

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-597-8642 (PTS)
213-597-8642 (COMM.)

I. Comments Relative to The Structure of the Sentencing Guidelines

- § 2G2.2: Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to Receive Material Involving the Sexual Exploitation of a Minor
- § 2K2.6: Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition by Convicted Drug or Violent Felon
- § 2L1.1: Smuggling, Transporting, or Harboring an Unlawful Alien

The organization of the Guidelines Manual designates distinct functions to the chapters. Chapter Two provides guidelines tailored to specific types of offenses, focusing on the offense behavior of the case to be sentenced. Chapter Three addresses universal adjustments common to all offenses. Criminal History determinations are presented in Chapter Four. However, in each of the three proposed amendments listed above, there are specific offense characteristics addressing prior criminal conduct within the Chapter Two guideline. In order to retain the integrity of the structure of the guidelines, it would appear that such prior criminal conduct considerations would be more properly addressed in Chapter Four. Although I am doubtless missing something, in which case you will correct me, save for the Career Offender Guidelines, also contained in Chapter Four, I know of no instance where prior criminal history affects offense level. I fear that the proposals will cause confusion, as well as skew the guidelines structure.

In sum, in developing the procedures to determine a defendant's criminal history score, the Commission decided that points are assigned based upon the sentence imposed rather than the substance of the offense of conviction. The proposed specific offense characteristics in the three referenced amendments incorporate sanctions for the nature of a prior offense(s) or criminal conduct. If the Commission is now seeking to incorporate sanctions for the nature and essence of prior criminal behavior, perhaps a more comprehensive approach can be developed within Chapter Four, rather than piecemeal in certain Chapter Two guidelines.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#23, Page 29 -- §2G2.2

We object to the increased penalties for this non-violent conduct wherein selling certain obscene materials would result in more severe punishment than the commission of some robberies (BOL 20).

The "Reason for Amendment", at Page 31, states only the need to better reflect the severity of more grievous offenses. Again, the Commission's staff has not provided justifiable background or supportive material.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#24, Page 31 -- §2G3.1

We object for the same reasons set forth in #23.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Items 23 and 24 would, if adopted, result in dramatically increased punishment for the crime of selling obscenity. The sole published rationale for this change is "to better reflect the severity of more grievous offenses." To be sure, many consider the sale of obscenity to be grievous conduct, but who is to say that the current guideline does not adequately reflect that fact? Are there cases in which courts have departed upward from the current guideline? Are there sentencing opinions in which judges have complained about the leniency of the guideline? Has the Commission conducted a survey of current obscenity sentencing practices? Has there been an increase in the sale of obscenity within federal jurisdiction since the current guideline became effective in November, 1987?

This proposal would provide for extraordinarily long periods of incarceration for non-violent conduct. Selling certain obscene materials would result in more severe punishment than committing most robberies. Specific offense characteristic (b)(3) in proposed 2G2.2 is especially troublesome, because it expands the real offense concept to unrelated conduct, no matter how remote in time. The Commission alludes to, but does not cite, social science research concerning a correlation between sexual abuse and selling obscenity.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

The Commission's failure to provide all but the most boilerplate rationale for this proposal leads to the conclusion that it is not based on legal or penological research but instead has emerged, Athena-like, from the heads of four Presidential appointees sitting around a table in Washington. The Federal Communication Commission does not award broadcast licenses on such a basis. The Food and Drug Administration does not regulate new medications on such a basis. The United States Sentencing Commission should not increase punishment on such a basis.



CDL

April 6, 1989

Honorable William W. Wilkins, Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue NW, Suite 1400
Washington, D.C. 20004

Dear Sir:

I serve as General Counsel of Citizens for Decency through Law, Inc., a national, non-profit legal organization devoted to assisting police and prosecutors to enforce constitutional laws prohibiting obscenity and regulating pornography. Since 1957, CDL has been involved in all aspects of the fight against pornography, but especially in providing expert legal assistance to allow communities, cities, states and the federal government to take effective action against illegal activity involving pornography.

Because the proposed sentencing guidelines for pornography offenses are so lenient they will be ineffective in dealing with this organized-crime controlled industry, we oppose the proposed amendments.

Citizens for Decency through Law, Inc., assisted Congress in drafting the federal pornography statutes affected by these guidelines. Indeed, on several occasions CDL provided expert testimony in Congress. Memoranda of law authored by CDL's legal staff were entered into the Congressional Record as bedrock support for these laws on three separate occasions. CDL has submitted amicus curiae briefs in every case before the Supreme Court involving obscenity or pornography for the last three decades. In addition, CDL currently represents a 4-year-old victim of dial-a-porn in a \$10-million lawsuit against the pornographic message provider and Pacific Bell. The child was molested by a 12-year-old boy after he listened to two-and-a-half hours of explicit sex messages. CDL has hundreds of affiliated citizen organizations around the United States with thousands of members, and hundreds of thousands of contributors. These supporters were instrumental in motivating Congress to pass the above legislation.

The proposed sentencing guideline amendments, No. 126 (distributing obscene matter), No. 127 (obscene telephone

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communications) and No. 128 (broadcast obscenity), would be completely ineffective in deterring and punishing violators of these statutes. By taking the teeth out of these criminal laws, the amendments would in one fell swoop negate the years of work that went into this legislation -- by the Attorney General's Commission on Pornography, by citizen and community leaders, and by many members of the Senate and House of Representatives. Most importantly, the amendments would frustrate the will of Congress, which overwhelmingly passed the Child Protection Act in response to demonstrated and serious national problems.

IMPORTING, MAILING OR TRANSPORTING OBSCENE MATTER

The base offense level of 6 for "Importing, Mailing, or Transporting Obscene Matter," is ridiculously low for what always has been considered a very serious offense. These laws have traditionally been aimed at preventing huge interstate shipments of obscene material. And it is the consensus of law enforcement officials nationwide that there is no major interstate distributor of hard-core pornography who is not affiliated with or directly controlled by organized crime. (See generally Attorney General's Commission on Pornography Final Report, Vol. II at 1037-1238). Organized crime is not likely to be deterred from engaging in an \$8 billion annual industry by a sentence of six months probation. Most states have higher penalties for transporting obscene material into the state than for selling it within, and virtually all of those states punish the crime more severely than under these proposed guidelines.

Additionally, making the penalty dependent on the volume of obscene materials transported along with whether transported for "pecuniary gain," forces the government to prove for purposes of sentencing two elements not relevant to whether the statute has been violated. This is inadvisable, for in a very real way this has the effect of amending the statute. So too with the proposed increased penalties if the material depicts sado-masochism or violence. Sado-masochism is not an element of the test for obscenity. The Congress has not determined that sado-masochistic obscenity is more heinous than other forms of obscenity; neither should this commission. All obscenity is heinous, and should be treated more seriously than by these proposed guidelines.

OBSCENE TELEPHONE COMMUNICATIONS FOR A COMMERCIAL PURPOSE

Interestingly, where the transportation of obscene material penalties are increased if for "pecuniary gain," the

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penalty for telephone obscenity remains Level 6 even though the entire telephone pornography industry is engaged in the business for pecuniary gain. If pecuniary gain is important in transporting obscene materials so that the penalty can become much higher than Level 6, why is the penalty for obscene telephone communications not higher?

Again, the problem is that this commission apparently does not believe obscene telephone messages to be a serious problem, despite the clear concern expressed by Congress for the victims of telephone pornography, most frequently children. The increase by a mere two levels for dissemination to a minor is outrageous considering the documented harms associated with this activity, including those suffered by our client in the above-mentioned case. The exemption if the defendant took "reasonable action" to prevent access by minors or relied on such action by the phone company is equally outrageous, and almost certainly broad enough that no one will be sentenced according to this provision. And again, there is an unnecessary and unwarranted increase in levels if the material is sado-masochistic. Why is a description of orgasms achieved by sex with animals, or through defecation and urination, treated less severely than descriptions of someone being spanked in conjunction with sexual activity?

The telephone pornography business is a multi-million dollar industry that will not be affected in the least by laws which carry such impotent penalties.

BROADCASTING OBSCENE MATERIAL

In the broadcast medium, along with telephone pornography, we have the greatest possibility that children will be in the initial audience -- much more so than with material sold in sexually oriented businesses. Those who are responsible for disseminating harmful, illegal and obscene sex scenes in such a reckless manner must be dealt with harshly, certainly more harshly than under these proposed amendments. Also, the broadcasting industry is obviously engaged in business for pecuniary gain, yet in this area again, that does not seem to affect the commission's thinking -- the punishment remains at Level 6. And as discussed previously, CDL does not support separate categories of penalties based on the type of illegal obscenity being disseminated.

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CONCLUSION

CDL urges this commission to reconsider its proposed guidelines in the above-discussed areas, and increase considerably the penalties for violations of these important federal laws. Passing these proposed amendments as currently written will have two primary effects:

(1) federal prosecutors will not seek to enforce these laws, knowing that the penalties are so weak as to not have any effect on the illegal activities; and

(2) no distributor of obscenity, no company that sells telephone sex messages, and no broadcaster of pornography will alter their behavior in an attempt to comply with the law, but will view any potential penalties as minor and incidental costs of doing business.

The law will be unenforced by prosecutors and ignored by the industry. Hence, the victimization of women and children by pornographers will continue unabated. The Child Protection Act might as well never have been passed.

Respectfully submitted,



Benjamin W. Bull
General Counsel



Children's Legal Foundation

"protecting the innocence of children"

March 22, 1990

Paul K. Martin
Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

I am writing in reference to the proposed amendments to the federal sentencing guidelines, in particular, Amendments 22, 23, and 24 concerning child pornography and adult obscenity offenses.

Children's Legal Foundation, Inc. (CLF), formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. CLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area. CLF has more than 120 affiliated chapters across the nation representing approximately 100,000 supporters.

CLF supports any increases in penalties for violations of the obscenity and child pornography statutes. Department of Justice statistics describe the pornography industry as a \$9 billion annual revenue enterprise controlled by organized crime -- indeed, their third most profitable enterprise behind only gambling and narcotics. Because of that, the Foundation strongly endorses any increases in these penalties, which might give federal prosecutors incentive to vigorously enforce the statutory provisions and which might deter the pornographer by increasing his risk of doing business.

CLF believes that overall the obscenity base offense level of "6" is too low to adequately confront this organized crime problem. I am attaching copies of two letters previously sent to the Commission addressing our concerns and advocating increased penalties. CLF respectfully requests that the arguments and recommendations contained therein be considered again.

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CLF approves of the change to include in the sentencing consideration a defendant's prior history of sexually abusing minors, found in Amendment 23. The Attorney General's Commission on Pornography pointed out: "The great 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." [Final Report, p.68, Rutledge Hill Press]. Much of child pornography involves photographs taken by child abusers themselves, and which is then either kept or traded with other child abusers. An excellent summary of the unique subculture of child pornography and child abusers is found in Chapter 7 of the Final Report of the Attorney General's Commission on Pornography, a copy of which is attached.

Statistically, a defendant convicted of distributing or possessing child pornography is highly likely to be a child abuser, and also a pedophile. "Child pornography plays a central role in child molestations by pedophiles, serving to justify their conduct, assist them in seducing their victims, and provide a means to blackmail the children they have molested in order to prevent exposure." [Report of the U.S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia, 1986].

Dr. Eugene Abel, Professor of Psychiatry at the Emory University Medical Center, clinically studied 240 child molesters (pedophiles). They averaged 30 (homosexual or same-sex) to 60 (heterosexual) victims before being caught. The average number of children molested by these pedophiles was 380 in a lifetime. [Abel, 1986].

The fact that a person convicted of possessing or distributing child pornography has a previous history of sexually abusing minors is very relevant to the sentencing of that individual. Especially in light of the fact that pedophilia is considered untreatable and thus the primary goal of sentencing should be removal of the pedophile offender so that he or she does not present a threat to society -- hopefully for a long time.

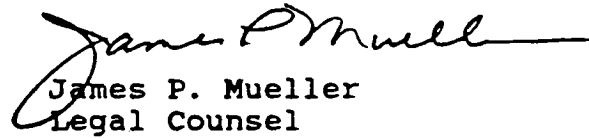
The proposals found in Amendment 22 (increases based on age of victims, based on whether the perpetrator is in supervisory control of the child, or based on the number of victims exploited) are well-reasoned and certainly justified. Also, the provisions found in Amendments 23 and 24 which, in effect, require courts to impose the more severe sentencing guidelines of the original offense in cases of "plea bargaining" are an excellent method of keeping the pornographer from avoiding the

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penalty for his intended criminal act. This proposal is much needed and CLF strongly recommends its adoption.

CLF supports the recommended increases in sentencing for obscenity and child pornography violations, found in Amendments 22, 23 and 24, and urges further increases.

Sincerely,


James P. Mueller
Legal Counsel

JPM/lak

Enclosures

Child Pornography

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,⁷⁰ 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 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 re-

lated 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.

CHILD PORNOGRAPHY AS A 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 later, 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

⁷⁰ 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.

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.⁷¹ 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.

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.⁷² 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 end 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 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, video tapes 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 por-

71. 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.

72. 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.

nography 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.

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.⁷³

Second, there is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molesta-

tion 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.⁷⁴ As with the problem of the 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 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

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

74 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*, 393 U.S., pp. 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 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.

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.⁷⁵

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 any 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 determined to be legally obscene pursuant to *Miller v. California*.⁷⁶

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*,⁷⁷ 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 "the 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

"when 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 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.

ENFORCEMENT OF THE CHILD PORNOGRAPHY LAWS

In Chapter 6 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, one hundred individuals were indicted in the federal system for violation of the federal obscenity laws, and of those indicted seventy-one were convicted.⁷⁸ 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 be-

75. 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.

76. 413 U.S. (1973), p. 15. *Miller* is discussed extensively above in Chapter 3.

77. 458 U.S. (1982), p. 747.

78. See, *supra* note 52.

lieve 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 under-investigation, under-prosecution, and under-sentencing than seems to exist with respect to enforcement of the obscenity laws.⁷⁹ Child pornography seems to be a matter that judges, 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.

⁷⁹ There are, however, impediments to investigation and prosecution that are specially related to any prosecution involving sexual abuse of children. One is the 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 these people are self-evidently "weird."



Children's Legal Foundation

"protecting the innocence of children"

June 30, 1989

Honorable William W. Wilkins, Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Sir:

I serve as Executive Director of Children's Legal Foundation, (formerly Citizens for Decency through Law, Inc.), a national, non-profit legal organization devoted to assisting police and prosecutors to enforce constitutional laws prohibiting obscenity, child pornography and sexual exploitation. Since 1957, CLF has been involved in all aspects of the fight against pornography, but especially in providing expert legal assistance to allow communities, cities, states and the federal government to take effective action against illegal activity involving pornography.

I formerly served as Executive Director of the Attorney General's Commission on Pornography and Chief of the Criminal Section of the U.S. Attorney's Office in Louisville, Kentucky.

Children's Legal Foundation assisted Congress in drafting the federal pornography statutes affected by these guidelines. Indeed, on several occasions CLF provided expert testimony in Congress. Memoranda of law authored by CLF's legal staff were entered into the Congressional Record as bedrock support for these laws on three separate occasions. CLF has submitted amicus curiae briefs in every case before the Supreme Court involving obscenity or pornography for the last three decades. In addition, CLF currently represents a 4-year-old victim of dial-a-porn in a \$10 million lawsuit against the pornographic message provider and Pacific Bell. The child was molested by a 12-year-old boy after he listened to two-and-a-half hours of explicit sex messages. CLF has hundreds of affiliated citizen organizations around the United States with thousands of members, and hundreds of thousands of contributors. These supporters were instrumental in motivating Congress to pass the above legislation.

Honorable William W. Wilkins, Chairman
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June 30, 1989

This letter is in response to your June 2, 1989 request for comment on the proposed temporary emergency amendments to the Sentencing Guidelines regarding distribution of obscene materials. I would first request that you review the April 6 letter of our General Counsel, Benjamin Bull (copy attached), which sets forth in detail our views generally on this matter.

With respect to the proposed temporary, emergency amendments, Children's Legal Foundation renews its objections to several of the guidelines:

(1) The base offense level of (6) is too low to adequately confront a billion-dollar industry controlled almost exclusively by organized crime. When Congress overwhelmingly passed this legislation, it certainly did not intend that it never be used by federal prosecutors. Yet that will undoubtedly be the effect if the penalties remain this low -- prosecutors will recognize that convictions will have little to no impact on the illegal pornography industry.

(2) We oppose any attempt to increase or decrease the penalty depending on the "retail value" of obscene materials transported or whether transported for "pecuniary gain." Obscenity is illegal because it is considered harmful to communities, and to the nation as a whole. The motivation of its purveyors should not be relevant in sentencing. The fact that organized crime controls the industry because of its profitability supports our push for harsher penalties. But we do not seek to suppress obscenity only because organized crime gets rich selling it. We seek to suppress obscenity because it is harmful to our nation. Harsher penalties will deter organized crime, and therefore reduce the harm to our country. But it is the harm caused by obscenity, not its mere profitability, that should be the focus of law enforcement efforts and sentencing guidelines. And the harm flowing from the proliferation of obscenity in the United States exists whether disseminated for proven "pecuniary gain" or not. There is no Congressional intent to the contrary.

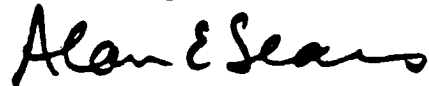
Again, we would ask the Commission to reconsider its proposed guidelines in light of this legislation's overwhelming support in Congress and the nation as a whole. We should point out that the trend in recent state and federal legislation has been to increase, not decrease, penalties for violations of obscenity and child pornography statutes, in recognition of growing evidence of organized crime's control of the industry.

Honorable William W. Wilkins, Chairman
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The Commission's recommendations fall far below the penalties in current law for numerous states for similar intra-state violations. Let us not make the federal law into a paper tiger, to be laughed at by the career criminals who flout it daily with impunity.

Thank you very much for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Alan E. Sears".

Alan E. Sears
Executive Director

AES:kb

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

23-24. NACDL agrees with other commentators objecting to these sections principally on the ground that the Commission cites no empirical research concerning the relationship between sexual abuse and selling obscenity. Moreover, these proposals would constitute a wholesale revision of the obscenity guidelines under which dramatically increased punishment would result without adequate factfinding and research.

FIRST LIFE INSURANCE COMPANY

**805 RYAN PLAZA DRIVE
ARLINGTON, TEXAS 76011**

**JOHN R. BOYD
PRESIDENT**

March 29, 1990

**United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004**

Re: Amendments 22, 23, and 24

Dear Sirs,

I am in favor of establishing much tougher sentencing guidelines that increase the penalty for sexual exploitation and abuse of children. The proposed Amendments 22, 23, and 24 before you need to be approved and enforced.

I am strongly urging you to support Amendments 22, 23, and 24, and make our nation a safer place for children.

Sincerely,


**John R. Boyd
President**

JRB/dtr



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EMMET E. TRACY

Chairman & President

Alma Products, Inc.

MISS LORETTA YOUNG

March 29, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington DC 20004

Att: Communications Director

Re: Proposed Amendments to
Sentencing Guidelines for
Child Pornography and
Adult Obscenity Offenses

Morality In Media has the following comments:

Proposed Amendment to Section 2G2.1

We support the increase to 4 levels for children under the age of 12 and the increase of 2 levels under the age of 16.

We also support the increase of 2 levels where the defendant was the parent, relative or legal guardian etc.

We further support the proposed Special Instruction.

We support these increases because of the heinous nature of the crime involving as it does the sexual exploitation of children. The existence of the Federal Child Pornography Law and the similar laws of the various states has in our opinion reduced child pornography to a "cottage industry". It is no longer purveyed to our knowledge, in the shops such as the Times Square Porn shops and adult book stores throughout the country. The focus, therefore, should be on this cottage industry production. These amendments further that end.

Proposed Amendment To Section 2G2.2

We believe that the proposed amendments to the Base Offense Level are inadequate and that the Base Offense Level itself should be increased to 15.

We understand that the existence of the Federal Child Pornography Law was bottomed on preventing the sexual exploitation of children following the example of New York whose law had been upheld in the Ferber case. The Supreme Court in that case clearly said that the governmental objective of the State of New York was not to punish "Obscenity", but to dry up the market for child pornography. Certainly the prohibition against possession, receipt or advertising advances that goal. By punishing these offenses, we prevent the sexual exploitation of children. By treating them more leniently than the transportation and distribution of the material, we propose a non-sequitur. It sends a message that you can stimulate the market by advertising for child pornography or receive it through the mail and be treated more leniently. The Ferber Court said:

"The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."

We also object to the use of the word "mere". It should be eliminated. It gives the impression that somehow this is not an important offense.

We further object to the Section relative to "distribution for pecuniary gain", not in its increase to level 15, but for failure to recognize that the term "pecuniary gain" is inadequate and requires that the government prove that a profit was made. We know from examining the cases that much of the child pornography "underground industry" relies on a "swapping" concept. Typically, Pedophiles exchange this material or "swap" it. This peculiarity of the industry should be recognized. It would be difficult in such circumstances to show "pecuniary gain". The word "pecuniary" contemplates an exchange of money and comes from Latin "pecuniarius" or the French "pecunia", both of which are related to money. In fact, Webster defines "pecuniary" as "consisting of or measured in money." If, therefore, the pedophile exchanges child pornography for any thing other than money, enhancement does not apply. In fact, he could swap it for diamonds or gold, or gold bars, or even for a car and there would be no "pecuniary gain". The same is true of anybody who is in the business of dealing in child pornography, provided he doesn't take "money" for his product. This is an obvious hole that should be plugged.

It behooves the Sentencing Commission to check with the National Obscenity Enforcement Unit to determine how many of the convictions obtained under the Child Pornography Statute involved the element of "pecuniary gain". Our guess would be very few, which adds to the requirement that the swapping concept or the exchange for other than money be included at this point.

We applaud the increase of 4 levels for sadistic, masochistic or violent depictions, but suggest that depictions of oral or vaginal or anal sex relations involving a child may be just as heinous. After all, a child could be bound, but not sexually abused and by binding him or her, there is an increase of 4 levels, but no corresponding increase for sexual intercourse. The same is true, if the child were being spanked, since this is a violent act. There is a serious discrepancy here which should be attended to.

Proposed Section 2G3.1

Our first recommendation would be to raise the Base Level from 6 to 8 for reasons outlined in our prior Comments attached in response to your proposed Temporary Emergency Amendment to Section 2G3.1. [See especially pages 7 and 8].

We also bring your attention to our prior comment above, about the inadequacy of the phrase "pecuniary gain" and we ask that this be modified to reflect the fact that any type of payment or exchange of assets, whether in money, property, [real or personal] be included in the phrase "pecuniary gain". In fact, the whole question of "gain" is more or less irrelevant to the governmental interest involved.

At least this move from 11 to 15 is a move in the right direction, but the wording of the phrase "pecuniary gain" needs further elucidation.

We also draw your attention to our Comments on the inadequacy of the the enhancement for retail value of obscene matter. Our comments can be found in the prior document submitted which is attached at pages 8 and 9.

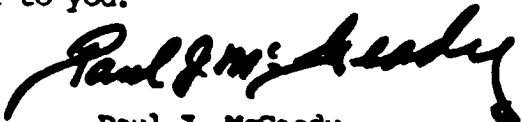
We again point out to you that the enhancement for sadistic, masochistic or violent depictions is inconsistent with the governmental interest involved. The Obscenity Law exists basically because the distribution of these depictions offends the sense of decency and morality of the citizens of the United States. They also tend to break up marriages and stimulate persons, especially children to

commit antisocial acts. If these are the proposals, then "merely" including sadism, masochistic conduct or violence for enhancement is again a non-sequitur. There are many things that should be included under this guideline for enhancement, not the least of which would be bestiality or necrophillia. I now give you a list of items that you might consider for inclusion at this point. These are:

Annalingus
Artificial Vagina Display
Beaver shots
Bestiality
Circus Orgies
Coitus
Coprophagy
Coprophillia
Cum-shots
Cunnilingus
Daisy Chain Copulation
Dildoe Display
Ejaculation
Exhibitionism (of the Genitals)
Fellatio
Fetishism
Flagellation
French Tickler Displays
Frottage
Golden Showers
Incest
Orgasm
Masochism
Masturbation
Necrophillia
Pederasty
Voyeurism
Piquerism
Reaming
Sadism
Sadomasochism
Sapphism
Sixty-Nineing
Sodomy
Triolism
Urolagnia
Zooerasty

We trust that this will be of assistance to you.

PJM:mm
Enc.


Paul J. McGeedy
General Counsel

P.S. We also include our Comments of April 5, 1989 in accordance with the invitation in the last paragraph of your notice and request for comments.

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

Prepared by:
Robert Peters, Esq.
Morality in Media, Inc.
475 Riverside Drive
New York, N.Y. 10115
(212) 870-3208

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 greater than six months. (emphasis supplied)

greater than

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.



April 5, 1989

FOUNDER
REV. MORTON A. HILL, SJ
FOUNDER
(July 13, 1917-November 4, 1985)
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Chairman of the Board
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William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., NW, Suite 1400
Washington, D.C. 20004

Attn.: Paul Martin

Re: Proposed Amendments 126-128,
Pertaining To Obscenity

Dear Mr. Chairman:

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States.

This organization is now national in scope, and its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. The founder and President of Morality In Media (until his death in 1985) was Rev. Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography" [two copies enclosed].

Morality In Media, Inc. files the attached Comments with a genuine appreciation of the complexity of the task faced by the Commission, but also with deep concern about the impact that the Guidelines and Proposed Amendments 126, 127 and 128 [pertaining to obscenity] will have on the future enforcement of both federal and state obscenity laws.

The Proposed Amendments 126, 127 and 128 are set forth verbatim. Our Comments follow.

Sincerely,

Robert Peters
Attorney

RP/mtb

COMMENTS REGARDING THE
PROPOSED AMENDMENTS 126-128 (OBSCENITY)
TO THE FEDERAL SENTENCING GUIDELINES

Prepared by:
Morality in Media, Inc.
475 Riverside Drive
New York, N.Y. 10115

126. Proposed Amendment to Section 2G3.1 Of the Guidelines
[pertaining to Title 18, Sections 1460-1463 and 1465-1466].

"§2G3.1 Importing, Transporting, Mailing, or Distributing
(Including Possessing With Intent to Distribute) Obscene Matter

Base Offense Level: 6

Specific Offense Characteristics:

(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material but in no event by less than 5 levels

(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

A. "Base Offense Level: 6"

Comment: The proposed Amendment does not change the Base Level Offense established under the existing Guidelines. The existing Guidelines permit a sentence range between 0-6 months for an Offense Level 6, which may be satisfied solely by probation. Under the existing Guidelines, even repeat obscenity offenders have little to fear, so long as their offenses are not "related to distribution for pecuniary gain."

In contrast Sections 1461, 1462 and 1465 of Title 18 permit a maximum prison term of 5 years for a first offense and Sections 1461 and 1462 permit a maximum term of 10 years for each subsequent offense, irrespective of whether there is a commercial element. In United States v. Orito, 413 U.S. 139 (1973), the United States Supreme Court upheld 18 U.S.C. 1462 as applied to a person who allegedly transported the obscene material (which included 83 reels of film) by private carriage and "solely for the private use of the transporter." The Court stated:

That the transporter has an abstract proprietary power to shield the obscene material from all others...is not controlling. Congress could reasonably determine such regulation to be necessary..., based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause.

In July 1986 the Attorney General's Commission on Pornography released its Final Report—revealing both an explosive increase in the quantity of pornographic materials and a radical degenerative change in their content since 1970. The Commission had access to testimony from victims, victimizers, law enforcement officials, physicians, psychologists and pastoral counselors, as well as social scientists, which showed the destructive impact that substantial, habitual exposure to pornographic materials can have on users. The Commission found that youth, ages 12 to 17, constitute the largest audience for pornographic material in America today. Several Commissioners noted the moral harms of pornography as well as its destructive impact on family life—concerns which the Supreme Court has also raised in its decisions upholding obscenity laws.

The harms associated with obscene material occur irrespective of whether distribution is for pecuniary gain, and we respectfully suggest that the Commission's classification of obscenity offenses at Base Offense Level 6 neither promotes respect for the federal obscenity laws nor reflects the nature and degree of harm caused by the crime.

Of course, if the Proposed Amendment is accepted, the Base Level Offense will be 6 even where the act is "related to distribution for pecuniary gain"—if the defendant is not also "in the business."

B. "Specific Offense Characteristics

(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels."

Comment: The proposed Amendment changes the existing Guideline which reads, in part:

"(1) If the offense involved an act related to distribution for pecuniary gain, increase by...."

The "Reason for Amendment" provided in the Proposed Amendment states:

"The purpose of this amendment is to incorporate the new offenses created by sections 7521 and 7526 of the Omnibus Anti-Drug Abuse Act of 1988..., and to make clarifying changes." (emphasis supplied)

The "new offenses" noted are Sections "1466. Engaging in the business of selling or transferring obscene matter" and "1460. Possession with intent to sell, and sale, of obscene matter on federal property." Section 1466 does include an "engaged in the business" requirement. Section 1460 includes only a "sale" requirement. As stated previously, it is not necessary to prove a commercial element in order to convict under Sections 1461-1465 of Title 18.

Under the existing Guidelines, a showing that the offense "involved

an act related to distribution for pecuniary gain" is necessary to upgrade the Base Offense Level to eleven (11). Such a showing would seldom place an additional burden of proof on the U.S. Attorney. On the other hand, a showing that the defendant "denotes time, attention, or labor to such activities, as a regular course of business, with the objective of earning a profit" may very well add such a burden—a burden Congress placed on a prosecutor only regarding Section 1466.

Further, the Proposed Amendment relegates an offense involving "pecuniary gain" to a Base Offense Level 6, unless it can also be proved that the defendant is, so to speak, "in the business." At the same time, the Proposed Amendment does not increase the Base Level Offense beyond grade 11 even where a defendant is in fact "in the business." Of course, the Base Level Offense can, theoretically, be increased beyond grade 11 if the "retail value of the material" exceeds \$100,000. This, however, will almost never happen in obscenity cases because of the requirement that the trier of fact must make an obscenity determination for each item. Prosecutors will seldom if ever ask a jury to make such a determination for each of hundreds, even thousands, of individual magazines, films, and books.

C. "Specific Offense Characteristics

(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

Comment: Under the existing Guideline, the offense need only "involve" material depicting sadomasochistic abuse. The Proposed Amendment also requires a "distribution" element. Presumably, the terms "distributed" and "distribute" mean that defendant would have to sell, rent, lend, or give the material to others or intend to do so. Accordingly, if an American travelling abroad returned with boxes of sadomasochistic tapes and magazines "solely for private use" [i.e. no distribution or "intent to distribute"], the Base Level Offense would not be increased—despite the fact that much of the material would almost certainly "find its way" into others' hands—including children's. See United States v. Orito, supra.

But there is a further problem with both the existing Guideline, as well as the Proposed Amendment—to wit, the special treatment accorded material "that portrays sadomasochistic or other violent conduct." It is for the trier of fact to determine what is obscene, and there is no concept of "degrees of obscenity" in the obscenity law field. Nor is it clear that materials depicting "sadomasochistic abuse" per se pose a greater threat of harm to society, or to individual victims, than do materials "portraying," for example:

1. incest;
2. man/boy love—with "performers" who look 14 but are 18 or over;
3. bestiality;

4. sodomy, group sex, or promiscuous sex, in the age of AIDS;
5. adultery, in the age of family breakdown; or
6. excretory activities or products.

In Paris Adult Theatre I v. Slaton, 413 U.S. 49, the United States Supreme Court spelled out the various governmental interests that justify obscenity legislation. These include:

"[T]he interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers...."

The Paris Court continued:

"Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature...could quite reasonably determine that such a connection does or might exist. ...[t]his Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'" (emphasis supplied)

In Roth v. United States, 354 U.S. 476, at 502 (1957), Mr. Justice Harlan, in a concurring opinion, elaborated:

It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society.

[E]ven assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the [government] may be protected by the prohibition placed on such materials. The [government] can reasonably draw the inference that over a long period of time the indiscriminant dissemination of materials, the essential nature of which is to degrade sex, will have an eroding effect on moral standards. (emphasis supplied)

Few would quarrel with the assertion that materials depicting sadomasochistic abuse are heinous, but it is a great and tragic mistake to ignore or downgrade the harms associated with other types of hardcore pornography.

Congress has not made distinctions, and we respectfully urge this Commission to also avoid doing so.

127. Proposed Amendment to Section 263.2 of the Guidelines
[pertaining to 47 U.S.C. 223(b)]

*263.2 Obscene Telephone Communications for a Commercial Purpose
(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved material that describes sadomasochistic or other violent conduct, increase by 4 levels.

(2) If a person who received the communication was less than 18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

A. "(a) Base Offense Level: 6"

Comment: The "dial-a-porn" industry is a multi-million dollar business and a major U.S. distributor of hardcore pornography. Congress in part recognized this by upgrading the penalty from misdemeanor to felony status for making any "obscene communication for commercial purposes." Yet, the Proposed Amendment simply turns a "blind eye" to the commercial aspect of the dial-a-porn industry, relegating all offenses to Base Level 6, unless the communication describes sadomasochism or the person receiving the communication is a child. We think this ignores the nature and degree of the harm caused by the crime, as well as the community view of the gravity of the offense.

Kim Murphy (Staff writer), "Regulators Answer Protests Of Huge 976 Phone Charges," Los Angeles Times, Sept. 28, 1987, at p. 3:

Clester Jones' 15-year-old son hid the...phone bill when it arrived, so Jones did not see it until the phone was shut off for nonpayment of \$5,312 for calls to a 976 number that offered sexually explicit conversation. "The boy didn't realize it was going to cost that much. He got hooked.... He just got so that he couldn't keep from calling," said [the boy's Aunt].... Complaints like the Jones' have drawn the attention of regulators [of] the nation's booming dial-a-message industry, which is expected to expand by 80% this year....

Dr. Victor Cline (psychologist), NPD Journal, Nov. 1985:

With the sponsorship of the U.S. Justice Department, I conducted a pilot field study of the effects of Dial-a-Porn on child consumers in January 1985.... With everyone of the children we studied we found an "addiction" effect in making these calls. In every case...the children (girls as well as boys) became hooked on this sex by phone and kept going back for more.... I next found that nearly all of the children had clear memories of a great deal of the content of the calls they heard.... We also found that almost without exception the children felt guilty, embarrassed, and ashamed.... In nearly all cases there were some problems and tensions generated in the parent-child relationships....

Dr. Cline continues:

When one makes a call to Dial-A-Porn, it is usually answered by a very sexy, seductive sounding female (actually a recording) who talks directly to the caller about how bad she wants to have sex with him now. She then tells the caller all the things she wants to

do to him—oral sex, vaginal sex, anal sex, etc. This is done with a lot panting and groaning suggesting that she is in intense heat. She may discuss the turgid state of her sex organs or that of the caller. There may be a second female on the line and they may talk about having sex together as well as with the caller. They may mention having a sex marathon today will all the explicit details. In some cases bondage is a part of the scenario.... Sex with animals is also included as well as group sex (e.g., five guys at once), lesbianism, anal sex, rape, having sex with a "baby sister," a school teacher having sex with class members, inviting the married male to have sex with the babysitter, inviting the caller to urinate in the woman's face, inviting beatings, torture and physical abuse as part of the sexual activity. The messages keep changing every hour or so and new numbers are given out in order to encourage constant call backs.

From a letter to a public official. Names have been changed:

I must relate to you a terrible incident that happened to our family.... It occurred July 26, 1987. My 13 year old son Tim called the dial-a-porn number.... Tim's friend Edward, aged 15, was over and they were listening to the prerecorded messages. Later when I arrived home from work I immediately made them hang up. Unknown to me Tim's 14 year old brother was listening on another line with his two friends.... Karen, age 10, was also listening on her extension. Within the next 48 hours, Edward and his 11 year old brother molested my daughter Karen. Police were notified and in their investigation revealed that Karen had encouraged the boys by asking them to touch her and "do it with her." She actually used phrases she heard on the "Dial-a-Porn."

From an article in the Daily News (LA), 10/3/87:

"A man who ran up nearly \$38,000 in phone-sex bills has been ordered to spend 180 days in a psychiatric hospital and repay the money he embezzled from a North Hollywood insurance agency to support his habit." (emphasis supplied)

From a May 1987 letter from a Christian ministry to people coming out of homosexuality:

"But there is another matter I would like to address and that is the possibility of proposing and lobbying for legislation that would prohibit the networking of gay telephone sex across this nation.... All I can tell you is that many, many men and women I counsel are being dragged into sexual addiction in this form of perverse activity." (emphasis supplied)

B. "(b) Specific Offense Characteristics

- (2) If a person who received the communication was less than

18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

Comment: The Commission is certainly aware that in early 1988, Congress amended 47 U.S.C. 223(b) to prohibit obscene or indecent communication for commercial purposes to any person, regardless of the caller's age, and to abolish the "defense" under the old law for those who complied with FCC regulations intended to restrict access to adults only. Congress did so because it concluded that a "safe harbor" for obscene or indecent dial-a-porn was not constitutionally required for adults or minors.

On July 19, 1988, the United States District Court for the Central District of California upheld the prohibition in 47 U.S.C. 223(b) on obscene commercial messages, but invalidated 223(b)'s prohibition on indecent commercial messages. The United States Supreme Court agreed to hear the appeal of that decision, and oral argument is scheduled for April 19. [Sable Communications of California, Inc. v. FCC, 88-515 & 88-525.]

We fully expect the Supreme Court to uphold Section 223(b), as amended, and urge the Commission to follow the good example of Congress which did away with both the distinction in the previous law between adults and minors and with the statutory "defense" for those complying with ineffective FCC regulations—lest the Commission unwittingly grant dial-a-porn operators what is in effect a "partial immunity" for following its ineffective "rules."

It is to be noted that the Guidelines do not elsewhere make distinctions based on the age of the recipient of obscene (or indecent) matter. There is no reason to do so here.

128. Proposed Amendment: Adding An Additional Guideline, §263.3 [pertaining to Sections 1464 and 1468 of Title 18]

"§263.3 Broadcasting Obscene Material

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic:
 - (1) If the offense involved the broadcast of material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

Comment: Again, the Commission chooses to treat obscenity offenses as "low grade;" again, chooses to turn a "blind eye" to the commercial element in most broadcast and cable TV programming; again, attempts to determine "degrees of obscenity."

Conclusion

We genuinely appreciate the difficulty faced by the United States Sentencing Commission in determining appropriate Sentencing Guidelines for the hundreds of criminal provisions contained in the United States Code. We fear, however, that in determining sentencing ranges for obscenity offences, the Commission has been unduly influenced by a policy of non-enforcement of obscenity laws that existed for approximately 20 years, roughly from the United States Supreme Court's Fanny Hill-Memoirs decision in 1966 (requiring proof that material was "utterly without redeeming social value"—a burden almost impossible to discharge) until the Final Report of the Attorney General's Commission on Pornography in 1986. The prosecution and sentencing practices of the late 1960's, the 1970's and early 1980's are simply an inadequate basis for determining appropriate sentencing ranges for obscenity offenses.

This is not to say that every obscenity offense should be put in the the highest possible offense level. Nor is it to say that noncommercial offenders, those who profit financially from the distribution of obscenity, and those who are "in the business" of distributing obscene material should be treated exactly alike.

It is to say that those who violate the federal obscenity laws, like those who violate federal drug laws, should know that if apprehended, they will not be treated with "kid gloves." It is to say that if a prosecutor expends the office resources needed to investigate and successfully prosecute a major distributor of obscene matter in his or her district—including a "dial-a-porn" provider, he or she can know that the defendant will not get off with a "slap on the wrist" simply because the defendant is a "first offender" or because the dollar value of the materials that formed the basis of the prosecution is relatively small.

We think too that it is not for the Commission to attempt to establish "degrees of obscenity." Hardcore pornography by its very nature reduces human beings to objects for sexual gratification, and, as noted by the United States Supreme Court in its Paris Adult Theatre I v. Slaton, supra, decision:

The sum of experience...affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Congress passed laws punishing the transportation and dissemination of obscene material, and all obscene materials endanger the social fabric.



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March 28, 1990-

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Mr. Paul K. Martin
Communications Director

Dear Mr. Martin:

On behalf of the American Family Association and the over 400,000 families it represents, I would like to offer several comments to the proposed changes to the Sentencing Guidelines pertaining to obscenity and child pornography violations.

The amendment of section 2G2.1 would recognize the additional harm that young children face who have been used in sexually explicit material. Children of a young age are aware and able to distinguish between the anxiety of the actual physical abuse and the anxiety associated with the knowledge that photographs or films have been made of the sexual abuse. See, Child Molesters: A Behavior Analysis 21 (National Center for Missing and Exploited Children, April 1987).

The amendment would also provide for enhanced penalties for those defendants who were in a trust relationship with the child. If for no other reason than to attempt to preserve the traditional family structure, this enhancement is necessary. Many parents need to place their children in day care or after school care. In addition, parents entrust their children to school teachers, boy scout leaders and relatives. When the bonds of this trust are broken through the sexual

exploitation of the child, not only is the child physically and emotionally injured, but the child-parent relationship is also damaged. The child is at a loss to understand why his parent placed him in the position to incur such harm.

Third, the amendment would treat each child of a multiple molestation situation as a separate instance of molestation for purposes of sentencing. This provision specifically addresses the problems arising out of child sex rings and the difficulties in prosecution and adequate sentencing of those defendants. While the traditional law enforcement mechanisms that are in place address facets of child sex rings, this type of exploitation has unique characteristics that should be separately addressed. See, Child Pornography and Sex Rings (A. Wolbert Burgess ed. 1984).

Section 2G2.2 has been amended to enhance the penalty for the distribution of child pornography. These enhancements recognize the harm associated with the mere distribution of the material. See, New York v Ferber, 458 U.S. 747 (1982); and State v Meadows, 503 N.E.2d 697 (Ohio 1986), cert. denied, 480 U.S. _____, 94 L.Ed. 2d 771 (1987).

In addition, the amendment recognizes the minimal market value of child pornography. The harm to society is not the evil that results from criminals amassing a fortune from others' weaknesses, but from the pure exploitation of children. The harm of producing child pornography remains with the existence of the material and its use in blackmailing and seducing other children into participating in sexual activities. See, Child Molesters: A Behavior Analysis 21 (National Center for Missing and Exploited Children, April 1987).

This amendment would also specifically consider the prior criminal behavior of the offender. In discussing the unique sentencing problems pedophile offenders present, the Attorney General's Commission on Pornography identified pedophile offenders second in recidivism only to exhibitionists. See, Final Report of the Attorney General's Commission on Pornography 670 (1986).

It should be the immediate goal of the criminal justice system to protect the victims and potential victims of these offenders. Absent treatment programs for pedophile offenders, particularly recidivist offenders, enhanced sentences are essential to adequately protect America's children.

Finally, the Commission is considering amendments to the sentencing guidelines involving the distribution of obscene material. These enhanced levels recognize the basis for

individuals engaged in the transportation of such material. There is a lucrative market for obscene material. These enhancements reflect this fact.

The only negative aspect of this enhancement provision is that as a practical matter, only a few items among tens of thousands available from one distributor will be the subject of a prosecution. As it is the nature of an obscenity prosecution, each magazine or video tape must be viewed, in its entirety, by the jury prior to a finding that the material is obscene. To require a jury to find the entire cache of material from a particular distributor to be obscene would be unwieldy and unreasonable. Consequently, a conviction for a violation of federal obscenity laws is usually a reflection of only a small portion of the overall stock of the distributor.

The enhancement provision should examine whether the defendant was engaged in the business of distributing obscene material as an indicia of the extent of the commercial enterprise. To rely solely on the retail value of the items that were the subject of the prosecution will generally not be an accurate reflection of the extent of the commercial enterprise or the pecuniary gain involved.

Again, I am pleased to have this opportunity to support the proposals of this Commission in calling for enhanced penalties for producers and distributors of child pornography and distributors of obscene material. These current proposals will go a long way in the effort to curb the flow of this illegal and insidiously harmful material. Should the insight of the American Family Association be of value in the future, please do not hesitate to call on me.

Sincerely,



Peggy M. Coleman
General Counsel
American Family Association



March 26, 1990

To: Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

From: Joan Morse
President

We want it to be known to you this day that we do support the new proposed sentencing guidelines that are included in Amendments 22, 23, and 24 for tougher penalties for the sexual exploitation of children.

It is our prayer that this legislation will be passed very soon. Children look to adults for protection and we should do everything in our power to protect them. We must start getting back to being more concerned about the victims rights rather than the abusers.

Our local AFA did not receive this information concerning these Amendments until today so I had literally no time to share this info before the March 30 deadline. This is probably the only letter you will receive from this area because of that.

As president of the Tri-Cities AFA for the past several years it has been my observation that many people are very concerned about how lax our government has become with regards to pornography. There seems to be a lack of confidence in our system. Also, some people feel it won't help to speak out. They feel helpless.

Last November we did have a pro-decency rally in this area of three small cities with a twenty mile radius. We had 200 people in attendance at that rally. People are concerned about this issue.

I personally do not understand why a civilized country such as ours puts up with this pornographic type of exploitation of it's people. We do need tougher laws in dealing with these evil and heartless people that see fit to abuse people in this way. The only thing many of them are sorry for is that they get caught.

Please do what you can to pass these laws.

Sincerely yours,

Mrs. Joan Morse

March 26, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attn: Communications Director

Dear Director:

I am writing to express my support
for Amendments 22, 23 and 24 of the
proposed new sentencing guidelines.

I have been combating child molestation,
and obscenity for five years now. These
are major crimes against the American
family and they deserve the proposed
increase in penalty.

Warmest regards,
Frank Wagner
311 Wister Way
Reading, PA 19606



Delmarva Citizens For Decency, Inc.

P.O. BOX 3156

SALISBURY, MARYLAND 21801

(801) 860-1200

March 27, 1990

United States Sentencing Commission
1331 Pennsylvania Ave, N.W.
Suite 1400
Washington, D.C. 20004
Attention: Communications Director

Dear Sir:

Our organization represents 300 members who strongly support Amendments 22, 23 and 24 for sentencing penalties.

The need is great that stronger and tougher sentencing guidelines be enacted for those who are sexually exploiting children.

Please pass our feelings to those concerned with these Amendments.

Sincerely,

Bill Hoffman, President

BH/jh

Joseph Bachtler
Daniel S. Collins
Jerry Gray
David Grier
Joan Hoffman

Bill Hoffman
Donna Propper
Jo Ruark
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Carl Webster

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US SENTENCING COMMISSION
1331 PENNSYLVANIA AVE 140
WASHINGTON DC 20004

I AM IN FAVOR OF HEAVIER SENTENCING FOR PORNOGRAPHERS.
DORIS MCGREW

16:57 EST

MGMCOMP

1757 Kent Pl.
Vista, CA 92084
March 27, 1990

U.S. Sentencing Commission
1331 Pennsylvania Ave., Ste. 1400
Washington, D.C. 20004

Dear Commissioners:

We strongly support stricter
sentencing for pornographers and
sex offenders.

Sincerely,

Alice M. Getz and
William J. Getz

Mrs. Ron W. Shepelwich
5505 Asbury
Fort Worth, Texas --
March 28, 1990 ---

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Communications Director:

I would like to be counted in favor of more severe punishment for crimes of sexual exploitation of children.

I am very much in favor of passing Amendments 22, 23 and 24. I do feel it is a deterrant and offers some protection to our children.

Thank you for counting my opinion.

Sincerely,

Mrs. Ron W. Shepelwich

Mrs. Ron W. Shepelwich

Mary & Tim
Muscatine, Ia 5276

United States Sentencing Commission
1331 Pennsylvania Ave NW
Suite 1400
Washington, DC - 20004

Attention: Communications
Director

Dear Sir:

I strongly support Amendment -
ments 22, 23 & 24 on the New
Proposed Sentencing Guidelines.
I am involved in a local
group - Muscatine Citizens Against
Pornography. There is not time
enough to contact all of them -
but I have 200 people (4 of them
their spouses) who would gladly
have sent in similar requests

Sincerely
Rosemary Levinson
510 Chestnut
Muscatine, Ia - 5276

3804 Floyd St.
Fort Worth, Texas
76116
28 March, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue N.W.
Suite 1400
Washington, D.C.

Dear Communication Director,

I strongly support Amendments 22, 23
and 24.

I cannot believe that we do so little to
keep persons who destroy our children -
to keep them away no matter who they
are!

Sincerely,
Mrs. Alicia L. Lamey

CITIZENS AGAINST PORNOGRAPHY
Concerned Citizens Committee

P.O. Box 331784 76163
6263 McCarr • Fort Worth, Texas 76133 • (817) 294-4199

March 27, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attn. Communications Director

Dear Sirs,

I represent 380 people who have been fighting pornography in our area and through the U.S. Legislature. We are shocked by the number of child abusers that seem to get away with terrible crimes against our little ones. Concerning the new proposed Sentencing Guidelines, we strongly support Amendments 22, 23, and 24 raising the current levels of penalties for sexual exploitation crimes.

We believe these new guidelines, if taken into account when sentences are decided, will save children's lives.

Sincerely yours,

Betty Hildebrand
President

(Mrs John W.)

March 27, 1990

Dear Sirs:

We strongly support amendments
22, 23, 24 for increasing the penalty
for sexual exploitation of children.

Our children the hope of our future
are at great risk. Please give this
matter careful consideration.

Sincerely,
Fran & Randy Howe
1025 Orchard Ave.
Muscatine, Iowa 52761

U.S. Sentencing Commission
1331 Pennsylvania Ave., Ste. 1400
Washington, D.C. 20004

WILLIAM GLENWINKEL
2520 MAJELLA RD
VISTA CA 92084-1627

Dear Sirs:

I understand you are inviting public comment on the sentencing of pornographers.

I have experienced injury in my life due to pornography and know the life-long devastation it can cause.

Pornographers are raping America in the name of First Amendment Rights. This is a flagrant abuse of our Constitutional freedoms.

Please take steps to end this major assault on the emotional and mental health of our nation. Give the most severe of penalties to pornographers. Their works are destroying our nation. This is not a victimless crime!

Very sincerely,
Sharon Glenwinkel

4008 Aragon Dr.
Ft. Worth, Texas
United States Sentencing Commission
1331 Pennsylvania Ave. N.W.
Suite 1400
Washington, D.C. 20004

Att: Communication Director

We, the undersigned do urgently
ask you to pass Amendments 22,
23 and 24. Parents and relatives
who abuse their children should
be severely punished! Repeat
offenders should never be re-
leased on society again!!

All of the amendments are
needed. Please stand firm!!

yours truly,

Lloyd H. Shaw

Edna Mae Shaw

Muscatine, Iowa

March 28, 1990

U.S. Sentencing Comm:
1331 Penn Ave N.W.
Attention Comm Director

This note is to inform you that I
strongly support Amendments 22, 23, 24

Please give this action your consideration.

Sincerely,

A. L. Hanson

1311 James Place

Muscatine, Iowa 52761

3/27/90

Dear Commissioners

Thank You for Accepting public
Opinion Regarding Sentencing for
pornography and Sexual Abusers..

my wife AND I ARE IN FAVOR OF
STRICT SENTENCES FOR THOSE ACCUSED OF
Pornography violations especially child
pornographers. We also ARE IN FAVOR OF
Harsher Sentences For Repeat Mentally
Disordered Sex Offenders - We have THREE
Children 1 boy + 2 girls We've taken this time
in An effort to protect them.

Thank You

Dean M Mesa

DEAN M. MESA

Brenda P Mesa

Brenda P. Mesa



March 27, 1990

United States Sentencing Commission
1331 Pennsylvania Ave. N.W.
Suite 1400
Washington, DC 20004
Attn: Communications Director

Dear Sir:

Please we need tougher sentencing
to increase the penalty for sexual
exploitation of children.

Do please support Amendments
Amendment # 22

Amendment # 23

Amendment # 24

Urgently & Sincerely,

Mrs. Jack Hallbrook
5513 Durham
Fort Worth, TX. 76114

my loving family
with children
join me.
Thank you.

March 29, 1990
Ft Worth, TX, :

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attn: Communications Director

Gentlemen:

We encourage you to vote for tougher sentencing guidelines on the penalty for sexual exploitation of children. We must have support of these three Amendments: 23, 22, and 24.

If we are to stop the increasing exploitation of children we must provide the penalty for those convicted and of those distribution_s of adult obscenity for pecuniary gain.

Thank you.

D & D Cropper

Mr. & Mrs. Dale Cropper

March 29, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Communications Director

Dear Sir:

In reference to Amendments 22, 23 and 24 regarding tougher sentencing for sexual exploitation of children, I heartily concur with each and every one of the proposed Amendments.

I think what has been allowed to happen to the children of this country has been disgustingly approved by not doing anything about it.

Luke 17:1-2

"Then said He unto the disciples, it is impossible but that offences will come: but woe unto him through whom they come! It were better for him that a millstone were hanged about his neck, and he cast into the sea, than that he should offend one of these little ones."

Sincerely,

Scottie L. Spurlock

Scottie L. Spurlock
8644 Stonewood Drive
Fort Worth, Texas 76179

IN APPRECIATION

Melinda Brogan
6057 W. 86th PL
Los Angeles, CA. 90045

Dear Sirs,

I want very much to lend my support to the prospect that pornography will receive stiffest possible sentencing for their contribution to the progressing deterioration of our society. It appears from the onslaught of such materials and the easy availability of it from womb to tomb that they operate quite happily free of any threats to their freedom. Too many people are suffering horribly because no one scares them. It's time we scared them.

Sincerely,

Melinda Brogan

March 28, 1990

United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Ste. 1400
Washington, D.C. 20004
Attn: Communications Director

Dear Sir;

I am writing to you in order to give my full support of the new sentencing guidelines, Amendments 22, 23, and 24.

I feel that these amendments will most surely help protect those in our society who are least able to protect themselves. The future of our nation depends on our stopping the pornography that has invaded our homes, our cities and the lives of our children. Those who murder the minds of our youth should be punished as if they had committed physical murder.

Sincerely,

Barbara Ragsdale

3937 Clayton Rd. West
Ft Worth, Texas 76116
March 31, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Communications Director

Dear Sir:

Of all the crimes rampant in our country today, none is as vicious as the sexual exploitation of children, which occurs largely because of the proliferation of adult and child pornography. It is a known fact that obscene magazines are used in connection with crimes of child abuse, as well as other sex offenses.

Please urge your members to support Amendment 22, 23, and 24, requiring tougher sentencing guidelines and much heavier penalties for all sex offenders, in proportion to the number of crimes each has committed against children.

It is time to stop the soft-hearted sympathizing with these criminals, who, in all probability, never can be rehabilitated; instead, empathy should be on the side of the helpless child victims and their families.

In the past, a blanket of protection was thrown around children. Now they are unsafe for one minute out of sight of a parent or other responsible adult. Please encourage your committee members to vote!

Sincerely,
Jane Mueller
(Mrs. Harold E. Mueller)

Concerned Citizens Committee

~~6263~~ McCart • Fort Worth, Texas ~~76133~~ • (817) 294-4199

P.O. Box 331784

76163

March 28, 1990

United States Sentencing Commission
Attention: Communications Director
1331 Pennsylvania Ave. N.W. Suite 1400
Washington, D.C. 20004

RE: Amendments 22, 23, 24

Dear Sir:

My letter comes to advise you of my strong support for three amendments which I understand you are considering as new tougher sentencing guidelines that would increase the penalty for sexual exploitation of children.

I would urge you to strengthen the sentencing guidelines by adopting Amendments # 22, # 23, and # 24. Adults who sexually exploit children need for their own sake as well as for their victims' sake to be stopped from continuing such frightfully damaging practice, and then certainly treated psychologically as well. Repeat offenders are doubtless harder to treat with counselling and discouraging problems facing a judge over and over again, but there is no good reason to refrain from imposing increased sentences to discourage them. The cross reference requirement in Amendment # 23 is very important.

Amendment # 24, providing an increase of almost 50% in the penalty for those convicted of distribution of "adult" obscenity for pecuniary gain could have a decisive effect on those distributors if strictly enforced. Of course, an attack on the pocketbooks of such distributors is intelligent and long overdue. Where money is the motive, remove the source of that money.

Please, please use the power of your Commission to curb the evil, totally hurtful actions of persons who so flagrantly take the lives of others into their own depraved and vicious darkness.

Sincerely,

Priscilla Bradford Holland
Priscilla Bradford Holland

3575 Hamilton St.
Fort Worth, Texas 76107

Jeff and Linda Hitch
247A Virginia Pl.
Costa Mesa, CA 92627

March 28, 1990

U.S. Sentencing Board
1331 Pennsylvania, Ste. 1400
Washington, D.C. 20004

Re: Public Comment

We are writing to express our view that we should have much stiffer penalties for both pornographers and for sex offenders. There are few deterrents to such people but stiffer penalties would certainly help. It would also give their victims a sense that some justice has occurred.

Very truly yours,

A handwritten signature in cursive script that reads "Jeff & Linda Hitch". The signature is written in dark ink and is positioned above the typed names.

Jeff and Linda Hitch



BIRCHMAN BAPTIST CHURCH

"Sounding Forth the Word of the Lord"

Church (817) 244-6590
Home (817) 244-6544

Miles Seaborn
Pastor

9100 N. Normandale
Ft. Worth, Texas 76116

March 29, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D. C. 20004

Attn: Communications Director

Dear Sir:

This letter is to affirm the new tougher sentencing guidelines that increase the penalty for sexual exploitation of children.

I, personally, and we as a church family strongly support Amendments 22, 23, 24.

We prayed about this in our Prayer Service last night, and we want to encourage you to stand firm against all forms of abuse to our precious children and families.

Hopefully, Amendment 24 will help stem the tide of pornography that is engulfing our society on all levels.

Please know that we fully support tougher sentencing guidelines for crime, and especially so against children.

Sincerely,

Miles Seaborn
abm
Miles Seaborn

MS:abm