Censorship and the Indecent Publications Tribunal*

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I. INTRODUCTION

Any kind of control or censorship of the written or spoken word, however imposed, is a restriction on the liberty of the individual; but conversely, most modern communities recognise that some control is necessary in the public interest. However, the principle of freedom of expression, a philosophic concept "based . . . on the willing sufferance or even encouragement of experiment and change in a continual search for improvement in all spheres, especially social, political, and moral",[1] would become a sham if suppression were allowed merely on the grounds of unorthodoxy or indelicacy, or if discussion were restricted to matters which most people would consider innocuous. The difficulty is to decide where to draw the line[2]

> . . . between liberty and that freedom to read and think as the spirit moves us, on the one hand, and on the other, a licence that is an affront to the society of which each of us is a member.

The aim of this article is to examine the attitude of the New Zealand Indecent Publications Tribunal (hereafter referred to as "the Tribunal") towards the basic issues in the area of literary censorship, and to consider what factors influence it in deciding where to draw the line between complete freedom and paternalistic control. The Tribunal has stated that the Indecent Publications Act 1963 (hereafter referred to as "the Act"), as well as the community, requires

[1] N. M. Hunnings, *Film Censors and the Law* (1967), 383.
[2] *R.* v. *Martin Secker & Warburg Ltd.* [1954] 2 All E.R. 683, 684, per Stable J.

it to "keep a balance between necessary protection and individual liberty".[3] Accordingly the Tribunal's pronouncements upon its statutory powers and functions, especially those which require it to ascertain the will, interests and standards of the community, must be examined in order to gain insight into which considerations most influence it in each case. Further, an examination of the Tribunal's opinion of the rationales of censorship will assist in ascertaining for whom, in the Tribunal's view, the protection is necessary, and how far it is necessary for the protection to extend.

II. The Function of the Indecent Publications Tribunal

1. *General*

The function of the Tribunal, established by the Indecent Publications Act 1963, is to determine whether any book,[4] magazine or periodical (either in manuscript or final form) or any sound recording referred to it is indecent. The Tribunal consists of a Chairman, who must be a barrister and solicitor of at least seven years' standing, and four other members, of whom at least two must have special qualifications in the field of literature or education. The five members are appointed by the Governor-General on the recommendation of the Minister of Justice. The members serve for five years, subject to section 3 (6) concerning dismissal or resignation, but may from time to time be re-appointed. The Chairman (who presides at sittings of the Tribunal[5]) and two other members constitute a quorum, with questions being determined by the opinion of the majority of those sitting.

The decision of the Tribunal is, subject to any appeal, final, and is conclusive evidence in any proceedings that the book is indecent, not indecent, or indecent *sub modo*, as the case may be.[6] Appeal is to the Full Court. Stuart Perry, in his book on the Tribunal, notes[7] that had appeals been to the Court of Appeal (the same three Judges, not any three) the chances of a consistent standard being attained might perhaps have been slightly improved.

Section 19 (2) of the Act provides that an appeal shall be heard and determined as if the decision of the Tribunal had been made in

[3] *N.Z. Gazette*, 25 July 1968, 1251.
[4] "Book" means any book, magazine or periodical (other than a newspaper published at intervals of less than a month) whether in manuscript or final form; and includes any picture-story book, whether likely to be read by children or not: s. 2.
[5] Section 5 (1).
[6] Section 18.
[7] S. Perry, *The Indecent Publications Tribunal*, (1965), 76, n.13.

the exercise of a discretion. This effectively limits the power of the Full Court to interfere with the Tribunal's decisions. The principles applicable on an appeal against the exercise of a discretion were laid down by the House of Lords in *Blunt* v. *Blunt*.[8] In that case it was held that an appeal against the exercise of a discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the Court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account. Importantly, the appeal is not from the discretion of the Court to the discretion of the appellate tribunal.

Section 5 (1) grants the Tribunal the power, subject to provisions in the Act itself or regulations made under the Act, to regulate its procedure in such manner as it thinks fit.

2. *The Tribunal's Wide Powers concerning the Calling of Evidence*

The Tribunal's function is "untrammelled by the requirements of the strict legal process"[9] as it can receive evidence which might not be admissible in a Court of law, besides having the powers of a Commission of Inquiry.[10] To aid it in coming to a decision, specific authority is granted for the Tribunal (or any Court) to[11]

> . . . receive in evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with any matter before it relating to the character of a document . . . , whether or not the same would be otherwise admissible in a Court of law.

To assist it further the Tribunal may issue summonses requiring the attendance of witnesses before it, or the production of documents, or may do any other act preliminary or incidental to the hearing of any matter by the Tribunal.[12] These provisions therefore overcome the problems experienced in some other countries concerning questions of evidence. For example, in the Australian case of *Crowe* v. *Graham*[13] Windeyer J. stated that the appointed tribunal of fact must be the judge of the question of obscenity in relation to community standards and to its effects upon the persons for whom the material was published. "Evidence," he said, "is neither needed nor permitted."[14] Clearly the New Zealand Legislature considers that evidence on such matters is necessary for a proper determination of the question of indecency.

[8] [1943] A.C. 517.
[9] S. Perry, op. cit., 84.
[10] Section 7 (1).
[11] Section 6.
[12] Section 7 (2).
[13] (1968) 41 A.L.J.R. 402.
[14] Ibid., 411.

3. *Limits of the Tribunal's Jurisdiction*

The Act provides[15] that whenever the question of the indecency of a publication arises in any civil or criminal proceedings, the Court hearing the matter must refer the question to the Tribunal for decision and report, since the Tribunal is granted exclusive jurisdiction to determine the question of indecency in such cases. The question of indecency (a word which will be used synonymously with obscenity) is therefore not, as it previously was, a matter for decision by a Court of law, although the Courts still have an element of discretion. As was said in *Police* v. *Brien*:[16]

> Just because a book meets with the approval of the Tribunal cannot mean that regardless of circumstances a picture from the book can never be displayed in an indecent manner.[17]

In that case the display of certain pages of a book which had been cleared by the Tribunal was held indecent in a criminal prosecution.

The only exceptions to this mandatory procedure of referring the question of indecency of a book, magazine, periodical or sound recording to the Tribunal are where a party admits that the material is indecent[18] or the Tribunal has already given a decision concerning the disputed material.[19]

The Tribunal's function is limited to an extent in that it is not given a general authority of its own motion to exercise an oversight over publications. It can only operate when a book is submitted to it. Importantly, publications may be submitted to the Tribunal for decision without any civil or criminal proceedings having been instigated.[20] Submission may be made by the Secretary for Justice, the Comptroller of Customs, or by any other person with the leave of the Minister of Justice or, if such leave is refused, with the leave of the Chairman of the Tribunal.[21]

It is fundamental to the Tribunal's sole function of determining the decency of, and classifying, any book, magazine, periodical or sound recording submitted to it, that it only declares on the decency of the publication. The Tribunal has no power to punish disseminators of indecent works.[22] Prosecutions are brought by the police, although all prosecutions under the Act require the consent of the Attorney-General.[23] Expressing approval of this procedure, Norman St. John-

[15] Sections 10 (c) and 12.
[16] [1971] N.Z.L.R. 119; see also *Powell* v. *Police* [1971] N.Z.L.R. 110.
[17] [1971] N.Z.L.R. 119, 121, per Roper J.
[18] Section 12 (2).
[19] Section 12 (3).
[20] Section 14.
[21] Idem.
[22] But see s. 21 and pp. 17-18 post.
[23] Section 29 (1).

Stevas writes:[24]

> By making all prosecutions subject to the consent of the . . . Attorney-General vexatious prosecutions would be avoided. Ill-advised prosecutions which fail, serve only to advertise a book, and do more harm than good to public morals.

4. *Publicity and the Tendency to Focus Attention*

It is of course desirable that a censorship Tribunal be open to public scrutiny, but it is one of the basic dilemmas in the field of the censorship of indecent publications that " . . . any attempt to regulate unfortunately has a tendency to focus attention upon the material which is regulated."[25] Furthermore,[26]

> [i]t is unfortunately a cheap and easy matter to submit for consideration a relatively harmless book, and so obtain a cheap and effective advertisement—for some booksellers feature prominently books exonerated by the Tribunal.

Some degree of undesirable advertising would seem unavoidable, an inevitable consequence of the publicity accorded the Tribunal's decisions. The fact that the Tribunal's sittings are open to the public[27] and that its decisions are openly announced, with reasons for them in writing,[28] may increase the tendency to focus attention upon the material being considered. But these are very important provisions for protecting freedom of expression, especially the requirement that the Tribunal cannot give an arbitrary classification without any attempt to justify it. The Supreme Court or the Tribunal may to an extent counteract this attention-focussing aspect by prohibiting publication of reference to proceedings before the Tribunal.[29] Section 15 (2), however, directs that this power of prohibition is to be exercised only when the "interests of public morality" require it. Further provisions[30] enable the Tribunal or Supreme Court to exclude persons from the proceedings (except the parties, lawyers, and bona fide reporters) and to restrict radio, television and newspaper publicity regarding decisions. The Tribunal's decisions must, however, be published in the *Gazette*. Section 15 does have a number of provisions protecting the right of the public to be informed of censorship proceedings, including the requirement that no order prohibiting publication or broadcasting of the decision shall be made where a "difficult or important question" has been considered.[31] Furthermore, any

[24] N. St. John-Stevas, *Obscenity and the Law*, (1956), 203.
[25] *Robson* v. *Hicks Smith & Sons Ltd.* [1965] N.Z.L.R. 1113, 1125 per Woodhouse J.
[26] S. Perry, op. cit., 124.
[27] Section 15 (1).
[28] Section 16.
[29] Section 15.
[30] Section 15 (3) and (4).
[31] Section 15 (4).

person affected by such an order may apply to the Supreme Court for a review of the order.[32] To date there is no Court decision clarifying the meaning of a "difficult or important question" or a "person affected" by a Court order.

III. The Meaning of Indecent

1. *The Statutory Definition*

In further exposition of the Tribunal's function, section 10 of the Act directs the Tribunal to "determine the character" of a work, and then to declare its status by classifying it as indecent, not indecent, or as indecent *sub modo* in the terms of the Act i.e. indecent in the hands of persons under a specified age, or indecent unless its circulation is restricted to specified persons or classes of persons, or unless for a particular purpose. Section 11 provides that in fulfilling its function of determining and classifying the Tribunal shall take into account six factors:

1. the "dominant effect" of the work;
2. the intrinsic worth of its contents;
3. its intended or probable readers;
4. its price;
5. the possibility of corruption of any readers and the likelihood of benefit to others; and
6. the sincerity of the author.

These matters, however, are not to be viewed in isolation; section 11 (1) is not exhaustive in defining the factors which the Tribunal may take into account in classifying, or determining the character of, any publication.[33]

The statutory considerations contained in section 11 (1) of the Act are "highly relevant" in determining the question of indecency, but as[34]

> . . . balancing factors in the approach to assessing the basic issue. . . . Isolated passages (the section requires) are not to be used to label a book in the face of its dominant effect as a whole; and its merits or importance may be weighed in its favour together with the honest purpose which it might seem to display; while the extent to which it is likely to be circulated and available is to be considered; and its capacity for corruption measured with its possible benefits.

The "balancing factors" in themselves, provide "little as a positive guide to what is to be regarded as indecent".[35] They are, however,

[32] Section 15 (5).
[33] *Robson* v. *Hicks Smith & Sons Ltd.* [1965] N.Z.L.R. 1113.
[34] Ibid., 1123, per Woodhouse J.
[35] Idem.

important factors which must be considered carefully by the Tribunal when it decides upon the classification of a publication and the nature of any restriction to be placed upon its distribution.

The definition of the word indecent is contained in section 2 of the Act:

> 'Indecent' includes describing, depicting, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good.

This definition, like any other definition of indecency, is unsatisfactory, although it does make it clear that publications dwelling on violence and horror may be indecent (this is not so in the United States[36]) and that injury to the public good is central in determining indecency. Apart from this, the "balancing factors", not the definition itself, are the most important guidelines for assisting the Tribunal in deciding questions of indecency.[37]

During remarks made at the first sitting of the Tribunal, the Solicitor-General[38] stated that the definition of indecent in section 2 was not comprehensive and did not exclude such ordinary connotations as "in extremely bad taste" or offending against "propriety and decency". An example given was sneering in an offensive way at some institution or belief that people hold dear, such as the Christian religion or the observance of Anzac Day.[39] Fortunately the Tribunal has not accepted such a sweeping definition of indecency, and it has been supported by the Court in this stand. Woodhouse J. in *Robson* v. *Hicks Smith and Son*[40] stated that the term *indecent* was not used in the Act in its "ordinary meaning": indecency included "noxious material which has a capacity to injure the public good," but "anything less than this can hardly be brought in by implication."[41] He stressed the "malignant flavour" of indecent material, and its "power . . . to contaminate."[42]

2. *The Tribunal's Interpretation of Indecency*

The Tribunal, in an early case, stated that the definition of indecent in section 2 of the Act "takes the matter no further than to

[36] The United States Supreme Court, by its decision in *Winters* v. *New York* 333 U.S. 503 (1948) prevented any expansion of the United States' definition of obscenity to include horror and violence unless it was incorporated into descriptions of sexual sadism.

[37] *N.Z. Gazette*, 14 January 1965, 23-24. It is to be noted that the Act does not really *define* the word "indecent", but only says what it includes and what is to be considered in determining indecency.

[38] Mr H. R. C. Wild Q.C. (now Sir Richard Wild C.J.).

[39] S. Perry, op. cit., 84; *N.Z. Listener*, Vol. 50, No. 1279, 3 April 1964, 10 and 21.

[40] [1965] N.Z.L.R. 1113.

[41] Ibid., 1123.

[42] Idem.

pose the question whether the matters of sex and violence are described in a manner injurious to the public good."[43] The Tribunal appears to consider section 2 to be definitive. In one decision it would not classify a magazine as indecent because, although the magazine might be considered "arrogant, offensive, 'sick' or even libellous or subversive",[44] the Tribunal has "no jurisdiction to consider any of these elements" unless, "taken as a whole", the magazine dealt with sex, horror, crime, cruelty or violence in a manner injurious to the public good.[45] The Tribunal has never attempted to define indecency but it has made a number of important negative statements, saying, for instance, that anything which is merely "highly indelicate or immodest"[46] is not indecent.

Indecency is not decided by using a definition as a touchstone; it is decided by balancing the factors contained in section 11 (1) and by the subjective opinion of those chosen to adjudicate upon the matter. Indeed, as the concept of indecency is so nebulous and varies so greatly depending on the circumstances, and so many exceptions to one general rule are required to be made involving considerations of literary merit, the author's intentions, the scientists' right to read etc., any definition of indecency must be so general that its value as a legal guideline can only be extremely limited. It is doubted whether the field of obscenity generally is justiciable. An Ohio state Court has asserted:[47]

> Obscenity is not a legal term. It cannot be defined so that it will mean the same to all people, all the time, everywhere. Obscenity is very much a figment of the imagination—an indefinable something in the minds of some and not in the minds of others, and it is not the same in the minds of the people of every clime and country, nor the same today that it was yesterday and will be tomorrow.

The "balancing factors" are merely factors in determining indecency —subjective considerations are unavoidable. Indecency involves the expression of opinion rather than the finding of fact. The Tribunal is required to determine whether a publication will be injurious to the public good and in doing so, to ascertain community standards. This necessitates value judgments. There exists in the community a general consensus that indecency refers to descriptions of sex and, to a lesser extent, of violence that are corrupting, depraving and contrary to "good morals", but this cannot be considered a definition, especi-

[43] *N.Z. Gazette*, 14 January 1965, 23-24.
[44] *N.Z. Gazette*, 21 May 1970, 896.
[45] Idem.
[46] *N.Z. Gazette*, 25 July 1968, 1251.
[47] *State* v. *Lerner* 81 N.E. (2), 282, 286 (1948).

ally one for the guidance of a tribunal whose decisions have legal effect. One must agree with Walter Gellhorn:[48]

> In reality . . . the word indecency does not refer to a thing so much as a mood. It is variable. Its dimensions are fixed in part by the eye of the individual beholder and in part by a generalised opinion that shifts with time and place.

IV. The Community Standards Test: Injury to the Public Good

1. *The Public Good*

The Tribunal[49] and the Court[50] have clearly stated that the dominant consideration under the Act is whether a publication submitted deals with matters of (inter alia) sex in a manner which is injurious "to the public good". The need to consider the public good is laid down in the definition of indecent in section 2 of the Act[51] and in section 11 (2) which provides:

> Notwithstanding the provisions of Subsection (1) of this section, where the publication of any book . . . would be in the interests of art, literature, science or learning and would be for the public good, the Tribunal shall not classify it as indecent.

In the *Robson*[52] case the Full Court held that in order to determine what is "injurious to the public good", the Tribunal is obliged to consider the general situation in the community in which the audience lives. Woodhouse J. stated that:[53]

> . . . the issue before the Tribunal must be decided in relation to the word 'indecent' as the word is used in the Act, and this is a question of degree to be tested against the level of harm which can be recognised as injurious to the public . . . . In order to ascertain the standard against which any true assessment can be made of some given material, I think it must be relevant to look to see what is currently acceptable in the community, and circulating or available. The degree of community sophistication in this matter, and the community instinct operating at the time must be the real measure of the distinction to be drawn.[54]

2. *The Tribunal's View of the Community Standards Test*

In its early decisions, prior to the *Robson*[55] case, the Tribunal expressed the view that it would be an "impossible task"[56] to attempt to

[48] W. Gellhorn, *Individual Freedom and Governmental Restraints,* (1956), 34.
[49] *N.Z. Gazette,* 14 January 1965, 21; ibid., 4 March 1965, 290.
[50] In *Robson* v. *Hicks Smith and Sons Ltd.* [1965] N.Z.L.R. 1113, 1117 and 1121.
[51] Ante, p. 7.
[52] Ante, n.40.
[53] Ibid., 1123-1124.
[54] Section 20 of the Act takes account of the changing nature of community standards by allowing a publication to be submitted for reclassification, as of right, after the elapse of at least three years since the work last went before the Tribunal. See *Gazette,* 15 April 1971, 669.
[55] Ante, n.40.
[56] *N.Z. Gazette,* 14 January 1965, 21.

assess the standards of the community—"community standards" was too "elusive" a concept; the Tribunal's task was to give a purely subjective decision.[57] However after the *Robson*[58] case the Tribunal felt itself bound to do its best to assess community standards,[59] but the Tribunal did not adopt this test in its strictest form.

The problem of attempting to ascertain the common conscience of the community (if there be such a thing) is especially difficult in our modern society, pluralistic and rapidly changing, a society in which there is no one established Church, dogma, or élite that forms and embodies prevailing values. Yet no matter how diverse a society is, it may be strongly argued that there must be some moral consensus underlying it, something approaching a general average of thinking and feeling—and it is this that the Full Court in the *Robson*[60] case required the Tribunal to ascertain. However, although the community standards test purports to be objective it is so only to an extent. In the final analysis, the censor must lay down what the community standards are, and his judgment, in the Tribunal's words, "must necessarily be coloured in some degree by . . . his predispositions", and "will be conditioned to some extent by . . . his background and instinct."[61] Furthermore, it is the censor who must decide how these standards are to be ascertained—if he considers this possible.

The Tribunal, in a 1968 decision,[62] accepted that as members of the community they were conditioned by its standards and would not find it possible to disregard them. The Tribunal, however, downgraded the importance of the community standards test by stressing that if a document, judged by the yardstick of community standards, was highly indelicate or immodest, that was not enough to make it indecent within the meaning of the Act. The overriding consideration is the public good. The definition of indecent in section 2 also requires the Tribunal, in carrying out its classifying functions under section 10 (b), to "go beyond the ordinary dictionary meaning of the word"[63] —the likelihood of injury to the public good must be considered.

The Tribunal has expressed the view that committing the determination of the character of a book to it and the requirement[64] that at least two members of the Tribunal have special qualifications in the

[57] See, for example, *N.Z. Gazette*, 14 January 1965, 21-23; *ibid.*, 23-24; *N.Z. Gazette*, 18 March 1965, 353.
[58] Ante, n.40.
[59] Ante, n.46.
[60] Ante, n.40.
[61] *N.Z. Gazette*, 6 November 1969, 2217.
[62] Ante, n.46. This has become known as the "Waverley decisions".
[63] Idem.
[64] Section 3 (2) (b).

field of literature or education, made it clear that the Tribunal was required to arrive at its judgment[65]

> . . . partly by subjective processes, or at least is not precluded, in arriving at its judgment, from having recourse to its own views on the matter.

The Tribunal then plainly stated its interpretation of the community standards test:[66]

> In simple words, we assert that the Tribunal may say: 'As members of the community chosen to make the decisions, we think it is not fitting that this book should circulate through the community'; we do not have to substitute such a formula as: 'Whatever our views, we think in balance that more people would think this book indecent in terms of the Act than would not'.

In a later case the Tribunal, quoting the words of the Solicitor-General[67] at its first sitting, stated that its decisions "would not be expected to reflect the current standards and tastes of the community"[68] and that the "question of indecency really becomes one to be judged subjectively on each occasion."

Thus the Tribunal has consistently stressed the necessary subjective element in its task. Its decisions purport to reflect the community standards, yet it does not really have to try and assess what those standards are. The danger of this subjective approach is that it places a power within the hands of the Government to control censorship by the choosing of new appointees with known attitudes towards the censorship of publications. Indeed, in 1967, the then Minister of Justice, the late Hon. J. R. Hanan, threatened to change the Tribunal's personnel because of his disapproval of its decisions.[69] This may be seen as an attempt by the Executive to influence future decisions of the Tribunal. As J. M. Priestley noted:[70]

> Such a course undermines the very basis on which all statutory tribunals are founded; namely the exercise of an unfettered discretion in a specified area.

The Minister also said that the Tribunal was not, in determining questions of indecency, interpreting the will of Parliament, but as Priestley further pointed out,[71]

> . . . the ultimate decision of the Tribunal is entirely at that body's discretion. Provided that the Tribunal is acting intra vires, and considers such matters as the Act stipulates, then the charge that the Tribunal is not interpreting Parliament's will is without foundation.

[65] Ante, n.62.
[66] Idem.
[67] See also p. 7, ante.
[68] *N.Z. Gazette*, 6 November 1969, 2217.
[69] *Auckland Star*, 16 August 1967, 1; *N.Z. Herald*, 16 August 1971, 1.
[70] [1967] N.Z.L.J. 417, 419.
[71] Idem.

The main advantage of the Tribunal's interpretation of the community standards test is that it does not (as a rigid interpretation of the test may) support the preservation and enforcement of current standards of morality per se, without any requirement that actual or potential harm to either individual or society be demonstrated. The Tribunal does not support a blind, unquestioning defence of the moral status quo: it is aware that the "standards which at present appear to be acceptable to the community are . . . constantly changing."[72]

Mr Justice Douglas, in an important United States obscenity case, expressed his belief that the community standards test is loose, capricious and destructive of freedom and that it creates a "regime where in the battle between the literati and the Philistines, the Philistines are certain to win."[73] This is not a valid criticism of the community standards test as interpreted and applied by the Tribunal. In New Zealand, the Philistines are not certain to win: the Tribunal has stated that the overriding considerations are "public interest and aesthetic value".[74]

3. *The Public Interest and Injury to the Public Good*

The Tribunal has emphasised in a number of decisions[75] that the "public interest" is not merely synonymous with an unthinking enforcement of the moral status quo. Before a book may be declared indecent, the Act requires that its publication would be injurious to the public good, and would be in contravention of the public interest. The Tribunal has observed:[76]

> An inconsiderable infringement of propriety or assault on accepted standards of good taste would not alone justify a classification of indecent; a restriction when imposed means not simply we feel that circulation would contribute nothing to the public interest but that it would actively contravene that interest and be in breach of the Act.

The Tribunal, well aware that the declaration of a document as indecent means that if the document is handled in any one of the ways enumerated in the Act,[77] the handling will constitute a criminal offence,[78] has emphasised that although a book may not contribute anything to the public good, that does not mean that the book is injurious to the public good. In its decision on *No Adam in Eden* by Grace Metalious, the Tribunal stated:[79]

[72] Ante, n.62.
[73] *Roth* v. *United States; Alberts* v. *California* 334 U.S. 476 (1957).
[74] Ante, n.62.
[75] See, e.g. *Gazette* 18 September 1969, 1798; ante, n.62.
[76] *N.Z. Gazette,* 18 September 1969, 1798.
[77] Sections 21-23.
[78] *N.Z. Gazette,* 18 September 1969, 1798.
[79] *N.Z. Gazette,* 14 January 1965, 23.

> We do not think the circulation of the book can be said to be for the public good; it is too trumpery and worthless. But that does not compel a finding that it is injurious to the public welfare and we are not prepared so to hold.

Furthermore, if it is not injurious to the public good merely to attack commonly accepted standards, then publications which are not otherwise harmful ought not to be prohibited merely because they question established moral values or present a sexual heterodoxy. It is very much in the public interest that freedom of expression, a fundamental freedom which has contributed immeasurably to the development of every society and which is indispensable to a society's continued growth, be protected from unnecessary restrictions. This is a freedom which has the clear support of the Tribunal. It has repeatedly asserted that publications should not be declared indecent or otherwise censored merely because they advocate practices and philosophies which are not widely socially acceptable in New Zealand, but in regard to which there can be honest differences of opinion. Companionate marriage is an example given by the Tribunal.[80]

The following quotations from its decisions exemplify the Tribunal's liberal recognition of and support for freedom of discussion and expression:[81]

> We do not think the public interest requires suppression merely on the grounds of unorthodoxy, either in argument or presentation, and we do not think the community desires it.
>
> We do not believe it to be in the public interest that there should be a ban on the advocacy of the unorthodox, that those who consider that different mores would benefit society should not be allowed to plead their case temperately and logically, nor even that they should not be allowed considerable latitude in doing so. We are commissioned not as arbiters of morality but of decency.[82]
>
> Some people may consider that the acceptance of these ideas on greater sexual freedom would, in terms of s. 2 of the Indecent Publications Act, be injurious to the public good, but the suppression of minority views, seriously put forward, may be equally injurious to the public good.[83]

Thus the claim that the expression of unorthodox views[84] is injurious to the public good in that it may lead to wider acceptance of such views and a consequent lowering of community standards is rejected by the New Zealand Tribunal. Such a claim of course presupposes that any change in present community standards must necessarily be for the worse.

[80] Ante, n.76.
[81] Ante, n.46.
[82] Ante, n.76.
[83] *N.Z. Gazette*, 20 December 1967, 2289.
[84] The Tribunal, of course, has no power to censor politically unorthodox views unless they are indecent (s. 2) as regards their presentation or exposition. See *N.Z. Gazette*, 5 August 1971, 1554.

It must therefore be asked: What constitutes dealing with (inter alia) sex in a manner injurious to the public good?

D. H. Lawrence wrote that indecent publications are those which "attempt to insult sex, to do dirt on it."[85] Lawrence's words may serve as a concise summary of the Tribunal's views in this regard. It has said that where scenes in a publication give the "impression . . . that promiscuity, violence and perversion are being glamourised and offered for vicarious pleasure"[86] or if the publication makes a "simple appeal . . . to wallow in grossly offensive incidents of sexual indulgence"[87] it is indecent. It is in the public interest to restrict the distribution of "girlie" and other magazines which have illustrations which are not "intended to inform and attract but to distort and pervert",[88] and which have a text which is "not intended to develop an honestly entertained thesis but to make money regardless of any social consequences".

In summary, a publication is likely to be held to be injurious to the public good or detrimental to the public interest, and hence indecent, if it is no more than a commercial exploitation of sex;[89] if it presents sex as "an uncontrollable appetite to be followed wherever it leads",[90] and "savours the resulting experiences in . . . revolting detail"; if it exhibits cruelty, violence or the "grosser perversions" with a "relish that panders to perverted and morbid interest in sexual exploitation and violence";[91] if it displays a "concentrated appeal to the lowest tastes of readers";[92] and if it shows no honesty of intention, no sincerity of purpose, no artistic integrity.

4. *Literary Considerations and the "Intrinsic Worth"*[93] *of a Publication's Contents*

> [The Tribunal system] is often considered to have one unassailable asset: there is virtually no book with any claim to merit which an adult cannot legally buy.[94]

[85] D. H. Lawrence, *Pornography and So On* (London, 1936), 23.
[86] *N.Z. Gazette,* 22 July 1971, 1454.
[87] Idem.
[88] Ante, n.76; Cf. *N.Z. Gazette,* 6 November 1969, 2217.
[89] See, e.g., *N.Z. Gazette,* 1 September 1966, 1419; *ibid.,* 17 August 1967, 1386.
[90] *N.Z. Gazette,* 5 August 1971, 1554.
[91] *N.Z. Gazette,* 21 October 1971, 2199.
[92] *N.Z. Gazette,* 31 March 1966, 577.
[93] *Robson* v. *Hicks Smith & Sons Ltd.* [1965] N.Z.L.R. 1113, 1120, per Haslam J.
[94] *Sunday Times,* 13 February 1972, 13. This statement does not take into account that many books may be classified as indecent unless their circulation is restricted to certain persons, such as sociologists or psychologists.

Even if one accepts this rather over-confident statement, there are still the questions which must be asked of any censorship system: what constitutes accepted merit, and to whom? Who is to be the final arbiter of indecency—the community (as represented by the community standards test) or the literary specialist?

The New Zealand legislature has attempted to achieve a balance between the rights and opinions of the community as a whole on the one hand, and of the *literati* on the other. At least two of the Tribunal's members must have special qualifications in the field of literature and education.[95] Moreover it might be argued that, even if the Tribunal does not attempt to assess community standards, the standard set jointly by its five members, though subjective, would generally reflect the will of the people. As it is any tests, whether based on community standards, the public interest, or literary merit, which are created to assist in establishing what is indecent, are to a large extent merely means of cloaking subjective opinions with a pretence of rationalised objectivity. The tests and statutory considerations can provide guidelines, but each individual member of the Tribunal must use his own judgment in interpreting and applying those guidelines.

The Tribunal is required to determine whether the publication of the book before it would be in the interests of art, literature, science or learning and would be for the public good.[96] If so, the book is not to be classified as indecent (although, of course, its circulation may be restricted). The Act lays down a number of guidelines regarding the literary value of a publication and these, along with other factors which appear important to the Tribunal, need to be briefly considered.

Section 11 (1) (a) requires the Tribunal to consider the dominant effect of the book as a whole—not whether particular words or passages are indecent. The Tribunal has said that indecency is not to be found in particular words as such, "but in their use in indecent contexts or for discreditable purposes",[97] and that words "cannot be treated in isolation from the scenes depicted and to which they relate."[98] Accordingly, obscenities in dialogue are not disapproved of by the Tribunal if they are appropriate in their context and used to assist in an honest and sincere portrayal of life.

Section 11 (1) (f) of the Act requires the Tribunal to take into consideration whether the publication displays an honest purpose and an honest thread of thought, or whether its content is merely camou-

[95] Section 3 (2) (b).
[96] Section 11 (1) (b), and s. 11 (2).
[97] *N.Z. Gazette,* 4 March 1965, 290.
[98] *N.Z. Gazette,* 14 January 1965, 21.

flage designed to render acceptable any indecent parts of the book. The sincerity of the author—his honesty of intention, his artistic integrity—is the pivotal factor. One Tribunal member has suggested that censorship should be confined to publications "written without sincerity".[99] In its decision on *Querelle of Brest* by Jean Genet, the Tribunal stated:[1]

> There is in our view no comparison to be drawn between the serious literary work of a man like Genet, whose affinities are with such writers as Lawrence, Joyce, Nabokov, and Baldwin, and the mass of cheap, cynically commercialised periodical and paper-back pornography which the Tribunal is properly concerned to keep under strict restraint.

Books containing specific descriptions of, for example, homosexuality, murder and depravity, often "require appreciable literary or sociological merit to outweigh the sordid nature"[2] of the subject matter. In classifying *Querelle of Brest,* the Tribunal noted Genet's international stature and his honesty of intention, and although it considered his descriptions of homosexual relations and his glorification of murder to be "undoubtedly shocking" it emphasised that[3]

> . . . such unwelcome knowledge is suppressed at our peril; and taken as a whole, the book leaves one impressed with the nature of evil which, far from asking to be realised by imitation, must be faced, understood, and overcome. . . .
> [T]he Tribunal believes that this book is unlikely to promote any desire for realisation; rather, on a more abstract level, it leaves one to grapple with the problem of evil. And that is not a problem to be solved by evasion.

Clearly, too strict a censorship would deprive authors of their right to communicate their views freely and would deprive the adult public of its "right to make up . . . its mind without unnecessary protection."[4] Furthermore, from the author's point of view, his creative faculties may be inhibited if censorship is too rigid. As Tolstoy said: What matters is not what the censor does to what I have written, but to what I might have written. The freedom of the author must extend to every sphere of human conduct. This is especially so today when literature is often closely concerned with psychological problems and the realistic portrayal of sex and cruelty. However it must be determined whether the author, in portraying sexual relations, cruelty and violence in great detail, is doing so for artistic creative reasons and

[99] S. Perry, quoted in the *Sunday Times,* 13 February 1972, 13.
[1] *N.Z. Gazette,* 21 November 1968, 2119.
[2] *N.Z. Gazette,* 26 August 1971, 1707. The fact that an author has a high moral purpose does not necessarily redeem a book from being indecent, but the author's honesty and sincerity is often decisive in determining whether the book has literary, artistic or scientific merit. If it does have such merit, its circulation may be restricted but not completely prohibited.
[3] *N.Z. Gazette,* 21 November 1968, 2119.
[4] Ante, n.90.

with an honest purpose, or whether he is merely pandering to the commercial market.

5. *The Conditions of Sale*

The Tribunal, in classifying a publication, must take into account the manifest intention and integrity of not only the author but also of the publisher. The Tribunal is very much opposed to pandering i.e. "that kind of promotion and advertising of erotic literary materials which flagrantly exploits the sexually provocative or stimulating properties in such materials."[5] Regard is had to the general presentation of the book to determine whether there is any intention on the part of the publisher to "force sales by vulgar methods to a wide and possibly immature readership."[6] Indications of pandering may be evidence that the book is no more than a commercial exploitation of sex—this being reinforced if the book is priced cheaply.

The price at which a publication sells or is intended to be sold is a factor the Tribunal is required to take into consideration (cheap books being more readily obtainable by young persons).[7] Another factor is the intended or probable readers of any publication.[8]

In the *Robson*[9] case (where it was held that section 11 (1) is not exhaustive in defining the factors which the Tribunal may take into account in classifying and determining the character of any book) counsel contended that in classifying the paper-back edition of *Lady Chatterley's Lover* the Tribunal was not entitled to take into consideration the fact that the hard-back edition (not submitted to the Tribunal) was in unrestricted circulation. The majority of the Full Court rejected this argument, holding that the Tribunal must consider the situation in the community in which potential readers of a book live and that the Tribunal was entitled to take into account the fact that another identical but more expensive edition of the same book was freely available in that community.

If a book is already in wide circulation before it is submitted to the Tribunal, any decision by the Tribunal on that book "may be at best little more than an academic exercise and at worst a means of enforcing the punitive provisions of the Act."[10] Exemplifying this is the decision concerning *Masskerade 69*. Fifty two thousand of the

[5] H. M. Clor, *Obscenity and Public Morality: Censorship in a Liberal Society*, (1969), 79.
[6] *N.Z. Gazette*, 21 November 1968, 2119.
[7] Section 11 (1) (d).
[8] Section 11 (1) (c).
[9] Ante, n.25.
[10] *N.Z. Gazette*, 6 November 1969, 2217.

55,000 copies of this magazine printed, were sold within two to three days. As the Tribunal stated,[11]

> a decision of this Tribunal will provide a guide to acceptable standards, but it cannot forestall massive distribution of another magazine, and no decision subsequent to distribution can recall the copies sold.

This defect is partly remedied by section 21 of the Act which makes it clear that the mere exhibition of a document to any person in whose hands it has been declared indecent (persons under seventeen years of age, for example, in the *Masskerade 69* decision) constitutes an offence of strict liability under the Act. Therefore, any restriction on circulation imposed by the Tribunal involves restraints on displays as well as distribution. Accordingly, if the Tribunal's decisions are enforced, such a restriction "effectively precludes the book from being openly displayed in shops or sold on the street."[12] And enforcement is a matter for the Police, not the Tribunal.

In its decision regarding the book *Lolita,* by Vladimir Nabokov, the majority of the Tribunal expressed the view that orders restricting circulation to persons above a specified age were not fully effective because of the difficulties of enforcement. The Tribunal stated:[13]

> It is conceivable that any book dealing with sex and crime will be harmful in some way to some person. To classify it as forbidden fruit, unless it can be effectively kept from him, is surely to intensify that risk. . . . It is not the locked cupboard but a developing discrimination that will provide the remedy against any harm that books can do.

V. Rationales of Censorship

1. *The Need to Show Harmful Effects*

In a free society legal restraints must be justified by the showing of harmful consequences flowing from the activity to be restrained. As Lord Birkett, a former Lord Justice of Appeal, said:[14]

> Censorship . . . can only be justified if its purpose is to prevent harm or injury either to the individual, the general public, or to the good order of the community. If it is imposed under colour of these things when no such conditions exist, or if it is maintained when any such necessity has vanished, it is an evil thing and ought to be abolished.

Freedom of expression must not, and this the Tribunal recognises, be limited merely on the basis of a feeling that the expression is undesirable, offensive or even dangerous. There must be, at the least, arguments and evidence leading to a conclusion that indecency has harmful effects upon the individual or the community.

[11] Idem.
[12] Idem.
[13] *N.Z. Gazette,* 14 January 1965, 21-23.
[14] Lord Birkett, "The Changing Law", in *'To Deprave and Corrupt': Original Studies in the Nature and Definition of 'Obscenity',* J. Chandos (ed.) (1962), 73-88, at 74.

What, then, are the harmful effects of indecency? Why is a book which is no more than a commercial exploitation of sensational material injurious to the public good?

2. *The Protection of the Moral Status Quo*

An argument often proferred in defence of literary censorship is that it acts in the public interest by removing from circulation writing which attacks commonly accepted standards of morality and thereby subverts the moral status quo with resulting depravation and corruption of the community. Indecent literature, it is claimed, by challenging or questioning accepted moral standards, might actually change them. John Chandos[15] concisely answers this argument by contending that literature and all forms of communication do, and are meant to, change community standards:[16]

> The morals of society are modified and amended by argument, illustration, and disputations as well as by example. To try and frustrate such communication would be to violate the principle of freedom of expression on matters of public interest. Without changes in morality we should still have the rack, trials for witchcraft, child labour in mines . . . and proscription of contraceptives. . . .

In any community, changes in social morality (including sexual mores) should be accepted as normal. If a publication contains no threat to the social order other than challenging accepted values, "the remedy which democracy provides against challenges of this nature is not censorship but intelligent and vigorous defence of the values attacked."[17]

As stated earlier,[18] the Tribunal does not support a blind unquestioning defence of the moral status quo. It will not allow itself to be restricted by a rigid application of the community standards test. Neither does it consider that the public interest requires suppression merely on the grounds of unorthodoxy.[19] It sums up its attitude by saying: "We are commissioned as arbiters not of morality but of decency."[20]

3. *The "Libidinous Thoughts" Rationale*

One rationale advanced in favour of censorship is that indecency gives rise to "impure and libidinous thoughts",[21] these being con-

[15] J. Chandos, "My Brother's Keeper", *'To Deprave and Corrupt'*, 15-50.
[16] Ibid., 43.
[17] R. G. Fox, *The Concept of Obscenity*, (1967), 151.
[18] Ante, p. 12.
[19] Ante, p. 13.
[20] Ante, n.82.
[21] See, e.g., W. B. Lochart and R. C. McClure, "Why Obscene", *'To Deprave and Corrupt'*, *op. cit.*, 53-70.

sidered sufficient evil in themselves to justify suppression of the writing which stimulated them.[22] This belief has its roots in the religious principle that lustful thoughts are as sinful as lustful desires. However it provides no satisfactory answers to two most important questions it raises: what kinds of thoughts are impure, and what degree of causal relationship is required between the allegedly indecent material and the impure thoughts to justify censorship? Furthermore, erotic thoughts are a perfectly natural part of human nature and are evoked by a "myriad of stimuli which are often far removed from that which is ordinarily regarded as erotic."[23] As Frank J. said:[24]

> If the government possesses the power to censor publications which arouse sexual thoughts, regardless of whether those thoughts tend probably to transform themselves into antisocial behaviour, why may not the government censor political and religious publications regardless of any causal relation to probable dangerous deeds?

Section 11 (1) (e) of the Act requires the Tribunal to take into consideration, when determining the character of any book, whether any person is "likely to be corrupted" by reading the book, and whether other persons are "likely to benefit" from it. The Tribunal does not, however, support the view that publications ought to be censored merely because they evoke erotic responses. Such a policy would result in the banning of all erotically realistic literature. The dominant effect of the book must be considered, as must the purpose of the author. The likelihood of injury to the individual or the public good must be shown. Indeed, it has been argued that exposure to indecent materials is not only relatively harmless—it may well have positive therapeutic value, "facilitating a release of tensions which might otherwise explode in action."[25]

4. *The "Overt Misbehaviour" Rationale*

The "libidinous thoughts" rationale is usually extended to the claim that there is a causal relationship between the stimulation of sexual thoughts and overt misbehaviour. A great deal of material has been written on this subject, the opinions varying from one extreme (that indecent material has no effect on behaviour whatsoever) to the other (that indecent literature is the sole cause for a wide variety of social evils). The most important point to be made is that no method has yet been devised to predict the probable effect of

[22] Idem.
[23] R. G. Fox, *The Concept of Obscenity*, (1967), 140.
[24] *United States* v. *Roth* 237 F. 2d. 796 (1957), 805.
[25] H. M. Clor, *Obscenity and Public Morality: Censorship in a Liberal Society*, (1969), 146.

indecency on overt misbehaviour, nor even to determine whether any causal relationship exists at all between exposure to "indecent" literature and anti-social conduct. In Denmark there was a decline in the number of sex crimes after all legal barriers against printed indecency were abolished by the Danish Parliament.[26] Furthermore, in the vast research literature on the causes of juvenile delinquency there is "no evidence to justify the assumption that the reading about sexual matters or about violence leads to delinquent acts."[27] The hypothesis that the reading of indecent literature induces harmful behaviour "remains at best wholly conjectural, conjecture based on intuition or generalisations broadly derived from sensational single instances."[28] The Tribunal is aware of this:[29]

> We take notice that there is widespread scepticism, which we share, as to how far printed matter conduces to the commission of offences against the law.

It has never stated that the reading of indecent materials is a cause of anti-social behaviour. Moreover it has said that a document is not to be assumed to be inherently indecent merely because it may be used in a particular way (e.g. by a "pervert bent upon seducing boys or younger men"[30]):[31]

> Nude photographs may no doubt be used in an attempt to corrupt young people; but so may old masters, or pictures of famous statuary, or even holy writ.

5. *Corruption and the "Deadening of Sensitivity" Rationale*

Although appearing to consider that indecent material does not cause overt misbehaviour, the Tribunal clearly believes that such material may be injurious:[32]

> Particularly in the case of young persons, corruption as we see it is usually a continuing process: we do not consider that the words of the statute [s. 11 (1) (e)] mean that we are confined to considering whether any person may be corrupted absolutely and immediately by exposure to a single document. We believe our function . . . is to consider whether such an exposure is in our view likely to contribute to any person's corruption, giving that word its full and proper meaning, and weighing against our conclusion our assessment of whether other persons are likely to benefit from publication.

This statement, considered in the light of the Tribunal's other decisions, suggests that it feels that the possible danger of indecent litera-

[26] P. S. Boyer, *Purity in Print: Book Censorship in America,* (1968), xvii.
[27] From an unpublished treatise by Dr Jahoda, quoted by Frank J. in *United States* v. *Roth* 237 F. 2d. 796 (1957), 815.
[28] R. G. Fox, *The Concept of Obscenity,* (1967), 142.
[29] *N.Z. Gazette,* 25 July 1968, 1251.
[30] Idem.
[31] Idem.
[32] *N.Z. Gazette,* 18 September 1969, 1798.

ture is not that it may cause sexual perversion or anti-social behaviour but that, as corruption is usually a continuing process, it may cause what Chief Justice Tauro described as "the brutalising of the human spirit and the desensitising of emotional and intellectual responses."[33]

The Tribunal's statement that corruption is a continuing process can more easily be interpreted as being in accordance with the "desensitising" rationale (which places far more emphasis on the morals of individuals or groups in society than does the "community standards" test) than with the "overt misbehaviour" rationale. Of the former, J. M. Clor wrote:[34]

> An obscenity—saturated literary environment could function as one factor in the activation and reinforcement of unworthy traits of character. The unrestricted circulation of obscene materials could also operate to break down moral standards by undermining the convictions and the sensitivities which support them. . . . 'Finer feelings' could be blunted and eroded by a steady stream of impressions which assault them. Men whose sensibilities are frequently assaulted by prurient and lurid impressions may become desensitised.

Of course, these alleged effects are difficult to measure and cannot be predicted with scientific accuracy, but Clor contends that a "sober reflection upon common experience"[35] will tend to support his argument.

6. *The Protection of Children*

If it is accepted that indecency can contribute, in the long term, to the debasement of an individual's moral standards and character, then the primary aim of censorship should be to protect those who are most susceptible to such debasement and desensitising, namely children. Indeed, it might be argued that they are the only people susceptible in this way.

The Tribunal has endorsed this need to protect the vulnerable[36] as one of the aims of the Indecent Publications Act. It is clearly of the opinion that indecent material may corrupt or injuriously affect children because of their lack of maturity of judgment.[37] The Tribunal decided that *Fanny Hill* should be withheld from "impressionable young persons"[38] as it might "arouse interest in the one form of

[33] *Commonwealth* v. *Karalexis*, Massachusetts, as yet unreported; see [1971] N.Z.L.J. 90.
[34] Clor, op. cit., 170-171.
[35] Ibid., 172.
[36] *N.Z. Gazette*, 18 September 1969, 1798. The Tribunal seems to consider that adults, as well as children, need to be protected from material which is "designed to make the abnormal appear normal": *N.Z. Gazette*, 18 September 1969, 1798; ibid., 14 January 1965, 23-24.
[37] *N.Z. Gazette*, 14 January 1965, 23-24.
[38] *N.Z. Gazette*, 20 May 1965, 809.

perversion it describes." *Lady Chatterley's Lover* was likewise held unsuitable for juveniles because "mentally immature minors would be incapable of appreciating the theme of the story and the purpose of the writer."[39] In another decision[40] the Tribunal had regard to a psychologist's evidence that frequent exposure to a violent comic book would have a bluntening effect on the sensitivity of any child towards the concept of aggression and in the case of the high-risk group of disturbed or unstable children, the cumulative effect could be harmful.

The Tribunal has repeatedly emphasised the need to control the circulation of books which, though not injurious to adults, might be injurious to mentally and emotionally immature minors.[41] As A. T. Poffenberger says:[42]

> One respect in which children differ from the adults is in suggestibility; another is the lack of ability to foresee and to weigh the consequences for self and others of different kinds of behaviour; another is the lack of capacity and willingness to exercise self-restraint; and still another is an imagination less controlled and checked by realities.

However the Tribunal considers that "censorship of books in the interests of the young should be the minimum necessary",[43] and that its ability to classify publications as indecent in the hands of persons under a specified age allows it to respect the rights of adults as well as the best interests of school children.[44]

VI. Conclusion

It might be thought that real freedom of expression and artistic creativity require the complete abolition of all indecency laws relating to literature. However in New Zealand it has been decided by Parliament that there should be some regulation of written and other material. In interpreting and applying the Act, the New Zealand Tribunal has adopted the attitude that an adult should generally be allowed to make his own decision about the books he reads, but that some minimum control is required in the interests of young people. The Tribunal's liberal and flexible, but consistent approach is manifest in its belief that adults should be provided with as much freedom as possible both to read and write; in its support of the freedom to advocate the unorthodox; and in its recognition of the liberty

[39] *N.Z. Gazette*, 4 March 1965, 290.
[40] *N.Z. Gazette*, 20 February 1969, 297.
[41] E.g. *N.Z. Gazette*, 14 January 1965, 23-24.
[42] "Motion Pictures and Crime", *Censorship of the Theatre and Moving Pictures*, (ed.) L. T. Beman, (1931), 72.
[43] *N.Z. Gazette*, 28 January 1965, 96.
[44] *N.Z. Gazette*, 4 March 1965, 290.

of the writer to endeavour to change the moral standards of the community. Although the Tribunal's notion of liberality may not extend far into the "meretricious paperback field",[45] it has striven to protect serious literature and, in so doing, many of its decisions, " . . . given our kind of society, . . . have been astonishingly liberal."[46] The Tribunal's decisions have reflected the tolerance of the community but not its intolerance.

"The law," wrote George Bernard Shaw, "may be only the intolerance of the community; but it is a defined and limited intolerance."[47] In the field of censorship of publications, however, the foremost problems are ones of definition and limitation. Indecency, the public good, literary merit—these are largely matters of opinion. Because of the elements of uncertainty and subjectivity embodied in the concept of indecent, judgments should favour freedom rather than suppression. Freedom of expression is a governing principle in those countries which claim to be democratic. But the boundary between protection and suppression is so indistinct, the causal relationship between reading and behaviour so uncertain, the number of sexual and other stimuli so diverse, and the subjective factors in this area so numerous, that the determination of standards of decency in the literary sphere is something which the law must approach with circumspection.

[45] S. Perry (a member of the Tribunal for eight years), quoted in the *Sunday Times*, 13 February 1972, 13.

[46] L. Johnston, quoted in *Censorship* (published by the Congress for Cultural Freedom), No. 3, Summer 1965, 54.

[47] Preface to *The Showing-Up of Blanco Posnet*, in *The Complete Prefaces of Bernard Shaw* (Paul Hamlyn, London 1965), 415.