Cambridge, Cambridge University Press, 1999), pp.9-32, at p.9.

⁶⁵ Macleod G, *The Visual Arts*, in Levenson M (ed.), *The Cambridge Companion to Modernism*, (Cambridge, Cambridge University Press, 1999), pp.194-216, p.194.

⁶⁶ Blair S, “Modernism and the Politics of Culture”, in Levenson M (ed.), *The Cambridge Companion to Modernism*, (Cambridge, Cambridge University Press, 1999), pp.158-174, at p.162.

⁶⁷ See Carey J, *The Intellectuals and the Masses - Pride and Prejudice among the Literary Intelligentsia 1880 - 1939* (London, Faber & Faber, 1992), Chapter 4.

⁶⁸ Bertens H, *The Idea of the Postmodern A History*, (London & New York, Routledge, 1995)

⁶⁹ Jencks C (ed.), *The Post-modern Reader* (London, Academy Editions, 1992), p.16.

⁷⁰ Lucy N, *Postmodern Literary Theory: An Introduction* (Oxford, Blackwell, 1997), p.63.

⁷¹ Jencks, n 69 above, p.12.

considerable disagreement as to whether we are witnessing a simple extension, or development, of modernity, or whether we are entering a genuinely new historical configuration”⁷² and there is even disagreement concerning whether we are now existing in a postmodern era, or whether modernism and postmodernism continue to exist simultaneously.⁷³

Whilst the term defies precise definition, there are a considerable number of characteristics that are thought to pertain to postmodernism, or ‘the postmodern condition’.⁷⁴ Kearns (1998) provides the reader with some thirty traits of postmodernism, such as “(1) the meaninglessness of all higher truths”; “(4) the dominance of market forces”; “(12) eclecticism”; “(22) self-legitimation” and “(26) oblique and ironic statement; reverence of “cleverness”; pseudo-sophistication”⁷⁵ and in practice the term ‘postmodern’ is understood to refer to a multitude of different facts, statistics, ideas and theories, all of which are aspects of a general postmodern condition. As Jencks (1996) states, despite the fact that the term is welcomed and used in a positive sense only by few (a minority of which the writer is not a member), post-modernism is now “inescapable”.⁷⁶ Thus it is a term which is used throughout the remainder of this thesis. To return now to the search for formal qualities within postmodern visual art and literature. Again these will be dealt with separately:

(a) The Visual Arts

Bell (1999) maintains that the 1950s marked “a mid-century watershed for the project of ‘high art’”⁷⁷ and that “[t]he subsequent history of twentieth-century painting can be seen as a progressive encroachment of the realm once considered as art by materials once considered as fun”.⁷⁸ Richard Woods’ *Renovated Carpet No.1*

⁷² Cook S, J Pakulski and M Waters “*Postmodernization: Change in an Advanced Society*” (1992, SAGE Publications, London) p.1.

⁷³ Ibid..

⁷⁴ Lyotard, n 57 above.

⁷⁵ Kearns P, *The Legal Concept of Art*, (Oxford, Hart Publishing, 1998), Appendix pp.185-186.

⁷⁶ Jencks C, *What Is Post-Modernism?* (London, Academy Editions, 4th ed, 1996), pp.13-14.

⁷⁷ Bell J, *What Is Painting?* (London, Thames & Huson, 1999), p.204.

⁷⁸ Ibid.

(*Burgundy*)⁷⁹ (a carpet upon which the artist has painted in gloss paint and PVA) can be cited as one example of this. Other contemporary works of visual art, such as Tracey Emin's *The Simple Truth* (1995),⁸⁰ a wool and appliqué blanket depicting an American flag and the words *TRACEY EMIN HERE TO STAY*, Jane Simson's *Baby Bath (lip slightly melted)*⁸¹ (a silicone rubber baby bath in yellow, with a dusting of powder inside) and Angela Bulloch's *Pink Chance Corner*⁸² (two belisha beacons which light up alternately - and occasionally simultaneously) provide further illustrations of this general development in the visual arts whereby the use of materials not formerly used (nor formerly considered appropriate for use) in artistic works has become commonplace. Within the category of visual art we might now include such things as body art, ceramics, collage and assemblage, computer generated art (such as three-dimensional 'virtual' art or 'webart'⁸³), film-making⁸⁴, graphic art, holographic art, illustration, installations, performance art, photography, print-making and video art,⁸⁵ many of which have emerged in response to the technical advances of the late nineteenth and twentieth centuries. These technical advances have had a great impact upon artists and upon the way in which works of art are produced; French artist Fernand Leger (1881-1955) stating that "the thing that is imagined does not stay still...as it formerly did...modern man registers a hundred times more sensory impressions than an eighteenth century artist".⁸⁶ Much of our contemporary art no longer stays still; for example the winner of the Turner prize in 1999 was Steve McQueen, whose most noted works were a film piece entitled *Deadpan* (1997) and a video installation entitled *Drumroll* (1998).⁸⁷

The use in visual art of media or objects which have been conceived traditionally as

⁷⁹ Arts Council, n 25 above, pp.56-57.

⁸⁰ Ibid.

⁸¹ Arts Council, n 25 above, pp.46-47.

⁸² Arts Council, n 25 above, pp.22-23.

⁸³ Veltman C, "Tate Drawn into the Web", *The Daily Telegraph*, 5th October 2000, p.8E.

⁸⁴ Including film or CD Rom; see for example Debra Petrovitch's *Uncle Bill* (2000) using this media.

⁸⁵ Most of these examples have been taken from a list of categories revealed on an internet search under the phrase "visual art" on 17.03.99.

⁸⁶ Cited in Adams LS, *A History of Western Art*, (London, Brown & Benchmark, 2nd ed, 1997) p.469.

⁸⁷ <http://www.tate.org.uk/london/exhibitions/turnerprize99/index.htm>

'non-art' or for 'every day' use or entertainment has caused many observers to question whether such works can be properly termed 'art', let alone assessed as high art on the basis of their artistic merit or worth.⁸⁸ The works do not lend themselves to any formal, stylistic, or qualitative assessment - not least because they are intended not to do so. Where qualitative assessments are made by the drawing of comparisons with more traditional works, there are few tangible factors to allow positive distinctions to be made since, as the forthcoming discussion will show, the postmodern emphasis in art has been firmly placed upon *concepts* as opposed to objects. Much contemporary art exhibits the influence of a movement in the visual arts which came to be known as 'conceptual art' and which reached its high point during the late 1960s and early 1970s; a period which has been described as one in which the conviction arose that "thought was as much an artistic material as any other".⁸⁹ Jencks (1992) describes this period as being one which witnessed "an assault on the notion of a stable category such as high art, good taste, classicism or modernism".⁹⁰ More particularly, Godfrey (1998) states that "[c]onceptual art is not about forms or materials, but about ideas and meanings. It cannot be defined in terms of any medium or style, but by the way it questions what art is. In particular, conceptual art challenges the traditional status of the art object as unique, collectable or saleable. Because the work does not take a traditional form it demands a more active response from the viewer, indeed it could be argued that the Conceptual work of art only truly exists in the viewer's mental participation".⁹¹

An alternative viewpoint on conceptual art is provided by Graham-Dixon (1996), who maintains that with regard to contemporary visual arts, "painting, drawing and carving [are] now...regarded, in most art schools, as painfully old-fashioned activities.

⁸⁸ Cumming (1999) designates the title of "[t]he most effective shock of the century" to the exhibition in 1917 of Marcel Duchamp's readymade urinal entitled 'Fountain'; a work which is cited frequently as one of the earliest precursors of conceptual art; maintaining that "Duchamp's 1917 urinal...prompted the "But is it Art?" cavil that's stuck to modern art ever since". Cumming L, Arts: "The Critics' Century 1900-2000: Art: Look At It This Way", 26 December 1999, *The Observer*, p.9. See also Godfrey T, *Conceptual Art*, (Phaidon Press, London, 1998), p.6.

⁸⁹ Hopkins D, *After Modern Art 1945 - 2000* (Oxford, Oxford University Press, 2000) p.177.

⁹⁰ Jencks, n 69 above, p.23.

⁹¹ Godfrey T, *Conceptual Art*, (Phaidon Press, London, 1998), p.4. See also Smith R, "Conceptual Art", in Stangos (ed.) *Concepts of Modern Art From Fauvism to Postmodernism* (London, Penguin, 3rd ed, 1994), pp.256-270.

There are no accepted criteria for judging art. Indeed, there is no useful definition of what art is anymore. A work of art is that which one who claims to be an artist claims to be a work of art".⁹² Thus it is not the viewer's response to a work which is significant, but the fact that the artist deems his or her own work to be "art". The exhibition of works by artist Michael Craig-Martin in 1974 is cited as an illustration. There was, in fact, only one exhibit and this was a glass of water placed on a shelf, which was hung on the wall, over 2.5 metres from the floor. The artist had entitled the work "An Oak Tree" and leaflets were made available to the audience, which contained questions and answers, written by the artist in the form of an interview. In this leaflet, Craig-Martin claimed that he had altered the physical substance of the glass of water and turned it into an oak tree, but agreed that it still looked like a glass of water because he had not changed its appearance. Graham-Dixon asserts the view that, amongst other things, this work is a "demonstration of the artist's omnipotence within his own domain. If Craig-Martin chooses to assert that what looks like a glass of water is an oak tree...then that is his privilege".⁹³

Such artistic omnipotence is illustrated in that which has become known as 'performance art'⁹⁴ wherein the artist him/herself is physically present within the work. In the late 1960s and early 1970s, British Artists Gilbert and George themselves became "Singing Sculptures"⁹⁵ and appeared in public as such, and other artists have performed in various activities which Archer (1997) describes kindly as being "excessive in one way or another".⁹⁶ One example cited by Archer is the Californian artist Burden who "variously crawled across a floor strewn with broken glass, had himself shot and was crucified on a car".⁹⁷ A more recent example is Kira O'Reilly's *Wet Cup*, wherein the artist performed the archaic medical technique of drawing blood from an incision.⁹⁸ Following such performances, only a photographic

⁹² Graham Dixon A, *A History of British Art*, (BBC Books, London, 1996), p.235.

⁹³ Graham-Dixon, n 92 above, pp.234-5.

⁹⁴ Goldberg R, *Performance Art from Futurism to the Present*, (London, Thames and Hudson, 1988).

⁹⁵ Adams L, *A History of Western Art* (Madison, Brown & Benchmark Publishers, 2nd ed, 1997) p.508. See also Goldberg, n 94 above, pp.167-169.

⁹⁶ Archer M, *Art Since 1960* (London, Thames and Hudson, 1997), p.107.

⁹⁷ Ibid.

⁹⁸ Ayers R, "Censorship: Blood Simple", *Art Monthly* Dec. 00 - Jan.01/No.242, p.59.

or written report exists as evidence of the original art form⁹⁹ and it is neither possible nor appropriate to apply any formalistic analysis to works such as these. Furthermore, advancing technology makes available to us a means by which a text or visual design can remain constantly open to change and there is an ever-increasing range of materials with which works of visual art can be produced, for example the computer-generated 'sculptures' of William Latham.¹⁰⁰

Since then it is possible to perceive contemporary visual art variously as being that which the artist determines it to be, or that which the viewer perceives it to be, and since the materials used in its creation have expanded to the extent that the only thing that may be stated with certainty in this regard is that for some people nothing is excluded now from the field of visual art,¹⁰¹ then this thesis concludes that it is not possible to draw comparisons between the formal aspects of these works in order to determine which work may be placed above another in the metaphorical hierarchy of high art. However, it is necessary to state here, for the purposes of future discussion, that this thesis supports the view expressed by Bell (1999) that this bringing into the field of art that which hitherto has been excluded from its remit is not an entirely new occurrence, but the continuation of a gradual process which has been in place at least since the Modernist era.¹⁰² As stated above (p.6), Manet's *Le Dejeuner sur l'Herbe* was badly received when first exhibited,¹⁰³ exhibitions of French Post-Impressionist painting in England in 1910 and 1912 (featuring works by artists now highly acclaimed, such as Seurat and Cezanne) were praised by very few; fellow painter John Singer Sargeant (1856-1925) expressing the view that he was "absolutely

⁹⁹ Archer, n 96 above, p.105

¹⁰⁰ Latham states that "[the] computer screen acts as a window looking into a three-dimensional volume of synthetic, illusory space and it is within this space that I make my sculptures", in *The Conquest of Form, Computer Art by William Latham, Exhibition Guide*, (Bristol, Arnolfini Gallery Ltd., 1989), p.13.

¹⁰¹ Not even, as in Marc Quinn's *Self* (1997), a cast of the artists's head filled with his own frozen blood. See Dennison S, "Agenda 1: Blubber Head": Life Magazine, 11th April 1999, *The Observer*, p.7

¹⁰² Bell, n 77 above, p.203. See also Hughes R, *The Shock of the New - Art and the Century of Change*, (London, BBC, 1980).

¹⁰³ Tarabukin N states: "The French Impressionists were the first revolutionaries in painting, liberating it from the paralysing path of naturalistic trends and giving it new directions", in "From the easel to the machine", Frascina F and Harrison C (Eds.), *Modern Art and Modernism: A Critical Anthology*, (London, Harper and Row, 1982) pp.135-142, at p.135.

sceptical as to their having any claim whatever to being works of art”;¹⁰⁴ these objections being made in response to the exhibition for the first time of styles and/or subject matter which had not before been seen, and which therefore shocked their first audiences. Gayford (2000) supports this view, stating that “notoriously, ever since the dawn of Impressionism, modern art has delivered the shock of the new”,¹⁰⁵ citing the specific example of the outrage caused by Manet’s *Olympia* when it was first exhibited in 1865.¹⁰⁶

This aspect of visual art - the bringing in of the new - is, it is submitted, of great importance since the capacity of a work to shock, or to prompt questions about what does or does not constitute ‘art’ is itself an indication of the artist’s freedom to express him or herself in the form of visual objects, regardless of accepted custom.

(b) Literature

The postmodern era has witnessed within ‘secondary’ literature (that being the critical evaluation of primary texts) a move away from a focus upon the formal elements of a work and towards the notion that it is the reader’s response to a work which actually ‘forms’ it; the literary work no longer being perceived as an “autonomous object”¹⁰⁷ to be judged solely by its formal properties.

Firstly, there came the notion that the text consists only of ‘signs’, a view heavily influenced by Saussure’s linguistic theories¹⁰⁸ which arguably led to the second notion,¹⁰⁹ that it is the reader’s response to a work which is the most significant factor in any assessment of it. In simple terms, Saussure argued that all language consisted of signs and that these signs themselves consisted of two aspects; the

¹⁰⁴ Graham Dixon, n 92 above, p.205.

¹⁰⁵ Gayford M, “The Art of Outrage”, *The Daily Telegraph*, 26th August 2000, Arts & Books, p.1

¹⁰⁶ Ibid.

¹⁰⁷ Sadler I, *Art of the Postmodern Era From the late 1960s to the Early 1990s*, (New York, Harper Collins, 1996), p.333

¹⁰⁸ Selden R, *Practising Theory and Reading Literature An Introduction* (Harvester Wheatsheaf, Hemel Hempstead, 1989) p.75

¹⁰⁹ Easthope recognises that “people do respond to texts and any analysis of signifying practice must be concerned with response”, in his *Literary into Cultural Studies* (London, Routledge, 1991), p.137

‘signifier’ (the written word or acoustic sound) and the ‘signified’ (that which we *think* when producing or receiving ‘the signifier’). Saussure recognised that once a connection became established between the signifier and the signified, then a bond is formed between them and “...[w]e feel and behave as if the words we use are inseparable from the concepts we have of things”, but nevertheless he argued that there existed no natural connection between the two.¹¹⁰ When we apply this theory to literature, the written words of the texts become ‘signifiers’, the meaning of which can never be fixed. The author produces a text from his or her own “complex network of signification”¹¹¹ but the reader receives the signifiers within his or her own network; thus that which is signified in the text by the author will not necessarily be that which is interpreted by the reader, and it is likely too that each reader’s interpretation of the text will vary. Obviously, this theory moves our focus away from the text and towards the reader. It also makes any value judgement of the text very difficult since there is no ‘text’, only a series of signifiers.

There are a broad range of views which might be seen to fall within the category of “reader response criticism”, whereby the response of the reader to a particular text is perceived to be an essential aspect of the construction of its meaning.¹¹² In its extreme, this view will perceive the literary work as existing *only* in the mind of the reader and we are reminded here of the conceptual art theories in the visual arts which have already been discussed. If such a view is accepted, it follows that the practice of identifying linguistic or stylistic features within a work in order to assess its intrinsic merit is misconceived; an argument which has been put forward strongly during the postmodern era.¹¹³ This is an important extension from the earlier discussion of postmodern visual art, where it was agreed that many works created *in that era* defied qualitative assessment on the basis of formal qualities. Significantly, and in regard to both art forms, there has developed the view that the value or quality

¹¹⁰ Selden, n 108 above, pp.75-76

¹¹¹ Selden, n 108 above, p.76

¹¹² Tompkins JP, states in the opening sentences of her *Reader Response Criticism* (Baltimore, John Hopkins University Press, 1980); “reader-response criticism is not a conceptually unified critical position, but a term that has come to be associated with the work of critics who use the words *reader*, *the reading process* and *response*, to mark out an area for investigation”.

¹¹³ See further below, pp.40-42

of a work of art *from any era* is not related to its inherent properties, but rather is created solely by external factors; primarily the views and judgements of readers and critics.¹¹⁴ Consequently, the traditional practice of differentiating between high and low forms of art has been called into question; as Charlesworth (2000) states “[t]he relationship between high and low culture is no longer what it was. In a society that tends to privilege inclusion over division, the idea that different cultural forms should exist in a hierarchy of value has fallen out of fashion”.¹¹⁵ The extent to which this thesis accords with prevailing fashion is set out in chapter three.¹¹⁶ It is necessary for the purposes of this chapter to conclude now the search for tangible factors or qualities, and to proceed to a consideration of those intangible factors which some commentators have claimed to be the *sine qua non* of high art.

Concluding the Search for Tangible Factors

It is submitted that in this search for tangible factors, certain discernible factors within certain ‘valued works’¹¹⁷ have been discovered, but it has also been ascertained that in the visual arts many of the works which have been produced in the postmodern era defy any type of formal assessment, and that in the field of literature, postmodern literary theories present at the very least a significant challenge to the Modernist emphasis upon the assessment of the substantive elements of the text.

With regard to these ‘discernible factors’, two further points must be made. Firstly, although various factors have been identified in certain works or certain types of works which can, rightly in this thesis’ view, cause one to be considered superior to another, none of these qualities causes any of the works to be considered ‘great’ in an absolute sense. Rather, they are factors which can be used to determine *comparative* greatness. Kant (1790) draws a distinction between describing something as ‘great’ and ‘absolutely great’; something which is absolutely great is that which is great

¹¹⁴ Newton KM, *In Defence of Literary Interpretation* (London, Macmillan, 1986), p.8.

¹¹⁵ Charlesworth JJ, ‘Common Culture’ *Art Monthly* Dec. 00 - Jan. 01/No. 242, 42

¹¹⁶ Chapter three, pp.84-5

¹¹⁷ Smith BH in her *Contingencies of Value*, (Cambridge, Massachusetts & London, Harvard University Press, 1988) uses the term to refer to that which this thesis would call high art.

beyond comparison. But when something is referred to as 'great', without qualification, then "it is not merely meant that the object has magnitude, but greatness is ascribed to it pre-eminently among many other objects of a like kind, yet without the extent of this pre-eminence being determined".¹¹⁸ Thus it is argued that the factors which have been identified in certain works can distinguish them as 'great' or 'high' art only in the sense that indicate that these works are pre-eminent examples of works of a similar kind. It has not been possible to find any "fundamental 'traits', recurrent 'features', or shared 'properties' of valued works"¹¹⁹ which could cause them to be considered to form an elite category, wherein they have in common the fact that they are incomparably great.

Secondly, whilst it has been possible to identify within established works certain factors which have, rightly in the writer's view, caused them to be considered high art; this does not mean necessarily that it is possible to determine high art merely by the presence or absence of such factors. Returning to X's hypothetical discoveries, it is not possible to instruct X that if the painting has, say, excellent use of perspective, or perfect balance of composition, then it will necessarily be high art. Likewise with the manuscript; linguistic or stylistic factors may make it more likely to be high art, but these are not sufficient in themselves to determine the work's status.

Something else is required. The final section of this chapter considers whether this additional factor might be an intangible or immaterial quality.

¹¹⁸ Kant I, *The Critique of Judgement* (transl. J C Meredith), (Oxford, OUP, 1952) (Orig. pub. 1790), pp.94-5.

¹¹⁹ Smith, n 117 above, p.15.

Section Two: The Intangible Qualities of High Art

Since X cannot be directed to identify any particular tangible quality in her discoveries in order to determine whether they are high art, is it possible that X will be able to identify some intangible or immaterial quality or qualities which distinguishes either as belonging to this discrete category? In this section, visual art and literature will be discussed concurrently.

Artistic Expression and Imagination

Early in the so-called Romantic period¹²⁰ there developed the now familiar conception of the author or artist as an eccentric genius, marginalised from the rest of society;¹²¹ a solitary figure; an “embattled seer at odds with his times”.¹²² The rather fixed rules as to what constituted the highest forms of art which had been propounded by artists such as Sir Joshua Reynolds (1723-92) and hitherto widely accepted,¹²³ were criticised and the perceived role of the author or artist as a creative genius, expressing emotions through his or (rarely) her work was emphasised for the first time.¹²⁴ Reynolds had informed his students that “[i]nvention is one of the great marks of genius; but if we consult experience, we shall find that it is by being conversant with the inventions of others that we learn to invent”¹²⁵ and thus he impressed upon them the need to study the great masters and to seek to emulate them. Reynolds believed that “[t]he greatest natural genius cannot subsist on its own stock”¹²⁶ and so it was necessary for both painters and poets to draw upon the examples of others in order to create works of visual or literary art. William Blake

¹²⁰ A movement in the arts which occurred from around 1770 - 1830.

¹²¹ Wolff J, *The Social Production of Art*, (London, Macmillan, 2nd ed, 1993), pp.10-11.

¹²² Graham-Dixon, n. 92 above, p. 127.

¹²³ For example, until the Romantic period “imagination was not a cardinal point in poetical theory. For Pope and Johnson, as for Dryden before them, it has little importance, and when they mention it, it has limited significance”: Bowra CM, *The Romantic Imagination*, (Oxford, Oxford University Press, 1961), p.1.

¹²⁴ Pointon M, “Romanticism in English Art”, from Prickett S (ed.) *The Romantics (The Context of English Literature)*, (London, Methuen & Co, 1981), pp.77-114, at pp.94-95.

¹²⁵ Wark R (ed.), *Joshua Reynolds: Discourses on Art*, (New Haven & London, Yale University Press, 1975), p.98. (Reynolds’ *Discourses* were lectures delivered by him to students of the Royal Academy of Art at annual prize-giving ceremonies, from 1769—1790).

¹²⁶ Wark, n 125 above, p.99.

(1757-1827) was one of the first to criticise this view. For Blake, "One Power alone makes a Poet: Imagination, The Divine Vision"¹²⁷ and for him and the other so-called Romantic poets it has been said that the single characteristic which differentiated them from earlier poets was "the importance which they attached to the imagination and the special view which they held of it".¹²⁸

Wordsworth famously stated that "all good poetry is the spontaneous overflow of powerful feelings",¹²⁹ thus emphasising the role of the author as an imaginative creator, and Coleridge claimed that "descriptions of the natural world 'become proofs of original genius only as far as they are modified by a predominant passion'".¹³⁰ Of course, the new emphasis upon imagination and creativity was not confined to the field of poetry. Blake himself was not only a poet, but also an engraver, painter and illustrator and it has been said of him that "whatever his sources, he always transmitted everything by the power of his imagination".¹³¹ In the field of painting, Joseph Turner (1775-1851) and John Constable (1776-1837) have been described as "the artists who broke more radically and decisively with the assumptions of the past than any who have come after them".¹³²

They too placed a new emphasis upon imaginative creativity; Constable stating that "painting is with me but another word for feeling".¹³³ The so-called Romantic movement profoundly influenced the way in which future artists, authors, viewers, readers and critics regarded works of art¹³⁴ (for example, Selden (1989) states with regard to literature that "[u]ntil the 1960s modern criticism had its roots in the Romantic movement of the late eighteenth and early nineteenth centuries").¹³⁵ In

¹²⁷ Bowra, n 123 above, p.14.

¹²⁸ Bowra, n 123 above, p.1.

¹²⁹ Owen WJB (ed.) *Wordsworth's Preface to Lyrical Ballads* (Westport, Greenwood Press, 1979), p.116.

¹³⁰ Easthope, n 109 above, p.43.

¹³¹ Murray, n 18 above, p.54.

¹³² Graham-Dixon, n 92 above, p.126.

¹³³ Pointon, n 124 above, p.104.

¹³⁴ Beardsley MC, *Aesthetics from Classical Greece to the Present A Short History* (New York, Macmillan, 1966),p.246.

¹³⁵ Selden, n 108 above, p.2. See also Parrinder P, *Authors and Authority*, (London, Macmillan, 1991) pp.44-5.

literary criticism, many of the views expressed concerning what might constitute high art focused upon the author's creativity; Easthope (1991) calling this "an expressive theory of value" whereby "the literary text is to be assessed as a significant expression of the imagination of its author".¹³⁶

Writing specifically with reference to painting, Bell (1999) describes how prior to the late eighteenth century "most authorities took it as an assumption that painters were satisfying a common and legitimate wish for information about the world"¹³⁷ and thus paintings were imitative or representative in style, with 'imaginative' works being merely those in which images were reshuffled or the subject matter imitated selectively.¹³⁸ Creativity was reserved for the Creator. It was when the creative act became associated with the artist (Blake's 'Divine Imagination' was after all his own, and not that of a God whose original works he was imitating) that the hitherto accepted ideas about painting, and indeed about other art forms, were brought into question.¹³⁹ This new emphasis upon the creativity of the artist has had a significant impact upon the way in which works of art are perceived and received by the reader or viewer and therefore this issue recurs throughout this and subsequent chapters. For present purposes, if it is accepted that works of literary or visual art are primarily expressions of the artist's or author's creativity, then high art will be that which exhibits most apparently or forcefully this imaginative creativity. Accordingly, X might consider her discoveries and believe that, *in her view*, both display strongly their creators' imaginative creativity. Is X's view sufficient to categorise these works as high art? The first difficulty is that there are no objective criteria by which to judge artistic imagination; the work of visual art or literature provides us with a record of that which the artist or author fashioned at a certain time, having in his or mind certain thoughts which are inaccessible to the subsequent observer of the work. This leads to the second difficulty; that X's view is based upon her subjective response to the works and so that which X considers a fine example of artistic creativity, could be viewed quite differently by others.

¹³⁶ Easthope, n 109 above, p.43.

¹³⁷ Bell, n 77 above, p.16.

¹³⁸ Bell, n 77 above, pp.17-19.

¹³⁹ Bell, n 77 above, p.21.

Communication or Contagion Theories

In both literature and the visual arts, an extension of this perception of the work of art as a record of artistic imagination and creativity was the practice of judging the quality of a work not only by reference to the work and its creator, but by considering the degree to which the work succeeded in transmitting the ideas or intentions of its creator to the reader or viewer.¹⁴⁰

Ruskin (1819-1900),¹⁴¹ described as “the most influential art critic of the nineteenth century”¹⁴² (and less politely as “the most influential and neurotic of Victorian writers on art”¹⁴³) expressed the view that “the art is greatest which conveys to the mind of the spectator, by any means whatsoever, the greatest number of the greatest ideas”¹⁴⁴ thus placing the transmission of ideas between the artist and spectator above any formal qualities which might be expected within the work itself. Tolstoy (1896) stated that “[t]o evoke in oneself a feeling one has experienced, and having evoked it in oneself, then by means of movement, lines, colours, sounds, or forms expressed in words so to transmit that feeling that others experience the same feeling - this is the activity of art. Art is a human activity consisting in this, that one man consciously, by means of certain external signs, hands on to others feelings he has lived through, and that others are infected by these feelings and also experience them”¹⁴⁵ and so “the degree of infectiousness is...the sole measure of excellence in art”.¹⁴⁶ This view, which Wollheim (1991) refers to as “the Contagion theory”,¹⁴⁷ prevailed into the twentieth century; for example, DH Lawrence, the so-called “arch-Romantic”¹⁴⁸ of

¹⁴⁰ Greene TM, *The Arts and the Art of Criticism* (Princeton University Press, Princeton, 1952), p.389.

¹⁴¹ Ruskin strongly criticised the works of James Whistler (1834-1903) entitled “Nocturnes”, resulting in a libel case. This case is discussed in Chapter 5.

¹⁴² Murray, n 18 above, p.399.

¹⁴³ Graham-Dixon, n 92 above, p.176.

¹⁴⁴ Barrie D (ed.) *Modern Painters by John Ruskin* (London, Andre Deutsch, 1987) (Orig. pub 1843), p.8.

¹⁴⁵ Tolstoy L, *What Is Art?* (Indianapolis, Bobbs-Merrill Co.,1960) (Orig. pub 1896), p.51.

¹⁴⁶ Tolstoy, n 145 above, p.140.

¹⁴⁷ Wollheim R, “What the Spectator Sees”, in Bryson N, MA Holly & K Moxey (eds.), *Visual Theory Painting and Interpretation*, (Cambridge, Polity Press, 1991), pp.101-150, at p.103.

¹⁴⁸ Willey B, *Nineteenth Century Studies*, (London, Chatto & Windus, 1964), p.27.

that era, stated that the “mission of art” was to “set vibrating in the second person the emotion which moved the producer”.¹⁴⁹

The difficulties with these views are similar to those already stated with regard to determining the quality of artistic expression within a work. How is it possible to judge with any certainty how successfully the artist’s ideas, intentions or feelings have been transmitted to the viewer? particularly when it is highly unlikely that the viewer has access to that which the artist was thinking or intending when the work was created. Questions such as this were posed by the earliest critics of the theory; most notably the proponents of the practice of “New Criticism” which has already been referred to in this chapter.¹⁵⁰ Subsequently, in the field of literature particularly, Wimsatt and Beardsley (1954) have expressed the view that “the design or intention of the author is neither available or desirable as a standard for judging the success of a work of literary art” (the so-called ‘intentional fallacy’).¹⁵¹ Theories which have taken this view to its extreme, resulting in *The Death of the Author*,¹⁵² will be discussed in chapter two.¹⁵³ For the purposes of this chapter, it has been shown that for certain critics, the extent to which the artist or author succeeds in communicating such things as ideas, feelings, emotion or imagination within a work of art is the measure of its greatness. The problem is that there is no practical means of assessing how effectively emotions, feelings or ideas have been conveyed to the observer, nor of judging whether that feeling or emotion which is experienced by the observer when considering the work accords with that which the creator of the work intended to convey: if indeed he or she did intend to convey anything at all.

For the sake of clarity, it is necessary to state at this point that whilst the writer rejects the notion that the quality of a work can be judged according to whether the

¹⁴⁹ In his “Art and the Individual”, from Steele B (ed.) *The Cambridge Edition of the Works of DH Lawrence: Study of Thomas Hardy and other Essays* (Cambridge, Cambridge University Press, 1985), p.139-40

¹⁵⁰ See p.8 above

¹⁵¹ Wimsatt WK & M Beardsley, *The Verbal Icon: Studies in the Meaning of Poetry* (Kentucky, University of Kentucky Press, 1954), p.3

¹⁵² Heath S (ed.), *Roland Barthes, Image Music Text: Essays selected and Translated* (London, Fontana Press, 1977), pp.142-8.

¹⁵³ See p.40

intentions or ideas of the author or artist are conveyed to the reader via the work of literary or visual art; this thesis nevertheless supports the view that a work of literary or visual art is essentially the expression of its human creator; or as Ingarden (1972) terms it: “the product of the intentional activities of an artist”.¹⁵⁴ As further discussion in this and the subsequent chapter will show, the writer also maintains that the reader or viewer receives from that work certain information or ideas, as a result of his or own interpretation of it. It is the practice of using the notion of the *transference* of specific ideas or emotions through the work as a means to assessing its quality to which the writer objects, and therefore rejects as a means to defining or identifying high art.

A Timeless Quality

A characteristic which is considered by some to be present in works of high art is their timeless quality; that which causes certain works to remain constantly at the peak of their metaphorical hierarchy, despite the fact that the conditions of society are constantly changing. It is submitted that there is no specific ‘timeless’ quality, but that it may be possible to identify factors within certain works which can account for the fact that they have been of particular relevance and interest to successive observers. One which has been cited is that which might be termed its ‘human’ quality; certain aspects of humanity never change and thus works which reveal something about one or more of these aspects are considered to be and to have been highly valuable to present, previous and future generations.¹⁵⁵ This is one aspect of the work of Shakespeare which was emphasised in a recent celebration of his works.¹⁵⁶ However, it must be recognised that the ability to have any depth of insight into the human condition is a characteristic peculiar to human beings; ‘depth of insight’ being something which does not dwell within animals or inanimate objects. It is argued that essentially it is the tangible, material factors of a work, such as the

¹⁵⁴ Ingarden R, “Artistic and Aesthetic Values”, in Osborne H (ed.) *Aesthetics* (Oxford, Oxford University Press, 1972) pp.39-54, at p.40.

¹⁵⁵ Posner RA, *Law and Literature*, (Cambridge (USA), Harvard University Press, 2nd ed, 1998), p.392.

¹⁵⁶ “The Southbank Show”, ITV, 23rd January 2000.

arrangement of words on paper or the arrangement of colour, lines and form on canvas which operate to give the impression to the reader that some human quality exists. In some works, these factors are arranged in such a way as to cause the observer to perceive correctly that the creator of that work had some depth of insight into the human condition, but this perception is not something that should be attributed to the work itself.

A related theory is that which perceives a work's ability to 'withstand the test of time' to be a factor inherent in all high art. For example, the *ArtLex* Visual Arts Dictionary¹⁵⁷ describes high art as being "art that is of universal transcendence, having withstood the test of time and representing the epitome of artistic achievement".¹⁵⁸ This concept refers to more than just "the sheer physical persistence of an object".¹⁵⁹ For Saville (1982), it refers to "effective survival...[the] persistence of the work in our attention".¹⁶⁰ The fact that a work has survived and has been the object of constant interest and admiration is itself an indication of its timeless quality; that which marks it out as high art. However, already in this chapter a number of examples have been given of works which were not appreciated when first exhibited, but which later came to be admired and esteemed. These works have not, therefore, been *constantly* admired, they merely came to be admired some years after their initial publication. With specific regard to literature, Smith (1991) questions this "survival of the fittest model of cultural history"¹⁶¹ in which those works which are of the highest quality are those which endure and, expressing a view with which this thesis accords, Smith doubts whether the survival of a literary work and its 'high canonical status' can be attributed simply to the "continuous appreciation of the timeless virtues of a fixed object by succeeding generations of isolated readers".¹⁶² Steiner (1989) also questions this "very assumption of a maturing plurality, of a broadly based catholicity of perception and choice on which the liberal, consensual

¹⁵⁷ <http://www.artlex.com>

¹⁵⁸ Delahunt MR, "high art", *ArtLex*, <http://www.artlex.com>, 24.11.99

¹⁵⁹ Saville A, *The Test of Time An Essay in Philosophical Aesthetics* (Oxford, Clarendon Press, 1982), p.4.

¹⁶⁰ Saville, n 159 above, p.5.

¹⁶¹ Smith, n 117 above p.194 n3.

¹⁶² Smith, n 117 above, p.47.

case for the determination and validation of values is founded”, considering it to be “largely spurious”.¹⁶³ This thesis argues that the practice of identifying high art as being that which has been valued by successive generations is one which oversimplifies the process by which works of art have achieved such status. It is a view which affords to ‘generations’ of observers a role which is arguably preserved for “the passionate few”;¹⁶⁴ something which is considered more fully in the following chapter.¹⁶⁵

The Aesthetic Quality

The term ‘aesthetic’ is sometimes used as a synonym for ‘artistic’¹⁶⁶ when referring to a matter which relates in some way to art. This is not the sense in which it is used here. Reference has been made previously to Bell’s emphasis upon form, which he saw as “the quality shared by all objects that provoke our aesthetic emotions”¹⁶⁷ and for Bell, and for other writers such as Fry who were influenced by Kantian philosophy, there is “pure aesthetic reaction”¹⁶⁸ to a work of art which can be separated from the other “infinitely diverse reactions to a work of art”.¹⁶⁹ Other theorists have taken this notion and, to cite Richards’ theory, have ‘projected’ onto the work of art the response which the work caused in the observer.¹⁷⁰ In short, that which was considered to be a peculiar *response* to certain factors within a work came to be seen itself as a peculiar, inherent *quality*.

P and L Murray (1976) describe how for the twentieth century practitioners of Abstract art (such as sculptor Barbara Hepworth (1903-75)), the emphasis which they placed upon the form of a work as opposed to its subject matter was based upon

¹⁶³ Steiner G, *Real Presences Is there Anything in What we Say?* (London, Faber & Faber, 1989), p.68.

¹⁶⁴ Bennett A, *Literary Taste: How To Form It*, (London, Hodder & Stoughton, 7th ed, 1914), p.18

¹⁶⁵ Chapter two, p.56.

¹⁶⁶ Allen RE (ed.), *The Pocket Oxford Dictionary of Current English*, (Oxford, Clarendon Press, 7th ed, 1984), p.12.

¹⁶⁷ Bell, n 5 above, preface.

¹⁶⁸ Fry R, *Vision and Design* (London, Chatto & Windus, 1920) p.298-9.

¹⁶⁹ Ibid.

¹⁷⁰ Richards IA, *Principles of Literary Criticism*, (London, Routledge, 1924), pp.13-14.

the assumption that “specifically aesthetic values reside in forms and colours and are entirely independent of subject of the painting or sculpture.”¹⁷¹ Furthermore, Greene (1952) has argued that “[a]esthetic quality is...as objective as the secondary qualities of colour and sound, and may...be entitled a tertiary quality. It is “objective” in the sense of actually characterizing certain objects of awareness and not others, and therefore as awaiting discovery by the aesthetically sensitive observer”.¹⁷² If such a quality does exist in all true works of art, then high art must be that in which the aesthetic quality is most forcefully present and obvious to a particular type of observer. Thus our discoverer of hidden treasures, X, would be able to discern this aesthetic quality only if she is sensitive to it. The writer rejects the notion that within works of art a peculiar aesthetic quality exists which is a means to judging its quality. The reasons for this rejection are threefold:

It is submitted in the first instance that no peculiar aesthetic quality exists, since the writer rejects the notion upon which this belief is based; namely that “there is a distinct *kind* of mental activity present in what are called aesthetic experiences”.¹⁷³ Kant’s highly influential theory was that “[a] judgement of taste which is uninfluenced by charm or emotion...and whose determining ground therefore, is simply finality of form, is a pure *judgement of taste*.”¹⁷⁴ Thus a pure aesthetic response to an object is that which occurs in direct response to its form, as distinct from any emotional or sentimental response to its form, style or subject matter. However, there is little indication of any method which can be used to identify or define this response, Fry stating that “[i]t seems to be as remote from actual life and its practical utilities as the most useless mathematical theory. One can only say that those who experience it feel it to have a peculiar quality of “reality” which makes it a matter of infinite importance in their lives”.¹⁷⁵ Whilst acknowledging that which has been termed the “awe and exhilaration people feel upon seeing or hearing [or

¹⁷¹ Murray, n 18 above p.17.

¹⁷² Greene, n 140 above, pp.4-5.

¹⁷³ Richards, n 170 above, p.6.

¹⁷⁴ Kant I, *The Critique of Judgement*, transl. JC Meredith, (Oxford, OUP, 1952) (Orig. pub 1790), p.65.

¹⁷⁵ Fry, n 168 above, p.301.

reading] something beautiful”,¹⁷⁶ this thesis rejects the notion that this feeling is entirely separate from emotion or sentiment.

Secondly, it is argued in accordance with the views set out by I.A.Richards in *Principles of Literary Criticism* (1st published 1924), that in the realms of literary and art criticism, “natural terms of speech are misleading”¹⁷⁷ and we frequently describe as a quality inherent to a work, something which is actually a description of the effect which viewing a picture or reading a poem caused in our mind. It was in this way that the belief that the mind could experiencing a pure, distinct aesthetic response became projected into the object, thus adorning it with a pure aesthetic quality, which does not in fact exist. If X were to search for an aesthetic quality within her discoveries, it is submitted that that which X might term such a quality would actually be a description of her own reaction to the works. Ingarden’s (1972) view, using the term ‘pleasure’ rather than ‘aesthetic response’, is cited here to illustrate further this point: “The observer...announces his pleasure by ‘valuing’ the work of art, but strictly speaking he is valuing his own pleasure: his pleasure is valuable to him and this he uncritically transfers to the work of art which arouses his pleasure”.¹⁷⁸

Lastly, and in support of the comments made above, this thesis alerts the reader to the fact that the notion of there being an aesthetic response or an aesthetic quality is a comparatively modern one. Baumgarten (1714 -1762) is frequently cited as being one of the first to use the term “aesthetics” in the early eighteenth century.¹⁷⁹ Williams (1958) describes how during the mid to late eighteenth century, the word ‘art’, which had been used historically to describe a human skill or attribute, became the term for a group of particularly imaginative and creative skills, adding that “[f]urther and most significantly, *Art* came to stand for a special kind of truth,

¹⁷⁶ Csikszentmihalyi M & RE Robinson, *The Art of Seeing An Interpretation of the Aesthetic Encounter* (Malibu, J Paul Getty Museum and The Getty Center for Education in the Arts, 1990), p.5.

¹⁷⁷ Richards, n 170 above, p.13

¹⁷⁸ Ingarden, n 154 above, p.43

¹⁷⁹ Tolstoy, n 145 above, p.25 ; Staniwzewski MA, *Believing Is Seeing*, (New York & London, Penguin Books, 1995), p.119; Csikszentmihalyi and Robinson, n 176 above, p.6.

‘imaginative truth’, and *artist* for a special kind of person”¹⁸⁰ and that with this development emerged the more common usage of words such as ‘aesthetics’ and ‘aesthete’. Williams submits that these changes in language reflect “a remarkable change in ideas of the nature and purpose of art, and of its relation to other human activities and to society as a whole.”¹⁸¹ Collingwood (1938) too maintains that the word “art” in its “aesthetic sense...is very recent in origin”;¹⁸² the Greeks and Romans saw painting or poetry as crafts, alongside other crafts such as carpentry; they had “no conception of what we call art”¹⁸³ and it was not until the late eighteenth century that a distinction was drawn between useful or skilled arts and fine arts (the “beautiful” arts or *les beaux arts*).¹⁸⁴

Despite the fact that ideas about there being an aesthetic response and an aesthetic quality did not emerge until the late eighteenth century, observers have apparently been able to experience an aesthetic response, and to identify retrospectively this peculiar aesthetic quality, in respect of works which were produced centuries before the notion of there being an *aesthetic* anything had arisen. Thus it seems that many of the Renaissance artists have created works containing a quality which they were ignorant of at the time. Staniszewski (1995) argues that since the notion of art or a work of art itself is an “invention of the modern era - that is, the past two hundred years”,¹⁸⁵ and that prior to this time the things that we now call “Art” were “embedded in the fabric of everyday life”.¹⁸⁶ Michaelangelo’s “Creation of Adam” was a wall decoration; a depiction of the power of God and of the Della Rovere Papacy and it was the work of the painter ordered to produce it, but it was not “Art”¹⁸⁷ and so in Staniszewski’s view, even “[t]o consider Michaelangelo’s work

¹⁸⁰ Williams R, *Culture and Society 1780 - 1950*, (London , Chatto & Windus, 1958) at xvi.

¹⁸¹ Ibid. See also Pointon, n 124 above, p.100 and Culler J, *Literary Theory A Very Short Introduction* (Oxford, Oxford University Press, 1997), pp.20-21.

¹⁸² Collingwood RG, *The Principles of Art*, (Clarendon Press, Oxford, 1938), pp.5-6.

¹⁸³ Collingwood, n 182 above, p.5.

¹⁸⁴ This view is supported by Tilghman BR in the foreward to *But Is It Art?* (Oxford, Basil Blackwell, 1984) and by Beardsley, n 134 above , p.246.

¹⁸⁵ Staniszewski, *Believing is Seeing: Creating the Culture of Art* (New York, Penguin, 1995), p.28.

¹⁸⁶ Staniszewski, n 185 above, p.39.

¹⁸⁷ Staniszewski, n 185 above, p.43.

Art is to ignore the vast differences between that historical moment and ours”.¹⁸⁸ Collingwood (1938) makes a similar point in relation to the discovery of primitive ‘art’; by calling these discoveries art we make the error of assuming that “they were designed and executed with the same purpose as the modern works from which the name was extended to them”.¹⁸⁹ The writer extends these views to make the same point in relation to the so-called aesthetic quality; we consider that it exists within works of art primarily because the notion of there being a special kind of quality or response accords with the modern perception of art as a special kind of object or as “a special kind of experience”;¹⁹⁰ that which is no longer perceived as a functional or ornamental part of life but as something separate from and above mere existence.¹⁹¹

The Metaphysical or Transcendental Quality

Linked to the idea of there being an aesthetic quality in works of art is the notion that there is some transcendental or metaphysical quality within all ‘great’ works of literary and visual art. Steiner (1989) argues that “[t]here is aesthetic creation because there is *creation*” and that although mathematical and scientific theories claim to have discovered and explained the origins of the world, “[n]othing in these prodigious conjectures disarms, let alone elucidates, the fact that the world is, when it might not have been, the fact that we are in it when we might, when we could not have been”.¹⁹² This latter role is one which Steiner ascribes to artistic creativity, since there is, “in the art -act and its reception ...a presumption of presence” and in the highest forms of art, a “shining through” of this metaphysical or transcendental *other*.¹⁹³

The writer rejects strongly the notion that there exists within high art any metaphysical or transcendental ‘presence’ or quality. This is not because the writer

¹⁸⁸Ibid. See also Buck L and P Dodd, *Relative Values or What's At Worth?* (London, BBC Books, 1991), at pp.163-4, and generally H Wohl, *The Aesthetics of Italian Renaissance Art A Reconsideration of Style* (Cambridge, Cambridge University Press, 1999).

¹⁸⁹ Collingwood, n 182 above , pp.9-10.

¹⁹⁰ Buck L and P Dodd, *Relative Values or What's At Worth?* (London, BBC Books, 1991), p.162.

¹⁹¹ See Thistlethwaite D, *The Art of God and the Religions of Art*, (Carlisle, Solway, 1998), p.33.

¹⁹² Steiner, n 163 above, p.201.

¹⁹³ Steiner, n 163 above , pp.211-226.

supports Nietzsche's Madman's view that 'God is dead'¹⁹⁴ but because the writer's personal reading of the Old and New Testaments has caused her to consider that the notion that God presences himself in material objects is contrary to the nature of God as revealed by The Bible. This is also recognised by Carey (1992) who states: "What art, if any, God might like, Steiner does not inquire, and has no means of knowing (though if it is the biblical God he has in mind, the divine prejudice against graven images suggests artistic priorities incompatible with those of Western intellectuals like Steiner)".¹⁹⁵ With regard to the visual arts, the Apostle Paul states that "what may be known about God is plain...because God has made it plain...For since the creation of the world God's invisible qualities--his eternal power and divine nature--have been clearly seen, being understood from what has been made, so that men are without excuse".¹⁹⁶ Thus God has revealed himself adequately by means of his own creativity and there is no necessity for the further revealing of God through manmade objects. Furthermore, were the presence of God actually within a work of literature or visual art, then it is submitted that the effect of this would be quite dramatic and thoroughly obvious. The Old Testament describes one of the rare occasions when God actually inhabited a man-made object, namely a gold-plated box known as the Ark of the Covenant, which was placed within an elaborately designed tabernacle. When God's presence actually filled this tabernacle, the results were dramatic;¹⁹⁷ indeed one man died when he touched it.¹⁹⁸ Thus the writer rejects strongly the notion that art objects, be they literary or visual, actually possess some metaphysical or transcendental presence.

However, the writer also recognises that Steiner's argument is not simply referring to the art object *per se*, but to the creation and reception of it.¹⁹⁹ For Steiner, those works which the writer terms high art are "re-enactments, reincarnations via spiritual and technical means of that which human questioning, solitude, inventiveness,

¹⁹⁴ Magnus B & KM Higgins, *The Cambridge Companion to Nietzsche*, (Cambridge, Melbourne & New York, Cambridge University Press, 1996), p.35-36.

¹⁹⁵ Carey, n 67 above, p.90.

¹⁹⁶ Romans 1: 19-20 (NIV). Thistlethwaite states "nature is there, among other things, to make the fact of God blindingly obvious"; n 191 above, p.55.

¹⁹⁷ Exodus 40:35-36.

¹⁹⁸ 1 Chronicles 13:7-10.

¹⁹⁹ Steiner, n 163 above p.215-6.

apprehension of time and of death can intuit of the *fiat* of creation, out of which, inexplicably, have come the self and the world in which we are cast”²⁰⁰ and the act of observing or reading of such ‘re-enactments’ is “metaphysical”²⁰¹ in the sense that meanings can be and are received from a work which are “somehow outside the range of man”.²⁰² Thus that which marks out high art for Steiner is not the fact that it causes the observer to question him or herself, nor indeed the nature of humanity, but that it causes the observer to become alert to that which is beyond humanity; beyond “empirical seizure or proof”.²⁰³

A comment which was made earlier in regard to the ‘human’ and ‘aesthetic’ qualities of art can be repeated here. It is more appropriate to speak of the human response to a work in these terms than to project them onto the work itself. It is possible for the artist or writer to have arranged the text or canvas in such a way as to cause the observer to question the existence of God and his or own relationship to that God, but there is no spiritual presence within the work itself. Furthermore, whilst it is possible to cite numerous examples of high art which, in the writer’s view, might fall within Steiner’s description (such as Milton’s *Paradise Lost*, Hugo’s *Les Misérables*, Shakespeare’s *King Lear*, Michaelangelo’s *Creation of Adam*), the writer cannot cite high art works *exclusively* as being those which prompt in the observer an alertness to that which is beyond “the range of man”;²⁰⁴ those which cause the observer to ask “Is there or is there not a God? Is there or is there not a meaning to being?”.²⁰⁵ The art form upon which Steiner centres his argument - namely, music - provides a useful illustration of this point. Handel’s *Messiah* is indeed likely (but not bound) to provoke such a response in many; but Paul McCartney’s *Yesterday* may also do so in some. Secondly, it should be noted that certain works have become established as high art, yet were created post-Enlightenment (when, as discussed previously, the notion that art was primarily imitative had been replaced by a focus upon human creativity) and can be seen as attempts to find that which Schaeffer (1968) terms “a

²⁰⁰ Steiner, n 163 above p.215.

²⁰¹ Steiner, n 163 above p.216.

²⁰² Steiner, n 163 above p.217.

²⁰³ Steiner, n 163 above p.225.

²⁰⁴ Steiner, n 163 above p.217.

²⁰⁵ Steiner, n 163 above p.220.

humanistic universal”,²⁰⁶ a meaning to life which neither requires, nor seeks after, a God. The so-called “three pillars of modern art”,²⁰⁷ Van Gogh (1853-90), Gauguin (1848-1903) and Cezanne (1839-1906) are cited by Schaeffer as examples of artists who sought to find this universal²⁰⁸ within the remit of their work alone.²⁰⁹ Whilst it is possible that the works of these artists has caused observers to query the existence of God, it cannot be said with certainty that they have done so, yet the works of these artists have been highly acclaimed.

Steiner’s notion of ‘real presences’ is thus rejected by this thesis as a means to defining high art, since whilst its relevance to certain works is acknowledged, it offers no precise means of determining whether a newly discovered work is high art. Not only is the extent to which a work might provoke such questioning dependent, at least in part, upon the person observing that work (and indeed to his or her own state of mind at the time)²¹⁰ but it is also by nature beyond empirical proof. It possible to advise X only as follows: that if she considers her discoveries, and as a result questions not only her own existence, but the possible source of that existence, then they *may* be high art. However, even if the works do not provoke such a response, then they too *may* be high art.

Concluding the Search for Intangible Qualities

A number of views concerning the existence of intangible or immaterial qualities have been considered, the latter two having been strongly refuted. With regard to some of the expressive and communication theories identified, these appeal to the writer in the sense that they conceive of the production of literary or visual art works as an essentially human activity, being the expression of the artist or author, or a

²⁰⁶ Schaeffer FA, *The God Who Is There*, (Illinois, Inter-Varsity Press, 1968), p.31.

²⁰⁷ Schaeffer, n 206 above, p.30.

²⁰⁸ Ibid.

²⁰⁹ See also Walther IF & R Metzger, *Vincent Van Gogh The Complete Paintings*, (Koln, Benedikt Taschen, 1990), Vol. II, pp. 397-418.

²¹⁰ The observer’s judgement of a work therefore may be not only subjective, but also a relative one. See Ingarden, n 154 above, p.43.

means by which he or she seeks to communicate ideas, rather than merely being a means to the creation of an object which exists independently from its producer, or solely in the mind of its observer, once it is made. However, the difficulty in applying a theory which defines as high art that which shows most clearly or fully the artist's or author's imaginative expression, or that in which the artist or author has most successfully communicated his or her intentions or feelings, has been identified; namely that there is very rarely any practical means of determining that which the author actually imagined or intended to express at the time when the work was created. Thus if we return once more to this chapter's initial illustration, any view which X has reached concerning the expressive or communicative quality of her discoveries cannot itself be discovered to be true or false (or at least only in very rare circumstances, whereby X has access to the living persons who created the works and they truthfully relate to her that which was imagined or conceived by them when producing them).

This chapter concludes, therefore, on the basis that whilst it is possible to identify within certain works of established high art, inherent qualities which have caused them to be categorised as such, it has not been possible to deduce from this search any factor, or combination of factors, which is common to all and which therefore provides the basis for determining or defining high art. It has also been argued that a number of the features which have been said to pertain to high art are actually descriptions of that which the observer thinks or feels when considering the work; they are thus responses projected onto the work as inherent qualities. The search for inherent attributes concludes at this point and a new search begins; chapter two considering those factors external to the work of literary or visual art in order to establish how high art comes to be classified as such.

Chapter Two

Defining High Art II - The Significance of Factors External to the Work

Introduction

In this chapter, the significance of factors external to the work will be assessed, with particular reference to the second of the two specific questions posed at the outset of chapter one; namely: ‘How significant are factors external to the work, such as the role of the artist or author, the response of the reader or viewer, or more generally, historical, ideological and sociological factors, in the categorisation of high art?’. Perhaps the most obvious ‘factor’ that is physically external to the work is the creator of that work and this aspect will be discussed first. Thereafter, matters such as the response of the viewer or reader to the work, the response of “the passionate few”,²¹¹ institutional influences, contextual factors, and ideological and sociological factors will be considered, and conclusions drawn as to the extent of their influence in the determination of high art. In this chapter, works of literary and visual art will be considered together; with the emphasis being placed upon either form where appropriate.

The Role of the Artist or Author

To refer back once more to the now familiar illustration of X and her discoveries; is the author or painter relevant to the evaluation of the works as high art? If it could have been shown that works of high art exist solely by virtue of their *inherent* qualities, then the identity of the painter or author of that work would not be at all relevant to its categorisation.

As stated in the previous chapter, views have been put forward at various times during the twentieth century which have strongly denied that the author is relevant to

²¹¹ Bennett, n 164 above, p.18.

any assessment or reading of a literary work. These views, whilst having similar results in terms of removing the author's significance, differ greatly in substance. The reader will recall that the earlier of these views, expressed by the New Critics, called for the reader to form a qualitative assessment of the work based only upon its textual content. The limitations of such a theory have already been discussed in chapter one.²¹² The more recent view argues that the work of art or literature is formed only in the mind of the reader or viewer, and therefore there is no 'text' and the author or artist (and any biographical details concerning the author or artist) is irrelevant to any discussion of a work of art.²¹³ This issue is not only of hypothetical interest, but also of practical importance. Strict adherence to a theory which removes from a work the relevance of its author raises the question of whether it is appropriate for such a person to be held accountable for any alleged breach of the law which arises from the publication of that work. This view is acknowledged by Burke (1998), who supposes that if the author is indeed "a mere fiction or trace of language...there could be no charge to answer".²¹⁴ For this reason the postmodern theories which have pronounced the author dead are considered more fully below.

The Death of the Author

Barthes (1977) sees the literary work or text as "a tissue of quotations drawn from the innumerable centres of culture"²¹⁵ and therefore not as something original which the author has created. Thus he asserts that the focus of the text must now be upon the reader and not the author. Furthermore, for Barthes, this "the birth of the reader" must be at the cost of "the death of the Author".²¹⁶ Similarly, Foucault (1984) submits

²¹² See p.9

²¹³ The titles of two essays *What is an Author?* and *The Death of the Author* give a good indication of the author's lack of significance under this theory. See Rabinou P (ed.) *The Foucault Reader* (London, Penguin Group, 1984), pp.101-120, and Heath S (ed.) *Roland Barthes Image Music Text: Essays Selected and Translated*. (London, Fontana Press, 1977) pp.142-8.

²¹⁴ Burke S, *The Death and Return of the Author*, (Edinburgh, Edinburgh University Press, 2nd ed, 1998), p.5.

²¹⁵ Heath S (ed.) *Roland Barthes Image Music Text: Essays Selected and Translated* (London, Fontana Press, 1977) p.146.

²¹⁶ Heath, n 215 above, p.148.

that writing “has freed itself from the dimension of expression”²¹⁷ and consists of “signs” within which “the writing subject cancels out the signs of his particular individuality”,²¹⁸ causing him or her to become absent from the text. Within the realms of literary criticism and theory, the effect of this doctrine is to refute any reading of a text which seeks to ‘interpret’ or to discover any ‘true meaning’ from it and places the meaning of the text within the reader’s mind.²¹⁹ Such theories also dismiss as “a cultural artifact” the modern practice of attributing “specific works to specific individuals as authors”.²²⁰

If the author is truly irrelevant to the text, then it is arguable that the English legal system should acknowledge this in its framing and interpretation of the law. However, Baldick (1996) describes how “the basis of literary criticism and theory in the period after 1890 is characterized above all by the spectacular development of professional academic criticism,”²²¹ meaning that *two* broad strands of criticism now exist. These are academic criticism, from which has arisen a self-serving publishing market “which has no need to respond to public demands for relevance or intelligibility,”²²² and a more general form of criticism which serves the general public by reviewing literature in various journals or via other media.²²³ Whilst literary theories maintain that literature takes its form within the mind of the reader, or within some other ‘virtual’ place between the reader and the text,²²⁴ literary texts continue to be published in the form of print on paper and qualitative assessments continue to be made concerning their formal qualities, with direct reference to their authors. For example, in a recent literary review of two novels, the critic states “Linn Ullmann, as we realise within a few lines of her book (all present tense and jagged grammar), wants to write Serious Literature. Jenny Colgan, as we realise within a few

²¹⁷ Rabinou P (ed.) *The Foucault Reader* (London, Penguin Group, 1984), p.102.

²¹⁸ Rabinou, n 217 above, p.103.

²¹⁹ Iser W, *The Act of Reading* (Baltimore & London, John Hopkins University Press, 1978) p.10 and Wollf J, *The Social Production of Art* (London, Macmillan, 2nd ed, 1993), p.120, where she states: “Reading is always re-reading, and original meaning is inaccessible both to reader and to analyst”.

²²⁰ Posner, n 155 above, p.381.

²²¹ Baldick C, *Criticism and Literary Theory 1890 to the Present* (London, Longman, 1996), p.12.

²²² Baldick, n 221 above, p.14. See also Burke, n 214 above, preface (ix).

²²³ Baldick, n 221 above, p.13.

²²⁴ Iser W, *The Act of Reading* (Baltimore & London, John Hopkins University Press, 1978) p.21.

paragraphs of hers, wants to write Popular Fiction”.²²⁵ Whereas this thesis acknowledges the importance of the theoretical demise of the author in the postmodern era, and indeed exhibits the influence of such theories by its focus upon the subjective response of the reader or observer thus far, it considers that this postmodern literary theory is of significance primarily within the confines of academic criticism. ‘The death of the author’ is a theory which does not have a sufficiently broad application to warrant any amendment in the law.

In light of the above discussion, the writer’s own conception of the significance of the author or artist might be seen as something of a ‘middle ground’. It is this thesis that whilst the response of the reader or observer to a work of visual or literary art is crucial to any understanding of it, or to any qualitative assessment of it, the author or artist nevertheless remains significant as the person who first intended the work and caused its creation. It is the author or artist who *puts in* that which the reader receives, and even if that which the reader receives differs from that which the artist or author first intended, the author remains significant ultimately as the person who bears the primary responsibility for the creation of the work itself. Ingarden (1972) expresses this as follows: “The work of art...is the product of the intentional activities of an artist. The *concretion* of the work is not only the reconstruction thanks to the activity of an observer of what was effectively present in the work, but also a completion of the work and the actualisation of its moments of potentiality. It is thus in a way the common product of artist and observer”.²²⁶

Having diverted somewhat from the primary objective of this section; to analyse the significance of the author/artist in the categorisation of high art, this chapter now returns to its original aim.

²²⁵ Van der Zee B, “Dodgy Drizzle, or Burned Lasagne?” *The Guardian*, Saturday Review, 15 January 2000, p.10.

²²⁶ Ingarden, n 154 above, p.40

The Significance of the Author/Artist in the Categorisation of High Art

The evidence suggests that the identity and person of the author or artist *is* significant to the classification of a work as high art. This fact is established firstly by the kind of reception which is afforded to a newly discovered work where the artist or author has already written or formed works which are considered to be high art, and secondly, by the significance which is placed upon authenticity in the evaluation of works of literary or visual art. There is also, it is submitted, a general tendency to “regard a work and its creator as a single unit”,²²⁷ the significance of which will be discussed further below.

Works by Established Authors or Artists

Where a work has been produced by an artist or author whose name is already established (for example, where a manuscript or painting is discovered for the first time and attributed to one of the acknowledged *great* writers or painters, such as Shakespeare or Michaelangelo) then that work will be received in a manner which differs greatly to that in which a work by a hitherto unknown artist or author will be. Arguably, there is a presumption that the work will be within the category of high art, if other works by the same artist or author have already been categorised as such. Although he is commenting upon secondary literature, an explanation given by Burke (1998) can be applied equally to primary works in this context: Where a person has established his or her “*Author-ity*”²²⁸ in a given area, “it is this authority that commends these [newly discovered] texts so urgently to our attention over and above the countless other...of the time”.²²⁹ The fact that a particular work is highly acclaimed thus establishes authority not for the art object but for the artist or author who created it.²³⁰

²²⁷ Arnau F, *3000 Years of Deception In Art and Antiques* (transl. J Maxwell Brownjohn) (London, Jonathan Cape, 1961), p.116.

²²⁸ Burke, n 214 above, p.4.

²²⁹ Ibid.

²³⁰ Richards IA, *Practical Criticism: A Study of Literary Judgement* (London, Routledge, 1929) p.315.

In general terms, the names of the great authors of the past remain important in any common discussion of ‘the classics’ or in our understanding of the literary canon; an obvious example being the lasting significance of the name of Shakespeare. In the 1920s, Richards carried out an experiment using printed sheets of poetry, which he gave to individuals without revealing the poets’ identities. Richards encouraged the readers to give a full reading of the poem (usually more than four times) and then to give their comments.²³¹ The results of the experiment were dramatic; the authorship of the poetry was rarely recognised and many of the works by established poets were strongly criticised; whereas the poems of less well established or popular poets were praised. This caused Richards to conclude that “[w]ithout the control of this rather mysterious, traditional authority, poets of the most established reputations would very quickly and surprisingly change their places in general approval. This...should lead us to question very closely the quality of the reading we ordinarily give to authors whose rank and character have been officially settled. There cannot be much doubt that when we know we are reading Milton or Shelley, a great deal of our approval and admiration is being accorded not to the poetry but to an idol. Conversely, if we did not know that we were reading Ella Wheeler Wilcox, much of our amusement or patronising condescension might easily be absent”.²³²

So too with the great visual artists of the past. One reaction to a recent ‘unearthing’ of a Michaelangelo drawing serves as an example of this: “It’s like finding part of the Holy Grail...It is the most significant Michaelangelo work to be discovered in living memory”;²³³ the emphasis being placed firmly upon the identity of the artist, rather than upon the qualities of the drawing itself. In 2000, the National Gallery asked a number of leading contemporary artists to create works which were to be “inspired by old master paintings in the gallery”.²³⁴ Twenty-four artists agreed without hesitation to make the works, free of charge. The gallery’s director is reported as saying that “the idea was to match the greatest artists of our time with the greatest of

²³¹ Richards, n 230 above.

²³² Richards, n 230 above, p.315.

²³³ Stated by James Millery, Deputy Chairman of Sotheby’s, as reported by M. Kennedy, “£8m Michaelangelo Unearthed”, *The Guardian*, 11th October 2000, p.1.

²³⁴ “World’s artists Rise to Old Master Challenge” *The Guardian*, 12 January 2000, p.9.

all time”.²³⁵ These works subsequently formed the *Encounters* exhibition in the National Gallery,²³⁶ not because of any inherent qualities which they possess but because they are the works of artists whose previous works have received critical acclaim. This is a clear example of the way in which the name and reputation of an artist can create the presumption (albeit quite validly in many cases) that his or her work will be of a high quality.

Authenticity

In support of this thesis’ view, Buck and Dodd (1991) assert that the artist is vital to any assessment of the quality of a work.²³⁷ They point out that whether a particular work is proved to be or not be the work of an artist such as Rembrandt is highly significant: “Although the painting will not in itself have changed in any way, a change in attribution will affect the painting’s price and likewise the judgement of its aesthetic value”.²³⁸ Certainly in the visual arts, whether a particular work is proved to be or not be the work of an esteemed artist such as Rembrandt is highly significant to its *commercial* value; with a great emphasis being placed upon the requirement of authenticity. Forgeries, whilst they might appear to be identical to the authentic work of an established artist, are far less valuable than originals. Berger (1972) maintains that the work of art is now “defined as an object whose value depends upon its rarity”.²³⁹ We might add that its value depends also upon its *authentic* rarity. Buck and Dodd describe how “establishing provenance” is very important in the art market.²⁴⁰ If there exists a complete record of the successive ownership of a particular work, then it is considered unlikely to be a fake; thus “the exact pedigree of a picture by Vermeer is a matter of great importance, especially to the dealer trying to sell it”.²⁴¹ It is also significant to the art-dealer because he or she is seeking to sell not only the work of art, but the tradition which accompanies it; offering to the buyer

²³⁵ Ibid.

²³⁶ Reid C, “The Orchestration of Serendipity”, TLS, 30th June 2000, p.18

²³⁷ Buck and Dodd, n 190 above, p.25

²³⁸ Ibid.

²³⁹ Berger J, *Ways of Seeing*, (London, BBC and Penguin Books, 1972), p. 21

²⁴⁰ Buck and Dodd, n 190 above, p.71

²⁴¹ Murray, n 18 above, p.364

not only a work of art, but also membership into “an old and honourable fraternity” of art owners.²⁴²

Likewise with that which Buck and Dodd term the ‘aesthetic value’ (see above p.45). Where a work of art is discovered to be a fake or a forgery, this fact does not of course alter the work materially in any way.²⁴³ Yet if a work is found to be a fake, then this will alter any qualitative assessment of it. Arnau (1961) describes one incident at the Bavarian National Museum in Munich, when a wood-carving thought to have been a work of the Tyrolese School, created in around 1480, was consigned to the basement after it was declared a fake. The wood carving was placed on display once more when further investigation established its authenticity.²⁴⁴ It appears then that the fact of a work being a fake operates to invalidate any previous assessment of it, and precludes the observer from assessing the work in the manner which is typically adopted for original works. Jones (1998) explains this as follows: “The faking of art is a scandal because it unsettles our deepest beliefs about artistic originality, the individual and historical truth...[a] fake is embedded in its own time, the time it was made, trying to be two or three hundred years older”.²⁴⁵ Arnau makes a similar point: “A work in the manner of an age long past may successfully reproduce the style but can never be begotten of nor sustained by the spirit of that age”.²⁴⁶ Thus the work has to be assessed in light of the fact that it was created at a point in history which differs to that which was first understood, and assessed in the light of the lack of virtue and sincerity on the part of the artist who created it. This change in evaluation reflects primarily a general concern for artistic integrity, which once shown to be false, discounts a ‘normal’ evaluation of the work.

²⁴² Buck and Dodd, n 190 above, p.71

²⁴³ Arnau, n 227 above, pp.13-14.

²⁴⁴ Arnau, n 227 above, p.198.

²⁴⁵ Jones J, “Forgery’s Great Renaissance” *The Guardian Arts / Features*, 25th April 1998, p.4.

²⁴⁶ Arnau, n 227 above, p.194.

Identifying a Work By Reference to its Author or Artist

Despite theories which seek to remove the individual author or artist from our perception of a work, in fact the two remain inextricably linked. This view is supported by Hopkins (2000) who states that although the latter half of the twentieth century witnessed “an ideologically motivated call for the ‘death of the artist’, the fact remains that in real terms the prestige of individual artists has continued to be paramount”.²⁴⁷ Accordingly, Bennett & Royle (1995) note that we still say “as X writes” when referring to a literary work, even where the author is physically dead²⁴⁸ and in this and other theses, literary works are referred to primarily by the names of their authors. So too in the visual arts; the name of the artist is commonly used when referring to specific works, such as “a Manet” or “a Van Gogh”.²⁴⁹ This is further evidence to suggest that the author or artist (a factor *external* to the work for the purposes of this chapter) remains highly significant to our perception of a work of literary or visual art.

Commentators such as Wolff (1993) have argued (in relation to both authors and artists) that all artistic production is a collaborative act, since even in the more obviously ‘individual’ arts, such as writing, works are collectively produced; “writers need materials, need to be literate, benefit from acquaintance with some literary tradition...access to publishers and printers, as well as then being affected by both the book market and (possibly) literary critics”.²⁵⁰ Wolff argues further that the views of the artist or author are a product of his or her “group consciousness” as he or she cannot avoid being influenced by the social and economic structures which surround him or her,²⁵¹ and thus in a more general sense some collaboration is involved. When we recognise this fact, Wolff argues, then “[t]he simple idea of an artistic idea being penned ...by an inspired individual...begins to recede into the realm of myth”.²⁵² This thesis considers that it is possible to acknowledge that a degree of collaboration is

²⁴⁷ Hopkins, n 89 above, p.1.

²⁴⁸ Bennett and Royle, n 37 above, p.23.

²⁴⁹ Staniszewski, n 185 above, p.106

²⁵⁰ Wolff J, *The Social Production of Art*, (London, Macmillan, 2nd ed, 1993) p.33.

²⁵¹ Wolff, n 250 above, pp.119-120

²⁵² Wolff, n 250 above, p.33

involved in the production of a work, without discounting the role which the artist has played in its creation. As stated above, particularly since the late Eighteenth century, the artist or author is the person who bears the ultimate responsibility for the creation of a work, regardless of whether other persons were involved in its commission or execution, and it is submitted that the practice of referring to a work by the name of its author or artist represents a recognition of this fact.

Significantly, and in accordance with a view expressed by Staniszewski (1995) the writer sees this practice of identifying a work with its artist or author as an indication that an important function of art is to demonstrate “its maker’s freedom”²⁵³ and “a realization of his or her essential self”.²⁵⁴ Staniszewski bases this view upon the fact that “art”²⁵⁵ came into being in the late eighteenth century when the authority of the European Monarchies began to dissolve”,²⁵⁶ when revolutions took place in France and America, and when individuals began to see themselves less as subjects of their monarchs and more as individual citizens with rights.²⁵⁷ In support of this view, Parrinder (1991) states that the publication of William Wordsworth’s *Lyrical Ballads* in 1792 “heralded a revolution in English poetry”.²⁵⁸ The poet’s pronouncement that “all good poetry is the spontaneous overflow of powerful feelings”,²⁵⁹ and its subsequent broad acceptance, had the effect of freeing poetry from the constraints of a tradition which had hitherto required poets to write in a certain ‘classical’ manner. Similarly in the visual arts, painters such as Turner and Constable ousted the conventions by which artists had hitherto been bound, thus liberating the artist to portray his or her subject matter through the power of his or her own imagination.²⁶⁰ This freedom for artists and authors to reject tradition and to create works which are contrary to established convention has been described as “the assertion of an exalted freedom to act, at least on an artistic plane”.²⁶¹ Thus it seems that the shift in

²⁵³ Staniszewski, n 185 above, p.104

²⁵⁴ Ibid.

²⁵⁵ That is ‘art’ as we now understand the term – See above pp.33-34

²⁵⁶ Staniszewski, n 185 above, p.102

²⁵⁷ Staniszewski, n 185 above, p.106

²⁵⁸ Parrinder, P, *Authors and Authority*, (London, Macmillan, 1991) p.45.

²⁵⁹ Owen, n 129 above, p.116. See also chapter one, p.24.

²⁶⁰ See chapter one, p.24.

²⁶¹ Rosenthal, n 32 above, p.1.

thinking which arose in the late Eighteenth century and which caused the author or artist to be perceived as the imaginative creator of the work of art (and indeed allowed him or her to be such) came about as a result of an artistic or cultural revolution in which freedom of artistic expression was secured, at least within its own genre. Therefore, just as Thomas Paine declared the political *Rights of Man*²⁶² in 1792, so too Wordsworth and his contemporaries proclaimed contiguously the *artistic* rights of man, Wordsworth making that which Parrinder describes as a “statement of universal principles valid far beyond its particular occasion”.²⁶³

To conclude the current section, it is argued that this thesis has shown that the general practice of identifying a work with its author or artist is so widespread as to make it highly likely that the identity of the author or artist will be, or would have been, considered to some degree in the making of any qualitative assessment of a work of visual or literary art. The extent of the significance attached to the author’s identity cannot however be determined, save in the specific circumstances discussed above, when the authority of the artist is already established, or where authenticity is in question. Thus this section has shown that one external factor, namely the author or artist, is of some significance to the categorisation of high art, and it has shown that at least in certain circumstances, a work of literary or visual art is not judged by its inherent qualities alone.

The Identification of a Work with its Author or Artist in the Postmodern Era

It is submitted that although an accepted manner of considering contemporary art is to see it as merely that which the viewer perceives it to be, there exists also the alternative view stated earlier, that contemporary art is that which the artist determines it to be; and many of the so-called Young British Artists (or “YBAs”) choose now to cultivate a public image; marketing themselves as artists and celebrity figures, rather than promoting merely their works as artistic productions. Indeed it has been argued that some artists, such as Tracey Emin, use their works merely as a

²⁶² Paine T, *Rights of Man* (Harmondsworth, Penguin Books Ltd., 1984)

²⁶³ Parrinder, n 258 above, p.47.

means to achieving their own, personal notoriety.²⁶⁴ Emin has become famous for her self-revealing monologues and highly personal artistic works, and was herself the subject of a BBC documentary in 1999.²⁶⁵ One of Emin's works, *My Bed* (1998), which formed part of the 1999 Turner Prize exhibition, received much media attention. Emin's work has been described as "a confessional art" and *My Bed*, being a mattress, bed linen and pillows, stained with various bodily secretions offers to the viewer an insight into the artist's personal life, and makes it an eminently public matter.

Another 'famous' example of the YBAs is Damien Hirst. Godfrey (1998) refers to Hirst as "the most ferociously hyped artist of the 1990s"²⁶⁶ and he questions whether the capacity of Hirst's work to outrage the audience reflects an artistic approach or merely a means of gaining media attention. Furthermore, Godfrey questions whether these two approaches can now be separated. Many of the works by YBAs have been purchased by Charles Saatchi (himself an acknowledged marketing guru) and works of forty-two artists from the Saatchi collection²⁶⁷ were exhibited in 1997 at The Royal Academy of Arts under the title *Sensation*. The exhibition contained a wide variety of works, including Hirst's first major work entitled *A Thousand Years* (1990). This piece consists of two large glass cabinets, joined together. In one cabinet is a large white box which contains maggots, from which numerous bluebottle flies hatch. In the second cabinet is a rotting cows head, a bowl of sugar lumps, some water and a fluorescent 'insect-o-cutor'. The adjoining walls of the cabinets are cut away so as to allow the flies to pass from one cabinet to the other and, of course, the flies die when they inadvertently fly into the insect-o-cutor.²⁶⁸

Also exhibited were Tracey Emin's *Everyone I Have Ever Slept With* (a tent made by the artist and inscribed with the names of literally all the people with whom she had

²⁶⁴ Suggested by David Lee, Editor of *Art Review*, in "30 Minutes", Central ITV, 23rd March 2000

²⁶⁵ "Close Up: Mad Tracey From Margate", BBC2, 15th September 1999

²⁶⁶ Godfrey T, *Conceptual Art*, (Phaidon Press, London, 1998), p.379.

²⁶⁷ Royal Academy of Arts, *Gallery Guide, Young British Artists from the Saatchi Collection Sensation*, 18th September - 28th December 1997 (London, Royal Academy, 1997)

²⁶⁸ Kent S, *Shark Infested Waters The Saatchi Collection of British Art in the 90s*, (Zwemmer, London, 1994), pp.6 &36.

ever slept, including her twin brother in the womb, and previous sexual partners. The name of her aborted foetus is also included.²⁶⁹), Marcus Harvey's *Myra* (a portrait of Myra Hindley, produced by children's hand prints)²⁷⁰ and Jake and Dinos Chapman's *Zygotic acceleration, biogenetic, de-sublimated libidinal model (enlarged x 1000)* (consisting of a number of child mannequins with displaced genitalia). It is submitted that these works provide us with examples of the contemporary practice of producing works which are likely to be considered offensive or repugnant to many observers, which have the effect of creating a certain reputation for the artist.²⁷¹

In the Gallery Guide to *Sensation* the artists are described as being "known for their entrepreneurial spirit and media-friendly wit".²⁷² The exhibition certainly gained a great deal of media attention (although arguably not on account of the artists' wit) both in the United Kingdom and abroad. When *Sensation* reached New York, the Mayor of New York, Rudy Giuliani, threatened to withdraw the city subsidy from its host gallery, unless Chris Ofili's portrait of the Virgin Mary adorned with elephant dung was removed from the exhibition.²⁷³ *Sensation* was, however, shown in its entirety and the funding was withdrawn.²⁷⁴ A legal action was then brought against the Mayor's department, based upon the first amendment right to freedom of expression, which resulted eventually in the Mayor agreeing to restore funding.²⁷⁵ Not surprisingly, a great deal of media attention was focused upon the exhibition as a result of the furore. Thus we see that in much contemporary visual art, there is no desire for anonymity on the part of the artist and every reason for the practice of "regard[ing] a work and its creator as a single unit"²⁷⁶ to continue.

In response, it may be argued that criticism of contemporary art practice is not

²⁶⁹ <http://www.tate.org.uk/london/exhibitions/turnerprize99/index.htm>

²⁷⁰ Kemp S, "Myra, Myra on the wall: the Fascination of Faces", *Critical Quarterly*, Vol.40, no.1, 38.

²⁷¹ *Sensation* is also discussed in chapter five, pp.190-191.

²⁷² Royal Academy of Arts, n 267 above.

²⁷³ Ellison M, "Hillary Backs Britart Show", *The Guardian*, 28 September 1999. p.13

²⁷⁴ Ellison M, "Checkmate at artshow", *The Guardian*, 30 September 1999. p1.

²⁷⁵ "Comon Sense Prevails on the Museum", *The New York Times*, March 29th 2000, Section A, p.24, col.1.

²⁷⁶ Arnau, n 227 above, p.116.

relevant to a discussion of high art. It was stated earlier in this chapter that there are no formal qualities inherent in most contemporary art works which can cause one work to be considered superior to another. Yet the fact that some contemporary works, and not others, have been purchased for national and private collections, that some, and not others, were exhibited in the Royal Academy, and that some contemporary artists have been awarded prizes in preference to others, has caused us to acknowledge that some have been considered (by some person or persons) to be superior to others; the best of their kind. Is Ofili's *Holy Virgin Mary* (1996)²⁷⁷ high art? Can it be high art if no internal factors exist by which to judge it? In order to answer these questions, it is necessary to consider further the significance of other factors external to a work, which may operate to distinguish certain works as high art.

The Reader/Viewer's Response

The sonnet has been cited as an example of a work which is particularly suited to close structural or formal analysis; whereby it is easy to distinguish objectively one work as being superior to another. However, it has been argued that even in relation to artistic productions which lack these formal qualities, certain works have been considered to be superior to others. Can the assessment of a work of art be truly objective? If the decision is subjective, then who decides which works are better than others; who decides which are high art? Firstly, it is argued that even though it is possible to identify tangible factors which, when present in a work, signify high art status, the qualitative assessment of any work, be it a book, poem, painting, sculpture, installation or video is predominantly a subjective one. Returning to the example of the sonnet; it does not declare itself to be "fourteen lines of iambic pentameter...and approximately 140 syllables", with a variable rhyming scheme.²⁷⁸ All formal constraints are, to use an industrial term, *manmade*. The sonnet's structure is one that has been externally and humanly imposed; and so the reader's judgement of it takes place within the human constraints which have been placed

²⁷⁷ Royal Academy of Arts, n 267 above.

²⁷⁸ Lennard, n 43 above, p.23

upon it. In other words, from the outset it is judged in accordance with that which it is expected to be; and not merely according to what it is.

Secondly, and following Richards' (1924) theory which was alluded to in chapter one²⁷⁹ (that which Richards terms the "the fallacy of 'projecting' the effect and making it a quality of its cause"²⁸⁰) it is this thesis that in many cases where it appears that an objective assessment of a work has been made, what has commonly happened is that the observer has described or identified as a quality inherent to a work something which is actually a description of the effect which that work has had upon the mind of the observer. Richards cites numerous examples of where, in his view, this occurs: In all types of the arts we refer to "'construction', 'form', 'balance', 'composition', 'design', 'unity', 'expression'"; with reference to painting we use terms such as "'depth', 'movement', 'texture'" and in literary criticism "'rhythm', 'stress', 'plot' [and] 'character'".²⁸¹ Richards maintains that all these terms refer to matters within the mind of the observer and not exterior to it. Only the painting as "an assemblage of pigments" and the poem as "print and paper" actually exists outside of the mind of the observer.²⁸² Richards explains this as follows: "A (a work of art) causes an effect E in us, which has the character b; A causes E. We speak as if A has the quality B".²⁸³ However, there are particular features of the object A which cause the effect in the first place and Richards sees the role of the critic as describing the value of the experience which was caused in him or her by identifiable features within the work.²⁸⁴ If a reader is presented with a poem written in a language unknown to him or her, then his or her response to it demonstrates Richards' theory. He or she will be able to comment only upon "print and paper"; it is necessary for the reader to be able to mentally respond to a work in order to offer any meaningful assessment and evaluation of it.

²⁷⁹ Chapter one, p.30.

²⁸⁰ Richards, n 170 above, p.13.

²⁸¹ Richards, n 170 above, p.14.

²⁸² Richards, n 170 above, pp.13-14.

²⁸³ Richards, n 170 above, p.13, footnote 1.

²⁸⁴ Richards, n 170 above, p.15.

Further, and on this basis, it is submitted that there is a difference between a formal analysis of a work and a critical evaluation of it. Whilst the former may be an objective description of factors inherent in the work, some subjective element must be present in the latter. Here is an example of formal analysis. Muller (1968), describing Rembrandt's *Jacob Blessing His Grandchildren* (1656), states "[t]he harmony which exists between the characters is repeated in the colours and shapes. Jacob, Joseph and the two children form what is almost an equilateral triangle, and inside this triangle the colouring is delicate and light. At different points it is warmer, or colder and duller, but all the shades blend in with each other. The same combination of tints appears on the face of the woman in the brown dress who stands a little to one side, her body describing the shape of an isosceles triangle".²⁸⁵

Even here, the writer's own opinion enters in; the colours in the painting are not physically warm or cold, they may not be harmonious; the characters do not actually exist, they are depicted; the woman is not standing, 'she' is an arrangement of pigments on canvas. Here the same writer critically evaluates Rembrandt's *The Jewish Bride* (c.1665) as "one of the finest works of his career...[t]he man is leaning slightly towards the woman, whose features express shyness and reserve...there is not a trace of sensuality, merely affection and an unutterable tenderness. The eyes...do not meet: they are too absorbed by inward feelings to wish to look at each other. They have no visual contact, for emotionally they are united".²⁸⁶ But they are not real! Rather, it is argued that the excellence of the painting is that colours, lines and shapes have been arranged in such a way as to give the impression to the viewer that the depicted figures display human characteristics. The effect was certainly successful with Muller.

Lastly, since there is some element of subjective response in the evaluation of works of visual or literary art then, since each mind is different, a wide variety of responses is likely. The huge amount of secondary works, which exist to evaluate and interpret primary texts, is an indication of this fact. Steiner (1989) maintains that "the volume

²⁸⁵ Muller JE, *Rembrandt*, (London, Thames & Hudson, 1968), pp.170-172.

²⁸⁶ Muller, n 285 above, pp.249-252.

of secondary discourse defies inventory...[t]he mass of books and critical essays, of scholarly articles, of *acta* and dissertations produced each day in Europe and the United States, has the blind weight of a tidal wave” and estimates that since the late 1780s, approximately 25,000 works have been produced solely on the subject of Shakespeare’s *Hamlet*.²⁸⁷ Smith (1988) cites as an example of the infinite variations possible in the critical evaluation of a sonnet her personal study of Shakespeare’s Sonnets over some thirty-five years; stating that “[s]ome of the sonnets that are now my favorites, I once...thought of as obscure, grotesque or raw; and some that I once saw as transparent, superficial, or perfunctory have subsequently become, for me, thick with meaning, subtle and profound”.²⁸⁸ Smith argues therefore that any evaluation of a literary text is “always compromised, impure, contingent; altering when it alteration finds; bending with the remover to remove; always Time’s fool”.²⁸⁹ In other words, all critical evaluation (including that which evaluates as high art certain works in preference to others) is variable, even when the reader appears to be referring to objectively identifiable qualities within the text. This view is illustrated further (although apparently unintentionally) by Wellek (1963) who asserts that “[i]t would be easy to collect hundreds of definitions of “form” and “structure” from contemporary critics and aestheticians and to show that they contradict each other so radically and basically that it may be best to abandon the terms”.²⁹⁰ Different observers at different times seek different qualities (even if they are given the same name) within works of art with which to evaluate them.

The recognition that that which is sought after in a work to determine its quality may differ, together with the fact that human responses to a work will differ, has caused writers such as Eagleton (1996) to assert that even Shakespeare “can cease to be literature”.²⁹¹ Yet if this were so, then how has any consensus of opinion concerning the relative merits and demerits of a given work ever been reached in order for a category of high art to come into being?

²⁸⁷ Steiner, n 163 above, pp.24-25.

²⁸⁸ Smith, n 117 above, pp.5-6.

²⁸⁹ Smith, n 117 above, p.1.

²⁹⁰ Wellek R, *Concepts of Criticism*, (New Haven and London, Yale University Press, 1963), p.54.

²⁹¹ Eagleton, n 38 above, p.9.

The answer to this is two-fold. Firstly, it is this thesis with relation to the established canons, that the works which are included in them are excellent examples of their kind, based upon factors inherent to them. The writer would, perhaps, choose to describe these factors in a manner different to that which is commonly adopted, but acknowledges that because of the presence of certain factors within certain works, they have been considered to be superior to other works, and that they are likely to continue be so. Secondly, whilst the element of subjectivity allows the possibility of there being a vast disparity among the judgements of any work, it is argued that the factors present within certain works make it likely that a certain category of persons will respond positively to them. Arguably, it is this category of persons, rather than the public at large, who are the means by which certain works are judged to be high art.; thus diminishing severely the possible disparity of relevant response (see below for a further discussion of this). Furthermore, it is submitted that certain statements concerning high art are and have been made in a manner which, whilst being subjective, are in some sense universal; statements which Kant (1790) described as being those which “do not purport to speak only for the judging subject, but...demand the assent of everyone”.²⁹² A proviso would be added in this particular case, to limit “everyone” to “everyone in the same category of persons as the speaker”. This peculiar category of persons who are considered to be highly influential in the categorisation of high art is discussed in the next section.

The Response of “The Passionate Few”

The term “the passionate few” is taken from Arnold Bennett’s *Literary Taste - How To Form It* (1914), in which he states that the fame of classical authors is “originally made, and...maintained, by the passionate few” and is “entirely independent of the majority”.²⁹³ Whereas the majority of people have some “faint and perfunctory” interest in literature (they “care as much about literature as they care about aeroplanes or the programme of the Legislature”),²⁹⁴ a small minority find significant

²⁹² Kant I, *The Critique of Judgement*, (transl. JC Meredith) (Oxford, Oxford University Press, 1952) (Orig. published 1790), pp.84 & 95.

²⁹³ Bennett, n 164 above, p.18.

²⁹⁴ Ibid.

pleasure in literature and it is these people who decide (for reasons which Bennett is unable to identify) which works are worthy of our attention. More recently, and in a markedly more verbose manner, Steiner (1989) has supported this view. Steiner maintains that “[g]iven a free vote, the bulk of humankind will choose football, the soap opera or bingo over Aeschylus” and “those who ...generate the syllabus, who recognise, elucidate and transmit the legacy of literacy in regard to textual, artistic and musical creation, have always been, are a handful”.²⁹⁵ Wolfe (1989) makes a similar point in regard to the visual arts. He maintains that a certain group of people, who he terms “the culturati” and of whom, Wolfe estimates, there are only around 10,000 in the entire world, are those who judge works of art and determine whether or not a particular artist becomes successful; the general public do not determine artistic greatness; “[t]he public is presented with a fait accompli”.²⁹⁶

Based upon this view, it is submitted that whilst it is considered highly inappropriate presently to categorise contemporary art works such as Ofili’s *Holy Virgin Mary* as high art, this view may change in time. For many contemporary artists their works are intended to represent a challenge to the traditional understanding of art and to the very notion that certain works are, by virtue of their inherent properties, superior to others and this is a fact which is recognised by ‘the passionate few’. Yet as has been stated earlier, distinctions are drawn between these works, with some receiving awards or being exhibited in preference to others. Wolfe (1989) describes how each new movement, each new *ism* in Modern Art, was a declaration by the artists that they had a new way of seeing things which the rest of the world could not comprehend. “We understand!” said the culturati, thereby separating themselves from the herd”.²⁹⁷ Thus it is submitted that those who claim such understanding at present are highly unlikely to categorise as high art works by artists who consider the concept of high art to be an anathema, yet in practice they continue to make

²⁹⁵ Steiner, n 163 above, pp.67-8. See also Rowley S (ed), *Craft and Contemporary Theory*, (St. Leonards, Allen and Unwin, 1997), p.xvii.

²⁹⁶ Wolfe, n 13 above, p.27.

²⁹⁷ Wolfe, n 13 above, p.37.

qualitative assessments of them, perhaps based merely upon that new intangible artistic material, “thought”²⁹⁸ which was referred to in the previous chapter.²⁹⁹

Bourdieu (1984) maintains that “cultural practices” such as visiting museums and reading are closely linked to educational levels and social origin.³⁰⁰ When faced with certain photographs, those people whom Bourdieu describes as being “culturally most deprived”³⁰¹ made comments from their own experience. For example, when faced with a photograph of an old woman’s hands, one respondent says “Oh, she’s got terribly deformed hands!”.³⁰² By contrast, those whom Bourdieu classifies as being at the higher cultural and social levels respond in a more abstract and general manner. A respondent from this category states “I find this a very beautiful photograph. It’s the very symbol of toil.”³⁰³ This work is cited here to support the notion that a small number of persons (who could be classified as occupying the highest educational levels) are likely to respond to certain works in a like manner.³⁰⁴ This manner would be abstract and, it is argued, *comparative*. It is not merely (or, perhaps not at all) by virtue of the fact that this minority find lasting pleasure in the arts that they exercise significant influence, but rather it is in their roles as experts, as those who “have some claim to knowledgeability by virtue of a distinctive professional activity...who produce secondary discourse about cultural objects”³⁰⁵ that they are influential. These persons, many of whom occupy positions at the highest educational level, respond in a manner which is peculiar to their status. The response of a person from this category is likely to include references to other works, a description of its formal qualities and an assessment of its artistic merit or value. Critics, contemporary artists and authors, academics and scholars are thus particularly influential in the categorisation of high art because they frequently

²⁹⁸ Hopkins, n 89 above, p.177.

²⁹⁹ Chapter one, p.16.

³⁰⁰ Bourdieu P, *Distinction: A Social Critique of the Judgement of Taste*, (London, Routledge Kegan Paul, 1984) (1st published in French 1979), Introduction.

³⁰¹ Bourdieu, n 300 above, pp.44-45.

³⁰² Bourdieu, n 300 above, p.45.

³⁰³ Ibid.

³⁰⁴ See Willis P, “Symbolic Creativity”, in Storey J (ed.) *Cultural Theory and Popular Culture: A Reader* (Hemel Hempstead, Prentice Hall, 2nd ed, 1998), pp.546-553, at p. 547.

³⁰⁵ Shrum WM, *Fringe and Fortune...The Role of Critics in High and Popular Art* (Princeton, Princeton University Press, 1996), p.9.

possess the requisite knowledge which allows them to argue with some authority that certain works are better than others.

The power to determine which works are included in the University syllabus rests with persons who form a part of this distinguished “passionate few”.³⁰⁶ University professors and lecturers determine those works which they consider to be appropriate for study, and likewise they exercise significant influence in deciding which works should be made available for study in schools. The effect of this is to create a frame of reference within which the student operates, learning to accept as high art that which has been made accessible. The examples of high art which the writer has referred to in this thesis are not those which have been personally discovered by her, they are those which were made known to her throughout her education. They are those which established and respected academics have included in their text books as objects of praise. For example, the views of Professor Gombrich were relied upon in this thesis to support the notion that Manet’s *Le Dejeuner sur l’Herbe* (1863) is high art.³⁰⁷ The outer-cover description of Professor Gombrich’s sixteenth edition of “The Story of Art” states that “[r]eaders...have found in Professor Gombrich a true master” and reproduces an extract from the *Times Literary Supplement* review of the first edition; stating that “[t]his book, as widely read as it will certainly be, may well affect the thought of a generation”,³⁰⁸ thus acknowledging the considerable influence of academics in this field.

This fact is illustrated when the practical means by which works of literary and visual art gain high art status are considered. Return once more to X and her discoveries. Most works of art are not first encountered under a pile of leaves in a forest. Occasionally, a work of visual art is purchased relatively cheaply for ornamental use and later discovered to be the work of a ‘great’ artist, but most contemporary works are produced by artists who then seek to gain the attention and approval of influential figures in the ‘art world’, whose response to the work will govern its short-term

³⁰⁶ Rowley S (ed), *Craft and Contemporary Theory*, (St. Leonards, Allen and Unwin, 1997), Introduction, pp.xvi-xviii.

³⁰⁷ Gombrich, n 10 above.

³⁰⁸ *Times Literary Supplement*, 27th January 1950.

future. Wolfe (2000) cites as an example of the influence of this small group of people (“the culturati”)³⁰⁹ who are particularly in this instance “the curators, dealers, collectors, scholars, critics and artists in New York”,³¹⁰ their treatment of the work of a sculptor named Frederick Hart (1944-1999). In 1971, Hart won an international competition which was held to choose a sculptor who would produce a large-scale work, based upon the theme of creation, on the west facade of the Washington National Cathedral. Wolf maintains that “Hart turned out to have Giotto’s seemingly God-given genius...for pulling perfectly formed human figures out of stone and clay”,³¹¹ yet when Hart’s sculpture *Ex Nihilo* (a stone carving) was unveiled, there were no critical reviews of the work in newspapers or in art journals. Wolf maintains that “*Ex Nihilo* never got ex nihilo simply because the art worldlings refused to see it. Hart had become so absorbed in his ‘triumph’ that he had next to no comprehension of the American art world as it existed in the 1980s...the word was that school-of-Renaissance sculpture like Hart’s was nonart. Art wordlings just couldn’t see it...[b]y 1982, no ambitious artist was going to display skill, even if he had it”.³¹² Thus *Ex Nihilo* was never acclaimed as high art because those in a position to acknowledge it as such refused to acknowledge it.

Thus it is argued that works *become* high art; that the identification of certain properties must take place and the conclusion drawn that the work is of superior quality to other like-works before the work is established within an elite category.³¹³ Those who are responsible for this practice are, it is argued, ‘the culturati’ or ‘the passionate few’. It has already been stated that until the late eighteenth century, art objects which entered the public domain commonly served some useful purpose and were created for specific persons, for specific reasons, rather than for their own sake. (It is not, of course disputed that artists prior to that time created works privately and for their personal satisfaction too). The new way of seeing art which developed at that time was accompanied by a new category of persons; those who commented

³⁰⁹ Wolfe, n 13 above, p.18.

³¹⁰ Wolfe T, “The Genius they Chose to Ignore”, *The Daily Telegraph*, Telegraph Magazine, 26th February 2000, pp.34-41, at p.39.

³¹¹ Wolfe, n 310 above, p.37.

³¹² Wolfe, n 310 above, pp.37-39.

³¹³ Newton, n 114 above, p.8.

upon, criticised and analysed works of art. With regard to literature, Shrum (1996) describes critics as being those whose “social role...emerged over the past two centuries *together with high and low art as identifiable categories*,”³¹⁴ who acted and continue to act as mediators between the work and the audience. Shrum argues therefore that “[c]riticism is not extrinsic but intrinsic to the artistic process in the modern world. Critics are not objective referees of the best and worst, standing outside of the art world and judging its output, but participants in a stream of discourse that defines the cultural hierarchy”.³¹⁵

Goodall (1995) submits that although the second half of the eighteenth century was the time in which the foundations for modern thought on such things as the nature of art were laid, it was also a time of rapid industrialisation which brought challenges to new aesthetic notions: not least because of the unsightly nature of some of the newly industrialised areas.³¹⁶ Thus it has been asserted that “at this time was born not just the notion of high culture but of popular culture also”,³¹⁷ a time when “an interest in the commonplace and the everyday”³¹⁸ developed alongside the new understanding of art as a peculiarly imaginative and creative skill. Thus “by the end of the eighteenth and the beginning of the nineteenth centuries, the nature of the debate about high art and popular art had taken shape in a way that we are still familiar with”.³¹⁹ Lowenthal (1961) supports this conclusion, although he perceives the late eighteenth century as a time when that which we now term the ‘arts’ became divided into two factions; “art” and “commodity”³²⁰ - the important distinction being the work’s likely audience: “art” being for discerning individuals, and “commodity” for the masses.³²¹ The concern to identify and to preserve high art grew, Lowenthal argues, when these

³¹⁴ Shrum, n 305 above, p.10.

³¹⁵ Ibid.

³¹⁶ Ruskin described the late 18th Century London in which Turner grew up as “meanness, aimlessness, unsightliness: thin-walled, lath-divided, narrow-garreted houses of clay”; Bradley J, *An Introduction to Ruskin* (Boston, Houghton Mifflin Co., 1971), p.62 and Goodall asserts that “[f]or D.H.Lawrence, the worst offence of industrialism in English culture was its criminal ugliness”, n 46 above, p.2.

³¹⁷ Goodall, n 46 above, p.2

³¹⁸ Pointon, n 124 above, p. 86.

³¹⁹ Goodall, n 46 above, p.2

³²⁰ Lowenthal L, *Literature, Popular Culture and Society*, (Palo Alto California, Pacific Books, 1961), p.xii.

³²¹ Ibid.

two areas came into contact as a result of a rapidly increasing popular audience, and a decline in patronage.³²² Thus it seems that the practice of categorising works into “high” or “low” art developed as a result of a number of factors; and clearly a discrete category of humans (notably, for the purposes of this chapter, themselves being factors external to the work) were closely involved in this process from its beginning. High art did not (and does not) announce itself as such.

Contextual Influences

Many of the works cited as examples of high art in this thesis are those of which the writer has been made aware via secondary and further education and, in the case of the visual arts, many are those which the writer has seen first-hand, displayed in various galleries (such as the *Rout of San Romano* at the National Gallery and some of the works of Rembrandt at the Rijksmuseum in Amsterdam.) Are such works displayed in galleries there because they are high art? or does the context in which they are placed cause them to be valued above works which are placed elsewhere?

Berger (1972) maintains that the practice of placing art in institutions changes the way in which the viewer perceives it.³²³ When an image is placed in a gallery it is presented as a work of art and this, Berger maintains, causes the viewer to assess it in accordance with “a whole series of learned assumptions about art” concerning such things as taste, form or genius.³²⁴ More specifically, Buck and Dodd (1991) maintain that “the architectural style of the museum building also often promotes a spirit of reverence and devotion to the artworks [and] [a]ll this ritual surrounding revered objects is in keeping with the dominant image of a museum as a temple of art”;³²⁵ thus they maintain that the physical surroundings of a work of art can affect our perception of it. Many of the older works which are now exhibited in galleries were created for a particular setting and purpose and not for a gallery. For example,

³²² Lowenthal, n 320 above, p.xiii.

³²³ Berger, n 239 above, p.8

³²⁴ Berger, n 239 above, p.11

³²⁵ Buck and Dodd, n 190 above, p.142.

Uccello's *Rout of San Romano* (c.1456)³²⁶ is now split into three separate pieces and exhibited in The National Gallery, the Uffizi and the Louvre; whereas it thought to have been designed originally as three panels forming part of a decorative scheme in the Medici Palace (recorded as being part of the bedroom furnishings of Lorenzo de' Medici in 1492). Of course, many contemporary works of visual art are now constructed specifically for the gallery and even within the gallery, using the gallery space itself to form part of the artwork (the practice termed installation art).³²⁷

With regard to literature and the effect which the context of a work can have upon the observer, Culler (1997) argues in regard to literature that "most of the time what leads readers to treat something as literature is that they find it in a context that identifies it as literature: in a book of poems or a section of a magazine, library or bookstore".³²⁸ 'Literature', the term used to describe various forms of creative or imaginative writing, took on its current meaning in the late eighteenth century. Easthope (1991) describes how the word originates from the Latin "litera", which meant written, as opposed to oral, communication³²⁹ and he cites Williams' view expressed in *Marxism and Literature* that the word literature "acquired progressively more specialised connotations";³³⁰ firstly by its associations with the notion of polite letters and the acquisition of reading skills and later, in the Romantic period, with regard to notions of art, imagination and creativity. Culler (1997) supports this view, stating in regard to literature a view similar to that expressed by Staniszewski regarding visual arts: "For twenty-five centuries people have written works that we call literature today, but the modern sense of literature is scarcely two centuries old. Prior to 1800 literature and analogous terms in other European languages meant 'writings' or 'book knowledge'".³³¹

³²⁶ Reproduced in Pope-Hennessy, n 14 above, plates 51-76.

³²⁷ Archer, n 96 above, pp.203-4.

³²⁸ Culler J, *Literary theory A Very Short Introduction* (Oxford, Oxford University Press, 1997), p.27.

³²⁹ Easthope, n 109 above, p.7.

³³⁰ Ibid.

³³¹ Culler, n 328 above, pp.20-21.

The word is sometimes used with a capital ‘L’ to refer to works which are considered to be the highest forms of literature. Eagleton (1996), in a discussion under the heading “What is Literature?”, acknowledges this indirectly when he states that Superman comics and Mills and Boon novels are fictional works, but they are not regarded generally as literature and certainly not as ‘Literature’.³³² Buck and Dodd (1991) note that there are some novels we call “Literature...in order to distinguish them from other novels that we call fiction or even trash”.³³³ It seems that the use of an initial capital is one means of inferring that works placed within this category are those of the highest worth; those which will be likely to form part of the so-called ‘literary canon’.³³⁴ It should be noted, however, that although Culler argues that contextual factors can and do influence value judgements, he later adds the proviso that that “sometimes the object has features that make it literary”.³³⁵

What is the significance of the fact that a work of visual art is exhibited in a museum, or the fact that a poem is included in an anthology of nineteenth century verse? Must it be high art to merit being placed in this context, or by being placed in this context does it become high art? The former view is adopted here. It is submitted that the categorisation of works as high art takes place prior to their being placed in a particular context (they have already been considered the best examples of their kind) but that the placing of those works in such a context serves to consolidate their status.³³⁶

Sociological and Ideological Factors

The term ‘ideology’ has been used in a wide variety of contexts. Williams (1977) defines the term as being “a system of beliefs characteristic of a particular class or group”³³⁷ and Easthope (1991) describes it as “meaning which is socially

³³² Eagleton, n 38 above, p.2.

³³³ Buck and Dodd, n 190 above, p.10.

³³⁴ Easthope, n 109 above, p.11, and Culler, n 328 above, p.48.

³³⁵ Culler, n 328 above, p.27.

³³⁶ See pp.59 and 62 above; the writer’s examples of high art have been drawn from such contexts.

³³⁷ Cited in Wolff, n 121 above, p.54.

constituted”³³⁸ as opposed to ideas which emanate solely from an individual. There have been a number of ways in which ideological theories have been applied to literary theory, but here ideological theory is expressed in its simplest terms, as a means of asserting that “the ideas and beliefs people have are systematically related to their actual and material conditions of existence”.³³⁹ Thus an individual’s assessment of the value of a work is at any given time linked to wider social factors which strongly influence the individual, regardless of his or her awareness of it. Since social and economic factors change over time, so then do the ideas and beliefs of people existing at any given time. Thus, following this view all evaluation, including that which deems certain works to be high art, is subject to change. Even if certain factors inherent to a work remain the same, there is no guarantee that the value which is attributed to these factors will remain constant.

Writers such as Fish (1989) and Eagleton (in what has been called his “hugely influential”³⁴⁰ work *Literary Theory An Introduction*) argue forcefully that “there is no such thing as intrinsic merit”.³⁴¹ More specifically, Eagleton maintains that “Literature, in the sense of a set of works of assured and unalterable value, distinguished by certain shared inherent properties, does not exist...value-judgements are notoriously variable...the so-called ‘literary canon’, the unquestioned ‘great tradition’ of the ‘national literature’, has to be recognised as a construct, fashioned by particular people for particular reasons at a certain time. There is no such thing as a literary work or tradition which is valuable in itself, regardless of what anyone has said or come to say about it. ‘Value’ is a transitive term: it means whatever is valued by certain people in specific situations, according to particular criteria and in the light of given purposes.”³⁴² It is this view which has caused Eagleton (1996) to draw the conclusion alluded to earlier; namely that it is possible that even the works of Shakespeare may cease to be highly acclaimed in the future.

³³⁸ Easthope, n 109 above, p.130.

³³⁹ Wollf, n 121 above, p.50.

³⁴⁰ Easthope, n 109 above, p.51.

³⁴¹ Fish S, *Doing What Comes Naturally: change, rhetoric and the practice of theory in literary and legal studies* (Oxford, Clarendon, 1989), p.164.

³⁴² Eagleton, n 38 above, p.11

As is discussed further in chapter three, the recent decision to remove canonical texts from the English GCSE syllabus supports to some extent Eagletons' assertion. Conversely, examples have already been cited in this thesis of works which received condemnation when first exhibited but which subsequently received great praise. Whilst this thesis has argued that the categorisation of high art is a predominantly subjective process, and that no criteria exist with which to identify a work as high art in the sense that it is incomparably 'great', some formal factors within certain works have been identified as means by which one work may be considered to be of a superior quality to others. Historically, it is arguably the presence of these factors which has caused the group of persons who have been referred to previously as "the passionate few" to react to them in a certain manner, although the writer acknowledges the view put forward by Fish (1980), that it is often "not that literature exhibits certain formal properties that compel a certain kind of attention; rather, paying a certain kind of attention ...results in the emergence of noticeability of the properties we know in advance to be literary".³⁴³ In other words, there are many works which exist which possess those formal qualities identified in the first section of this chapter which would mark them out as being comparatively 'great', or the best examples of their kind, had "the passionate few" paid attention to them. Hart's *Ex Nihilo* provides a convenient example of this fact.

It is submitted (with the awareness that this cannot be proved) that sociological factors can be used to explain further the reason why, given the possible diversity of opinion, "the passionate few" respond in apparently consensual manner to certain works. It has been stated with regard to Eighteenth Century admirers of art (and subscribers to a standard of taste) that "they often had a guilty conscience; they were worried that they weren't liking the right things, that they were instead expressing a lowly or uninformed taste by preferring cheerful, erotic, over-simple or "low" works to the "elevated" and "spiritual" works which should be the objects of their admiration".³⁴⁴ This is an example of how social pressure can influence the reaction

³⁴³ Fish S, *Is There A Text In This Class? The Authority of Interpretive Communities* (Cambridge Massachusetts & London, England, Harvard University Press, 1980), pp.10-11.

³⁴⁴ Benton T, *The Concept of High Art and The Reaction To It*, (Bletchley, Open University Press, 1972) p.17

of the observer to a work of art. It is submitted that if a work is acclaimed by a respected figure within the category of persons who have been termed “the passionate few”, then there will be a social and professional pressure placed upon other members of that group to accord with this opinion, or in the least to express very clearly and with full consideration their reasons for disagreeing with it. If, as is argued, certain factors do exist within a certain work which cause it to be acclaimed, then it is likely that the close attention which is required even to refute an opinion concerning a work, will cause the viewer or reader to at least acknowledge their presence. It is submitted further that an apparent ability upon the part of the observer to appreciate high art will influence his or her social standing; in short “Taste classifies, and it classifies the classifier”.³⁴⁵ Thus those who seek to be a part of a social or academic elite are likely to conform to a pre-existing standard of taste, and so too members of the public who view works of art in galleries or read certain literary works are (be it consciously or unconsciously) conforming to a standard of taste which has been predetermined by “the passionate few”.

Conclusion

In the introduction to chapter one, reference was made to the fact that *Great Expectations* is considered metaphorically to occupy a position which is superior to *High Stakes* and that it is at the peak of this metaphorical hierarchy that high art is thought to exist. In concluding this chapter, it is submitted that the terms ‘considered’ and ‘thought’ are fundamental to any understanding of high art.

Section one identified tangible factors which allow certain works to be favoured above others, although it was acknowledged that these could not be identified in much contemporary visual art. No intangible factors could be identified as a practical means of evaluating works of literary or visual art. No tangible or intangible factors were identified which could cause certain works to be considered ‘great’ beyond comparison. Factors external to the work were then considered and it was argued that the evaluative process was a predominantly subjective one; the significant issue

³⁴⁵Bourdieu P, cited in Staniszewski, n 185 above, p.121

being the effect which certain factors inherent to a work had upon the mind of the observer. A distinct category of persons was then identified as being instrumental to the categorisation of high art; being those who by virtue of their social, academic or professional status were most likely to respond to a work and in an abstract and disinterested manner and who, most importantly, were most likely to be in a position to make a *comparative* assessment of it. Thus high art does not exist independently from human response. Rather, factors within a work exist which give rise to its capacity to become acknowledged as high art but these are not factors which necessarily command attention and their presence does not in itself constitute high art. High art is that which is *considered* or *thought* to be so. Notably, this is not the same thing as saying that high art does not exist, or that it is not real. It means that high art is not a category of “autonomous objects”³⁴⁶ consisting of certain shared formal properties, but rather that it is a category which is brought into being by “the judgements and valuations of people”.³⁴⁷

Returning to the initial example of X and her discovery of a golden object and the manuscript and painting. Suppose tests reveal that the first discovery is indeed gold. Physical, objective tests of the painting can reveal only that it is an arrangement of pigments on canvas. Likewise with the manuscript, it is print on paper. In both cases it may also be possible to give an estimate of the time in which they were created, based upon physical factors, but it will not be possible to discern whether either are high art, based upon objective tests or analysis. So is X’s response sufficient to categorise either as high art? It is argued that it is not. Furthermore, it is unlikely that unless X is herself a member of the small category of persons referred to above, the question as to whether or not the works are high art is unlikely even to come to her mind. The term itself is one which is of specialised use; it is not it is not used sufficiently commonly or frequently to merit inclusion as a term “in its own right” in the *Oxford English Dictionary*³⁴⁸ or in *Chambers 21st Century Dictionary*.³⁴⁹

³⁴⁶ Sadler I, *Art of the Postmodern Era From the late 1960s to the Early 1990s* (New York, Harper Collins, 1996), p.333.

³⁴⁷ Newton, n 114 above, p.9.

³⁴⁸ Simpson J & Weiner E (eds), *Oxford English Dictionary*, Vol.VII (Oxford, Clarendon Press, 1989), p.216.

³⁴⁹ Robinson M (ed), *Chambers 21st Century Dictionary*, (Chambers, 1996, UK).

Indeed it is not even included as a term in the thirty-four volumed *Dictionary of Art*,³⁵⁰ nor is it in the *Dictionary of Literary Terms and Literary Theory*³⁵¹ or *The Cassell Dictionary of Literary and Language Terms*.³⁵² High art does feature as a dictionary example of the application of the word “high” in this sense of it being “[o]f exalted quality, character, or style; of lofty, elevated, or superior kind; highclass”³⁵³ or “significant, exalted or revered”³⁵⁴ and it is argued that it is by virtue of the fact that it is exalted or revered by a certain group of persons that high art exists. In order to become high art, it will be necessary for X’s discoveries to be brought to the attention of experts, those who “have some claim to knowledgeability by virtue of a distinctive professional activity...who produce secondary discourse about cultural objects”³⁵⁵ and who may eventually reach some consensus as to their artistic merit or value.

³⁵⁰ Turner J (ed), *The Dictionary of Art*, (1996, Macmillan, London).

³⁵¹ Cuddon J (ed.), *Dictionary of Literary Terms and Literary Theory*, (Oxford, Blackwell, 3rd ed, 1991)

³⁵² Ruse C & M Hopton (eds), *The Cassell Dictionary of Literary and Language Terms* (London, Cassell, 1992).

³⁵³ Simpson and Weiner, n 348 above, at 6.a.

³⁵⁴ Robinson, n 349 above, p.633.

³⁵⁵ Shrum, n 305 above, p.9.

Chapter Three

Reasons for Protecting High Art

Introduction

This Chapter considers whether high art should be afforded greater protection than works of literary or visual art which are not considered to fall within this elite category, focusing upon some of the non-legal arguments which have been put forward in this regard. More specifically, this chapter considers whether all forms of artistic expression should be afforded equal protection, or whether high art is of such significance that it should be afforded protection *in preference* to more prosaic works.

Whilst the term ‘protection’ can refer to the physical protection of the art object, it is employed in this chapter to refer to the practice of defending the creator or publisher of the work from an external influence, being one that is likely to prohibit the work from being exhibited in its original state in public (for example, by application of the law; specific examples of which will be discussed in subsequent chapters). Non-legal attitudes to the protection of high art can be divided into two broad categories: Firstly, it has been argued that high art should be protected because of the (various) positive effects that it brings about. Secondly, high art should be protected ‘for its own sake’ because of its inherent value and not because of any beneficial effect which it may have. These categories are discussed in turn in this chapter.

Section One: High Art and Its Beneficial Effects

It has been the alleged redeeming moral and social value of high art which has been used most forcefully to support the argument that high art should be protected as an elite category (particularly with regard to literature), or that works of high art should be made more widely available to the public (particularly with regard to the visual arts). A related argument is for the inclusion of the study of high art works in

schools and universities, because of their educational value. Alternative arguments which have been put forward relate to what this thesis terms the perceived benefits of high art relating to 'the national interest' (particularly with regard to its promotion) and to the industrial or commercial aspects of high art. These will be discussed in turn in this chapter and considered individually as reasons to support or deny the assertion that high art should be afforded greater protection than more prosaic works.

The Redeeming Moral and Social Value of High Art

In chapter two, reference was made to the 'standard of taste' which existed in the eighteenth century; whereby only certain works, created in certain styles, were considered worthy of admiration.³⁵⁶ Inherent in this view was the notion that in occupying his or her mind with acceptable works of visual art or literature, the reader or viewer would be prompted to behave in a socially acceptable manner. In short, "it was an axiom of High Art that good art led to good morals".³⁵⁷ Following the significant period in the late eighteenth century, when 'the arts' first came to be referred to collectively, 'the artist' assumed his Romantic role as creative genius and the audience became increasingly aware of the so-called 'aesthetic' response, it was no longer specific styles of work which were considered to inspire good conduct, but 'the arts' in general; for example, writing in 1805, a painter and member of the Royal Academy, Martin Archer Shee, stated that "our morals are materially connected with our arts, and good taste not only refines, but reforms".³⁵⁸

Under the influence of King George IV (1762 - 1830), whose enthusiasm for and interest in the arts has been said to be characteristic of his reign (1820 - 1830),³⁵⁹ the early nineteenth century was a period in which both the visual arts and literature were encouraged. The British Museum Library and the Royal Society for Literature were founded at this time and the foundations set for the National Gallery. During

³⁵⁶ Chapter two, p.66.

³⁵⁷ Benton, n 344 above, p.8.

³⁵⁸ Shee MA, *Rhymes on Art, or The Remonstrance of a Painter*, (London, John Murray and John Harding, 2nd ed, 1805) Preface pp.xxxiv - xxxv.

³⁵⁹ Richardson J, *George IV A Portrait*, (London, Sidgwick & Jackson, 1966), p.111.

the 1830s and 1840s, societies known as ‘Art Unions’ were formed in London and other large cities throughout England. Each had the basic objective of encouraging fine art. Members paid an annual subscription fee and the proceeds were used to purchase works of visual art, such as paintings or engravings. At the end of each year one or more members were chosen by lot and given the works of art which had been purchased by the Art Union that year. This gave each member a chance of owning a valuable work of art which he would be unable to afford to purchase privately. King (1985) describes how the basic philosophy of the founders of the London Art Union was that all men could gain pleasure and enjoyment from the fine arts, even if they had no interest previously in the subject and he describes the stated objectives of the union as expressing “self-righteous and almost evangelical feelings about art and about the abilities of the common man (middle classes) with regard to self-instruction”.³⁶⁰ This is reflected in the reported statement of George Godwin, Chairman of the London Art Union in 1861, that “an acquaintance with works of art gives dignity and self-esteem to the operative, a matter of no slight value as regards the stability of society, besides making him a better workman and furnishes him with delight, independent of position, calculated to purify and exalt”.³⁶¹

In 1856, upon the founding of the National Portrait Gallery, Lord Palmerston, then Prime Minister, announced to Parliament that “[t]here cannot be a greater incentive to mental exertion, to noble actions, to good conduct on the part of the living than for them to see before them the features of those who have done things worthy of our admiration, and whose example we are more induced to imitate when they are brought before us in the visible and tangible shape of portraits”³⁶² and writing in 1862, Sandby provides us with what might be deemed the definitive view of the moral and social function of the arts. He states: “When once the love of art is created in a nation, it does not rest satisfied till it has attained to the possession and enjoyment of its noblest performances; and thus the advance towards perfection, and

³⁶⁰ King LS, *The Industrialisation of Taste: Victorian England and the Art Union of London* (UM Research Press, Michigan, 1985) at p.46.

³⁶¹ Trodd C, “Culture, Class, City: The National Gallery, London and the Spaces of Education, 1822-57”, in Pointon M (ed) *Art Apart: Art Institutions and Ideology Across England and North America* (Manchester and New York, Manchester University Press, 1994), pp.33-49, at p.38.

³⁶² Graham-Dixon, n 92 above, p.169.

the healthy influences of elevated and refined feelings are combined together to produce the happiest results upon individuals and communities. It has been truly stated that a taste for what is beautiful is one great step to a taste for what is good. Kings and statesmen may therefore regard the encouragement of the arts at home to be as much a part of their duty as the defence of their country in the field, or the maintenance of its interests in the cabinet. The pictured morals of the work of art charm our minds, and, through our eyes, correct our hearts.”³⁶³

Early in the Modernist era, Matthew Arnold (1822 - 1888) placed English Literature in what Eagleton (1993) comes to describe as “its classical role of reconciliation”.³⁶⁴ With its moralizing influence, great Literature (that which is also termed high art in this thesis) was seen as a means to self-improvement and thereby a means to cultivating social harmony; a society in which class differences would become less important,³⁶⁵ even to the point of a ‘doing away’ with classes altogether.³⁶⁶ By contrast, ‘popular literature’ was considered by Arnold to be something prepared specifically for the so-called masses, through which they could be influenced or indoctrinated. The aim of ‘culture’ was not to “teach down to the level of inferior class” but rather to make itself available to all.³⁶⁷ Arnold was concerned that the “true and grand idea of Church” had gone and with it had gone its practical function of bringing the kingdom of Christ into the lives of the people.³⁶⁸ Arnold was concerned also with what he perceived to be the materialism of his age and the apparent lack of social order which existed in the comparatively new democracy; thus “[h]ow to make order emerge from chaos, how to restore purpose and idea to the social organism, how to maintain communications with the past and the future...were the problems he set himself to solve”.³⁶⁹

³⁶³ Sandby Sir W, *The History of the Royal Academy of Arts*, Vol.1 (London, Longman, Roberts & Green, 1862) pp.1-2.

³⁶⁴ Eagleton T, *The Crisis of Contemporary Culture*; An Inaugural Lecture delivered before the University of Oxford, 27th November 1992, (Oxford, Clarendon Press, 1993), p.8.

³⁶⁵ Baldick C, *The Social Mission of English Criticism 1848-1932*, (Oxford, Clarendon Press, 1983), p.106.

³⁶⁶ Gregor I (ed), *Matthew Arnold Culture and Anarchy*, (Indianapolis and New York, Bobbs-Merrill Co., 1971) (Orig. published 1869), p.56.

³⁶⁷ Ibid.

³⁶⁸ Gregor, n 366 above, p.xv.

³⁶⁹ Willey B, *Nineteenth Century Studies*, (London, Chatto and Windus, 1964), p.254-255.

In his 'Culture and Anarchy' (1869) Arnold recommended 'culture' as being the answer to these problems; 'culture' being "a pursuit of our total perfection by means of getting to know, on all matters which most concern us, the best that has been thought and said in the world; and through this knowledge, turning a stream of fresh and free thought upon our stock notions and habits".³⁷⁰ Thus it has been correctly stated³⁷¹ that Arnold's recommendations concerning literature were placed originally within a broad context; being merely one aspect of 'the best that has been thought and said in the world' on a variety of matters. However, in his *Study of Poetry* (1880) Arnold maintained that his readers should think more highly of poetry and that they "should conceive of it as capable of higher uses, and called to higher destinies than those which in general men have assigned it hitherto".³⁷² and it was to this 'higher use' of poetry to which the early twentieth century writers who became known as the 'New Critics' gave particularly close attention; Baldick (1983) describing how the central concern of the earliest of these so-called 'New Critics', I.A.Richards, was "the safeguarding of cultural order against a threatened chaos through the conciliatory agency of poetry".³⁷³

It is necessary to state at this point that there exists a substantial amount of literature concerning the nature and development of popular culture during the twentieth century.³⁷⁴ However, the focus of this thesis is upon high art and not upon popular culture. Hence it is the views of the so-called 'New Critics' which receive particular attention in this chapter.

³⁷⁰ Gregor, n 366 above, Preface p.5.

³⁷¹ Goodall, n 46 above, p.xiv-xv

³⁷² Cited in Baldick, n 365 above, pp.18-19.

³⁷³ Baldick, n 365 above, p.137.

³⁷⁴ See for example Orwell's essay 'Boys Weeklies' (1939), reproduced in Orwell S and I Angus, *George Orwell The Collected Essays, Journalism and Letters : Volume I*, (London, Penguin 1970), pp.505-531 and Hoggart R, *The Uses of Literacy*, (London, Penguin, 1992 reprint with additional material).

The New Critics and High Art

Richards (1926) saw the era in which he lived as being in a state of moral chaos, where the 'magical' age in which people had relied upon and believed in spiritual truths had ended and had been replaced by a scientific age, and he believed that "our protection, as Matthew Arnold insisted is Poetry. It is capable of saving us, or as some have found scandal in this word, of rescuing us from confusion and frustration".³⁷⁵ Richards recognised that these extraordinary claims concerning poetry were those which were likely to be viewed "with astonishment"³⁷⁶ by many people, yet Richards insisted that in the reading of poetry there was great value; indeed he proposed that if a friend had only an hour to live, then "the best life...which we can wish for our friend will be one in which as much as possible of himself is engaged" with as little interference as possible, and that such life "feels like and is the experience of poetry".³⁷⁷ Reading poetry was seen by Richards (1929) also as "a means of ordering our minds";³⁷⁸ a way of training the mind to incorporate various impulses without being imbalanced by them³⁷⁹ and thus a society which consisted of persons who had ordered their minds in this way would be an ordered society, saved from chaos.³⁸⁰

Europe had witnessed a population explosion during the nineteenth century; a population of around 180 million in 1800 had risen to 460 million by 1914,³⁸¹ and this, combined with the impact of educational reforms which had taken place in the nineteenth century, created for the first time a mass readership in Europe;³⁸² Carey (1992) stating that "[t]he difference between the nineteenth-century mob and the twentieth-century mass is literacy...a huge literate public had come into being".³⁸³ This was a particular concern for Richards and for many other intellectuals in the

³⁷⁵ Richards IA, *Poetries and Sciences*, (London, Routledge and Kegan Paul, 1926), p.78.

³⁷⁶ Richards, n 375 above, p.20.

³⁷⁷ Richards, n 375 above, pp.37-39.

³⁷⁸ Richards, n 230 above, p.349.

³⁷⁹ Baldick, n 365 above, p.150.

³⁸⁰ Richards, n 230 above, pp.350-51.

³⁸¹ Carey, n 67 above, p.3.

³⁸² Carey, n 67 above, pp.3-5.

³⁸³ Carey, n 67 above, p.5.

Modernist era. Richards (1924) stated that “[w]ith the increase of population the problem presented by the gulf between what is preferred by the majority and what is accepted as excellent by the most qualified opinion has become infinitely more serious”³⁸⁴ and that there was a need therefore to defend the “consensus of best qualified opinion”³⁸⁵ and to make popular appreciation nearer to it. Richards feared “a transvaluation by which popular taste replaces trained discrimination”³⁸⁶ since it was in the reading of high art (particularly poetry, of course) that the mind became fully engaged and able to remain balanced. Popular fiction, by contrast, would merely entertain the reader and only partly engage his or her mind, with little positive effect.

It is Richards’ former pupil at Cambridge University, F.R. Leavis, who is described as the person who “at once takes up the defence threatened minority values where Arnold and Richards had left off”³⁸⁷ in his *Mass Civilisation and Minority Culture* (1930). In this work, Leavis stated that “[i]n any period it is upon a very small minority that the discerning appreciation of art and literature depends; it is...only a few who are capable of unprompted, first-hand judgement. There are still a small minority, though a larger one, who are capable of endorsing such first-hand judgement by genuine response”³⁸⁸ and, in Leavis’ view, it was this minority who were capable of determining “the implicit standards that order the finer living of an age, the sense that this is worth more than that”.³⁸⁹ Leavis feared that society was in a state of unprecedented crisis, due to the negative influence of increased mechanisation, mass-production and standardisation. New printing and publishing techniques which were developed in the latter half of the nineteenth century, such as the steam-operated press and type-setting machines, made it possible to mass-produce works of literary and visual art in the form of reproductions; thus making, as Guy (1999) explains, “literary and artistic culture available to a mass audience for the

³⁸⁴ Richards, n 230 above, p. 25.

³⁸⁵ Richards, n 230 above, pp.25-26.

³⁸⁶ Richards, n 230 above, p.25.

³⁸⁷ Baldick, n 365 above, p.163.

³⁸⁸ Leavis FR, “Mass Civilisation and Minority Culture” (1930), reproduced in Leavis FR, *For Continuity*, (Cambridge, Minority Press, 1933), pp.13-46, at pp. 13-14.

³⁸⁹ Leavis, n 388 above, p.15.

first time through cheap reprints and reproductions”.³⁹⁰ Thus the new literate ‘masses’ had available to them numerous, mass-produced literary works and pictorial reproductions, some designed specifically to appeal to them, such as so-called ‘popular fiction’ of the ‘popular novel’, which DH Lawrence referred to as “that smirking, rather plausible hussy”.³⁹¹

In Leavis’ view, mass-production had resulted in a lowering of standards. There had been a “levelling-down” in the standard of newspapers,³⁹² whereby they were written in a manner which appealed to “the unintelligent many” rather than to “the intelligent few”,³⁹³ and the relatively new fields of film and broadcasting, in Leavis’ view, offered to the public merely “a means of passive diversion”³⁹⁴ and were no encouragement to active thought. Films which had required the audience to think more deeply in order to appreciate them had not been commercially successful and Leavis attributed this to the fact that “the general public does not wish to think”.³⁹⁵ A further example of this was the public’s apparent allegiance to the views of Arnold Bennett (whose literary reviews in *The Evening Standard* were scorned by Leavis) which signalled to Leavis that “there is no longer an informed and cultivated public”,³⁹⁶ but rather a public which for the first time was challenging and showing contempt for high art; Leavis citing the “ominous addition” of the word “highbrow” to the English language as an indication of this.³⁹⁷ As with his predecessors, Leavis saw Literature as a means to redeeming society; but extended the initial focus of Arnold and Richards upon poetry

³⁹⁰ Guy J, “Aesthetics, Economics and Commodity Culture: Theorizing Value in Nineteenth Century Britain”, *English Literature In Transition 1880-1920*, Vol.42:2, 1999, pp.143-171, at p.152.

³⁹¹ Lawrence DH, “The Future of the Novel”, in Steele B (ed.), *The Cambridge Edition of the Works of DH Lawrence: Study of Thomas Hardy and Other Essays* (Cambridge, Cambridge University Press, 1985), pp.151-155, at p.151.

³⁹² Arguably an earlier version of the recent concern over “dumbing-down” in the media; for example David Heath, MP, statement in the Commons that “we all share the feeling that the BBC is retreating from the intellectual and moral high ground that it was once able to occupy”. HC, Vol 317, col 1224, October 21, 1998.

³⁹³ Leavis, n 388 above, pp.18-19.

³⁹⁴ Leavis, n 388 above, p.21.

³⁹⁵ Leavis, n 388 above, p.21, n.1.

³⁹⁶ Leavis, n 388 above, pp.24-30.

³⁹⁷ Leavis, n 388 above, p.38.

to cover wider forms of literature; particularly the novel. Samson (1992) states that “Literature mattered to Leavis because he believed it to be the means, above all others, of combating the ills of a mechanised, constantly changing world and of restoring the heritage of those dispossessed by the machine”.³⁹⁸ It was thought necessary to defend those works considered by “the pre-eminent few” to “belong to the realm significant creative achievement”³⁹⁹ (that which this thesis terms high art) as a means to promoting serious thought and greater human awareness in society; and ultimately for society’s moral and social good. The new literate masses were perceived to pose a threat to high art, and to the minority who determined its status, due to the fact that the values of that minority were not shared by the majority, and “what was new and threatening in the post-war world was precisely that the ‘mass’ was beginning to actively challenge the status of the minority”.⁴⁰⁰ Thus it was from the influence of mass literacy, and the increase in popular entertainments which accompanied it, which writers such as Leavis sought to protect high art as an elite category.

For Leavis, “[t]he minority not only capable of appreciating Dante, Shakespeare, Baudelaire, Hardy (to take major instances) but of recognising their latest successors constitute the consciousness of the race (or a branch of it) at a given time”;⁴⁰¹ thus the standards which the minority appeared able to detect in the highest forms of literature were considered to apply equally to society. Thus literary critics were not only thought to be experts in their field, but also to be those who possessed a knowledge of and concern for society in general, whose views should be respected and followed by ‘the masses’. In a response to this perceived threat to the highest literary standards, Leavis, together with his wife QD Leavis and other associates, such as LC Knights and D Culver, launched *Scrutiny* magazine in 1932. In the opening ‘Manifesto’ of the first edition of *Scrutiny*, the editors stated that “[t]he general dissolution of standards is common place” but yet “it goes without saying that for the majority neither the present drift of civilization nor the plight of the arts is

³⁹⁸ Samson A, *F.R. Leavis*, (Hemel Hempstead, Harvester Wheatsheaf, 1992) p.3.

³⁹⁹ Leavis, n 49 above, pp.2-3.

⁴⁰⁰ Baldick, n 365 above, p.163.

⁴⁰¹ Leavis, n 388 above, p.14

a matter for much concern”.⁴⁰² There was, however, in the editors’ view a “small minority” who recognised that “the arts are something more than a luxury product...that they are ‘the store-house of recorded values’ and, in consequence, that there is a necessary relationship between the quality of the individual’s response to art and his general fitness for humane existence”.⁴⁰³ *Scrutiny* was designed to allow such individuals to “exchange and refine” ideas, focusing on intellectual interests with an active concern for the maintenance of the highest standards.⁴⁰⁴ As “[t]he degeneration of popular taste [had] mirrored the degradation of the popular condition”,⁴⁰⁵ it was hoped that the regeneration of the highest standards would result in the reconstruction of a civilized society, wherein the status of high art and its proponents would once again be pre-eminent. Thus for the Scrutineers the protection of high art (particularly literature) and the recognition of its peculiar status was considered not only to be important but necessary to the restoration of a civilized society. Whether or not high art was (or is) capable of achieving this social and moral regeneration will now be considered.

Did High Art Redeem Society?

As the above discussion indicates, there were certainly some high expectations as to the capacity of high art to improve society. As Culler (1997) states (particularly with regard to ‘Literature’) “[i]t would at once teach disinterested appreciation, provide a sense of moral greatness, create fellow-feeling among the classes and, ultimately, function as a replacement for religion, which seemed no longer to be able to hold society together”.⁴⁰⁶ So did the attempts to preserve high art as an elite category and to consolidate the minority who were capable of discerning and appreciating it lead to a more civilised society, where higher standards were both sought and attained ?

⁴⁰² Knight LC and D Culver, “A Manifesto”, *Scrutiny*, Vol.1, No.1, May 1932, pp.2 and 5.

⁴⁰³ Knight and Culver, n 402 above, p.5.

⁴⁰⁴ Knight and Culver, n 402 above, p.5 & p.2.

⁴⁰⁵ Mulhern F, *The Moment of Scrutiny*, (London, NLB, 1979), p.39.

⁴⁰⁶ Culler, n 328 above, p.36. See also Selden n 108 above, p.2.

It is necessary to state at this point that a definite distinction is drawn in this chapter between the process of making general education more commonly available which took place from the late 1800s onwards, and the more distinct project associated particularly with Leavis, whereby high art specifically was to provide a basis for humanising society. Whereas it will be argued that the increased availability of education has, on the whole, been a successful scheme, this thesis accords nevertheless with the views expressed by writers such as Carey (1992), Easthope (1991) and Eagleton (1996) regarding high art; namely that it failed to redeem society or to moralise its audience, despite the faith of writers such as Arnold, Richards and Leavis that it was able to do so. Easthope (1991) states that “[s]tudying literature was supposed to make you a better person, to develop your ‘imagination’ so you could enter imaginatively into the experiences of others, thus learning to respect truth and value justice for all. If this is its moral aim literary study simply does not work”⁴⁰⁷ and he concludes that “this humanist project” was “an ineluctable failure”.⁴⁰⁸

Intellectual Elitism

It is submitted that one reason why the increased availability of high art and the attempts to preserve it as an elite category did not have the positive effect upon society that its proponents had hoped for is because of the profound intellectual elitism which was intrinsic to the proposition that high art could make you ‘a better person’. Elitism, it is submitted, has the effect of dividing society rather than uniting it, despite the professed intentions of its protagonists.

Writing in 1932, QD Leavis set out the results of her investigation into the reading habits of the English public, based on the period from the eighteenth century onwards. Leavis (1932) opens her first chapter with the following statement: “In twentieth-century England not only every one can read, but it is safe to add that

⁴⁰⁷ Easthope, n 109 above, p.9.

⁴⁰⁸ Ibid.

every one does read”⁴⁰⁹ and Leavis bases this assumption upon the fact that “even the poorest households take a newspaper [on a Sunday], though it may be of a different type from that favoured by the educated”.⁴¹⁰ This statement illustrates Leavis’ ignorance of (and lack of concern to research fully) the fact that whilst literacy rates had dramatically increased, a proportion of the population at that time remained illiterate or only semi-literate.⁴¹¹ Leavis reports that despite increased literacy, “[s]erious book-buying has not increased in proportion”⁴¹² and that people were more likely to hire or borrow books from libraries. However, whilst libraries were likely to contain classic and popular novels from the past and works of popular contemporary novelists, they were highly unlikely to house that “which is considered by the critical minority to be the significant work of fiction - the novels of D.H. Lawrence, Virginia Woolf, James Joyce, T.F. Powys, and E.M. Forster”,⁴¹³ Leavis adding that in any case “three out of the five are held by the majority to be indecent...[and] four out of the five would convey very little, if anything, to the merely literate”.⁴¹⁴

It is submitted that Leavis reveals within these comments a condescending and even contemptuous attitude towards ‘the merely literate’ public and a misunderstanding of their interests and ideals. As Eagleton (1996) states with reference to both Q.D. and F.R. Leavis “the Scrutiny case was inescapably elitist: it betrayed a profound ignorance and distrust of those not fortunate enough to have read English at Downing College”.⁴¹⁵ It has been stated that most of the members of the so-called lower classes did not want what the intellectual elite wanted for them; for example, people did not enter into the free galleries and museums in their thousands, but chose rather to make their own entertainment⁴¹⁶ and it appears that by the late twentieth century the position had not changed significantly with studies showing that in

⁴⁰⁹ Leavis, n 48 above, p.3.

⁴¹⁰ Ibid.

⁴¹¹ Estimated literacy figures for England around 1930 are 90-99 per cent. Todd E, *The Causes of Progress Culture, Authority and Change* (Oxford, Basil Blackwell, 1987), p. 38

⁴¹² Leavis, n 48 above, p. 4.

⁴¹³ Leavis, n 48 above, p. 5.

⁴¹⁴ Leavis, n 48 above, pp.4-5.

⁴¹⁵ Eagleton, n 38 above, p.30.

⁴¹⁶ Bennett T et al, *Open University, The Study of Culture 1: Unit 4 Popular Culture and High Culture*, (Milton Keynes, Open University Press, 1977), p.42.

general “visitors to museums have above-average income, educational and social status, in the UK and other Western countries.”⁴¹⁷ Furthermore it has been argued that writers such as Q.D. and F.R. Leavis failed to acknowledge that although the reading of some literary works may have a beneficial effect on its audience, it will not necessarily do so. Bennett and Royle (1995) state this view as follows: “Rather than innocently pretend that literature in its creativity and *joie de vivre* is somehow innately *good*, or ludicrously claim, as do critics such as Matthew Arnold (in the nineteenth century) and F.R. Leavis (in the twentieth), that reading and studying literature in some ‘natural’ way makes you a ‘better’ person, we should recognize instead that literary creativity has at least as much to do with evil as with good”.⁴¹⁸

To support this view, Bennett and Royle cite in particular Bataille’s *Literature and Evil* (1953), a series of studies in which Bataille seeks “to extract the essence of literature”⁴¹⁹ by reference to certain texts and their authors. Bataille maintains that “Literature cannot assume the task of regulating collective necessity. It should not conclude that ‘what I have said commits us to a fundamental respect of the laws of the city’ or, like Christianity, ‘that which I have said (the tragedy of the gospel) shows us the path of Good’...Literature, like the infringement of moral laws, is dangerous...Nothing rests on it”.⁴²⁰ Certainly, this thesis accords with the view that literature (or indeed visual art) as a form of communication has the capacity to convey thoughts and ideas which are both good and evil, and where evil is conveyed the presumed ‘good’ of the work of art per se is an insufficient basis from which to argue for its protection.

⁴¹⁷ Sawers D, *Should the Taxpayer Support the Arts?* (London, Institute of Economic Affairs, 1993), p.11.

⁴¹⁸ Bennett A and N Royle, *An Introduction to Literature, Criticism and Theory: Key Critical Concepts* (Hemel Hempstead, Harvester Wheatsheaf, 1995), p.125.

⁴¹⁹ Bataille G, *Literature and Evil* (trans. A Hamilton), (London, Calder & Boyars, 1973) (orig. pub.France 1957), Preface.

⁴²⁰ Bataille, n 419 above, p.12.

Literary Distinctions Applied to Society

The evidence shows that the arbiters of high art did not merely discriminate in matters of literary or artistic merit, but also with regard to social status. Thus the perceived superior value of “the best that has been thought and said in the world”⁴²¹ was applied equally to “the small minority”⁴²² who were capable of judging or identifying high art. Richards provides an illustration of this in *Principles of Literary Criticism* (1924) where he states that “[t]he expert in matters of taste is in an awkward position when he differs from the majority. He is forced to say in effect “I am better than you. My taste is more refined, my nature more cultivated, you will do well to become more like me than you are.”⁴²³ Further, Richards asserts that it is not his fault that “he has to be so arrogant” since his claim to being an expert depends upon the truth of these assumptions.⁴²⁴ Thus Richards saw himself as belonging to an elite category of persons who were *themselves* of superior value to the considerable number of persons who they perceived to be of lower intellectual capacity. It is this placing of certain individuals in a metaphorical hierarchy, in which a person’s relative worth is determined by his or her intellectual ability, to which the writer objects.

Writers such as Carey (1992) and Goodall (1995) make reference to the works of European writers which were in circulation during the 1920s and 1930s; both citing⁴²⁵ Ortega’s *The Revolt of the Masses* (1932) as an example of a highly influential work which alerted intellectuals to the danger of the increasing power of ‘the masses’ who, in Ortega’s view, “by definition, neither should nor can direct their own personal existence, and still less rule society in general”.⁴²⁶ Leavis’ concern that the public were beginning to question the views and authority of the intellectual elite has already been discussed. Thus the period in history during which the protection of high art was most forcefully proposed as a means to reforming society appears also

⁴²¹ Gregor, n 366 above, p. (xv).

⁴²² Leavis, n 388 above, pp. 13-14.

⁴²³ Richards, n 230 above, p.26

⁴²⁴ Ibid.

⁴²⁵ See Goodall, n 46 above, chap. 2; and Carey, n 67 above, preface.

⁴²⁶ Ortega Y Gasset, *The Revolt of The Masses*, (London, Unwin Books, 1961) (1st published in Great Britain 1932), p.9.

to have been a period in which the intellectual elite feared that the newly literate public were threatening their position as the arbiters of good taste and sound judgement in matters relating not only to high art, but to society at large. There is then a significant conflict between the theory originally proposed by Arnold, whereby high art was one aspect of a more general movement towards cultivating social harmony; and the practice of modernist creators and discerners of high art, who sought to preserve their own superior status within that society. Indeed Carey (1992) contends that it was the *aim* of modernist writers to preserve intellectual seclusion and to make their works inaccessible to the masses; stating that the word ‘mass’ is itself fictional; a linguistic device whose function is “to eliminate the human status of the majority...or at any rate to deprive them of those distinctive features that make users of the term, in their own esteem, superior.”⁴²⁷

Furthermore this practice of referring to the majority of human beings in a society as ‘the masses’ is potentially harmful, since it has a dehumanising effect; thus providing the self-proclaimed elite with an ideological basis for treating ‘the masses’ in an inhumane way. Writers such as Goodall (1995)⁴²⁸ and Hirsch (1991)⁴²⁹ stress the dangers of such an ideology with particular reference to the Holocaust, both citing it as an example of this dehumanizing ideology taken to its extreme. Hitler’s professed view that society should endeavour “to place thinking individuals above the masses”,⁴³⁰ based within an expressed “philosophy of life which endeavours to reject the democratic mass idea and give this earth to the best people”⁴³¹ provides salient support for this view. Perhaps in recognition of this, steps were taken following the Second World War to replace a “hierarchy of taste” with a “democracy of access to the arts”⁴³² and this has led to the “cultural democracy” view which is the current one

⁴²⁷ Carey, n 67 above, preface.

⁴²⁸ Goodall, n 46 above, p.23.

⁴²⁹ Hirsch DH, *The Deconstruction of Literature: Criticism after Auschwitz* (Hanover and London, Brown University Press, 1991), p.71.

⁴³⁰ Hitler A, *Mein Kampf* (transl. R Manheim) (London, Hutchinson & Co.. 1969) (1st translated version published 1933), p.406.

⁴³¹ Hitler, n 430 above, p.403

⁴³² Hewison R, *Culture and Consensus in England, Art and Politics Since 1940*, (London, Methuen, 1995), p.302.

concerning high art and its place in society.⁴³³ Writing as the (then) Secretary of State for Culture, Media and Sport, Smith (1998) states that “[t]here is good and bad in both ‘high’ and ‘low’. Some work is more immediately approachable than other work: that does not make it in any way inherently inferior. Some work appeals to vast numbers, other work to tiny niche groups. So what? What matters is not the imposition of an inappropriate category, but the quality of the work and its ability to transcend geography and class and time. A cultural democracy - a cultured democracy - will want to embrace the best of everything, no matter what labels others may put upon it”.⁴³⁴

It is submitted that although writers such as FR and QD Leavis argued ostensibly that their concern for the state of Literature and of literary appreciation was equally a concern for the state of society in general,⁴³⁵ their calls for the need for strict discrimination and for “a recall to a due sense of differences”⁴³⁶ in the field of literature reveal an elitist attitude not only to literature but likewise to society; in which the superiority of the intellectual elite should be safe-guarded. Implicit to such a view is a belief in the inferiority of non-intellectuals in society (namely the majority) and it is this idea to which the writer objects. The capacity of one person to determine or appreciate high art does not make inevitable his or her superiority. Neither does that person’s ability to determine or appreciate high art necessarily make him or her the appropriate person to define more widely that which Leavis (1933) terms “the implicit standards” of society; “the sense that this is worth more than that”.⁴³⁷ Hence there is a conflict here. Leavis et al were advocating a restoration in the status of high art as being conducive to the reconstruction of a civilized society (see above p.80); a society which was by this stage a democratic one. Yet the evidence shows that their views were elitist and elitism is, by definition,

⁴³³ Smith C, *Creative Britain*, (London, Faber & Faber, 1998), p.3.

⁴³⁴ Ibid. Peter Ainsworth MP subsequently queried whether “the arts are safe in the hands of a Secretary of State who is on record as saying that Bob Dylan is the artistic equal of John Keats”. HC, Vol.317, col. 386, July 29th, 1998.

⁴³⁵ Leavis, n 388 above, p.14.

⁴³⁶ Leavis, n 49 above, p.2.

⁴³⁷ Leavis, n 388 above, p.15.

divisive. It is difficult to see how the social harmony originally envisaged by Arnold (see above p.73) could be achieved by the application of such theories.

High Art and its Educational Value

The theories of Matthew Arnold once more provide a starting point for this discussion. One of Arnold's central beliefs was the importance of universal access to education, which would allow all members of society to consider 'the best that has been thought and said in the world' and thus "make all men live in an atmosphere of sweetness and light".⁴³⁸ More specifically, for Arnold and some of his contemporaries it was the inclusion of English Literature as a subject for study which was important; Baldick (1983) describing how "[m]any educationalists agreed with Arnold that in all sectors of education the provision of practical knowledge had to be supplemented by a humane, moralizing subject which could harmonize an otherwise anarchic profusion of 'dry facts'".⁴³⁹ Arnold believed that the principal aim of education was "to enable a man to know himself and the world"⁴⁴⁰ since such knowledge was, in Arnold's view, "the only sure basis for action".⁴⁴¹ Writing at a time when English literature was not yet a part of the school curriculum, Arnold maintained that it was more beneficial for a student to know the literature of any language than it was to learn its grammatical laws,⁴⁴² since "[t]o know himself, a man must know the capabilities and performances of the human spirit; and the value of the humanities...is that it affords for this purpose an unsurpassed source of light and stimulus".⁴⁴³

Arnold sets out a theory of education, the basis of which this thesis supports; namely that "[e]very man is born with aptitudes which give him access to vital and formative knowledge" and that "the business of instruction is to seize and develop these

⁴³⁸ Gregor, n 366 above, p.56.

⁴³⁹ Baldick, n 365 above, p.62.

⁴⁴⁰ Super RH (ed.) *Mathew Arnold, Schools and Universities on the Continent* (Michigan, Michigan University Press, 1964) (Orig. published 1868), p.290.

⁴⁴¹ Ibid..

⁴⁴² Super, n 440 above, p.296.

⁴⁴³ Super, n 440 above, p.290.

aptitudes".⁴⁴⁴ Arnold believed that there were two main areas of learning which were vital; firstly, as cited above, the humanities, and secondly, a knowledge of the world and the laws which govern nature; those which we might now refer to broadly as the arts and sciences. Whilst it was rare for a person to have aptitudes for both, it was still possible for a mind with an aptitude for the sciences to understand aspects of the arts, and vice versa, and each was of equal importance; Arnold referring to an "entire circle of knowledge" which "comprehends both" and of which all should at the very least be aware of.⁴⁴⁵ However, Arnold recognised too that "the circle is so vast and human faculties are so limited, that it is for the most part through a single aptitude...that each individual will really get his access to intellectual life and vital knowledge".⁴⁴⁶

It is important to note that although Arnold believed that the study of literature was of great significance in that it enabled the student to gain a knowledge of the human spirit and its capabilities, he was arguing that English literature should be included in the school curriculum alongside other subjects,⁴⁴⁷ since it was of equal value to these subjects within the 'circle of knowledge'. It was Richards, and subsequently Leavis, who stressed more particularly the value of Literature as a subject for study; Richards' view concerning the beneficial effects of reading poetry and his introduction of the method of 'practical criticism' being highly influential in development of the English tripos at Cambridge University. In line with his concern for the lowering of standards, it was Leavis who stressed most forcefully the need for the study of Great Literature (that which may also be termed high art) and with it the need for greater discrimination in determining which works should fall within that category. Leavis considered that as "a recall to a due sense of differences it is as well to start by distinguishing the few really great - the major novelists who count in the same way as the major poets, in the sense that they not only change the possibilities of the art for practitioners and readers, but that they are significant in

⁴⁴⁴Super, n 440 above, pp.290 - 291.

⁴⁴⁵Super, n 440 above, p.300.

⁴⁴⁶Super, n 440 above, p.291.

⁴⁴⁷ Stating "We still have to make the mother tongue and its literature a part of the school course...and we shall do it", in Super, n 440 above, p.299

terms of the human awareness they promote; awareness of the possibilities of life”⁴⁴⁸ and he stated that “Jane Austen, George Eliot, Henry James, Conrad, and D.H.Lawrence: the great tradition of the English novel is *there*”,⁴⁴⁹ believing that they “are all distinguished by a vital capacity for experience, a kind of reverent openness before life, and a marked moral intensity”.⁴⁵⁰ Leavis rules out Dickens from this list, whilst acknowledging his genius, on account of him being primarily a great entertainer⁴⁵¹ and due to what Guillory (1993) terms “his mass cultural affiliations”.⁴⁵²

References to the ‘possibilities of life’ accord with the sentiments expressed by Arnold concerning the educational value of literature, yet it is submitted that the general attitude of Leavis and that of his contemporary intellectuals towards education was less egalitarian than that espoused by Arnold. It has been stated that “Leavis’ concern was not with the educationally underprivileged so much as with the preservation of excellence in British cultural life”⁴⁵³ and for this reason, whilst Leavis supported the extension of higher education, he believed that access should be restricted in order to maintain the highest standards.⁴⁵⁴ T.S.Eliot (1943), in a discussion of educational theories which were circulating at the time, states that “the ideal of a uniform system such that no one capable of receiving higher education could fail to get it, leads imperceptibly to the education of too many people, and consequently to the lowering of standards to whatever this swollen number of candidates is able to reach”.⁴⁵⁵ Elsewhere in this work, Eliot argues that there is a need for an educated elite to replace the ruling class in the government of the nation and he states that “it is an essential condition of the preservation of the quality of the culture of the minority, that it should continue to be a minority culture”⁴⁵⁶ and on this

⁴⁴⁸ Leavis, n 49 above, p.2.

⁴⁴⁹ Leavis, n 49 above, p.27.

⁴⁵⁰ Leavis, n 49 above, p.9.

⁴⁵¹ Leavis, n 49 above, p.19.

⁴⁵² Guillory J, *Cultural Capital The Problem of Literary Canon Formation* (Chicago and London, University of Chicago Press, 1993), p.17.

⁴⁵³ Ford B (ed.), *The Cambridge Guide to the Arts in Great Britain, Volume 9, Since the Second World War*, (Cambridge, Cambridge University Press, 1988), p.10.

⁴⁵⁴ Ibid.

⁴⁵⁵ Eliot TS, *Notes Towards The Definition Of Culture*, (London, Faber & Faber, 1943), p.101

⁴⁵⁶ Eliot, n 455 above, p.107.

basis he questions whether there should be equality of opportunity within the education system.

Thus it appears that those most concerned with the preservation of high art as an elite category were less concerned or even opposed to the notion that all members of society should receive state education, which would give those with an aptitude for the arts the opportunity to develop their abilities and participate in the appreciation of its highest forms, indeed Carey (1992) maintains that in the movement that became known as modernism in England “[t]he early twentieth century saw a determined effort, on the part of the European intelligentsia, to exclude the masses from culture” and that they did this, in Carey’s view, by “making it too difficult for them to understand”.⁴⁵⁷ Certainly, a look at the art forms of that period causes the observer to concur with Carey’s opinion. In the visual arts, Modernist styles such as Cubism, involving techniques of “fragmentation, multiple perspectives and juxtaposition”⁴⁵⁸ and Abstraction were non-representational and nonrealistic. In Literature, works such as Eliot’s *The Waste Land* and Joyce’s *Ulysses* were praised and esteemed by contemporary intellectuals, but were unintelligible to the literate majority.⁴⁵⁹

Bourdieu (1993), in his *Outline of a Sociological Theory of Art Perception* maintains that the viewing of a work of art is a “conscious or unconscious deciphering operation”⁴⁶⁰ and that the less educated are likely to decipher representational works most readily since they “cannot apply any other code to works of a scholarly nature than that which enables them to apprehend as meaningful objects of their everyday environment”.⁴⁶¹ Following this theory, the fact that Modernist works were often non-representational meant that the less educated were unlikely to be able to decipher them, and thus were unlikely to gain any positive benefit from them whatsoever. Writing early in the Modernist era, Tolstoy (1896) strongly criticised the increasingly

⁴⁵⁷ Carey, n 67 above, pp.16-17.

⁴⁵⁸ Macleod G, “The Visual Arts”, in M Levenson (ed.), *The Cambridge Companion to Modernism*, (Cambridge, Cambridge University Press, 1999), pp.194-216, at p.202.

⁴⁵⁹ Carey, n 67 above, p.20.

⁴⁶⁰ Bourdieu P, “Outline of a Sociological Theory of Art Perception”, reproduced in R Johnson (ed.) *Pierre Bourdieu, The Field of Cultural Production, Essays on Art and Literature*, (Cambridge, Polity Press, 1993), pp.215-237, at p.215.

⁴⁶¹ Bourdieu, n 460 above, p. 217.

unintelligible nature of the art of that period; stating that “art, becoming more and more exclusive has become more and more incomprehensible to an ever increasing number of people, and...in this its progress toward greater and greater incomprehensibility...it has reached a point where it is understood by a very small number of the elect, and the number of these chosen people is becoming smaller and smaller”.⁴⁶² For Tolstoy, great art was that which was universal; “accessible and comprehensible to everyone”⁴⁶³ and to argue that “a work of art is very good but incomprehensible to the majority of men is the same as saying of some kind of food that it is very good, but that most people can’t eat it”.⁴⁶⁴ He maintains that if the majority are incapable of understanding high art, then the requisite knowledge should be taught which would allow them to understand; yet “it turns out that there is no such knowledge...[and] in order to understand them, one must read, and see, and hear these same works over and over again. But this is not to explain; it is only to habituate!”⁴⁶⁵

These views contrast sharply with those which have already been discussed in this chapter, such as those of FR and QD Leavis, which equate the quality of a work with its likely readership and which call for the protection of high art as an elite category of works, consisting of those works which will always be determined by and only be accessible to the intellectual elite. It is submitted that this presents a particular problem with regard to education. For example, Richards’ theory concerning the engagement of the mind can work only for those who persons who have the intellectual capacity to understand the poetry before them. If the poetry is so abstract or complex as to be intelligible merely to those of the highest intellectual capacities, then the majority cannot benefit from the reading of it. Surely, if high art can itself redeem society then it must be capable of being understood by the populace, all of whom are entitled to receive an education which improves such understanding and which allows those with a particular aptitude or talent for, say, literary appreciation, to develop that aptitude.

⁴⁶² Tolstoy, n 145 above, p.94.

⁴⁶³ Tolstoy, n 145 above, p.96.

⁴⁶⁴ Tolstoy, n 145 above, p.95.

⁴⁶⁵ Tolstoy, n 145 above, pp.95-96.

Writing at the turn of the nineteenth century, Wordsworth (1801) stated that he had written his Lyrical Ballads in “the very language of men”⁴⁶⁶ so that his poetry could be understood by them. In Wordsworth’s view, whilst a poet might be distinguished from other men in that he has “a greater promptness to think and feel without immediate external excitement, and a greater power in expressing such thoughts and feelings as are produced in him in that manner...these passions and thoughts and feelings are the general passions and thoughts and feelings of men”⁴⁶⁷ and it was for these ‘other men’ that the poet wrote, not merely for himself and others like him. Therefore, “[u]nless...we are advocates for that admiration which subsists upon ignorance, and that pleasure which arises from hearing what we do not understand, the Poet...must express himself as other men express themselves”.⁴⁶⁸ Wordsworth was writing at the end of an era in which only certain ‘high’ styles of writing and drawing or painting had been considered acceptable and worthy of admiration. Much of the art and literature of the Modernist era was created for the artist or writer and for others like him and not for other men, and it is argued that those who sought that this would in itself redeem society, were mistaken.

The postmodern era has witnessed a turning away from the notion of there being educational benefit only in high art as opposed to ‘lower’ art forms. The inclusion of English Literature as a subject for study in secondary and further education did not result in high art being valued more widely by society or indeed being valued permanently as *the* elite group of works to be studied within academic institutions, with the study of Literature being extended in the postmodern era to include, amongst other things, mass communications, mass media, film studies, cultural studies and popular fiction.⁴⁶⁹ (Bennett (1990) describes how the study of popular fiction in University English Departments took “a precarious toe-hold” on the curriculum in the 1960s and had become soundly established by 1990; there now

⁴⁶⁶ Lucy N, *Postmodern Literary Theory: An Introduction* (Oxford, Blackwell, 1997), p.43.

⁴⁶⁷ Owen, n 129 above, p.125.

⁴⁶⁸ Owen, n 129 above, p.126.

⁴⁶⁹ Bennett T (ed.), *Popular Fiction: Technology, Ideology, Production, Reading* (London and New York, Routledge, 1990), Editor’s Preface.

being “few tertiary institutions where popular fiction is not accorded some space in the curriculum”⁴⁷⁰). Yet speaking at his inaugural lecture before the University of Oxford in 1992, entitled “The Crisis of Contemporary Culture”, Eagleton expressed his fear that there exists “a project” which is “out to liquidate meaning, destroy standards, replace Beowulf with the Beano Annual and compose a syllabus consisting of nothing but Geordie folk-songs and gay graffiti”.⁴⁷¹

Arguably, the recent proposal to remove canonical texts, such as Shakespeare’s plays and the works of Chaucer, from the English GCSE syllabus has proved that Eagleton’s fears were well-founded; the idea causing one commentator to question whether the British are therefore “to become the dunces of the Western world?”⁴⁷² Is it time then to argue once more that high art should be afforded greater protection on account of its particular educational benefits and that the study of English Literature should focus upon the highest forms of poetry and literature? Certainly the complete removal of canonical texts from the syllabus at secondary level, is considered to be far too extreme a measure in any effort to ensure a cultural democracy. Whilst this thesis upholds the view stated by Bennett (1990) that “[t]here are many good reasons for studying popular fiction. The best, though, is that it matters. In the many and varied forms in which they are produced and circulated - by the cinema, broadcasting institutions and the publishing industry - popular fictions saturate the rhythms of everyday life. An understanding of such fictions...is...central to an understanding of ourselves; of how those selves have been shaped and how they might be changed”, it also supports the added proviso that the aim of such study “is not to transform popular fiction into something else - into literature, say”.⁴⁷³ An acknowledgement of the benefits of studying popular fiction does not, however, mean that there is no value in studying those works which have been considered to be the most excellent examples of works of literary and visual art (namely high art). There is, it is submitted, value in *both* in terms of academic study; *both* offering the

⁴⁷⁰ Ibid.

⁴⁷¹ Eagleton, n 364 above, p.6.

⁴⁷² Johnson D, “Are Britons to become the dunces of the Western world?” *Daily Telegraph*, February 8th 2001, p.28

⁴⁷³ Bennett, n 469 above, Series Editor’s Preface.

student an opportunity to discover the positive and negative aspects of the capabilities of the human spirit.

Finally, it is submitted that the increase in the number of subjects available for study in schools and in Universities represents a recognition of the fact that individual aptitudes vary considerably. It has been correctly stated that an important aspect of a universal education system is, as Finch (1984) states, that “it provides an important means whereby disadvantaged groups become aware of their inequalities”⁴⁷⁴ and that it subsequently provides such groups with the skills necessary to defeat such inequalities. In order to do this, it is necessary for a wide variety of subjects to be made available, in order that all students are given the opportunity to develop their individual aptitudes to the highest level of which they are capable. High art is an important part of education, but it is not of more importance than other aspects of education, or indeed than education itself. Therefore, the writer concludes that it is a broadly-based, universal education system which should be supported, a system which includes the study of high art alongside and in addition to other subjects, all of which will allow the student to discover his or her aptitudes and to develop them accordingly. Thus the writer cannot support the notion that high art should be protected above other art forms or in preference to other areas of study.

High art and the National Interest

One argument which has been put forward for the protection of works of high art, in the sense that it works of high art should be valued above other kinds of work and even promoted or financially supported by the state, has been based upon nationalistic interests. Historically, such an argument has been raised particularly with regard to works of visual art. Royal Academician Shee (1805), in his *Rhymes On Art* asks;

“Will no warm patriot take the Muse’s part,
And rouse his country in the cause of art?”

⁴⁷⁴ Finch J, *Education As Social Policy* (London & New York, Longman, 1984) p.140.

Plead for her pleasant glory - future fame,
And save the age from everlasting shame?"⁴⁷⁵

Shee believed that there was a growing disregard for 'the arts' and for artists in England and he argued that the country's reputation was being diminished as a result. Shee saw the arts as "the vital principle - the breathing soul" of the Empire and its immortal aspect; which "survives in spiritual vigour throughout the long futurity of time"⁴⁷⁶ and queried why the arts were not, therefore, viewed as a national object. Shee argued for National Patronage of the arts, stating that "[t]hough power and wealth are the prime agents in establishing the consequence of a country, yet, there are subsidiary means which no high minded people will allow themselves to disregard; without which they know that the present may be divested of dignity, and the future may be deprived of fame. Amongst these means, the fine arts require more particularly, and requite more effectually, the protection of the state".⁴⁷⁷

Shee's views are cited here as an early example of an argument in favour of state protection for the arts based upon an assertion that the nation's international reputation was strongly influenced by its art. As with earlier arguments concerning the social and moral benefits of high art, the term 'high art' is not yet used specifically, yet the works to which he referred (such as those create by artists such as himself, a member of the Royal Academy) would be those which would now be likely to fall within that category. Shee's concerns were later to be addressed to some extent by George IV who, as stated earlier, was a great supporter and promoter of the arts in England. However, the argument for state patronage of the arts subsisted in various forms until the twentieth century; for example, a report published in 1946 stated that "[t]he visual arts are one of the manifestations of quality by which a nation is judged" and that "[t]he Government should..support painters and sculptors by buying their work for the national collections and by commissioning them for

⁴⁷⁵ Shee MA, n 358 above, p.77.

⁴⁷⁶ Shee MA, n 358 above, Preface pp.xii - xiii.

⁴⁷⁷ Shee MA, n 358 above, Preface to 2nd ed., pp.liv - lv.

specific purposes.”⁴⁷⁸ In accordance with this view came the establishment in 1946 of the state-funded Arts Council of Great Britain (hereinafter referred to as “the ACGB”), which was developed from the Committee for the Encouragement of Music and the Arts which had been established during the Second World War.

In the years that followed the Second world war the steps which were taken to “democratise the arts”,⁴⁷⁹ to make high art accessible to the general public and not merely to an intellectual elite included the introduction of the ACGB; meaning that the public were certainly more involved in the arts, if only by virtue of the fact that a part of their taxes was subsidising them for the first time in history. State-funding continues to the present day,⁴⁸⁰ and it appears that successive governments have become increasingly aware of the apparent significance of the arts to the nation. In 1965, a junior minister was appointed for the first time to be responsible for the arts policy and in 1992 the Department of National Heritage was established under the Conservative government.⁴⁸¹ Margaret Thatcher considered state patronage to be acceptable only on the grounds of national prestige; she stated “I was profoundly conscious of how a country’s art collections, museums, operas and orchestras combine with its architecture and monuments to magnify its international standing”.⁴⁸² Is it possible then to argue for the increased protection of high art, on account of the national prestige which such works bestow upon a nation?

Certainly such an argument is not in line with contemporary political thought. The newly elected Labour government changed the title of the Department of National Heritage, a title which Hewison (1995) argues reflected the patriotic and nationalistic concerns of the administration, giving the impression of “a world of secure values and an unthreatening social order where the arts supply colourful illustrations to the national narrative”,⁴⁸³ to the Department for Culture, Media and Sport. The then

⁴⁷⁸ ‘The Arts Enquiry: The Visual Arts’ A Report Sponsored by the Dartington Hall Trustees (London, Oxford University Press, 1946) pp. 9 & 13.

⁴⁷⁹ Ford, n 453 above, p.9.

⁴⁸⁰ The ACGB was devolved into Arts Councils for England, Wales and Scotland in 1994.

⁴⁸¹ Sawers, n 417 above, p.10.

⁴⁸² Hewison, n 432 above, p.243.

⁴⁸³ Hewison, n 432 above, p.300.

Secretary of State for this Department, Chris Smith, wrote in 1998 that it was not his government's wish to be side-tracked into discussions of the importance of 'high' or 'low' culture, since "we do recognise the difference between culture and 'simply entertaining'. But we recognise at the same time ...that culture can embrace a broad sweep of fine and high-quality activity, of all kinds. It does not need to be highbrow to qualify as 'culture'. It does not need to be elitist. It can appeal to broad masses of people and still have crossed over the threshold from entertainment to cultural excellence".⁴⁸⁴

Thus although the present administration believe that a "flourishing creative and cultural sector, and one which is supported by the body politic, is the symbol of a confident and energetic society,"⁴⁸⁵ the idea that it is an elite category of the arts which brings national pride and international esteem is rejected, and the idea that 'culture' might be seen to be alien to the majority, "something just for an elite and for special people in privileged places" is seen as "a perpetual danger" which must be "sturdily" fought against.⁴⁸⁶ Thus the present government expresses its ideal of a cultural democracy, whereby excellence is encouraged but elitism is rejected, which is one with which the writer accords. It is submitted that it would be wrong now to argue for a return to the principles which guided modernist arguments in favour of protecting high art above other art forms (particularly popular ones) upon the basis that high art fosters national esteem. The concepts of 'national pride' or 'international prestige' are in any case somewhat elusive and difficult to measure. It is not possible to know exactly how far the nation's 'heritage' in the form of its works of high art might affect them; the nation's success or failure in international sporting events seemingly being an equally significant factor in determining the level of national pride which exists at any given time. Thus it is submitted that these concepts are not of sufficient weight or certainty to merit a change in policy towards the arts.

⁴⁸⁴ Smith, n 433 above, p.4.

⁴⁸⁵ Smith, n 433 above, p.19.

⁴⁸⁶ Smith, n 433 above, p.37.

High Art and Commerce

The joining of the terms ‘high art’ and ‘commerce’ would have been seen as an anathema by post-industrial proponents of high art, such as Leavis. However, there was a period particularly during the mid-nineteenth century when the encouragement of the highest forms of art was seen by some as being a means by which to promote industry and the more ‘decorative’ forms of art that were a part of that industry. In Parliament, a Select Committee met to consider specifically the “Arts and their Connexion with Manufactures”⁴⁸⁷ in 1836 and in 1841 a Select Committee on Fine Arts met to consider the rebuilding and refurbishment of the two houses of Parliament, following the fire in 1834. Distinguished Professors and Admirers of Art (as they are described in the report) were consulted and all agreed that the proposed restoration project afforded an opportunity for encouraging and promoting Fine Art in England, by employing English artists to carry out the work. It was felt that not only the artists themselves would benefit, but also industry and the nation as a whole. It is noted in the report that the exhibition of a collection of vases made by Sir W Hamilton was the inspiration behind a new manufacturing industry founded by a Mr Wedgewood and the notion that public patronage of higher forms of art would inspire industry and creativity in the “lower” forms of art is evident throughout the report.⁴⁸⁸

Whilst these reports focused upon the likely ‘trickle-down’ effect that an acquaintance with the highest forms of art would have on those working within industries, in other words the possible positive influence of high art upon commerce or industry, more recent arguments have focused upon the arts and their creation as being in itself a commercial activity. Indeed Hewison (1995) argues that by the mid-twentieth century, “high art [was] ...absorbed into the general circulation of commodities”.⁴⁸⁹ In addition to this, he argues that it was specifically at the time when the arts received public funding, that concerns regarding them became primarily

⁴⁸⁷ Report of the Select Committee on Arts and their Connexion with Manufactures, 1836 (568.) ix.i, pp.x-xi.

⁴⁸⁸ Report of the Select Committee on Fine Arts, 1841 (423.) vi. 331, p.v. These reports are discussed more fully in chapter four.

⁴⁸⁹ Hewison, n 432 above, p.303.

economic: “The problem created by the argument that the arts are a source of urban regeneration, or that the taxes they yield show that a subsidy is really ‘an investment’, is that the arts became entirely instrumental, a matter of ‘value for money’...[w]here Matthew Arnold held up the values of high culture against the anarchy of the market, high culture is now a niche market all of its own”.⁴⁹⁰ So should the creation of high art be afforded greater protection on account of its value as an inspiration to industry, and indeed by virtue of its own commercial value?

This writer considers that such an argument would be rejected in the current political climate, firstly because it places high art above other art forms (not acceptable in ‘the cultural democracy’), and secondly because it is not only high art which has significant commercial value or which presents the greatest ‘investment potential’; the more popular and general forms of art such as music, film, television and literature (of all kinds)⁴⁹¹ having comparable financial worth. Thus this section concludes by rejecting the notion that high art should be afforded greater protection than those works which are considered to be more prosaic or of more popular appeal, based upon economic grounds.

⁴⁹⁰ Hewison, n 432 above, p.305-6. Allen S reports that “[c]urated collections are now common among larger city law firms”; indicating that art and law are compatible when coupled with commercial endeavour; LSG vol..98, no.6, p.30, February 8th 2001.

⁴⁹¹ Smith, n 433 above, p.15.

Section Two: Art For Arts Sake

The second part of this chapter considers whether it is possible to argue that high art should be afforded greater protection than other art forms, not on account of any of the apparent benefits to society which flow from it, but because high art is of such inherent importance. Such an argument is founded upon that which has become known as the ‘art for art’s sake’ doctrine, whereby art is considered to be self-sufficient, having a “special - and separate - status within the larger world”⁴⁹² which does not necessarily mean that “only art matters”⁴⁹³ since it has been correctly stated that many things matter alongside art,⁴⁹⁴ but it does mean that a work of art is considered to be “a self-contained entity”⁴⁹⁵ which exists for its own sake, and not because of any positive (or indeed negative) effect which it may have upon the society which surrounds it. The phrase “art for art’s sake” (sometimes cited in its French form as “l’art pour l’art”) has also been described as encompassing the view that “a work of art has intrinsic value without didactic or moral purpose”⁴⁹⁶ and in stark contrast to those views discussed in the first part of this chapter, Reinhardt (1962) expounds this view as follows: “The notion that art...‘enriches life’ or ‘fosters a love of life’ or ‘promotes understanding and love among men’, is as mindless as anything in art can be. Anyone who speaks of using art to further any local, municipal, national or international relations is out of his mind”.⁴⁹⁷

The Preface to Gautier’s *Mademoiselle de Maupin*, published in France in 1835, is cited frequently⁴⁹⁸ as one of the earliest expressions of art for arts sake, although it

⁴⁹² Bertens, n 68 above, p.5.

⁴⁹³ Forster EM, “Art For Art’s Sake” (1949) reproduced in Girvetz H & R Ross, *Literature and the Arts: The Moral Issues* (Belmont California, Wadsworth, 1971), pp.16-19, at p. 16.

⁴⁹⁴ Ibid.

⁴⁹⁵ Forster, n 493 above, p.17.

⁴⁹⁶ Cuddon, n 351 above, p.62.

⁴⁹⁷ Reinhardt A, “Art-as-Art” (1962), reproduced in H Girvetz & R Ross, *Literature and the Arts: The Moral Issues* (Belmont California, Wadsworth, 1971), pp.20-29, at p.21.

⁴⁹⁸ Baldick C, *The Concise Oxford Dictionary of Literary Terms* (Oxford and New York, Oxford University Press, 1990), p.17; Beardsley, n 134 above, p.286; Prettejohn E (ed.), *After the Pre-Raphaelites Art and Aestheticism in Victorian England* (Manchester, Manchester University Press, 1999), p.5.

was not until the 1860s the doctrine emerged most forcefully in England.⁴⁹⁹ Gautier opposed the notion that literature or art could have any positive influence upon society. Rather he saw improvements in the physical and practical aspects of life as being “essentially civilizing, and ...advanc[ing] humanity along the path of progress”.⁵⁰⁰ The role of art and literature was not, in Gautier’s view, a functional or utilitarian one since although “nothing beautiful is indispensable to life”,⁵⁰¹ and “[n]othing is really beautiful unless it is useless”.⁵⁰² Thus the doctrine offered a radical alternative to the concept of art which had previously existed and, although it received a generally mixed reception (*Mademoiselle de Maupin* was one of the works cited in the English court upon the indictment of publisher Henry Vizetelly when he was charged with obscene libel in 1888)⁵⁰³ it was highly influential amongst practitioners in changing established attitudes towards literature and visual art.

Whereas formerly realistic works of literature and visual art might have included descriptions of immoral behaviour within a generally ‘moral’ framework, from whence a valuable moral lesson could be learned,⁵⁰⁴ artists and authors gradually shifted out of this framework and began to reveal immoral behaviour per se; Prettejohn (1999) describing how the art-for art’s sake doctrine was “seen as scandalous for its apparent advocacy of the life of the senses over moral responsibility”.⁵⁰⁵ Closely linked to this was a rejection of realism and a new-found emphasis upon aesthetics, beauty and sensuality; meaning that “verse and fiction are without any moral, social, cognitive, or other extraliterary purposes. The sole objective of a work of literature is to be beautiful, well structured and well written. We “learn” absolutely nothing about life or values from literature. Questions of

⁴⁹⁹ Prettejohn E (ed.), *After the Pre-Raphaelites Art and Aestheticism in Victorian England* (Manchester, Manchester University Press, 1999), pp.2-3, 17-35.

⁵⁰⁰ Gautier T, *Mademoiselle de Maupin*, transl. J Richardson, (Harmondsworth, Penguin Books, 1981), pp. 35-36; Gautier states “a book does not make jellied soup; a novel is not a pair of seamless boots; a sonnet, a syringe with a continuous spurt, a drama is not a railway”.

⁵⁰¹ Gautier, n 500 above, p.39.

⁵⁰² Ibid.

⁵⁰³ *The Times* 1st November 1888. See further chapter five, p.163

⁵⁰⁴ For example Hogarth’s *The Rake’s Progress* or the earlier novels such as Richardson’s *Pamela* and Defoe’s *Moll Flanders*, all describe immoral lifestyles within a broadly moral context.

⁵⁰⁵ Prettejohn, n 499 above, p.3.

“content” therefore have no legitimacy or relevance in writing, reading, studying, and judging literary products...Literature is one thing...and the real world another”.⁵⁰⁶

If this is so, and if Oscar Wilde (described as the “High Priest”⁵⁰⁷ of the art for art’s sake movement in London during the late 1800s) was correct when he stated that “[t]here is no such thing a moral or immoral book. Books are well written, or badly written, that is all”,⁵⁰⁸ then a work of art can be wholly or partly sexist, racist, blasphemous, obscene or seditious and yet ‘untouchable’ by the laws which prohibit the expression of such attitudes in the rest of society. High Art may be seen as a special category, separate from the world - with its own value which supersedes such ‘real world’ issues. It is to be judged by literary or artistic standards alone. An example of this principle in action occurred in the United States of America (“USA”); namely the awarding of the Library of Congress Bollingen Prize to Ezra Pound, for his *Pisan Cantos*, which was considered by those awarding the prize to be the best book of poetry published in 1948. Pound was awarded the prize despite the fact that it was considered by some readers to contain expressions of anti-Semitism. In this regard, it should be noted that whilst one contemporary commentator questioned “[h]ow far is it possible, in a lyric poem, for technical embellishments to transform vicious and ugly matter into beautiful poetry?”⁵⁰⁹ the author of a more recent study of the *Pisan Cantos*, whilst acknowledging that “[t]he anti-Semitism is there”,⁵¹⁰ argues that there is little in the poem “that is truly pro-facist, or anti-Semitic”⁵¹¹ and he considers that the poem is highly significant, since “it is the only modern epic that attempts a serious moral judgement on history and the state of society in the 20th Century”.⁵¹²

⁵⁰⁶ Bell-Villada G, *Art For Arts Sake How Politics and Markets Helped Shape the Ideology and Culture of Aestheticism 1790 – 1990*, (Lincoln USA and London, University of Nebraska Press, 1996), p.3.

⁵⁰⁷ By The Rt. Hon. Sir Travers Humphreys, P.C. in his foreword to H Montgomery-Hyde (ed), *The Trials of Oscar Wilde*, (London and Glasgow, William Hodge & Co, 1960), p.7.

⁵⁰⁸ Aldington R (ed), *Oscar Wilde Selected Works*, (London and Toronto, Heinemann, 1946), p.132.

⁵⁰⁹ Barrett W, Editorial in *The Partisan Review* (April 1949), reproduced in Girvetz H & R Ross, *Literature and the Arts: The Moral Issues* (Belmont California, Wadsworth, 1971), pp.82-86, at p.86.

⁵¹⁰ John R, *A Beginner’s Guide to the Cantos of Ezra Pound*, (Salzburg, University of Salzburg, 1995), xi.

⁵¹¹ Ibid.

⁵¹² John, n 510 above, p.ix.

The award was also controversial because Pound had been indicted for treason following his taking part in radio broadcasts in Italy, in which he spoke out against the Jews and against the President of the USA, among others.⁵¹³ The prize was awarded solely on grounds of poetic achievement, with the judges stating that “[t]o permit other considerations...to sway the decision would destroy the significance of the award and would in principle deny the validity of that objective perception of value on which any civilized society must rest”.⁵¹⁴ Thus the high art object was deemed to be worthy of the type of consideration which excluded any condemnation for the expression of a view which could be read as being anti-Semitic, even when the issue was one which was painfully current at the time.

The example given above is not an isolated one. The argument that works of art have a distinct status which separates them from the rest of society; meaning that the rules by which a society is governed do not apply to them is one which has been used to practical effect in other areas; Easthope (1991) recognising that “[a]s is well known, from *Lady Chatterley’s Lover* to the 1990 Cincinnati Mapplethorpe exhibition, in the name of Art and Literature high culture has traditionally been able to legitimate reaching into the realms of (for example) transgressive sexuality censored in more everyday discourses.”⁵¹⁵ High art has thus to some extent been protected by the fact that it is perceived to be above, or separate from, more commonplace forms of expression. It should be noted at this point, however, that this protection has not only been based upon the perception of high art as being distinct from everyday life, but also upon arguments relating to the possible beneficial effects of high art which were discussed earlier in this chapter. These are issues which will be discussed more fully in subsequent chapters.

For present purposes, it is necessary to consider whether high art truly exists for its own sake, and whether it is to be judged by literary or artistic standards alone, and not by those values which determine how the rest of society is administered. The

⁵¹³ Blair S, “Modernism and the Politics of Culture” in M Levenson (ed.), *The Cambridge Companion to Modernism*, (Cambridge, Cambridge University Press, 1999), pp.160-1

⁵¹⁴ Barrett, n 509 above, p.83.

⁵¹⁵ Easthope, n 109 above, p.97

elevation of the arts to a special status which took place at the end of the eighteenth century has already been discussed in this thesis, so too Bell's (1999) description of how creativity became associated primarily with the artist and not with the idea of a Divine Creator for the first time during this era.⁵¹⁶ Writing with regard to Matthew Arnold, Selden (1989) maintains that Arnold saw literature as a replacement for religion, "astutely grasping the fact that literature was able to satisfy an emotional need created by the materialism of industrialised society and modern science, a need to which religion was responding less and less effectively".⁵¹⁷ It is this thesis that the elevation of literature and the visual arts to a special status was actually a *symptom* of this failure of religion, and not its remedy.

As Bell (1999) observes, the first reference to man-made images in the Old Testament comes in the form of a prohibition of the practice of idolising, such prohibition being stated prior to warnings against killing, adultery and theft.⁵¹⁸ Bell asserts that the reason for this is that "[i]mages draw us in"⁵¹⁹ and for Old Testament writers, reverence of man-made works indicated an irreverence for God.⁵²⁰ In accordance with this view, it is argued that the increased reverence for works of visual and literary art which has occurred since the late eighteenth century is an indication of the general increase in irreverence for God which has occurred since that time. Those persons who we would now call 'artists' feature in the Old Testament as men "skilled to work in gold and silver, bronze and iron, and in purple, crimson and blue yarn" or "experienced in the art of engraving"⁵²¹ and they carried out a useful function in the society in which they lived. Their role was important, but was of no greater significance than those involved in other forms of work. Likewise, it is this thesis that the arts are a part of society and that high art is one important aspect of this. However, high art is certainly not of such significance that it can be considered to exist in a vacuum, disconnected from the rest of society and unbound by its rules (being those which society, in the form of a democratic government, has

⁵¹⁶ Bell, n 77 above, pp.17-19.

⁵¹⁷ Selden, n 108 above, p.2.

⁵¹⁸ Bell, n 77 above, p.9. See also Exodus 20:4.

⁵¹⁹ Bell, n 77 above, p.9.

⁵²⁰ Bell, n 77 above, pp.9-10.

⁵²¹ 2 Chronicles 2:7 (NIV)

decided that they should be at a given time). This is not to argue for or against the censorship of the arts; merely to state that high art is a part of society and is not separate from it, and that accordingly it is bound by its laws. This thesis rejects too a related argument which sees art as having an “independent cultural identity”⁵²² which should be recognised by the law. To afford matters pertaining to high art a special status within the legal system would, it is argued, elevate high art to a status of which it is not worthy: “Life includes and is more important than art, and it judges things by their consequences”.⁵²³

Conclusion

Whilst the writer supports the view that there is value in studying, reading or becoming acquainted with works of high art, it also supports the view that there is value in studying, reading or becoming acquainted with the best examples of the art forms which are considered to be ‘popular’ in that they appeal more readily to a wider audience. Although it has been argued that there is no longer any distinction between high art and low (for example, Seabrook (2000) maintains that the old hierarchy of values has been replaced by a new ‘Nobrow’ culture, and that by the 1990s “the notion that high culture constituted some sort of superior reality, and that people that made it were superior beings, was pretty much in the toilet”⁵²⁴) the writer has argued that it is still possible to draw a distinction between these two categories, based primarily upon the response of ‘the passionate few’ to works of literary and visual art.

The conclusion was reached in chapter two that high art was an elite category of works which an elite group of people had determined to be the most excellent examples of their kind and the writer acknowledges that those who determine high

⁵²² Kearns, n 75 above, p.88.

⁵²³ A view expressed by Clement Greenburg in response to the awarding of the Bollingen prize to Ezra Pound in 1948, recorded in Girvetz H & R Ross, *Literature and the Arts: The Moral Issues* (Belmont, Wadsworth, 1971) p.88. Greenburg, whilst stating that he is not against the publication of the poem, confesses that he is “sick of the art-adoration that prevails among cultured people”. (p.88)

⁵²⁴ Seabrook J, *Nobrow*, (London, Methuen, 2000) p.70.

art are those who are experts in their field. It is acknowledged here that such persons are likely to be in the best position to judge the artistic or literary merit of a work by drawing comparisons with other works which are already within their realm of knowledge. However, the writer does not consider that the public should be bound by such views, merely that they should have the opportunity to consider them and more especially the works in question, should they wish to do so.

An examination of the notion that the beneficial effects of high art make it a worthy candidate for increased protection has shown that these beneficial effects either do not exist, or that they relate to the arts in general and not specifically to high art. A consideration of the art for art's sake doctrine caused the writer to conclude that high art could be afforded greater protection on this basis, only if it was accepted that high art was 'above' life and society; a view which the writer rejects. Thus the conclusion of this chapter is that it is not possible to put forward a plausible argument for the protection of high art in preference to other more prosaic art forms, and indeed that it is not desirable to do so.

Chapter Four

The Legislature and High Art

Introduction

This Chapter considers the law as created by Statute,⁵²⁵ together with parliamentary debates and Select Committee reports where appropriate, in order to assess the various approaches of the Legislature towards the notion of high art, as defined in chapters one and two of this thesis. This chapter also seeks to assess the attitude of the Legislature towards the notion that high art should be afforded greater legal protection than more prosaic works, both historically and now. Where arguments have been put forward for the protection of high art, have they been based upon the belief that high art promotes certain beneficial effects upon society, or upon the view that high art is of particular significance for some other reason? The term “Legislature” refers in this thesis to the authority that, at any given time, has had the power to enact those rules regulating the conduct of English citizens. Presently, this authority rests with the Queen in Parliament, although the requirement of royal assent is now merely a formality given that the assent is given strictly in accordance with the advice of the executive.⁵²⁶ Whilst it is acknowledged here that European Legislation also now regulates much of the conduct of English citizens, a discussion of this area is reserved for chapter six, when England’s international obligations will be considered; as will the Human Rights Act 1998.⁵²⁷

The areas of domestic law that are relevant to this discussion are of a diverse nature, but arguably one of the areas most pertinent to this thesis’ period of study is that

⁵²⁵ As stated in the introduction, the approaches of the Legislature and the Courts to high art are addressed separately in this thesis. Although the common law cases involving high art come first chronologically, statute law is addressed first in this thesis. This is because the application of statutes in this area has become increasingly important, and the OPAs provide a useful frame of reference for both this and the following chapter.

⁵²⁶ Barnett H, *Constitutional and Administrative Law*, (London & Sydney, Cavendish Publishing, 3rd ed, 2000), p.175. Bradley AW & Ewing KD, *Constitutional and Administrative Law*, (London & New York, Longman 12th ed, 1997), p.22. Both point out that it is not since the early 1700s, during Queen Anne’s reign, that the monarch’s right to refuse assent has been exercised.

⁵²⁷ Human Rights Act 1998, c.42

which relates to the censorship of works of literature or visual art on grounds of obscenity. For this reason, the two main ‘obscenity’ statutes; namely the Obscene Publications Act 1857 (“OPA 1857”)⁵²⁸ and the Obscene Publications Act 1959⁵²⁹ (“OPA 1959”) are used in this chapter to provide convenient benchmarks for the discussion. Thus this chapter considers first the law relating to high art up to and including 1857, thereafter the relevant law between 1858 and 1958, and finally the period from 1959 to the present day. These periods are also significant in that they mark or span developments in the arts which have been discussed in the previous chapters. For example, the first period (1780 to 1857) precedes the art for art’s sake movement, whereas the second period (1858-1958) spans the influence of this movement, the subsequent rise in Aestheticism and the whole of Modernist era. The last period (1959 to date) is of course that which has already been described as postmodern.⁵³⁰ Therefore, within the framework of the questions set out in the first paragraph of this introduction, this chapter will also seek to discover whether the Legislature has been influenced by those artistic and literary theories which have been prevalent at any given time.

The Legislature and High Art from 1780 to 1857

Restraints Upon Free Speech and Expression

Following the writer’s view that a work of visual or literary art can and should be viewed primarily as the expression of its author or artist, statutes such as the 1799 Act prohibiting Seditious Practices⁵³¹ and the 1819 Act ‘for the more effectual Prevention and Punishment of Blasphemous and Seditious Libels’⁵³² (whereby the Courts were given power to make orders for the seizure and removal of all copies of any material which had been found by the court to consist of a blasphemous or seditious libel under the common law, and indeed allowing the court to order any

⁵²⁸OPA 1857 (20 & 21 Vict.) c.83

⁵²⁹OPA 1959 (7 & 8 Eliz. 2) c.66

⁵³⁰ Chapter one, p.13.

⁵³¹ An Act for the more effective suppression of societies established for Seditious and treasonable purposes, and for the better preventing treasonable and seditious practices, 1799, (39 Geo.3) c.79

⁵³² Blasphemous and Seditious Libels Act, 1819 (60 Geo.3) c.8

persons convicted of a second offence to be expelled from the country) might well be viewed as measures which stifled free expression (including artistic expression) and thus cited as evidence that the Legislature was not supportive of high art or the arts in general at this time. The same argument could be raised with regard to the Vagrancy Acts of 1824⁵³³ and 1838⁵³⁴, under which those responsible for the display of “any obscene Print, Picture or other indecent exhibition”⁵³⁵ could be prosecuted, or the Metropolitan Police Act 1839⁵³⁶ (applied provincially under the Town Police Clauses Act 1847⁵³⁷)⁵³⁸ which made it an offence to offer for sale or to exhibit “any profane, indecent, or obscene Book, Paper, Print, Drawing, Painting or Representation...or write or draw any indecent or obscene word.”⁵³⁹ So too with the Customs Act of 1846⁵⁴⁰ which allowed for the forfeiture and destruction of “any indecent or obscene prints, paintings, books, cards, lithographic or other engravings”⁵⁴¹ and the OPA 1857, its stated aim being “for more effectually preventing the sale of Obscene Books, Pictures, Prints and other Articles”.⁵⁴² None of these statutes contain exemptions from prosecution for those works which might be considered to be blasphemous, seditious, indecent or obscene, yet also of value, given their high literary or artistic merit.

Do they indicate then that the Legislature had a complete disregard for artistic expression and/or works of high art at this time? Whilst it is acknowledged that the likely effect of such legislation is to stifle artistic expression, it is submitted that to state that the legislature was oblivious to high art, or even opposed to it at this time is to misunderstand and to misrepresent the intentions of the Legislature during this period. This submission will be supported by reference to three main areas: Firstly, a brief overview of the social and political conditions which existed at the time;

⁵³³ Vagrancy Act, 1824 (5 Geo.4) c.83

⁵³⁴ Vagrancy Act, 1838, (1 & 2 Vict.) c.38.

⁵³⁵ Vagrancy Act 1824 (5 Geo.4) c.83, part IV.

⁵³⁶ Metropolitan Police Act 1839 (2 & 3 Vict.) c.47

⁵³⁷ Town Police Clauses Act 1847 (10 & 11 Vict.) c.89

⁵³⁸ Simpson, AWB, *Pornography and Politics: A Look Back to the Williams Committee*, (London, Waterlow: 1983), p.14.

⁵³⁹ Metropolitan Police Act 1839 (2 & 3 Vict.) c.47, section LIV.

⁵⁴⁰ Customs Act 1846 (9 & 10 Vict.) c.102.

⁵⁴¹ Customs Act 1846 (9 & 10 Vict.) c.102., s.19.

⁵⁴² Preamble to OPA 1857 (20 & 21 Vict.) c.83

secondly, the debates surrounding the implementation of the OPA 1857 and thirdly, reports of various select committees on matters relating to high art which were published during this period (the middle years in particular).

The Political and Social Conditions of the Period

The fact that our current conception of ‘the Arts’ (and consequently the notion of high art) came into being at the end of the eighteenth century, after “existing conventions of art and literature went through extreme and violent change”,⁵⁴³ has already been well-documented in this thesis.⁵⁴⁴ What then was the Legislature’s response to this development? As stated above⁵⁴⁵, this era predates the art for art’s sake movement, which did not emerge forcefully in England until the 1860s,⁵⁴⁶ but was there during this period any indication that the Legislature supported the now familiar notion that high art should be protected because of its inherent worth? The period in question was, of course, one in which England had experienced and was continuing to experience considerable political and social change. The so-called “Industrial Revolution” which had commenced in the late eighteenth century had caused radical changes in English society.⁵⁴⁷ The term “Industrial Revolution” was first used by French writers in the 1820s, as a parallel drawn from their own Revolution in 1789 and Williams (1958) submits that as the Revolution had transformed France, “so this had transformed England; the means of change are different, but the change is comparable in kind: it has produced ...a new society”.⁵⁴⁸ Was there any acknowledgement of high art by the Legislature in this newly industrialized era, or were the Arts disregarded by the Legislature during this period of social and political upheaval?

⁵⁴³ Graham-Dixon, n 92 above, p.128.

⁵⁴⁴ See chapter one, pp.32-3 and chapter two, pp.62-63.

⁵⁴⁵ See chapter three, p.100.

⁵⁴⁶ Prettejohn, n 499 above, pp.2-3, 17-35.

⁵⁴⁷ Williams, n 180 above, p.xiii.

⁵⁴⁸ Williams, n 180 above, p.xiv.

Early in the era (1792) came the French Revolution, described by Hodges (1926) as a “tremendous landmark of history...that unlocks the door of modern history”,⁵⁴⁹ its significance being based in the fact that it “gave to the world the doctrine that government should be of the people, by the people, for the people”,⁵⁵⁰ a proposition from which modern democratic ideas have developed. Expressing a view with which this thesis accords, Thomas (1969) maintains that during the latter decades of the eighteenth century, one of the most important factors which determined the nature of literary censorship in England was “the growing fear of political revolution”.⁵⁵¹ The other factor was the steady increase in the number of people able to read⁵⁵²; which, Thomas maintains, “made communication of revolutionary ideas possible over a whole country or even a whole continent”.⁵⁵³ Thus the legislature’s action to strengthen the law against seditious practices and writings⁵⁵⁴ can be seen primarily as an attempt to avoid the transmission of ideas set out in works such as Paine’s *Rights of Man*, published in two parts in England in 1791 and 1792,⁵⁵⁵ and not as a means to stifling high art.⁵⁵⁶ After all, only five years after implementing the 1819 Act, and still during a time of political unrest, Parliament approved the purchase of a collection of 38 works of art by artists such as Rembrandt, Claude and Raphael, which were to become the basis of the first National Gallery exhibition.⁵⁵⁷

In 1832, in light of its belief that there was a threat of revolution in England the Legislature passed the Reform Act; the first in a series of statutes⁵⁵⁸ which reformed the country’s electoral system.⁵⁵⁹ Evans (1994) describes how the Reform Act “was not a piece of timeless constitution-making, the product of a full and dispassionate

⁵⁴⁹ Hodges, HW, *Modern History 1750-1925*, (London and Glasgow, Blackie & Son, 1926), p.59.

⁵⁵⁰ Hodges, n 549 above, p.60.

⁵⁵¹ Thomas D, *A Long Time Burning: A History of Literary Censorship in England* (London, Routledge & Kegan Paul, 1969), p.98.

⁵⁵² O’Flinn P describes Paine as “read by millions in the 1790s and the most influential writer of his generation” in his “‘Beware of reverence’: writing and radicalism in the 1790s”, in Lucas J (ed), *Writing and Radicalism*, (London, Longman, 1996), pp.84-101, at p.87.

⁵⁵³ Thomas, n 551 above, p.98

⁵⁵⁴ Blasphemous and Seditious Libels Act 1819 (60 Geo.3) c.8

⁵⁵⁵ Paine, n 262 above.

⁵⁵⁶ High art and seditious writing were entirely separate concepts at this time. See further below, pp.115-6.

⁵⁵⁷ Trodd, n 361 above, pp.33-49

⁵⁵⁸ Further reform Acts were passed in 1867 (30 & 31 Vict.) c.102 and 1884 (48 & 49 Vict.) c.3.

⁵⁵⁹ Representation of the People Act, 1832 (2 & 3 Will.4) c.45.

consideration of the nation's needs. It was a compromise stitched together during a crisis",⁵⁶⁰ yet it proved sufficient, when combined with other measures directed at social reform,⁵⁶¹ to avoid a national upheaval upon the scale that had been witnessed in France.⁵⁶² Having overcome the apparent threat of revolution, it appears that the Legislature shifted its concern from seditious libels to the public display or publication of material which was indecent or obscene. It is submitted that this was no arbitrary shift in focus on the part of the Legislature, but rather a response to pressure which had been exerted during this period by certain groups outside of Parliament; such as the Proclamation Society (founded 1787)⁵⁶³ and the Society for the Suppression of Vice (founded 1802),⁵⁶⁴ each professing the intention of suppressing the publication of obscene books and prints, and likewise an attempt by Parliament to deal with that which it perceived to be threatening to the health and welfare of the population in general; the sale of "poisonous publications".⁵⁶⁵

The Obscene Publications Act 1857

The stated purpose of the OPA 1857, otherwise known as 'Lord Campbell's Act' was "for more effectually preventing the sale of Obscene Books, Pictures, Prints and other Articles".⁵⁶⁶ As this wording indicates, the Act did not represent any intention by Parliament to introduce ground-breaking censorship legislation. Rather, the OPA 1857 was an Act to consolidate and to extend the powers which existed already under the common law. The OPA 1857 granted powers to Magistrates and Justices of the Peace to issue warrants for the entry and search of a premises which was

⁵⁶⁰ Evans, EJ, *The Great Reform Act of 1832*, (London and New York, Routledge, 2nd ed, 1994), p.1. See also Cahill, GA (ed.), *The Great Reform Bill of 1832 Liberal or Conservative?* (New York, DC Heath & Co. 1969), p.x.

⁵⁶¹ Minihan J, *The Nationalization of Culture*, (London, Hamish Hamilton, 1977), p.29.

⁵⁶² Interestingly, it has been argued that whilst there was certainly a perceived threat of revolution which convinced the Legislature of the need to reform the law, there was no actual threat of violent revolution at this time. See Hamburger, J. "The Threat of Revolution: A Radical Bluff" in Maehl, WHM (ed.) *The Reform Bill of 1832 Why Not Revolution?* (New York, Holt, Rinehart and Winston, 1967), pp.77-84.

⁵⁶³ Hunter I, D Saunders and D Williamson, *On Pornography Literature, Sexuality and Obscenity Law* (London, Macmillan, 1993) p.77

⁵⁶⁴ Ibid.

⁵⁶⁵ HL, Vol. CXLV col.102, May 11th, 1857. See further below, p.114.

⁵⁶⁶ OPA 1857 (20 & 21 Vict.) c.83, full title.

believed⁵⁶⁷ to contain “any obscene books, papers, writings, prints, pictures, drawings or other representations”⁵⁶⁸ which were held for the purpose of gain (that is, they were not part of a private collection or library) and which were of such a character that publication of them would amount to a misdemeanour. The misdemeanour referred to is obscene libel under common law, the offence which had been established in *R v Curll* (1727) 2 Str. 788;⁵⁶⁹ the terms of which had not yet been fully defined by the courts (the ‘tendency to deprave and corrupt’ formula was not established until the case of *R v Hicklin* (1868) L.R. 3 QB 371).⁵⁷⁰

The Obscene Publications Bill met with considerable opposition in its progress through Parliament since the potential for the Act to be invoked against works of high art was recognised.⁵⁷¹ For example in the Second Reading of the Bill in the House of Lords, Lord Brougham asked Lord Campbell how he proposed to define an “obscene publication”, given that there were passages in the works of some of the most eminent poets which might be considered obscene.⁵⁷² Lord Campbell replied that he had not even “the most distant contemplation” of including such a class of works in the Bill; the “measure was intended to apply exclusively to works written for the single purpose of corrupting the morals of youth, and of a nature calculated to shock the feelings of decency in any well regulated mind”.⁵⁷³ Lord Lyndhurst then queried what interpretation was to be put on the word “obscene”, giving some vivid examples of how great works of art (or their reproductions) could become the subjects of criminal prosecutions. A print of Correggio’s *Jupiter and Antiope* could be conceived to be a “licentious print”, a sculpture of naked figures could be seized under the Act, as could numerous poems available for hire in the Circulating

⁵⁶⁷ An informant would have to state such a belief on oath in the first instance.

⁵⁶⁸ OPA 1857 (20 & 21 Vict.) c.83, section I.

⁵⁶⁹ Curll had published a book entitled *Venus in the Cloister or The Nun in her Smock* which, the prosecution argued, would lead to the corruption of morality. Such matters had been dealt with hitherto by the Ecclesiastical Court. However, on the basis that the corruption of morals amounted to an offence against “the peace of the Government” (2 Str.789) Curll was convicted of publishing an obscene libel.

⁵⁷⁰ The courts’ application of the common law in this area is discussed in the following chapter.

⁵⁷¹ Manchester C “Lord Campbell’s Act: England’s First Obscenity Statute” *Journal of Legal History*, (1988) Vol.9, 230.

⁵⁷² HL, Vol.CXLVI col.329, June 25th, 1857

⁵⁷³ Ibid.

Libraries.⁵⁷⁴ Lord Wensleydale too expressed concern that “the classic authors” might be held to be obscene.⁵⁷⁵ On all these occasions, Lord Campbell denied that works of high art were within the remit of the Bill, and he was supported by Lord Wynford who stated that whilst it might be possible to find “some objectionable passages” in the works cited, “it would be absurd to suppose that the possession of such books would render the possessors liable to punishment”.⁵⁷⁶

Their lordships expressed concern for such works appears also to have been based upon the belief that they were inherently valuable; such value being assumed in the fact that their Lordships feared the prosecution of such works purely on the ground that they were high art. Given that the term ‘obscene’ was not going to be clearly defined in the Act (and had not yet been defined by case law), the fact that some of these established works depicted nude figures or contain passages which were sexually explicit or held sexual connotations was a cause for concern. Manchester (1988) points out that the requirement that two magistrates be satisfied that the material in question was “of such a character and description that the publication of them would be a misdemeanour”⁵⁷⁷ prior to issuing a warrant, went some way to ensuring that the Act would not be used to prosecute inappropriate works (namely, those established as high art). Likewise, the requirement that the works in question had to be offered for sale in order to come within the terms of the Act was considered to adequately safeguard classical works kept in private collections.⁵⁷⁸ However, writing with the benefit of hindsight, Manchester gives examples of how a number of works possessing some artistic or literary merit were seized and destroyed in the latter decades of the nineteenth century, using the powers conferred by the OPA 1857, making valid the concerns expressed by Lord Lyndhurst and others.⁵⁷⁹ Manchester adds, however, that in some cases prosecutions for obscene libel, rather than forfeiture proceedings, were brought against publishers and these actions may have been pursued in any event; he concludes: “The subjecting of serious works to

⁵⁷⁴ HL, Vol.CXLVI cols 330-331, June 25th, 1857.

⁵⁷⁵ HL, Vol.CXLVI col.336, June 25th, 1857.

⁵⁷⁶ Ibid.

⁵⁷⁷ OPA 1857 (20 & 21 Vict. c.83), section I.

⁵⁷⁸ Lord Campbell, HL, Vol.CXLVI col.337, June 25th, 1857.

⁵⁷⁹ Such cases are discussed in the following chapter.

legal proceedings was not essentially a development that the Obscene Publications Act was instrumental in bringing about, although the Act might well have contributed to the impact that this development had”.⁵⁸⁰

Lord Campbell’s reference to “the great injury”⁵⁸¹ which was being caused by obscene publications is an indication of the fact that obscene publications were considered at the time to be capable of causing physiological damage.⁵⁸² There was also a concern that exposure to obscene literature could lead to promiscuity, which could in turn lead to an early grave.⁵⁸³ By contrast, as the forthcoming discussion of various select committee reports will shown, high art was considered to have beneficial effects for individuals and for society in general.⁵⁸⁴ The legislation was intended, therefore, as a means to ridding the country of an apparent danger which was generally acknowledged,⁵⁸⁵ not as a means to inhibiting a form of expression to which the legislature was ideologically opposed. Hunter et al (1993) support this view, stating with regard to the obscene publications which the Act sought to restrain that “[t]his was a commodity whose uncontrolled circulation and consumption threatened to corrupt the regenerate body and mind of the population. To have done nothing to control this circulation and consumption would have been to remain passive in the face of disaster”.⁵⁸⁶ Thus whilst the drafting of the legislation proved insufficient to avoid the prosecution of serious works of art in accordance with its provisions, it is submitted that this failure is not sufficient evidence to show that the Legislature had little or no regard for high art at the time. The “Obscene Books, Pictures, Prints and other Articles” which were the focus of the OPA 1857 were outside of and separate from the Legislature’s contemplation of high art at the time;

⁵⁸⁰ Manchester, n 571 above, pp.236-7.

⁵⁸¹ HL Vol.CXLVI col.337, June 25th, 1857

⁵⁸² Saunders D,” Victorian Obscenity Law: Negative censorship or Positive administration?”, in Hyland P & Sammells N (eds), *Writing and Censorship in Britain*, (Routledge, London & New York, 1992), pp.154-170, at p.164.

⁵⁸³ Thomas, n 551 above, p.241

⁵⁸⁴ See also Morse D, *High Victorian Culture*, (London, Macmillan, 1993), p.432

⁵⁸⁵ An article published in *The Times* on July 23rd 1857 concedes that legislation is necessary to curb the sale of “prints, song-books and other publications of the most disgusting character” and, despite the fact that works of art might be prosecuted under a new law, the article states: “let the experiment be tried”.

⁵⁸⁶ Hunter et al, n 563 above, p.60.

their Lordships' concern being that the wording of the statute might allow its provisions to be used inappropriately, and against Parliament's intentions. There was no intention to censor high art, or as Saunders (1992) states, "[i]n 1857 the law's concern was not with serious literature, and serious literature's concern was not with the law".⁵⁸⁷

Reports of Select Committees during this Period

As stated in the previous chapter, the reign (1820-1830) of King George IV was one in which the arts were afforded significant attention by the monarchy.⁵⁸⁸ This marked the onset of a period in which it appears that Parliament embraced thoroughly the notion of encouraging the Arts (the visual arts in particular); the impetus being sustained throughout the reign of William IV (1830-1837) and into the reign of Victoria (1837-1901); Morse (1993) describing how early in the Victorian era "never before had the visual arts been the subject of such widespread debate and discussion".⁵⁸⁹ It appears that this view was based upon the belief that high art could benefit society in two main ways: Firstly, by influencing members of all classes of society and encouraging them behave in a more refined manner, and secondly, by promoting the nation's manufacturing industry and increasing the country's wealth thereby.

The 1836 Select Committee Report on the Arts and Manufacturing

The 1836 House of Commons Select Committee report on the Arts "and their connexion with manufactures" provides an example of both of these views. The Committee reported that "from the highest branches of poetical design down to the lowest connexion between design and manufactures, the Arts have received little encouragement in this country"⁵⁹⁰ and whilst the emphasis of this report is on manufacturing and the need for instruction in design for those working in industry,

⁵⁸⁷ Saunders, n 582 above, p.162.

⁵⁸⁸ Chapter three, p.71.

⁵⁸⁹ Morse, n 584 above, p.394.

⁵⁹⁰ Report of Select Committee 1836, n 487 above, p. (iii)

attention is also paid to the absence of “public and freely open galleries containing approved specimens of art” in England.⁵⁹¹ The Committee recommended that “perfect specimens of beauty” should be exhibited in public galleries, the Arabesques of Raphael being cited as one example.⁵⁹² It is suggested also that manufacturers should exhibit “works of proportion and of beauty” in appropriate places in their factories, in order to encourage a knowledge and a love of art among the workmen.⁵⁹³

It is assumed in the report that making works of art available for public inspection will encourage a love and appreciation of art in the population. No evidence is put forward to support this assumption, but examples are drawn from other nations, particularly France, and it is asserted that foreign manufacturing artists possess an advantage over their British counterparts because art is extended throughout “the mass of society”.⁵⁹⁴ In the concluding paragraphs of the report, the Committee submit that “an occasional outlay of public money on British works of art of acknowledged excellence, and in the highest style and purest taste, would be a national advantage”⁵⁹⁵ and they express their desire that a love of art be diffused among the people, who would have been taught then to “respect and venerate the name of “Artist””.⁵⁹⁶ Thus in the visual arts at least, selected representatives in Parliament were proposing that measures be taken to encourage an appreciation of high art throughout the nation, even if only to benefit the nation’s industry. Terms such as “proportion”⁵⁹⁷, “beauty”⁵⁹⁸ and “classical purity of taste”⁵⁹⁹ which are found in the report indicate that the types of work of art which the committee were contemplating were those which were considered to be high art by virtue of certain inherent qualities, such as excellence in form and composition or skillful application, which marked them out as such.

⁵⁹¹ Ibid.

⁵⁹² Report of Select Committee 1836, n 487 above, p. (v)

⁵⁹³ Ibid.

⁵⁹⁴ Report of Select Committee 1836, n 487 above, p. (iv)

⁵⁹⁵ Report of Select Committee 1836, n 487 above, p. (x)

⁵⁹⁶ Report of Select Committee 1836, n 487 above, p. (xi)

⁵⁹⁷ Report of Select Committee 1836, n 487 above, p. (v)

⁵⁹⁸ Ibid.

⁵⁹⁹ Report of Select Committee 1836, n 487 above, p. (vi)

The 1841 Select Committee on Fine Arts

As stated in chapter three⁶⁰⁰, a further Select Committee met in 1841 to consider the rebuilding and refurbishment of the two houses of Parliament, following the fire in 1834.⁶⁰¹ When the opinion of a Mr. Dyce was sought on this issue, he stated as follows: “I believe the encouragement of the Historical Art of Painting would raise the fine arts generally; I believe the encouragement of the highest kind of Ornamental Art would improve the lower kinds of Arts of Design for industry. We want, in fact, a middle class of Artists; we have only at present Artists of the highest sort, - those who paint pictures; and of the lowest, who make patterns of the worst description for manufactures; we want a middle class who have the knowledge of Artists and the skill of Ornamentists”.⁶⁰²

The terminology used throughout the report indicates that there was an awareness of a distinction between works which would be considered high art and more prosaic works which were deemed useful for industry. To promote and encourage high art would, it was thought, lead to an elevation in the quality of the Arts in general, and as in the 1836 report, there was an expectation that the promotion of high art would have “a beneficial influence...upon the character of the people”.⁶⁰³ The Committee considered it most appropriate that Fresco painting should be adopted as the mode or style of decoration within parts of the new building. This was a style of painting which had been revived on the Continent and the example of Munich in particular is used to illustrate how successful Fresco painting could be in encouraging the Arts and in impressing upon the mind of a nation a general love of art.⁶⁰⁴ Frescos were particularly successful in achieving the latter aim because “it was not to be expected that the lower classes of the community should have any just appreciation of the delicacies and finer characteristics of painting in oil and ... they required large and simple forms, very direct action, and in some instances exaggerated expression”.⁶⁰⁵

⁶⁰⁰ p.98.

⁶⁰¹ Report of Select Committee 1841, n 488 above

⁶⁰² Report of Select Committee 1841, n 488 above, p. (viii)

⁶⁰³ Report of Select Committee 1841, n 488 above, p.(vi)

⁶⁰⁴ Report of Select Committee 1841, n 488 above, pp.(vi) - (vii).

⁶⁰⁵ Report of Select Committee 1841, n 488 above, p. (vii)

The report indicates that the Legislature at that time had great expectations concerning the possible outcome of the promotion of Fine Arts and public patronage of high art in England. The artists commissioned to do the work would be given an opportunity to exercise their genius (although the Committee recognised that fresco painting had not been studied hitherto by English artists and so suggested that the artists be given an opportunity to make “some experimental efforts in the first instance”!).⁶⁰⁶ Creators of the lower forms of applied art would be inspired and encouraged and so the Arts in general would improve in quality, industry would given a fresh stimulus, and the people of England would gain an appreciation of art which would lead directly to their own moral elevation. The belief of both select committees that a general moral elevation could be achieved through the encouragement of the high art echoes the ideas expressed outside of parliament at the time, as discussed in the previous chapter.⁶⁰⁷

Also referred to in the previous chapter was the founding during the 1830 and 1840s of societies known as Art Unions.⁶⁰⁸ During the 1840s London print sellers grew concerned about the effects upon their business caused, in their view, by the Art Unions’ emphasis upon engravings.⁶⁰⁹ They sought counsel’s advice and on the basis of this, publicised their view that the Art Unions were operating contrary to the Lottery Act of 1802.⁶¹⁰ This resulted in the temporary closure of the London Art Union. Supporters of the Art Unions (one of whom was Thackeray)⁶¹¹ petitioned the Commons and it fell to Parliament to decide whether or not the Unions did fall foul of the Lottery Act and, in any event, whether the Unions should be exempted from this law.⁶¹² A Select Committee was formed in 1844 to consider these matters in depth and in the meantime, Parliament passed temporarily “An Act to indemnify Persons connected with Art Unions...against Certain Penalties” (7 & 8 Vict. c.109).

⁶⁰⁶ Report of the Select Committee 1841, n 488 above, p. (iv)

⁶⁰⁷ Chapter three, pp.71-73.

⁶⁰⁸ Chapter three, p.72.

⁶⁰⁹ King, n 360 above, p. 97.

⁶¹⁰ (42 Geo.3) c.54

⁶¹¹ King, n 360 above, p.102.

⁶¹² Minihan, n 561 above, pp.79-80.

The 1845 Select Committee Report on Art Unions

The Committee found that the object of all the Art Unions in England was the encouragement of the Arts in all departments, and of high art in particular.⁶¹³ The fact that Parliament chose to indemnify Art Union members prior to receiving a Select Committee Report, and then charged the Select Committee with the duty of preserving and improving the art unions in any event, indicates that members of Parliament were supportive instinctively to the Art Unions and to their aims at that time; “the Art Union had friends in Parliament”.⁶¹⁴ The Committee found also that the Unions had had a direct impact upon artists, benefiting them financially at least.⁶¹⁵ With regard to the encouragement of high art, the Committee questioned how high art could be best encouraged and asked whether “the Art Unions... can so effectually encourage High Art (however desirable) as either the Government or the Church, in whose hands such function generally lies”.⁶¹⁶ This is an interesting statement since it places the responsibility for encouraging high art upon the administration and the Church, institutions which had united in previous centuries to censor and destroy works of visual art and literature.⁶¹⁷ It is notable that such a statement is made at a time when statutes such as those mentioned earlier in this chapter⁶¹⁸ had either been recently enacted (such as Metropolitan Police Act 1839) or were to be enacted within only a few years (for example, the Customs Act of 1846). Was one branch of Parliament then contradicting the whole? It is submitted that the reason for this apparent discrepancy is that the notion that high art could be amoral, or devoid of any didactic purpose had not yet become current, either in Parliament or elsewhere. This will be discussed further below with reference to the OPA 1857, but for present purposes it is submitted that this aspect of the report indicates the Legislature at that time held the prevailing view in regard to high art: simply that blasphemous,

⁶¹³ Report of the Select Committee on Art Unions 1845, (612.) vii. 1. p.iv

⁶¹⁴ Minihan, n 561 above, p.80.

⁶¹⁵ Report of Select Committee 1845, n 613 above, p.x

⁶¹⁶ Report of Select Committee 1845, n 613 above, p.xx

⁶¹⁷ Smith, AGR *The Emergence of a Nation State, 1529-1660*, (Longman., London & New York, 1984) and Aston, M *England's Iconoclasts (Volume I) Laws Against Images*, (Clarendon Press, Oxford, 1988).

⁶¹⁸ At p.108.

sedition, indecent or obscene books or prints were harmful, whereas high art was, by contrast, beneficial and brought about positive effects.

This Report differs from the 1836 Report in that it goes some way in explaining how, in the Legislature's view, a love of art may be developed in society. In a discussion on private patronage, the Report states: "The man who is induced to purchase at an exhibition, or Art Union, or sale of books, had he not chanced upon these opportunities, might probably never have purchased at all; and it often happens that this purchase (accidental, not necessary) is the creator or developer of an appetite, or taste, which till then lay dormant, and which without such accident would probably never have shown itself, much less sought for its appropriate gratification".⁶¹⁹ It is thus as a result of being given the opportunity to observe or read a work of visual art or literature that an individual's capacity to enjoy or appreciate such things will emerge. Although it is not clear from this or the other Select Committee Reports exactly how a taste and appreciation for high art will then manifest itself as moral elevation (that which King (1985) calls the "faith in the ability of art not only to make people think, but also to make them good"⁶²⁰) the view expressed by the Committee is yet more appealing than those which were to be put forward in the Modernist era and which were discussed in the previous chapter. This is because its was an essentially all-embracing notion (bringing high art 'down' to the people and making it more accessible) rather than an exclusive or elitist one (making high art 'higher' and more inaccessible). For example, in the 1841 Report frescoes were recommended because they were considered to be most accessible to the general public, with their "large and simple forms"⁶²¹ and "very direct action".⁶²²

The Committee concluded that Art Unions should be exempted from the operation of the lottery laws and the Art Union Act, 1846 (9& 10 Vict., c.48) was passed accordingly. However, the Art Unions were again to become the subject matter of a Select Committee Report some twenty years later. This report will be discussed in

⁶¹⁹ Report of Select Committee 1845, n 613 above, p.xx.

⁶²⁰ King, n 360 above, p. 259.

⁶²¹ Report of Select Committee 1841, n 488 above, p.vii

⁶²² Ibid.

the second section of this chapter. It is submitted that the reports discussed hitherto in this section have indicated that at this time, the Legislature's concept of high art was something of a classical one, based upon its respect and admiration for established works of art. Furthermore, the Legislature reveals itself in these reports as being in accordance with the view expressed outside of Parliament around this time, basing its support of high art upon the belief that high art could morally elevate its audience.

Further Provisions

That the Legislature was broadly supportive of high art, as the concept was then understood, is evidenced finally by the fact that other provisions were enacted during this period which were advantageous to the owners, publishers or creators of high art, albeit not exclusively so at this stage. The Legacies Act of 1799 specifies that "no legacy, consisting of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles" shall be liable to any duty, providing that any such item is bequeathed to a public body (listed in the Act) and not for the purpose of sale.⁶²³ This provision ensured that the owners of valuable works of art (or, more particularly, their estates) could benefit financially by allowing such works to enter the public domain. Also during this period, copyright legislation which had been founded at the beginning of the eighteenth century was amended to ensure its continued application, and whilst the 1842 Copyright Act⁶²⁴ afforded protection to the creators of certain works, regardless of their quality, its stated purpose to "afford greater encouragement to the production of literary works of lasting benefit to the world"⁶²⁵ indicates the Legislature's positive intentions at this time.⁶²⁶ An environment was being established whereby writers were free to create literary works in the knowledge that their commercial interests were protected.

⁶²³Legacies Act 1799 (39 Geo.3) c. 73

⁶²⁴Copyright Act 1842 (5 & 6 Vict.) c.45

⁶²⁵Copyright Act 1842 (5& 6 Vict.) c.45 (Preamble)

⁶²⁶ It is noted here also that the Customs Act of 1845 (8 & 9 Vict.) c.86, s.62 prohibited the import of books from foreign countries where copyright subsisted or had originated in the United Kingdom; thus adding greater protection to the commercial interests of those who owned the copyright, regardless of the quality of the work in question.

The Legislature and High Art from 1858 to 1958

Although it may be stated generally in regard to this period that the influence of the art-for art's sake doctrine in England becomes apparent, with a shift in emphasis away from the didactic or moral purpose of high art accompanying a removal of the expectation that the subject matter of high art be broadly 'moral' (this period is the first in which the legislature recommends a "work of art" defence to a charge of indecency or obscenity, see below p.128), the writer acknowledges that otherwise this period is far too great in terms of size and import to warrant the drawing of general conclusions. As such, this chapter's treatment of the period 1858 to 1958 will differ from that afforded to the previous one. Rather than considering the period as a whole, specific areas of law will be considered in turn, and for each the extent to which they indicate the Legislature's approach to high art will be assessed.

The Demise of the Art Unions

In 1866, the Art Unions were once more the subject of a Select Committee Report,⁶²⁷ but this time the Legislature concluded that "[t]he tendency of Art Unions had been to foster the love of chance and speculation rather than to encourage high art"⁶²⁸ and whilst "the influence of Art Unions in improving the public taste appears to have been very slight, the moral effect of some of them has been proved...to be very bad."⁶²⁹ The Committee was informed that Art Unions were adapting themselves to the tastes of "the uninstructed public" and therefore they could not cultivate a truly good style of art.⁶³⁰ Despite these criticisms, Art Unions were permitted to continue but under more closely defined regulations, and they continued to operate throughout the nineteenth century, until decreasing membership numbers caused them to be dissolved in the early twentieth century.⁶³¹ It appears that the enthusiasm which the

⁶²⁷ Report of the Select Committee on Art Unions 1866 (332.) vii.1.

⁶²⁸ Report of Select Committee 1866, n 627 above, p.iii.

⁶²⁹ Report of Select Committee 1866, n 627 above, p.iv.

⁶³⁰ Ibid.

⁶³¹ King, n 360 above, chapter 5. Notably, the period of decline for the art unions coincides with the rise of the Modernist movement. It is submitted that the aim of the art unions, to make visual art more accessible to the public, conflicted with Modernist trends in the arts, through which works of art became increasingly non-representational and difficult to comprehend.

Legislature had first greeted the Art Unions was based in a hope that was never realised; namely the fostering of a love of art among the population and thus the Legislature withdrew its support. However, it should be noted that such a withdrawal represented a belief by the Legislature that the Art Unions had failed to meet their objectives, not that high art itself had failed to achieve that which the Legislature had hoped for.⁶³²

Commercial and Financial Interests

Taxation and High Art

As stated above (p.121) the Legacies Act of 1799⁶³³ introduced the idea of exempting from taxation certain items (such as works of high art, but not exclusively so) which had been bequeathed to public bodies, and which otherwise would have been chargeable to tax. In 1894, a new tax system was introduced and Estate Duty became payable on the estate of a deceased person.⁶³⁴ Under section 15(2) of the Finance Act 1894 “such pictures, prints, books, manuscripts, works of art or scientific collections as appear[ed] to the Treasury to be of national, scientific or historic interest ... given or bequeathed for national purposes, or to any university, or to any county council or municipal corporation” were not to be aggregated with the estate in order to determine the level of duty payable and could be granted a remission from Estate duty by the Treasury.⁶³⁵ This exemption was, then, broadly in line with that included in the Legacies Act, with the added proviso that only those objects which the Treasury considered appropriate could now qualify for relief. Slightly later, in 1896, a further Finance Act allowed for the same category of works⁶³⁶ to be kept by their inheritors and exempted from capital taxation, so long as

⁶³² The report states: “Of by far the greater number of Art Unions it was truly said that they have not promoted the object for which they were permitted to exist”; Report of Select Committee 1866, n 628 above, p.iv

⁶³³ Legacies Act 1799 (39 Geo.3) c. 73

⁶³⁴ Finance Act 1894 (57 & 58 Vict.) c.30

⁶³⁵ Webster-Brown, J *The Finance Acts 1894-1910*, (London, Horace Cox, 1910), p.180.

⁶³⁶ Finance Act 1896, (59 & 60 Vict.) c.28, s.20

such objects were settled so as to be enjoyed in kind by different persons. Tax would become payable if at any time the object was sold.

There was no financial incentive for the Legislature or for the treasury to exempt certain works from taxation, and whereas the 1799 and 1894 Acts had required that the exempted works be bequeathed to public bodies (thus creating a benefit to the public, or to national interests), the later exemption (1896) allowed works to be retained privately. Whilst a requirement that an exempted work should be made available for public inspection was to be added at a later date (see discussion in next section), this was not required by the 1896 Act. Early in the twentieth century, the criteria with which the Treasury were given to judge whether a particular object was worthy of an exemption were amended to include specifically works which appeared to the Treasury to be of “artistic interest” (under section 63 of the Finance Act 1910⁶³⁷). Arguably, this indicates on the part of the Legislature an acknowledgment of the view which was by this time current outside of parliament, that works of art were valuable not only (or even not at all) because of their relation to national interests, or because of their didactic role, but purely because they were “artistic”.

Copyright

Copyright law was further amended throughout the period, and whilst the general effect of the law over the years has been to protect works regardless of literary or artistic merit,⁶³⁸ amendments to copyright legislation provide useful indications of the Legislature’s attitude to works of literary or visual art at a given time. Initially, only literary works were protected but gradually throughout the nineteenth century, new art forms were granted protection; such as engravings,⁶³⁹ sculptures⁶⁴⁰ and then “original” paintings, drawings and photographs, under the Fine Arts Copyright Act of

⁶³⁷ Finance Act 1910 (10 Edw.7 & 1 Geo.5) c.8

⁶³⁸ Bainbridge *DI Intellectual Property* (Pitman, London, 1992), at p.29, describes how the law has adopted “a very practical posture and tak[en] under its umbrella many types of works which lack literary or artistic merit”.

⁶³⁹ Copyright Act 1766 (7 Geo.3) c.38

⁶⁴⁰ Copyright Act 1814 (54 Geo.3) c.56

1862.⁶⁴¹ The Bill which preceded the 1862 Act had a difficult passage through Parliament. At Committee stage in the Commons, Mr Harvey Lewis complained that photographs should be excluded from the Bill, since photography was not a fine art but a “mechanical process”.⁶⁴² The Solicitor General agreed that photographs were not really works of fine art but pointed out that photographers often went to a great deal of expense to obtain their works, for example by traveling abroad, and so their economic interests should be protected.⁶⁴³ In the Bill’s second reading in the House of Lords, Lord Taunton argued that the Bill would prevent the multiplication of “works of high art” and that it would “lower art in this country and depreciate the public taste”.⁶⁴⁴ The Lord Chancellor argued to the contrary, stating that the proposed measures would be likely to increase works of genius and “What greater benefit could be granted to [the public] than that there should be given to works of genius the largest amount of protection possible?”⁶⁴⁵ Although such comments indicate that by this time there existed an awareness of the distinction between high and low art and perhaps even a concern for preserving works of high art in preference to other works, this distinction is not evident in the actual copyright legislation which resulted from the Bill. The requirement in the Act that the works be “original” does not indicate that Parliament expected the works to be particularly inventive or creative in nature, rather there had been much debate over whether copies and/or originals should be included in the Act and “original” meant for these purposes works which were created by “independent effort” from non-copyright subject matter.⁶⁴⁶

In 1911, a further Copyright Bill was introduced which was the first to bring together the two areas of visual art and literature, in addition to other categories of work.⁶⁴⁷ The proposer of the Bill saw it as an opportunity to promote books which would be

⁶⁴¹ Fine Arts Copyright Act of 1862 (25 & 26 Vict.) c.68

⁶⁴² HC, Vol. CLXV, col.1890, March 20th 1862

⁶⁴³ Ibid.

⁶⁴⁴ HL, Vol.CLXVI, col.2017, May 22nd 1862

⁶⁴⁵ HL, Vol.CLXVI, col.2019, May 22nd 1862

⁶⁴⁶ Renton AW & MA Robertson (eds) *Encyclopaedia of the Laws of England*, Vol.3 (Sweet & Maxwell, London, 1907), p.625.

⁶⁴⁷ Cornish, WR, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, (London, Sweet and Maxwell, 4th ed, 1999), p.344.

“of lasting benefit to the world”⁶⁴⁸, echoing the sentiments expressed in the preamble of the 1842 Copyright Act as earlier cited.⁶⁴⁹ However, whilst rhetoric reveals a desire on the part of the Legislature to encourage the production of the highest forms of art, this is not reflected in the broad protection afforded under the 1911 Act (nor indeed under subsequent copyright legislation, such as the Copyright Act of 1956⁶⁵⁰), whereby copyright was deemed to exist in every original literary, dramatical, musical and artistic work regardless of quality; the one minor exception being a work of “artistic craftsmanship” which requires some degree of artistic quality to be present in a work prior to copyright protection being afforded.⁶⁵¹

Legislation Restricting Free Expression

Indecency and Obscenity

Statutes such as the Vagrancy Act 1838 and the Metropolitan Police Act 1839,⁶⁵² which were intended to restrict the sale and public display of indecent or obscene books or prints remained in force throughout this period. In addition, the legislature enacted further provisions to deal with this same type of material in different contexts. For example, the Indecent Advertisements Act in 1889 (52 & 53 Vict.c.18)⁶⁵³ applied this restriction specifically to advertising materials, such as posters,⁶⁵⁴ and new legislation was created also to cover the sending of indecent or obscene materials through the post.⁶⁵⁵ Again whilst these may be seen as acts to restrict free expression it is argued, as with regard to the earlier period, that these

⁶⁴⁸ Sydney Buxton HC, Vol.XXIII, col.2599, April 7th, 1911

⁶⁴⁹ Above, p.122.

⁶⁵⁰ Copyright Act 1956 (4 & 5 Eliz. 2) c.74

⁶⁵¹ Gibbs-Smith, CH, *Museums Association Information Sheet Copyright Law Concerning Works of Art, Photographs and the Written and Spoken Word*, (London, Museums Association, 3rd ed, 1978) p.7.

⁶⁵² (1 & 2 Vict.) c.38 and (2 & 3 Vict.) c.47

⁶⁵³ A precursor to the Indecent Displays (Control) Act 1981 c.42, which is discussed in the following section.

⁶⁵⁴ St.John-Stevan, N, *Obscenity and the Law*, (London, Secker & Warburg, 1956) p.132.

⁶⁵⁵ The Postmaster General was given wide-ranging powers under s.20 of the Post Office Act 1870 (33 & 34 Vict.) c.79 to make such regulations “as he thinks fit” for the prevention of the sending or delivery by post of indecent or obscene articles. A general prohibition on sending such articles by post was included in the Post Office Act 1884 (47 & 48 Vict.) c.76, s.4. and maintained in further amendments to the law, such as in the Post Office Act 1953 (1 & 2 Eliz.2) c.36, s.11.

enactments do not indicate any general negative approach by the legislature towards artistic expression or towards high art. As Hunter et al (1993) have acknowledged, the common law existed and was used throughout this period to deal with cases which involved works which might be considered to exhibit literary merit, but which nevertheless were considered to constitute an obscene libel (see next chapter); the statutes detailed above were designed primarily to be used by the police and by magistrates for “keeping public order on the streets”.⁶⁵⁶ For example, the offence of selling or exhibiting obscene or indecent materials which was created by the Metropolitan Police Act 1839⁶⁵⁷ is included in the Act under a general heading “Prohibition of nuisances by persons in thoroughfares” and is numbered 12 in a list which includes driving or riding furiously through a thoroughfare (number 5) and wantonly discharging a firearm (number 15).⁶⁵⁸

Early in the twentieth century (1908) a Joint Parliamentary Select Committee met to consider the law as to lotteries, as to indecent literature and pictures, and as to indecent advertisements.⁶⁵⁹ The Committee found that the OPA 1857 was constantly made use of by the police and recommended that the powers should be further extended to allow the police to search premises during the night and not just during the day. It recommended also that a new statutory offence should be created, triable summarily by magistrates, which would make liable to a fine or imprisonment any person found guilty of publishing or obtaining for sale “any obscene or indecent books, papers, writings, prints, pictures, drawings or other representations”.⁶⁶⁰ Thus at the turn of the century, the legislature continued to adopt a strong course against the publication of obscene articles. However, the same Committee was the first official body to suggest exempting works of art and literature from law of obscene

⁶⁵⁶ Hunter et al, n 563 above, p.74.

⁶⁵⁷ s.LIV, no.12.

⁶⁵⁸ s.LIV

⁶⁵⁹ Report of the Joint Select Committee on Lotteries and Indecent Advertisement, 1908, (275) ix. 375

⁶⁶⁰ Report of Joint Select Committee 1908, n 659 above, para.42.

libel,⁶⁶¹ recommending that a provision should be included which would exempt from the Act any book of literary merit or reputation or any genuine work of art. Since this was impossible to define, the decision should rest with the magistrate. Whereas this notion had been considered earlier by the courts and by those practising the law (see chapter five, p.162), this was the first time that a Parliamentary body had recommended the inclusion of a “work of art” defence, indicating that by this stage the Legislature had embraced the notion that high and obscenity could overlap; something which had not been recognised in the previous period. Although the proposals of the 1908 Joint Select Committee were acted upon to the extent that a bill was drafted, the bill was never introduced to Parliament.⁶⁶² St.John-Stevas (1956) explains that the parliamentary session was considered too full to permit the introduction of the bill in 1911, and with the outbreak of the first world war, the bill was “shelved”.⁶⁶³

The Law relating to Film

At the turn of the twentieth century, a new form of visual art became available in England. This was the motion picture or cinematograph, now referred to commonly as the film. Initially, films were black and white, and silent. However by the late 1920s, audiences were able to view films in colour and with sound.⁶⁶⁴ As early as 1909, a bill was introduced into Parliament which would bring the public showing of films under some form of statutory control but the primary fear expressed in the House of Commons was for the physical safety of the audience and not for their moral well-being.⁶⁶⁵ Reports of deaths caused by fires in premises exhibiting inflammable films⁶⁶⁶ prompted calls for statutory regulation of such premises and

⁶⁶¹ Report of Joint Select Committee 1908, n 659 above, para.46. See also Roberts MJD, “Blasphemy, Obscenity and the Courts: Contours of Tolerance in Nineteenth Century England”, in Hyland P & N Sammells (eds), *Writing and Censorship in Britain*, (Routledge, London & New York, 1992), pp.141-153, at p.153, note 26.

⁶⁶² Simpson, n 538 above, p.3.

⁶⁶³ St.John-Stevas, n 654 above, p.88.

⁶⁶⁴ Cowie P (ed.), *A Concise History of the Cinema*, Vol.1., (London & New York, Tantivy Press, 1971), pp.81-82.

⁶⁶⁵ Cinematograph Bill; 1909 (132) i 399.

⁶⁶⁶ HC, Vol. III, col.1597, April 21st 1909.

apart from Watson Rutherford's protest that the bill was a "grandmotherly" and "entirely unnecessary" precaution⁶⁶⁷, the bill proceeded through Parliament without much opposition or discussion. Thus at this stage the Legislature appears to have had little concern about the possible impact of this new art form upon society, perhaps because it failed to anticipate its future mass appeal.

Unfortunately, though, Parliament had allowed the Cinematograph Act⁶⁶⁸ to receive Royal assent without considering fully the detailed drafting of the legislation. The Act required persons to apply for licences in respect of any premises in which they were intending to show films. These licenses were to be granted by the county councils, who were given power to grant licenses "to such persons as they think fit to use the premises specified in the licence...on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may...determine".⁶⁶⁹ This gave powers to the local authorities that were far wider than ensuring that fire regulations were followed and soon regulations were being imposed as to the type of films which could be exhibited.⁶⁷⁰ Montagu (1929) describes how the power of local authorities to impose wide-ranging conditions upon exhibition licenses was frequently challenged by licensees, but the courts held that "whatever the title and intention of the Act, any reasonable condition must be regarded as *intra vires*"⁶⁷¹ in view of the wording of the statute. Thus the system of pre-exhibition censorship of films began to develop without Parliament ever having intended so. The response of the film industry was the setting up in 1912 of the British Board of Film Censors (hereinafter "BBFC"), a body to which film-makers could voluntarily submit their films prior to distribution. Phelps (1975) submits that the aim of those in the film industry was for the BBFC to replace the local authorities in their role as film censors,⁶⁷² but the removal of the powers of the local authorities would, of course, have required Parliamentary action and such action has never been taken. The BBFC does not operate as a statutory body, since Parliament has never

⁶⁶⁷ Ibid.

⁶⁶⁸ Cinematograph Act 1909 (9 Edw.7.) c.30

⁶⁶⁹ Cinematograph Act 1909, (9 Edw.7) c.30, s. 2(1)

⁶⁷⁰ Phelps G, *Film Censorship*, (London, Victor Gollancz, 1975), chapter two.

⁶⁷¹ Montagu, I *The Political Censorship of Films*, (London, Victor Gollancz, 1929), p.8.

⁶⁷² Phelps, n 670 above, p.28.

intervened to create it as such. The legal power to censor films prior to their exhibition to the public rests with the relevant local authority but in practice most films are submitted to the BBFC, they are given a rating (indicating the minimum age of the audience which the board consider appropriate) and the local authorities abide with this decision.

In 1927, Parliament passed further legislation in respect of the British film industry, when it introduced a quota system for the showing of British films in Britain. These films were guaranteed showing and a financial return, under the terms of the Cinematograph Act, 1927.⁶⁷³ The debate which preceded the creation of the Act reveals the attitude of the Legislature towards the film as an art form at that particular time. The Bill was introduced as a means of encouraging the creation of British films and thereby promoting the growth of the industry.⁶⁷⁴ It was also hoped that an increase in the number of films made here would result in more of them being exported abroad, and not for merely financial reasons. In the Bill's Second Reading, MacDonald expressed his concern that "British films should uphold to foreign nations a better conception of the moral conduct and social habits of people who profess to belong to the leading nations of the world than, unfortunately, is the case with so many films that are being exported".⁶⁷⁵ The impact of the cinema had, by now, been recognised. The President of the Board of Trade stated that "the cinema is today the most universal means through which national ideas and national atmosphere can spread"⁶⁷⁶ and he expressed his concern that whilst millions of films were being shown throughout the Empire, only about five per cent of those were British. Thus Parliament acknowledged the power of the visual image and now saw this as a means of influence at home and abroad.

Runciman criticised the fact that broadly commercial interests provided the motivation for the Bill as he saw the film as a part of international art and argued that

⁶⁷³ Cinematograph Act 1927 (17 & 18 Geo.5) c.29

⁶⁷⁴ Cinematograph Bill, 1927, (80) i. 183, [HC]

⁶⁷⁵ HC, Vol. 203, col.2051, March 16th 1927

⁶⁷⁶ HC, Vol. 203, col.2039, March 16th 1927

the only way to improve the industry was to improve the quality of the films.⁶⁷⁷ This would not be achieved by the Bill. This was a view supported by other Members of the Commons.⁶⁷⁸ It was felt that the films produced in Britain were of poor quality, but a quota system was not the way to become competitive. Frequent references were made to the film as an art form and concern was expressed that the Bill would achieve only an increase in the number of poor quality films, and that it would be “disastrous to the artistic and aesthetic side of the industry”.⁶⁷⁹ Thus Parliament recognised the cinema as an art form and expressed the view that it should be of high quality, but nevertheless the Bill became law. As feared, its effect was to encourage only the production of low-budget “quota quickies”⁶⁸⁰ and it failed in anyway to encourage the development of the cinema as an art form. This task was taken up by the British Film Institute, established in 1933, its stated aim being to “encourage the development of the art of film, to promote its use as a record of contemporary life and manners and to foster public appreciation and study of it from these points of view”.⁶⁸¹

Parliament intervened in the film industry again in 1952, after it was recognised that only inflammable film was covered by the 1908 Act and this meant that modern non-inflammable film did not fall within its scope. The Cinematograph Act 1952⁶⁸² was passed to bring non-inflammable film within the licensing provisions, therefore. The next piece of legislation which was to have an impact on the cinema was the Obscene Publications Act 1959 (7 & 8 Eliz.2), c.66 (hereafter “OPA 1959”), although this Act was drafted originally to exclude film from its operation. The OPA 1959 and amendments which brought film into its remit will be discussed further in the final section of this chapter.

⁶⁷⁷ HC, Vol. 203, col.2062, March 16th 1927

⁶⁷⁸ For example Colonel Day HC, Vol.203, col.2069, March 16th 1927

⁶⁷⁹ Johnston HC, Vol. 203, col.2112. March 16th 1927

⁶⁸⁰ Cowie, n 664 above, pp.81-2.

⁶⁸¹ Jenkins, H, *The Culture Gap: An Experience of Government and the Arts*, (London & Boston, Marion Boyars, 1979) p.126.

⁶⁸² Cinema Act 1952 (15 & 16 Geo.6 & 1 Eliz. 2) c.20

The Legislature and High Art from 1959 to 2001

This chapter arrives at last in the postmodern era and encounters firstly the OPA 1959; a particularly important statute for this thesis since it includes for the first time in English law a specific defence from criminal liability for any person charged under the terms of the Act if it can be proved that the publication of “the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern”⁶⁸³. This statute will be considered first, and then as with the previous section, specific areas of law will be considered in turn.

The Obscene Publications Act 1959

Not only does the OPA 1959 include a ‘public good’ defence, but it also allows for the use of expert opinion in order to help the court to determine the literary, scientific, artistic or other merits of the publication in question.⁶⁸⁴ Unlike its 1857 predecessor, the OPA 1959 was not an act designed to reinforce the operation of the common law. Rather its effect was to remove entirely from the common law jurisdiction the offence of obscene libel, by the creation of a new statutory offence. Although the wording of the defence is broad, in that it applies to any object ‘of general concern’ as well as art, literature, science or learning, the original motive behind the inclusion of such a defence, and behind the Obscene Publications Bill itself was primarily one which related to a concern for the need to protect serious literature from prosecution under the common law. Hunter et al (1993) state; “law about obscenity was for the first time set on a statutory basis, this demonstrating the resolve of Parliament moved, by the pressures of liberal reform, to put limits on the common law principle by which English judges could use the law of obscene libel to punish actions which they found contrary to public morality. In this sense it was the end of

⁶⁸³ s.4(1)

⁶⁸⁴ s. 4(2)

an episode in English legal history beginning with Curll's case in 1727."⁶⁸⁵

The Passage of the Obscene Publications Bill through Parliament

In 1954, a number of prosecutions took place under the common law in regard to literary works which had been published by those which Lord Birkett later describes as "publishers of high standing and very reputable firms".⁶⁸⁶ A committee was established by the Society of Authors in response to this spate of prosecutions and it was this committee that drafted the first Obscene Publications Bill, which was introduced to Parliament by Roy Jenkins in 1955. The Bill did not enjoy a speedy or straight-forward passage through Parliament. When first introduced it made no further progress but was reintroduced by Jenkins later in the year and was given leave to be brought in. In the following Parliamentary session, a similar bill was brought in by another M.P. but that bill made no further progress. In the following session, considerable amendments were made to Jenkins' Bill, under the guidance of the Home Office, and the Bill in its revised form was reintroduced. At Second Reading the Bill was referred to a Select Committee, which considered the matters raised by the Bill for nearly a year. A new Bill was constructed on the basis of the Select Committee's Report, which Jenkins introduced to the Commons in November 1958. At the Second Reading of this new Bill, it was referred to Standing Committee, which recommended the inclusion of the 'public good' defence clause in a form which is close to that which was eventually included in the Act.⁶⁸⁷ The Bill then received a third reading and passed through the commons to the Lords, where it was debated at some length and amendments were proposed. The Bill received Royal Assent only after these amendments had been referred back to the Commons and approved after another lengthy debate.

⁶⁸⁵ Hunter et al, n 563 above, p.142.

⁶⁸⁶ Lord Birkett, HL, Vol 216, col 489, June 2nd, 1959.

⁶⁸⁷ The clause recommended by the Standing Committee reads: (1) A person shall not be convicted of an offence...if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other object of general concern . (2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or negative the said ground". HC, Vol. 604, col.803, April 24th. 1959.

The rather complicated passage of the OPA 1959 as outlined here gives an indication of the seriousness with which the legislature considered matters raised by the Act, and also reflects the considerable differences of opinion among members of both houses relating to such issues. The following discussion focuses upon comments made concerning the defence of public good particularly, and upon other comments made concerning artistic or literary merit, in order to ascertain the views which were instrumental in establishing the law relating to 'serious' artistic works and their protection. In a memorandum submitted to the Select Committee, Sir Alan Herbert (on behalf of the Society of Authors) concludes that "the paramount need is to distinguish pornography from literature. Publications written for the sole purpose of pandering to and exploiting sexual passions are rightly subject to the law: works of literature which might be shocking to a particular generation are not. Nothing emerges more clearly from a study of this problem than the extraordinary changes in literary taste that separate one generation from another. The law is not fitted to be an arbiter of taste and if it attempts to do so only succeeds...in bringing itself into disrepute".⁶⁸⁸ This statement outlines the three principle areas of discussion, which are considered in more detail below. These are (1) drawing a distinction between pornography and serious, if shocking, literature; (2) the relevance of the author's intention; and (3) the role of the law in establishing literary merit.

Drawing a Distinction Between Pornography and Serious Literature

It may be recalled that in the House of Lords discussion of the 1857 OPA, the House was assured that it was not Lord Campbell's intention that serious literature should be prosecuted. However, "Lord Campbell's words ...proved not to be the governing factor in the matter"⁶⁸⁹ and serious literature did come to be prosecuted under the new powers given by that Act. Therefore it was considered by some (most notably the Society of Authors) that "the House of Commons might be said to owe authors some form of redress in this".⁶⁹⁰ Thus the House was faced with the perceived need

⁶⁸⁸ Obscene Publications: Report from the Select Committee, 1957-1958 (123) VI 599, D2.

⁶⁸⁹ Jenkins HC, Vol. 604, col. 820, April 24th 1959

⁶⁹⁰ Report from Select Committee, 1957-1958, n 688 above, p.106.

to protect serious literature from prosecution, at the same time as strengthening (or at least not weakening) the law against the publication of pornography.

Opening the debate in which the Commons considered the report of the Select Committee, the Home Secretary foresaw a difficulty which the House would need to address in its treatment of the bill; that “the area between truly creative work which some might find offensive or immoral, and the depths of pornography is vast. It is somewhere between those two extremes that the law has to place a limit to define what is permitted and what is not. The problem is how to set the limit right”.⁶⁹¹ A related aspect which was discussed was the fact that the number of works which might fall on the ‘borderline’ (and so claim that they should not be convicted of obscenity on account of their literary merit) is relatively small when compared to the vast number of publications which are without doubt pornographic.⁶⁹² In giving evidence to the Select Committee, the Director of Public Prosecutions (“DPP”) described as “an infinitesimal proportion of the material we have to deal with”⁶⁹³ those books which claim some sort of literary value, and the Commissioner of the Metropolitan Police supported this, stating that police action was concerned principally with manifestly obscene and disgusting publications. A member of the Committee addressed this issue with two eminent authors, namely T.S.Eliot and E.M. Forster, asking them whether, in view of the fact that there was a vast amount of pornographic material available, and comparatively few ‘borderline’ works of literary merit, they considered it in the public interest to amend the law so as to further restrain the publication of pornographic works, at the risk of excluding some works of literary merit, or so as to strengthen the opportunity for the author or publisher to claim literary merit at the risk of “letting in” more pornographic literature. Forster did not respond directly to the question, but Eliot maintained that “everyone has a bias one way or another, and it is just as well to admit it”. His own bias was to run the risk of admitting too much, rather than suppressing works of literary value.⁶⁹⁴

⁶⁹¹ HC, Vol. 597, col. 994, December 16th 1958

⁶⁹² The distinction which is now drawn, however, is between different types of pornographic material. See Edwards S, “On the Contemporary Application of the Obscene Publications Act 1959”, *Crim.LR* [1998] 843

⁶⁹³ Report from Select Committee, 1957-1958, n 688 above, p. 39.

⁶⁹⁴ Report from Select Committee, 1957-1958, n 688 above, p. 19.

This bias was both supported and opposed in Parliament. Representing one extreme, in the House of Lords, Viscount Brantford maintained that this particular aspect of the bill was comparatively unimportant, since it was possible for all authors of repute, if they have a book destroyed, to “recoup themselves” and write another book “on the right side of the borderline”.⁶⁹⁵ To lower the borderline for artistic merit would automatically raise the borderline for pornography, in his view, and therefore he urged the House not to do this. Others who contributed to the various discussions concerning the Bill took the opposite view, some associating the issues raised by the Bill more closely to notions of free speech. In the Commons, Eric Fletcher stated that he thought that the House would agree that there was a great need to check juvenile delinquency, but the “[p]rinciple enshrined in the Bill, namely, the liberty of the Press, is of equal importance”.⁶⁹⁶ He went on to state that it was certainly not the function of Parliament to act as a censor of literature...Every member of the public must be free to judge for himself what and what not to read. Serious authors, especially of literature which has artistic or other merits, must be free, without any risk of censorship or control, to publish work of that kind”.⁶⁹⁷ In the House of Lords, Lord Denning described the issue simply as being one example of a continual question: “where to draw the proper use of freedom on the one hand and the abuse of it on the other”⁶⁹⁸ and Lord Birkett stated that “the freedom to write is a great freedom. Your English writer must be free and permitted to depict the thoughts and feelings of his own generation, the habits, the customs, the prejudices and the weaknesses which form the complexity of human behaviour”.⁶⁹⁹ Thus within the Legislature there existed one view which perceived that if a book were to be prosecuted, this was no particular problem, since the author was free to write another work which would not fall foul of the law. There also existed the more dominant view that serious literature should be protected from prosecution under the law, since it was vitally important that the authors or publishers of such works should have the freedom to publish them. Notably, there is a stress upon there being a freedom to

⁶⁹⁵ HL, Vol. 216, cols 514-515, June 2nd 1959

⁶⁹⁶ HC, Vol. 604, col. 856, April 24th 1959

⁶⁹⁷ Ibid.

⁶⁹⁸ HL, Vol. 216, col. 503, June 2nd 1959

⁶⁹⁹ HL, Vol. 216, col. 495, June 2nd 1959

write 'serious' literature and not upon the freedom to write any sort of literature at all.

The final issue to be discussed under this section relates to the apparent incongruity in the Legislature's provision of a defence for the public good for a work of particular merit, which may have already been established as obscene under the law, and therefore being a work which tends to deprave and corrupt those persons who are likely to read it⁷⁰⁰. As Lord Denning pointed out, if a work has been held to tend to deprave and corrupt its reader, it is difficult to then prove that it is nevertheless justified as being for the public good: "The two things are almost inconsistent".⁷⁰¹ For this reason, Lord Denning suggested that the question of literary or artistic merit should be brought within the definition of obscenity itself, and not placed separately at the end of the bill. Of course, this suggestion was not acted upon and the incongruity remains. It is submitted that this aspect of the Act reveals a significant shift in opinion concerning the role and function of the arts in society. If the law operates to censor a work which is likely to deprave and corrupt its reader, then it does so ostensibly based upon the practical operation of the so-called "harm-principle". People are free to act in any manner which does not harm others. The inclusion of the defence of public good under the OPA 1959 is an expression of the principle that artistic works have a special status within society and that the publication of artistic works is so greatly for the public good that this outweighs any consideration of possible harm.

The Lord Chancellor expressed his opinion that Scottish satiric verse from the period 1400 to 1796 was "great poetry...one of the most unique contributions to the history of my country"⁷⁰² and added that it would be impossible to give a description of such verse without including passages that are obscene.⁷⁰³ This was, in his view clearly a case in which the s.4 defence could be applied successfully. The writer considers

⁷⁰⁰ The test of obscenity under the OPA is whether "its effect ... is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely...to read, see or hear the matter contained or embodied in it"; s. 1(1).

⁷⁰¹ HL, Vol. 216, col. 506, June 2nd 1959

⁷⁰² HL, Vol. 216, cols 524-5, June 2nd, 1959

⁷⁰³ HL, Vol. 216, col. 525, June 2nd, 1959

such an argument to be flawed, since the bill (and eventually the Act, under s.1 (1)) requires that any work be “taken as a whole” when its tendency to deprave and corrupt is being considered. This was sufficient to reduce the possibility of a work of literary merit being prosecuted on account of isolated passages which might be considered obscene. If works which, when taken as a whole, are considered to tend to deprave and corrupt their likely audience are to be censored under the established law, then this law should be applied to all such works or not at all. Artistic or literary merit is not so important as to disqualify any work from operation of the law, since the apparent public benefit of all such works cannot be proved. If works or art convey a message to the reader or viewer, then it is foolish to suppose that this message will always be for the public benefit, just as it is foolish to consider that all messages conveyed by speech will be so. With regard to speech, the law operates to prohibit certain forms of speech which might result in harm, for example that considered to be racist,⁷⁰⁴ notwithstanding the fact that in principle it is for the public benefit that speech should be free.

The Relevance of the Author’s Intention

The offence of obscene libel under common law was one of strict liability, making the intention of the author or publisher irrelevant. The Society of Authors suggested that a provision should be included in the Act which required that an offence would only be committed by an author if he or she willfully and knowingly published a work which he or she knew to be obscene. However, this suggestion was not adopted by Parliament, which considered that the general principle under the criminal law, that a person is presumed to intend the natural consequences of his or her actions, would be sufficient.⁷⁰⁵ The author was, though, afforded the opportunity of giving evidence in court to negative this presumption under a provision which became s.3(4) of the Act, even if he or she was not the person named in the summons (as would be the case if

⁷⁰⁴ See below p.146.

⁷⁰⁵ Report from Select Committee, 1957-1958, n 688 above, p.xi.

the publisher of the work was prosecuted and not its author).⁷⁰⁶ This indicates how far the legislature at this stage accepted the view that a work was inextricably linked with its author; the author was not yet dead in Parliament.

The Role of the Law in Establishing Literary Merit

At the Standing Committee stage of the Obscene Publication Bill in 1959, Roy Jenkins pressed the committee to accept recommendations for the inclusion of the clause which was to become section 4(2) of the Act; a declaratory statement “that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act”.⁷⁰⁷ Jenkins stated that “There is no doubt that, in practice, in thinking what are works of artistic or literary merit and deciding whether, on balance, they are obscene or not, we are all greatly influenced by the accumulation, over many years, of expert evidence in regard to works written or produced some time ago. There are many people in the world who would say without hesitation that a particular work was a classic, and that it had great literary merit, although they had never read it, or would say that a painting was an outstanding painting although they had never seen it. They would do so on the basis of accumulated evidence over a great period of time” and his insistence upon the inclusion of the clause in the Act which allows expert opinion to be admitted on the question of literary merit, was based upon his concern that “modern unknown authors should have...the same protection as is enjoyed by the established classical authors”.⁷⁰⁸ Here Jenkins is acknowledging a point already made in chapter two of this thesis; namely that “the passionate few” are and have been highly influential in the categorization of certain works as high art (see above pp.56-62).

The recommendation was accepted, and included under s.4(2) of the Act. As the Solicitor-General explained to the Commons, the law of evidence allows only

⁷⁰⁶ s.3(4) states: “In addition to the person summoned, any other person being the owner, author or maker of the any articles brought before the court...shall be entitled to appear before the court on the day specified in the summons to show cause why they should not be forfeited”.

⁷⁰⁷ Obscene Publications Bill; Report of Standing Committee C, H.C. 4th - 25th March 1959.

⁷⁰⁸ Report of Standing Committee C, 1959, n 707 above, p.111.

evidence of fact to be adduced in court unless there are exceptional circumstances which mean that evidence of opinion is then admissible and he accepted the statement cited from Halsbury's Laws by Jenkins in this regard, that "opinions of experts are generally admissible whenever an issue comprises a subject in which knowledge can only be secured by special training or experience".⁷⁰⁹ In the application of the common law, most notably in the case of *R v Hicklin* (1868) L.R.3 QB 360, expert opinion had been deemed admissible in regard to medical and legal text books, but not in a wider context than that.⁷¹⁰ Again, this had been a matter of some concern for the Society of Authors and this aspect of the statute was included as a result of this concern, although the Solicitor-General pointed out that the effect of the clause was declaratory only, since it was merely an expression of the law as it already stood.⁷¹¹ The effect of including this clause was to make it clear that the question of whether or not a work possessed literary or artistic merit was one which was required special training or experience. It is submitted that the legislature's view that literary excellence is determined by experts who are able to draw comparisons between the work in question and other works of a similar type, demonstrates its accordance with this thesis' definition of high art. Experts were not admitted into court to testify to the fact of high art, merely to give their opinion of its status.

Amendments (and Recommendations for Amendment) to the OPA 1959

The OPA 1959 was amended at various stages throughout the latter decades of the twentieth century, both for procedural reasons and to take into account new forms of publication and the growing impact of existing ones. In 1964 the Act was amended to remedy various flaws which had arisen in its application.⁷¹² It was further amended under the Criminal Justice Act 1967⁷¹³ to end the ability of individuals to apply for a police seizure warrant and, following pressure from back-benchers in the House of Commons, film was brought within the remit of the OPA 1959, under

⁷⁰⁹ HC, Vol. 604, col. 804, April 24th 1959

⁷¹⁰ Report from Select Committee, 1957-1958, n 688 above, p.108.

⁷¹¹ HC, Vol. 604, col. 807, April 24th 1959

⁷¹² Obscene Publications Act 1964, c.74.

⁷¹³ Criminal Justice Act 1967 c.80.

section 53 of the Criminal Law Act 1977.⁷¹⁴ This amendment also prohibited private actions being instituted against the makers or distributors of films under the common law, and gave those prosecuted under the OPA 1959 in respect of the exhibition of a film, the opportunity to defend such a prosecution by proving that the “publication of the film or soundtrack is justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art, or of literature or learning.”⁷¹⁵ Thus the statutory defence for film differs to that applied to literature and the visual arts, with the criteria indicating a preference for the high art film which is likely to be appreciated by a more select audience than the popular blockbuster. The Act has since been extended to cover video films⁷¹⁶ and under the Broadcasting Act of 1990,⁷¹⁷ television and radio broadcasting were also brought within its remit.

The Report of the Williams Committee

In 1977, the then Home Secretary appointed a Committee to consider all aspects relating to obscenity and film censorship. The Report of the Committee (commonly referred to as ‘the Williams Committee’) was published in 1979,⁷¹⁸ recommending the abolition of the existing law and the imposition of a new system based upon the harm principle and upon the public interest in not being offended by certain material.⁷¹⁹ Specifically with regard to the ‘public good defence’, the Committee concluded that it was possible for a pornographic or obscene work to have artistic merit but that the defence was “inevitably unworkable”.⁷²⁰ With regard to the former point, the Committee considered at some length the film *Salo*, which had been refused a certificate by the BBFC and became the subject of a prosecution after it was shown in a private club. The report describes the film displaying “scenes of extraordinary cruelty and repulsiveness...All of us agreed that it is obscene, in the sense that it is

⁷¹⁴ Criminal Law Act 1977 c.45.

⁷¹⁵ OPA 1959, s.4 (1A).

⁷¹⁶ *Attorney-General's Reference No.5 of 1980* [1980] 3 All ER 816.

⁷¹⁷ Broadcasting Act 1990, c.42

⁷¹⁸ Report of the Committee on Obscenity and Film Censorship, (Williams Committee) Cmnd 7772 (1979).

⁷¹⁹ Williams B (ed.), *Obscenity and Film Censorship, An Abridgement of the Williams Report*, (Cambridge, Cambridge University Press, 1981), pp.159-160.

⁷²⁰ Williams, n 719 above, p.103.

ruthlessly and almost unwatchably repellant. On its other qualities, and its merits, we found ourselves in great disagreement...Those who were most impressed by it thought that it presented an extraordinary metaphor of political power and was a remarkable work, perhaps a masterpiece. For anyone with that opinion of it, it is a work that combines artistic control and seriousness with a deep and sustained obscenity”.⁷²¹

This work, then, was considered to provide an illustration of one in which obscenity and artistic merit were both apparent, thus denying the view put forward by some to the Committee that it was impossible for a work of art to be obscene. However, the definition of obscenity (being ‘offensiveness’) adopted by the committee differed to the ‘tendency to deprave and corrupt’ test under the existing law, and it was felt that whilst the general view of the Committee in this regard accorded with the s.4 defence, their own emphasis was not a causal one. Under the OPA 1959, “[t]he work’s tendency, as obscene, to produce bad effects has to be weighed against its tendency, having artistic merit, to produce good effects, and the jury is expected to weigh one of these causal properties against the other” and there was, in the Committee’s view, as much difficulty in ascribing negative effects to a work as to ascribing positive ones to a work of literary merit.⁷²² This point relates to that already made during the discussion of the passage of the Obscene Publications bill through Parliament, namely the apparent inconsistency between these two aspects of the s.4 defence. It was acknowledged that works of literary merit might correctly be assumed to have good effects, such as deepening the reader’s understanding of humanity,⁷²³ and that it might only be possible to say that bad works do not have good effects; thus “[i]n the sense in which great works can draw the reader to new possibilities and extend his grasp, bad works may merely do nothing”.⁷²⁴ Because of the lack of clarity or proof with such concepts, the fact that experts were asked to give evidence under s.4 of the Act in such causal terms was considered by the committee to be absurd.

⁷²¹ Williams, n 719 above, p.108.

⁷²² Williams, n 719 above, p.109.

⁷²³ Ibid.

⁷²⁴ Ibid.

Another reason why the s.4 defence was considered wrong in principle was because the very fact that experts had to give evidence on the merits of the work meant that established, successful works were more likely to be afforded protection under the Act than unknown works by new writers. The committee found this aspect of the law unacceptable, since “informed persons, literary and artistic experts, are supposed to appear from the world of culture and inform the jury of how things stand up there with the work under trial”.⁷²⁵ In their view, expert consensus as to the artistic significance of the work emerges over time and the process cannot be speeded up, as was suggested by the writer earlier in this thesis. The writer asserts that the view expressed by the committee in this regard serves to support this thesis’ definition of high art as being a category of works whose existence depends upon the judgements and valuations of experts, rather than upon their intrinsic qualities alone (see above pp.67-68). Were the experts called to give evidence upon the established status of a work, then the writer might also concur with the sentiments expresses here regarding the apparent disadvantage in such a system to an unknown writer. However, the experts are called to give evidence as to the *merit* of a particular work in the light of their knowledge of works of a similar nature already in existence. Thus it may be argued that the legislation acknowledges the means by which works achieve or fail to achieve high art status and merely attempts to concentrate the process.

No changes were made to the OPA 1959 as a result of this report, yet calls for change continue for various reasons.⁷²⁶ The OPA 1959 remains the only statute which includes a specific defence for works of literary or artistic merit; some of which might fall within the category of high art. There is, however, a notable exemption from prosecution for certain works of art, within an Act that relates to a specific concern expressed by the Williams Committee, namely the ‘public nuisance’ aspect of the display of pornographic magazines on the shelves of newsagents’ shops and sex shops.⁷²⁷ This Act, together with other statutory provisions, is discussed in the following section.

⁷²⁵ Williams, n 719 above, p.110.

⁷²⁶ A bill was introduced (unsuccessfully) into Parliament in 1996; Obscene Publications Bill, 1996-97, H.L.21.

⁷²⁷ Report of Williams Committee 1979, n 718 above, paras 9.1-9.16

Restrictions Upon Free Expression

The Indecent Displays (Control) Act 1981

The Indecent Displays (Control) Act 1981⁷²⁸ (“IDCA 1981”) prohibits the public display of “any indecent matter”⁷²⁹ but expressly excludes from its operation any matter that is included within an art gallery or museum (and visible only from within it).⁷³⁰ The target of the Act was the “public nuisance”⁷³¹ aspect of indecent displays, a matter which had become a particular concern throughout the 1970s and 80s⁷³² and, whilst the main focus of the bill was “matter that is mass produced and widely available”⁷³³ not modern art, the provision to protect works of art was included to prevent “those who disapprove perhaps more of modern art than what it displays” from “pursu[ing] their artistic prejudice”.⁷³⁴ A contrast can thus be drawn between the IDCA 1981 and those statutes enacted in the previous periods of discussion which were repealed in part or in whole by its enactment. Whereas the Vagrancy Acts of 1824⁷³⁵ and 1838⁷³⁶ or the Indecent Advertisements Act in 1889⁷³⁷ had outlawed indecent displays, no provision was made to protect works of art. Arguably, the inclusion of such an exemption in the IDCA 1981 indicates an increase in the significance afforded to works of art by the legislature; part of a general process through which art was gradually being elevated to a position ‘above the law’, a matter which is discussed further throughout chapter five. Notably, there is no artistic merit criteria within this exemption; the works being defined merely by the situation in which they are placed. Whilst on its face, an exemption designed for modern art, based only upon its location, indicates that the Legislature had no intention of protecting high art exclusively (or even at all) from the operation of this

⁷²⁸ 1981, c.42

⁷²⁹ IDCA 1981, s.1(1)

⁷³⁰ IDCA 1981, s 1(4)b)

⁷³¹ Stone, R, (1981) 45 MLR 621

⁷³² Munro, C, (1982) 132 NLJ 629, pp.629 and 630.

⁷³³ HC, Vol 997, cols 1169-70, January 30th, 1981

⁷³⁴ Sainsbury HC, Vol 997, cols 1169-70, January 30th, 1981

⁷³⁵ Vagrancy Act, 1824 (5 Geo.4) c.83.

⁷³⁶ Vagrancy Act, 1838, (1 & 2 Vict) c.38

⁷³⁷ Indecent Advertisements Act (52 & 53 Vict.) c.18

statute, it may also be argued that the requirement that the work be situated in a gallery or museum corresponds with assertions made earlier in this thesis,⁷³⁸ that contextual factors are significant to our perception of works of art as being worthy of special attention.

Protection of Children Act 1978

This Act provides an immediate contrast to the IDCA 1981, since it does not exclude from its remit works exhibited in galleries or museums; indeed it has been used recently as a basis for a police “raid” upon a gallery in London.⁷³⁹ The Protection of Children Act 1978⁷⁴⁰ (“PCA 1978”) was designed to “prevent the exploitation of children by making indecent photographs of them”⁷⁴¹ and was created in response to concerns over an apparent increase in child pornography;⁷⁴² concerns which have remained, as shown by the recent amendments to the PYA 1978 to include within its remit images created by computer graphics and which *appear* to be photographs.⁷⁴³ The stance taken by the legislature in relation to child pornography compares to that adopted in the previous century in regard to obscene publications in general.⁷⁴⁴ Whereas obscenity may be justified upon artistic grounds, child pornography does not attract such justifications, it being considered such a serious issue that matters pertaining to art or literature are deemed insignificant, or presumed to be irrelevant, to the primary intention of the Act.

⁷³⁸ See chapter two, pp.62-63

⁷³⁹ Travis, A, “Police obscenity squad raid Saatchi gallery”, *The Guardian*, March 10th, 2001, p.1.

⁷⁴⁰ 1978, c.37 (as amended by the Criminal Justice Act, 1998, c.33)

⁷⁴¹ Preamble to PCA 1978, c.37.

⁷⁴² Stone R, *Textbook on Civil Liberties and Human Rights*, (London, Blackstone, 3rd ed, 2000) p.264.

⁷⁴³ Criminal Justice and Public Order Act, 1994, c.33, s.84.

⁷⁴⁴ Simpson, n 538 above, p.42 refers to a “nationwide alarm over child pornography” which existed prior to the implementation of the PCA 1978, with the use of words such as “poison” and “evil” echoing those used over a century earlier prior to the enactment of the OPA 1857.

Race Relations

In 1965 the Race Relations Act,⁷⁴⁵ made it an offence to use abusive or threatening words or behaviour in a public place, or to display “any writing sign or visible representation” which is threatening, abusive or insulting, in circumstances where a breach of the peace is likely, or intended.⁷⁴⁶ The Race Relations Act 1965 also made it an offence to publish or distribute “written matter” which is threatening, abusive or insulting, with the intent of stirring up hatred against any section of the public.⁷⁴⁷ Whilst the link between such actions and high art is not immediately apparent, art forms had changed dramatically by the time these latter statutes came into force. As stated in chapter one⁷⁴⁸ such things as body art and performance art became current during the 1960s and whereas it had once been unlikely for a work of art to cause a breach of the peace, this had become a possibility by this time. Despite this, no artistic merit defence was included in the statute, nor in the present Public Order Act 1986 which created a new offence (under s.5 (1)) of displaying “any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person who is likely to be caused harassment, alarm or distress thereby”, either in private or in a public place (s.5(2)), nor in subsequent legislation, such as the Race Relations Act 1976.⁷⁴⁹

Official Secrets

The current law in this area is based in the Official Secrets Act of 1989.⁷⁵⁰ As the discussion of relevant case law in the chapter six will show, whilst these provisions have had the greatest impact upon the press and upon the writers of Memoirs, rather than upon the creators of high art, they remain of relevance since they allow comparisons to between the different types of cases within the general remit of

⁷⁴⁵ Race Relations Act 1965, c.73.

⁷⁴⁶ s.7.

⁷⁴⁷ s.6(1). It should be noted that intention to stir up racial hatred was extended to cover scenarios whereby such a consequence was *likely* even if not intended, under the Public Order Act 1986, c.64, s.18(1)(b).

⁷⁴⁸ Chapter one, p.17.

⁷⁴⁹ 1976, c.74.

⁷⁵⁰ 1989, c.6.

freedom of speech or expression. More particularly, it will be argued in the chapter six that where books or documents have been printed by the press, or otherwise published, and challenged by the government as being contrary to the Official Secrets Acts, the European courts have adopted a stance which differs from that which has been adopted for artistic works.

Commercial and Financial Interests

Copyright

Copyright law is now based in the Copyright, Designs and Patents Act 1988 (hereinafter referred to as the “CDPA 1988”) and the provisions which relate to works of visual art and literature remain substantially the same as in the 1911 Act. Under section 1(1)(a) of the CDPA 1988, copyright is deemed to exist in (amongst other things) “original literary, dramatic, musical or artistic works” and in s.3(1), “literary work” is defined as meaning “any work, other than dramatic or musical work, which is written, spoken or sung” and specifically includes a table or compilation and a computer program. Further, in s.4(1), “artistic work” is defined as meaning “(a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality, (b) a work of architecture being a building or a model for a building, or (c) a work of artistic craftsmanship”. The phrase “graphic work” appeared for the first time in the 1988 statute and it is widely defined as including “any painting, drawing, diagram, map, chart or plan” and further “any engraving, etching, lithograph, woodcut or similar work”⁷⁵¹. Thus the overall emphasis is upon the inclusion of all types of work, irrespective of artistic or literary merit.

The CDPA 1988 was the first Copyright Act in England to include provisions for the protection of the “moral rights” of the creator of a copyright work. Thus under section 77 of the Act, the creator of a copyright work has a right to be identified as such (the so-called paternity right) and he or she also has the right to object to any

⁷⁵¹ s. 4(2).

derogatory treatment of that work (the so-called integrity right), under section 80.⁷⁵² Flint (et al)⁷⁵³ cite Clark's view that the origins of the inclusion of moral rights in copyright law are based in the inequality in bargaining power between the creator and the publisher or dealer under contract law, leaving an aggrieved artist to rely on the law of tort (for example, defamation) in a dispute over authorship or integrity, whilst still being bound by the terms of any contractual agreement which had been reached. The fact that the rights are afforded to *any* author or artist whose works are protected within the CDPA 1988 does seem to support the view that the rights are being protected for broadly commercial reasons and certainly not in order to promote or protect the moral rights of authors or artists whose work is of a particularly high quality. This commercial approach is also seen in Parliamentary discussion of the Copyright Bill, prior to its enactment in 1988. Bryan Gould stated (with sounds of agreement from his fellow Members of Parliament) that the future of the United Kingdom would lie in a "high-tec, science based industry" and that for this reason, "we must give priority to the spirit of inquiry and to the pursuit of knowledge which has served us so well in the past" and in addition, "establish a climate in which...enterprise can flourish"⁷⁵⁴. The strengthening of copyright law was seen therefore as a means of encouraging creativity, which would directly benefit the nation's industry.

Under the umbrella of Copyright legislation falls the requirement for what is known as the legal deposit of books. In a Government Consultation Paper published in 1997, the system of legal deposit is described as having ensured that the nation's "heritage of published material" has been preserved for future generations, and the "intrinsic value" of maintaining such a heritage is noted.⁷⁵⁵ There is no requirement of quality applied in the system; the current law applying to *any* book (which is widely defined to include most printed works) published in the United Kingdom. Currently, a publisher of any book published in England (and the United Kingdom)

⁷⁵² Flint MF, CD Thorne & AP Williams, *Intellectual Property: the New Law*, (Butterworths, London, 1989), chapter 7.

⁷⁵³ Flint et al, n 752 above, para.7.3

⁷⁵⁴ HC, Vol. 132, col. 534 April 28th 1988

⁷⁵⁵ *Legal Deposit of Publications: A Consultation Paper* February 1997 (London, Department of National Heritage, 1997)

must deposit a copy of that book with the British Library and, if requested to do so, deposit further copies of the book with the National Libraries of Scotland and Wales, the University Libraries of Cambridge and Oxford, and with Trinity College Library in Dublin.⁷⁵⁶ This notion of there being value in preserving ‘heritage’ is apparent also in the law covering the exemption of certain works from capital taxation.

Taxation

The earliest forms of this exemption were cited in the first section of this chapter as evidence that the legislature was broadly supportive of high art, though not exclusively so at this stage. Although the systems of capital taxation have been changed throughout the twentieth century, the relief has been maintained throughout; for example, when Estate duty was abolished in 1975 and Capital Transfer Tax introduced, the exemption was preserved.⁷⁵⁷ The requirement that those works granted an exemption would be made available for public inspection was introduced in 1976, under section 77(2)(b) of the Finance Act⁷⁵⁸ and currently the Legislature exempts from capital taxation pictures, prints, books, manuscripts, works of art or scientific collections which appear to the Inland Revenue (formerly the Treasury) to be of pre-eminent national, scientific, historical or artistic interest, provided that these objects are transferred to a public body or retained by their owners and made available for public viewing.⁷⁵⁹

The requirement of pre-eminence has been added by the 1998 Finance Act,⁷⁶⁰ and arguably it makes it more difficult for works to qualify for an exemption.⁷⁶¹ Furthermore, works which are granted an exemption are included on the List of Conditionally Exempt Assets, which may be accessed via the internet, where specific searches can be made for particular works or artists/authors, and access details are

⁷⁵⁶ *Legal Deposit of Publications*, n 755 above, p.9.

⁷⁵⁷ Finance Act 1975, c.7, s.31

⁷⁵⁸ Finance Act 1976, c.40

⁷⁵⁹ *Inheritance Tax - The Register of Conditionally Exempt Works of Art*, (Inland Revenue, 2.8.1993) BTE at 6-2000/712

⁷⁶⁰ Finance Act 1998, c.36

⁷⁶¹ See generally Shepherd C, “Heritage Chattels - Practical Posthumous Planning Part I”, *Private Client Business* (1999) Issue no. 5, pp.264-272.

given, thus making it easier for members of the public to gain access to the works if they wish to do so.⁷⁶² It is submitted that these measures indicate further the process of ‘democratising’ the arts, as discussed in chapter three (pp.84-85), whereby the importance of high art is acknowledged, but the elitist notion that high art is accessible only to those with the requisite education and understanding is denied.

Conclusion

It has been stated in regard to the period 1780 to 1857 that the legislature was broadly supportive of high art, as it was then understood, as being within the confines of conventional morality and likely to produce beneficial effects.⁷⁶³ Furthermore, it is submitted that the legislature’s approach during that period can be described as proactive; considering high art as something to be *promoted* rather than protected. As stated earlier, few generalisations are possible in regard to the period 1858 to 1958, save to say that influence of the art for art’s sake doctrine becomes increasingly apparent. Similarly, with regard to the final period of discussion (1959 to 2001), the diverse nature of the relevant material makes it difficult to draw general conclusions. However, it is concluded that the approach of legislature towards high art has been increasingly broad, with the emphasis in commercial and financial legislation being placed upon ‘the arts’ and securing public access to them. Furthermore, given that the latter period saw the introduction of a specific defence for works of visual and literary art in the OPA 1959, and a ‘contextual’ defence for visual art works displayed in galleries or museums in the IDCA 1981, it is submitted that the legislature’s approach to high art can (at least in part) be described as protective, as opposed to proactive in this period: whereas from 1780 to 1857 the legislature could safely presume that high art was unlikely to fall foul of obscenity or indecency legislation, the reverse could be presumed by 1957. This is evidenced by the case law which forms the subject matter of the following chapter.

⁷⁶² <http://www.inlandrevenue.gov.uk/cto/heritage.htm>

⁷⁶³ See above, pp.111-115

Chapter Five

The Courts and High Art

Introduction

As with the previous chapter, this discussion will focus in turn upon three periods in time; 1780 to 1857, thereafter 1858 to 1958 and finally 1959 to 2001. The questions which this chapter seeks to address are as follows: Firstly, it is intended that this chapter will establish whether the courts have acknowledged the existence of high art, as opposed to low or popular art forms and, if so, upon what basis. Secondly, this chapter seeks to establish how far the courts have acted to protect high art from the operation of the law (be it the common law or legislation) and again if so, upon what basis.

The terms ‘court’ or ‘courts’ are used in this chapter to refer collectively to the Magistrates Courts, Crown Courts, County Courts and Higher Courts and to their variously named predecessors which have administered historically and continue to administer domestically the English legal system. This term is adopted by this thesis since it is the writer’s view that ‘the court’ reflects most accurately the diverse nature of the civil and criminal justice systems whereby issues are tried. However, the limitations of this approach are acknowledged. It is recognised that it is not possible to determine any collective attitude towards high art amongst those persons such as jurors, witnesses, counsel and judiciary who, in any given case constitute ‘the court’. Reported judgements are for the majority of cases the only available means of assessing ‘the court’s’ approach to high art, and so it is in practice the attitudes of various members of the judiciary which are being considered, especially since reported cases are most likely to be those which have reached the higher courts on appeal, requiring the verdict of the judiciary as opposed to the jury. Even where details are available of first instance criminal cases involving juries, whilst crucial, the attitude of the jury can be ascertained only by means of their ultimate verdict.

The Courts and High Art 1780 to 1857

The earliest cases in this period which involved works of high art occurred in the 1820s. In 1822, Lord Byron, having been initially granted an injunction to prevent the publication of a copy of his poem *Cain*, was refused an extension of the injunction on the ground that it was a profane libel,⁷⁶⁴ and the court refused copyright protection to Byron's *Don Juan* on the same grounds in 1823.⁷⁶⁵ As with obscene libels, the matter of profane or blasphemous libels had once been dealt with by the Ecclesiastical Court. However, as early as 1676 the matter had been brought within the remit of the Temporal Courts on the basis that to reproach the Christian religion was to speak in subversion of the law.⁷⁶⁶

Don Juan has since been described as Byron's "masterpiece"⁷⁶⁷ and the "greatest" of his poems.⁷⁶⁸ In the case involving *Cain*,⁷⁶⁹ the presiding judge Lord Eldon drew a distinction between Byron's poem and one such as Milton's *Paradise Lost*. In his lordship's view Milton's object in *Paradise Lost* was "to promote the cause of Christianity"⁷⁷⁰ but since Byron's object was not in line with conventional morality, his poem could not receive the assistance of the court. Notably, Byron's peers criticised the poet for his "lack of deference to public morals"⁷⁷¹ in *Don Juan* and described *Cain* as containing "direct attacks on the goodness of God [that] are such as we dare not utter or transcribe".⁷⁷² Thus the attitude of the court appears to have been in line with contemporary opinion at this stage.

⁷⁶⁴ *Murray v Benbow* (1822) Jac. 474n (noted in *Lawrence v Smith* Jac. 471at (1)), a case where copyright protection was refused to a work entitled *Lectures on Physiology, Zoology and the Natural History of Man*, on the grounds that "the law does not give protection to those who contradict Scripture"). Also cited in *R v Hicklin* (1868) 3 QBD 360, at 366.

⁷⁶⁵ This case is also noted in *Lawrence v Smith* Jac. 471 at (1).

⁷⁶⁶ As per Hale CJ in *R v Taylor* (1676) 1 Vent.293, 86 ER 189

⁷⁶⁷ Lee, B (ed.) *Don Juan (1819) by Lord Byron*, (London, Collins, 1969) p.12.

⁷⁶⁸ Lee, n 767 above, p.185.

⁷⁶⁹ *Murray v Benbow* (1822) Jac. 474

⁷⁷⁰ Cited in *R v Hicklin* (1868) 3 QBD 360, at 366.

⁷⁷¹ Hayden JO (ed.) *Romantic Bards and British Reviewers* (London, Routledge & Kegan Paul, 1971), p.266.

⁷⁷² Hayden, n 771 above, p.281.

Another of Byron's poems *Vision of Judgement* came before the court in 1824, when its publisher Hunt was found guilty of libeling the memory of the late King George III.⁷⁷³ Byron describes the late King as;

“...although no tyrant, one
Who shielded tyrants, till each sense withdrawn
Left him nor mental nor external sun”.⁷⁷⁴

Although defence counsel argued (amongst other things) that historical facts would be concealed if those who survived a monarch were prohibited from discussing freely his or her character,⁷⁷⁵ the jury very quickly reached a guilty verdict, following the Chief-Justice's summing-up in which he noted that it was a fact of human nature that “a calumny against the father could not be published without wounding the feelings of a son”.⁷⁷⁶ Notably, there was no contention that the poem was worthy of any special consideration on account of the fact that it possessed (or was considered to possess) literary merit.

However, case reports from the 1840s onwards reveal that from around this time, counsel began to argue before the courts that the quality of the work in question should be relevant to the outcome of the proceedings; this concern for the protection of high art being in line with the ideas current at the time that high art could positively benefit society.⁷⁷⁷ In 1841, the publisher of Shelley's *Queen Mab* was prosecuted for blasphemous libel; the charge relating to selected extracts from the poem which amounted to less than a three hundredth part of the whole.⁷⁷⁸ Counsel for the defendant objected to the process of extracting certain lines from a work and then, upon the basis of such extracts, deeming the whole work obscene. He

⁷⁷³ *R v Hunt*, 15th January 1824, K.B.D., noted in Fleming A, *Bright Darkness The Poetry of Lord Byron in the Context of his Life and Times* (London, Nottingham Court Press, 1983), pp.75-77. See also *The Times*, 16th January 1824.

⁷⁷⁴ Fleming A, *Bright Darkness The Poetry of Lord Byron in the Context of his Life and Times*, (London, Nottingham Court Press, 1983), p.75.

⁷⁷⁵ Fleming, n 774 above, p.77.

⁷⁷⁶ *Ibid.*

⁷⁷⁷ See chapter four, pp.115-121.

⁷⁷⁸ According to Defence Counsel. *R v Moxon*, *The Times*, 24th June 1841

submitted that if the prosecution were to succeed then “they must destroy the existence of the greatest ornaments of literature, ancient as well as modern [and]...if the jury were to find the present defendant guilty, they must equally condemn the publishers of the works of Milton, Gibbon, Byron, Voltaire, Rousseau, Congreve, Wycherly, and even of Shakespeare himself”.⁷⁷⁹ The presiding Judge, Lord Denman, whilst acknowledging counsel’s “animated and eloquent” speech, nevertheless directed the jury that they were bound “to take the law as it had been handed down to them from all time” and decide only whether or not the defendant was guilty of the offence with which he was charged.⁷⁸⁰ However, Lord Denman did state further that, in his own view, sentiments or opinions which might be considered blasphemous were most effectually ‘suppressed’ or ‘neutralized’ by argument and reason and not by prosecution of their authors. Despite this observation, the jury returned a verdict of guilty about fifteen minutes after retiring.⁷⁸¹

With regard to *Queen Mab*, Blackburn, J. was to state some 27 years later that he did not concur with the outcome of *Moxon*’s case;⁷⁸² adding that the prosecution of the works of Dryden “whether the publication...is or is not a misdemeanour...would not be a case in which a prosecution would be proper”.⁷⁸³ Thus by this stage, once the reputation of an author had been established and his or her works considered to be high art, then the court saw it as improper for a prosecution to be brought, or to succeed, against him. By contrast, a factual and discursive work received much harsher treatment. Whilst a lapse of time had allowed the poetic work, *Queen Mab* to become established by consensus of critical opinion, this was not so with a birth-control manual *The Fruits of Philosophy*⁷⁸⁴ which had been in circulation for over 40 years prior to its prosecution (the book was written by American Physician Charles

⁷⁷⁹ *The Times*, 24th June 1841.

⁷⁸⁰ *Ibid.*

⁷⁸¹ *Ibid.*

⁷⁸² *R v Hicklin* (1868) 3 L.R. Q.B. 360, 374.

⁷⁸³ *Ibid.*

⁷⁸⁴ Roberts MJD, “Blasphemy, Obscenity and the Courts: Contours of Tolerance in Nineteenth Century England”, in Hyland P & N Sammells (eds), *Writing and Censorship in Britain*, (Routledge, London & New York, 1992), pp.141-153, at p.144 See also Atkins, J, *Sex in Literature*, (London, Calder and Boyars, 1970) p.36.

Knowlton and was first published in England in 1834).⁷⁸⁵ The court, whilst acknowledging that the work had been in circulation for a number of years, held that it came within the meaning of the OPA 1857 and Watts was ordered to sell no more copies of it.⁷⁸⁶ An immediate challenge was brought to this decision when Bradlaugh and Besant re-published the work, claiming a right to publish opinions in order that the public may make an informed judgement.⁷⁸⁷ A single magistrate determined, once more, that the work was obscene and ordered its destruction, although a procedural error eventually ensured that the order could not be enforced.⁷⁸⁸ It is submitted that the treatment of this work indicates a disparity between the court's view of factual and artistic works at the time. There was no opportunity for *Fruits of Philosophy* to become protected by critical acclaim during the period in which it had circulated freely and thus there was no question as to whether its prosecution was or was not 'proper'.

Case law leading up to the OPA 1857

As discussed in the previous chapter,⁷⁸⁹ the notion that works of literary or visual art should be protected from prosecution was one which was discussed in Parliament during the debates leading to the enactment of the OPA 1857. Notably, though, the concern was a hypothetical one - 'what if' serious works of literary or visual art were to be prosecuted using the enhanced powers given under the bill - and not related to any specific cases involving serious works of art. Although some of the cases cited above are examples of such prosecutions; they are very few in number considering the time-span which they cover. Although there exists some difficulty in ascertaining the exact nature of the articles prosecuted, since many of the cases were reported briefly in newspapers, where it was considered inappropriate to publish the precise details,⁷⁹⁰ the works prosecuted were those being commonly sold in specific areas,

⁷⁸⁵ St.John-Stevas, n 654 above, pp.70-71. See also *The Times*, 10th January, 1877.

⁷⁸⁶ *The Times*, 10th January 1877

⁷⁸⁷ St.John-Stevas, n 654 above, pp.70-71.

⁷⁸⁸ *Ex parte Bradlaugh and Besant* (1878) 3 QBD 509

⁷⁸⁹ Chapter four, pp.112-113.

⁷⁹⁰ And later under Law of Libel Amendment Act 1888 (51 & 52 Vict.) c.64 newspapers became liable to prosecution if they printed blasphemous or obscene passages which had been read out in court.

such as Holywell Street in London.⁷⁹¹ Prosecutions instigated in 1855 and 1856 had involved the sellers of obscene photographs⁷⁹² and books “of an amorous character”,⁷⁹³ both of whom pleaded guilty and, unlike the situation which was to occur almost a century later, there had been no string of prosecutions which formed the grounds for concern about the application of obscenity laws against works which might be considered to be high art.⁷⁹⁴

The Courts and High Art 1858 to 1958

It was not until a few years after the enactment of the OPA 1857 that the authors or publishers of those works which have been referred to as ‘serious’ works of visual art or literature came to be prosecuted in greater number than before. St. John-Stevas (1956) terms these post-1857 prosecutions as being of “the greatest interest, since they provide the first examples of the law being invoked successfully against works of literary merit”.⁷⁹⁵ The above discussion has shown that this statement is not entirely accurate, although the number of relevant cases certainly increased after 1857, as the following discussion will show.

Although he devotes two pages of his book to the ‘literary revolt’ of the last quarter of the nineteenth century,⁷⁹⁶ St. John-Stevas attributes the change in the application of obscenity law chiefly to the increasing demand for high moral standards.⁷⁹⁷ Certainly the imposition of moral standards, particularly as practiced by groups such as the National Vigilance Association and the Society for the Suppression of Vice sometimes had a direct impact upon the law as practiced by the courts; an example of this being an action brought in 1869 by the Society for the Suppression of Vice

⁷⁹¹ It was reported in *The Times* on 23 July 1857 that “in certain parts of London, and notably in Holywell Street...prints, song books, and other publications of the most disgusting character are exposed to public view. So obscene and abominable are the contents of the windows in this locality that they defy description by sheer force of their own filth”. See also Manchester, n 571 above, p.228 and St. John-Stevas, n 654 above, p.68

⁷⁹² *R v Golstone*, *The Times* 12th April 1855.

⁷⁹³ *R v Duncomb*, *The Times* 17th April 1856.

⁷⁹⁴ See further below pp.179-182

⁷⁹⁵ St. John-Stevas, n 654 above, p.79.

⁷⁹⁶ St. John-Stevas, n 654 above, pp.74-5.

⁷⁹⁷ St. John-Stevas, n 654 above, p.79.

against Powell, a case which is discussed further below (p.160). However, such groups had brought prosecutions prior to the period when the subject matter of complaint began to change. For example, the Society for the Suppression of Vice was responsible for bringing both of the actions in 1855 and 1856 which were referred to above. Thus it is submitted that the important factor is not that cases continued to be brought by societies such as these, but that the nature of the material prosecuted gradually began to change.

Manchester (1988) goes some way in addressing this issue, arguing with regard to early Victorian novelists or artist that they perhaps “had generally lived up to the moral expectations of their audience and critics, with the result that conventional morality did not feel threatened. Since their works were not considered subversive of the moral *status quo*, no action was taken against them”.⁷⁹⁸ He then cites the imposition of even stricter standards of morality and the repressive attitude of contemporary critics as the sources of a “bolder and more adventurous”⁷⁹⁹ approach being adopted by artists. As stated previously in this thesis, during the early and mid-1800s there had been an emphasis upon the positive value of high art to society, particularly in terms of the elevation of moral and social behaviour, and inherent in this view was the presumption that works which were to have a positive moral effect were themselves ‘moral’. Hence the idea that works could be blatantly obscene or otherwise injurious to society and yet be of redeeming value to society on account of the fact that they were high art was not yet current.⁸⁰⁰

The art for art’s sake doctrine which emerged most forcefully in the 1860s⁸⁰¹ in England was highly influential in changing attitudes towards literature and visual art particularly amongst those who created such works. Furthermore, it is submitted that the application of this doctrine, and the movement which closely followed it and which is known as aestheticism, radically changed the nature of works which became available to the viewing and reading public; for the first time separating totally the

⁷⁹⁸ Manchester, n 571 above, p.234.

⁷⁹⁹ Ibid.

⁸⁰⁰ See chapter three, p.71

⁸⁰¹ Prettejohn, n 499 above, pp.2-3, 17-35.

notion of literature and art from that of conventional morality. Thus the change in the court's application of the law can be seen primarily as a response to this and not merely as a conscious policy decision on its part. As time has progressed, the nature of works of literary and visual art has continued to change but the creators of such works have never returned to the practice of working within the confines of any 'acceptable' moral code. Thus the case law which is discussed further below can be viewed as a record of the gradually shifting response of the courts to works of art, the nature of which was changing and adapting to its comparatively new amoral role in society.

The Hicklin case

One of the most important cases in this field which came to be decided following the implementation of the OPA 1857⁸⁰² was *R v Hicklin* (1868) 3 L.R. Q.B. 360, not because it involved the prosecution of a work which is now considered to be high art (the work involved was *The Confessional Unmasked*, a pamphlet which contained the alleged details of confessions given in the Catholic Church) but because this case set out a definition of obscenity which was subsequently adopted by the courts in their enforcement of the new Act and by the courts in their application of the common law of obscene libel. The 'Hicklin test' (in amended form) was also subsequently adopted by the Legislature in the framing of the OPA 1959 which is still in force today. The case involved the seizure of a number of copies of the pamphlet under the powers conferred by section 1 of the OPA 1857 which were ordered to be destroyed at first instance. Hicklin appealed, claiming that his intention had been to expose certain practices within the Catholic church which he considered to be erroneous. This argument was accepted by the Recorder hearing the appeal, subject to the opinion of the Court of Queen's Bench.⁸⁰³

In the Court of Queen's Bench, Cockburn, C.J. affirmed the first instance decision, stating that where there is a breach of the law "the intention to break the law must be

⁸⁰² 1857 (20 & 21 Vict.) c.83.

⁸⁰³ *R v Hicklin* (1868) 3 L.R. Q.B. 360, 363.

inferred”⁸⁰⁴ and the nature of the article in question is not altered by the intention of the writer. The Judge acknowledged that “there are a great many publications of high repute in the literary productions of this country the tendency of which is immodest, and, if you please, immoral”⁸⁰⁵ but which had not been the subject of prosecution, but stated that “it is not to be said [that] because there are in many standard and established works objectionable passages, that therefore the law is not as alleged on the part of this prosecution”.⁸⁰⁶ No further information was given as to why such publications of high repute had not been prosecuted but it is submitted here that there are two main reasons why prosecutions had not been brought in respect of such works: Firstly, works which dated from previous centuries, such as Chaucer’s *Canterbury Tales* or, the works of Shakespeare, had become established and revered to such an extent as classical literature or high art that it would seem absurd and somewhat ill-educated to bring a prosecution against them. Secondly, it is submitted that such works had not until comparatively recently become available to the general public, whose morality the courts were seeking to protect.⁸⁰⁷ This is indicated by Lush, J.’s response in the current case to Counsel’s rhetorical question; “What can be more obscene than many pictures publicly exhibited, as the Venus in Dulwich gallery?” The Judge stated that just because a work is exhibited in a gallery, it does not follow that photographs of the work could be “sold in the streets with impunity”.⁸⁰⁸ It is submitted that there was here a presumed distinction between the type of persons likely to visit the work in a gallery and those likely to purchase a copy of it in Hollywell Street.

Cockburn, C.J. thereafter set out the now famous (or infamous) test for obscenity as being “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences,⁸⁰⁹ and into whose hands a publication of this sort may fall”.⁸¹⁰ Expressing a view which vividly

⁸⁰⁴ *R v Hicklin* (1868) 3 L.R. Q.B. 360, 370.

⁸⁰⁵ *R v Hicklin* (1868) 3 L.R. Q.B. 360, 371.

⁸⁰⁶ *Ibid.*

⁸⁰⁷ See chapter three, p.75.

⁸⁰⁸ *R v Hicklin* (1868) 3 L.R. Q.B. 360, 365.

⁸⁰⁹ Perhaps those persons who were more likely to purchase a copy of the Venus in the street than visit the original in Dulwich gallery?

⁸¹⁰ *R v Hicklin* (1868) 3 L.R. Q.B. 360, 371.

contradicts with later developments in the law, the Judge later stated: “The law says, you shall not publish an obscene work” and if a work is found to be obscene, the writer or publisher of that work cannot claim that his actions which are “wrong, legally and morally”, are justified because some greater good might be accomplished.⁸¹¹ This statement flatly contradicts that which is now expressed in section 4 of the OPA 1959;⁸¹² namely that even where a work is found to be obscene, it may nevertheless be protected via the public good defence. The present discussion of cases from 1858 to 1958, it is argued, reveals and will reveal the gradual process by which this change took place.

Cases following Hicklin

Soon after the Hicklin case came one which is notable not only because a distinction was drawn between high art and works of a more prosaic or ‘low’ nature, but because the drawing of such a distinction appears to have influenced for the first time the outcome of the case; albeit in rather an unusual manner. The Society for the Suppression of Vice was responsible for bringing a prosecution in 1869 against Powell, the owner of a shop from which certain items had been seized under section 1 of the OPA 1857. The items are described as being ‘indecent photographs and prints’⁸¹³ plus two paintings which counsel for the owner of the paintings described as being the work of Bouchet, “a French artist of the highest eminence”.⁸¹⁴ At committal stage, counsel for Powell argued that these two works were not within the meaning of the Act, since they were “valuable works of art, and were valuable only for their artistic merit, and if they had somewhat a lewd tendency, they did not differ in that respect from many which were preserved in national collections”.⁸¹⁵ Powell subsequently pleaded guilty to having offered for sale all of the works in question, apart from the two oil paintings⁸¹⁶ and was sentenced to imprisonment. Thereafter, an order was sought for the destruction of the two paintings and at this hearing

⁸¹¹ *R v Hicklin* (1868) 3 L.R. Q.B. 360, 372.

⁸¹² (7 & 8 Eliz. 2) c. 66

⁸¹³ *R v Powell*, *Law Times* 47 (1869) 257.

⁸¹⁴ *The Times* 27th July 1869

⁸¹⁵ *The Times* 17th May 1869

⁸¹⁶ *Law Times* 47 (1869) 257

further contentions were made as to the eminence of these works. Since Powell had pleaded guilty to only part of the charges included in the indictment against him and no further action had been taken in respect of those outstanding, the Magistrate hearing the case held that he had no power to make any order. The Magistrate also stated that however excellent they might appear as works of art to some persons, it seemed that “the details which most offended against decency formed no part of the original paintings, but had been recently added,”⁸¹⁷ indicating that had he had the power to do so, he would indeed have made the order for these works to be destroyed.

Thus the distinction which was drawn between these two works and the others which formed a part of the charges brought against Powell was, in an indirect manner, responsible for their preservation. The case is most significant in that it caused commentators at the time to question whether Lord Campbell’s Act extended to works of art.⁸¹⁸ The commentary which follows the report of the case in the *Law Times* queries whether the Act extends to “works of art designed as art, and not produced for obscene purposes...The boundary line between obscenity and erotic art is very difficult to draw, and perhaps the safest route would be to look at intention”.⁸¹⁹ Although it is not alluded to here, the recently decided Hicklin case had already determined this question; deciding that intention was immaterial to the question of whether a work was or was not obscene under the law, and thus we see the emergence of the conflict between the court in its strict application of the law, and the work of art which may have been produced with artistic intent, rather than with any intention to deprave and corrupt its audience, but which may nevertheless be obscene. Notably, the comment made concerning the difficulty of drawing the line between art and obscenity contradicts statements made by Lord Campbell in the House of Lords debates which preceded the OPA 1857, indicating that there was no such difficulty,⁸²⁰ and may be seen to indicate an increased awareness that the two areas of art and obscenity were beginning to become less distinct.

⁸¹⁷ *The Times* 27th July 1869

⁸¹⁸ *Law Times* 47 (1869) 257

⁸¹⁹ *Ibid.*

⁸²⁰ HL, Vol.CXLVI col.329, June 25th, 1857

As early as 1877, the idea that the publisher of a work which was found to be obscene could nevertheless avoid conviction if it could be shown that such publication is “for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest” was being put forward as a submission,⁸²¹ based upon the judgements given in the Hicklin case in 1868. However, case law around this time indicates that the idea of *justifying* obscenity upon artistic grounds was not yet being argued in the courts. Rather, artistic intent or merit was being put forward as a means by which to *negative* apparent indecencies or obscenity. Artistic endeavour was gradually becoming recognised as a factor in determining moral issues. An example of this occurred in 1886, when Messrs. Erdmann and Macintosh were prosecuted for selling obscene photographs of nude figures. Counsel representing the defendants argued that these photographs were “art studies” and “although the figures were nude they were classic in character and not of a class known as indecent or improper”.⁸²² Furthermore, pursuing a line of argument which is by now familiar, counsel argued that various works of art exhibited in public galleries might be considered “indecent or improper”⁸²³ if these photographs were considered to be so. The argument appears to have been at least partially successful, in that the magistrate determined that some, but not all, of the photographs should be destroyed and the remainder returned to the defendants.⁸²⁴ However, related arguments which were put forward in a trial which closely followed this one were not so successful.

In 1888, Vitezelly was prosecuted for publishing obscene libels in the form of translations of French novels.⁸²⁵ Robertson (1979) describes how the National Vigilance Association, in his view “an organisation which combined puritanism with xenophobia in its efforts to suppress french classics”⁸²⁶ was responsible for bringing

⁸²¹ Stephen Sir James Fitzjames, *A Digest of the Criminal Law (Crimes and Punishments)*, (London, Macmillan & Co., 1877), Article 172 at pp. 104-5.

⁸²² *The Times* 14th June 1886

⁸²³ *Ibid.*

⁸²⁴ *The Times* 5 July 1886.

⁸²⁵ Robertson G, *Obscenity An Account of Censorship laws and their enforcement in England and Wales* (London, Weidenfeld & Nicolson, 1979) p.31.

⁸²⁶ *Ibid.*

the action. A number of works were cited in the indictment,⁸²⁷ but only three novels were selected for consideration at the first hearing. These were works by Emile Zola (1840-1902) which had been written during the 1870s in France, but which Vitezelly was among the first to introduce in translated form into England in the 1880s.⁸²⁸ At the first hearing, prosecuting counsel argued that the works in question were of such a nature that “no decent-minded person would say that their publication would not be detrimental to public morals”⁸²⁹ and he proceeded to cite passages from *Nana* to illustrate this point; intending thereafter likewise to identify passages from the other two novels in question. At this stage the Magistrate intervened and requested that counsel might rely on only one of the works, namely *The Soil* (or *La Terre*), since it was “the worst of the three”.⁸³⁰ It is submitted that the fact that it was considered appropriate for only three of the works listed in the indictment to be examined in court (and indeed reduced to one for the purposes of this hearing) indicates that the court was not open to considering in any detail the nature of the works in question, and that it was at this very early stage in the proceedings predisposed to securing a guilty verdict in the case; ignoring submissions from Defence Counsel that there existed many works “within the cognizance of all men of education which were very much worse than those now under discussion”.⁸³¹

The case was committed for trial, where a Hicklin-based response was given to the attempts to compare Zola’s works favourably with other works which were now established as high art.⁸³² The Solicitor-General read out passages (21 in total) from *La Terre*, in order to substantiate his claim that the work was “filthy from beginning to end” and devoid of “any literary genius or the expression of any elevated thought”.⁸³³ At this stage the jury queried whether it was necessary for all the passages to be read out and, no doubt seeing this as a strong indication of a guilty

⁸²⁷ One of them being the work considered to be foundational to the art for arts sake doctrine, Gautier’s *Mademoiselle de Maupin*.

⁸²⁸ Robertson, n 825 above, pp.31-2.

⁸²⁹ *The Times* 11th August 1888

⁸³⁰ *Ibid.*

⁸³¹ *Ibid.*

⁸³² Counsel had, for example, made specific reference to *The Merry Wives of Windsor* at the first hearing.

⁸³³ *The Times* 1st November 1888

verdict, the defendant changed his plea to guilty. Thus on the basis of selected passages from only one of the works cited in the indictment, Vitezelly was fined and ordered to cease circulation of all the books in question. This case shows that very little attention was paid by the court to the notion that the works which Vitezelly had published should be protected from prosecution on the basis that they were high art. No witnesses were brought to attest to the literary merit of the works, but Thomas (1969) records how Vitezelly had, prior to the trial, sent to the Treasury Solicitor his own compilation entitled *Extracts Principally from English Classics: Showing that the Legal Suppression of M. Zola's Novels would Logically involve the Bowdlerizing of some of the Greatest Works in English Literature*, wherein he had included extracts from Shakespeare, Rossetti, Swinburne and Fielding, amongst others. Vitezelly had also included evidence of critical acclaim of Zola's works.⁸³⁴ Clearly this communication had had no effect upon the outcome of the case whatsoever and this is because, it is submitted, the works at that time could not be saved by the drawing of such comparisons. The merits of the works before the court were relevant only so far as they could be said to negative the obscenity, and this was not what Vitezelly was arguing. Despite Fitzjames-Stephen's submission that literary interests could justify obscenity in certain cases, upon the basis of a 'public benefit' argument, the court was clearly not yet ready to acknowledge any such justification.

Vitezelly was again prosecuted in 1889 for publishing translations of Zola's works and pleaded guilty on this occasion. Expressing the view that "spreading impure literature...did a great deal of mischief to a large class of persons", the Recorder sentenced Vitezelly (who was by now 70 years of age and in ill-health) to a term of three months imprisonment.⁸³⁵ Despite the harsh treatment which Vitezelly received from the court, it is submitted that the case does not reveal a failure by the court at the time to acknowledge the importance of high art. Rather it reveals firstly, that Zola's works had not yet become established as high art, since insufficient time had elapsed between its publication and its consideration by the court to enable a consensus of critical opinion to be drawn and secondly, that the peculiarly naturalistic

⁸³⁴ Thomas, n 551 above, p.268.

⁸³⁵ *The Times* 31st May 1889

style⁸³⁶ of Zola's works, such as *La Terre*, with its blunt description of peasant life, was such that, according to *The Times*, "[n]o one can ascribe the publication of such works to a high literary purpose or to any motive worthy of respect",⁸³⁷ and certainly not a moral one. As Farr (1978) states; [t]he advanced French writers of the period 1835–95 became increasingly aware of the importance of the formal elements of their craft...[and] though they might draw on their experience of the world around them, they saw no reason to use their art to preach a moral or to serve a useful purpose".⁸³⁸ By contrast, a report of a meeting of the London County Council on 31st May 1889,⁸³⁹ the day after Vitezelly was sentenced to imprisonment, indicates the prevailing view that art should confer some moral benefit upon its viewer or reader. The reason given for supporting the opening of public galleries, museums and libraries on Sundays being that such places offered "some counter-attraction to the degrading influences which affected the people in the East-end of London".⁸⁴⁰ This echoes a view which had been put forward some years earlier regarding the Sunday opening of The National Gallery, Edwards (1840) submitting that "[t]hose who are led to visit a gallery of pictures by mere curiosity may, despite themselves, receive better impressions. And from taking delight in a picture representing Christ's beneficent miracles, to taking delight in the hearing of his divine words, there is, perhaps, less distance than some men suspect".⁸⁴¹

The translator of a 1980 edition of *La Terre* maintains that "[i]n retrospect, we can now see that Zola stood at the right point in time to produce what is certainly a masterpiece";⁸⁴² thus identifying an aspect of high art which is reiterated constantly throughout these cases - that it is not merely the attributes of a work which cause it to be called high art, but the consensus of critical opinion which emerges over time. Of course, significant also is the fact that society's concept of morality changes constantly; as Chandos (1962) states, [w]ithout changes in morality we should still

⁸³⁶ Turnell M, *The Art of French Fiction*, (London, Hamish Hamilton, 1959) p.93.

⁸³⁷ *The Times*, 1st November 1888.

⁸³⁸ Farr D, *English Art, 1870-1940*, (Oxford, Clarendon Press, 1978), p.3.

⁸³⁹ *The Times* 3rd June 1889.

⁸⁴⁰ Ibid.

⁸⁴¹ Edwards E, *The Administrative Economy of the Fine Arts in England*, (London, Saunders and Otley, 1840), p.128.

⁸⁴² Zola E, *The Earth (La Terre)*, Transl. D.Parmee, (Harmondsworth, Penguin, 1980) p.18.

have the rack, trials for witchcraft, child labour in mines, slavery and proscription of contraceptives”;⁸⁴³ meaning that works which were considered to be shocking or obscene when first published are likely to be perceived as less shocking in future years. This evolution in a response to a work occurs, of course, even where there is no issue of indecency or obscenity, but merely a change in artistic style, such as the move away from a realistic representation of a subject towards a more abstract approach.

The Whistler v Ruskin trial

In the late 1870s, artist Whistler (1834-1903), whom Merrill (1992) describes as a painter who had “gradually replaced his realism with aesthetic attitude - an interest in art for art’s sake”⁸⁴⁴ mounted an exhibition of his works, entitled *Nocturnes*. With regard to *Nocturne in Black and Gold* in particular, Merrill maintains that “[f]ireworks made an appropriate subject for a nocturne but proved an affront to conventional ideas of Victorian painting, which tended toward daylight depictions of clearly articulated narratives. Indeed, Whistler’s falling rocket was a modern, urban, sensational, ephemeral, indescribable, spectacle - a vision of beauty without a trace of moral meaning, a model of art for arts sake”.⁸⁴⁵ The art critic Ruskin’s (1819-1900) response to this painting, that the artist was ‘flinging a pot of paint in the public’s face’⁸⁴⁶ prompted Whistler to sue him for libel, and the ensuing trial is interesting in that it reveals the process by which the court sought to determine the artistic merit of the works in question.⁸⁴⁷

This trial provides one of the earliest examples of using expert, critical opinion to establish whether or not a work is high art. Whistler secured three witnesses to give evidence in his support. These were fellow artists Albert Moore and William Gorman

⁸⁴³ Chandos J, (ed.), *To Deprave and Corrupt’...original studies in the nature and definition of obscenity*, (London, Souvenir Press, 1962), p.43.

⁸⁴⁴ Merrill L, *A Pot of Paint: Aesthetics On Trial in Whistler v Ruskin* (Washington & London, Smithsonian Institution Press, 1992), p.22. (There is no case report for this trial; hence the reliance upon this text)

⁸⁴⁵ Merrill, n 844 above, p.36.

⁸⁴⁶ Murray, n 18 above, p.481.

⁸⁴⁷ Merrill, n 844 above, p.192.

Wills and literary and art critic William Michael Rossetti.⁸⁴⁸ Whistler himself described his *Nocturnes* as being devoid of any anecdotal interest, “an arrangement of line, form and colour first”⁸⁴⁹ and Rossetti stated that he admired them sincerely; “they are very fine works, with one or two exceptions”.⁸⁵⁰ Upon being cross-examined as to why he considered one of the *Nocturnes* to be a work of art, Rossetti responded that “it represents what was intended. It is a picture painted with a considerable sense of the general effect of such a scene and finished with considerable artistic skill”.⁸⁵¹ By contrast defence counsel maintained that “these are fantasies and exaggerated conceits, having elements of beauty some of them, and having some value, no doubt, but unworthy of the title of great works of art”.⁸⁵² Ruskin did not appear at the trial in person, but artist Edward Burne-Jones gave evidence to support Ruskin’s case.⁸⁵³ Burne-Jones, who has been described as being one who “led the most powerful and historically significant counter-movement against the doctrines of Art for Art’s sake”⁸⁵⁴ raised a concern which had been emphasised by counsel, namely that Whistler’s works were incomplete, or unfinished.⁸⁵⁵ If this was proved to be so, then Ruskin’s comments about the artist’s impudence at asking 200 guineas for such a work, could be said to be fair.

In a seemingly extraordinary move, Burne-Jones exhibited in court a portrait of the Doge Andrea Gritti, painted in oil on canvas and attributed to Titian (c.1487-1576)⁸⁵⁶ to provide the jury with an example of a ‘finished’ work of art.⁸⁵⁷ When directing the jury, the Judge commented that this had been “scarcely fair. Nobody has ever equalled, and probably never will equal, Titian”.⁸⁵⁸ Despite the defence argument that the issue for the jury to decide was not the quality of Whistler’s paintings but

⁸⁴⁸ Merrill, n 844 above, pp. 84-91.

⁸⁴⁹ Merrill, n 844 above, p.144.

⁸⁵⁰ Merrill, n 844 above, p.156.

⁸⁵¹ Merrill, n 844 above, p.157.

⁸⁵² Merrill, n 844 above, p.168.

⁸⁵³ Whistler JM, *The Gentle Art of Making Enemies* (London, Heinemann, 3rd ed, 1904) p.13.

⁸⁵⁴ Farr, n 838 above, p.48.

⁸⁵⁵ Merrill, n 844 above, p.172.

⁸⁵⁶ This work has since been attributed to a lesser known artist, Vincenzo Cantana, and is exhibited in the National Gallery in London.

⁸⁵⁷ Merrill, n 844 above, p.174.

⁸⁵⁸ Merrill, n 844 above, p.191.

whether or not Ruskin's criticism of the artist was fair, a great deal of the time spent in court was devoted to hearing evidence as to the merits of the works in question; it seemingly being important to establish for the sake of the jury whether or not Whistler's paintings were high art. The use of experts to support both parties contentions indicates that by this stage, critical opinion was considered essential to proving, or disproving, artistic merit and Burne-Jones' unfavourable comparison between Whistler's paintings and that of Titian's is a blunt but clear example of the practice of determining the status (be it high art, or otherwise) of an artwork by reference to others of its type. The jury decided in favour of Whistler, but awarded only a farthing in damages, indicating that although the jury considered that a libel had been committed, they did not consider that Whistler had suffered any financial or material loss as a result of it.⁸⁵⁹ Furthermore, accepting counsel's argument that the jury's decision indicated that this was an action which should never have been brought, the Judge made no order for costs, meaning that Whistler was penalised financially for bringing the action.⁸⁶⁰

The Whistler case is unusual in that the principle issue of discussion was the artistic merit (or lack of it) exhibited in the paintings and there was no issue of obscenity to be determined first. This allowed the court to enter into a full discourse on the subject. It is submitted that the reliance placed upon critical opinion in court indicates that the pictures themselves did not amount to sufficient evidence of Whistler's artistic merit or skill; the significant issue being whether or not the *Nocturnes* could be acknowledged as works of art, when considered in comparison to other works of a similar kind. This process, it is submitted, provides support for the writer's view that the opinion of experts is vital in determining which works are, and which are not, high art.

⁸⁵⁹ Merrill, n 844 above, pp.197 & p. 203.

⁸⁶⁰ Ibid.

The Modernist Era and High Art in the Courts

The so-called Modernist period (1890-1930) has been described as “a new era of high aesthetic self-consciousness and non-representationalism”⁸⁶¹ and a time in which “[s]exual liberation, and liberation through sexuality, were conscious and central projects”.⁸⁶² Issues relating to sexuality became increasingly the subject matter of literary and visual art during this period and, not surprisingly, the authors or publishers of such works became the subjects of prosecution for violation of the obscenity laws. With respect to some of the artistic and literary works which emerged during the late nineteenth and early twentieth centuries, those enforcing the law had to adapt and respond to ideas and beliefs that were rapidly changing, and which were not universal. As has already been seen, the separation of art and literature from any moral or didactic purpose was widely influential amongst practitioners, but not so widely accepted by their audiences, and therefore the courts were called upon to mediate between the two when conflicts arose.

One of the earliest cases which involved directly issues relating to sexuality was the prosecution for libel instigated by Oscar Wilde in 1895 against the Marquis of Queensbury, in respect of a card addressed to “Oscar Wilde, posing as a somdomite” (as Hyde (1960) notes, “the word being misspelled in his fury”⁸⁶³). Of course, this trial did not involve directly any issue relating to high art, but in his plea of justification made in response to Wilde’s charge, Queensbury cited *The Picture of Dorian Gray* as an indication that his accusation concerning its author was justified because it was true. In cross-examination, Wilde confirmed his assertion in the Preface to *The Picture of Dorian Gray*, that “[t]here is no such thing as a moral or an immoral book”; giving the defence counsel an opportunity to read out to the court an extensive passage from the work in which Wilde’s fictional character Basil Hallward describes his introduction to Dorian Gray and his subsequent infatuation with him.⁸⁶⁴

⁸⁶¹ Bradbury M and J McFarlane (eds) *Modernism 1890-1930* (London, Penguin, 1991) p.25.

⁸⁶² Bell, n 64 above, p.25.

⁸⁶³ Hyde HM (ed.) *The Trials of Oscar Wilde* (London, Edinburgh, Glasgow, William Hodge & Co., 1960) p.28.

⁸⁶⁴ Hyde, n 863 above, pp.124-5.

Counsel was to refer to the work once again when, having referred the court to certain relationships which Wilde had formed with various young men; he described the book as “the tale of a beautiful young man who, by the conversation of one who has great literary power, just as Mr. Wilde has - and who...has his eyes opened to what they are pleased to call the “delights of the world””.⁸⁶⁵ Thus Wilde’s fictional work was being used in court as evidence of its author’s factual lifestyle. Wilde’s refusal to distinguish between immorality and morality in fictional works was translated into ‘real life’ before the court, causing Wilde’s counsel to withdraw the prosecution before the end of the proceedings.

As a result of the evidence given in this trial, Wilde was subsequently charged with committing acts of gross indecency.⁸⁶⁶ During the ensuing trial, records of the cross-examination of Wilde which had taken place in the libel trial were read out to the jury, including the extracts from *The Picture of Dorian Gray*, but in directing the jury Mr. Justice Charles stated that “I do not think in a criminal case that you ought to base any unfavourable opinion on the fact that Wilde is the author of *The Picture of Dorian Gray*. Coleridge, a great writer...has said ‘Judge no man by his books’. I would rather say: ‘Judge no man, confound no man with the characters he has created’”.⁸⁶⁷ The jury in this trial were unable to reach a verdict, causing there to be a second trial, in which the same thing happened again, and it was only following a third trial that Wilde was ultimately convicted and imprisoned. Wilde was, it seems, judged finally by his actions and not by his literary works, but the considerable attention paid to Wilde’s works in the Queensbury libel trial indicate that it was not yet considered acceptable for a literary work to describe a relationship which was considered both illegal and immoral, despite its creator’s contention that the work itself was amoral, and despite the fact that it was well-written. Morality remained the central issue for the court; and artistic merit could be judged only in the light of it.

The notable exception to this rule was when the work of artistic or literary merit was

⁸⁶⁵ Hyde, n 863 above, p.167.

⁸⁶⁶ Hyde, n 863 above, p.179.

⁸⁶⁷ Hyde, n 863 above, p.256.

already an established classic. An attempt in the early 1900s to prosecute the publisher of a work entitled *Heptameron of Margaret of Navarre*, which was written in the 1500s and derived from *The Decameron* was unsuccessful.⁸⁶⁸ There was a definite distinction drawn between this type of work and those of a more contemporary nature, partly because of the differing nature of the works, but primarily because the idea of prosecuting classical art or literature, or those which had become established as high art over time, was considered to be absurd. *The Decameron* case considered below (p.179) is a further example of this.

An Extension in the Role of the Arts

It is submitted that by late nineteenth and early twentieth century, much art and literature had evolved from being that which was broadly moral and functional, to that which was amoral and “which need serve no other purpose than its own ends”,⁸⁶⁹ to that which purported to offer some indication of the meaning of life itself by reference to even the most personal and private aspects of it. No longer was it expected that the moralising influence would come from any message conveyed by the subject matter of the work, but rather through the work itself, which could prompt the viewer or reader to look more closely at the meaning of life, and to modify his or her behaviour accordingly. It was in this latter role (associated closely with ‘high’ as opposed to ‘low’ art) that art was once more seen as having the potential to morally redeem society, particularly by writers such as Arnold, Richards and Leavis. Reference was made in chapter one to the search for “a humanistic universal”;⁸⁷⁰ or a meaning for life outside of that which had been taught traditionally by the Christian religion. Thus art moved from being outside or irrelevant to Christian morality, towards creating a new, secular morality all of its own. It is argued that works created within such a realm, and which were to come before the courts for various reasons, were bound to conflict with an institution which continued to base itself upon established, Christian principles. The conflict was to diminish only

⁸⁶⁸ *The Times*, 16th September 1954.

⁸⁶⁹ Cuddon, n 351 above, p.12.

⁸⁷⁰ Schaeffer, n 206 above, p.31.

when the courts too adopted, or accepted, this new secular morality which did not rely upon any non-human authority for its basis.

DH Lawrence's essays *Art and Morality*⁸⁷¹ and *Morality and the Novel*⁸⁷² indicate clearly two significant aspects of what this thesis terms 'secular morality'. Firstly, Lawrence states that "[e]ach thing, living or unliving, streams in its own odd, intertwining flux, and nothing, not even man nor the God of man, nor anything that man has thought or felt or known, is fixed or abiding. All moves. And nothing is true, or good, or right, except in its own living relatedness to its own circumambient universe; to the things that are in stream with it".⁸⁷³ Hence there is a rejection of any fixed moral absolutes. Secondly, Lawrence states "If a novel reveals true and vivid relationships, it is a moral work, no matter what the relationships may consist in. If the novelist honours the relationship in itself, it will be a great novel"; it need not conform to external standards.⁸⁷⁴ Note the progression here from Wilde's earlier assertion that the book was neither moral nor immoral; the book was now moral or immoral upon its own self-referential terms. This was to provide the basis for T.S.Eliot's assertion that "the whole of modern literature is corrupted by what I call Secularism, that it is simply unaware of, simply cannot understand the meaning of, the primacy of the supernatural order over the natural life".⁸⁷⁵

In 1915 Messrs. Methuen and Co. were summonsed before a magistrate, to give reasons why their publication of D.H. Lawrence's *The Rainbow* should not be destroyed.⁸⁷⁶ Prosecuting counsel stated that the work was "a mass of obscenity of thought, idea and action throughout, wrapped up in a language which he supposed would be regarded in some quarters as an artistic and intellectual effort".⁸⁷⁷ Methuen

⁸⁷¹ Steele B (ed.), *The Cambridge Edition of the Works of DH Lawrence: Study of Thomas Hardy and Other Essays* (Cambridge, Cambridge University Press, 1988 reprint) pp.163-170.

⁸⁷² Steele, n 871 above, pp.171-176.

⁸⁷³ Steele, n 871 above, p.167.

⁸⁷⁴ Steele, n 871 above, pp.172 and 174.

⁸⁷⁵ Eliot TS, "Religion and Literature", in Girvetz H and R Ross (eds), *Literature and the Arts: the Moral Issues*, (Belmont California, Wadsworth, 1971)

⁸⁷⁶ *The Times*, 15th November 1915.

⁸⁷⁷ *Ibid.*

did not defend the proceedings.⁸⁷⁸ In the following year, the court refused to grant copyright to the author of a novel entitled *Three Weeks* on the basis that the release of a film entitled *Pimple's Three Weeks* did not amount to an infringement of copyright; adding that even if there had been any breach of copyright, there could be no order in the author's favour, since the work was "grossly immoral in its essence, its treatment, and in its tendency".⁸⁷⁹ Hence the court's unwillingness to protect the author's interest was based upon moral grounds; the novel including a description of an adulterous relationship. It is notable that despite the difference in literary merit between this work and Lawrence's *The Rainbow*, there is very little difference in the treatment of the two by the courts. The courts, in their role a *custodes morum*, operated to preserve that morality, regardless of other factors.

This attitude persisted throughout the 1920s, as shown particularly in the trial of Jonathan Cape for publishing Radclyffe Hall's *Well of Loneliness* and in two other cases that followed it. Radclyffe Hall described her own work as being "a long and very serious novel entirely upon the subject of sexual inversion".⁸⁸⁰ It has also been described as "a long, sad, dull book about a sexual relationship between two women".⁸⁸¹ Both agree that it is a 'serious' work of literature, as opposed to a pornographic work by which the author intended to deprave and corrupt the reader. Although Cape had secured around 40 witnesses who were willing to give evidence for the defence, only one of these was admitted on the day of the trial; the Magistrate ruling that such evidence was not admissible since it was his duty alone to determine the issue of obscenity.⁸⁸² Counsel requested the Magistrate to refer the matter of admitting expert evidence to a higher court, but the request was refused, and a destruction order made.⁸⁸³ Although the argument was put that the book was one of such literary merit that it

⁸⁷⁸ St John-Stevas, n 654 above, p.94.

⁸⁷⁹ Per Younger, J. in *Glyn v Western Feature Film* [1916] 1 Ch 261, at 269.

⁸⁸⁰ Souhami D, *The Trials of Radclyffe Hall*, (London, Weidenfeld & Nicolson, 1998), p.167. See also Rolley K, "The Treatment of Homosexuality and The Well of Loneliness", in Hyland P & Sammells N (eds), *Writing and Censorship in Britain*, (Routledge, London & New York, 1992), pp.219-23.

⁸⁸¹ Chandos, n 843 above, p.34.

⁸⁸² *The Times*, 10th November 1928

⁸⁸³ Chandos, n 843 above, p.34.

should not have been the subject of such a prosecution, this was rejected as “an entirely untenable position”⁸⁸⁴ and once again the only possible redeeming factor for the work would have been for its author to have made the work broadly moral in that it condemned homosexuality, or that it at least attributed some blame or adversity to its fictitious characters. *Well of Loneliness*, though, was condemned since “there is not a single word...which suggests that anyone with these horrible tendencies is in the least blameworthy or that they should in any way resist them” and furthermore, “the actual physical acts of these women indulging in unnatural vices are described in the most alluring terms”.⁸⁸⁵

In the following year, the publisher of Norah C. James’ novel *The Sleeveless Errand* was summonsed before the court to show cause why that book should not be destroyed. Perhaps upon the basis of the *Well of Loneliness* judgement, Counsel for the defendant sought to establish in the case that any apparent obscenity in the work was negated by the overall intention of the work, which was moral as opposed to immoral: “So far from tending to deprave and demoralize, this book tended entirely the other way. Shakespeare’s works and the Old Testament mentioned horrible things in order to condemn them or to exhort against their use...The whole tendency of the book was to hold up to horror practices which all the way through it were condemned”.⁸⁸⁶ Perhaps also on the basis of the *Well of Loneliness* judgement, not a great deal of attention was paid to arguing that the work was a serious one of literary merit; defence counsel merely stating that the publisher, Mr. Partridge, was a Master of Arts and a bachelor of letters at Oxford, and that he had received “an extraordinarily good report” on the novel from “a very well known reader”.⁸⁸⁷ There was no attempt to bring expert witnesses to attest to the book’s literary merit, despite the fact that as in the previous case, the intention of the author appears to have been a serious one.

⁸⁸⁴ St.John-Stevas, n 654 above, p.102.

⁸⁸⁵ As per the Magistrate, Sir Chatres Biron. See Souhami, n 880 above, p.209.

⁸⁸⁶ *The Times*, 5th March 1929

⁸⁸⁷ Ibid.

Upon a strict application of the Hicklin test, the Magistrate held that the book would suggest to the minds of young people, and those of more senior years, “thoughts of a most impure character”⁸⁸⁸ and thus its tendency was indeed to deprave and corrupt those into whose hands it might fall. Arguments relating to the overall ‘moral’ intention of the work were rejected; the Magistrate stating that he “could not accept the view that the book in its results was not obscene if the passages referred to were not held up to glorification”;⁸⁸⁹ thus giving a somewhat negative and limited report of counsel’s contention, making it difficult to determine whether the magistrate rejected the validity of such an argument *per se*, or whether he rejected the argument merely in regard to this work. Whatever the reason for this rejection, the outcome was a destruction order; which prompted questions to the Home Secretary in the House of Commons. Sir Frank Meyer MP queried whether the law was adequate in its present state to deal with obscene publications, since it placed upon magistrates and the police “a duty which they should not have to perform, of acting as literary or moral censors”⁸⁹⁰ and concern was expressed that a system of literary censorship was evolving without the matter having been discussed in the House of Commons.⁸⁹¹

A matter which was also raised during this debate was the seizure of a manuscript of poems by DH Lawrence which had been sent through the post and which, under the powers of the Post Office Act 1908⁸⁹² had been referred to the D.P.P.⁸⁹³ This matter never reached the courts, since the publishers complied with the D.P.P.’s recommendation that certain poems be removed before the book was published.⁸⁹⁴ However, others of Lawrence’s works were the subject of court proceedings later in the year when the owners of the Warren Gallery were summonsed to show cause why certain paintings and books by Lawrence which had been exhibited there should not be destroyed on the ground that they were obscene.⁸⁹⁵ Defence counsel contended that the paintings were “considered not obscene by prominent persons in

⁸⁸⁸ Ibid.

⁸⁸⁹ Ibid.

⁸⁹⁰ HC, Vol.225, col 2160, February 28th 1929

⁸⁹¹ Ibid.

⁸⁹² (8 Edw. 7) c.48

⁸⁹³ HC, Vol.225, col 2159, February 28th 1929

⁸⁹⁴ Hunter et al, n 563 above, p.140.

⁸⁹⁵ *The Times*, 9th August 1929.

the art world”,⁸⁹⁶ thus alluding to critical opinion in order to give some credit to the works, but the Magistrate stated that it was “immaterial...whether they were works of art. The most beautiful picture in the universe might be obscene”.⁸⁹⁷ This statement reveals clearly the prevalent attitude within the courts, that whilst the existence of high art might be recognised, it was not an issue which could override that of obscenity.

As had happened in the *Well of Loneliness* trial, the Magistrate refused to admit evidence in the form of expert critical opinion that, according to the defence counsel, would have shown “that the pictures were serious paintings by a serious artist struggling to find expression seriously to that which was within him” and not “painted with the idea of titillating obscene-minded people”; only the latter being those envisaged by the framers of the OPA 1857 as falling within its remit.⁸⁹⁸ The magistrate held that such evidence could not be heard since it was not relevant to the case; but he did concede to making an order in accordance with the defendants’ suggestion, that only the books of reproductions be destroyed and the originals be returned to Lawrence or to their owners (upon the defendants undertaking not to exhibit them again).⁸⁹⁹ It is notable that although expert evidence was not admitted by the court, this was not because it was doubted that such evidence could establish literary merit, but rather because it was considered irrelevant to obscenity proceedings.

Fitzjames Stephen’s contention in 1877 as to the possible justification of obscenity on public interest grounds had not yet been successfully argued, and whilst it was held in *R v De Montalk* (1932) 23 Cr App R 182 that in certain circumstances, a person might be considered justified in publishing obscene books or exhibiting “disgusting objects” if such a publication or exhibition could be shown to be “for the public good, as being necessary or advantageous to religion or science, literature or art” this

⁸⁹⁶ Ibid.

⁸⁹⁷ *The Times*, 9th August 1929.

⁸⁹⁸ Ibid.

⁸⁹⁹ Ibid.

justification was held to be inapplicable to the defendant in this case.⁹⁰⁰ De Montalk was convicted at first instance and the decision was upheld on appeal; the Judge stating that “[a] man must not say he was a poet and be filthy. He has to obey the law just the same as ordinary citizens, and the sooner the highbrow school learns that, the better for the morality of the country.”⁹⁰¹ Clearly De Montalk’s *Here Lies John Penis* had exceeded the level of obscenity which the court was willing to accept before considering any public good defence, but the possibility of the two issues of literary or artistic merit and obscenity being considered together had now been acknowledged.

The Modernist era had by this stage completed the transformation which the art for art’s sake doctrine had started in terms of re-establishing and redefining the traditional relationship between art and literature and morality. Bell (1999) notes that the role of literary criticism developed particularly within this period and he attributes this development to “a belief in literature as a primordial constation of values not to be reached or grounded by other means”.⁹⁰² Furthermore, he states that “[t]he Arnoldian sense of literature as the modern substitute for religion was increasingly realised not, as the classicist Arnold had thought, as a source of transmitted wisdom, “the best that is known and thought in the world”, but rather as an active means of questioning and discovering fundamental values, truths, and understandings...A central philosophical feature of Modernism... [being] its claim for literature itself as a supreme and irreplaceable from of understanding”.⁹⁰³ Thus we arrive at the now commonly argued definition of high art as being that which causes us to question or to understand something more about our own humanity, without any need for reference to any higher truth or supernatural order. The reading of literature, or the viewing of a work of visual art, has thus become itself a moral good, within the newly defined terms of secular morality.

⁹⁰⁰ *R v De Montalk* (1932) 23 Cr App R 182_

⁹⁰¹ Robertson, n 825 above p.37

⁹⁰² Bell, n 64 above, p.28.

⁹⁰³ Bell, n 64 above, p.28.

The Second World War and its Aftermath

The Second World War caused the focus of those in authority to shift away from alleged obscenities and towards more pressing issues, and there were few prosecutions during this time. However, during the war the government funded musical performances and other artistic enterprises in order to boost the morale of the civilian population⁹⁰⁴ and after the war had ended, the Council for the Encouragement of Music and the Arts was formed and given financial support by the administration; this being notable as the first time in history that a British government has taken on “a formal and general responsibility for the arts”.⁹⁰⁵ As described in chapter three (p.95), the Council for the Encouragement of Music evolved during the 1940s into the Arts Council of Great Britain, which is now the devolved Arts Councils of England, Wales and Scotland. It is submitted that this formal adoption of the arts by government reveals that, whereas the dramatic changes in artistic practices which had occurred during the Modernist era had remained somewhat removed from the general public,⁹⁰⁶ the accompanying belief that exposure to and participation in the arts has a beneficial effect for individuals, communities and society at large had become increasingly accepted by the wider population.

As has already been stated, this idea had been present as far back as the 1830s and 1840s but ‘the arts’ as envisaged by their protagonists at this time differed significantly from those conceived to offer some public benefit a century later. Whereas the ‘moralising influence’ of works in the 1830s and 40s came from within a traditionally moral framework,⁹⁰⁷ whereby it was expected that the subject matter of the work or the manner in which it was portrayed would uphold the moral ‘good’ and offer some reproach to the morally ‘bad’, by the 1940s the reading or viewing of

⁹⁰⁴ Sawers, n 417 above, p.9.

⁹⁰⁵ Hewison, n 432 above, p. (xv)

⁹⁰⁶ Hobsbawm E, *Age of Extremes The Short Twentieth Century 1914-1991* (London, Abacus, 1995), p.181.

⁹⁰⁷ Lord Devlin affirms this view of morality being based upon Christian values until the latter 1800s. He states that “up until a century ago no one thought it worth distinguishing between religion and morals”. Devlin P, *The Enforcement of Morals*, (Oxford, Oxford University Press, 1965), p.10.

a work of literary or visual art was perceived in itself to be a moral good; offering as it did an opportunity to discover more about humanity and to hold certain aspects of it up to question.⁹⁰⁸ High art was that which prompted this type of response in its audience; not that which itself exerted some moralising influence. The remainder of this chapter follows the progression of the courts towards a total acceptance of this idea.

The Courts and the Notion of High Art as a Moral Good: A Lack of Consensus

It was not until the 1950s that the courts were again faced with cases which involved works which, whilst allegedly obscene, were arguably serious works of literature. Although the courts were beginning to accord with the view that high art could be for the public benefit despite the fact that it might be considered obscene, there remained a view which was strongly to the contrary, its concern based still upon a perceived need for the upholding of public moral standards. The lack of consensus in the courts' attitude to such issues is shown in the following discussion.

In July 1954 Foulds, a bookseller, was called before Swindon Magistrates to show cause why some 65 different works which had been seized from her shop should not be destroyed on the ground that they were obscene. Foulds failed to persuade the magistrates, and a destruction order was made. One of the works in question was *The Decameron* by Giovanni Boccaccio.⁹⁰⁹ With respect to this particular work, Foulds appealed to a higher court and on her behalf, counsel argued that there was very little in the book which was sexually explicit, and certainly much less than had been found in the modern works which had been destroyed. Counsel argued further that extracts from the works of "Juvenal, Aristotle, Swift, Defoe, Rabelais, Brantome and Chaucer" might be considered obscene but that the idea of prosecuting such "masterpieces" was nonsensical; it was for the public good that such works should be published, in order that "people now could form an estimate of their characters and of

⁹⁰⁸ See chapter one, p.10.

⁹⁰⁹ *The Times*, 16th September 1954. Other titles included *Corpse in the Boudoir* and *Foolish Virgin says No*".

the time in which they lived”.⁹¹⁰ These arguments were accepted by the Appeal Committee, who decided to allow the appeal after only five minutes deliberation.⁹¹¹

The Decameron was written in the fourteenth century and thus received the court’s protection as an established ‘classic’. A different approach was adopted in respect of a contemporary work in a trial which took place only days after the *The Decameron* decision when Messrs. Hutchinson and Co. were found guilty of publishing an obscene libel in the form of a novel by Vivian Connell entitled *September in Quinze*.⁹¹² Although defence counsel advised the court that the book had been published only after it had been submitted to “competent readers” and that its author had also written a best-seller entitled *The Chinese Room*, there was no further attempt to argue that the work could be justified upon the basis that it possessed literary merit. This was not a work which could be regarded as ‘Hollywell Street’ pornography, yet despite this the Recorder summed up the case to the jury by advising them that the Hicklin test was “designed to protect the weak rather than the strong” and whilst sex was a vital aspect of life, “the jury might think sex was something to be protected and indeed even sanctified as it was by the marriage ceremony”.⁹¹³ Thus the Recorder reveals his own concern for the upholding of conventional moral standards, and with literary standards only so far as they were in keeping with this tradition.

A case in the same year provides a contrast to the *September in Quinze* decision, particularly in the judge’s summing up.⁹¹⁴ The book involved in this case was *The Philanderer* by Stanley Kauffman; the central character of which is a married man who becomes involved in a number of adulterous affairs. Thus there was sufficient opportunity here for a focus upon moral values and the sanctity of marriage. However, Stable, J. advised the jury that “the verdict you will give is a matter of the utmost consequence”⁹¹⁵ not on the basis of the moral issues raised by the subject

⁹¹⁰ *The Times*, 16th September 1954

⁹¹¹ *Ibid.*

⁹¹² *The Times* 18th September 1954

⁹¹³ *Ibid.*

⁹¹⁴ *R v Martin Secker Warburg Ltd.* [1954] 2 All ER 683

⁹¹⁵ *R v Martin Secker Warburg Ltd.* [1954] 2 All ER 683, 684F

matter of the work but because of the importance of the verdict itself to publishers, to authors and to the community in general; Stable, J. seeing the jury's decision as having "a great bearing on where the line is drawn between liberty, that freedom to read and think...on the one hand, and license which is an affront to the society of which we are all members, on the other".⁹¹⁶ The focus of the summing up is upon literature and its importance to society; literature from the past offering the reader an insight into life as it once was,⁹¹⁷ and contemporary literature offering the reader "an understanding of how life is lived and how the human mind is working in those parts of the world which are not separated from us in point of time but are separated from us in point of space".⁹¹⁸ The jury was instructed that whereas "[t]he literature of the world from the earliest times...so far as we have it today...represents the sum total of human thought throughout the ages";⁹¹⁹ pornographic works "are not literature. They have got no message; they have got no inspiration; they have got no thought. They have got nothing"⁹²⁰ and, not surprisingly in light of the Judge's comments, the defendants were acquitted.

Also in 1954, publishers Werner Laurie were found guilty of publishing an obscene libel in the form of a novel entitled *Julia*, Arthur Baker was acquitted of the same charge in respect of McGraw's *The Man in Control*, and Heinemann were eventually acquitted of an obscene libel charge in respect of *The Image and the Search*, a novel which was described by defence counsel as "a serious portrayal of the vulnerability to evil of an ego-centred personality, and the disintegrating effects of sin on such a personality".⁹²¹ At the first trial of *The Image and the Search*, the jury were unable to agree upon a verdict, and this occurred again at the second trial, despite the direction of Mr Justice Devlin to the jury that "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

⁹¹⁶ *R v Martin Secker Warburg Ltd.* [1954] 2 All ER 683, 684F

⁹¹⁷ *R v Martin Secker Warburg Ltd.* [1954] 2 All ER 683, 686G

⁹¹⁸ *R v Martin Secker Warburg Ltd.* [1954] 2 All ER 683, 686H

⁹¹⁹ *R v Martin Secker Warburg Ltd.* [1954] 2 All ER 683, 688D

⁹²⁰ *R v Martin Secker Warburg Ltd.* [1954] 2 All ER 683, 688E-F

⁹²¹ *The Times*, 9th October 1954

of morality is guilty of obscene libel.”⁹²² The third trial resulted in a verdict of not guilty, only after the prosecution offered no evidence in support of their case. It is submitted that the outcome of this case, showing as it does an uncertainty as to how to approach the issue of obscenity and literature, provides a single illustration of that which had occurred more generally in respect of all of the cases considered during 1954 which are discussed above. Whilst it has been correctly stated that “[a]ll the books had serious literary pretensions all the publishers were...wholly respectable”,⁹²³ these factors were not sufficient grounds for securing a uniform approach from the courts.

The process of the court adapting to the new notion of art never reached a natural conclusion within the common law, since the legislature intervened in 1959 to remove the issue of obscene publications from its remit, under the OPA 1959. This, of course, meant that from 1959 onwards, in considering issues relating to obscenity, the courts were no longer strictly bound by common law precedents, although the repetition of the ‘deprave and corrupt’ test within the statute of course meant that the break was not complete. The remainder of this chapter considers the approach of the courts to high art following the implementation of this statute.

The Courts and High Art 1959-2001

As previous discussion has shown, the concept of visual art and literature underwent further dramatic changes throughout this postmodern period, with far greater significance being placed upon the reader or viewer’s perception of a work, and upon the artist’s own determination.⁹²⁴ However, as stated previously in this chapter (p.171), the removal of art and literature from any traditionally moral sphere had already taken place and the courts were gradually adjusting to this change. Following the implementation of the OPA 1959, the courts were required to consider specifically the notion that art could be obscene yet justified on its merits as being for

⁹²² Rolph CH (ed.), *The Trial of Lady Chatterley, R v Penguin Books Ltd*, (Privately Printed, 1961) p.14

⁹²³ Clark CDL, *Obscenity, the Law and Lady Chatterley - I* [1961] Crim L.R. 156, at 160.

⁹²⁴ Chapter one, pp.14-19.

the public good. They have had to do so at the same time as adjusting once more to new styles of art and literature.

The Obscene Publications Act 1959

One of the earliest cases to come before the courts after the implementation of the 1959 Act was that involving the prosecution of Penguin Books for their publication of D.H. Lawrence's *Lady Chatterley's Lover*.⁹²⁵ Lawrence had died some years earlier, indeed Penguin intended to publish the work to mark the thirtieth anniversary of his death,⁹²⁶ and those of his works which had been published in England and abroad had caused Lawrence to become highly respected as a novelist; the first defence witness describing him as being "generally recognised as one of the most important novelists of this century and one of the greatest novelists in any century";⁹²⁷ the second describing him as "among the six greatest, the five or six greatest writers in English literature of this century"⁹²⁸ and the third estimating Lawrence "among the younger people, since Hardy and Conrad, ...the greatest writer of fiction that we have ever had".⁹²⁹ Thus although the reputation of this version of Lawrence's work had not yet emerged,⁹³⁰ that of its author certainly had been established by the time the prosecution was brought. In light of this, it was going to be highly unlikely that the prosecution would be able to show that the book lacked literary merit, indeed the prosecution conceded from the outset that Lawrence was a "great writer" and that the work in question contained "some literary merit"⁹³¹, and this, together with the fact that the publishers in the case were very well-known and highly reputable,⁹³² caused commentators at the time to question the decision of the

⁹²⁵ [1961] Crim LR 176. A transcript of the trial is set out in Rolph, n 922 above.

⁹²⁶ Clark CDL, *Obscenity, the Law and Lady Chatterley - II* [1961] Crim L.R. 224.

⁹²⁷ This witness was Graham Hough, a Fellow of Christ's College Cambridge and author of a study of Lawrence's works; see Rolph n 922 above, pp.41-42. Also according to this witness, over 800 books had been written about Lawrence's works by this time.

⁹²⁸ Rolph, n 922 above, p.58.

⁹²⁹ Rolph, n 922 above, p.62.

⁹³⁰ Although the expurgated version of the novel had been available for some years.

⁹³¹ Rolph, n 922 above, p.18.

⁹³² Rolph, n 922 above, p.9.

D.P.P. to bring this as a test case.⁹³³ Clark (1961) asserted that “Treasury Counsel could scarcely have set themselves a more difficult task” than prosecuting this “publication by a company which is almost a national institution of a novel whose literary merit is incontrovertible”.⁹³⁴

Some 35 witnesses gave evidence in support of Penguin, and more were willing to give evidence if called.⁹³⁵ Whilst the witnesses were in agreement over Lawrence’s status as a great novelist, opinion as to the literary merit of *Lady Chatterley’s Lover* was more mixed. Dame Rebecca West believed that the novel had “great literary merit” although she qualified that statement to the effect that it was difficult to define literary merit and that it was Lawrence’s works taken “as a whole” which led her to this conclusion.⁹³⁶ Other witnesses saw *Lady Chatterley’s Lover* as a work which possessed literary merit, but which could not claim to be the best of Lawrence’s novels;⁹³⁷ Richard Hoggart, for example, placing it in “a high place; not the highest place” whilst considering it to be “an important and valuable work”.⁹³⁸ In the light of such evidence, together with the fact that the prosecution brought no witnesses to negative the section 4 defence, the jury returned a verdict of ‘Not Guilty’. Thus the test case had been brought and lost; and it may have seemed at the time that the OPA 1959 had proved itself successful in providing protection for literature,⁹³⁹ with particular assistance from the provision in the Act that allowed for the inclusion of expert evidence as to artistic, literary and other merits.⁹⁴⁰ Notably, the court had not considered it necessary for the work to be considered the most excellent example of Lawrence’s writing; but it is submitted that the substantial body of evidence given by expert witnesses in the trial placed the work as being an excellent example of a novel;

⁹³³ The prosecution described the case as such to the jury from the outset of the proceedings: Rolph, n 922 above, p.10.

⁹³⁴ Clark, n 926 above, p. 227.

⁹³⁵ Rolph, n 922 above, p.5.

⁹³⁶ Rolph, n 922 above, p.68.

⁹³⁷ A point which was acknowledged by Mr. Justice Byrne in his summing-up, see Rolph, n 922 above, p.234.

⁹³⁸ Rolph, n 922 above, p.75.

⁹³⁹ The preamble to the Act describes it as “An Act to amend the law relating to the law of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography”.

⁹⁴⁰ OPA 1959, s.4(2)

not least because of the reputation which Lawrence already enjoyed as a novelist. Thus high art was protected, despite the arguments which the prosecution put forward concerning the subject matter of the work; namely Lady Chatterley's adulterous relationship with Mellors, and its tendency to deprave and corrupt the reader.

Although the outcome of the case might have been seen as proof that the successful prosecution of serious literature for obscenity was at an end; such a view turned out to be somewhat premature. As Sutherland (1982) states, "[o]ptimists may have thought the victory for 'literature' decisively won in November 1960 with the liberation of *Lady Chatterley*. The forces of reaction were, however, tenacious and ingenious".⁹⁴¹ In the years which followed, the attitude of the courts towards high art, and towards works of a more prosaic nature on whose behalf it was argued that they were for the public good on account of their literary merit, or 'other objects of general concern',⁹⁴² was inconsistent and uncertain. No doubt to the horror of those members of the Herbert Committee who had instigated the changes in Obscenity law some 10 years earlier, in 1964 the publishers Mayflower were summonsed before a Magistrate and required to show good reason why a work entitled *Fanny Hill* should not be destroyed.⁹⁴³ *Fanny Hill* was written in the mid-1700s by John Cleland and because it included descriptions of rape, sodomy and various other sexual acts, it has been described as "the classic of English pornography".⁹⁴⁴ However, the nature of pornographic works had, of course, altered in the two hundred years between the writing of *Fanny Hill* and the 1964 publication of it, and thus the work has also been described as a "chaste (linguistically) erotic picaresque fiction".⁹⁴⁵ Hence Mayflower argued forcefully that the work should not be destroyed because of its literary and historical merit⁹⁴⁶ but despite these arguments, the Magistrate ordered that the book be destroyed.

⁹⁴¹ Sutherland J, *Offensive Literature Decensorship in Britain, 1960-1982*, (London, Junction Books, 1982) p.1.

⁹⁴² OPA 1959 s.4(1)

⁹⁴³ OPA 1959 s.3

⁹⁴⁴ Robertson, n 825 above, p.25.

⁹⁴⁵ Sutherland, n 941 above, p.1

⁹⁴⁶ Robertson, n 825 above, p. 96.

In the following year, a further case was brought under s.3 of the OPA 1959 in respect of *Cains Book* by Alexander Trocchi.⁹⁴⁷ The book describes the life of a New York drug addict, and in light of the appeal court's view that "the book high-lighted the favourable effects of drug-taking and, so far from condemning it, advocated it"⁹⁴⁸ the first instance decision of the Magistrate to order that the work be destroyed was upheld. This was in spite of evidence given in support of the defendants that the book had literary and sociological merit. If one were to seek to distinguish between literature and pornography, or "dirt for dirt's sake",⁹⁴⁹ then it is submitted that this work would fall into the former category, yet it was destroyed. By contrast, in 1968, the s.4 defence was argued successfully in respect of a magazine entitled *Nasty Tales*.⁹⁵⁰ Two years later the publishers of a comic called *Oz No.28 School Kids Issue*⁹⁵¹ were convicted at first instance of publishing an obscene publication, but this conviction was quashed on appeal due to the Judge's misdirection to the jury as to the definition of obscenity. Hence during this period both the application and misapplication of the new law resulted in the protection of works which were clearly not serious literature.

In 1968, the Court of Appeal upheld an appeal brought by publishers Calder and Boyars against the decision of the Central Criminal Court that they were guilty of publishing an obscene article contrary to section 2 (1) of the OPA 1959; namely a book entitled *Last Exit to Brooklyn* by Hubert Selby, Jnr.⁹⁵² The route by which this book came to be considered by the Court of Appeal reveals, it is submitted, the diversity of opinion which existed as to the operation of the still relatively new statute. *Last Exit to Brooklyn* had received favourable reviews from American critics and British critics had given a similar response.⁹⁵³ Yet in 1966, a private prosecution was brought under section 3 of the OPA 1959 and the three copies of the book which

⁹⁴⁷ *John Calder (Publications) Ltd. v Powell* [1965] 1 All ER 159

⁹⁴⁸ As per Lord Parker, CJ, in *John Calder (Publications) Ltd. v Powell* [1965] 1 All ER 159, 162E

⁹⁴⁹ A term adopted particularly by the defence counsel in *R v Penguin Books*: See Rolph, n 922 above, p.27.

⁹⁵⁰ *Wiggins v Field* [1968] Crim LR 503

⁹⁵¹ *R v Anderson* [1971] 3 All ER 1152

⁹⁵² *R v Calder & Boyars Ltd.* [1968] 3 All ER 644

⁹⁵³ As per Salmon LJ in *R v Calder & Boyars Ltd.* [1968] 3 All ER 644, 645-646.

had been seized were forfeited.⁹⁵⁴ Having been informed by the publishers that they intended to go on publishing the work, despite the forfeiture, the D.P.P. instituted proceedings under s.2 of the OPA 1959.⁹⁵⁵ The publishers were convicted before a jury at the Central Criminal Court, and an appeal was made to the Court of Appeal on the basis that the Judge's summing up in the trial was defective. This all had occurred despite the fact that "[n]oone has ever suggested that this is not a serious book or that the appellants did not genuinely believe that it ought to be published in the interests of literature"⁹⁵⁶ and despite the fact too that *Calder and Boyars* had tendered some 30 witnesses in support of their section 4 defence.⁹⁵⁷ In the Court of Appeal, it was decided that the Judge at first instance had failed to properly direct the jury as to the application of the section 4 defence and thus "[i]n effect he threw them in at the deep end of s. 4 and left them to sink or swim in its dark waters".⁹⁵⁸

Robertson (1979) cites the inclusion of the two stage test under the OPA 1959 as the reason for its "uncertain and unacceptable operation" in the two decades which followed its enactment.⁹⁵⁹ He points out that in the original recommendations made by the Society of Authors for statutory measures to protect literature, it was recommended that the issue of literary merit should be considered *within* the issue of obscenity, and that the 'public good' aspect of the defence was included by the government during the process of the bill.⁹⁶⁰ For Robertson, the two-stage test and the process of balancing the two issues is "a logical nonsense"⁹⁶¹ which is bound to confuse a jury: "the publication of this book is for the public good, although it will deprave and corrupt its readers' being a verdict any jury would be reluctant to deliver";⁹⁶² a view with which the writer agrees, as stated in the previous chapter.⁹⁶³ However, it can be argued that whilst there is certainly a logical problem in the

⁹⁵⁴ *R v Calder & Boyars Ltd.* [1968] 3 All ER 644, 646F.

⁹⁵⁵ *R v Calder & Boyars Ltd.* [1968] 3 All ER 644, 646G.

⁹⁵⁶ As per Salmon, LJ in *R v Calder & Boyars Ltd.* [1968] 3 All ER 644, 645I-646A.

⁹⁵⁷ *R v Calder & Boyars Ltd.* [1968] 3 All ER 644, 648I.

⁹⁵⁸ As per Salmon, LJ in *R v Calder & Boyars Ltd.* [1968] 3 All ER 644, 650B.

⁹⁵⁹ Robertson, n 825 above, p.163.

⁹⁶⁰ Robertson, n 825 above, p.162.

⁹⁶¹ Robertson, n 825 above, p.164.

⁹⁶² Robertson, n 825 above, p.165.

⁹⁶³ Chapter four, pp.137 and 142-143.

application of the s.4 defence, there is also a more fundamental disparity which causes the two aspects of the defence to conflict.

Conflicting Moralities

In the *Lady Chatterley* case, prosecution counsel, Griffith-Jones, gave dictionary definitions as to the meaning of the words 'deprave' and 'corrupt' and he described the former as meaning "to make morally bad, to pervert or corrupt morally" and the latter as meaning "[t]o render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin, to debase defile".⁹⁶⁴ It is submitted that the 'morality' referred to here is to be understood in the traditional sense of that word; it having been introduced as long ago as 1868 in the Hicklin case wherein the court applied the common law of obscene libel upon the premise that its role as *custodes morum* was to outlaw a publication which was clearly detrimental to public morals. By contrast, the section 4 defence is based upon a secular form of morality, which has for its focus the individual and the common good, without reference to any external higher truths or absolutes. The defence included in s.4 of the OPA 1959 is inherently contradictory because it seeks to join together these two different concepts of morality, which are fundamentally opposed to one another.

Had the s.4 defence allowed the issue of obscenity to be considered alongside that of artistic merit, without basing obscenity within a firmly Christian tradition, it would have been possible to weigh up the two factors based upon a secular morality which was, by this stage most relevant to works of art: it was, after all, almost one hundred years since the art for art's sake doctrine had separated art from any traditionally moral purpose, and the subsequent notion that the reading or viewing of high art had in itself some moral value, in that it caused the viewer/reader to focus upon and question his or own humanity (but not necessarily with reference to any external higher authority) and perhaps to change his or her behaviour as a result, was by this

⁹⁶⁴ Rolph, n 922 above, p.17.

time widely accepted. The framing of the legislation, which Robertson (1979) explains as being the result of the “influence of precedent trained to law rather than aesthetics”⁹⁶⁵ brings into conflict law and high art, since it seeks to merge within one statute two concepts of morality which are irreconcilable.

The End of the Conflict

The section 4 defence did, however, introduce a means by which juries could pay less attention to traditional concerns about the harmful effects of obscene literature or visual art, and focus upon the possible benefits that such works could bring to the community, and it is submitted that by the mid 1970s, the positive value of the arts had become so widely accepted, and the traditional view of morality so widely questioned, that it became highly unlikely that a serious work of art or literature would be successfully prosecuted under the OPA 1959. Section 4 enabled a work of art to be judged according to its own standards and did not require compliance with any fixed moral code.

The case which is considered to mark the end of all prosecutions of literature came in 1976, when the publishers of a book entitled *Inside Linda Lovelace* were acquitted of a charge brought against them under the OPA 1959. Linda Lovelace was the star of an American pornographic film entitled *Deep Throat*, and the book purports to have been written by the actress herself in the form of a series of detailed confessions concerning her sexual exploits. The publishers were represented in court by highly respected counsel; John Mortimer and Geoffrey Robertson, who produced a number of expert witnesses who testified in support of a s.4 defence in this case. Sutherland (1982) describes how these witnesses claimed variously that the book was useful to couples, to women and to society in general in that it asserted a liberated view of sexuality, and that it compared favourably with other works.⁹⁶⁶ In his summing up, Rigg, J. stated: “If this book is not obscene within the definition of the Act it might

⁹⁶⁵ Robertson, n 825 above, p.162.

⁹⁶⁶ Sutherland, n 941 above, p.139.

well be difficult to imagine anything that would fall into that category”⁹⁶⁷ and this certainly proved to be the case in regard to the written word; the police and the D.P.P. taking the decision by the jury to acquit in this case as a strong indication that prosecutions of a similar nature were not likely to succeed.⁹⁶⁸ Whereas in 1868, Cockburn C.J. had been able to state that the publication of an obscene libel was “wrong, legally and morally”⁹⁶⁹ and to take for granted that the application of the law would be equivalent to the imposition of a fixed moral standard, this was no longer possible.

The fact that prosecutions are no longer instituted under the OPA 1959 in respect of written works means that even those works which provoke a response of outrage or concern from the public are not brought before the courts; a recent example being a novel written by Amy Homes, entitled *The End of Alice*. The novel describes the sexual abuse of a child, and for this reason the National Society for the Prevention of Cruelty to Children protested against the publication of it⁹⁷⁰ and booksellers WH Smith refused to stock it.⁹⁷¹ Despite these and other objections, such as one expressing the view that it was “vital that material normalising sexual abuse is not accepted as the legitimate currency of society”⁹⁷² no prosecution was brought in respect of these works under the OPA 1959. Concerns have also been expressed in Parliament concerning the failure to prosecute books such as *Juliette*⁹⁷³ and *Under the Rooftops of Paris*,⁹⁷⁴ both of which include descriptions of child abuse. Likewise, the OPA has not been used as a basis for prosecuting visual works of art in the latter decades of the twentieth century; despite the fact that as Kearns (2000) points out, there has been considerable public protest⁹⁷⁵ over some of the “arguably charmless

⁹⁶⁷ Cited in Sutherland, n 941 above, p.139. See also Report of Williams Committee 1979, n 718 above, para 4.2

⁹⁶⁸ Report of Williams Committee 1979, n 718 above, p.35.

⁹⁶⁹ *R v Hicklin* (1868) 3 L.R. Q.B. 360, 372

⁹⁷⁰ Rayner J, “A triumph of hype over expectation”, *The Observer* 2nd November 1997, Features/Review p.1

⁹⁷¹ Ibid.

⁹⁷² Letter from C Natzler to the Editor, *The Guardian* 30th October 1997, p.20

⁹⁷³ HC Vol 224 col 160, May 4th 1993

⁹⁷⁴ HC Vol 163 col 1370, December 15th 1989

⁹⁷⁵ Julius recalls how the public “recoiled, whilst attending in record numbers”: Julius A ‘Art Crimes’, in Freeman M & Lewis A, *Law and Literature: Current legal Issues 1999* Vol.2 (New York, Oxford University Press, 1999), 499-532, at 500.

exhibits”⁹⁷⁶ in exhibitions such as *Sensation* (as described in chapter two, p.51 above).

Thus it can be stated that the OPA 1959 has operated to protect serious works of art and literature to the extent that such works are no longer even brought before the courts in order for their literary or artistic merit to be assessed, and that it is not in practice only high art which has been protected, but *any* work which may claim to possess *any* artistic or literary merit.⁹⁷⁷

Prosecutions under the Common Law

Despite the fact that prosecutions have not been instituted against the publishers or creators of artistic works under the OPA 1959 in recent years, the courts have been required to consider the application of other statutes in relation to works of art, as well as administering the common law in this regard. In 1961, Lord Hodson took the opportunity to assert that “the courts have never abandoned their function as *custodes morum*”⁹⁷⁸ when the publisher of the *Ladies Directory* (a book containing contact details of various prostitutes and photographs of nude female figures)⁹⁷⁹ was charged with the common law offence of conspiracy to corrupt public morals. Despite the dissension of Lord Reid in the case, who feared that the resurrection of an offence which had its basis in the eighteenth century would cause the law to become uncertain, the conviction by jury at first instance was upheld on appeal, and the House of Lords subsequently confirmed in *Knulier v DPP* [1972] 2 All ER 898 that a charge of conspiring to corrupt public morals could be brought in the appropriate circumstances. Thus Gibson and Sylverie came to be prosecuted for this same offence in the ‘foetus earrings’ case of 1991, which will be discussed further below.

⁹⁷⁶ Kearns, P ‘Sensational Art and Legal Restraint’, (2000) NLJ Vol.150 No.6962, pp.1776-7, at p.1777.

⁹⁷⁷ Kearns, n 75 above, p.13

⁹⁷⁸ *Shaw v DPP* [1961] All ER 446, 468B

⁹⁷⁹ *Shaw v DPP* [1961] All ER 446

In regard to literature, alternative routes were taken to prosecute the publishers of works which caused particular offence to individuals, or groups of individuals. An early example is the trial which ensued from a private action brought by Mary Whitehouse against the editors of *Gay News* magazine.⁹⁸⁰ Up until the time when the action was brought (1977), there had been no cases involving a charge of blasphemous libel for over fifty years and it is submitted that Whitehouse's reliance upon the common law confirms the view expressed earlier, that the OPA 1959 was not by this stage considered a viable option for obtaining a conviction against the written word, due to the court's broad application of the s.4 defence. The publication which caused such offence was a poem written by Professor James Kirkup entitled *The Love That Dares To Speak Its Name*, which was described in the House of Lords as containing details of "explicit acts of sodomy and fellatio with the body of Christ immediately after his death and to ascribe to him during his lifetime promiscuous homosexual practices with the Apostles and with other men".⁹⁸¹ Had the prosecution been brought under the OPA 1959, then it is likely that witnesses for the defence would have successfully argued that its publication was justified as being for the public good on literary grounds.⁹⁸² This was not open to the defence in this case as the prosecution was brought under the common law. Thus Whitehouse used a 'traditionally moral' and comparatively archaic cause of action to secure a conviction (albeit by dissent in the House of Lords) in respect of a work which offended against a conventional, moral viewpoint. The refusal of the courts in 1988 to allow a similar action to be taken by Muslim applicants in respect of Rushdie's *Satanic Verses*⁹⁸³ indicates further how strictly the courts adhere, where precedent allows, to a traditionally Christian viewpoint, despite the increasingly pluralistic nature of English society.

The case of *R v Gibson and Sylverie* [1990] 3 WLR 595 (referred to above) provides a more recent example of a prosecution brought using this time the common law offence of conspiring to corrupt public morals, as established by *Shaw v DPP* [1961]

⁹⁸⁰ *R v Lemon and Gay News Ltd.* [1979] 1 All ER 898

⁹⁸¹ As per Lord Diplock, *R v Lemon and Gay News Ltd.* [1979] 1 All ER 898, 900g

⁹⁸² OPA 1959 s.4(1)

⁹⁸³ *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 All ER 306.

C.L.Y 1963 and *Kneller v D.P.P* [1973] AC 435. Sylverie ran the “Young Unknowns Gallery” in London and exhibited there an item which was the work of Gibson, entitled “Human Earrings”. This was a pair of earrings, each of which contained of a human foetus of about three to four months gestation. When the case came before the Crown Court, it was argued that the intention of the OPA 1959 was to defend artistic works and to limit the defence of artistic works in cases outside of the scope of the OPA 1959 would mean that the intention of the Act could not be fulfilled.⁹⁸⁴ This argument was rejected by the Court of Appeal, Lord Lane going so far as to state that in this type of case “it is unlikely that a defence of public good could possibly arise”.⁹⁸⁵ Also in this case, the appellants claimed that their intention had been to create and exhibit a work of visual art, and not to corrupt public morality, but this argument was rejected. This aspect of the decision has caused Kearns (1998) to argue that “[t]here is little hope of a fair defence for an artist and art gallery curator on a charge of outraging public decency if no provision is made for the distinctive ontology of art. If the mens rea requirement is as narrow as decided in Gibson...(cognate with that for the offence of obscene libel and amounting to strict liability), the availability of a defence accommodating the specialised nature of artistic intent is essential”.⁹⁸⁶

A similar argument was put forward by Julius (1998) following the conviction of sculptor Anthony-Noel Kelly for stealing, with the assistance of another party, numerous body parts from the Royal College of Surgeons.⁹⁸⁷ Kelly had privileged access to these anatomical specimens as he was an artist and had gained permission to draw them. He had obtained possession of them in order to take casts from them. Whilst it was acknowledged by the court that Kelly was “primarily motivated by what he regarded as artistic reasons”⁹⁸⁸ this was not considered a sufficient reason for acquitting him, nor for suspending the prison sentence which the court imposed.⁹⁸⁹ Julius criticises the prosecutor’s argument that the case was “not about art, nor even

⁹⁸⁴ *R v Gibson and Sylverie* [1990] 3 WLR 595, 599.

⁹⁸⁵ *R v Gibson and Sylverie* [1990] 3 WLR 595, 600E

⁹⁸⁶ Kearns, n 75 above, p.33.

⁹⁸⁷ *The Times*, April 4th 1998, p.22a.

⁹⁸⁸ As per Rose LJ, *R v Kelly* [1999] 2 WLR 384, 394F

⁹⁸⁹ *R v Kelly* [1999] 2 WLR 384, 395D

about outraging public decency. It was just...about theft”⁹⁹⁰ on the basis that Kelly was an artist, and as such “claimed the privilege and status”⁹⁹¹ which attached to that title. As stated in chapter three (pp.101-104), the writer considers that arguments for the elevation of artistic intent above the law which applies to all other non-artistic acts or works, greatly over-emphasise the significance of art in contemporary society, and thus the writer does not accord with the views put forward by Kearns and Julius in this regard.

Prosecutions under Statute Law

Of course, it is not only under the common law that no equivalent of the s.4 defence is allowed, but also under alternative statutes such as the Metropolitan Police Act 1839⁹⁹² which was used (unsuccessfully) in 1970 as the basis for prosecuting a London gallery which was exhibiting the art work of John Lennon. The exhibition work was considered by some to be indecent and, the prosecution argued, it was ‘to the annoyance of passengers’ who could view it from outside.⁹⁹³ Statutes such as this one, which were introduced to prohibit indecent or obscene prints or books being offered for sale, sent by post or otherwise publicly displayed, imposed restrictions upon such articles which were more severe than those included in the OPA 1857 (and subsequently the OPA 1959); since they included within their remit works which were indecent as well as those considered to be obscene. This inconsistency has caused certain legislation to be challenged in the twentieth century as being contrary to Article 30 of the Treaty of Rome.⁹⁹⁴ The forfeiture provisions contained in the Customs Consolidation Act (“CCA 1876”)⁹⁹⁵ were challenged when a number of life-sized rubber dolls whose owners had hoped to import them were seized and refused entry into the United Kingdom (“UK”). It was argued successfully that since the dolls were indecent rather than obscene articles, their sale (although not their public

⁹⁹⁰ *The Times* April 4th 1998, p.22a

⁹⁹¹ *Ibid.*

⁹⁹² Metropolitan Police Act 1839, (2 & 3 Vict.) c.47, s 54 (12).

⁹⁹³ Robertson, n 825 above, p.201.

⁹⁹⁴ However, where articles are obscene within the meaning of the OPA 1959, a prohibition can be justified on grounds of public morality under Article 36 of the same treaty. See *Wright v Commissioners of Customs and Excise* [1999] 1 Cr.App.R. 69

⁹⁹⁵ (39 & 40 Vict.) c.36.

display or their posting) would have been legal in the UK and therefore these imports were being discriminated against.⁹⁹⁶

As stated in chapter four (p.145), the Protection of Children Act 1978 (“PCA 1978”) makes it an offence to take, show, distribute or have in one’s possession “any indecent photograph of a child”⁹⁹⁷ and contains no artistic merit defence. It has been used very recently by the police as grounds for requiring that certain photographs be removed from the “I am a camera” exhibition at the Saatchi gallery, and that all copies of the book which accompanies the exhibition be removed from sale.⁹⁹⁸ The photographs in question depict two children naked and were taken by their mother Tierney Gearon. Gearon describes the photographs as “incredibly innocent and totally unsexual”⁹⁹⁹ and she states: “Of course, there is a place for censorship in our society, and I find it amazing the amount that the authorities let slip by. But this is nothing compared to that. This is art”.¹⁰⁰⁰ Since these actions were taken prior to proceedings being instituted, the case does not fall strictly within the terms of this chapter’s discussion. However, the case is cited here as an indication that the police have sufficient faith in this statutory provision, lacking as it does any artistic merit defence, to take positive action on the basis that a court would be likely to convict. The writer’s own view is that the police action reflects the current general concern for the suppression of child pornography but that the concern was misplaced in this instance.

The evidence shows that the cases which have been brought under the common law, or under alternative statutes, since the OPA 1959 have allowed the courts to avoid questions of literary or artistic merit, and have reverted the focus back to a concern for upholding public morality. Where the option of judging an artistic work upon the basis of its own ‘distinctive ontology’ has been removed, the courts have once

⁹⁹⁶ *Connegate Ltd v Customs and Excise Commissioners* [1987] QB 254.

⁹⁹⁷ PCA 1978 s.1.

⁹⁹⁸ Travis, A, “Police obscenity squad raid Saatchi gallery”, *The Guardian*, March 10th, 2001, p.1.

⁹⁹⁹ Gearon, T, “Where is the sex?” *The Guardian*, March 13th, 2001, G2 p.2.

¹⁰⁰⁰ *Ibid.*

more shown themselves to be willing to enforce the law against them.

Conclusion

This chapter has revealed throughout a constant shifting of emphasis not only in the courts' approach to high art, but also in the concept of high art itself and in those concepts which the writer has termed conventional or traditional morality and its secular counterpart. Whereas at the beginning of the discussion, the merits of the work in question were secondary to the primary issue before the court, gradually attempts were made to submit evidence to the court of the merits of the prosecuted work as compared to others where issues of morality were at stake. Such arguments only became accepted in theory from the 1930s (DeMontalk's case)¹⁰⁰¹ and in practice following the implementation of the OPA 1959.

The courts were required to respond to the rapidly changing nature of visual art and literature by the application of fixed laws and precedents. More particularly, the elevation in status of art and literature throughout the period from being broadly functional and moral in the traditional sense, to being amoral and without didactic purpose in any sense, to being in itself perceived as a moral good in the secular sense (offering insight into the nature of humanity) has conflicted with the courts' application of the law which, in respect of the common law at least, has its "roots in Christianity".¹⁰⁰² The s.4 defence included in the OPA 1959 elevated the status of the arts within the law but retained aspects of traditional morality in its 'tendency to deprave and corrupt' test in s.1. Hence the continued divergence of opinions in cases which closely followed the Act. However, by the 1970s, the courts had adopted so broad an approach to the s.4 defence that it was not only works of particular merit which were secured protection under it. Hence it turned out not only to be Lady Chatterley whom the courts protected from censorship under the OPA 1959 but Linda Lovelace too. However, a further 'shift' is evidenced by the fact that when the courts have been required in recent years to consider the application of the common

¹⁰⁰¹ *R v De Montalk* (1932) 23 Cr.App.R. 182

¹⁰⁰² As per Lord Hodson, *Shaw v DPP* [1961] 2 All ER 446, 468H.

law or legislation other than the OPA 1959 in relation to works of literary or visual art, they have reverted to a more conventional approach, resulting in the successful prosecution of works such as Kirkup's *The Love That Dares To Speak Its Name* and Gibson's *Human Earrings*.

Notable in all of the cases discussed in this chapter is the lack of any strong argument against censorship or conviction based upon the artist's or author's common law right to free speech or expression. This is a matter which is discussed in the following chapter, where a comparison is drawn between the application of the free speech principle in the cases discussed in this chapter and those which, by contrast, have involved conflicting public interests and/or journalistic or political expression.

Chapter Six

High Art and the Human Rights Act 1998

Introduction

The primary focus of this chapter is the Human Rights Act 1998 (“HRA”).¹⁰⁰³ This Act is highly significant to this thesis since it brings within domestic law parts of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,¹⁰⁰⁴ more commonly referred to as the European Convention on Human Rights (“ECHR”), included within which is Article 10, the right to freedom of expression.¹⁰⁰⁵ However, prior to entering into a full discussion of the likely effects of the HRA on high art, this chapter will briefly consider international treaties other than the ECHR which also have some relevance to this thesis’ area of study.

Whilst acknowledging that the HRA is so new that its effects can be matters only for conjecture at the time of writing, the aim of this chapter is to consider the likely impact of the HRA upon the English legal system’s approach to high art as it has thus far been described. Arguments in favour of the artist or author’s right to freedom of expression were conspicuous only by virtue of their absence in the previous chapter’s discussion of the courts’ approach to high art. How significant then is this new enforced merger between freedom of expression and English law relating to the publication of works of literary or visual art? Is it likely that the HRA will result in

¹⁰⁰³ 1998, c.42. The Act came into force on 1st October 2000.

¹⁰⁰⁴ The HRA includes Articles 2 to 12 and Article 14 of the ECHR; Articles 1 to 3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the ECHR. (HRA s.1 and Sch.1)

¹⁰⁰⁵ Article 10 states:

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regard less of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or as are prescribed penalties by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

increased protection for high art? Or will the impact of the act be limited in this regard due to a continued emphasis upon the need to protect public morality?

During the passage of the Human Rights Bill through the House of Lords, the Lord Chancellor reminded the House that the UK has been bound to observe the rights and principles enshrined in the ECHR for fifty years; hence the HRA “does not create new human rights. It does not take any existing human rights away. It provides better and easier access to rights which already exist”;¹⁰⁰⁶ it merely brings them home.¹⁰⁰⁷ Whilst this is true, the HRA has also been described as “the most important piece of constitutional legislation in Britain for many years”¹⁰⁰⁸ which “makes a quantum leap into a new legal culture of foundational rights and freedoms”.¹⁰⁰⁹ This is due to the fact that although no new rights are created, the nature of these rights is fundamentally changed. Whereas formerly certain rights were protected “only in the traditional constitutional manner: citizens could do anything the law did not forbid”,¹⁰¹⁰ citizens are now “able to exercise positive rights, circumscribed by specified exceptions”.¹⁰¹¹

Furthermore, English courts will for the first time have the opportunity of determining the extent of such rights and they will enjoy considerable latitude in doing so under the terms of the HRA: the Act requiring only that the courts “take into account”¹⁰¹² any relevant European decision when deciding an issue before them. As Betten (1999) points out, this means a relevant decision “can be dismissed after having been taken into account”,¹⁰¹³ thus allowing English judges to “make a distinctively British contribution to the development of the jurisprudence of human

¹⁰⁰⁶ The Lord Chancellor HL, Vol 585, col 755, February 5th 1998

¹⁰⁰⁷ A fact which the government were keen to stress in the White Paper which preceded the Human Rights Bill, , *Rights Brought Home: The Human Rights Bill* Cm 3782 (October 1997).

¹⁰⁰⁸ Wadham J & H Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (London, Blackstone Press, 1999), p.xi.

¹⁰⁰⁹ Wade Sir W, “Opinion: Human Rights and the Judiciary” [1998] EHRLR Issue 5 520, at 532.

¹⁰¹⁰ Fenwick H & Phillipson G, “Public Protest, the HRA and Judicial Responses to Political Expression” [2000] PL Winter 627.

¹⁰¹¹ Ibid.

¹⁰¹² HRA s.2(1).

¹⁰¹³ Betten L (ed.), *The Human Rights Act 1998, What It Means*, (The Hague, Martinus Nijhoff Publishers, 1999), p.2.

rights in Europe”.¹⁰¹⁴ Robertson (2000) argues that the extent to which the judiciary will make such a contribution depends upon “whether the courts apply the new act in the spirit of John Wilkes and Tom Paine, or whether it is interpreted as just another European convention”¹⁰¹⁵. The approach which the judiciary is likely to take will be assessed in this chapter by reference to English and European case law, and to statements made by the English judiciary in contexts other than the courts.

Section 1: High Art and International Accountability

Although relevant international agreements in the early decades of the twentieth century focused upon the collective desire of the contracting nations to suppress obscene publications (as evidenced by international agreements for the suppression of such materials publications in 1910 and 1923)¹⁰¹⁶ agreements entered into in the later decades of the twentieth century exhibit an enhanced collective concern for the protection of fundamental rights and freedoms, primarily in response to the atrocities experienced in the Second World War.¹⁰¹⁷ Whilst initial concerns focused upon the need to preserve international peace and security, there was also an expressed aim “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women”¹⁰¹⁸ on a universal level. As Robertson and Merrills (1993) state, this indicates not only a concern to prevent further war, but also an acknowledgement of its underlying causes.¹⁰¹⁹

The concern to protect fundamental human rights, as evidenced by the *Universal Declaration on Human Rights* 1948 (“UDHR”) has been maintained in further

¹⁰¹⁴ *Rights Brought Home: The Human Rights Bill* Cm 3782 (October 1997), p.6.

¹⁰¹⁵ Robertson G, “Britain’s Champions of Liberty”, *The Guardian*, October 2nd 2000, p.18.

¹⁰¹⁶ *International Agreement for the Suppression of Obscene Publications* 1910; T.S.11, Cd 5657 (1911) and *International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*, Cmd 2575 (1923)

¹⁰¹⁷ Craven MCR, *The International Covenant on Economic, Social, and Cultural Rights* (Oxford, Clarendon Press, 1995), p.6. Nickel JW, *Making Sense of Human Rights Philosophical reflections on the Universal Declaration on Human Rights* (Los Angeles and London, University of California Press, 1987), pp.1-2.

¹⁰¹⁸ Preamble to the *Charter of the United Nations*, 1945.

¹⁰¹⁹ Robertson AH & JG Merrills, *Human Rights in Europe* (Manchester, Manchester University Press, 3rd ed, 1993), p.2.

treaties and declarations¹⁰²⁰ and has increased in scope to include economic, political and social interests, as evidenced by the International Covenant on Civil and Political Rights 1966¹⁰²¹ and the International Covenant on Economic, Social, and Cultural Rights of 1966¹⁰²² (both of which came into force in 1976).¹⁰²³ Within Europe, the ECHR came into force in 1953, offering protection for civil and political rights. Social and economic rights were protected later under the *European Social Charter* of 1961¹⁰²⁴ (which came into force in 1965)¹⁰²⁵ and economic integration came in the form of the 1957 *Treaty of Rome* which established the European Economic Community (“EEC”)¹⁰²⁶ of which the UK became a member 1973.¹⁰²⁷

So much for covenants, declarations and treaties. What is their bearing upon high art? It is submitted that such treaties are relevant to high art in two ways: Specifically, as referred to in chapter 5,¹⁰²⁸ the UK’s obligations under Article 30 of the EC Treaty of 1972 have directly effected the application of domestic customs legislation regarding the import of indecent materials. Also, the ECHR has had a direct impact upon artistic expression in the UK, as will be discussed further below. The ECHR has also indirectly affected English law to some extent via the laws of the EU, some of which directly bind the UK and all of which are intended to be compatible with the principles enshrined in the ECHR.¹⁰²⁹ Generally, the more recent agreements exhibit an increasing international concern for the protection of individual

¹⁰²⁰ De Blois M, “The Foundation of Human Rights A Christian Perspective”, in Beaumont PR (ed.) *Christian Perspectives on Human Rights and Legal Philosophy*, (Carlisle, Paternoster Press, 1998) pp.7-29, at p.13. The UDHR is expressly referred to in the preamble to the ECHR.

¹⁰²¹ UKTS 6 (1977), Cmnd 6702; 999 UNTS 171.

¹⁰²² UKTS 6 (1977), Cmnd 6702; 999 UNTS 3.

¹⁰²³ Craven MCR, *The International Covenant on Economic, Social and Cultural Rights* (Oxford, Clarendon Press, 1995) p.1.

¹⁰²⁴ UKTS 38 (1965), Cmnd 2643; 529 UNTS 89.

¹⁰²⁵ Bailey SH, DJ Harris & BL Jones, *Civil Liberties Cases and Materials*, (London, Butterworths, 4th ed, 1995) p.739.

¹⁰²⁶ The word “Economic” was removed from this title by the Treaty on European Union in 1991 (hence “EEC becomes EC”).

¹⁰²⁷ Kent P, *Law of the European Union*, (London, Pitman, 2nd ed, 1996) pp.4-5.

¹⁰²⁸ At p.194

¹⁰²⁹ Farran S, *The UK Before the European Court of Human Rights, Case Law and Commentary*, (London, Blackstone Press, 1996), p.4. See also Grief N, “The Domestic impact of the European Convention on Human Rights as mediated through Community Law”, [1991] PL 555, and The Rt.Hon. Lord Browne-Wilkinson, “The Infiltration of a Bill of Rights”, [1992] PL 397.

rights and freedoms (one such freedom being the right to free expression¹⁰³⁰) together with an increase in the number of freedoms protected. This is shown by the recent publication of the *Charter of Fundamental Rights*¹⁰³¹ by the European Union, of which the UK is a member. The Charter is at present a political declaration, with no legally binding force upon the member states¹⁰³² (although the European Commission have expressed the view that it will be incorporated “sooner or later” into existing treaties¹⁰³³) and it draws expressly upon existing treaties and declarations in its drafting. Hence it claims to create no new rights; a fact which has caused commentators to suggest that the EU is following the process first adopted by the UK, in ‘bringing rights home’.¹⁰³⁴ Notably, however, the Charter makes an express reference to freedom of the Arts, stating in Article 13 that “[t]he arts and scientific research shall be free of constraint”. Whilst it is somewhat minimalist, the reference is arguably a sign of increased recognition of the application of the free speech principle specifically to artistic expression; something which this thesis considers necessary in the light of existing English and European case law which will be discussed further below.

¹⁰³⁰ This is not only included in the ECHR but also in the ICCPR. Article 19(2) states; “everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice”. There is no right to petition the Human Rights Committee on the basis of the ICCPR, since the UK has not opted to allow this. See Bailey et al, n 1025 above, p.739

¹⁰³¹ *European Charter of Fundamental Rights* (2000). See [Http://europa.eu.int](http://europa.eu.int).

¹⁰³² A fact which the UK Europe minister was keen to stress; he is reported as stating that the Charter has no more legal validity than the Beano comic. See Oakley R, “EU Ministers wrangle over Rights Charter”, October 13th 2000, <http://europe.cnn.com>

¹⁰³³ <http://europa.eu.int>

¹⁰³⁴ Fredman S, C McCrudden and Freedland M, “An EU Charter of Fundamental Rights”, [2000] PL Summer 178-186.

Section 2: The Likely Effects of the Human Rights Act 1998 upon High Art

Turning the Free Speech Principle into a Right to Free Expression

Paine (1792) in his *Rights of Man*, drew a distinction between natural rights, as those being afforded to every individual from birth by virtue of their humanity, and civil rights, which humans may assume in the interests of society.¹⁰³⁵ Speech, in Paine's view, is a natural right which is always retained.¹⁰³⁶ Jones (1994) describes how "[i]n this tradition, natural rights were conceived as rights of the most fundamental moral importance. They represented the basic entitlements of all human beings and the first obligation of governments was to ensure that the natural rights of its citizens were respected".¹⁰³⁷

The modern term 'human right' has evolved from this earlier doctrine¹⁰³⁸ and the term is used therefore, in this thesis, to refer to an inalienable human right "inherent to people by virtue of their being human"¹⁰³⁹ and to which all are entitled, regardless of whether or not such a right is upheld or acknowledged by a society's governing body. Freedden (1991) defines a human right as "a conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is intended to serve as a protective capsule for those attributes; and that appeals for deliberate action to ensure such protection".¹⁰⁴⁰ It is submitted that the English legal system has, until the implementation of the HRA 1998, failed to take the deliberate action necessary to protect its citizens' fundamental or human right to free expression.

Despite the fact that the earlier years of this thesis' period of study witnessed the

¹⁰³⁵ Paine, n 262 above, pp.66-8.

¹⁰³⁶ Paine, n 262 above, p.90.

¹⁰³⁷ Jones P, *Rights*, (Basingstoke, Macmillan Press, 1994), p.72.

¹⁰³⁸ Ibid.

¹⁰³⁹ Shorts E and C de Than, *Civil Liberties*, (London, Sweet & Maxwell, 1998), pp.12-13.

¹⁰⁴⁰ Freedden M, *Rights*, (Milton Keynes, Open University Press, 1991), p.7.

publication and widespread dissemination¹⁰⁴¹ of works such as Paine's *Rights of Man* (1792) and later Mill's *On Liberty* (1859),¹⁰⁴² the former describing "the unrestrained communication of thoughts and opinions" as "one of the most precious rights of man"¹⁰⁴³ and the latter stating that "the appropriate region of human liberty...comprises, first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological",¹⁰⁴⁴ such notions were not readily accepted by the English legal system.¹⁰⁴⁵ Commenting upon the state of the law as it existed in 1885, Dicey maintained that whilst other nations might have believed that in England, freedom of discussion and freedom of the press were fundamental doctrines of the law, "this notion...is essentially false, and conceals...the real attitude of English law...As every lawyer knows, the phrases "freedom of discussion", or "liberty of the press" are rarely found in any part of the statute-book nor among the maxims of the common law. As terms of art they are indeed quite unknown to our courts."¹⁰⁴⁶

Even by the middle of the twentieth century, the nature of freedom of expression under English law was described in the following terms: "A man may say what he pleases provided he does not offend against the laws relating to treason, sedition, libel, obscenity, blasphemy, perjury, official secrets"¹⁰⁴⁷ and as recently as 1993 it

¹⁰⁴¹ Palley C, *The United Kingdom and Human Rights*, The Hamlyn Lectures Forty-Second Series, (London, Sweet & Maxwell, 1991) p.65. See also O'Flinn P, "'Beware of Reverence': writing and radicalism in the 1970s", in Lucas J (ed.) *Writing and Radicalism* (London and New York, Longman, 1996), pp.84-101, at p.87.

¹⁰⁴² Described as "the most celebrated defence of individual freedom in the English language" in Jones, n 1037 above, p.129.

¹⁰⁴³ Paine, n 262 above, p.111. (The statement is taken from a translation of the French Declaration of the Rights of Man). See also O'Flinn P, "'Beware of reverence': writing and radicalism in the 1790s", in Lucas J (ed.) *Writing and Radicalism* (London and New York, Longman, 1996), pp.84-101, at p.89.

¹⁰⁴⁴ Mill JS, *On Liberty*, (ed. CV Shields), (Indianapolis & New York, The Bobbs-Merrill Co., 1956) (Orig. published 1859), p.16.

¹⁰⁴⁵ Holdsworth W, *A History of the English Law*, Volume XIII (London, Methuen & Co., 1938), pp.17-18

¹⁰⁴⁶ Dicey AV, *Introduction to the Study of the Law of the Constitution*, (London, Macmillan & Co., 10th ed, 1964) (1st pub. 1885), p.239

¹⁰⁴⁷ Jennings I, *The Law and the Constitution*, (London, University of London Press, 5th ed, 1959), p.263.

was stated that “Liberty in Britain is a state of mind rather than a set of legal rules”.¹⁰⁴⁸ As stated in the introduction to this chapter, this is due to the fact that prior to the HRA there existed no positive, tangible legal right to free speech under English law, but merely a residual freedom to act in a manner which was not proscribed by law.¹⁰⁴⁹ Hence prior to the enactment of the HRA, freedom of speech or expression could be described most accurately as a ‘liberty’ or ‘principle’ rather than as a ‘right’.¹⁰⁵⁰

Boyle (1982), whilst he acknowledges that there is no right to free expression under English law in the “strong” sense in which it exists under written Constitutions, asserts that yet “there is a weaker sense in which a right of freedom of expression does exist and where it is not merely residual in character”.¹⁰⁵¹ Boyle bases this view on the fact that freedom of expression has been increasingly taken into account as a public interest by the judiciary and balanced against some other principle or interest which arises in a given case.¹⁰⁵² Boyle places particular emphasis upon the case of the *Attorney-General v British Broadcasting Corporation* [1980] 3 W.L.R. 109 in drawing his conclusions. The case concerned an attempt by the Attorney-General to restrain the British Broadcasting Corporation (“the BBC”) from broadcasting a television programme, on the ground that to air the programme would amount to a contempt of court. The phraseology used in the House of Lords certainly indicates a shift in the state of the law which commentators such as Dicey had previously described. Lord Salmon recognised that the appeal “raises some important questions relating to preservation of freedom of speech and preservation of contempt of court”¹⁰⁵³ and their Lordships held that to extend contempt of court to cover valuation courts and other tribunals which carried out an administrative, rather than a legal, function would mean that the scope of contempt of court would be

¹⁰⁴⁸ Robertson G, *Freedom, The Individual and the Law* (London, Penguin, 7th ed, 1993), p.xiii.

¹⁰⁴⁹ Palley C, *The United Kingdom and Human Rights*, The Hamlyn Lectures Forty-Second Series, (London, Sweet & Maxwell, 1991) p.111.

¹⁰⁵⁰ Feldman D, *Civil Liberties and Human Rights in England and Wales*, (Oxford, Clarendon, 1993) p.579. See also Freedman, n 1040 above, p.106.

¹⁰⁵¹ Boyle A, “Freedom of Expression as a Public Interest in English Law”, [1982] PL 574

¹⁰⁵² Ibid.

¹⁰⁵³ *Attorney-General v BBC* [1980] 3 W.L.R. 109, 117B.

“unnecessarily extended and accordingly freedom of speech and freedom of the press would be unnecessarily contracted.”¹⁰⁵⁴

Certainly, then, this case indicates that freedom of speech was becoming an increasingly important consideration for the courts by the 1980s, yet as Boyle recognises, his argument that a positive right to free expression does exist is limited to cases that involve the public interest in free expression “and other countervailing public interests” and does not extend to cases where “the conflict is...between freedom of expression and the existence of statutory or common law restrictions”.¹⁰⁵⁵ As stated in the previous chapter, only a few years prior to the publication of Boyle’s article, *Gay News* and its Editor were the subjects of a private prosecution by Mary Whitehouse, concerning the publication of a poem written by Professor James Kirkup, entitled *The Love That Dares To Speak Its Name*.¹⁰⁵⁶ Following a conviction at first instance, an appeal was made to the Court of Appeal concerning intention and the necessary elements of an offence of blasphemy, which held that intention was irrelevant. Further appeal was made to the House of Lords, yet there was no submission on behalf of the defence concerning a right to free speech or referring to a free speech principle, since the offence is one of strict liability.¹⁰⁵⁷

The Recent Application of the Free Speech Principle in English Courts

In *Attorney-General v Guardian Newspapers (No.2)* [1990] 1 A.C. 109, Lord Goff claimed that “we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world”, adding the proviso that “English courts proceed...on the assumption of freedom of speech, and turn to our law to discover the established exemptions to it”.¹⁰⁵⁸ This statement indicates that prior to the enactment of the

¹⁰⁵⁴ *Attorney-General v BBC* [1980] 3 W.L.R. 109, 119E.

¹⁰⁵⁵ Boyle, n 1051 above, p.575.

¹⁰⁵⁶ *R v Lemon* [1979] 1 All E.R. 898.

¹⁰⁵⁷ *Lemon* and *Gay News* subsequently brought an action against UK; see p.219 below.

¹⁰⁵⁸ *Attorney-General v Guardian Newspapers (No.2)* [1990] 1 A.C. 109, 283F

HRA the nature of free speech under English law remained residual, but that its significance as a general principle was becoming increasingly recognised by the English courts. As the following discussion will show, this was a trend which continued throughout the 1990s.

Writing in 1993, Barendt argues on the basis of the judgements given in the House of Lords in the case of *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 2 W.L.R. 449, that “freedom [of speech] has now attained the status of a quasi-constitutional principle”¹⁰⁵⁹ at least in regard to libel actions involving public authorities. The question in this case was whether a local authority was entitled to sue for libel, or whether it should be prohibited from bringing the action on the basis that to allow such an action would place an unreasonable restriction on freedom of speech.¹⁰⁶⁰ The decision of the court at first instance, which held in favour of the local authority, was reversed by the Court of Appeal. Subsequently, the House of Lords upheld the Appeal Court’s decision, but on grounds alternative to those stated in the lower court. Recognising the common law principle that a corporation was entitled to bring a libel action (as established in *Metropolitan Saloon Omnibus Co. Ltd. v Hawkins* (1859) 4 H&N. 87)¹⁰⁶¹ Lord Keith distinguished a local authority from other types of corporation on the ground that it is a governmental body and “[f]urther, it is a democratically elected body”.¹⁰⁶² For this reason, it was held that “[i]t is of the highest public importance that a democratically elected body, or indeed any governmental body, should be open to uninhibited public criticism [and] [t]he threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech”¹⁰⁶³ and it was upon this basis that the local authority was precluded from bringing its action.

Commenting on this case, Cumberbatch (1993) terms it “a telling blow for freedom of speech” yet he adds that “[l]egal scholars will be faced...with the dilemma of

¹⁰⁵⁹ Barendt E, “Libel and Freedom of Speech in English Law”, [1993] PL 449, at 450.

¹⁰⁶⁰ Barendt, n 1059 above, pp.449-464.

¹⁰⁶¹ *Derbyshire County Council v The Times* [1993] 2 W.L.R. 449, 453G.

¹⁰⁶² *Derbyshire County Council v The Times* [1993] 2 W.L.R. 449, 456G

¹⁰⁶³ *Derbyshire County Council v The Times* [1993] 2 W.L.R. 449, 456G.

whether to restrict the decision to its particular facts...or to regard the decision as a source of the view that English defamation law...now..recognises an absolute freedom of speech which is not to be fettered in matters of public interest...beyond what is necessary in a democratic society.”¹⁰⁶⁴ If the latter is true, then Cumberbatch considers that this would amount to “a quiet revolution” in this area of the law.¹⁰⁶⁵ However, earlier in the article, he queries whether the freedom asserted in the case is actually as broad as the Lordships suggest, given the continued existence of the principles of law relating to “defamation, malicious falsehood, sedition and criminal libel”.¹⁰⁶⁶ For the purposes of this thesis, the principles of law relating to the continued enforcement of common law offences such as blasphemy, outraging public decency, conspiracy to outrage public decency and conspiracy to corrupt public morals can be added to this list. Cases in these areas, it is argued, exhibit not even the quietest of revolutions in the application of a free speech principle. This is of particular relevance to this thesis since these latter offences are those, of course, which have been most commonly associated with works of literary or visual art in recent years.

Whilst Barendt (1993) also recognises that the decision in the Derbyshire County Council case is narrow in that it relates only to local authorities, he states nevertheless that in general, “[i]n the last decade the courts have shown themselves ever more willing to rely on the principles of freedom of speech and freedom of the press in developing the common law”¹⁰⁶⁷ and he suggests that “the English legal system is in a transitional period: it is moving from the treatment of free speech (and other freedoms) as merely residual to their recognition as constitutional rights”¹⁰⁶⁸ wherein there is an identifiable course which is being increasingly followed, although not yet universally so. Subsequent cases which have followed the Derbyshire case indicate that Barendt’s assumption is correct, although the qualification remains that

¹⁰⁶⁴ Cumberbatch J, “The Quiet Revolution in Freedom of Speech: A Comment on *Derbyshire CC v Times Newspapers Ltd*”. (1993 1 All E.R.1011), NILQ, vol. 45, Summer 1994, pp.219-26, at p.225.

¹⁰⁶⁵ Ibid.

¹⁰⁶⁶ Cumberbatch, n 1064 above, p.221.

¹⁰⁶⁷ Barendt, n 1059 above, p.460.

¹⁰⁶⁸ Barendt, n 1059 above, p.463.

it is with regard to cases involving conflicting public interests that the right to free speech is being increasingly recognised.

In *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] Q.B. 670, the Court of Appeal was asked to consider whether an award of £250,000 in libel damages amounted to a restriction upon the right to free expression. The Court, following *Attorney-General v Guardian Newspapers (No.2)* [1990] 1 A.C. 109 and the Derbyshire case held that the award did indeed amount to something more than a “necessary restriction in a democratic society” and reduced it accordingly. In *Goldsmith and others v Bhoyrul* [1998] QB 459, the principle established in the Derbyshire case was extended to cover political parties, namely Sir James Goldsmith’s Referendum party in this case. The plaintiffs sought to sue the defendant (a publishing company) for publishing a libel concerning the Referendum party. Buckley, J. stated that “the public interest in free speech and criticism in respect of those bodies putting themselves forward for office or to govern is ...sufficiently strong to justify withholding the right to sue. Defamation actions or the threat of them would constitute a fetter on free speech at a time and on a topic when it is clearly in the public interest that there should be none”.¹⁰⁶⁹ It is submitted that the reference to the public interest in free speech as being “sufficiently strong” itself reveals a strengthening in the judicial approach towards the recognition of a free speech principle.

In May 1999, the case of *R v Secretary of State for the Home Department, ex parte Simms and another* [1999] 3 W.L.R.328 came before the House of Lords. The applicants in the case were prisoners who had been convicted of murder but who continued to protest their innocence. Journalists who were visiting the prisoners were interested in publishing their stories, but once the prison authorities became aware of this, the journalists were denied visiting rights unless they agreed to undertake not to use information used in the visits for professional purposes. Although the Judge at first instance granted an application for judicial review, this

¹⁰⁶⁹ *Goldsmith v Bhoyrul* [1998] QB 459, 463A.

was reversed subsequently by the Court of Appeal. The outcome of the appeal to the House of Lords is discussed here because the applicants sought to rely on their right to free speech as a means to securing further oral interviews with the journalists. In his judgement Lord Steyn acknowledges that a prison sentence is intended to restrict a prisoner's liberties, but he states that "a convicted prisoner...retains all civil rights which are not taken away expressly or by necessary implication".¹⁰⁷⁰ Thereafter, his lordship enters into a full discussion of freedom of expression, with specific reference to two cases which have already been discussed, namely *Attorney-General v Guardian Newspapers Ltd* (No.2) [1990] 1 A.C. 109 and *Derbyshire County Council v Times Newspapers* [1993] A.C. 534.

Lord Steyn states that whilst he recognises that free expression is not an absolute right since it must "yield to other cogent social interests...[t]he starting point is the right of freedom of expression. In a democracy it is the primary right: without it an effective rule of law is not possible",¹⁰⁷¹ thus expressing the right in the terms which are among the strongest found to date in reported English case law. Following the opinions of Lord Goff and Lord Keith in the cases cited above, Lord Steyn states that there is no difference in principle between English law concerning free speech or expression issues and Article 10 of the ECHR.¹⁰⁷² Thereafter he enters into a discussion of freedom of expression of a nature which has hitherto been unknown in English courts. As Palley (1991) states, "Judges do not normally enunciate broad generalisations or principles in advance of conduct putting them in issue [and] [s]eldom, until recently did they opine about 'liberty of the person', 'individual liberties' and 'constitutional liberties', let alone 'human rights' and 'fundamental rights'".¹⁰⁷³

¹⁰⁷⁰ *R v Secretary of state for the Home Department, ex parte Simms and another* [1999] 3 W.L.R.328, 331G

¹⁰⁷¹ *R v Secretary of state for the Home Department, ex parte Simms and another* [1999] 3 W.L.R.328, 336C

¹⁰⁷² A similar view was expressed in the House of Lords by Lord Lester of Herne Hill in the debates on the Human Rights Bill. HL, Vol 577 col 1729, February 5th 1997.

¹⁰⁷³ Palley, n 1049 above, p.112.

The case of *Reynolds v Times Newspapers Ltd* [1999] 3 W.L.R. 1010, involved the former Taoiseach of Ireland and his claim against *The Times* concerning libelous statements made about him and his work in his capacity as Taoiseach. The issue which reached the House of Lords on appeal concerned the extent of qualified privilege under common law. This aspect of the law recognises that certain publications should be immune from prosecution because the public interest requires it.¹⁰⁷⁴ Whether or not a particular publication merits such immunity depends upon all the facts of the case, with the court paying particular attention to the nature of the material published, unless it is of a type of publication which is already granted privileged status under statute or common law. The case is of particular relevance to this thesis since the defence argued for an extension of the existing common law, to create a new category of privileged publications, namely those wherein the subject matter is political information. Political information is described by Lord Nicholls as being “information, opinion and arguments concerning government and political matters that affect people in the United Kingdom” and he summarises the argument put forward by the defence as meaning that “Malice apart, publication of political information should be privileged regardless of the status and source of the material and the circumstances of the publication”.¹⁰⁷⁵

This might be seen as one way in which high art could be afforded greater protection; “by the creation of a new category of occasion when privilege derives from the subject matter alone”;¹⁰⁷⁶ the subject matter in this case being a work of high art. This would have the effect, which Schauer (1982) suggests, of including high art “within some other principle of great strength”¹⁰⁷⁷ rather than relying solely on the free speech principle for its protection. On this basis, if an action were to be brought against the creator or publisher of a work for libel, then a defence to that claim would be that the work was high art, and that therefore its creator or publisher is immune from prosecution. There are two main problems with such a formulation: Firstly, the

¹⁰⁷⁴ *Reynolds v Times Newspapers Ltd* [1999] 3 W.L.R. 1010, 1018A

¹⁰⁷⁵ *Reynolds v Times Newspapers Ltd* [1999] 3 W.L.R. 1010, 1022E-F

¹⁰⁷⁶ *Reynolds v Times Newspapers Ltd* [1999] 3 W.L.R. 1010, 1022E

¹⁰⁷⁷ Schauer F, *Free Speech: A Philosophical Enquiry*, (Cambridge, Cambridge University Press, 1982), p.110.

courts have hitherto strictly limited the application of this defence and it was held in the Reynolds case that “the common law should not develop “political information” as a new...category of qualified privilege.”¹⁰⁷⁸ This was because their lordships considered it “unsound in principle” to distinguish political speech from other types of speech and because the current “elasticity” of the common law allows any interference with the free speech principle to be limited to that which is required in any given case.¹⁰⁷⁹ If their Lordships would not extend the privilege to cover political expression, it is highly unlikely that they will do so in favour of high art. Secondly, to place high art in such a category would raise its status beyond that which is appropriate. As argued in chapter 3 (pp.104-5), this thesis does not hold with the view that high art, or art in general, should be accorded any special status under the law and it disputes the view expressed by Kearns (2000) that “artistic intentions and forms...have only a specialist oblique relation to life”.¹⁰⁸⁰ It should be noted, however, that the writer does *not* argue that artistic expression should be afforded *less* protection than other forms of expression; merely that it should not be afforded *more*.

Lord Nicholls’ statement in the Reynolds case that “[a]bove all, the court should have particular regard to the importance of freedom of speech”¹⁰⁸¹, together with statements made in *Broadmoor Hospital Authority and another v R* [2000] 2 All E.R. 727, indicate that the common law approach to free speech or expression is coming into line with current social and political thinking in a manner which is unlike that which has been exhibited in previous centuries. The latter case involved an application for an injunction to restrain the publication of a transcript of a book *Armageddon Ahoy* which had been written by R, a Broadmoor patient who was suffering from paranoid schizophrenia and who had been convicted of manslaughter. The book contained details of the patient’s motives for the killing and made reference to other patients. The injunction had been granted at an *ex parte* hearing, but was

¹⁰⁷⁸ *Reynolds v Times Newspapers Ltd* [1999] 3 W.L.R. 1010, 1027A

¹⁰⁷⁹ *Reynolds v Times Newspapers Ltd* [1999] 3 W.L.R. 1010, 1027B.

¹⁰⁸⁰ Kearns P, “The uncultured God: Blasphemy Law’s Reprieve and the Art Matrix”, [2000] EHRLR Issue 5, 512-521, at 519.

¹⁰⁸¹ *Reynolds v Times Newspapers Ltd* [1999] 3 W.L.R. 1010, 1027G

discharged at the subsequent *inter partes* hearing. The case is notable in that Counsel for R drew the attention of the Court to that which Morritt L.J. terms “the importance which the common law and article 10 of the European Convention on Human Rights...attaches to freedom of speech” on his client’s behalf, and accordingly Morritt L.J. acknowledged that whilst the freedom is not an unqualified one, “this remains an important consideration”.¹⁰⁸² Hence the Court of Appeal refused to grant the injunction, since it considered that the Health Authority’s concern was not with the publication per se, but with the media publicity which could arise from it.

It is submitted that this decision, together with the case law already discussed, has shown that the English judiciary have increasingly acknowledged the relevance of the free speech principle to English law, latterly considering its status to equate to Article 10 of the ECHR, in limited circumstances at least. Could this development indicate that the English judiciary are more likely to apply the right to free expression in cases involving works of visual or literary art, now that Article 10 is expressly included within English law? The HRA, after all, loosens the bounds of precedent from the courts in determining matters arising under the common law. Before conclusions can be drawn in this regard, consideration will be given to the European case law which English courts are required to consider, prior to making their decisions under the HRA.

Relevant European Case Law

Artistic Expression not Artistic Merit

The wording of Article 10 indicates that it is artistic *expression* to which the ECHR affords protection; the focus being upon the artist’s or author’s right to express him or herself freely and likewise to impart information or ideas through an artistic medium. There is no requirement in Article 10 that the free expression which it guarantees is of particular consequence or of a serious nature, and applying this to artistic expression it may be presumed that artistic merit is not a primary

¹⁰⁸² *Broadmoor Hospital Authority and another v R* [2000] 2 All E.R. 727, 736c-d

consideration in the application of Article 10. This provides a significant contrast to the s.4 defence under the OPA 1959. Whereas the OPA presumes that society will benefit from artistic or literary works of merit (which includes high art but not exclusively so - the requirement being for merit rather than the highest merit) the ECHR presumes that society will benefit from the free expression of ideas in an artistic or literary form, regardless of the merits or demerits of the particular form.

As with other declarations which are broadly contemporaneous with the ECHR, the Council of Europe's aim in drafting the treaty was, as far as it was able, to prevent a repetition of the "large scale infringements of human rights"¹⁰⁸³ that had been experienced in the Second World War.¹⁰⁸⁴ The emphasis upon the nature of the freedom guaranteed rather than the form of expression protected corresponds with such an aim. Unlike other rights instruments,¹⁰⁸⁵ the ECHR does not specifically protect artistic expression, but the European Court has held that artistic expression is included within the scope of Article 10, "notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds".¹⁰⁸⁶ It has also been held, more specifically, that "everyone may...impart information or ideas from whatever source"¹⁰⁸⁷ under the terms of Article 10. Thus, whereas the wording of Article 10 that "[e]veryone has the right to freedom of expression" could be read as a strictly personal freedom, extending in cases involving works visual or literary art only as far as the creator of that work, the European court and the Commission have not considered this to be so. The Commission has stated that publishers and editors may bring proceedings under article 10 in respect of works which have been exhibited or published, but not actually created by them, where they purport "to disseminate the information or ideas contained therein".¹⁰⁸⁸

¹⁰⁸³ Farran S, *The UK Before the European Court of Human Rights, Case Law and Commentary* (London, Blackstone Press, 1996) p.2.

¹⁰⁸⁴ As per Lord Chancellor, HL, Vol 585 col 755, February 5th 1998

¹⁰⁸⁵ For example, Article 17a of the Basic Law of Austria provides that ""There shall be freedom of artistic expression and of the publication and teaching of art". See *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34, 41.

¹⁰⁸⁶ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 225

¹⁰⁸⁷ *Otto-Preminger Institute v Austria*, (1994) 19 EHRR 34, 44.

¹⁰⁸⁸ *App. No. 9615/81 v UK*, 5 EHRR 581, 591. See also Farran, n 1040 above, p.260

When the English courts are required to consider the scope of the freedom of article 10 in relation to works of art, they are of course free to determine that artistic expression does not fall within its remit. But it is submitted that in such cases we are likely to see the working out of the aspect of this new system which Starmer (1999) has highlighted; namely that if domestic courts depart drastically from existing Strasbourg decisions, there is a strong likelihood of an internal appeal, and ultimately an external appeal to the European Court.¹⁰⁸⁹ Thus it is considered likely that the English courts will consider that artistic expression falls within the remit of Article 10. Unfortunately, though, a second and equally compelling reason why the English courts are likely to follow Strasbourg jurisprudence in this regard is that the result of doing so is unlikely to cause them to take view which is a wildly different to that which they would have done prior to the implementation of the HRA. It is submitted that the following discussion will show that whilst in theory the ECHR protects artistic expression, in practice this has not occurred. The previous section has shown that political speech has been the type of expression which the English courts have latterly shown themselves willing to protect, particularly when balancing this freedom against matters of public interest. A similar approach can be detected from European case law, wherein “different kinds of speech enjoy different levels of protection, with journalistic speech - the public watchdog - coming very near the top end of the sliding scale and artistic speech somewhat lower down the scale”,¹⁰⁹⁰ this being based upon judicial policy which gives “a higher level of protection to the “political” function of freedom of expression as enabling informed public debate rather than to its “cultural “ function of contributing to self-fulfillment”.¹⁰⁹¹

Freedom of Artistic Expression

The discussion in chapter five concerning the domestic court’s application of the common law in line with traditional moral principles revealed that the English courts have viewed themselves historically as guardians of public morality, and that where

¹⁰⁸⁹ Starmer K, *European Human Rights Law* (London, Legal Action Group, 1999), p.26, at 1.46.

¹⁰⁹⁰ Mahoney P, *Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgements*, [1977] EHRLR Issue 4, 364, p.378.

¹⁰⁹¹ Mahoney, n 1090 above, p.379.

cases involving works of art or literature have been considered within these circumstances, the issue of morality has been considered to be the primary concern, outweighing any issue relating to the quality of the work in question. Since the ECHR is a relatively new instrument, it might be expected to exhibit a more modern¹⁰⁹² approach to such issues, and its inclusion of a justification for restricting expression on the ground of protecting morals, could have been interpreted widely to refer to both traditional and secular morality. As occurred in the application of the section 4 defence, the work of art's own form of 'morality', whereby its audience benefit morally by experiencing the work, might have been recognised and considered worthy of protection. However, as the following cases will show, the application of the margin of appreciation in cases where a restriction upon free expression may or may not be justified on the ground of protecting morality, has had the effect of allowing the domestic court to define itself that which it considers to be 'moral', meaning that in practice the European court has refrained from extending the definition of 'protection of morals' beyond that which has already been defined by the domestic court.

It was stated in *Handyside v UK*¹⁰⁹³ that "[t]he [European] Court's supervisory functions obliged it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."¹⁰⁹⁴ Thus the Court, in a statement which has been cited frequently in subsequent judgements, stated unequivocally that it attached the highest significance the right to free expression contained in Article 10. However, it was also stated in the *Handyside* case that "it is not possible to find in the domestic law of the various contracting States a uniform European conception of morals. The view taken by their respective laws on the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and

¹⁰⁹² By which the writer refers to more recent ideas that widen the concept of morality beyond the Christian tradition to include more secular concerns.

¹⁰⁹³ *Handyside v UK* (1976) 1 EHRR 737

¹⁰⁹⁴ *Handyside v UK* (1976) 1 EHRR 737, 754.

continuous contact with vital forces of their countries, State authorities are in principle in a better position than an international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them”.¹⁰⁹⁵ Whilst this does not mean that the State’s legislature and judiciary have an unlimited scope in their creation and application of the law, it does allow them to make their own assessment of the need for restricting free speech on grounds of morality. It is for this reason that in cases which have involved a claim by an individual that his or her right to freedom of artistic expression has been violated, and where the State has responded that any restriction upon that freedom is justified on the basis that it is “prescribed by law and...necessary in a democratic society, for the protection of....morals”,¹⁰⁹⁶ the European court has been highly likely to follow the decision of the domestic court, unless there are obvious and compelling reasons for not doing so.

Furthermore, whilst it was stated in the *Handyside* case that the right to free expression extended “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”,¹⁰⁹⁷ this statement was made expressly “subject to Article 10 (2)”¹⁰⁹⁸ and in practice, the effect of the European Court’s application of the margin of appreciation to domestic courts in relation to Article 10(2) has been to prohibit the expression of ideas expressed in an artistic form and which have been considered offensive, shocking or disturbing to the state or to a sector of its population. With regard to this latter group of persons, certain ‘sectors of the population’, the European court’s practice of upholding the domestic courts’ application of the law of blasphemy can be cited as a particular example.

¹⁰⁹⁵ *Handyside v UK*, (1976) 1 EHRR 737, 753..

¹⁰⁹⁶ ECHR Article 10(2)

¹⁰⁹⁷ *Handyside v UK* (1976) 1 EHRR 737, 754.

¹⁰⁹⁸ *Handyside v UK* (1976) 1 EHRR 737, 754.

Article 10 and Blasphemy

In 1995, the European court considered a case brought by the Otto-Preminger Institute (a non-profit making organisation which had legal personality under domestic law) which had been prevented from showing a satirical film entitled *Das Liebeskonzil* (Council in Heaven) in Austria.¹⁰⁹⁹ The film was based upon a play written and published in Germany in the 1890s by Oscar Panizza. Panizza was prosecuted as a result of publishing the play; he was imprisoned for “crimes against religion” and prohibited from showing the play in Germany.¹¹⁰⁰ The Austrian court acknowledged that the film in question could properly be termed a work of art and Austria’s constitutional laws specifically protect freedom of artistic expression.¹¹⁰¹ The beginning of the film depicts scenes which are intended to represent the trial of Panizza in 1895, as does the film’s ending. The scenes in between represent a showing of the play written by Panizza, yet using the media of film. Thus the applicant claimed that since the film was presented in this way, a “distance” was created between the subject matter of the play and the audience of the film, and indeed the film itself involved a discussion of freedom of artistic expression.¹¹⁰²

However, as the case report describes, the play itself “portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the devil, with whom he exchanges a deep kiss and calling the devil his friend. He is also portrayed as swearing by the devil. Other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to kiss and fondle his mother’s breasts, which she is shown as permitting. God, the Virgin Mary and Christ are shown in the film as applauding the devil”.¹¹⁰³ Thus it was highly probable that the film was going to cause offence to a

¹⁰⁹⁹ *Otto Preminger Institute v Austria* (1994) 19 EHRR 34

¹¹⁰⁰ *Otto Preminger Institute v Austria* (1994) 19 EHRR 34, 40.

¹¹⁰¹ See n 1085 above.

¹¹⁰² *Otto Preminger Institute v Austria* (1994) 19 EHRR 34, 46.

¹¹⁰³ *Otto Preminger Institute v Austria* (1994) 19 EHRR 34, 41.

sector of the community, namely those of a religious persuasion, if it was exhibited to them. Whereas the Commission expressed the view that the Austrian state's act of seizing the film and banning its exhibition was a disproportionate measure, since it allowed no opportunity for the message of the film to be discussed,¹¹⁰⁴ the European court held that there had been no violation of article 10 by the Austrian authorities. The court pointed out that article 10(2) allows restrictions upon this freedom in situations where a restriction is necessary for the prevention of disorder or crime or for the protection of the reputation or rights of others. Since the state's population in this case were 87% catholic and there was a pressing need to preserve the peace, the actions of the state did not, in the circumstances, exceed the margin of appreciation afforded to it by the court.¹¹⁰⁵

A similar approach is apparent in two cases involving the United Kingdom. These are *Gay News and Lemon v UK*¹¹⁰⁶ and *Wingrove v UK*.¹¹⁰⁷ The former of these cases has been discussed previously in chapter five (p.192) and the reader will recall that case concerned Gay News' publication of Kirkup's poem *The Love That Dares to Speak its Name*. As stated earlier in this chapter, (p.206) the House of Lords confirmed that blasphemous libel was a strict liability offence, and not one which required an intention to blaspheme on the part of the defendants.¹¹⁰⁸ The applicants complained that the English court's decision amounted to violations of Article 7 and Article 10 of the ECHR. Article 7 states that no one shall be found guilty of an offence "which did not constitute a criminal offence under national or international law at the time when it was committed"¹¹⁰⁹. This argument was based upon the fact that the offence of blasphemous libel was 'resurrected' in this case after 50 years of disuse, and also upon the fact that two Law Lords dissented from the prevailing judgement given in the House of Lords, indicating perhaps that the law was so unclear that blasphemous libel had actually been created as a fresh offence at the time

¹¹⁰⁴ *Otto Preminger Institute v Austria* (1994) 19 EHRR 34, 48.

¹¹⁰⁵ Council of Europe, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human Rights Files, No.15, (Strasbourg, Council of Europe Publishing, 1997) p.39.

¹¹⁰⁶ *Gay News and Lemon v UK*, (1983) 5 EHRR 123

¹¹⁰⁷ *Wingrove v UK*, (1997) 24 EHRR 1

¹¹⁰⁸ *Lemon & Gay News Ltd. v Whitehouse* (1979) AC 617

¹¹⁰⁹ Article 7(1).

of the hearing. However, these factors were not considered to be sufficient to amount to a violation of Article 7, since “the courts in the...case in fact did not go beyond the limits of a reasonable interpretation of the existing law”.¹¹¹⁰ The law of blasphemy did already exist at the time of the decision, and the courts application of the law represented a development of this law, rather than a restatement of it. With regard to Article 10, the Commission concluded that whilst there was no doubt that there had been an interference with the applicants’ right to free expression, this interference was justified on the basis that it had a legitimate purpose. Because the prosecution was a private one, the grounds of prevention of disorder and protection of morals were not considered applicable. However, the ground of protecting the rights of others was considered by the Commission to amount to a legitimate purpose for the court’s action of restricting free speech; since “the offence of blasphemous libel as it is construed under the applicable common law...has the main purpose to protect the right of citizens not to be offended in their religious feelings by publications”.¹¹¹¹

The Wingrove case was brought before the European court as a result of the refusal by the British Board of Film Classification (“BBFC”) to grant a distribution certificate to a video entitled *Visions of Ecstasy*, scripted and directed by Nigel Wingrove. Wingrove contended that the subject matter of the film (which contained visual imagery and music, but no dialogue) was the story of a sixteenth-century Carmelite nun, St. Teresa of Avila, who is believed to have experienced ecstatic visions of Christ. The BBFC had refused to grant a certificate in respect of the video on the ground that its publication would be likely to infringe the law of blasphemy.¹¹¹² In rejecting Wingrove’s application for certification, the BBFC stated that although the video “depicts the mingling of religious ecstasy and sexual passion, a matter which may be of legitimate concern to the artist”¹¹¹³ and that its sexual imagery did not exceed that required to achieve a category ‘18’ certificate, the fact that the focus of that sexual imagery was the crucified body of Christ meant that “its presentation is

¹¹¹⁰ *Gay News Ltd and Lemon v UK*, (1983) 5 EHRR 123, 129

¹¹¹¹ *Gay News Ltd and Lemon v UK*, (1983) 5 EHRR 123, 130

¹¹¹² In accordance with the Video Recordings Act 1984, c.39, s.4 (1).

¹¹¹³ *Wingrove v UK*, (1997) 24 EHRR 1, 7

bound to give rise to outrage at the unacceptable treatment of a sacred subject”.¹¹¹⁴ This view was upheld by a majority of the Video Appeals Committee and thus Wingrove petitioned the European court, claiming that his rights under Article 10 of the ECHR had been violated.

In bringing its judgement the European court once again recalled that “freedom of expression constitutes one of the essential foundations of a democratic society”¹¹¹⁵ but repeated that the “exercise of that freedom carries with it duties and responsibilities” amongst which, “in the context of religious belief”¹¹¹⁶ was the duty to avoid the expression of such ideas or opinions which are gratuitously offensive to others. It was held further that in determining whether a restriction upon free expression in these circumstances was “necessary in a democratic society”¹¹¹⁷ the European court allowed a certain margin of appreciation to the contracting states, and “[w]hereas there is little scope under Article 10 (2) of the Convention for restrictions on political speech or on debate of questions of public interest...a wider margin of appreciation is generally available to the Contracting states when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion”.¹¹¹⁸ Accordingly, the European Court held that there had been no violation of Wingrove’s rights under article 10: *Visions of Ecstasy*, portraying as it did “a female character astride the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature”¹¹¹⁹ achieved the high degree of profanation necessary to justify a charge of blasphemy, and the UK could not, therefore, be considered to have exceeded its margin of appreciation in this case.

Judge De Meyer expressed the view in this case that the decision given by the majority was wrong, since in refusing the video a certificate (which could, after all, have limited its audience) the state operated a form of prior restraint or pre-

¹¹¹⁴ *Wingrove v UK*, (1997) 24 EHRR 1, 7

¹¹¹⁵ *Wingrove v UK*, (1997) 24 EHRR 1, 29

¹¹¹⁶ *Wingrove v UK*, (1997) 24 EHRR 1, 29

¹¹¹⁷ Article 10(2)

¹¹¹⁸ *Wingrove v UK*, (1997) 24 EHRR 1, 30

¹¹¹⁹ *Wingrove v UK*, (1997) 24 EHRR 1, 31

publication censorship, something which is “unacceptable in the field of freedom of expression” regardless of the form which such expression takes.¹¹²⁰ Judge Lohmus also disagreed with the majority on the basis that the state’s action had not been necessary in a democratic society; “there is interference by the authorities with freedom of expression even though the members of the society whose feelings they seek to protect have not called for such interference...the actual opinion of believers remains unknown...[and] this is why we cannot conclude that the interference corresponded to a ‘pressing social need’”.¹¹²¹ Judge Lohmus expressly queried the precise principles upon which the application of the margin of appreciation has been based in various cases; thus supplying to the English judiciary a foothold from which they may choose to validly interpret certain European cases.

Article 10 and Public Morality

The European court has likewise allowed a wide margin of appreciation in cases not involving blasphemy, but concerning the wider issue of restricting expression on grounds of protecting morality. As recognized by the Council of Europe (1997), this issue has been raised and “prominently pleaded in cases involving restrictions upon the expression of sexuality in publications and works of art”¹¹²² and the Council cites the case of *Muller and Others v Switzerland*¹¹²³ as an indication of the European Court’s “reluctance...to interfere with restrictions based upon the protection of morality, particularly where sexual matters are concerned”.¹¹²⁴ Josef Muller, an artist, was invited to participate in an exhibition entitled *Fri-Art 81*. The exhibition was unusual in that it was to be held in a building due for demolition, and the artists were required to create their works on site, using the space available to them.¹¹²⁵ Muller produced three paintings; described in the domestic court as being “morally offensive to the vast majority of the population”¹¹²⁶ since they depicted, amongst

¹¹²⁰ *Wingrove v UK*, (1997) 24 EHRR 1, 36-37

¹¹²¹ *Wingrove v UK*, (1997) 24 EHRR 1, 37-38

¹¹²² Council of Europe, n 1105 above, p.24.

¹¹²³ *Muller and Others v Switzerland*, (1988) 13 EHRR 212

¹¹²⁴ Council of Europe, n 1105 above p.25.

¹¹²⁵ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 214.

¹¹²⁶ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 215.

other things, acts of sodomy, fellatio and bestiality. These paintings caused Muller and those responsible for mounting the exhibition to be charged and found guilty of exhibiting obscene material, and Muller's paintings were confiscated. At first instance, the court acknowledged expert evidence as to Muller's artistic skill, and it was as a result of this that confiscation was ordered, rather than destruction.¹¹²⁷ On appeal, the decision was upheld; the court determining that works of art had no privileged status in proceedings such as these.¹¹²⁸ Further appeals were successful only in that they secured the return of the paintings to Muller but did not overturn the original conviction.¹¹²⁹

Muller (together with his fellow convicts) brought his case to the European Court, arguing that his (and their) conviction and the confiscation of the paintings amounted to a violation of their rights under Article 10 of the ECHR. The European Court held that the restriction imposed upon Muller at al, had been prescribed by law and that the aim pursued by the Swiss authorities, being to protect morals and the rights of others, was a legitimate one.¹¹³⁰ Thereafter the court reiterated that "freedom of expression...constitutes one of the essential foundations of a democratic society", and repeated the statement made in *Handyside* that free expression did not just apply to inoffensive ideas or information, but also to those which might shock or offend the state, or any sector of it.¹¹³¹ However, the Court then went on to state that "Artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph (2) of Article 10"¹¹³² and, after having viewed the paintings for themselves, the European Court determined that both the conviction of the artist and the forfeiture of the paintings did not amount to a violation under Article 10 since "having regard to the margin of appreciation left to them" the Swiss courts were entitled to consider such actions necessary for the protection of morals.¹¹³³

¹¹²⁷ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 215-6.

¹¹²⁸ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 217.

¹¹²⁹ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 220-221.

¹¹³⁰ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 226.

¹¹³¹ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 228.

¹¹³² *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 228

¹¹³³ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 229.

In the Muller case, emphasis was placed by the European court upon the fact that Muller's paintings were exhibited to the general public, whose attendance was unrestricted and even encouraged.¹¹³⁴ A young girl had reportedly been upset when she had seen the paintings in the course of viewing the exhibition, and one viewer had physically attacked one of the paintings upon viewing it. Thus the state's actions might be seen to represent a valid attempt to 'protect' unwary visitors to the exhibition from being offended, shocked or morally outraged by the paintings (although these reactions provide rather weak evidence of widespread public concern). However, other cases such as *Otto-Preminger Institute v Austria*, *Wingrove v UK* and latterly *Robert Hoare v UK*¹¹³⁵ have involved films or videos; media to which access could, or would, be restricted. The Otto-Preminger Institute was intending to show its film in a "cinema of art" and although there was no age restriction, the showing time was to be 10 p.m. and a warning was to be given as to the nature of the contents of the film.¹¹³⁶ It was acknowledged in the Wingrove case that warnings could be placed upon the video casing, but the idea was dismissed upon the basis that the nature of the video industry was such that the video was not always placed in its original packaging when made available to the public. Presumably it would have been possible to request that a warning be inserted on the video film itself, prior to granting a certificate, so that those likely to be offended by the film would choose not to watch it. This idea was not pursued by the courts.

Judge Spielmann, in the Muller case, dissented from the majority verdict that the acts of fining Muller and confiscating his paintings did not amount to violations of article 10 since they were actions necessary in a democratic society. Stating simply that "Freedom of expression is the rule and interferences by the State, properly justified, must remain the exception",¹¹³⁷ Judge Spielmann advised the court that great care should be taken in determining cases in the field of literature and painting¹¹³⁸ and he

¹¹³⁴ As noted by the Commission in *Scherer v Switzerland* (1994) 18 EHRR 276, 285.

¹¹³⁵ *Robert Hoare v UK* [1997] EHRLR Issue 6, 678-680. The Commission confirmed that an interference with the applicant's freedom of expression was justified under article 10(2) for the purpose of protecting morals.

¹¹³⁶ *Otto-Preminger Institute v Austria* (1994) 19 EHRR 34, 48.

¹¹³⁷ *Muller and Others v Switzerland* (1988) 13 EHRR 212, 233

¹¹³⁸ Citing the examples of Flaubert and Baudelaire, both of whom had been prosecuted in 1857.

asserted that the contracting states should consider more carefully the “relativity of values in the field of expression of ideas”.¹¹³⁹ McHarg (1999)¹¹⁴⁰ contrasts the case of *Muller* (decided on the basis of protecting public morals) with that of *Dudgeon*,¹¹⁴¹ where it was held that the laws applicable to Northern Ireland (which made buggery a criminal offence between consenting adults) were in breach of Article 8 of the ECHR (the right to respect for private and family life) and were not justified under article 8(2) as being necessary in a democratic society for the protection of morals. Whilst the Commission recognised in this case the fact that a wide margin of appreciation might be afforded to contracting states in issues relating to public morality, it nevertheless determined that a distinction could be drawn in this case between the nature of morality protected by the state (being public) and the act in question, which was private. It is this thesis that the application of such reasoning to cases involving restricted (or potentially restrictable) access to artistic works would result in an outcome different to that experienced by applicants such as the Otto-Preminger Institute and Wingrove. With regard to the HRA therefore, McHarg argues that it is necessary to make clear the theoretical basis for protecting the rights incorporated into the Act, in order to prevent further ‘fudging’ of the issues.¹¹⁴²

Freedom of Journalistic and Political Expression

It should be noted that although a number of the cases cited here are those in which the UK was the respondent state, this is for no other reason than they are considered to provide clear examples of the European Court’s practice in this area. In bringing decisions under the HRA, the English courts will of course be required to take into account *all* relevant European case law, irrespective of the states involved. The first case to be considered is that which was brought before the European Court by the Sunday Times against the UK in 1979, which arose from the newspaper’s publication of a series of articles concerning the now infamous drug, thalidomide, and its alleged

¹¹³⁹ *Muller and Others v Switzerland*, (1988) 13 EHRR 212, 234.

¹¹⁴⁰ McHarg A, “Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights” (1999) MLR Vol. 62, No.5, 671

¹¹⁴¹ *Dudgeon v UK* (1981) 4 EHRR 149

¹¹⁴² McHarg, n 1140 above, p.690.

affects upon the children of mothers who had taken it during pregnancy. The Attorney-General obtained an injunction restraining the Sunday Times from publishing any further articles, on the basis that to do so would amount to a contempt of court (many of the parents of the children affected were in the course of proceedings against Distillers Company (Biochemicals) Ltd., the manufacturer of the drug, although none had reached trial).¹¹⁴³ The Court of Appeal reversed the injunction, but it was reinstated by the House of Lords and thus, having exhausted all the domestic remedies available to it, the newspaper (in the form of its editor, its publisher and a group of journalists) took the matter to Strasbourg, claiming that their right to free expression had been violated by the imposition of the injunction by the court.¹¹⁴⁴

The European Court concluded that a violation of Article 10 had occurred, and in bringing judgement it stated that “the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10(2). The ‘Handyside Case’ concerned the ‘protection of morals’. The view taken by the contracting states, observed the court [in that case], ‘varies from time to time and place to place, especially in our era’, and ‘State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements’. Precisely the same cannot be said of the far more objective notion of the ‘authority’ of the judiciary”.¹¹⁴⁵ Thus the European Court distinguished between a restriction based upon morality, and one involving the administration of justice. The effect was that the Sunday Times was considered to be justified in publishing its articles, and the state admonished for restricting journalistic expression. A similar response was given by the European Court in a number of cases¹¹⁴⁶ which came before it as a result of the British government’s attempts to prevent the publication of a book entitled *Spycatcher* which was written by Peter Wright, a former member of the British Security Service MI5. Although the issue involved here was national security, the

¹¹⁴³ *Sunday Times v UK* (No.1) (1979) 2 EHRR 245.

¹¹⁴⁴ Farran, n 1083 above, p.265.

¹¹⁴⁵ *Sunday Times v UK* (No.1) (1979) 2 EHRR 245, 276.

¹¹⁴⁶ *Observer and Guardian Newspapers Ltd. v UK* (1992) 14 EHRR 153; *Sunday Times v UK* No.2 (1992) 14 EHRR 229 and *Times Newspapers & Neil v UK* (1992) 15 EHRR CD 49

European Court did not consider this a situation in which the margin of appreciation should apply. The European Court determined on the evidence before it that, whilst there was a period in which national security was threatened to the extent that the government's acts to prevent publication were justified as being necessary in the interests of national security, all such actions which took place after this time amounted to violations of Article 10.¹¹⁴⁷

Other cases such as *Goodwin v UK*¹¹⁴⁸, where it was held that a violation of article 10 had occurred when a company obtained a court order requiring a journalist to inform it of his sources for an article which he had written concerning the company; the journalist refused to provide the information and was fined heavily for contempt of court; and *Jerslid v Denmark*¹¹⁴⁹ where it was held that a journalist's conviction for aiding and abetting his interviewees in the making of racist remarks on television was a violation of Article 10, since it effectively punished the journalist for his interviewees comments; an act which was likely to hamper the contribution of the press to matters of public interest¹¹⁵⁰, likewise indicate that the European court has strongly upheld the right of the freedom of the press to express ideas and impart information, considering this to be an area in which the margin of appreciation does not apply.

Conclusions Drawn from the Case Law

In simple terms, the above discussion has shown that an applicant complaining that his or her rights under Article 10 have been violated is far more likely to succeed in obtaining a positive response from the European court if it can be shown that effect of the violation has been to restrict his or her expression in a journalistic capacity, and not in an artistic one. This is because alleged violations involving works of visual or literary art are usually defended by the state on the grounds that the restriction imposed was "necessary in a democratic society" for the protection of morals or for

¹¹⁴⁷ Farran, n 1083 above, pp.273-5.

¹¹⁴⁸ *Goodwin v UK* (1996) 22 EHRR 123

¹¹⁴⁹ *Jerslid v Denmark* (1994) 19 EHRR 1.

¹¹⁵⁰ Wallace RM, *Companion to the European Convention on Human Rights*, Vol.2 *The Cases*, (London, Trenton Publishing, 1999), p.72.

the protection of the right of others, as expressly stated in Article 10 (2) of the ECHR, since they commonly involve sexually explicit material. Where restrictions are justified upon these bases, a wide margin of appreciation has been allowed to the contracting state in determining the extent to which actions are necessary to ensure such protection. The Council of Europe (1997) has asserted that although “it must be conceded that the Handyside and Muller cases each raise issues not easily resolved by a ready-to-hand formula, it can be argued that if the Court had placed the same emphasis upon freedom of expression in this context as it did in the Sunday Times case, the interferences in question would not have been excused”.¹¹⁵¹

The different way in which the different forms of expression have been treated by the European Court can and have been seen as a result of the imposition of national standards on the one hand (artistic expression) and international standards on the other (political or journalistic expression); or in short, ‘Subsidiarity’ and ‘Universality’, being the words adopted by Mahoney (1997) in his article on this subject, “Universality versus Subsidiarity in the Strasbourg case law on Free Speech”.¹¹⁵² Mahoney acknowledges this difference in approach which ensures “a higher level of protection to the “political” function of freedom of expression as enabling informed public debate rather than to its “cultural “ function of contributing to self-fulfillment”¹¹⁵³ and to illustrate this view he contrasts the outcomes of two ‘sets’ of cases; firstly *Goodwin v UK*¹¹⁵⁴ and *Wingrove v UK*¹¹⁵⁵ which were both decided in 1996 and, secondly, *Otto-Preminger Institute v Austria*¹¹⁵⁶ and *Jerslid v Denmark*,¹¹⁵⁷ both decided in 1994¹¹⁵⁸ (all of which have been discussed above).

Whilst Mahoney recognises that these (and other) decisions have caused commentators to criticise the European Court for bringing inconsistent and

¹¹⁵¹ Council of Europe, n 1105 above, p.27.

¹¹⁵² Mahoney, n 1090 above, p.364.

¹¹⁵³ Mahoney, n 1090 above, p.379.

¹¹⁵⁴ *Goodwin v UK* (1996) 22 EHRR 123

¹¹⁵⁵ *Wingrove v UK*, (1997) 24 EHRR 1

¹¹⁵⁶ *Otto-Preminger Institute v Austria* (1994) 19 EHRR 34.

¹¹⁵⁷ *Jerslid v Denmark* (1994) 19 EHRR 1.

¹¹⁵⁸ Mahoney, n 1090 above, pp.365-6.

contradictory judgements, he argues yet that “the criticism made is misconceived”¹¹⁵⁹ since the wording of Article 10 does not guarantee an absolute freedom of expression, but rather one which expressly allows the restriction of free expression “in so far as necessary in a democratic society”.¹¹⁶⁰ The chief aim of the drafters of the Convention, he argues, was to prevent the “naked abuse of power”¹¹⁶¹ which had been experienced in Europe during the World War period, in other words, to promote democratic, as opposed to autocratic or totalitarian government within the contracting states. Once democratic conditions are established, then Article 10 sets out measures for the use of the Court to determine whether a restriction imposed by the state is strictly necessary in a democratic society. Mahoney views this as the “second level of protection”¹¹⁶² guaranteed by Article 10, concerning which the margin of appreciation applies since Article 10 was “not intended to transfer to Strasbourg decision-making power on every aspect of the regulation of free speech. Through its very general language Article 10 lays down an abstract principle, not a detailed code of conduct” which does not require or expect uniformity of action among all the contracting states.¹¹⁶³ Thus, Mahoney concludes, the Convention sets a sort of minimum standard to be followed and not an ideal to be achieved, thus allowing scope for variation in the application of its principles among the various states with their diverse cultures and traditions.¹¹⁶⁴

Mahoney asserts too that the Commission and the European Court have considered the primary principle upon which Article 10 of the ECHR is based the ‘democratic’ free speech theory,¹¹⁶⁵ meaning that their first priority has been to ensure that the contracting states permit the free discussion of matters of public interest, in order that all members of society are afforded the opportunity to participate in democratic decision-making. This explains their strict application of Article 10 in the cases cited above which concerned press freedom and matters of public interest and their

¹¹⁵⁹ Mahoney, n 1090 above, p.367.

¹¹⁶⁰ Mahoney, n 1090 above, p.368.

¹¹⁶¹ Mahoney, n 1090 above, p.369.

¹¹⁶² Ibid.

¹¹⁶³ Ibid.

¹¹⁶⁴ Ibid.

¹¹⁶⁵ Mahoney, n 1090 above, p.372

‘universal’ approach to such matters. Despite the fact that the European Court has recognised an alternative basis for the protection of free expression, namely, self-fulfillment, as being significant also to the drafting of Article 10,¹¹⁶⁶ Mahoney notes correctly that this principle has been afforded less emphasis by the court, since the cases in which it is most relevant are commonly those which involve issues upon which no European consensus yet exists: Thus, for example, “our culturally diverse European democratic society has not yet developed a common value to the effect that blasphemy laws are in themselves and as a matter of principle repugnant to the dictates of free speech”.¹¹⁶⁷ He argues therefore, that it is a difference in philosophical approach to the two areas of expression which results in the apparently inconsistent judgements by the European Court when considering claims made under Article 10, and that upon the basis of these principles it is logical to apply a universal standard to cases involving issues of ‘public interest’ and a more subsidiary standard to cases involving artistic expression.

The writer considers that whilst Mahoney’s article expresses an accurate explanation for the different application of Article 10 to differing forms of expression, it does not adequately justify the reasons for doing so.¹¹⁶⁸ Mahoney states correctly that the original intention of the ECHR was to prevent a reoccurrence of the breaches of human rights experienced in the Second World War. However, the ECHR was created over 50 years ago and to limit its present function to the safeguarding of democratic government is to diminish its significant role in checking and modifying the actions of the contracting states, where democratic rule is now firmly established. In a reply to Mahoney’s article, Lord Lester (1998) (who described the European court’s decision in *Wingrove* as “a timorous ruling”¹¹⁶⁹) argues expressly against Mahoney’s view that “in the name of subsidiarity, weaker Convention protection should be given to expression by artists, novelists and playwrights than to political

¹¹⁶⁶ “Freedom of expression constitutes one of the essential foundations of...a [democratic] society, one of the basic conditions for its progress and for the development of every man” *Handyside v UK* (1976) 1 EHRR 737, 754.

¹¹⁶⁷ Mahoney, n 1090 above, p.375.

¹¹⁶⁸ A point supported by Lord Lester in his *Universality Versus Subsidiarity: A Reply* [1998] EHRLR Issue 1, 73, p.76.

¹¹⁶⁹ Lord Lester of Herne Hill, n 1168 above, p.73.

speech an investigative journalism”¹¹⁷⁰ and, expressing a view with which this thesis accords, Lord Lester states that he can discern no “satisfactory logical, philosophical or jurisprudential basis for protecting political expression and media freedom more strongly than artistic and cultural expression”.¹¹⁷¹ If free expression is a fundamental basis for securing democratic society, then it is surely the nature of the freedom (being restricted only in the most pressing of circumstances) which is more important than the form of expression protected. Significantly, in regard to high art, this means that this thesis supports the artist or author’s right to create a work which is considered to be high art (or the right of a publisher or exhibitor to publish the work) but not exclusively so.

The Margin of Appreciation

Lavender has stated that “[t]he margin of appreciation has an established place in the jurisprudence of the European Court of Human Rights. The problem lies in ascertaining with any certainty what that place is.”¹¹⁷² It is an equally difficult problem to determine the status of the margin of appreciation in English courts, when they are called to consider relevant European case law under the HRA 1998. Although fears have been expressed that the use of or reference to the margin of appreciation doctrine in domestic courts is likely to hinder “the effective incorporation”¹¹⁷³ of the ECHR, it is this thesis that such fears are largely unfounded in regard to new cases brought before the domestic courts under the HRA. This is because, as argued by the Secretary of State for the Home Office, Jack Straw, the margin of appreciation is a doctrine of a distinctively international law character¹¹⁷⁴ and as such it does not appear to have any direct application to domestic law.¹¹⁷⁵ However, in relation to the question of the likely weight which will be attached by English judges to the margin of appreciation in the established European case law,

¹¹⁷⁰ Lord Lester of Herne Hill, n 1168 above, pp.76-77.

¹¹⁷¹ Lord Lester of Herne Hill, n 1168 above, p.77

¹¹⁷² Lavender N, “The Problem of the Margin of Appreciation”, [1997] EHRLR Issue 4, 380.

¹¹⁷³ Singh R, M Hunt & M Demetriou, “Current Topic: Is there a role for the Margin of Appreciation in National Law after the Human Rights Act?” [1999] Issue 1 EHRLR 15, 22.

¹¹⁷⁴ HC, Vol 313 col 424, June 3rd 1998

¹¹⁷⁵ Fenwick H, “The Right to Protest, the Human Rights Act and the Margin of Appreciation”, (1999) MLR Vol.62 pp.491-514, at p.500.

the probable outcome is less clear. Fenwick (1999) argues that whilst there are a number of possible developments which may occur in this area, the main factor which will determine the route taken by the domestic court is the decision of the judge to follow either a 'review' or an 'activist' approach in deciding domestic cases in the light of Strasbourg jurisprudence.¹¹⁷⁶ The first of these would mean that the English judiciary would take a cautionary approach, relying fully upon the margin of appreciation aspect of relevant European case law; bringing a decision in a domestic case in line with that which could be discerned from a 'review' only of the relevant European cases.

The second 'activist' approach would require the English judiciary to focus more heavily upon the principles behind European decisions than upon the outcome of particular cases where a wide margin of appreciation has been allowed, and would make a deviation from established Strasbourg jurisprudence much more likely. In support of this view, but stating his more forcefully, Lord Lester asserts that "it is...essential that the doctrine of the margin of appreciation is not used to negate a principled interpretation and application of the right to free expression".¹¹⁷⁷ The writer considers too that this latter approach would be preferable. It would ensure that artistic or 'cultural' expression would be protected upon the same basis as other forms of expression, such as the expression of ideas or information of a journalistic or political nature. What it would not secure would be the protection of high art above other more prosaic forms of artistic expression. To do so, it is submitted, would be to contradict the principles upon which the right to free expression has been based.¹¹⁷⁸ It is necessary that all citizens, regardless of intellectual capacity, have the opportunity to participate in democratic decision-making, and likewise essential that all citizens are given the opportunity for self-fulfillment. A procedure by which the opportunity of self-fulfillment was granted only to those regarded as the cultural elite,

¹¹⁷⁶ Fenwick, n 1175 above, pp.500-502.

¹¹⁷⁷ Lord Lester of Herne Hill, n 1168 above, p.78.

¹¹⁷⁸ This issue is discussed more fully in the concluding chapter of this thesis.

would conflict strongly with the primary purpose of the ECHR, to safeguard against the re-creation of the totalitarian regimes experienced during the Second World War.

The HRA and Legislation

The HRA enables the higher English courts to declare any statutory measures incompatible with Convention rights.¹¹⁷⁹ Whilst on its face this seems a radical development, The Rt. Hon. Lord Hoffman (1999) has expressed the view that the potential of the HRA in this regard “has been greatly exaggerated”.¹¹⁸⁰ This is because, in Lord Hoffman’s view, Parliament has enacted a great number of measures since the 1960s which have shown an increased concern for human rights (the examples cited in the article include the ending of the death penalty, outlawing racial and sexual discrimination and the regulation of police conduct).¹¹⁸¹ Furthermore, the HRA requires that whenever new legislation is being considered by Parliament, a statement is to be made at the Second Reading as to the compatibility of the proposed legislation with the ECHR.¹¹⁸² These factors make frequent declarations unlikely, but as Stone (2000) states: “At some point a court is going to find that it is impossible to interpret a legislative provision in a way which is compatible with the Convention”¹¹⁸³ and if the legislation in question is primary, and the court the High Court or above, a declaration of incompatibility is possible.¹¹⁸⁴

The primary statute in this thesis’ area of study is, of course, the OPA 1959. As has already been stated, the effect of s.4 of the statute has been to deter the police or the Crown Prosecution Service (“CPS”) from prosecuting under this statute, and to rely more on the Common law if the case involves an artistic work. In any event, it is submitted that the inclusion of section 4 in the OPA makes the statute generally compatible with the ECHR, requiring as it does a consideration of the public interest

¹¹⁷⁹ HRA 1998, s.4.

¹¹⁸⁰ Rt. Hon. Lord Hoffman, “Human Rights and the House of Lords”, (A lecture delivered to the Common Law Bar Association on 25 November 1998) March (1999) MLR Vol.62, 159-166, at 161.

¹¹⁸¹ Rt. Hon. Lord Hoffman, n 1180 above, p.161.

¹¹⁸² Rt. Hon. Lord Hoffman, n 1180 above, p.162

¹¹⁸³ Stone, n 742 above, p.16.

¹¹⁸⁴ Stone, n 742 above, pp.16-17.

in the publication of the work. One area of potential incompatibility may, however, be the definition of obscenity contained in the OPA.

The Requirement of Precision

European case law has established that the requirement of Article 10(2) that a restriction upon free expression be “prescribed by law” applies to both common law and legislation,¹¹⁸⁵ meaning that in order for a restriction to be acceptable, it must be “formulated with sufficient precision to enable the citizen to regulate his conduct”.¹¹⁸⁶ The European Court has held recently that the UK was in breach of Article 10 when an English court bound over hunt saboteurs to keep the peace for one year, following their prosecution for behaviour *contra bonos mores* (meaning behaviour which was “wrong rather than right in the judgement of the majority of contemporary fellow citizens”¹¹⁸⁷). The ruling was made on the basis that the nature of the offence was too imprecise to be “prescribed by law” and thus compatible with the ECHR. It is arguable that the ‘tendency to deprave and corrupt’ formula contained in the OPA is likewise insufficiently clear to be compatible with Convention rights.

Commentary upon the Hashman and Harrup case has suggested that “this judgement cannot be regarded as a surprise”¹¹⁸⁸ since the Law Commission had already warned that this could be so. Notably, however, the Law Commission has also in the past criticised the English Blasphemy laws¹¹⁸⁹ (a fact which was recognised by the Commission in the *Gay News* case¹¹⁹⁰) but the European court has not found these to be too imprecise to conform with Article 10(2). However, it should be noted that other areas of the common law which have been applied to artistic works have not yet been considered before the European court; a notable example being the

¹¹⁸⁵ *Sunday Times v UK* No.1 (1979) 2 EHRR 245, 270 (para.47)

¹¹⁸⁶ *Sunday Times v UK* No.1 (1979) 2 EHRR 245, 270 (para.49)

¹¹⁸⁷ *Hashman and Harrup v UK* [2000] Crim.L.R. 185

¹¹⁸⁸ *Hashman and Harrup v UK* [2000] Crim. L.R. pp.185-186.

¹¹⁸⁹ See Buxton LJ, “The Human Rights Act and the Substantive Criminal Law” (2000) Crim LR 331 and Ashworth A, “Current Topic The Human Rights Act and the Substantive Criminal Law: A Non-Minimalist View” (2000) Crim LR 565.

¹¹⁹⁰ The Commission noted that “the Law Commission has criticised the law of blasphemous libel...with regard to lack of clarity”; *Lemon and Gay News v UK* (1983) 5 EHRR 123, at 129.

‘conspiracy to corrupt public morals’ ground used successfully to prosecute Gibson and Sylverie in the Foetus earrings case.¹¹⁹¹ The Law Commission has also questioned the use of this ground in criminal cases¹¹⁹² and if such a ground were used in future, it may be possible for the defendant to claim that the offence is insufficiently precise and therefore incompatible with Convention rights.

Conclusion

Although the HRA has been described as a “Trojan horse”¹¹⁹³ by which Christian values will be undermined and via which ideas which are “hostile to the Christian foundations of this country” will be propagated,¹¹⁹⁴ the outcome of some of the European cases discussed above indicate that, at least in cases which involve a claim to a right of free ‘artistic’ expression, this will not be so if the English courts choose to follow existing Strasbourg jurisprudence.¹¹⁹⁵ The European Commission’s decision in *Gay News and Lemon v UK* (1983) 5 EHRR 123 in effect supporting the views of Mary Whitehouse above those of the applicants, might be cited as a particular example to allay such fears. However, such reassurances should perhaps be made subject to two important reservations. Firstly, in all of the cases involving artistic works, the application of the margin of appreciation doctrine has been highly significant to the outcome of the case and it is not entirely clear how the English courts will choose to interpret the case law in the light of this. Secondly, in many of the cases cited above, there have been dissenting opinions which the English courts may choose to follow; unbound as they are by strict rules of precedent. This chapter has shown that the extent of the effects will depend greatly upon the approach adopted by the English judiciary in their application of the new law. On a practical level, Sedley LJ (1999) has pointed out that the “ultimate fate of the Convention

¹¹⁹¹ *R v Gibson and Sylverie* [1990] 3 WLR 595

¹¹⁹² The Law Commission, *Working Paper No.50, Inchoate Offences Conspiracy, Attempt and Incitement* (London, HMSO, 1973) pp.14-15.

¹¹⁹³ Nazir-Ali M, Bishop of Rochester, as reported by Petre J, “Human Rights Act Undermines Christian Values, Warns Bishop”, *Sunday Telegraph*, October 1st 2000, p.1.

¹¹⁹⁴ *Ibid.*

¹¹⁹⁵ Cumper P, in “The Protection of Religious Rights under the section 13 of the Human Rights Act 1998” [2000] PL Summer 254 states: “The ECHR has never been interpreted in such a way as to pose a threat to the spiritual autonomy of religious organisations” (p.265).

domestic law is going to depend to an unusual degree upon the practising profession”; it is they who select and present the relevant case law to the court and upon whom the judiciary will be relying to extend their education in this new area of domestic law.¹¹⁹⁶

In general terms, Starmer (1999) maintains that “[t]he circumstances in which domestic courts might depart from existing Strasbourg decisions are not clear”,¹¹⁹⁷ since where the domestic court deliberately or obviously contradicts European precedent, there is a strong likelihood of an appeal to a higher domestic court, and ultimately to the European Court.¹¹⁹⁸ Betten (1999) also acknowledges this fact and expresses the hope that, even though they are not bound to do so, the domestic courts will take European case law into account to the extent that “the Strasbourg case law forms part and parcel of the provisions” of the ECHR; the ECHR provisions themselves being only broad statements of principle to which case law has added over the past 50 years.¹¹⁹⁹ Taking a contrary and somewhat more robust approach, Robertson (2000) maintains that the HRA embodies “principles for which English radicals have fought and died down the centuries, with some monumental successes (habeus corpus, due process, ending the death penalty) and notable failures (blasphemy, sedition, official secrecy)”¹²⁰⁰ and, as stated in the introduction, Robertson calls for the judiciary to apply the Act with this radical spirit. The writer supports Robertson’s view since, as will be discussed more fully in the conclusion to this thesis, such an approach will be more likely result in the right to freedom of artistic expression being upheld in the future as strongly as the right to journalistic or political expression is upheld at present.

¹¹⁹⁶ Letter from Sedley LJ to Committee of Heads of University Law Schools dated March 25th 1999; <http://www.ukcle.ac.uk.sedleyjpg.html>

¹¹⁹⁷ Starmer, n 1089 above, p.26, at 1.45.

¹¹⁹⁸ Starmer, n 1089 above, p.26, at 1.46.

¹¹⁹⁹ Betten, n 1013 above, p.6.

¹²⁰⁰ Robertson, n 1015 above, p.18.

Chapter Seven

Conclusion

Introduction

Whilst arguing strongly in chapter three against the protection of high art ‘for its own sake’ or indeed for any other broadly non-legal reason, the writer argues equally strongly in chapter six for the need for greater protection for artistic expression under Article 10 of the ECHR, which is now expressly included in English law under the HRA.¹²⁰¹ It is the aim of the writer to explain this apparent contradiction whilst setting out below the conclusions of this project.

Inherent Qualities versus External Factors

Chapter one set out to discover any particular factor or combination of factors which could be identified within established works of high art, and which marked them out as incomparably great works of visual art or literature. Whilst it was not possible to identify any such factor or factors it was possible, within certain genres, to find certain properties which have caused certain works to be considered comparatively great, or the most excellent examples of their kind. It is upon this *comparative* nature of art and literary appreciation which the writer has sought to focus in arguing that human intervention is fundamental to the process whereby works of literary or visual art become high art. Guillory (1993) points out that the so-called literary canon is not an unchanging list of literary texts, but rather “an *imaginary* totality of works” which is constantly open to change.¹²⁰² The texts do not alter, but are constantly reinterpreted and compared with new contenders for canonical status.¹²⁰³ Human intervention, it is argued, is the essential component of this process. Whilst

¹²⁰¹ Chapter six, pp.230-231

¹²⁰² Guillory, n 452 above, p.30. See also Easthope, n 109 above, p.44

¹²⁰³ Culler gives the example of the novel, once considered “a modern upstart, too close to biography or chronical to be genuinely literary, a popular form that could not aspire to the high callings of lyric and epic poetry”, but now thought to be an appropriate genre for inclusion in the literary canon, in n 328 above, p.83.

the writer has referred to postmodern texts in support of this argument, others have been rejected (the author is not dead) and it should be noted also that reliance has been placed upon earlier theories, particularly those of I.A. Richards,¹²⁰⁴ in this thesis' emphasis upon the subjective nature of the reader's (or viewer's) response. The factor common throughout, it is submitted, is that which may be called the human dimension of literary and artistic production and reception. It is this same dimension that provides the basis for this thesis' argument that the right to freedom of artistic expression should be equal to that afforded to political speech under the recently incorporated Article 10 of the ECHR.

The Approach of the English Legal System towards High Art

The English legal system, in the form of the legislature and the courts, has acknowledged the existence of high art throughout the entire period of study, although the approach of each institution to high art has differed according to the variety of contexts in which it has been considered.

During the earliest period of study (1780 –1857), when there existed a belief within both institutions that high art was contiguous to high moral standards; the Legislature sought to promote high art in the belief that various beneficial social effects would follow.¹²⁰⁵ The courts' approach differs in that, although arguments were raised as early as 1841 for the protection of high art (in Moxon's case),¹²⁰⁶ these were not readily accepted as an appropriate justification for a breach of legal and moral standards in the form of say, a blasphemous libel. The significance of the process of change which occurred in the arts from the 1860s onwards has been stressed in this thesis, since the separation of art from life and morals which occurred as a result of the art for art's sake doctrine initiated a significant change in the law's attitude to high art, particularly in the period 1858 to 1958. The application of the OPA 1857 to serious works of literature or visual art so soon after its enactment (something that

¹²⁰⁴ As expressed in his *Principles of Literary Criticism* (n 170 above) and *Practical Criticism A Study of Literal Judgement* (n 230 above)

¹²⁰⁵ See chapter four, p.115

¹²⁰⁶ *R v Moxon* The Times, 24th June 1841. See chapter five, p.153

Parliament certainly did not intend in drafting the first OPA) was not the result of a deliberate policy change on the part of the legislature or the courts, but rather a reaction to the “wide breach” which began to develop between authors (or artists) and those whom Manchester (1982) terms “the upholders of conventional morality”.¹²⁰⁷ Whereas formerly there had been a clear distinction between high art and obscene publications (the latter being considered a public nuisance by the English legal system), this distinction became “increasingly blurred and literary and artistic works began to come into a ‘twilight zone’ separating the two”.¹²⁰⁸

By the early twentieth century, the separation of art from conventional morality was complete and proponents of high art were arguing for its protection on account of the benefits which could ensue from viewing works of visual art or reading literature (particularly poetry); providing as it could an opportunity for the reader/viewer to learn more about aspects of humanity and to order his/her mind in doing so.¹²⁰⁹ Hence by the time of the implementation of the OPA 1959, it was conceivable that the publication of a literary or visual work of art could be for the public good, regardless of whether or not its content or subject matter accorded with conventional morality, an idea that was inconceivable when the first OPA was drafted. The inclusion of the public good defence in the OPA 1959 is viewed therefore as the legal conclusion to the conflict between traditional or conventional morality on the one hand and that which this thesis has termed ‘secular morality’ on the other, a conflict which had been initiated in the previous century by the art for art’s sake movement.¹²¹⁰ In allowing for the publication of an obscene article on the basis that it is “for the public good on the ground that it is in the interests of science, literature, art or learning,”¹²¹¹ the legislature effectively allowed works of literary and visual art to be judged according to their own standards. As stated in chapter five, this defence was interpreted so broadly as to make it ineffective regarding any work which

¹²⁰⁷ Manchester, n 571 above, p.234

¹²⁰⁸ Ibid.

¹²⁰⁹ A view associated particularly with the “New Critics”; see chapter three, p.75

¹²¹⁰ See chapter five, pp.188-189

¹²¹¹ OPA 1959, s.4(1)

claimed to possess artistic or literary merit; the public good defence saving not only Lady Chatterley from censorship but Linda Lovelace too.¹²¹²

The inclusion of s.4(2) in the OPA, allowing for the opinion of experts as to the merits of the work in question, reflects it is argued an acknowledgement on the part of the legislature that the opinions of experts and critics are vital to the assessment of the quality of a work of art. It is submitted that this had been acknowledged too by the courts, as evidenced by the nineteenth century *Whistler v Ruskin* trial,¹²¹³ but not accepted as relevant in cases where the courts considered it their primary concern to act as *custodes morum*.¹²¹⁴ The OPA 1959 compelled the court to consider the relevance of a literary or artistic merit defence by the use of expert witness evidence; although remarkably s.4(2) was considered by those drafting the legislation to be a declaration of the existing law, rather than a restatement of it.¹²¹⁵ It is a general rule that experts are allowed in to court to give only evidence of fact, “opinions of experts are generally admissible whenever an issue comprises a subject in which knowledge can only be secured by special training or experience”.¹²¹⁶ Hence an art or literary critic is not allowed into court because he or she can attest to the fact that a work is (or is not) high art; rather he or she can, by virtue of their expertise in the area, give an opinion of the status of the work when compared to others of the same genre.

Whilst in theory this evidence is admissible only in regard to artistic (or other) merit and not as regards the issue of obscenity,¹²¹⁷ in practice the distinction has been blurred¹²¹⁸ due to the drafting of the Act, which requires the court to deduce that a work which tends to deprave and corrupt its readers may nevertheless be justified upon the basis that its publication is for the public good. In accordance with the view

¹²¹² See chapter five, p.189

¹²¹³ Chapter five, p.166

¹²¹⁴ See for example the magistrate’s rejection of expert evidence following the seizure of paintings and books by DH Lawrence in 1929; chapter five, p.176

¹²¹⁵ Chapter four, p.140

¹²¹⁶ HC, Vol. 604, col. 804, April 24th 1959. Chapter 4, p.140

¹²¹⁷ *R v Calder & Boyars* [1969] 1 QB 151, 172B and *DPP v Jordan* [1977] AC 699, 718H.

¹²¹⁸ *R v Skirving* [1985] 1QB 819 (allowing expert evidence on cocaine use). See Stone [1986] Crim LR 139, at p.142.

expressed by the Williams Committee in this regard,¹²¹⁹ this thesis considers this requirement to be inherently contradictory and in need of reform. This thesis also objects in principle to the inclusion of the s.4. defence in the OPA, since it raises literary or artistic works to an inappropriately high status within (or indeed above) society.¹²²⁰ Where society, in the form of a democratic government, has deemed it necessary or desirable to control the publication of obscene materials, this thesis considers it inappropriate thereafter to distinguish artistic or literary publications from non-artistic matter. Hence the writer would remove the s.4 defence (or its equivalent) from any statute which replaces the OPA 1959. As stated in chapter three: “Life includes and is more important than art, and it judges things by their consequences”.¹²²¹

High Art and Freedom of Expression

Chapter six has shown that both under English domestic law and under the ECHR, political or journalistic expression has been accorded greater protection than artistic expression;¹²²² Mahoney arguing with relation to the ECHR that this has been based upon judicial policy which gives “a higher level of protection to the “political” function of freedom of expression as enabling informed public debate rather than to its “cultural function of contributing to self-fulfillment”.¹²²³ In accordance with the view of Lord Lester as stated in chapter six, the writer considers that this drawing of a distinction between types of speech and affording weaker protection to one is wrong.¹²²⁴ Hence the writer argues for the protection for artistic expression, equal to that which is granted to political speech. Notably, the writer does not argue for the protection of artistic expression only when the work created is high art, for reasons which will be discussed further below.

¹²¹⁹ Chapter four, pp.141-142

¹²²⁰ Chapter four, p.138

¹²²¹ Greenburg, n 523 above. See Chapter three, p.104.

¹²²² Hare I acknowledges this in “Is the Privileged position of Political Expression justified?” in Beatson J and Cripps YM (eds), *Freedom of Expression and Freedom of Information* (Oxford, Oxford University Press, 2000), pp.105-121.

¹²²³ Mahoney, n 1090 above, p.379.

¹²²⁴ Chapter six, pp.230-231.

Equal Protection for Artistic Expression – A Matter of Principle

As Lord Steyn stated in the *Simms* case,¹²²⁵ three broad arguments have been cited traditionally as the bases for the protection of free speech, these falling under the headings of truth, democracy and self-fulfillment.¹²²⁶ However, there are few specific references to the philosophical foundations of the human rights protected in the international conventions, declarations and treaties which were cited in chapter six and which include the ECHR.¹²²⁷ Hence the philosophical basis upon which free speech is protected within the ECHR is not explicitly clear. However, from the case law arising from the ECHR, it may be deduced (as Mahoney has done)¹²²⁸ that the highest priority has been afforded to that which Barendt (1985) terms “probably the most attractive and certainly the most fashionable free speech theory in modern Western democracies,” the argument from democracy.¹²²⁹ This thesis considers that an argument for enhanced protection for artistic expression under the ECHR (and hence the HRA) can be justified by reference to this democratic principle, and by a renewed emphasis upon the principle of self-fulfillment in its relation to freedom of expression.

Argument from Democracy

As Stone (2000) states, the argument from democracy is most easily sustained in respect of political or philosophical opinions and ideas and factual information;¹²³⁰ since freedom of speech is considered to be requisite to the open criticism of government and the free discussion of public affairs.¹²³¹ As Stone also states, it is less easy to apply this argument to “purely artistic work”,¹²³² unless of course that

¹²²⁵ *R v Secretary of state for the Home Department, ex parte Simms and another* [1999] 3 W.L.R.328, 337A

¹²²⁶ See Barendt E, *Freedom of Speech*, (Oxford, Oxford University Press, 1985), pp.8-23.

¹²²⁷ Nickel JW, *Making Sense of Human Rights Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley, London, University of California Press, 1987) p.9.

¹²²⁸ Mahoney, n 1090 above, p.372.

¹²²⁹ Barendt, n 1226 above, p.20.

¹²³⁰ Stone, n 742 above, p.170

¹²³¹ Schauer, n 1077 above, p.35.

¹²³² Stone, n 742 above, p.170

work happens also to be political.¹²³³ Nevertheless this thesis argues that the argument from democracy can also be applied to artistic expression upon the basis that protection of the fundamental right to free expression, regardless of whether that expression is artistic or political in form, creates the underlying conditions from which democratic government can flourish. Conversely, a failure on the part of the government to adequately protect its citizens' fundamental right to free speech or expression, whatever the nature of that expression, can be taken as an indication that the value or dignity of each citizen is not being adequately acknowledged.¹²³⁴ Such a view requires an acceptance of the idea that "a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect".¹²³⁵ The basis of this thesis' acceptance of such a view is explained further below.

Argument from Self-fulfillment

Reference was made in chapter six to Robertson's (2000) hope that the English judiciary would apply the HRA in the spirit of English radicals such as Tom Paine.¹²³⁶ As has already been stated, Paine viewed speech as a natural right that is always retained and hence as a right of fundamental importance.¹²³⁷ In accordance with this theory, the writer considers that the right to free speech is a human right "inherent to people by virtue of their being human",¹²³⁸ a view which was also put forward by Lord Lester in a House of Lords debate of the Human Rights Bill¹²³⁹ and one which, when fully upheld by the state, allows each individual to fully develop his or her own thoughts and ideas. This theory can be distinguished from others in that "the ultimate point of reference is the individual, not the state, or society at large",¹²⁴⁰ a focus

¹²³³ Schauer, n 1077 above, p.109.

¹²³⁴ Hitler's 'purification' of German art can be cited as an extreme example. See Thistlethwaite, n 191 above, p.114.

¹²³⁵ Dworkin R, *Taking Rights Seriously*, (London, Duckworth, 1977), p.199.

¹²³⁶ Chapter six, p.200.

¹²³⁷ See p.203 above.

¹²³⁸ Shorts and De Than, n 1039 above, pp.12-13. See also Stone, n 742 above, p.170.

¹²³⁹ Lord Lester describes the rights contained in the ECHR as "fundamental rights and freedoms...which are the birthright of the people of this country and which are universal in the sense that they are inherent in our common humanity", HL, Vol 577, col.1726, February 5th, 1997.

¹²⁴⁰ Schauer, n 1077 above, p.48.

which can be detected in the writings of Paine (*The Rights of Man*) but which becomes less apparent in the human rights instruments of the latter twentieth century; the focus being upon the securing of national democratic governments and international accord.¹²⁴¹ Robertson's call for a 'robust' approach may therefore be seen as recognition of the need to return to a more individualistic approach in the interpretation of human rights. As Schauer (1982) states, a fulfilled life is one in which the mind is being completely used and developed; allowing the individual to realise his or her full potential; thus "speech is said to be an integral component of self-fulfillment, the one being inseparable from the other. Free speech is thus said to be justified not because it provides a benefit to society, but because it is a primary good".¹²⁴²

Staniszewski (1995) states: "Art, as we understand it, develops in conjunction with a revolutionary transformation of the way in which an individual conceives his or her humanity in Western culture"¹²⁴³ (that is, in conjunction with the ideas being expressed by writers such as Paine) and it is, therefore itself a demonstration of its creator's freedom; "a realization of his or her essential self".¹²⁴⁴ In accordance with such a view, and upon the basis that, as Tolstoy (1828-1910) states, "Art like speech is a means of communication and therefore of progress, that is, of the movement of humanity forward towards perfection",¹²⁴⁵ it is argued that artistic expression should be afforded greater protection, based upon the argument from self-fulfillment.

Protection Regardless of Merit – A Matter of Equality

It has been argued that artistic expression should be afforded greater protection under the law. It has been stated also that high art is that which experts and critics have considered to be excellent examples of their kind, based upon varying factors. Since Lord Steyn has asserted that "[t]he value of free speech in a particular case

¹²⁴¹ Nickel, n 1227 above, pp.6-7.

¹²⁴² Schauer, n 1077 above, pp.49-50.

¹²⁴³ Staniszewski, n 185 above, p.101.

¹²⁴⁴ Staniszewski, n 185 above, p.104

¹²⁴⁵ Tolstoy L "Art and Religious Perception", reproduced in H Girvetz & R Ross, *Literature and the Arts: The Moral Issues* (Belmont California, Wadsworth, 1971), p.30-36, at p.31

must be measured in specifics. Not all types of speech have an equal value”,¹²⁴⁶ should it then be argued that high art should be afforded greater protection, because it has been determined to be of greater value than works of a more prosaic nature? No. The right to freedom of artistic expression should be afforded to the artist (or author, or publisher) of a work, regardless of the merits of that work, since to protect only high art would conflict with the principles upon which this thesis has already relied; namely democracy (itself based upon a presumption of equality) and self-fulfillment.

Each individual has an equal right to free expression. More particularly, Rees (1971) states with regard to the UDHR that the rights afforded to men under this provision “are not thought to be dependent on their being possessed of a certain level of intelligence, prowess in the arts...any more than they are dependent on one’s racial origins or religious beliefs”¹²⁴⁷ (the preamble to the Declaration referring to “the inherent dignity and...the equal and inalienable rights of all members of the human family”¹²⁴⁸) and it is submitted that such an observation can be applied equally to the human rights contained in the ECHR.¹²⁴⁹ Hence the extent of the right of free expression contained in the ECHR must not be varied according to the individual’s skill or talent in self-expression. It is a fundamental right that must be applied equally and regardless of the literary or artistic merit of the work created.

Therefore the writer concludes that neither high art nor literary or artistic works in general should be afforded greater protection on the basis that they are ‘art’, but that the authors, artists, publishers and exhibitors of artistic or literary works, regardless of the quality of such works, should be afforded greater protection, on the basis that such works are ‘expression’, under the right to freedom of expression which is now included in English law, subject only to those restrictions prescribed by law, and which are necessary in a democratic society (Article 10(2)).

¹²⁴⁶ *R v Secretary of state for the Home Department, ex parte Simms and another* [1999] 3 W.L.R.328, 337D

¹²⁴⁷ Rees J, *Equality*, (London, Macmillan, 1971) p.102

¹²⁴⁸ Shorts and De Than, n 1039 above, p.7.

¹²⁴⁹ Not least because the ECHR expressly refers to the UDHR in its Preamble.

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