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Conspiracy to corrupt public morals and the 'unlawful' status of homosexuality in Britain after 1967

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ABSTRACT

The common law offence of conspiracy to corrupt public morals has a long though controversial history in English law. It was a charge mainly employed against obscenity, procuring prostitution, keeping a disorderly house, public indecency and public mischief. These could be interpreted by the courts as facets of a single offence known as conspiracy to corrupt public morals. The charge was used intermittently in the twentieth century, mainly against the arrangement of prostitution and 'disorderly houses' used by homosexual men. It was applied again in 1960 in the *Ladies Directory* case and was subsequently used against gay men who advertised for friends and partners in the underground magazine *International Times* (*IT*). The prosecution of *IT* was based on the legal principle that certain forms of 'outrageously immoral' conduct were in themselves corrupting of public morals, whether such conduct was legal or not. This principle placed male homosexuality in the legal category of 'unlawful' or 'wrongful' acts. In that sense, even after the decriminalization of homosexuality between men in 1967, it still had an uncertain legal status. Conspiracy to corrupt public morals cast a shadow over early attempts to create a gay civil society that was partly based on magazines and personal advertising. For conservative critics of the 1967 Act, conspiracy charges had the useful effect of curtailing public expressions of homosexuality.

KEYWORDS

Conspiracy to corrupt public morals; homosexuality; law

Conspiracy to corrupt public morals is still a common law offence capable of being applied in English courts, and its defenders have argued that it dates back to the seventeenth century. Whether that is true or not and whether a substantive offence of corrupting public morals has ever existed, the real heyday of the charge was in the period between 1960 and 1975 when it appeared to be one of the chief legal instruments of an apparent backlash against the counterculture and the emergence of a gay press and civil society. In the 1960s and early 1970s it was argued by several lawyers and commentators that the crime of conspiring to corrupt public morals was a prime example of 'judge-made law' and as such circumvented not only the will of parliament, but also the intentions of legislators in the period after the Wolfenden Report of 1957. Wolfenden had recommended the modification of the criminal

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law as it affected certain areas of private morality, specifically prostitution by women and male homosexuality between consenting adults in private, while also suggesting harsher penalties for public indecency and soliciting.[1] Legislation to achieve both aims reached the statute book in the form of, respectively, the Street Offences Act 1959, which increased penalties for soliciting and forced female prostitutes off the streets, and the 1967 Sexual Offences Act, which allowed male homosexuality in certain circumstances (between two people over the age of twenty-one).

This article aims first to examine the question of whether conspiracy to corrupt public morals was an offence, and on what terms. It then describes how conspiracies against morality formed part of the debate over the reforms suggested by Wolfenden. The legislation that followed the Wolfenden recommendations raised the question of the exact extent of personal liberty and public display in these newly defined areas of private morality. Conspiracy to corrupt public morals was seen at the time as part of a backlash against permissiveness that included a series of high-profile obscenity cases. Yet, if there was a 'backlash', I suggest that it grew less from the machinations of some secretive Establishment cabal than from attempts to test the boundaries of public and private that followed changes in the law regarding prostitution, homosexuality and obscenity that took place between 1959 and 1967. At that time, conspiracies against public morals charged against the underground press were identified by defenders of Wolfenden as a threat to the moral settlement envisaged in the report and subsequent legislation based on it. This was because certain key legal decisions made by the courts between 1960 and the early 1970s on the matter of conspiring against public morality ensured that homosexuality – now a legal activity – ended up as a 'wrongful' or unlawful activity in English law. These developments gave comfort to those moral and legal conservatives unhappy with the new openness of homosexuality, and who specifically wanted to stop it 'spreading' through overt public display. Charges of conspiracy against public morality in that sense effectively policed, albeit for a short period, the new publicness of gay life, thereby inhibiting the development of a gay civil society: by which I mean forms of association based not merely on commercial venues like pubs and clubs, but also on political activism and a thriving and independent press. For that civil society to grow, the law of conspiracy had to be debated, challenged and, in many cases, simply flouted. Although seemingly no more than a legal footnote, the law of conspiracy to corrupt public morals was in fact an important moment in the developing cultural visibility of homosexuality.

The most famous of the prosecutions for conspiracy to corrupt public morals were those directed at the *Ladies Directory*, a list of prostitutes produced by Frederick Shaw in 1959 and 1960, the underground paper *International Times*, or *IT* (known to the law reports as R *v*. Knuller), and the *OZ* obscenity trial of 1971. In addition to those, there were 38 other cases between 1965 and 1970 in which the charge of conspiring to corrupt public morals was employed involving 161 defendants, of whom 137 were found guilty.[2] While most of

[1] On Wolfenden and its cultural context see, for example, Frank Mort, *Capital Affairs: London and the Making of the Permissive Society* (New Haven, 2010), chaps 5, 6, 7; Julia Laite, *Common Prostitutes and Ordinary Citizens: Commercial Sex in London, 1885–1960* (Basingstoke, 2012); Matt Cook (ed.), *A Gay History of Britain* (London, 2007), 172–7; Stuart Hall, 'Reformism and the legislation of consent' in National Deviancy Conference, *Permissiveness and Control – The Fate of Sixties Legislation* (London, 1980), 1–42.

[2] The National Archives, UK (hereafter TNA), Director of Public Prosecutions, Case Papers, New Series (hereafter DPP), DPP 2/4598, Donelly and McGuigan, Advertising Magazine '*Exit*' Incorporating '*Way Out*': Conspiracy to Corrupt Public Morals, notes of A/S Met.

these cases involved the showing of blue films in Soho, or the prosecution of obscure small-time brothels or prostitutes and hence received little attention, the cases of Shaw, *IT* and *OZ* received massive publicity and focused critical attention on the apparent novelty of the charge of conspiracy employed in those prosecutions. Following the decision in Shaw's case, the legal scholar J. E. Hall Williams asked: 'Where in the books will one find the common law misdemeanour of corrupting public morals? In none to my knowledge. Where in the modern cases? In none to my knowledge.'[3] The journalist Bernard Levin was even more trenchant in his attack on the *IT* prosecution. The case, he wrote, 'has implications far beyond the fate of the defendants', mainly because 'the offence of conspiracy to corrupt public morals is not one which is to be found in any statute, modern or ancient', and as such provided a convenient category in which to place those who have 'done something that the authorities think he should not have done, even if the law had not previously forbidden its doing'. Moreover, according to Levin and some lawyers and judges, the offence itself was only twelve years old, having been 'invented in the late summer of 1960' to prosecute Frederick Shaw and his notorious *Directory*. Levin concluded: 'Something must be done about this, starting with the granting of pardons to the three *IT* defendants, convicted, even if correctly convicted, on a charge which should never have been brought.' Geoffrey Robertson, then beginning his career as a campaigning liberal barrister, noted of the conspiracy charges that 'they don't write laws like that anymore. … Nor should they.'[4]

In the *IT* trial, the essence of the prosecution's case was that morals had been corrupted via the small 'ads' (advertisements) placed in the magazine. The issue turned on the count alleging conspiracy to corrupt public morals, mainly because the magazine was charged with arranging 'unlawful' (though legal) sexual activity between men via its 'Males' small ads, as well as encouraging sex across the new age of consent boundary set at twenty-one in the 1967 Sexual Offences Act. The prosecution in the case argued that because the magazine circulated among university students and teenage schoolchildren, and because many of the ads seemed to be seeking young men around the age of twenty-one or below, the paper had the capacity to corrupt morals in the manner suggested. For a period after the 1967 Act, extending well into the mid-1970s, prosecutions such as that of *IT* seemed to confine male homosexuality to the legal hinterland of 'unlawfulness', in spite of the fact that in certain circumstances it was now legal.

Conspiracy to corrupt public morals: the history of an offence

The case that is usually seen as reviving the common law offence of conspiracy to corrupt public morals was that of Frederick Shaw. His *Ladies Directory* began production in the autumn of 1959 and contained around forty ads for female prostitutes in Soho, Mayfair, Bayswater and Notting Hill, as well as some black and white photographs of the women concerned in various stages of undress. Shaw was tried on three counts, first for publishing an obscene article, second for conspiring to corrupt public morals, and third for living on

[3] J. E. Hall Williams, 'Notes of cases: the *Ladies Directory* and criminal conspiracy. The judge as *Custos Morum*', *Modern Law Review* (September 1961), 626–31, 628–9.

[4] Bernard Levin, 'Storm under the common law umbrella', *The Times*, 20 June 1972, 14; Levin, '…Which brings me back to the Attorney-General', *The Times*, 27 June 1972, 16; Geoffrey Robertson, 'The politics of obscenity', *Cherwell*, 29 May 1971, quoted in Tony Palmer, *The Trials of* OZ (Manchester, 1971), 26.

the earnings of prostitutes via the ads in the *Directory*. He was convicted on all three counts and sentenced to nine months in prison.[5]

Shaw appealed against his conviction on the grounds that 'there was no such offence at common law as the conspiracy alleged', and he also contested his conviction for living on immoral earnings.[6] Broadly speaking, two conceptions of conspiracy to corrupt public morals were put forward at his appeal. The Crown argued that conspiracy to corrupt public morals was a single offence that grouped together particular kinds of immoral conduct over which the courts had long asserted jurisdiction. These were, primarily, obscenity, procuring prostitution, keeping a disorderly house, public indecency and public mischief. Although these could be offences in themselves, they could also be construed as conspiracies against morality where an agreement to do them had taken place. It was that interpretation of the common law which permitted the prosecution of Shaw for arranging what was a legal activity, and which was later used in a similar way against the underground press. Shaw argued to the contrary that each of these forms of conduct constituted separate offences and could not be seen as aspects of a single substantive offence known as corrupting public morals.

The main argument against the appeal was that the courts had long been *custos morum* (guardian of morals). This doctrine, it was maintained, was first articulated by Lord Mansfield in 1763 in R *v*. Delaval and relied on a series of cases dating back to 1663 to show that the courts had long asserted their right to prosecute conduct of various kinds held to be against public morality. In the first of these, Sir Charles Sedley's case, from 1663, he had exposed himself on a balcony at Covent Garden and made water on the people below. At Shaw's appeal, Sedley's case was held to be evidence that the secular courts, rather than the ecclesiastical ones, had asserted a right to prosecute such conduct. R *v*. Curl (1727), also cited by the Crown, was an obscene libel resulting from the publication of *Venus in the Cloister or The Nun in her Smock* by the bookseller Edmund Curll. That case reasserted the principle, which the courts sought to establish in Sedley, that the temporal, rather than ecclesiastical, courts had jurisdiction over offences against morality.[7] Another set of cases related to procuring acts of prostitution.[8]

Two other categories of conspiracy were used to support the decision in Shaw on the question of conspiracy against public morals: those that related to causing a public mischief and those concerning outrages against public decency. These cases were used to give force to the view that the courts had maintained an ability to punish immoral and mischievous offences as conspiracies against the public. As Peter Gillies has pointed out, the twentieth century saw a series of cases which established conspiracy to effect a public mischief as one head of the crime of conspiracy.[9] These cases generally related to forms of deception. Obtaining a passport by false pretences was the offence in R *v*. Brailsford (1905), while in Bassey an attempt to become a member of the Bar using false papers was also found to be a

[5]TNA, Records of the Central Criminal Court, CRIM 1/3467, Instructions for indictment, 6 September 1960, R *v*. Shaw, Corrupting Public Morals.
[6]Shaw *v*. DPP [1962], AC 220, 221.
[7]R *v*. Curl (1727) 2 Strange 788; 93 ER 849, 790.
[8]R *v*. Delaval (1763) 3 Burr 1434, 97 ER 913; R *v*. Howell (1864) 4 F and F 160, 176 ER 513; R *v*. Mears and Chalk (1851) 4 Cox CC 425.
[9]See Peter Gillies, *The Law of Criminal Conspiracy* (Sydney, 1981), 75–6.

form of public mischief.[10] The cases relied upon in Shaw relating to conspiracies to outrage public decency were, principally, R *v*. Saunders (1875), in which the defendants publicly displayed a corpse in a booth on Epsom Downs, R *v*. Wellard (1884, indecent exposure), and R *v*. Berg, Britt, Carré and Lummies (1927), the latter involving keeping a disorderly house for the purpose of corrupting those who went there by encouraging homosexual acts.[11] The Court of Appeal therefore decided in Shaw's case that all of these could be held, by analogy, to constitute conspiracies against public morals, and that therefore an offence with that name did exist. The Court concluded that it was 'an established principle of common law that conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an indictable misdemeanour'. The law reports showed that 'The conduct to which that principle is applicable may vary considerably, but the principle itself does not, and in our view the facts of the present case fall plainly within it.'[12]

In Shaw's case the Crown argued successfully before the House of Lords that 'the particular instances in the various authorities are but manifestations of a single underlying offence', a conclusion that seemed to later critics to be inventing a catch-all category of common law that could be applied *ex post facto* to almost anything deemed to be morally outrageous. For the appeal judges, however, conspiracy to corrupt public morals was an umbrella term containing several different types of immorality that collectively had long been within the compass of the common law. As Viscount Simonds stated, 'It matters little what label is given to the offending act.' He argued that such conspiracies could include affronts to public decency, corruption of public morals, the creation of a public mischief or the undermining of moral conduct. For Shaw, William Rees-Davies summed up his position on the offence of conspiracy to corrupt public morals by asserting that there were 'specific common law offences narrower in ambit in each case but no such general offence', and that 'Even if there is a general class of offence, it is limited to offences outraging public decency which are in the realm of public nuisance.'[13]

Part of the reason that conspiracy to corrupt public morals appeared to be a 'single underlying offence' was that in cases of obscenity, keeping a disorderly house, public indecency and procuring prostitution, part of the indictment (often in a separate count) alleged that the offences were committed with the intent of corrupting public morals. Therefore, although in the *IT* appeal there was some uncertainty among the Law Lords about the definition of corrupting public morals and about what conduct might constitute it, the question was ultimately irrelevant because in a practical sense the term had already been historically applied to the family of offences against morality referred to in Shaw.[14] Most notable of those were cases of obscenity.[15]

Although the requirement to frame the indictment for obscenity as a conspiracy against morals was changed in 1915, in cases of keeping a disorderly house and

[10](1931) 22 Cr. App. R. 160.
[11]R *v*. Wellard [1884] 14 QBD 63, and R *v*. Berg, Britt, Carré and Lummies (1927) 20 Cr App R 38.
[12]Shaw *v*. DPP [1962] AC 220, 234.
[13]Shaw *v*. DPP, 253, 241.
[14]On the question of definition in the *IT* appeal see Robert Hazell, *Conspiracy and Civil Liberties: A Cobden Trust Memorandum* (London, 1974), 30–1; R *v*. Knuller [1972] 3 WLR, 173.
[15]For instance, the case against Charles Bradlaugh, 'High Court of Justice, February 1, Queen *v*. Truelove', *The Times*, 2 February 1878, 11. See also TNA, CRIM 1/234, Cyril Benbow and Mervyn James Hyde, Corrupting Public Morals by Selling Obscene Literature, and that of Gramol Publications; TNA, Metropolitan Police: Correspondence and Papers, Special Series, MEPO 3/939, London Shops Where Condemned Magazines Can Be Bought, Minutes.

procuring prostitution the charge of intending to corrupt public morals was retained.[16] Historically, the use of conspiracy to corrupt public morals had also been directed at homosexual gatherings, which were treated in law as disorderly houses when no conclusive evidence of sexual acts could be obtained. In R *v*. Berg, Britt, Carré and Lummies (1927), a basement flat in Fitzrovia used for parties was, the police claimed, 'the resort of what are known as "Nancy Boys" '.[17] Rowdy soirees were held there by its occupants, Robert Britt and Constance Carré, and the police also said that they had witnessed two men undressing and going to bed in one of the rooms as well as an indecent dance performed by Britt during the course of which he exposed himself. It was charged that Britt and Carré did 'cause and procure and permit to assemble at and remain on the said premises divers immoral, lewd, and evil disposed persons tippling, whoring, using obscene language, indecently exposing their private naked parts and behaving in a lewd, obscene and disorderly and riotous manner to the manifest corruption of the morals of His Majesty's liege subjects'.[18] Ten other party-goers were charged with aiding and abetting the keeping of the house. Britt, Carré and two others were convicted of keeping a disorderly house and corrupting public morals after a cache of love letters to Britt and Lummies from another man were admitted in evidence and seemed to prove the suspicions of the police. Their appeals were dismissed.

A similar case, in which the offence appeared to consist of the apparent or potential arrangement of homosexual indecency and sexual acts at a disorderly house, occurred in 1933. At that time it was common in London to arrange public dances for those working in hotels and catering, and, as Matt Houlbrook has shown, these became by degrees a cover for gay men to meet. One such dance, organized by a barman named Austin Salmon – more commonly known as 'Lady Austin' – and John Packer, a waiter, took place at the Park House Private Ballroom in Holland Park, west London, on 3 December 1932.[19] The police testified that, at the event, men dressed as women and wearing make-up had kissed and embraced. Salmon, Packer and Kathleen O'Donnell, the owner of the house, were charged with keeping a disorderly house 'for the purpose of exhibiting to the view of any person willing to pay for admission to the said place, divers lewd, scandalous, bawdy and obscene performances and practices to the manifest corruption of the morals of His Majesty's liege subjects, against the Peace etc.'. Salmon and Packer were convicted on the count of conspiracy, while thirty-three revellers were charged with a variety of homosexual offences as well as aiding and abetting the conspiracy.[20]

Although it is difficult to disinter police practices in relation to the offence of conspiring to corrupt public morals, it seems that in R *v*. Berg, the Lady Austin trial, as well as later decisions, one of the chief uses of the charge before Shaw was to prosecute the arrangement and incitement of prostitution or other forms of illicit sexual activity or exhibition via print or at a disorderly house, especially in cases where direct evidence of sexual offences was lacking. In that respect the Law Lords' reading of history in Shaw was entirely correct in

[16]Indictment Act 1915, 5 & 6 Geo. 5, Appendix to Rules, 22.
[17]TNA, CRIM 1/387, R *v*. Britt and Others, Information of Robert Sygrove, Chief Inspector Metropolitan Police D Division, 8 January 1927.
[18]Examination of George Collins, 17 January 1927, 'R *v*. Britt and Others'; R *v*. Berg (1927) 20 Crim App R 38.
[19]See Matt Houlbrook, *Queer London: Perils and Pleasures in the Sexual Metropolis* (Chicago, 2005), 244–5.
[20]TNA, CRIM 1/639, Salmon, Austin and 33 Others, R *v*. Austin Salmon and Others, Central Criminal Court 7 February Sessions 1933, Copy Charges. See also R *v*. Quinn [1962] 2 QB 245, 246, 247, 255.

concluding that this form of conspiracy did have a long though intermittent history of use for the same purpose.

After Shaw, 1960–75

In spite of the protests from liberals and legal reformers that followed the prosecution of Frederick Shaw, his case was in fact part of a longer history of conspiracies against public morals. It was that relatively well-established interpretation of the offence which made it central to the debates over morality and law that followed the Wolfenden Report. After Shaw, it appeared that a legal activity could become criminal if subject to the charge of conspiracy. This reading of the common law seemed to contradict the Wolfenden recommendations, especially the notion that there were areas of private life – specifically prostitution, and homosexuality in certain circumstances – that were not the law's business. The contradiction was noted in the famous debates between the legal philosopher H. L. A. Hart and the judge Patrick Devlin over the consequences of Wolfenden. These debates are normally seen as being 'won' by the pro-Wolfenden Hart, with Devlin representing an outdated attempt to reassert the common law's power to supervise morality. However, Devlin's position that the common law could still police homosexuality even after it was decriminalized was the one that found an echo in the decisions of the House of Lords against *IT*.

The Shaw decision loomed large in Devlin's argument. For him, the morality of any society lay in those standards of conduct of which the 'reasonable man' approved, and those reasonable standards of morality were to be found expressed in the decisions of an English jury.[21] There were, he argued, two modern landmarks in the relationship between morality and law: the first was Wolfenden, and the second was the decision in Shaw's case which he regarded as having resulted directly from Wolfenden's recommendations. Shaw's case was, for Devlin, the prime example of the way in which morality, descending from Christianity and history, was expressed by the common law. The mechanism was self-regulating, for if juries disagreed with particular laws concerning morals, they would inevitably acquit those accused of them. That, Devlin concluded, 'confers on the jury a right and duty more potent than an unofficial veto; it makes the jury a constitutional organ for determining what amounts to immorality and when the law should be enforced'.[22] In arguing in this way, Devlin took his inspiration directly from the judgments of the Law Lords in the *Ladies Directory* appeal. There, Viscount Simonds had asserted on the part of the courts 'a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State', and a duty on their part 'to guard it against attacks which may be the more insidious because they are novel and unprepared for'. The jury was conceived in similar self-regulating terms by Lord Morris in Shaw's case: 'Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries, who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved.'[23]

To the contrary, H. L. A. Hart viewed Shaw's case as a part of a renewed 'outbreak of legal moralism' by which 'Judges both in their judicial capacity and in their extra-judicial statements have gone out of their way to express the view that the enforcement of sexual

[21]Patrick Devlin, *The Enforcement of Morals*, 7th edn (Oxford, 1965), 15.
[22]*ibid*., 90–1.
[23]Quoted in Hall Williams, *op. cit*., 628, 629.

morality is a proper part of the law's business.'[24] The 'exceedingly vague and indeed obscure idea of corrupting public morals has fashioned a very formidable weapon for punishing immorality as such', Hart argued. Moreover, Devlin's reading of the law threatened to confuse the fact-finding role of the jury with the judge's function of declaring the law. In that sense the Shaw decision seemed to make 'virtually any co-operative conduct … criminal if a jury consider it *ex post facto* to have been immoral'.[25]

For Hart, the Shaw decision threatened to undermine the settlement envisaged by Wolfenden that sought to separate the criminal law from particular areas of private morality, not least that of male homosexuality. There was some reason for believing that that might be the case. One of the curious features of the *Ladies Directory* appeal was the way in which it was viewed by the Law Lords as a pre-emptive statement of intent designed to map out the moral landscape of a society that was about to decriminalize homosexual acts between men according to the Wolfenden template. When Viscount Simonds asserted the courts' 'residual power where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare', he had in mind that exact situation. 'Let it be supposed,' he had said in 1961,

> that at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them.[26]

Statements such as that encouraged the fears of liberals like Hart, Hall Williams and later Bernard Levin, that the moral settlement suggested by Wolfenden might still be overturned or abridged. Simonds's views might also have provided justification for a series of prosecutions relating to morality and decency that did in fact follow Shaw. Most of the prosecutions for conspiring to corrupt public morals after 1960 were not, however, against legal activities such as prostitution or arranging it, and still less against behaviour considered merely immoral. Instead, these cases concerned the touts who wandered around Soho drumming up business for pornographic films on unlicensed premises or (more rarely) live sex shows. Films in general were exempted from the 1959 Obscene Publications Act in order to avoid the extension of censorship to cinema exhibition on licensed premises.[27] As a result, the blue films shown in Soho and other places could only be prosecuted on the grounds that those involved were conspiring to corrupt public morals. The charge of conspiracy also carried a more severe penalty, and therefore prevented the touts from merely paying their fines in order to avoid prison. Other isolated prosecutions for conspiracy in this period involved gay brothels, though additional charges, notably keeping a disorderly house, were also involved.[28] In general,

[24] H. L. A. Hart, *Law, Liberty and Morality* (Oxford, 1962), 6.
[25] *ibid*., 12.
[26] Shaw *v*. DPP [1962] AC 220, 268
[27] Obscene Publications Act 1959, section 1(3)b.
[28] On the blue films see TNA, CRIM 1/4465, Central Criminal Court Autumn Sessions 1965, 13 December 1965, Queen *v*. Michael Joseph Davis and others; TNA, CRIM 1/4536, R *v*. Kent and others; TNA, CRIM 1/4360, 'R *v*. Murray and Others'; TNA, CRIM 1/4102, Central Criminal Courts 1963, Queen *v*. Anthony Paul Kelly and Leslie Ward.

though, conspiracy to corrupt public morals was, in the 1960s, a charge directed at powerless people on the margins of society and morality.

In spite of appearances, official attitudes did not encourage the proliferation of such prosecutions. In 1961 Roy Jenkins had voiced the concerns of many liberals who feared that conspiracy to corrupt public morals might be used as an alternative to obscenity charges, thereby rendering his own 1959 Obscene Publications Act invalid. In 1961, in the wake of Shaw, Jenkins asked the Attorney-General in parliament whether he would instruct the DPP not to bring prosecutions for conspiracy to corrupt public morals in place of Section 4 of the 1959 Obscene Publications Act that allowed such material to be defended on the grounds of 'public good'. Sir Reginald Manningham-Buller replied that 'no such instructions are necessary' because there 'is no need for me to give instructions to the DPP not to do something which he would never dream of doing'.[29] In June 1964 the Solicitor-General Sir Peter Rawlinson had given a further assurance that a conspiracy to corrupt public morals would not be charged so as to circumvent the statutory defence in Section 4.[30]

Although there was no immediate flood of prosecutions outlawing immoral behaviour at the behest of England's judiciary, the Shaw decision did become part of the moral landscape of the 1960s and early 1970s in an important sense. In particular, the idea that the criminal law was *custos morum* was seized upon by those opponents of the 1967 Sexual Offences Bill which aimed to decriminalize homosexual acts between consenting men over the age of twenty-one. Opponents of that Bill sought to retain elements of moral supervision in that legislation, and based their arguments on the decision in Shaw. Specifically, those in favour of an age of consent of twenty-five and the retention of severe penalties for homosexual acts below that age cited the Law Lords' judgments in the Shaw case in support of their views. The critics of the 1967 Bill, such as the Welsh Tory Raymond Gower, aimed to hedge that legislation with safeguards aimed to protect youth, prevent publicity and confine homosexuality to 'true homosexuals', or those already so identified. Gower argued that even the Bill's proponents would 'acknowledge that the least desirable consequence … would be the extension of homosexual practices to those who do not participate in them already', and that 'any wider spreading of these practices would be extremely undesirable'.[31]

One of the key critics of the 1967 Bill was the Conservative MP for Thanet, William Rees-Davies, who had represented Shaw during his appeal and had at that time argued against the existence of conspiracy to corrupt public morals as a discrete offence. In Rees-Davies's view, the way to confine homosexuality to men who were authentically homosexual, those 'who have grown up to be homosexuals in private', rather than men likely to be corrupted by others, was to apply the principle asserted in Shaw's case. That was one that had 'stood the test of time and which has the complete support of the judges of the courts, and fairly recently of the Law Lords in the House of Lords'.[32] To that end, Rees-Davies aimed to alter the Bill's definition of what constituted public and private. The question of how a private sexual act was defined was central to the Bill, as it outlined the space of legal impunity which gay men might subsequently enjoy. Private acts were those taking place between two men over twenty-one with no other persons present or no other witnesses. Anything else was deemed to be taking place 'in public'. Rees-Davis aimed to widen the concept

[29]TNA, DPP 2/4668, Queen *v*. Knuller, Memo on *Hansard*, 29 January 1961.
[30]House of Commons, 3 June 1964, col. 121 and 16 June 1964.
[31]House of Commons, Fifth Series, vol. 749, 1966–7, 3 July 1967, col. 1415.
[32]*ibid*., col. 1444.

of publicness in the Bill to encompass any 'act of a lewd, obscene and disgusting nature and outraging public decency; or … conduct injurious to public morals by tending to corrupt the mind and destroy the love of decency, morality and good order'. That, he argued, would achieve the Bill's purpose, 'which is to retain the right for homosexuals to engage in their pleasures in private' but also to 'have protected the public from the public display of their immorality'.[33] Rees-Davies went on to quote from what he called Viscount Simonds's 'Churchillian' declaration in Shaw that there was such an offence as conspiracy to corrupt public morals, and that this offence should be used in future to police public expressions of homosexual interest or advertisement.[34]

Although Rees-Davies's amendment aiming to protect the public was defeated, the logic of his argument found an echo in the trial of *International Times* (*IT*). The case against *IT*, which played out between 1969 and 1972, revolved around three issues that had been central to the post-Wolfenden settlement and the 1967 Sexual Offences Act that arose from it: the age of consent, the publicness of homosexuality and its potential to spread to those unguarded against it. The trial developed from the established police practice of using conspiracy charges against attempts to advertise and arrange sexual activity, legal or otherwise. Whatever the motivation for the prosecution of *IT*, it was clear that the count relating to the corruption of public morals referred to the very situation outlined by Rees-Davies in 1967 in debates on the Sexual Offences Bill, and by Viscount Simonds in his judgment of Shaw. The outcome turned on the 'Males' section of *IT*'s small ads. The prosecution leant heavily, though not exclusively, on possible breaches of the age of consent boundary that might actually have resulted in the corruption of specific individuals via these advertisements. In his summing up at the trial, the judge, Edward Sutcliffe, dwelled on ads of that kind such as 'Alert young designer, 30, seeks warm, friendly, pretty boy under 23 who needs regular sex' and the 'Genuine friend (versatile passive)', looking for a man who 'must be virile'. That advertiser, 'with his own house', offered work that 'would suit working boy of boyish nature'. His ad, Sutcliffe suggested, was 'a clear inducement to a working boy to come along and commit homosexual acts'. Similarly, the 'Inexperienced student seeks initiation by beautiful young man' and others which offered material exchange or reward were clearly, in his view, 'trying to induce some other person who has not had homosexual experience before to indulge in homosexual activities'.[35] Bearing in mind that between 20,000 and 30,000 university students were said by *IT*'s editors to read the magazine on a regular basis, and the fact that it was sold in some schools, the jury was fully convinced that a conspiracy against public morals had taken place.

However, it was not only those under twenty-one who might have been corrupted. In his summing up, Sutcliffe argued that those over the age of consent could be equally affected by the ads. In that sense, homosexuality in the *IT* case was construed as an 'unlawful' or wrongful act (rather than a strictly illegal one) according to the logic of the decision in Shaw. Lord Reid, who dissented from the majority view in Shaw, nevertheless suggested in that case that the law up to that point had recognized a category of 'unlawful' acts that might not be '"breaches of the law at all, but which nevertheless are outrageously immoral or else in some way are extremely injurious to the public"'.[36] 'Of course the case is that persons

[33] *ibid*., col. 1433.
[34] *ibid*., col. 1436.
[35] TNA, DPP 2/4670, Q *v*. Knuller, Short Transcript, Monday 9 November 1970, 42, 43, 45.
[36] Lord Reid was quoting from Kenny's *Outlines of the Criminal Law*, (17th ed., Cambridge, 1952) Section iv, 451, quoted in Shaw *v*. DPP, 273–4.

over the age of twenty-one can be corrupted in the same way as persons under the age,' Mr Justice Sutcliffe argued in the *IT* trial, 'if not entirely to the same extent.' 'But,' he went on, 'there is no particular magic in the age of twenty-one and it is not suggested here by the Crown that if these were addressed to people only over twenty-one they were incapable of corrupting people of that kind.'[37]

One of the main issues in the case was whether what appeared to be the encouragement of homosexuality should be tolerated. At *IT*'s appeal the following year the issue seemed to have been decided in the negative when Lord Reid placed male homosexuality squarely at the margins of public morality by arguing that it shared the same legal status as gaming and prostitution. Even though homosexuality between men was now legal in some senses, there was 'a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense'. The 1967 Sexual Offences Act, he argued, 'enacts subject to limitation that a homosexual act in private shall not be an offence but it goes no farther than that … no licence is given to others to encourage the practice'. There was, he continued, nothing in the 1967 Act 'to indicate that parliament thought or intended to lay down that indulgence in these practices is not corrupting'. He read the Act 'as saying that, even though it may be corrupting, if people choose to corrupt themselves in this way that is their affair and the law will not interfere. But no licence is given to others to encourage the practice.' Though it went unmentioned by Lord Reid, the logic of Lord Devlin's argument in respect of the *Ladies Directory* applied in this case: 'So if one accepts Shaw's case as rightly decided it must be left to each jury to decide in the circumstances of each case whether people were likely to be corrupted.'[38]

The judgment in *IT* appeared to confirm the 'unlawful' status of male homosexuality, while the arguments of the judge at the trial of the magazine suggested that homosexuality was corrupting or likely to meet the standard of being 'outrageously immoral' in any circumstance, whether it took place between those over twenty-one or not. In that sense, the *IT* case expressed a set of concerns about the openness of homosexuality. At the time, gay rights advocates sensed the danger that hung over their emerging forms of civil society. For the campaigner Anthony Grey, who at the time was president of the Homosexual Law Reform Society (HLRS), the *IT* case showed that the proponents of the 1967 Act had been too trusting. The aim of gay life after 1967, as Grey recognized, was to put people in communication with each other in order to forge bonds of solidarity and community. A gay press was vital to that end. Free speech was therefore integral to the emergence of a gay civil society, and that issue was intimately bound up with the apparently trivial freedom to advertise for social activities, clubs, friends and sexual partners. This was widely recognized: the Gay Liberation Front's paper was called *Come Together*, playing deliberately on the many meanings, not only sexual, of the phrase. The first editorial of *Gay News* in 1972 also saw the significance of the *IT* trial. 'We feels that, despite legal reform and a certain relaxation in people's attitudes to sexuality, nothing much has really changed,' the magazine suggested. It was clear 'that many gay people are still extremely isolated, many still live restricted lives'. The solution was a 'medium which could help us all to know what we were all doing, which could put us in contact, and be open evidence of our existence and our rights for the rest of the people to see, could help start the beginning of the end of the present situation.'[39]

[37]Queen *v*. Knuller, 41, 50.
[38]Queen *v*. Knuller, House of Lords Appeal, 7–15 March, 14 June 1972 [1973] AC 435, 457.
[39]*Gay News*, 1 (1972), 2.

The difficulties surrounding these issues had been fully foreseen by the proponents of homosexual law reform. In 1975 the author and campaigner Michael De-la-Noy recalled that ten years previously the HLRS had submitted a memorandum to parliament pointing out the illogicality of making homosexual acts between men legal while advertising for a sexual partner remained a criminal offence.[40] In fact, in May 1966 the sociologist and progressive campaigner Baroness Wootton had moved an amendment to the Sexual Offences Bill proposing that 'It shall not be an offence to conspire or attempt to commit a homosexual act which by virtue of this Act is not itself an offence.' She had in mind the specific circumstances of Shaw, saying that 'We are still a little disturbed by the possible consequences of the *Ladies Directory* case, and the words used in that case.' She went on to quote the comments of Lord Devlin on that case in his book *The Enforcement of Morals*. There, Devlin had followed Lord Reid's comments in Shaw by suggesting that 'If homosexuality were to cease to be per se criminal, and two men were to be similarly charged with flaunting their relationship in public, a jury might be expected … to convict'.[41] Lord Stonham, replying to the debate for the government, gave assurances that neither conspiring to commit a homosexual act nor attempting one would be offences in the Act, and that for conspiracy to be a crime it had to have an element of public mischief. 'Broadly speaking,' he had said, 'we think that an agreement to promote homosexual acts would not amount to an offence of conspiracy unless there was some public affront involved.'[42] Baroness Wootton misread that statement as an 'unqualified assurance that we are not likely to be in trouble on the narrower issue raised in my Amendment', that of a potentially criminal conspiracy to arrange homosexual acts.[43]

This misinterpretation was pointed out in parliament in the aftermath of the *IT* case, with the Attorney-General Sir Peter Rawlinson remarking that in spite of the apparent assurances given in 1965 it was still the case in 1972 that if 'people produce advertisements by males or by females advertising their wares, calling for partners, reciting the terms which they will associate, describing their particular tastes or giving ways of communicating one with another, these at present are offences against the criminal law'.[44] The Law Officers' Department also stated that the 1967 Act did not exempt from prosecution any case 'involving incitement to commit homosexual acts'.[45] Reflecting on the *IT* prosecution in 1992, Anthony Grey recalled that he had thought at the time that 'Our failure to insert a clause [in the 1967 Act] to prevent conspiracy charges relating to activities which were themselves no longer illegal would have unpleasant results.' These fears seemed to be confirmed by the *OZ* trial which coincided with the *IT* appeal. Even though the *IT* appeal showed, Grey said, 'the obvious distaste of several of the Law Lords [for the offence of conspiracy to corrupt public morals], common law conspiracy charges were now solidly in business as a telling weapon in the battle for state control of private morals; they were soon to be used even more effectively against *OZ* and in other cases with which we [the HLRS] became concerned'.[46]

[40]'Guardian Miscellany', *Guardian*, 22 August 1975, 9.
[41]Devlin, *op. cit*., 99.
[42]House of Lords, 23 May 1966, vol. 274, cols 1204–5.
[43]House of Lords, 23 May 1966, vol. 274, cols 1199–1203.
[44]House of Commons, 2 August 1972, vol. 842, col. 926. Suki J. Pitcher, '"On All Fours…": the Attorney-General in the House of Commons', *Gay News*, 5 (1972), 10.
[45]Nicholas de Jongh and Simon Hoggart, 'Raids on him deplored', *Guardian*, 27 August 1975, 5.
[46]Anthony Grey, *Quest for Justice: Towards Homosexual Emancipation* (London, 1992), 163–4.

It is certainly the case that the charge of conspiracy hung over the gay press that emerged after 1967, and particularly over those advertisements which sought to bring men together. Between 1966 and 1974 the numbers of prosecutions for homosexual offences (indecency, buggery and attempted buggery) had increased by 55 per cent, from 1553 to 2798, and gay clubs and pubs were routinely subject to police harassment.[47] In that climate, the offence of conspiracy appeared to be part of a much wider attempt to constrain an emerging gay culture, or at least to keep it underground. The *IT* decision, it was feared, might also criminalize any attempt to bring men together for whatever reason.

Campaigning groups noted the contradictions that resulted. The thoroughly respectable Campaign for Homosexual Equality had its own correspondence list which theoretically could have come within the scope of a conspiracy charge.[48] Michael De-la-Noy observed in 1975 that Lord Reid's argument in the *IT* case had for three years loomed 'like a very potent threat over the work of social workers who recognize and try to alleviate the loneliness of homosexuals by organizing decent social meeting places for them'.[49] Even advertisers themselves were spooked. Although *Gay News* printed lonely hearts ads under the ironic title 'Love Knoweth No Laws', its editors also warned readers in every issue that 'Owing to certain pressures put upon us by the law, we hold the right to cut, change or refuse to print any personal "ads" sent to us.' They also alerted those under twenty-one to the fact that 'you may have unpleasant legal nasties unloaded on you, and us, if you attempt to use and reply for certain reasons connected with the meeting of someone for immoral purposes, namely making love.' Michael De-la-Noy noted that *Gay News* kept 'the ambiguously sexual [ads] in a pretty low key', while Jeffrey Weeks later recalled that the nervous condition of the editorial collective in the magazine's early days led them to 'disclaim any sexual intent' for the ads.[50]

Jeffrey, one of the new wave of gay magazines founded in the early 1970s, also included a column of small ads, 'Jeffrey's Little Ads'. The rules of the column stated that 'Pen pal advertisers must be 21 years or over' and that 'Offensive ads will be altered or refused'.[51] One worried advertiser, Tony from Leicester, wrote in to *Jeffrey* in 1973 to enquire about the legality of the matter. The previous June he had placed two ads in a different contact magazine, using words that were 'pretty strong to say the least', though he 'thought they would be OK'. He had since discovered that 'it was illegal to use such adverts and that the person advertising could be prosecuted "for conspiring with others to corrupt public morals"'. He had withdrawn the ads and asked the magazine to delete his records, but now wanted to know if he might become subject to the law, concluding that there 'must be others like me in the same boat'. Alex McKenna, one of the editors of *Jeffrey*, responded that he was in little legal danger. However, he also pointed out the legal constraints of the moment, suggesting that 'Few people would argue with the view that "strongly worded adverts" have spoiled the chances of other advertisers in many publications.' It was, he said, 'hardly surprising to find that the Law objects to such indiscreet wording' and that was why *Jeffrey* 'refused to print any advert which is of this type, as they always end in trouble'.[52]

[47]BPP, 'All Courts (persons found guilty)', Home Office, Criminal Statistics, England and Wales, Parliamentary Papers 1965–6, Cmnd 2815; 1974–5, Cmnd 6186.
[48]See Neville Gadd [pseud.], 'A free small ad', *Gay News*, 3 (1972), 7.
[49]'Guardian Miscellany', *Guardian*, 22 August 1975, 9.
[50]'Love Knoweth No Laws', *Gay News*, 1 (1972) [not dated], 11; Michael De-la-Noy, 'Guardian Miscellany', *Guardian*, 22 August 1975, 9; Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*, 3rd edn (London, 1990), 221–2.
[51]'Jeffrey's Little Ads', *Jeffrey*, 4 (1973) [not dated], 30.
[52]'Problems', *Jeffrey*, 2 (1973), 21.

For *Gay News*, the 'unlawful' status of homosexuality reflected in this cautious approach to advertising and meeting epitomized the 'confidence trick' that had been practised by the 1967 Act. In fact, the paper argued, 'The situation is clearly worsening for us; this present case is only another stage in the repression we suffer.' This included the harassment of gay bars and clubs, and entrapment by the police in indecency cases, such as the arrest for cottaging of 120 people in Harrow in two months during the spring of 1972. Lord Reid's summation of the law in the *IT* appeal to mean that although certain conduct was legal, it was not lawful, meant that, 'In plain English, it's legal, but then again, it isn't.' *Gay News* stated that to 'the corrupt minds of their lordships, of the police, and of everyone else in a position of power over your life and mine, our homosexuality is a "vice", a "perversion, an abnormality"'.[53] The impression of an Establishment offensive against alternative lifestyles and social protest was reinforced by more overtly political conspiracy trials brought in 1971 and 1972 against the anti-Apartheid demonstrator Peter Hain for disrupting sporting events, a group of protesting Sierra Leonean students who had occupied their government's embassy for a day, and trade unionists trying to picket the building industry in Shrewsbury.[54]

In spite of those cases, the *IT* trial seemed to be the high watermark of conspiracy to corrupt public morals, and subsequently the tide appeared to turn against the expansive view of that offence. Not only was the count of conspiring to outrage public decency not recognized by the Law Lords in the *IT* appeal, but Lord Diplock's dissenting judgment in the case on the count of conspiracy to corrupt public morals was well noted by liberal critics of the justice system. He argued that 'There never had been a generalized crime known to the common law as a conspiracy to corrupt public morals, which embraces every agreement to do anything which a jury thinks likely to have that effect.' Over the course of the previous century, he said, parliament had increasingly taken the role of legislating in the sphere of morality that had once belonged to the judiciary. To reassert that long-vanished power in Shaw's case at the late date of 1962 was, in his view, 'an unacceptable judicial usurpation' of parliament's legislative power.[55] Equally, cases that were partly built around conspiracy to corrupt public morals foundered in the early 1970s. In July 1971 the defendants in the *OZ* trial were acquitted of the charge of conspiracy because they were judged not to have conspired with the teenagers who edited the allegedly obscene 'School Kids' edition of that magazine, having handed over editorial control completely to them.[56]

The case against a less well-known paper also led to questions about the usefulness and prominence of conspiracy in policing morals. In April 1970, the proprietors of *Exit Incorporating Way Out*, an amateurishly produced contact magazine that catered for gay and straight advertisers, a small number of the latter being found to be prostitutes, were charged with one count of conspiracy to corrupt public morals and three more of having an obscene article for publication for gain, sending obscene material through the mail and of publishing an obscene article. The prosecution of *Exit* was directly modelled on that of the *Ladies Directory*. The DPP's office noted the similarity of the publications and on its

[53]'The 1967 confidence trick. Law or sexuality. Which corrupts?', *Gay News*, 2 (1972), 4; '*IT* lose House of Lords appeal', *Gay News*, 1 (1972), 2.
[54]R *v*. Kamara [1972] 3 All ER 999; Hazell, *op. cit*., 21–7, 56–8. Hain was prosecuted privately. For these cases see Peter Hain, *Political Trials in Britain: From the Past to the Present Day* (Harmondsworth, 1984), chap. 7; 'Conspiracy to trespass an indictable offence', *The Times*, 13 October 1972, 11.
[55]R *v*. Knuller [1973] AC 435, 479.
[56]Palmer, *op. cit*., 25–9; TNA, DPP 2/4349, *OZ* Appeal.

own initiative inserted the first count of conspiracy into the indictment, even though, as it noted, 'There is an arrangement between the Director and the Attorney-General that such a charge will not be laid unless the consent of the Attorney is obtained beforehand.'[57] However, this count did not help the case, as Mr Justice Rogers described the offence as 'something that was produced out of the air in round about 1959 in the *Ladies Directory* case, as far as I remember. No doubt it had existed, in fact it must have done because the House of Lords said it did.'[58] Even while recognizing that fact, the judge instructed the jury to acquit the defendants on that count. In discussion with the prosecuting counsel, he noted that the charge of conspiracy did not add 'a cubit to your stature at all' and that it

> considerably complicates the matter for the jury as one other facet of what is really all one matter to consider, and should you succeed on the other counts I am left with ample powers to deal with the matter. … I would regard this as a piece of dead wood which could be cut out. I have said it would make matters easier for the jury and also for me if I didn't have to be bothered with the rather complicated explanation of the law on his topic. … And this conspiracy to debauch and corrupt public morals charge is a very vague one which I know has the blessing of the House of Lords comparatively recently in Shaw but it is the type of thing which one, I feel, has to watch very carefully to see that it does not get extended too far.[59]

Similarly, the Law Commission, in its 1973 working paper on inchoate offences, as well as in its 1974 Report on Conspiracies Relating to Morals and Decency, recommended changing the law of conspiracy to avoid the ambiguity over agreements to commit 'unlawful' but not illegal acts that had arisen in Shaw, *IT* and other cases. The Commission argued that conspiracy 'should be limited to conspiracies to commit criminal offences: it sees no place in a criminal code for any offence of conspiracy to do something which is not itself criminal'. These recommendations influenced the 1977 Criminal Law Act that replaced the common law offence of conspiracy with a statutory definition. However, the Act retained both conspiracy to corrupt public morals and to outrage public decency as common law offences, though exempted from those categories of crime conduct that would not be an offence if carried out by one person and not as part of an agreement.[60]

Finally, in 1975, in DPP *v*. Withers, the offence of conspiracy to effect a public mischief, an offence that had supported the Shaw decision and existed since the case of Brailsford in 1905, was judged not to be an offence known to the law. In that case a private detective agency had obtained information about individuals from banks, building societies, government agencies and local authorities by pretending to be acting in an official capacity on behalf of other banks and institutions. Lord Diplock, who had dissented to the majority in the *IT* trial, remarked on the wearisome prominence of conspiracy in the contemporary criminal law, noting that the Lords had considered it three times in the previous five years. That branch of the law, he concluded, 'is irrational in treating as a criminal offence an agreement to do that which, if done, is not a crime; and that its irrationality becomes injustice if it takes days of legal argument and historical research on appeal to your Lordship's House to discover whether any crime has been committed even though the facts are undisputed'. Lord Simon also commented of the law of conspiracy that it 'would be idle to pretend that its present

[57]TNA, DPP 2/4598, Michael Corkery (DPP), 'The Queen against Edward Albert Donelly and James Joseph McGuigan. Advice' [not dated, 1970].
[58]TNA, DPP 2/4598, Transcript of Edward Donelly's Trial, Guildhall, 14 April 1970, 2.
[59]Transcript of Edward Donelly's trial, 4–5.
[60]Law Commission, *Inchoate Offences: Conspiracy, Attempt and Incitement* (London, 1973), 4; Law Commission, *Conspiracies Relating to Morals and Decency* (London, 1974); Criminal Law Act 1977 s 5 (3) (a) and (b).

condition is either coherent or clear'.[61] He observed that the *ratio decidendi* in Shaw relied on the proposition that conspiracy to corrupt public morals was a subspecies of conspiracy to effect a public mischief. However, if that reasoning were accepted as the basis of their judgment, and the Law Lords judged that there was an offence of conspiring to effect a public mischief, the practical effect would be to render the conduct of the defendants in Withers criminal, and thereby 'to permit the forensic creation of new criminal offences or the forensic extension of the ambit of old ones', a possibility that had been plainly rejected in the *IT* appeal.[62] Recognizing a generic offence of conspiracy to effect a public mischief would, Lord Simon argued, 'give an uncontrollable dynamism to this branch of the law', giving it the potential to 'penetrate into a sphere (privacy) of great delicacy and controversy and where parliament has assumed cognisance and as yet taken no action'.[63]

Most legal textbooks see DPP *v*. Withers as the effective end of the career of conspiracy to corrupt public morals, and hence a marker of the declining use of conspiracy as a weapon against both public mischief and 'unlawful' acts, but this was far from being the case.[64] In 1974 there were police raids on at least three bookshops selling gay magazines, and on another two in the summer of 1975. The material confiscated in one raid on the Modern Bookshop in Camden comprised 1300 gay magazines, including a contact paper called *Gay Circle*, and some films, amounting to 70 per cent of the total stock. A similar raid on the Incognito bookstore in Hammersmith and other places confiscated 22,000 copies of another gay magazine, *Him Exclusive*. That magazine was itself raided four times in three months in the summer of 1975.[65] Once again the personal ads that each magazine carried appeared to be the reason for the confiscations, though in this case journalists suggested that seemingly novel charges of 'conspiracy to procure acts of buggery and gross indecency' appeared to be in the offing. Barry Kenyon, the chairman of the Sheffield Campaign for Homosexual Equality, called the raids 'the most serious threat to the individual rights of gay people for years', while Michael De-la-Noy observed that the episode had brought to an end the 'uneasy lull of the last few years'. The editor of *Him Exclusive*, Alan Purnell, accused the police of 'a deliberate move to silence our publications, irrespective of content or legality'.[66] Although in the case of *Him Exclusive*, a report was sent to the DPP, the case and others like it that appeared to be pending attracted huge criticism, and do not appear to have gone any further. In particular, the future Liberal leader David Steel deplored the way in which the raids had occurred during the summer parliamentary recess, and accused the Labour government of ignoring the spirit of the 1967 Sexual Offences Act. The raids had returned English law to the 'old double standards before the 1967 Act was passed'.[67]

As in the aftermath of Shaw and the *IT* trial, the threat of conspiracy was more frightening than the reality, though each case cast the shadow of 'unlawfulness' over certain legal activities. In fact the common law offence of conspiracy to corrupt public morals was employed again against the Paedophile Information Exchange (PIE) in 1979 and 1980,

[61] DPP *v*. Withers [1975] AC 842 (1), 862, 863.
[62] See Lord Reid's comments, R *v*. Knuller, 457–8.
[63] DPP *v*. Withers, 872.
[64] Gillies, *op. cit*., 76.
[65] Nicholas de Jongh, 'Magazine alleges discrimination', *Guardian*, 21 August 1975, 4; Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*, 3rd edn (London, 1990), 175–7.
[66] 'Code on porn sales sought', *Guardian*, 26 August 1975, 5; Michael Parkin, 'Gays urged to enlist PM's help to end prosecutions', *Guardian*, 25 August 1975, 5; De-la-Noy, *op. cit*., 9; De Jongh, *op. cit*.
[67] Hoggart, 'Raids on him deplored', 5.

specifically its attempts to put its members in touch with each other through the medium of its magazine, *Magpie*. In 1980 PIE's leader, Tom O'Carroll, was sentenced to two years in prison on the count of conspiring against public morals. O'Carroll and his allies had tried to jump on the bandwagon of gay protests against the age of consent of twenty-one given by the 1967 Act, arguing that it should be massively liberalized. That led to reams of negative publicity, and strenuous efforts on the part of Anthony Grey and others to distinguish themselves from O'Carroll and PIE.[68] Nevertheless, the PIE trial was widely regarded as unfair for its reliance on conspiracy charges. Alan Rusbridger, later editor of the *Guardian*, stated that the decision to prosecute PIE members for conspiracy 'caused deep unease amongst people who, however much they disliked paedophiles' activities, disliked even more the resurrection of a notoriously vague law which had recently fallen into disuse', while Alan Watkins noted that O'Carroll had not been convicted of a substantive crime such as sexual activity with children, but essentially 'of writing, or fantasizing about it'.[69]

In spite of all the criticism of its use as a common law offence, conspiracy to corrupt public morals survived the legislation of the 1970s. However, it fell into desuetude not because it no longer remained part of the common law – the statutes that changed the law of conspiracy retained it – but because the legal instruments of public morality have since become far more detailed and specific. The older, more general common laws and statutes that included under one umbrella a variety of single offences – for instance those on obscenity, which reflected the 'deprave and corrupt' test of the obscene – have lost their force and credibility in the decades since the *IT* appeal.[70] That process must have owed something to the fact that this approach to policing morality was thoroughly discredited in the course of the 1970s. At that time, conspiracy to corrupt public morals appeared to be a useful if rudimentary mechanism that could be employed to police the consequences of the Wolfenden Report and the legislation that it brought about. Those in favour of retaining this common law offence argued that it enabled society to control the public display of legal, though immoral, activities such as homosexuality and prostitution. These consequences in terms of public morality had in fact been foreseen by Lord Reid in Shaw's case and by Baronness Wootton and others at the time of the attempts to decriminalize homosexuality. While one camp saw it as fundamentally necessary to police both the age of consent and public morality against the problematic visibility of homosexuality, the other aimed to defend the settlement envisaged by Wolfenden in which the law retreated from certain areas of private life. However, one element of the Wolfenden settlement was the increasing effort to police public morality, and in that sense, the common law offence of conspiracy to corrupt public morals could be said by its defenders to have performed that very function by preventing gay 'proselytizing'. To at least one observer, though, the use of conspiracy against gay advertisers and *IT* had been fully justified according to the logic of the new public/private divide. 'Leaving aside any dispute about the power of judges to make what is in effect new

[68]On that episode see Lucy Robinson, *Gay Men and the Left: How the Personal Got Political* (Manchester, 2007), 129–53; Matthew Thomson, *Lost Freedom: The Landscape of the Child and the British Post-war Settlement* (Oxford, 2013), chap. 6.

[69]TNA, Supreme Court, Case Files, J 267/868, R *v.* O'Carroll, Grove, Wade, Parratt, Dagnall (this file has been heavily edited). See also LSE Library, London, Hall Carpenter Archives, HCA Ephemera/141, Anthony Grey Papers, and HCA/CHE2/13/28, 1975–9; Alan Rusbridger, 'Why the DPP resurrected an ancient law to deal with paedophiles', *Guardian*, 14 March 1981, 17; Alan Watkins, 'Conspiracy, morals, and lynch law', *Observer*, 22 March 1981, 13.

[70]See Susan M. Edwards, 'On the contemporary application of the Obscene Publications Act 1959', *Criminal Law Review* (1998), 843–53. On the 2003 Sexual Offences Act see Richard Card, *Sexual Offences: The New Law* (Bristol, 2004).

law,' the *Sunday Telegraph* commented in June 1972, 'there will be general satisfaction that they have declared to be illegal any advertisement designed to put homosexuals in contact with one another.' The problem was that gay people had not observed 'the concept of privacy enshrined in the Wolfenden Act', which 'should have applied, not only to homosexual practices as such, but to anything likely to encourage them.' That 1967 Act 'was intended to protect an unfortunate minority from persecution, but not to empower them to spread their deviant ideas in society at large'.[71]

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[71]'Gents Directory', *Sunday Telegraph*, 25 June 1972, 20; Editorial, *Gay News*, 5 (1972), 5.