1988

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NUDITY, OBSCENITY AND PORNOGRAPHY:
THE STREETCARS NAMED LUST AND DESIRE

George P. Smith II*

“One would be foolish to deny the relevance of moral perceptions to law. Society’s moral beliefs necessarily affect its constitutional perceptions in general and its perceptions of what economic rights are protected by the constitution in particular.” Scalia, Morality, Pragmatism and the Legal Order, 9 HARV. J. L. & PUB. POL’Y 123 (1986).

“... suppression of the obscene persists because it tells us something about ourselves that some of us, at least, would prefer not to know. It threatens ... to destroy the carefully-spun social web holding sexuality in its place. ... In any case the desire to preserve that web by shutting out the thoughts and impressions that challenge it cannot be squared with a constitutional commitment to openness of mind. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 669-70 (1978).

“I know, and am persuaded by the Lord Jesus, that there is nothing unclean in itself; but to him that esteemeth anything to be unclean, to him it is unclean.” ROMANS XIV, 14.

Today, sex is packaged in every and all ways possible—from the gleeful banterings of Dr. Ruth Westheimer’s about “Good Sex,”1 through flagrant displays of revealing undergarments now worn as outer garments by such teen role models as Cyndi Lauper and Madonna,2 tightly contoured and suggestive Calvin Klein jeans,3 on television,4 cable,5 the movie screen,6 videos,7

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2. The NBC’s network morning program, TODAY, devoted a segment of its July 25, 1985, program to this phenomena. See Hubbard, When Underwear Looks This Good, It’s Gotta Be La Perla Lingere, PEOPLE MAG., Feb. 1, 1988, at 71.
4. Shales, Prime Time and The Play of All Flesh, WASH. POST TV GUIDE, Nov. 11-17, 1979, at 3.
and in suburban boutiques. No holds barred sensualism and extempore eroticism become the focal points for advertising and nudity—and its various degrees—an all too often erotic cue for lust. First, one part of the female (or male) body is uncovered and found erotic; and then another part is discovered, creating what has been referred to as “shifting erogenous zones.”

Living for the moment’s prevailing passion and for hedonistic pleasure—considered the sole object of desire—threatens to be overwhelming for many. Packaging sex, in all its various products, is big business. In New York City, for example, the marketing of sex as an industry is a significant part of the City’s economy and a lucrative tourist attraction as well. Not only does it generate business dollars and tax revenues, it employs a large number of people. Sadly, one person’s vulgarity is another’s lyric.

Western society has, over the years, sought to develop various standards to suppress the viewing and commercial dissemination of explicit materials. The dilemma, however, remains. As much as dilemmas cry for resolution, being what they are, they resist it. This is especially the case here as the quest for a “decent society” is forever balanced against the right of free expression with the first amendment, always being viewed as proscribing common sense by those who seek its protection.

In 1986, Maine became the first state in the Nation to conduct a referendum on whether pornography should be restricted. More specifically, the question on the ballot asked: “Do you want to make it a crime to make, sell,
give for value or otherwise promote obscene material in Maine." The results revealed, by a two to one majority, that the residents of Maine did not want any restrictions placed on their right to enjoy obscene material. This outcome should come as no surprise; for although a 1986 Harris poll found forty-one percent of Americans support "reasonable censorship" of obscene or pornographic materials, thirty-five percent opposed censorship and twenty-four percent expressed ambivalence, or a "we-don't-think-it-matters" attitude.

If, as the Surgeon General of the United States concludes, pornography is "blatantly antihuman" and poses a clear and present danger to the health of America, what should be done to prevent human sexuality from descending to the level of starkness or that "of animals other than man?" Modern society's ongoing debate about pornography and obscenity focuses upon two primary themes or questions: the nature of the relationship between that which is considered obscene and that taken as pornographic and the standards used to delineate and judge these two; and the relationship between the words and images of pornography—in the broad context—with violence against women (or, stated otherwise, as pornography the theory and rape the practice), male attitudes toward women generally, child abuse, and specifically consumer desensitization where the culture accepts violence against women as routine.

These two dynamic themes present a background for analysis of the modern dilemma of society in dealing with obscenity and pornography, and specifically the need to preserve a decent, moralistic society while guaranteeing a free right of expression, dissent and moral independence. Although laboratory studies reveal violent pornography may very well promote aggression toward women, the integrity of these conclusions in unstructured social situations is yet to be established. While some caution must obviously be taken in imposing blanket restrictions on pornography, on the issue of child pornography there can be no hesitancy in eradicating its dissemination and

21. Id.
use. The benchmark for ultimate decision making in this area of concern must forever be the standard of reasonableness that, in turn, dictates a case-by-case balancing of individual freedom of expression against the societal right to decency and moral integrity.

I. NUDITY: YESTERDAY, TODAY AND TOMORROW

Insofar as recorded history is concerned, the concept of nudity belongs to the ancient Greeks and their participation in athletic competitions.\textsuperscript{27} Those who competed in stadia did so entirely in the nude and thereby freed themselves of cumbersome garments during their competitions. Body freedom, then, was a tolerable activity for the sportsman. But this freedom almost totally vanished with the Dark Ages.\textsuperscript{28}

For more than fifteen centuries—with one single and rather markable exception—nudity was taboo. That exception was made in 1043 by a Saxon countess, Lady Godiva, who rode naked through her husband’s village to protest a levy of taxes which he had made on the local peasants.\textsuperscript{29} Both in Europe and America, the eighteenth and nineteenth centuries were characterized by a strikingly morbid fear of nudity. Throughout the major part of the world, some form of “covering up” was mandatory. Nudity became an integral part, or at least a significant element, of public morality.\textsuperscript{30}

In America, Anthony Comstock came into power and asserted himself as a symbol of extremism in the censorship of anything pertaining to nudity. Every instance of indecency was attacked—books, plays, pictures, etc.\textsuperscript{31} Anything approaching nudity was challenged. “He violently objected to circus posters that depicted acrobats in tights.”\textsuperscript{32} Congressional legislation embodying Comstock’s personal standards of decency was passed in 1873 and was enforced substantially for eighty years.\textsuperscript{33} Under this legislation, the United States Post Office undertook actions that suppressed every form of nudity—even the American nudist magazine, \textit{Sunshine and Health}, first


\textsuperscript{28} W. HARTMAN, M. FITHIAN & D. JOHNSON, \textit{supra} note 27, at 18.

\textsuperscript{29} \textit{Id}.

\textsuperscript{30} \textit{Id}.


\textsuperscript{32} W. HARTMAN, M. FITHIAN & D. JOHNSON, \textit{supra} note 27, at 20.

\textsuperscript{33} \textit{Id}.
published in 1933.34  
During this same time frame, Church authorities in Spain, Portugal and Italy banned nudity in every form—even in the case of young infants.35 In England, Queen Victoria established a pattern of public conservative conduct that bore her own name.36 The concept and practice of nudity was, prior to World War I, premature at best.37  
Nudity took hold and was nurtured after 1918—promoted in large part by the heavy poverty confronting the German nation following its defeat in the War. For the city dwellers, the countryside and the woods provided a free opportunity for swimming and frolicking au naturel. Sexual emotions were in no way aroused from these group activities.38 With the gradual recovery of the Nation, the ranks of the German nudist swelled to such an extent that by 1926, it was estimated some 50,000 active Lichtfreuden (or light friends) could be found. The idea and philosophy of nudism soon began to spread to other European countries—especially Switzerland, England and France.39 Freikörperkultur (or free body culture) is commonly thought of as being introduced into the United States in 1929 by Kurt Barthel.40  
The public response to nudity under certain prescribed conditions is—today—somewhat amazing in its degree of tolerance and also its volatility.41 More and more “free” beaches where swimsuits are “optional” appear to be spreading in California and elsewhere.42 In Austin, Texas, an apartment house was provided with a “liberated environment” where nudity was allowed in all public areas.43 Nudist resort areas or camps are also developing
and providing new dimensions for social nudism in tennis courts, teen centers, pools, jacuzzis, etc.\textsuperscript{44}

Yet, prudity raised its conservative head nationally with Newsweek's cover of June 7, 1982, that showed a colored picture of William Bailey's, "Portrait of S"—a frontal oil painting of a woman nude to the waist.\textsuperscript{45} So offensive was this striking reproduction considered to be by a surprising number of people that it was banned outright in some distribution outlets, and, in Washington, D.C., the magazine was pulled from the display racks of all 131 Giant supermarkets. The cover was used to introduce the reader—assuming he so wished—to a lead story on the revival of realism in art. Newsweek Editor, Lester Bernstein, could find nothing whatsoever of any pornographic nature in the cover.\textsuperscript{46} Above the reproduction on the cover was the line, "Art Imitates Life—The Revival of Realism." Mr. Bernstein observed, "I thought this was 1982." He continued,

[...] This just tells you that there are a lot more people around who haven't been inside a museum than you might expect. I expected that there might be some objections, but I felt that it was a beautiful painting illustrating a distinguished article of art criticism. Any different view of it is in the eye of the beholder.\textsuperscript{47}

In trying to discern why there was such an uproar over the cover, Meg Greenfield opined that it very probably was due in large part to the "women's movement" that has insisted as of late "that the female body—its appearance, reality and workings—not be regarded as either (1) fit subject only for cheesecake reveries or (2) a collection of vaguely disgusting glands and functions not to be contemplated by polite society."\textsuperscript{48} Decrying this false perception of the liberationist contemporary society, Ms. Greenfield observed that today there are practically no limitations on what society will purvey to the public.\textsuperscript{49} The new candor of the day tolerates "[a]dvertisements . . . [that] prey fairly explicitly on unspeakable instincts having to do with adult lust for children and . . . for fooling around in groups of more or less than two. . ."\textsuperscript{50} Continuing in her analysis of the


\textsuperscript{45} See Zito, The Cover Story: Commotion Over the Nude Newsweek, Wash. Post, June 4, 1982, at D1, col. 4.

\textsuperscript{46} Id.


\textsuperscript{49} Id.

\textsuperscript{50} Id.
openness of today's society, she comments, "[t]he women on some of those daytime call-in shows and the articles in some of those ancient mass-circulation homemakers' magazines deal overtly and clinically in sexual desires and practices in a way that would make the cover female on Newsweek blush." Finally, she concludes, with sage wisdom, that "[w]e will put up with the distant, the alien, the exotic and, yes, the present-day kinky. It's the rest that unnerves us. *Reality has become the last dirty picture.*"

There is, rather obviously, a significant number of women who are attracted to male erotica and who frequent male "strip" clubs of the Chippen-dale vintage. Originally chartered in West Los Angeles, Chippendales now has an outlet in New York and allows women to visit in a cocktail lounge atmosphere and be served and entertained by young bare-chested men, wearing white collars and cuffs and black tights and boots. This attire is exchanged for more revealing costumes during the entertainment or floor show. Many of the emancipated women of today have shown their freedom and attitudes regarding sexuality by developing popular male magazines. *Playgirl* is perhaps the most popular women's magazine that shows men in nude and often suggestive poses—designed obviously to either titillate or to entertain.

Most Americans have, during their formative years, cognitively allied nudity and sex and, indeed, a learned association between the two has built up. Undeniably, sex is but a normal part of life. Nudism is, however,

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51. *Id.* Dr. Ruth Westheimer, the puckish High Priestess of good sex, can be heard on radio and seen on television on a regular basis talking explicitly about "VD and orgasm and clitoral pleasure." *Mano,* *supra* note 1, at 109. See also *Leo,* *supra* note 7, at 63.

52. *Greenfield,* *supra* note 48 (emphasis added).

In the Los Angeles area, bondage-games and sexual theatre may be obtained at a minimum cost of $40.00 for forty minutes. A modern house in West Hollywood has been converted into an "exotic" interior of dungeons, pillories, cages, whipping posts, shackles, etc.—all designed to allow sadomasochistic fantasies to come into reality. One of the "mistresses" of the house allowed that, "[w]e provide customers mental relief from pressures, the fantasies and desires that have built up in them." *Leo,* *supra* note 8, at 73.


One "proposal" for a resolution to the problem of erotica was presented recently by the Conference of the United Methodist Church which expressed the contention that erotica "can show persons in warm, caring, human and responsible relationships." Erotica is defined as "sexually explicit and arousing" material that does not "use coercion, inflict pain or use violence in any way." *Methodist Hold Debate on Erotica,* Wash. Post, Jan. 23, 1988, at G11, col. 1. Blanket acceptance of this idea would surely resolve any and all problems with the issue itself.


neither a cult, nor a religion nor exhibitionism. Rather, it should be viewed properly as but healthy-mindedness with respect for the human body and human relationships.57

Sadly, popular and ingrained ideas hold that there is something not only wicked and daring but thrilling in viewing the exposed body of a member of the opposite sex.58 Sensations arise that have nothing to do with the body itself. If this were not so, classical statues could be taken as producing the same effect. In the normal and intelligent person, these sensual feelings are dispersed immediately and nudity is thus properly regarded in a plain and common light.59 Accordingly, obscenity should be viewed correctly as but an attitude or predisposition of the viewing and accusing mind which is only delusionally read into, or ascribed to that which is accused of being obscene. The emotional intensity which accompanies our accusations is an exact measure of our personal guilt—often unconscious over some similar past offense committed by us, or over some suppressed or perhaps craving to indulge in the condemned act . . . . Every passionate accusation is at the same time a confession.60

II. THE EARLY AND ENDURING PRINCIPLES

Certain ancient perennial principles lay at the core of constitutional governance in the United States.61 Perhaps the most controlling of these principles is the recognition of mankind's "fallen human nature"62 and the coordinate need to be guided by "republican virtue" if survival of this form of governance is to be assured.63 The society, structured during the period of the Nation's founding, thus recognized limitations on "lewdness" or

57. Id.
58. W. Welby, Naked and Unashamed 41 (1934).
59. Id.
60. C. Williams, supra note 56, at 146 (emphasis added).
62. Id. at 566.

Indeed, Benjamin Franklin observed that a nation's capability of freedom was guaranteed only if its citizens were virtuous. And, John Adams stated that man's happiness and his dignity were to be found in virtue. Stannmeyer, supra note 61, at 567. See generally Diamond, The Federalist of Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both", 86 Yale L. J. 1273 (1977).

If behavior is viewed as but a consequence of one's inner life, then the soul of the citizenry is to be understood as revealing the successes of the country. "We judge a nation by the character of its citizens, and common sense unassisted by sociological findings tells us that pornography is coarsing, and hence injurious to the community, and especially to women." Will, supra note 19, at 20.
"public indecency" simply because such acts would—it was believed—threaten the very core of a virtuous society. In adopting the Common Law that criminalized public indecency, the willful exposure of obscene print, and what was termed "grossly scandalous affairs," the Founders went on record as being opposed to all forms of "open and notorious lewdness." And, interestingly, this same generation witnessed the passage by the Federal Government and the states of not only the fourteenth amendment to the Constitution, but also—at the federal level as well—the Comstock Act. As noted previously the Comstock Act assessed criminal liability for the use of the mails to distribute or promote "obscene, lewd, lascivious, indecent, filthy or vile articles." Thus, it is seen historically that, some control of speech by government, certainly on the state level, was entirely consistent with the common law and the political theory of the Founders' generation, as well as with the actual language of the First Amendment. This is true whether the focus be the role of criminal law in maintaining public decency, the Founders' concern about responsible or virtuous use of freedom, or the unique brand of federalism they created.

Because of the dynamic role that faith and religion have played in the political life of the United States, politics and morality have, indeed, become inseparable. The very commitment of the United States to pluralism is both nurtured and sustained as a result of a firm insistence on a continuing recognition of the inviolability of individual conscience. Thus, if efforts were successful in excluding societal values, that are regarded as inherently religious in their core, from the public arena, a serious threat would be made to the very principle of pluralism itself.

Although popular comment admits that one can never legislate morality, and that private immorality harms no one other than perhaps those

64. Stanmeyer, supra note 61, at 574.
65. Id.
67. Stanmeyer, supra note 61, at 574.
70. Id.
participating in it, in reality, it is postured that the very nature of the existence of society is threatened by such acts. The reason given for this position is that society is comprised of not only a community of political ideas, but of moral ideas as well. Consequently, while "not every deviation from society's stated morals threatens its existence, every such deviation is at least capable of such a threat, and so cannot be put beyond the law." Accordingly, the spread of pornography threatens the Constitution in that it allows disorder to spread among individual lives to such an extent that society becomes morally corrupted, wounded, and possibly even endangered.

Every human organization has an inner life of shared purpose and values, and if too many of its members reject those purposes and discard those values, the inner life is shattered. In other words, when a critical mass of citizens who reject society's beliefs and norms develops, that society falls apart.

The central inquiry for the committed conservative is: what happens to the political character of young men and women who, over many years, indulge themselves "without inhibition, in today's hard-core, animalistic, predatory pornography?" If good character is acknowledged as the well-spring of rightful conduct, then moral sensibility must be structured by objective standards of truth.

Moral sensibility is composed of many elements, including a person's conscious values, his sense of respect for other persons, his ease in setting aside present comfort for future reward, his sense of right and wrong, and the degree of his commitment to honor and decency. It includes conscious principles, half-conscious attitudes and beliefs, and subconscious feelings. Moral sensibility is the psychic and intellectual bases for character.

A Right of Moral Independence

One strategy of analysis acknowledges that even if a community were to be made worse off as a consequence of a failure to censor pornography, it is still inherently wrong to either censor or, for that matter, restrict its use or dissemination simply because such a restriction "violates the individual moral

72. Id. at 625 (citing P. DeVLin, The Enforcement Of Morals (1965)).
73. Id.
74. Id.
75. Stanmeyer, supra note 61, at 591.
76. Id.
77. Id. at 589.
78. Id. at 587.
79. Id.
or political rights of citizens who resent the censorship."\textsuperscript{80} The only justification, then, for suppressing pornography is when it harms someone.\textsuperscript{81} Harm can either be taken as a form of direct physical damage to particular individuals, or injury to their property or financial interests, or broadened to include mental distress or annoyance—or even damage to the general cultural environment.\textsuperscript{82}

If the general value of free expression is recognized, it has been argued that "a presumption [should be made] against censorship or prohibition of any activity when that activity even arguably expresses a conviction about how people should live or feel, or opposes established or popular convictions."\textsuperscript{83} This presumption would not have to be recognized as absolute and might well be overcome by a direct showing that "the harm the activity threatens is grave, probable, and uncontroversial . . . ."\textsuperscript{84} Such a presumption should, however, be strong if it is to protect adequately the long term goal of guaranteeing the best conditions for human development.\textsuperscript{85}

Professor Ronald Dworkin opines that the inherent or pivotal issue in any analysis of pornography is a structuring of a right of moral independence and its recognition as such.\textsuperscript{86}

The right of moral independence is part of the same collection of rights as the right of political independence, and it is to be justified as a trump over an unrestricted utilitarian defense of prohibitory laws against pornography, in a community of those who find offense just in the idea that their neighbors are reading dirty books . . . . \textsuperscript{87}

The right is not derived as a consequence of the recognition of a general right to liberty, but rather, as the consequences of equality,\textsuperscript{88} and its application tied to a fundamental balancing process that weighs constraints on individual liberty against gains to others of such a restriction.\textsuperscript{89}

\textit{The Neo Conservative Attitude}

The "New Right", led by Robert H. Bork, endeavors to reduce all claims

\textsuperscript{80} Dworkin, \textit{Is There a Right to Pornography?}, 1 \textit{OXFORD J. LEGAL STUD.} 177, 178 (1981).
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 179.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 205.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 212.
\textsuperscript{89} Id.
and assertions for morality to a more central claim for "gratification." Thus, when clashes occur between a majoritarian assertion of power to regulate—here, pornography—and a counter assertion of minority interests for freedom of ideas and dissemination of them, it is to be regarded as but a clash between two competing groups, each of whom seek the gratification of certain needs, values or interests. For, any want that people have, to that degree of wanting, has some social value.

Judge Bork recognizes first amendment protections for political speech that is within the bounds of established order. He does not extend those protections to either academic or literary expression or any other forms. Mr. Chief Justice William H. Rehnquist is a close philosophical companion with the Judge when he acknowledges that personal moral judgments are just that—personal—until they are given, in some form or other, a legal sanction. Finally, Judge Richard A. Posner of the United States Seventh Circuit Court of Appeals, in responding to his contemporary judicial understanding of "value judgments," acknowledges that many judicial decisions are based on value judgments instead of being grounded in technical evidentiary proofs, and thus not readily verifiable. Consequently, such determinations "are not always profitably discuss[ed]." It is maintained that because these theorists of the New Right seek to reduce rights claims to demands for gratification, distinctions between moral reasons and arbitrary preferences are destroyed. Accordingly, the assertion is that "[i]n telling the majority, those with the strength of numbers, that morality may be ignored (because moral reasons are mere preferences), the New Right calls upon what is worst, not what is best, in the public."

Mr. Justice Antonin Scalia finds the noble middle ground in this dilemma and articulates it eloquently when he acknowledges that,

to say that there is a moral obligation to achieve a particular distributive result is not to say that government must undertake the function. And, conversely, to say that distributive justice is a purely moral matter is not to say that government cannot under-

91. Id.
92. Id. at 36.
93. Id. at 34.
94. Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 704 (1976). "There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience and vice versa." Id. at 704.
96. S. Macedo, supra note 90, at 35.
97. Id.
take the function. We are left with the usual problem of political choice. Moral perceptions are... relevant to that choice. We are more likely to pursue those moral perceptions we feel strongly about... 98

A classic exercise of the police power is to be found in the state's interest in promoting "morality"—including sexual morality. The dissent by Mr. Justice John Marshall Harlan in Poe v. Ullman speaks to this power:

the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. 99

Nor may privacy be considered a mask for actions termed by the state to be immoral. 100

III. OBSCENITY V. PORNOGRAPHY

Throughout most of the history of American law, no clear standards for governing obscenity and pornography have been evident. 101 Indeed, the development of obscenity law "has proceeded with a mixture of moralism and paternalism", 102 and some have maintained "that the only rationale for most obscenity laws is the belief that the government should protect public morals." 103

Although the terms, "obscenity" and "pornography" have all too often...
been used interchangeably, there is a proper distinction between these two words. The Oxford English Dictionary defines "obscene" as that which is "abominable, disgusting, filthy, indecent, loathsome or repulsive." An obscene act is one that is "offensive to the senses," and expresses or suggests "lewd, unchaste or lustful ideas." "Pornography" is defined as a description of the life activities of prostitutes and their patrons and "the expression or suggestion of obscene or unchaste subjects in literature or art." And, "sexual appetite" or "desire" is defined accordingly as "a libidinous desire, degrading animal passion." "Nudity" is simply, "the condition or fact of being naked or nude" with the "privy parts" being exposed.

Placing obscenity within contemporary context, Irving Kristol has observed that "[o]bscenity is not merely about sex, any more than science fiction is about science. . . . Obscenity is a peculiar vision of humanity: what it is really about is ethics and metaphysics.

Pornography is regarded as "inherently and purposefully subversive of civilization," this being the case, because it has been shown in some controlled studies that when violent images saturate the minds of the young and impressionable, a number of them are predisposed to violent actions.

In 1896, in Swearingen v. United States, obscenity was defined in terms of "sexual impurity" by the United States Supreme Court—with the emphasis on sexual and pornographic aspects of the questioned materials still permeating definitional inquiries today. Until 1957, however, the basic legal definition in American courts continued to be that derived from Queen v. Hicklin. Hicklin established the test as "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this
sort may fall."\textsuperscript{116}

\textbf{Coming of Age}

Before \textit{Roth v. United States}\textsuperscript{117} in 1957, the obscenity laws were challenged rarely on constitutional grounds.\textsuperscript{118} In \textit{Roth}, the High Court reaffirmed its conclusion that "obscenity is not within the area of constitutionally protected speech or press."\textsuperscript{119} More specifically, the Court determined that "sex and obscenity were not synonymous. Obscene material is material that deals with sex in a manner appealing to prurient interest," that is to say, "the material ha[s] a tendency to excite lustful thoughts."\textsuperscript{120} During the 1950's and 1960's that heralded the so-called "sexual revolution," criminal prosecutions and constitutional challenges thereto of cases designed to stop the production and distribution of sexually explicit and potentially offensive materials were seen in considerable numbers.\textsuperscript{121} In the ten years that followed \textit{Roth}, a three-part test was developed by the Supreme Court in \textit{Memoirs v. Massachusetts}\textsuperscript{122} and was recognized as ushering in an era of minimal regulation of obscenity.\textsuperscript{123}

The Supreme Court handed down eight obscenity decisions in 1973 that structured a new and stronger framework for regulating obscenity.\textsuperscript{124} In

\begin{itemize}
\item \textsuperscript{116} \textit{Id.} at 370.
\item \textsuperscript{117} 354 U.S. 476 (1957).
\item \textsuperscript{118} G. \textsc{Weaver}, \textsc{Handbook on the Prosecution of Obscenity Cases} 3 (1985).
\item \textsuperscript{119} \textit{Roth}, 354 U.S. at 485. \textit{Roth} specifically rejected the \textit{Hicklin} test. \textit{Id.} at 487.
\item \textsuperscript{120} \textit{Id.} at 487 n.20.
\item In attempting to define prurience, the Court used such words as "[i]tching; longing; uneasy with desire . . . lascivious desire or thought . . . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, \emph{i.e.}, a shameful or morbid interest in nudity, sex or excretion . . . ." \textit{Id.}
\item The Hawaii Supreme Court held on January 8, 1988, that a state statute prohibiting the sale of pornography was invalid and that, without the state showing a compelling state interest, one's right of privacy includes not only a right to peruse pornography at home, but a correlative right to obtain such materials. \textit{Hawaii v. Kam}, 56 U.S.L.W. 2429 (Feb. 9, 1988).
\item \textsuperscript{121} G. \textsc{Weaver}, \textit{supra} note 118.
\item \textsuperscript{122} 383 U.S. 413 (1966).
\item The three elements necessary to establish that the questioned material was obscene were:
\begin{itemize}
\item 1) that its dominant theme, taken as a whole, appealed to a prurient interest in sex;
\item 2) "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and
\item 3) the material is utterly without redeeming social value."
\end{itemize}
\item \textsuperscript{123} G. \textsc{Weaver}, \textit{supra} note 118.
Miller v. California,125 the Court retained the first element of the basic three prong test in Memoirs v. Massachusetts,126 and thereby sought to test “whether the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest [in sex].”127 It was with the second and third prongs of the obscenity test that changes were made.

Under Roth and Memoirs the concern to test whether “the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters . . . .”128 However, under Miller the new inquiry was “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . .”129 Under Roth and Memoirs the third test was undertaken to determine whether the work in question was devoid of “redeeming social value.”130 Miller’s third test or prong was reshaped in order to assess “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”131 This newly formulated test would allow “fair notice” to those dealing in “materials depict[ing] or describe[ing] patently offensive hard core sexual conduct specifically defined by the regulating state law.”132

The Court then proceeded to define with specificity the type of sexual conduct that could be regulated by the states: “patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated” and “patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”133 The Court

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129. Miller, 413 U.S. at 24.


131. Miller, 413 U.S. at 24.

132. Id. at 27.

133. Id. at 25.
emphasized that these specific examples neither limited nor served as a substitute for state legislative efforts in this area, but rather only as examples of conduct that could be regulated by the state.\textsuperscript{134}

Mr. Chief Justice Burger took the occasion in \textit{Paris Adult Theatre I v. Slaton}\textsuperscript{135} to underscore the authority of the states to regulate obscene material by acknowledging the power of the states to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren’s words, the States’ right \ldots to maintain a decent society.\textsuperscript{136}

The courts have, generally, sought to classify pornography by use of the legal terms “obscenity” and “indecency.”\textsuperscript{137}

The Supreme Court has never made a distinction between different means of disseminating obscenity, and, therefore, has clearly established that obscenity disseminated by \textit{any} means is not protected.\textsuperscript{138} Unresolved constitutional questions remain concerning the regulation of indecent, but not obscene, material over media that are pervasive and easily accessible to children, such as telephone, cable television, computers and video cassettes.\textsuperscript{139}

It was not until \textit{F.C.C. v. Pacifica}\textsuperscript{140} that the United States Supreme Court dealt with the issue of regulating obscenity over the airwaves. Here, the F.C.C. was firmly empowered to regulate indecent, yet non-obscene,

\begin{itemize}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} 413 U.S. 49, \textit{reh'g} denied, 414 U.S. 881 (1973).
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} \textit{F.C.C. v. Pacifica Foundation,} 438 U.S. 726, \textit{reh'g} denied, 439 U.S. 883 (1978).
\item \textsuperscript{140} \textit{Id.}
\end{itemize}

In shaping legal tests for obscenity and pornography, it has been suggested that the United States speaks of obscenity, although it is obvious that it has pornography in mind. E. \textit{Donnerstein, D. Linz & S. Penrod, supra} note 26, at 147. “[T]he Court has primarily concerned itself with words, pictures, or other portrayals that cause the reader or viewer to become sexually aroused. The Court has not usually been concerned with what is obscene in the conventional sense—profanity, scatology, impolite language, objects that are disgusting to the senses, or nonsexual conduct that offends higher sensibilities.” \textit{Id.} at 147-48.


Mr. Chief Justice Warren, in his dissenting opinion in \textit{Jacobellis v. Ohio,} 378 U.S. 184 (1964), acknowledged that he could not define “hard core pornography” without any greater clarity than terming it obscenity. \textit{Id.} at 201 (Warren, C.J., dissenting). In determining whether the questioned materials are obscene, the use to which they are put—\textit{not} just the words and pictures themselves—\textit{must} be evaluated. \textit{Id.}

broadcasts over both radio and television; it being determined that a radio
monologue entitled “Filthy Words,” presented by George Carlin, had been
presented in a patently offensive manner. One major thrust of the deci-
sion was to assure a level of protection for children from being exposed to
either profane or indecent material through a medium that was readily ac-
cessible to them.

In 1982, with its decision in New York v. Ferber, the Supreme Court
again showed its intent in protecting children from the pervasive and degen-
erative effects of pornography by upholding a New York State legislative
prohibition on child pornography without proof of obscenity. In Ferber,
unlike Pacifica, children were afforded protection by a proscription on the
dissemination of child pornography because the material constituted not
only acts of sexual abuse of children in progress, but because the pictures—
once created—presented a very real and continuing potential for mental and
emotional injury, and even blackmail.

IV. THE SCIENTIFIC RESEARCH ON SEXUAL AROUSAL

A significant body of research exists that both studies and documents the
immediate effects of pornography and the effect of nudity as an erotic cue.
The purpose of this article is not to probe with inexhaustive depth this litera-
ture, but rather merely to evaluate several sources.

Erotic stimuli include an exceedingly wide range of subjects, including

141. Pacifica Foundation, 438 U.S. at 748-50.
142. Id. at 749. See Foltz, Achiron & Leslie, Jazzing Up the Airwaves, Newsweek, Mar.
26, 1984, at 36.

The United States Court of Appeals for the Ninth Circuit held, in Carlin Communications,
Inc. v. Mountain States Telephone & Telegraph Co., that the first amendment was violated
when a telephone company expelled an “adult entertainment” message service from its 976
network after a threat of prosecution. Even with the ruling, the court found no state action,
and thus no violation of the first amendment with the telephone company’s subsequent adop-
tion of a policy banning all messages of this type from its 976 network. 56 U.S.L.W. 2188
(Oct. 6, 1987).

The state of Virginia was surprised when it discovered, from a computer check on the long-
distance calls being placed by its employees, that, in one month, some 2,509 calls were made to
a single New York City number. It was found that the telephone number in question gave a 57
second recorded message that titillated the callers with aural sex—specifically, “the breathless
sounds of an ersatz liaison in which the imaginative caller can pretend that he (or she) is a
participant.” Aural Sex, Time, May 9, 1983, at 39. See Kenworthy, Senate Approves Educa-
tion Measure: $8.3 Billion Authorization Includes Ban on Dial-a-Porn Services, Wash. Post,
April 21, 1988, at A7, col. 1.
144. Id. at 759-61.
145. Id. at 756-59, 759 n.10.
146. See, e.g., M. Goldstein & H. Kant, Pornography and Sexual Deviance (1973).
partial nudity, explicit portrayals of sexual relations in unrestrained manner, line drawings, movies, video tapes and live entertainment.\textsuperscript{147} Because of the varying degrees of naturalism presented by the stimuli, it has been posited that immediate arousal value varies with the stimuli and the circumstances under which it is presented.\textsuperscript{148} The late Dr. Alfred Kinsey of Indiana University, a pioneer in understanding human sexuality, presented one of the earliest and classic studies of this subject area by conducting large-scale interviews in the 1940's.\textsuperscript{149} In his interviews, he not only sought information about the sexual behavior of the respondents, but he sought to elicit information regarding their reactions to erotica.\textsuperscript{150} A significant number of those interviewed for this study, men and women alike, reported that they became sexually aroused when presented with material portraying either nudity or sexual acts.\textsuperscript{151} Also rated were various materials according to the likelihood of arousal—with their impact varying between the male and female respondents.\textsuperscript{152}

\begin{thebibliography}{9}
\bibitem{147} Id. at 13.
\bibitem{148} Id.
\bibitem{150} M. Goldstein \& H. Kant, \textit{supra} note 146, at 14.
\bibitem{151} Id.
\bibitem{152} Id.
\end{thebibliography}
**Frequency of Sexual Responses to Different Erotic Stimuli Reported by Males in Kinsey Study**

<table>
<thead>
<tr>
<th>Stimuli</th>
<th>Definitely Frequent (%</th>
<th>Sometimes (%)</th>
<th>Never (%)</th>
<th>Size of Sample</th>
</tr>
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<tr>
<td>Portrayals of nudes</td>
<td>18</td>
<td>36</td>
<td>46</td>
<td>4191</td>
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<tr>
<td>Observing genitalia</td>
<td>“Many”</td>
<td>“Many”</td>
<td>“Few”</td>
<td>617</td>
</tr>
<tr>
<td>Commercial films</td>
<td>6</td>
<td>30</td>
<td>64</td>
<td>3231</td>
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<tr>
<td>Burlesques</td>
<td>28</td>
<td>34</td>
<td>38</td>
<td>3377</td>
</tr>
<tr>
<td>Observing sex acts</td>
<td>42</td>
<td>35</td>
<td>23</td>
<td>3868</td>
</tr>
<tr>
<td>Reading* romantic material</td>
<td>21</td>
<td>38</td>
<td>41</td>
<td>3952</td>
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<tr>
<td>Reading* erotic stories</td>
<td>16</td>
<td>31</td>
<td>53</td>
<td>4202</td>
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</tbody>
</table>

* In this study, Kinsey distinguished between commercially available romantic literature and erotic literature available through illicit sources. This distinction makes little sense in the United States today.

For males, the level of response to the erotic stimuli was tied to the degree of realism portrayed by the stimuli. Thus, the most powerful stimulus for males was the actual observance of sex acts, with floor shows or burlesque next in arousal values and commercial films of least value. The more direct and unambiguous the sexual cue, for the males in the Kinsey sample, the more likely it was found that arousal occurred. Since this study was undertaken prior to revision of the film rating code, it is very conceivable that commercial films rated X or XX, now made available by video reproduction with VCR machines, would today not be rated as low in arousal value as they were in the 1940's.

A study presented in 1943 of two hundred-eighty adolescent boys ranging

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153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 15.
from eleven to fourteen and fifteen to eighteen years of age asked them to rank some fifteen potentially erotic stimuli on an arousal scale potential. It was determined that the young adolescents found three experiences as having the highest arousal value: sexual conversations among themselves, female nudity, and obscene pictures.157 For the older adolescent groups (fifteen to eighteen), the stimuli presenting the most arousal were female nudity, daydreaming and obscene pictures.158 This study, taken together with the Kinsey work, suggests that the level or number of one's sexual experience affects his or her reactions to erotica.159 Thus, for those having had a greater level of sexual experience, "more direct representations of sexual activity are found to be arousing."

A 1967 study exploring nudity as an erotic cue has relevance for this essay. There, two sets of photographs, each portraying similar sexual activities, were presented to the subjects.161 In one set of pictures, all participants were totally nude, while the other set presented nudity with only an exposure of the genitals. Those interviewed (thirty-eight percent) reported a more significant degree of sexual arousal from the photographs showing nudity than from the partially nude set. Thus, despite suggestions nudity contributes significantly to sexual arousal in an erotic stimulus, this study supports the 1948 work of Dr. Kinsey and associates in one important conclusion that, "the more explicit the representation of heterosexual intercourse, the higher the rated sexual arousal."

158. M. GOLDSTEIN & H. KANT, supra note 146, at 15.
159. Id.
160. Id.
RANK ORDERING OF SEXUAL AROUSAL PROPERTIES 
BY A GROUP OF MALE GRADUATE STUDENTS

1. Heterosexual coitus in the ventral-ventral position.
2. Heterosexual coitus in the ventral-dorsal position.
3. Heterosexual petting, participants nude.
4. Heterosexual petting, participants partly-clad.
5. Heterosexual fellatio.
8. Masturbation by a female.
9. A triad of two females and one male in conjunctive behavior involving coitus and oral-genital activity.
11. Homosexual cunnilingus.
12. Homosexual petting by females.
13. Sadomasochistic behavior, male on female.
15. Sadomasochistic behavior, female on male.
16. Masturbation by a male.
17. Homosexual anal coitus.
18. Nude male.

The Kinsey material on arousal value of varying stimuli for females shows marked differences between male and female responses, even though, as to observing genitals, a substantial number of females and males were aroused. The female respondents to Dr. Kinsey's study reported greater arousal from viewing commercial films or from reading materials in which sexuality is infused and placed within a romantic context. While more direct and sexually explicit expressions that were found to arouse males have less influence on females, this statistic could be thought of as reflecting in part the state of the American culture during the time of the investigation. Indications were found that within a given statistically defined female population, "those who report more masculine interests and values respond more emphatically to erotic stimuli." To some extent, every stimulus exists in the "eye of the beholder," who proceeds to give it meaning and/or actual

163. Id. at 17.
164. Id. at 21.
165. Id. at 22.
166. Id.
significance.\textsuperscript{167}

\begin{center}
\textbf{FREQUENCY OF SEXUAL RESPONSES TO DIFFERENT EROTIC STIMULI REPORTED BY FEMALES IN KINSEY STUDY\textsuperscript{168}}
\end{center}

<table>
<thead>
<tr>
<th>Sexual Arousal Response</th>
<th>Definitely</th>
<th>Frequently</th>
<th>Sometimes</th>
<th>Never</th>
<th>Size of Sample</th>
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</thead>
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<tr>
<td></td>
<td>(%)</td>
<td>(%)</td>
<td>(%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Portrayals of nudes</td>
<td>3</td>
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<td>88</td>
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</tr>
<tr>
<td>Observing genitalia</td>
<td>21</td>
<td>27</td>
<td>52</td>
<td></td>
<td>617</td>
</tr>
<tr>
<td>Commercial films</td>
<td>9</td>
<td>39</td>
<td>52</td>
<td></td>
<td>5411</td>
</tr>
<tr>
<td>Burlesques</td>
<td>4</td>
<td>10</td>
<td>86</td>
<td></td>
<td>2550</td>
</tr>
<tr>
<td>Observing sex acts</td>
<td>14</td>
<td>18</td>
<td>68</td>
<td></td>
<td>2242</td>
</tr>
<tr>
<td>Reading romantic material</td>
<td>16</td>
<td>44</td>
<td>40</td>
<td></td>
<td>5691</td>
</tr>
<tr>
<td>Reading erotic stories</td>
<td>2</td>
<td>12</td>
<td>86</td>
<td></td>
<td>5523</td>
</tr>
</tbody>
</table>

Various studies of the effect of sex-oriented magazines—Chic, Club, Gallery, Genesis, Hustler, Oui, Penthouse and Playboy—and rape in 1979 showed a correlation of .63 between the circulation of these magazines and rapes. A similar study of magazine circulation in 1980 showed a .55 correlation, while one conducted between 1980 and 1982 among all the states showed a correlation of .64.\textsuperscript{169} Although a plausible interpretation of this data could be that pornography is the cause of rape, other sophisticated research merely acknowledges that, “the evidence presented allows only that there is a strong association between sex magazine readership and rape, not that one causes the other.”\textsuperscript{170} The exact degree of influence—direct or indirect—pornography has on known sex offenders is still lacking.\textsuperscript{171}

\textsuperscript{167} Id. at 21. Goldstein & Katz found no evidence in their studies to suggest erotica \textit{per se} triggers anti-social sexual behavior. \textit{Id.} at 138.

\textsuperscript{168} Id. at 22.

\textsuperscript{169} E. DONNERSTEIN, D. LINZ & S. PENROD, supra note 26, at 67.

\textsuperscript{170} Id. at 67, 68.

\textsuperscript{171} Id. at 71, 72. While it appears there is serious doubt about a direct relationship be-
The crucial issue of understanding here in this area of concern is that great care and caution should be given to generalizing from experimental laboratory results to real world situations. Only when laboratory studies of sexual violence have been undertaken that allow the exposure to this type of violence to have been manipulated as an independent variable and field studies completed (testing the level to which consumption of sexually violent material is correlated with subsequent rates of sexual assault or a comparable variable), can a rational conclusion of causality be reached. “So far, there have been no field studies measuring naturally occurring levels of exposure to sexual violence and later sexually violent behavior that would allow us to assess the validity of the laboratory work in this area.”

V. CONTEMPORARY RESPONSES

Led actively by two powerful political women—Susan Baker, wife of James Baker, Secretary of the Treasury, and Tipper Gore, wife of Senator Albert Gore—the campaign against “porn rock” has received national publicity. Groups such as the National Music Review Council based in Dallas, Texas, the National Parents and Teachers Association and the Parents Music Resource Center have been mobilized as well to campaign against the “unwholesome” recording companies, radio stations and producers of rock videos who market musical porn in the marketplaces of the 1980s.

This approach to modern censorship is tied not only to calls for truth in advertising and labeling that will allow rock and video albums and tapes to be identified as to their degree of “raunchiness,” so that parental guidance may be preferred before purchase by underage children (assuming children shop with their parents when such purchases are made); but it promotes an enormous pressure on distributing outlets to take the offending products off the shelves as well. This, in turn, creates an equal level of intense pressure for the artists and studios producing X-rated music-videos to stop their production of these items. This whole program has been termed “an elegant form of censorship” because it is made to have the appearance of a program

tween nonviolent pornography and violent behavior, this does not preclude the possibility that exposure to this form of pornography has a detrimental effect on how men think about women. Perhaps exposure to pornography results in greater callousness about violence against women. Perhaps exposure predisposes men to believe that women in general are open to a wide range of sexual activities including deviate forms of sexual activity such as rape. Id. at 73.

172. Id. at 174.
174. Id.
in consumer education and information.\textsuperscript{175} If this form of self-censorship has success, then it must surely be applauded, for it obviates the need for strong enforcement or censorship policies by the state and federal governments.

Rock music has become a plague of messages about sexual promiscuity, bisexuality, incest, sadomasochism, satanism, drug use, alcohol abuse and, constantly, misogyny. The lyrics regarding these things are celebratory, encouraging or at least desensitizing . . . . The concern is less that children will emulate the frenzied behavior described in porn rock than that they will succumb to the lassitude of the demoralized literally . . . .\textsuperscript{176}

The hottest numbers on the radio dial appear more and more to be those stations where “obnoxious, sometimes lewd, occasionally pornographic morning radio shows” operate.\textsuperscript{177} Indeed, over recent years, audience support has grown for the services of disc jockeys who seek to titillate their listeners.\textsuperscript{178} One station, KLOL-FM in Houston, Texas, goes so far in programming its morning show to encourage their listeners to call it while they are having sex.\textsuperscript{179}

In May, 1987, the Federal Communications Commission tightened its policy on indecent language and banned references that were explicit as to “sexual and/or excretory activities.”\textsuperscript{180} Designed to regulate the “extremes” in radio programming, most station managers, however, perceive the new policy directive as ineffective simply because “shock” radio makes far too much


\textsuperscript{177} Rauch’n’roll Radio is Here to Stay, U.S. NEWS & WORLD REPORT, May 4, 1987, at 52.

\textsuperscript{178} Id.

\textsuperscript{179} Id.

\textsuperscript{180} Id.
money with ready advertisers to be "toned down" or taken off the airwaves.\textsuperscript{181}

\textit{Executive and Administrative}

The 1970 Presidential Commission on Obscenity and Pornography concluded that when some individuals are exposed to erotic materials, masturbatory or coital behavior increase, but for the majority, no change in these two behavioral patterns occurs. In any event, the increases of these behaviors disappear generally within forty-eight hours. When masturbation followed exposures to erotica, it occurred most often among those either with established masturbatory patterns or among individuals with established, but unavailable sexual partners. And, for those individuals increasing coital frequencies following exposure to sexual stimuli, the activation occurred generally among sexually experienced persons with established and available sex partners. Thus, generally, it was determined that established patterns of sexual behavior were stable and not altered substantially by exposure to erotica.\textsuperscript{182}

The Commission found that pornography was not only harmless but had, in some presentations, a potential therapeutic or "cathartic" value, and secondly had no negative effect on adults or on children.\textsuperscript{183} Because of the past futility of efforts to legislate in the area of obscenity prevention, the Commission concluded that public opinion in America did "not support the imposition of legal prohibitions upon the right of adults to read or see explicit sexual materials."\textsuperscript{184} Owing to this lack of consensus concerning the availability of sexually explicit materials, serious problems existed regarding the enforcement of legal prohibitions in the area. Accordingly, the Commission found,

Consistent enforcement of even the clearest prohibitions upon consensual adult exposure to explicit sexual materials would require the expenditure of considerable law enforcement resources. In the absence of a persuasive demonstration of damage flowing from consensual exposure to such materials, there seems no justification for thus adding to the overwhelming tasks already placed upon the law enforcement system. Inconsistent enforcement of prohibitions, on the other hand, invites discriminatory action based upon con-

\textsuperscript{181} Id.
\textsuperscript{183} D. SCOTT, PORNOGRAPHY—ITS EFFECT ON THE FAMILY, COMMUNITY AND CULTURE 1 (1985).
\textsuperscript{184} PORNOGRAPHY COMMISSION REPORT, supra note 182, at 53.
This Report was rejected by the United States Senate by a sixty to five vote and was characterized by President Nixon as "morally bankrupt."

On May 21, 1985, Attorney General Meese, III named an eleven-member Commission to study pornography and, "if appropriate," propose measures designed to control not only its production, but its distribution as well. The Attorney General stated that the very formation of the Commission reflected the basic concern that a healthy society has "regarding the ways in which its people publicly entertain themselves." He continued further by observing that, "[t]he Commission is an affirmation of the proposition that the purpose of a democracy involves . . . the achievement of the good life and the good society." It is assumed that "good" was a synonym for "virtuous."

Prior to the official release of the 1,960 page Final Report of the Commission in July, 1986, advance copies of the conclusion and recommendations showed, among other points, that, based on admittedly "tentative" scientific evidence, a substantial exposure to pornography likely increases the extent to which those so exposed will view either rape or other forms of sexual violence as less serious than they would have otherwise if not exposed to the material. Critics came forward immediately to caution that the conclusions of the Commission are not based upon conclusive scientific proof and, further, that social scientists are divided on the issue of whether most pornography is harmful.

Dr. Judith Becker of Columbia University and a member of the Commission, called attention to the fact that the word, "pornography," was not defined in the Commission's Final Report. She also noted that,

A number of the commissioners wanted to discuss what was appropriate sexual behavior; the only appropriate sexual behavior would be that which occurs within a marriage and is procreative in nature. It was not the mandate of this commission to decide what the

185. Id.
186. D. SCOTT, supra note 183.
188. Id.
189. Id.
191. Id.
country should or should not be doing sexually.193

On the issue of simple nudity, the Commission expressed its concern about the impact of this “on children, on attitudes toward women, on the relationship between the sexes and on attitudes toward sex in general.”194

The panel urged among other points, that pornography and its censorship be targeted by state and federal prosecutors; that Congress enact laws that would make it unfair to hire actors and actresses for x-rated films; that the interstate commerce laws be strengthened to combat pornography; obscene material on cable television be banned; “Dial-a-Porn” telephone messages be banned; and further urged the formation of citizen groups whose responsibility it would be to monitor newsstands, videocassette stores and other outlets allegedly displaying and selling obscene materials, and further, organize boycotts of the offending establishments.195

Two of the researchers whose work was cited extensively by the Attorney General’s Commission on Pornography, Edward I. Donnerstein and Daniel G. Linz, have taken issue with several of the Commission’s contentions, charging that they simply cannot be supported by empirical evidence and, furthermore, that the Commission did not fully understand certain fundamental assumptions in social science research on pornography.196 The first point made is that violence, not pornography, is the most important problem confronting society today.197 Although the Commission found correctly the most dangerous form of pornography included violent themes, it assumes, without complete and accurate verification, “that images of violence have become more prevalent in pornography in recent years.”198 It also concludes

193. Id.
194. Id.
195. See Appendix to this article where the recommendations of the Commission are presented. See generally Grove, Descent Into the World of Porn, Wash. Post, June 7, 1986, at D1, col. 4; Buchwald, Undercover Work on the Porn Patrol, Wash. Post, July 17, 1986, at B1, col. 1.

The National Federation of Decency, a Christian group based in Tupelo, Mississippi organized picketing at hundreds of convenience stores selling adult magazines and took pride in announcing that since the beginning of 1986, more than eight thousand such stores around the country removed “adult” magazines from their racks. Wald, Stores Forbid Them, N.Y. Times, June 16, 1986, at 1, col. 5.


197. Id.
198. Id. at 57.
that "increased aggressive behavior towards women is causally related, for an aggregate population, to increased sexual violence." It has not been determined whether aggressive behavior, measured under clinical conditions, after exposure to violent pornographic films, has a cumulative effect or is merely temporary. A significant body of evidence suggests the effect is only temporary.

While there is evidence that particular pornographic themes, specifically that women find force or aggression a pleasurable quality, influence the male perceptions and attitudes regarding rape, interpreting and drawing broad conclusions about measures of motivation and "likelihood to rape" is "tricky." Thus, the Commission's broadly sweeping conclusion that "substantial exposure to sexually violent material . . . bears a causal relationship to antisocial violence and, for some subgroups, possibly to unlawful acts of sexual violence," is flawed and not verifiable from present research and study. The state of knowledge simply does not exist with certainty; and "it remains to be seen whether changes in attitudes about women and rape revealed in relatively small-scale tests have any applicability to rape and aggression in the real world." Donnerstein and Linz conclude that a number of studies suggest strongly "that violence against women need not occur in a pornographic or sexually explicit context to have a negative effect upon viewer attitudes and behavior . . . violent images, rather than sexual ones, are most responsible for people's attitudes about women and rape." Regrettably, the Attorney General's Commission did not seek to disentangle sexuality from violence. Professor Frederick Shauer, who not only served on the Attorney General's Commission but was the principal author of its Final Report, stated that, "there is no evidence that undifferentiated sexually explicit behavior causes violence." He allowed that the Report has been misinterpreted widely and nothing in it "urges regulation of ob-

199. Id.
200. Id.
201. Id. at 57, 58.
202. Id. at 58. One-third of all reported sex offenses are acts of indecent exposure. J. MACDONALD, INDECENT EXPOSURE (1973).
203. Donnerstein & Linz, supra note 196, at 58.
204. Id.
205. Id. at 59.
207. Experts Dispute Link Between Porn and Harm, 16 The [Columbia] Observer 4 (May, 1987).
scene material that is not violent."

The 1987 Initiative

While the cause of sexual abuse has been recognized as not only complex, but rooted within family relationships, the fact remains: actual sexual abuse of children is rising very significantly. A direct correlation has been found to exist between pornography and child abuse. The Surgeon General of the United States has termed pornography "an accessory to the crime of child abuse." Obviously, the sexual integrity of the nation's children must be guaranteed. Responding to this grave, national crisis, the Reagan Administration took bold action last year.

On November 10, 1987, President Reagan transmitted his "Child Protection and Obscenity Enforcement Act of 1987" to the Congress and called for its "immediate consideration and enactment." A brief analysis of the major provisions of this proposed legislation is in order. Section 201 adds clarifying language to 18 U.S.C. Sections 2251 and 2252 the Sexual Exploitation of Children statutes to prohibit the use of computers to advertise, 

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208. Id. See also Schauer, supra note 206.

The Pornography Victims Protection Act of 1987, was introduced by Senators Specter and McConnell on March 10, 1987, as S. 703 and referred to the Committee on the Judiciary. It imposes a civil penalty of $100,000.00 for those who cause, intimidate or fraudulently induce an individual eighteen years or older to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct if the individual or individuals involved knows, or has reason to know, that the depiction will be transported in interstate or foreign commerce or mailed. See generally Yost, Foot-Dragging on Antismut Plans?, Wash. Post, Oct. 13, 1986, at A23, col. 1. Kurtz, Meese Forms Antipornography Task Force, Wash. Post, Oct. 26, 1986, at A21, col. 3; Bishop, Justice Dept. Team Leading Broad Effort on Obscenity, N.Y. Times, Aug. 22, 1987, at 6, col. 1; Thornton, Child Pornography Charges Filed: More Than 100 Indicted After Sting by Customs, Postal Service, Wash. Post, Sept. 15, 1987, at A6, col. 1.
213. PRESIDENT'S MESSAGE, supra note 212.
distribute or receive child pornography and related information. This action was recommended in the final recommendations of The Report of the Attorney's Commission on Pornography. Subsection 202(a) proposed a new Subsection 2251A(a) to prohibit a parent, legal guardian or any person having custody or control of a minor from selling or otherwise transferring custody or control of that minor or offering to do so where the person has knowledge that the minor would be used for the production of pornography or where the person acts to promote either the minor's engaging in sexually explicit conduct or assisting another to do so for the purpose of producing a depiction of such conduct.

Section 203, consistent with Recommendation 37 of the Attorney General's Report, would establish a new Section 2257 of Title 18 to require producers and distributors of sexually explicit materials to create and maintain verifiable records as to the age and identity of the performer. Section 204 would make child pornography offenses and underlying criminal activity for purposes of the Racketeer Influenced and Corrupt Organizations ("RICO") statute, 18 U.S.C. Section 1961 et seq. Section 301, following Recommendation Two of the Attorney General's Report, would add a new Section 1466 to Title 18 and prohibit the receipt or possession of obscene matter if the individual sells, transfers, or offers to sell or transfer such matter. Punishment would be up to two years of imprisonment and/or a fine of up to $250,000.00. A rebuttable presumption is created by the Section that one who offers to sell or transfer two or more obscene articles or publications is engaged in the business of selling such material, with punishment being in the nature of up to five years of imprisonment and/or a fine of $250,000.00.

Subsection 301(c) expands the scope of Section 1465 of Title 18 to prohibit the use of a "facility or means" of commerce for obscenity trafficking. Accordingly, the use of a federal interstate highway system, federally financed highways, and interstate railroads would trigger this Section. The use of a "means of interstate commerce," such as the use of motor vehicles, boats, and even airplanes, would trigger operation of the Section as well. It would not be necessary to demonstrate that obscene material actually travelled interstate but only that a "facility or means" of interstate commerce or foreign

214. Id. See Appendix, Recommendation 39.
215. PRESIDENT'S MESSAGE, supra note 212.
216. Id. See Appendix, Recommendation 37.
217. PRESIDENT'S MESSAGE, supra note 212.
218. Id.
219. See Appendix, Recommendation 2.
220. Mano, supra note 1.
sale was used. Subsection 301(f) would add violations of state of federal obscenity laws to the list of crimes included in the definition of "unlawful activity" under Title 18 U.S.C. Section 1952. Such activity would include telephone conversations between distributors and retailers in different states concerning an order of obscene material would trigger federal jurisdiction. In a circumstance of this nature, such a call would constitute the use of a "facility" in interstate commerce.

Section 302(a), following Recommendation One of the Attorney General's Report, would add a new Section 1467 to Title 18 providing both criminal and civil forfeiture statutes allowing the government to obtain assets attributable to profits made through violations of obscenity laws. Section 305 adds a new Section 1460, subsection (a) which proscribes the sale of obscene matter or child pornography or its possession with intent to sell on federal property. A violation would be considered a felony punishable by up to two years of imprisonment and/or a fine of $250,000.00.

Section 306 would add the felony obscenity offenses in Chapter 71 of the United States Code to the list of crimes for which the government may seek a court order authorizing wiretaps. Section 303 would add Section 1464(a) to Title 18 which would in turn proscribe uttering obscene language or distributing obscene matter by cable television or subscription services on television. The violation of this provision would be a felony punishable by imprisonment for up to two years and/or a fine of $250,000.00. This is consistent with Recommendation Five of the Attorney General's Report.

Finally, Section 304, implementing Recommendation Six of the Attorney General's Report, proscribes the making of obscene telephone calls, for commercial purposes, to any person regardless of age or whether the maker of the communication placed the call or whether the communication was made directly or by recording devices. The punishment for this offense would be the imposition of a felony that would carry imprisonment of up to two years

221. Id.
222. Id.
223. Id.
224. See Appendix, Recommendation 1.
225. PRESIDENT'S MESSAGE, supra note 212.
226. Id.
227. Id.
228. Id. See Appendix, Recommendation 5.
and/or a fine of $250,000.00.\textsuperscript{229}

President Reagan noted in his Congressional Message that this proposed legislation was designed to strengthen further his attack on pornography and thereby implement the work of the newly created National Obscenity Enforcement Unit within the Justice Department.\textsuperscript{230} He observed that this new “Enforcement Unit” was “spearheading nationwide prosecutions of a scope never before attempted in our Nation’s history.”\textsuperscript{231} The President called upon all “decent-minded citizens” to assist the Federal government in its task of protecting all Americans “from the corruption, the disease, the violence, degradation, and victimization that flows from” the “despicable” industry of pornography.\textsuperscript{232}

CONCLUSIONS

There can be no definitive resolutions to the dilemmas that obscenity and pornography pose to the cultural, moral and ethical fiber of the modern society; for, in a pluralistic nation such as ours, toleration of opposing views is the sine qua non of a vibrant democracy.\textsuperscript{233} A right of moral independence must of necessity, however, guarantee a coordinate right of free expression.\textsuperscript{234} If there is a justification for imposing restraints upon individual freedom, it is to be found only when restraint is undertaken to prevent injury to others or to the public good.\textsuperscript{235} Under this position, acts, sexually explicit or pornographic, performed by consenting adults in private, should not be prohibited as criminal regardless of how some may view them as sinful or unvirtuous.\textsuperscript{236}

Basic or central arguments made traditionally against legal enforcement or even a working passive acceptance and consideration of moral standards, derive from the tendency of a liberal society to reduce questions of law and morals to the principles of liberty and equality. Thus, a society steeped in liberalism can hardly understand a moral-legal issue, except, perhaps, as a

\begin{footnotes}
\item[229] Id. See Appendix, Recommendation 6.
\item[230] President's Message, supra note 212, at 1.
\item[231] Id. at 4.
\item[232] Id.
\item[235] M. Adler, We Hold These Truths 128 (1987).
\item[236] Id. See Note, Fornication, Cohabitation and The Constitution, 77 Mich. L. Rev. 252, 291 (1978). If it is assumed the existence of marriage is to serve as a means to facilitate emotional and sexual expressions of intimacy, intimacy becomes so fundamental “to individual liberty that it demands constitutional protection. Nothing is different about the psychological and emotional needs of unmarried couples which would justify denying them the same protection.” Id.
\end{footnotes}
conflict of rights: either as a clash between individual claims of right or as one between the rights of the individual and those of the state. In such a liberal society, every individual is allowed to follow his own preferences to the extent of their compatibility with not only the rights of other individuals, but also with their very social existence.\textsuperscript{237} The overriding problem, however, is that the liberal society finds it increasingly difficult to evaluate preferences by any standards thought of as being in common with total societal standards. The conscience of society, then, must be the final arbiter when conflict arises. Consequently, where a society in a particular nation, settles definitely into a secular, post-Christian view of life, the laws will inevitably change. But whilst the conscience of society is still in a state of transition, the demands of liberalization should be contested, if only to pinpoint the moral issues, and make public opinion fully aware of the implication of the legal changes to which it is urged to consent.\textsuperscript{238}

The 1986 Report of the Attorney General’s Commission on Pornography undertook a most ambitious study of a complex socio-legal phenomenon with an exceedingly modest budget and strict time constraints. Not all of its final conclusions and recommendations can be accepted as constitutionally permissible and socially tolerable. Yet, the work of the Commission should surely be viewed as a catalyst for further thought and possible Congressional action and President Reagan’s Child Protection and Enforcement Act of 1987 as a solid beginning especially in combatting child pornography. A full and honest debate or at least a dialogue should be the mechanism through which Congress can determine the breadth and depth of public support or opposition for various measures pertinent to restricting obscenity and pornography. That debate should begin now and not be postponed or misdirected by mutant journalistic ploys of the popular press.

Deregulation of any kind or manner of pornography should be evaluated cautiously because of the potential for misreading the symbolic effect of such action; for, such specific deregulations of that, heretofore regulated, could well be perceived as an act of governmental condonation of the deregulated conduct.\textsuperscript{239}

To take the affirmative step of deregulation would thus more likely be perceived as a governmental statement that the deregulated conduct is harmless . . . the burden of proof ought to be on those who would have society engage in a politically symbolic deregulation in a way that it is on those who would have society initiate a poten-

\textsuperscript{237} Canavan, \textit{Law and Society’s Conscience}, 2 \textit{HUMAN LIFE REV.} 1, 6 (1976).
\textsuperscript{238} \textit{Id.} at 7.
\textsuperscript{239} Schauer, \textit{supra} note 206.
tially symbolic regulation.240

Even though there are laboratory studies that show violent pornography can influence aggression toward women,241 the conclusiveness and projectability of these conclusions into non-structured situations must be drawn carefully—especially since there is no conclusive proof that pornography has become more violent since the 1970s.242 The very inconclusiveness of the clinical work in the field demands continued vigilance before definitive actions are undertaken one way or the other.

In the final analysis, no unequivocal, unyielding standard can be applied to efforts to determine, with dispositive clarity, when questioned materials, actions, pictures, etc., are obscene or pornographic and the extent to which they should be censored or restricted. Our goal remains the same as it was stated in 1964 in Mr. Chief Justice Earl Warren’s dissenting opinion in Jacobellis v. Ohio;243 namely, to maintain a decent society and one in which individual rights may be expressed freely and consistent with the constitutional guarantees of the first and fourteenth amendments.244 To this end, in rendering decisions regarding limitations or expansions on one side of this balancing equation, the Supreme Court must always endeavor to balance, equitably, conflicting social, ethical, moral and political values and policies. If it allows too much weight to be given to alleged political or social dangers, of a real or imagined nature, such actions will have a chilling effect on the freedom of citizens to speak out on current issues. Contrariwise, when the Court appears to interpret the first amendment as offering carte blanche to the likes of writers, speakers, publishers, etc., it will surely be met with the indignant outcries of those whose beliefs or values have been either attacked or ridiculed in the offending material. Nothing more should be expected within a pluralistic society than to have all ultimate actions be set within a framework of principled decision-making and guided by the standard of reasonableness.

240. Id. at 29.
242. Id. at 91.
244. Id.
APPENDIX

RECOMMENDATIONS FOR THE JUSTICE SYSTEM AND LAW ENFORCEMENT AGENCIES, UNITED STATES ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, JULY, 1986:

A. RECOMMENDATIONS FOR CHANGES IN FEDERAL LAW

1. CONGRESS SHOULD ENACT A FORFEITURE STATUTE TO REACH THE PROCEEDS AND INSTRUMENTS OF ANY OFFENSE COMMITTED IN VIOLATION OF THE FEDERAL OBSCENITY LAWS.

2. CONGRESS SHOULD AMEND THE FEDERAL OBSCENITY LAWS TO ELIMINATE THE NECESSITY OF PROVING TRANSPORTATION IN INTERSTATE COMMERCE. A STATUTE SHOULD BE ENACTED TO REQUIRE ONLY PROOF THAT THE DISTRIBUTION OF THE OBSCENE MATERIAL "AFFECTS" INTERSTATE COMMERCE.

3. CONGRESS SHOULD ENACT LEGISLATION MAKING IT AN UNFAIR BUSINESS PRACTICE AND AN UNFAIR LABOR PRACTICE FOR ANY EMPLOYER TO HIRE INDIVIDUALS TO PARTICIPATE IN COMMERCIAL SEXUAL PERFORMANCES.

4. CONGRESS SHOULD AMEND THE MANN ACT TO MAKE ITS PROVISIONS GENDER NEUTRAL.

5. CONGRESS SHOULD AMEND TITLE 18 OF THE UNITED STATES CODE TO SPECIFICALLY PROSCRIBE OBSCENE CABLE TELEVISION PROGRAMMING.

6. CONGRESS SHOULD ENACT LEGISLATION TO PROHIBIT THE TRANSMISSION OF OBSCENE MATERIAL THROUGH THE TELEPHONE OR SIMILAR COMMON CARRIER.

B. RECOMMENDATIONS FOR CHANGES IN STATE LAW

7. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, OBSCENITY STATUTES CONTAINING THE DEFINITIONAL REQUIREMENT THAT MATERIAL BE "UTTERLY WITHOUT REDEEMING SOCIAL VALUE" IN ORDER TO BE OBScene TO CONFORM WITH THE CURRENT STANDARD ENUNCIATED BY THE UNITED STATES SUPREME COURT IN MILLER v. CALIFORNIA.

8. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, OBSCENITY STATUTES TO ELIMINATE MISDEMEANOR STATUS
FOR SECOND OFFENSES AND MAKE ANY SECOND OFFENSE PUNISHABLE AS A FELONY.
9. STATE LEGISLATURES SHOULD ENACT, IF NECESSARY, FORFEITURE PROVISIONS AS PART OF THE STATE OBSCENITY LAWS.
10. STATE LEGISLATURES SHOULD ENACT A RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ("RICO") STATUTE WHICH HAS OBSCENITY AS A PREDICATE ACT.

C. RECOMMENDATIONS FOR THE UNITED STATES DEPARTMENT OF JUSTICE

11. THE ATTORNEY GENERAL SHOULD DIRECT THE UNITED STATES ATTORNEYS TO EXAMINE THE OBSCENITY PROBLEM IN THEIR RESPECTIVE DISTRICTS, IDENTIFY OFFENDERS, INITIATE INVESTIGATIONS, AND COMMENCE PROSECUTION WITHOUT FURTHER DELAY.
12. THE ATTORNEY GENERAL SHOULD APPOINT A HIGH RANKING OFFICIAL FROM THE DEPARTMENT OF JUSTICE TO OVERSEE THE CREATION AND OPERATION OF AN OBSCENITY TASK FORCE. THE TASK FORCE SHOULD CONSIST OF SPECIAL ASSISTANT UNITED STATES ATTORNEYS AND FEDERAL AGENTS WHO WILL ASSIST UNITED STATES ATTORNEYS IN THE PROSECUTION AND INVESTIGATION OF OBSCENITY CASES.
13. THE DEPARTMENT OF JUSTICE SHOULD INITIATE THE CREATION OF AN OBSCENITY LAW ENFORCEMENT DATA BASE WHICH WOULD SERVE AS A RESOURCE NETWORK FOR FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AGENCIES.
14. THE UNITED STATES ATTORNEYS SHOULD USE LAW ENFORCEMENT COORDINATING COMMITTEES TO COORDINATE ENFORCEMENT OF THE OBSCENITY LAWS AND TO MAINTAIN SURVEILLANCE OF THE NATURE AND EXTENT OF THE OBSCENITY PROBLEM WITHIN EACH DISTRICT.
15. THE DEPARTMENT OF JUSTICE AND UNITED STATES ATTORNEYS SHOULD USE RICO AS A MEANS OF PROSECUTING MAJOR PRODUCERS AND DISTRIBUTORS OF OBSCENE MATERIAL.
16. THE DEPARTMENT OF JUSTICE SHOULD CONTINUE TO PROVIDE THE UNITED STATES ATTORNEYS WITH TRAINING PROGRAMS ON LEGAL AND PROCEDURAL MATTERS RE-
LATED TO OBSCENITY CASES AND ALSO SHOULD MAKE SUCH TRAINING AVAILABLE TO STATE AND LOCAL PROSECUTORS.

17. THE UNITED STATES ATTORNEYS SHOULD USE ALL AVAILABLE FEDERAL STATUTES TO PROSECUTE OBSCENITY LAW VIOLATIONS INVOLVING CABLE AND SATELLITE TELEVISION.

D. RECOMMENDATIONS FOR STATE AND LOCAL PROSECUTORS

18. STATE AND LOCAL PROSECUTORS SHOULD PROSECUTE PRODUCERS OF OBSCENE MATERIAL UNDER EXISTING LAWS INCLUDING THOSE PROHIBITING PANDERING AND OTHER UNDERLYING SEXUAL OFFENSES.

19. STATE AND LOCAL PROSECUTORS SHOULD EXAMINE THE OBSCENITY PROBLEM IN THEIR JURISDICTION, IDENTIFY OFFENDERS, INITIATE INVESTIGATIONS, AND COMMENCE PROSECUTION WITHOUT FURTHER DELAY.

20. STATE AND LOCAL PROSECUTORS SHOULD ALLOCATE SUFFICIENT RESOURCES TO PROSECUTE OBSCENITY CASES.

21. STATE AND LOCAL PROSECUTORS SHOULD USE THE BANKRUPTCY LAWS TO COLLECT UNPAID FINES.

22. STATE AND LOCAL PROSECUTORS SHOULD USE ALL AVAILABLE STATUTES TO PROSECUTE OBSCENITY VIOLATIONS INVOLVING CABLE AND SATELLITE TELEVISION.

23. STATE AND LOCAL PROSECUTORS SHOULD ENFORCE EXISTING CORPORATE LAWS TO PREVENT THE FORMATION, USE AND ABUSE OF SHELL CORPORATIONS WHICH SERVE AS A SHELTER FOR PRODUCERS AND DISTRIBUTORS OF OBSCENE MATERIAL.

24. STATE AND LOCAL PROSECUTORS SHOULD ENFORCE THE ALCOHOLIC BEVERAGE CONTROL LAWS THAT PROHIBIT OBSCENITY ON LICENSED PREMISES.

25. GOVERNMENT ATTORNEYS, INCLUDING STATE AND LOCAL PROSECUTORS, SHOULD ENFORCE ALL LEGAL REMEDIES AUTHORIZED BY STATUTE.

E. RECOMMENDATIONS FOR FEDERAL LAW ENFORCEMENT AGENCIES

26. FEDERAL LAW ENFORCEMENT AGENCIES SHOULD CONDUCT ACTIVE AND THOROUGH INVESTIGATIONS OF ALL SIG-
27. The Internal Revenue Service should aggressively investigate violations of the tax laws committed by producers and distributors of obscene material.

F. Recommendations for State and Local Law Enforcement Agencies

28. State and local agencies should provide the most thorough and up-to-date training for investigators involved in enforcing the obscenity laws.

29. State and local agencies should allocate sufficient personnel to conduct intensive and thorough investigations of any violations of the obscenity laws.

30. State and local enforcement officers should take an active role in the law enforcement coordinating committees.

31. State and local revenue authorities must insure taxes are collected from businesses dealing in obscene materials.

32. State and local public health authorities should investigate conditions within "adults only" pornographic outlets and arcades and enforce the laws against any health violations found on those premises.

G. Recommendations for the Judiciary

33. Judges should impose substantial periods of incarceration for persons who are repeatedly convicted of obscenity law violations and when appropriate should order payment of restitution to identified victims as part of the sentence.

H. Recommendations for the Federal Communications Commission

34. The Federal Communications Commission should use its full regulatory powers and impose appropri-
ATE SANCTIONS AGAINST PROVIDERS OF OBSCENE DIAL-A-PORN TELEPHONE SERVICES.

35. THE FEDERAL COMMUNICATIONS COMMISSION SHOULD USE ITS FULL REGULATORY POWERS AND IMPOSE APPROPRIATE SANCTIONS AGAINST CABLE AND SATELLITE TELEVISION PROGRAMMERS WHO TRANSMIT OBSCENE PROGRAMS.

I. RECOMMENDATIONS FOR OTHER FEDERAL ORGANIZATIONS

36. THE PRESIDENT'S COMMISSION ON UNIFORM SENTENCING SHOULD CONSIDER A PROVISION FOR A MINIMUM OF ONE YEAR IMPRISONMENT FOR ANY SECOND OR SUBSEQUENT VIOLATION OF FEDERAL LAW INVOLVING OBSCENE MATERIAL THAT DEPICTS ADULTS.

II. RECOMMENDATIONS FOR THE REGULATION OF CHILD PORNOGRAPHY

37. CONGRESS SHOULD ENACT LEGISLATION REQUIRING PRODUCERS, RETAILERS, OR DISTRIBUTORS OF SEXUALLY EXPLICIT VISUAL DEPICTIONS TO MAINTAIN RECORDS CONTAINING CONSENT FORMS AND PROOF OF PERFORMERS' AGES.

38. CONGRESS SHOULD ENACT LEGISLATION PROHIBITING PRODUCERS OF CERTAIN SEXUALLY EXPLICIT VISUAL DEPictions FROM USING PERFORMERS UNDER THE AGE OF TWENTY-ONE.

39. CONGRESS SHOULD ENACT LEGISLATION TO PROHIBIT THE EXCHANGE OF INFORMATION CONCERNING CHILD PORNOGRAPHY OR CHILDREN TO BE USED IN CHILD PORNOGRAPHY THROUGH COMPUTER NETWORKS.

40. CONGRESS SHOULD AMEND THE CHILD PROTECTION ACT FORFEITURE SECTION TO INCLUDE A PROVISION WHICH AUTHORIZES THE POSTAL INSPECTION SERVICE TO CONDUCT FORFEITURE ACTIONS.

41. CONGRESS SHOULD AMEND 18 U.S.C. § 2255 TO DEFINE THE TERM "VISUAL DEPICTION" AND INCLUDE UNDEVELOPED FILM WITHIN THAT DEFINITION.

42. CONGRESS SHOULD ENACT LEGISLATION PROVIDING FINANCIAL INCENTIVES FOR THE STATES TO INITIATE TASK FORCES ON CHILD PORNOGRAPHY AND RELATED CASES.

43. CONGRESS SHOULD ENACT LEGISLATION TO MAKE THE
ACTS OF CHILD SELLING OR CHILD PURCHASING, FOR THE PRODUCTION OF SEXUALLY EXPLICIT VISUAL DEPICTIONS, A FELONY.

B. RECOMMENDATIONS FOR STATE LEGISLATION

44. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, CHILD PORNOGRAPHY STATUTES TO INCLUDE FORFEITURE PROVISIONS.

45. STATE LEGISLATURES SHOULD AMEND LAWS, WHERE NECESSARY, TO MAKE THE KNOWING POSSESSION OF CHILD PORNOGRAPHY A FELONY.

46. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, LAWS MAKING THE SEXUAL ABUSE OF CHILDREN THROUGH THE PRODUCTION OF SEXUALLY EXPLICIT VISUAL DEPICTIONS A FELONY.

47. STATE LEGISLATURES SHOULD ENACT LEGISLATION, IF NECESSARY, TO MAKE THE CONSPIRACY TO PRODUCE, DISTRIBUT, GIVE AWAY OR EXHIBIT ANY SEXUALLY EXPLICIT VISUAL DEPICTIONS OF CHILDREN, OR THE EXCHANGE OR DELIVERY OF THE CHILDREN FOR SUCH PURPOSE A FELONY.

48. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, CHILD PORNOGRAPHY LAWS TO CREATE AN OFFENSE FOR ADVERTISING, SELLING, PURCHASING, BARTERING, EXCHANGING, GIVING OR RECEIVING INFORMATION AS TO WHERE SEXUALLY EXPLICIT MATERIALS DEPICTING CHILDREN CAN BE FOUND.

49. STATE LEGISLATURES SHOULD ENACT OR AMEND LEGISLATION, WHERE NECESSARY, TO MAKE CHILD SELLING OR CHILD PURCHASING FOR THE PRODUCTION OF SEXUALLY EXPLICIT VISUAL DEPICTIONS A FELONY.

50. STATE LEGISLATURES SHOULD AMEND LAWS, WHERE NECESSARY, TO MAKE CHILD PORNOGRAPHY IN THE POSSESSION OF AN ALLEGED CHILD SEXUAL ABUSER, DEPICTING THAT PERSON ENGAGED IN SEXUAL ACTS WITH A MINOR, SUFFICIENT EVIDENCE OF CHILD MOLESTATION FOR USE IN PROSECUTING THAT INDIVIDUAL, WHETHER OR NOT THE CHILD INVOLVED IS FOUND OR IS ABLE TO TESTIFY.

51. STATE LEGISLATURES SHOULD AMEND LAWS, IF NECESSARY, TO ELIMINATE THE REQUIREMENT THAT THE PROSECUTION IDENTIFY OR PRODUCE TESTIMONY FROM THE
CHILD WHO IS DEPICTED, IF PROOF OF AGE CAN OTHERWISE BE ESTABLISHED.

52. STATE LEGISLATURES SHOULD ENACT OR AMEND LEGISLATION, IF NECESSARY, WHICH REQUIRES PHOTO FINISHING LABORATORIES TO REPORT SUSPECTED CHILD PORNOGRAPHY.

53. STATE LEGISLATURES SHOULD ENACT OR AMEND LEGISLATION, IF NECESSARY, TO PERMIT JUDGES TO IMPOSE A SENTENCE OF LIFETIME PROBATION FOR CONVICTED CHILD PORNOGRAPHERS AND RELATED OFFENDERS.

C. RECOMMENDATIONS FOR FEDERAL LAW ENFORCEMENT AGENCIES


55. THE UNITED STATES DEPARTMENT OF JUSTICE SHOULD DIRECT THE LAW ENFORCEMENT COORDINATING COMMITTEES TO FORM TASK FORCES OF DEDICATED AND EXPERIENCED INVESTIGATORS AND PROSECUTORS IN MAJOR REGIONS TO COMBAT CHILD PORNOGRAPHY.

56. THE DEPARTMENT OF JUSTICE, OR OTHER APPROPRIATE FEDERAL AGENCIES SHOULD INITIATE THE CREATION OF A DATA BASE WHICH WOULD SERVE AS A RESOURCE NETWORK FOR FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AGENCIES TO SEND AND OBTAIN INFORMATION REGARDING CHILD PORNOGRAPHY TRAFFICKING.

57. FEDERAL LAW ENFORCEMENT AGENCIES SHOULD DEVELOP AND MAINTAIN CONTINUOUS TRAINING PROGRAMS FOR AGENTS IN TECHNIQUES OF CHILD PORNOGRAPHY INVESTIGATIONS.

58. FEDERAL LAW ENFORCEMENT AGENCIES SHOULD HAVE PERSONNEL TRAINED IN CHILD PORNOGRAPHY INVESTIGATION AND WHEN POSSIBLE THEY SHOULD FORM SPECIALIZED UNITS FOR CHILD SEXUAL ABUSE AND CHILD PORNOGRAPHY INVESTIGATION.

59. FEDERAL LAW ENFORCEMENT AGENCIES SHOULD USE SEARCH WARRANTS IN CHILD PORNOGRAPHY AND RELATED
CASES EXPEDITIOUSLY AS A MEANS OF GATHERING EVIDENCE AND FURTHERING OVERALL INVESTIGATION EFFORTS IN THE CHILD PORNOGRAPHY AREA.

60. FEDERAL LAW ENFORCEMENT AGENTS SHOULD ASK THE CHILD VICTIM IN REPORTED CHILD SEXUAL ABUSE CASES IF PHOTOGRAPHS OR FILMS WERE MADE OF HIM OR HER DURING THE COURSE OF SEXUAL ABUSE.

61. THE DEPARTMENT OF JUSTICE SHOULD APPOINT A NATIONAL TASK FORCE TO CONDUCT A STUDY OF CASES THROUGHOUT THE UNITED STATES REFLECTING APPARENT PATTERNS OF MULTI-VICTIM, MULTI-PERPETRATOR CHILD SEXUAL EXPLOITATION.

D. RECOMMENDATIONS FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES

62. LOCAL LAW ENFORCEMENT AGENCIES SHOULD PARTICIPATE IN THE LAW ENFORCEMENT COORDINATING COMMITTEES TO FORM REGIONAL TASK FORCES OF DEDICATED AND EXPERIENCED INVESTIGATORS AND PROSECUTORS TO COMBAT CHILD PORNOGRAPHY.

63. STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD DEVELOP AND MAINTAIN CONTINUOUS TRAINING PROGRAMS FOR OFFICERS IN IDENTIFICATION, APPREHENSION, AND UNDERCOVER TECHNIQUES OF CHILD PORNOGRAPHY INVESTIGATIONS.

64. STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD PARTICIPATE IN A NATIONAL DATA BASE ESTABLISHED TO SERVE AS A CENTER FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES TO SUBMIT AND RECEIVE INFORMATION REGARDING CHILD PORNOGRAPHY TRAFFICKING.

65. STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD HAVE PERSONNEL TRAINED IN CHILD PORNOGRAPHY INVESTIGATION AND, WHEN POSSIBLE, THEY SHOULD FORM SPECIALIZED UNITS FOR CHILD SEXUAL ABUSE AND CHILD PORNOGRAPHY INVESTIGATIONS.

66. STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD USE SEARCH WARRANTS IN CHILD SEXUAL EXPLOITATION CASES EXPEDITIOUSLY AS A MEANS OF GATHERING EVIDENCE AND FURTHERING OVERALL INVESTIGATION EFFORT IN THE CHILD PORNOGRAPHY AREA.

67. STATE AND LOCAL LAW ENFORCEMENT OFFICERS
SHOULD ASK THE CHILD VICTIM IN REPORTED CHILD SEXUAL ABUSE CASES IF PHOTOGRAPHS OR FILMS WERE MADE OF HIM OR HER DURING THE COURSE OF SEXUAL ABUSE.

E. RECOMMENDATIONS FOR PROSECUTORS

68. THE UNITED STATES DEPARTMENT OF JUSTICE SHOULD DIRECT UNITED STATES ATTORNEYS TO PARTICIPATE IN LAW ENFORCEMENT COORDINATING COMMITTEE TASK FORCES TO COMBAT CHILD PORNOGRAPHY.

69. FEDERAL, STATE, AND LOCAL PROSECUTORS SHOULD PARTICIPATE IN A TASK FORCE OF MULTI-DISCIPLINARY PRACTITIONERS AND DEVELOP A PROTOCOL FOR COURTROOM PROCEDURES FOR CHILD WITNESSES THAT WOULD MEET CONSTITUTIONAL STANDARDS.

70. PROSECUTORS SHOULD ASSIST STATE, LOCAL, AND FEDERAL LAW ENFORCEMENT AGENCIES TO USE SEARCH WAR- RANTS IN POTENTIAL CHILD PORNOGRAPHY AND RELATED CHILD SEXUAL ABUSE CASES.

71. STATE, LOCAL, AND FEDERAL PROSECUTORS SHOULD ASK THE CHILD VICTIM IN REPORTED CHILD SEXUAL ABUSE CASES IF PHOTOGRAPHS OR FILMS WERE MADE OF HIM OR HER DURING THE COURSE OF SEXUAL ABUSE.

72. STATE AND LOCAL PROSECUTORS SHOULD USE THE VERTICAL PROSECUTION MODEL IN CHILD PORNOGRAPHY AND RELATED CASES.

F. RECOMMENDATIONS FOR THE JUDICIARY AND CORRECTIONAL FACILITIES

73. JUDGES AND PROBATION OFFICERS SHOULD RECEIVE SPECIFIC EDUCATION SO THEY MAY INVESTIGATE, EVALUATE, SENTENCE AND SUPERVISE PERSONS CONVICTED OF CHILD PORNOGRAPHY AND RELATED CASES APPROPRIATELY.

74. JUDGES SHOULD IMPOSE APPROPRIATE PERIODS OF INCARCERATION FOR CONVICTED CHILD PORNOGRAPHERS AND RELATED OFFENDERS.

75. JUDGES SHOULD USE, WHEN APPROPRIATE, A SENTENCE OF LIFETIME PROBATION FOR CONVICTED CHILD PORNOGRAPHERS.

76. PRE-SENTENCE REPORTS CONCERNING INDIVIDUALS FOUND GUILTY OF VIOLATIONS OF CHILD PORNOGRAPHY OR
RELATED LAWS SHOULD BE BASED ON SOURCES OF INFORMATION IN ADDITION TO THE OFFENDER HIMSELF OR HERSELF. 77. STATE AND FEDERAL CORRECTIONAL FACILITIES SHOULD RECOGNIZE THE UNIQUE PROBLEMS OF CHILD PORNOGRAPHERS AND RELATED OFFENDERS AND DESIGNATE APPROPRIATE PROGRAMS REGARDING THEIR INCARCERATION.

78. FEDERAL, STATE, AND LOCAL JUDGES SHOULD PARTICIPATE IN A TASK FORCE OF MULTI-DISCIPLINARY PRACTITIONERS AND DEVELOP A PROTOCOL FOR COURTROOM PROCEDURES FOR CHILD WITNESSES THAT WOULD MEET CONSTITUTIONAL STANDARDS.

G. RECOMMENDATIONS FOR PUBLIC AND PRIVATE SOCIAL SERVICE AGENCIES

79. PUBLIC AND PRIVATE SOCIAL SERVICE AGENCIES SHOULD PARTICIPATE IN A TASK FORCE OF MULTI-DISCIPLINARY PRACTITIONERS AND DEVELOP A PROTOCOL FOR COURTROOM PROCEDURES FOR CHILD WITNESSES THAT WOULD MEET CONSTITUTIONAL STANDARDS.

80. SOCIAL, MENTAL HEALTH AND MEDICAL SERVICES SHOULD BE PROVIDED FOR CHILD PORNOGRAPHY VICTIMS.

81. LOCAL AGENCIES SHOULD ALLOCATE FUNDS TO VICTIMS OF CRIMES TO PROVIDE MONIES FOR PSYCHIATRIC EVALUATION AND TREATMENT AND MEDICAL TREATMENT OF CHILD PORNOGRAPHY VICTIMS AND THEIR FAMILIES.

82. CLINICAL EVALUATORS SHOULD BE TRAINED MORE EFFECTIVELY TO ASSIST CHILDREN WHO HAVE BEEN VICTIMIZED THROUGH THE PRODUCTION AND USE OF CHILD PORNOGRAPHY AND TO BETTER UNDERSTAND ADULT PSYCHOSEXUAL DISORDERS.

83. BEHAVIORAL SCIENTISTS SHOULD CONDUCT RESEARCH TO DETERMINE THE EFFECTS OF THE PRODUCTION OF CHILD PORNOGRAPHY AND THE RELATED VICTIMIZATION OF CHILDREN.

84. STATES SHOULD SUPPORT AGE APPROPRIATE EDUCATION AND PREVENTION PROGRAMS FOR PARENTS, TEACHERS AND CHILDREN WITHIN PUBLIC AND PRIVATE SCHOOL SYSTEMS TO PROTECT CHILDREN FROM VICTIMIZATION BY CHILD PORNOGRAPHERS AND CHILD SEXUAL ABUSERS.

85. A MULTI-MEDIA EDUCATIONAL CAMPAIGN SHOULD BE
DEVELOPED WHICH INCREASES FAMILY AND COMMUNITY AWARENESS REGARDING CHILD SEXUAL EXPLOITATION THROUGH THE PRODUCTION AND USE OF CHILD PORNOGRAPHY.

III. VICTIMIZATION

86. STATE, COUNTY AND MUNICIPAL GOVERNMENTS SHOULD FACILITATE THE DEVELOPMENT OF PUBLIC AND PRIVATE RESOURCES FOR PERSONS WHO ARE CURRENTLY INVOLVED IN THE PRODUCTION OR CONSUMPTION OF PORNOGRAPHY AND WISH TO DISCONTINUE THIS INVOLVEMENT AND FOR THOSE WHO SUFFER MENTAL, PHYSICAL, EDUCATIONAL, OR EMPLOYMENT DISABILITIES AS A RESULT OF EXPOSURE TO OR PARTICIPATION IN THE PRODUCTION OF PORNOGRAPHY.

87. LEGISLATURES SHOULD CONDUCT HEARINGS AND CONSIDER LEGISLATION RECOGNIZING A CIVIL REMEDY FOR HARMs ATTRIBUTABLE TO PORNOGRAPHY.

V. "ADULTS ONLY" PORNOGRAPHIC OUTLETS

88. "ADULTS ONLY" PORNOGRAPHIC OUTLET PEEP SHOW FACILITIES WHICH PROVIDE INDIVIDUAL BOOTHs FOR VIEWING SHOULD NOT BE EQUIPPED WITH DOORS. THE OCCUPANT OF THE BOOTH SHOULD BE CLEARLY VISIBLE TO ELIMINATE A HAVEN FOR SEXUAL ACTIVITY.

89. HOLES ENABLING INTERBOOTH SEXUAL CONTACT BETWEEN PATRONS SHOULD BE PROHIBITED IN THE PEEP SHOW BOOTHs.

IV. CIVIL RIGHTS

90. BECAUSE OF APPARENT HEALTH HAZARDS POSED BY THE OUTLET ENVIRONMENT GENERALLY, AND THE PEEP SHOW BOOTH IN PARTICULAR, SUCH FACILITIES SHOULD BE SUBJECT TO PERIODIC INSPECTION AND LICENSING BY APPROPRIATE GOVERNMENTAL AGENTS.

91. ANY FORM OF INDECENT ACT BY OR AMONG "ADULTS ONLY" PORNOGRAPHIC OUTLET PATRONS SHOULD BE UNLAWFUL.

92. ACCESS TO "ADULTS ONLY" PORNOGRAPHIC OUTLETS SHOULD BE LIMITED TO PERSONS OVER THE AGE OF
EIGHTEEN.*

* 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY FINAL REPORT 433-58 (July 1986).