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CHAPTER I

INTRODUCTION

1.1 The Commission and Its Mandate

The Attorney General's Commission on Pornography (referred to throughout this Report as "The Commission") was established pursuant to the Federal Advisory Committee Act[1] on February 22, 1985 by then Attorney General of the United States William French Smith, at the specific request of President Ronald Reagan. Notice of the formation of The Commission, as required by Section 9(c) of the Federal Advisory Committee Act, was given to both Houses of Congress and to the Library of Congress on March 27 and March 28, 1985. On May 20, 1985, Attorney General Edwin Meese III publicly announced formation of the Commission and the names of its eleven members, all of whom served throughout the duration of the Commission's existence.

The formal mandate of The Commission is contained in its Charter, which is attached to this Report as an appendix. In accordance with that Charter, we were asked to "determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." Our scope was undeniably broad,

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1. 5 U.S.C. App.2, 86 Stat. 770 (1972), as amended by 90 Stat. 1241, 1247 (1976).

including the specific mandate to "study . . . the dimensions of the problem of pornography," to "review . . . the available empirical evidence on the relationship between exposure to pornographic materials and antisocial behavior," and to explore "possible roles and initiatives that the Department of Justice and agencies of local, State, and federal government could pursue in controlling, consistent with constitutional guarantees, the production and distribution of pornography."

Because we are a commission appointed by the Attorney General, whose responsibilities are largely focused on the enforcement of the law, issues relating to the law and to law enforcement have occupied a significant part of our hearings, our deliberations, and the specific recommendations that accompany this Report. That our mandate from the Attorney General involves a special concern with enforcement of the law, however, should not indicate that we have ignored other aspects of the issue. Although we have tried to concentrate on law enforcement, we felt that we could not adequately address the issue of pornography, including the issue of enforcement of laws relating to pornography, unless we looked in a larger context at the entire phenomenon of pornography. As a result, we have tried to examine carefully the nature of the industry, the social, moral, political, and scientific concerns relating to or purportedly justifying the regulation of that industry, the relationship between law enforcement and other methods of social control, and a host of other topics that are inextricably linked with law enforcement issues. These various topics are hardly congruent with the issue

of law enforcement, however, and thus it has been necessarily the case that issues other than law enforcement in its narrowest sense have been before us. In order that this Report accurately reflect what we thought about and what we felt to be important, we have included in the Report our findings and recommendations with respect to many issues that are related to but not the same as law enforcement.

For similar reasons, we have been compelled to consider substantive topics not, strictly speaking, specified exactly in our charter. A few examples ought to make clear the problems that surround trying to consider an issue that itself has no clear boundaries: We have heard testimony and considered the relationship between the porhography industry and organized crime, and this has forced us to consider the nature of organized crime itself; we have examined the evidence regarding the relationship between pornography and certain forms of anti-social conduct, and this has necessitated thinking about those other factors that might also be causally related to anti-social conduct, and about just what conduct we consider anti-social; we have thought about child pornography, and this has caused us to think about child abuse; and we have, in the course of thinking about the relationship between pornography and the family, thought seriously about the importance of the family in contemporary America. This list of examples is hardly exhaustive. We mention them here, however, only to show that our inquiry could not be and has not been hermetically sealed. But we all feel that what we may have lost in focus has more than

been compensated for in the richness of our current contextual understanding of the issue of pornography.

1.2 The Work of the Commission

We have attempted to conduct as thorough an investigation as our severe budgetary and time constraints permitted. The budgetary constraints have limited the size of our staff, and have prevented us from commissioning independent research. We especially regret the inability to commission independent research, because in many cases our deliberations have enabled us to formulate issues, questions, and hypotheses in ways that are either more novel or more precise than those reflected in the existing thinking about this subject, yet our budgetary constraints have kept us from testing these hypotheses or answering these questions. In numerous places throughout this report we have urged further research, and we often recommend that research take place along specific lines. We hope that our suggestions will be taken up by researchers. Neither this Report nor any other should be taken as definitive and final, and we consider our suggestions for further research along particular lines to be one of the most important parts of this document.

The time constraints have also been significant. We all wish we could have had much more time for continued discussion among ourselves, as the process of deliberation among people of different backgrounds, different points of view, and different areas of expertise has been perhaps the most fruitful part of our task. Yet we have been required to produce a report within a

year of our creation as a Commission, and our ability to meet together has been limited by the budgetary constraints just referred to, as well as by the fact that all of us have responsibilities to our jobs, our careers, and to our families that make it impossible to suspend every other activity in which we are engaged for the course of a year.

Despite these limitations, we have attempted to be as careful and as thorough as humanly possible within the boundaries of these constraints. We thought it especially important to hear from as wide a range of perspectives as possible, and as a result held public hearings in Washington, D.C,. from June 18 to 20, 1985; in Chicago, Illinois, from July 23 to 25, 1985; in Houston, Texas, from September 10 to 12, 1985; in Los Angeles, California, from October 15 to 18, 1985; in Miami, Florida, from November 20 to 22, 1985; and in New York City from January 21 to 24, 1986. With the exception of the initial hearing in Washington, each of the hearings had a central theme, enabling us to hear together those people whose testimony related to the same issue. Thus the hearings in Chicago focused on the law, law enforcement, and the constraints of the First Amendment; in Houston we concentrated on the behavioral sciences, hearing from psychologists, psychiatrists, sociologists, and others who have been clinically or experimentally concerned with examining the relationship between pornography and human behavior; in Los Angeles our primary concern was the production side of the industry, and we heard testimony from those who were knowledgeable about or involved in the process of producing, distributing, and marketing

pornographic materials; in Miami most of our time was spent dealing with the issue of child pornography, and we heard from people who in either their professional or personal capacities had familiarity with the creation, consequences, or legal control of child pornography; and in New York we heard about organized crime and its relationship with the production, distribution, and sale of pornographic materials.

Although these hearings each had their specific concentration, we also attempted to hear people throughout the country who wished to address us on these issues, and one of the reasons for conducting hearings in different cities in various parts of the country was precisely to give the greatest opportunity for the expression of views by members of the public. Time did not permit us to hear everyone who desired to speak to us, but we have tried as best we could to allow a large number of people to provide information and to express their opinions. The information provided and the opinions expressed represented a wide range of perspectives and views on the issues before us. Many of the people appearing before us were professionals, who because of their training and experiences could enlighten us on matters that would otherwise have been beyond our knowledge. Many people represented particular points of view, and we are glad that varying positions have been so ably presented to us. And many others have been members of the public who only wished to represent themselves, relating either points of view or personal experiences. All of this testimony has been valuable, although we recognize its limitations. These limitations will be

discussed throughout this report, although there is one that deserves to be highlighted in this introductory section. That is the distortion that has been the inevitable consequence of the fact that some pornography is illegal, and much pornography is, regardless of legality or illegality, still considered by many people to be harmful, offensive, or in some other way objectionable. As a result, legal as well as social constraints may distort the sample, in that they severely limit the willingness of many people to speak publicly in favor of pornography. This phenomenon may have been somewhat counterbalanced by the financial resources available to many of those from the publishing and entertainment industries who warned us of the dangers of any or most forms of censorship. But the point remains that various dynamics are likely to skew the sample available to us. In evaluating the oral evidence, we have thus been mindful of the fact that the proportion of people willing to speak out on a particular subject, and from a particular point of view, may not be a fully accurate barometer of the extent that certain views are in fact held by the population at large.

Many of the limitations that surround oral testimony lessen considerably when written submissions are used, and we have made every effort to solicit written submissions both from those who testified before us and from those who did not. We have relied heavily on these, in part because they represent the views of those who could not testify before us, and in part because they frequently explored issues in much greater depth than would be possible in a brief period of oral testimony.

The written submissions we received constitute but a miniscule fraction of all that has been written about pornography. While it would not be accurate to say that each of us has read all or even a majority of the available literature, we have of course felt free to go beyond the written submissions and consult that which has been published on the subject, and much of what is contained in this report is a product of the fact that many thoughtful people have been contemplating the topic of pornography for a long time. To ignore this body of knowledge would be folly, and we have instead chosen to rely on more information rather than less.

We could not have responsibly conducted our inquiry without spending a considerable period of time examining the materials that constitute the subject of this entire endeavor. Engaging in this part of our task has been no more edifying for us than it is for those judges who have the constitutional duty to review materials found at trial to be legally obscene.[2] Obviously, however, it was an essential part of our job, and many witnesses provided to us for examination during our hearings and deliberations samples of motion pictures, video tapes, magazines, books, slides, photographs, and other media containing sexually

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2. "[W]e are tied to the 'absurd business of perusing and viewing the miserable stuff that pours into the Court . . . .' Interstate Circuit, Inc. v. Dallas, 390 U.S., at 707 (separate opinion of Harlan, J.). While the material may have varying degrees of social importance, it is hardly a source of edification to the members of this Court who are compelled to view it before passing on its obscenity." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92-93 (1973) (Brennan, J., dissenting).

explicit material in all of its varied forms. In addition, when in Houston we visited three different establishments specializing in this material, and in that way were able to supplement the oral and written testimony with our own observations of the general environment in which materials of this variety are frequently sold.

In addition to our public hearings, we have also had public working sessions devoted to discussing the subject, our views on it, and possible findings, conclusions, and recommendations. These working sessions occupied part of our time when we were in Houston, Los Angeles, Miami, and New York, and in addition we met solely for these purposes in Scottsdale, Arizona from February 26 to March 1, 1986, and in Washington, D.C. from April 29 to May 2, 1986. As we look back on these sessions, there is little doubt that we have all felt the constraints of deliberating in public. It can hardly be disputed that the exploration of tentative ideas is more difficult when public exposure treats the tentative as final, and the question as a challenge. Still, we feel that we have explored a wide range of points of view, and an equally wide range of vantage points from which to look at the problem of pornography. As with any inquiry, more could be done if there were more time, but we are all satisfied with the depth and breadth of the inquiries in which we have engaged. When faced with shortages of time, we have chosen to say here less then we might have been able to say had we had more time for our work, but we are convinced that saying no more than our inquiries and deliberations justify is vastly preferable to paying for time

shortages in the currency of quality or the currency of accuracy. Thus, given the many constraints we operated under, we believe this Report adequately reflects both those constraints and the thoroughness with which we have attempted to fulfill our mandate.

Finally, we owe thanks to all those who have assisted us in our work. Although in another part of this Report we express our gratitude more specifically, we wish here to note our appreciation to an extraordinarily diligent staff, to numerous public officials and private citizens who have spent much of their own time and their own money to provide us with information, and especially to a large number of witnesses who appeared before us at great sacrifice and often at the expense of having to endure great personal anguish. To all of these people and others, we give our thanks, and we willingly acknowledge that we could not have completed our mission without them.

1.3 The 1970 Commission on Obscenity and Pornography

Our mission and our product will inevitably be compared with the work of the President's Commission on Obscenity and Pornography, which was created in 1967, staffed in 1968, and which reported in 1970. Some of the differences between the two enterprises relate to structural aspects of the inquiry. The 1970 Commission had a budget of $2,000,000 and two years to complete its task. We had only one year, and a budget of $400,000. Taking into account the changing value of the

dollar,[3] the 1970 Commission had a budget sixteen times as large as ours, yet held only two public hearings. We do not regret having provided the opportunity for such an extensive expression of opinion, but it has even further depleted the extremely limited resources available to us.

In addition to differences in time, budget, and staffing, there are of course differences in perspective. Although the work of the 1970 Commission has provided much important information for us, all of us have taken issue with at least some aspects of the earlier Commission's approach, and all of us have taken issue with at least some of the earlier Commission's conclusions. We have tried to explain our differences throughout this Report, but it would be a mistake to conclude that we saw our mission as reactive to the work of others sixteen years earlier. In sixteen years the world has seen enormous technological changes that have affected the transmission of sounds, words, and images. Few aspects of contemporary American society have not been affected by cable television, satellite communication, videotape recording, the computer, and competition in the telecommunications industry. It would be surprising to discover that these technological developments have had no effect on the production, distribution, and availability of pornography, and we have not been surprised. These technological developments have themselves caused such significant changes in the practices

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3. Taking 1967, the date of creation of the 1970 Commission, as the base year, the dollar at the end of 1984, five months before this Commission commenced work, was worth $0.31.

relating to the distribution of pornography that the analysis of sixteen years ago is starkly obsolete. Nor have the changes been solely technological. In sixteen years there have been numerous changes in the social, political, legal, cultural, and religious portrait of the United States, and many of these changes have undeniably involved both sexuality and the public portrayal of sexuality. With reference to the question of pornography, therefore, there can no doubt that we confront a different world than that confronted by the 1970 Commission.

Perhaps most significantly, however, studying an issue that was last studied in the form of a national commission sixteen years ago seems remarkably sensible even apart from the social and technological changes that relate in particular to the issue of pornography. Little in modern life can be held constant, and it would be strikingly aberrational if the conclusions of one commission could be taken as having resolved an issue for all time. The world changes, research about the world changes, and our views about how we wish to deal with that world change. Only in a static society would it be unwise to reexamine periodically the conclusions of sixteen years earlier, and we do not live in a static society. As we in 1986 reexamine what was done in 1970, so too do we expect that in 2002 our work will similarly be reexamined.

We do not by saying this wish to minimize the fact that we are different people from those who studied this issue sixteen years ago, that we have in many cases different views, and that we have

in a number of respects reached different conclusions. Whether this Commission would have been created had the 1970 Commission reached different conclusions is not for us to say. But we are all convinced that the creation of this Commission at this time is entirely justified by the difference between this world and that of 1970, and we have set about our task with that in mind.

1.4 Defining Our Central Terms

Questions of terminology and definition have been recurring problems in our hearings and deliberations. Foremost among these definitional problems is trying to come up with some definition for the word "pornography." The range of materials to which people are likely to affix the designation "pornographic" is so broad that it is tempting to note that "pornography" seems to mean in practice any discussion or depiction of sex to which the person using the word objects. But this will not do, nor will an attempt to define "pornography" in terms of regulatory goals or condemnation. The problem with this latter strategy is that it channels the entire inquiry into a definitional question, when it would be preferable first to identify a certain type of material, and then decide what, if anything, should be done about it. We note that this strategy was that adopted by the Williams Committee in Great Britain several years ago,[4] which defined pornography as a description or depiction of sex involving the dual characteristics of (1) sexual explicitness; and (2) intent

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4. Report of the Home Office Committee on Obscenity and Film Censorship (Bernard Williams, Chairman) (1978).

to arouse sexually.

Although definitions of the sort adopted by the Williams Committee contain an admirable dose of analytic purity, they unfortunately do not reflect the extent to which the appellation "pornography" is undoubtedly pejorative. To call something "pornographic" is plainly, in modern usage, to condemn it, and thus the dilemma is before us. If we try to define the primary term of this inquiry at the outset in language that is purely descriptive, we will wind up having condemned a wide range of material that may not deserve condemnation. But if on the other hand we incorporate some determination of value into our definition, then the definition of pornography must come at the end and not the beginning of this report, and at the end and not at the beginning of our inquiry. Faced with this dilemma, the best course may be that followed by the Fraser Committee in Canada,[5] which decided that definition was simply futile. We partially follow this course, and pursuant to that have tried to minimize the use of the word "pornography" in this Report. Where we do use the term, we do not mean for it to be, for us, a statement of a conclusion, and thus in this Report a reference to material as "pornographic" means only that the material is predominantly sexually explicit and intended primarily for the purpose of sexual arousal. Whether some or all of what qualifies as pornographic under this definition should be prohibited, or

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5. Report of the Special Committee on Pornography and Prostitution (Paul Fraser, Q.C., Chairman) (1985).

even condemned, is not a question that should be answered under the guise of definition.

If using the term "pornography" is problematic, then so too must be the term "hard core pornography." If we were forced to define the term "hard core pornography," we would probably note that it refers to the extreme form of what we defined as pornography, and thus would describe material that is sexually explicit to the extreme, intended virtually exclusively to arouse, and devoid of any other apparent content or purpose. This definition may not be satisfactory, but we all feel after our work on this Commission that the late Justice Stewart was more correct than he is commonly given credit for having been in saying of hard core pornography that although he could not define it, "I know it when I see it."[6] But although we are inclined to agree with Justice Stewart, we regrettably note that the range of material to which witnesses before us have applied this term is far broader than we would like, and we therefore conclude that careful analysis will be served if we use this term less rather than more.

Trying to define the word "obscenity" is both more and less difficult. It is more difficult because, unlike the word "pornography," the word "obscenity" need not necessarily suggest anything about sex at all. Those who would condemn a war as "obscene" are not misusing the English language, nor are those

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6. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart. J., concurring).

who would describe as "obscene" the number of people killed by intoxicated drivers. Given this usage, the designation of certain sexually explicit material as "obscene" involves a judgment of moral condemnation, a judgment that has led for close to two hundred years to legal condemnation as well. But although the word "obscene" is both broader than useful here as well as being undeniably condemnatory, it has taken on a legal usage that is relevant in many places in this Report. As a result, we will here use the words "obscene" and "obscenity" in this narrower sense, to refer to material that has been or would likely be found to be obscene in the context of a judicial proceeding employing applicable legal and constitutional standards. Thus, when we refer to obscene material, we need not necessarily be condemning that material, or urging prosecution, but we are drawing on the fact that such material could now be prosecuted without offending existing authoritative interpretations of the Constitution.

Numerous submissions to us have made reference to "erotica." It seems clear to us that the term as actually used is the mirror image of the broadly condemnatory use of "pornography," being employed to describe sexually explicit materials of which the user of the term approves. For some the word "erotica" describes any sexually explicit material that contains neither violence nor subordination of women, for others the term refers to almost all sexually explicit material, and for still others only material containing generally accepted artistic value qualifies as erotica. In light of this disagreement, and in light of the

tendency to use the term "erotica" as a conclusion rather than a description, we again choose to avoid the term wherever possible, preferring to rely on careful description rather than terms that obscure more than advance rational consideration of difficult issues.

Various other terms, usually vituperative, have been used at times, in our proceedings and elsewhere, to describe some or all sexually explicit materials. Such terms need not be defined here, for we find it hard to see how our inquiry is advanced by the use of terms like "smut" and "filth." But we have also encountered frequent uses of the term "X-rated," and a few words about that term are appropriate here. As will be discussed in detail in the section of this Report dealing with the production of sexually explicit materials, "X" is one of the ratings of the Motion Picture Association of America, a private organization whose ratings of films are relied upon by theaters and others to determine which films are or are not suitable for people of various ages. But the MPAA rating system is not a series of legal categories, and does not have the force of law. Although many films that carry either an "X" rating or no rating might be deemed to be legally obscene, many more would not, and it is plain that many X-rated films could not conceivably be considered legally obscene. Moreover, there is no plain connection between the words "pornographic" and "X-rated," and once again it seems clear that common usage would apply the term "pornography" to a class of films that overlaps with but is not identical to the class encompassed by the "X" rating. As a result, we avoid the

term "X-rated," except insofar as we are discussing in particular the category of materials so rated in the context of the purposes behind the MPAA rating system.

CHAPTER II

THE HISTORY OF PORNOGRAPHY

2.1 Pornography as Social Phenomenon

Descriptions of sex are as old as sex itself. There can be little doubt that talking about sex has been around as long as talking, that writing about sex has been around as long as writing, and that pictures of sex have been around as long as pictures. In this sense it is odd that historical treatments of pornography turn out to be historical treatments of the regulation, governmental or otherwise, of pornography. To understand the phenomenon of pornography it is necessary to look at the history of the phenomenon itself, prior to or at least distinct from the investigation of the practice of restricting it. Some works on the history of sexual behavior, eroticism, or erotic art help to serve this goal, but the history of pornography still remains to be written. Commissioning independent historical research was far beyond our mandate, our budget, and our time constraints, yet we do not wish to ignore history entirely. We feel it appropriate to offer the briefest overview here, but we urge as well that more comprehensive historical study be undertaken.

The use of comparatively explicit sexual references for the purposes of entertainment or arousal is hardly a recent phenomenon. Greek and Roman drama and poetry was frequently highly specific, and the works of Aristophanes, Catullus, Horace,

and Ovid, to name just a few, contain references to sexual activity that, by the standards of the time, are highly explicit. Scenes of intercourse have been found on the walls of the brothel at Pompeii, and the Roman sculptural representations of the god Priapus are as bawdy as Aubrey Beardsley's most explicit drawings. Obviously the explicitness of the past must be viewed in light of the times, and there is no question but that the works of Aristophanes are less shocking to our contemporary vision than are some of the materials currently shown in adult theaters. Yet to ask what the Romans would have thought about "Deep Throat" is akin to asking what the Romans would have thought about helicopters. The more useful historical question is whether highly explicit sexuality for the times was a part of the literature and discourse of the times, and the answer to that question is plainly "yes."

Similar observations can be made about later historical periods and about other cultures. The Thousand and One Nights and the Kamasutra are but examples of the fact that numerous eastern cultures also have a long history of comparatively explicit depictions and descriptions of sexuality. In western cultures the explicit treatment of sex continued through modern history. Whether in the form of the medieval bawdy ballads and poems of Chaucer, Dunbar, and others, or in the form of the French farces of the fourteenth and fifteenth centures, or in the form of the art and poetry of Renaissance Florence, or in the form of Elizabethan ballads and poetry, sexuality, and quite explicit sexuality at that, was a recurrent theme in drama, in

poetry, in song, and in art.

We can be fairly certain that sexually explicit descriptions and depictions have been around in one form or another almost since the beginning of recorded history, and we can also be fairly certain that its regulation by law in a form resembling contemporary regulation of sexually explicit materials is a comparatively recent phenomenon. It is difficult, however, to draw useful conclusions from this aspect of the history. For one thing, until the last several hundred years, almost all written, drawn, or printed material was restricted largely to a small segment of the population that undoubtedly constituted the social elite. The drama of the classical age was frequently highly sexually explicit, or at least suggestive, but its audience tended to be limited to the wealthiest, best educated, and most powerful members of society. And of course the historical or universal presence of a phenomenon need not justify permitting its continuation. Slavery was a central fixture of much of the past, and warfare and ethnocentricity are as nearly universal as sexually explicit depictions, but the sensitivities of most cultures demand that such practices be discouraged.

In addition, it is a mistake to draw too many conclusions about social tolerance and social control from the presence or absence of laws or law enforcement practices. There is little indication that sexual <u>conduct</u> was part of classical drama, and the very fact that many sexual references were veiled (however thinly) rather than explicit indicates that some sense of taboo

or social stigma has always been in most societies attached to public discussion of sexuality. Yet although some degree of inhibition obviously attached to public descriptions and depictions of sexual acts, it is equally clear that the extent of these inhibitions has oscillated throughout history. In somewhat cyclical fashion, social tolerance of various practices has been at times limited and at times extensive. To conclude that inhibition, in some form or another, of public discussion and representations of sexual practices is a totally modern phenomenon is to overstate the case and to misinterpret the evidence from earlier times. But to assume that public discussions and descriptions of sexuality were, prior to 1850, always as inhibited as they were in English speaking countries from 1850 to 1950 is equally mistaken.

We have mentioned here the early history of pornography in large part to encourage thinking about sexually explicit material as social phenomenon as well as object of governmental regulation. Although our task is largely to think about laws and law enforcement, we know that thinking about law requires thinking as well about the social foundations of the practice involved. Most historical study to date has not been about the social practice of pornography, but largely about control of that social practice by government. If the use of sexually explicit material is to be understood fully, the scope of thinking about the issue should be broadened substantially.

2.2 Regulation and the Role of Religion

When earlier social inhibitions about public descriptions and depictions of sexuality and sexual practices came to be enforced by law, it was largely in the context of religious rather than secular concerns. Moreover, the earliest enforcement efforts were directed not against descriptions or depictions of sex itself, but only against such depictions when combined with attacks on religion or religious authorities.

This phenomenon of regulation in defense of religion rather than in defense of decency can be seen by the tolerance, at least in European cultures, of secular bawdiness up to the middle of the seventeenth century. Although many European countries rigidly controlled written and printed works from medieval times through the seventeenth century, this control was exercised only in the name of religion and politics, and not in the name of decency. In one legal form or another, and in secular as well as ecclesiastical tribunals, heresy, blasphemy, treason, and sedition were all severely sanctioned, but sexually explicit representations alone were rarely treated as a matter justifying punishment or restraint. Perhaps the best example of this phenomenon was the action of the Council of Trent in 1573, when it permitted publication of a version of Boccacio's Decameron in which the sinning priests and nuns were converted into sinning members of the laity.

If we focus on England, from which our legal system emerged, it is commonly acknowledged that sexuality itself was not treated as a matter for governmental legal concern until 1663. That year

saw the conviction in London of Sir Charles Sedley, but the activity for which he was convicted hardly looks like a case involving pornography.[1] Instead, Sedley was convicted of the crime of committing a breach of the peace for getting drunk, removing his clothes, uttering profane remarks, and pouring urine on the crowd below the tavern balcony on which he was standing at the time. Although Sedley's profane remarks included words, there seems little doubt that he would have been convicted even had he remained silent. The significance of this case, therefore, lies in the fact that mere indecent behavior, absent any attack on religion, and absent any challenge to secular authority, was for the first time perceived to be something deserving of governmental involvement. Prior to Sedley's case, government stepped in to protect the person and his property, to protect the authority of the state, and to protect the church. With Sedley's case came the beginning of a broader range of governmental concerns, and thus Sedley's case is properly seen as the precursor of most modern regulation of sexually explicit materials.

Even after Sedley's case, the common law was hardly eager to come to the defense of decency. Throughout the seventeenth and eighteenth centuries, common law courts in England were only occasionally asked to take action against the kind of material that would then have been considered pornographic. Even when

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1. King v. Sedley, 1 Keble 620 (K.B.), 83 Eng. Rep. 1146 (1663).

asked, the courts were often reluctant to respond. In 1708, for example, James Read was indicted in London for publishing an extremely explicit book entitled The Fifteen Plagues of a Maidenhead. The Queen's Bench court, however, dismissed the indictment, and Lord Justice Powell's statement provides an apt summary of the general reaction of the law to sexually explicit materials until very late in the eighteenth century:

"This is for printing bawdy stuff but reflects on no person, and a libel must be against some particular person or persons, or against the Government. It is stuff not fit to be mentioned publicly; if there should be no remedy in the Spiritual Court, it does not follow there must be a remedy here. There is no law to punish it, I wish there were, but we cannot make law; it indeed tends to the corruption of good manners, but that is not sufficient for us to punish."[2]

Not all of the common law reaction to sexual explicitness absent religious blasphemy was the same. In 1727 Edmund Curll was convicted for corrupting public morals on account of his publication of Venus in the Cloister, or the Nun in Her Smock,[3] and the Crown's attack on John Wilkes, largely on the basis of

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2. Queen v. Read, Fortescue's Reports 98, 92 Eng. Rep. 777 (1708).

3. Dominus Rex v. Curll, 2 Str. 789, 93 Eng. Rep. 849 (1727). Because the religious aspects of this book were anti-Catholic, it seems safe to conclude that protection of religion was no part of the governmental desire to indict or to convict.

his activities as political dissident, included prosecution for publishing his highly explicit Essay on Woman.[4] Yet at about the same time, in 1748 to be exact, the publication of John Cleland's Memoirs of a Woman of Pleasure, better known as Fanny Hill, took place without either public outcry or governmental intervention.

The history of the English experience with sexually explicit materials is largely paralleled by the experiences in other European countries, and in the English colonies, including those in North America. As the world entered the nineteenth century, it remained the case that in most of the world there was greater tolerance for sexually explicit writing, printing, and drawing than there would be fifty years later, and that governmental action against spoken, written, or printed materials remained largely devoted to protecting the authority of the state and to protecting the integrity and values of religion.

2.3 Obscenity Law - The Modern History

As indicated in the previous section, there were traces of legal concern with decency itself in the eighteenth century, but these were little more than traces. If one is searching for the roots of modern American obscenity law, one must look to the first half of the nineteenth century in both Great Britain and the United States. The impetus in Britain came initially from private organizations such as the Organization for the

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4. The King v. John Wilkes, 2 Wils. K.B. 151, 95 Eng. Rep. 737 (1764), 4 Burr. 2527, 98 Eng. Rep. 327 (1770).

Reformation of Manners and its successor the Society for the Suppression of Vice. As printing became increasingly economical, printed materials became more and more available to the masses. Thus, the kinds of sexually explicit material that had circulated relatively freely in England among the elite during the eighteenth century and earlier now became more readily available to everyone. With this increased audience came an increase in demand, and with the increased demand came an increased supply. As a result, the early part of the nineteenth century saw much greater production and circulation of material as sexually explicit as had been less widely circulated earlier. And because the audience was more broad-based, the material itself became not necessarily more explicit, but certainly briefer, simpler, and more straightforward.

These developments in England came at about the same time as general views about sexual morality, and especially about public sexual morality, were becoming increasingly stern. In an important sense, Victorianism preceded Victoria, and thus the initiatives of organizations like the Society for the Suppression of Vice found a receptive audience in the population at large, in government, and in the judiciary. Because private prosecution for criminal offenses was part of the English system of criminal justice at the time, the Society and others like it were able to commence their own criminal prosecutions, and their efforts from the early 1800s through the 1860s resulted in many prosecutions for obscene libel, as it had by then come to be called. Most of these prosecutions were successful, and by the 1860s there had

developed a well established practice of prosecuting people for distributing works perceived as immoral.

The 1800s also saw the development of more effective ways of printing drawings in one form or another for mass circulation, and saw as well the development of photography. Not surprisingly, printed materials with a sexual orientation came to include increasingly large amounts of pictorial material. This development not only increased the impact of the materials, and therefore the offensiveness to many of the materials, but also increased their accessibility. With literacy no longer a requirement for appreciation, the market demand increased, and so, consequently, did the supply. Legal reactions to the proliferation of pictorial materials, again largely inspired by the Society for the Suppression of Vice and similar organizations, included the Vagrancy Act of 1824, which provided criminal penalties for the publication of an indecent picture, as well as legislation enacted in 1853 directed primarily at the increasing importation into England of so-called "French postcards."

American developments were similar. Although prior to 1800 there existed colonial statutes and some common law cases seemingly inclusive of profanity or sexual immorality, again the plain intent of these laws, as well as their universal application, was only to that which was blasphemous or in some other way threatening to religion. Pure sexual explicitness, while often condemned, was not until after 1800 taken to be a

matter of governmental concern. After 1800, however, trends with respect to the type of material available and the audience to whom it was directed were quite similar to the trends in England. The reaction was also similar, and in Pennsylvania in 1815 the case of Commonwealth v. Sharpless[5] represented the first reported conviction in the United States for the common law crime of obscene libel. Massachusetts followed six years later, in the case of Commonwealth v. Holmes,[6] and at about the same time Vermont passed the country's first statute prohibiting the publication or distribution of obscene materials. Other states followed, and by the middle of the nineteenth century the production and distribution of obscene materials was a crime throughout most of the United States.

As in England, however, most of the enforcement impetus in the United States came from private organizations. Most prominent among these were the Watch and Ward Society in Boston and the New York Society for the Suppression of Vice. The New York Society for the Suppression of Vice, officially created in 1873, was largely the product of the efforts of Anthony Comstock, who crusaded actively from about that time until his death in 1915 for greater restrictions on indecent materials, and for more vigorous prosecution of the laws against them. Although he was also actively opposed to light literature, pool halls, lotteries,

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5. 2 Serg. & R. 91 (1815).

6. 17 Mass. 336 (1821).

gambling dens, popular magazines, weekly newspapers, contraception, and abortion, most of his energies were directed at sexually explicit magazines, books, and pictures. In large part his most vigorous efforts were directed at magazines like The National Police Gazette, and other generally non-artistic works. Although Comstock admitted that artistic or literary merit did not concern him if the material dealt with "lust," most prosecutions of the time were for compararatively unimportant works, a phenomenon that was to change in the early part of the twentieth century. Comstock was largely responsible for the enactment of the federal laws that still, with only comparatively minor modifications through the years, constitute the bulk of the federal laws dealing with obscene materials. And he himself, as a specially appointed agent of the Post Office Department, enthusiastically and vigorously enforced the law. Shortly before his death, he announced with pride that he had "convicted persons enough to fill a passenger train of sixty-one coaches, sixty coaches containing sixty passengers each and the sixty-first almost full. I have destroyed 160 tons of obscene literature."

Although Comstock's efforts were the most vigorous, the most extensive, and the most effective, similar initiatives took place throughout the United States during the latter part of the nineteenth century and the early part of the twentieth. The result of this had a profound effect on the nature of the industry, for throughout the first half of the twentieth century in the United States the market for sexually explicit materials was almost exclusively clandestine. During this period

prosecutions and legal developments surrounded the attempted and often successful actions against works now (and even then) commonly taken to be of plain literary or artistic merit. The law concerned itself not only with comparatively explicit works such as D.H. Lawrence's Lady Chatterley's Lover and James Joyce's Ulysses, but works containing suggestions of sexual immorality no more explicit than that in, for example, Theodore Dreiser's An American Tragedy. The Supreme Judicial Court of Massachusetts found this book to be obscene because "the seller of a book which contains passages offensive to the statute has no right to assume that children to whom the book might come would not read the obscene passages, or having read them, would continue to read on until the evil effects of the obscene passages were weakened or dissipated with the tragic denouement of the tale."[7]

With publications such as An American Tragedy and Esquire magazine[8] constituting the legal skirmishes, it was plain that truly sexually explicit material could not circulate openly, and in fact it did not for much of this century. It still existed, however, despite having been driven rather deeply underground. We discuss the more recent history of the production, distribution, and sale of truly explicit material at greater length in the appendix to this Report dealing with the nature of the industry in general, but it is important to note here that

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7. Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930).

8. Hannegan v. Esquire, 327 U.S. 146 (1946).

the existence of legal disputes about instream literary works did not mean that these works constituted the extent of what was available. So-called "stag films" were produced and distributed in a highly surreptitious fashion. Sales of pornographic pictures, magazines, and eight millimeter films took place through the mails as a result of advertisements in heavily guarded language, or through sales by someone who knew someone who knew someone else, or in some form or another "under the counter" in establishments primarily devoted to more accepted material. Until the 1960s, therefore, the law operated largely in two quite different roles. On the one hand, and more visible, were the prosecutions of books and films that contained substantial merit and were directed to and available to a general audience. But on the other hand were enforcement efforts against much more explicit material, distributed in much more surreptitious fashion, as to which serious constitutional or definitional issues never arose. It was not until the early 1960s, when the Supreme Court began actively to scrutinize the contents of material found to be obscene, that attempted prosecutions of unquestionably serious works largely withered, and that most of the legal battles concerned the kinds of material more commonly taken to be pornographic.

This active Supreme Court scrutiny had its roots in the 1957 case of Roth v. United States,[9] discussed at length in Chapter III of this Report, in which the First Amendment was first taken

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9. 354 U.S. 476 (1957).

to limit the particular works that could be found obscene. By the 1960s, cases such as Jacobellis v. Ohio[10] had made this close scrutiny a reality, and by 1966 the range of permissible regulation could properly be described as "minimal." In that year the Supreme Court decided the case of Memoirs v. Massachusetts,[11] which held that material could be restricted only if, among other factors, it was "utterly without redeeming social value." The stringency of this standard made legal restriction extraordinarily difficult, and shortly thereafter the Supreme Court made it even more difficult by embarking on a practice of reversing obscenity convictions with respect to a wide range of materials, many of which were quite explicit.[12] The result, therefore, was that by the late 1960s obscenity regulation became essentially dormant, with a consequent proliferation of the open availability of quite explicit materials. This trend was reinforced by the issuance in 1970 of the Report of the President's Commission on Obscenity and Pornography, which recommended against any state or federal restrictions on the material available to consenting adults. Although the Report was resoundingly rejected by President Nixon and by Congress, it nevertheless reinforced the tendency to withdraw legal restrictions in practice, which in turn was one of the factors contributing to a significant growth from the late

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10. 378 U.S. 184 (1964).

11. 383 U.S. 413 (1966).

12. E.g., Redrup v. New York, 386 U.S. 767 (1967).

1960s onward of the volume and explicitness of materials that were widely available.

The Supreme Court decisions of 1973, most notably Paris Adult Theatres I v. Slaton[13] and Miller v. California,[14] by reversing the "utterly without redeeming social value" standard and by making clear once again that the First Amendment did not protect anything and everything that might be sold to or viewed by a consenting adult, tended to recreate the environment in which obscenity regulation was a practical possibility. Since 1973, however, the extent of obscenity regulation has varied widely throughout the country. In some geographic areas aggressive prosecution has ended the open availability of most extremely explicit materials, but more commonly prosecution remains minimal, and highly explicit materials are widely available. Because the current situation is explored throughout this Report, and because it is described in detail in an appendix, we will go no further in this Chapter, whose primary purpose has been to put the present into historical perspective.

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13. 413 U.S. 49 (1973).

14. 413 U.S. 15 (1973).

CHAPTER III

THE CONSTRAINTS OF THE FIRST AMENDMENT

3.1 The Presumptive Relevance of the First Amendment

The subject of pornography is not coextensive with the subject of sex. Definitionally, pornography requires a portrayal, whether spoken, written, printed, photographed, sculpted, or drawn, and this essential feature of pornography necessarily implicates constitutional concerns that would not otherwise exist. The First Amendment to the Constitution of the United States provides quite simply that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Longstanding judicial interpretations make it now clear that this mandate is, because of the Fourteenth Amendment, applicable to the states as well,[1] and make it equally clear that the restrictions of the First Amendment are applicable to any form of governmental action, and not merely to statutes enacted by a legislative body.[2]

To the extent, therefore, that regulation of pornography constitutes an abridgment of the freedom of speech, or an abridgment of the freedom of the press, it is at least presumptively unconstitutional. And even if some or all forms of

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1. Gitlow v. New York, 268 U.S. 652 (1925).

2. E.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

regulation of pornography are seen ultimately not to constitute abridgments of the freedom of speech or the freedom of the press, the fact remains that the Constitution treats speaking and printing as special, and thus the regulation of anything spoken or printed must be examined with extraordinary care. For even when some forms of regulation of what is spoken or printed are not abridgments of the freedom of speech, or abridgments of the freedom of the press, such regulations are closer to constituting abridgments than other forms of governmental action. If nothing else, the barriers between permissible restrictions on what is said or printed and unconstitutional abridgments must be scrupulously guarded.

Thus, we start with the presumption that the First Amendment is germane to our inquiry, and we start as well with the presumption that, both as citizens and as governmental officials who have sworn an oath to uphold and defend the Constitution, we have independent responsibilities to consider constitutional issues in our deliberations and in our conclusions. Although we are not free to take actions that relevant Supreme Court interpretations of the Constitution tell us we cannot take, we do not consider Supreme Court opinions as relieving us of our own constitutional responsibilities. The view that constitutional concerns are only for the Supreme Court, or only for courts in general, is simply fallacious, and we do no service to the Constitution by adopting the view that the Constitution is someone else's responsibility. It is our responsibility, and we have treated it as such both in this Report and throughout our

deliberations.

3.2 The First Amendment, The Supreme Court, and the Regulation of Obscenity

Although both speaking and printing are what the First Amendment is all about, closer examination reveals that the First Amendment cannot plausibly be taken to protect, or even to be relevant to, every act of speaking or writing. Government may plainly sanction the written acts of writing checks backed by insufficient funds, filing income tax returns that understate income or overstate deductions, and describing securities or consumer products in false or misleading terms. In none of these cases would First Amendment defenses even be taken seriously. The same can be said about sanctions against spoken acts such as lying while under oath, or committing most acts of criminal conspiracy. Although urging the public to rise up and overthrow the government is protected by the First Amendment, urging your brother to kill your father so that you can split the insurance money has never been considered the kind of spoken activity with which the First Amendment is concerned. Providing information to the public about the misdeeds of their political leaders is central to the First Amendment, but providing information to one's friends about the combination to the vault at the local bank is not a First Amendment matter at all.

The regulation of pornography in light of the constraints of the First Amendment must thus be considered against this background - that not every use of words, pictures, or a printing

press automatically triggers protection by the First Amendment. Indeed, as the examples above demonstrate, many uses of words, pictures, or a printing press do not even raise First Amendment concerns. As Justice Holmes stated the matter in 1919, "the First Amendment . . . cannot have been, and obviously was not, intended to give immunity for every possible use of language."[3]

As described in Chapter II, both the states and the federal government have long regulated the trade in sexually explicit materials under the label of "obscenity" regulation. And until 1957, obscenity regulation was treated as one of those forms of regulation that was totally unrelated to the concerns or the constraints of the First Amendment. If the aim of the state or federal regulation was the control of obscenity, then the First Amendment did not restrict government action, without regard to what particular materials might be deemed obscene and thus prohibited.[4] When, throughout the first half of this century, states would determine to be obscene such works as Theodore Dreiser's An American Tragedy,[5] or D.H. Lawrence's Lady Chatterley's Lover,[6] or Erskine Caldwell's God's Little Acre,[7]

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3. Frohwerk v. United States, 249 U.S. 204 (1919).

4. Dunlap v. United States, 165 U.S. 486 (1897).

5. Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930).

6. People v. Dial Press, 182 Misc. 416 (N.Y. Magis. Ct. 1929).

7. Attorney General v. Book Named "God's Little Acre," 326 Mass. 281, 93 N.E.2d 819 (1950).

or Radclyffe Hall's The Well of Loneliness,[8] the First Amendment was not taken to constitute a significant barrier to such actions.

In 1957, however, in Roth v. United States,[9] the Supreme Court confronted squarely the tension between the regulation of what was alleged to be obscene and the constraints of the First Amendment. After Roth, it is not simply the form of regulation that immunizes a prosecution from the First Amendment. The Court made clear in Roth, and even clearer in subsequent cases,[10] that the simple designation of a prosecution as one for obscenity does not cause the First Amendment considerations to drop out. If the particular materials prosecuted are themselves protected by the First Amendment, the prosecution is impermissible. After Roth mere labels could not be used to justify restricting the protected, and mere labels could not justify circumventing the protections of the First Amendment.

But the Supreme Court also made clear in Roth that some materials were themselves outside of the coverage of the First Amendment, and that obscenity, carefully delineated, could be considered as "utterly without redeeming social importance." As a result, the Court concluded, obscene materials were not the

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8. People v. Seltzer, 122 Misc. 329, 203 N.Y.S. 809 (N.Y. Sup. Ct. 1924).

9. 354 U.S. 476 (1957).

10. E.g., Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959).

kind of speech or press included within the First Amendment, and could thus be regulated without the kind of overwhelming evidence of harm that would be necessary if materials of this variety were included within the scope of the First Amendment. But to the Court in Roth, that scope was limited to material containing ideas. All ideas, even the unorthodox, even the controversial, and even the hateful, were within the scope of the First Amendment. But if there were no ideas with "even the slightest redeeming social importance," then such material could be taken to be not speech in the relevant sense at all, and therefore outside of the realm of the First Amendment.

The general Roth approach to obscenity regulation has been adhered to ever since 1957, and remains still today the foundation of the somewhat more complex but nevertheless fundamentally similar treatment of obscenity by the Supreme Court. This treatment involves two major principles. The first, reiterated repeatedly and explained most thoroughly in Paris Adult Theatre I v. Slaton,[11] is the principle that legal obscenity is treated as being either not speech at all, or at least not the kind of speech that is within the purview of any of the diverse aims and principles of the First Amendment. As a result, legal obscenity may be regulated by the states and by the federal government without having to meet the especially stringent standards of justification, often generalized as a "clear and present danger," and occasionally as a "compelling

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11. 413 U.S. 49 (1973).

interest," that would be applicable to speech, including a great deal of sexually oriented or sexually explicit speech, that is within the aims and principles of the First Amendment. Instead, legal obscenity may constitutionally be regulated as long as there exists merely a "rational basis" for the regulation, a standard undoubtedly drastically less stringent than the standard of "clear and present danger" or "compelling interest."

That legal obscenity may be regulated by the states and the federal government pursuant to Roth and Paris does not, of course, mean that the states must regulate it, or even that they necessarily should regulate it. It is in the nature of our constitutional system that most of what the Constitution does is to establish structures and to set up outer boundaries of permissible regulation, without in any way addressing what ought to be done within those outer boundaries. There is no doubt, for example, that the speed limits on the highways could be significantly reduced without offending the Constitution, that states could eliminate all penalties for burglary without violating the Constitution, and that the highest marginal income tax rate could be increased from 50% to 90% without creating a valid constitutional challenge. None of these proposals seems a particularly good idea, and that is precisely the point - that the fact that an action is constitutional does not mean that it is wise. Thus, although the regulation of obscenity is, as a result of Roth, Paris, and many other cases, constitutionally permissible, this does not answer the question whether such regulation is desireable. Wisdom or desireability are not

primarily constitutional questions.

Thus the first major principle is the constitutional permissibility of the regulation of obscenity. The second major principle is that the definition of what is obscene, as well as the determination of what in particular cases is obscene, is itself a matter of constitutional law. If the underpinnings of the exclusion of obscenity from the scope of the First Amendment are that obscenity is not what the First Amendment is all about, then special care must be taken to ensure that materials, including materials dealing with sex, that are within what the First Amendment is all about are not subject to restriction. Although what is on the unprotected side of the line between the legally obscene and constitutionally protected speech is not protected by the First Amendment, the location of the line itself is a constitutional matter. That obscenity may be regulated consistent with the First Amendment does not mean that anything that is perceived by people or by legislatures as obscene may be so regulated.

As a result, the definition of obscenity is largely a question of constitutional law, and the current constitutionally permissible definition is found in another 1973 case, Miller v. California.[12] According to Miller, material is obscene if all

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12. 413 U.S. 15 (1973). Among the most significant aspects of Miller was the fact that it rejected as part of the definition of obscenity the requirement that before material could be deemed obscene it had to be shown to be "utterly without redeeming social value." This standard, which had its roots as part of the test for obscenity in Memoirs v. Massachusetts, 383 U.S. 413

three of the following conditions are met:

1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest [in sex]; and

2. the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [or federal] law; and

3. the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

It is not our function in this Report to provide an exposition of the law of obscenity. In an appendix to this Report we do provide a much more detailed treatment of the current state of the law that we hope will be useful to those with a need to consider some of the details of obscenity law. But we do not wish our avoidance of extensive description of the law here to imply that the law is simple. Virtually every word and phrase in the Miller test has been the subject of extensive litigation and substantial commentary in the legal literature. The result of this is that there is now a large body of explanation and clarification of concepts such as "taken as a whole," "prurient interest," "patently offensive," "serious value," and "contemporary community standards." Moreover, there are many constitutionally mandated aspects of obscenity law that are not

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(1966), had in practice made proving obscenity virtually impossible.

derived directly from the definition of obscenity. For example, no person may be prosecuted for an obscenity offense unless it can be shown that the person had knowledge of the general contents, character, and nature of the materials involved, for if the law were otherwise booksellers and others would avoid stocking anything even slightly sexually oriented for fear of being prosecuted on account of materials the content of which they were unaware of.[13] The procedures surrounding the initiation of a prosecution, including search and seizure, are also limited by constitutional considerations designed to prevent what would in effect be total suppression prior to a judicial determination of obscenity.[14] And the entire subject of child pornography, which we discuss in Chapter VII of this Report, is governed by different principles and substantially different legal standards.

The constitutionally-based definition of obscenity is enforced not only by requiring that that definition be used in obscenity trials, but also, and more importantly, by close judicial scrutiny of materials determined to be obscene. This scrutiny, at both trial and appellate levels, is designed to ensure that non-obscene material is not erroneously determined to be

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13. Smith v. California, 361 U.S. 147 (1959). The principle was reaffirmed in Hamling v. United States, 418 U.S. 87 (1974), which also made clear that the defendant need not be shown to have known that the materials were legally obscene.

14. See Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973).

obscene. The leading case here is the 1974 unanimous Supreme Court decision in Jenkins v. Georgia,[15] which involved a conviction in Georgia of the Hollywood motion picture Carnal Knowledge. In reversing the conviction, the Supreme Court made clear that regardless of what the local community standards of that community may have been, the First Amendment prohibited any community, regardless of its standards, from finding that a motion picture such as this appealed to the prurient interest or was patently offensive.[16] Thus, although appeal to the prurient interest and patent offensiveness are to be determined in the first instance by reference to local standards, it is clear after Jenkins that the range of local variation that the Supreme Court will permit consistent with the First Amendment is in fact quite limited.

In the final analysis, the effect of Miller, Jenkins, and a large number of other Supreme Court and lower court cases is to limit obscenity prosecutions to "hard core"[17] material devoid of anything except the most explicit and offensive representations of sex. As we explained in our Introduction, we believe that the late Justice Stewart was more perceptive than he has been given

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15. 418 U.S. 153 (1974).

16. The third facet of the Miller test, that the work lack "serious literary, artistic, political, or scientific value," is never in any event to be determined by reference to local standards. Here the frame of reference must in all cases be national. Smith v. United States, 431 U.S. 291 (1977).

17. The Supreme Court in fact uses the term in Miller.

credit for having been in saying of hard-core pornography that he knew it when he saw it.[18] Now that we have seen much of it, we are all confident that we too know it when we see it, but we also know that others have used this and other terms to encompass a range of materials wider than that which the Supreme Court permits to be restricted, and wider than that which most of us think ought to be restricted. But it should be plain both from the law, and from inspection of the kinds of material that the law has allowed to be prosecuted, that only the most thoroughly explicit materials, overwhelmingly devoted to patently offensive and explicit representations, and unmitigated by any significant amount of anything else, can be and are in fact determined to be legally obscene.

3.3 Is the Supreme Court Right?

We cannot ignore our own obligations not to recommend what we believe to be unconstitutional. Numerous people, in both oral and written evidence, have urged upon us the view that the Supreme Court's approach is a mistaken interpretation of the First Amendment. They have argued that we should conclude that

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18. "I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligently doing so. But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stevart, J., concurring).

any criminal prosecution based on the distribution[19] to consenting adults of sexually explicit material, no matter how offensive to some, and no matter how hard-core, and no matter how devoid of literary, artistic, political, or scientific value, is impermissible under the First Amendment.

We have taken these arguments seriously. In light of the facts that the Supreme Court did not in Roth or since unanimously conclude that obscenity is outside of the coverage of the First Amendment, and that its 1973 rulings were all decided by a scant 5-4 majority on this issue, there is no doubt that the issue was debatable within the Supreme Court, and thus could hardly be without difficulty. Moreover, we recognize that the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues is incorrect.[20] With dissent existing even within the Supreme Court, and with disagreement with the Supreme Court majority's approach predominant among legal scholars, we could hardly ignore the possibility that the Supreme Court might be wrong on this issue, and that we would wish to find protected that which the

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19. We do not in this Report discuss Stanley v. Georgia, 394 U.S. 557 (1969), in which the Supreme Court held the mere possession of even legally obscene material to be constitutionally protected. We do not discuss Stanley because nothing we recommend is inconsistent with it, and no one has suggested to us that we should urge that Stanley be overruled.

20. See, e.g., Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1; Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963); Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974).

Supreme Court found unprotected.

There are both less and more plausible challenges to the Supreme Court's approach to obscenity. Among the least plausible, and usually more rhetorical device than serious argument, is the view that the First Amendment is in some way an "absolute," protecting, quite simply, all speech. Even Justices Black and Douglas, commonly taken to be "absolutists," would hardly have protected all spoken or written acts under the First Amendment, and on closer inspection all those accused of or confessing to "absolutism" would at the very least apply their absolutism to a range of spoken or written acts smaller than the universe of <u>all</u> spoken, written, or pictorial acts. This is not to deny that under the views of many, including Black and Douglas, what is now considered obscene should be within the universe of what is absolutely protected. But "absolutism" in unadulterated form seems largely a strawman, and we see no need to use it as a way of avoiding difficult questions.

Much more plausible is the view not that the First Amendment protects all spoken, written, or pictorial acts, but that all spoken, written, or pictorial acts are at least in some way covered, even if not ultimately protected, by the First Amendment. That is, even if the government may regulate some such acts, it may never do so unless it has a reason substantially better than the reasons that normally are sufficient to justify governmental action. Whether this heightened standard of justification is described as a "clear and

present danger," or "compelling interest," or some standard less stringent than those, the view is still that regulating any spoken, written, or pictorial acts requires a particularly good reason. And when applied to the regulation of obscenity, so the argument goes, the reasons supplied and the empirical evidence offered remain too speculative to meet this especially high burden of justification.

Other views accept the fact that not all spoken, written, or pictorial acts need meet this especially high burden of justification. Only those acts that in some way relate to the purposes or principles of the First Amendment are covered, but, it is argued, even the hardest-core pornographic item is within the First Amendment's coverage. To some this is because both the distribution and use of such items are significant aspects of self-expression. And while not all acts of self-expression are covered by the First Amendment, acts of self-expression that take the form of books, magazines, and films are, according to the argument, so covered. These, it is argued, are the traditional media of communication, and when those media are used to express a different world view, or even merely to achieve sexual satisfaction, they remain the kinds of things towards which the First Amendment is directed. As a result, regulation of the process by which an alternative sexual vision is communicated, or regulation of the process by which people use the traditional media of communication to experience and to understand a different sexual vision, is as much a part of the First Amendment as communicating and experiencing different visions about, for

example, politics or morals.

A variant on this last argument, which takes obscenity to be within a range of First Amendment coverage admittedly smaller than the universe of communicative acts, looks not so much to the act or to the communication but instead to the government's reasons for regulating. If, so the argument goes, government's action in restricting is based on its reaction to a particular point of view, then the action is impermissible. Because it is the purpose of the First Amendment to allow all points of view to be expressed, an attempt by government to treat one point of view less favorably than another is unconstitutional for that reason alone, no matter how dangerous, offensive, or otherwise reprehensible the disfavored point of view may be.

We have heard witnesses articulate these various views intelligently and forcefully, and we have read more extensive versions of these arguments. They are not implausible by any means, but in the final analysis we remain unpersuaded that the fundamental direction of Roth and Paris is misguided. Indeed, we are confident that it is correct. Although we do not subscribe to the view that only political speech is covered by the First Amendment, we do not believe that a totally expansive approach is reasonable for society or conducive to preserving the particular values embodied in the First Amendment. The special power of the First Amendment ought, in our opinion, to be reserved for the conveying of arguments and information in a way that surpasses some admittedly low threshold of cognitive appeal, whether that

appeal be emotive, intellectual, aesthetic, or informational. We have no doubt that this low threshold will be surpassed by a wide range of sexually explicit material conveying unpopular ideas about sex in a manner that is offensive to most people, and we accept that this is properly part of a vision of the First Amendment that is designed substantially to protect unpopular ways of saying unpopular things. But we also have little doubt that most of what we have seen that to us qualifies as hard-core material falls below this minimal threshold of cognitive or similar appeal. Lines are of course not always easy to draw, but we find it difficult to understand how much of the material we have seen can be considered to be even remotely related to an exchange of views in the marketplace of ideas, to an attempt to articulate a point of view, to an attempt to persuade, or to an attempt seriously to convey through literary or artistic means a different vision of humanity or of the world. We do not deny that in a different context and presented in a different way, material as explicit as that which we have seen could be said to contain at least some of all of these characteristics. But we also have no doubt that these goals are remote from the goals of virtually all distributors or users of this material, and we also have no doubt that these values are present in most standard pornographic items to an extraordinarily limited degree.

In light of this, we are of the opinion that not only society at large but the First Amendment itself suffers if the essential appeal of the First Amendment is dissipated on arguments related to material so tenuously associated with any of the purposes or

principles of the First Amendment. We believe it necessary that the plausibility of the First Amendment be protected, and we believe it equally necessary for this society to ensure that the First Amendment retains the strength it must have when it is most needed. This strength cannot reside exclusively in the courts, but must reside as well in widespread acceptance of the importance of the First Amendment. We fear that this acceptance is jeopardized when the First Amendment too often becomes the rhetorical device by which the commercial trade in materials directed virtually exclusively at sexual arousal is defended. There is a risk that in that process public willingness to defend and to accept the First Amendment will be lost, and the likely losers will be those who would speak out harshly, provocatively, and often offensively against the prevailing order, including the prevailing order with respecty to sex.

The manner of presentation and distribution of most standard pornography confirms the view that at bottom the predominant use of such material is as masturbatory aid. We do not say that there is anything necessarily wrong with that for that reason. But once the predominant use, and the appeal to that predominant use, becomes apparent, what emerges is that much of what this material involves is not so much portrayal of sex, or discussion of sex, but simply sex itself. As sex itself, the arguments for or against restriction are serious, but they are arguments properly removed from the First Amendment questions that surround primarily materials whose overwhelming use is not as short-term masturbatory aid. Whether the state should, for example,

prohibit masturbation in certain establishments that are open to the public is a question that some would wish to debate, but it is certainly not a First Amendment question. Similarly, the extent to which sex itself is and under what circumstances constitutionally protected is again an interesting and important constitutional question, but it is not usefully seen as a First Amendment question.[21]

We recognize, of course, that using a picture of sex as masturbatory aid is different from the simple act of masturbation, or any other form of sex. The very fact that pictures and words are used compels us to take First Amendment arguments more seriously than would be the case if the debate were about prostitution. Still, when we look at the standard pornographic item in its standard context of distribution and use, we find it difficult to avoid the conclusion that this material is so far removed from any of the central purposes of the First Amendment, and so close to so much of the rest of the

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21. As this report is being written, the Supreme Court has under advisement after oral argument the case of Bowers v. Hardwick, 760 F.2d 1202 (11th Cir. 1985), Sup. Ct. Docket No. 85-140, challenging the constitutionality of the Georgia sodomy statute as applied to the private and consensual acts of two male homosexuals. The arguments rely primarily on constitutional claims of liberty, privacy, and freedom of association. If the Supreme Court strikes down the statute as unconstitutional, arguments other than the First Amendment might be available to challenge certain laws against certain uses of even legally obscene materials. Without such an action, however, such privacy or liberty arguments, which the Supreme Court rejected with respect to exhibition of obscene material to consenting adults in a theater in Paris, would be unlikely to succeed. Doe v. Commonwealth's Attorney, 403 F. Supp.. 1199 (E.D. Va. 1975), aff'd without opinion, 425 U.S. 901 (1976).

sex industry, that including such material within the coverage of the First Amendment seems highly attenuated.

Like any other act, the act of making, distributing, and using pornographic items contains and sends messages. For government to act against some of these items on account of the messages involved may appear as problematic under the First Amendment, but to hold that such governmental action violates the First Amendment is to preclude government from taking action in every case in which government fears that the restricted action will be copied, or proliferate because of its acceptance. Government may prosecute scofflaws because it fears the message that laws ought to be violated, and it may restrict the use of certain products in part because it does not wish the message that the product is desirable to be widely disseminated in perhaps its most effective form. So too with reference to the kind of material with which we deal here. If we are correct in our conclusion that this material is far removed from the cognitive, emotive, aesthetic, informational, persuasive, or intellectual core of the First Amendment, we are satisfied that a governmental desire to restrict the material for the messages its use sends out does not bring the material any closer to the center.

We thus conclude not that obscenity regulation creates no First Amendment concerns, nor even that the Supreme Court's approach is necessarily correct. But we do believe the Supreme Court's approach is most likely correct, and we believe as well that arguments against the Supreme Court's approach are becoming

increasingly attenuated as we focus on the kind of material commonly sold in "adults only" establishments in this country. We may be wrong, but most of us can see no good reason at the moment for substituting a less persuasive approach for the Supreme Court's more persuasive one.

3.4 The Risks of Abuse

Although we are satisfied that there is a category of material so overwhelmingly preoccupied with sexual explicitness, and so overwhelmingly devoid of anything else, that its regulation does no violence to the principles underlying the First Amendment, we recognize that this cannot be the end of the First Amendment analysis. We must evaluate the possibility that in practice materials other than these will be restricted, and that the effect therefore will be the restriction of materials that are substantially closer to what the First Amendment ought to protect than the items in fact aimed at by the Miller definition of obscenity. We must also evaluate what is commonly referred to as the "chilling effect," the possibility that, even absent actual restriction, creators of material that is not in fact legally obscene will refrain from those creative activities, or will steer further to the safe side of the line, for fear that their protected works will mistakenly be deemed obscene. And finally we must evaluate whether the fact of restriction of obscene material will act, symbolically, to foster a "censorship mentality" that will in less immediate ways encourage or lead to various restrictions, in other contexts, of material which ought

not in a free society be restricted.

We have heard in one form or another from numerous organizations of publishers, booksellers, actors, and librarians, as well as from a number of individual book and magazine publishers. Although most have urged general anti-censorship sentiments upon us, their oral and written submissions have failed to provide us with evidence to support claims of excess suppression in the name of the obscenity laws, and indeed the evidence is to the contrary. The president of the Association of American Publishers testified that to his knowledge none of his members had even been threatened with enforcement of the criminal law against obscenity, and the American Library Association could find no record of any prosecution of a librarian on obscenity charges. Other groups of people involved in publishing, bookselling, or theatrical organizations relied exclusively on examples of excess censorship from periods of time no more recent than the 1940s. And still others were even less helpful, telling us, for example, that censorship was impermissible because "This is the United States, not the Soviet Union." We know that, but we know as well that difficult issues do not become easy by the use of inflammatory rhetoric. We wish that many of these people or groups had been able to provide concrete examples to support their fears of excess censorship.

Throughout recent and not so recent history, excess censorship, although not necessarily prevalent, can hardly be said not to have occurred. As a result we have not been content

to rest on the hollowness of the assertions of many of those who have reminded us of this theme. If there is a problem, we have our own obligations to identify it, even if witnesses before us have been unable to do so. Yet when we do our own researches, we discover that, with few exceptions, the period from 1974[22] to the present is marked by strikingly few actual or threatened prosecutions of material that is plainly not legally obscene. We do not say that there have been none. Attempted and unsuccessful actions against the film Caligula by the United States Customs Service, against Playboy magazine in Atlanta and several other places, and against some other plainly non-obscene publications indicate that mistakes can be made. But since 1974 such mistakes have been extremely rare, and the mistakes have all been remedied at some point in the process. While we wish there would be no mistakes, we are confident that application of Miller has been overwhelmingly limited to materials that would satisfy anyone's definition of "hard core."

Even absent successful or seriously threatened prosecutions, it still may be the case that the very possibility of such an action deters filmmakers, photographers, and writers from exercising their creative abilities to the fullest. Once it appears that the likelihood of actual or seriously threatened prosecutions is almost completely illusory, however, we are in a

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22. 1974 seems the most relevant date because that was the year in which the Supreme Court, in Jenkins v. Georgia, 418 U.S. 153 (1974), made it clear that determinations of obscenity were not primarily a matter of local discretion.

quandry about how to respond to these claims of "chilling." We are in no position to deny the reality of someone's fears, but in almost every case those fears are unfounded. Where, as here, the fears seem to be fears of phantom dangers, we are hard pressed to say that the law is mistaken. It is those who are afraid who are mistaken. At least for the past ten years, no even remotely serious author, photographer, or filmmaker has had anything real to fear from the obscenity laws. The line between what is legally obscene and what is not is now so far away from their work that even substantially mistaken applications of current law would leave these individuals untouched. In light of that, we do not see their fears, however real to them, as a sufficient reason now to reconsider our views about the extent of First Amendment protection.

Much more serious, much more real, and much less in our control, is the extent to which non-governmental or governmental but non-prohibitory actions may substantially influence what is published and what is not. What television scriptwriters write is in reality controlled by what television producers will buy, which is in turn controlled by what sponsors will sponsor and what viewers will view. Screenwriters may be effectively censored by the extent to which producers or studios desire to gain an "R" rating rather than an "X," or a "PG" rather than an "R," or an "R" rather than a "PG." Book and magazine writers and publishers are restricted by what stores are willing to sell, and stores are restricted by what people are willing to buy. Writers of textbooks are in a sense censored by what school districts are

willing to buy, authors are censored by what both bookstores and librarians are willing to offer, and librarians are censored by what boards of trustees are willing to tolerate.

In all of these settings there have been excesses. But every one of these settings involves some inevitable choice based on content. We think it unfortunate when Catcher in the Rye is unavailable in a high school library, but none of us would criticize the decision to keep Lady Chatterley's Lover, plainly protected by the First Amendment, out of the junior high schools. We regret that legitimate bookstores have been pressured to remove from their shelves legitimate and serious discussions of sexuality, but none of us would presume to tell a Catholic bookseller that in choosing books he should not discriminate against books favoring abortion. Motion picture studios are unable to support an infinite number of screenwriters, and their choice to support those who write about families rather than about homosexuality, for example, is not only permissible, but is indeed itself protected by the First Amendment.

Where there have been excesses, and we do not ignore the extent to which the number of those excesses seems to be increasing, they seem often attributable to the plainly mistaken notion that the idea of "community standards" is a carte blanche to communities to determine entirely for themselves what is obscene. As we have tried once again to make clear in this report, nothing could be further from the truth. Apart from

this, however, the excesses that have been reported to us are excesses that can only remotely be attributed to the obscenity laws. In a world of choice and of scarce resources, every one of these excesses could take place even were there no obscenity laws at all. In a world without obscenity law, television producers, motion picture studios, public library trustees, boards of education, convenience stores, and bookstores could still all choose to avoid any mention or discussion of sex entirely. And in a world without obscenity laws, all of these institutions and others could and would still make censorious choices based on their own views about politics, morals, religion, or science. Thus, the link between obscenity law and the excess narrowness, at times, of the choices made by private industry as well as government is far from direct.

Although the link is not direct, we are in no position to deny that there may be some psychological connection between obscenity laws and their enforcement and a general perception that non-governmental restriction of anything dealing with sex is justifiable. We find the connection unjustifiable, but that is not to say that it may not exist in the world. But just as vigorous and vocal enforcement of robbery laws may create the environment in which vigilantes feel justified in punishing offenders outside of legal processes, so too may obscenity law create an environment in which discussions of sexuality are effectively stifled. But we cannot ignore the extent to which much of this stifling, to the extent it exists, is no more than the exercise by citizens of their First Amendment rights to buy

what they want to buy, and the exercise by others of First Amendment rights to sell or make what they wish. Choices are not always exercised wisely, but the leap from some unwise choices to the unconstitutionality of criminal laws only remotely related to those unwise choices is too big a leap for us to make.

CHAPTER IV

THE MARKET AND THE INDUSTRY

4.1 The Market for Sexual Explicitness

More than in 1957, when the law of obscenity became inextricably a part of constitutional law, more than in 1970, when the President's Commission on Obscenity and Pornography issued its report, and indeed more than just a year ago in 1985, we live in a society unquestionably pervaded by sexual explicitness. In virtually every medium, from books to magazines to newspapers to music to radio to network television to cable television, matters relating to sex are discussed, described, and depicted with a frankness and an explicitness of detail that has accelerated dramatically within a comparatively short period of time. To attempt to isolate the causes of this phenomenon is inevitably to embark on a futile enterprise, for the sexual openness of contemporary America is unquestionably a product of that immense interplay of factors that makes contemporary America what it is in numerous aspects apart from sexual explicitness.

We have spent much of our time investigating the nature of the industry that produces, distributes, and sells sexually explicit materials, for we do not believe we could responsibly have drawn conclusions relating to that industry unless we became familiar with it. The results of this investigation are set out comprehensively and in detail in an appendix to this Report, but we feel nevertheless that a general overview of the market and

the industry is necessary here.

The pervasiveness of sexual explicitness in the society in which we live underscores the importance of distinguishing what might plausibly be characterized as "pornographic" from the entire range of descriptions, depictions, and discussions that are more sexually explicit than would have been the case in earlier times, and that, for that reason, engender some or substantial objection from various people within the society. We find it useful in this Report to describe some particularly salient aspects of the pornography industry, but any such discussion must be preceded by a brief survey of some other forms of sexually explicit material that are usefully contrasted with the more unquestionably pornographic.

4.1.1 The Motion Picture Industry

With few exceptions, what might be called the "mainstream" or "legitimate" or "Hollywood" motion picture industry does not produce the kinds of films that would commonly be made available in "adults only" outlets. The films shown in such establishments, the ones containing little if any plot, unalloyed explicitness, and little other than an intent to arouse, are not the products of the motion picture industry with which most people are familiar. Nevertheless, sexuality, in varying degrees of explicitness or, to many, offensiveness, is a significant part of many mainstream motion pictures. One result of this phenomenon has been the rating system of the Motion Picture Association of America. Because those ratings are so frequently

used as shorthand, and frequently erroneous shorthand, for certain forms of content, a brief description of the rating system may be in order.

The rating system, established in 1968, has no legal force, but is designed to provide information for distributors, exhibitors, and viewers of motion pictures. At the present time there are five different categories within the rating system. Motion pictures rated "G" are considered suitable for everyone, and people of all ages are admitted when such films are shown. The "PG" rating, which stands for "parental guidance suggested," still allows all to be admitted, but warns parents that some material may not be suitable for children. Films receive a PG rating if there is more than minimal violence, if there is brief nudity, or if there are non-explicit scenes involving sex. A "PG-13" rating is used where some more parental caution is suggested, especially with respect to children under the age of thirteen.

Most germane to this Report are the ratings of "R" and "X." An "R" rating indicates a restricted film, and those under the age of seventeen are admitted only if accompanied by a parent or guardian. Motion pictures with this rating may be somewhat, substantially, or *exclusively devoted to themes of sex or* violence. They may contain harsh language, sexual activity, and nudity. Films with this rating, however, do not contain explicit sexual activity. If a film contains explicit sexual activity, or if, in some cases, it contains particularly extreme quantities

and varieties of violence, it is rated "X," and no one under the age of seventeen may be admitted.

Only in rare cases will anything resembling standard pornographic fare be submitted to the MPAA for a rating. More often such material will have a self-rated "X" designation, or will have no rating, or will have some unofficial promotional rating such as "XXX." It is important to recognize, however, that although no motion picture not submitted to the MPAA can have any rating other than "X," and that although standard pornographic items would unquestionably receive an "X" rating if submitted, not all, and indeed, not many officially "X" rated motion pictures would commonly be considered to be pornographic. Although the nature of what kind of content will get what rating will change with the times, it remains the case that the "X" rating, especially when applied to the small number of mainstream films that officially receive that rating after submission to the MPAA, is not in every case synonymous with what most people would consider pornography.

4.1.2 Adult Magazines

Although the sexual content of large numbers of magazines has increased in recent years, particular attention is often focused on so called "men's" magazines, commonly referred to within the trade as "male sophisticate" magazines. In recent years variations aimed at a female audience have also appeared, but the genre remains largely directed to men.

Magazines of this variety tend to be produced and distributed in a manner not dissimilar to the production and distribution methods for most mass-circulation magazines. It is almost misleading to consider them as one category, however, for such magazines vary enormously in content and explicitness. A few magazines of this variety combine their sexual content with a substantial amount of non-sexually oriented, and frequently quite serious, textual or photographic matter. Some magazines have for their photographs little more than suggestive nudity, while a number of others feature significant amounts of simulated or actual sexual activity. From the perspective we adopt and explain in Chapter V, all of the magazines in this category contain at least some material that we would consider "degrading." Some contain a large amount of such degrading material, and some also contain sexually violent material.

With respect to the category of the legally obscene, some of the magazines in this category could not plausibly be considered legally obscene, while others have occasionally been determined to be legally obscene by particular courts. As a purely empirical matter, such determinations of obscenity for even the most explicit and offensive of these magazines seem aberrational, and by and large most of these magazines circulate widely throughout the country without significant legal attack.

4.1.3 Television

Television has become technologically more diverse than in earlier years, and it is no longer possible even to think of

television as one dium. Broadcast television, whether network or local, has a frequent explicit or implicit sexual orientation, but, with only the rarest exceptions, sexual activity of any explicitness at all, or even frontal nudity, has been largely absent from broadcast television. In part this is explained by rules and regulatory practices of the Federal Communications Commission, and in part this is explained by the practices of stations, networks, and, sponsors. But whatever the cause, the amount of nudity, sexual innuendo, and sex itself on broadcast television has traditionally been a far cry from even moderate levels of sexual explicitness, although it is plainly the case that the degree of sexual explicitness in depiction, in theme, and in language on broadcast television has been increasing substantially in recent years.

Cable television, however, by which we include satellite as well, is quite different. Under current law, cable is not subject to the same range of Federal Communications Commission content regulation, and as a result is often substantially more sexually explicit than anything that would be available on broadcast television. This increased explicitness may take the form of talk shows or call-in shows specializing in sexual advice, music videos featuring strong sexual and violent themes, cable channels that specialize in sexual fare, and more general purpose cable channels may offer mainstream motion pictures that would not in uncut form be shown on broadcast television. Although some motion pictures available on cable might be deemed legally obscene in some areas, and although much of this material

is highly explicit and offensive to many, by and large the sexually explicit material available on cable would not be of the type likely to be determined to be legally obscene. More often, what is available, and it does vary from area to area and channel to channel, is a degree of sexuality somewhat closer to what is available in a mainstream motion picture theater, but would not be available on broadcast television.

In some sense the videotape cassette ought to be considered a form of television, since the television is the device by which such cassettes are viewed. But the cassettes themselves are so variable in content that generalization is difficult. Much of what people rent or, less frequently, buy to watch at home is standard motion picture theater fare, and therefore can encompass anything from the kinds of films that are rated "G" to the kinds of films that are rated "R," and occasionally the kinds of films that are officially rated "X" by the MPAA. In many video outlets, however, a range of even more sexually explicit material is available, not dissimilar to what might be shown in an "adult theater." Although much of this material would commonly be considered pornographic, and although much of it might in some areas be found to be legally obscene, it has in the past tended to be more on the conventional end of such material, obviously reflecting the desires of patrons of an establishment offering a full range of video material. More recently, however, some less conventional material has become available in some full range video outlets. Finally, there is the material available either in "adults only" establishments offering many types of materials,

or in "adults only" outlets offering only videotapes. This material, although viewed at home, is for all practical purposes the same as that which would be shown in adult theaters or peep shows, and the same range of sexual themes and practices is commonly available.

4.2 The Pornography Industry

In terms of methods of production, methods of distribution, and methods of ultimate sale to consumers, the pornography industry itself must be distinguished from the outlets for some degree of sexual explicitness discussed in the previous section. The true pornography industry is quite simply different from and separate from the industry that publishes men's magazines, the industry that offers some degree of sexually oriented material on broadcast and cable television, and the mainstream motion picture industry. In some rare instances there may be some linkages between the two, but in general little more than confusion is served by concentrating on the these linkages rather than on the major differences.

4.2.1 The Production of Films, Videotapes, and Magazines

There can be little doubt that there has within the last ten to twenty years been a dramatic increase in the size of the industry producing the kinds of sexually explicit materials that would generally be conceded to be pornographic. One consequence of this is that the industry is not as clandestine as it was in earlier years. Nevertheless, when this industry is compared to

the kinds of industries that produce more mainstream materials, it is still the case that the production of pornographic materials is a practice and a business that remains substantially "underground."

Approximately 80% of the American production of this type of motion picture and videotape takes place in and around Los Angeles, California. In part this is a consequence of the location there of technical personnel, such as camera operators, who either do, have been, or wish to be employed in the mainstream motion picture industry. Indeed, this description applies as well to many of the performers in these films, although, unlike technical personnel, the likelihood of a performer who is involved in pornographic materials simultaneously or eventually working in the mainstream motion picture industry is minuscule.

Production of these materials tends to be done on a rather limited budget, usually in temporary locations such as motel rooms or rented houses, and usually in quite a short period of time. Often not only the premises, but the photographic equipment as well, is rented for only the limited time necessary to make the film. It is not uncommon for producer, director, and scriptwriter to be the same person. In many cases the performers are secured through one of a number of agents who specialize in securing performers for highly sexually explicit films. Although there is virtually no overlap between this industry and the mainstream film industry, the method of securing performers for

films is largely similar, with agents providing producers with books describing various performers, and with producers often interviewing a number of possible performers before selecting the ones to be used.

As this Report is being written, the technological nature of the industry is in the midst of transition from photographic motion pictures to videotape. The proliferation of the home videotape recorder is in many respects transforming the industry, and in addition the process of producing a videotape tends to be more efficient and less expensive than the process of producing a photographic motion picture. With respect to aspects of production that are not technical, however, this technological development has had little effect on the production side of the industry.

The production of the standard variety of pornographic magazine, the kind likely to be sold in an "adults only" establishment for a rather high price, is in many respects similar to the production of pornographic motion pictures and videotapes. The process again operates in a partially clandestine manner, although it is much more likely here that the production and distribution processes will be combined. When this is the case, taking the photographs, assembling them with some amount of textual material, and physically manufacturing the magazine will all take place at the same location.

With respect to the business of producing pornographic paperback books containing nothing but text, the writing,

production, and distribution processes are again likely to be combined. Although independent authors are occasionally used, more common is the use of a full-time staff of authors, employed by the producer to write this kind of book at a rapid rate.

4.2.2 Channels of Distribution

The process of distribution of films is rapidly in the process of becoming history. The photographic motion picture film typically shown in adult theaters is rapidly decreasing in popularity, along with the theaters themselves, as the videotape cassette becomes the dominant mode of presentation of non-still material. Many of these videotapes are sold or rented for home consumption, and many are shown in "peep show" establishments. The effect of this is that the adult theater, in any event an expensive operation, and one that is more visible than many patrons would like, is becoming an increasing rarity. Similar trends are apparent with respect to mainstream motion pictures and the theaters in which they are shown as well, although the effect of videotape on the pornographic film industry is much more dramatic, probably owing in large part to the fact that a night out at the movies remains substantially more socially acceptable in contemporary America than a night out at the peep show.

The films that are shown in theaters, or that are shown by use of traditional projection equipment in peep shows, tend to be distributed nationally by use of complex and sophisticated distribution networks concentrating exclusively on highly

sexually explicit material. There are exceptions to this generalization, and one reason for the attention that focused in the early 1970s on films such as "Deep Throat," "The Devil in Miss Jones," and "Behind the Green Door" was that the standard methods of distribution and exhibition were changed so that films such as these were shown in theaters usually showing more mainstream films. But apart from exceptions such as these, most of the chain of distribution involves producers who deal only in this kind of material, distributors and wholesalers whose entire business is devoted to highly sexually explicit materials, and theaters or peep shows catering exclusively to adults desiring access to very sexually explicit material.

With respect to videotapes, most of the distribution is on a national scale, and most of that national distribution is controlled by a relatively limited number of enterprises. These distributors duplicate in large quantities the tapes they have purchased from producers, and then sell them to wholesalers, frequently with some promotional materials, who in turn sell them to retailers specializing in this type of material, or to more generally oriented video retailers who will include some of this material along with their more mainstream offerings. Based on the evidence provided to us, it appears as if perhaps as many as half of all of the general video retailers in the country include within their offerings at least some material that, by itself, would commonly be conceded to be pornographic.

Magazines are also distributed nationally, and again are

likely first to be sold to wholesalers who will then sell to retailers. This process, however, likely culminating in a sale at an "adults only" outlet, does not account for as high a proportion of the total sales as it does for films or videotapes. Moreso than for films or tapes, many of the magazines are sold by mail, usually as a result of advertisements placed in similar magazines, in pornographic books containing text, and even in more mainstream but sexually oriented publications. There is some indication that the videotape has hurt the pornographic magazine industry as well as the pornographic motion picture industry. The retail prices for such magazines, within the recent past commonly in the range of from ten to twenty-five dollars per magazine, are in some geographical areas likely to be substantially discounted, and adult establishments appear to be offering an increasing percentage of videotapes and a decreasing percentage of books and magazines.

4.2.3 The Retail Level

Apart from mail order, and apart from the rental of pornographic videotapes in general use video retail outlets, most pornographic material reaches the consumer through retail establishments specializing in this material. These outlets, which we refer to as "adults only" outlets or establishments, usually limit entry to those eighteen years of age or older, but the strictness of the enforcement of the limitation to adults varies considerably from outlet to outlet. At times these retail outlets will take the form of theaters in which only material of

this variety is shown, and at times they will be "adults only" outlets specializing in books and magazines. Increasingly, however, the peep show, often combined with an outlet for the sale of pornographic books and magazines, is a major form of meeting consumer demand.

The typical peep show is located on the premises of an "adults only" establishment selling large numbers of pornographic magazines, along with some other items, such as pornographic text-only books, sexual paraphernalia, sexually oriented newspapers, and videotapes. The peep show is often separated by a doorway or screen from the rest of the establishment, and consists of a number of booths in which a film, or, more likely now, a videotape, can be viewed. The patron inserts tokens into a slot for a certain amount of viewing time, and the patron is usually alone or with one other person within the particular booth. The peep show serves the purpose of allowing patrons to masturbate or to engage in sexual activity with others in some degree of privacy, at least compared to an adult theater, while watching the pornographic material. In our appendix describing these establishments we note in detail the generally unsanitary conditions in such establishments. The booths seem rarely to be cleaned, and the evidence of frequent sexual activity is apparent. Peep shows are a particularly common location for male homosexual activity within and between the booths, and the material available for viewing in the booths is frequently oriented towards the male homosexual.

There are, of course, establishments offering adult material that do not contain peep shows. Although videotapes and various items of sexual paraphernalia are likely to be sold, the bulk of the stock of these establishments consists of pornographic magazines, frequently arranged by sexual preference. There can be little doubt that the range of sexual preferences catered to by magazines is wider than that of any other form of pornography. As the listing of titles in the appendix makes clear, virtually any conceivable, and quite a few inconceivable, sexual preferences are featured in the various specialty magazines, and materials featuring sado-masochism, bestiality, urination and defecation in a sexual context, and substantially more unusual practices even than those are a significant portion of what is available.

4.3 The Role of Organized Crime

We have spent a considerable amount of our time attempting to determine whether there is a connection between the pornography industry and what is commonly taken to be "organized crime." After hearing from a large number of witnesses, mostly law enforcement personnel, after reading a number of reports prepared by various law enforcement agencies, and after consulting sources such as trial transcripts, published descriptions, and the like, we believe that such a connection does exist.

We recognize that the statement that there is a connection between the pornography industry and organized crime is contrary to to the conclusion reached by the President's Commission on

Obscenity and Pornography in 1970. That Commission concluded that:

> Although many persons have alleged that organized crime works hand-in-glove with the distributors of adult materials, there is at present no concrete evidence to support these statements. The hypothesis that organized criminal elements either control or are "moving in" on the distribution of sexually oriented materials will doubtless continue to be speculated upon. The panel finds that there is insufficient evidence at present to warrant any conclusion in this regard.

Caution about jumping too easily to conclusions about organized crime involvement in the pornography industry was further induced by the evidence offered to us by Director William H. Webster of the Federal Bureau of Investigation. Director Webster surveyed the FBI field offices throughout the country, and reported to us that "about three quarters of those [fifty-nine] offices indicated that they have no verifiable information that organized crime was involved either directly or through extortion in the manufacture of pornography. Several offices, did, however, report some involvement by members and associates of organized crime."[1]

We reach our conclusions in the face of a negative conclusion by the 1970 Commission, and in the face of the evidence provided by the FBI, not so much because we disagree, but because we feel that more careful analaysis will reveal that the discrepancies

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1. We note, however, that a report prepared by the FBI in 1978, which is included in the appendix portion of this report, contains detailed information regarding various links between organized crime and the pornography industry.

are less than they may at first appear.

One leading cause of conflicting views about organized crime involvement in pornography is that there are conflicting views about what organized crime is. To many people organized crime consists of that organization or network of related organizations commonly referred to by law enforcement personnel and others as La Cosa Nostra. This organization, which we describe in much more detail in our appendix on organized crime, is a highly structured and elaborately subdivided organization in some way involved in an enormous range of criminal activities. It has its own hierarchy, its own formalized system of ranks and methods of advancement, and its own procedures for settling disputes. Commonly, although in our view erroneously, La Costra Nostra and "organized crime" are synonymous.

To other people organized crime consists of any large and organized enterprise engaged in criminal activity, regardless of any connection with La Cosa Nostra. To the extent that enterprises have continuity and a defined membership and engage in crime, then this is considered to be organized crime.

Finally, to still others the "best" definition of organized crime lies somewhere in between. For them organized crime consists of a large and organized enterprise engaged in criminal activity, with a continuity, a structure, and a defined membership, and that is likely to use other crimes and methods of corruption, such as extortion, assault, murder, or bribery, in the service of its primary criminal enterprise.

These differences in definition are especially important with respect to identifying the connection between the pornography industry and organized crime, because much of the evidence supports the conclusion that major parts of the industry are controlled by organizations that fit the second or third but not the first of the foregoing definitions. In particular, there is strong evidence that a great deal of the pornographic film and videotape distribution, and some of the pornographic magazine distribution, is controlled by one Reuben Sturman, operating out of the Cleveland area, but with operations and controlled organizations throughout the country. Although we inevitably must rely on secondary evidence, it appears to us that Sturman's enterprise is highly organized and predominantly devoted to the vertically integrated production, distribution, and sale of materials that would most likely be determined to be legally obscene in most parts of the country. Of this we are certain, and to that extent we could say that significant parts of the pornography industry are controlled by organized crime. We also have some but less clear evidence that organizations like Sturman's, but not quite as large, play similar roles, and that all of these various organizations at times have employed other activities that themselves violate the law in order to further the production, distribution, and sale of pornographic materials. In this sense these organizations would fit the third as well as the second definition of organized crime.

We also have strong reason to believe, however, that neither Sturman's organization, nor some substantially smaller ones, are

themselves part of La Cosa Nostra. In that sense this part of the industry would not fit the first of the above definitions of organized crime. We do not say that there are no connections with La Cosa Nostra. On the contrary, there seems to be evidence, frequently quite strong evidence, of working arrangements, accomodations, assistance, some sharing of funds, and the like, as well as evidence of control by La Costra Nostra, but nothing that would justify saying that these organizations are La Cosa Nostra or are a part of La Cosa Nostra.

Much the same could be said about the relationship between smaller pornography operators and La Cosa Nostra. Again there seems little evidence of direct ownership, operation, or control, but there does seem to be a significant amount of evidence that "protection" of these smaller operators by La Cosa Nostra is both available and required. This applies in some areas to distribution, in some to production, and in some to retail outlets themselves, in much the same way that it applies frequently to many more legitimate businesses. But we are not reluctant to conclude that in many aspects of the pornography business that La Cosa Nostra is getting a piece of the action.

This is not to say that La Cosa Nostra is not itself engaged in pornography. There also seems strong evidence that significant portions of the pornographic magazine industry, the peep show industry, and the pornographic film industry are either directly operated or closely controlled by La Cosa Nostra members or very close associates. Major portions of these industries

seem to be as much a part of La Cosa Nostra as any other of their activities. At times there is direct involvement by La Cosa Nostra even with the day-to-day workings of business, and in many cases there is clear control even when the everyday management is left to others. In many of the reports and other documents we have received there has been evidence to the effect that members of the Columbo, DeCavalcante, Gambino, and Luchese "families" have been actively in as well as merely associated with the production, distribution, and sale, of unquestionably pornographic materials. There is much evidence that La Cosa Nostra members such as Robert DiBernardo and Louis Peraino are or have in the recent past been major figures in the national distribution of such materials. Although we cannot say that every piece of evidence we have received to this effect is true, the possibility that none of this cumulative evidence is true is so remote that we do not take it seriously.

As was the case with many other topics within our manbdate, our lack of investigative resources has made it impossible to investigate these matters directly. Moreover, the matters to be investigated with respect to organized crime are, as has been well known for decades, so clandestine that thorough investigation without conflicting information is virtually impossible to accomplish. Nevertheless, there has been much investigation by federal and state authorities, and we have found it important to rely on those investigations. We include as an appendix to this Report a number of those reports prepared by other law enforcement agencies. We are indebted to all of those

who have worked on these reports, for without them our investigation would have been much less complete. At times there is information in these reports that we are unsure of, but we have little doubt as to the general truth of the big picture painted by these reports, and we have little hesitancy in relying on them to the extent either of agreeing with the big picture, or of agreeing with specific facts where those facts recur in consistent form in information from a number of different sources. The general picture seems clear, and we invite recourse to those specific reports to fill out this general conclusion that seems most appropriate as a statement from us.

CHAPTER V

THE QUESTION OF HARM

5.1 Matters of Method

5.1.1 Harm and Regulation - The Scope of Our Inquiry

A central part of our mission has been to examine the question whether pornography is harmful. In attempting to answer this question, we have made a conscious decision not to allow our examination of the harm question to be constricted by the existing legal/constitutional definition of the legally obscene. As explained in Chapter III, we agree with that definition in principle, and we believe that in most cases it allows criminal prosecution of what ought to be prosecuted and prohibits criminal prosecution of what most of us believe is material properly protected by the First Amendment. In light of this, our decision to look at the potential for harm in a range of material substantially broader than the legally obscene requires some explanation. One reason for this approach was the fact that in some respects existing constitutional decisions permit non-prohibitory restrictions of material other than the legally obscene. With respect to zoning, broadcast regulation, and liquor licensing, existing Supreme Court case law permits some control, short of total prohibition, of the time, place, and manner in which sexually explicit materials that are short of being legally obscene may be distributed. When these non-prohibitory techniques are used, the form of regulation is

still constrained by constitutional considerations, but the regulation need not be limited only to that which has been or would be found legally obscene. To address fully the question of government regulation, therefore, requires that an examination of possible harm encompass a range of materials broader than the legally obscene.

Moreover, the range of techniques of social control is itself broader than the scope of any form of permissible or desirable governmental regulation. We discuss in Chapter VIII of this report many of these techniques, including pervasive social condemnation, public protest, picketing, and boycotts. It is appropriate here, however, to emphasize that we do not see any necessary connection between what is protected by law (and therefore protected <u>from</u> law), on the one hand, and what citizens may justifiably object to and take non-governmental action against, on the other. And if it is appropriate for citizens justifiably to protest against some sexually explicit materials despite the fact that those materials are constitutionally protected, then it is appropriate for us to broaden the realm of our inquiry accordingly.[1]

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1. With respect to the general issue of condemnation, and especially with respect to the condemnation of specific materials by name, our role as a government commission is somewhat more problematic. At some point <u>governmental</u> condemnation may act effectively as governmental restraint (see Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), and we are therefore more cautious in condemning specific publications by name than citizens need be. This caution, however, does not mean that we feel that governmental agencies may not properly condemn even that which they cannot control. We feel that we have both the right and the duty to condemn, in some cases, that which is

Most importantly, however, we categorically reject the idea that material cannot be constitutionally protected, and properly so, while still being harmful. All of us, for example, feel that the inflammatory utterances of Nazis, the Ku Klux Klan, and racists of other varieties are harmful both to the individuals to whom their epithets are directed as well as to society as a whole. Yet all of us acknowledge and most of us support the fact that the harmful speeches of these people are nevertheless constitutionally protected. That the same may hold true with respect to some sexually explicit materials was at least our working assumption in deciding to look at a range of materials broader than the legally obscene. There is no reason whatsoever to suppose that such material is necessarily harmless just because it is and should remain protected by the First Amendment. As a result, we reject the notion that an investigation of the question of harm must be restricted to material unprotected by the Constitution.

The converse of this is equally true. Just as there is no necessary connection between the constitutionally protected and the harmless, so too is there no necessary connection between the constitutionally unprotected and the harmful. We examine the harm question with respect to material that <u>is</u> legally obscene because even if material is legally obscene, and even if material is therefore unprotected by the First Amendment, it does not

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properly constitutionally protected, but we do so with more caution than is necessary when the condemnation comes from the citizenry and not the government.

follow that it is harmful. That some sexually explicit material is constitutionally regulable does not answer the question of whether anything justifies its regulation. Accordingly, we do not take our acceptance of the current constitutional approach to obscenity as diminishing the need to examine the harms purportedly associated with the distribution or use of such material.

We thus take as substantially dissimilar the question of constitutional protection and the question of harm. Even apart from constitutional issues, we also take to be separate the question of the advisability of governmental regulation, all things considered, and the question of the harmfulness of some or all sexually explicit materials. The upshot of all of this is that we feel it entirely proper to identify harms that may accompany certain sexually explicit material before and independent of an inquiry into the desirability and constitutionality of regulating even that sexually explicit material that may be harmful. As a result, our inquiry into harm encompasses much material that may not be legally obscene, and also encompasses much material that would not generally be considered "pornographic" as we use that term here.

5.1.2 What Counts as a Harm?

What is a harm? And why focus on harm at all? We do not wish in referring repeatedly to "harm" to burden ourselves with an unduly narrow conception of harm. To emphasize in different words what we said in the previous section, the scope of

identifiable harms is broader than the scope of that with which government can or should deal. We refuse to truncate our consideration of the question of harm by defining harms in terms of possible government regulation. And we certainly reject the view that the only noticeable harm is one that causes physical or financial harm to identifiable individuals. An environment, physical, cultural, moral, or aesthetic, can be harmed, and so can a community, organization, or group be harmed independent of identifiable harms to members of that community.

Most importantly, although we have emphasized in our discussion of harms the kinds of harms that can most easily be observed and measured, the idea of harm is broader than that. To a number of us, the most important harms must be seen in moral terms, and the act of moral condemnation of that which is immoral is not merely important but essential. From this perspective there are acts that need be seen not only as causes of immorality but as manifestations of it. Issues of human dignity and human decency, no less real for their lack of scientific measurability, are for many of us central to thinking about the question of harm. And when we think about harm in this way, there are acts that must be condemned not because the evils of the world will thereby be eliminated, but because conscience demands it.

We believe it useful in thinking about harms to note the distinction between harm and offense. Although the line between the two is hardly clear, most people can nevertheless imagine things that offend them, or offend others, that still would be

hard to describe as harms. In Chapter VI our discussion of laws and their enforcement will address the question of the place of governmental regulation in restricting things that some or many people may find offensive, but which are less plainly harmful, but at this point it should be sufficient to point out that we take the offensive to be well within the scope of our concerns.

In thinking about harms, it is useful to draw a rough distinction between primary and secondary harms. Primary harms are those in which the alleged harm is commonly taken to be intrinsically harmful, even though the precise way in which the harm is harmful might yet be further explored. Nevertheless, murder, rape, assault, and discrimination on the basis of race and gender are all examples of primary harms in this sense. We treat these acts as harms not because of where they will lead, but simply because of what they are.

In other instances, however, the alleged harm is secondary, not in the sense that it is in any way less important, but in the sense that the concern is not with what the act <u>is</u>, but where it will lead. Curfews are occasionally imposed not because there is anything wrong with people being out at night, but because in some circumstances it is thought that being out at night in large groups may cause people to commit other crimes. Possession of "burglar tools" is often prohibited because of what those tools may be used for. Thus, when it is urged that pornography is harmful because it causes some people to commit acts of sexual violence, because it causes promiscuity, because it encourages

sexual relations outside of marriage, because it promotes so-called "unnatural" sexual practices, or because it leads men to treat women as existing solely for the sexual satisfaction of men, the alleged harms are secondary, again not in any sense suggesting that the harms are less important. The harms are secondary here because the allegation of harm presupposes a causal link between the act and the harm, a causal link that is superfluous if, as in the case of primary harms, the act quite simply is the harm.

Thus we think it important, with respect to every area of possible harm, to focus on whether the allegation relates to a harm that comes from the sexually explicit material itself, or whether it occurs as a result of something the material does. If it is the former, then the inquiry can focus directly on the nature of the alleged harm. But if it is the latter, then there must be a two-step inquiry. First it is necessary to determine if some hypothesized result is in fact harmful. In some cases, where the asserted consequent harm is unquestionably a harm, this step of the analysis is easy. With respect to claims that certain sexually explicit material increases the incidence of rape or other sexual violence, for example, no one could plausibly claim that such consequences were not harmful, and the inquiry can then turn to whether the causal link exists. In other cases, however, the harmfulness of the alleged harm is often debated. With respect to claims, for example, that some sexually explicit material causes promiscuity, encourages homosexuality, or legitimizes sexual practices other than vaginal

intercourse, there is serious societal debate about whether the consequences themselves are harmful.

Thus, the analysis of the hypothesis that pornography causes harm must start with the identification of hypothesized harms, proceed to the determination of whether those hypothesized harms are indeed harmful, and then conclude with the examination of whether a causal link exists between the material and the harm. When the consequences of exposure to sexually explicit material are not harmful, or when there is no causal relationship between exposure to sexually explicit material and some harmful consequence, then we cannot say that the sexually explicit material is harmful. But if sexually explicit material of some variety is causally related to, or increases the incidence of, some behavior that is harmful, then it is safe to conclude that the material is harmful.

5.1.3 The Standard of Proof

In dealing with these questions, the standard of proof is a recurrent problem. How much evidence is needed, or how convinced should we be, before reaching the conclusion that certain sexually explicit material causes harm? The extremes of this question are easy. Whenever a causal question is even worth asking, there will never be conclusive proof that such a causal connection exists, if "conclusive" means that no other possibility exists. We note that frequently, and all too often, the claim that there is no "conclusive" proof is a claim made by someone who disagrees with the implications of the conclusion.

Few if any judgments of causality or danger are ever conclusive, and a requirement of conclusiveness is much more rhetorical device than analytical method. We therefore reject the suggestion that a causal link must be proved "conclusively" before we can identify a harm.

The opposite extreme is also easily dismissed. The fact that someone makes an assertion of fact to us is not necessarily sufficient proof of that fact, even if the assertion remains uncontradicted. We do not operate as a judge sitting in a court of law, and we require more evidence to reach an affirmative conclusion than does a judge whose sole function might in some circumstances be to determine if there is sufficient evidence to send the case to the jury. That there is a bit of evidence for a proposition is not the same as saying that the proposition has been established, and we do not reach causal conclusions in every instance in which there has been some evidence of that proposition.

Between these extremes the issues are more difficult. The reason for this is that how much proof is required is largely a function of what is to be done with an affirmative finding, and what the consequences are of proceeding on the basis of an affirmative finding. As we deal with causal assertions short of conclusive but more than merely some trifle of evidence, we have felt free to rely on less proof merely to make assertions about harm then we have required to recommend legal restrictions, and similarly we have required greater confidence in our assertions

if the result was to recommend criminal penalties for a given form of behavior than we did to recommend other forms of legal restriction. Were we to have recommended criminal sanctions against material now covered by the First Amendment, we would have required proof sufficient to satisfy some variant of the "clear and present danger" standard that serves to protect the communication lying at the center of the First Amendment's guarantees from government action resting on a less certain basis.

No government could survive, however, if all of its actions were required to satisfy a "clear and present danger" standard, and we openly acknowledge that in many areas we have reached conclusions that satisfy us for the purposes for which we draw them, but which would not satisfy us if they were to be used for other purposes. That we are satisfied that the vast majority of depictions of violence in a sexually explicit manner are likely to increase the incidence of sexual violence in this country, for example, does not mean that we have concluded that the evidence is sufficient to justify governmental prohibition of materials that both meet that description and are <u>not</u> legally obscene.

It would be ideal if we could put our evidentiary standards into simple formulas, but that has not been possible. The standards of proof applicable to the legal process - preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt - are not easily transferred into a non-judicial context. And the standards of justification of

constitutional law - rational basis, compelling interest, and clear and present danger, for example - relate only to the constitutionality of governmental action, not to its advisability, nor to the standards necessary for mere warnings about harm. Thus we have felt it best to rely on the language that people ordinarily use, words like "convinced," "satisfied," and "concluded," but those words should be interpreted in light of the discussion in this section.

5.1.4 The Problem of Multiple Causation

The world is complex, and most consequences are "caused" by numerous factors. Are highway deaths caused by failure to wear seat belts, failure of the automobile companies to install airbags, failure of the government to require automobile companies to install airbags, alcohol, judicial leniency towards drunk drivers, speeding, and so on and on? Is heart disease caused by cigarette smoking, obesity, stress, or excess animal fat in our diets? As with most other questions of this type, the answers can only be "all of the above," and so too with the problem of pornography. We have concluded, for example, that some forms of sexually explicit material bear a causal relationship both to sexual violence and to sex discrimination, but we are hardly so naive as to *suppose* that *were* these forms of pornography to disappear the problems of sex discrimination and sexual violence would come to an end.

If this is so, then what does it mean to identify a causal relationship? It means that the evidence supports the conclusion

that if there were none of the material being tested, then the incidence of the consequences would be less. We live in a world of multiple causation, and to identify a factor as a cause in such a world means only that if this factor were eliminated while everything else stayed the same then the problem would at least be lessened. In most cases it is impossible to say any more than this, although to say this is to say quite a great deal. But when we identify something as a cause, we do not deny that there are other causes, and we do not deny that some of these other causes might bear an even greater causal connection than does some form of pornography. That is, it may be, for example, and there is some evidence that points in this direction, that certain magazines focusing on guns, martial arts, and related topics bear a closer causal relationship to sexual violence than do some magazines that are, in a term we will explain shortly, "degrading." If this is true, then the amount of sexual violence would be reduced more by eliminating the weaponry magazines and keeping the degrading magazines than it would be reduced by eliminating the degrading magazines and keeping the weaponry magazines.

Why, then, do we concentrate on pornography? For one thing, that is our mission, and we have been asked to look at this problem rather than every problem in the world. We do not think that there is something less important in what we do merely because some of the consequences that concern us here are caused as well, and perhaps to a greater extent, by other stimuli. If the stark implications of the problem of multiple causation were

followed to the ultimate conclusion of casting doubt on efforts relating to anything other than the "largest" cause of the largest problem, few of us could justify doing anything in our lives that was not directly related to feeding the hungry. But the world does not operate this way, and we are comfortable with the fact that we have been asked to look at some problems while others look at other problems. And we are equally comfortable with the knowledge that to say that something is one of many causes is not to say that it is not a cause. Nor is it to say that the world would not be better off if even this one cause were eliminated.

When faced with the phenomenon of multiple causation, cause is likely to be attributed to those factors that are within our power to change. Often we ignore larger causes precisely because of their size. When a cause is pervasive and intractable, we look elsewhere for remedies, and this is quite often the rational course. A careful look at the available evidence can give us some idea of where the problems are, what different factors are causing them, which remedies directed at which causes are feasible, and which remedies directed at which causes are futile, unconstitutional, or beyond available means. We acknowledge that all of the harms we identified have causes in addition to the ones we identify. But if we are correct with respect to the causes we have identified, then we can take confidence in the fact that lessening those causes will help alleviate the problem, even if lessening other causes might very well alleviate the problem to a greater extent.

5.1.5 The Varieties of Evidence

We have looked at a wide range of types of evidence. Some has come from personal experience of witnesses, some from professionals whose orientation is primarily clinical, some from experimental social scientists, and some from other forms of empirical science. We have not categorically refused to consider any type of evidence, choosing instead to hear it all, consider it all, and give it the weight we believe in the final analysis it deserves. No form of evidence has been useless to us, and no form is without flaws. A few words about the advantages and disadvantages of various types of evidence may help to put into perspective the conclusions we reach and the basis on which we reach them.

Most controversial has been the evidence we have received from numerous people claiming to be victims of pornography, and reporting in some way on personal experiences relating to pornography. In supplementary portions of this Report concerned with victimization and with the performers in pornographic material we discuss this evidence in more detail. We have considered this first-hand testimony, much of it provided at great personal sacrifice, quite useful, but it is important to note that not all of the first-hand testimony has been of the same type.

Some of the first-hand testimony has come from users of pornography, and a number of witnesses have told us how they became "addicted" to pornography, or how they were led to commit

sex crimes as a result of exposure to pornographic materials. Although we have not totally disregarded the evidence that has come from offenders, in many respects it was less valuable than other victim evidence and other evidence in general. Much research supports the tendency of people to externalize their own problems by looking too easily for some external source beyond their own control. As with more extensive studies based on self-reports of sex offenders, evidence relying on what an offender thought caused his problem is likely to so overstate the external and so understate the internal as to be of less value to us than other evidence.

Most of the people who have testified about personal experiences, however, have not been at any point offenders, but rather have been women reporting on what men in their lives have done to them or to their children as a result of exposure to certain sexually explicit materials. As we explained in the introduction, we do not deceive ourselves into thinking that the sample before us is an accurate statistical reflection of the state of the world. Too many factors tended to place before us testimony that was by and large in the same direction and concentrated on those who testified about the presence rather than the absence of consequences. Nevertheless, as long as one does not draw statistical or percentage conclusions from this evidence, and we have not, it can still be important with respect to identification and description of a phenomenon. Plainly some of these witnesses were less credible or less helpful than others, but many of the stories these witnesses told were highly

believable and extremely informative, leading us to think about possible harms of which some of us had previously been unaware. Many witnesses have urged us to draw conclusions about prevalence exclusively from anecdotal evidence of this variety, but we have refused to do so. But that we have refused to make invalid statistical generalizations does not mean that we cannot learn from the stories of those with personal experiences. Many of their statements are summarized in the victimization section of this Report, and we urge people to consider those statements as carefully as we did. We can and we have learned from many of these witnesses, and their testimony has provided part of the basis for our conclusions. As in many other areas of human behavior, the most complete understanding emerges when a phenomenon is viewed from multiple perspectives. One important perspective is the subjective meaning that individuals attribute to their own experiences. This perspective and the unique experiences of individuals are less amenable to objective or statistical inquiry than certain other perspectives, and thus can be valuably examined through the kinds of witnesses whose statements we summarize in the appendix.

The evidence provided by clinical professionals carries with it some of the same problems. Although filtering the evidence through a trained professional, especially one who described to us the experience of numerous cases, eliminates some of the credibility problems, the problem of statistical generalization remains. Because people without problems are not the focus of the clinician's efforts, evidence from clinical professionals

focuses on the abberational. Consequently, clinical evidence does not help very much in answering questions about the overall extent of a phenomenon, because it too is anecdotal, albeit in a more sophisticated way and based on a larger sample. Still, clinical evidence should not be faulted for not being what it does not purport to be. What it does purport to be is sensitive professional evaluation of how some people behave, what causes them to behave in that manner, and what, if anything, might change their behavior. Clinical evidence helps us to identify whether a problem exists, although it does not address the prevalence of the problem. We have looked at the clinical evidence in this light, and have frequently found it useful.

The problems of statistical generalization diminish drastically when we look to the findings of empirical social science. Here the attempt is to identify factors across a larger population, and thus many of the difficulties associated with any form of anecdotal evidence drop out when the field of inquiry is either an entire population, some large but relevant subset of a population, or an experimental group selected under some reliable sampling method.

Some of the evidence of this variety is correlational. If there is some positive statistical correlation between the prevalence of some type of material and some harmful act, then it is at least established that the two occur together more than one would expect merely from random intersection of totally independent variables. Some of the correlational evidence is

less "scientific" than others, but we refuse to discount evidence merely because the researcher did not have some set of academic qualifications. For example, we have heard much evidence from law enforcement personnel that a disproportionate number of sex offenders were found to have large quantities of pornographic material in their residences. Pornographic material was found on the premises more, in the opinion of the witnesses, than one would expect to find it in the residences of a random sample of the population as a whole, in the residences of a random sample of non-offenders of the same sex, age, and socioeconomic status, or in the residences of a random sample of offenders whose offenses were not sex offenses. To the extent that we believe these witnesses, then there is a correlation between pornographic material and sex offenses. We have also read and heard evidence that is more scientific. Some of this evidence has related to entire countries, where researchers have looked for correlations between sex offenses and changes in a country's laws controlling pornography or changes in the actual prevalence of pornographic materials. Other evidence of this variety has been conducted with respect to states or regions of the United States, with attempts again being made to demonstrate correlations between use or non-use of certain sexually explicit materials and the incidence of sex crimes or other anti-social acts.

Correlational evidence suffers from its inability to establish a causal connection between the correlated phenomena. It is frequently the case that two phenomena are positive correlated precisely because they are both caused by some third phenomena.

We recognize, therefore, that a positive correlation between pornography and sex offenses does not itself establish a causal connection between the two. It may be that some other factor, some sexual or emotional imbalance, for example, might produce both excess use of pornographic materials as well as a tendency to commit sex offenses. But the fact that correlational evidence cannot definitively establish causality does not mean that it may not be some evidence of causality, and we have treated it as such. The plausibility of hypothesized independent variables causing both use of pornography and sex offenses is one factor in determining the extent to which causation can be suggested by correlational evidence. So too is the extent to which research design has attempted to exclude exactly these possible independent variables. The more this has been done, the safer it is to infer causation from correlation, but in no area has this inference been strong enough to justify reliance on correlational evidence standing alone.

The problem of the independent variable drops out when experiments are conducted under control group conditions. If a group of people are divided into two subgroups randomly, if one group is then exposed to a stimulus while the other is not, then a difference in result between the stimulus group and the control group will itself establish causation. As long as the two groups are divided randomly, and as long as the samples are large enough that randomness can be established, then any variable that might be hypothesized other than the one being tested will be present in both the stimulus group and the control group. As a result,

the stimulus being tested is completely isolated, and positive results are very strong evidence of causation.

The difficulty with experimental evidence of this variety, however, is that it is virtually impossible to conduct control group experiments outside of a laboratory setting. As a result, most of the experiments are conducted on those who can be induced to be subjects in such experiments, usually college age males taking psychology courses. Even a positive result, therefore, is a positive result only, in the narrowest sense, for a population like the experimental group. Extrapolating from the experimental group to the population at large involves many of the same problems as medical researchers encounter in extrapolating from tests on laboratory animals to conclusions about human beings. The extrapolation is frequently justified, but some caution here must be exercised in at least noting that the extrapolation requires assumptions of relevant similarity between college age males and larger populations, as well as, in some cases, assumptions of causality between the effects measured in the experiment and the effects with which people are ultimately concerned.

Perhaps more significantly, enormous ethical problems surround control group experiments involving actual anti-social conduct. If the hypothesis is that exposure to certain materials has a causal relationship with rape, for example, then the "ideal" experiment would start with a relatively large group of men as subjects, would then divide the large group randomly into two

groups, and would then expose one of the two groups to the pornographic materials and the other to control materials. Then the experimenter would see if the stimulus groups committed more rapes than the control group. Of course such an experiment is inconceivable, and as a result most experiments of this variety have had to find a substitute for counting sexual offenses. Some have used scientific measures of aggression or sexual arousal, some have used questionaires reflecting self-reported tendency to commit rape or other sex offenses, some have used experiments measuring people's willingness to punish rapists, and some have used other substitutes. With respect to any experiment of this variety, draving conclusions requires making assumptions between, for example, measured aggression and an actual increased likelihood of committing offenses. Sometimes these assumptions are justified, and sometimes they are not, but it is always an issue to be examined carefully.

One final point about the experimental evidence presented to us is in order. Even with control group experiments, the ultimate conclusions will depend on the ability of the reasecrher to isolate single variables. For example, where there is evidence shoving a causal relationship between exposure to violent pornography and aggressive behhavior, the stimulus as just described contains two elements, the violence and the sex. It may be that the cause is attributable solely to the violence, or it may be that the cause is attributable solely to the sex. Good research attempts to examine these possibilities, and ve have been conscious of it as ve evaluated the research presented

to us.

5.1.6 The Need to Subdivide

Taking into account all of the foregoing methodological factors, it has become clear to all of us that excessively broad terms like "pornography" or "sexually explicit materials" are just too encompassing to reflect the results of our inquiry. That should come as no surprise. There are different varieties of sexually explicit materials, and it is hardly astonishing that some varieties may cause consequences different from those caused by other varieties.

Our views about subdivision as a process, if not about the actual divisions themselves, reflect much of the scientific evidence, and we consider the willingness of scientists to subdivide to be an important methodological advance over the efforts of earlier eras. So too with our own subdivision. We have unanimously agreed that looking at all sexually explicit materials, or even all pornographic materials, as one undifferentiated whole is unjustified by common sense, unwarranted on the evidence, and an altogether oversimplifying way of looking at a complex phenomenon. In many respects we consider this one of our most important conclusions. Our subdivisions are not intended to be definitive, and particularly with respect to the subdivision between non-violent but degrading materials and materials that are neither violent nor degrading, we recognize that some researchers and others have usually employed broader or different groupings. Further research or

thinking, or just changes in the world, may suggest finer or different divisions. To us it is embarking on the process of subdivision that is most important, and we strongly urge that further research and thinking about the question of pornography recognize initially the way in which different varieties of material may produce different consequences.

We cannot stress strongly enough that our conclusions regarding the consequences of material within a given subdivision is not a statement about all of the material within a subdivision. We are talking about classes, or categories, and our statements about categories are general statements designed to cover most but not all of what might be within a given category. Some items within a category might produce no effects, or even the opposite effects from those identified. Were we drafting laws or legal distinctions, this might be a problem, but we are not engaged in such a process here. We are identifying characteristics of classes, and looking for harms by classes, without saying that everything that is harmful should be regulated, and without saying that everything that is harmful may be regulated consistent with the Constitution.

5.2 Our Conclusions About Harm

We present in the following sections our conclusions regarding the harms we have investigated with respect to the various subdividing categories we have found most useful. To the extent that these conclusions rest on findings from the social sciences, as they do to a significant extent, we do not in the body of this

report describe and analyze the individual studies or deal in specifics with their methodologies. For that we rely on the report on the social science research prepared by the Commission staff, which is included in this report as an appendix. Each of us has relied on different evidence from among the different categories of evidence, and specific studies that some of us have found persuasive have been less persuasive to others of us. Similarly, some of us have found evidence of a certain type particularly valuable, while others of us have found other varieties of evidence more enlightening. And in many instances we have relied on certain evidence despite some flaws it may have contained, for it is the case that all of us have reached our conclusions about harms by assimilating and amalgamating a large amount of evidence. Many studies and statements of witnesses have both advantages and disadvantages, and often the disadvantages of one study or piece of testimony has been remedied by another. Thus, the conclusions we reach cannot be identified with complete acceptance or complete rejection by all of us of any particular item of evidence. As a result, we consider the staff social science analysis, which is much more specific than what we say in this section, to be an integral part of this Report, and we urge that it be read as such. We have not relied totally on that analysis, as all of us have gone beyond it in our reading. And we cannot say that each of us agrees with every sentence and word in it. Nevertheless, it seems to us a sensitive, balanced, comprehensive, accurate, and current report on the state of the research. We have relied on it extensively,

and we are proud to include it here.

5.2.1 Sexually Violent Material

The category of material on which most of the evidence has focused is the category of material featuring actual or unmistakably simulated or unmistakably threatened violence presented in sexually explicit fashion with a predominant focus on the sexually explicit violence. Increasingly, the most prevalent forms of pornography, as well as an increasingly prevalent body of less sexually explicit material, fit this description. Some of this material involves sado-masochistic themes, with the standard accoutrements of the genre, including whips, chains, devices of torture, and so on. But another theme of some of this material is not sado-masochistic, but involves instead the recurrent theme of a man making some sort of sexual advance to a woman, being rebuffed, and then raping the woman or in some other way violently forcing himself on the woman. In almost all of this material, whether in magazine or motion pictire form, the woman eventually becomes aroused and ecstatic about the initially forced sexual activity, and usually is portrayed as begging for more. There is also a large body of material, more "mainstream" in its availability, that portrays sexual activity or sexually suggestive nudity coupled with extreme violence, such as disfigurement or murder. The so-called "slasher" films fit this description, as does some material, both in films and in magazines, that is less or more sexually explicit than the prototypical "slasher" film.

It is with respect to material of this variety that the scientific findings and ultimate conclusions of the 1970 Commission are least reliable for today, precisely because material of this variety was largely absent from that Commission's inquiries. It is not, however, absent from the contemporary world, and it is hardly surprising that conclusions about this material differ from conclusions about material not including violent themes.

When clinical and experimental research has focused particularly on sexually violent material, the conclusions have been virtually unanimous. In both clinical and experimental settings, exposure to sexually violent materials has indicated an increase in the likelihood of aggression. More specifically, the research, which is described in much detail in the appendix, shows a causal relationship between exposure to material of this type and aggressive behavior towards women.

Finding a link between aggressive behavior towards women and sexual violence, whether lawful or unlawful, requires assumptions not found exclusively in the experimental evidence. We see no reason, however, not to make these assumptions. The assumption that increased aggressive behavior towards women is causally related, for an aggregate population, to increased sexual violence is significantly supported by the clinical evidence, as well as by much of the less scientific evidence.[2] They are also

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2. For example, the evidence from formal or informal studies of self-reports of offenders themselves supports the conclusion that

to all of us assumptions that are plainly justified by our own common sense. This is not to say that all people with heightened levels of aggression will commit acts of sexual violence. But it is to say that over a sufficiently large number of cases we are confident in asserting that an increase in aggressive behavior directed at women will cause an increase in the level of sexual violence directed at women.

Thus we reach our conclusions by combining the results of the research with highly justifiable assumptions about the generalizability of more limited research results. Since the clinical and experimental evidence supports the conclusion that there is a causal relationship between exposure to sexually violent materials and an increase in aggressive behavior directed towards women, and since we believe that an increase in aggressive behavior towards women will in a population increrase the incidence of sexual violence in that population, we have reached the conclusion, unanimously and confidently, that the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence.

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the causal connection we identify relates to actual sexual offenses rather than merely to aggressive behavior. For reasons we have explained in Section 5.1.5, the tendency to externalize leads us to give evidence of this variety rather little weight. But at the very least it does not point in the opposite direction from the conclusions reached here.

Although we rely for this conclusion on significant scientific empirical evidence, we feel it worthwhile to note the underlying logic of the conclusion. The evidence says simply that the images that people are exposed to bears a causal relationship to their behavior. This is hardly surprising. What would be surprising would be to find otherwise, and we have not so found. We have not, of course, found that the images people are exposed to are a greater cause of sexual violence than all or even many other possible causes the investigation of which has been beyond our mandate. Nevertheless, it would be strange indeed if graphic representations of a form of behavior, especially in a form that almost exclusively portrays such behavior as desirable, did not have at least some effect on patterns of behavior.

Sexual violence is not the only negative effect reported in the research to result from substantial exposure to sexually violent materials. The evidence is also strongly supportive of significant attitudinal changes on the part of those with substantial exposure to violent pornography. These attitudinal changes are numerous. Victims of rape and other forms of sexual violence are likely to be perceived by people so exposed as more responsible for the assault, as having suffered less injujry, and as having been less degraded as a result of the experience. Similarly, people with a substantial exposure to violent pornography are likely to see the rapist or other sexual offender as less responsible for the act and as deserving of less stringent punishment.

These attitudinal changes have been shown experimentally to include a larger range of attitudes than those just discussed. The evidence also strongly supports the conclusion that substantial exposure to violent sexually explicit material leads to a greater acceptance of the "rape myth" in its broader sense - that women enjoy being coerced into sexual activity, that they enjoy being physically hurt in sexual context, and that as a result a man who forces himself on a woman sexually is in fact merely acceding to the "real" wishes of the woman, regardless of the extent to which she seems to be resisting. The myth is that a woman who says "no" really means "yes," and that men are justified in acting on the assumption that the "no" answer is indeed the "yes" answer. We have little trouble concluding that this attitude is both pervasive and profoundly harmful, and that any stimulus reinforcing or increasing the incidence of this attitude is for that reason alone properly designated as harmful.

Two vitally important features of the evidence supporting the above conclusions must be mentioned here. The first is that all of the harms discussed here, including acceptance of the legitimacy of sexual violence against women but not limited to it, are more pronounced when the sexually violent materials depict the woman as experiencing arousal, orgasm, or other form of enjoyment as the ultimate result of the sexual assault. This theme, unfortunately very common in the materials we have examined, is likely to be the major, albeit not the only, component of what it is in the materials in this category that

causes the consequences that have been identified.

The second important clarification of all of the above is that that evidence lends some support to the conclusion that the consequences we have identified here do not vary with the extent of sexual explicitness so long as the violence is presented in an undeniably sexual context. Once a threshold is passed at which sex and violence are plainly linked, increasing the sexual explicitness of the material, or the bizarreness of the sexual activity, seems to bear little relationship to the extent of the consequences discussed here. Although it is unclear whether sexually violent material makes a substantially greater causal contribution to sexual violence itself than does material containing violence alone, it appears that increasing the amount of violence after the threshold of connecting sex with violence is more related to increase in the incidence or severity of harmful consequences than is increasing the amount of sex. As a result, the so-called "slasher" films, which depict a great deal of violence connected with an undeniably sexual theme but less sexual explicitness than materials that are truly pornographic, are likely to produce the consequences discussed here to a greater extent than most of the materials available in "adults only"

Although we have based our findings about material in this category primarily on evidence presented by professionals in the behavioral sciences, we are confident that it is supported by the less scientific evidence we have consulted, and we are each

personally confident on the basis of our own knowledge and experiences that the conclusions are justified. None of us has the least doubt that sexual violence is harmful, and that general acceptance of the view that "no" means "yes" is a consequence of the most serious proportions. We have found a causal relationship between sexually explicit materials featuring violence and these consequences, and thus conclude that the class of such materials, although not necessarily every individual member of that class, is on the whole harmful to society.

5.2.2 Nonviolent Materials Depicting Degradation, Domination, Subordination, or Humiliation

Current reasearch has rather consistently separated out violent pornography, the class of materials we have just discussed, from other sexually explicit materials. With respect to further subdivision the process has been less consistent. Some researchers have made further distinctions, while others have merely classed everything else as "non-violent." We have concluded that more subdivision than that is necessary. Our examination of the variety of sexually explicit materials convinces us that once again the category of "non-violent" ignores significant distinctions within this category, and thus combines classes of material that are in fact substantially different.

The subdivision we adopt is one that has surfaced in some of the research. And it is also one that might explain a significant amount of what would otherwise seem to be conflicting

research results. Some researchers have found negative effects from non-violent material, while others report no such negative effects. But when the stimulus material these researchers have used is considered, there is some suggestion that the presence or absence of negative effects from non-violent material might turn on the non-violent material being considered "degrading," a term we shall explain shortly.[3] It appears that effects similar to although not as extensive as that involved with violent material can be identified with respect to such degrading material, but that these effects are likely absent when neither degradation nor violence is present.

An enormous amount of the most sexually explicit material available, as well as much of the material that is somewhat less sexually explicit, is material that we would characterize as "degrading," the term we use to encompass the undeniably linked characteristics of degradation, dominstaion, subordination, and humiliation. The degradation we refer to is degradation of people, most often women, and here we are referring to material

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3. For example, the studies of Dr. Zillman regarding non-violent material, studies that have been particularly influential for some of us, use material that contain the following themes: "He is ready to take. She is ready to be taken. This active/passive differentiation that coincides with gender is stated on purpose." Women are portrayed as "masochistic, subservient, socially nondiscriminating nymphomaniacs." Dr. Zillman goes on to characterize this material as involving mutual consent and no coercion, but also describes the films as ones in which "women tend to overrespond in serving the male interest."

that, although not violent, depicts[4] people, usually women, as existing solely for the sexual satisfaction of others, usually men, or that depicts people, usually women, in decidedly subordinate roles in their sexual relations with others, or that depicts people engaged in sexual practices that would to most people be considered humiliating. To give an admittedly extreme example, we would all consider a photograph of an upright male urinating into the mouth of a kneeling woman to be degrading. There are other examples as well of the type of images that we consider degrading and which we have seen in enormous prevalence in most "adults only" establishments. These would include depictions of a woman lying on the ground while two standing men ejaculate on her; two women engaged in sexual activity with each othjer while a man looks on and masturbates; a woman non-physically coerced into engaging in sexual activity with a male authority figure, such as a boss, teacher, or priest, and then begs for more; a woman in a role as nurse or secretary

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4. We restrict our analysis in large part to degradation that is in fact depicted in the material. It may very well be that degradation led to a woman being willing to pose for a picture of a certain variety, or to engage in what appears to be a non-degrading sexual act. It may be that coercion caused the picture to exist. And it may very well be that the existing disparity in the economic status of men and women is such that any sexually explicit depiction of a woman is at least suspect on account of the possibility that the economic disparity is what caused the woman to pose for a picture that most people in this society would find embarrasing. We do not deny any of these possibilities, and we do not deny the importance of considering as pervasively as possible the status of women in contemporary America, including the effects of their current status and what might be done to change some of the detrimental consequences of that status. But without engaging in an inquiry of that breadth, we must generally, absent more specific evidence to the contrary, assume that a picture represents what it depicts.

portrayed as required by the job to provide sexual satisfaction to a male physician or boss; a woman with legs spread wide open holding her labia open with her fingers; a man shaving the hair from the public area of a woman; a woman dressed in a dog costume being penetrated from the rear by a man; and a woman lying on a bed begging for sexual activity with a large number of different men who approach her one after another. Although these examples are extreme, forms of degradation not totally different from these represent the largely predominant proportion of commercially available pornography.

With respect to material of this variety, our conclusions are substantially similar to those with respect to violent material, although we make them with somewhat less confidence and our making of them requires more in the way of assumption than was the case with respect to violent material. The evidence, scientific and otherwise, is more tentative, but supports the conclusion that the material we describe as degrading bears some causal relationship to the attitudinal changes we have previously identified. That is, substantial exposure to material of this variety is likely to increase the extent to which those exposed will view rape or other forms of sexual violence as less serious than they otherwise would have, will view the victims of rape and other forms of sexual violence as significantly more responsible, and will view the offenders as significantly less responsible. We also conclude that the evidence supports the conclusion that substantial exposure to material of this type will increase acceptance of the proposition that women like to be forced into

sexual practices, and, once again, that the woman who says "no" really means "yes."

With respect to material of this type, there is less evidence causally linking the material with sexual aggression, but this may be because this is a category that has been isolated in only a few studies, albeit an increasing number. The absence of evidence should by no means be taken to deny the existence of the causal link. But because the causal link is less the subject of experimental studies, we have been required to think more carefully here about the assumptions necessary to causally connect increased acceptance of rape myths and other attitudinal changes with increased sexual aggression and sexual violence. And on the basis of all the evidence we have considered, from all sources, and on the basis of our own insights and experiences, we believe we are justified in draving the following conclusion: Over a large enough sample a population that believes that many women like to be raped, that believes that sexual violence or sexual coercion is often desired or appropriate, and that believes that sex offenders are less responsible for their acts, will commit more acts of sexual violence or sexual coercion than would a population holding these beliefs to a lesser extent.

We should make clear what we have concluded here. We are not saying that everyone exposed to material of this type has his attitude about sexual violence changed. We are saying only that the evidence supports the conclusion that substantial exposure to degrading material increases the likelihood for an individual and

the incidence over a large population that these attitudinal changes will occur. And we are not saying that everyone with these attitudes will commit an act of sexual violence or sexual coercion. We are saying that such attitudes will increase the likelihood for an individual and the incidence for a population that acts of sexual violence, sexual coercion, or unwanted sexual aggression will occur. Thus, we conclude that substantial exposure to materials of this type bears some causal relationship to the level of sexual violence, sexual coercion, or unwanted sexual aggression in the population so exposed.

We need mention as well that our focus on these more violent or more coercive forms of actual subordination of women should not diminish what we take to be a necessarily incorporated conclusion: Substantial exposure to materials of this type bears some causal relationship to the incidence of various non-violent forms of discrimination against or subordination of women in our society. To the extent that these materials create or reinforce the view that women's function is disproportionately to satisfy the sexual needs of men, then the materials will have pervasive effects on the treatment of women in society far beyond the incidence of identifiable acts of rape or other sexual violence. We obviously cannot here explore fully all of the forms in which women are discriminated against in contemporary society. Nor can we explore all of the causes of that discrimination against women. But we feel confident in concluding that the view of women as available for sexual domination is one cause of that discrimination, and we feel confident as well in concluding that

degrading material bears a causal relationship to the view that women ought to subordinate their own desires and beings to the sexual satisfaction of men.

Although the category of the degrading is one that has only recently been isolated in some research, in the literature generally, and in public discussion of the issue, it is not a small category. If anything, it constitutes somewhere between the predominant and the overwhelming portion of what is currently standard fare heterosexual pornography, and is a significant theme in a broader range of materials not commonly taken to be sexually explicit enough to be pornographic. But as with sexually violent materials, the extent of the effect of these degrading materials may not turn substantially on the amount of sexual explicitness once a threshold of undeniable sexual content is surpassed. The category therefore includes a great deal of what would now be considered to be pornographic, and includes a great deal of what would now be held to be legally obscene, but it includes much more than that. Since we are here identifying harms for a class, rather than identifying harms caused by every member of that class, and since we are here talking about the identification of harm rather than making recommendations for legal control, we are not reluctant to identify harms for a class of material considerably wider than what is or even should be regulated by law.

5.2.3 Non-Violent and Non-Degrading Materials

Our most controversial category has been the category of

sexually explicit materials that are not violent and are not degrading as we have used that term. They are materials in which the participants appear to be fully willing participants occupying substantially equal roles in a setting devoid of actual or apparent violence or pain. Examples would include a sexually explicit depiction of a man and woman meeting and then engaging in consensual and equal vaginal intercourse; a depiction of a couple engaging in oral-genital sexual activity under conditions of consent and equality; and two couples simultaneously engaging in the same activity. Our list of examples of materials in this category is smaller than for the category of the degrading in large part because this category is in fact quite small in terms of currently available materials. There is some, to be sure, and the amount may increase as the division between the degrading and the non-degrading becomes more accepted, but we are convinced that only a small amount of currently available highly sexually explicit material is neither violent nor degrading. We thus talk about a small category, but one that should not be ignored.

We have disagreed substantially about the effects of such materials, and that should come as no surprise. We are dealing in this category with "pure" sex, as to which there are widely divergent views in this society. That we have disagreed among ourselves does little more than reflect the extent to which we are representative of the population as a whole. In light of that disagreement, it is perhaps more appropriate to explain the various views rather than indicate a unanimity that does not exist, within this Commission or within society, or attempt the

preposterous task of saying that some fundamental view about the role of sexuality and portrayals of sexuality was accepted or defeated by such-and-such vote. We do not wish to give easy answers to hard questions, and thus feel better with describing the diversity of opinion rather than suppressing part of it.

In examining the material in this category, we have not had the benefit of extensive evidence. Research has only recently begun to distinguish the non-violent but degrading from material that is neither violent nor degrading, and we have all relied on a combination of interpretation of existing studies that may not have drawn the same divisions, studies that did draw these distinctions, clinical evidence, interpretation of victim testimony, and our own perceptions of the effect of images on human behavior. Although the social science evidence is far from conclusive, we are on the current state of the evidence persuaded that material of this type does not bear a causal relationship to rape and other acts of sexual violence. We rely once again not only on scientific studies outlined in the Commission staff's report, and examined by each of us, but on the fact that the conclusions of these studies seem to most of us fully consistent with common sense. Just as materials depicting sexual violence seem intuitively likely to bear a causal relationship to sexual violence, materials containing no depictions or suggestions of sexual violence or sexual dominance seem to most of us intuitively unlikely to bear a causal relationship to sexual violence. The studies and clinical evidence to date are less persuasive on this lack of negative effect than they are

persuasive for the presence of negative effect for the sexually violent material, but they seem to us of equal persuasive power as the studies and clinical evidence showing negative effects for the degrading materials. The fairest conclusion from the social science evidence is that there is no persuasive evidence to date supporting the connection between non-violent and non-degrading materials and acts of sexual violence, and that there is some but very limited evidence indicating that the connection does not exist. The totality of the social science evidence, therefore, is slightly against the hypothesis that non-violent and non-degrading materials bear a causal relationship to acts of sexual violence.

That there does not appear from the social science evidence to be a causal link with sexual violence, however, does not answer the question of whether such materials might not themselves simply for some other reason constitute a harm in themselves, or bear a causal link to consequences other than sexual violence but still taken to be harmful. And it is here that we and society at large have the greatest differences of opinion.

One issue relates to materials that, although undoubtedly consensual and equal, depict sexual practices frequently condemned in this and other societies: Examples include the large amount of material depicting homosexual activity; material depicting anal intercourse; material depicting sexual activity with animals; material depicting oral-genital sexual activity; material depicting more than two people engaged in sexual

activity; and material depicting sexual activity with priests or nuns. There are many other varieties than these, but this should give an example of the genre as well as effectively state the problem. For it is clear that the level of societal condemnation of these activities varies, and it is equally clear that the activities depicted are ones that some people condemn and others do not. We have discovered that to some significant extent the assessment of the harmfulness of materials depicting these activities correlates directly with the assessment of the harmfulness of the activities themselves. Intuitively and not experimentally, we can hypothesize that materials portraying, for example, homosexual activity or anal intercourse or oral-genital sexual contact, will either help to legitimize or will bear some causal relationship to homosexual activity itself, anal intercourse itself, or oral-genital contact itself. With respect to these materials, therefore, it appears that a conclusion about the harmfulness of these materials turns on a conclusion about the harmfulness of the activity itself. As to this, we are unable to agree with respect to many of these activities. Some of us believe that homosexuality, for example, is inherently wrong, while others of us believe that homosexuality is a matter of sexual preference as to which condemnation is inappropriate. Our differences reflect differences now extant in society at large, and actively debated, and we can hardly resolve them here. The same can be said for oral-genital sexual activity, anal intercourse, and a number of other such activities, although it should be mentioned that none of us is willing to include

sexual intercourse with animals in the category of mere sexual preference, and all of us are willing therefore to condemn it.

A larger issue is the very question of promiscuity. Even to the extent that the behavior depicted is not inherently condemned by some or any of us, the manner of presentation almost necessarily suggests that the activities are taking place outside of the context of marriage, love, commitment, or even affection. Again, it is far from implausible to hypothesize that materials depicting sexual activity without marriage, love, commitment, or affection bear some causal relationship to sexual activity without marriage, love, commitment, or affection. There are undoubtedly many causes for what used to be called the "sexual revolution," but it is absurd to suppose that depictions or descriptions of uncommitted sexuality were not among them.[5] Thus, once again our diagreements reflect disagreements in society at large, although not to as great an extent. Although there are many members of this society who can and have made affirmative cases for uncommitted sexuality, none of us believes it to be a good thing. A number of us, however, believe that the level of commitment in sexuality is a matter of choice among those who voluntarily engage in the activity. Others of us believe that uncommitted sexual activity is wrong for the individuals involved and harmful to society to the extent of its prevalence. Our view of the ultimate harmfulness of much of this

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5. Nor, of course, do we deny the extent that the phenomenon, in part, also goes the other way. Sexually explicit materials in most cases seem both to reflect and to cause demand.

material, therefore, is reflective of our individual views about the extent to whether sexual commitment is purely a matter of individual choice.

Even insofar as sexually explicit material of the variety being discussed here is not perceived as harmful for the messages it carries or the symbols it represents, the very publicness of what is commonly taken to be private is cause for concern.[6] Even if we hypothesize a sexually explicit motion picture of a loving married couple engaged in mutually pleasurable and procreative vaginal intercourse, the depiction of that act on a screen or in a magazine may constitute a harm in its own right (a "primary harm" in the terminology introduced earlier in this Chapter) solely by virtue of being shown. Here the concern is with the preservation of sex as an essentially private act, in conformity with the basic privateness of sex long recognized by this and all other societies. The alleged harm here, therefore, is that as soon as sex is put on a screen or put in a magazine it changes its character, regardless of what variety of sex is portrayed. And to the extent that the character of sex as public rather than private is the consequence here, then that to many would constitute a harm.

In considering the way in which making sex public may fundamentally transform the character of sex in all settings, it

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6. The concerns summarized here are articulated more fully in a statement, contained in the appendix, that expresses the views of a number of individual members of this Commission.

seems important to emphasize that the act of making sex public is as an empirical matter almost always coincident with the act of making sex a commercial enterprise. Whether the act of making sex public if done by a charitable institution would be harmful is an interesting academic exercise, but it is little more than that. For in the context we are discussing, taking the act of sex out of a private setting and making it public is invariably done for someone's commercial gain. To many of us, this fact of commercialization is vital to understanding the concern about sex and privacy.

We are again, along with the rest of society, unable to agree as to the extent to which making sex public and commercial should constitute a harm. We all agree for ourselves on the fundamental privateness of sex, but we disagree about the extent to which the privateness of sex is more than a manner of individual choice. And although we all to some extent think that sexuality may have in today's society become a bit too public, many of us are concerned that in the past it has been somewhat too private, being a subject that could not be talked about, could not constitute part of the discourse of society, and was treated in some way as "dirty." To the extent that making sex more public has, while not without costs, alleviated some of these problems of the past, some of us would not take the increased publicness of sexuality as necessarily harmful, but here again we are quite understandably unable to agree.

The discussion of publicness in the previous paragraph was

limited to the necessary publicness consequent in making a picture of a sexual act, regardless of whether the picture is made public in the broader sense. But to the extent that this occurs, we are once again in agreement. While some might argue that it is desirable for sexual explicitness to be publicly displayed to both willing and unwilling viewers, and while some might argue that this is either a positive advantage for the terrain of society or of no effect, we unanimously reject that conclusion. We all agree that some large part of the privateness of sex is essential, and we would, for example, unanimously take to be harmful to society a proliferation of billboards displaying even the hypothesized highly explicit photograph of a loving married couple engaged in mutually pleasureable and procreative vaginal intercourse. Thus, to the extent that materials in this category are displayed truly publicly, we unanimously would take such a consequence to be harmful to society in addition to being harmful to individuals. Even if unwilling viewers are offended rather than harmed in any stronger sense, we take the large scale offending of the legitimate sensibilities of a large portion of the population to be harmful to society.

A number of witnesses have testified about the effects on their own sexual relations, usually with their spouses, of the depiction on the screen and in magazines of sexual practices in which they had not previously engaged. A number of these witnesses, all women, have testified that men in their lives have used such material to strongly encourage, or coerce, them into engaging in sexual practices in which they do not choose to

engage. To the extent that such implicit or explicit coercion takes place as a result of these materials, we all agree that it is a harm. There has been other evidence, however, about the extent to which such material might for some be a way of revitalizing their sex lives, or, more commonly, simply constituting a part of a mutually pleasurable sexual experience for both partners. On this we could not agree. For reasons relating largely to the question of publicness in the first sense discussed above, some saw this kind of use as primarily harmful. Others saw it as harmless and possibly beneficial in contexts such as this. Some professional testimony supported this latter view, but we have little doubt that professional opinion is also divided on the issue.

Perhaps the most significant potential harm in this category exists with respect to children. We all agree that at least much, probably most, and maybe even all material in this category, regardless of whether it is harmful when used by adults only, is harmful when it falls into the hands of children. Exposure to sexuality is commonly taken, and properly so, to be primarily the responsibility of the family. Even those who would disagree with this statement would still prefer to have early exposure to sexuality be in the hands of a responsible professional in a controlled and guided setting. We have no hesitancy in concluding that learning about sexuality from most of the material in this category is not the best way for children to learn about the subject. There are harms both to the children themselves and to notions of family control over a child's

introduction to sexuality if children learn about sex from the kinds of sexually explicit materials that constitute the bulk of this category of materials.

We have little doubt that much of this material does find its way into the hands of children, and to the extent that it does we all agree that it is harmful. We may disagree about the extent to which people should, as adults, be tolerated in engaging in sexual practices that differ from the norm, but we all agree about the question of the desirability of exposing children to most of this material, and on that our unanimous agreement is that it is undesirable. For children to be taught by these materials that sex is public, that sex is commercial, and that sex can be divorced from any degree of affection, love, commitment, or marriage is for us the wrong message at the wrong time. We may disagree among ourselves about the extent to which the effect on children should justify large scale restrictions for that reason alone, but again we all agree that if the question is simply harm, and not the question of regulation by law, that material in this category is, with few exceptions, generally harmful to the extent it finds its way into the hands of children. Even those in society who would be least restrictive of sexually explicit materials tend, by and large, to limit their views to adults. The near unanimity in society about the effects on children and on all of society in exposing children to explicit sexuality in the form of even non-violent and non-degrading pornographic materials makes a strong statement about the potential harms of this material, and we confidently

agree with that longstanding societal judgment.

Perhaps the largest question, and for that reason the question we can hardly touch here, is the question of harm as it relates to the moral environment of a society. There is no doubt that numerous laws, taboos, and other social practices all serve to enforce some forms of shared moral assessment. The extent to which this enforcement should be enlarged, the extent to which sexual morality is a necessary component of a society's moral environment, and the appropriate balance between recognition of individual choice and the necessity of maintaining some sense of community in a society are questions that have been debated for generations. The debates in the nineteenth century between John Stuart Mill and James FitzJames Stephen, and in the twentieth century between Patrick Devlin and H.L.A. Hart, are merely among the more prominent examples of profound differences in opinion that can scarcely be the subject of a vote by this Commission. We all agree that some degree of individual choice is necessary in any free society, and we all agree that a society with no shared values, including moral values, is no society at all. We have numerous different views about the way in which these undeniably competing values should best be accomodated in this society at this time, or in any society at any time. We also have numerous different views about the extent to which, if at all, sexual morality is an essential part of the social glue of this or any other society. We have talked about these issues, but we have not even attempted to resolve our differences, because these differences are reflective of differences that are

both fundamental and widespread in all societies. That we have been able to talk about them has been important to us, and there is no doubt that our views on these issues bear heavily on the views we hold about many of the more specific issues that have been within the scope of our mission.

Thus, with respect to the materials in this category, there are areas of agreement and areas of disagreement. We unanimously agree that the material in this category in some settings and when used for some purposes can be harmful. None of us think that the material in this category, individually or as a class, is in every instance harmless. And to the extent that some of the materials in this category are largely educational or undeniably artistic, we unanimously agree that they are little cause for concern if not made available to children are foisted on unwilling viewers. But most of the materials in this category would not now be taken to be explicitly educational or artistic, and as to this balance of materials our disagreements are substantial. Some of us think that some of the material at some times will be harmful, that some of the material at some times will be harmless, and that some of the material at times will be beneficial, especially when used for professional or nonprofessional therapeutic purposes. And some of us, while recognizing the occasional possibility of a harmless or beneficial use, nevertheless, for reasons stated in this section, feel that on balance it is appropriate to identify the class as harmful as a whole, if not in every instance. We have recorded this disagreement, and stated the various concerns. We can do

little more except hope that the issues will continue to be discussed. But as it is discussed, we hope it will be recognized that the class of materials that are neither violent nor degrading is at it stands a small class, and many of these disagreements are more theoretical than real. Still, this class is not empty, and may at some point increase in size, and thus the theoretical disagreements may yet become germane to a larger class of materials actually available.

5.2.4 Nudity

We pause only briefly to mention the problem of mere nudity. None of us think that the human body or its portrayal is harmful. But we all agree that this statement is somewhat of an oversimplification. There may be instances in which portrayals of nudity in an undeniably sexual context, even if there is no suggestion of sexual activity, will generate many of the same issues discussed in the previous section. There are legitimate questions about when and how children should be exposed to nudity, legitimate questions about public portrayals of nudity, and legitimate questions about when "mere" nudity stops being "mere" nudity and has such clear connotations of sexual activity that it ought at least to be analyzed according to the same factors that we discuss with respect to sexually explicit materials containing neither violence nor degradation.

In this respect nudity without force, coercion, sexual activity, violence, or degradation, but with a definite provocative element, represents a wide category of materials. At

the least explicit end of the spectrum, we could envision aesthetically posed, air brushed photographs of beautiful men or women in a provocative context. The provocation derives from the power of sex to attract the attentions and stir the passions of all of us. Such materials may have, in most uses, little negative effect on individuals, families, or society. But at the other end of the continuum, we see materials specifically designed to maximize the sexual impact by the nature of the pose, the caption, the seductive appearance, and the setting in which the model is placed. For example, consider a woman shown in a reclining position with genitals displayed, wearing only red feathers and high heeled shoes, holding a gun and accompanied by a caption offering a direct invitation to sexual activity. With respect to such more explicit materials, we were unable to reach complete agreement. We are all concerned about the impact of such material on children, on attitudes towards women, on the relationship between the sexes, and on attitudes towards sex in general, but the extent of the harms was the subject of some difference of opinion.

None of us, of course, finds harmful the use of nudity in art and for plainly educational purposes. Similarly, we all believe that in some circumstances the portrayal of nudity may be undesirable. It is therefore impossible to draw universal conclusions about all depictions of nudity under all conditions. But by and large we do not find the nudity that does not fit within any of the previous categories to be much cause for concern.

5.3 The Need for Further Research

Although we have mentioned it throughout this report, it is appropriate here to emphasize specially the importance of further research by professionals into the potential and actual harms we have discussed in this chapter. We are confident that the quality and quantity of research far surpasses that available in 1970, but we also believe that the research remains in many respects unsystematic and unfocused. There is still a great deal to be done. In many respects research is still at a fairly rudimentary stage, with few attempts to standardize categories of analysis, self-reporting questionnaires, types of stimulus materials, description of stimulus materials, measurement of effects, and related problems.

We recognize that the ethical problems discussed above will inevitably place some cap on the conclusions that can be drawn from the research in this area. But apart from this inherent and incurable limitation, much can still be done. The research that has led to further subdivision of the large category of sexually explicit materials has perhaps been the most important development in recent years, and we strongly encourage research that will deal more precisely with different varieties of materials. We also believe that many other specificv questions are in need of further research. There needs to be more research, for example, about the effect of pornography on the marriage relationship, about the nature of appetites for pornographic material and hov those appetites are developed,

about the effect of depictions of particular sexual practices on the sexual preferences of those who view them, and about the effects of exposure to pornographic material on children. This list could be much longer, but the point is only to show that much more needs to be done.

Some of the professionals who have provided evidence to us have been quite outspoken in their views about what the government in general or the legal system in particular ought to do about pornography. This phenomenon has been about equally divided between those researchers who have advocated fewer legal controls and those who have advocated more. While we do not deny to citizens the right to speak out on matters of public concern, we ought to note that we have tended to rely most on evidence provided by those who seem less committed to a particular point of view beyond their scientific expertise. We deal in an area in which a great deal must be taken on faith, including description of stimulus materials, description of experimental environments, questionnaire design, and description of what may or may not have been told to subjects. At no time have we suspected any scientist of deliberately or even negligently designing an experiment or reporting its results, but it remains nevertheless the case that there is room for judgment and room for discretion. Where a researcher has taken on the role as active crusader, one way or another, on the issue of governmental control of pornography, we are forced to question more than we would otherwise have done the way in which this judgment and discretion has been exercised. We will not suggest how any

researcher should balance the issue of his or her own credibility against his or her own strong feelings about an issue of importance. But we will note that the more that is expected to be taken on trust, the more likely it is that active involvement with respect to what is to be done with the results of the research will decrease the amount of trust.

CHAPTER VI

LAWS AND THEIR ENFORCEMENT

6.1 An Overview of the Problem

In Chapter V we explored the various harms alleged to be caused by certain kinds of sexually explicit materials. We also indicated our conclusions with respect to questions of harm. But as we insisted throughout Chapter V, the fact that a certain kind of material causes a certain kind of harm, although generally a factor in making decisions about law and law enforcement, does not by itself entail the conclusion that the material causing the harm should be controlled by the law. In some cases private action may be more appropriate than governmental action. In some cases governmental action, even if ideally appropriate, may be inadvisable as a matter of policy or unworkable as a matter of practice. And in some cases governmental action may be unconstitutional. Still, the prevention and redress of harms to individuals and harms to society have long been among the central functions of government in general and law in particular. Although we are sensitive to the space between what is harmful and what harms the government ought to address, at least we start with the assumption that where there is an identified harm, then governmental action ought seriously to be considered. In some cases the result of that consideration will be the conclusion that governmental action is inappropriate, unworkable, or unconstitutional. But so long as we have identified harms, we must consider carefully the possible legal remedies for each harm

ve have identified.

We have tried to consider as broadly as possible the kinds of legal remedies that might be appropriate to deal with various harms. Although enforcement of the criminal law has long been considered the primary legal tool for dealing with harmful sexually explicit material, it has not been the only such tool, and ought not to be considered the only possible one. We have tried to be as open as we could be to various options in addition to or instead of enforcement of the criminal law. Thus in this Chapter we will consider the appropriateness, as exclusive or supplemental remedies, of zoning, administrative regulation, civil remedies for damages in the form of a civil rights action, civil remedies to obtain an injunction, and other possible legal responses to the harms that have been identified. We do not claim to be exhaustive in our consideration of regulatory options. Some options that have been suggested to us simply do not warrant discussion. And others that we mention briefly could and should be explored more thoroughly by others. But it is important to us to emphasize that approaches other than the traditional criminal law sanctions do exist, and are an integral part of thinking carefully about the issue of pornography.

6.2 Should Pornography Be Regulated By Law?

6.2.1 The Question is Deregulation

Numerous witnesses at our public hearings, as well as many others in written evidence or in various publications, have urged

upon us the view that pornography should not be regulated by law. Because such arguments have been around for some time, and because such arguments were substantially accepted by the 1970 Commission, we have very seriously considered them. To a significant, extent, however, the arguments remain unpersuasive.

Many of the arguments against regulation, both those made currently and those made earlier, rest on claims of harmlessness that, as we have explained in Chapter V, are simply erroneous with respect to much of this material. Some of these claims of harmlessness tend either to ignore much of the evidence, or to extrapolate from plausible conclusions about the most innocuous material to conclusions about an entire class. Others start with the assumption that no finding of harm can be accepted unless it meets some extraordinarily high burden of proof, a burden of proof whose rigor often seems premised on an a priori assertion that the material being discussed ought not to be regulated.

In addition to erroneous or skewed claims of harmlessness, many of the arguments against regulation depend on claims of unconstitutionality that would require for their acceptance a view of the law strikingly different from that long accepted by the Supreme Court in its rulings on obscenity. As we discuss in Chapter III, we accept the Supreme Court's basic approach to the constitutional question. To the extent that claims for non-regulation thus rest on constitutional arguments with which neither we nor the Supreme Court accept, we reject those arguments for non-regulation.

To the extent that arguments for non-regulation do not depend on implausible claims of harmlessness or rejected claims of unconstitutionality, however, they deserve to be taken even more seriously. As questions of policy in particular areas or the appropriateness of governmental action in general, serious arguments have been made that go to the most fundamental questions of what governmental action is designed to achieve.

We have thought carefully about these issues explicitly, and in doing so we have found it necessary to recast the question. The question as often presented to us in effect asks whether, if we had no laws dealing with pornography, we would want them. This question is not the same as the question whether, given 180 years of pornography regulation in the United States, we should repeal it. Although virtually every argument for deregulation presented to us has been in the former tone, it is the latter that represents reality. We certainly do not take everything that is to be inevitable, and we deem it important to treat even that which has been assumed for generations as open for serious and foundational reconsideration. Nevertheless, it remains the case that there are vast real and symbolic differences between not doing what has not before been done and undoing what is currently in place. To undo makes a statement much stronger than that made by not doing. In many cases it may be fully appropriate to make this stronger statement, but we presuppose here that the evidence and our convictions must be stronger to urge dismantling what is now in place than it would have to be to refuse to put in place what did not now exist. Moreover, we

recognize that this is an area marked by serious debate, involving plausible arguments both for and against regulation. Where the issues are not all on one side, we have given some weight to the considered judgment of the past. In some sense, therefore, the burden of proof is on those who would urge adoption of a variety of governmental regulation that does not now exist. In a nation founded on principles of limited government, those who would make it less limited have the obligation to persuade. But where there exists a present practice and long history of regulation of a certain variety, the burden is on those who would have government make the necessarily much stronger statement implied by an affirmative act of deregulation.

In light of this, we take the question of the governmental regulation of the legally obscene not to be whether if we did not have obscenity laws would we want them, but whether given that we have obscenity laws do we want to abandon them. In many areas the issues before us are not close, and how the question is put does not determine the outcome. But in many other areas the questions are indeed difficult, and how the questions are cast, and where the burden of proof lies, do make a difference. With reference to criminal sanctions against the legally obscene, for example, the burden must be on those who would have us or society make the specially strong statement implicit in the act of repeal. But with reference to certain forms of regulation that do not now exist, the burden is similarly on those who would have us or society make the specially strong statement implicit in

urging the totally new.

6.2.2 Law Enforcement, Priority, and Multiple Causation

As we have discussed in Chapter V, most of the harms that we have identified are not caused exclusively or even predominantly by pornography. In Chapter V we discussed this problem of multiple causation in terms of relatively abstract questions of harm. But when the phenomenon of multiple causation is applied to actual problems of laws and their enforcement, the issue gets more difficult. Even if it is the case that a certain form of sexually explicit material bears a causal relationship to harm, the question remains whether some other stimulus has an even greater causal relationship. Except peripherally, we could not be expected to delve deeply into all possible other causes of sexual violence, sex discrimination, and excess sexual aggression. To the extent that we make recommendations about law enforcement, we make them from a presupposition that others from a larger perspective must make the ultimate determinations about allocation of scarce financial and other societal resources. This task includes not only the allocation of resources among various causes of the harms we have identified, but also involves the even more difficult question of allocating resources among these harms and others. These are difficult questions, and we do not claim that either simple formulas or easy platitudes can answer questions about, for example, apportioning money among countermeasures against poverty, racism, terrorism, and sexual violence. None of us would say that any of these is unimportant,

but we recognize that in a world of scarce resources the long term commitment of resources to combat one evil inevitably draws resources away from those available to combat another evil. Even if one assumes that there are currently underutilized resources that could be allocated to the harms we discuss here, such an allocation still involves a decision to allocate the currently underutilized resources to combat these harms rather than some others. We have no solutions to these intractable problems of priority in a world in which there is more to do than there are resources with which to do it. Nevertheless, we feel it important to note here that we have not ignored these problems, and we urge that everything we say be considered in light of these considerations.

Although we are sensitive to the difficulty of problems of priority, we still feel confident in concluding that, at the very least, the problems of sexual violence, sexual aggression short of actual violence, and sex discrimination are serious societal problems that have traditionally received a disproportionately small allocation of societal resources. To the extent that we would be asked the question whether resources should be expended on alleviating these problems rather than dealing with others, we assert strongly that these problems have received less resources than we think desirable, and that remedying that imbalance by a possibly disproportionate allocation in the opposite direction is appropriate.

The conclusion in the previous paragraph does not address the

question of priorities of approach once we have decided to treat these problems as high priority matters. With respect to priorities in dealing with the problems of sexual violence, sexual aggression not involving violence, and sex discrimination, people disagree about the optimal priority that dealing in some way with sexually violent pornography and sexually degrading pornography ought to have. But images are significant determinants of attitudes, and attitudes are significant determinants of human behavior. To the extent constitutionally permissible, dealing with the messages all around us seems an important way of dealing with the behavior. We have concluded that the images we deal with here seem to be at the least a substantial cause of the harms we have identified. But common sense leads us to go further, and to suppose that the images are a significant cause even when compared with all of the other likely causes of these same harms. To the extent that this substantial causal relationship has not been reflected in the realities of law enforcement, we have little hesitation in making recommendations about increased priority.

6.2.3 The Problem of Underinclusiveness

The problem of multiple causation is addressed to those causes of certain harms other than some varieties of pornographic materials. The problem has another aspect, best referred to as the problem of underinclusiveness. For even if we restrict our consideration to sexually oriented images, to the various kinds of sexually explicit materials discussed in Chapter V, it is

certainly the case that many of those materials are constitutionally immune from governmental regulation. And to the extent that the material involved becomes less explicit, the immunity from regulation, as a matter of current law, increases. A great deal of sexual violence, for example, is part of less sexually explicit and generally available films and magazines, and because it is presented in less explicit fashion in the context of some plot or theme it remains beyond the realm of governmental control, although non-governmental self-restraint or citizen action seems highly appropriate. And when we include various other sources of sexually oriented messages and images in contemporary society, from prime time television to the lyrics of contemporary music to advertisements for blue jeans, it is even more apparent that much of what people are concerned with in terms of truly pornographic materials might also be a concern with respect to an immense range and quantity of materials that are unquestionably protected by the First Amendment. Many of these materials may present the message in a more diluted form, but certainly their prevalence more than compensates for any possible dilution. As a result, even the most stringent legal strategies within current or even in any way plausible constitutional limitations would likely address little more than the tip of the iceberg.

We thus confront a society in which the Constitution properly requires governments to err on the side of underregulation rather than overregulation, and in which the First Amendment leaves most of the rejection of unacceptable and dangerous ideas to citizens

rather than to government. Faced with this reality, it would be easy to note the irremediable futility of being limited only to a thin slice of the full problem, and as a consequence recommend deregulation even as to the material we deem harmful and constitutionally unprotected. But this would be too easy. First, it ignores the extent to which the materials that can be regulated consistent with the Constitution may, because they present their messages in a form undiluted by any appeal to the intellect, bear a causal relationship to the harms we have identified to a disproportionate degree. And with respect to sexual violence, these materials may disproportionately be aimed at and influence people more predisposed to this form of behavior. For both of these reasons, most of us believe that in many cases the harm-causing capacities of some sexually explicit material may be more concentrated in that which is constitutionally regulable and legally obscene than in that which is plainly protected by the Constitution. This factor of concentration of harm may itself justify maintaining a strategy of law enforcement in the face of massive underinclusiveness.

More significantly, however, law serves an important symbolic function, and in many areas of life that which the law condemns serves as a model for the *condemnatory attitudes* and actions of private citizens. Obviously this symbolic function, the way in which the law teaches as well as controls, is premised on a general assumption of legitimacy with respect to the law in general that generates to many people a presumption that the law's judgments are morally, politically, and scientifically

correct in addition to being rely authoritative. In king recommendations about what the law should do, we are cognizant of the responsibilities that accompany law's symbolic function. We are aware as well of its opportunities, and of the symbolic function that may be served by even strikingly underinclusive regulation. Conversely, we are aware of the message conveyed by repeal or non-enforcement of existing laws with respect to certain kinds of materials. To the extent that we believe, as we do, that in a number of cases the message that is or would be conveyed by repeal or non-enforcement is exactly the opposite message from what we have concluded and what the evidence supports, we are unwilling to have the law send out the wrong signal. Especially on an issue as publicly noted and debated as this, the law will inevitably send out a signal. We would prefer that it be the signal consistent with the evidence and consistent with our conclusions.

6.3 The Criminal Law

In light of our conclusions regarding harm, and in light of the factors discussed above in Section 6.2, we reject the argument that all distribution of legally obscene pornography should be decriminalized. Even with that conclusion, however, many issues remain, and it is to these that we now turn.

6.3.1 The Sufficiency of Existing Criminal Laws

The laws of the United States and of almost every state make criminal the sale, distribution, or exhibition of material

defined as obscene pursuant to the definition set forth by the Supreme Court in Miller v. California.[1] The enormous differences among states and among other geographic areas in obscenity law enforcement are due not to differences in the laws as written,[2] but to differences in how, how vigorously, and how often these laws are enforced.

Some witnesses have urged us to recommend changes in the criminal law resulting in laws that are significantly different in scope or in method of operation from those now in force. We have, for example, been urged to recommend a "per se" approach to obscenity law that would make the display of certain activities automatically obscene and we have been urged to recommend a definition of the legally obscene that is broader than that of Miller. We have thought carefully about these and similar suggestions, but we have rejected them. We have rejected these suggestions for a number of reasons, the most important of which is that it has not been shown that the basic definitions or broad methods of operation of existing laws are in any way insufficient legal tools for those who care to use them. Some witnesses have complained about the uncertainty of the existing legal definition of obscenity, but it has appeared to us that these uncertainty

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1. 413 U.S. 15 (1973). We discuss Miller and other applicable cases in detail in Chapter III of this Report.

2. There are exceptions to this, however. For example, California has until recently employed as a definition of obscenity not the test in Miller, but the "utterly without redeeming social value" test from Memoirs v. Massachusetts, 383 U.S. 413 (1966).

claims have usually been the scapegoat for relatively low prosecutorial initiatives. A substantially larger number of witnesses involved in law enforcement have testified that they do not find excess uncertainty in the Miller standard as applied and interpreted, and consequently believe that the existing laws are sufficient for their needs. The success of prosecutorial efforts in Atlanta, Cincinnati, and several other localities, in which vigorous investigation, vigorous prosecution, and stringent sentencing have substantially diminished the availability of almost all legally obscene materials, plainly indicates that the laws are there for those areas that choose the course of vigorous enforcement. We recognize that not all localities will wish to make the commitments of resources that Atlanta and Cincinnati have, but the experiences in such localities persuades us that the desire to have new or more laws, while always appealing as political strategy, is in fact unjustified on the record.

Moreover, a new law incorporating a definition of its coverage different from that in Miller would be sure to be challenged in the courts on constitutional grounds. At the moment, the conclusion must be that these proposals are constitutionally dubious in light of Miller, that they would remain so until there was a Supreme Court decision validating them and in effect overruling Miller, and that there is no indication at the present time that the Supreme Court is inclined in this direction. Even assuming a desire to restrict materials not currently subject to restriction under Miller, a desire that most of us do not share, we find a strategy of embarking on years of constitutional

litigation with little likelihood of success to be highly counterproductive unless the current state of the law is distinctly unsatisfactory in light of the desire to pursue legitimate goals. Because we do not find the existing state of the law unsatisfactory to pursue the goals we have urged, we reject the view that laws incorporating a different and constitutionally suspect definition of coverage are needed or are in any way desireable.

6.3.2 The Problems of Law Enforcement

If the laws on the books are sufficient, then what explains the lack of effective enforcement of obscenity laws throughout most parts of the country? The evidence is unquestionable that with few exceptions the obscenity laws that are on the books go unenforced. As of the dates when the testimony was presented to us, cities as large as Miami, Florida and Buffalo, New York had but one police officer assigned to enforcement of the obscenity laws. Chicago, Illinois had two. Los Angeles, California had fewer than ten. The City of New York will not take action against establishments violating the New York obscenity laws unless there is a specific complaint, and even then prosecution is virtually non-existent. Federal law enforcement is limited almost exclusively to child pornography and to a few major operations against large pornography production and distribution networks linked to organized crime. From January 1, 1978 to February 27, 1986, a total of only 100 individuals were indicted for violation of the federal obscenity laws, and of the 100

indicted 71 were convicted.

From this and much more evidence just like it, the conclusion is unmistakable that with respect to the criminal laws relating to obscenity, there is a striking underenforcement, and that this underenforcement consists of undercomplaining, underinvestigation, underprosecution, and undersentencing. The reasons for this are complex, and we regret that we have not been able to explore nearly as much as we would have liked the reasons for this complex phenomenon. We offer here only a few hypotheses, and hope that further research by criminologists and others will continue where we leave off.

With respect to sentencing, the evidence was almost unanimous that small fines and unsupervised probation are the norm, with large fines or sentences of incarceration quite rare throughout the country. In examining this phenomenon, we can speculate on a number of problems. When the prosecution involves as defendants those with significant control over the enterprise, the defendant is likely to appear as very much like the typical "white collar" criminal - nicely dressed, well-spoken, and a residence in the suburbs. A person fitting this description is least likely in contemporary America to receive jail time, regardless of the crime. In this respect we suspect that the problem of undersentencing is traceable to the same causes that have produced the same phenomenon with regard to other crimes. People who have control over the sale of illegally obscene materials do not go to jail for many of the same reasons that price fixers,

odometer adjusters, and securities manipulators do not go to jail, and if they do it is still less often and for less time than do people committing other crimes that allow equivalent statutory sentences. Moreover, like these and other crimes, obscenity offenses often appear to both judges and probation officers as less serious than violent crimes, and often as even less serious than various crimes against property. To a significant extent, those involved in the sentencing process tend not to perceive obscenity violations as serious crimes. Whether these judgments of seriousness made by judges and probation officers are or are not correct is of course debatable, but the point remains that there seems to be a substantial interposition of judgment of seriousness between the legislative determination and the actual sentence. As a result, sentencing usually involves only a fine and unsupervised probation, and is often treated by the defendant as little more than a cost of doing business.[3]

With respect to those without ownership or managerial control, usually ticket takers or clerks, many judges and probation officers seem understandably reluctant to impose periods of incarceration on people who are likely to be relatively short

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3. In this connection, we should note our support (and our specific recommendation in that section of this Report) for use of the Racketeer Influenced and Corrupt Organizations (RICO) Act as a method of requiring many of those convicted of multiple and substantial obscenity violations to disgorge the profits from their enterprises. Whether in this form or another, methods of attacking profits, or the assets purchased with those profits, seem likely to be more effective financial deterrents than substantially smaller fines.

term employees earning little more than the minimum wage. Although in some cases ticket takers or clerks are involved with the business itself, more often they are not. With some justification in fact, therefore, some judges perceive that people who would but for fortune be clerks in candy stores rather than clerks in pornography outlets should not receive jail time for having taken the only job that may have been available to them.

Whatever the causes of undersentencing, it is apparent that with the current state of sentencing the criminal laws have very little deterrent effect on the sale or distribution of legally obscene materials. Although we have recommended mandatory minimum sentences for second and further offenses, some of us are not convinced that this will actually serve as a solution, for in many areas mandatory sentencing may result in plea bargains for lesser charges, or prosecutorial reluctance to proceed against someone the prosecutor is unwilling to see go to jail. None of us are certain about the effects of mandatory sentencing, and mandatory sentencing may be appropriate if it comports with practices for crimes of equivalent seriousness within a jurisdiction. But we fear that the problem of undersentencing is more complex than simple, and to the extent that mandatory minimum sentencing may in practice be only cosmetic, it should not blunt efforts to look further for the roots of the problem of undersentencing.

The problem of undersentencing is likely to affect the level

of prosecution. When the end result of even a successful prosecution is a fine that is insignificant compared to the profits of the operation, or at most a period of incarceration that is so minimal as to have insignificant deterrent effect, the incentive to prosecute diminishes on the part of both prosecutors and law enforcement personnel. The potentially light sentence magnifies the fact that obscenity prosecutions are likely to be properly perceived as necessitating a high expenditure of time and resources as well as being, in terms of the likelihood of securing a conviction, high risk enterprises. The defendants will usually be represented by sophisticated lawyers with a mandate to engage in a vigorous and extensive defense. It would be a rare prosecutor who did not understand the difference between prosecuting a mugger represented by a young public defender with too many cases and too little time and resources, on the one hand, and, on the other, prosecuting a pornography distributor who has a team of senior trial lawyers at his disposal and who will probably receive only a minimal sentence even if convicted.

In addition to the fact that obscenity prosecutions are seen as high risk and low reward ventures for prosecutors and law enforcement personnel, it is also the case that being involved in obscenity investigation or obscenity prosecution is likely to be lower in the hierarchy of esteemed activities within a prosecutorial office or within a police department. This may stem in part from the extent to which the personal views of many people within those departments are such as to treat these

matters as not especially serious. The extent to which this is so, and the extent to which there are other factors we have been unable to isolate, we cannot at this time determine. But we are confident that the phenomenon exists.

The upshot of all of the above is that we are forced to conclude that the problem of underprosecution cannot be remedied simply by saying that enforcement of the obscenity laws ought to have a higher priority, or simply by providing more money for enforcement, or simply by increasing the amount of community and political pressure on all those involved in the law enforcement effort. We do not discount any of these approaches, as all have proved effective at times when used in conjunction with other techniques of changing law enforcement practices, but it is clear that the dynamics are sufficiently complex that no one remedy for the problem will suffice. There is a multiplicity of factors explaining the lack of enforcement, and changing that situation will require a multiplicity of remedies. We urge that many of the specific recommendations we suggest be taken seriously.

6.3.3 Federalism

We operate in a nation with dual systems of criminal law. The laws of most states make the sale, exhibition, or distribution of obscene material a crime, but federal law also makes it a crime to use the mails or the facilities of interstate commerce for such purposes. In thinking about law enforcement a recurring issue is the proper sphere of operation for federal law and the proper sphere of operation for state law.

Putting aside the enforcement of federal laws against child pornography, which we discuss in Chapter VII,[4] federal law enforcement efforts are now directed almost exclusively against large nationwide obscenity distribution networks with known connections with organized crime. With few exceptions, there is little enforcement of federal obscenity laws in cases not involving some strong suspicion of organized crime involvement. For example, despite reasonably clear evidence that sophisticated multi-state operations dealing in large quantities of legally obscene material have substantial contacts with localities such as Los Angeles and New York City, there has been essentially no federal prosecution of the obscenity laws in the Central District of California and the Southern District of New York. We mention these particular districts only because they are large and have within them particular concentrations of either production or distribution of legally obscene materials. But the pattern of federal non-involvement is not limited to these districts. The nationwide pattern of little federal prosecution seems to have changed somewhat within the past months, most likely as a result

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4. In addition to trying to achieve some degree of analytic clarity, we put aside child pornography in this context because we note the extent to which prosecutors and other law enforcement officials have frequently relied on the number of child pornography prosecutions to give a general impression of vigorous enforcement of the obscenity laws in their jurisdiction. On closer examination, it has usually appeared that there was a great deal of activity with respect to child pornography, and virtually none with respect to the obscenity laws. We do not of course deny the importance of allocating large amounts of resources to child pornography. We do not believe, however, that any purpose is served by clouding the existing state of affairs with respect to the enforcement of the obscenity laws.

of the publicity associated with this Commission, but it remains a safe conclusion that enforcement of federal law has been minimal.

We note the extent to which it has become common to assume that whenever there is a large problem the solution ought to be a federal one. Witness after witness representing some branch of state law enforcement complained that the real problem was the lack of federal support. Although we sympathize with these witnesses in their attempts to get more support for their efforts, we are dismayed at the unwillingness of the states to assume the bulk of the responsibility for enforcement of the criminal law. Although we do not deny the extent of federal responsibility, and although we do not deny that some states have budgetary crises that approach in seriousness if not in magnitude that of the federal government, there comes a point at which the ready solution of more federal money for even the most worthy endeavors can no longer be the strategy of first resort. We are aware of our responsibilities, now a matter of law as well as good sense, to look for alternatives other than major additional expenditures of federal funds with respect to our own rather than someone else's agenda, and we urge that states consider their law enforcement responsibilities mindful of these considerations. We also note that in our federal system primary responsibility for law enforcement has always been with the states. The police power of the states has commonly been taken to include primary responsibility for dealing with the very types of harms at which the obscenity laws are addressed. And the constitutional

commitment to a federal system assumes that state involvement is preferable to federal in areas, such as most of the criminal law, in which local decisions may vary. We see no reason not to make, in general, the same assumptions with respect to the enforcement of obscenity laws.

Despite our view that primary law enforcement responsibilities rest with the states, federal law and federal law enforcement have an essential role to play in the enforcement of the obscenity laws. Most of the material that we find most harmful is distributed throughout the country by means of large and sophisticated distribution networks. It is precisely with respect to this kind of massive and complex interstate (and international) operation that the special skills and resources of federal investigative agencies are most needed, and to which the nature of federal criminal prosecution is most suited. Prosecutions can, as with the MIPORN prosecutions in Miami, join in a single prosecution people from different states who are integral and controlling parts of the same enterprise. And the federal judicial apparatus is often more suited than that of the states where evidence and witnesses must be secured from throughout the country.

Thus, we do not see the scope of federal prosecution as being limited to cases involving demonstrable connections with organized crime. In any case in which the evidence indicates a multi-state operation of substantial size and sophistication, federal rather than or in addition to state law enforcement is

most appropriate. By concentrating vigorously on such operations, federal prosecutorial and investigative resources will be reserved for the cases in which federal involvement has the greatest comparative advantage, while still reserving to the states that primary role in more local law enforcement that is at the core of our system of federalism.

6.3.4 What Should Be Prosecuted?

In Chapter V we discussed at length the increasing trend in the scientific research and in general discussions of this subject to recognize that not all pornographic items are identical. There are substantial differences in the content of such materials, and we have tried in the rough categorization of Chapter V to express our sympathy with these efforts to advance the clarity of thinking about the issue of pornography. Indeed, we hope that we have contributed to those efforts. As the natural consequence of these efforts to recognize the differences among pornographic materials, we urge that thinking in terms of these or analogous categories be a part of the analysis of the total law enforcement effort.

The categories we discussed in Chapter V encompass a range of materials far broader than the legally obscene, and thus, in the context of this discussion of the criminal law, a range of materials far broader than what we know can be prosecuted consistent with the Constitution. Nevertheless, these categories, with the exception of nudity not involving the lewd exhibition of the genitals, exist within as well as around the

category of the legally obscene. Within the category of the legally obscene, material that has been or could be criminally prosecuted consistent with the Miller standard, there exist materials that are sexually violent, materials that are non-violent but degrading, and materials that, although highly sexually explicit and offensive to many, contain neither violence nor degradation.

In light of our conclusions in Chapter V, we would urge that prosecution of obscene materials that portray sexual violence be treated as a matter of special urgency. With respect to sexually violent materials the evidence is strongest, societal consensus is greatest, and the consequent harms of rape and other forms of sexual violence are hardly ones that this or any other society can take lightly. In light of this, we would urge that the prosecution of legally obscene material that contains violence be placed at the top of both state and federal priorities in enforcing the obscenity laws.[5]

With respect to materials that are non-violent yet degrading, the evidence supporting our findings is not as strong as it is with respect to violent materials. And on the available evidence

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5. In discussing priorities here, we exclude from consideration child pornography. As we explain in Chapter VII, child pornography involves a different range of materials, a different kind of "industry," a different kind of offender, and a consequently different approach to the problems of law enforcement. We treat it separately because it is so different. We do not in so doing wish to suggest that the problems are any less. If anything they are greater, but they remain different, and little purpose is served by dealing with child pornography as part of the larger category of pornography.

we have required more in the way of assumption to draw the connection between these materials and sexual violence, sexual aggression, and sex discrimination. Nevertheless, these assumptions have significant support on the evidence and in our own logic and experiences, and the causal evidence remains for us strong enough to support our conclusions. None of us hesitate to recommend prosecution of those materials that are both degrading and legally obscene. If choices must be made, however, prosecution of these materials might have to receive slightly lower priority than sexually violent materials, but this is not to say that we view action against degrading materials as unimportant.

With respect to materials in the third category we have identified, materials that are neither violent nor degrading, the issues are more difficult. There seems to be no evidence in the social science data of a causal relationship with sexual violence, sexual aggression, or sex discrimination. These three harms do not exhaust the possible harms, however, and our disagreements regarding this category reflect disagreements that abound in this society at this time. Many people believe that making sex into an essentially public act is a harm of major proportions, a harm that is compounded by its commercialization. To others legitimizing through this material either a wide range of traditionally prohibited sexual practices, or legitimizing sex without love, marriage, commitment, or even affection is the primary harm with which people should be concerned. Some people have recognized the extent to which material of this variety is

likely to wind up in the hands of children, and thus to frighten children or to encourage children to model their behavior on what they have seen, and would take this to be a sufficient condition for serious concern. And some people note the importance to any society of some set of shared moral values, including values relating to sexuality, and look upon the proliferation of the material even in this category as an attack on something that is a precondition for a community. On the other hand, many people see these concerns as less problematic, or matters appropriate for individual choice and nothing more, or see in some of the use of these materials beneficial effects which ought also to be taken into account.

We cannot resolve these disagreements among ourselves or for society, but the fact of disagreement remains a fact. Regardless of who is right and who is wrong about these issues, and we do not purport to have clear, definitive, or easy answers, the substantially lower level of societal consensus about these matters is an empirical fact.[6] To some of us, this substantially lower level of societal consensus, when combined with the absence for these materials of scientific evidence showing a causal connection with sexual violence, sexual aggression, or sex discrimination, leaves a category as to which this society is less certain and as to which one array of concerns, present with

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6. Indeed, all of the survey evidence supports the view that there are substantial disparities between societal views regarding restrictions on materials depicting sexual violence and materials depicting sex alone.

the two previous categories, is al nt. More than this is necessary to recommend deregulation or even to support a recommendation not to prosecute what has long been taken to be regulable. And we will not so easily discount the substantial arguments that can be made for regulation by recommending a drastic change in what has been general practice for most of the history of this nation. Nevertheless, the factors of lower societal consensus and absence of causal connection with sexual violence, aggression, or discrimination are to some of us germane to the question of priority. With respect, therefore, to legally obscene material within this category it seems entirely appropriate to some of us, at least in terms of long-term commitment of resources, for prosecutors and law enforcement personnel to treat such material differently from material containing sexual violence or degradation of women. Should a community wish to allocate sufficient resources to obscenity enforcement that material in this category is prosecuted as vigorously as that in the previously discussed category, we find that an entirely legitimate decision for a community to make. But if a community does not wish to devote resources to that extent, or if a community believes that the material in this category, even if legally obscene, is not cause for the stringent sanctions of the criminal law, then it would seem to some of us appropriate for that community to concentrate its efforts on material that is either violent or degrading.

On this issue we are, as would be expected given our differences with respect to the harms associated with this

category, deeply divided. Some of us would strongly urge that all legally obscene material be prosecuted with equal vigor, and would not only urge the communities of which we are part to take this course, but would condemn those that did not. Others of us see the prosecution of material within this category as something that should quite consciously be treated as a lower priority matter, and still others of us see the questions with respect to this category as being primarily for the community to make, with community decisions to prosecute vigorously, or not at all, or somewhere in between, as entitled to equal respect.

Although we are divided on this question, the division is likely on the current state of the law to be more philosophical than real. Pursuant to Miller, material is obscene only if, among numerous other factors, it offends the community in which it is made available. As a result, in those communities in which material within this category is not considered especially problematic, the material will not be considered legally obscene. And in those communities in which material within this category is condemned, it will offend community standards and thus, if the other requirements of Miller are met, will be legally obscene.[7] As a result, therefore, the existing legal approach incorporates within the definition of obscenity the views of a particular community. The question whether to

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7. We emphasize that it is the values of the entire community that are relevant, and we do not suggest here that it is appropriate for a prosecutor or law enforcement official to substitute his or her values for that of the community as a whole.

prosecute material in this category, therefore, assuming that the decision to prosecute is in effect a community decision, will turn into the question, under current law, whether the material is obscene at all.

6.3.5 The Special Prominence of the Printed Word

In oral testimony before us, in written submissions, and in numerous published discussions of the question of pornography, fears have been expressed about the dangers of excess censorship. As we have explained in Chapter III, we are sensitive to the risks of excess censorship beyond the bounds of what the First Amendment or good sense should allow, but we have found many of these claims to be little more than hyperbole, warning against censorship in the abstract but providing little in the way of real evidence that the possibility exists.

That the evidence presented has been weak, however, does not mean that we should ignore the possibility that in some areas prosecutions might be attempted of works of undoubted merit in the name of obscenity law, or that obscenity prosecution might be threatened as a way of exercising impermissible control over works that are not even close to being legally obscene. We heard testimony, for example, about a local prosecutor who, presented with a citizen complaint about a not even plausibly obscene book in the local library, sought out a written statement of a literary justification for the book instead of telling the complainant that the book quite simply was not obscene. And as we have investigated similar incidents, and listened to claims

about excess censorship, it has become apparent to us that the vast majority of these concerns have surrounded books consisting entirely of the printed word - text only, without photographs or even drawings.

In thinking about these concerns, we note that material consisting entirely of the printed word can be legally obscene, as the Supreme Court held in 1973 in Kaplan v. California.[8] And we have seen in the course of our inquiries books that would meet this standard - books consisting of nothing other than descriptions of sexual activity in the most explicit terms, plainly patently offensive to the vast majority of people, and plainly devoid of anything that could be considered literary, artistic, political, or scientific value.

Although many such books exist, and although they constitute part of all the categories of material we have identified, they seem to be the least harmful materials within the various categories. Because they involve no photographs, there need be no concerns with those who are actually used in the process of production. And the absence of photographs necessarily produces a message that seems to necessitate for its assimilation more real thought and less almost reflexive reaction than does the more typical pornographic item. There remains a difference between reading a book and looking at pictures, even pictures printed on a page.

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8. 413 U.S. 115 (1973).

All of us would strongly urge prosecution of legally obscene material containing only text when the material is either targeted at an audience of children or when its content involves child molestation or any form of sexual activity with children. Because of the effect of the child pornography laws, photographic material involving children is becoming less available, and this material, which is likely to encourage acts of child molestation, occupies a significant portion of textual obscenity. There is little prosecution of this material now, and we hope that that situation will change.

Some of us, however, except for material plainly describing sexual activity with minors or targeted to minors, would urge that materials consisting entirely of the printing word simply not be prosecuted at all, regardless of content. There is for all practical purposes no prosecution of such materials now, so such an approach would create little if any change in what actually occurs. But by converting this empirical fact into a plain statement even the possibility of prosecuting a book will be eliminated. If this is eliminated even as a possibility, those of us who take this position believe that the vast majority of potential abuses can be quelled and the vast majority of fears alleviated with what will be at most a negligible reduction in law enforcement effectiveness. Most likely there will be no effect at all on law enforcement, although those who take this position nevertheless deplore many of the books, a substantial proportion of which involve violence or degradation. But from this perspective, what is lost in the ability to prosecute this

material is more than compensated for by the symbolic and real benefits accompanying the statement that the written word has had and continues to have a special place in this and any other civilization.

Others of us, however, while sharing this special concern for the written word, would not adopt such a rigid rule, and would retain both in theory and in practice the ability to prosecute obscene material regardless of the form in which the obscenity is conveyed. Especially in light of the fact that we have seen many books that are devoted to sexual violence and sexual degradation, some of us fear that giving carte blanche to such material, regardless of current prosecutorial practices, is to send out exactly the wrong signal. Those of us who take this position share the concern for the writtn word,,, but believe that that concern can best be reflected in ways other than providing a license for material that, although presented in verbal form, seems substantially similar to the forms of pictorial obscenity that concern us.

Although we are deeply divided on the question of a clear rule prohibiting prosecution (except in cases involving or directed at children), we share each others concerns. Those of us who would adopt a clear rule nevertheless regret some of its consequences, and deplore much of the textual obscenity we have seen. And those of us who reject the idea of a clear rule understand the concerns for purely verbal communication, and urge that prosecution of entirely textual material be undertaken only with

extraordinary caution.

6.4 Regulation By Zoning

For many people the harms caused by pornography relate in part to the effects on communities and neighborhoods of the establishments in which such materials are commonly sold. Whether it be a peep show, an "adult" theatre, or a so-called "adult bookstore," there seems widespread agreement that virtually all such establishments are largely detrimental to the neighborhoods in which they are located. Some of the negative consequences arise from the style of the establishments themselves, which usually have garish lights and signs advertising the nature of what is to be found within in no uncertain terms. Other consequences flow from the clientele, who are often people that many citizens would just as soon be somewhere else. And such establishments are likely to exist in close proximity to areas in which prostitution exists, and in close proximity to establishments such as bars featuring live sexually oriented entertainment. As a result, most people would consider such establishments environmentally detrimental, and there is some evidence indicating a correlation between crime rates and the particular neighborhoods in which such establishments exist.

Although some communities have attempted to deal with pornography outlets through criminal prosecution, others have attempted zoning regulation more narrowly tailored to alleviating the consequences discussed in the previous paragraph. These

regulations generally take two forms. One is a dispersal regulation, in which zoning ordinances prohibit location of such an establishment within a specified distance of another such establishment. The principle behind dispersal ordinances is that of scattering these establishments throughout a large geographic area, so that no concentration of them can have a major deleterious effect on any one neighborhood. Alternatively, some communities have endeavored to concentrate these establishments, attempting through zoning to limit them to one or just a few parts of the community, usually remote from residential areas, and frequently remote as well from certain business districts.

In order for such ordinances to be effective, they must be able to describe the establishments they regulate in terms at least slightly broader than the Miller definition of obscenity. Were the Miller standard to be used, the administrative enforcement mechanism commonly in force with respect to zoning would become bogged down in the more cumbersome procedures characteristic of full trials. Most such ordinances, therefore, regulate establishments that specialize in sexually explicit material, and usually the ordinance contains a definition of sexually explicit material that is more precise but more expansive than Miller.[9] Although such ordinances include more

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9. For example, the Detroit ordinance that was before the Supreme Court in the Young case defined as an "adult establishment" any establishment concentrating on offering material emphasizing "specified sexual activities" or "specified anatomical areas." "Specified sexual activities" were defined to include, for example, "Human Genitals in a state of sexual stimulation or arousal," "Acts of human masturbation, sexual intercourse or

than could criminally be prosecuted under Miller, the Supreme Court has approved zoning regulation of this variety, first in 1976 in Young v. American Mini Theatres, Inc.,[10] and then again in February 1986 in City of Renton v. Playtime Theatres, Inc.[11] The most significant qualification imposed by the Court is the requirement that the zoning regulation not have the effect of a total prohibition.[12] The result, therefore, is that if communities wish to restrict the location of such "adult" establishments, they may do so, but they may not under the guise of zoning banish them altogether.

Witnesses who have testified before us about zoning approaches in their localities have by and large not endorsed these approaches. Most of these witnesses, however, have been law enforcement personnel who would prefer prohibition to relocation. The zoning approach, which is not aimed at prohibition, is not surprisingly a poor tool if prohibition is the desired result. Moreover, in most localities these ordinances contain "grandfather" clauses, eliminating from the

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sodomy," and "Fondling or other erotic touching of human genitals, pubic region, buttock or female breast." The definition of "Specified anatomical areas" was similarly broader than would be permitted by Miller if the aim were total prohibition. To the extent that zoning approaches concentrate on establishments specializing in this material, we note that such approaches may have the effect of providing incentives for attempts to introduce more plainly pornographic material into more mainstream outlets.

10. 427 U.S. 50 (1976).

11. 54 U.S.L.W 4160 (February 25, 1986).

12. On this point, see Schad v. Mt. Ephraim, 452 U.S. 61 (1981).

restrictions those establishments already in place on the date of enactment of the ordinance.[13] Thus the result has often been to prevent the problem from growing, but has done little to diminish the extent of an existing problem.

It has been suggested that zoning may be the ideal solution to the problem of pornography, because it allows people who wish access to this material to have such access without having its sale intrude on the lives and sensibilities of the majority of the population who wish to have nothing to do with it. This solution is ideal, however, only under the presupposition that the material is not indeed harmful except insofar as it causes offense to non-users. With respect to sexually violent material and degrading material, we have found that the evidence does not support such a modest view of the likely consequences, and thus we reject an equivalently modest remedy for what we take to be harmful material, even when its access is restricted to willing buyers. If indeed the material in these categories is harmful, as we have found it to be, we cannot consistent with that finding urge a remedy of moving it to another part of town.

With respect to materials that are neither violent nor degrading, however, both the evidence of harms and the level of societal consensus are less, and zoning might possibly be more appropriate for establishments restricting their stock to

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13. Although such clauses may be required by state law, we note that nothing in the First Amendment, or in federal constitutional law generally, would require such an approach.

materials in this category. As suggested above in Section 6.3.4, the absence of evidence for this material of a causal connection with sexual violence, sexual aggression, or sex discrimination may suggest lower prosecutorial priority within a system of enforcement of the criminal laws. But even for localities that may choose this course, the offensiveness of these materials and the deleterious effects on the neighborhoods in which they are made available may still be seen to justify some restriction. If this is the case, then zoning may be the appropriate way to deal with materials of this variety, although many of us are concerned that in practice such an approach will concentrate such establishments in or near the most economically disadvantaged segments of a locality. Some of us fear that zoning may be a way for those with political power to shunt the establishments they do not want in their own neighborhoods into the neighborhoods of those with less wealth and less political power.

Restrictions on public display, whether through the criminal law or zoning ordinances, are in effect another form of zoning. The concept here is that there may be many materials that, regardless of their alleged harmlessness, and regardless of the fact that they are not legally obscene, ought not to be displayed in a manner that offends unwilling viewers. Moreover, the public display does not differentiate between passersby who are adults and those who are children, and taking into account the likelihood that children will be exposed to this material at inappropriate ages justifies restrictions that might seem harsh in settings involving only adults. Even those most likely to

oppose obscenity regulation would, we suspect, have little difficulty in principle with restricting sexually explicit material from billboards. None of us has difficulty with this either, even when extended somewhat beyond the legally obscene. We believe that public display regulations, including but not limited to the control of advertising materials displayed on the exterior of adult establishments, and including but not limited to the display ordinances requiring shielding of the covers of sexually explicit magazines, are fully justifiable measures in a society that has long restricted indecent exposure. If copulating in a public park may be restricted, we are not troubled by regulations prohibiting billboards depicting copulation.

We ought finally to mention in this section the attempts in a number of communities to restrict adult establishments through the use of nuisance laws and related legal remedies. Nuisance laws, when applied to sexually explicit materials, are attempts to serve many of the interests that generated the zoning approach, but here the aim is prohibition rather than relocation. The desired result in most such legal actions is an injunction against further operation of the establishment. For that reason, all effective uses of this approach have thus far been found unconstitutional. Even where an establishment has been found guilty of a criminal obscenity violation, the law as of this moment does not permit the finding of obscenity with respect to one magazine, or one film, to justify what is in fact a restriction on other films and other magazines not yet

determined to be legally obscene, and therefore presumptively protected by the First Amendment. Total prohibition, therefore, on the state of the law right now, seems much more likely to stem from substantial criminal penalties for those involved with such establishments than from civil remedies directed in some way directed against the establishment and not the person.

6.5 The Civil Rights Approach to Pornography

Within the last several years a substantial amount of the public discussion of pornography has centered around a proposed anti-pornography ordinance drafted by two scholars, Andrea Dworkin and Catherine MacKinnon, and proposed in one form or another in a number of localities, most notably Minneapolis, Minnesota, Los Angeles, California, Cambridge, Massachusetts, and Indianapolis, Indiana. The only community actually to adopt such an ordinance was Indianapolis, which on June 11, 1984 drafted an ordinance providing civil remedies against pornography. The ordinance defined pornography as:

> [T]he graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women are presented being penetrated by objects or animals; or (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; [or] (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The ordinance has subsequently been held unconstitutional by the United States District Court for the Southern District of Indiana,[14] and that decision has been affirmed by the United States Court of Appeals for the Seventh Circuit.[15] Recently the Seventh Circuit's decision has been affirmed, on the merits but without opinion, by the Supreme Court of the United States.[16] The basis for the finding of unconstitutionality was the way in which the definition set forth above was substantially more inclusive than that in Miller. To the extent that legislation restricts material beyond the legally obscene, that legislation must confront an array of First Amendment-inspired barriers that few if any statutes could meet. This statute could not surmount those obstacles, for much the same reason, according to the courts, that attempted restrictions on members of the American Nazi Party and the Ku Klux Klan could not surmount those obstacles. Once the comparatively narrow realm of Miller-tested legal obscenity is left, virtually no restrictions on communication based on the point of view expressed, no matter how wrong or harmful it may be, are permitted by the First Amendment.

That this ordinance with this definition was properly held

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14. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984).

15. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

16. Hudnut v. American Booksellers Ass'n, Inc., 54 U.S.L.W. 3560 (February 24, 1986).

unconstitutional, however, should not deflect attention from three other features of the ordinance and of the support it engendered. First, we are in substantial agreement with the motivations behind the ordinance, and with the goals it represents. The harms at which the ordinance is aimed are real and the need for a remedy for those harms is pressing. That we understand both the harms and the urgent need to remedy these harms should be apparent from the discussion in Chapter V. Moreover, although we feel that the safer and better course is to proceed within existing constitutional boundaries, our recommendations regarding criminal prosecution for legally obscene material containing sexual violence or degradation are largely consistent with what this ordinance attempts to do, although the approach we recommend clearly will reach less material. In effect, this ordinance reaches material containing sexually violent or sexually degrading material when it is sexually explicit. The only constitutionally permissible approach, however, is to reach material containing sexually violent or sexually degrading material when it is legally obscene, and that in effect is what we have strongly urged here.

In addition, the ordinance proposed a civil remedy, rather than a criminal one. We have thought about the issue of a civil remedy, because the question whether there should be a civil or a criminal remedy is analytically distinct from the question of what material will be reached by that remedy. A civil remedy could be combined with all or part of the category of material reached by Miller, and we have thought about the possibility of

civil rather than criminal sanctions with respect to Miller-tested obscenity. Although we recognize that details would remain to be worked out, in large part relating to who would have the ability to bring an action against whom, we endorse the concept of a civil remedy so long as it takes place within existing constitutional limitations. Although we do endorse the concept of a civil remedy, and although we do recognize that much of the material we have seen directly implicates in a harmful way the civil rights of women, we do not ignore the deterrent effect on publishers of being forced to defend a wide range of suits that might raise claims that are totally without merit, but which would still require at least a preliminary defense. Although we recognize that occasionally prosecutors might be overzealous, we have no doubt that the average prosecutor is substantially less likely to be overzealous than the most zealous potential plaintiff. We have heard from a wide range of people in the course of our work, and some have employed definitions of pornography or have expressed views about what ought to be restricted that are far beyond what any of us would conceivably tolerate. We are unwilling to have each of these people as potential plaintiff. We are not willing to put a publisher to a defense in every case in which someone thinks that material is obscene or pornographic. If a procedure could be devised that provided for some preliminary determination by a judge or magistrate that the suit was plausible before the complaint was allowed to be filed, our fears would evaporate, and with such a procedure we believe that civil remedies available to

a wide range of people ought seriously to be contemplated. And in any event, civil remedies that restricted the right of action to, for example, people who were compelled to perform in obscene material or people who were compelled to view obscene material would not have the problems associated with a potentially enormous class of plaintiffs, and ought to be considered even more seriously.

Finally, the ordinance and the support for it properly focused attention on the people who are frequently coerced into performing in sexually explicit films, or into posing for sexually explicit pictures. And even where coercion in the contemporary legal sense is absent, the conditions of employment unquestionably deserve close attention. We agree with these concerns for the participants, and we agree that legal concern for participants need not be limited to the question of child pornography. We believe that civil and other remedies ought to be available to those who have been in some way injured in the process of producing these materials/ But we are confident that the remedies of restricting the material itself, at least beyond the category of the legally obscene, permissible in the case of child pornography, remain constitutionally impermissible with respect to adults. We believe, therefore, that the appropriate remedy in the case of adults is that which is directed at the conduct itself, and we include as an appendix to this report a special report directed exclusively to harms to performers, and possible remedies for those harms.

6.6 Obscenity and the Electronic Media

Where legally obscene material is transmitted by radio, television, telephone, or cable, the same legal sanctions are and should be available as are available for any other form of distribution or exhibition. Although federal law has long prohibited the transmission of legally obscene materials by radio, television, and telephone, the advent of cable television left a gap in the law. That gap has now been filled, and the Cable Communications Policy Act of 1984 now provides criminal penalties for anyone transmitting over any cable system "any matter which is obscene or otherwise unprotected by the Constitution." A number of states have or are on the verge of adopting similar changes in their obscenity laws to include cable transmission, and we support those legislative efforts to ensure that the law keeps up with technological changes. To the extent that obscene material material appears on cable television, we urge prosecution to the same extent and with the same vigor as we do with respect to any other form of distribution of obscene material. We note that this has not always been the case, and we urge that enforcement efforts directed to legally obscene material, in whatever regulatory form those enforcement efforts might take, be as aggressive with respect to cable transmission of the legally obscene as with other forms of distribution of the legally obscene.

Under existing law, however, the Federal Communications Commission has the power to impose some sanctions against certain

broadcasting of sexually explicit language or pictures over radio and television even where the material is not legally obscene. In FCC v. Pacifica Foundation,[17] the Supreme Court upheld the constitutionality of this form of regulation, in the context of sanctions against a radio station for a daytime broadcast of George Carlin's "Seven Dirty Words" monologue, which is in fact about the FCC regulations, and which uses repeatedly the words the FCC prohibits.

As we have explained in Chapter IV and in the appendix, there is a great deal available on cable television today that is sexually explicit but which is not legally obscene. Some of this material contains sexual violence, some of it is degrading as we have used that term here, and some of it is, although rather explicit, neither violent nor degrading. In almost all of these cases the films shown have simulated rather than actual sexual activity, most have a rather sustained story line, and many are mainstream and highly acclaimed Hollywood productions.

With respect to these materials that are not legally obscene, they are beyond the reach of the law as it stands today. Nevertheless, we have been urged to recommend changes in the law so that material which is "indecent" as well as legally obscene might be kept from cable television to the same (or greater) extent as it has been kept from broadcast non-subscriber radio and television. We have not adopted these suggestions, however,

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17. 438 U.S. 726 (1978).

although it is an issue on which we are deeply divided. Some of us believe that enforcement of obscenity laws with respect to such material, when combined with vigorous enforcement of the "lockbox" requirements so that children may be prevented by their parents from seeing such material, are all that is appropriate at this time. Some of us are persuaded by the fact that the suggestions made to us are all, on the existing state of the law, unconstitutional, with all of the courts that have confronted the issue deciding that cable cannot be controlled by the standards applicable to broadcast non-subscriber television.[18] Some of us are skeptical about Pacifica itself, and do not wish to extend to new areas a principle that we find dubious even with respect to broadcast media. In light of the existence of, for example, serious and non-pictorial sexual advice programs as well as serious mainstream motion pictures containing more explicit sexuality than would be available on broadcast television, extension of the limitations of broadcast television to cable seems highly likely to restrict that which simply ought not to be restricted. Some of us question the current state of the law, but would urge change in the direction of permitting restriction of pure violence rather than indecency. Some of us are also uncomfortable once again about taking on any doubtful causes and courses of constitutional adjudication when existing law seems sufficient for the more extreme cases. And some of us reject all

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18. Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Community Television of Utah v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); HBO v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982). The Supreme Court has yet to be faced with the question.

of the above, and feel that cable television, even with lockboxes, is so similar to broadcast television that regulation of more than the legally obscene should be permitted with respect to cable just as it is when the airwaves rather than wires are the medium of transmission. Some of us who hold this view would prefer somewhat broader definitions of what can permissibly be regulated in many areas. And others of us who take this position are comfortable with the existing definition of obscenity, but feel that television is a medium with a special power and a special intrusiveness in contempory society.

These are difficult questions, going not only to the roots of First Amendment doctrine and theory, but also to the nature of television in American life. As with other fundamental issues, we are unable to agree here, and as a result there is no consensus among us that would justify urging that regulation of cable encompass more than the legally obscene.

Many of the same considerations apply to the regulation of those telephone services, commonly referred to as Dial-a-Porn, that provide sexually explicit messages. As we discuss at length in the appendix, there is no doubt that the number and variety of these services is increasing, and that they have generated substantial citizen concern. Some of the concerns relate to the way in which these services are advertised, and some relate to the messages themselves regardless of who uses the service. Most of the concerns, however, relate to the frequent use of these services by minors, a concern that seems accentuated by the

extent to which many of the services seem designed to cater to the particular sexual perceptions of teenagers rather than adults. We have heard a number of these messages, and we have little doubt that the bulk of them could be considered to be legally obscene under existing law.[19] Although they use words rather than pictures, even those of us who would refuse to apply obscenity law to materials containing only the printed word would not apply that principle to these materials. Apart from the fact that many seem implicitly if not explicitly directed at minors, the nature of the spoken voice, especially in this context, contains enough of the characteristics of the visual image that we have no difficulty in saying that such material should be dealt with consistent with our recommendations concerning films, tapes, and pictorial magazines.

Although once again we have been urged to recommend new laws that are substantially more encompassing than the existing definition of the legally obscene, we find such approaches both unnecessary and undesirable. The vast bulk of this material seems to us well within the Miller definition, and thus could be prosecuted in accordance with the concerns and the priorities we have urged here. In light of that, we see few advantages and substantial risks in going further. But we also urge that there be laws allowing the prosecution of such legally obscene

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19. We believe this to be the case even when the messages are directed at and available only to adults. To the extent that they are directed at and available to minors, the application of the test for obscenity may properly take that into account. Ginsberg v. New York, 390 U.S. 629 (1968).

material, and we urge as well that such laws be enforced. There seems now to be little enforcement, and in light of the frequency with this material is used by minors, we deplore the failure to have and to enforce obscenity laws with respect to material of this type.

6.7 Enforcing Both Sides of the Law

Both in Chapter III and in this Chapter we have emphasized our belief that conscientious enforcement of existing obscenity laws and the dictates of the First Amendment are not inconsistent. But our confidence in this conclusion will be increased if all of those with law enforcement responsibilities would recognize their responsibilities to enforce the existing principles of the First Amendment as conscientiously and as vigorously as they enforce the obscenity laws. The Constitution is a law too, and we expect that anyone who has taken an oath to uphold the law will recognize that they must uphold the First Amendment as well.

We make these general observations because we acknowledge that many citizens, sincerely and for very good reasons, would want the law to do more than it is now constitutionally able to do, and more than we feel it ought constitutionally be able to do. Many of these citizens will find an outlet for their views in the fully legitimate and appropriate private actions that we discuss in Chapter VIII. But many others will make requests or demands on law enforcement personnel, sometimes out of ignorance about the constitutional constraints but often out of an understandable frustration that the Constitution, in the name of long run

values, often prevents us from doing what seems quite justifiable in the short run.

When faced with such requests or demands, we hope that law enforcement personnel will recognize their responsibilities to interpose their legal responsibilities at that time. They must refuse to take any action that would in any way be governmentally threatening to those who are exercising their constituitional rights, and they must be willing to explain to their angry constituents why they have and must do so. We recognize that this may not always be easy in a world in which the citizens properly expect their elected and appointed officials to be responsive to the desires of the citizenry. But we should point out as well that most of our recommendations about increased or at least maintained law enforcement presuppose this attitude, and presuppose an environment in which the limitations of the First Amendment are enforced by all public officials at the point at which they first matter. To assume that enforcement of the obscenity laws is for law enforcement personnel while enforcement of the Constitution is for the courts is to misunderstand the nature of the system. It may also, ultimately, be to threaten the constitutional underpinnings of what we have urged in this Report. In the long run, the enforcement of the obscenity laws depends on the willingness of those who do the enforcing to respect the appropriate constitutional limitations. If that respect does not take place in practice and at the first instance, neither courts nor commissions such as this one will be able to be as confident of the current accomodation between

conflicting goals as we now are.

CHAPTER VII

CHILD PORNOGRAPHY

7.1 The Special Horror of Child Pornography

What is commonly referred to as "child pornography" is not so much a form of pornography as it is a form of sexual exploitation of children. The distinguishing characteristic of child pornography, as generally understood, is that actual children are photographed while engaged in some form of sexual activity, either with adults or with other children. To understand the very idea of child pornography requires understanding the way in which real children, whether actually identified or not, are photographed, and understanding the way in which the use of real children in photographs creates a special harm largely independent of the kinds of concerns often expressed with respect to sexually explicit materials involving only adults.

Thus, the necessary focus of an inquiry into child pornography must be on the process by which children, from as young as one week up to the age of majority,[1] are induced to engage in sexual activity of one sort or another, and the process by which children are photographed while engaging in that activity. The

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1. A significant amount of sexually explicit material includes children over the applicable age of majority who look somewhat younger. Because people who are actually minors are not used in this type of publication, it would not qualify as child pornography, although it might still be legally obscene. In general, this variety of material does not cater to the pedophile, but instead to those who prefer material with young-looking models.

inevitably permanent record of that sexual activity created by a photograph is rather plainly a harm to the children photographed. But even if the photograph were never again seen, the very activity involved in creating the photograph is itself an act of sexual exploitation of children, and thus the issues related to the sexual abuse of children and those related to child pornography are inextricably linked. Child pornography necessarily includes the sexual abuse of a real child, and there can be no understanding of the special problem of child pornography until there is understanding of the special way in which child pornography is child abuse.

7.2 Child Pornography as Cottage Industry

In addition to understanding the way in which child pornography is defined by its use of real children engaged in real sexual activity, it is important to understand the way in which the "industry" of child pornography is largely distinct from any aspect of the industry of producing and making available sexually explicit materials involving only adults.

A significant aspect of the trade in child pornography, and the way in which it is unique, is that a great deal of this trade involves photographs taken by child abusers themselves, and then either kept or informally distributed to other child abusers. As we discuss in more detail in an appendix, some of these child abusers are situational, abusing children on occasion but not restricting their sexual preferences to children. Others are preferential, not only preferring children as a means for

achieving sexual satisfaction, but seeking out children in order to satisfy this desire. We have heard substantial evidence that both situational and preferential child molesters frequently take photographs of children in some sexual context. Usually with non-professional equipment, but sometimes in a much more sophisticated manner, child abusers will frequently take photographs of children in sexual poses or engaged in sexual activity, without having any desire to make commercial use of these photographs. At times the child abuser will merely keep the photograph as a memento, or as a way of recreating for himself the past experience. Frequently, however, the photograph will be given to another child abuser, and there is substantial evidence that a great deal of "trading" of pictures takes place in this manner.[2] The desire to have collections of a large number of photographs of children seems to be a common, although not universal, characteristic of many pedophiles. Some of this exchange of photographs takes place in person, a great deal takes place through the mails, and recently a significant amount of the exchange has taken place by the use of computer networks through which users of child pornography let each other know about materials they desire or have available.

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2. There is also evidence that commercially produced pictures of children in erotic settings, or in non-erotic settings that are perceived by some adults as erotic, are collected and used by pedophiles. There is little that can be done about the extent to which, for example, advertisements for underwear might be used for vastly different purposes than those intended by the photographer or publisher, but we feel it nevertheless important to identify the practice.

In addition to the primarily non-commercial trade in child pornography, there appears to be a commercial network for child pornography, consisting to a significant extent of foreign magazines that receive the very kinds of pictures described in the previous paragraph, and then sell in magazine form collections of these non-commercially produced photographs. These magazines will frequently contain advertisements for private exchange of pictures in addition to publishing pictures themselves.[3] Although the publication of the magazines, almost exclusively abroad, is itself a commercial enterprise, it does not appear as if most of the contributors contribute for the purpose of commercial gain. And although the publication of these magazines is largely foreign, there is substantial evidence that the predominant portion of the recipients of and contributors to these magazines are American.

Prior to the late 1970s, when awareness and concern about child pornography escalated dramatically, commercially produced and distributed child pornography was more prevalent than it is now. It was in the late 1970s that this awareness and concern started to be reflected in major law enforcement initiatives, state and federal, against child pornography. When the Supreme Court in 1982 approved of child pornography laws whose coverage was not restricted to the legally obscene, these enforcement efforts accelerated, and the sum total of these enforcement

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3. Some of this private exchange is quite informal, but there is evidence that more formal and elaborate underground networks for the exchange of these pictures exist.

efforts has been to curtail substantially the domestic commercial production of child pornography. This is not to say that it does not exist. There is a domestic commercial child pornography industry, but it is quite clandestine, and not nearly as large as the non-commercial use of and trade in non-commercially produced sexually explicit pictures of children.

Although there now appears to be comparatively little domestic commercial production of child pornography, there remains a significant foreign commercial industry, and much of this material is available in the United States. Some of this material is in magazine form, some are photographic motion picture films, but increasingly, as with much of the adult material, videotapes are dominating the market. None of this material is available openly, however. We received some testimony that commercially produced child pornography was available "under the counter" in some establishments selling adult sexually explicit material. A number of experienced police officers testified to having no actual knowledge that material is available in this way, but others indicated that they had either heard of its availability or had themselves seen its availability in rare circumstances. We have also heard evidence about more surreptitious networks for the distribution of this material, and we have heard some evidence about the way that this material is sold through the mails. We have little doubt that there is some distribution in the United States of commercially produced material, although the extremely clandestine nature of the distribution networks makes it difficult to assess the size of

this trade.

Although we note, therefore, that there is some commercially produced material, efforts to deal with the problem of child pornography will fail if they overestimate the extent of the commercial side of the practice, and underestimate the non-commercial side. The greatest bulk of child pornography is produced by child abusers themselves in largely "cottage industry" fashion, and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children. That does not make the problem of child pornography unimportant. On the contrary, to the extent that it is an aid to and a part of a problem that is unfortunately prevalent and plainly outrageous, child pornography, in both its creation and its distribution, is of unquestioned seriousness. But it is different, in virtually every aspect of its definition, creation, distribution, and use. Serious consideration of the issue of child pornography must begin with this fact.

7.3 Child Pornography, the Law, and the First Amendment

Because the problem of child pornography is so inherently different from the problems relating to the distribution of legally obscene material, it should be no surprise to discover that tools designed to deal with the latter are largely ineffective in dealing with the former. The problems to which child pornography regulation is addressed are numerous, but four stand out most prominently.

The first problem is that of the permanent record of the sexual practices in which children may be induced to engage. To the extent that pictures exist of this inherently nonconsensual act, those pictures follow the child up to and through adulthood, and the consequent embarrassment and humiliation are harms caused by the pictures themselves, independent of the harms attendant to the circumstances in which the photographs were originally made.[4]

Second, there is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children. Children are shown pictures of other children engaged in sexual activity, with the aim of persuading especially a quite young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it.[5] As with the problem of the

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4. We refer in this regard to our specific recommendation regarding possession of child pornography. We do not believe that a photograph of a child coerced into sexual activity should be part of someone else's "collection," even if that collection remains in the home.

5. We note that there seems to be significant use of adult sexually explicit material for the same purpose. Child molesters will frequently show sexually explicit pictures of adults to children for the purpose of convincing a child that certain practices are perfectly acceptable because adults engage in them with some frequency. We are greatly disturbed by this practice, although we do not take the phenomenon as sufficient to justify restrictions we would not otherwise endorse. Many of the materials used for this purpose are not even close to being legally obscene, and, in the words of Justice Felix Frankfurter, we do not want to "burn the house to roast the pig." Butler v. Michigan, 353 U.S. 380, 383 (1957). Nevertheless, we have no doubt that the practice exists, and we have no doubt that it is dangerous insofar as it helps break down the resistance of

permanent record, we see here a danger that is the direct consequence of the photographs themselves, a danger that is distinct from the harms related to the original making of the picture.

Third, photographs of children engaged in sexual practices with adults often constitute an important form of evidence against those adults in prosecutions for child molestation. Given the inherent difficulties of using children as witnesses, making it possible for the photographs to be evidence of the offense, or making the photographs the offense itself, provides an additional weapon in the arsenal against sexual abuse of children.

Finally, an argument related to the last is the unquestioned special harm to the children involved in both the commercial and the noncommercial distribution of child pornography. Although harms to performers involved would not otherwise be taken to be a sufficient condition for restriction of the photographs rather than the underlying conduct, the situation with children is of a different order of magnitude. The harm is virtually unanimously considered to be extraordinarily serious, and the possibility of consent is something that the law has long considered, and properly so, to be an impossibility. As a result, forms of deterrence of the underlying conduct that might not otherwise be

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children to sexual advances by adults. At the very least, we strongly urge that children be warned about the practice in the course of whatever warnings about sexual advances by adults are being employed.

considered advisable may be considered so with respect to photographs of children. If the sale or distribution of such pictures is stringently sanctioned, and if those sanctions are equally stringently enforced, the market may decrease, and this may in turn decrease the incentive to produce those pictures.

As part of the previous justification, it ought to be obvious that virtually all child pornography is produced surreptitiously, and thus, even with vigorous enforcement efforts, enforcement will be difficult. Enforcement efforts against the more accessible product of the process rather than or in addition to the less accessible process itself may enable the realities of enforcement to track the magnitude of the problem.[6]

For all of these, as well as other, reasons, a number of states, including New York, enacted around 1980 laws directed at "child pornography" itself. These laws defined child pornography not in terms of the legally obscene, but rather in terms of <u>any</u> portrayal of sexual conduct by a child, or in terms that were somewhat similar to this. Under these statutes, the sale or distribution of any photographic depiction of a real child engaged in sexual activity was made unlawful, regardless of whether the photograph, or magazine, or film was or could be

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6. As much as we urge the most vigorous enforcement of child pornography laws with respect both to commercial and noncommercial production, possession, and distribution, we recognize that the problem of child abuse is larger than the problem of child pornography. We urge vigorous enforcement of child pornography laws as an important way of fighting child abuse, but if it is treated as the only weapon, or the major weapon, a great deal that needs doing will remain undone.

determined to be legally obscene pursuant to Miller v. California.[7]

Because these new child pornography statutes encompassed material not legally obscene pursuant to Miller, and therefore encompassed material presumptively protected by the First Amendment, a constitutional challenge ensued. But in New York v. Ferber,[8] the Supreme Court unanimously rejected the constitutional challenges for reasons substantially similar to those discussed just above. The Court noted the undeniably "compelling" and "surpassing" interests involved in protecting children against this variety of exploitation, and also rested its conclusion on the fact that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimus. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." Given this minuscule amount of First Amendment protection, therefore, the Court determined that "[w]hen a definable class of material, such as that covered [by the New York statute], bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and

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7. 413 U.S. 15 (1973). Miller is discussed extensively above in Chapter IV.

8. 458 U.S. 747 (1982).

that it is permissible to consider these materials as without the protection of the First Amendment."

As a result of Ferber, virtually every state, as well as the United States, now prohibits by its criminal law the production, promotion, sale, exhibition, or distribution of photographs of children engaged in any sexual activity regardless of whether the material is legally obscene under the Miller standards. After Ferber these laws are clearly constitutionally sound, and none of us has any quarrel with the constitutionality of these statutes.

7.4 Enforcement of the Child Pornography Laws

In Chapter VI we discussed the enforcement of state and federal obscenity laws, and described what we see as a rather consistent pattern of underenforcement of these laws. We do not reach the same conclusion with respect to the child pornography laws. It is plain to us that every unenforced violation of the child pornography laws is an underenforcement that ought to be remedied. We believe that many cases remain uninvestigated, and we believe that state and federal prosecution of child pornography, commercial and noncommercial, needs to be even more vigorous. Nevertheless, it remains the case that the child pornography laws seem now to be the subject of a substantial amount enforcement efforts on both the state and local levels. The federal statistics are illustrative. From January 1, 1978 to February 27, 1986, 100 individuals were indicted in the federal system for violation of the federal obscenity laws, and of those indicted 71 were convicted. During that same time period, 255

individuals were indicted in the federal system for violation of federal child pornography laws, and of those 215 were convicted. Although these statistics themselves are highly suggestive of a substantial disparity, we believe that, if anything, the statistics understate the disparity. For one thing it is highly likely that in absolute terms there are more violations of the federal obscenity laws than there are violations of the child pornography laws. In addition, it was not until final adoption of the Child Protection Act of 1984 on May 21, 1984 that federal law, following Ferber, finally eliminated the requirement of "obscenity," and of the 255 indictments in fact 183 were secured in the period from May 21, 1984 through February 27, 1986.

This comparatively aggressive approach to enforcement of the federal child pornography laws has been matched by equally vigorous efforts in the vast majority of states. Although we urge even more aggressive enforcement of the child pornography laws at both state and federal levels, we see less systematic underinvestigation, underprosecution, and undersentencing than seems to exist with respect to enforcement of the obscenity laws.[9] Child pornography seems to be a matter that judges,

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9. There are, however, impediments to investigation and prosecution that are specially related to any prosecution involving sexual abuse of children. One is the difficulty of using children as prosecution witnesses, a difficulty we address in our specific recommendations. Another is the fact that on occasion parents have themselves been involved in the illegal activity. And there seems still to be some reluctance to impose stiff sentences upon people who look and act otherwise "normal." To that extent a significant problem in dealing with sexual abusers of children is the mistaken and dangerous assumption that all or most of those people are self-evidently "weird."

prosecutors, and law enforcement personnel have, with few exceptions, taken seriously. We are glad that they do, and we urge them to take it even more seriously.

In terms of taking these matters even more seriously, we note again the inseparable relationship between child pornography and child abuse. To take child pornography more seriously is to take sexual abuse of children more seriously, and vice versa. It is apparent that as of the date of this Report the sexual abuse of children is being taken increasingly seriously in this country, and we applaud that increased concern for a problem that has long been both largely unspoken and largely avoided. That situation is changing rapidly, and the increased attention to child pornography is part of the increased attention being given to all forms of sexual abuse of children, whether photographs are part of the act or not. We do not hesitate to support further efforts, in public education, in the education of children, and in law enforcement, to continue to attempt to diminish the sexual abuse of children, regardless of the form it takes.

None of us doubt that child pornography is extraordinarily harmful both to the children involved and to society, that dealing with child pornography in all of its forms ought to be treated as a governmental priority of the greatest urgency, and that an aggressive law enforcement effort is an essential part of this urgent governmental priority. Our unanimity of vigor about child pornography does not surprise us, and we expect that it will not surprise others. We hope that society will respond

accordingly.

CHAPTER VIII

THE ROLE OF PRIVATE ACTION

8.1 The Right to Condemn and the Right to Speak

We are a government commission, and thus most of what we have to say is addressed to government. Yet it is simply mistaken to assume that citizen concerns need be exclusively or even largely channeled into governmental action. We feel it appropriate, therefore, to spend some time in this report addressing the issue of how citizens might appropriately and lawfully put into practice their own concerns.

At the outset, it should be clear that citizens have every right to condemn a wide variety of material that is protected, and properly so, by the First Amendment. That governmental action against a certain variety of communication is unwise and unconstitutional does not mean that the communication is valuable, and does not mean that society is better off for having it. Earlier in this Report we used the examples of the Nazis and the Ku Klux Klan to illustrate this point, and we could add many more examples to this list. That the Communist Party is a lawful organization does not prevent most Americans from finding its tenets abhorrent, and the same holds true for a wide variety of sexually oriented material. Much of that material is, as we have explained, protected by the First Amendment, but it does not follow that the material is harmless, or that its proliferation is good for society.

The act of condemnation, of course, is itself central to what the First Amendment is all about. Just as speaking out against government has long been part of what citizens are both entitled and indeed encouraged to do, so too is speaking out on matters of concern not directly related to the functioning of government. Expressing a point of view about sexually explicit materials in general, or about particular sexually explicit materials, is plainly the very kind of activity that First Amendment properly protects. To the extent that citizens have concerns about the kinds of sexually explicit material that are available in contemporary America, they should not only recognize that the First Amendment protects and encourages their right to express these concerns loudly and often, but should as well appreciate the fact that in many aspects of our lives to keep quiet is to approve. Moreover, communities are made by what people say and do, by what people approve and what people disapprove, and by what people tolerate and what people reject. For communities, and for the sense of community, community acceptance and community condemnation are central to what a community is.

Although we are concerned here primarily with protest or related action against materials that citizens find harmful, immoral, or objectionable, we do not wish to discount the value of protest directed at government when citizens wish government to do something it is not currently doing. Protest and related activities are entirely appropriate if citizens are dissatisfied with the work of their law enforcement officials, their prosecutors, their administrators and executives, their

legislators and their judges. It is certainly appropriate for citizens to protest the work of this Commission. We encourage citizens to be actively involved in what their government is doing, and if they feel that the government is not doing enough, or is doing too much, with respect to prosecution of prosecutable materials, then they should make their wishes known to those who have the power to make changes.

8.2 The Methods of Protest

It should be apparent from the foregoing that citizens need not feel hesitant in condemning that which they feel is worthy of condemnation. Moreover, they need feel no hesitation in taking advantage of the rights they have under the First Amendment to protest in more visible or organized form. They may, of course, form or join organizations designed expressly for the purposes of articulating a particular point of view. They may protest or picket or march or demonstrate in places where they are likely to attract attention, and where they will have the opportunity to persuade others of their views. The right of citizens to protest is of course coextensive with the right of publishers to publish, and we do not suggest that citizens not exercise their First Amendment rights as vigorously and as frequently as do those who publish their views in print, on film or tape, or over the airwaves.

Of some special relevance in this context is the practice of protesting near the premises of establishments offering material that some citizens may find dangerous or offensive or immoral.

We recognize that such forms of protest may at times discourage patrons who would otherwise enter such establishments from proceeding, but that, we believe, is part of the way in which free speech operates in the United States. In the context of a labor dispute, picket lines frequently have this very kind of discouraging effect, and the Supreme Court, even outside of the labor context, has recognized the free speech rights of those people who would protest on public streets or sidewalks but in close proximity to business establishments whose business practices they find objectionable.[1] For citizens to protest in the vicinity of a pornography outlet is fully within the free speech traditions of this country, and so too is protest in the vicinity of an establishment only some of whose wares the protesters would find objectionable. If people feel that businesses, whether a local store or a multinational corporation, are behaving improperly, it is their right and their obligation to make those views known.

Somewhat related to on-site or near-site protesting, in terms of coercive force, is the boycott, in which a group of citizens may refuse to patronize an establishment offering certain kinds of magazines, or tapes, or other material, and may also urge others to take similar action. At times the boycott may take the form of action against an advertiser, where people may express

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1. In fact, in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the Court prohibited an injunction directed against people who were passing out leaflets in the neighborhood of the residence of a person whose business practices they found objectionable.

their views abour corporate responsibility by refusing to buy certain products as long as the producer of those products advertises in certain sagazines, or on certain television shovs. Boycotts attempt to take advantage in organized fashion of the needs for business establishments to have customers. They are thus attempts to mobilize consumer power towards controlling the products and services made available in the market.

In a number of purely business contexts, an organized boycott would violate the antitrust laws, whose aim, in part, is to encourage competition by discouraging some forms of organized economic pressure. But consumer boycotts for social and political aims have been determined by the Supreme Court to be protected by the First Amendment,[2] and thus we do not hesitate to note that a consumer boycott, premised on the view that corporations can often do as much, for good or for evil, as government, is well within the First Amendment-protected methods of protesting business activities that citizens may find objectionable.

8.3 The Risks of Excess

In pointing out the citizen's undoubted right to protest written, printed, or photographic material that he or she finds harmful, objectionable, immoral, or offensive, we are not so naive as to suppose that this right to protest may often be carried to excess. Citizens who protest, or boycott, or picket,

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2. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

or distribute leaflets, or march, or demonstrate are unquestionably exercising their First Amendment rights. But just like the First Amendment rights of some of those who deal in sexually explicit materials, these rights may be exercised harmfully or unwisely.

Thus, we have no doubt that a citizen has the right to refuse to shop at a store that sells the National Review or The New Republic because the citizen disagrees with the political point of view of one of those magazines. And we have no doubt that a citizen who urges his friends and others to do the same is still well within what the First Amendment does and ought to protect. But we also have no doubt that the citizen who exercises his First Amendment rights in this manner would be criticized by most people, and most of us would strongly support that criticism. Apart from the question of governmental interference, there are positive values associated with the free flow of ideas and information, and society is the loser when that process is unduly stifled. Just as with the free speech rights of those who trade in sexually explicit materials, the free speech rights to protest objectionable material may be exercised in a lawful but societally harmful manner.

Thus we have little doubt that in exercising their First Amendment rights to protest material that they find objectionable, some people will protest material that quite simply ought to be encouraged freely to circulate in this society. We also have little doubt that protest activity may

very well inhibit this process of circulation. If large numbers of people refused to patronize bookstores that sold Sinclair Lewis' Elmer Gantry because it dealt with sexual immorality by a minister, or if people picketed the residences of booksellers who sold James Joyce's Ulysses because of its sexual themes and language, this society would, quite simply, be the worse for it. These examples are of course extreme, but the fears that many arguably valuable but sexually frank works of fiction and non-fiction will be stifled not by governmental action but by social pressure is real.

We have no solutions to this dilemma. We believe it fully appropriate for citizens to protest against material they find objectionable, and we know that at times this protest activity will go too far, to the detriment of all of us. This society is a free society not only because of the First Amendment, but also because of generally held attitudes of tolerance. We encourage people to object to the objectionable, but we think it even more important that they tolerate the tolerable.

8.4 The Importance of Education and Discussion

By focusing on protests, boycotts, and related activities, we have here emphasized conduct that is largely negative and reactive. Although we see a central place for communicative activities that are negative and reactive, we do not wish to suggest that this is all that can or should be done. In particular, we note the extent to which education is ultimately central to much that we have been discussing. In the broadest

sense, not just with respect to the education that takes place in the schools, and with respect to values and awareness as well as to facts, education is the real solution to the problem of pornography.

We have identified harms that seem to be caused by certain sexually explicit material, but many of those harms are the result of how images affect attitudes, and of how images affect behavior. But the ability of an image to affect behavior is not only a function of what that image is saying or doing, but of what other images are part of the array of stimuli received by an individual. We recognize the extent to which an attraction to one sexual stimulus rather than another may significantly be caused by individual characteristics formed at a relatively early age, in many cases before exposure to any highly sexually explicit material. But we recognize as well that if images can cause certain forms of behavior, as we believe they can and as the evidence shows, then images ought as well to be able to prevent behavior, or cause different behavior.

The images that might cause different behavior can, of course, come from numerous sources. So can the messages that would lead people in even greater numbers to reject the view that sexual violence is sometimes appropriate, to reject the view that women enjoy being physically coerced into sex, to reject the view that women's primary sexual role is to satisfy the desires of men, to reject the view that sex ought to be an essentially public act, and to reject the view that sex outside of love, marriage,

commitment, or affection is something to be sought. These positive messages might address all of these underlying attitudes. They might also address pornography more explicitly, discussing its dangers to individuals and to society. The messages might come from family members, or teachers, or religious leaders, or political figures, or the messages might come, perhaps especially, from the mass media.

Ultimately, a significant part of the concern with pornography is a concern about negative messages. One way to deal with negative messages is to prevent them from being sent, or to prevent them from being reinforced once they are sent. Action against harmful pornography, whether by law or by social action or by individual condemnation, is in the final analysis a negative approach. It is an attempt to eliminate a harmful message, and such attempts are frequently appropriate. But they cannot succeed by themselves. These essentially negative and reactive efforts must be accompanied by positive efforts. If there are certain attitudes that people ought not to have, then what attitudes ought people to have, and how can those attitudes best be inculcated. What will be taught in the schools? What forms of behavior will be publicly admired? What will the mass media encourage? What will we expect of each other in interpersonal behavior? The list goes on and on.

We commenced this report by noting that we were a Commission appointed by the Attorney General of the United States, and therefore felt a special responsibility to concentrate our

efforts towards law and law enforcement. It is appropriate to conclude, however, with this recognition of the limits of law and the limits of law enforcement. A wide range of behaviors, from telling the truth to our friends to eating with knives and forks rather than fingers, is channeled quite effectively without significant legal involvement. And another wide range of behaviors, from jaywalking to income tax evasion, persists even in the face of attempts by law to restrict it. To know what the law can do, we must appreciate what the law cannot do. We believe that in many respects the law can serve important controlling and symbolic purposes in restricting the proliferation of certain sexually explicit material that we believe harmful to individuals and to society. But we know as well that to rely entirely or excessively on law is simply a mistake. Law may influence belief, but it also operates in the shadow of belief. And beliefs, of course, are often a product of deeply held moral, ethical, and spiritual commitments. That foundation of values is the glue that holds a democracy, which functions according to the will of the majority, together. Government can and must protect the interests of the minority, to be sure. But law enforcement cannot entirely compensate for or regulate the consequences of bad decisions if the majority consistently chooses evil or error. If there are attitudes that need changing and behaviors that need restricting, then law has a role to play. But if we expect law to do too much, we will discover only too late that few of our problems have by solved.