

PORNOGRAPHY — AN ARGUMENT FOR CENSORSHIP

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I. INTRODUCTION

The Films, Videos, and Publications Classification Bill 1992 has once again focused public attention on the issues of the desirability and implementation of censorship law in New Zealand. With these issues of censorship, which have been recognised by New Zealand judges to raise notoriously difficult questions of social policy,¹ academics have traditionally favoured the freedom of circulation side of the case. My own personal view once was that the dangers of censorship outweighed the dangers of pornography, but study of the various Commissions of Inquiry and researchers in the area has persuaded me otherwise.

Hence, the purpose of this article is not to examine in detail either the criteria or the mechanics of the new legislation, which is assured of enactment, but to show why I believe that the Classification Office and Board of Review, when making classification decisions in the future, should reflect current community standards demanding strong censorship.

Thirty years ago, discussion about pornography and censorship revolved around such titles as Baldwin's 'Another Country', Lawrence's 'Lady Chatterley's Lover', and Nabokov's 'Lolita'.² There may then have been legitimate grounds for concern over the effects of censorship on artistic and intellectual freedom, and over an alleged "... puritanical protectionism of New Zealanders of amazing rigidity".³ But the nature of material under discussion in the debate on censorship has changed dramatically,⁴ and debate now revolves around such titles as 'Asses' and 'Legs', to select the least offensive. In the contemporary New Zealand context, there is, in my view, simply no realistic risk of a work with an artistic, literary intent, or with a socially serious purpose, being subject to censorship.

With respect, I also consider it mistaken to take the view of some Judges that the standards of New Zealanders now differ so widely that generalisations as to community standards on pornography cannot be made.⁵

1 See, for example, the comments of Jeffries J in *Waverley Publishing Co Ltd v Comptroller of Customs* [1980] 1 NZLR 631, at 643, and *Comptroller of Customs v Gordon and Gotch* [1987] 1 NZLR 80, at 85. Also see the preface written by Sir Kenneth Gresson, former President of the Court of Appeal, in Perry, *The Indecent Publications Tribunal* (1965, Whitcombe and Tombs) 20. In Canada, see a similar comment by Sopinka J in *R v Butler* (1992) 89 DLR (4th) 449, at 453.

2 These books were among the first twelve books considered by the Indecent Publications Tribunal: see Perry, *The Indecent Publications Tribunal*, *ibid*, 80-123. 'Lolita' had previously been the subject of judicial proceedings in *Re Lolita* [1961] NZLR 542, and the paperback version of 'Lady Chatterley's Lover' was the subject of proceedings in *Robson v Hicks Smith and Sons Ltd* [1965] NZLR 1113. In 1974 a legal practitioner, R A Heron (now Heron J), observed that "very little" hard-core pornography came before the Tribunal or probably got into the country: "The Indecent Publications Tribunal A Legal Practitioner's Viewpoint" (1974) 3 OLR 222, 226.

3 Judge Kearney in *Re Fiesta* (1987) 6 NZAR 213, at 216. This attitude was not confined to New Zealanders: for example, in the 1940's the words "sex appeal" and "sex life" were not allowed in English films – see the Chief Film Censor's argument in Submission to the Committee of Inquiry into Pornography (Department of Internal Affairs, Wellington, 1988) 59.

4 As recognised by Judge Kearney in *Re Fiesta*, *ibid*, at 216.

5 In *Society for the Promotion of Community Standards Inc v Everard* (1988) 7 NZAR 33, McGechan J declined to make a generalisation, arguing that New Zealand was a wide, diverse and contentious society with a considerable range of age groups, outlooks, and life styles (at 61). Similarly, see the comment of Judge Rushton on her view of the possible range of reactions

Obviously there is no unanimity, but all the available evidence of current community thinking, manifested in particular by public opinion polls, indicates a surprising degree of consensus in favour of censorship controls in New Zealand.⁶ This opposition to pornography appears to be shared, from perhaps differing spiritual perspectives, by Pakeha, Maori and Polynesian alike.⁷

For instance, a poll commissioned by the Royal Commission on Social Policy in 1987 of around 3000 people, revealed that 44 percent of respondents supported censorship measures "a very great deal", and 23 percent favoured them "quite a lot".⁸ Consistently with that finding, a National Research Bureau public opinion poll conducted in 1992 of 1000 males and 1000 females aged sixteen years and over, revealed that 65% of respondents found depictions of sexual intercourse to be "objectionable" in magazines and films, and that ninety per cent found depictions of acts such as urolagnia (a sexual practice involving urination onto a person or into a person's mouth) to be objectionable in those two media.⁹ An earlier, admittedly less scientific, telephone survey of 100 persons conducted by Women against Pornography in 1988 confirmed this general level of community anxiety: 64% of respondents were concerned about the availability of pornography, and 70% thought there the laws should be tightened to make pornography less available.¹⁰

Although in the early 1980's this consensus may not have been present in New Zealand (and it is possible that a bare majority of adults may have favoured less censorship at least in films),¹¹ it is clear that most New Zealanders have generally always supported censorship, in the past arguably to excess.¹² The present pro-censorship consensus manifested itself in the Parliamentary debate on the introduction of the Films, Videos and

from New Zealanders to playing cards depicting male nudes: *Collector of Customs v Lawrence Publishing Co* [1992] NZAR 271, 288.

- 6 It may well be the case, as recently claimed by the Indecent Publications Tribunal, that New Zealanders are more sensitive to pornography than Americans: *Re Penthouse (US) vol 19, no 5 and others* [1991] NZAR 289, 325. Also see the Report of the Ministerial Committee of Inquiry into Pornography (Wellington, 1989) 151.
- 7 See the discussion of the Ministerial Committee of Inquiry, above n 6, 22-23, and 38. Maori and Pacific Island women were said to be more likely to believe that nudity was offensive, though it was noted that Maori and Polynesians were not widely involved in public action against pornography (at 77). The Film Censor in recent years began to give added emphasis to Maori and Polynesian views: Campbell, "Cinema Sex: How far will they go?" *New Zealand Listener* 5 September, 1992, 17, 20.
- 8 Report of the Royal Commission on Social Policy (1988, Wellington) Vol 1, 351-352. In all age groups there was a majority in favour of firm controls ranging from 51% for those aged 15-29, to 85% for those aged 60 and over (p 550). The response rate in the survey was 64%.
- 9 National Research Bureau Public Opinion Poll "New Zealanders' Opinions Regarding New Definitions of Objectionable Acts", prepared for the Society for Promotion of Community Standards (Auckland, July 1992). The National Research Bureau is an independent, respected polling organisation, and its findings are likely to be accepted as valid: cf an earlier poll taken by the Society for Promotion of Community Standards, where the questions were described by the Indecent Publications Tribunal as leading and ambiguous: *Re 'Penthouse'* above n 6, at 323.
- 10 "Survey on Pornography", (WAP, 1988), unpublished, but referred to by the Ministerial Committee of Inquiry above n 6, at 37. See also the Report of the Ministerial Committee of Inquiry into Violence (Department of Justice, 1987) 135-136.
- 11 In 1982, the Department of Internal Affairs commissioned a Heylen survey on films censorship, and 52% of respondents wanted either less censorship or none at all: Ministerial Committee of Inquiry into Pornography, above n 6, at 37.
- 12 In 1974, Levine argued that the overwhelming weight of influential opinion in New Zealand had always favoured some censorship: "The Indecent Publications Tribunal - Some Political Observations" (1974) 3 OLR 228, 229. For the history of censorship in New Zealand, see Perry, *The Indecent Publications Tribunal*, above n 2, and *Indecent Publications Control in New Zealand* (Government Printer, 1980); Beeby, *Books you couldn't buy: censorship in New Zealand* (Price Milburn, 1981); Christoffel, *Censored: A short history of censorship in New Zealand* (Department of Internal Affairs, Wellington, 1989).

Publications Classifications Bill 1992. After the Minister of Women's Affairs had moved the introduction, and supported the firmer, more stringent censorship guide-lines contained in the Bill, not one member of the House spoke against the measure. On the contrary, the Opposition Associate Spokesperson on Women's Affairs responded to the Minister's speech by welcoming the measure, saying that the Bill had merely caught up with public opinion which had moved against pornography.¹³

It will be seen in this article that although many of the criteria found in the new Bill are more detailed and specific than those to be found in the past, imprecision unavoidably remains. It is thus the judgment and philosophies of the newly-established Office of Film and Literature Classification (the Classification Office) and the Film and Literature Board of Review (the Board of Review) that will define the direction and effectiveness of the new censorship regime.

The results of an extremely liberal approach to the censorship task will be seen when some recent decisions of the Indecent Publications Tribunal, one of the predecessors to the Classification Office, are examined. I will argue that this liberalism not only led to difficult-to-explain inconsistencies, but to an undermining of the Tribunal's own stated philosophy to treat as unconditionally indecent any publication which either fused sex and violence, or treated women in an unequal, demeaning manner.

I will further argue that any indulgence towards publications properly classifiable as pornographic was, and is, misplaced. As discussed below, pornographic works intrinsically lack social value, and if a pornographic work or depiction is banned, there can be no ensuing social, intellectual or cultural loss. If, though, a pornographic work or depiction is allowed, even under restrictions, the potential for harm exists. The risks taken by a liberal censoring body such as the Indecent Publications Tribunal were therefore considerable. To avoid those risks in the future, I believe that the Classification Office and Board of Review must censor more in accordance with community expectations.

II. THE MEANING OF "PORNOGRAPHY" AND "EROTICA"

"Pornography" is not a legal term of art, or indeed a term to be found in legislation either in New Zealand or overseas. For example, the Films, Videos, and Publication Classification Bill 1992 provides a lengthy definition of "objectionable" materials, with no reference to the concept of "pornography". However, it is the term "pornography" which is most used and best-understood in both academic and popular discussion, and a work which can be properly described as pornographic, as explained below, should inevitably fall under the new statutory definition of "objectionable" materials. When the designation "pornography" is used, the censorship argument does become more accessible, and for that reason it will be used throughout this article.

Of course, one of the commonest criticisms of any censorship regime is that there is no satisfactory definition of pornography, and that a censorship decision therefore becomes an arbitrary, subjective exercise based on the personal whim of the censor. The fear expressed is that "pornography" for one person would be "erotica" to another – or, as it was once put

13 Ms Tennet, replying to the Minister's speech, 532 NZPD 12762 (2 December 1992). (She correctly noted that initiatives undertaken during the time of the former Labour Government had been significant.)

judicially, "... one man's vulgarity is another's lyric".¹⁴ The US Attorney General's Commission on Pornography thus accepted the claim that the terms "erotica" and "pornography" were often "conclusory" rather than descriptive concepts: "erotica" being used by a person when he or she approved of the material: "pornography" when he or she did not.¹⁵ For this reason the Commission, like the Fraser Committee in Canada before it,¹⁶ avoided defining or using either term, preferring instead to rely on description of the material that should be subject to regulation.

However, there are ways of marking out "erotica", as it is now commonly understood, from "pornography", as it is commonly understood. For instance, Posner, in a major work, recently argued that *pornography* is a subset of *erotic* presentations and representations, distinguishable by virtue of the frankness or other offensive or disturbing properties that shock or embarrass many people.¹⁷ That insight went some way towards differentiating the two species, for the violation of community standards of appropriateness is an important ingredient in the concept of pornography:¹⁸ the violation occurring both in the transgression of the appropriate line between public and private activity,¹⁹ and in the repugnant portrayal of sexuality and women.

In New Zealand, the Report of the Ministerial Committee of Inquiry into Pornography, adopted the mainstream feminist definition of "pornography" and identified it as:

... sexually explicit material which is demeaning and degrading to women (and sometimes to children or men). It eroticises the sexual subordination of women, perpetuating myths about women's sexuality and objectifying women for the pleasure of men.²⁰

"Erotica", on the other hand, was defined as "sexually explicit material designed to arouse the viewer/reader which is not pornographic ie not exploitive depictions of sexuality".²¹ Other feminist writing, it can be noted, had distinguished depictions of erotica as depictions of mutuality.²²

The Ministerial Committee in fact took the wrong turning when it suggested that erotica was sexually explicit material designed to arouse. More helpful critiques had previously emerged from the Committee reports in Britain and Canada, which had stated that erotic material was

14 See the comment of Mr Justice Harlan, delivering the judgment of the majority of the Supreme Court of the United States in *Cohen v California* 403 US 15, 29 L Ed (2d) 284, at 294.

15 Attorney General's Commission on Pornography Final Report Part I, 227-231. (In the literature the Commission is often termed the "Meese Commission".) The distinction between "pornography" and "erotica" appears to be a C20th development: Hoff, "Why is there no history of pornography" in *The Dilemma of Violent Pornography* (ed Gubar and Hoff, Indiana Press, 1989) 23.

16 Report of the Special Committee on Pornography and Prostitution *Pornography and Prostitution in Canada* Vol 1 (Minister of Supply and Services, 1985) 45-61. In the literature, it is usually termed the "Fraser Committee".

17 Posner, *Sex and Reason* (Harvard University Press, 1992) 351-352.

18 *Pornography and Censorship* (ed Copp and Wendell, Prometheus Books, 1983) 20.

19 See the Report of the Home Office Committee on Obscenity and Film Censorship, the "Williams Committee Report", (Cambridge University Press, 1981) Part One, paras 7.4-7.7 as reproduced in Copp and Wendell, *ibid*, 188-189. Sexual activity, along with certain other bodily activity, almost invariably takes place in private, without public gaze.

20 Above n 6, at 28.

21 *Ibid*, at 29. It was said to be difficult, but useful, to make this distinction.

22 Steinem, "Erotica and Pornography; A Clear and Present Difference" *Ms Magazine*, November 1978, quoted in *Pornography: Women Violence and Civil Liberties* (ed Itzin, OUP, 1992) 448-449. In the Alberta Court of Queen's Bench, Shannon J accepted a similar definition of material which "portrays positive and affectionate human sexual interaction between consenting individuals participating on the basis of equality": *R v Wagner* (1985) 36 Alta LR (2d) 301, at 311.

designed primarily to depict sexual arousal, rather than to cause it.²³ But the real answer to the problem of the distinction between erotica and pornography would seem to lie in the realisation that erotica depicts and deals with sexual activity in an *overall context of human relationships*. An erotic work thus has a purported artistic, human dimension, and attempts to create some emotional response to the depiction of human relationships. It is only as a possible incidental, further effect, that a viewer and reader might become sexually stimulated.²⁴

Pornography, on the other hand, wittingly eliminates the human, emotional context from sexual depictions, and has no purpose other than that of arousing genital excitement in the reader or viewer.²⁵ No attempt is made to explore the meaning or significance of the sexual activity, and it was this characteristic that once led D H Lawrence to damn pornography as an insult to and degradation of sexuality.²⁶ For a not dissimilar reason, feminists have damned it as a degradation of women.

Hence, pornography is distinguishable from erotica in a number of ways. The sole intention of pornography is to arouse sexual excitement in the reader and viewer, with the obvious motive for the depiction being one of economic profit. In pornography, as popularly understood, the depiction of sexual activity will be devoid of any human, artistically imaginative context, and it will usually involve degrading portrayals of women's sexuality.

That understanding, which is to be adopted in this article, fully incorporates but extends beyond both the feminist analysis discussed below, and the viewpoint that it is the sexually violent which is pornographic. On this understanding, reflective of community thinking revealed in public opinion polls, an explicit depiction of consensual sexual intercourse could well be described as "pornographic", "objectionable" and "injurious to the public good".²⁷ It is only if the depiction were in the context of an attempted artistic portrayal of human relationships, or were an integral aspect of a work with a cognitive purpose, that the term "pornographic" would become inapt.

III. THE FEMINIST ANALYSES OF PORNOGRAPHY

Whilst the popular definition of pornography concentrates on depictions of sexuality, the feminist definitions tend to focus on what pornography says about women, and what it does to women in allegedly reinforcing gender inequality. Longino, for example, described pornography as "material that explicitly represents degrading or abusive sexual behaviour so as to endorse and/or recommend the behaviour as described".²⁸

23 See the Fraser Committee Report, above n 16, at 57, quoting and agreeing with the Williams Committee definition.

24 Similar observations have been made by Ennew, *The Sexual Exploitation of Children* (Polity Press, 1986) 116-117. Also see Kristol, "Is this what we wanted" in *The Case Against Pornography* (ed Holbrook, Tom Stacey Ltd, 1972).

25 The Williams Committee defined pornography as a description or depiction of sex involving the dual characteristics of sexual explicitness and the intention to arouse sexually: para 8.2 as reproduced in Copp and Wendell, above n 18, at 196.

26 Lawrence, "Pornography and Obscenity" in *Phoenix* (New York: Viking, 1972) 174-175.

27 In *Society for the Promotion of Community Standards v Everard*, above n 5, McGechan J held that the Film Censor had misinterpreted the statutory concept of injury to the public good by proceeding on the basis that if depictions of sex were consensual, non-violent, and without anti-social treatment the material could never be injurious to the public good

28 Longino, "Pornography, oppression and freedom: a closer look" in *Take Back the Night Women on Pornography* (ed Lederer, Morrow, 1980) 44.

In New Zealand, that feminist perspective has had an immense impact, and is responsible, more than any other, for the recent political and legislative activity. The impetus for review of the previously existing New Zealand censorship laws came not from liberals disgruntled with the existing censorship controls, but from feminists, such as Women Against Pornography, seeking the "outlawing" of pornography.²⁹ Calls for greater regulation were also supported by widely representative women's groups, such as the National Council of Women.³⁰ When the Minister of Justice eventually announced the formation of the Ministerial Committee of Inquiry into Pornography, he reflected the feminist concerns, saying:

[v]iolent, degrading attitudes to women are not acceptable, just as racism is not acceptable. The worrying message implicit in some pornographic material now available is that men are entitled to treat women with violence. And that women are the sexual subordinates or mere objects for the sexual gratification of men.³¹

When the Committee conducted its inquiry, the traditional "liberal" and "conservative" submissions were numerically overwhelmed by those from women's groups of a predominantly feminist stance. And in its final report, the Committee stated that it placed itself in "the middle of feminist thought",³² becoming thereby the first Committee of the common law world to embrace what will be termed in this article the "mainstream" feminist approach.³³

The recommendations of the Committee formed the basis of the Department of Justice's 1990 Paper on Censorship and Pornography,³⁴ and of the Films, Videos, and Publications Classification Bill 1992. Significantly, and symbolically, the Bill was introduced into the House of Representatives by the Minister of Women's Affairs and Social Welfare, on behalf of the Minister of Justice.

The "radical" feminist perspective on pornography³⁵

Much critical American analysis of pornography and censorship has centred around the views of Andrea Dworkin and Catherine Mackinnon, two leading feminists who drafted the Minneapolis and Indianapolis anti-pornography ordinances. Although the Indianapolis ordinance eventually failed a constitutional challenge,³⁶ the contribution of these two

29 The goal of "outlawing" pornography was articulated by Women Against Pornography in their publication, *Its About Time* (Mr Printer Ltd, Wellington, 1985) 2. The group, formed in 1983, has also been responsible for publications such as "Pornography and violence against Women and children: connections from research" (WAP, Wellington, 1986). For further New Zealand writing from a feminist perspective see Bean, *Capitalism and Pornography*, Corich, *Patriarchy and Pornography* and Jackson, *What should be done* in (1986) 3 Race Gender Class, 6-14.

30 *The Christchurch Press*, 8 September 1986, 12. The National Council of Women represented 45 national societies with a combined membership of over 200,000 women.

31 The Hon G W R Palmer, Ministerial Press Statement, Wednesday 15 June 1987, p 1.

32 See the Report, above n 6, at 60.

33 Noted by Bynum, "Feminism and Pornography: A New Zealand Perspective" (1991) 65 Tul L R 1131, 1134.

34 *Censorship and Pornography: Proposals for Legislation* (Department of Justice, 1990) released by the then Minister of Justice, the Hon W P Jeffries.

35 The term "radical feminist" is a self-description of Andrea Dworkin and Catherine Mackinnon: Hawkings and Zimrin, *Pornography in a Free Society* (University of Cambridge, 1988) 151, and is the term hesitantly preferred by Mize, "A critique of a proposal by radical feminists to censor pornography because of its sexist message" (1988) 6 OLR 589.

36 In *America Booksellers Assn Inc v Hudnut* 771 F 2d 323 Circuit Judge Easterbrook, holding the Indianapolis ordinance unconstitutional, accepted the feminist argument that pornography did not persuade people as much as change them (and was an injury rather than an idea), but he held that simply demonstrated the power of speech, guaranteed under the First Amendment. Excerpts from the Minneapolis Ordinance are reproduced in Feminism and Censorship (ed Chester and Dickey, Avery Publishing, 1988) 258-260. That ordinance was passed by the

women is of profound historical importance in the global debate on pornography and censorship, and has been embraced, in New Zealand, by Women Against Pornography.

Interestingly, Mackinnon and Dworkin favoured legislation adopting a civil rights rather than a censorship approach. Their argument was that censorship laws had not been able to adequately deal with the harms of pornography. They therefore suggested that pornography should be seen as an issue of sex-discrimination, and of women's civil rights, with women, in certain circumstances, being able to sue producers or distributors of pornography. That "sex-discrimination" approach has also been favoured by "radical" feminists in Britain,³⁷ but seems unlikely to be adopted, in full, by the New Zealand Parliament.³⁸

Mackinnon, who provides the more scholarly and legal analysis of the two authors, has argued that pornography can be defined as sexually explicit subordination.³⁹ Pornography, she asserts, is an act of male supremacy, "a form of forced sex, a practice of sexual politics, an institution of gender inequality".⁴⁰ Sex discrimination and female subordination is said to be sexualised, and, for consumers of pornography, the experience is said to be not one of fantasy but one of sexual reality. Pornography, she says, communicates powerfully a real message that it is permissible to treat women in the way portrayed. On this view, pornography is perceived to be misogynist propaganda against women, and an issue of ideology and sexual politics. To use Morgan's oft-cited comment, "[p]ornography is the theory, and rape the practice".⁴¹ On this analysis, it is otiose to question whether pornography causes harm, for pornography *is* violence against women.⁴²

That explanation of pornography has been criticised, validly to some extent, as being a re-definition which encompasses the most objectionable forms of material, but thereby departs too far from the popular usage and understanding.⁴³ The criticism has some substance because, for example, some sado-masochistic depictions of males being sexually abused by females, or some male homosexual pornography, could certainly be described as pornographic under the more commonly understood definition, but would not fit neatly within the Mackinnon-Dworkin analysis.

However, the above feminist reasoning has had an incalculable impact on general community thinking in New Zealand, with the Ministerial

Council, but vetoed by the Mayor: Fraser Committee, above n 16, 55.

37 Itzin, "Legislating against Pornography without censorship" in *Pornography. Women, Violence and Civil Liberties*, above n 22, 401-434.

38 The question of pornography as an issue of sex discrimination is not dealt with in the Films, Videos, and Publications Classifications Bill 1992. But see cl 36 of the Human Rights Bill 1992, covering sexual harassment, whereby visual displays of pornography could, in certain circumstances, become unlawful. Recommendation 175(iii) of the Report of the Ministerial Committee of Inquiry, above n 6, suggested that pornography should be considered a practice of sex discrimination falling under the Human Rights Commission Act 1977, and the idea received some support from the Department of Justice paper, above n 34, 8.

39 Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) esp chs 11-16. Also Mackinnon, "Pornography as Sex Discrimination" (1986) 17 *Law and Inequality*, 38-49.

40 *Feminism Unmodified*, *ibid*, 148.

41 Morgan, "Theory and Practice: Pornography and Rape" in *Take Back the Night* (ed Lederer, Morrow) 139.

42 See Bynum, above n 33, 1170 citing the New Zealand Ministerial Committee of Inquiry, 41-42. This type of analysis could be found even in the early 1970's, before the advent of the Mackinnon-Dworkin thinking, eg Stoller, "Pornography and Perversion" in *The Case Against Pornography*, above n 24, 124-125.

43 Hawkins and Zimring, *Pornography in a Free Society*, above n 35, 154-157.

Committee reflecting the Mackinnon-Dworkin approach more than any other, and with advocacy of censorship no longer associated with sexual prudery. The “respectability” of their general argument in New Zealand has meant that it is somewhat misleading to continue to describe the argument as “radical” feminist – opposition to pornography has become the “mainstream” feminist approach, and it is accordingly so-labelled in this article.⁴⁴

Feminists opposed to censorship

Not all feminists favour more stringent censorship. For instance, in America, Feminists Against Censorship Task-force campaigned with the American Civil Liberties Union to discredit, and eventually defeat legally the anti-pornography ordinance drafted by Mackinnon and Andrea Dworkin; and in Britain, a similar organisation, Feminists Against Censorship, was established in 1990. In New Zealand, a minority of feminists making submissions to the Ministerial Committee of Inquiry also opposed censorship, and feminist anti-censorship arguments have been forcefully expressed in New Zealand legal writing by Mize.⁴⁵

One consistent theme which emerges from the writings of overseas feminists against censorship is the fear that the State and its organs are founded on patriarchal lines, and cannot therefore be trusted to regulate effectively in a pro-women manner.⁴⁶ It is also argued that feminist concentration on pornography mobilises too many resources on the issue, and diverts energy and resources away from work on fundamental economic and institutional change of the patriarchal culture, of which pornography is said to be simply reflective.⁴⁷ Concentrating on depictions of the sexually explicit, it is mooted, leaves the sexist values and nexus of power within society unaltered, and that other wide-ranging strategies should be adopted to change those general values. Indeed, the fear has been expressed that the goals of the feminist anti-pornography movement will become identified in the popular mind with conservative goals and ideology, and that this will actively harm and backfire on the feminist values and strategies.⁴⁸

44 For examples of legal writings reflecting this approach see Mahoney, “Obscenity, Morals and the Law: A Feminist Critique” (1984) 17 Ottawa L Rev 33, Bakan, “Pornography, Law and Moral Theory” (1984) 17 Ottawa L Rev 1, Ayim, “Pornography and Sexism: A Thread in the Web” (1985) 23 U of Western Ontario L Rev 189. See also *The Sexual Liberals and the Attack of Feminism* (eds Leidholdt and Raymond, Pergamon Press, 1990) and, for less academic writing reflecting this general view, see Faludi, *Backlash: The Undeclared War Against American Women* (Crown Publishers, 1991) esp. Ch 5, and Naomi Wolf *The Beauty Myth* (Vintage, 1991). In recent New Zealand magazines, see Crow, “Sex To Go” (1992/3) Broadsheet 24-26, and the editorial by Lewis, “Made for Women Too”, *The New Zealand Listener*, 23 January 23, 1993, 7.

45 Above n 35.

46 See *Women Against Censorship* (ed Burstyn, Douglas and McIntyre, 1985); in particular, see King, “Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better”, 79, 84 and Steele, “A Capital Idea: Gendering in the Mass Media” 58, 59. For further writings by feminists opposed to censorship, see Rodgerson and Wilson, *Pornography and Feminism: The Case against Censorship* (Lawrence and Wishart Ltd, 1991), and also some of the essays in *Feminism and Censorship: the current debate* (eds Chester and Dickey, Prism Press, 1988).

47 See, for instance, Burstyn, “Political Precedents and Moral Crusades: Women, Sex, and the State” in *Women Against Censorship*, *ibid*, 26-27, and Mize, above n. 35 at 613. In response, Mackinnon has stated in an interview that pornography is the “dynamic engine” in the system of sexism, promoting male supremacy in a unique way by allowing men bodily, orgasmic pleasure over female subordination: Campbell, “Penalising the Porn Merchants” *The New Zealand Listener* 15 October, 1988, 30, 31.

48 West argues that the Meese Commission, whilst condemning pornography on feminist grounds, defined the material in an essentially conservative way, so that material which violated norms of sexual “virtue” rather than sexual “equality” would be proscribed: “The

Further, some feminists have surmised that some women too have pornographic imaginations, and that pornography can validate and affirm those women. It is similarly hypothesised that pornographic fantasies do not lead to sexist attitudes and behaviour outside the context of the sexual fantasies.⁴⁹

However, it can be said that feminists against censorship generally share the same repugnance for pornography as do the pro-censorship feminists, with the difference of opinion merely lying in the response.⁵⁰ But it would seem that the responses are scarcely incompatible, and should be seen as complementary rather than mutually exclusive. Women Against Pornography, for instance, have long argued for a “progressive” sex education policy, as well as for legislative strengthening of censorship criteria;⁵¹ and the Ministerial Committee of Inquiry made numerous recommendations relating to education and social strategies.⁵² On no view is a censorship regime the complete solution to the problems posed by pornography (and sexism), and non-legal responses are not excluded by a statutory system of censorship.

IV. THE STATE AND FREEDOM OF EXPRESSION — THE “LIBERAL” VIEWPOINT

The Bill of Rights Act 1990

The liberal viewpoint, which places fundamental importance upon the freedom of individuals to live their own lives and to express themselves as they wish without interference from the State or majority opinion, has always had “an essential and powerful influence in our kind of society”.⁵³ That liberal creed in support of freedom of expression is now enshrined in section 14 of the Bill of Rights Act 1990, providing, in essence, that everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind. However, s 5 of the Act states that the rights and freedoms affirmed in the Act are subject “... to such reasonable limits as can be demonstrably justified in a free and democratic society”.

That latter provision highlights the crucial philosophical question, being debated in this article, of whether censorship of pornographic materials can be justified in a free and democratic society. In one sense, the answer to that question, perhaps more than other, determines the attitude taken by a censorship body or person in the exercise of a statutory power to classify material; for a censor’s determination of the degree to which censorship is demonstrably justified in a free and democratic society will largely influence his or her decision as to what meets the statutory test of injury to the public good.⁵⁴

Feminist-Conservative Alliance and the 1986 Attorney General’s Commission on Pornography Report” [1987] American Bar Foundation Research Journal, 681, 700-701. See further Mize, above n 35, 611-612.

49 See *Pornography and Feminism*, above n 46, 59, and *Women against Censorship*, above n 46, especially Kotash, “Second Thoughts” 32, 36, and Diamond, “Pornography Image and Reality”, 40, 48. Further see West, *ibid*, 696, and Mize, above n 35, 602-603.

50 As noted by the Ministerial Committee of Inquiry into Pornography, above n 6, 59. (Mackinnon, in an interview, claimed that education without the backing of law was hypocritical, and made the taboo material more attractive, above n 47, 31).

51 *Its About Time*, above n 29, 16-17.

52 See, for instance, recommendations 174-202 of the Ministerial Committee, above n 6

53 Ministerial Committee of Inquiry into Pornography n 6, at 56.

54 See the comment of the Indecent Publications Tribunal in Decision 123/92, 24 December 1992, at 9.

However, under both the old and new legislation the exercise of the statutory discretion to classify material is governed by listed statutory criteria, and there can, of course, be no question of the legislation or the statutory criteria being subordinate to the Bill of Rights Act.⁵⁵ The Bill of Rights Act argument may thus have an important philosophical impact, but it is only of tangential relevance in the actual exercise of any statutory decision to classify.⁵⁶

Liberalism, Utilitarianism, and Ronald Dworkin

Liberal intellectuals have always been particularly attracted to the writing and philosophy of John Stuart Mill,⁵⁷ arguing that society benefits from an “open marketplace of ideas”, rather than from the prescription of majority wisdom. The liberal purist is likely to subscribe to the view that individual autonomy is paramount over any principle of utility,⁵⁸ and that each individual is presumed to be the best judge of his or her own interests.

In the censorship context, a utilitarian might argue that a majority preference for strict censorship controls, as clearly evidenced in opinion polls, should be satisfied. A liberal would be unmoved by any such majority preference, and would argue that the State is only justified in intervening to punish or suppress conduct if the conduct discernibly harmed other people. The freedom to publish and consume pornography has therefore long been defended by liberals, as it has been assumed, almost certainly wrongly, that the production and consumption of pornography causes no harm to individual persons.

The most powerful liberal attack against the utilitarian argument over censorship has been by Ronald Dworkin. In his significant article, *Is there a right to pornography*,⁵⁹ Dworkin asserted that the right to moral independence, which permits pornography, trumped the unrestricted utilitarian argument. Advocating the principle of equal concern and respect, he distinguished between “personal” and “external” preferences. A personal preference, he explained, is a preference as to what the person in question does or receives, whereas an external preference is a preference that person has about what others do or receives. Dworkin argued that by treating important rights such as the right to self expression (an aspect of the all-important right to treatment as an equal) as trumps, any external, “moralistic” preferences were rightly discounted. Dworkin did not argue that the community would be better off in the long run if pornography is unrestricted – he doubted it – but that under his rights-based strategy the right to moral independence must be respected.

55 This is made explicit by s 4 of the Bill of Rights Act 1990. In *Society for the Promotion of Community Standards v Waverley International* (High Court, Wellington, AP 213/91, 27 November 1992) Tipping J endorsed, presumably needlessly, the view of the Indecent Publications Tribunal that the limitation of expression in the Indecent Publications Act 1963 was consistent with the Bill of Rights Act, and was demonstrably justified in a free and democratic society.

56 See the comment by Burrows, *Statute Law in New Zealand* (Butterworths, 1992) 329-331, in his analysis of the Indecent Publications Tribunal’s discussion of the Act in *Re ‘Penthouse’*, above n 6. The Bill of Rights Act clearly does apply, though, to anyone exercising the statutory power to classify or censor (s 3(b)); and see the observation by Rishworth, “The New Zealand Bill of Rights Act 1990: The First Fifteen Months” in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation No 32, 1992) 7, 34. See, further, Hastings, “The New Zealand Bill of Rights and Censorship” [1990] NZLJ 384.

57 Especially his classic work *On Liberty* (John W Parker and Son, 1881).

58 The principle that social policy should be organised to maximise general welfare and fulfil as many people’s goals for their own lives as possible.

59 Dworkin, (1981) 1 Oxford J Legal Stud 177-212. Pornography is also discussed by Dworkin in *Taking Rights Seriously* (Duckworth, 1977) 256-258.

Although the Dworkin thesis was predictably fluent and well-argued, his assumptions have been subjected to vigorous attack from other legal philosophers. MacCormick, for instance, has described the crucial distinction between external and personal preferences as "too crude to be acceptable", and has argued that at least some forms of obscenity law may be justified.⁶⁰ Feminist philosopher, Langton, has further argued that Dworkin's principle of equal concern and respect in fact requires a policy that restricts or prohibits pornography. She asserts that the permissive policy towards pornography is dependent upon external preferences of some as to the worth of women, thus conflicting with the principle of equal concern and respect. She argues that women accordingly have rights as trumps against it.⁶¹

The liberal goals

Some liberals might argue that Ronald Dworkin's philosophy represents one moral idea or conception of good, and that Langton offers another. The State, they might say, should remain neutral between those competing, incommensurable ideas and cannot coercively adopt one over another.⁶² Thus the Langton world-view could not be imposed on those subscribing to Dworkin.

However, the notion of State neutrality has recently come under increasing attack,⁶³ and it is indeed difficult to see why liberals should feel inhibited from supporting movements that have the goal of strengthening the liberal values of freedom, equality, and human dignity.⁶⁴ The goals of freedom, equality, dignity and respect of the person are the necessary prerequisite conditions for an individual to enjoy autonomy, and it would seem sensible that all necessary measures, including legislation, be used to protect and secure those goals.

Legislation which proscribes expression that is racially hostile has thus generally been supported by liberals, with enthusiasm.⁶⁵ Here, the argument has run along the lines that people can become conditioned by racial intolerance and hatred, so that legislative measures designed to preserve the core social values of racial respect and equality is needed. If this is acknowledged to be so, it is also surely true that people could become conditioned by pornographic sexual material; and legislative proscription of pornography is an equally appropriate response, in order to protect the core social values of gender respect and equality.

Additionally, it is apparent that any freedom to produce, distribute, and consume pornography is generally only availed upon by men,⁶⁶ and that

60 MacCormick, *Legal Rights and Social Democracy* (Oxford University Press, 1982) 152-153

61 Langton, "Whose Right? Ronald Dworkin, Women and Pornographers" (1990) 19 *Philosophy and Public Affairs*, 311.

62 See, for instance, the liberal philosophy of Rawls found in such writings as "The Idea of an Overlapping Consensus" (1987) 7 *Oxford J Legal Stud* 1, and "The Priority of Right and the Ideas of Good" (1988) 19 *Philosophy and Public Affairs* 251.

63 See, for instance, Gardbaum, "Why the Liberal State can promote moral ideas after all" (1991) 104 *Harv L R* 1350.

64 Following the Fraser Committee, the New Zealand Ministerial Committee of Inquiry identified 5 basic social values over which there was consensus viz equality, responsibility, individual freedom, human dignity, appreciation of sexuality: above n 6, at 59-60. On occasions, the Indecent Publications Tribunal made reference to these five values in its classification decisions, eg *Re 'Ecstasy' vol 1, nos 1, 2 and 3* [1992] NZAR 133, at 143.

65 In New Zealand there exists the offence of inciting racial disharmony: ss 25 and 26 of the Race Relations Act 1971, and cls 139 and 140 of the Human Rights Bill 1992. (Under the Bill the fine is to be increased from \$1000 to \$7000). Also see cl 75 of the Human Rights Bill 1992. Hodge did express concern over the effects of the provision in "Incitement to Racial Hatred in New Zealand" (1981) 30 *ICLQ* 918, 924-926.

66 The Ministerial Committee of Inquiry quoted overseas figures suggesting, for instance, that

the expression is motivated by commercial considerations of economic profit.⁶⁷ All this lends substance to Andrea Dworkin's terse observation that pornography is silence rather than free speech for women.⁶⁸ Accordingly, once liberals begin to examine the true implications of pornography, their opposition to censorship often begins to evaporate.⁶⁹

The rationale for freedom of expression: the Sunstein analysis

Liberals can also feel more comfortable in supporting regulation of pornographic materials when the rationale of guarantees for freedom of expression (such as those found in section 14 of the Bill of Rights Act 1990) is examined.

Following a series of writings by Sunstein,⁷⁰ it can be said that speech qualifies as "high-value" when it expresses a point of view on a matter of public affairs, and is part of the exchange of ideas. In a democratic society, it is vital that all political and philosophical views on matters of public affairs, or religious opinions, can be freely heard and debated, however popular or unpopular those ideas may be. As Sopinka J put it in *R v Butler*⁷¹ the values which underlie the protection afforded to freedom of expression relate to "... the search for truth, participation in the political process and individual self-fulfilment".

Expression, however, is of "low value" if it has little or nothing to do with public affairs, if its method is non-cognitive, and if the speaker is not attempting to communicate a message. Pornography, Sunstein asserts, is of that type, because it is not cognitive, not directly concerned with public affairs, and cannot be easily countered by "more speech". He explains that pornography is more akin to a sexual aid than a communicative expression, and it is non-cognitive, in that its effect and intent are to produce sexual arousal. There is no reason, he concludes, why a sensible system or defence of free expression must treat violent pornography in the same way as it treats political speech or the works of Albert Einstein.⁷²

The argument is compelling. Pleading the case of the right of a person to express an unpopular political, religious, or philosophical idea is a worthy task, and a natural brief for a liberal. Defending the right of a person to disseminate or consume a pornographic image, as, for example, a woman's labia being nailed to the table,⁷³ is not such an obvious liberal cause.

women made up 10% of the customers for sex videos, above n 6, at 33.

67 Economic motives for expression means that restriction on expression might be easier to justify: in the Canadian context see Sopinka J's observation in *R v Butler*, above n 1, at 482. The economic motives adds further to the depersonalising aspect of pornography: see the discussion in (1986) 3 Race Gender Class, 6-14.

68 Dworkin, "Against the Male Flood: Censorship, Pornography and Equality" in *Pornography: Women Violence and Civil Liberties*, above n 22, 515, at 531. Scutt, whose writing was quoted in Parliamentary debate, similarly argued that the only freedom in pornography was for males, whilst women's ideas about pornography were effectively censored: 532 NZPD 12774 (2 December 1992) (quoted by C Fletcher MP).

69 The New Zealand Council for Civil Liberties was said by J Blincoe MP to have softened its opposition to censorship: 532 NZPD 12775 (2 December 1992).

70 See, for example, Sunstein, "Pornography and the First Amendment" [1986] Duke LJ 589; "The First Amendment and Cognition: A Response" [1989] Duke LJ 433; "Low Value Speech Revisited" (1989) 83 Nw U L Rev 555, "Free Speech Now" (1992) 55 U Chi L Rev 255 and "Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)" (1992) 92 Colum L Rev 1. Despite the different American constitutional context, Sunstein's arguments have a broader, philosophical significance.

71 Above n 1, at 481. For similar comment by a New Zealand political scientist, see Levine, "The Indecent Publications Tribunal - Some Political Observations" (1974) 3 OLR 228.

72 "The First Amendment and Cognition: A response" above n 70, at 437.

73 This admittedly extreme instance of a pornographic depiction was cited by the Associate

IV. THE HARM OF PORNOGRAPHY

If harm could be established as a consequence of the expression, then even the most purist liberal might feel justified in suppressing pornography under John Stuart Mill's classic dictum that "... the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others".⁷⁴ For this reason the question of harm, if any, of pornography has been the subject of considerable discussion and controversy.

The findings of Commissions

There has been a surprising lack of consensus amongst the various national commissions established to assess the harm of pornography.⁷⁵ For instance, in the USA, the Johnson Commission concluded, in 1970, that exposure to pornography did not play a significant role in the causation of social or individual harms, such as sexual offending, whereas in 1986 the Meese Commission was of the unanimous and "confident" view that exposure to sexually violent materials did. In Canada, the Fraser Committee concluded that the research was so inadequate and chaotic that no consistent body of information had been established, though the Badgley Committee reporting in 1984 on Sexual Offences Against Children and Youths found pornography was harmful in that it corrupted moral and social values, and altered personal values and behaviour. In the United Kingdom, the Williams Committee concluded in 1979, after assessing the evidence, that exposure to pornography was essentially harmless. In Australia, the Joint Select Committee of Video Material was split down the middle on the question of harmfulness, and in 1988 issued two reports: the majority report of six Parliamentarians concluded that evidence of third party harm was established; the minority report of five, including the Chairman, concluded to the contrary.

In New Zealand, the Ministerial Committee adopted as definitive the United Surgeon-General's 1986 workshop report. That report concluded, inter alia, that pornography portraying sexual aggression as pleasurable for the victim increased the acceptance of coercion in sexual relations, that acceptance of coercive sexuality appeared to be related to sexual aggression, and that there was substantiation for basic concern that sexually violent material had more consistent and marked effects than non-violent erotic pornography.⁷⁶

Minister of Women's Affairs, the Hon K O'Regan, in Parliamentary debate: 532 NZPD 12771 (2 December 1992). Polly Toynbee, a member of the Williams Committee, above n 19, wrote how in the course of the inquiry that she had witnessed such scenes as "... the crushing of breasts in vices, exploding vaginas packed with hand grenades ... women engaged in sexual intercourse with pigs". She had concluded, however, along with other members of the Committee, that there was no evidence of harm, except where the participants in the photographs might have come to harm: quoted in *Pornography: Women Violence and Civil Liberties*, above n 22, 2-3. Compare though the reaction of the three members of the New Zealand Ministerial Committee of Inquiry, described in the Preface to the Report, above n 6, 5.

⁷⁴ Above n 57, at 22.

⁷⁵ The most cited overseas reports are 1970 Commission on Obscenity and Pornography (the Johnson Committee report), the Williams Committee report, above n 19, the Fraser Committee report, above n 16, and the Meese Commission report, above n 15. The various reports have been reviewed and compared in numerous books in this area: see, for instance, Hawkins and Zimring, *Pornography in a Free Society* above n 35, esp Ch 4. The Report of the Joint Select Committee on Video Material (Australian Government Publishing Service, 1988) is so confusing that it is of minimal value in the censorship debate.

⁷⁶ The report is cited by the Committee, above n 6, at 39-40.

The laboratory experiments

In the classic judgment of *R v Hicklin*,⁷⁷ Lord Cockburn made the presupposition that certain materials could deprave and corrupt. At that time there were no scientific studies to support that assumption.⁷⁸

Now, though, a number of laboratory studies have been conducted to investigate the correlation between exposure to sexually explicit materials and behavioural or attitudinal changes, and, for example, over 145 papers on the topic were published between 1982-1990.⁷⁹ Typically, the subjects, usually male university students who had been psychologically screened, were aroused or angered through provocation from a female, and then exposed to various sorts of stimuli including various varieties of sexually explicit, violent images. They were then given an opportunity to retaliate, perhaps by way of simulated electric shocks, against the female initiator of the original provocation.

There now seems to be little scientific controversy over *violent* or aggressive pornography. Thus, the Surgeon-General's Report, relied upon by the Ministerial Committee of Inquiry, noted that laboratory studies, measuring short-term effects, indicated that exposure to violent pornography increased punitive behaviour towards women. Additionally, it has been shown in laboratory research that even brief exposure to sexually violent material renders male subjects, in the laboratory setting, less sensitive to real rape victims – the subjects have become somewhat desensitised, and callous regarding rape, and more accepting of rape myths.

The laboratory experiments have suggested that even “normal” males can be aroused by images of rape, particularly where the victim becomes aroused or finds pleasure, and it seems that many males in the “normal” population find images of rape more arousing than explicit images of mutually consenting sex.⁸⁰ Moreover, it appears that even “liberal” male college students, after exposure to this sort of material, show an increased willingness to say they might commit rape if not caught.⁸¹ All this lends weight to one prominent psychiatrist's observation that in many cultures, including ours, sexual desirability, potency, and success in the male have been inseparably entwined with aggressiveness and power.⁸²

77 (1968) LR 3 QB 360.

78 Writing in 1965, Sir Kenneth Gresson said he knew of no scientific study indicating literature to be a significant cause of social problems: *The Indecent Publications Tribunal*, above n 2, 14. The capacity of publications to “corrupt” (or benefit) persons was, however, assumed in s 11(1)(e) of the Indecent Publications Act 1963. No equivalent provision is found in the Films, Videos, and Publications Classification Bill 1992.

79 Weaver, “The Social Science and Psychological Research Evidence: Perceptual and Behavioural Consequences of Exposure to Pornography” in *Pornography: Women Violence and Civil Liberties*, above n 22, 284, 288 (citing American Psychological Association figures). In Itzin's book, over 300 items of research are referred to: *Pornography: Women Violence and Civil Liberties*, *ibid*, 565.

80 Donnerstein, “Pornography and the First Amendment: What does Social Science Research Say?” (1984) 4 *Law and Inequality* 17, 19, citing research done by him and Malamuth.

81 *Ibid*, 20. For further discussion on research indicating that exposure to pornography reduces inhibitions against rape see Russell, “Pornography and Rape: A causal model” in *Pornography: Women Violence and Civil Liberties*, above n 22, 310, 332-339. Worryingly, research findings reveal that between 25-30% of University male students in North America would commit rape, if there was no fear of detection or apprehension: Russell, *ibid*, 311-312.

82 Roth, “Pornography and Society: a psychiatric view” in *The influence of pornography on behaviour* (ed Yaffe and Nelson, Academic Press, 1982) 13. Similarly, Sigmund Freud was of the view that the tendency to aggression was “an innate, independent, instinctual disposition in man” *Civilisation and its Discontents* (Hogarth Press, 1939) 102. (Conservative writer, Alan Bloom, has bemoaned feminist thinking on sexuality which, in his view, has made male sexual passion “sinful” (1987) 83 *Commentary* 24, 24).

There are certain problems with the various laboratory studies, which at the very least are strongly suggestive of a correlation, if not a causal relationship, between exposure to sexually violent material and negative behavioural effects. For instance, it must be conceded that laboratory subjects are drawn from a small, unrepresentative segment of the population, that a laboratory setting is artificial and entirely removed from the environment of the outside world, and that the duration of any adverse effects is unknown. However, the research is so consistent that even anti-censorship supporters are driven to accept the reasonableness of the proposition that violent pornography is related to sexual violence in a "probabilistic or multiple causal way".⁸³ In other words, there seems no doubt that violent pornography is, at the very least, one of the causes of sexual violence.

Generally, the laboratory evidence on exposure to *non-violent*, sexually explicit depictions is less clear. Unlike sexually violent pornography, some leading social scientists are not prepared to conclude that exposure to non-violent pornography results in aggression towards women.⁸⁴ Their conclusion seems to be that non-aggressive pornography only affects aggression when inhibitions to be aggressive are quite low, or possibly after long-term exposure.⁸⁵

However, it must be pointed out that other social scientists have undertaken research indicating that even non-violent, sexually explicit material results in sexually callous perceptions of women, increased self-reported proclivity for sexual violence, and in some instances, aggressive behaviours – particularly, as is common, where the material portrays women as sexually promiscuous and indiscriminating.⁸⁶

And so whilst harm from exposure to non-violent pornography has not been established in the same consistent way by the laboratory studies, some studies do exist in which a correlation is posited. Moreover, research has indicated that there is a satiation effect in the consumption of pornography,

83 Downs, *The New Politics of Pornography* (University of Chicago Press, 1989) 170-171. Although in 1990 Cumberbatch and Howitt reported to the Home Office that research evidence of pornography and sexual violence was "scant" and "failed to establish causal links", this report has been roundly damned by a number of leading pornography researchers in the USA and Canada: Itzin, "Pornography and Civil Liberties, Freedom, Harm and Human Rights" in *Pornography Women Violence and Civil Liberties*, above n 22, 553, 561-562.

84 Donnerstein, Linz, and Penrod, *The Question of Pornography* (The Free Press, 1987) Ch 3 esp p 72, and "The Attorney General's Commission on Pornography: The Gaps between "Finding" and Facts" [1987] American Bar Foundation Research Journal 713. Donnerstein has been accused of being highly inconsistent in his views on the causative role of pornography (Russell, in *Pornography Women Violence and Civil Liberties*, above n 22, 347).

85 Donnerstein, "Pornography: Its effect on violence against women" in *Pornography and Sexual Aggression* (eds Malamuth and Donnerstein, Academic Press, 1984) Ch 2, esp pp 78-79. Donnerstein cites the research of Zillman and Bryant, "Effects of Massive Exposure to Pornography" in *Pornography and Sexual Aggression*, *ibid*, Ch 4. But in the late 1980's Donnerstein argued that evidence was mixed on whether even long-term exposure to degrading images of women in non-violent sexually explicit films resulted in male attitudinal change. "Effects on long-term exposure to violent and sexually degrading depictions of women" (1988) 55 *Journal of Personality and Social Psychology* 758. It seems that in the mid 1980's Donnerstein's stance on non-violent pornography changed, and he came to identify violence and not explicit sex as the problem: Itzin, in *Pornography, Women, Violence and Civil Liberties*, above n 22, 564-565.

86 Weaver, "The Social Science and Psychological Research Evidence: Perceptual and Behavioural Consequences of Exposure to Pornography" in *Pornography Women Violence and Civil Liberties*, above n 22, 284. Also the 1989 study of Check and Guloien (discussed in Check, "The Effects of Violent Pornography, Nonviolent Dehumanising Pornography, and Erotica: Some Legal Implications from a Canadian Perspective" in *Pornography Women Violence and Social Liberties*, above n 22, 350, 353-35 – also the summary at 582) showed that pornography fostered self-reported proclivity to rape, but no demonstrated antisocial impact was found.

so that subjects remain interested in pornography only if they are as or more explicit than previous material.⁸⁷ There is thus an obvious danger that consumers of the non-violent pornography become jaded with that format, and seek sexual stimulation from the more violent variety.⁸⁸

The comparative evidence

Kutchinsky has undertaken a number of studies of the relationship between the availability of pornography, including aggressive pornography, and rape. He has concluded from these studies that pornography does not lead to rape, but is an aphrodisiac for those who like to masturbate.⁸⁹ For instance, in one study of Denmark, Sweden, USA and West Germany between 1964-1984, where Kutchinsky claimed there was clear evidence that the availability of pornography changed from relative scarcity to relative abundance, his results showed that in no country did the level of rape offending increase more than for non-sexual violent crimes.

However, some of the assumptions that Kutchinsky makes, such as the wide availability of pornography in the countries he studies, have been questioned.⁹⁰ Additionally, there has been a cross-state study in America by Baron and Strauss finding a positive correlation between the circulation of “soft-core” pornographic magazines and rape. Although Baron and Strauss themselves doubted whether the relationship was a causal one,⁹¹ Posner, an anti-censorship proponent, has argued that the relationship is statistically robust, and is suggestive if not conclusive of causation.⁹² There are difficulties in being confident over the alleged relationship between pornography and rape – for instance, Japan has a very low incidence of rape despite allowing pornography which is unusually violent and rape-oriented,⁹³ and there are so many possible variables – but in Western culture there would seem to be a reasonable possibility of a correlation. Overall, comparative studies may not prove the harm, but, on a cautious view, the real possibility of harm is left open.

The experiences of women

It has long been a feminist argument that women’s experiences of pornography should be treated as relevant to the identification of harm;⁹⁴ and the Ministerial Committee of Inquiry readily accepted the suggestion that the social scientists, by focussing on male attitudes and behaviours, had undervalued the importance of women’s feeling about pornography.⁹⁵

87 Zillman is quoted as establishing that “heavy consumption of common forms of pornography fosters an appetite for stronger material” *Pornography: Women Violence and Civil Liberties*, above n 22, 349. Also see Lahey, citing Zillman’s research, in “Listening to women” (1991) 14 Int’l J L and Psychiatry 117, 119.

88 Berger, Searles, and Cottle, *Feminism and Pornography*, (Praeger Publishers, 1991) 80, citing a number of authors who have come to this conclusion.

89 Kutchinsky, “Pornography and Rape: Theory and Practice?” (1991) 14 Int’l J L and Psychiatry 47, 62.

90 Lahey, above n 87, 123; Court, “Sex and Violence” in *Pornography and Sexual Aggression*, above n 85, 143-169.

91 Berger, Searles, and Cottle, above n 88, 97: the authors state that Baron and Strauss argue that the association was based on the yet unmeasured factor of “hyper-masculinity” and machismo.

92 Posner, above n 17, 371. There is certainly no evidence to support the view once espoused by the anti-censorship body Society for the Promotion of Individual Responsibility that “cross-cultural studies have shown that it is society that suppresses porn that produces the rapist”: *The New Zealand Sunday Times*, 11 May 1986, 11.

93 Posner, above n 17, 369-370. Also Abramson and Hayashi “Pornography in Japan: Cross-Cultural and Theoretical Considerations” in *Pornography and Sexual Aggression*, above n 85, Ch 5.

94 Lahey, above n 87. Also Lewis, above n 44, and Russell, “Research on How Women Experience the Impact of Pornography” in *Pornography and Censorship*, above n 18, 213.

95 Above n 6, 41.

The research that has been undertaken on women's experience of pornography has been limited, and, not having been conducted by the leading social scientists, could be subject to methodological criticism. Given those limitations, however, it does tend to confirm that a significant number of women are harmed by the desire of their male partners to perform acts seen in pornographic publications.

One study, conducted in 1978, of 933 San Francisco women indicated that 9% of women had been upset by someone attempting to get them to do what had been seen in a pornographic picture, film or book.⁹⁶ In a pilot study of 35 assaulted women in women's shelters in Ontario, 57% of the women reported that their partners used pornography, and 53% reported some kind of sexual force used on them in the course of their partner's use of pornography.⁹⁷ In a British magazine survey, published in 1990, 34% of the 4,000 respondents had been raped or sexually assaulted, and in 14% of those cases pornography was said to have been used in the act.⁹⁸ In New Zealand, Urban Research Associates, at the request of the Ministerial Committee, interviewed 60 women; five of those women described specific instances of effects on their partners, and there was general agreement that men's attitudes are adversely affected by watching pornography.⁹⁹

Additionally, there are numerous anecdotal reports from affected women, and at the end of 1992 the Health Alternatives for Women reported that women were increasingly saying their partners' access to pornography was affecting their relationship.¹⁰⁰ Pro-censorship feminists place great weight on such reports as "... human experience, raw and true, not mediated by dogma, or ideology, or social convention";¹⁰¹ and the first-hand stories and reports undoubtedly often do have an impact unmatched by the academically footnoted articles.

Given that women are the most obvious victims of the alleged harms of pornography, and that women more than men favour censorship,¹⁰² it would be unwise and academically arrogant for a predominantly male legal and social science establishment to dismiss these reports on the ground that they do not meet an academic format. The stories and reports make it clear beyond doubt that some individual women are adversely affected in a significant way by the existence of pornography – the only doubt is over the number.

The harm to men

Whilst the censorship debate has mainly centred on the possible direct harm occasioned to women as a result of the availability of pornography with the research focusing on undesirable male attitudes and behaviour, it is important not to overlook the argument that men, too, can be victims.

⁹⁶ Russell, above n 18, 213-214.

⁹⁷ Lahey, above n 87, 128.

⁹⁸ Itzin and Sweet, "Women's Experience of Pornography: UK Magazine Survey Evidence" in *Pornography: Women Violence and Civil Liberties* above n 22, 222. The survey was in *Cosmopolitan* magazine.

⁹⁹ Above n 6, 186.

¹⁰⁰ *The Christchurch Press*, 19 November 1992, 6.

¹⁰¹ Andrea Dworkin, *Men Possessing Women* (Dutton, 1989), p xxvi.

¹⁰² The New Zealand Royal Commission on Social Policy poll, above n 8, showed that 57% of all male respondents favoured controls either a "very great deal" or "quite a lot", whereas 76% of women favoured controls in that way. The difference in perceptions between male and females was confirmed by the poll conducted by Urban Research Associates. Ministerial Committee of Inquiry, above n 6, 181-194.

The Ministerial Committee heard anecdotal evidence from some men that their self-esteem had been adversely affected by the messages conveyed by pornography, but noted that there was little information available on this theme.¹⁰³ Only a few men are likely to confess to being adversely affected by pornography,¹⁰⁴ and men are more likely than women to perceive there to be some value in pornography.¹⁰⁵

However, it is quite conceivable that in portraying the artificial images of the voraciously sexual woman and the sexually desirable male, some men are conditioned to believe that sex and women's sexual satisfaction revolves around penile performance and male dominance. If so, it could be expected that those men would become emotionally and sexually stunted. For instance, by masturbating to pornographic fantasies some men will question whether they are "man enough" to attract a real female partner, and be consequently less able to enter into a mutually satisfying sexual relationship.¹⁰⁶ The masturbatory fantasy could become a substitute for a sexual partner.¹⁰⁷

Of course, if it could be assumed that all men who consumed pornography would never forcibly seek a sexual partner, then such an outcome would harm those individual men (in stunting their potential emotional development), but leave relatively unscathed the persons with whom they came in contact. However, the research evidence discussed above suggests that, for some men, exposure to violent pornography almost certainly does result in adverse behaviour, and that exposure to non-violent could also possibly have harmful attitudinal and behavioural effects. This is confirmed by self-reports from some sex offenders who attribute their offending to their exposure to pornography. For instance, Ted Bundy shortly before he was executed for serial rape and murder in 1989 "confessed" that he had started his offending as a result of "addiction" to pornography when he was young.¹⁰⁸ In New Zealand, police claim that Charles Coulam, who killed an English tourist at Mount Maunganui, had had sexual fantasies of murder and rape which, he believed, developed as a result of his reading and watching pornography for a period of years. He was stated to be unable to differentiate between fantasy and reality in his relationships with women.¹⁰⁹ Such self-reports are confirmed by some professionals who work with sex offenders. These professionals argue that pornography

¹⁰³ Above n 6, 41.

¹⁰⁴ Some men do admit to effects at a personal level, eg a former Bishop of Woolwich The Rev David Sheppard: *The Obscenity Laws: A Report by the Arts Council Working Party* (Andre Deutsch, 1969), Appendix D iv, 49-50, and the claim by "Richard" in an article by Stirling, "Sex after the revolution", *The New Zealand Listener*, 30 January, 1993, 17, 19. (Interestingly, Keri Hulme, a novelist and former member of the Indecent Publications Tribunal, stated that from her own experience, pornography did have an effect on her mind: *The Christchurch Press*, 8 August 1992, "The Press Weekend", 1.

¹⁰⁵ See the poll results of Urban Research Associates: Ministerial Committee of Inquiry, above n 6, 181-194. Feinberg, though, argues that pornography does not appeal at all to the psychologically normal male who is not in the grip of the cult of machismo: *The Moral Limits of the Criminal Law* (vol 2) (1985, OUP) 153. The Film Censor recently said that as women did have a problem with violence, the then three current female film censors sometimes called in "a couple of beefy blokes" to help classify a film: *The New Zealand Listener*, 5 September 1992, 18.

¹⁰⁶ *Feminism and Pornography*, above n 88, 80, and Baker, "Maintaining Male Power: Why Heterosexual Men Use Pornography" in *Pornography: Women Violence and Civil Liberties*, above n 22, 124-143.

¹⁰⁷ The argument made by writer, Anthony Burgess, quoted by Feinberg, above n 105, 130.

¹⁰⁸ See Brannigan, "Obscenity and Social Harm: A Contested Terrain" (1991) 14 Int'l J L and Psychiatry 1, 3.

¹⁰⁹ The account was given by the Associate Minister of Women's Affairs, the Hon K O'Regan in Parliamentary debate 532 NZPD 12771 (2 December 1992).

is used by sex offenders both to fantasise – with fantasy being the usual prerequisite to the committing of sexual offences – and then justify their behaviour.¹¹⁰

It seems quite probable, then, that some men are harmed by their exposure to pornography, by failing to develop fully their emotional and sexual potential. Other men, such as Bundy and Coulam, appear to have joined their female victims in having their own lives effectively destroyed. Certainly there is little evidence that pornography has a positive cathartic effect for men, and the major proponent of the catharsis theory has reformulated his position.¹¹¹

The harm to children

The protection of children, as a particularly vulnerable group in society, has always been recognised as a well-established justification for censorship.¹¹² There are two types of harm caused by pornography. The first and most obvious harm is where a child is used as part of “child pornography”, and the child is involved in either a real or simulated act of child abuse for the purpose of adult sexual stimulation.¹¹³ Apart from the direct harm to the child participant, it seems that such portrayals also have the potential to stimulate an adult to commit sexual acts with children,¹¹⁴ and to be used by paedophiles to persuade children that sexual activity is normal and acceptable.¹¹⁵ Not surprisingly, even countries with a “liberal” regime of censorship for adults have enacted special legislation against child pornography.¹¹⁶

- 110 Wyre, “Pornography and Sexual Violence: Working with Sexual Offenders” in *Pornography: Women Violence and Civil Liberties*, above n 22, 236-247. (Wyre is Director of the Gracewell Clinic in the UK, a clinic for child sex abusers, and author of *Working with Sexual Abuse* (Oxford, Swift, 1987)). Also see the comments of Johnson, Senior Psychologist at Kia Marama (the National Treatment Unit for men who have abused children sexually): *Sunday Times*, 27 October 1991, 3.
- 111 See the discussion of Einsiedel, “The Experimental Research Evidence: Effects of Pornography on the ‘Average Individual’” in *Pornography: Women, Violence and Civil Liberties*, above 22, 248, 281. In *The Dilemma of Violent Pornography*, above n 15, 91, Einsiedel describes the catharsis theory as “obsolete”.
- 112 See the comment by Indecent Publications Tribunal in *Re ‘Rangar’s Guide to Home and Recreational Use of High Explosives’* [1992] NZAR 578, at 591. The Tribunal continued that “[a]dults on the other hand must take responsibility for their actions”.
- 113 Ennew, *The Sexual Exploitation of Children*, above n 24, 118. Child pornography is discussed by the Ministerial Committee of Inquiry, above n 6, 42-45, and was the subject of considerable media discussion in 1992: see, eg Mannion, “The Trail of Kiddie-porn” *Sunday Times*, 1 November 1992, 8.
- 114 The Report of the Committee on Sexual Offences Against Children and Youths (the Badgley Committee) reporting in Canada in 1984 had “no doubt” that some exposure of pornography to children resulted in children having been sexually assaulted: quoted by Mahoney, above n 44, 53. The Ministerial Committee of Inquiry, above n 6, noted that police statistics gathered during 1988 testified to the fact that the use of pornography in child abuse was not uncommon (at 5). A similar conclusion had been reached by Reissman, *Recent Pornography Research: Effects on Women and Children* (Society for Promotion of Community Standards, 1989). (Reissman’s research methodology has, however, been subjected to criticism).
- 115 As argued by the Minister of Social Welfare and Women’s Affairs, the Hon J Shipley: *The Christchurch Press*, 30 July 1992, 7, and the Chief Investigations officer for Customs Department, S Best: *The Christchurch Press*, 14 August 1992, 8. A senior psychologist at the Department of Justice, H Dixon, is also reported to have doubted whether child pornography causes paedophilia, but has argued that it helps to reinforce notions about child sex not being wrong: *Sunday Times* 1 November 1992, 8. (See also the editorial opinion of *The Christchurch Press*, 30 September 1992, 16).
- 116 See the Fraser Committee Report, above n 16, 256. Even liberals such as Feinberg have no quarrel with the aim of protecting children: *The Moral Limits of the Criminal Law*, above n 105, 188-189. At the Select Committee hearings on the Cinematograph Films Bill 1975, there was close to full agreement from witnesses that children should be protected: see the comment of Hon D Highet 408 NZPD 4012 (17 November 1976).

A second potential harm arises when pornography is used as a rudimentary educator about sex for adolescents or children, particularly for young males grappling with emerging sexuality.¹¹⁷ This area has not yet been fully researched,¹¹⁸ and for obvious ethical reasons it is difficult to do so. However, even those adhering to the traditional liberal position in the censorship debate are prepared to concede that depictions of "... commercial, machine-like activity involving more than one person may come as a shock and may even damage a sixteen year old's view of sexuality, thereby injuring the public good ...".¹¹⁹

The cultural harm

Culture and good taste do play an important part in public life, as culture both reflects and prompts human sensibility towards society and other people.¹²⁰ There has thus always been some concern expressed over the possible cultural damage that pornography could cause. In the early 1970's, for example, a number of writers argued that literature and art would fall victim to the deadening, debasing impact of pornographic materials, and that the case for censorship started from the premise that the law could not remain indifferent to the manner in which people amused themselves.¹²¹

Conventional intellectual and legal opinion would, of course, roundly condemn regulation of material on the grounds of taste and aesthetics; and any proposal to ban or restrict pornography on the grounds of bad taste would inevitably be characterised as elitist and discriminatory. The argument would run that there is no reason why high-brow consumers of, for instance, Renaissance nude paintings should have their tastes pandered to, while the "low-brow" consumers of pornographic magazines could not. Furthermore, it would be said that if taste is the criterion for censorship, then much of the popular cultural entertainment would fall under the censorship blanket. Thus although many American commentators have recently examined the banality and vulgarity of the popular culture of television, films, music and books,¹²² there has been no suggestion that censorship is the appropriate response to the shallowness and mediocrity. As Sir Geoffrey Howe once put it in a lecture on pornography law, "[w]e don't want to indict bad taste ...".¹²³

117 Roth, above n 82, 13. The rationale for the censorship regime of the Indecent Publications Act 1963 was the protection of "immature minds" of young people: Hon J R Hanan moving the Second Reading of the Indecent Publications Bill, 336 NZPD, 1693 (4 September, 1963).

118 Weaver, in *Pornography: Women, Violence and Civil Liberties*, above n 6, 307-308. In 1990, the Indecent Publications Tribunal indicated that it wanted to hear further arguments on the extent to which the portrayal of sexual acts in a non-caring way could harm the young person's sexuality: see the separate decision of Ms Barrington in *Re 'Raunchy'* [1990] NZAR 520, at 527. National Commissions, other than the Meese Commission, have devoted little time to the issue of pornography and child protection: *Pornography in a Free Society* above n 35, 175.

119 See the opinion of Hastings, a member of Indecent Publications Tribunal, in Decision No 32/92, 30 April 1992, at 5. See also the discussion of the Ministerial Committee of Inquiry, above n 6, 42.

120 See Havel, writer and President of former Czechoslovakia, as quoted in *Time* magazine, August 3, 1992. See also Havel's writings in *Open Letters* (Faber and Faber, 1991) esp 209-210.

121 In *The Case against Pornography*, above n 24, see esp Kristol, "Is this what we wanted?" 187, Kahn, "Pornography and the Politics of Rage and Subversion" 129, and Berns, "Beyond the Garbage Pale, or Democracy, Censorship and the Arts", 273.

122 See, for instance, Twitchell, *Carnival Culture: The Trashing of Taste in America* (Columbia University Press, 1992), Bernstein, "Idiot Culture: Reflections of post-Watergate journalism" *New Republic*, June 8, 1992, 22, and the Special Report "The Controversy about Popular Culture" 1992 *American Enterprise* (May/June) pp 72-96. The hope of J S Mill, expressed in *On Liberty*, above n 57, that the best conditions for human flourishing were in a free market-place of ideas proved to be somewhat optimistic.

123 [1972] NZLJ 421, 422. See also judicial comments to similar effect by Gonthier J in *R v Butler*, above n 1, at 498 and Justice Scalia in *Pope and Morrison v Illinois* 481 US 497; 95 L Ed 2d 439, at 448.

However, pornography is distinguishable from other varieties of popular "poor taste" entertainment, on the basis that it not only infringes basic tenets of good aesthetic taste but also contains the various additional harmful ingredients discussed above. In a sense, pornography does not even fall within the rubric of poor art, literature, or film: for, as previously discussed, pornography by its very nature has no artistic pretensions or characteristics. Devoid of emotional context, destitute of any meaningful plot or artistry, it does not attempt to deal with inner experiences or to touch the human spirit and emotions. Pornography aims only to cause sexual stimulation, and, as such, it is a quite discrete genre.

Though cultural harm is perhaps the most controversial of the claimed harms,¹²⁴ it does provide further support for the censorship argument. It is not wrong for a civilised community to use censorship legislation to send "very clear messages about the society we want to live in ...",¹²⁵ and, conversely, a failure to discriminate against pornography could mark a deep failure in intellectual, cultural life.¹²⁶

V. THE NEW LEGISLATIVE CRITERIA FOR CLASSIFICATION

The Films, Videos and Publications Classification Bill 1992 brings together, into a single statute, the three different censorship regimes previously operating. These existed under the Indecent Publications Act 1963, dealing with books, magazines, sound recordings and other "documents"; the Films Act 1983, dealing with films and video recordings intended for public exhibition; and the Video Recordings Act 1987, dealing with the classification of video recordings intended for hire or sale. Television and radio broadcasting, however, remains subject to the provisions of the Broadcasting Act 1989.

Pursuant to the Bill, a single set of statutory criteria govern the classification of all "publications" falling within the purview of the new statutory regime. Under the new criteria, the decision to prohibit or restrict the availability of a publication will be made according to whether or not the publication is "objectionable" within the meaning of clause 3. A publication is defined as "objectionable" if it describes, depicts, expresses or otherwise deals with matters of sex, horror, crime, cruelty or violence in such a manner that the availability of the publication is "likely to be injurious to the public good".

The term "objectionable" was apparently preferred over the more familiar New Zealand concept of "indecent", which was to be found in the Indecent Publications Act 1963 and the Video Recordings Act 1987, both because it better conveyed the idea that material might be prohibited if it departed from the acceptable legal standards, and because it comfort-

¹²⁴ The Williams Committee (Home Office, Britain, 1979) said the argument of cultural harm should be considered "as carefully as one can" but that the argument contained too many dangers - as quoted in *Pornography in a Free Society*, above n 35, 120

¹²⁵ See the Minister of Social Welfare, introducing the Films, Videos, and Publications Bill, 532 NZPD 12578 (2 December 1992). A "conservative" approach to legislation, epitomised by Lord Devlin's arguments, is that law can be used as a social tool to "protect social decency and the quality of life": Hoffman "Feminism, Pornography and the Law" (1985) 133 U Pa L Rev 497, at 506. For an example of a judicial enunciation of that proposition, see *R v Great West News Ltd* (1970) 72 WWR 354, at 355 (Man CA) per Freedman J A.

¹²⁶ Holbrook, *The Case Against Pornography*, above n 24, 2. In this context, see the argument that the "... intellectual pattern of amoral 'objectivity' ... is to blame for the social deterioration of America ..." Persig, *Lila: An Inquiry into Morals* (Corgi Books, 1991), 357.

ably covered such material as crime, cruelty or violence, falling under the umbrella of both the old and the new legislation.¹²⁷

Publications deemed to be objectionable

The first step of the process under the new regime is to establish whether a publication is *deemed* to be objectionable.¹²⁸

For a publication to fall under this deeming provision, it must promote or support, or tend to promote or support one of six specified activities. These are: (a) the exploitation of children or young persons or both for sexual purposes; (b) the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; (c) sexual conduct with or upon the body of a dead person; (d) the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; (e) bestiality; or (f) acts or cruelty or the infliction of extreme violence or extreme cruelty.

If the publication is found to fall within one of those defined categories, it must be held to be “objectionable”, and will be automatically prohibited outright. The assumption is that any such material is so obviously injurious to the public good that it could not be saved by any other characteristic.

Other publications

If a publication is not automatically prohibited as a result of the deeming provision, then the Classification office must apply statutory criteria to determine whether it is to be classified as (i) objectionable (and therefore prohibited), (ii) objectionable except in certain circumstances (and therefore restricted), or (iii) unrestricted.¹²⁹

The contextual approach seen in previous censorship legislation in New Zealand is thus continued, with the difference that the legislation now states that certain factors are to be given *particular* weight.¹³⁰ Introducing the Bill, the Minister of Social Welfare expressed the hope that this direction would provide decision-makers with a sharper focus than the factors set out in the old law, described by her as “rather bland and ineffectual”.¹³¹ The hope is that the closest scrutiny will be given to the kind of matters which were perceived to be at the heart of public concern.¹³²

Accordingly, the Classification Office and Board of Review must give particular weight to the extent, degree, and manner to which the publication, inter alia, describes, depicts, or otherwise deals with acts of significant cruelty, sexual violence or sexual coercion, other sexual or physical conduct of a degrading or dehumanising nature,¹³³ sexual conduct with or by children or young persons, and physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain. Other factors which require particular weight include the manner in which the publication exploits the nudity of children or young persons or both, or degrades or dehumanises any person.

¹²⁷ *Censorship and Pornography: Proposals for legislation* above n 34, 11. Although in Parliamentary debate, the Associate Minister of Women’s Affairs described the term as “ground breaking”, 532 NZPD 12271 (2 December 1992), the Department of Justice paper, *ibid*, suggested that it had previously been used in Australian legislation.

¹²⁸ Films, Videos, and Publications Classification Bill 1992, cl 3(2).

¹²⁹ *Ibid*, cl 21(2). There can be excisions from, and alterations to, films pursuant to cls 29-32 of the Bill.

¹³⁰ *Ibid*, cl 3(3).

¹³¹ 532 NZPD 12760 (2 December 1992).

¹³² *Censorship and Pornography: Proposals for Legislation*, above n 34, 13.

¹³³ For discussion on the concept of degradation in this context see Jarvie, “Pornography and/as degradation” (1991) 14 *Int’l J L and Psychiatry* 13.

As New Zealand censorship legislation has always had a wider coverage than just regulation of pornography, the Bill also requires particular weight to be given to the manner in which the publication promotes or encourages criminal acts or acts of terrorism. Particular weight must further be given to whether the publication represents, directly or by implication, that members of any particular class of persons are inherently inferior to other members of the public by reason of the colour, race, ethnic or national origins, sex, physical or intellectual capacity, or religious beliefs of the members of that class. Here, the feminist analysis of pornography, receives some limited legislative recognition, despite some previously expressed judicial scepticism.¹³⁴

Apart from those especially listed factors, the Bill also sets out a list of more standard factors, familiar from previous legislation, which are to be taken into account. Accordingly, the Office and Board of Review must consider such matters as the dominant effect of the publication as a whole,¹³⁵ the purpose of the publication, the intended or likely audience, and the character of the publication including any merit, value or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific or other matters. One specific new factor includes consideration of the impact of the medium in which the publication is presented,¹³⁶ and, additionally, the office can take into account any other relevant circumstances relating to the intended or likely use of the publication.

The statutory discretion

Despite the unmistakable legislative intention to strengthen the censorship legislation by providing firmer, more directive and objective guidelines the censors are left with considerable room to exercise personal judgment. For example, even the provision deeming material to be automatically objectionable is dependent upon the opinion of the censor that the publication “promotes or supports or tends to promote or support” the six listed activities. If the Classification Office were to consider that the material merely described, rather than supported, the specified activity, then the more general criteria would apply. Many of those statutory criteria are open-ended in nature, no single criterion is determinative, and there would be obvious difficulty in weighing one factor against the other in any objective way. In sum, there is little positive legislative control over what is to be determined as objectionable.

The significance of the exercise of judgment in the censorship decision is further made clear by a new statutory provision. Endorsing earlier judicial decisions concerning the Indecent Publications Tribunal, the legislation now provides that the question of whether or not a publication is objectionable is a matter for the expert judgment of the censor, and that

¹³⁴ See, for instance, Jeffries J in *Comptroller of Customs v Gordon and Gotch* [1987] 2 NZLR 80, 93-95, McGechan J in *Society for Promotion of Community Standards v Everard* (1988) 7 NZAR 33, 62-63, and Tipping and Jaine JJ, obiter, in *Society for the Promotion of Community Standards v Waverley International*, above n 55, but see Eichelbaum C J's dissent in the latter case. Dugdale has described the Bill as betraying an origin in “feminist propaganda”: [1993] NZLJ 16, 17.

¹³⁵ The “effect” refers to the effect on the mind of the reader: *Society for the Promotion of Community Standards v Waverley International*, above n 55, 10 per Tipping and Jaine JJ.

¹³⁶ See the discussion of Gonthier J on the varying impact of the media (in books, magazines, films, and billboards) of a portrayal of sexual intercourse *R v Butler*, above n 1, 494.

evidence or proof of any particular matter that the body is required to consider is not essential.¹³⁷

VI. THE JUDICIAL APPROACH TO CENSORSHIP AND ITS APPLICATION

In the past, there had been much judicial discussion and disagreement over the test for “indecent” under the Indecent Publications Act 1963.¹³⁸ Now some of that discussion is truly academic: for instance, the definition of “objectionable” materials under the Films, Videos, and Publications Classification Bill 1992 is unmistakably comprehensive.¹³⁹ However, because the Bill retains the central concept of “injury to the public good”, in the definition clause of “objectionable” publications, the previous judicial discussion could retain some relevance, and should provide guidance for the Courts, Classification Office, and Board of Review in the future. But, at the same time, a purposive approach to the interpretation of the new legislation means that heed must be paid to the clear legislative intention of the Bill to strengthen censorship – just as, in the past, the judges had correctly recognised a liberalising intent of the Indecent Publications Act 1963.

It has been noted that under cl 4 of the Bill, the Classification Office will be required to exercise its own expert judgment as to whether a publication is injurious to the public good and has the capacity for harm¹⁴⁰. In practical terms, this actually requires the Classification Office to determine what the standards of the community require¹⁴¹.

Under the Bill the test of injury to the public good is an exclusive one, and the test of community standards of decency, or acceptability appeared to have been earlier rejected as an alternative test by the Court of Appeal in *Collector of Customs v Lawrence*¹⁴². However, many judges in the past had implicitly recognised the common ground between the test of injury to the public good and that of community standards. In *Lawrence* itself McMullin J approved of the Davison CJ’s attempt to reconcile the two tests in *Waverley Publishing Co Ltd v Comptroller of Customs*,¹⁴³ and opined that to ask whether a document is injurious to the public good is

137 Films, Videos, and Publications Classifications Bill 1992, cl 4. This embraces the decision of the Full Court in *Comptroller of Customs v Gordon and Gotch (NZ) Ltd*, above n 134. (The previous position with respect to censorship decisions of the District Court under the Indecent Publications Act 1963 had, however, been unclear: see the discussion on *Collector of Customs v Hewitt* [1988] 1 NZLR 243 in Burrows, *News Media Law in New Zealand* (3rd ed, OUP, 1990), and Caldwell, “The Test for Indecency – Is Evidence Required?” [1987] NZLJ 375).

138 The emphasis placed on injury to the public good differed slightly between the Indecent Publications Act 1963, and the Video Recordings Act 1987 (where it was a qualifying requirement to the test of indecency) and the Films Act 1983 where it was the test itself: as noted by Heron J in *Wheeler v Everard* (High Court, Wellington, CP 284/86, 22 October 1986) 29, and cited with approval by McGechan J in *Society for the Promotion of Community Standards v Everard*, above n 5, at 55-56.

139 The definition of “indecent” in the Indecent Publications Act 1963 was inclusive, which gave rise to considerable judicial controversy. The cases were discussed by the author in earlier writing: see, for instance, “The determination of indecency under the Indecent Publications Act – A need for greater clarity” [1984] NZLJ 326; “The determination of indecency under the Indecent Publications Act: A need for new criterion” [1986] NZLJ 340, and “The Video Recordings Act 1987” (1987) 12 NZULR 438.

140 In *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404, Woodhouse P held the statutory concept of injury to the public good required “... demonstration that any relevant material has a capacity for some actual harm” (at 409).

141 See Burrows, *News Media Law in New Zealand*, above n 137, at 311. Burrows was addressing the impact of *Comptroller of Customs v Gordon and Gotch*, above n 134, on the Indecent Publications Tribunal.

142 Above n 140. See also *Armstrong v Collector of Customs* (High Court, Hamilton, M 442/84, 8 July 1985, Gallen J).

143 [1980] NZLR 631, at 637-638.

much the same as to ask whether the public interest requires a document to be treated as indecent. In the interests of certainty, McMullin J favoured a single-stage test of injury to the public good test, but he felt any difference between that and the community standards of decency was more illusory than real.¹⁴⁴ Somers J similarly held that there might be little practical difference between the two tests.¹⁴⁵ As Grieg J put it in a later case, injury to the public good requires detriment to the common or national well-being¹⁴⁶. That common well-being could obviously only be assessed with reference to community standards of appropriateness. When deciding what is injurious to the public good, it is thus “axiomatic” that a classification body must keep in touch with community standards.¹⁴⁷

Recognition of the community’s pro-censorship standards should thus result in pro-censorship, responses to pornographic material from both the Courts, Classification Office, and Board of Review. In my view it should mean, for instance, that if in a future case on appeal a Court found material to be “distasteful in the extreme”, “highly objectionable” and “of no public benefit whatever”, then a majority of members, and not simply a dissenting member, would hold a censorship body to be “plainly wrong” in not prohibiting them outright.¹⁴⁸

Similarly, although there are no absolutes as to what is injurious to the public good,¹⁴⁹ it would be entirely appropriate for the Classification Office, Board of Review, (or a Court) to hold in the future, for example, that an explicit photographic display of actual sexual intercourse in a pornographic publication was injurious to the public good.¹⁵⁰ Even assuming, purely for the sake of argument, that no actual harm to individuals could be scientifically proven by the depiction, it would be a proper exercise of the censor’s judgment to hold it infringed community standards of appropriateness, and thereby injured the public good, for a recent, reliable public opinion poll has shown that just under two thirds of New Zealanders find such a depiction to be “objectionable”.¹⁵¹

144 Above n 140, at 420.

145 Ibid, at 421, citing Richmond J in *Police v News Media Ownership*, [1975] 1 NZLR 610, at 626.

146 *Comptroller of Customs v Gordon and Gotch Ltd* above n 134, at 98.

147 As observed of the Indecent Publications Tribunal in *Society for the Promotion of Community Standards v Waverley International*, above n 55, at 6, per Tipping and Jaine JJ.

148 Compare *Society for the Promotion of Community Standards v Waverley International*, *ibid*, where the majority of the Full Court, Tipping and Jaine JJ, dismissed the appeal against the decision of the Indecent Publications Tribunal, despite the Judges’ personal views of the magazines in question. Eichelbaum CJ dissented. Under cl 52 of the Bill, appeals lie against decisions of the Board of Review “on questions of law”. Judicial review proceedings also remain open.

149 See the comment of McGechan J in *Society for the Promotion of Community Standards v Everard*, above n 5, at 57-58 (subject now to cl 3(2) of the Films, Videos, and Publications Bill 1992, deeming certain depictions to be “objectionable”).

150 Greig J used such a depiction as an illustration of an “extreme case” which would be deemed and acknowledged to be harmful: *Comptroller of Customs v Gordon and Gotch* above n 134, at 98; cf *Society for Promotion of Community Standards v Everard*, above n 5, at 58 per McGechan.

151 The National Research Bureau survey, above n 9, revealed that 65% of respondents found depiction of sexual intercourse to be objectionable in magazines (with 63% finding such a depiction objectionable in films, and 60% finding such a depiction objectionable in videos). Given that discernible harm to individuals is also likely, that sentiment of a clear majority should be a sufficient basis upon which to act.

Previous judicial scepticism over the feminist analysis of pornography¹⁵² also needs to be revised in view of the impact and increasing acceptance of the mainstream feminist argument.¹⁵³ As community thinking evolves, so too must the boundaries of the what harms the public good.¹⁵⁴ The judicial warning, given many years ago, that Judges must not attempt to minimise or overlook pornography in order to show judicial “broad-mindedness or tolerance or imperturbability or even cynicism”¹⁵⁵ remains especially pertinent in a community penetrated by mainstream feminist thinking.

VII. RECENT DECISIONS OF THE INDECENT PUBLICATIONS TRIBUNAL

As discussed above, considerable discretion is inevitably reposed in the Classification Office under the new legislation. This means that the judgment and philosophical perspective of that Office will be the critical determinant in the effective implementation of the new censorship regime. Accordingly, the recent decisions of the Indecent Publications Tribunal, whose written decisions have been the most accessible of the previously existing censorship bodies are of considerable interest in revealing how an increasingly liberal approach to censorship resulted in a loosening of censorship restrictions under the relevant Act. In turn, it will be seen that this resulted in the Tribunal permitting, albeit subject to conditions, pornographic material which in my view would have been more appropriately prohibited.

The test of injury to the public good

Reflecting the New Zealand judicial approach discussed above, the Indecent Publications Tribunal took account of perceived changing community standards in determining what was injurious to the public good.¹⁵⁶ The Tribunal, rather neatly, encapsulated the test of injury to the public good by equating it to any depiction of a sexual practice which:

... interferes with the social contract in a way that upsets harmony, or equality and mutual respect for others, or the sanctity of life or physical and mental freedom or health ...¹⁵⁷

There is nothing to which objection could be taken in the enunciation of that test: it aptly reflected current community standards of appropriateness.

The Tribunal's guide-lines

Community standards, derived mainly from the Ministerial Committee of Inquiry, and psychological evidence of certain social scientists were expressly used by the Tribunal to determine what, in its view, could be

152 See various judicial comments, as noted at n 134.

153 There has been judicial acceptance of the feminist perspective in Canada. See, for instance, the decision of the Supreme Court of Canada *R v Butler* above n 1, at 486-487 per Sopinka J. (In *Society for the Promotion of Community Standards v Waverley International* above n 55, Tipping and Jaine JJ held that the case was not particularly helpful in deciding the case before them, but admitted that Sopinka J's discussion on “community standards of tolerance” might have some relevance in NZ (at 33-34)).

154 See the comment of Grieg J in *Comptroller of Customs v Gordon and Gotch*, above n 134, at 99. To similar effect, see the observation of Tipping and Jaine JJ in *Society for the Promotion of Community Standards v Everard*, above n 5, at 19.

155 The comment of Sholl J in *Mackay v Gordon and Gotch (Australasia) Ltd* [1959] VR 420, at 426, cited with approval by North P in *Re 'Lolita'*, above n 2, at 553.

156 See, for example, *Re 'Penthouse'* above n 6, at 322-326, and Decision 57/90, 24 October 1990 at 2. The Tribunal argued that Article 5 of the Bill of Rights Act 1990 enabled the Tribunal to take official notice of community concerns: Decision 28/91, 30 August 1991, at 6.

157 Decision 71/92, 14 July 1992, at 5; also Decision 80/92, 16 October 1992, at 18.

classified as injurious.¹⁵⁸ The Tribunal's conclusion was that non-violent depictions of sexual activity were not injurious to the public good per se, but that violent depictions were.¹⁵⁹

As a result, the Tribunal's former "tripartite" guide-lines (under which scenes of intimacy involving more than two models or scenes of heterosexual couple scenes involving depictions of a fellation, cunnilingus, or intercourse could lead to a finding of unconditional indecency)¹⁶⁰ were held to be unsatisfactory. Some of the guide-lines were felt to be consistent with the Tribunal's view of psychological evidence and evidence of community standards, but some were not.

The Tribunal consequently laid down new guide-lines, said to be an evolution rather than a complete departure from the old, under which two types of depictions would lead to a finding of unconditional indecency, viz:

1. depictions of violence, sexual violence, paedophilia, necrophilia, coprophilia, urolagnia and bestiality, which are not treated seriously and are intended as sexual stimuli
2. Depictions of sexual activity which demean or treat as inherently inferior or unequal any person or group of persons which are not serious treatments, and which are intended as sexual stimuli ... (by way of example, this would include magazines the dominant content of which is the depiction of single models spreading their labia, magazines the dominant content of which is the close-up depiction of genitalia or other body parts, and other depictions which reduce a person to his or her sexual parts).¹⁶¹

The first guide-line reflected the scientific consensus concerning the fusion of sex and violence in pornographic depictions;¹⁶² the second reflected the mainstream feminist analysis.

Problems with the Tribunal's approach: heterosexual pornography

The Tribunal frequently argued that the second guide-line was aimed at the potential reinforcement of male attitudes to women (rather than at whether or not the models themselves have been demeaned);¹⁶³ but it admitted "extreme difficulty" in its attempts to translate it into a practical test.¹⁶⁴

¹⁵⁸ See, for instance, *Re 'Penthouse'*, above n 6, and Decision 123/92, 24 December 1992. Professor Donnerstein's evidence was particularly relied on (for discussion on Donnerstein see text and fns 84 and 85).

¹⁵⁹ See, for instance, *Re 'Penthouse'*, above n 6, Decision 123/92, *ibid*, and Decision 28/91, above n 156. (The conclusion in Decision 123/92, *ibid*, at 20-21, that research into non-violent depictions had shown no ill-effects, but possibly beneficial cathartic effects, is contradicted by some studies: see above n 111).

¹⁶⁰ The origins and history of the "tripartite" test, found in such decisions as Decisions 1053 and 1054, are discussed in *Re 'Penthouse'*, above n 6, 293-295. The tripartite test was still being used in 1990: see for example Decision 49/90, 14 September 1990. The Tribunal's use of guide-lines, provided they were not treated as equivalent to statutory criteria, had been approved by the High Court: *Waverley Publishing Co Ltd v Comptroller of Customs*, above n 1, at 641 per Jeffries J, and *Society for the Promotion of Community Standards v Waverley International*, above n 55 at 17, per Tipping and Jaine JJ.

¹⁶¹ *Re 'Penthouse'*, above n 6, at 325. A third guide-line allowed all other material to be classified not indecent or conditionally decent according to statutory criteria, with particular reference to matters of availability and distribution.

¹⁶² The Tribunal would not allow an exception to allow sado-masochists access to "bondage" material: Decision 80/92, above n 157.

¹⁶³ See, for instance, Decision 26/92, 31 March 1992, at 8.

¹⁶⁴ Decision 28/91, above n 156, at 6. In *Society for the Promotion of Community Standards v Waverley International*, above n 55 Tipping and Jaine JJ suggested a reformulation, whereby

The difficulty probably arose through an instinctual liberal fear of censorship. On occasions the Tribunal was able to well-identify the aims and purposes of censorship. It often stated that injury to the public good would be present if there was interference with the social contract, and it concluded that changing community standards had arguably come to regard as unacceptable and injurious to the public good the portrayal of women as sex objects.¹⁶⁵ On one occasion, it declared a publication to be indecent because women had been portrayed as inhuman receptacles and objects for male sexual arousal and pleasure, with sexual activity being portrayed completely independently of any link with human emotion or respect.¹⁶⁶ Such reasoning, and the above tests, aptly recognised the intrinsically objectionable qualities of most heterosexual pornography.

Yet in this area the Tribunal was not always consistent. Sometimes the Tribunal could be seen to struggle hard not to prohibit a publication outright, when it was patently clear that a female model was being used as a sex object for male arousal, and the depiction was devoid of human respect. In one decision, for instance, some publications, depicting masturbation and dildo use, were declared unconditionally indecent on the grounds of the dehumanising of women; but other publications with photographs of oral sex between models, women spreading their labia, and of a woman masturbating herself were not.¹⁶⁷

In a further decision, dealing with publications containing portrayals of women spreading their labia,¹⁶⁸ the Tribunal argued it was not a reasoned approach towards censorship simply to count the frequency of the photographs emphasising genitalia. The Tribunal held that in determining the dominant effect of the publication, a criterion on which the Tribunal placed great weight, the manner and power of the depictions were as important and content as the frequency and number. As a result, the Tribunal prohibited only a few of the magazines of that genre; and, by a majority decision, most merely received a restriction order. The distinction drawn by the Tribunal between the magazines was one which the majority of the High Court said, on appeal, that they would have been hard put to draw, if they had been looking at the matter *de novo*.¹⁶⁹ And the Chief Justice, dissenting, considered the Tribunal's distinction to be plainly wrong.¹⁷⁰ Eichelbaum CJ held that, on the Tribunal's own guide-lines, the depictions in the merely restricted magazines had been intended as sexual stimuli, had not been serious treatments, and the dominant effect had been to demean women and treat them as inherently unequal.

With respect, the Chief Justice's argument seems more convincing. The magazines had been characterised by such titles, to choose two of the least offensive, as "Legs and Asses" and "Shaved Crotches", and manifestly would have lacked any artistic, intellectual or emotional content: obviously, the sole purpose of the magazines was to provide sexual excitement for the male reader. With such magazines, as Eichelbaum CJ pointed out,

the focus would be more on the content than the effect of the publication (at 20-24).

¹⁶⁵ Decision 57/90, 24 October 1990, at 2.

¹⁶⁶ Decision 26/92, above n 163, at 8.

¹⁶⁷ Decision 37/92, 26 May 1992, at 8. Rather, a restriction order as to age, with conditions as to display and distribution, was attached. The absence of any human context in the publications is evident enough from titles such as "Dynamic Pussies" and "Humongous Tits".

¹⁶⁸ Decision 28/91, above n 156.

¹⁶⁹ *Society for the Promotion of Community Standards v Waverley International*, above n 55, at p 29 of Tipping and Jaine JJ's judgment.

¹⁷⁰ *Ibid*, pp 6-8 of Eichelbaum CJ's judgment.

it could be inferred that when a publisher included a significant number of photographs of spread labia it was intended those photographs would make the greatest impact, and would be a major selling point. As such the effect of the photographs could be said to be dominant.¹⁷¹

But the argument in favour of prohibition of such a publication goes even further than this. First of all, it should be recalled that the dominant effect of the publication as a whole is but one relevant statutory criterion, both under the old and new legislation, in determining the critical issue of injury to the public good. Hence, even *one* photograph concentrating on spread labia could well lead to a finding that a sex magazine is objectionable and injurious to the public good. For that one photograph is implicitly suggesting, for the purpose of sexual arousal, that the posed woman is sexually available to the male stranger who is viewing the depiction. Either there is a hint of rape in that depiction, or there is the dangerously distorted suggestion that a woman is actively seeking penile penetration from the total stranger. Either suggestion is harmful, and contravenes community standards of appropriateness. If we accept the general social worthlessness of the typical sex magazine, book, or video, then even one depiction of spread labia could be sufficient to warrant an order of outright prohibition.

Problems with the Tribunal's approach: homosexual pornography

The second guide-line of course reflects much of the feminist analysis though, as just discussed, the application of the guide-lines would be too libertarian to meet the feminist argument. Where, as is usual, publications are aimed at the male heterosexual market that analysis is very helpful, but where publications are aimed at the homosexual male or lesbian female market, the feminist analysis is insufficient. For lesbian or male homosexual publications cannot often be said to be treating women as passive receptacles for male desire.

However, that feminist analysis, and the second guide-line, continued to be used by the Tribunal in its classification of publications aimed at the homosexual market, with the result that, in recent years, the Tribunal would only rarely ban the publications outright. Arguing that there was more of an equal power relationship in male homosexual activity than in heterosexual relationships, the Tribunal claimed that there was less room to argue that photographs concentrating on the object of homosexual penetration were demeaning or dehumanising.¹⁷² Thus, for example, publications concentrating on the close-up depiction of male genitalia and anuses, with depictions of male intercourse and ejaculation, were held by a 3-1 majority not to be unconditionally indecent.¹⁷³

Replying to a submission that the Tribunal was inconsistent in its treatment of publications aimed at homosexual men as compared to heterosexual men, the Tribunal insisted that the difference lay in male/female sexual roles. According to the Tribunal, the depiction of a naked male in a state of sexual arousal, with erect penis, was typically accorded more "respect" in sex publications, with a flattering muscular, confident pose, than a female who was typically shown as a passive recipient.¹⁷⁴

¹⁷¹ Ibid.

¹⁷² Decision 29/92, 30 April 1992, at 4.

¹⁷³ Decision 69/92, 30 November 1992. An age restriction order, with conditions as to distribution and display was made.

¹⁷⁴ Decision 37/92, above n 167, at 15-16.

In fact, of course, depictions of male on male ejaculation, and of men displaying anuses, degrade, distort, and depersonalise homosexual sexuality, as surely as depictions of male on female ejaculation degrade and distort heterosexual sexuality. In both categories of depiction the sole aim is to arouse sexual desire, there is no human, emotional dimension, and the social contract based on mutual respect for others is interfered with. In both cases there is harm.¹⁷⁵

The liberalism of the Tribunal

What appears to have happened, in recent years, was that the Tribunal felt most comfortable with the traditional liberal arguments in favour of freedom of expression, and came to view the more-censorship body as “a comparatively small but vociferous group”.¹⁷⁶ Censorship restrictions were loosened, with the Tribunal markedly changing its approach to publications such as ‘Penthouse’ and ‘Men Loving Themselves’.¹⁷⁷

The Tribunal frequently asserted that the manner and context of the depiction mattered and not its content,¹⁷⁸ but here, I believe, the Tribunal was asserting a distinction without a difference. As has often been stressed in this article, the essential context of all pornographic portrayals is the absence of any intellectual, emotional content other than the sexual depiction, and it is that manner of depiction and that context which makes the work objectionable.

The Tribunal also frequently shied away from unconditional prohibition, except with in most extreme depictions of sexual degradation or sexual violence, and preferred instead to restrict, conditionally, publications of the offensive and explicit to those aged over 18 years old.¹⁷⁹ For instance, in one decision the Tribunal decided that magazines, aimed at the male heterosexual market, containing photographs that depicted women inserting enemas into each other, only warranted a conditional order of an age restriction.¹⁸⁰ In another decision, publications containing depictions of forced urolagnia, and of a homosexual relationship between an uncle and nephew were held not to be sufficiently objectionable to warrant outright bans.¹⁸¹ Similarly, magazines for homosexual males, containing photographs depicting single male models masturbating and ejaculating were, by a majority of 4-1, also given a conditional age restriction, with the dissenting member favouring a restriction in age of 16 rather than 18.¹⁸²

175 For analysis of writings on homosexual pornography see Berger, Searles, and Cottle, above n 88, 83-86. Also see Sychin, “Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography” (1992) 16 *Vt L Rev* 857.

176 *Sunday Times*, 31 May, 1992, 11.

177 See the history of the Tribunal’s treatment of ‘Penthouse’ magazine, discussed in *Re ‘Penthouse’* above n 6. Compare also the conditional age restriction (of 16 years and older) given to a publication concerned with male masturbation “Men Loving Themselves” in Decision 58/92 30 June 1992, with the finding of unconditional indecency in Decision 1071, 5 July 1983.

178 See, for example, Decision 80/92, above n 157, at 21 (“context is everything in censorship”). In an interview one member of the Tribunal expressed her concern thus: “context not content. Manner not matter”: *Sunday Times*, 31 May 1992, 11.

179 The conditions were usually as to display and distribution: commonly, the conditions required an adhesive label, prominently displaying the age restriction and confining sale to “adults-only” shops. Other conditions included the requirement of sealed wrappers, on the assumption the community would better tolerate the publications (eg Decision 103/92, 30 November 1992), and, in the case of the book *Sex* by Madonna, there was the condition that the book be sold in its vacuum-packed aluminium bag, displaying a cautionary warning as to contents (Decision 112/92, 30 November 1992). The power to impose such conditions will, for the first time, shortly have an express statutory base: Films, Videos, and Publications Classification Bill 1992, cl 25.

180 Decision 80/92, above n 157, at 25-26.

181 Decision 116/92, 15 December 1992. The magazines were said to be on the “borderline”.

182 Decision 32/92, above n 119.

On the thesis of this article, all the publications discussed above could be assumed to be in contravention of community standards of appropriateness, and to be harmful. Once a harm, of any nature, is assumed it cannot be avoided by placing restrictions on age and distribution.¹⁸³ In the case of a magazine or book, the harm of pornography can only be prevented by an order of prohibition.¹⁸⁴

VIII. CONCLUSION

The criteria of the Indecent Publications Act 1963 could have been, and once were, weighed and applied in a quite different way from that recently adopted by the Indecent Publications Tribunal.¹⁸⁵ But legislative imprecision and reliance on personal judgment are inevitable features of any censorship legislation, and in practice the philosophy of the censoring body is of more significance than the specific statutory wording. Thus, were the Classification Office or Board of Review to follow the approach recently adopted by the Indecent Publications Tribunal, the more stringent, detailed legislative intent of the Films, Videos, and Publications Classification Bill could easily be undermined.

Such an approach, I have argued here, would not only contravene the clear legislative intention, but would be socially undesirable and wrong. Admittedly, there is uncertainty about some of the specific harms alleged to arise from pornography, but the significant possibility of their existence is a more than sufficient reason to err on the side of censorship. A wrong leaning in favour of “freedom of expression” could have significant social costs, possibly causing, for example, direct personal harm to individual women and children. Conversely, a wrong leaning in favour of censorship in a particular case would, at worst, proscribe material of minuscule value – because in the context of this discussion the material affected is almost inevitably lacking artistic, serious design, and is only intended to be a sexual stimulus. In New Zealand, in the 1990’s, there is simply no realistic risk of a work of serious literary, artistic, or intellectual importance being censored. Additionally, community standards of appropriateness support a presumption in favour of censorship, remembering always that the statutory test of “likelihood”, as contrasted with certainty, is to be applied to the concept of injury to the public wellbeing.

In this article, I have argued that the pornographic and “objectionable” can include depictions not only of the sexually violent, but also of the sexually explicit. Where the depiction has no intellectual or emotional context or purpose other than that of sexual arousal, then the depiction of the sexually explicit can fairly be described as pornographic and “objectionable”. On the other hand, if the explicit sexual depiction is not designed only to arouse, but is contained within a serious and honest

¹⁸³ A point made by Sopinka J in *R v Butler*, above n 1, at 486. Apart from the harm arising from adult consumption of the material, there is also the obvious problem that adolescents and children under the determined age limit could well have access to the material in private homes.

¹⁸⁴ In the case of a film, there would need to be excision of any pornographic depictions: see Films, Videos, and Publications Bill 1992, cls 29-32.

¹⁸⁵ In 1985, the Fraser Committee, above n 16, argued that the Tribunal’s standards appeared “quite conservative”, compared to those applied in North American courts. In *Re ‘Raunchy’ Issues 3,5,7 and others*, above n 118, the then Chief Film Censor submitted to the then Indecent Publications Tribunal that its standards on the sexually explicit were too strict. (The membership and chair of the Tribunal changed in 1990).

artistic portrayal of human relationships, or within a work of serious intellectual intent, then the depiction and publication should not be seen as dehumanising, pornographic or “objectionable”.¹⁸⁶

I have also suggested that once a depiction can be properly regarded as pornographic or objectionable, then it should be prohibited or excised rather than restricted.¹⁸⁷ In my view, a restricted classification, available under the old and new legislation, would become apposite only if, in a borderline case, the existence or non-existence of an artistic purpose and context should become a difficult issue to determine.

Strong censorship, of the type advocated here, is, of course, never going to eliminate pornography from a community, particularly with the advent of new technology. However, it can reduce the flow of imported publications, as assuredly as a liberal approach to censorship markedly increased the number of pornographic publications submitted for classification.¹⁸⁸ In this context, I believe that strict censorship is to be welcomed rather than feared, and the Classification Office can be urged to censor accordingly.

¹⁸⁶ The National Research Bureau poll, above n 9, did not seek respondents' views on the context of the depiction of sexual intercourse; but it is quite probable, consistently with the argument of this article, that the attitude to the depiction hinges on the context.

¹⁸⁷ Cl 3(2) of the Films, Videos, and Publications Classification Bill 1992, of course, defines certain types of material which will be deemed to be objectionable. See also the Ministerial Committee view on (i) materials requiring prohibition and (ii) materials which should be presumed to require prohibition: above n 6, 87-94.

¹⁸⁸ In their final decision for 1992, Decision 123/92, above n 158, the Tribunal recorded that following the 'Penthouse' decision, above n 6, “materials of an extremely explicit nature have been coming to the Tribunal for classification in rapidly increasing numbers.” In May, 1992, the Chairman of the Tribunal said that although the number of publications had recently run at 200-300, they were by the time of the interview classifying over 1000 a year *Sunday Times*, 31 May 1992, 11.