

COMMENTS OF

THE AMERICAN CIVIL LIBERTIES UNION

TO THE

UNITED STATES SENTENCING COMMISSION

REGARDING

PROPOSED EMERGENCY AMENDMENTS

TO SENTENCING GUIDELINES FOR OBSCENITY OFFENSES

Filed: July 5, 1989

The American Civil Liberties Union does not believe that the provisions of the Anti-Drug Abuse Act of 1988 dealing with obscenity warrants promulgation of emergency guidelines or amendments to existing guidelines for related obscenity offenses. Quite properly, obscenity offenses are not treated as a major priority in most federal jurisdictions. Indeed, Justice Department testimony given in 1988 to the Crime Subcommittee indicated that approximately 50 percent of jurisdictions were not pursuing a single adult obscenity case. There has been no apparent rush to use any of the new obscenity provisions in the Anti-Drug Abuse Act and we can envision no basis for not using normal procedures, including Congressional review, to put guidelines in place.

On the merits, the ACLU opposes the proposed amendments to Guideline 2G3.1 (Importing, Mailing or Transporting Obscene Matter). Subtitle N of the Anti-Drug Abuse Act of 1988, which creates the offense of "engaging in the business of selling obscene matter," does not provide a sufficient policy basis for increasing the penalties for all obscenity-related offenses. In addition, increasing the sentence for any obscenity-related offense unfairly equates obscenity with offenses involving willful harm and serious physical danger to individuals.

Congressional action on Subtitle N of the Anti-Drug Abuse Act of 1988 provides no policy basis for amending the guidelines as proposed. The new offense involves being in the "business" of selling or distributing obscene materials. The current guidelines more than adequately penalize simple distribution of

obscene material for pecuniary gain. The Congressional decision to create a new crime for engaging in a "business" of obscenity distribution implies that there is a distinction between obscenity distribution and engaging in the "business" of obscenity distribution. It would, therefore, be illogical for the Sentencing Commission to make the base sentences for all obscenity offenses identical. The ACLU believes that the proposed guidelines would unfairly penalize and stigmatize an "offender" who, perhaps even unwittingly, sells or distributes what is later determined to be "obscene" material to consenting adults.

The new guidelines would raise the base offense level of an obscenity crime from level 6 to a minimum level of between 12 and 16. Thus, the new provisions would increase the minimum permissible sentence from 0-6 months to 10-27 months. As a result, obscenity offenses would carry essentially the same base level penalty as serious physical crimes such as aggravated assault and criminal sexual abuse of a minor (both carrying minimum sentences of 18-24 months). Notwithstanding the possible addition of levels according to specific offense characteristics, the new guidelines would suggest that selling one videotape classified as obscene endangers individuals and society and stigmatizes the offender as much as sexually abusing a minor. Certainly the "harm" created by distributing "obscene" materials to consenting adults cannot be compared to the harm involved in assault crimes.

The ACLU believes that neither the elements of the offense

nor the danger posed by the seller of obscene materials justify the imposition of the higher sentences. Selling or distributing obscene materials differs substantially from every other crime. Obscenity is so abstract a concept that the United States Supreme Court has been unable to adequately define or describe it. As Justice Brennan wrote, "we are manifestly unable to describe it except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech." Unlike criminal sexual abuse of a minor or aggravated assault, distributing or possessing obscene material is not an offense which the common law would recognize as malum in se. Whereas an individual committing aggravated assault is aware that he is committing an illegal act or at least an act carrying a sense of lawlessness or evil, a possessor or distributor of obscene materials to adults is generally not clearly aware he is committing an offense until a court pronounces the material "obscene" and him "guilty." Placing an offense that lacks the element of wilful behavior on the same level as offenses defined by the intentional infliction of harm to an individual is blatantly unreasonable and reflects unsound public policy.

Finally, the "commentary" section of the proposals suggests in its "application note" that when a person "pretending to be under eighteen years of age" is involved in the material, sentencing is to be conducted under the much harsher § 2G2.2 guidelines related to the sexual exploitation of minors. This is wholly unjustified and unconstitutional. Production and distribution of even non-obscene depictions of actual minors

engaged in sexual conduct is constitutionally unprotected under the Supreme Court decision in New York v. Ferber, 458 U.S. 747 (1982). However, there is no evidence in the Congressional debate on obscenity laws justifying the conclusion that depictions of persons "pretending to be" minors should be treated any differently from depictions of other forms of sexual activity. It is also unclear what it even means to "pretend" to be under eighteen? If an obviously mature woman is wearing pigtails or holding a stuffed animal is she "pretending" to be under eighteen?

In summary, we do not believe that an emergency promulgation of new obscenity guidelines is justified. Moreover, the proposed guidelines are unreasonably harsh.

Submitted by:
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