

**COMMENTS REGARDING THE PROPOSED TEMPORARY,
EMERGENCY AMENDMENT TO SECTION 2G3.1 (OBSCENITY) OF THE
FEDERAL SENTENCING GUIDELINES**

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INTRODUCTION

Morality in Media welcomes the opportunity to submit Comments to the proposed Temporary Amendment to Sentencing Guideline 2G3.1, pertaining to violations of 18 U.S.C. Sections 1460-1463, 1465-1466 (obscene matter). Part I of the Comments discusses the policy basis for treating obscenity offenses more severely than the existing Guidelines direct. Part II discusses appropriate base offense levels for these offenses.

I. POLICY CONSIDERATIONS

A. Obscenity Regulation Becomes Dormant

As we noted in our Comments submitted in April 1989, the prosecution and sentencing practices during the period from 1966 - 1986 are not an adequate basis for determining appropriate sentencing ranges for obscenity offenses.

In 1966, the United States Supreme Court handed down its Fanny Hill - Memoirs decision which required, in order to prove obscenity, that the U.S. Attorney show that the material was "utterly without redeeming social value." In rejecting this test in 1973, the Court in Miller v. California said it "called on the prosecution to prove a negative--a burden almost impossible to discharge under our criminal standards of proof." As noted by Morality in Media General Counsel Paul J. McGeady in a statement to the Attorney General's Commission on Pornography (Chicago, Ill., July 24, 1985):

"This Fanny Hill case made it a practical impossibility to convict from 1966 to 1973, and a policy of non-enforcement set in at the U.S. Attorney level. Miller, of course, rejected this

test and gave us a workable definition, but Justice apparently has never recovered from its lethargy."

In 1970, The President's Commission On Obscenity and Pornography issued a report which was accurately described in the Hill-Link Minority Report of the Presidential Commission as a "Magna Carta for the Pornographer." Among other things the Commission leadership and majority recommended repeal of obscenity laws for "consenting adults." In commenting on the work of this 1970 Presidential Commission, the 1986 Final Report of the Attorney General's Commission on Pornography stated:

"[B]y the late 1960's obscenity regulation became essentially dormant. 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 material available to consenting adults. Although the Report was soundly 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 1960's onward of the volume and explicitness of materials that were widely available." (emphasis supplied)

In the 1970's, America also witnessed what has since been described as a "sexual revolution." This "sexual revolution" did indeed prove costly. As New York Daily News columnist Bill Reel put it in a June 16, 1983 article:

"The legacy of liberation is AIDS, herpes, gang rape and sexual abuse of children.

....

The sexual revolution was supposed to liberate society, to provide harmless outlets for repressed urges. The opposite has occurred. An explosion of raw sex in magazines and movies has been accompanied by a scary upsurge of violence.

....

'Who will deny that there is something new and sinister in the air?' Michael Gallagher wrote recently.... 'And is it unfair to indict pornography for some share of the blame?'

....

Gallagher, who works for the U.S. Catholic Conference, urges citizens to demand enforcement of anti-pornography laws. That's a beginning.... The sexual revolution has brutalized many innocent

victims. How many more will follow? Where are our leaders?"

B. Growing Concern

On March 28, 1983, at the behest of Morality in Media President Morton A. Hill, S.J., President Ronald Reagan--along with the Attorney General, Postmaster General, Commissioner of Customs, and FBI Director--met with a group of religious leaders and heads of major anti-pornography organizations. It was estimated that the religious and organizational leaders present represented a constituency of 100 million persons. Of that meeting, President Reagan stated in a July 7, 1983 letter to Fr. Hill:

"I was pleased to have the opportunity on March 28 to meet with you and other leaders in the drive against pornography and to discuss methods to improve enforcement of our federal anti-obscenity laws.

We share a deep concern about the ever more extreme forms of pornography being distributed throughout our land.

In response to the recommendations made at that meeting, I have directed that a working group be established here at the White House to coordinate investigation and enforcement of the Federal anti-obscenity laws."

And, in a May 22, 1985 letter to a conference on pornography sponsored by Morality in Media, President Reagan stated:

"Just two years ago I had the opportunity to meet with Father Morton Hill and other national leaders to discuss the spread of ever more extreme forms of pornography across the land. Our meeting made clear that ... efforts by law enforcement agencies and private organizations to deal with the problem were in need of renewal.

[T]hat renewal is now well under way. Parents, schools, churches and community groups are joining forces to combat pornography and to urge public officials to take the steps within their power to control its production and distribution in their communities. This activity is truly encouraging

... Last week ... Attorney General Meese announced the formation of the Commission on

Pornography.... This Commission will study the full dimensions of the pornography problem.... I look forward to reviewing the work of the Commission when it reports its findings next year."

C. Final Report of the Attorney General's Commission on Pornography Marks Turning Point In Obscenity Law Enforcement

In July 1986, the Attorney General's Commission on Pornography released its Final Report, revealing the explosive growth of pornographic materials in America since 1970, as well as the degenerative change in their content. Pursuant to its Charter Mandate and consistent with "Constitutional guarantees," the Commission made recommendations for both government and private action.

At an October 22, 1986 press conference to announce the Justice Department's response to the Commission on Pornography, Attorney General Meese outlined a seven-point program to curb the growth of obscenity and child pornography, promising to pursue "with a vengeance" and prosecute "to the hilt" those trafficking in obscenity. The seven points of the Justice Department's program included:

- (a) A center for obscenity prosecution;
- (b) A task force of attorneys to work closely with the center;
- (c) An enhanced effort by each U.S. Attorney's office concentrating on interstate trafficking in obscenity;
- (d) An enhanced effort by the Organized Crime and Racketeering Strike Forces against organized criminal enterprises involved with obscenity production and distribution;
- (e) A legislative package to be introduced in the next Congress.

On February 10, 1989 Attorney General Edwin Meese announced the creation of the Obscenity Enforcement Unit within the Justice Department consisting of two components--a Task Force and Law Center. In addition, Mr. Meese stated that all 93 U.S. Attorney's Offices would have at least one lawyer trained in obscenity matters.

On November 10, 1987 President Reagan unveiled the "Child Protection and Obscenity Enforcement Act." In his transmittal message, the President stated that the purposes of the Act were two fold:

(a) To update Federal law to take into account new technologies and ways of doing business employed by pornographers; and

(b) To remove loopholes and weaknesses in the laws "which have given criminals in this area the upper hand for far too long."

On February 2, 1988, the Child Protection and Obscenity Enforcement Act of 1988 was introduced in the 100th Congress, 2nd Session, and on Friday, October 21, 1988, in the closing hours of its legislative session, Congress passed the Child Protection and Obscenity Enforcement Act.

D. Enforcement of Federal Obscenity Laws Now A Priority.

In the brief time since the National Obscenity Enforcement Unit was formed, many milestones in obscenity prosecution have been reached. Although statistics have not yet been released for the 1988 fiscal year, there was an 800% increase in federal obscenity prosecutions in the 1987 fiscal year. In 1987 the Justice Department also obtained the first federal conviction against "dial-a-porn" companies and the first conviction under the federal R.I.C.O. law where the predicate offenses consisted of obscenity violations. In October 1987 a federal grand jury in Las Vegas also indicted Reuben Sturman on RICO/obscenity charges.

In 1988, a federal grand jury in Los Angeles returned a 12-count indictment against two men and two companies for alleged violations of RICO and obscenity laws. The Justice Department and the Postal Service announced that criminal charges had been brought in eight states against 20 persons and 14 corporations for using the mails to advertise and distribute obscene materials. As of May 1989, Project Postporn had resulted in 18 convictions for mailing obscene material in 11 districts.

On March 13, 1989 the Justice Department announced that a Washington, D.C. corporation pled guilty to violating the federal RICO statute where the predicate offenses consisted of obscenity violations.

In another case tried in Nashville, Tennessee, three Chicago men pled guilty on June 1, 1989 to using the U.S. mail to distribute obscene materials.

The above "chronology" of obscenity prosecutions is by no means an exhaustive list of obscenity investigations and prosecutions initiated or completed

since 1986. They do show that enforcement of the federal obscenity laws has become a Justice Department priority since 1986, and the new Justice Department head, Attorney General Dick Thornburgh, has made it clear that obscenity enforcement will remain a priority. President Bush has expressed his full support of obscenity enforcement efforts, and last, but not least, opinion poll after opinion poll show that the American people want obscenity laws enforced.

E. The Child Protection and Obscenity Enforcement Act of 1988 Does Provide a Basis for Providing Stiff Sentences for Obscenity Offenders

Congress' action in passing the Child Protection and Obscenity Enforcement Act of 1988 is the clearest indication that Congress fully shares the concerns of the Reagan/Bush administrations and of parents and decent citizens about the proliferation of hardcore pornographic material in American society and that Congress means business about dealing with those who traffic in such materials.

In the obscenity portions of the Act, Congress expanded the scope of federal obscenity laws to reach the sale of obscene matter on federal lands and the distribution of obscene material on subscription TV. Congress also made it easier to prosecute those who would use the channels of commerce as a "means of spreading [the] evil" of obscene matter [See United States v. Orito, 413 U.S. 139, at 144 (1973)] by:

- a. Punishing those who receive obscene matter shipped interstate;
- b. Punishing those who use a facility or means of interstate commerce to transport obscenity;
- c. Permitting court ordered "wire taps" for obscenity violations;
- d. Creating rebuttable presumptions to show that the channels of commerce have in fact been utilized; and
- e. Facilitating cooperation between the Customs Service and U.S. Attorney's Office when both civil forfeiture of obscene material and criminal prosecution under 18 U.S.C. 1462 may be appropriate.

Congress also increased the penalty from misdemeanor to felony status for making obscene telephone communications for commercial purposes and authorized criminal forfeiture in obscenity cases.

Congress has chosen to exercise its authority to keep the channels of interstate commerce clear of obscene matter, has made all violations of the federal

obscenity laws felonies, has made property constituting or traceable to proceeds obtained from obscenity offenses subject to criminal forfeiture, and has defined "racketeering activity" in 18 U.S.C. 1961(1) to encompass obscenity offenses.

We think the Congressional intent is clear: obscenity offenses are serious offenses and sentences imposed on obscenity offenders should reflect that fact.

II. APPROPRIATE BASE OFFENSE LEVELS FOR OBSCENITY OFFENSES

A. Base Offense Level Where There Is No Distribution For Pecuniary Gain

The existing Guidelines permit a sentence range of between 0-6 months for obscenity offenses not related to distribution for pecuniary gain. This sentence can be satisfied solely by probation. Public comment is now sought as to whether the base offense level should be raised to 8.

There is an important lesson to be learned from the Constitutional analysis in determining whether there is a Sixth Amendment right to a trial by jury for persons charged with a particular offense. In its recent Blanton v. City of North Las Vegas decision (57 L.W. 4314, 3/6/89), the United States Supreme Court wrote:

In recent years ... we have sought more 'objective indications of the seriousness with which society regards the offense.' ... '[W]e have found the most relevant criteria in the severity of the maximum authorized penalty.'

....

Primary emphasis ... must be placed on the maximum authorized period of incarceration. Penalties such as probation or a fine may engender a significant infringement of personal freedom, ... but they cannot approximate in severity the loss of liberty that a prison term entails.

....

Following this approach...a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of six months. (emphasis supplied)

In the Court's own language, the primary indicator as to the "seriousness with which society regards the offense" is the maximum authorized period of incarceration. Offenses punishable by a maximum

sentence of six months or less are "categorized as 'petty.'"

We think Congress intends all obscenity offenses to be regarded as serious offenses. Raising the Base Offense Level to at least 8, and thereby permitting a maximum sentence of 8 months, is a step in the right direction.

B. Base Offense Level for Offenses Involving Distribution for Pecuniary Gain

Under the existing Guidelines, the Base Offense Level is increased to at least 11 if the offense involved an act related to distribution for pecuniary gain. Public comment is now sought as to whether the Base Offense Level for offenses involving pecuniary gain should be increased to either 12, 13, 14, 15, or 16.

We think the Base Offense Level should be increased to at least 18 for all offenses involving distribution for pecuniary gain, unless enhancements are provided for retailers and for wholesalers, distributors, manufacturers, and producers.

In regard to the seriousness of an offense, there is a difference between the person who sells a "few" obscene videotapes to a neighbor or co-worker and the person who retails obscene matter as a regular course of trade or business. For the former, we would recommend a Base Offense Level of at least 13; for the latter a Base Offense Level of at least 16.

There is also a difference between the retailer, on the one hand, and the wholesaler, distributor, manufacturer and producer, on the other. In New York and Pennsylvania, for example, a retailer who violates the obscenity law for the first time is guilty of a misdemeanor; the person who manufactures, sells or distributes for purpose of resale is guilty of a felony. Accordingly, we would recommend a Base Offense Level of at least 18 for those who sell, distribute, manufacture or produce obscene matter for purposes of resale.

C. Specific Offense Characteristics

(1) Retail Value of the Obscene Matter

As noted in our April Comments, providing an enhancement calibrated to the retail value of the material involved is of little value in most obscenity cases. Because of the requirement that the trier of

fact must make an obscenity determination for each item, prosecutors usually do not base an obscenity prosecution on large numbers of allegedly obscene items. In the recent, well-publicized Pryba case, for example, the RICO charges were based on seven counts of interstate distribution of obscene material and on fifteen prior convictions obtained against the corporate defendant for violating the Virginia obscenity statute. Yet, the dollar value of the obscene videotapes in the instant case was \$105.30.

In obscenity cases, it makes more sense to provide an enhancement if the offender retails obscene matter and a greater enhancement for those who traffic in obscene matter for purposes of resale.

(2) Distribution of Obscene Matter to Minors

Again, we doubt that this enhancement will be of much use in obscenity cases. While youth do seem to have an uncanny ability to obtain pornographic materials, it is doubtful that retailers are an important source of it. Most youth obtain pornographic material "second hand." The one exception to this is "dial-a-porn," but Section 2G3.1 does not encompass dial-a-porn.

Also, it is not clear whether defendant must "knowingly" engage in a pattern of distributing obscene matter to minors.

CONCLUSIONS

Passage of the Child Protection and Obscenity Enforcement Act of 1988 does indeed provide a policy basis for amending Guideline 2G3.1 to increase the Base Offense Level for various obscenity offenses. In passing the Act, Congress responded to a ground swell of concern from the American people about the proliferation of hardcore pornography in the nation. The specific provisions of the Act indicate clearly the Congressional intent that obscenity offenses be treated as serious offenses.

Enhancements for retail value of obscene matter and distribution to minors will not significantly further the Congressional intent. The dollar value of obscene material at issue in an obscenity case is usually small and minors typically do not receive hardcore pornography from retail outlets. It would be better to provide an enhancement where defendant sells at retail obscene matter as a regular course of trade or business and a greater enhancement for those who traffic in obscenity for purposes of resale.