

Y4
P 84/10
91-12
GOVERNMENT

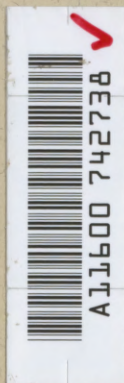
Storage

1022
STATE UNIVERSITY LIBRARIES

PART I

OBSCENITY IN THE MAILS

9114
P 84/10
91-12



HEARINGS BEFORE THE COMMITTEE ON POSTAL OPERATIONS OF THE COMMITTEE ON OFFICE AND CIVIL SERVICE USE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

FIRST SESSION

ON

H.R. 10867

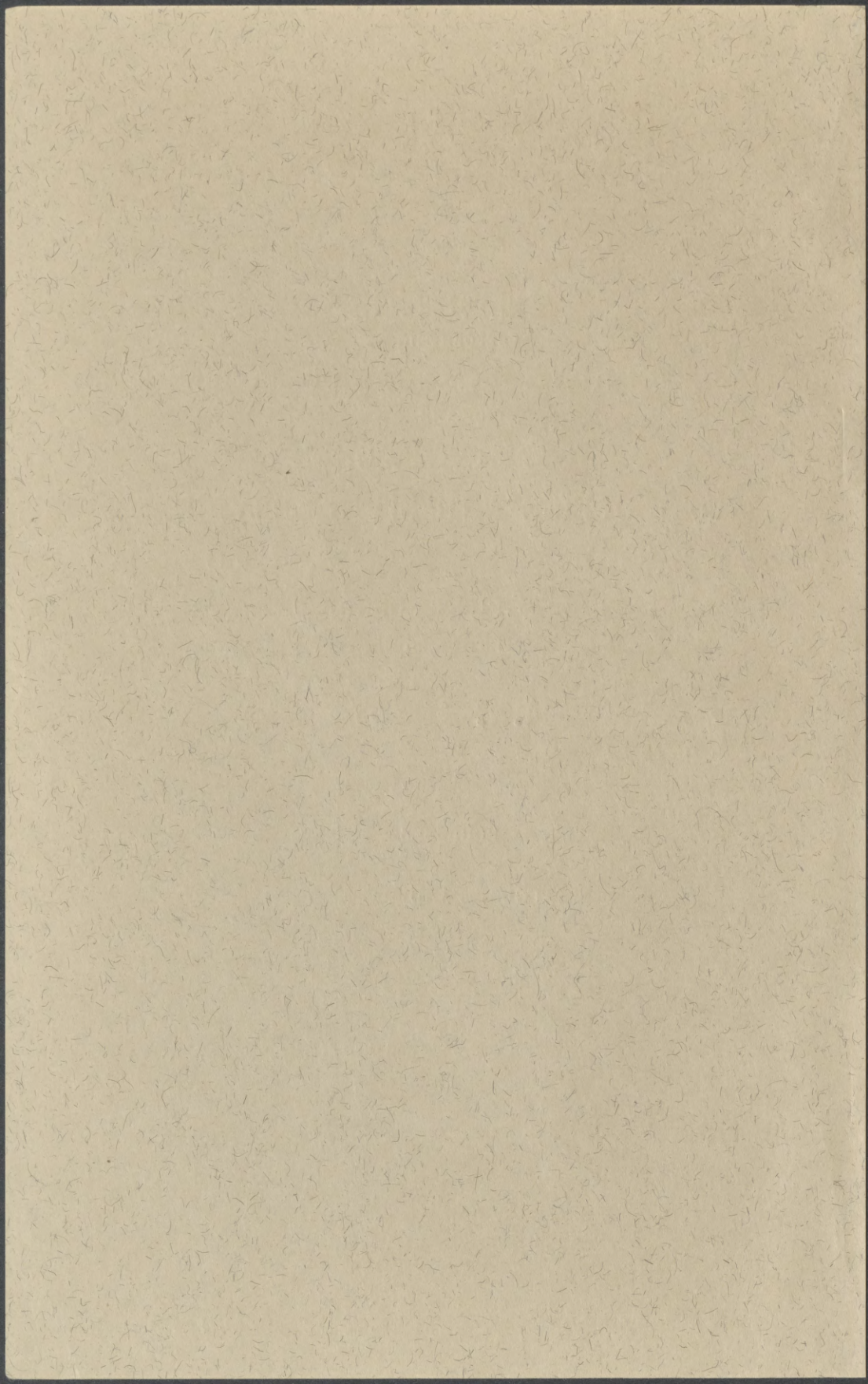
A BILL TO AMEND TITLE 39, UNITED STATES CODE, TO
EXCLUDE FROM THE U.S. MAILS AS A SPECIAL CATEGORY
OF NONMAILABLE MATTER CERTAIN OBSCENE MATERIAL
SOLD OR OFFERED FOR SALE TO MINORS, AND FOR OTHER
PURPOSES

AUGUST 5 AND 6, 1969

Serial No. 91-12

Printed for the use of the
Committee on Post Office and Civil Service





PART I

OBSCENITY IN THE MAILS

HEARINGS
BEFORE THE
SUBCOMMITTEE ON POSTAL OPERATIONS
OF THE
COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES
NINETY-FIRST CONGRESS

FIRST SESSION

ON

H.R. 10867

A BILL TO AMEND TITLE 39, UNITED STATES CODE, TO
EXCLUDE FROM THE U.S. MAILS AS A SPECIAL CATEGORY
OF NONMAILABLE MATTER CERTAIN OBSCENE MATERIAL
SOLD OR OFFERED FOR SALE TO MINORS, AND FOR OTHER
PURPOSES

AUGUST 5 AND 6, 1969

Serial No. 91-12

Printed for the use of the
Committee on Post Office and Civil Service



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1969

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

THADDEUS J. DULSKI, New York, *Chairman*,

DAVID N. HENDERSON, North Carolina, *Vice Chairman*

ARNOLD OLSEN, Montana
MORRIS K. UDALL, Arizona
DOMINICK V. DANIELS, New Jersey
ROBERT N. C. NIX, Pennsylvania
JAMES M. HANLEY, New York
CHARLES H. WILSON, California
JEROME R. WALDIE, California
RICHARD C. WHITE, Texas
WILLIAM D. FORD, Michigan
LEE H. HAMILTON, Indiana
FRANK J. BRASCO, New York
ROBERT O. TIERNAN, Rhode Island
GRAHAM PURCELL, Texas

ROBERT J. CORBETT, Pennsylvania
H. R. GROSS, Iowa
GLENN CUNNINGHAM, Nebraska
EDWARD J. DERWINSKI, Illinois
ALBERT W. JOHNSON, Pennsylvania
DANIEL E. BUTTON, New York
WILLIAM L. SCOTT, Virginia
JAMES A. McCLURE, Idaho
THOMAS J. MESKILL, Connecticut
DONALD E. LUKENS, Ohio
LAWRENCE J. HOGAN, Maryland

CHARLES E. JOHNSON, *Chief Counsel and Staff Director*

B. BENTON BRAY, *Associate Staff Director*

JOHN H. MARTINY, *Counsel*

WILLIAM A. IRVINE, *Assistant Staff Director*

THEODORE J. KAZY, *Senior Staff Assistant*

SUBCOMMITTEE ON POSTAL OPERATIONS

ROBERT N. C. NIX, Pennsylvania, *Chairman*

DOMINICK V. DANIELS, New Jersey
CHARLES H. WILSON, California
RICHARD C. WHITE, Texas
WILLIAM D. FORD, Michigan

GLENN CUNNINGHAM, Nebraska
EDWARD J. DERWINSKI, Illinois
JAMES A. McCLURE, Idaho

Ex Officio Voting Members

THADDEUS J. DULSKI, New York

ROBERT J. CORBETT, Pennsylvania

Thomas R. Kennedy, Staff Assistant, Room B-345(b), Rayburn Building—Ext. 6741 and 6742)

CONTENTS

Hearings held on—	Page
Tuesday, August 5, 1969-----	1
Wednesday, August 6, 1969-----	27
Testimony of—	
Brooks, Hon. Jack, a Representative in Congress from the State of Texas-----	8
Dulski, Hon. Thaddeus J., a Representative in Congress from the State of New York-----	2
Meskill, Hon. Thomas J., a Representative in Congress from the State of Connecticut-----	32
Nelson, Hon. David, General Counsel, Post Office Department, accompanied by William Lawrence, Assistant General Counsel, Mailability Division, and William J. Cotter, Chief Postal Inspector-----	14
Rademacher, James, president, National Association of Letter Carriers-----	41
Scott, Hon. William L., a Representative in Congress from the State of Virginia-----	28
Wilson, Will, Assistant Attorney General, Criminal Division, Department of Justice, accompanied by Harland F. Leathers, Bob Mahony, Ed Rubin, and Joan Dean-----	45
Wylie, Hon. Chalmers P., a Representative in Congress from the State of Ohio-----	36
Statement submitted by—	
Annunzio, Hon. Frank, a Representative in Congress from the State of Illinois-----	59
Commission on Obscenity and Pornography, W. Cody Wilson, Executive Director-----	70
Derwinski, Hon. Edward, a Representative in Congress from the State of Illinois-----	59
Hunt, Hon. John E., a Representative in Congress from the State of New Jersey-----	68
Kuykendall, Hon. Dan, a Representative in Congress from the State of Tennessee-----	69
Letters from—	
Erlenborn, Hon. John N., a Representative in Congress from the State of Illinois, enclosing H.R. 13241, and a section-by-section analysis--	61
Wilson, W. Cody, Executive Director, Commission on Obscenity and Pornography, letter enclosing statement and publication entitled "Progress Report"-----	69
Montague, H. B., Chief Postal Inspector, Post Office Department-----	74
Nelson, Hon. David A., General Counsel, Post Office Department, with enclosure-----	76
New York Academy of Medicine news release with enclosed letter to President Johnson, dated November 19, 1964, citing medical problems involved in spread of salacious publications-----	80
Material submitted for record—	
Summary of earlier committee legislation to protect postal patrons---	5
Review of Supreme Court cases-----	58
Address by Commissioner Robert E. Lee, Federal Communications Commission, before the Association of Broadcasting Executives of Texas, Dallas, Tex., July 31, 1969-----	71
Memorandum of Decision entered by the three-judge Federal Court that was convened in California to consider the Constitutionality of 39 U.S.C. 4009-----	76
"Progress Report," July 1969, of the Commission on Obscenity and Pornography-----	101
President's message—"Proposals on Sex-Oriented Mail," Document No. 91-114-----	127

IV

Newspaper, Congressional Record, and magazine articles—	Page
"Smut Plan Tailored to Court Rulings"-----	82
"Keeping Smut Out of Young Hands Is New Anti-Obscenity Law's Goal"-----	82
"Stricter Pornography Laws Favored"-----	83
"Right To Bar Obscene Mail Upheld"-----	84
"See Test Case Shaping in Obscene-Mail Ruling"-----	85
"The Courage To Stand for Standards"-----	85
"Lofty Phrases Often Cover Multitude of Sins"-----	89
"All That the Law Allows"-----	90
"Poisson in Print and How To Get Rid of It"-----	140
"The Fight Against the Smut Peddlers"-----	145
"Must Our Movies Be Obscene"-----	150
"The Damning Case Against Pornography"-----	153
"Filth for Profit: The Big Business of Pornography"-----	157
"Society and the Sex Criminal"-----	161
"A Victory Over the Smut Peddlers"-----	169
"Landmark Decision in the War on Pornography"-----	173
"Smut Peddlers"—Parts, I, II, III, IV, and V-----	178-187
"Mailing Lists and Pornography"-----	188
"The High Price of Pornography," by Richard Kyle-Keith, chapter IV—Pornography and Crime-----	92
Bills included—	
H.R. 8397-----	64
H.R. 10867-----	v
H.R. 10876-----	65
H.R. 10877 (Title II) and sectional analysis-----	130
H.R. 12788-----	67
H.R. 13241-----	61

H. R. 10867

IN THE HOUSE OF REPRESENTATIVES

MAY 5, 1969

Mr. DULSKI (for himself, Mr. NIX, Mr. CORBETT, Mr. CUNNINGHAM, and Mr. ROGERS of Florida) introduced the following bill; which was referred to the Committee on Post Office and Civil Service

A BILL

To amend title 39, United States Code, to exclude from the United States mails as a special category of nonmailable matter certain obscene material sold or offered for sale to minors, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That the Congress finds—

4 that the United States mails are being used for the
5 indiscriminate dissemination of matter so designed and
6 so presented as to exploit sexual sensationalism for com-
7 mercial gain;

8 that such matter is profoundly shocking to many
9 persons who receive it, unsolicited, through the mails;

(v)

1 that such use of the mails subjects these persons to
2 offensive and unwarranted intrusions upon their right to
3 privacy; and

4 that such use of the mails reduces the ability of
5 responsible parents to protect their minor children from
6 exposure to material which they as parents believe to be
7 harmful to their children.

8 On the basis of the foregoing the Congress determines
9 that it is contrary to the public policy of the United States
10 for the facilities and services of the United States Post Office
11 Department to be used for the distribution of such materials
12 to persons who do not want their privacy invaded in this
13 manner or to persons who wish to protect their minor chil-
14 dren from exposure to such material.

15 SEC. 2. (a) Chapter 51 (relating to nonmailable matter)
16 of title 39, United States Code, is amended by adding at the
17 end thereof the following new sections:

18 **"§ 4011. Special category of nonmailable matter with**
19 **respect to minors**

20 “(a) The mails may not be used—

21 “(1) to make to a minor a sale, delivery, or distri-
22 bution, or an offer for a sale, delivery, or distribution, of
23 any matter described in this section; or

24 “(2) to make to any person not a minor but with
25 whom a minor resides a delivery or distribution, or an

1 offer for sale, delivery, or distribution, of any matter
2 described in this section, if the delivery or distribution
3 or offer for sale, delivery, or distribution is unsolicited
4 by the person not a minor but with whom the minor
5 resides.

6 Such matter constitutes, under the circumstances described
7 in subparagraph, (1) and (2) of this subsection, a special
8 category of nonmailable matter with respect to minors, as
9 follows:

10 “(A) any picture, photograph, drawing, sculpture,
11 motion picture film, or similar visual representation or
12 image of a person or portion of the human body, which
13 depicts nudity, sexual conduct, or sado-masochistic
14 abuse in a manner designed primarily to appeal to the
15 prurient interests of the viewer; or

16 “(B) any book, magazine, or other printed matter,
17 however reproduced, or any sound recording, which—

18 “(i) depicts nudity, sexual conduct, or sado-
19 masochistic abuse or contains explicit and detailed
20 verbal descriptions or narrative accounts of sexual
21 excitement, sexual conduct, or sado-masochistic
22 abuse; and

23 “(ii) is designed primarily to appeal to the
24 prurient interests of the reader or listener.

1 “(b) As used in this section—

2 “(1) ‘minor’ means a person under the age of 16
3 years;

4 “(2) ‘nudity’ means a display of the human male or
5 female genitals or pubic area, or the depiction of covered
6 human male genitals in a discernibly turgid state;

7 “(3) ‘sexual conduct’ means explicit acts of sod-
8 omy, masturbation, homosexuality, sexual intercourse,
9 or physical contact with the covered or exposed genitals
10 or pubic area of any person;

11 “(4) ‘sexual excitement’ includes human male or
12 female orgasm and the condition of human male or
13 female genitals when in a state of sexual stimulation or
14 arousal; and

15 “(5) ‘sado-masochistic abuse’ means acts of flagel-
16 lation, torture, or other personal physical harm per-
17 formed by a person clad in an attire which exposes the
18 buttocks or genitals of that person or, if that person is
19 female, the breast in the condition of being fettered,
20 bound, or otherwise physically restrained, upon any
21 other person, irrespective of the attire of such other
22 person.

23 **“§ 4012. Mailing of sexually oriented advertisements**

24 “(a) Any person who mails or causes to be mailed any
25 sexually oriented advertisement shall place on the envelope

1 or cover thereof his name and address as the sender thereof
2 and such mark or notice as the Postmaster General may pre-
3 scribe.

4 “(b) Any person, on his own behalf or on the behalf
5 of any of his children who have not attained the age of
6 nineteen years and who reside with him, may file with the
7 Postmaster General a statement, in such form and manner as
8 the Postmaster General may prescribe, that he desires to
9 receive no sexually oriented advertisements through the
10 mails. The Postmaster General shall maintain and keep
11 current, insofar as practicable, a list of the names and ad-
12 dresses of such persons and shall make the list (including
13 portions thereof or changes therein) available to any person;
14 upon such reasonable terms and conditions as he may pre-
15 scribe, including the payment of such service charge as he
16 determines to be necessary to defray the costs of compiling
17 and maintaining the list, keeping it current, and making it
18 available as provided in this sentence. No person shall mail
19 or cause to be mailed any sexually oriented advertisement to
20 any individual whose name and address has been on the list
21 for more than thirty days.

22 “(c) No person shall sell, lease, lend, exchange, or
23 license the use of, or, except for the purpose expressly au-
24 thorized by this section, use any mailing list compiled in

1 whole or in part from the list maintained by the Postmaster
2 General pursuant to this section.

3 “(d) ‘Sexually oriented advertisement’ means any ad-
4 vertisement that depicts, in actual or simulated form, or
5 explicitly describes, in a predominantly sexual context, hu-
6 man genitalia, any act of natural or unnatural sexual inter-
7 course, any act of sadism or masochism, or any other erotic
8 subject directly related to the foregoing. Material otherwise
9 within the definition of this subsection shall be deemed not
10 to constitute a sexually oriented advertisement if it con-
11 stitutes only a small and insignificant part of the whole
12 of a single catalog, book, periodical, or other work the
13 remainder of which is not primarily devoted to sexual
14 matters.

15 **“§ 4013. Judicial enforcement**

16 “(a) Whenever the Postmaster General believes that
17 any person is mailing or causing to be mailed any sexually
18 oriented advertisement in violation of section 4012 of this
19 title, he may request the Attorney General to commence a
20 civil action against such person in a district court of the
21 United States. Upon a finding by the court of a violation
22 of that section, it may issue an order including one or more
23 of the following provisions as the court deems just under
24 the circumstances:

25 “(1) a direction to the defendant to refrain from

1 mailing any sexually oriented advertisement to a specific
2 addressee, to any group of addressees, or to all per-
3 sons;

4 “(2) a direction to any postmaster to whom sexu-
5 ally oriented advertisements originating with such de-
6 fendant are tendered for transmission through the mails
7 to refuse to accept such advertisements for mailing; and

8 “(3) a direction to any postmaster at the office
9 at which registered or certified letters or other letters
10 or mail arrive, addressed to the defendant or his repre-
11 sentative, to return the registered or certified letters or
12 other letters or mail to the sender appropriately marked
13 as being in response to mail in violation of section 4012
14 of this title, after the defendant, or his representative,
15 has been notified and given reasonable opportunity to
16 examine such letters or mail and to obtain delivery of
17 mail which is clearly not connected with activity al-
18 leged to be in violation of section 4012 of this title.

19 “(b) The statement that remittances may be made to
20 a person named in a sexually oriented advertisement is prima
21 facie evidence that such named person is the agent or repre-
22 sentative of the mailer for the receipt of remittances on his
23 behalf. The court is not precluded from ascertaining the ex-
24 istence of the agency on the basis of any other evidence.

25 “(c) In preparation for or during the pendency of a

1 civil action under subsection (a) of this section, a district
2 court of the United States, upon application therefor by the
3 Attorney General and upon a showing of probable cause to
4 believe the statute is being violated, may enter a temporary
5 restraining order or preliminary injunction containing such
6 terms as the court deems just, including, but not limited to,
7 provisions enjoining the defendant from mailing any sexually
8 oriented advertisement to any person or class of persons,
9 directing any postmaster to refuse to accept such defendant's
10 sexually oriented advertisements for mailing, and directing
11 the detention of the defendant's incoming mail by any post-
12 master pending the conclusion of the judicial proceedings.
13 Any action taken by a court under this subsection does not
14 affect or determine any fact at issue in any other proceeding
15 under this section.

16 “(d) A civil action under this section may be brought
17 in the judicial district in which the defendant resides, or has
18 his principal place of business, or in which any sexually
19 oriented advertisement mailed in violation of section 4011
20 has been delivered by mail according to the direction thereon.

21 “(e) Nothing in this section or in section 4012 shall be
22 construed as amending, preempting, limiting, modifying, or
23 otherwise in any way affecting section 1461 or 1463 of title
24 18, United States Code, or section 4006, 4007, or 4009 of
25 title 39, United States Code.”

1 (b) The table of sections of chapter 51 of title 39,
2 United States Code, is amended by adding at the end
3 thereof—

“4011. Special category of nonmailable matter with respect to minors.

“4012. Mailing of sexually oriented advertisements.

“4013. Judicial enforcement.”.

4 SEC. 3. (a) Chapter 83 of title 18, United States Code,
5 relating to offenses against the postal service, is amended by
6 adding at the end thereof the following new sections:

7 **“§ 1735. Sexually oriented advertisements**

8 “Whoever willfully uses the mails for the mailing, car-
9 riage in the mails or delivery of any sexually oriented adver-
10 tisement in violation of section 4011 of title 39, or willfully
11 violates any regulation of the Postmaster General issued under
12 such section.

13 “Whoever sells, leases, rents, lends, exchanges, or li-
14 censes the use of, or, except for the purpose expressly author-
15 ized by section 4011 of title 39, uses a mailing list maintained
16 by the Postmaster General pursuant to such section shall be
17 fined not more than \$5,000 or imprisoned not more than five
18 years, or both, for the first offense, and shall be fined not
19 more than \$10,000 or imprisoned not more than ten years,
20 or both, for any second or subsequent offense.

21 **“§ 1736. Restrictive use of information**

22 “(a) No information or evidence obtained by reason of
23 compliance by a natural person with any provision of section

1 4012 of title 39, or regulations issued thereunder, shall,
2 except as provided in subsection (c) of this section, be
3 used, directly or indirectly, as evidence against that person
4 in a criminal proceeding.

5 “(b) The fact of the performance of any act by a
6 natural person in compliance with any provision of section
7 4012 of title 39, or regulations issued thereunder, shall not
8 be deemed the admission of any fact, or otherwise be used,
9 directly or indirectly, as evidence against that person in a
10 criminal proceeding, except as provided in subsection (c) of
11 this section.

12 “(c) Subsections (a) and (b) of this section shall not
13 preclude the use of any such information or evidence in a
14 prosecution or other action under any applicable provision
15 of law with respect to the furnishing of false information.”

16 (b) The table of contents of such chapter 83 is amended
17 by adding at the end thereof the following:

“1735. Sexually oriented advertisements.

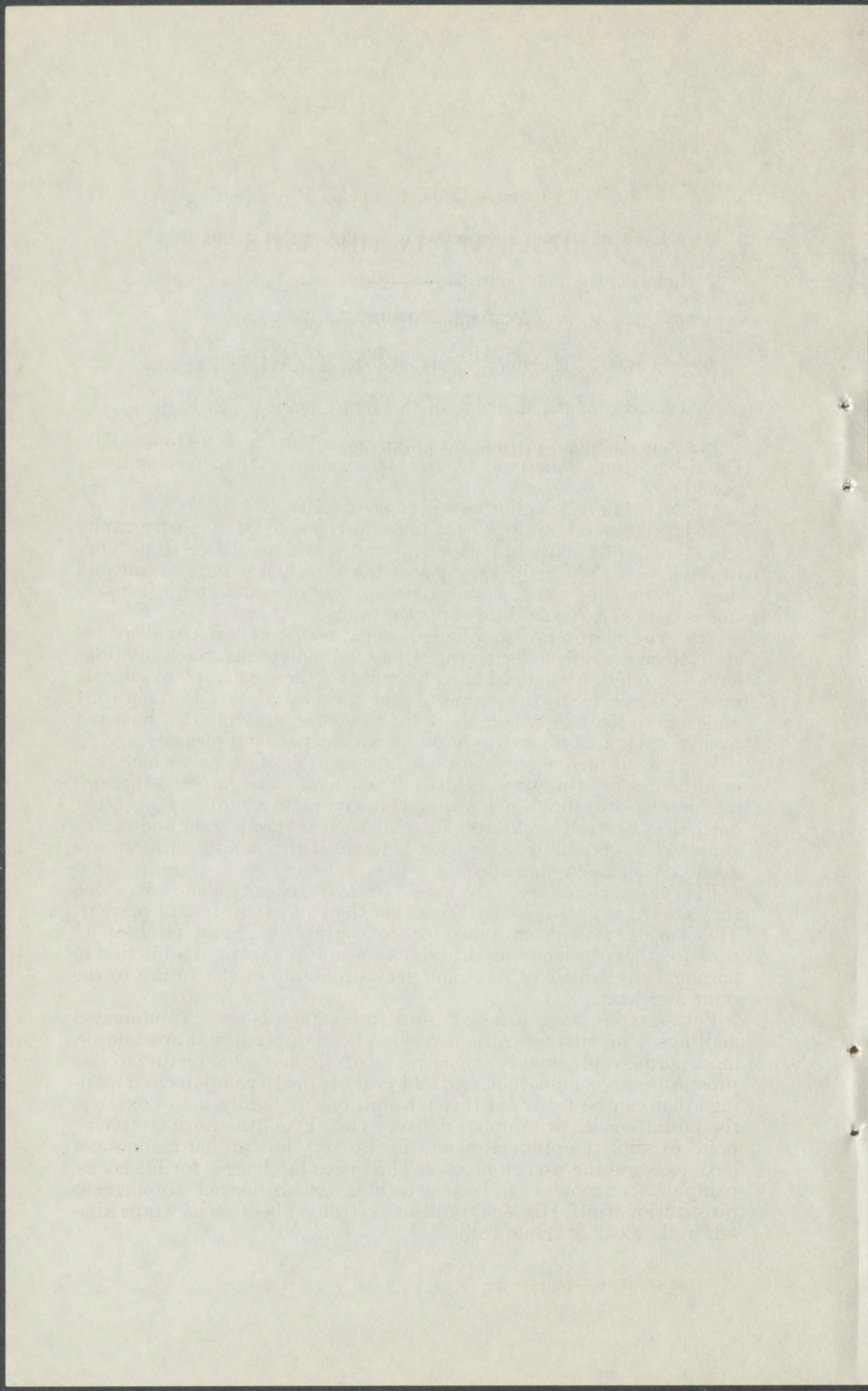
“1736. Restrictive use of information.”.

18 SEC. 4. If any provision of this Act or the application
19 thereof to any person or circumstance is held invalid, the
20 remainder of this Act and the application of such provision
21 to other persons not similarly situated or to other circum-
22 stances shall not be affected thereby.

23 SEC. 5. Section 4006 (relating to unlawful matter) of

1 title 39, United States Code, is amended by inserting "in-
2 cluding any matter described in section 4011 of this title,"
3 immediately after "obscene, lewd, lascivious, indecent, filthy,
4 or vile article, matter, thing, device, or substance,".

5 SEC. 6. The amendments made by this Act shall become
6 effective on the first day of the sixth month which begins
7 after the date of enactment of this Act.



OBSCEINITY IN THE MAILS

TUESDAY, AUGUST 5, 1969

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON POSTAL OPERATIONS OF THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, D.C.

The subcommittee met at 10 a.m., in room 112, Cannon House Office Building, Hon. Robert N. C. Nix (chairman of the subcommittee) presiding.

Mr. Nix. The subcommittee will come to order.

Today the subcommittee will take up the subject of pornography and its mail distribution. Federal interest in the regulation of pornography is based on the jurisdiction of the Post Office Department and the operations of the Customs Bureau. Our subcommittee's jurisdiction is limited to the mailing of pornography.

The mass mailing of unsolicited, unnatural, and sexually degenerate material is aimed for the most part at adolescents. Such mailings have the effect of undermining parents in their attempt to educate their children as to the meaning and purpose of sex. Pornography undermines the family because it, by its nature, preaches that men and women are sexual objects to be exploited for personal pleasure.

Many smut merchants operate by means of mailing lists which contain the names of preteen children. These names are gathered through the purchase of preteen mailing lists compiled originally by other businesses who sell to children by mail, such as stamp clubs and record clubs. The preteen lists are then held until the named children are about 15, for maximum effect.

Fifteen-year-olds are at the height of their curiosity about sex which they regard as an adult mystery rather than a matter of adult privacy. This curiosity reaps millions for pornographers. Smut is cheap to produce, inexpensive to mail, and may result in a form of addiction to pornography which will become very profitable in the future to the smut merchant.

Pornography as a form of prostitution in this age of automated mailings is lucrative because it costs so little to produce. For example, most pornography makes extensive use of pictures. One picture of one prostitute can bring a thousandfold profit through computerized mailings that can be force fed through millions of family mail boxes via the postal service at minimal delivery cost. From the pornographer's point of view the production cost is also very low in that he does not have to house the women he uses. The prices he charges for his books, pamphlets, or movies can become as high for his hooked customers as prostitution itself. His legal position is stronger because he wraps himself in the cloak of free speech.

(1)

There may be those who fear that their own right to express themselves may in some distant future be limited if the pornographers' right to sell is restricted. We will be hearing from these people in editorial columns in the near future. The ironic thing is that many of these same persons will support legislation that will restrict cigarette advertising aimed at the very young because they fear lung cancer themselves. These same individuals will support safety requirements for the manufacturer of automobiles because they abhor the slaughter of motorists on our highways. They will ask what interest is protected by antismut legislation.

The interest we seek to protect here is as vital as the interest of the American public in physical health, it is an interest in the mental health of children. A child's disoriented orientation toward the opposite sex will damage his relationships with other people and may even make the state of marriage a very difficult one. In some cases it may lead to sexual deviation or crime. This can happen because a young person's first impression of something as important as sex is perhaps the strongest impression. Extensive psychiatry may be necessary for a child who has been disoriented by pornography in order to bring him back to his full potential.

The parents of America have had enough. They have no way to turn but to their Representatives in Congress to protect themselves against mass mailings and repeated mass mailings designed to get by their guard and reach children, regardless of parental opposition. Pornography with its essential ingredient of sadism, the use of human beings as things, has no place in the American home or in the family mailbox.

I am very pleased to have the chairman of the full committee present today, and I made the observation it is to the everlasting credit of the Congress of the United States that the chairman of the full committee, despite his multiplicity of duties is always available, is always making a contribution to the efforts of this subcommittee and to the entire full committee and to the Congress.

It is my pleasure at this time to call as the first witness, the chairman of the full committee, the distinguished gentleman from New York, Mr. Dulski.

**TESTIMONY OF HON. THADDEUS J. DULSKI, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF NEW YORK, AND CHAIRMAN
OF THE HOUSE POST OFFICE AND CIVIL SERVICE COMMITTEE**

Mr. DULSKI. Thank you, Mr. Chairman, for the very kind remarks.

At the outset I want to commend highly the chairman of the subcommittee, the gentleman from Pennsylvania, for the diligent attention which he has been giving to this important subject.

During the recent weeks when the full committee has been preoccupied with extensive hearings on postal reform, I am well aware that you and your staff have been doing your homework on what we may do legislatively to deal with the ever-increasing flow of smut through the mails.

For the record, Mr. Chairman, I am Thaddeus J. Dulski, a Representative from the 41st District in New York and an ex-officio member of your subcommittee.

Hardly a day goes by that I do not receive a complaint from a homeowner who has received obscene material in the mail. Other Members also report a continuing flood of complaints. The most indignant letters, naturally, are those from parents of minor children.

Mr. Chairman, you have a number of bills pending before your subcommittee and I know that you will give full consideration to each of them.

Among them are two bills which I introduced, both aimed at prohibiting the mailing of obscene material into a home where a minor resides.

My original bill, H.R. 7375, was introduced last February. In May I introduced a revised version, H.R. 10867, which incorporates several suggestions made in a presidential message to Congress.

The additional provisions are:

First, I would make it a Federal crime to use the mails for the commercial exploitation of a prurient interest in sex through advertising.

Second, I propose extension of the present law to enable a citizen to protect his home from any intrusion of sex-oriented advertising—regardless of whether or not a citizen ever has received such mailings.

The control of the mailing of obscene material is a very difficult area of law, but I feel we must deal with it. Indeed, it is essential that we act forcefully to prevent mailings of obscene materials to minors.

I have no question whatsoever about our authority to protect our young people and this is the heart of my bill.

In substance, my basic bill will impose a stricter ban on the use of the mails, in any way, for the solicitation, sale, delivery, or distribution of pornographic material to a minor.

The same ban would apply on mailings to any person with whom a minor resides.

This new authority to the Post Office Department, with enforcement provision, is aimed directly at the area of greatest concern: The continued unsolicited mailings to our young people.

The bill spells out in detail exactly what type of material is objectionable and should be banned from the mails. Such standards need to be laid down in law so that no court can be in doubt as to what the Congress means when it talks about smut mail.

The problem of pornography has been with us for years, but control of smut mail has been aggravated in recent years by various court decisions.

I am not here to argue with the courts or their decisions. Some decisions have made the problem more difficult, but we must accept them and start from there.

I would like nothing better than to put all of these smut peddlers out of business and one of these days we should find a way to do that.

Right now, it seems to me, we should place heavy accent on putting a ban on the mailing of smut into homes where minors reside. This is an area where I am convinced that we can—and should—take prompt action.

One of the sticky points over the years has been the definition of what is or what is not obscene. It is a gray area. As we can see in so many fields today—the stage, the theater, the airwaves, the news-

papers and magazines, the books—the level of tolerance and permissiveness has been declining rapidly.

Certainly, it varies from generation to generation and even, sometimes, from decade to decade. Some may even say from month to month in looking at the recent appalling decline in morality.

Nevertheless, in the matter of mailings into homes where there are minors, my bill has spelled out—in quite graphic language so there can be no doubt at all—exactly what we mean in this legislation as being obscene.

This is my 11th year of service on this great committee and in all these years one of the matters to which I have devoted the most attention is the control of smut mail. Our committee has tried in every way possible to come up with answers.

We have pleaded with the executive departments for guidance and help in bringing this smut mail under control. We have made gains, but it has been a lot like trying to empty Lake Erie with a pail. The flow just continues. There always seems to be another loophole for every control we install.

Our committee originated legislation in the 90th Congress to curb pandering advertisements. This law is effective, but unfortunately it comes into force after the fact. That is it doesn't come into use until the first piece of smut mail is received by a householder.

Having received an objectionable piece of mail, the householder can go to his local post office and ask the postmaster to inform the sender that no further such mail is to be sent to that household. Failure to comply with the request permits the Government to step in and enforce the ban.

Just to give you an idea, if I may, of the extent of smut mailings today:

In the past 15 months, the Post Office Department has received some 200,000 complaints from patrons about material received which the householders considered to be of smut variety.

Acting on these complaints, the Department was able to order the removal of names from mailing lists, under threat of referral of individual cases to the Justice Department.

I get complaints almost every day and I refer each one to the Department for such action as is possible.

However, I was a little disappointed—to say the least—in the somewhat casual reply I received the other day from one of my letters.

In fact, I have the letter and contents, right here.

This is a lengthy letter to me—and, obviously the writer at the Post Office Department didn't realize that I am a member of this committee.

This long letter goes into some history of the problem and mentioned pending legislation without any reference even to my own bill. In fact, it just doesn't seem from this letter as though this new administration downtown really has any grip on this situation at all.

I realize we have new people in all the top positions at the Department and they need time to get an understanding of their job. But these people have had 6 months. I think that's quite a bit of time and they ought to be getting organized now—not “next week” as the old saying goes.

Mr. Chairman and members of the subcommittee, I commend you for moving promptly on this matter now that the public hearings on postal reform are just about concluded. You have my full support.

And I might say, too, Mr. Chairman, that I commend your plan to solicit every Governor, every State attorney general, and the mayors of our large cities for their suggestions and comments. We cannot afford to leave a single stone unturned in this drive against smut mail—and I know full well that this subcommittee is going to do the job that needs to be done.

In closing, I may note that most of the progress that has been made in keeping obscenity out of the mails—a most difficult and often frustrating endeavor—is a tribute to the Subcommittee on Postal Operations.

Accordingly, Mr. Chairman, I ask that there be included in the record a summary of "Earlier Committee Legislation To Protect Postal Patrons" which is at each member's desk.

Mr. NIX. Without objection, so ordered.

(The material referred to follows:)

EARLIER COMMITTEE LEGISLATION TO PROTECT POSTAL PATRONS

H.R. 980 is the fifth in a series of legislative improvements in the postal and criminal statutes developed by the Postal Operations Subcommittee of this committee to aid in keeping obscenity and other unfit matter out of the U.S. mails. The earlier measures encountered substantially the same degree of opposition that has occurred during the consideration of H.R. 980. Nevertheless, each such earlier measure has long since proved its value to the postal service and to the public.

Public Law 84-821 authorizes the Postmaster General to direct the postmaster concerned to impound incoming mail addressed to persons or firms found to have been sending obscenity through the mail. It applies the simple but effective expedient of cutting off the illicit gains of the muck merchants as the money and the orders flow in through the mails. The postal inspection service hailed this law as the greatest advance in years to aid them in maintaining "clean mail" service.

Public Law 86-673 revised, updated, and further strengthened Public Law 84-821, particularly with respect to orderly administrative proceedings and effective court supervision.

An equally important measure was the so-called venue amendment (Public Law 85-796) to the criminal statutes which prescribe penalties for the mailing of obscenity. This legislation was developed and proposed by the Postal Operations Subcommittee but was referred to the House Committee on the Judiciary because of that committee's jurisdiction in the matter. Prior to enactment of the venue amendment, the applicable criminal obscenity statutes were directed solely to the mailing of obscene matter. Prosecution was possible only at the place of mailing. The venue amendment extended the arm of the law to the place where the damage is done—the destination of the mailing—as well as to the point of origin. Aside from the pure logic of giving protection where the damage occurs, it is true that standards of morality and decency at the point of destination for mailings of this kind often are far higher than at the point of origin. The stronger penalties meted out by courts at the destination point of obscene mailings have proved to be among the most effective deterrents to growth of the obscenity racket.

Public Law 86-676 strengthens administrative procedures in postal fraud and obscenity cases by providing a judicial officer in the Post Office Department to perform such quasi-judicial duties as the Postmaster General assigns to him. This authority overcomes the effect of a judicial decision (169 F. Supp. 746) which enjoined enforcement of a postal fraud order on the ground that the Post Office Department's judicial officer has no authority to receive evidence under the Administrative Procedure Act. Public Law 86-676 vests in the judicial officer authority to receive evidence, along with existing authority to render decisions, consistent with the Postmaster General's delegation of authority. This legislation is a valuable aid to the prompt action always necessary to protect the public in fraud and obscenity cases.

Mr. DULSKI. The fine record disclosed by that summary is further enhanced by our committee legislation, in the 90th Congress, to curb pandering advertisements, which I referred to during my testimony.

Mr. Chairman, I have concluded, and I will answer any questions you might have.

Mr. NIX. I want to congratulate you on your long and continuing efforts to eradicate this pernicious evil in our midst, and I turn to Mr. McClure. Do you have a question?

Mr. McCLURE. Yes, Mr. Chairman, I wish to echo the comments made by the chairman of this subcommittee in regards to your own personal record and the record of this committee also in attempting to deal with what you have characterized as this most difficult problem.

The past efforts of this committee and of the Congress have been pretty largely frustrated, have they not, by the ever-widening circle of protection which has been granted to this traffic by the decisions of the Supreme Court?

Mr. DULSKI. That is correct, Mr. McClure. May I elaborate. Mr. Cunningham and myself went down one time, and Mr. Martiny and I, on another, to see the Attorney General under the past administration. It was frustrating for us to hear him say, "I threw up my hands. I can't do anything."

I'm not an attorney, but the Court's decisions sure have not helped. We had very little cooperation—I'm not here to criticize this administration or any other, but we have had little cooperation. The frustration with the Justice Department, they are afraid to tackle the job and we tried to put in some legislation which would be constitutional, and we had to wait months before they came down with a very lukewarm proposal, and of course Congress passed it.

The present Congress today is more heated because every Member, Members on your side of the aisle and Members on my side, know of the great interest on this smut matter. I want to commend you and the chairman and Mr. Fuller. I know he has spoken on smut. This is a nonpartisan piece of legislation, and I feel eventually when we get all the facts, that a clean bill will be reported.

Mr. McCLURE. I would like to just call attention to one thing, because I think people in this country need to recognize that this committee or this Congress can't simply override a Supreme Court decision, even though we might disagree with it.

Of course, a great many people throughout the country—I'm sure your mail reflects this—say, "Why don't you do something about this?" in terms of reversing the Supreme Court's decisions in certain fields, is that not correct?

Mr. DULSKI. That's correct. That's the impression, and I feel the Supreme Court is the law of the land.

Mr. McCLURE. I perhaps have a little less tolerant remark to make as far as the Supreme Court decisions are concerned. Some I violently disagree with, but nevertheless I am bound by them, and I'm sure you don't imply by that that there is any more acceptance of the results of some of those decisions so far as this traffic is concerned.

Mr. DULSKI. That's right.

Mr. McCLURE. I think you and I and other members of this committee and Congress have been exposed to more of this and in more detail than the average citizen in this country, because irate citizens

send it to us. But I wonder, what is your feeling as to how much the people in this country realize the extent of this traffic. Is it widespread knowledge on their part, do you think?

Mr. DULSKI. Well, Mr. McClure, to give you an idea, when a mailing goes out, they have a mass mailing in a particular area. That's when the letters start coming in. They come in many times in bundles from a minister, from a preacher, sometimes from a school, because the students receive this kind of information. The newspapers have been talking a great deal about smut mail, but they have done very little as far as writing on smut mail.

I sent out to each one of my constituents one of these (indicating pamphlet) pertaining to enforcing the pandering advertisement law, and I explained in my statement that the damage is already done when that mail has been received. If the Post Office Department just took the bull by the horns, as the expression goes, and then rely on the courts, I'm sure that people would be very much more interested.

Mr. McCLURE. I remember receiving letters from the General Counsel's office, of the Post Office Department, expressing their frustrations in dealing with this mail under what they regard as restrictions imposed by the Supreme Court. It is your attitude they ought to act more vigorously in spite of that feeling?

Mr. DULSKI. That's right. I feel at least in this legislation, if we have exactly the meaning of obscenity, people talk of art and obscenity and they have different judgments. I sympathize with the Chief Postal Inspector, and I sympathize with the Attorney General, but I feel they should be more aggressive, they should at least not hinder us from trying to pass legislation with reports that come back negative from the Attorney General's office.

Mr. McCLURE. Thank you very much. I think your statement is very constructive and I hope it initiates action in this field. I certainly agree with the statement our chairman made, the parents of America have had enough.

Mr. WHITE. I didn't hear all of your statement—

Mr. DULSKI. You missed a great speech.

Mr. WHITE. I'm sure I did. I'm sure you gave great emphasis to it. The thought came through my mind as I read through your statements which you delivered, were the Supreme Court decisions on material that was purchased, other than through the mails, or was it directly on what was sent through the mails?

Mr. DULSKI. Well, I don't know. According to when we had the *Ginsberg* case, which we won, mostly the decisions were made on both mail and purchase.

Mr. WHITE. In other words, is there any distinction in Supreme Court rulings or could there be made any distinction on rulings? What you purchase on the shelves in a book store or magazine store and what you might be able to send through the mail, is any distinction made?

Mr. DULSKI. Congressman White, my idea is that if it's sent by mail, you receive it; the other way it's a purchase. Whether it's mailed or purchased a decision has to be made on what is obscenity. We need a good definition of what is obscene.

Mr. WHITE. Perhaps we could put greater restrictions on what goes through the mail than what goes through the stands.

Mr. DULSKI. That's correct. The idea is, Congressman White, the thing is the definition. What is obscenity?

Counsel advises me that there is a practical difference, because at the newsstand you have a choice. You have no defense when it is mailed to your home.

Mr. WHITE. What I'm wondering too, would the mailings in any way be regarded as something of a privilege on the part of the mailer?

Mr. DULSKI. That's the Justice Department's decision.

Mr. WHITE. It is a privilege?

Mr. DULSKI. That's right.

Mr. WHITE. We can go as far afield as your bill, in other words, and maybe even tighten it up without running afoul of Supreme Court decisions which may have been based on purchase at newsstands.

Mr. DULSKI. I imagine. I leave it to the qualified attorneys to be deciding on the constitutional part of this bill. I'm sure, whatever is going to come out of this committee, there will be amendments, and I will support wholeheartedly a bill that will stand up in the Supreme Court.

Mr. WHITE. I support it, especially since I'm cosponsor of a similar measure. We'll have to first find what we want to restrict, and then restrict it, with teeth.

Mr. NIX. Again I want to express our appreciation for your appearance here today.

Our next witness, ladies and gentlemen, is a gentleman for whom I entertain a deep and abiding affection. When I first came here he was extremely kind to me and considerate, and when you think of the fact that, when a person is first admitted to the Congress of the United States, he is awed, a little bit frightened, certainly not certain, and to have someone who appreciates the feeling of such a person is a thing that must be appreciated, and I shall always remember it.

In addition to that, I have a deep respect for his ability and the contributions that I have seen him making during my tenure here in the Congress of the United States. So I am particularly pleased to have the honor to present the Honorable Jack Brooks from Texas.

TESTIMONY OF HON. JACK BROOKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BROOKS. Mr. Chairman, I want to thank you for the privilege of being here, and I'm especially pleased to be testifying following your very able and distinguished chairman, Mr. Dulski. It is a pleasure to be here before you, and I know of your deep concern and that of your subcommittee in making every possible effort to eliminate this pornographic material flowing into the homes of American people.

Now, I'm testifying particularly in favor of H.R. 12788 which has to do with illustrations sent unsolicited through the mails of the United States. I further support any of the legislation that is not in conflict with it.

Mr. Chairman, the subcommittee is most gracious in giving me this opportunity to appear before you today concerning the flow of pornographic and obscene material through the Nation's postal service.

The people of my district in Texas are very deeply concerned over the depraved nature of many of the unsolicited advertisements that postmen are forced to deliver to their homes and their offices. This mate-

rial, without restraint of any kind and completely devoid of any artistic or social benefit, degrades the human body and demeans the sexual relationship.

Each year, the Post Office Department receives thousands of protests from citizens throughout the Nation over the use of the U.S. postal service for the delivery of this material. Meanwhile, national polls indicate that well over 70 percent of the people in the United States strongly object to the receipt of hard-core obscene material through the mail.

Last year, the Government Activities Subcommittee, which I serve as chairman, in our annual review of Post Office Department operations, requested the Postmaster General to take a new look at postal activities relating to the mailing of pornographic and obscene material.

On July 8 of this year, in a followup hearing, the new Postmaster General was invited to testify and outline for the Government Activities Subcommittee just what the problem is and what can be done to meet the challenge of the increasing wave of obscene advertisements that is flowing through the mail into the homes and offices of millions of Americans.

In his testimony, the Postmaster General outlines the serious constitutional problems and other factors which limited the nature and the extent of the Post Office Department's reaction to this problem.

He indicated the difficulties the courts have in defining the word "obscene" as used in some of our Federal statutes. He outlined the broad and extensive interpretation of the first amendment of the Constitution, which we all agree must be maintained free of any taint of compromise.

In response to the problems that the Postmaster General and his staff outlined, the Government Activities Subcommittee proposed an additional regulation that might be issued under the authority of present statutes defining specific types of illustrations that, when appearing in an unsolicited advertisement, could well be considered as obscene per se and, therefore beyond the protection of the constitutional rights of freedom of expression.

The Postmaster General refused to issue such a regulation on the basis that to do so would cast him in the role of a censor. Subsequently, I introduced H.R. 12788, which in substance contains the language of the regulation we proposed during the Government Activities Subcommittee hearing.

I urge approval of this proposal for the following reasons:

First, when one views the chaotic history of the Post Office Department's unsuccessful efforts to curb the flow of hard-core pornography through the mails, one must realize that the solution Congress provides must be limited in nature.

We cannot expect to define in objective terms, either in a statute, a postal regulation, or in a court decision, an exact and absolute meaning of the term "obscene." Therefore, we must set our goal against those specific types of material which in objective terms are, beyond any question, obscene per se.

In dealing with obscene material, we are close to the edge of the constitutional guarantees providing for the freedom of expression. We must protect these constitutional guarantees. To do so, it logically

follows that the action we take be carefully tailored to meet the precise problem that confronts us.

At the present time, the principal problem comes from the illustrations in unsolicited advertisement of obscene material. Therefore, as reflected in H.R. 12788, our remedy should be directed at these specific illustrations.

For this reason, H.R. 12788 is limited to pictures and illustrations of the types expressly itemized in the bill. Nor does the bill extend to any written material in the advertisement, nor to any material of any kind which might be solicited by the receiver.

As a further means of avoiding troublesome problems, H.R. 12788 provides for the nonmailability of the specific types of unsolicited advertisements enumerated in the bill. No criminal sanctions are provided. If we can deny the use of the mails to the material, the prosecution of individuals becomes of secondary importance.

Last, H.R. 12788 contains no broad subjective tests of obscenity. There are no words in this short proposal that require extensive interpretation either of an administrative or judicial nature. The statute goes directly to the point and, in frank and candid terms, provides an objective test of mailability which can serve as an effective standard to those involved in the dirty business of printing and disseminating pornographic and obscene material.

The objectivity and the clarity of this proposal should avoid the present holding of the courts requiring a judicial-type determination of obscenity prior to Post Office refusal to deliver the material that is involved.

In closing, Mr. Chairman, I believe that the text of H.R. 12788, either as an amendment to title 39 of the United States Code, or as a regulation issued pursuant to present obscenity statutes, would provide an appropriate balance between the right of privacy and the right of freedom of expression that Americans enjoy under the terms of our Constitution. I recommend that you give this proposal affirmative consideration.

Thank you. I will be pleased to make an effort to reply to any questions you or the members of your staff might propound.

Mr. NIX. I want to thank you very much. I think we have approached the subject in a most realistic manner, and I think your statement and the language of your bill will make a real contribution to our effort to get some definite facts in this field, Mr. McClure?

Mr. McCLURE. Thank you, Mr. Chairman. I, too, want to commend the gentleman for what I think is a very constructive statement. I am certain you realize, as all of us do, that we're dealing in an area which will be difficult to legislate within the parameters of the Court decisions. I think you have indicated one such direction, and I certainly commend you and look forward to what I'm sure will be your support to the action this subcommittee takes.

Mr. BROOKS. Mr. McClure, I might say you understand that this does not apply to material which you buy, material which you order, material which you print. This is a specific proposal aimed at illustrations of an obscene nature, which I do not believe violates any of the existing Supreme Court decisions, and which I think the Postmaster General could today issue as a regulation if he had the courage and desire to do so. He says he doesn't want to be a censor. I'd rather

have him be a censor and not have this mail sent to my home for my son or my wife to open up.

Mr. McCLURE. I appreciate the position you're taking, and I certainly want to concur that there are some things that can be done, I think, under existing law and statutes. I think there are some things that ought to be attempted, even though they might possibly run afoul of the Supreme Court prohibitions.

Mr. BROOKS. Yes, I fully agree with that, and I believe the Post Office Department traditionally has been scared to death of the Supreme Court and every Federal jurisdiction in the United States. They don't have the courage to take a case to court and run the risk of losing it. They say they try, but they're very reluctant get in and scrap with them.

I think the Post Office Department could go into court under this bill and I do not believe the Federal judges, at least in my jurisdiction, would strike it down, and I don't believe the Circuit Court of Appeals would do it, and neither do I believe the Supreme Court would. But you run into considerable reluctance on the part of the Post Office Department and this is a very bipartisan reluctance.

I don't know whether they like dirty pictures or are saving a collection of them, but they sure do deliver an awful lot of them.

Mr. McCLURE. I wish more people who are in the position of making decisions were forced to view some of that collection.

Mr. BROOKS. I'm afraid they're not on those types of lists.

Mr. McCLURE. I remember a statement made by a Justice of the Supreme Court. He said he didn't have to look at that dirty stuff and he didn't have to agree that there was such a thing as pornography. I'm afraid if he had to look at some of these things he'd have to agree that there is a possibility of pornography.

Mr. NIX. Perhaps the Justice's idea has been more highly developed than mine. Mr. White?

Mr. WHITE. I thank Mr. Brooks for coming here. I think he's absolutely right about the Postmaster General filing cases, and I think he should file cases until this area is completely defined. Every case can make a new definition, and they ought to whittle it out so we know exactly where we are. And I wonder if we shouldn't define right of privacy. I wonder what you think about going beyond Mr. Dulski's bill and defining right of privacy as a congressional observation, at the very beginning, in the preamble of this bill.

Mr. BROOKS. As an observation, I'm not an expert in this field, but obviously any broad definition of the written word as to obscenity is very difficult. Traditionally and historically it has been difficult to define. I would not object or think it unwise for Congress to pass some broad legislation and let them try it out. I think there's nothing to be lost by a few losses on Federal lawsuits by a few lawyers arguing about it.

Mr. WHITE. Some of us may be missing a point in concentrating so much on obscenity as it might exist in itself, and obscenity as it would be received, because I think we can go further in the sense of regulating what is received or sent unsolicited then we can go in trying to regulate what is printed and published.

Mr. BROOKS. This is the point of my legislation. I make a very clear distinction. You can order anything you want, you can buy it in the

store, they have hard-core pornography by the rack in most major cities, and if you want to buy it, that's your business. But I don't think the Post Office Department should haul it around the country free. These people are going to keep on printing this stuff and publishing it as long as the business is there. They're going to go after that business, but whether the Government should help subsidize it by hauling it around is another question. There is a way to keep them from shipping and mailing and delivering unsolicited to every home in this country hard-core pornographic pictures. There's no question about it.

I believe it can be done, even though it's an area that has not been specifically delineated before. It can be so specifically delineated and described, and I think they can stop it, and I think this committee could pass a bill that would stand up, and if the Postmaster General doesn't have the courage to issue it as a regulation, Congress could pass it as an amendment to title 39 of the United States Code. It would become a law, and I think it would stand the test of the courts.

Mr. McCURE. What you are suggesting is an approach somewhat similar to the approach this committee took in the last session, the legislation which was enacted by Congress, which is now in the courts, in which we didn't attempt to confront the entire problem of pornography, but at least we were willing to take some small step in that direction. You are suggesting instead of confronting that broader question, we should step first into an area where we believe we can act.

Mr. BROOKS. Take one step at a time.

Mr. WHITE. You didn't provide any penalties in your bill. It was just handed to me. You didn't have in mind a penalty provision, just merely to confiscate?

Mr. BROOKS. That's correct, no criminal penalties. There is a higher degree of protection for the individuals. What we're trying to do is prevent them from sending this material out unsolicited. I'm not trying to put anybody in jail. I just don't want the Postmaster to haul it around and deliver it to our homes.

Mr. WHITE. You would probably have to require that the sender designate on the envelope what the material is so that the Postmaster wouldn't be opening all the mail.

Mr. BROOKS. The Postmaster is aware of about 15 major mailers of dirty pictures, and they can in truth understand when these mass mailings come out. You know if they have a mass mailing of dirty pictures from across the river in Mexico coming into the El Paso Post Office. Everybody who works in that office, every grade 4 postal clerk knows that XYZ company just brought four truckloads of dirty pictures over. They can look and tell the character of the addresses, and hold it up to the light, they're not above it. They know very well when those mailings are brought to the Post Office, and that's when the Postmaster ought to lock them up.

Mr. WHITE. If you did have them designate it on the envelope with the understanding that the letter might be subject to confiscation, that would certainly stand the test in the courts.

Mr. BROOKS. That's a more difficult job. What's written on the envelope, who always looks at the fine print? It might depend on the size of print.

Mr. WHITE. You'd have to designate that. Then they could confiscate it and there's no way the court could complain about that.

Mr. NIX. Congressman Brooks, I want to again express our deep appreciation for your appearance today and your contribution. Thank you.

Mr. DULSKI. I want to commend the gentleman for his fine statement and his contribution made over the years to this problem.

Do you think we can stop this flow of mail, unless we have severe penalties? If it is mailed and the Post Office has no way of stopping delivery, it is too late. My bill provides for a penalty, and I think there should be some penalty connected with it. What is your opinion?

Mr. BROOKS. I think it is much more difficult to pass the reluctance of the Post Office Department, the reluctance of their lawyers, the reluctance of all those people, to pass that gauntlet, and pass the Federal courts, circuit courts, Supreme Court. I think you make a lighter load if you don't have a criminal offense penalty. The name of the game is to get at these 15 or so major distributors and start hamstringing their operation. This costs a lot of money and if the Post Office stopped delivering it, I think they would probably quit, or possibly start using trucks.

Mr. DULSKI. Jack, when you talk about subsidizing, we don't really subsidize most of this. Most of it goes first-class mail. They pay for everything. That's the reason the Post Master General has to be very cautious, because its first-class mail.

Mr. BROOKS. A large amount is.

Mr. DULSKI. In the past administration they were always afraid of the courts. I'm not going to get political, but the attorney general of Massachusetts didn't win all his cases, but he confiscated a lot of the material. He didn't win all the cases, but he put a lot of people out of business, and I think that's the attitude we should take. Let's get the ball rolling.

Mr. WHITE. May I ask a question. Is there any place in the law that provides for punitive damages? For instance, if you confiscate this material by the Post Office, and an action is brought by the mailer, is there any provision whereby the Government can then counter-action, cross-action in the same suit for double or triple damages, punitive damages of some sort?

Mr. JOHNSON (counsel). Mr. Chairman, there is no such provision in the law now. The provisions of the Administrative Procedure Act are rather scrupulously observed in connection with this procedure, the so-called impounding law, which originated in this committee. There are ample provisions for normal proceedings under the Administrative Procedure Act, but no punitive damages. Also under the law there are no criminal penalties, including the Venue Act which originated in this committee but reported by the Judiciary Committee.

Mr. WHITE. If there was a provision for punitive damages, these companies would be more reluctant to file an action against the Government, if they thought they'd be cross actioned.

Mr. BROOKS. There would be no bar to the Postmaster General issuing this regulation and trying a case tomorrow on this one. If you really want to do something about it, that's what you should do. There's no guarantee that any law will be upheld until you go to the Supreme Court. You just have your odds.

Mr. WHITE. Different facts make different cases.

Mr. BROOKS. That's right. I think they'd have a very hard time proving these pictures are not obscene.

Mr. NIX. Our next witness is a gentleman who has appeared before our full committee on many occasions and for whom we have the highest respect, Mr. David Nelson, General Counsel of the Post Office Department, and he is accompanied by Mr. William Lawrence, Assistant General Counsel, Mailability Division, Post Office Department, and Mr. William J. Cotter, Chief Postal Inspector, Post Office Department.

Gentlemen, we welcome you and you may proceed.

TESTIMONY OF HON. DAVID NELSON, GENERAL COUNSEL, POST OFFICE DEPARTMENT; ACCOMPANIED BY WILLIAM LAWRENCE, ASSISTANT GENERAL COUNSEL, MAILABILITY DIVISION; AND WILLIAM J. COTTER, CHIEF POSTAL INSPECTOR

Mr. NELSON. Thank you very much, Mr. Chairman; I do indeed welcome the opportunity to appear before this subcommittee to testify on the problem of obscenity in the mail.

Let me say at the outset that the Postmaster General is very deeply concerned over the misuse of the mails for distribution of unsolicited and unwanted pornography. He is determined that such misuse must be stopped. The Post Office Department is pleased that you and this subcommittee are giving your attention to this difficult problem, Mr. Chairman, for new statutory weapons could be very helpful in carrying on the fight against unwelcome mailings of smut.

This subject has taken on a particular urgency in recent months as the volume of offensive, sexually oriented mail has continued to increase. Measured by the number of complaints made to the Post Office Department the increase has been striking. From 140,000 complaints of obscenity in the mails in fiscal 1967, the number rose to 167,000 in fiscal 1968, and exceeded 234,000 in fiscal 1969. Many of these complaints are, of course, relayed to the Department through Members of Congress and the volume is absolutely staggering.

I might say, at this point, I am concerned about the fact that the letter to which Mr. Dulski referred in his testimony did not specifically mention the chairman's bill, I intend to take steps to see that the writer is made aware that Mr. Dulski is chairman of the House Post Office and Civil Service Committee, that he has introduced legislation on the matter of postal obscenity, and that this fact should be referred to in any correspondence with the chairman on this subject.

The bulk of these complaints result from indiscriminate mass mailings of pandering advertisements that are utterly repellant to many of the people who receive them. That's where the real problem lies, that's where the bulk of the complaints originate—with these pandering advertisements. Concern over the possibility that such materials may fall into the hands of children frequently makes such mail doubly unwelcome.

While we do not believe that the Post Office Department should be cast in the roll of a censor, neither do we believe that it should be lawful for the postal system to be used to violate the privacy of its patrons in this uniquely disturbing manner.

For over a century Congress has relied almost exclusively on criminal statutes to keep the mails free of obscenity. The first statute on the subject was enacted in 1865, and, although its language has been somewhat expanded, it is still, as 18 U.S.C. 1461, the basic law on postal obscenity. In 1957 the Supreme Court upheld the constitutionality of the statute in the landmark case of *Roth v. United States*, 354 U.S. 476, which marked the first serious challenge of the statute on constitutional grounds. While the statute's constitutionality now seems firmly established, however, its scope has been significantly limited in recent years by the stringent tests which the courts have used to determine what is "obscene." In the *Roth* opinion itself, the Court stated the test as follows:

Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

In subsequent decisions, it has been suggested that three separate elements must be established before a finding of obscenity can be justified. Under this threefold test, it must be shown that:

(a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; (c) the material is utterly without redeeming social value.

While there may be some doubt as to whether a majority of the Supreme Court would subscribe to the view that each of these elements must be proved separately, it has been widely assumed that this is the case.

Some have felt that the more stringent definition of obscenity which resulted from the *Roth* decision and others following it renders our present obscenity statutes of little value as a means of restricting the flood of sexually oriented mail. I do not think this is so. Although there is clearly a need for additional legislation, the smut peddlers who think they can now send obscenity through the mails with impunity may be in for a rude awakening. We are determined, Mr. Chairman, that the existing obscenity laws shall be vigorously enforced, and we believe that the prospects of making significant progress under those laws are excellent.

The Chief Postal Inspector has estimated that 95 percent of the current complaints about obscenity in the mails result from the indiscriminate direct mail advertising of some 15 major promoters. One of these dealers has already been convicted of violating the postal obscenity statute, and his appeal is now pending. I might add, however, as a matter of possible interest to the committee, that in the criminal trial to which I refer some of the material which this dealer was sending out was specifically found not to be obscene. I think the committee would be shocked at this finding because the material is of a character that unquestionably would be highly offensive to many people. I cite this fact as an example of the difficulties we do encounter in obtaining convictions under the present law.

Ten more of these major promoters are under indictment, and evidence relating to the mailing activities of the remaining four is in the hands of the appropriate U.S. Attorneys. We hope that indictments against these four will be returned promptly.

Only last week the Postmaster General made a personal appearance before a national conference of U.S. Attorneys to emphasize the importance he personally attaches to vigorous prosecution of those who violate the postal obscenity statute and related laws. The Attorney General has made it clear that he too places a high priority on strict enforcement of the law in this area.

I think there has definitely been a change in attitude on the part of those with enforcement responsibilities in this field, and I think in the months ahead, while it does take time for these matters to proceed through the courts, you will see a real change in the way the existing laws are enforced.

It is somewhat paradoxical that in protecting the exercise of first amendment rights, the courts appear to have found criminal prosecution for dissemination of obscene material to be more acceptable than some other methods of obscenity control. The key to the paradox may lie in the fact that criminal proceedings are surrounded by the most carefully worked out procedural safeguards in the legal system. The Supreme Court has indicated that noncriminal proceedings involving a prior restraint on expression must have many of these same procedural safeguards. For example, a 1965 decision, *Freedman v. Maryland* 380 U.S. 51, the Court held a State movie censorship statute invalid because it failed to provide for a prompt judicial determination of whether the film under review was obscene and because it failed to provide for an adversary proceeding in which the burden of initiating the proceedings and establishing the fact of obscenity would rest with the State.

The *Freedman* decision was recently relied upon by a three-judge Federal court in holding unconstitutional the administrative postal obscenity statute, title 39 United States Code section 4006. This statute, the one to which Mr. Johnson referred a moment ago, authorizes the Post Office Department, upon satisfactory evidence that the mails are being used to obtain remittances for obscene material, to direct that mail addressed to the advertiser be returned to the sender stamped "Unlawful."

In 1968, after a period of several years in which action pursuant to this statute had been limited to foreign dealers (who are beyond the effective reach of criminal sanctions) the Department began a proceeding against a California firm known as the Mail Box.

After a full administrative hearing, the Post Office Department's judicial officer entered an "unlawful" order against the Mail Box. The dealer promptly began a law suit in Federal district court in Los Angeles to challenge the validity of section 4006. The court held section 4006 unconstitutional on its face because of its supposed failure to provide adequate procedures for the protection of first amendment rights.

The Post Office Department is urging the Department of Justice to appeal the district court's ruling to the Supreme Court and to seek a stay of its judgment pending a determination of that appeal. In the meantime, we expect to continue to invoke the provisions of section 4006 in appropriate cases in those jurisdictions where we are legally able to do so.

I might say that the current administration has instituted additional proceedings under section 4006 notwithstanding the pendency

of the *Mail Box* case. We have, however, encountered difficulty in obtaining interlocutory court orders under title 39 United States Code, section 4007 (the companion statute of section 4006) because of the adverse decision rendered by the three-judge court in California in the *Mail Box* case.

Some measure of the significance which procedural aspects assume in obscenity control legislation may be found in the fact that the same three-judge panel which ruled section 4006 unconstitutional upheld the constitutionality of section 4009 of title 39, the Pandering Advertisements Statute, which relies entirely on judicial sanctions for its enforcement. There are, of course, other substantial differences between the statutes—perhaps the most significant of which is that section 4009 operates only to protect the privacy of those who have affirmatively evidenced a desire not to receive advertisements for material that they consider erotically arousing or sexually provocative—but it is clear that the form of the proceeding has become a matter of great importance.

As this subcommittee knows, the President has recommended enactment of three separate measures designed to permit more effective control of sexually oriented material without overstepping the constitutional limits to which legislation in this area is subject.

One of these legislative proposals, embodied in H.R. 11032, would make it a crime punishable by imprisonment and by fines ranging up to \$100,000 for repeated offenses to send through the mails or in interstate commerce advertisements designed or intended to appeal to a prurient interest in sex. As a criminal statute it could be an effective deterrent to the proscribed conduct without risking constitutional attack on procedural grounds.

A second bill, H.R. 11031, would make it a crime to send to any person under the age of 18 years sexually related material defined by the bill as harmful to minors. This measure would adopt for the Post Office the concept of "variable obscenity" which was upheld in principle by the Supreme Court in 1968 in relation to a New York statute.

This same concept is the basis of the proposed "special category of nonmailable matter with respect to minors" contained in both H.R. 7375, introduced by Chairman Dulski, in February, and H.R. 10867, a second bill introduced by Chairman Dulski and of which you are a cosponsor, Mr. Chairman, together with Mr. Corbett, and Mr. Cunningham of this subcommittee.

H.R. 7375 and H.R. 10867 would prohibit the use of the mails for delivery to a person under 16 years of age, or for unsolicited delivery to an older person with whom someone under 16 years resides, of various types of material designed primarily to appeal to prurient interests.

Enforcement would depend up the "unlawful order" machinery established in 39 U.S.C. 4006. In view of the district court decision in the *Mail Box* case holding section 4006 unconstitutional, a decision which was handed down subsequent to the introduction of H.R. 7375 and H.R. 10867, it would now seem unwise to rely on that section for the enforcement of new limitations on the mailing of sex-related mail.

The third bill which the President has recommended is one which is contained in both H.R. 10867 and, as title II, in H.R. 10877. This is the measure designed to protect the privacy of the American home

from the offensive intrusion of sexually oriented advertisements which may or may not be obscene in the strict legal sense, but which the individual householder has decided he does not wish to receive.

In substance this bill permits any person to notify the Post Office Department that he wants to receive no sexually oriented advertisements, as defined in the bill, from any source. The Department would maintain a list of these persons and make it available to mailers of such advertisements at a cost designed to defray the Department's administrative expenses.

These mailers would be forbidden to send such advertisements to anyone whose name had been on the Department's list for more than 30 days. Criminal penalties are provided for willful violations of the bill's prohibitions, and express provision is made for the use of court orders to enjoin continued violations.

The wide range of enforcement devices which the bill contains are intended to provide the maximum flexibility in helping to insure that the bill's objective is attained.

This measure, as you know, Mr. Chairman, builds on the principle of freedom of choice which is contained in 39 U.S.C. 4009. It goes beyond that statute, however, in several ways.

First, and perhaps most important, is the fact that no one need wait until his privacy has been invaded the first time. The notice to the Post Office Department provided for by this measure may be given at any time, by any person in his own behalf and in behalf of any children under 19 years, regardless of whether an offensive advertisement has already been received.

Second, the notice once given applies to all mailers, rather than just to a particular one.

And, third, effective enforcement is more direct. Willful violations can be punished by a fine of up to \$5,000 and imprisonment for 5 years, without any need for intervening administrative proceedings. Subsequent convictions could result in up to 10 years' imprisonment and a fine of \$10,000.

We would anticipate that these criminal sanctions would be invoked most frequently against large volume mailers who made no effort at all to comply with the bill's provisions. Violations could also lead to an injunction prohibiting the mailer from sending sexually oriented advertisements to whatever addressee or group of addressees the court finds just under the circumstances.

If, for example, the court found wholesale noncompliance with the bill on the part of a mailer due perhaps to poor policing of its mailing lists, the mailer could be enjoined from mailing sexually oriented advertisements to anyone until a better method of policing the lists had been devised.

Such an order could, in the discretion of the court, be combined with a direction to the mailer's postmaster to refuse to accept the offending mailer's sexually oriented advertisements or to impound incoming mail containing remittances for the sexually oriented material which he is selling. In appropriate combination, these sanctions should exercise a powerful restraint on unlawful mailings.

It may be appropriate for me to comment briefly on the definition of "sexually oriented advertisements" which the bill contains. This term is defined as "* * * any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context,

human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing."

The purpose of this definition is to enable postal patrons to understand the type of material they are requesting not to receive in the mail and to provide guidance to both mailers and enforcement officials as to what may not be mailed to unwilling addressees.

An objective standard of this kind is necessary if the bill is to be made applicable to mailers generally, rather than being limited, as the present pandering advertisement law is limited, to individual mailers whose materials have been found offensive, on a subjective basis, by individual addressees.

As I mentioned before, Mr. Chairman, we think that these measures, which are designed to deal specifically with particular problem areas, will effectively supplement the basic postal obscenity statutes. They rely on principles which the courts have indicated are constitutionally acceptable. I believe that they will enable us to make real progress in our efforts to deal responsibly with the problem of offensive sexually oriented mail.

I would be happy to try to answer any question you may have.

Mr. Nix. Just one question, Mr. Counsel. You have studied each of the bills under consideration, including those suggested by the President of the United States. Which of these bills would you say could accomplish the objective that we seek?

Mr. NELSON. I think that all three of the bills recommended by the President are necessary, Mr. Chairman, because of the fact that the bills are focused on separate phases of the problem that lend themselves to legislative attacks in a manner consistent with the first amendment.

In the *Ginsberg* case it was established that it is constitutionally permissible for the Government to go further in protecting minors from the receipt of this material than it can in protecting the public at large. I think the minors bill will focus on one phase of the problem which is of particular concern, especially to parents.

Title II in H.R. 10877 is built on the principle that the Government can constitutionally legislate against unwelcome invasions of privacy. I do not believe the Constitution requires an individual who does not want to be subjected to offensive, sexually oriented materials, to receive such material through the mail, even though a willing recipient might be constitutionally entitled to receive such mail.

The principle of protection of the right of privacy is one under which it is possible to legislate, we believe, rather effectively, and I think this bill too is important.

The third measure which the President has proposed is one that zeroes in on advertising designed to appeal to prurient interest in sex. There is case law suggesting that Congress can go farther in dealing with advertising than it can with respect to other forms of expression.

So I think all three are worth trying.

Mr. Nix. Obviously there has been a very serious effort to analyze the decision, recent decision of the Supreme Court and to formulate language which would meet any objection. That has been done by the legal staff, it has to be done by the legal staff for anyone who is writing a bill. Do you think it is feasible to incorporate the proposed legislation, the objective of each one of these bills, into a single bill?

Mr. NELSON. Oh, yes; I think it could be done.

Mr. NIX. Chairman Dulski, do you have a question?

Mr. DULSKI. I have no questions. I just want to compliment counsel. I have the greatest respect for his ability, as I stated in the Congressional Record. With him as one of the advisers to the Postmaster General, and legal counsel, I'm sure he will be instrumental in getting more action in the Post Office Department than we have had in the past.

Mr. WHITE. I'm trying to study your material. I think we're all striving for the same end. I'm looking at the Supreme Court decision you have outlined on page 2. If you need all three of these tests before you can establish the type of material you can exclude from the mail, I'm not so sure you're ever going to do it. Perhaps the Supreme Court needs to distinguish their decisions.

You say here, in the Supreme Court tests, the dominant theme of the material taken as a whole appeals to a prurient interest in sex, and such material is utterly without redeeming social values to be pornographic. That means if they have some pretty bad stuff, say one third is bad and two thirds okay, they can get anything through the mail under those decisions; isn't this true, sir?

Mr. NELSON. It may well be true, Congressman White, and I think the belief of some of the lower courts that it is true is responsible for the fact we have not in recent years been as successful as we formally were in obtaining convictions for violation of the existing postal obscenity law.

Mr. WHITE. Do you think the Supreme Court really has this view of it, that you could cloak some very rough stuff in—overlay it with a little social value and thereby escape their restrictions, or do you think they were focusing in on one particular phase of material?

Mr. NELSON. It is difficult to tell, Congressman White. In most of these cases there are almost as many opinions as there are members of the Supreme Court, and it is difficult to know what the Court as a body thinks about these questions. I'm afraid that some of the lower courts, at least, do have the impression that virtually anything that might arguably contain some redeeming social value is entitled to free passage through the mails without let or hindrance.

Congress may well be able to enact legislation that will protect minors from exposures to such material, however. It may well be able to enact legislation to protect people who have expressed an interest in not receiving this material from getting it; and it may be that Congress could constitutionally prohibit certain types of advertising, singling it out as advertising.

Mr. WHITE. So you're talking in terms of recipient, which is I guess our best approach. Looking at the one last bill you described, I wonder if you are not bumping into some real problems there. Let me voice these. You have a bill that provides that anyone who does not want to receive this material, who will notify the Post Office Department, will have their names placed on a list. The bill says that anyone mailing sexually oriented material, I don't know whether you speak of prurient interest or not, but sexually oriented material to persons on that list are in violation of the law. That's the way it is?

Mr. NELSON. Yes, anyone who sends a sexually oriented advertisement as defined in the statute—and it is intended to be a tight, narrow definition—would be in violation of the law if the individual's name has been on the list for more than 30 days.

Mr. WHITE. No. 1, what is the definition of the material you are speaking of?

Mr. NELSON. The definition is: Any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing.

Mr. WHITE. Now, is there a possibility by this statute that you are implying a consent on the part of all others who are not on that list to receive this material?

Mr. NELSON. No, the statute expressly declares that it does not affect the existing postal obscenity laws.

Mr. WHITE. No consent is implied or will be implied.

Mr. NELSON. We have endeavored to spell out in the legislation specifically that no such consent is to be implied.

Mr. WHITE. Are you not concerned about the phrase that says if a subjective decision on the part of the Postmaster General, if the enforcement is not proper, he can stop all mails until such time as a decision is rendered?

Mr. NELSON. He could not do so without a court order.

Mr. WHITE. Does the statute say that, does the bill say a court order?

Mr. NELSON. Yes, it does.

Mr. WHITE. I see. How many cases do you have on file now that you are carrying up to the higher courts in this area?

Mr. NELSON. I wonder if the Chief Postal Inspector could give me the data on that. The criminal prosecutions are handled by the Inspector's Office.

Mr. COTTER. I believe that this fine Postal Inspection Service which I just joined recently has been referred to as the "silent service" and I feel perhaps I haven't been communicating adequately with regard to what we have been doing, so I welcome this opportunity to say a few words.

During the last fiscal year on obscenity dealer cases, not involved with individuals, we have collected evidence, investigated cases, presented to the U.S. attorney, and indictments have ensued on 21 of these major dealers. That's in the past fiscal year.

These include all the big operators responsible, we estimate, for well over 90 percent of the objectionable material going through the mails, and there are a lot of smaller operators under investigation. Twenty-one have been indicted and arrested, and the cases will hopefully proceed through the courts under appeal. In addition, during the past fiscal year, 13 other dealers have been investigated and the cases have been presented to the U.S. attorney, and we are optimistic that in these cases too, indictments will be forthcoming.

These cases are being handled by U.S. attorneys throughout the United States. Indictments have been returned in 18 different districts. As to how recently these indictments were returned: July 10, 1969, three in Indiana; June of 1969 in Louisiana; January 24, 1969, in Maryland; February of 1969 in Michigan; May 1969 in New York. One goes way back to June of 1968 in New York, the southern district. Another big dealer was indicted in North Dakota in January of 1969. Sturman, concerning whom many, many complaints were received was indicted in late 1968 in the northern district of Ohio. Linetsky, a well-known operator, indicted in the southern district of Ohio, was arrested

August 15, 1968. Another one in Oregon, April 1969; Pennsylvania, eastern district, May 21, 1969, and so on.

We have been vigorously investigating and presenting evidence to U.S. attorneys resulting in quite a few indictments.

Mr. WHITE. Are these under one statute principally?

Mr. COTTER. Section 1461, the existing one. It is our position that the real effective solution to this problem is criminal prosecution of these fellows. After the conviction of Ginzburg in 1965 and the case was affirmed by the Supreme Court in 1966, a reduction of thousands of complaints temporarily ensued. So regardless of the fact that the Court has been making the definition of obscenity much more restrictive, it has been our approach to continue to investigate and present these cases for prosecution. We believe if they are convicted and the cases move up through the appellate courts even on the basis of advertising alone, we believe we will obtain a confirmation of the convictions since the material is much more offensive today.

Mr. WHITE. What is there lacking in 1461 that you would like to see in it?

Mr. COTTER. A more precise definition of what is obscenity. We welcome these provisions in the new bill.

Mr. WHITE. Have you studied Mr. Dulski's bill?

Mr. COTTER. Yes.

Mr. WHITE. Do you like that definition?

Mr. COTTER. Yes, I like it. It's a pretty standard definition similar to the New York statute.

Mr. WHITE. If you had Mr. Dulski's bill, do you think you could pretty well make your indictments stick on a good many of these? If you were prosecuting under Mr. Dulski's bill, could you restrict these people you have indicted?

Mr. COTTER. We could. I personally think we could go under the present statute, I think it would be more solid if we had a more precise definition of obscenity.

Mr. WHITE. If Mr. Dulski's bill passes, would any of the three bills named here be necessary to buttress your prosecution?

Mr. COTTER. Again, if I may, my area is criminal prosecution, and law enforcement and I would welcome that bill. I can also appreciate the value of having this other vehicle, people to be able to put their name on lists, for example, and say to stop that type of mail coming to me. There's no question about it, too, when you get into the definition of obscenity in a law suit, when it's directed to a minor that case is much stronger.

Mr. WHITE. Do you think there should be something about a constructive notice as suggested by the administration added?

Mr. COTTER. I'm not clear on that.

Mr. WHITE. What you're saying here is that a publisher or any person that sends sexually oriented material, it doesn't say what kind, is subjected—

Mr. COTTER. I'll have to defer to Mr. Nelson.

Mr. McCLURE. You use that term material, and I think the statute says advertisements. I think there is an essential difference.

Mr. WHITE. You're right, sexually oriented advertisements. If a person sends to any person on that list whose name has been on that list 30 days, could you make that stick in the Supreme Court?

Mr. COTTER. I would have to defer to general counsel. In my area of responsibility, we would collect the evidence to present it, but as to this aspect I toss the ball to the U.S. attorney or Mr. Nelson.

Mr. NIX. Mr. McClure?

Mr. McCLURE. Thank you. I realize we're talking in a narrow area here, only with regard to mailing, and not in the broader aspects of pornography or even in the somewhat narrow aspects of public presentation of what might be obscene. This is where we start running into difficulty. I think the difference between advertising by mail and billboard advertising for instance, either one of which could be an invasion of privacy, either one of which could be offensive to anyone who might view it, whether receiving it at the house, or whether driving by and seeing it on a lighted billboard with their kids in the back seat. Is it your feeling that the fact that it uses the mails gives us a greater right or stronger legal basis for regulating it?

Mr. NELSON. Obviously, the Constitution does authorize Congress to establish post offices and post roads. Congress does have jurisdiction over the postal system, and I think there is no question of Congress' constitutional power to regulate the use of the mail system as long as the first amendment rights of the users of the system are in no way prejudiced. The Supreme Court has, however, said as long as Congress maintains a postal system, the right to use the mails is almost as much a part of free speech as the right to use our tongues. This language originated with Mr. Justice Holmes in the case of *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, and was adopted by the Supreme Court, or eight members of the Supreme Court, in 1964 in the case of *Lamont v. Postmaster General*, 381 U.S. 301.

So there is no question but that the protection of the first amendment does extend to matter that is transmitted through the mails, and this is one of the factors, frankly, that has caused us a great deal of the difficulty we now have in trying to reconcile the wishes or a great many of our citizens with the requirements of the Constitution.

Mr. McCLURE. It has been suggested upon numerous occasions, and again before this committee today, that it is possible to use the regulatory approach or perhaps even the impounding approach pending the prosecution and ultimate decision by the Supreme Court of some of the cases now going up. Is that a possibility which ought to be pursued by the Post Office Department?

Mr. NELSON. It is a possibility we are actively exploring, Congressman McClure. It is essential, we believe, that there be a prompt judicial determination as to whether or not the material in question is obscene. I take it by impounding, you are speaking of actually seizing material suspected of being obscene and not delivering it. It seems quite apparent, on the basis of the number of Supreme Court opinions, that this can be done constitutionally only if there is a prompt judicial determination as to whether the material is or is not obscene.

Mr. McCLURE. What happens if you attempted, and the Court makes a determination that the material was not of the nature that would be considered obscene?

Mr. NELSON. Then we deliver it.

Mr. McCLURE. Is there any penalty to the Government if that were involved?

Mr. NELSON. I would hope not.

Mr. WHITE. Would the gentleman yield?

I believe there would be a penalty if the company filed for damages.

Mr. McCLURE. That was what I was directing my attention to.

Mr. NELSON. I'm not sure the Government has consented to be sued under those circumstances. I wouldn't want to give that opinion now.

Mr. McCLURE. The reason I asked that question, if indeed you attempt to do something and fail in that attempt, is there any danger to the Government in having made the attempt?

Mr. NELSON. No, sir; I do not think there is.

Mr. McCLURE. Isn't there some value where there seems to be a very clear case in preventing a kind of operation that goes forward in such volume with such great financial rewards?

Mr. NELSON. I think there is, and we are actively working now on procedures which will accomplish just this.

Mr. McCLURE. If I recall correctly, you have some background, Mr. Chief Inspector, some background with the FBI. Is that correct?

Mr. COTTER. Yes.

Mr. McCLURE. I was prosecuting attorney and the FBI used to brag that they had a high percentage of convictions, around 95 or 96 percent, and as a practicing prosecuting attorney, that percentage is too darn high. You have to lose some if you are doing an effective job of enforcing the law. You have to stick your necks out on some of the doubtful cases if you are going to reach the kind of problems we're trying to reach.

I just have a couple other questions. First of all, this committee in Congress has imposed upon the Post Office Department a rather greatly increased workload in the last couple of years in this area.

Mr. NELSON. Yes, indeed it has. The number of complaints we have received under the pandering advertisements law is something in the neighborhood of 320,000.

Mr. McCLURE. Has there been any increase in the personnel assigned to the processing and handling of these matters?

Mr. NELSON. No, sir. There has not. We are desperately short-handed. We're trying to recruit additional people for that operation. There have been ceilings on the number of people we could have in our office, and we are hopeful that we will be able to obtain additional personnel.

Mr. McCLURE. Are you urging the administration that the ceilings be lifted so you can get more people?

Mr. NELSON. Yes.

Mr. McCLURE. How many trial examiners are available to the Department in administrative proceedings?

Mr. NELSON. We have two hearing examiners at the present time.

Mr. McCLURE. Do you have any idea of what you would need if you would embark on a very extensive attempt to stem this flow by regulation?

Mr. NELSON. Well, it depends on what statute we're proceeding under; 39 U.S.C. 4006, is the statute under which those administrative proceedings would now be conducted. If that statute is held unconstitutional and no constitutional replacement is enacted, we don't need additional hearing examiners.

Mr. DULSKI. Are you aware that supergrades have been requested by the administration? Would you need any super grades in that field?

Mr. NELSON. At this time, in my office, I do not think we need any additional supergrades for obscenity work.

Mr. DULSKI. They are recruiting these specialized men. Would you say there would be a need for these supergrades in the future?

Mr. NELSON. There might well be in the future. I can see that coming.

Mr. McCCLURE. Have you given any thought to the methods by which the obscenity judgment can be made along the lines of what has been referred to in the popular press as the Dirksen approach, by using a jury to make that determination?

Mr. NELSON. This really is a matter that is more within the cognizance of the Department of Justice than of the Post Office Department. I think it would be inappropriate for me to express an opinion on that question.

Mr. McCCLURE. You touched on the matter a couple times with respect to the attitudes of the lower courts. It seems to me you were bearing down on the possible tendency on the part of the district courts and courts of appeals to be more restrictive than the Supreme Court requires, is that correct?

Mr. NELSON. I think that's very definitely the case, Mr. McCCLURE.

Mr. McCCLURE. Is that not also somewhat typical of the court system in which they don't like to be overturned?

Mr. NELSON. I think it is.

Mr. McCCLURE. I for one as a member of this committee and Member of the Congress will support and defend any action you may take in this field and certainly urge you to be aggressive and don't fear some failures. I lost a number of cases in which I thought merely having prosecuted the case was a great help in upholding the law.

Mr. NELSON. You're going to see more prosecutions.

Mr. McCCLURE. And I suspect we'll see some failures, too. Thank you very much.

Mr. NIX. Mr. White?

Mr. WHITE. Yes, sir. A thought occurred to me, suppose Congress passed a bill providing for penalties for contributing to the delinquency of a minor by mailing sexually oriented material. Would this get around some Supreme Court rulings?

Mr. NELSON. I think the approach is one that can be followed very profitably, Mr. White. The Supreme Court has indicated that the Government can constitutionally go farther in protecting minors than in dealing with the public at large.

Mr. WHITE. Instead of concentrating on mailable material, perhaps we should concentrate on the effect it has on the minor just as a local authority, local legislative body would pass a statute against contribution to the delinquency of a minor. You could do the same thing with respect to interstate traffic of this material.

Mr. NELSON. Yes. Of course, the Federal Government is a government of enumerated powers, and it would be necessary to tie it to an express constitutional grant of authority.

Mr. WHITE. Yes. By using the mails, you're in interstate commerce.

Mr. NELSON. I would like to clear up what may be one ambiguity, Congressman White. In asking the Chief Postal Inspector a moment ago about definition of obscenity contained in Mr. Dulski's bill, 10867, and inquiring as to whether it would be easier to obtain convictions if that definition were on the statute books, I should like to point out that H.R. 10867 does not amend section 1461, and the

section relating to nonmailable matter with respect to minors, as I understand it, does not contain criminal sanctions.

Mr. WHITE. Thank you very much.

Mr. NIX. Chairman Dulski?

Mr. DULSKI. I have nothing further.

Mr. NIX. Mr. Nelson, Mr. Lawrence and Mr. Cotter, I'm certain that I reflect the feelings of the Chairman of the full committee, Mr. McClure and Mr. White, when I express our deep appreciation for your appearance here today.

Thank you very much.

Mr. NELSON. Thank you, Mr. Chairman.

Mr. NIX. The subcommittee will be in recess until 10 o'clock tomorrow morning in this room.

(Thereupon, at 11:45 a.m., the subcommittee was adjourned.)

OBSCEINITY IN THE MAILS

WEDNESDAY, AUGUST 6, 1969

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON POSTAL OPERATIONS OF THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, D.C.

The subcommittee met at 10 a.m., in room 112, Cannon House Office Building, Hon. Robert N. C. Nix (chairman of the subcommittee) presiding.

Mr. NIX. The subcommittee will be in order. This is a continued hearing from yesterday on a very old problem to which we seek some new answers. It also has a changing legal definition.

The *Roth* test proclaimed by the U.S. Supreme Court in the case of *Roth v. United States*, 254 U.S. 476 (1957), provides that in order to be obscene material must have as its dominant theme, taken as a whole, an appeal to prurient interest in sex, and be patently offensive to national community standards relating to the representation of sexual matters and be utterly without redeeming social value. This test has created a crisis in the regulation of obscenity since it has meant in practice that the lowest national standard applies in matters of obscenity; the standard of Greenwich Village in New York City had not previously been the standard in Philadelphia, Boise, Idaho, Butte, Mont., or El Paso, Tex.

In addition, the requirement that pornography be utterly without redeeming social value is almost impossible to meet.

The U.S. Supreme Court has been subject to severe criticism because of the *Roth* case and other cases which interpreted the *Roth* definition. I believe that such criticism is at least partly in error because State and local prosecutors have now brought about a workable situation in the law by bringing cases to court that have resulted in new decisions by the Supreme Court. These new decisions have supplied new definitions and guidelines to work with and we now have hope of solving a grave constitutional problem.

But because of the courage of local prosecutors who were most often defeated in their specific cases, we have decisions which can serve as the basis for new legislation. The law on obscenity has been clarified to some extent. The Supreme Court can only act on the cases that are brought before it and where there is a reluctance to act on the part of prosecutors, particularly at the Federal level, the law cannot be clarified.

In the case of *Redrup v. New York*, 386 U.S. 767 (1967), a successful prosecution against several magazine dealers was reversed, but in so doing the Court stated that the majority of the Justices believed that in situations where a statute was specifically designed to protect chil-

dren, or where the facts demonstrated an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, or in a situation where there is evidence that the work was offered in a manner that pandered to prurient interest, the Court might uphold convictions.

In the case of *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court followed the *Redrup* case in upholding a New York State statute which prohibits the sale to minors under 17 years of age of obscenity which is specifically defined by a law which protects minors.

The *Redrup* case is the bedrock on which we supported the Cunningham-Waldie amendment, which became Public Law 90-206, 39 U.S.C. 4009. We have hope here of correcting deficiencies in the law as pointed out by the U.S. Supreme Court. The administration and Members of Congress from both sides of the aisle agree that on the basis of new Supreme Court cases, we can pass legislation that will withstand any test in the courts.

I hope that we can look for vigorous action in the future. I believe that we will get such action from the Post Office Department. I am impressed with the dedication and ability of Dave Nelson, the present General Counsel of the Post Office Department, and his staff, as I was with Tim May, his predecessor.

The Post Office Department has tried to cooperate with our subcommittee. It seems to me that it may be beneficial to permit the Post Office Department to bring its own cases in court.

At least important matters would get attention under such a system of Government litigation, and I think we should take this question up during our deliberations. We need action as well as reflection.

Now our first witness today is the distinguished gentleman from Virginia, Mr. William Scott. I might state that Mr. Scott is a member of the full committee and has made outstanding contributions since he assumed his duties as a member of the Post Office and Civil Service Committee. We welcome you, Mr. Scott. You may proceed.

TESTIMONY OF HON. WILLIAM L. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Scott. Mr. Chairman, let me commend the committee for conducting these hearings. My own office receives a considerable amount of mail from constituents concerned about the increase in pornography and particularly from parents concerned about obscene literature coming through the mail to their children.

But in talking with other Members of the House, it leads me to believe that this is a general problem and that smut literature is on the increase throughout the country. This is evident by the number of bills which have been introduced in both Houses of the Congress to deal with the problem. I noticed a letter from a colleague a few weeks ago stating that 197 Members of the House and 45 Members of the Senate had introduced 206 bills at that time.

And you will remember last month, Postmaster General Blount was quoted in a newspaper article as saying that his office had received 200,000 complaints in the past fiscal year and, in all probability, the

vast majority do not formally complain to the Post Office Department.

Let me submit, Mr. Chairman, and I have it in an envelope right here, with your permission, some material that has come to my office that has gone through the mails, and some constituents have sent this in to me.

Certainly, I do not suggest that this literature be included in any reports that the committee prepares, but it is merely one copy of each of the various types of literature that we found from a review of our files. And if it should happen that any member of this subcommittee has not seen similar material, it might be enlightening for them to look at it.

Mr. NIX. Without objection, it is admitted for the exclusive consideration of the committee and not to be printed in the record.

Mr. SCOTT. Thank you, Mr. Chairman. I think perhaps if our courts had seen some of this material, some of the recent decisions might have been different.

And I would hope that after the conclusion of your hearings, legislation will be enacted that will reverse the increase of obscene literature now invading thousands of American homes without request from the people receiving it.

Upon careful examination, I think you will find that the persons who design this promotional literature have been careful to include words suggesting that the advertised material is of medical, therapeutic, or educational value. But in each case, one has only to read or to look at the material to find that the real appeal is to arouse sexual interest and exploit the weaknesses of others.

Now, Mr. Chairman, departing from the text, I have introduced three bills, or cosponsored three bills, and I would commend particularly for your committee's consideration, H.R. 13241.

This bill, as I see it, does provide that pornographic literature cannot be sent to anyone without their consent and does make it a criminal offense to do this.

Now, it permits the solicitation, provided that there are no pictures, or no provocative, sexually provocative words in the solicitation. Then, if the people want to receive the pornographic literature, as adults, it is permitted to come to them, but only with their permission.

The question is often asked, what is wrong with the present laws, and the answer seems to be that the laws are perfectly good except that postal officials say they are not enforceable in the light of recent Supreme Court decisions.

However, I believe that we are sometimes guilty of blaming the Supreme Court for everything that goes wrong and letting it stop there. It is the job of Congress to make valid and enforceable laws and I venture to hope that this subcommittee is commencing the process of meeting this need.

Now, at this point, it might be asked, do we really need laws on the subject? Is pornography that harmful?

Frankly, I believe that the vast majority of our citizens favor a decent America and want smut control. We are voluntarily responsible enough in this country to put warnings on medicine bottles. "Keep out of reach of children," they say.

Most remedies in our medicine closets are perfectly safe when taken as directed. There may be a parallel with sexual literature. In the

hands of a normal, mature adult, it may not be harmful but even beneficial.

Most people, I think, choose to throw smut away if it comes involuntarily into their possession. But what is to stop children and adolescents, some of which do not possess the emotional tools to cope with it, from getting obscene matter when it comes right to the front door. Our country has reached a sorry state when parents try to beat their children to the mailbox for fear of what it may contain.

As you pointed out yourself, Mr. Chairman, in your opening remarks for these hearings yesterday, much of this material is aimed at children and, in your own words, "The parents of America have had enough."

It is still against the law to mail explosives. It is against the law to mail barbiturates. It is against the law to mail LSD. These things are harmful to people and it doesn't take much analysis to see the merits of the illustrations. Bombs and dangerous drugs are destructive. It is my belief that pornography, in some ways, is just as destructive to the minds and morals of our young people.

Venereal disease, I am told, has greatly increased throughout the country and that the increase is primarily among teenage youngsters. We might consider what part dirty literature plays in this increase.

Illegitimacy is increasing at an alarming rate despite new birth control measures. I am told that one out of every 13 children born in this country is illegitimate. Certainly other factors influence this figure, but I wonder how much of it is the result of sexual stimulation from pornography.

Only last week, it was reported that a 10-year-old girl had a baby in Alexandria, Va. A member of my staff checked with officials and physicians in the District of Columbia and was informed that it was not as rare as one might think. Indeed, they say there are about 60 under-12-year-old mothers giving birth to children in the Washington area each year. This may be the result of ignorance and low moral standards, but I wonder if pornography did not play a part in these cases.

Sex crimes are increasing each year. In 1966, according to an FBI report, a forcible rape was committed every 21 minutes. Also, I understand that one-half the major crimes in this country are now committed by juveniles. I believe pornography plays its part in this disturbing phenomena.

Mr. Chairman, let me conclude by saying that in any organized society, we need rules to govern that society and we need laws to protect the young of the society. It seems unreasonable to me for us to permit unadulterated and unwanted filth to enter the homes of the citizens of this country. Therefore, I do urge this committee to favorably act upon some measure that will prevent pornographic literature from going through the mails into the homes of our citizens, except when they have consented to its receipt.

Thank you for permitting me to appear and you can count on one vote in the full committee in favor of a curb upon unsolicited pornographic literature.

Mr. Nix. Thank you, Mr. Scott. We are deeply appreciative of the fact that you appeared. I'd like you to state again, briefly, the purposes of H.R. 1341. The chairman of the full committee is now here.

Mr. SCOTT. Mr. Chairman, this bill does find that the mails are being utilized indiscriminately to disseminate advertising and other material designed to exploit sexual sensationalism for commercial and private gain.

It indicates that the use subjects the recipients to this material to an unwarranted invasion of the privacy of their homes, that it reduces the ability of concerned parents to exercise control and to protect their minor children from exposure to this type of material which they believe is harmful, that Congress determines as a matter of policy that the Post Office should not be utilized for the distribution of sexually provocative material invading these people's homes and does wish to protect the minor children from exposure.

Then the main thrust of the bill is section 4011, says that this type of material shall not be deposited in the mail unless, in effect, the occupant has agreed and that if it is addressed to a minor, and contrary to the laws of a State, it is illegal and it provides a penalty to someone that sends unrequested material into the homes or mails it to a minor, a penalty of \$50,000, or imprisonment for not more than 5 years, or both.

Mr. Chairman, this may seem a bit harsh but when these folks are making millions of dollars, \$50,000 is a very reasonable fine or so it seems to me.

If we were talking about the ordinary individual, \$50,000 would be harsh, but this is going out in large volume and, according to news reports, they are making large profits.

So I think we do have to have a rather severe penalty if in fact we are going to stop the flow of this material.

Mr. NIX. Mr. Dulski?

Mr. DULSKI. I just want to commend Mr. Scott for cosponsoring legislation in a field of such importance. Pornographic material is being sent to young boys and girls that belong to the Girl Scouts. They are getting the material because they subscribe to a stamp book or something of this nature.

This is the crux of the whole argument. These people are receiving information from mailers through the medium of exchanging these addresses. This is one of the first things that I think we ought to look into is the mail list brokers. If you subscribe to a magazine, you should have some assurance that your address will not be sold. If you subscribe to a book of the month club, you don't want to have your name and address used by a dealer in obscene material.

I want to commend the gentleman by bringing up the \$50,000 fine. The more severe the fine, the more cautious they will be about this.

I want to add my voice in adding congratulations for sponsoring the legislation and we appreciate your work.

Mr. SCOTT. Thank you, Mr. Chairman. I might add that perhaps we should realize that our youngsters, while they may obtain physical maturity in their early teens, they may be physically capable of sexual acts, but they don't have the emotional maturity, mental maturity to cope with these situations and I feel they do need to be protected.

Mr. NIX. Thank you, Mr. Scott, for a most substantial contribution.

Our next witness is one of our colleagues, the distinguished gentleman from Connecticut, the Hon. Thomas J. Meskill, a Member of Congress. It is a pleasure to have you here. You may be seated.

TESTIMONY OF HON. THOMAS J. MESKILL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mr. MESKILL. Thank you. First I'd like to commend Chairman Dulski for his early remarks dealing with this subject. I remember when the Postmaster General originally announced a legislative proposal, one part of which concerned strong action against using the mails in pornography, our chairman, Mr. Dulski, spoke out strongly, saying he predicted early legislative, committee action on this legislation, and I commend him for it and I want to commend you, Mr. Nix, chairman of the subcommittee, for calling these hearings, because I feel confident and I feel every other Congressman and parent in the country feels confident that out of these hearings is going to come strong legislation dealing with this very serious problem.

I want to speak out in strong support of H.R. 10876. Incidentally, this is one-half of the administration bill that Chairman Dulski spoke about at that time.

It is a bill which I have cosponsored in order to curtail the offensive intrusion into private homes of sexually oriented mail.

The proliferation of frankly obscene material—printed matter, photographs, advertisements, and the like—has reached such proportions as to be considered a national scandal.

Much of the material is now mailed—unsolicited—into private homes and does not qualify even under the Supreme Court's liberal Roth decision as having the smallest iota of "redeeming social value." It is plainly and unequivocally of the most sordid, of the most squalid prurience and thus offensive to both individual privacy and common decency.

It is time to deal with the unsolicited dissemination of obscene mail through strong legislative action. Thus, I have joined in sponsoring the "Offensive Intrusion of Sexually Oriented Mail Act of 1969."—H.R. 10876.

This bill states the finding of Congress that "the U.S. mails are being used for the indiscriminate dissemination of advertising matter so designed and so presented as to exploit sexual sensationalism for commercial gain;" and further that:

The Congress determines . . . it . . . contrary to the public policy of the United States for the facilities and services of the United States Post Office Department to be used for the distribution of such materials to persons who do not want their privacy invaded in this matter or to persons who wish to protect their minor children from exposure to such material.

H.R. 10876 provides for protection of private homes from unsolicited sexually oriented advertisements. Thus, this bill requires that any person mailing such material place on the envelope or cover his name and address, clearly identifying himself as the sender.

Furthermore, any person may file with the Postmaster General a statement that he desires not to receive any such material through the mails. The Postmaster General shall compile and maintain a list of these people, who will be, after 30 days, automatically protected by law from receiving the proscribed matter.

And the way he is protected, the mailer has to go through that list and remove anyone who appears on the list that the Postmaster General has compiled.

H.R. 10876 provides penalties of a maximum \$5,000 fine, or imprisonment for 5 years, or both, for a first offense and a maximum fine of \$10,000 and/or 10 years imprisonment, for a second or subsequent offense

I strongly urge passage of this bill. I cite testimony given last year by FBI Director J. Edgar Hoover, as indicative of the potential harmful effect of unregulated proliferation of pornographic material:

The publication and sale of obscene material [said Mr. Hoover] is big business in America today. . . . It is impossible to estimate the amount of harm to impressionable teenagers and to assess the volume of sex crimes attributable to pornography, but its influence is extensive.

Sexual violence is increasing at an alarming pace. Many parents are deeply concerned. . . . Pornography in all its forms is one major cause of sex crimes, sexual aberrations and perversions.

There are some who maintain that the unrestricted sale of pornography is harmless, or even conducive to decreasing sexual looseness and violence. I do not believe that substantial research has been conducted which can prove the validity of this point. Even greater is my concern, however, with the increasing frequency with which unsolicited pornography is finding its way into individual households.

Mr. Scott handed Mr. Nix an envelope with such mailings in it. I must confess that I immediately destroyed the ones that my constituents sent to me because I wouldn't want to be caught with one on my desk or even in my wastebasket unless it was torn up.

Such activity is clearly an encroachment upon the privacy of millions of American citizens, and furthermore, a blatant misuse of the function of the U.S. Post Office. It is intolerable that this offense be allowed to continue.

As an example of the degree to which the mailing of objectionable material has become a national problem, I cite recent Post Office Department figures: During the first 10 months of fiscal year 1969, the Post Office Department received 172,000 complaints from recipients of unsolicited, sexually oriented materials.

Mr. Scott I think updated my figure a little bit. He said it is now over 200,000.

And while the laws currently on the books have allowed some action by the Post Office Department and the Department of Justice in allaying this flow of filth, the available statistics clearly indicate the need for more stringent laws.

President Nixon said in May:

There are constitutional means available to assist parents seeking to protect their children from the flood of sex-oriented materials moving through the mails. The Courts have not left society defenseless against the smut peddler; they have ruled out reasonable government action.

I suggest that H.R. 10876 constitutes not only "reasonable Government action," but urgently necessary rectification of the current disgraceful situation. Both the well-being of minor children throughout the country and the inviolability of household privacy demand Government response to curb the appalling influx of pornographic materials where they are neither asked for nor desired.

I urged immediate passage of H.R. 10876—we can afford no further delay.

I would like to add, Mr. Scott and I believe Mr. Dulski spoke about the way some of this material gets into the households, and the mail-

ing lists of girls' and boys' magazines are used. And I am very unhappy to say that in my own State of Connecticut, the Motor Vehicle Department sells the registration lists and they sell them, they claim, and they don't get much revenue from it, to an organization which claims to deal only in automotive parts and automotive supplies—seat covers, and so forth.

And yet I have had people write to me and tell me that they have received pornographic material through the mail and the address that is on the envelope appears in that form in only one other place and that is the motor vehicle registration—that in all their other correspondence, the letterhead and everything else, all their magazines, they do not use the middle initial or full name spelled out, and yet time and time again these people complain that they are receiving pornographic material and once again they wonder where the name was received from, and this is the only way they can trace it through the list of the motor vehicle department.

The great State of Connecticut, I know, does not wish to be a party to this type of activity but what I am stating is that when a State government or city government sells a mailing list to any company, they have no control over what that company will subsequently do with the list.

So this points out just how devious these panderers are in getting mailing lists in order to promote the pornographic material.

Mr. NIX. Mr. Meskill, the consensus condemning this practice is great—and I have experienced it on any question that has come before the Congress or any committee thereof in the last 15 years that I have been here. I think it is safe to say that more Members of Congress have participated in the introduction of legislation on this question than on any that I can think of, and I am confident that out of these hearings there will come legislation to be presented to the Congress.

My only concern is that the analysis of the decisions of the Supreme Court have been carefully made so that the wording of the legislation to be presented is carefully framed in order to meet any adverse decision that might come in the future.

I think that is essential to the success in our endeavor. Mr. Dulski?

Mr. DULSKI. Thank you, Mr. Chairman. I just want to add my commendation to our colleague from our committee. He has done a great deal of work on this problem of pornographic material.

In regard to H.R. 10876, the administration bill, I feel that it doesn't go far enough. Once the material is received, it is too late.

The sections of the bill which I added in H.R. 10867 have a different aspect. They will regulate the flow of the material to minors.

Don't you think it is better to stop the mail right at its source instead of going through this mailing list procedure? The Postmaster General can restrain them from sending this under my provisions.

Mr. MESKILL. If I felt, if I could be assured that your bill would stand the test of the Supreme Court challenge, I would agree with your conclusion. Personally, I would go perhaps even further than you. But I know such legislative action would be unconstitutional.

I share Mr. Nix's concern for the constitutionality of the legislation we pass. I am confident that there are enough aroused parents in this country who would file their claims with the Postmaster General to the effect that they do not wish to receive this kind of material, that

this really, I think, I am certain, that this would withstand any attack on a constitutional basis, because certainly the courts would never say that a person does not have the right to refuse to receive certain kinds of mail.

I think I am a little concerned—I assume from your bill, and I haven't read it—that the Postmaster General either reads the material and decides it is pornographic and then restrains it.

Mr. DULSKI. He doesn't read it. It is just the idea of what is pornographic material?

Mr. MESKILL. At some point, censorship enters into this.

Mr. DULSKI. We have to challenge the courts and find out what is obscene and not obscene.

Mr. MESKILL. I think when it is referred to sexually oriented, we are saying, in effect, regardless of whether or not it is obscene, even if it is a copy of Gray's Anatomy, or illustrations from it, if it is sexually oriented, a person has the right to tell the Postmaster General, I don't want this material delivered to my house, and I think this may be the most protection we can give without running the risk of coming up with a *Roth* case, for example, where we end up having the legislation declared unconstitutional.

And I think the legislation passed last year was of some help, but obviously not enough help. I think in H.R. 10876, and I know there are other bills which contain the same provisions, I think either one of these would be the next step we could take and be sure it would pass the constitutionality test.

I think if they were passed and we still found a tremendous influx of material, then I would agree that perhaps we should go further and run the risk of incurring an adverse decision of the court.

I want to make it clear that as far as I am concerned personally, people who distribute pornographic literature, in my opinion, are no better than persons who peddle dope, because whether you are destroying the bodies or the minds of young people, you are destroying these young people, and I would show them no mercy, for that reason.

But I do recognize this fact, that we are faced with this problem of censorship and this is the reason that I am enamored with the approach taken by H.R. 10876, because it doesn't get into the censorship problem. I think it is much easier to decide what is sexually oriented than to decide what is obscene.

Mr. DULSKI. Thank you very much.

Mr. NIX. Thank you. Mr. McClure?

Mr. McCLURE. Thank you, Mr. Chairman.

I wanted to ask a question. If I understand your statement correctly, you would be willing to go farther than H.R. 10876, as far as you personally are concerned, but you feel that it is better to take this step that you are certain will be upheld than to place reliance upon measures which go further but might be ruled offensive to the Constitution by the Supreme Court; is that correct?

Mr. MESKILL. That is correct. That is my concern.

Mr. McCLURE. If we should enact H.R. 10876 or legislation substantially similar to that, would you think it might be advisable also to enact legislation that goes further than that and confront the Court with the issue of what is obscene, so we have the advantage of the sure step as well as the possible advantage of going further than that?

Mr. MESKILL. I must confess I hadn't considered that tactic but I think it might be a good one. We might be able to have concurrent legislation here where we had a floor which we could rely on and hopefully a ceiling to keep out the rain.

Mr. McCLURE. I think your statement and responses to the questions that have been asked here today indicate the depth of your interest and the fact that you have indeed given it a great deal of study and I wish to commend you on the statement and your interest. Certainly the bill on which you have been a cosponsor has my support, along with some other measures which perhaps do go further.

Mr. MESKILL. Thank you.

Mr. NIX. Our next witness is the Honorable Chalmers P. Wylie, a Member of Congress from Ohio, who has exhibited a deep and continuing interest in the subject. I am glad to welcome you.

TESTIMONY OF HON. CHALMERS P. WYLIE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. WYLIE. Thank you, Mr. Chairman, and distinguished members of this subcommittee. I appreciate the opportunity to testify this morning and thank you for inviting me.

I commend you for your efforts to find ways to strengthen the hand of the Post Office Department in dealing with pornography.

Almost every day, since I was sworn in as a Member of Congress, I receive letters protesting the receipt in the mail of more smut literature. Until March 6 this year, I sent the letters and examples of smut literature being received to the Post Office Department. On March 6, 1969, Congressman Hunt and I introduced H.R. 8397. Since then, I have retained as evidence at least one copy of the various types of material being sent. I am sure that members of this subcommittee have seen any material I have, but if you would like to examine the evidence, I have it with me.

H.R. 10867, which is before you, is similar to H.R. 8397 which Congressman Hunt and I introduced, and would prohibit the dissemination through interstate commerce or the mails of obscene materials to persons under the age of 18 years. It would also provide that the Supreme Court and court of appeals would not have jurisdiction to review any determination that material was, in fact, designed primarily to appeal to a minor's prurient interest.

Since the introduction of H.R. 8397, I have received something over a thousand letters and over 3,000 names on petitions in support of H.R. 8397. Among the petitions was one from Buckeye Branch 78 of the National Association of Letter Carriers containing 838 names of letter carriers. The petition states if your bill were passed it would "help relieve us of the guilty conscience of having to handle such filth." Mr. James H. Rademacher, President of the National Association of Letter Carriers, also sent a letter. His statement and other supporting data is contained in the Congressional Record for June 4 at page H4484. I would like to call your attention to my remarks and the remarks of other Members made in a special order on this subject in the Congressional Record to which I have just referred.

Gentlemen, the examples of smut material which I have here is filth, absolute filth, that would offend and shock the sensibilities of anyone, save those with a warped mind.

To peddle his wares, in sufficient volume to generate large profits, the purveyors of smut must advertise, and direct mail has become the solicitation medium for most smut operations. The advertisements themselves contain vivid samples of the filth being offered for sale.

These materials often arrive in envelopes which do not reveal the contents and unsuspecting housewives, children, and secretaries, in business offices in open view to the public are subjected to this filth unwittingly. This piece of material was received by a 12-year-old boy. There was no mistake that it was sent to him because his name is different than his father's and it was addressed in the boy's name. The mother of a 15-year-old boy sent him to my office with this book he had obtained through the mails.

The people who sign petitions and protest the mailing of the smut to them are all in accord with the need to keep obscene literature and materials from the mails.

The Supreme Court has strained through several cases—the *Roth* case, the *Jacobelli* case, "Memoirs of a Woman of Pleasure," *Redrup*, and *Ginzburg* and *Ginzberg*. From all of these cases, the Supreme Court has developed a definition of obscene which is not too much help. However, in the second *Ginzberg* case, the Court upheld a criminal statute from the State of New York which prohibits the sale to minors of obscene material and based on its appeal to minors and not on whether an adult might find the matter obscene. Based on the second *Ginzberg* case, Congressman Hunt and I introduced H.R. 8397 which prohibits the mailing of material which would be "harmful to minors" and "harmful to minors" is defined as:

That quality of any description or representation of whatever form, which depicts nudity, sexual conduct, sexual excitement, or sado-masochistic abuse which—

(a) predominantly appeals to the prurient interest of minors;
(b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) is utterly without redeeming social importance for minors.

A statute could readily be passed meeting this test which would reduce considerably the flow of smut materials into homes where there are persons 18 years of age or under. The sender of the mail would have the burden of determining whether there is a person 18 years of age or under in the home. In this way the traffic could be reduced considerably and immediately, and it would give us time to act on the total problem.

In addition to the widespread public support for antiobscenity legislation, there is considerable support in the Congress. As of July 18, 197 Members of the House and 45 Members of the Senate had introduced 206 bills dealing with the problem of obscenity and pornography. By now these figures have increased. One need only skim the Record to learn that obscenity legislation in some form is introduced almost every legislative day.

With this much support we can pass a bill if we want to, and I think we want to. In closing, I would like to thank you for the opportunity to appear before this subcommittee and trust that you will

report a bill out which would at least prohibit the mailing of materials to minors. Thank you.

Mr. NIX. Let me ask you this. Do you favor the position expressed by Mr. McClure a moment ago, that it might be desirable to go further than your bill does, for the purpose of having confrontation on certain features of the proposed legislation?

Mr. WYLIE. That it might be desirable to have a confrontation?

Mr. NIX. Yes. The extent of your proposed legislation has to do with youngsters under 18 years of age. Now, suppose we went into the question that has been dealt with by the Supreme Court in the Ginsberg case and others, to go into the question of what actually is wrong with the subject. Do you think we ought to do that now—ought to force the issue, bring it up once and for all so that we are certain to conform—have our language, or whatever it is, conform to the thinking behind the decisions of the Court?

Mr. WYLIE. Yes; I understand your question now, Mr. Nix, and I do feel that we need to get to that eventually.

I think it will take a little time. I believe when we begin examining the whole question of what is obscene and what is obscenity, we run into very difficult problems of definition as we go through these various decisions.

The definition which was apparently finally developed by the Supreme Court is, as I say, one which seems rather obscure and not too much help.

It says that these two elements must coalesce after all these decisions. The dominant theme of the material taken as a whole appeals to a prurient interest in sex. The material is apparently offensive because it affronts the contemporary community standards, relating to description or representation of sexual matters and is considered utterly without redeeming social value.

Now, when you get to the last part of it, it seems to me you are going to have a lot of problems to determine whether it is utterly without redeeming social value. I think when you get into that, that we do indeed open a Pandora's box, so to speak, and it will take a considerable amount of time.

What I am suggesting, Mr. Chairman, is that we do have one area clearly established by the Supreme Court where we can act and that is in the second Ginsberg case. In the case of minors, they upheld a statute from the State of New York which is incorporated in the bill which Congressman Hunt and I introduced, so we know that this language is acceptable to the Supreme Court. It could be acted on now and it could, I think, substantially reduce the flow of this smut material into the homes of America.

Mr. NIX. Conceding that the result would be a substantial reduction of the flow into the homes of America, if the passage of your legislation was effected, don't you think that we will be left, while not exactly where we are now, but still with a very grave pressing problem on our hands in this area?

Mr. WYLIE. No question about it, and I think we must meet the problem eventually and the sooner the better.

Mr. NIX. Mr. Chairman?

Mr. DULSKI. Thank you. I congratulate the gentleman for his fine statement and contribution in this field, in trying to curb smut mail.

I notice in your bill, H.R. 8397, page 4, on the bottom of section 2, I am a little concerned about the language. The Supreme Court shall not have jurisdiction, the court of appeals shall not have jurisdiction.

According to some of the cases that were presented and some of the arguments that we have had at the Justice Department, the Justice Department does not want to take a chance of going to court. And by your bill, I wonder if we would be giving the opportunity of trial for an individual, if neither the Supreme Court nor the court of appeals has jurisdiction, and—would that be constitutional?

Mr. WYLIE. I think the section is constitutional. I think the Congress of the United States can define the jurisdiction of the Supreme Court and the court of appeals. In my opinion, it is definitely constitutional.

However, it would be controversial and it might lead to a series of cases on the subject and if such a statute would be passed, it might hold up the enforcement of the statute on that particular section.

I would like to see such a section incorporated in the law. However, if the chairman and the chairman of the subcommittee would feel that it might jeopardize enforcement of the law dealing with the dissemination of the obscene material to minors, then I think that I would have no objection that it be eliminated from a bill which might pass this Congress and continue the jurisdiction of the courts of appeals and the Supreme Court as it is now in this type of a case.

I might add that Senators Dirksen and Mansfield have introduced a bill which has identical language. I offer that as authority to the fact that it might be constitutional.

Mr. DULSKI. I was just going to comment on the fact that we are very much interested in passing legislation that will curb this smut mailing.

Thank you for appearing here this morning.

Mr. McCLURE. I think really what these sections are designed to do, are they not, is to leave in the hands of the jury and the trial court the determination of fact with respect to whether or not it offends the community standards and various criteria set down by the Court, is that not the intention?

Mr. WYLIE. That is correct, and the jurors are, of course, the finders of fact in our judicial process.

Mr. McCLURE. That every defendant would have his day in court and have the opportunity to have a trial by a jury of his peers on those facts and the jurisdiction of the court of appeals and the Supreme Court would be excluded from that area only, of the fact, as to the nature of the material, is that not correct?

Mr. WYLIE. That is correct and on the question of whether it was designed primarily to appeal to a minor's prurient interests, on that question of fact.

The question of law would still remain to the court of appeals and the Supreme Court. I could understand that there might be some fusing of the question of fact and the question of law.

Mr. McCLURE. The reason I ask this question, is because I think it is a lawyer's argument as to the distinction of the appeal process that is defined in your bill. It shouldn't be lost on the public, that there is an appeal on all other factors in the case except this one.

Mr. WYLIE. I thank the gentleman for making that point clear.

Mr. McCLURE. In this approach that you adopt in your bill, isn't this placing upon the mailer the burden of determining whether or not there is anyone in the household under 18 years of age? Is there any question in your mind as to the defense or lack of criminal intent?

Mr. WYLIE. Not in my mind, no. I have no problem settling that. We say that a certain act has criminal sanctions and—

Mr. McCLURE. The only intent that would be required here is the intent to mail?

Mr. WYLIE. That's right.

Mr. McCLURE. And you feel that is sufficient, that that sufficiently meets the requirement of criminal intent?

Mr. WYLIE. That is my judgment; yes, sir.

Now, in the *New York* case, with reference to the New York statute, it was the purchase of a book, so you didn't get into the question of mailing. Maybe that's what you are coming to, I don't know, but I appreciate that, but in my judgment, if the mailer sends in literature which is obviously obscene and obviously appeals to the prurient interest as a matter of fact, then I think there is an intent to violate the law, if he does not ascertain whether there is a person 18 years of age or under in the household.

Mr. McCLURE. The thing I am getting to is that I can conceive of a defense on the basis of the requirement that there be a union of act and intent to constitute a criminal offense. Some defendant is going to say, "Well, I didn't know there was a person under 18, I didn't intend to violate that law, and therefore I can't have that criminal intent which is necessary to constitute a criminal offense." If I understand, your answer would be—as I am sure the answer of the court would be—that the only intent that's required is to do the proscribed act which is mailing to such a household.

Mr. WYLIE. Yes. I think we can gain that from the decision of the Supreme Court in the second *Ginsberg* case. I had with me at one time this morning a copy of the Congressional Record where we took a special order, and I think that point in there, and I refer to that special order. But I think if you read through the second *Ginsberg* case, perhaps you will get the impression, as I did, that there is a different test for minors. That is obviously in there.

And that we can go pretty far in proscribing that which, insofar as minors are concerned, is a criminal act.

Mr. McCLURE. I am inclined to agree with you and I wanted to bring out for the record the legislative intent here of what your understanding was.

You refer to the fact that you received a thousand protests. I would assume that they were on the appeals provision, is that correct?

Mr. WYLIE. No. I am sorry. I didn't make that clear. I have received a thousand letters in protest of receiving obscene material in the mail.

Mr. McCLURE. Not in protest to your bill?

Mr. WYLIE. No; I have not received one protest on my bill.

Mr. McCLURE. Thank you. I am glad to have a clarification.

Mr. WYLIE. I am glad you cleared that up, too.

Mr. McCLURE. I have no further questions. I would commend the gentleman for his interest and certainly I am in agreement with you that the number of bills that have been introduced and the number of Members of the House who have shown this interest do indicate

that we can pass a bill. The only danger that would lie in it, it seems to me, is that each of us may have a different approach and that we never get a majority opinion behind any single piece of legislation.

Certainly, I think that is the challenge before this subcommittee.

Mr. WYLIE. I think that is the danger of the challenge but last week I sent a letter to every Member of the House and Senate who had introduced a bill dealing with this subject, and suggesting that they write to the chairman of the Subcommittee No. 3 in the Judiciary Committee, and ask for hearings.

But you have gotten to it before they did and I am glad you have. But I made the point in the letter that with this kind of weight behind all these bills, it seemed to me that we could at least have hearings on it and attempt to develop a colloquy and dialog, which could lead to meaningful legislation.

Now, the real point I want to make with this committee here this morning is that I think we can act in this one particular area which the Supreme Court has been very specific in, the area of minors, and we can indeed take the language of the New York statute which has been upheld as to its constitutionality by the Supreme Court and incorporate it in the law here and pass it through Congress, rather quickly, and this would be in my judgment a very strong beginning.

Mr. NIX. Thank you very much.

Mr. WYLIE. Thank you.

Mr. NIX. Our next witness will be Mr. James Rademacher, president of the National Association of Letter Carriers. I understand you have an appointment.

Mr. RADEMACHER. Yes; and I appreciate the indulgence, Mr. Chairman, of the committee members and also the other witnesses at this time.

I am pleased that once again the very distinguished chairman of the full committee, Representative Dulski, is sitting in at these hearings. He has made a habit of doing so and I believe he is one of the most dedicated and interested people in the postal establishment of the entire Congress. Chairman Nix, you and the subcommittee members are to be commended also for bringing to the forefront this problem which has caused several hundred bills to be introduced and caused great concern among the postal patrons on this particular subject.

TESTIMONY OF JAMES RADEMACHER, PRESIDENT, NATIONAL ASSOCIATION OF LETTER CARRIERS

Mr. RADEMACHER. Mr. Chairman and members of the subcommittee, my name is James H. Rademacher. I am president of the National Association of Letter Carriers which represents more than 200,000 men and women who carry the mail and who are deeply concerned about the legislation under study by this committee today.

I don't want to give the impression that I have any pretensions in regard to the technical aspects of the problem before you today. I know there are constitutional problems involved, particularly in regard to the provisions concerning free speech and expression. I also know that there is a very difficult problem concerning the definition of obscenity and the distinction between obscenity and mere frankness—or even between obscenity and vulgarity.

We want to leave such distinctions up to the lawyers and the legislators. I feel that any normally sophisticated adult person can determine at a glance what is obscene and what is not, but I also know that it is often very difficult to translate a purely instinctive reaction into viable legal language.

On that subject, Mr. Chairman, I would like to merely call attention to the fact, without having it become part of the record, a document that I received myself in the mail last week, unsolicited.

This document is, on the surface and cover page, nothing more than small type which introduced me to the booklet which is entitled "The Photographic Manual of Sexual Intercourse" and upon opening the brochure I find eight pictures of nude men and women actually engaged in sexual intercourse.

The statement on the brochure makes our point, when it declares "Are the photographs of the man and woman engaged in sexual intercourse really necessary? We say yes, because it has always been and always will be true that a picture is worth a thousand words."

I am certainly glad that I don't have such a grave responsibility, and I congratulate you, Mr. Chairman, and the members of the committee, for attacking this problem in the straightforward manner you have adopted.

Our position boils down to a single proposition, Mr. Chairman: something has to be done—soon and effectively—to dam up the poisonous river of revolting filth that is pouring into America's homes today.

Our members—the letter carriers of America—must, by law, deliver to the homes of America whatever mail they are directed to deliver. They have not—and of course, should not have—any discretion in this matter. Still—while rejoicing in the fact that they are the "messengers of sympathy and love, the servants of parted friends, the consolers of the lonely, the bond of the scattered family, the enlargers of the common life, the carriers of news and knowledge" and all the rest—they also are painfully aware that their need must be, through the very circumstances of the job, the bearer of the poison-pen letter—the transmitter of the demand for blackmail—the deliverer of the eviction notice—the disseminator of subversive material.

While these matters make letter carriers uneasy, they are part of the job. All letter carriers would like to feel that they carry within their satchels a cargo of sweetness and light, unstained by human frailty or human sorrow—but, of course, we all know that, in an imperfect world, this is impossible.

But, Mr. Chairman, pornography is different. It attacks the young—it attacks the unprotected—the youngsters who have the most pitifully inadequate defenses against sexual aggressions.

I know, and you know, that we are bound by law to deliver to the homes of America everything the Government says we must deliver. Yet, if, under some insane circumstances, we were ordered to deliver to every home in the country an extremely volatile and noxious type of nerve gas which was capable of reducing every householder in the Nation to a state of hopeless idiocy, we would be expected to protest against the assignment. And indeed we would protest.

The necessity of delivering a steady stream of pornography into the homes of America is equally disturbing to our members.

The average letter carrier is a family man. Almost 90 percent of our members are married, and among the families within the organizations the average runs to about three children.

In many communities of America letter carriers service residential routes for years, even decades. They know when their housewife patrons are expecting children; they are among the friends who welcome the infant's birth. They watch with affection the development of the child. They watch it grow into young adulthood—high school—college—marriage and the production of the next generation.

It is a very close—and a unique—involvement. I don't know anything in American life quite comparable to this relationship. Thousands of our letter carriers are witnesses at christenings among their patron families—they attend the confirmations or bar mitzvahs as the case might be—they attend the weddings and the funerals—and start the same cycle all over again with the next generation. It is a unique phenomenon in American life.

So, Mr. Chairman, the letter carriers feel an indignation and sense of guilt when they are called upon by law to deliver to the homes of their friends, the patrons, the unmitigated and highly poisonous filth which the courts now permit—and by implication, order—them to carry.

One distinguished and indignant member of our union wrote me recently in these words:

I sometimes feel that the courts have transformed me into a sewer pipe. I have been forced into becoming a transmitter of moral pollution, which is the most pernicious and the most damaging type of pollution known to God or man.

There is a serious moral responsibility involved here.

As St. Luke says in his gospel (chapter 17, verses 1 and 2), Jesus was particularly severe when speaking of those who would pervert or subvert children and rob them of their innocence:

Offenses will come—but woe to him through whom they come! It were better for him that a millstone were hanged around his neck and he cast into the sea, than that he should offend one of these little ones.

The laws as they are written and interpreted today leave the letter carrier no choice. He becomes the innocent instrument through whom the offenses are committed, and this unbecoming and unavoidable role causes him great moral revulsion. Who would relish the position of being—innocently and through necessity—the instrument of subversion and perversion of the morals of the young? Many of our members admit that when they get through with the distribution of some mailings they feel physically and spiritually contaminated by the filth they are called upon to deliver to the innocent.

Mr. Chairman, I know we live in a permissive society—although I feel that much of the present permissiveness has been forced upon the people. An aggressive and unprincipled minority is forcing upon a more decorous majority of the population a standard of morality that is far lower than the majority desires.

The extremely permissive forces in this controversy—backed by some of the court decisions—have decided that the American people have a standard of community acceptability in these matters which would have raised eyebrows in the most unsavory neighborhoods of Sodom and Gomorrah and would have a certain degree of dismay in the more liberal suburbs of Pompeii.

I simply do not believe the standard of moral acceptance in this country had deteriorated anywhere near to what the apostles of permissiveness claim. I believe that the average American is revolted by—and deeply resents—the uninvited filth that the mails deposit in his home.

I can say this with a certain degree of confidence, Mr. Chairman, because by and large, the letter carriers, through their occupation become fairly sensitive barometers of public opinion. Their patrons tell them what they think, and they tell us.

Believe me—they tell us.

And their reports reflect an alarm, a disgust, and a hope that Congress will take strong and remedial action against this vile intrusion.

I know, Mr. Chairman, that in this so-called permissive society I sound like a “square.” On the other hand, I know also that most members of Congress are fundamentally “square” also—and they reflect the attitudes of their constituents, who sent them here. The Nation, in short, is far more “square” than the apostles of permissiveness will have us believe.

And, if I am square, let me say that our members—the letter carriers of America—are equally “square” in their thinking. Our national conventions on several occasions have passed resolutions protesting the obscene and pornographic material they are forced to deliver, and at our latest convention, in Boston in 1968, they passed a particularly forceful and insistent resolution on the subject.

I might add that I personally serve on the executive committee of Morality in Media, a national organization devoted to the suppression of pornography in the mails.

I have a further thought I would, if I may, share with you.

Philosophers, dictators, statesmen and churchmen—for good purposes and for evil purposes—have for 20 centuries claimed that if they could just be given control of the youth of a nation, they could mold them in any form or shape they desired—and could, therefore, mold the future of that nation in any form or shape they desired.

I cannot help but think that the present and sudden wave of total obscenity in this Nation springs from political sources.

What better way is there to insure the future degradation of the nation than to pervert its youth? What better way than to destroy all sense of idealism, to make a mockery of the Christian-Judaic concept of marriage, to degrade the tradition of family life? What more effective way than to make of hedonism a God and to commit to the flames all spiritual values, all commitment to the traditional virtues of self-restraint and moderation and reasonable self-sacrifice.

I cannot think of a better way to insure the degradation of America's future than to follow the totally permissive paths that we are now being urged to follow.

I want to make this following point crystal clear, Mr. Chairman—because we shall undoubtedly be attacked on this score unless I do make it clear.

We do not want in any way to censor the mail we deliver. We do not set ourselves up as judges of what is obscene and what is not: And we do not seek in any way the right of making such legalistic decisions.

But—as citizens as well as public employees—we feel we have a perfect right to express our disgust and alarm at the quality of some

of the material we are forced to deliver to our patrons. We feel we have the right to plead for relief from the disgusting duty of delivering moral poison to the homes of America.

We are not going to favor one bill over another bill—one approach over any other approach. All we ask is that Congress—through your leadership, Mr. Chairman, and through the leadership of this committee, agree upon a viable approach which will stem the tide of pornography which is undermining the foundations of the American society of tomorrow, and then enact it into law.

Thank you very much for the opportunity to appear here today.

Mr. NIX. Thank you. I might say that you have concentrated in a single statement the essence of all of the thought of the hundreds of people that I have heard from. I thank you for it. Mr. Chairman?

Mr. DULSKI. I heartily congratulate you, Mr. Rademacher, for your fine statement.

It typifies the very deep public spirited concern our postal employees have with the grave social problem that the subcommittee has before it.

I know from experience that our letter carriers and other postal employees will continue to give—as they have always given—their vigorous support to the Congress and the Postmaster General in this endeavor, whenever possible.

Again, I want to thank you for your fine statement.

Mr. McCLURE. I, too, want to commend you on what I think is a very significant contribution to the effort of this subcommittee to come up with some legislation.

I want to particularly call attention to your statement on page 5, in the middle of the page, in regard to the permissive society and the feeling which you have expressed here that much of the permissiveness has been forced upon the people.

I think you are speaking from the heart of America when you make that statement and I certainly commend you on it.

I would also like to note in passing that the statement on page 7, concerning your feeling that the sudden wave of total obscenity in this Nation, springs from political sources—I think there are a great many people in America who share that conviction.

Thank you very much for what I regard as a very fine statement.

Mr. RADEMACHER. Thank you sir.

Mr. NIX. Our next witness is Mr. Will Wilson, Assistant Attorney General, Criminal Division, Department of Justice.

TESTIMONY OF HON. WILL WILSON, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY HARLAND F. LEATHERS, CHIEF, GENERAL LITIGATION, CIVIL DIVISION; BOB MAHONY AND ERIC RUBIN OF THE CRIMINAL SECTION; AND JOHN DEAN, ASSOCIATE DEPUTY ATTORNEY GENERAL

Mr. WILSON. Thank you very much, Mr. Chairman, Mr. Dulski, and Mr. McClure. I am accompanied here today by several members of the Department of Justice who are experts in the present legislation.

Mr. NIX. Will you introduce them for the record?

Mr. WILSON. Yes, sir. Mr. Harland F. Leathers, Chief, General Litigation, Civil Division, who handles those cases originating from the present legislation allowing a patron of the postal department to file a complaint with the postal department and have his name removed from a mailing list.

Mr. Bob Mahony and Mr. Eric Rubin of the Criminal Division, who are assigned the responsibility of prosecutions under present obscenity statutes, and Associate Deputy Attorney General John Dean, who generally works in the field of Congressional liaison in the Department of Justice. I might say I would welcome questions from the committee addressed to these gentlemen especially, who know more about this area than I do.

So they are here for your use.

I have a prepared statement for the record from the Department which you may wish to have me read or I will simply introduce it and discuss it.

Mr. NIX. What is the wish of the committee?

Mr. DULSKI. It is a short statement. I think we can have the statement read.

Mr. McCLURE. I would agree with the Chairman.

Mr. NIX. Would you proceed with the reading of it?

Mr. WILSON. In his message to the Congress on May 2, 1969, President Nixon expressed his deep concern with the increased volume of sex-oriented material being purveyed throughout the United States, and recommended three new legislative approaches which would enable the Federal Government to deal more effectively with the distribution of pornography.

The President called for the enactment of legislation that would make it a "Federal crime to use the mails, or other interstate facilities, to deliver to anyone under 18 years of age, material dealing with a sexual subject in a manner unsuitable for young people." He requested a second measure that would "bar the exploitation of a prurient interest in sex through advertising."

These proposals were transmitted to the Congress by the Attorney General and introduced in the House as H.R. 11031 and H.R. 11032. They have been printed and referred to the Committee on the Judiciary.

The third measure recommended by the President, which is incorporated in title II of the postal rate bill (H.R. 10877), would afford each citizen a remedy against receiving certain defined unsolicited advertisements. I note that the provisions of this latter proposal are embodied in H.R. 10867. Yesterday, General Counsel Nelson of the Post Office Department, testified as to the desirability of giving all citizens this method of protecting their homes from unwanted sex literature. In this regard, the Department of Justice fully concurs with the views he expressed.

The other major provision of H.R. 10867 concerns the mailing of sexual material and advertisements to minors. The proposed section 4011 of title 39, United States Code, would create a new classification of matter which is nonmailable to persons below the age of 16 years, and is designed to remove the profit from the dissemination of these materials to our youth. While we agree with the aims of this proposed section, we believe that on the whole it lacks certain important pro-

visions which make it a less desirable approach for the protection of minors than that embodied in the legislation before the Judiciary Committee.

Initially, I note that the enforcement machinery for section 4011 would be provided by incorporating the existing provisions of 39 U.S.C. 4006, which provides the Postmaster General with certain administrative remedies against persons who mail unlawful matter. I believe that yesterday General Counsel Nelson discussed the enforcement problems involved in the operations of section 4006. Therefore, I will not dwell on this issue other than to again point out that these factors would surely limit the effective enforcement of section 4011.

Of equal concern to the Department of Justice is the fact that the "minors" provision of H.R. 10867 does not provide for criminal penalties when the prohibited advertisements and materials are disseminated. The Attorney General has proposed a maximum penalty of a \$50,000 fine and 5 years imprisonment for such a violation. We regard the inclusion of criminal penalties as essential if this statute is to have a truly deterrent effect in halting the distribution of these sordid materials to children.

In addition, section 4011 would require that the materials be designed primarily to appeal to the prurient interest of the viewer, listener, or reader, if they are to be nonmailable. Assuming that the terms "viewer, listener, or reader" refer only to minors, this definition would allow any sexual material to be delivered to minors so long as it lacked an appeal to their prurient interests. We believe that the inclusion of this element would render the proposal unnecessarily narrow in scope and hamper its effectiveness. In addition, difficult problems of proof are posed by the question of what appeals to the prurient interest of a minor. In an effort to reduce such problems, the administration uses as its yardstick "harmful to minors." This is defined in terms of what is offensive to prevailing standards in the adult community concerning what is suitable for minors and what is substantially without social value for minors. We believe this dual standard substantially broadens the scope of the law while, at the same time, comporting with Supreme Court decisions.

Finally, it is important to point out that the minors provision of H.R. 10867 extends solely to distribution through the mails. To be fully effective, any final enactment should foreclose the delivery of proscribed materials to minors through the other channels of interstate or foreign commerce as well.

It is my firm belief that the legislation proposed by the administration to protect minors from the sordid materials they now receive will better provide the Government with the tools necessary to accomplish our objective. I assure you that the Department of Justice is implementing a vigorous enforcement program to the full extent of its resources, while seeking to develop new proposals as the times and circumstances may warrant. Should the committee decide to report out H.R. 10867, the Department of Justice would appreciate a further opportunity to submit some technical suggestions.

This concludes my formal statement; either I or Mr. Leathers would be pleased to answer any questions you may have.

Mr. NIX. I would like to ask, Mr. Wilson, whether or not the Attorney General must be consulted before any action is brought by the Post Office Department's legal staff?

Mr. WILSON. Personally consulted? No, sir.

Mr. NIX. That is to say that Office.

Mr. WILSON. No, sir. The Attorney General's Office is subdivided, as you know, and I have charge of the criminal work and then this particular criminal work is assigned to our General Crimes Section.

General Mitchell has authorized me, and I have authorized the Chief of the section, to proceed with the processing of complaints and other matters that come in in this field when in his judgment he feels that it is a matter that properly should be handled.

Actually, the bulk of the matters go directly to the U.S. attorneys from the Postal Department. The U.S. attorneys then consult with our staff as to whether to proceed with the case.

Now, what you probably have in mind is that in most instances we instruct them not to proceed and that is because of the problem of multiple litigation on the same mailing.

With these one-man nationwide mailings, for example, from Los Angeles, we could have 10,000 cases against the same man if we should take all the complaints and file a case on each one.

So what we do is select a particular case that we think is a strong case and bring it and litigate that particular mailing in one case.

We have had some experience in multiple litigation and the Department has had some difficulty in being enjoined from bringing multiple cases where it is thought that they were brought primarily to harrass the defendant as a matter of strategy rather than the prosecution of an individual case.

So we have to hold down the number of cases to those necessary to put in issue a particular mailing.

Mr. NIX. After the explanations, I think it is a proper regulation. Because usually the similar cases would occur in many jurisdictions.

Mr. WILSON. We could have them all over the United States in one mailing.

Mr. NIX. Mr. Chairman?

Mr. DULSKI. Mr. Wilson, in past years it has seemed to members of the subcommittee that the Department of Justice was overly preoccupied with protection of an absolute right of mailers to send anything they cared to send through the mails—regardless of the rights of the addressees to protect their privacy.

This issue—the right of privacy on the part of an addressee, as opposed to the rights of a mailer—is involved in H.R. 10877, one of the three administration bills before the subcommittee.

Will the Department of Justice act strongly to support the Post Office in the administration of these provisions if enacted into law?

Mr. WILSON. We certainly will, Mr. Dulski. Now, as you know, there are substantial philosophical differences between the approach to the law of Attorney General Clark and Attorney General Mitchell. And it would not be, I guess, proper for me to try to speak either pro or con of Mr. Clark's administration of the Department of Justice. I just don't feel that I should comment on that.

As far as Attorney General Mitchell is concerned, he is firmly convinced that the protection of the public, that the victim of crime,

in a sense, is one of the things to be considered in the administration of the Department of Justice, and while we are required to follow the law, and to apply the law, because if the law enforcement people don't follow it, who is going to do it—so we try to follow the law and stay within the law ourselves.

At the same time, General Mitchell is committed to a vigorous enforcement of these provisions, and whatever you enact in this field will be welcomed by the Department.

Mr. DULSKI. You are pretty well staffed to take on this big task with examiners and lawyers, to handle these cases?

Mr. WILSON. The Post Office will do most of the investigatory and preparatory work. The actual litigation will be primarily handled in the U.S. attorney's offices and while, if we selected one particular U.S. attorney's office to litigate most of it, it might impose a staff problem, but scattered throughout the United States, if the cases sort of fall out by the luck of the draw, in a sense, I do not see any staff problem.

If it should happen that a great volume of this litigation should fall on one U.S. attorney, he might have a staff problem.

Mr. DULSKI. Regarding the present Attorney General, you say that he has a vigorous campaign against this pornographic material and he wants—did they send many cases to the Attorney General for prosecution so far in the last few months?

Mr. WILSON. Well, the Postal Department now routinely refers to us much of this material that they get through the mail. So we have a great volume of that material referred to us.

When you get through analyzing it, it comes down to not many defendants. So we have now about 25 major dealers indicted. Nine of them might be classified as major distributors. In these cases, there is a total of 35 individuals and 26 corporations presently under indictment in this field.

We have matters concerning another 14 major dealers which are in the investigatory stage. We work with the Postal Department in preparing those cases and they should mature into active cases shortly.

And there are about 400 matters concerning small distributors that the Post Office Department has in preparation and which should mature into some type of litigation shortly.

That is a sort of thumbnail sketch of the litigation picture at this time.

Mr. DULSKI. Are all these mail cases?

Mr. WILSON. Yes, sir.

Mr. DULSKI. Thank you very kindly.

Mr. NIX. Mr. Wilson, you said on page 4 at the bottom, should the committee decide to report out H.R. 10867 to the Department of Justice, we would appreciate opportunity to subsequently submit some technical suggestions.

I think it would be most desirable if you give us your suggestions on each of the bills under consideration by the committee.

Mr. WILSON. Could we do that by letter, Mr. Chairman? As to the specific provisions of the bills?

Mr. NIX. Certainly. We would appreciate it.

The gentleman from Idaho, Mr. McClure.

Mr. McCLURE. Thank you, Mr. Chairman. I, too, had noted that in the statement and was thinking, as we go through the markup on the legislation, assuming we get to that point, and I am sure we will, that it would be helpful to have your recommendations at that time rather than have to clean up a bill later in conformity with your suggestions.

Mr. WILSON. We will get to that right away.

Mr. Dulski, I would like to recommend in your bill, consideration of this point you raised about the difference between the prurient and the damaging minors definition, that it would fit either into your bills or into the others, and it makes a distinct difference between what is prurient for an adult and what could be damaging to minors, and I think it would be a broader definition if you could consider that.

Mr. DULSKI. I think it would be of great help to us. Because on the majority side we submitted quite a bit to the last Attorney General and his description, I don't know, didn't fit entirely, because we had squabbles with the Justice Department in trying to get a small bill out.

So I hope that the Attorney General is going to be cooperative to give us the proper guidance.

Mr. WILSON. I can assure you that irrespective of the individual viewpoints that the individual lawyers might have, on this question, the Department's position would be one that would protect the public.

I'd like, just on my own, and not on the part of the Department's presentation here, to call the committee's attention to a fine article that would be helpful.

It was prepared by a former Congressman named O. K. Armstrong and is in the last issue, the August issue, of the American Legion magazine. It is a fine article.

Mr. McCLURE. I might remark, Mr. Wilson, that I have read the article and I agree with your analysis. I think it is a helpful article and knowing the membership to which that is sent, I am sure that those of us in Congress will receive some mail as a result of the article.

I would like to follow up a little bit on the line of questioning that Chairman Dulski was asking with respect to how many cases have been referred to the Justice Department by the Post Office Department.

You indicated in rather general terms that probably most of the ones that the Members of Congress referred to the Post Office Department were sent over to you. And I think that amounts to around 200,000.

Mr. WILSON. We get the same material—you get it from your constituents, the Congressmen then ship it to us. And the post office and the public do also.

Mr. McCLURE. Aside from the references, the general references, how many cases has the Post Office Department referred to you for prosecution as a result of what has been referred to as their primary development of the case?

Mr. WILSON. We call them matters up until they are referred for indictment, and become a case, so your question would be how many matters have been referred to us?

Mr. MAHONY. We have now 25 postal cases under indictment. And of that about nine or 10 are major distributors. That represents an

overwhelming majority of the smut industry, as it is called, in terms of what is really causing the problem.

The number of people who cause the outcry from the public represents anywhere from 20 to 25 distributors. We have 10 of them under indictment now and, as Mr. Wilson pointed out, the others we hope will ripen into that stage in the future, but it takes time.

Mr. McCCLURE. I think we are skirting around what I am trying to get at.

I mean, how many cases has the Post Office Department referred and asked you to prosecute?

Mr. MAHONY. The case would be the defendant as distinguished from the recipient. They have referred approximately, and we have now either under indictment or preparatory, 25 major dealers.

Mr. McCCLURE. If I understand you correctly, then, would you say that the Post Office Department in their references to you dealing with individual defendants, have not been outside of the number that you referred to that are either under indictment or in preparation for prosecution?

Mr. MAHONY. This is essentially correct. Some cases may go directly to the U.S. attorney in a district and not come into the Department except as a matter of information.

We may not follow it if it involves hard core or stag-type films, or because there is no issue of obscenity. But the point I want to make is that this isn't an area where volume, in terms of cases, is particularly meaningful as a way to look at it. Because there aren't that many people cranking this stuff out.

There are only 20 or 25 and we have half of them under indictment now.

Mr. McCCLURE. I don't want you to think I am critical. Don't react in a defensive manner, but I am trying to find out whether or not the Justice Department is proceeding in matters that have been referred by the Post Office Department.

Mr. MAHONY. Absolutely. We are working closely with the postal inspection service and we do proceed as rapidly as we can once they collect the necessary evidence to proceed to grand jury.

The Government is never slow in presenting these cases. It does take time to work up an investigation.

Mr. McCCLURE. I understand from your earlier statement that the Post Office Department works up the investigation.

Mr. MAHONY. Correct.

Mr. McCCLURE. I would assume when they submit one of these instances to you for indictment that they have worked it up?

Mr. MAHONY. Sometimes we may ask them to go and get more information, to get some indictment counts, more documentary evidence.

We may not be satisfied with initial presentation, and think more evidence is required.

Mr. McCCLURE. How many of those have occurred?

Mr. MAHONY. If we are talking about major dealers, not more than three or four, and these are presently being developed.

Mr. McCCLURE. I think we are concerned as to whether or not there is a bottleneck either because of personnel, because of the need for more information, or because of the decisionmaking process.

Mr. MAHONY. No; there is no bottleneck. I can state that flatly. There is no problem involving developing or presenting the cases.

Mr. McCLURE. Has there been any change in the volume of cases referred in the past 3 years?

Mr. MAHONY. There has been a change in volume in the sense that the people who distribute this material, the purveyors of the material, have upped the anti quite a bit. They have come up with more material. But in terms of actual number of major distributors, there has been a slight increase but not substantial.

Mr. McCLURE. I was going to ask that question, as to the overlap between the individuals and the corporations.

You mentioned 35 individuals, I think, Mr. Wilson, and 26 corporations. Would I understand that these are separate or is there some degree of overlap between the corporations?

Mr. MAHONY. Again, in your major distributors, there is overlap. You may have one family—in many of these instances there are husbands and wives or brothers and sisters or closely knit family groups that run the operations and you may have one to 10 corporate structures, and coming off that, three or four or five fictitious firm names.

In terms of investigating, it takes time.

Mr. WILSON. Would it be helpful to you to furnish you with a list of these cases and corporations?

Mr. McCLURE. Well, yes; it would, and I ask that it be made a part of the committee file.

Mr. DULSKI. You wouldn't want to put that in the record.

Mr. McCLURE. No, not in the record, just for the file.

What was the policy reason for transferring jurisdiction over Customs Bureau cases from the Administrative Regulations Section to the General Crimes Section?

Mr. MAHONY. The reason was mainly that the General Crimes Section handled all title 18 criminal obscenity cases. Title 19 section 1305 was the Custom statute. The transfer was just a supervisory and administrative change. There is no personnel problem or anything like that. Just mainly to get all the obscenity cases handled by the same people who specialized in this area. Just for the convenience of it.

Mr. McCLURE. How many individuals make policy determinations in Washington as to the prosecution of obscenity cases?

Mr. MAHONY. As far as policy decisions go, the Attorney General and Mr. Wilson make policy decisions. There are two Department attorneys working full time on nothing but obscenity cases—myself and Mr. Rubin sitting behind me.

Mr. McCLURE. Your answer then would be the Attorney General, Mr. Wilson and you two are the four people in the Department of Justice who have oversight in this area?

Mr. MAHONY. And the section chief, Mr. Belcher; those five.

Mr. McCLURE. How many cases have been taken by the Department of Justice to the U.S. Supreme Court in the obscenity field since the *Manuel v. Day* case in 1962?

Mr. MAHONY. The first *Ginsberg* case was a Federal case. That was the last Federal case to go before the Supreme Court. There are two major cases in the Ninth Circuit Court right now awaiting oral argument in the Ninth Circuit.

The other cases we have under indictment—assuming that convictions result, all of them could go to the Supreme Court.

Mr. McCLURE. I understand that the *Ginsberg* case was actually taken to the Supreme Court over the protests of the Department of Justice.

Mr. MAHONY. The Department of Justice—the Solicitor's Office—represented the Government. I don't think that it is accurate to state that it was under protest.

Mr. McCLURE. Was there advice against the appeal by the Department of Justice in spite of the fact that you may have represented Justice?

Mr. MAHONY. Not to my knowledge.

Mr. McCLURE. Does the Department of Justice insist on sending representatives of the Department headquarters, from the General Crimes Section, to the field to oversee and participate in obscenity cases which are filed?

Mr. MAHONY. In major prosecutions, we do, yes.

Mr. McCLURE. And the district attorneys in the various districts are not really in charge then, after decision is made?

Mr. MAHONY. They are in charge from the point of indictment on. We are in charge up to the point of the indictment.

Although in both instances, after the indictment, we do work closely with them in supplying them with certain types of pleadings and trial briefs and things of that nature.

Mr. McCLURE. When you say you are in charge up through the indictment stage, is this solely on the basis of prevention of duplication of suits or does it also involve a discretion as to what kinds of suits are brought and which ones have the proper kinds of basis?

Mr. MAHONY. Both. We feel in a more appropriate position to assess the material in Washington. We have the opportunity to review all the material that both has been litigated and also that is being selected for litigation. The U.S. attorneys, 93 of them spread throughout the country, do not have the opportunity to look at the material, so we do act as a clearinghouse, as it were.

Mr. McCLURE. How many cases or instances or matters—I'm not sure I am using the right terminology for you—has the Department in review with the district attorneys exercised your discretion and said don't file this. Don't proceed with this. Except in cases where there would be overlapping and for that reason alone.

Mr. MAHONY. Probably none. The only reason we would say don't go is if we would say we want more investigation, but if we think the case has been investigated properly and is ready for grand jury, and the U.S. attorney is in a position to handle the case, we always say go.

Mr. McCLURE. What is the practice under customs law as to seizure of allegedly obscene materials while a legal determination is made as to the nature of the material?

Mr. MAHONY. The practice under the customs law—film, for example—is that it is screened by the Bureau of Customs. If it is not obscene they will release it. If there is a question in their mind, they will institute what is called a seizure procedure which is in effect a letter sent to the importer.

The movie would then go to the U.S. Attorney's office for a judgment as to whether it should be held. If there is still a question, if there is doubt, the film will be sent to Washington where it will be viewed by the members of the Customs Bureau, the Department of Justice—Mr. Wilson has attended several of the viewings—and assessment is made at that time as to whether the item should be admitted or whether it should go through the legal proceeding.

Mr. McCLURE. Has there been any change of volume in the kind of material which is coming in from outside the United States?

Mr. MAHONY. There is a change not in movies but in magazines. A significant increase in both the number and type of magazine that is being imported.

Mr. McCLURE. The flood is not wholly domestically produced?

Mr. MAHONY. No, most of that is from Scandinavia.

Mr. McCLURE. Would this procedure in regard to seizure of films be the procedure followed in other seizures?

Mr. MAHONY. Yes.

Mr. McCLURE. Do you regard seizure as a useful device to stem the flow while pending decisions of the court?

Mr. MAHONY. As I see it, there is no real other device because these are *in rem* proceedings where you are proceeding against the article. If you release the article, you no longer have jurisdiction over the subject matter.

Mr. McCLURE. Is there any possibility of applying the same kind of *in rem* procedure as far as domestically produced literature or devices are concerned?

Mr. MAHONY. Not under these statutes.

Mr. McCLURE. Is there a possibility of such a statute being passed which would help us stop the flow which is generating hundreds of thousands of dollars of income while these matters are being processed in the courts?

Mr. MAHONY. I don't think so because you get into the problem of censorship and prior restraint. I think the problem—the drafting problem to come up with a statute—is insurmountable.

Mr. McCLURE. Has it been applied successfully to those brought in from the outside?

Mr. MAHONY. It hasn't been challenged.

Mr. McCLURE. You think it would not be successful if challenged?

Mr. MAHONY. I don't want to hazard a guess.

Mr. McCLURE. It is slowing the flow—

Mr. MAHONY. I think the proscription against prior restraint would outweigh the possibility.

Mr. McCLURE. If a statute were drafted and passed by the Congress, even though you personally have some feeling of difficulty, what would be the attitude of the Department of Justice in utilizing that statute?

Mr. WILSON. I can answer that. We will attempt to sustain any statute where there is a good basis for trying to sustain it.

Mr. NIX. What redress has a sender when his material is seized and found to be perfectly all right?

Mr. MAHONY. If it is found to be not obscene in the course of a judicial proceeding, then it is released.

Mr. NIX. But what redress does he have?

Mr. MAHONY. To my knowledge, in the sense of a claim against the Government, there is no provision.

Mr. NIX. How do you justify under present law the seizure?

Mr. MAHONY. The only justification is that it is what the statute calls for.

Mr. NIX. It specifically gives the right of seizure?

Mr. MAHONY. Yes.

Mr. DULSKI. I was in New York a few years ago with Mrs. Granahan, then chairman of the subcommittee, and visited the port of entry at New York.

The seizure was made, but the negatives of the film still were inserted in a newspaper, and through some manipulation they found that this material got into the newspapers. Now, as I understand it, it was explained to us that the man who ordered it went to the Justice Department. He said he wanted that released because he ordered that material.

Is there a statute now that constrains them releasing that?

Mr. MAHONY. They don't have to release it under the present law. They can litigate. This is where you are getting into the constitutional area. It has not been challenged to the Supreme Court.

As I indicated, in my judgement, if the issue is properly formulated before the Supreme Court, there may be a problem about the statute.

Mr. DULSKI. Pursuing the same question, because we have had material and I think Mr. Rademacher said, we had committee hearings in New York City and these questions were put to the postmaster and the Customs Bureau. When they seize this material and it is demanded by the sender or the recipient, are you forced to give them the article, because he demands it?

Mr. MAHONY. No; we are clearly not forced to do so. They can hold it and litigate it. They are saying it is an open question. We will go to court then, and if you win it, you get it.

Mr. DULSKI. I have been on this committee 11 years. Why is it that the Justice Department in the entire seizure of articles they have had—and we have seen some of the film—they still didn't want to go to court because there is no precedent and they said perhaps we don't have enough evidence.

Don't you think that the Justice Department should at least endeavor to make an attempt to bring to a conclusion to find out if this is constitutional?

Mr. MAHONY. If your question is, "Should we challenge the statute," if the case is going to go on appeal, the Government is represented by the Solicitor's Office. I can't speak for that office. I don't want to go beyond that. That judgment would be made by the Solicitor's Office. I can't comment on it.

Mr. McCLURE. Is there a statement or memorandum available to this committee concerning a brief statement of the law of obscenity in Western European countries and the British Commonwealth?

Mr. MAHONY. Not to my knowledge.

Mr. McCLURE. Would it be possible for you to locate that material and provide it to the committee? I think it would be helpful to us to compare the approach taken in other countries.

I might just make a general statement that I made yesterday, and repeat it to you gentlemen because I think it bears on what Mr. Dulski was saying a moment ago.

Sometimes you have to prosecute cases that you are pretty sure you are going to lose, but that there can be a net gain in the enforcement process just by the restraint of the fact that you are going to take some cases to court; and sometimes the people who are violating law become emboldened by the fact that the Government will not take a case unless they are sure to win. Therefore they get by with the shady ones.

Mr. WILSON. Mr. McClure, I want to assure you, for the Nixon administration and Mr. Mitchell, that on assessing the material and bringing the cases, we have taken an advocate's position where there is room for an advocate, recognizing that we may lose a case.

Mr. McCLURE. I speak as an old prosecutor and, perhaps as a result I have a predisposition in judging these things of thinking that the defendant is pretty adequately protected and that every stage of the proceedings in a criminal or quasi-criminal proceeding is weighted heavily in favor of the defendant.

As a result there are many doubtful cases in which reasonable minds would say: yes, this fellow sure is guilty of violating the intent of the law, but we probably can't make it stand up in court. I think some of those cases ought to be prosecuted just for the deterrent effect that it has, not because they are going to be convicted, but because the fact that it makes them a little more cautious in the violation of the law.

Mr. WILSON. I think that is good law enforcement policy especially in this field. The fact of the matter is that the tests are so vague, and in a certain sense subjective, that it is difficult to predict what the final outcome is going to be.

Mr. McCLURE. You touch on one thing that I think is very crucial to these laws, and that is the very fact that it is subjective. It is very difficult to write an objective test and this leads back to what has been proposed by a number of people in one way or another, to leave the determination to a jury rather than to a court or to a statutory definition.

What is your feeling with respect to that approach?

Mr. WILSON. Well, I think the factual determination would be on a pragmatic basis, looking at the particular court you are in.

But I have not studied this and since I am the Department spokesman, I could not express an opinion on these various bills. If you want the Department's position on that, we can get that and make another return or give it to you by letter.

Mr. McCLURE. I would appreciate it if you would give us the benefit of your opinion concerning the legal desirability of such an approach. Both from the standpoint of legal philosophy and also the pragmatic.

Mr. WILSON. There was mention made earlier of one of those bills—which ones are these?

Mr. McCLURE. There are a number of such bills—8397 contains the limited appeal approach.

Mr. DEAN. I am John Dean, Associate Deputy Attorney General. We are in the process of preparing a report for the House Judiciary Committee on all the obscenity measures before the Congress. They fall into roughly five or six categories. We would be happy to supply this

subcommittee with a copy of that report because it will include the items pending before your committee and that will give you a good overview of the entire legislation that has been submitted in Congress.

Mr. McCURE. I ask unanimous consent that that report be made part of the record.

Mr. NIX. Without objection, so ordered.

I would like to make an observation—as an old attorney for the defense, during a great deal of my practice the defendant was presumed to be guilty until found innocent.

Mr. McCURE. Mr. Chairman, I might just observe that I was a prosecutor for 6 years and represented defendants for more years than that. The first case I had as prosecutor was a murder, and the last case was a murder, and I also defended some people from that side of the fence, so while I may have a predisposition to judge that the defendant is, in a legal sense, more adequately protected by the statutes, there are procedural practicalities.

Mr. NIX. During that time I spoke of, I had the unhappy privilege of being involved in some 300 murder cases. During those early years, prosecutors withheld evidence. There was no such thing as disclosure. Beautiful time in which to live.

Mr. DEAN. Mr. Chairman, in response to Mr. McClure's request for an analysis of the law of the European countries, I would suggest that the Library of Congress, American Law Division, with their foreign law section, could probably supply that far faster, if they haven't already prepared that, than the Department.

I am not sure we have the multilinguist down there to do an analysis of the law. We would merely be searching the law journals, whereas the American Law Division could go to the statutes you are interested in and supply it faster.

Mr. NIX. We will suggest to the staff that they make the request.

On behalf of the chairman of the full committee, Mr. Dulski, and Mr. McClure and myself, I want to express our deep appreciation for your presence here today, along with your associates and thank you for your contribution.

We look forward to the information which you will supply for the record.

Mr. McCURE. One further question I had overlooked, Mr. Chairman.

What would be your reaction to the possibility of a multifaceted approach to this, either a separability clause or a clear statement that we want each of the sections of the proposed statute to stand independently if some portions are challenged?

Mr. DEAN. As the Congressman is probably aware, the Court has interpreted most legislation to be severable and that would be inherent. There is assurance if the Congress includes a severability provision; whether to include one is a matter for the subcommittee to decide.

Mr. McCURE. Do you feel this might be a good approach to follow in nailing down the areas in which we are relatively sure and scouting ahead in unsure areas?

Mr. DEAN. When the administration sent up three proposals, it very carefully surveyed the horizon to see what we thought we could do within the confines of the important decisions, and very meaningful viable approaches within that area.

One is before this committee and two are before the House Judiciary Committee and I assume shortly after the recess we will also be testifying before that committee on those proposals. I think the administration would like to see all three of them enacted, because we believe that is the best approach and we hope that you will act favorably on the one before you.

Mr. McCLORE. But would the administration object if this committee should also, in addition, attempt to go further?

Mr. DEAN. I think we would have to look to see where you went before we could answer that.

Mr. NIX. Thank you.

A review of Supreme Court cases on the subject of this hearing will be inserted in the record at this point. The subcommittee has statements and letters which have been submitted for inclusion in the record. A compilation of pertinent material compiled by subcommittee staff will also be made a part of the record, without objection.

The subcommittee is adjourned, subject to the call of the Chair.

(Whereupon, at 12 noon, the subcommittee adjourned.)

(The statements, letters, and other material referred to above are as follows:)

To: Hon. Robert N. C. Nix, Member of Congress.

From: Thomas R. Kennedy, Subcommittee Counsel.

A SHORT REVIEW OF SUPREME COURT CASES

Obscenity was defined for Federal purposes and declared to be speech that was without social importance and therefore not protected under the Constitution in *Roth v. United States*, 354 U.S. 476 (1957).

The definition of obscenity included three elements which must coalesce. These are:

1. The dominant theme of the material taken as a whole appeals to a prurient interest in sex;

2. The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters: (In 1964, the court decided in *Jacobellis v. Ohio*, 378 U.S. 184, 192-3 (1964) that the community standard was a national standard.)

3. The material is utterly without redeeming social value. In 1966, the Supreme Court decided that all three elements must coalesce in the case of a book named "*John Cleland's Memoirs of a Woman of Pleasure*" v. *Attorney General of Massachusetts*, 393 U.S. 413, 418 (1966). This state of the law limits enforcement in that a national standard is enforced which has become the lowest standard (Greenwich Village, New York City becomes the standard for Boise, Idaho) and almost everything has some particle of redeeming social value.

However, in *Ginzburg v. United States*, 383 U.S. 463 (1966) the court added a fourth element in conjunction with the "Roth" test that is the manner of distribution and the court asks the question "whether a pandering element is involved?" If it is, material that would escape condemnation under the three parts of the Roth decision may be condemned if the manner of distribution and advertising as such as to consist of a self description of obscenity. The how of distribution being more important than the content of the matter.

In May of 1967 in the case of *Redrup v. New York* 386 U.S. 767 (1967) named three conditions in which the strict requirements of *Roth v. United States* would not be applied.

These are:

1. Where a statute was specifically designed to protect children.

2. Where the facts demonstrate an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.

3. Where there is evidence that the work was offered in a manner that pandered to prurient interest.

The *Redrup* case was the basis of the theory on which the subcommittee supported the Cunningham-Waldie amendment on pandering advertising, which has now been held constitutional by a three member Federal district court, and is now on appeal to the U.S. Supreme Court in *Rowan et al. v. Postmaster General*, memorandum opinion April 30, 1969, U.S. Dist. Ct. Central District of California, Public Law 90-206.

In the second *Ginsburg* case, *Ginsburg v. New York*, 390 U.S. 629 (1968) the Supreme Court followed *Redrup* in upholding a New York State statute which prohibits the sale to minors under 17, matter which is defined as obscene for minors by the State. This establishes a double standard—one for adults and one for minors. The Dulski bill, H.R. 10867, is in part based on this case and the New York State statute, which was upheld.

The interest of privacy which may be protected has not been tested directly in the Supreme Court, although the Court did refuse to review the conviction of a violator of a city ordinance who had a nude statue on his lawn in *Fort v. City of Miami* 389 U.S. 918 (1967). The ban on pandering advertising, Public Law 90-206, which was passed by this committee will pose a clear cut test after being upheld by a U.S. district court in California, April 30, 1969.

H.R. 108687 introduced by Congressman Dulski because of its very specific definition of obscenity may provide an answer to the Supreme Court's demand that obscenity be defined specifically. In *Interstate Circuit, Inc. v. Dallas* 390 U.S. 676 (1968), the Court collected examples of statutes which it had held void for vagueness.

On April 7, 1969, the Court held in *Stanley v. Georgia* 394 U.S. 557 that an individual could have obscene material in his own home and that such possession could not be held a crime. We agree that the mere private possession of obscene matter cannot constitutionally be made a crime. This case follows *Redrup* in that it takes the position that it is how obscenity is used or distributed or published that makes it unconstitutional.

CONCLUSION

The *Roth* test protects obscenity in that almost anything has some social value to somebody but the recent cases of *Ginzburg*, *Redrup*, *Ginsburg* and *Stanley*, are based on an entirely new concept of obscenity regulations which protects children, the right to privacy and condemns pandering advertising and distribution.

STATEMENT OF HON. EDWARD J. DERWINSKI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman and members of the subcommittee, as a sponsor of a number of bills which are intended to control the flow of smut material I am pleased that the subcommittee is taking this matter under consideration and is planning to give it prompt and, hopefully, effective attention.

I have sponsored or cosponsored the following bills in this session of Congress: H.R. 5171, H.R. 9117, H.R. 10881, H.R. 13168, and H.R. 13241.

Chairman Nix has carefully and properly pointed out that smut merchants make extensive use of mailing lists containing the names of youngsters. The adverse effect upon individual pre-teen and teen-age recipients is obvious and the flood of pornographic material in the mail these days is a national disgrace. It is my hope that our committee will produce a bill that will arm the Post Office Department with the administrative authority needed to curb pornography. The bill, of course, will face a challenge in the courts and I am hopeful that unlike past measures the bill we will produce will survive the expected court test.

In my opinion, Mr. Chairman, the subject before us and the legislative process which we are commencing will be one of the most important contributions of this Congress to the welfare of our country. The smut industry must be effectively curtailed.

STATEMENT OF HON. FRANK ANNUNZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, I express my strong support for two measures which I cosponsored, H.R. 13241 and H.R. 13259, and which are designed to put a stop to the disgusting flood of unwanted obscene mail which plagues our citizens. There is

simply no excuse for the continued use of the U.S. mail to intrude on the privacy of our homes with unsolicited material that is shocking, disturbing, and harmful to our children.

Briefly, H.R. 13259 provides for return to the sender at the sender's expense of all sexually provocative material mailed to and refused by an addressee in violation of section 4011 of title 39 of the United States Code. Thus, if this bill becomes law, and if all the potential victims of offensive advertising take advantage of the protection which this bill offers, mass mailings of unsolicited pornography will quickly become highly unprofitable ventures for their promoters.

H.R. 13241, the "Sexually Provocative Mail Regulation Act of 1969," requires the advertiser to obtain permission from the recipient before mailing any offensive material. Furthermore, it prohibits altogether the mailing of offensive material to minors if the minor's State of residence has a law prohibiting such dissemination. On the other hand, this bill does not prohibit the mailing of sexually oriented material to persons ordering it themselves.

I believe that these two measures together will protect the public while at the same time upholding the spirit of the Constitution. The first amendment protection of freedom of speech is one of our most cherished freedoms, but we must remember that freedom of speech can sometimes be freedom from speech. The use of the U.S. mails to distribute unwanted pandering advertising constitutes a flagrant invasion of our right to privacy in our homes. These bills protect the right of mature citizens to decide for themselves whether something is obscene or not, and this is as it should be. Those adults who are interested will not be deterred, but the vast majority of Americans will no longer be exposed to the current barrage of unsolicited and harmful smut.

These bills will place the administrative workload where it belongs; that is, upon the purveyor of smut material rather than on the Post Office Department or the Department of Justice. It would strengthen the police powers of the States; and it would encourage lagging States to enact appropriate laws for the protection of minors from sexually provocative materials.

Mr. Chairman, two points emerge very clearly from the controversy over obscenity, pornography, and censorship. One is that individual, reasoning adults must be permitted their adulthood, with all its risks. Censorship should not be a concern of government in a free and democratic nation except in cases where there is a clear public responsibility, as with the use of broadcasting channels and the U.S. mail.

The second point on which most of us agree and on which the Federal courts have agreed, is that we have a right to protect our children from the harmful effects of pornography. Children are by definition not prepared to deal with many of the sadder aspects of adult reality, and it is both legitimate and right to protect them from it. The U.S. Supreme Court has upheld State laws prohibiting distribution of obscene materials to minors. I believe that we have a duty to encourage the 14 States that do not have such laws to pass them, and to insure that the State provisions are efficiently and effectively enforced.

The U.S. Post Office is a public service which operates for the benefit and welfare of all our citizens. It must not be used, therefore, as a key to gain entry into the privacy of our homes on unwanted material which is shocking, disturbing, and immensely harmful to our children. H.R. 13241 and H.R. 13259 are admirably designed to put a stop to the flood of smut mail while at the same time preserving our constitutional protection of freedom of speech. May I urge this committee to report these two bills favorably to the House. Speedy and thorough action is urgently needed for these measures to be passed and approved so that the overwhelming majority of our constituents can be protected.

I would like to take this opportunity to thank the very able chairman and the distinguished members of the Subcommittee on Postal Operations for their careful preparation, cooperation, and interest. They are doing a fine job, and the legislation that is reported out of this committee deserves the pride and congratulations of every Member of Congress.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., August 4, 1969.

HON. THADDEUS J. DULSKI,
Chairman, House Post Office and Civil Service Committee,
House Office Building,
Washington, D.C.

DEAR MR. CHAIRMAN: I am indeed pleased to learn that your Subcommittee on Postal Operations will start hearings tomorrow on obscene mail matter.

This is the subject of my bill H.R. 13241, the Sexually Provocative Mail Regulation Act of 1969, which is cosponsored by 24 of our colleagues.

The Congressional Record notice of hearings does not indicate which bills will be considered, and I am wondering if I am correct in assuming that mine will be among them.

H.R. 13241 takes a somewhat different approach than other proposals attempting to deal with the extensive flow of pornographic mail. Briefly, it would prohibit the use of the U.S. mails to send sexually provocative materials: (1) to any home unless the occupant specifically asked for such materials, and (2) to minors in any State having laws prohibiting dissemination of obscene materials to minors. (This means 36 States and the District of Columbia.) The bill would place the administrative workload where it belongs, that is, on the purveyor of smut materials rather than on the Post Office Department or the Department of Justice.

Assuming that your schedule of hearings for this week is complete and that hearings will continue, I respectfully request an opportunity to testify.

A copy of H.R. 13241 and a section-by-section analysis of it are included for your information.

Your sincerely,

JOHN N. ERLNBORN,
Member of Congress.

Enclosures.

[H.R. 13241, 91st Cong., first sess.]

A BILL To protect the privacy of the American home from the invasion by mail of sexually provocative material, to prohibit the use of the United States mails to disseminate material harmful to minors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Sexually Provocative Mail Regulation Act of 1969."

FINDINGS AND DECLARATIONS

SEC. 2. (a) The Congress hereby finds that—

(1) the United States mails are being utilized for the indiscriminate dissemination of advertising and other matter so designed and presented as to exploit sexual sensationalism for commercial and private gain;

(2) the use of the United States mails subjects the recipients of sexually provocative materials to offensive and unwarranted invasions of their right to the privacy of their homes; and

(3) such use of the United States mails reduces the ability of responsible and concerned parents to exercise control over and to protect their minor children from exposure to material which they as parents deem to be harmful to their children.

(b) The Congress hereby determines and declares that it is contrary to the public policy of the United States and to the welfare of its people for the facilities and services of the United States Post Office Department to be utilized for the distribution of sexually provocative material to persons opposed to the invasion of their privacy by this type of material or to persons wishing to protect their minor children from exposure to such material.

SEC. 3. (a) Chapter 51 of title 39, United States Code, is amended by adding at the end thereof the following new section:

"§ 4011. Mailing sexually provocative material

"(a) A sender shall not deposit in the mails, or have deposited in the mails, any sexually provocative material—

"(1) unless such material is addressed to a person to whom a notification has been sent in accordance with subsection (b) of this section, and who has requested such material and has furnished the information specified by such subsection; or

"(2) if information or notice of the type referred to in subsection (c) of this section has been received by the sender; or

"(3) if such material is addressed to a minor (A) in a State (including the District of Columbia and the Commonwealth of Puerto Rico) which prohibits by law the dissemination of such material to minors or (B) in a United States possession.

"(b) (1) Prior to sending any sexually provocative material, a sender shall send or have sent to such addressee a notification containing the following specific notice (or a notice to the same effect in words prescribed by the Postmaster General):

"(i) State whether you desire to receive advertisements, information, or devices pertaining to nudity, sexual conduct, sexual excitement, or sadomasochistic abuse.

"(ii) Provide your name and address, and the month, day, and year in which you were born. (If you are acting as an officer, agent, or employee of a corporation, company, trust, partnership, firm, joint venture, society, foundation, association, or other organization, list your own name and address and the name and address of your organization and the month, day, and year of your birth.)

"(iii) Sign your name."

"(2) A notification mailed by a sender shall be sent to an addressee only in the name of an individual or in the name of an organization. Such notification shall contain no other language, literature, graphic illustration, or device, except as the Postmaster General may otherwise deem appropriate.

"(3) For the purposes of subsection (a) (3) of this section, the sender is entitled to rely upon information furnished by the addressee concerning the age of the addressee, unless the sender has in his possession information which conflicts with the information furnished by the addressee.

"(c) If a sender of sexually provocative material—

"(1) receives information that an addressee is a minor and ineligible to receive such material because the State, the District of Columbia, or the Commonwealth of Puerto Rico, in which he lives prohibits by law the dissemination of such material to minors; or

"(2) receives notice from an addressee that he no longer desires any such material;

such sender shall immediately remove the name of any such addressee from his mailing list, and cease distribution of such material to the addressee.

"(d) The Postmaster General shall have authority to promulgate rules and regulations to carry out the provisions of this section.

"(e) As used in this section—

"(1) 'nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, the female breast with less than a fully opaque covering of any portion below the top of the nipple, or the depiction of covered male genitals in discernibly turgid state;

"(2) 'sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, physical contact with a person's clothed or unclothed genitals, pubic area, or buttocks, or, in the case of a female, physical contact with her breasts;

"(3) 'sexual excitement' means the condition of human male or female genitals in a state of sexual stimulation or arousal;

"(4) 'sadomasochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask, or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed; and

"(5) 'sender' means a person who mails for himself, or on whose behalf there is a mailing; and

"(6) 'minor' means a person under the age of majority as established by the laws of the place of residence and/or domicile;

"(7) 'sexually provocative material' means any material which—

"(A) solicits or offers to send matter of the type described in subparagraph (B) of this paragraph.

"(B) is tangible, including any device, and used or adapted, or capable of being used or adapted, to depict or arouse (through readings, sound, touch, or observation) interest in nudity, sexual conduct, sexual excitement, or sadomasochistic abuse.

"(f) Material which is otherwise within the definition of this subsection shall be deemed not to constitute sexually provocative material if it constitutes only a small and insignificant part of the whole of a single catalog, book, periodical, or other work the remainder of which is not devoted to sexual matters."

(b) The analysis of chapter 51 of title 39, United States Code, immediately preceding section 4001, is amended by adding at the end thereof the following new item:

"4011. Mailing sexually provocative material."

SEC. 4. (a) Chapter 71 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1466. Mailing sexually provocative material

"(a) A sender who deposits in, or causes to be deposited in, the mails any sexually provocative material in violation of section 4011 of title 39, or knowingly takes the same from the mails for the purpose of circulating or disposing of, or aiding in the circulation or disposition of the same, or violates a regulation of the Postmaster General issued under such section, shall be fined not more than \$50,000 or imprisoned not more than five years, or both.

"(b) The terms 'sender' and 'sexually provocative material' shall have the same meaning given them in section 4011 of title 39."

(b) The analysis of chapter 71 of title 18, United States Code, immediately preceding section 1461, is amended by adding at the end thereof the following new item:

"1466. Mailing sexually provocative material."

SECTION-BY-SECTION ANALYSIS OF THE SEXUALLY PROVOCATIVE MAIL REGULATION ACT PROPOSED BY JOHN N. ERLNBORN, MEMBER OF CONGRESS

SECTION 1

Title of bill to be cited as "Sexually Provocative Mail Regulation Act of 1969."

SECTION 2

1. Finding by Congress that—

U.S. mails are being utilized to exploit sexual sensationalism;

Intrusion of sexually provocative materials into the American home constitutes an unwarranted invasion of the right of privacy;

Such intrusion lessens the ability of parents to protect their minor children from harmful materials.

2. Declaration by Congress that such use of the U.S. mails is contrary to public policy and the welfare of the American people.

SECTION 3

Amends chapter 51 of title 39, United States Code, by adding a new section which—

1. Prohibits the depositing in the U.S. mails of any sexually provocative material pertaining to nudity, sexual conduct, sexual excitement or sadomasochistic abuse:

Unless the material is *addressed to a person who has specifically indicated his desire to receive such material.*

if such material is addressed to a minor in a State having laws prohibiting dissemination of such materials to minors.

2. Prescribes notification format to be used for determining if persons on the mailing lists of dealers in sexually provocative materials wish to receive such materials.

3. Allows only *nonillustrated* notifications to be sent *only in names of individual persons or organizations.*

4. Requires senders of sexually provocative materials to remove names of minors, and individuals not wishing to receive such materials, from their mailing lists.

5. Authorizes the Postmaster General to issue appropriate regulations to carry out the provisions of the section.

6. Defines the terms "nudity," "sexual conduct," "sexual excitement," "sodomasochistic abuse," and "sexually provocative materials."

7. Provides for the mailing of publications which might fall within the above definitions if such material therein constitutes only an insignificant part of the whole publication (e.g., legitimate medical encyclopedias, textbooks, etc.).

SECTION 4

Amends chapter 71, title 18, United States Code, by adding a new section which "Provides for fines up to \$50,000 or imprisonment of up to 5 years, or both, for violations."

[H.R. S397, 91st Cong., first sess.]

A BILL To amend title 18, United States Code, to prohibit the dissemination through interstate commerce or the mails of obscene materials to persons under the age of eighteen years, and to restrict the exhibition of movies or other obscene matter to such persons, and for other purposes

Be it enacted by the Senate and House of Representative of the United States of America in Congress assembled, That (a) chapter 71 of title 18, United States Code, is amended by adding at the end thereof the following new section :

"§ 1466. Exposing obscene matter to minors

"(a) It shall be unlawful for any person knowingly—

"(1) to sell, offer for sale, loan, deliver, distribute, or provide to any minor—

"(A) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body, which depicts nudity, sexual conduct, or sadomasochistic abuse, in a manner designed primarily to appeal to the viewer's prurient interests; or

"(B) any book, pamphlet, or other printed matter however reproduced, or sound recording which depicts nudity, sexual conduct, or sadomasochistic abuse or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse, and which is designed primarily to appeal to the listener's or reader's prurient interests; or

"(2) to exhibit to a minor a motion picture, show, or other obscene matter which—

"(A) has moved in interstate commerce or through the mails,

"(B) depicts nudity, sexual conduct, or sado-masochistic abuse, and

"(C) is designed primarily to appeal to the viewer's prurient interests.

"(b) Whoever violates paragraph (1) or (2) of subsection (a) shall be fined not more than \$5,000 or imprisoned for not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned for not more than ten years, or both, for each such offense thereafter.

"(c) Whoever uses interstate commerce or the mails to make an unsolicited sale, offer for sale, loan, delivery, or distribution of any matter described in subparagraph (A) or (B) of paragraph (1) of subsection (a) to any person who has a minor child residing with him with knowledge of its character and content shall be fined not more than \$5,000 or imprisoned for not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned for not more than ten years, or both, for each such offense thereafter.

"(d) For the purposes of this section :

"(1) The term 'minor' shall mean any person under the age of eighteen years.

"(2) The term 'nudity' shall mean the showing of the human male or female genitals, exposed pubic area, the female breast with less than a full opaque covering of any portion below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

"(3) The term 'sexual conduct' shall mean explicit acts of sodomy, masturbation, homosexuality, sexual intercourse, physical contact with a person's clothed or unclothed genitals or pubic area, or in the case of a female, physical contact with her breast.

"(4) The term 'sexual excitement' shall mean the condition of human male or female genitals when in a state of sexual stimulation or arousal and male or female orgasm.

"(5) The term 'sado-masochistic abuse' shall mean flagellation, torture, or the infliction of physical or mental anguish by or upon a person clad in undergarments, a mask, or bizarre costume which exposes the buttocks or genitals, or if, in the case of a female participant, the breast in the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

"(6) The term 'child' shall mean a natural child, stepchild, adopted child, and a child who is a ward of, or in the custody of, the addressee or who is living with such addressee in a regular parent-child relationship."

(b) The table of sections for chapter 71 of title 18, United States Code, is amended by adding at the end the following new item:

"1466. Exposing obscene matters to minors."

SEC. 2. (a) The Supreme Court shall not have jurisdiction under section 1252 or 1253 of title 28, United States Code, to review any determination made under section 1466 of title 18, United States Code, that any material described in subsection (a) of this Act is designed primarily to appeal to a minor's prurient interests.

(b) The courts of appeals shall not have the jurisdiction under section 1291 or 1292 of title 28, United States Code, to review any determination made under section 1466 of title 18, United States Code, that any material described in subsection (a) of this Act is designed primarily to appeal to a minor's prurient interests.

SEC. 3. Section 4001 of title 39, United States Code, is amended by inserting "1466," immediately after "1463,".

SEC. 4. This Act and the amendments made by this Act shall take effect on the sixtieth day after the date of the enactment of this Act.

[H.R. 10876, 91st Cong., first sess.]

A BILL To afford protection to the public from offensive intrusion into their homes through the postal service of sexually oriented mail matter, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Offensive Intrusion of Sexually Oriented Mail Act of 1969".

SEC. 2. (a) The Congress finds—

(1) that the United States mails are being used for the indiscriminate dissemination of advertising matter so designed and so presented as to exploit sexual sensationalism for commercial gain;

(2) that such matter is profoundly shocking to many persons who receive it, unsolicited, through the mails;

(3) that such use of the mails subjects these persons to offensive and unwarranted intrusions upon their right to privacy; and

(4) that such use of the mails reduces the ability of responsible parents to protect their minor children from exposure to material which they as parents believe to be harmful to their children.

(b) On the basis of the foregoing the Congress determines that it is contrary to the public policy of the United States for the facilities and services of the United States Post Office Department to be used for the distribution of such materials to persons who do not want their privacy invaded in this manner or to persons who wish to protect their minor children from exposure to such material.

SEC. 3. (a) Chapter 51 of title 39, United States Code, is amended by adding at the end thereof the following new sections:

"§ 4011. Mailing of sexually oriented advertisements

"(a) Any person who mails or causes to be mailed any sexually oriented advertisement shall place on the envelope or cover thereof his name and address as the sender thereof and such mark or notice as the Postmaster General may prescribe.

"(b) Any person, on his own behalf or on the behalf of any of his children who have not attained the age of nineteen years and who reside with him, may file with the Postmaster General a statement, in such form and manner as the Postmaster General may prescribe, that he desires to receive no sexually oriented advertisements through the mails. The Postmaster General shall maintain and keep

current, insofar as practicable, a list of the names and addresses of such persons and shall make the list (including portions thereof or changes therein) available to any person, upon such reasonable terms and conditions as he may prescribe, including the payment of such service charge as he determines to be necessary to defray the costs of compiling and maintaining the list, keeping it current, and making it available as provided in this sentence. No person shall mail or cause to be mailed any sexually oriented advertisement to any individual whose name and address has been on the list for more than thirty days.

"(c) No person shall sell, lease, lend, exchange, or license the use of, or, except for the purpose expressly authorized by this section, use any mailing list compiled in whole or in part from the list maintained by the Postmaster General pursuant to this section.

"(d) 'Sexually oriented advertisement' means any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing. Material otherwise within the definition of this subsection shall be deemed not to constitute a sexually oriented advertisement if it constitutes only a small and insignificant part of the whole of a single catalog, book, periodical, or other work the remainder of which is not, primarily devoted to sexual matters.

"§ 4012. Judicial enforcement

"(a) Whenever the Postmaster General believes that any person is mailing or causing to be mailed any sexually oriented advertisement in violation of section 4011 of this title, he may request the Attorney General to commence a civil action against such person in a district court of the United States. Upon a finding by the court of a violation of that section, it may issue an order including one or more of the following provisions as the court deems just under the circumstances:

"(1) a direction to the defendant to refrain from mailing any sexually oriented advertisement to a specific addressee, to any group of addressees, or to all persons;

"(2) a direction to any postmaster to whom sexually oriented advertisements originating with such defendant are tendered for transmission through the mails to refuse to accept such advertisements for mailing; and

"(3) a direction to any postmaster at the office at which registered or certified letters or other letters or mail arrive, addressed to the defendant or his representative, to return the registered or certified letters or other letters or mail to the sender appropriately marked as being in response to mail in violation of section 4011 of this title, after the defendant, or his representative, has been notified and given reasonable opportunity to examine such letters or mail and to obtain delivery of mail which is clearly not connected with activity alleged to be in violation of section 4011 of this title.

"(b) The statement that remittances may be made to a person named in a sexually oriented advertisement is prima facie evidence that such named person is the agent or representative of the mailer for the receipt of remittances on his behalf. The court is not precluded from ascertaining the existence of the agency on the basis of any other evidence.

"(c) In preparation for or during the pendency of a civil action under subsection (a) of this section, a district court of the United States, upon application therefor by the Attorney General and upon a showing of probable cause to believe the statute is being violated, may enter a temporary restraining order or preliminary injunction containing such terms as the court deems just, including, but not limited to, provisions enjoining the defendant from mailing any sexually oriented advertisement to any person or class of persons, directing any postmaster to refuse to accept such defendant's sexually oriented advertisements for mailing, and directing the detention of the defendant's incoming mail by any postmaster pending the conclusion of the judicial proceedings. Any action taken by a court under this subsection does not affect or determine any fact at issue in any other proceeding under this section.

"(d) A civil action under this section may be brought in the judicial district in which the defendant resides, or has his principal place of business, or in which any sexually oriented advertisement mailed in violation of section 4011 has been delivered by mail according to the direction thereon.

"(e) Nothing in this section or in section 4011 shall be construed as amending, preempting, limiting, modifying, or otherwise in any way affecting section

1461 or 1463 of title 18, or sections 4006, 4007, or 4009 of this title 39, United States Code." (b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof the following:

"4011. Mailing of sexually oriented advertisements.
"4012. Judicial enforcement."

SEC. 4. (a) Chapter 83 of title 18, United States Code, relating to offense against the postal service, is amended by adding at the end thereof the following new sections:

"§ 1735. Sexually oriented advertisements

"Whoever willfully uses the mails for the mailing, carriage in the mails or delivery of any sexually oriented advertisement in violation of section 4011 of title 39, or willfully violates any regulation of the Postmaster General issued under such section.

"Whoever sells, leases, rents, lends, exchanges, or licenses the use of, or, except for the purpose expressly authorized by section 4011 of title 39, uses a mailing list maintained by the Postmaster General pursuant to such section shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, both, for any second or subsequent offense.

"§ 1736. Restrictive use of information

"(a) No information or evidence obtained by reason of compliance by a natural person with any provision of section 4011 of title 39, or regulations issued thereunder, shall, except as provided in subsection (c) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding.

"(b) The fact of the performance of any act by a natural person in compliance with any provision of section 4011 of title 39, or regulations issued thereunder, shall not be deemed the admission of any fact, or otherwise be used, directly or indirectly, as evidence against that person in a criminal proceeding, except as provided in subsection (c) of this section.

"(c) Subsections (a) and (b) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law with respect to the furnishing of false information."

"1735. Sexually oriented advertisements.

"1736. Restrictive use of information."

SEC. 5. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

SEC. 6. The provisions of this Act shall become effective on the first day of the sixth month which begins after the date of enactment.

[H.R. 12788, 91st Cong., first sess.]

A BILL To prohibit the mailing of certain obscene matter

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4001 of title 39, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Matter otherwise legally acceptable in the mails which—

"(1) is unsolicited,

"(2) offers for sale, rent, or loan any photograph, drawing, picture of any kind, or any material containing any illustration which depicts in whole or in part the genitals of the human body, or any act of sodomy, masturbation, homosexuality, sexual intercourse, sadism, or masochism, and

"(3) illustrates in any way the nature or the contents of the items offered for sale, rent, or loan

is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postmaster General directs."

STATEMENT OF HON. JOHN E. HUNT, A REPRESENTATIVE IN CONGRESS FROM THE
STATE OF NEW JERSEY

Mr. Chairman, I appreciate the opportunity to submit a statement for the record in connection with the subcommittee's hearings on obscene mail matter.

Because of the steadily increasing volume of unsolicited, sexually oriented advertisements through the mails, the record of legislative bills so far in this session to restrict such activities certainly reflects the deep concern of the Congress and the pleading of our constituencies for prompt and decisive action. By and large, it appears the major aim of legislation to date is to enable the Post Office Department to deal more effectively with the purveyors of obscene materials so as to stem the flow of such materials to minors.

Congressman Wylie and I have introduced H.R. 8397, not unlike the purpose of H.R. 10867 now before the subcommittee, to prohibit the dissemination of obscene matter through the mails or the facilities of interstate commerce to minors, or to families with minor children residing with them. The types of materials subject to the provisions of the act are precisely defined so as to avoid the issue of void for vagueness which has been raised in conjunction with existing statutes, both State and Federal.

Although I do not profess to be a lawyer, and notwithstanding the volumes of court decisions on the subject of obscenity, I speak for the large majority of my constituency in believing that the Congress is not powerless to take affirmative action now in moving to cut off the two prime channels for the distribution of obscene matter; namely, the U.S. Postal System and the facilities of interstate commerce. There is much merit in two of the basic provisions of H.R. 10867, the first of which would place certain well-defined materials into a special category of nonmailable matter with respect to minors. As in the Hunt-Wylie bill, H.R. 8397, this provision places the burden upon the sender to determine that he is not sending his direct-mail advertisements to minors or to families with minor children residing with them. While this provision is not foolproof, it seems that the large volume of unsolicited, direct-mail advertisements would diminish in a proportion to the difficulty to which the sender would have to go to refine his mailing lists.

The other provision, restricting the mailing of sexually oriented advertisements, would be a useful extension of the principle now contained in the anti-pandering law. Whereas now, the recipient of unsolicited mail matter addressed either to himself or a member of his family 19 years old or younger, living with him, and considered by the recipient alone "to be erotically arousing or sexually provocative," may submit an order through the Postmaster General to prohibit the sender or his agents from making any further mailings to the complaining recipient, the effectiveness of this law is very incomplete. I have had numerous complaints from constituents who have utilized the provisions of the anti-pandering law, in more than one instance, but each time the recipient receives undesired advertisements from another firm. It seems there must be some collusion among the peddlers to assure that once an individual is on a mailing list, it would be most difficult for him to bar mailings from all of the large number of sources currently in operation since to do so would require a separate order from the recipient for each source. Consequently, by allowing an individual to register his name and address with the Postmaster General to bar the mailing of sexually oriented advertisements, identifiable by required imprinting on the face of the envelope, to his address, would again place the burden upon the sender to avail himself of such lists so as to avoid the prescribed penalties.

Mr. Chairman, inevitably, legislative consideration of proposals to deal with obscenity and pornography must confront the problem of semantics, admittedly, made the more confusing because of the inability of even our Highest Court to successfully define what certain words actually mean or are intended to mean. Understandably, therefore, there is a tendency for some to want to postpone substantive consideration of legislation until the Commission on Obscenity and Pornography has submitted its final report and recommendations. I do not believe, nor does my constituency, that this problem precludes all congressional action until some later date. To the extent of the proposals being considered by the subcommittee and covered by my remarks, there does not appear to be much of a discrepancy as to what we are hoping to accomplish; there are, however, honest differences of opinion with respect to how we might accomplish our objectives. To be sure, whatever legislation is eventually enacted, the courts will still be left with the responsibility of interpreting congressional intent, and there will

still be those who will raise the constitutional questions that have been belabored in the courts for years.

Plain commonsense may not be a persuasive legal argument for pursuing legislative action now, but it will surely be fools play to allow ourselves to become so entangled in questionable legalities that this is our only reason for not enacting legislation before the report of the Commission on Obscenity and Pornography.

STATEMENT OF HON. DAN KUYKENDALL, A REPRESENTATIVE IN CONGRESS FROM THE
STATE OF TENNESSEE

Mr. Chairman and members of the committee, I would like to commend you for undertaking this very important hearing to determine what action may be taken to stop the attack upon decency now being conducted on a major scale by purveyors of filthy, obscene, and degenerate material throughout this Nation.

My own city of Memphis, Tenn., seems to be a prime target for these greedy pervers to flood with indescribable solicitations for their products.

The decent people of Memphis have risen en masse to combat this plague which is threatening the moral decay of our children, but they are handicapped because of Supreme Court decisions which encourage trade in obscenity and the lack of proper laws to deal with it.

I can think of no more important legislative business for this committee and for this Congress to undertake then to come up with a law which will put an end to the activities of these dealers in smut.

Most of these filth peddlers use mailing lists which contain the names of teenage and preteenage youngsters. The advertising material they receive is provocative and clearly designed to arouse an unnatural interest in illicit sex and all types of perversion. Yet, under present law, all that a parent can do is to ask that the names be removed from such mailing lists. At that point much of the damage has been done. I have in my office hundreds of examples of the most depraved advertising which have been sent to me by distraught parents and city officials. Locking the barn door after the horse is stolen, which is exactly what we are doing under the present law, can no longer be tolerated.

We must stop the spread of this smut at its source by clearly defining in the law, obscenity, and fixing tough penalties for those engaging in the interstate shipment of such material whether it is sent directly to the homes or to merchants for resale.

I have introduced a bill, H.R. 10969, to make it a Federal offense to mail obscene material to any home in which there are residents under 18 years of age. I would hope that as a result of these hearings we can come up with an even stronger recommendation to prevent interstate shipment of any type of such material.

The vast majority of decent, law-abiding, God-fearing people of America demand that we act and, in my opinion, we dare not fail them if we are to save our country from the moral decadence which inevitably leads to the destruction of nations.

COMMISSION ON OBSCENITY AND PORNOGRAPHY,
Washington, D.C., August 7, 1969.

HON. ROBERT N. C. NIX,
Subcommittee on Postal Operations,
Rayburn House Office Building, Washington, D.C.

DEAR Mr. Nix: We are pleased to provide you with the enclosed statement from the Commission on Obscenity and Pornography in response to a request from Mr. Thomas Kennedy. As this statement indicates, the Commission is issuing a progress report in the next week or so. (We are encountering some printing difficulties, and the exact date is still not available.) This progress report will provide much more detail about the activities of the Commission thus far. We will provide you with a copy of the progress report as soon as it is available.

If we can be of further assistance to you and your subcommittee, please call on us.

Sincerely yours,

W. CODY WILSON, Executive Director.

STATEMENT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY

Mr. Chairman, Congress, in Public Law 90-100, found the traffic in obscenity and pornography to be a matter of national concern. The Federal Government was deemed to have a "responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials." To this end the Congress established an advisory commission whose purpose is, "after a thorough study which shall include a study of the causal relationship of such materials to antisocial behavior, to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography."

Congress assigned four specific tasks:

"(1) With the aid of leading constitutional law authorities, to analyze the laws pertaining to the control of obscenity and pornography, and to evaluate and recommend definitions of obscenity and pornography;

(2) To ascertain the methods employed in the distribution of obscene and pornographic materials and to explore the nature and volume of traffic in such materials;

(3) To study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other antisocial behavior; and

(4) To recommend such legislative, administrative, or other advisable and appropriate action as the Commission deems necessary to regulate effectively the flow of such traffic without in any way interfering with constitutional rights."

Funds were appropriated for the Commission's operation in July 1968. It is to report its findings and recommendations to the President and the Congress by July 31, 1970.

One of the first activities of the Commission was to review the existing information relevant to its tasks. This review revealed that there was very little objective empirical information already available. The Commission decided that the existing information was not sufficient to provide a sound basis for its recommendations, and that it would have to undertake a scientific research program in order to fulfill the assignment given it by Congress.

The Commission then developed a research program designed to remedy this almost complete absence of information. This research program has been implemented through a series of research contracts with universities and other research agencies. None of these research projects is yet completed; several are scheduled to submit reports in the fall of 1969, and all are to be completed by the spring of 1970. This research program is described in some detail in a "Progress Report" to be issued by the Commission later this month.

The Commission subscribes completely to the congressional directive to make recommendations only after thorough study. Therefore, because results of its studies are not yet available, the Commission feels that it would not be appropriate for it to make recommendations at this time.

Respectfully,

W. CODY WILSON,

Executive Director

(For Chairman of the Commission).

(See p. 101 for the Commission's "Progress Report.")

MEMORANDUM

To: Chairman Robert N. C. Nix, Member of Congress.
From: Thomas R. Kennedy, Subcommittee Counsel.

The President of the United States, Richard M. Nixon, on May 5, 1969 in a message to the Congress endorsed a proposal that is contained in H.R. 10877 (title II) and in H.R. 10867 introduced by Chairman Dulski.

The difference between title II of H.R. 10877 and H.R. 10867 is that the Dulski bill contains an additional provision which defines the word "obscenity" for purposes of application under title 39, United States Code. This specific definition is based on a New York State statute that has been upheld by the U.S. Supreme Court. The definition is important because it will meet the objections of appellate courts to obscenity prosecutions because of the vagueness.

The administration has endorsed those provisions identical to title II of H.R. 10877 which are contained in H.R. 10867, sections 4012, 4013, 1735, and 1736.

(See p. 127 for H. Doc. 91-114, title II of H.R. 10877 and section-by-section explanation.)

ADDRESS BY COMMISSIONER ROBERT E. LEE, FEDERAL COMMUNICATIONS COMMISSION, BEFORE THE ASSOCIATION OF BROADCASTING EXECUTIVES OF TEXAS, DALLAS, TEX., JULY 31, 1969

SELF-REGULATION OR CENSORSHIP

George Bernard Shaw, asked what he thought of television, retorted with typical Shavian wit and precision—"I don't know; I'm afraid to look." About 5 years ago, I gave a speech expressing considerable apprehension on the future use of movies, then being produced, and speculated what would happen when this old product was fully exposed and the then current motion pictures were released for television.

The public and congressional reaction today to an overkill of sex and violence can be traced to many of the productions of several years ago and now, for the first time, available to television. What will happen 4 or 5 years hence when the television rights to current controversial movies become available? My first reaction is that of Mr. Shaw—I am afraid to look. Actually, I do watch and enjoy television and expect to watch it for years to come. We have the very best television and communications network in the world, which was not brought about by Government regulation but by the broadcaster's responsible use of freedom of speech and expression, and I might add, a large measure of this perspiration and commonsense.

We are now at another major intersection—industry self-regulation or censorship. I doubt if this matter will ever be solved. Back in the 1700's, Dr. Samuel Johnson, a leading writer of his time, said that the unbounded liberty of printing "has produced a problem in the science of government which human understanding seems hitherto unable to solve." The problem still remains.

Before I proceed further in this delicate area, I think you should know my position on Commission control of programing. I must emphasize that anything I say from here on is not to be interpreted as Commission policy. Actually, there is a divergence of opinion within the Commission as to just what our role can and should be in this area. When I say "can" I have reference to the view of those who believe the Commission is, pursuant to section 326 of our act,¹ completely without legal authority in the field of programing. This is based on the theory that there can be no prior restraint on material that is broadcast. From this, it follows that we cannot examine material already broadcast, and, if we find said programing not in the public interest, cannot refuse to renew the license. The fear of reprisal by the Commission is no less censorship than if the licensee were required to submit his day-by-day programing in advance.

I have read with great interest the five-part series of articles published in the Congressional Record by Congressman Thaddeus J. Dulski of New York called "The Smut Peddlers." He is primarily concerned with the use of mails for distributing such matters but an equal temptation exists in the radio and TV medium to pander to the baser emotions within all of us. Congressman Dulski points out that in his State alone there is a \$19 million a year business in pornography. Nationwide, pornography is estimated perhaps to be a \$500 million business. Is it any wonder that the radio or TV producer or owner might be tempted to the off-color or risque in programing? The station's financial support comes through public donations in the case of noncommercial stations or through advertisers on commercial stations. Without question, smut of any type through any medium has dollar appeal.

However, I believe that the majority of our stations have reached a balance on programing which is acceptable in their communities insofar as the morals and local tastes are concerned.

¹ Sec. 326. Censorship; Indecent Language: Nothing in this act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. (The last sentence of sec. 326 was repealed and recodified as sec. 1464 of the Criminal Code, 18 U.S.C., 1464. Sec. 1464 now reads as follows: "Broadcasting Obscene Language. Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.")

Even though I commend the industry for its effort along this line, I cannot overlook the fact that the Commission received 1,265 complaints during the fiscal year 1969 which were related solely to the off-color type of programing. I think it may be safely assumed that for every complaint received there were others who shared those views but did not write.

I believe that the station owners must exercise ever increasing diligence in the review of programing offered over the station so that the off-color smut will not be aired. When borderline programing is used because of some overriding social or moral redeeming value, the broadcaster should insist on truth, not titillation.

I do not view moral standards as being equal for the entire Nation nor do I believe that such standards should be necessarily dictated by production centers located in New York State, California, or other States. I question whether we have either now accepted or should ever accept universal or unrestricted use of the four-letter words and all manner of normal and abnormal sexual activity.

Courts have found that theater admission can be restricted to "adults only" but how is a station to judge the age of its viewers with precision? I believe that a station must assume that its audience at all hours of operation includes the young who can be mentally injured by smut programs just as seriously as they can be by a dose of strychnine or LSD.

In the final analysis, station control is surely preferable to censor control.

I am in complete agreement with the view that the Congress very wisely did not set up a seven-man body to sit as a judge and jury of what the American people shall hear and see on their airwaves. This could be carried one step further when you consider that only four of the seven Commissioners are required to take action. Had Congress attempted to set up such a body, I have no doubt that the Supreme Court would have held such an act unconstitutional. On the other hand, the Court said in the *NBC* case that—

"The right of free speech does not include * * * the right to use facilities without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard of licensing of stations was the 'public interest convenience or necessity. Denial of a license in that ground is not a denial of free speech.'"

The Court went on to say:

"* * * The act does not restrict the Commission merely to the supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic."

This, or similar statements contained in various decisions of the courts, indicates that the Commission does have a certain amount of control over programing through the exercise of its public interest determination. This, to me, is a passive duty in that I expect the licensee to determine what the listening or viewing desires of his service area may be. Having once made such a determination, I regard that licensee as the expert to carry out his commitment—which I also recognize can be changed from time to time. It is the obligation of the broadcaster to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedules consistent with the public interest in his service area. If the licensee significantly fails to live up to this commitment, then we do have authority to examine past programing. In the *KFKB* case, the court turned to scriptures and stated:

"* * * In considering an application for renewal of license, an important consideration is the past conduct of the applicant for 'by their fruits, ye shall know them.' Math. VII :20."

Actually, I believe the broadcasting industry is close today to inviting censorship, even though the courts may later strike it down, if the broadcaster does not daily practice responsible self-regulation in direct relation to the public he serves.

I believe your best defense against censorship is an understanding of the freedom which you now enjoy. At the outset, the critical question you will have to answer is: Do you view censorship as representing hatred of restraint more than a love of freedom? Someone once said to John Adams that man is born with a desire for freedom. "Yes, replied Adams, "but so is a wolf." If freedom meant no more than a natural hatred of restraint, it would not be a useful ideal.

Your freedom as a broadcaster, under section 326 of the act, is more than a matter of making choices. It also includes the freedom to share in setting up possible choices of programing. This implies some restrictions because no society allows unlimited choice. Laws, as well as the unwritten codes embodied in com-

munity standards may restrict freedom. Free speech, like other rights, has definite limits.

For example, if a man walks uninvited into a home and makes a speech, he has no right to complain when the owner puts him out or has him put out and arrested. He has abused the privileges of free speech by invading the privacy, and perhaps also the property, of those who do not want to hear him. Speech can invade the rights of listeners. In the case of the broadcaster invading the rights of the listener, the listener can turn off the offending program; refuse to purchase the products of the sponsor; write the station, the Federal Communications Commission, or his congressional delegation. Over a period of time, if enough people object by the various means open to them, the broadcaster must eventually get the message that he has missed the mark. He simply is not responsive to the public he serves. The duty connected with his freedom as a broadcaster is calling for adjustment. Let me make it clear at this point that I am not talking about the fringe or way-out complaint. And, I do not expect a puritanical sentiment to seize the broadcast industry.

Former President Hoover, then Secretary of Commerce during the Radio Conference of 1922-25, set forth the responsibility of the local licensee to the public:

"The dominate element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution. There is no proper line of conflict between the broadcaster and the listener, nor would I attempt to array one against the other. Their interests are mutual, for without one the other could not exist.

"There have been few developments in industrial history to equal the speed and efficiency with which genius and capital have joined to meet radio needs. The great majority of station owners today recognize the burden of service and gladly assume it. Whatever other motive may exist for broadcasting, the pleasing of the listener is always the primary purpose * * *.

"The greatest public interest must be the deciding factor. I presume that few will dissent as to the correctness of this principle, for all will agree that the public good must ever balance private desire, but its acceptance leads to important and far-reaching practical effect, as to which there may not be the same unanimity, but from which, nevertheless, there is no logical escape."

I can say that personally I rely heavily on the standards set by the industry itself in the Code of the National Association of Broadcasters and the commitment of each individual broadcaster, as far as the judgments I am called upon to make in the field of programing. It is my belief that if all broadcasters lived up to the Code and observed their programing commitment as updated to a true cross section of the public interest, it seems, my job as a Commissioner would be much easier and the growing number of skeptics would be obliged to concede that ours is the best broadcast system in the world. But as you know, all broadcasters do not live up to the Code and I am afraid some few treat the public with an "I know what is best for you attitude," or simply do not care.

Carved on the Archives Building, in Washington, D.C., which houses many of this Nation's important historic documents, is a statement admonishing all who enter that "The past is prolog to the future." These dusty files, and men, who long since have passed from the scene, still attest to the most advanced thinking and up-to-date precepts. The Founding Fathers knew what they intended when they used the word "freedom."

They felt that true freedom was obedience to moral laws. Lawful freedom, they said was the right of decent men, governed by conscience, to make their own principal choices in life. The founders were not anarchists, who wished to abolish government. Most of them, led by men such as John Adams, Benjamin Franklin, James Madison, Gouverneur Morris, George Wythe, John Marshall, and Alexander Hamilton, desired only a disciplined, moderate, law-respecting freedom. Perhaps the greatest cause of decay of freedom is that people do not understand the sources from which come true freedom. In this sense, I believe the "Self Regulation" (part of the title of this speech) is perhaps a misnomer for what I am really talking about is the broadcaster's true freedom. Such freedom does not grow out of any fear of what Government or the FCC may do but rather grows out of love, respect, and regard for the freedom we have here.

In closing, I would briefly bring before you a few observations on current issues involving programing and the individual licensee. I question whether

a broadcaster is actually exercising his right of freedom when on off-color program is permitted on the air only to be canceled after one night due to the vociferous outcry of an overweary public. This is your responsibility. I question the individual network affiliate's right to accept the judgment of a review board in New York. This is your duty as a broadcaster and you cannot delegate such obligation. Here the local licensee cannot look to the network to perform this duty for him. It is not the answer to say that the local broadcaster has no control over network programming or is obliged to take whatever comes over the "line." Unlike the network, the local broadcaster is a censor of programming with the exception of political broadcasting.

I question whether the broadcaster's freedom duties can be discharged with occasional spot checking of programs because these duties entail a 365-day-per-year task.

I will vigorously dissent to any FCC decision which threatens to control the content of your programming. The broadcaster's license is not intended to convert his business into "an instrumentality of the Federal Government" but neither may he ignore the public interest.

POST OFFICE DEPARTMENT,
Washington, D.C., October 4, 1968.

HON. ROBERT N. C. NIX,

Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN: I have the pleasure of presenting this report, in response to your request of September 9, 1968. You have asked that we cite some of the problems which we have had with alleged pornographers and describe some examples of the operations of those engaged in the pandering and mail order distribution of material alleged to be obscene.

On June 9, 1967, a rather comprehensive statement on this general subject was supplied your subcommittee incident to hearings held at Philadelphia, Pa. For ready reference and with your permission, there is herewith a copy of that statement. Essentially, this report will represent an effort to carry the subject forward to the present date.

Complaints to this Service regarding alleged mail order obscenity dropped 34 percent during the 6 months immediately following the Supreme Court affirmation of the *Ginzburg* conviction on March 21, 1966. This decision coupled with a lower court conviction of *Milton Lueros*, a Los Angeles, Calif., promoter, and four of his publishing and distributing corporations on November 4, 1966; and the indictment of three nationwide mail order distributors at St. Paul, Minn., on February 6, 1967, in my opinion, contributed in large part to the marked reduction in mail patron complaints in fiscal year 1967.

Fiscal year:	Complaints
1964 -----	86, 291
1965 -----	128, 140
1966 -----	197, 277
1967 -----	140, 786
1968 -----	¹ 177, 625

¹ Includes 29,491 complaints not referred to the Postal Inspection Service but filed and retained by Service Center postmasters since Apr. 14, 1968, incident to the implementation of the "pandering law," Public Law 90-206; 39 U.S.C. 4009.

The defendants at St. Paul, Minn., were acquitted on July 26, 1967, on the basis that the materials did not meet current tests with respect to obscenity and on February 7, 1968, the court of appeals for the eighth circuit reversed the conviction in *Lueros* on the same principle.

Mail patron complaints in fiscal year 1968, particularly in the latter half of that year, increased measurably as seemingly did the pornographic nature of the sex oriented material advertised and distributed by large mail order dealers. It may well be, however, that certain large mail order dealers in this material have misjudged the situation and assumed license in this area when none in fact was granted. Some may have gone too far. To illustrate, and in line with your request for examples of such operations, the following cases reflect postal inspector pursuit of certain suspect promotions in conjunction with the prosecutive efforts of the U.S. attorneys in various parts of the country.

HARVEY B. LEVITT & ASSOCIATES, INC.

On January 18, 1968, Harvey B. Levitt was sentenced to 2 years imprisonment and an associate, Robert Baranov, was sentenced to 1½ years imprisonment after conviction in Federal court, San Diego, Calif., for violation of the Federal obscenity statute, section 1461, title 18, United States Code. Fines totaling \$9,400 were assessed against the two promoters and their corporate entity. Operating as Flag Publications, San Diego; Sahara Publications and Van Peter and Associates, Lemon Grove, Calif.; they mailed an average of 5,000 circulars monthly advertising homosexual magazines and books as well as bondage and flagellation books and phonograph records designed to appeal to the sado-masochist. The conviction is on appeal.

LINETSKY PRODUCTS INC., ET AL.

On June 14, 1968, a Federal grand jury at Cincinnati, Ohio, returned an indictment against Louis W. Linetsky, Ruth Linetsky, and Linetsky Products Inc. charging violation of section 1461, title 18, United States Code, in advertising and mailing such books as those entitled "The Crowded Bed," "Oral Love," and "Sex Driven People."

Operating from printing, publishing, and distributing points in and about Los Angeles, Calif., Linetsky has continuously offered a wide variety of sex oriented materials on a nationwide mail order basis under as many as 15 business names, including John Amslow and Associates, Elgin Products, Gem Products et al since in or about 1958. Previous Federal indictments brought in 1962 and 1963 were dismissed by trial judges on the basis of early defense motions alleging that the materials then involved were not obscene as a matter of law. We are optimistic that this may not happen in the present case.

ART FILMS INTERNATIONAL, INC., ET AL.

On September 11, 1968, Federal grand jury at Milwaukee, Wis., returned an indictment against John Lamb, Ronald Graham, Art Films International Inc., doing business as Special Imports Ltd., and Zephyr Publications Inc., for violations of section 1461, title 18, United States Code. These promoters mail and distribute from the Los Angeles, Calif., area and are charged with the mail order advertising and sale of such films as those entitled "Scandinavian House of Love" and "Geisha Love Act," as well as certain allegedly pornographic magazines.

WORLD WIDE NEWS CORP., ET AL.

On September 6, 1968, an indictment was returned by a Federal grand jury at Cleveland, Ohio, charging Reuben Sturman, Esther Sturman, Joseph Sturman, Alvin I. Dlott, and Morris Wiseman together with four corporate entities, World Wide News Co., Inc.; Spot Discount Stores, Inc., d.b.a. Connoisseur Publications; Sovereign News Co., Inc.; and Cuyahoga News Co., Inc., with violations of sections 1461 and 1465, title 18, United States Code. The indictment charges the advertising, mailing, and interstate shipment of such paperback books, magazines, and films as those entitled "Lesbian Quarterly," "30 Day Orgy," "The Swingers and Switchers," "Beyond Lust," et cetera.

COVINA PUBLISHING INC., ET AL.

On March 29, 1968, Marvin Miller together with corporate entity, Covina Publishing Co., d.b.a. Collector's Publications were indicted by a Federal grand jury at Los Angeles, Calif., for use of the mails and common carrier in the distribution of allegedly obscene paperback books in violation of sections 1461 and 1462, title 18, United States Code.

On June 6, 1968, Miller was reindicted together with his corporate entity Covina Publishing Co. d.b.a. G & M Enterprises and Collector's Publications on similar charges. The material cited includes, in addition to direct mail advertising circulars, such paperback books as those entitled "Intercourse," "Misfortunes of Mary," "Female Photographs," and "Restless Love."

The above cases relate to domestic mail order dealers in alleged pornography. As indicated in my statement of June 9, 1967, vigorous action was also under way in cooperation with Canadian authorities to curb the activities of the so-called "Randolph" ring based in Canada but mailing into the United States. At that time, thirteen members of the ring had been arrested. The figure has now grown to 31 and these arrests together with the numerous foreign unlawful

orders issued through the efforts of the General Counsel have served to largely reduce this traffic.

You indicate an understanding that many of the promoters dealing in alleged pornography operate out of the States of California, New York, and Maryland. The facts in our possession indicated that perhaps 90 percent of the large dealers operate from bases in California or New York. We know of only one dealer operating from the State of Maryland at this time. We concentrate our investigative efforts on cases involving commercial dealers, and in fiscal year 1968 caused 345 arrests and obtained 263 convictions for obscenity violations.

As you know, the administration of the civil statute (39 U.S. Code 4009) regarding pandering advertisements and the expunging of names from mailing lists has been handled by the General Counsel. Should you wish detailed information as to the implementation of that law, I am sure the General Counsel would be happy to provide it.

I trust the information herewith supplied will assist the subcommittee and we stand ready to supply any additional data that may be desired.

With kind regards,

Sincerely,

H. B. MONTAGUE, *Chief Inspector.*

POST OFFICE DEPARTMENT,
Washington, D.C., May 12, 1969.

THOMAS R. KENNEDY, Esq.

Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR TOM: In response to your inquiry of May 9th, I enclose a copy of the memorandum of decision entered by the three-judge Federal court that was convened in California to consider the constitutionality of title 39 United States Code section 4009.

The New York statute to which you refer is section 484-h of the New York penal law. The law is set forth as an appendance to the decision in *Ginsberg v. New York*, 390 U.S. 629 (1968), where the Supreme Court held that the New York statute is not unconstitutional on its face.

I shall be happy to send you a copy of our revised memorandum on obscenity as soon as it is ready.

With best regards,

Sincerely,

DAVID A. NELSON,
General Counsel.

Enclosure.

MEMORANDUM OF DECISION, No. 68-1562-R, FILED APRIL 30, 1969, IN THE U.S. DISTRICT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ENTERED APRIL 30, 1969

DANIEL ROWAN, doing business as AMERICAN BOOK SERVICE, DONALD BARRSUGLIA, doing business as CALSUR Co., CHRIS WARFIELD, doing business as HOME PRODUCTS, RONALD STUART, doing business as RAS ENTERPRISES-DARO INDUSTRIES, PETE CHRISTO, doing business as ATHENA PRODUCTS, SOL RESNICK, doing business as CAMEO DISTRIBUTORS, WILLIAM YOUNG, doing business as BILTHELS MAILING SERVICE, FLOYD CLEMENS, doing business as TIFFANY ENTERPRISES, LEJAY WINKLER, doing business as QUALITY PRODUCTS, KEVIN CURLEY, doing business as MEDIA CONSULTANTS, LAMBERT FONTENOT, doing business as UNITED SURGICAL, RALPH LEVERSON, doing business as PREMIER PRODUCTS, NORMAN ARNO, doing business as NORMAN STACY & ASSOCIATES, NORMAN ARNO, doing business as C & A SALES, and EVE MILLER, PLAINTIFFS, *vs.* UNITED STATES POST OFFICE DEPARTMENT; UNITED STATES POSTMASTER GENERAL, W. MARVIN WATSON; ATTORNEY GENERAL OF UNITED STATES, RAMSEY CLARK, DEFENDANTS.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

(No. 68-1562-R)

MEMORANDUM OF DECISION

Plaintiffs herein are all either engaged in the mail order business, distributing, mailing and selling items, books and materials through the U.S. mail, or in the business of buying and selling lists of names to mail order houses or both.

Each of the plaintiffs have received prohibitory orders issued by the Postmaster General pursuant to the provisions of Public Law 90-206, now codified as Title 39, U.S.C. § 4009.¹

A three-judge court convened pursuant to 28 U.S.C. § 2284 now considers the attacks of plaintiffs upon the alleged constitutional deficiencies of Title 39 U.S.C. § 4009, as applied to their mail order business. Plaintiffs complain that section 4009 is unconstitutional because:

1. It is particularly violative of free speech granted by the First Amendment of the Constitution,
 2. It is violative of due process guaranteed by the Fifth Amendment of the Constitution of the United States,
 3. It is vague, ambiguous, uncertain, and without standards,
 4. It provides an unlawful delegation of powers,
- and asks that defendants be temporarily restrained and permanently enjoined from enforcing, implementing, acting upon or demanding performance pursuant to section 4009 of the United States Code, or any administrative determinations or order predicated thereon and that section 4009 be declared null and void.

The matter now comes before the Court upon motion for preliminary injunction on behalf of plaintiffs and defendants' motion to dismiss pursuant to Rule 12 (b) Federal Rules of Civil Procedure.²

¹ Title 39, section 4009, provides:
§ 4009. Prohibition of pandering advertisements in the mails:

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

² Federal Rules of Civil Procedure, Rule 12(b) provides in pertinent part:

"Rule 12. Defenses and Objections—
When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

*(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto * * * except the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted, * * *

I. THE FIRST AMENDMENT AND PLAINTIFFS' COMPLAINTS

Use of the mails for the dissemination and distribution of protected material,³ particularly written materials, is well within the protection and guarantee of the First Amendment of the United States Constitution.⁴ But plaintiff does not here present a *per se* prohibition of a use of the mails. Execution of any prohibitory order requires:

1. The addressee in his sole discretion believes a pandering advertisement to be erotically arousing or sexually provocative, and,
2. Notice to the Postmaster General by the addressee and request by the addressee of issuance of a prohibitory order.

These provisions make it clear that we must balance free speech when it confronts an unwilling recipient's right of privacy—pre-dating constitutional considerations and constitutionally recognized in *Raines v. United States*, 362 U.S. 17; *Breard v. Alexandria*, 341 U.S. 622 and *Griswold v. Connecticut*, 381 U.S. 479.

In *Breard v. Alexandria*, *supra*, a municipal ordinance forbidding peddlers and canvassers from going to private residences without an invitation was upheld. The Court in considering the First Amendment claims of magazine vendors says at page 637:

"We recognize the importance to publishers * * * of house-to-house method of selling by solicitation. As a matter of Constitutional law, however, they in their business operations are in no different position so far as the Commerce Clause is concerned than the sellers of other wares. Appellant * * *, is no more free to violate local regulations to protect privacy than are other solicitors."

Plaintiffs maintain that in balancing the guarantee of first amendment to freedom of speech and of the press and the right of privacy that the right of privacy must yield, citing to us the decision in *Lamont v. Commissioner Of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y. 1967).

We disagree—particularly in the posture of what is proscribed by the statute here in question. Judge Frankel had before him the enjoining of a sale of lists which (1) were public records, (2) may have contained names of willing as well as unwilling recipients, and (3) were prior restraints. Here we are concerned with a statute that proscribes mailings to an *unwilling* recipient *only*. To require a commercial enterprise to strike a name from a mailing list seems little burden to impose to guarantee that dimension of privacy to an individual, otherwise helpless in his home, to "turn off" pandering advertisements which may be erotically arousing or sexually provocative to him and his family.

We accept the suggestion of validity of such a statute as pronounced by the Supreme Court in referring to 39 C.F.R. § 44.1(a)⁵ in *Lamont v. Postmaster General*, 381 U.S. 301, when it says at page 310:

"The government asserts that Congress enacted the statute in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. But the sensibilities of the unwilling recipient are fully safeguarded by 39 C.F.R. § 44.1(a) (Supp. 1965) under which the Post Office will honor his request to stop delivery; * * *"

Title 39 U.S.C. § 4009 is only an implementation of the right of an individual to choose what it is he desires to see and read within his own personal sensitivity and concept of privacy.

It is summed up in *Kovacs v. Cooper*, 336 U.S. 77 at page 88—

"... The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. . . ."

³ Reference to "protected material" includes all matter other than those declared expressly non-mailable by statute or regulation withstanding the test of constitutional validity.

⁴ *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 437 where Mr. Justice Holmes says: " * * * The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our own tongues * * *"

See also *Speiser v. Randall*, 357 U.S. 513, 518.

⁵ 39 C.F.R. § 44.1(a) (now § 154.1) provides in pertinent part:

§ 154.1 Delivery to persons.

"(a) Delivery to addressee. The addressee may control delivery of his mail. In the absence of a contrary order, the mail is delivered as addressed * * *. The addressee may refuse to accept a piece of mail at the time it is offered for delivery. Also, he may request his postmaster in writing to withhold from delivery for a period not to exceed 2 years specifically described items of foreign printed matter or any obscene, lewd, lascivious, or indecent matter * * *"

II. DUE PROCESS AND PLAINTIFFS' COMPLAINT

The due process argument of plaintiff has been two-fold—(1) procedural defects and (2) confiscatory aspect of prohibitions on mailing lists.

Procedural Defects

Title 39 U.S.C. § 4009 meets the requirements of procedural due process, i.e., notice and fair hearing. The statute in clear terms provides:

1. A request from an addressee to the Postmaster General,
 2. Issuance of an order by the Postmaster General ordering the sender to refrain from further mailings to a named addressee and deletion of the named addressee from mailing lists,
 - and without penalty of any kind for violation of the order of the Postmaster General. Upon violation of the prohibitory order:
 3. The Postmaster General must serve by registered or certified mail a complaint stating the violation,
 4. The sender has 15 days within which to respond to the complaint,
 5. If requested by the sender—a hearing to determine whether or not a violation has occurred,
- the Postmaster General is still not authorized to prohibit the delivery of *any* mail though it may be violative of the order. Effective enforcement can only be had:

6. After request to and action by the Attorney General in petitioning to a United States district court for an order of compliance with the notice.
- A violation of the order of the district court may be punished as contempt. A recitation of the procedure makes it abundantly clear that section 4009 comports to the Constitutional requirements of due process.

Confiscatory aspects

Plaintiff complains that section 4009 in permitting the Postmaster General to order deletion of the name of an addressee from a mailing list is unduly oppressive and amounts to a violation of due process. Plaintiffs argue that their lists are not alphabetical and therefore the cost of deletion is approximately \$5.00 per name. This estimated cost, without more, appears incredible. But, assuming that plaintiffs have accurately assessed the cost of eliminating a name from a list, such a burden does not amount to a violation of due process guaranteed by the Fifth Amendment of the Constitution. Particularly when in the context presently before this Court it is being applied to commercial enterprises.

We do not read this statute to require that a sender refrain from *any* future mailings but only from mailings of "such materials," i.e., "any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." Nor do we read the statute to prevent "sale, rental, exchange, or other transaction" of a mailing list from which the name of a complaining addressee has been deleted. Plaintiffs' contentions to the contrary are without merit.

III. VAGUENESS, AMBIGUITY, STANDARD AND UNLAWFUL DELEGATION OF POWER

Plaintiff charges generally vagueness, ambiguity, lack of standard and unlawful delegation of power. It should be noted at the outset that no effective or threatened *prohibition* of free use of the mails is effected until hearing and order of an appropriate United States district court.

The standard could hardly be clearer than provided here. For the statute provides that the sender can be ordered to refrain from mailing "erotically arousing or sexually provocative" materials, *as determined by the addressee*, requesting issuance of an order of the Postmaster General. It is after the *first mailing* that all other proposed mailings are to be measured by the objectionable material of such first mailing.

It is only after determination of a United States district court *upon trial* and order that a sender is in danger of any penalty for mailings subsequent to the order of an appropriate United States district court but not of any order issued by the Postmaster General.

That the addressee may initiate the process, in which eventually the Attorney General "is authorized to make application, to a district court of the United States, for an order directing compliance with such notice," as part of a comprehensive scheme to guarantee to both parties, addressee and sender, a hearing before the district court of their respective rights and duties, comports with all notions of fairness and due process expressed in the Constitution.

The discretion given the addressee affects only the individual asserting his and his minor children's right of privacy. It sets no standard to be applied to anyone else or to the community at large. It does not infringe the right of any individual to accept or reject ideas in the marketplace of free expression. We find no unlawful delegation of power in validating this statute.

IV. PRELIMINARY INJUNCTION AND THE MOTION TO DISMISS

Where injunctive relief is sought, plaintiffs must show that there is a reasonable probability that they will prevail on the merits; that the danger of irreparable damage is immediate; and that they have no adequate remedy at law.

Plaintiffs fail in each respect. The statute provides a specific remedy at law *before* plaintiffs can be compelled to do anything. We see no reason that injunctive relief should be granted.

Since no factual issue is in dispute; having determined that Title 39 U.S.C. § 4009 is constitutional and provides an adequate forum in which plaintiffs may litigate any dispute they may have with any of the defendants herein, the motion to dismiss, treated as one for summary judgment under Rule 56, as required by Federal Rules of Civil Procedure, Rule 12(b), is granted.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law.

The clerk is instructed to enter judgment for defendants.

Dated: April 30, 1969.

CHARLES H. CARE,
United States District Judge.
MANUEL L. REAL,
United States District Judge.

Concurring by separate opinion.

SHIRLEY M. HUFSTEDLER,
United States Circuit Judge.

(For release a.m. Tuesday, November 24, 1964)

From: The New York Academy of Medicine, 2 East 103d St., New York City, 10029.

NEW YORK ACADEMY OF MEDICINE LETTER TO PRESIDENT JOHNSON CITES MEDICAL PROBLEMS INVOLVED IN SPREAD OF SALACIOUS PUBLICATIONS

The problem of salacious literature has deep-going sociomedical implications for the entire Nation and requires action on the Federal level, the New York Academy of Medicine stated in a letter (copy attached) to President Lyndon B. Johnson.

The letter from the academy was sent to the White House on Thursday, November 19, over the signature of Dr. Harold Brown Keyes, president of the 117-year-old medical organization.

"The Academy believes," the letter said, "that although some adolescents are unaffected by such literature, there are others who may be more vulnerable." The letter pointed out that "in the opinion of some psychiatrists, salacious literature may have an especially detrimental effect on disturbed adolescents."

Acknowledging the difficulty of proving scientifically a direct causal relationship between libidinous literature and socially unacceptable conduct, the academy asserts that "it is undeniable that concurrently with the flood of salacious literature, there has been a resurgence of venereal disease, particularly among teenagers, and an appalling upswing in the rate of illegitimacy, to mention only those social disorders which present a large element of medical concern."

The academy suggests that President Johnson direct the Federal Bureau of Investigation to initiate an investigation of the sources of salacious literature and the magnitude and channels of distribution in the United States. This gathering of information, the academy believes, is a necessary first step and would be helpful in planning measures to combat the menace.

As a second step, the academy proposes support for a program aimed at developing a coordinated effort at all governmental levels, and by public and private groups to oppose, by every constitutional means, the traffic in salacious literature.

The academy's interest in the medical aspects of the problem created by the increasing prevalence of salacious literature was high-lighted in 1963 by a study

undertaken by its Committee on Public Health. In its study, the Committee confined its consideration to the impact of salacious literature on the health of children and adolescents. Following these deliberations, the academy issued a statement on the problem in its official bulletin.

NOVEMBER 19, 1964.

THE PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: The New York Academy of Medicine has been, for several years, profoundly concerned about the medical aspects of the problem created by the increasing prevalence of salacious publications which are available to the children and youth of our Nation.

In 1963 the academy's committee on public health explored the problem at some length. It confined its considerations to the impact on health. The committee studied a collection of paperback books, magazines, records, and illustrated advertising leaflets and folders, ranging from erotic through libidinous to outright lascivious and lecherous. Although some samples in the collection were marked "For Adults," it is believed that the greater proportion of the material is purposefully directed toward teenagers. Indeed, teenagers are said to constitute a substantial segment of the readers of these publications. Following its study and deliberations the academy issued a statement on salacious literature which was published in its bulletin.

From its observations, the Academy gained the impression that the prevalence of salacious literature has increased. There appears to be an increased display of these publications on newsstands, with attendant greater circulation and sales. Their easy availability has been noted in newspaper reports and is being deplored in responsible publications. In the recent period, police action against sales of salacious literature seems to have been stepped up. But beyond these general impressions, the academy has been unable to obtain accurate authoritative data on the magnitude of the present distribution of this literature.

The academy notes also that the problem is not confined to this country alone although the United States is said to be a major source of salacious literature. The London Times of September 2, 1964 reported: "Scotland Yard is dealing with a new problem—mail order pornography." According to the London Committee Against Obscenity, Scotland Yard said they had 73 mail order "firms" on their books and as a result of investigations begun last May, about 1,850 prosecutions were being considered.

The academy believes that although some adolescents are unaffected by such literature, there are others who may be more vulnerable. Such reading encourages a morbid preoccupation with sex and interferes with the development of a healthy attitude and respect for the opposite sex. In the opinion of some psychiatrists, salacious literature may have an especially detrimental effect on disturbed adolescents. While it is difficult to prove scientifically that a direct causal relation exists between libidinous literature and social unacceptable conduct, it is undeniable that concurrently with the flood of salacious literature, there has been a resurgence of venereal disease, particularly among teenagers, and an appalling upswing in the rate of illegitimacy, to mention only those social disorders which present a large element of medical concern. In short, it can be asserted that the perusal of salacious literature has the potentiality of inciting some young persons to enter into illicit sex relations and thus of leading them into promiscuity, illegitimacy, and venereal disease.

The New York Academy of Medicine believes that the problem of salacious literature has deep-going sociomedical implications for the entire Nation. It suggests that the situation requires action on the Federal level. As a necessary first step the collection of information would be helpful in planning measures to fight the menace. The organization best equipped and most experienced to carry out an effective investigation of the problem is the Federal Bureau of Investigation. It is the academy's hope that you may use the authority of your high office to direct the FBI to initiate an investigation of this area, to determine the sources of salacious literature and the magnitude and channels of distribution.

In the academy's opinion a second step is also needed: a coordinated effort at all governmental levels, and by public and private groups to combat by every constitutional means the traffic in salacious literature. As you know, this was the purpose of legislation introduced by Senator Karl Mundt, of South Dakota.

The academy believes that both kinds of action are necessary: the gathering of information and the coordination of effort. Only in this way can an effective campaign be carried out.

Sincerely yours,

HAROLD BROWN KEYES, M.D., *President.*

[From the Washington Daily News, May 3, 1969]

PRESIDENT DEFINES OBSCENITY

SMUT PLAN TAILORED TO COURT RULINGS

(By Dan Thomasson)

The Nixon administration is seeking to curtail the flow of smut in the Nation's mails with proposals tailored to avoid conflicts with recent Supreme Court decisions on obscenity.

The keystone of a three-phase plan offered by the President yesterday was a recommendation to Congress that the mailing of pornographic material to persons under 18 years of age be made a Federal crime.

The administration defines what materials are obscene, including the depiction of "human genitalia" and erotic acts.

Other proposals included broadening the existing law that permits a homeowner to reject mailed material that he considers obscene and banning advertising mail designed purely to arouse prurient interest.

Smut Bombardment

"American homes are being bombarded with the largest volume of sex-oriented mail in history," the President said in announcing his proposals. "Most of it is unsolicited, unwanted, and deeply offensive to those who receive it."

Mr. Nixon said more than 140,000 letters of protest have been received by the Post Office Department in the last 9 months alone.

The President said Supreme Court interpretations of the First Amendment's free speech and free press guarantees have made it increasingly difficult for Federal authorities to crack down on offensive sex-oriented material in the mails.

The ban on the mailing of smut to minors is patterned after a Supreme Court approved New York statute, which prohibits the distribution of material to minors that depicts nudity, sexual conduct or sado-masochistic behavior.

The Nixon proposals adds that the material must be adjudged offensive to "the prevailing standard in the adult community" and proven to be without "redeeming social value."

Conviction of violation of the law, if passed, would carry a penalty of \$50,000 fine and/or 5 years in prison for the first offense and double that for the second.

Affect Publications

The ban on sex advertising—which a Justice Department spokesman said could apply to ads in general circulation publications sent through the mails—is patterned closely after Supreme Court standards which permit States to ban any material that appeals to "prurient interests."

Under the third proposal a homeowner would not have to receive material he considered obscene before asking the Post Office to order the sender to take his name off the mailing list. Instead he could ask the Post Office to put his name on a list of persons who don't want to be sent any obscene material. This list would be made available to the 2,000 dealers in sex material now operating in the United States.

[From the National Observer, July 7, 1969]

CALIFORNIA'S CONCERN—KEEPING SMUT OUT OF YOUNG HANDS IS NEW ANTI-OBSCENITY LAW'S GOAL

(By Ron Blubaugh)

SACRAMENTO.—Two new antiobscenity laws have just been signed into California law by Gov. Ronald Reagan. One is drafted so as to define obscenity as limned in recent U.S. Supreme Court decisions and so as to meet judicial objec-

tions to previous legal definitions. The other new law is designed to prevent sale of pornographic matter to juveniles.

Finding a workable definition of what constitutes obscene literature or other material has proved to be one of the most frustrating of legislative jobs. Time after time, various antiobscenity laws have been struck down by the courts. In recent U.S. Supreme Court decisions, four tests were established to determine whether particular material is obscene. These are:

- Whether the material is utterly without redeeming social importance;
- Whether the material is patently offensive;
- Whether to the average person, applying contemporary national community standards, the dominant theme of the material taken as a whole appeals to the prurient interest; and
- Whether the seller of the material was "pandering to the widespread weakness for titillation by pornography."

BASED ON FOUR TESTS

The new California laws were drawn by the lawmakers with direct reference to these four tests. Whether the new laws turn out to be enforceable and will stand judicial tests, of course, remains to be seen.

With the fourth and most recently declared test in mind, the California legislators drafted a law that authorizes courts to rule that material exploited commercially for "prurient interests" is "utterly without redeeming social importance" and is, therefore, obscene. The idea is that courts may determine whether certain books, pictures, films, and other matter are obscene by considering how they are advertised.

Heretofore, California antiobscenity laws had failed to take into account the motives of the seller; that is, whether he was "pandering" to human lust.

OBSCENITY DEFINED

Regardless of the seller's motives, moreover, the new law says particular material is obscene if it has a predominant appeal to prurient interests, if it goes substantially beyond customary limits of candor, and if it is utterly without redeeming social importance. "Prurient interest" is defined as "a shameful or morbid interest in nudity, sex, or excretion."

The law designed to keep pornography away from youngsters establishes a category of "harmful matter" that is nearly the same as the definition for obscene matter. The difference is that the new measure permits juries to find that some material is obscene for juveniles but not for adults. Such material is deemed merely "harmful." Persons convicted of selling harmful matter to youngsters under 18 are subject to as long as a year in jail and fines up to \$2,000. Repeat offenders will get 5-year prison terms.

Both measures were part of Mr. Reagan's proposed legislative program. On signing the new laws, the Governor said: "The need to keep pornographic and obscene materials out of the hands of our children has been, and is today, a matter of extreme importance. . . . Pandering to the weaknesses of our adult citizens is bad enough. Appealing to the weaknesses of our children is nothing less than criminal. This landmark legislation will rightly return to parents the ability to protect their children from obscenity by strengthening significantly the punishment of smut peddlers who are guided solely by the enormous profits such material can bring."

[From the Washington Post, June 26, 1969]

STRICTER PORNOGRAPHY LAWS FAVORED

(By George Gallup)

PRINCETON, N.J.—Most Americans favor stricter laws on pornography. At the same time they are not afraid to have sex dealt with in a frank and objective manner. A majority of adults, in fact, favor courses in schools in sex education, which would include a discussion of birth control.

Of every 100 adults interviewed in a new Gallup survey, 85 say they favor stricter State and local laws dealing with obscene literature sent through the mails and 76 in every 100 want a tougher stand on the kind of magazines and newspapers available at newsstands.

Among those opposed to restrictions are some who feel that the lifting of all laws on pornography could have a salutary effect on public morals.

A total of 1501 were interviewed in the survey, which was conducted May 16 through 19. These were the questions asked and the findings:

What about magazines and newspapers sold on newsstands? Would you like to see stricter State and local laws on such literature or not?

STRICTER LAWS ON NEWSSTAND LITERATURE?

	Yes (percent)	No (percent)	No opinion (percent)
National.....	76	17	7
Men.....	70	23	7
Women.....	80	12	8
21 to 29 years.....	61	31	8
30 to 49 years.....	77	17	6
50 and over.....	82	9	9
College.....	65	30	5
High school.....	80	13	7
Grade school.....	77	13	10

Do you approve or disapprove of schools giving courses in sex education?

The seven in 10 (71 percent) who answered in the affirmative were then asked this question:

Would you approve or disapprove if these courses discussed birth control?

The latest results and those from 1965:

	1969 (percent)	1965 (percent)
Approve of courses with discussion of birth control.....	55	46
Disapprove.....	12	18
No opinion.....	4	5
Favor sex education.....	71	69

Of particular interest is the finding that Catholics are nearly as likely as Protestants to approve of sex education courses that discuss birth control. Young adults, as well as people with a college background, express the highest degree of approval.

To discover the views of Americans on the fare offered by the movies, TV and in magazines, this question was asked:

Have you seen anything dealing with sex on television or in the movies or in print in a magazine that was objectionable?

Here are the findings:

Thirty-eight percent say they have been something objectionable on television.

Twenty-five percent say they have seen something objectionable in print in a magazine.

Twenty-three percent say they have seen something objectionable in the movies.

Among teenagers and college students, something approaching a revolution in attitudes on sex may be in the making. Evidence for this can be found in a recent Gallup survey of the Nation's college campuses.

Two out of every three college students interviewed (66 percent) think it is not wrong for men and women to have premartial sex relations.

There are differences, however, on the basis of the type of school attended. A majority of students in both public and private colleges say sex before marriage is not wrong, but a majority of college students in church-related colleges hold the opposite view.

[From the Washington Post, May 9, 1969]

RIGHT TO BAR OBSCENE MAIL UPHOLD

LOS ANGELES, May 9 (UPI)—A three-judge Federal panel has upheld the constitutionality of a 1968 law allowing persons to halt the mailing of advertise-

ments for obscene material to their homes, U.S. District Attorney Matt Byrne disclosed today.

It was the first court test of the law that gives the citizen sole discretion to determine what he considers obscenity. Passed by Congress in December 1967, it became effective April 15, 1968.

The law had been challenged by 15 individuals in a suit filed last September seeking to enjoin the Post Office Department and the U.S. Attorney General from enforcing it. They contended the statute was unconstitutional because it violates freedom of speech.

The ruling was handed down April 30 by a panel made up of U.S. Circuit Judge Shirley M. Hufstедler and U.S. District Court Judges Charles H. Carr and Manuel L. Real.

[From the Federal Times, Jan. 15, 1969]

SEE TEST CASE SHAPING IN OBSCENE MAIL RULING

WASHINGTON.—In a case which could result in a test of the postmaster general's authority to administratively halt mail-order sales of obscene materials, the post office has denied a firm the right to receive funds through the mails for magazines found to be obscene.

Acting under a civil statute authorizing the department to bar mail-order sales of obscene matter, the judicial officer for the department, Peter R. Rosenblatt, found seven magazines sold by "The Mail Box" of North Hollywood, Calif., appeal "to the prurient interest in sex, are patently offensive to contemporary community standards . . . and are utterly without redeeming social importance."

Following an administrative hearing in Los Angeles, the department ordered postmasters to refuse to cash money orders the firm has received and to return mail payments and new orders to senders marked "unlawful."

The order may be appealed to the Federal courts.

This is the first time in 7 years that the department has attempted to enforce the civil statute (title 39 U.S.C., sec. 4006). In 1961 the Supreme Court (*Manual Enterprises v. Day*) ruled that the post office had no authority to determine whether material was obscene or not.

Postal investigations in fiscal 1968 led to 263 convictions in Federal and State courts. Inspectors are handling about 150,000 citizen complaints a year.

Under the "Anti-Pandering Act" of last April, the department has issued more than 95,000 prohibitory orders through its General Counsel's Office; 100,000 more are expected during the current 1969 fiscal year.

[From the Philadelphia Bulletin, June 18, 1967]

THE COURAGE TO STAND FOR STANDARDS IN A TIME WHEN PORNOGRAPHY MASQUERADES AS LITERATURE, POP ART FRAUDS PASS AS MASTERPIECES, AND LEADERS OF OPINION FEAR TO SPEAK OUT LEST THEY BE THOUGHT OF AS "SQUARES"

(By Barbara W. Tuchman)

What I want to say is concerned less with leadership than with its absence, that is, with the evasion of leadership. There is an abdication of moral leadership in the sense of general unwillingness to state standards.

Of all the ills that our society is heir to, the focal one, it seems to me, from which so much of our uneasiness and confusion derives, is the absence of standards. We are too unsure of ourselves to assert them, to stick by them if necessary and, in the case of persons who occupy positions of authority, to impose them. We seem to be afflicted by a widespread and eroding reluctance to take any stand on any values, moral, behavioral, or esthetic.

Everyone is afraid to call anything wrong, or vulgar, or fraudulent, or just bad taste or bad manners.

Our time is one of disillusion in our species and a resulting lack of self-confidence—for good historical reasons. Man's recent record has not been reassuring. After engaging in the Great War with all its mud and blood and ravaged ground, its disease, destruction and death, we allowed ourselves a bare 20 years before going at it all over again. And the second time was accompanied by an episode of man's inhumanity to man of such enormity that its implications for us have not yet, I think, been fully measured.

A historian has recently stated that for such a phenomenon to take place as the planned and nearly accomplished extermination of a people, one of three preconditions necessary was public indifference.

Since then the human species has been busy overbreeding, polluting the air, destroying the balance of nature and bungling in a variety of directions so that it is no wonder we have begun to doubt man's capacity for good judgment. It is hardly surprising that the self-confidence of the 19th century and its belief in human progress has been dissipated.

"Every great civilization," said Secretary of Health, Education, and Welfare John W. Gardner last year, "has been characterized by confidence in itself."

At mid-20th century, the supply is low. As a result we tend to shy away from all judgments. We hesitate to label anything wrong and therefore hesitate to require the individual to bear moral responsibility for his acts.

We have become afraid to fix blame. Murderers and rapists and muggers and persons who beat up old men and engage in other forms of assault are not guilty; society is guilty; society has wronged them; society beats its breast and says *mea culpa*—it is our fault, not the wrongdoer's. The wrongdoer, poor fellow, could not help himself.

I find this very puzzling because I always ask myself in these cases, what about the many neighbors of the wrongdoer, equally poor, equally disadvantaged, equally sufferers from society's neglect, who nevertheless maintain certain standards of social behavior, who do not commit crimes, who do not murder for money or rape for kicks?

How does it happen that they know the difference between right and wrong and how long will they abide by the difference if the leaders and opinionmakers and pace setters continue to shy away from bringing home responsibility to the delinquent?

Admittedly, the reluctance to condemn stems partly from a worthy instinct—and from a rejection of what was often the hypocrisy of Victorian moral standards.

True, there was a large component of hypocrisy in 19th century morality. Since the advent of Freud, we know more, we understand more about human behavior; we are more reluctant to cast the first stone—to condemn—which is a good thing, but the pendulum has swung to the point where we are now afraid to place moral responsibility at all.

Society, the large, amorphous, nonspecific scapegoat, must carry the burden for each of us, relieving us of guilt. We have become so indoctrinated by the terrors lurking in the dark corridors of the guilt complex that guilt has received a very bad name. Yet, a little guilt is not a dangerous thing; it has a certain social utility.

When it comes to guilt a respected writer—respected in some circles—has told us, as her considered verdict on the Nazi program, that evil is banal—a word that means something so ordinary that you are not bothered by it; the dictionary definition is "commonplace and hackneyed." Somehow that conclusion does not seem adequate or even apt. Of course, evil is commonplace; of course, we all partake of it. Does that mean that we must withhold disapproval and that when evil appears in dangerous degree or vicious form we must not condemn but only understand?

That may be very Christian in intent but in reality it is an escape from the necessity of exercising judgment—which exercise, I believe, is a prime function of leadership.

What it requires is courage—just a little, not very much—the courage to be independent and stand up for the standard of values one believes in. That kind of courage is the quality most conspicuously missing, I think, in current life.

I don't mean the courage to protest and walk around with picket signs or boo Defense Secretary Robert S. McNamara which, though it may stem from the right instinct, is a group thing that does not require any very stout spirit.

I did it myself for Sacco and Vanzetti when I was about 12, and picketed in some now forgotten labor dispute when I was a freshman and even got arrested. There is nothing to that; if you don't do that sort of thing when you are 18 then there is something wrong with you.

I mean, rather, a kind of lonely moral courage.

Standards of taste, as well as morality, need continued reaffirmation to stay alive, as liberty needs eternal vigilance.

To recognize and to proclaim the difference between the good and the shoddy, the true and the fake, as well as between right and wrong, or what we believe at

a given time to be right and wrong, is the obligation, I think, of persons who presume to lead, or are thrust into leadership, or hold positions of authority.

That includes educators.

Educators meet the problem of fixing, or at least elucidating, social and cultural values all the time.

I realize that it is increasingly the habit in the difficult circumstances of college administration today, to find out what the students want in the matter of curriculum and department and then give it to them. This seems to me another form of abdication, another example of the prevailing reluctance to state a standard and expect, not to say require, performance in accord with it.

SOURCE OF ANGER

The permissiveness, the yielding of decision to the student, does not—from what I can tell—promote responsibility in the young so much as uneasiness and a kind of anger at not being told what is expected of them, a resentment of their elders' unwillingness to take a position.

Recently a student psychiatric patient of the Harvard Health Services was quoted by the director, Dr. Dana Farnsworth, as complaining, "My parents never tell me what to do. They never stop me from doing anything."

That is the unheard wail, I think, extended beyond parents to the general absence of a guiding, reassuring pattern, which is behind much of society's current uneasiness.

Most people need a structure, not only to fall into but to fall out of. The rebel with a cause is better off than the one without. At least, he knows what he is "agin." He isn't lost. He does not suffer from an identity crisis.

It occurs to me that much of the student protest now may be a testing of authority, a search for that line to fall out of, and when it isn't there they become angrier because they feel more lost, more abandoned than ever.

In the late turmoil at Berkeley, at least as regards the filthy speech demonstration, there was a missed opportunity, I think (however great my respect for Dr. Clark Kerr) for a hearty, emphatic and unmistakable "No!" backed up by sanctions.

Why? Because the act, even if intended as a demonstration of principle, was in this case, like any indecent exposure, simply offensive and what is offensive to the greater part of society is antisocial, and what is antisocial, so long as we live in social groups and not each of us on his own island, must be curtailed.

The issue is really not complicated or difficult but, if we would only look at it with more self-confidence, quite simple.

So, it seems to me, is the problem of the Central Intelligence Agency. You will say that in this case people have taken a stand, opinion makers have worked themselves into a moral frenzy. Indeed they have, but over a false issue.

The CIA is not, after all, the Vietcong nor the Schutzstaffel in blackshirts. Its initials do not stand for "Criminal Indiscretions of America." It is an arm of the American Government, our elected, representative Government.

Virtually every government in the world subsidizes youth groups, especially in their international relations, not to mention in athletic competitions.

The difficulty here is simply that the support was clandestine in the first place and not the proper job of the CIA in the second. An intelligence agency should be restricted to the gathering of intelligence and not extend itself into operations.

PORNOGRAPHIC WORKS

A similar confusion exists, I think, with regard to the omnipresent pornography that surrounds us like smog.

A year ago the organization of my own profession, that is, the Authors League, filed a brief *amicus curiae* in the appeal of Ralph Ginzburg, the publisher of a periodical called *Eros* and other items, who had been convicted of disseminating obscenity through the mails.

The league's action was taken on the issue of censorship, to which all good liberals automatically respond like Pavlov's dogs. (For the record, I should perhaps insert my own qualifications as a liberal, which go way back to employment on the *Nation*, to Loyalist Spain during the Civil War and even to pursuit by the FBI during the McCarthy era, my badge of respectability.)

Since at this stage in our culture, pornography has so far got the upper hand that to do battle in its behalf against the dragon censorship is rather like doing battle today against the bustle in behalf of short skirts; and since I believe that

the proliferation of pornography in its sadistic forms is a greater social danger at the moment than censorship; and since Mr. Ginzburg was not an author anyway but a commercial promoter, I raised an objection, as a member of the council, to the Authors League spending its funds in the *Ginzburg* case.

I was, of course, outvoted; in fact, there was no vote. Everyone around the table just sat and looked at me in cold disapproval.

NOT STIFLED

Thereafter, when the Supreme Court upheld Ginzburg's conviction, everyone in the intellectual community raised a hullabaloo about censorship advancing upon us like some sort of Frankenstein's monster.

This seems to me another case of getting excited about the wrong thing.

The cause of pornography is not the same as the cause of free speech. There is a difference. Ralph Ginzburg is not Theodore Dreiser and this is not the 1920's.

If one looks around at the movies, especially the movie advertisements, and the novels and the pulp magazines glorifying perversion and the paperbacks that make *De Sade* available to schoolchildren, one does not get the impression that in the 1960's we are being stifled in the Puritan grip of Anthony Comstock.

Here again, leaders, in this case authors and critics, seem too unsure of values or too afraid of being unpopular, to stand up and assert the perfectly obvious difference between smut and free speech, or to say: "Such and such is offensive and can be harmful."

Happily there are signs of awakening. In a review of a book called "On Iniquity" by Pamela Hansford Johnson which related pornography to the Moors murders in England, the reviewer concluded that "this may be the opening of a discussion that must come, the opening shot."

In the realm of art, no less important than morals, the abdication of judgment is almost a disease.

Last fall when the Lincoln Center opened its glittering new opera house with a glittering new opera on the tragedy of Antony and Cleopatra, the curtain rose on a gaudy crowd engaged in energetic revels around a gold box in the shape of a pyramid, up whose sides several sinuous and reasonably nude slave girls were chased by lecherous guards left over from *Aida*.

When these preliminaries quieted down, the front of the gold box suddenly dropped open, and, guess who was inside?—no, it was not Cleopatra, it was Antony, looking, I thought, rather bewildered.

Thereafter, everything happened and in crescendos of gold and spangles and sequins, silks and gauzes, feathers, fans, jewels, brocades, and such a quantity of glitter that one began to laugh, thinking that the spectacle was intended as a parody of the old Schubert revue. But no, this was the Metropolitan Opera in the vaunted splendor of its most publicized opening since the Hippodrome.

I gather it was Mr. Bing's idea of giving the first night customers a fine splash. What he achieved was simple vulgarity, as at least some reviewers had the courage to say next day. Now, I cannot believe Mr. Bing and his colleagues do not know the difference between what is honest artistry in stage design and what is pretentious ostentation. If they know better, why do they allow themselves to do worse?

As leaders in their field of endeavor, they should have been setting standards of beauty and creative design, not debasing them.

VISUAL ARTS

One finds the same peculiarities in the visual arts.

Non-art, as its practitioners describe it, the blob school, the all-black canvas, the paper cutouts and Campbell soup tins and plastic hamburgers and pieces of old carpet, are treated as art, not only by dealers whose motive is understandable (they have discovered that shock-value sells); not only by a gullible pseudo-cultural section of the public who are not interested in art but in being "in" and wouldn't, to quote an old joke, know a Renoir from a Jaguar; but also, which I find mystifying, by the museums and the critics. I am sure they know the difference between the genuine and the hoax. But not trusting their own judgment, they seem afraid to say "No" to anything for fear, I suppose, of making a mistake and turning down what may be next decade's Matisse.

For the museums to exhibit the plastic hamburgers and twists of scrap iron is one thing but to buy them for their permanent collection puts an imprimatur on what is fraudulent.

Museum curators, too, are leaders who as such, have an obligation to distinguish—I will not say what is good from what is bad in art because that is an elusive and subjective matter dependent on the eye of the time—but at least what is an honest expression from what is phony.

Most of what fills the galleries on Madison Avenue is simply stuff designed to take advantage of current fads and does not come from an artist's vision or an honest creative impulse.

The dealers know it; the critics know it; the purveyors themselves know it; the public suspects it; but no one dares say it because that would be committing oneself to a standard of values and even, heaven forbid, exposing oneself to being called square.

In the fairy story, it required a child to cry out that the emperor was naked. Let us not leave that task to the children. It should be the task of leaders to recognize and state the truth as they see it.

[From the Evening Star, Aug. 11, 1969]

LOFTY PHRASES OFTEN COVER MULTITUDE OF SINS

(By Morrie Ryskind)

When this column started, almost a decade ago, I was at first astounded and, frankly, flattered—by the amount of mail it evoked. And, though there were far more thorns than roses, I felt I might be remembered gratefully as the man who had wiped out the postal deficit.

For some reason—it may be one of Parkinson's laws—things haven't worked out that way, and both postal rates and deficits soar. Yet, though it now costs 5 cents instead of 3 to send a post card saying "Drop dead, you pig," and the price of a special delivery stamp has just jumped to 45 cents from 30, nothing deters my faithful pen pals when aroused. And they arouse easily.

They salivate like Pavlov's dogs at any liberal slogan, whether or not it fits a given case. But "academic freedom" really sets them off. At this they jump to the parapets, ready to defend the sacred standard with their very lifeblood or at least a quart of ink on letters for which I sometimes have to pay 12 cents postage due.

I hold that lofty phrases often cover a multitude of sins, and cited two such recent instances in California. The first was that of the physics professor who couched his final examination in verbiage indicating that America was a police state. Called to account, he claimed his right to so propagandize was protected by "academic freedom."

The second was the English teacher who used one of her own poems—a tour de force in which she contrived a veritable mountain of pornography in only 50 lines—as an artistic (her own phrase) example of modern verse. Fired, she contends that know-nothing parents and trustees interfered with her—you guessed it—"academic freedom."

My scoffing has brought letters by the score. Here's a typical one from a man angry enough to pay the new special delivery rate: "You attack the right of a professor to express himself in, of all places an institution of learning! Your diatribe should go down in history with Hitler and neofascism!"

On the poet I am asked, "Who are you to judge poetry?" This one—like many others—enclosed a review of the verses by an English professor at a local university. The savant agrees with the author that hers is a work of art, likens her to Baudelaire and says the indignation aroused by her opus is due to abysmal ignorance.

And thus a spokesman for the younger generation: "Get with it man! Those four-letter words are in everyday use now, you * * * (Here follows one not in use in my undereducated household.) You belong to a hypocritical era when sex and other body functions were considered dirty. * * * How far back do you go?"

Quite a way, I fear. In my day a four-letter man was one who had won honors in four different sports. Now it refers to composers of graffiti once reserved for toilet walls.

As a matter of fact, I regard the human body as a miraculous structure. And, if memory serves, I was all for sex—though I thought its proper place in the bedroom—with the door closed.

And, to use a simple more down your alley, son, I believe in urination, too—but not in the public streets, as is the custom in some backward (or should I

say progressive) lands. It is you avant-garde lads who have mad sex and the other bodily functions dirty.

As to the now hallowed poem, I believe that even if there were no dispute about its phrasing, it still would not qualify as poetry. It exemplified what Max Eastman called the "cult of unintelligibility." When the author has nothing to say, he disguises it by throwing in confusing metaphors, which, if you can't understand, make you a lowbrow.

The lady has added sensationalism to disguise the fact that her cupboard of ideas is bare. Minus the dirty words, the poem would have received no attention at all.

But with the attendant publicity, the odds are that the work will be turned into a movie or play under the title of "Academic Freedom"—for mature folk only. With, of course, an all-star cast in the nude. What a gold mine!

[From This Week, May 25, 1969]

ALL THAT THE LAW ALLOWS

(By Edward Silberfarb)

In the last century, proper young ladies were shocked at the use of the word "leg" in polite conversation. It was, they felt, a much too direct term for a part of the anatomy that could nicely be called a "limb" instead. Even pianos stood on limbs" during what H. L. Mencken called the golden age of euphemism in his "The American Language."

Now limbs grow only on trees, and a reference to any part of the leg, from mid-thigh to metatarsal arch, evokes only a stifled yawn. These are the days when not only legs but every other part of the body is discussed, displayed, and celebrated in books, movies and plays with a frankness that would have sent the proper Victorian ladies of the 1800's scurrying for earplugs and blinders.

The book that best demonstrates this new era of permissiveness is Philip Roth's "Portnoy's Complaint," a young man's lament to a psychoanalyst. In it, the hero spells out his sex life, from his earliest memory of his mother unrolling her stockings over her thighs to his latest experiences, an orgy in Rome and a seizure of impotence in Israel. Throughout, Roth never hesitates to call a leg a leg.

The result is a 274-page Joycean soliloquy that takes the bloom off Molly. Indeed, it leaves one wondering why James Joyce's "Ulysses," which was banned until 1933, ever caused even a raised judicial eyebrow. Or why Norman Mailer had to invent a three-letter word to replace a more recognizable four-letter one in order to get "The Naked and the Dead" past the censor.

The dramatic arts are leaping ahead even faster than literature toward the extreme in frankness. From hints of nudity on stage (as in "You Know I Can't Hear You When the Water's Running"), came nudity itself, unfrocked and undisguised: a few seconds at the end of act I in the rock musical "Hair" and 40 minutes (with the naked, silent heroine tied to a chair) in "Sweet Eros."

Critics were wondering, "What can they do for an encore?" and the theater soon had the answer. An off-Broadway production this year, "Che!" displayed sexual acts on stage, and the Swedish movie "I Am Curious (Yellow)" showed more of the same on the screen.

The race toward forthrightness has been so swift that one publisher who specializes in that sort of thing was caught off guard. Bernard Geis Associates has just published David Gurney's "The F Certificate," considered at the time it was being written to be a futuristic view of what the sexual revolution would lead to. In the book, a moviemaker produces a superblue film showing sexual intercourse to the general public for the first time.

"The joke was on us," Geis said in a recent interview. "We thought we had a book that was ahead of its time, but between the writing and the publication events had caught up with us. The future had already occurred."

If the future is already upon us, what lies ahead? How far can obscenity go in literature and the arts? What indeed can they do for an encore? Geis sees a counterrevolution in which restraints will be imposed. "We're approaching an extreme in permissiveness and the pendulum will swing the other way," he predicts, with obvious regret. "Freedom from inhibition is a healthy thing, but we live in a hypocritical society."

One kind of counterrevolution came in March when some 30,000 persons gathered at a "Down With Obscenity" rally in Miami's Orange Bowl. A similar rally was being planned in New York.

Not all observers agree that there will be a public revolt against the current trend. One literary agent predicts that the new freedom will merely bring on a lot of bad literature. "And as a result, the public will lose interest in pornography," she said. "We musn't confuse literary quality with the presence or absence of sex."

And not everyone agrees that the free expression in today's literature is a new phenomenon. An editor at Macmillan said, "There's too much fuss being made over something that isn't new at all. Perhaps public morality is changing, but it's all been said before. Books of the past have said far more than *"Portnoy's Complaint."*

But if today's pornographers are not saying anything new, certainly their product is more widely distributed and more available than ever before. A high-ranking law enforcement officer recently declared, "In the last year and a half, the proliferation of pornography, both hardcore and borderline, has become a major phenomenon." He attributes it to a changing interpretation of the laws.

"There is an irreversible trend in the Federal courts," he said, "to allow an adult to have anything he wants, as long as it isn't forced upon him." The U.S. Supreme Court recently underscored the lawman's comment when it upset the conviction of Robert Eli Stanley, an Atlanta, Ga., bachelor, for possession of obscene material (films) in his home.

In the Stanley case, the court said in effect that obscenity in the home is a constitutional right. "If the first amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch," Justice Thurgood Marshall said. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

Te judicial trend began in 1933 when Federal Judge John Woolsey lifted the ban on "Ulysses." Then in 1957 the U.S. Supreme Court, in upholding the conviction of Samuel Roth, a publisher and dealer in erotica, laid guidelines that were expanded by rulings on the novel, "Fanny Hill." The guidelines, sometimes called the gripes of Roth, established that a work could be banned as obscene only if it "appeals to prurient interest," is "without redeeming social importance," and is "patently offensive under a national standard."

There was much flexibility under the Roth- "Fanny Hill" standard, and the standard grew more flexible with the U.S. Supreme Court's 1967 decision in the *Redrup* case, reversing the conviction of a clerk in a New York City bookstore. In that one, the court was more concerned with the manner of distribution than with content. It determined that the books in question were not sold to minors or thrust on an unwilling public.

Two Supreme Court justices, Hugo Black and William O. Douglas, have maintained that all prosecution for obscenity is unconstitutional. And Justice Black has also noted the problem of definition: "Of course, I understand that pornography sounds bad. But I have never seen anybody who'd say what it is."

Another Supreme Court justice who has leaned toward freedom of expression is Abe Fortas. His position that certain allegedly obscene movies could be shown brought him under fire from the Senate Judiciary Committee when he was nominated by President Johnson as chief justice. Coming to his support was the Yale Law School, which held an "Abe Fortas Film Festival" to show that the controversial movies were quite innocuous.

Literature, plays and films are not the only outlets for direct expression. For example, artist Charles Stark draws buttocks and genitals and foresees those subjects eventually gaining wide acceptance, somewhat like portrait painting.

If the public is wondering how far this new expressiveness will go, it is also wondering why it has come this far. One answer comes from Father John Culkin, director of the Center for Communications at Fordham University. He sees the root of it all to be Puritanism, a reaction to the repressive atmosphere of family, church and school.

"What we're going through now is a shakedown cruise, exploring a new morality," he said.

THE HIGH PRICE OF PORNOGRAPHY

(By Richard Kyle-Keith)

CHAPTER IV—PORNOGRAPHY AND CRIME

The dissemination of pornography in modern society presents two problems—the morally depraved nature of pornography itself, and the socially and morally undesirable effects of pornography.

There are two diametrically opposed views on the casual relationship between pornography and crime. In the opinion of some medical experts appearing from time to time as witnesses on behalf of persons charged with spreading pornography, there is no relationship between the reading of smut and the perpetration of crimes. However, the fact that such statements usually are made in behalf of pornography merchants subject to penalization makes this view somewhat suspect. The expert appearing in court on behalf of a defendant gets paid for his services; his fee may be assumed to be based on the proposition that the views expressed by him coincide with those propounded by the defense. His opinions are not without some bias. Moreover, it must be remembered that in American courts expert testimony is not by itself allowed to become the guiding principle of a decision; a jury or judge are guided chiefly by the facts as they see them, taking into account only so much of the expert testimony as they consider necessary or relevant.

The opinion that there is no relationship between pornography and crime is not, to be sure, always expressed in a courtroom to aid the defense of pornography peddlers. Quite frequently it represents a disinterested and honest point of view. In "Obscene Literature and the Constitution," writer Philip R. Davis points out:

"Mr. Comstock himself is also an unconscious witness to the harmlessness of obscenities. In a report he informs us that of 30 years he had stood at the mouth of a sewer searching for and devouring obscenity as a salary, and yet he claims that his lucrative delving into filth has left him, or made him so much purer than all the rest of humanity that they cannot be trusted to choose their own literature, art, plays, and motion pictures until these works have been expurgated by him or his kind. Why is it that Mr. Comstock is immune? * * * If it is true that his morality was still unimpaired at his death, then it would seem to follow that obscenity cannot injure the ordinary normal human."

If the latter-day Comstocks are not affected by the pornography they seek out and then endeavor to banish, it might follow that few persons are adversely affected by pornography; the self-appointed censors are not sought out by the Divinity, and presumably have no greater or lesser capacity to resist temptation than anybody else has.

The trouble with this view is that it hinges on the meaning of "the ordinary normal human," a term often used and indeed applied here by Davis himself. What is an ordinary, normal human? Psychiatrists claim that there is no such thing or concept as "normal" when applied to man; it is normal for one man to act one way, for another to act in another way under identical circumstances. While some readers of pornography may be totally unaffected, even revolted by it, others may find pornography a highly potent aphrodisiac. Indeed the fact that some people are affected by pornography in one way or another does not mean that all others are affected at all, or affected in the identical manner. At any rate, the crux of the problem frequently is not the question how one particular person was influenced by pornography, but how he reacted on his environment after he was so influenced. Drug addiction is fought by society not so much because of the influence drugs have on the addict—dangerous though this may be to the fabric of society in the long run—but because the addict is likely to act upon society in a destructive manner. By the same token, the influence of pornography on the reader himself is not of as much immediate interest as is action which the pornography addict may take within or without the frame of society. And this, of course, is the problem of the influence of pornography on crime. The old cliché "a book has never seduced a girl yet" consequently in nonsense, because it is not the book that does the seducing but the boy who reads it.

Those who believe that no causal relationship exists between the reading of pornography and the commission of crimes frequently point out the absence of reliable statistics on the subject, and insist that no clinical or statistical tests have ever been made to determine the exact relationship between pornography and crime. In this age of the supremacy of statistics such an objection certainly seems to have value—until it is more closely examined. A congressional Sub-

committee on Postal Matters dealt with the problem of pornography in 1959; its members believed that the answer to the question of statistics had been supplied by Father Terrence Murphy at a recent symposium at Loyola University Law School.

Indicating the weakness of the position taken by people who claim that the effect of pornography on human behavior has not been proven by statistics made under clinically controlled conditions, Father Murphy contended that "the-no-effect-between-the-reading-and-conduct school not only demands the use of empirical methods, but many of its advocates require empirical-statistical evidence of controlled experiments. They call for evidence produced by experiments which would require thousands of persons to be isolated from all erotic visual material for a number of years. And then their behavior pattern would have to be compared to that of a group of similar psychological makeup, influenced by the same environmental factors, but subjected to controlled exposure to obscenity. This demand by the men who know only one method is completely unrealistic. The practical difficulties of carrying out such experiments in our society are readily evident. If the demands of the empirical-statistical method were acceded to in other areas, many disciplines would be impoverished. Under such requirements, psychiatry, for example, would never have made the progress it has made."

It is in the nature of the problem that no statistical evidence exists—or perhaps ever will exist—to indicate the exact connection between the reading of pornography and the commission of crimes. Law enforcement agencies rarely have the means at their disposal or indeed find it necessary to survey the established reading habits of sex offenders. Nevertheless, responsible police officials are convinced that there is a direct causal relation between the enormous increase of pornography and the increase in sex crimes in the United States. J. Edgar Hoover, the Director of the Federal Bureau of Investigation, stated recently:

"I believe pornography is a major cause of sex violence. I believe that if we can eliminate the distribution of such items . . . we shall greatly reduce our frightening sex crime rate.

"As a law officer I have no doubt in my mind that the most sensible and most effective place to attack is through those who produce and distribute pornography. Yet it is not easy to stop the peddler. It is appalling that an entire community can work itself into an hysteria of outrage against the sex criminal himself, yet tend to regard the man who helped trigger the criminal as only a contemptible human being, better ignored than punished."

Thus, despite all the absence of statistical proof, it is impossible to come to any other conclusion but that there is a close, causal relationship between pornography and crime; all human experience points in that direction. The F.B.I. has come forward with some statistics demonstrating that the increasing avalanche of pornography during the past few years can reasonably be considered to have a close connection with pornography. The crime rates, particularly the statistics relating to sex crimes, certainly have increased of late. In various circulars addressed to law enforcement officials during the past few years, the F.B.I. has pointed out that in the crime rates reported by police in cities of over 2,500 population, the number of persons involved in sex offenses, excluding rape and prostitution, rose from 38.5 per 100,000 population in 1953, to 41.7 per 100,000 in 1954, to 45.3 per 100,000 in 1955, and reached 47.5 per 100,000 in 1956. In 1957 there were nearly eight forcible rapes per 100,000 persons in the United States. In 1958 this figure increased 10½ percent—so that, statistically, a forcible rape occurred every 36 minutes. On the basis of offenses known to the police, a study of 353 cities revealed that rapes have increased 101 percent since 1939—a staggering picture of immorality that does not even reflect the real extent of the problem. Law enforcement agencies know that probably less than half of all the rape cases are reported to the police; in many cases the victims, afraid of embarrassing publicity, remain silent, with the result that thousands of dangerous sex criminals remain at large, free to continue their maladjusted careers.

In a circular addressed to law enforcement officials on September 1, 1957, J. Edgar Hoover particularly emphasized that danger that results from the failure to report to the authorities sex offenses short of rape: "Of vital importance is the need for prompt reporting of sex violations, including indecent advances, "peeping tom" and exhibitionist instances, and other seemingly "minor" offenses. Recently, upon the news of a double slaying of child victims, the police of one city received no less than twenty calls from parents belatedly reporting assaults on small children. Failure to report these violations, generally based on an un-

founded fear of embarrassing publicity, can only given an unreasonable second chance to a potential sex fiend."

It is impossible to believe that there is no connection between the increase in crime rates and the growing dissemination of pornography in this country. Nor do recent statistics support views such as those expressed by Virginia Howlett, consultant to the health and welfare council of Philadelphia. In a statement before the House Subcommittee on Postal Operations in 1959, Miss Howlett said that as a social worker with years of experience, she did not think that pornographic material was the cause of delinquency, but rather a symptom. This would mean of course that the problem of delinquency—whether juvenile or adult—would have to be tackled independently of the problem of smut. While this approach simplifies the whole question, its fallacy is almost self-evident. Only in very rare cases do people manufacture their own pornography; it is sold or offered to them. The fact that they read it or come across it does not mean that ipso facto they are delinquents; pornography is all around them, and as often as not, they find it without searching for it.

The real danger lies in the possibility that pornography may awaken instincts which, although subconsciously existing, might never have come to the surface but for the stimulus provided by pornography. Once smut is read, it can hardly be denied that there is a considerable possibility of a strong and lasting influence on the reader—and that influence can only be discovered after he has read it; it cannot be disregarded as a possibility before he has seen it.

Legislative and law enforcement officials are particularly concerned with the effect of pornography on young people. There is a variety of obvious reasons for this. The rate of juvenile sex crimes has risen sharply during the past 10 years; the effect pornography has upon the immature mind may be far more serious than the influence which it exerts upon the mature; the future of the nation may be at stake if young people are permitted to grow up with morals that can only be considered destructive of civilized society.

While the influence of pornography on the young cannot and should not be underestimated, it is wrong to believe that only the young are susceptible to its wiles. Maturity is by no means a matter of chronological age; indeed, there are a great many people who never really mature at all. There is no reason to believe that such people, adults in the eyes of the law and society, are not as much influenced by pornography as are the physically young. Yet the question of the influence of smut on the public is frequently treated as if it only concerned the welfare of youth, when in fact the danger encompasses all age groups.

More often than not smut is primarily directed at young people or at persons of their emotional age level. A peddler always directs his wares at those whom he believes to be most susceptible. In his opening statement at the New York hearings of the Senate Subcommittee on Juvenile Delinquency in May 1955, Senator Kefauver explained that "many people are under the impression that pornographic movies, so-called party-record, pictures showing unnatural sexual activities, and other material of this sort is produced primarily for stag parties and men's smokers. The effect of this material on adults is undoubtedly degrading, but the long-range impact on juveniles is far more serious. That is what we are considering here today. We shall show by these hearings that a large portion of the market for this material is with inquisitive and impressionable teenagers. This means that after young people have been exposed to these pornographic pictures and movies, showing all types of perversion, they may tend to regard these things as normal. Indeed the influence is to lead them to embrace the abnormal and thus mar youthful lives."

It should be borne in mind that the work of this Senate committee concerned itself only with the influence of pornography on the young. This restriction implies that the general problem of pornography is indeed far more serious than was indicated by the committee's hearings. If the number of adults who read and are influenced by pornography is added to the number of juveniles who do so, the problem well-nigh assumes incalculable proportions. To the general public the influence of pornography on youth of course is the most dramatic and burning issue, because it is a natural American tendency to be primarily concerned with the welfare of the young.

An interim report of the Senate committee stated emphatically that "lewd, indecent, and obscene pornographic material does reach juveniles. The subcommittee, at this point, because of inability to get accurate statistics from enforcement agencies, is unable to give exact figures as to the amount of pornographic material that reaches youth, but it is in a position to state that large quantities

are bought and read by those in the 12- to 18-year group, and even larger quantities get into the hands of those 18 to 21 years of age."

Senator Kefauver's committee addressed questionnaires to the police officials in a large number of American cities; almost every one of the responses cited examples of cases where at least some of the most repulsive smut had been found in the hands of juveniles of all ages—some of them even under the age of 10. Smut was found in the school lockers and desks; in the wallets of girls and boys; hidden in toy telescopes; concealed in a cache near a swimming pond frequented by 8 to 10 year olds; secreted in bureau drawers at home. Police officials reported that smut was sold openly or clandestinely at newsstands, from cars stationed near playgrounds, through agents who themselves were students—and it was always sold to all comers, irrespective of age. The only basic requirement was hard cash.

Some purveyors of pornography piously claim that their merchandise, when ordered through the mails, is only available to adults, and that a purchaser has to give his age on the order blank. In order to test this claim several Government investigators ordered some smut through the mails, filling out the order blanks in childish, scribbled handwriting, and leaving blank the printed question about the age of the purchaser. In each case, the material ordered arrived without fail; the age or the absence of an indication of the age of the purchaser clearly was not a factor when it came to filling the order.

There is ample evidence that pornography not only reaches people of all ages, but also substantially influences them. Dr. George W. Henry, professor of clinical psychiatry at Cornell University College of Medicine, has made some pertinent observations on the growing tendency toward sexual deviation. He is particularly concerned with fetishism—a form of sexual aberration where certain objects such as lingerie, high-heeled shoes, etc., excite sexual desires, as do trussing, binding, whipping, and other forms of sadism or masochism. He feels that the increase in sex crimes and the various forms of deviation are to a substantial degree the result of the reading of pornography. Dr. Henry believes that "the majority of people are so constituted and live in environments such that they will grow up to be reasonably normal in their sexual adjustment. There is, however, quite a large proportion of the population who are susceptible to training, training such as may be obtained from these publications, and whether or not they arrive at a point of violence is perhaps an academic matter in view of the other problem that no one can tell ahead of time who is going to arrive at that goal once they have been exposed to these publications. Furthermore, there are all degrees of sadism and masochism which enter into human relations and which seldom get into the newspapers."

The reasonable assumption that pornography creates sexual deviation is inescapable. Since a statistically underterminable, but probably very large number of persons turn to sexual deviation if an opportunity offers itself, it is likely that the reading of smut constitutes a sizable training ground.

Dr. Henry points out that there is some confusion in the public's mind about the meaning of "children" and "adolescents." He suggests that when people use the word "children," they mean "adolescent," and "everyone knows that the adolescent is most sexually excitable, and has the least legitimate opportunity to find an outlet for that sexual excitability. As the result of that they find every conceivable means of finding an outlet * * *. It is an error also to assume that if you sell something to an adult it doesn't get to an adolescent. A great many of these so-called adults are really still adolescents, and feel most at home with actual adolescents. More than that, some of them are primarily interested in introducing adolescents into abnormal practices."

Referring to the adult sex pervert whose aim it is to convert young people, and indeed children, to his abnormal practices, Dr. Benjamin Schwartz, chairman of the Community and Civil Relations Committee of the Omaha Council of Churches, contends that "the legal process needs to be remedied to take care of the sex pervert who is the result of this pornographic literature quite as much as the adolescent who gets it."

The overwhelming opinion of psychiatrists and social workers supports the view that smut is substantially responsible for the increase in sexual deviations and sex offenses by young people. According to Dr. Benjamin Karpman, chief psychotherapist at St. Elizabeths Hospital in Washington, D.C., "there is a definite relationship between juvenile delinquency and sex life * * *. Our life from our point of view is guided by our instincts. We have two main instincts, the self-preserved instinct, and the race-preserved instinct, commonly known as the hunger and sex instincts." Dr. Karpman adds:

"Instincts spread by tension—you and I will never know that we are hungry unless there would develop in the stomach some sort of tension which sends a message to the brain and tells us that we are hungry. In other words we know of our sex life and of our personal life, of hunger life, only through the medium of tension developing.

"Tension is tension. When a younger boy * * * is reaching adolescence, he is hungry for information about sex, but for some reason or other he doesn't get it at home because the mother and father are too tired to talk.

"Where is the boy going to find it? He cannot find it at home. He doesn't always find it in school. Very few schools have developed to the point of giving lectures on the subjects of the facts of life. He looks for it in the gutter, and there he comes across pornographic material and literature, and that draws him into all sorts of gang life, which discharges itself as juvenile delinquency.

"In other words, here is a boy who is under a great deal of sexual tension. The home environment will not permit him to discharge the sexual tension in normal sex relations. Society doesn't permit that in a premarital way. Tension is tension. It must break through. If he cannot discharge it in a sexual way, he discharges it in a criminal antisocial way."

There is ample evidence—statistical and otherwise—that juvenile delinquency is sharply increasing with each year, that it is most commonly concerned with acts of violence, and that it appears in the suburbs as well as in the slums. In the 9-year period from 1949 through 1957, the number of appearances before juvenile courts for delinquency increased $2\frac{1}{2}$ times, while the child population increased only by one-fourth. According to an estimate of the Senate Subcommittee on Juvenile Delinquency, one out of every five boys in the 10 through 17 age group has a delinquency record. During 1957 over 600,000 children in this age group appeared before juvenile courts throughout the Nation. The chief neuropsychiatrist and medical director of the Philadelphia Municipal Court, Dr. Nicholas G. Frignito, whose position affords an unusual opportunity to evaluate the effects of obscenity and pornography on the conduct of youthful law violators, contends that antisocial, delinquent, and criminal activity frequently results from sexual stimulation creating such a demand for expression that gratification by vicarious means follows: "Girls run away from their homes and become entangled in prostitution. Boys and young men who have difficulty resisting the undue sexual stimulation become sexually aggressive and generally incorrigible. The more vicious delinquent or psychopathic type may become an exhibitionist, a rapist, a sadist, a fetishist. He may commit such antisocial acts as arson, pyromania, or kleptomania, which are often symbolic sexual acts."

"The Philadelphia Municipal Court," according to Dr. Frignito, "has case histories in which sexual arousal from smutty books led to criminal behavior from vicious assaults to homicide. Some of these children did not transgress sexually until they read suggestive stories and viewed lewd pictures in licentious magazines. In several instances the children were very young, varying in age from 9 to 14 years. The filthy ideas implanted in their immature minds impelled them to crime.

"Sexual stimulation by printed material does not always lead to crime, but it is always an inducement to impurity and in the more suggestible leads to aberrant forms of sexual misconduct, incest, voyeurism, and narcissism.

"Our prisons, correctional institutions, and mental hospitals are jammed with many of the unfortunates who were prey to pornography. Many may never recover their mental or physical health. Others may never have freedom.

"Pornography is an instrument for delinquency, it is an insidious threat to moral, mental, and physical health. It debases the true meaning and function of sex, and it incites to immoral and antisocial activity.

"The purveyor of pornography is an immoral, corrupt, degenerate individual who completely disregards the harm he causes to public morality and decency. The viciousness of his trade can be equaled to a pestilence."

At the conclusion of his testimony, Dr. Frignito was asked whether he felt that other members of the psychiatric profession would agree with the conclusion he had expressed. He replied that he believed they would agree with his statement because most psychiatrists talk about, write about, and agree that many emotionally disturbed people are psychosexually disturbed and that the added factor of widespread smut makes the problem of controlling their actions much more difficult.

Psychiatrists and police officials are not the only persons who see a close and direct connection between the spread of pornography and the increase in juvenile crime. One of the best informed groups on the effects of obscenity and all other

types of smut on juvenile behavior are the juvenile court judges who come into daily contact with the juvenile delinquent himself. The National Council of Juvenile Court Judges, at its meeting in 1956, passed a resolution asking Federal, State, and local authorities to curb and prohibit the publication, dissemination, and distribution of so-called comics, horror magazines, and other material depicting antisocial and vicious pictures and reading material:

"The National Council of Juvenile Court Judges are directly aware of the widespread distribution of certain so-called comic books and horror magazines, and other publications depicting sadism, crime, vulgar sex, and horror scenes in abnormal, salacious, and extreme forms and frequently containing advertisements for the sale of information on sex, vulgar pictures, and dangerous weapons.

"There is a growing realization that such foul publications, through their distribution to children and youth and their extensive encouragement to read them, contribute to the breakdown of the moral sense in children which today is causing an increase in juvenile delinquency throughout the nation and is often responsible for adult criminality.

"The publication, sale, and availability of these destructive and deteriorating books and magazines and 'comics' have become so prevalent in all parts of the Nation that their presence can no longer be ignored, or permitted by individuals charged with rearing, education, and protection of childhood.

"The character of juvenile delinquency has changed as a consequence of the stimulation of these publications, being no longer the thoughtless, mischievous acts of children, but are reflected in acts of violence, armed robbery, rape, torture, and even homicide to which the vicious and vile publications conditioned the minds of our children.

"As judges of the juvenile courts in America, we daily see the tragic and pitiful consequences of the children appearing before us and are conscious of the menace to our children which results from these antisocial and vicious pictures and reading materials."

Empirical knowledge can frequently be far more valuable in the field of human relations than statistical evidence; observation provides the specificity lacking in even the most reliable statistics. Thus, commenting on the incidence of pornography in the Nation's Capital, Congressman John Dowdy recently observed that, "nationally, 82 percent of arrests for rape were under 18 years of age, but in the city of Washington, where it is demonstrated this foul literature is in the schools, one-third of the arrests for rape were composed of youths under age 18."

The observations made by the juvenile court judges and the conclusion drawn from the situation in Washington are affirmed by Inspector Harry Fox, commanding officer of the Juvenile Division of the Philadelphia Police Department, who works in close collaboration with the juvenile courts in that city. In the period of 5 years, Fox and the men in his department interrogated over 100,000 boys and girls; in 1958, the Philadelphia Morals Squad arrested 300 boys and girls under 18 for sexual offenses. With the directness derived from immediate and personal observation, Fox addressed himself to the two basic questions involved in the problem of pornography and crime: whether young people actually buy, possess, or read obscene material, and whether it affects or motivates susceptible persons to the point where they commit the various offenses for which so many of them are arrested. The first question he emphatically answered in the affirmative. In regard to the second point, Fox reported that the Philadelphia police files—like the police files in most other cities—included many cases which support the view that pornography does create and abet crime.

While Senate, House, and State legislative hearings into the pornography problem usually concentrate on the danger pornography presents to youth, and emphasize the close connection between juvenile delinquency and pornography, there can be no doubt that the problem is not restricted to young people. This goes back to the interpretation of the word "young" itself; it is usually used to imply immaturity, and immaturity as has been pointed out, is not restricted to the chronologically young. Law enforcement officials are quite aware that pornography plays an important part in triggering the hidden drives of a great many adults who, but for pornography, would never have become overt deviates and sex offenders. In reviewing his experience in this area, Inspector Fox stated that "my men and I have questioned hundreds of these adults, these deviates and the juveniles and we believe, sincerely believe, that this material acts as an aphrodisiac resulting in rapes, seductions, sodomy, indecent assaults, and indecent exposures."

Dr. E. Preston Sharp, executive director of the Youth Study Center in Philadelphia, supports the view that there is a sufficient number of well-documented cases proving the direct link between reading or seeing pornography and the commission of crimes. Recalling a particular case which dramatized this connection, Dr. Sharp told a Senate committee in 1959 that he remembered well "a convict at the Eastern State Penitentiary who illustrates this point. In his initial term at this institution he served time for stealing. While in the penitentiary he was found guilty of a misconduct which involved the drawing of obscene pictures and was punished for this infraction of the rules. He was released on parole and shortly after completing his parole period he was arrested on charge of rape. When his room was searched at the time of the arrest, a considerable number of obscene books and pictures was found. There is no doubt in my mind that the imaginative activities stimulated by the literature precipitated the crime of rape."

Thus there is evidence that sexual deviates use pornographic material to entice children, particularly young girls, into sex acts by showing them pornographic pictures and lulling them into security by persuading them that nudity and sex play are accepted practices. In one case, a 62-year-old man in Philadelphia used pornographic pictures to seduce three girls—aged 16, 14, and 10. In another case, a man showed pornographic material to a girl so small that she was nicknamed "Peanuts" by her friends, in order to persuade her to pose nude for him. In a third case, a man was so aroused by the near-nudity displayed in a Brigitte Bardot picture that he went out and committed rape—a fine testimony for the kind of motion pictures one can see today in any community.

A particularly heinous sex crime with strong overtones of homosexuality occurred in Miami in August 1954. A 17-year-old boy was found hanging in an inverted position from a stick suspended between the branches of two trees, trussed up in such a fashion—a rope around his legs, arms, and neck—that by his position he was forced to strangle himself slowly to death. It is the opinion of Dr. George W. Henry that this was the end result of "bondage" pornography which suggested to the man responsible for the crime that sexual pleasure could be gained from viewing the boy's slow strangulation. A good many of the sexually maladjusted, in the psychiatrist's opinion, are not primarily interested in sex relations, but in the thrill and danger which is associated with the sexual act.

Sex crimes usually make the headlines of the newspapers and not necessarily only of the yellow press. In the public's mind the outward appearance of a sex criminal and the vendor of pornography reveals the disgusting nature of the activities. However, the degenerate who seduces or attacks young people by way of pornography does not always belong to the lowest stratum of society. The innocent are by no means always guided toward pornography and its resulting evils by the obviously degenerate or the man grown old in depravity; introductions to aberrations do not always take place behind the bushes in an unlighted park or under the protection of the shadows in an alley. Quite frequently men who to all outward appearances are eminently respectable get their sexual satisfaction by introducing others to the evils of pornography.

A raid on a dance studio in Washington, D.C., found 197 boys on hand to view a pornographic motion picture. The father of one of the boys, all members of a high school fraternity, had made the arrangements for the showing; the counselors of three high schools where the fraternity had charters were present for the movie.

Within 1 month after the Senate Subcommittee on Juvenile Delinquency held its hearings in New York in 1956, residents of Long Island were shocked by the discovery that a wealthy inventor, Ivan Jerome, had been corrupting the morals of young girls—one of them was only 11—by first showing them indecent pictures, and then photographing them in his penthouse apartment. Jerome had lured them to the apartment with money and costume jewelry and induced them to commit acts of perversion while cameras recorded the indecencies. His activities were revealed when an incendiary fire destroyed the apartment; his efforts to retrieve cans of films from the ruins led to his discovery. Dubbed by the newspapers "The Massapequa Monster," Jerome did not represent an isolated case of a respectable man gone astray; there were at the time similar cases in Philadelphia, in Oklahoma City, on the west coast, and in other parts of the country. The motive in these cases is either commercial or the satisfaction of perverted sex concepts so well exemplified in pornographic literature.

There are other cases where apparently respectable people, guided by pornographic literature, committed sexual offenses. A 42-year-old scientist arrested

in the Midwest on charges of taking indecent liberties with a 9-year-old girl was found to have an impressive collection of pornography in his home. In a recent FBI case a housewife received constant telephone calls from an individual who made obscene and suggestive remarks. After a letter arrived containing drawings and threats of bodily harm and assault, investigating agents discovered that the sender had an admitted addiction to reading pornographic literature.

Police blotters and court records throughout the Nation are full of cases indicating the close connection between pornography and crime, particularly crime involving sex deviations. It seems hardly necessary to recite them ad nauseam to prove what the overwhelming number of psychiatrists and jurists have known all along.

Nor is the public unaware of the causal relationship between pornography and crime. This is particularly so when a community or a family discovers that one of its members has become the victim of this vicious relationship. The father of a 6-year-old girl who was killed by a rapist in 1957 did not need any statistics when he came to the conclusion that society had to be blamed more than the sex criminal himself for permitting conditions that resulted in the death of his daughter.

On the other hand, there is evidence that the removal of pornography from the newsstands does result in a reduction in the incidence of sex crimes. Benjamin S. Schwartz, judge of the Cincinnati Juvenile Court, reported in March 1960 that "there has been a decline in juvenile delinquency in our county (Hamilton) in 1959. I believe that one of the important factors was the intense drive against obscenity and pornography in the past year, made by the Citizens for Decent Literature. For example, we found that upon my becoming judge in 1957, many juveniles on being brought to the court were carrying photographs and books on their person that were obscene and unadulterated trash. However, in 1959 we found only a trickle of this type of material in the possession of the youth brought into this court. Further, it is to be noted that sex delinquency took a sharp drop in the past year."

Difficult and far reaching as the problem of the relationship between pornography and crime is, it is not always without its tangential aspects. Thus a Col. Victor J. Fox wrote a book entitled "The Pentagon Case," intended to prove that pornography in America is the result of a giant Communist scheme to demoralize the country and then take it without resistance. The theory of history as a conspiracy is not new to this field. In 1798 a bishop of the Anglican Church warned the House of Lords that the appearance of dancing girls in London was the result of a conspiracy of the French, who, having realized that they could not take Britain by force, now were intent on demoralizing her so that conquest could be accomplished without battle. Very little is added to the solution of a serious problem by speculations of this kind.

COMMISSION ON OBSCENITY AND PORNOGRAPHY

PROGRESS REPORT

Introduction

This is a progress report to the Congress and the President. It reports no findings. It makes no recommendations. Either would be premature at this time in view of the extensive study and research assignments Congress gave to the Commission. It simply reports the manner in which the Commission is carrying out its assignments, and the directions its studies, investigation and research are taking. The Commission plans to report its findings and recommendations in the summer of 1970 as directed by Congress.

The Commission's Assignment

Congress, in Public Law 90-100, found the traffic in obscenity and pornography to be a matter of national concern. The Federal Government was deemed to have a "responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials." To this end the Congress established an advisory commission whose purpose is "after a thorough study which shall include a study of the causal relationship of such materials to antisocial behavior, to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography."

Congress assigned four specific tasks:

"(1) with the aid of leading constitutional law authorities, to analyze the laws pertaining to the control of obscenity and pornography; and to evaluate and recommend definitions of obscenity and pornography;

(2) to ascertain the methods employed in the distribution of obscene and pornographic materials and to explore the nature and volume of traffic in such materials;

(3) to study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other antisocial behavior; and

(4) to recommend such legislative, administrative, or other advisable and appropriate action as the Commission deems necessary to regulate effectively the flow of such traffic without in any way interfering with constitutional rights."

The Commission subscribes completely to the Congressional directive to make recommendations only after thorough study. Therefore, because results of its studies are not yet available, the Commission cannot yet make recommendations. Rather, this report relates the history of the Commission's activities, the status of its current work, and the directions in which it is moving.

Organization of the Commission

Congress established the Commission in October 1967, and the President appointed its members in January 1968. (A listing of the Commissioners is provided as Appendix A.) However, not until July 1968 were funds appropriated for its operation; at the same time the tenure of the Commission was extended to provide it the originally intended two years for its activities. The Commission is to report its findings and recommendations to the President and the Congress by July 31, 1970.

The Commission held its first meeting in July 1968. It gave exploratory consideration to the various areas of its responsibilities, making use of experts who presented preliminary analyses of the available information in the legal, traffic, and effects areas. It elected a chairman and vice-chairman. The Commission then organized itself into four working panels: 1) Legal; 2) Traffic and Distribution; 3) Effects; and 4) Positive (non-regulatory) Approaches. It appointed a subcommittee to recommend a director for the Commission's staff. The Director and a General Counsel were appointed effective the last week in August 1968, and the nucleus of a staff was assembled during September 1968. (A listing of the Commission's staff is provided in Appendix B.)

The full Commission or its working panels held 16 meetings through June 5; the attendance of Commission members at these meetings has averaged 90%. The Commission has reviewed many available studies and other data in the areas of its responsibility, developed research plans, and implemented the studies required by Congress. The remainder of this report will review the status of the Commission's work in each of the panel areas.

Legal Panel

The Legal Panel, noting Congress' directive that recommended action should not in any way interfere with constitutional rights, reviewed recent case law regarding obscenity and pornography for guidelines concerning permissible

legislative action. Apart from general obscenity statutes, constitutional precedents suggest three primary directions for effective legislative action to control erotic materials: 1) statutes with specific concern for juveniles; 2) statutes dealing with assaults upon individual privacy and offensive public displays; and 3) statutes prohibiting pandering.

The panel, in experimenting with drafting statutes, has worked first in these above areas, while leaving open the possibility of other types of legislation, including possible use of Federal laws to aid in enforcement of local obscenity laws. In Appendix C will be found an example of a possible statute designed to meet one of the areas of expressed public concern--the problem of assaults upon privacy through unsolicited mailings.

Congress in establishing the Commission stated "The State and local governments have an equal responsibility [to the Federal Government] in the exercise of their regulatory powers and any attempts to control this transmission [of pornographic and obscene materials] should be a coordinated effort at the various governmental levels." To provide the necessary background information for recommendations in this area, the panel is studying the legal provisions and enforcement activities at all three governmental levels.

Obscenity statutes of the Federal Government and from the 50 states have been assembled and are under review; statutes from selected municipalities are currently being collected. Also in preparation is a descriptive review of the activities of several Federal Departments which have responsibilities under Federal law for dealing with obscenity (the Postal Inspector's Office and the General Counsel's Office within the Post Office Department; the F.B.I., the Criminal Division, and the Civil Division of the Department of Justice; and the Customs Office in the Treasury Department). A survey of State and Municipal prosecutors regarding their experience, problems, and recommendations regarding the enforcement of obscenity statutes is nearing completion, and a survey of police officials is in the planning stage. The recommendations of States Attorneys General and of constitutional lawyers throughout the United States are being solicited. Intensive first-hand examination of obscenity law enforcement in a number of communities throughout the nation will take place within the next few months.

The survey of prosecuting attorneys merits some further elaboration. Questionnaires have been mailed to a stratified random sample of over 700 prosecuting attorneys. The questionnaires inquire into the extent of the problem of obscenity in the local community and what kinds of materials and distributions are involved; the experience of their offices in prosecuting obscenity cases; the methods most often used; the obstacles encountered in prosecution; recommendations for changes in existing obscenity law; and the role of local police officials and citizens groups in law enforcement. The sample has been selected in such a way as to allow comparisons between local and state prosecutors, between large urban and small town communities, and among

regions of the nation. Although the returns are not all in and the analysis is not completed, a preliminary review indicates that there is considerable variation in the experiences of the prosecuting attorneys. The returns are providing valuable information, insights, and suggestions. Finally, the Legal Panel has authorized the staff to plan a national sample survey designed to provide information relevant to the currently applied judicial test of "contemporary community standards." Recent discussions indicate that there are considerable variations in opinions about what are contemporary community standards regarding the offensiveness of sexual stimuli, but there does not now exist any empirical data on the matter to inform these discussions. One of the most troublesome aspects is the changing climate of opinion. Change has, of course, always been a factor, but currently the rates and degree of change make the problems in assessment of community standards increasingly difficult. Differences based on locality, age, economic status, education, etc., are obviously wide. Greater knowledge seems essential in order to construct any acceptable definition of obscenity. This survey is tentatively planned for the fall of 1969.

Traffic and Distribution

The Commission concluded early in its existence that, since there is no well-defined and generally accepted definition of obscenity or pornography, it must study a wide variety of erotic stimuli or sexually related materials. In its study of traffic and distribution, materials will be classified by descriptive categories.

Most existing estimates of volume of traffic do not designate the kinds of materials that are involved and are seldom based on empirical data. The most informative source on traffic and distribution is a report made to the California Legislature by the Office of the California Attorney General in 1967. This report described chiefly the state of affairs in California at that time, and requires up-dating because of rapid developments. Nevertheless, the report, based on carefully specified classes of materials, provides valuable insights into the organization of the erotic materials industry and helpful leads for further study. The overall question with which the panel is faced is, "Who gets how much of what, and how?" A two-pronged attack on the problem is being made by approaching it through studies of both distributors and consumers. Thus, two independent estimates of volume and nature of traffic will be secured.

The Commission staff is currently engaged in a study of the producers and wholesale distributors of erotic materials. Also, on our agenda is the study of local retail distribution, open and underground, including the types of materials handled and types of customers served by the various classes of retailers, and an inquiry into the extent of circulation among youth of material initially purchased at retail by adult customers. All these studies are somewhat

complicated by the fact that there tend to be several different industries, each centering in a particular medium. Because of limited resources, the studies will have to be done serially, and thus, spread over time. Currently, we are looking at certain types of magazines, books, and newspapers; movies are scheduled for the fall.

The mail order business in erotic or sexual materials is also currently under study. The study is being coordinated with the Post Office Department, and will complement its activities and provide independent estimates of volume. Questions concerning the use and abuse of mailing lists for unsolicited advertising of erotic materials are of high priority in the mail studies.

Estimates of the volume of traffic in erotic materials provided by the studies of distributors will be compared with independent estimates based on studies of potential customers. A national sample survey is being planned to determine the general public's experience with erotic materials. The survey is being designed to produce information about how much exposure, under what circumstances, various kinds of people have had to different kinds of erotic stimuli. This survey, scheduled for the fall, will not only provide independent estimates of the gross volume of erotic materials, but also crucial empirical data about patterns of distribution to the eventual consumers.

Two research projects currently under way are closely related to this issue of patterns of exposure: One is a study of the experience of college students with erotic materials, and the other is a feasibility study to see if this information can be obtained from high school students. The results from these studies are expected in the summer and will provide much needed information about the extent to which and the channels by which young people are exposed to erotic materials.

Another vital question in the realm of patterns of distribution is "Who are the large scale consumers of erotic materials--the regular customers?" The staff is designing a research project, which is to be carried out next fall, that will provide information about the characteristics of the habitual consumer of erotic materials, the functions of such materials for these people, and how they came to be involved with erotic materials.

Effects

The assignment to study the effects of obscene and pornographic materials on the public, and in particular on minors, is the most complicated of the Commission's technical tasks. The study of cause and effect relationships in any area is difficult enough; in the area of pornography and minors it is even more so. Some of the problems are: 1) the variety of stimulus materials that may be of concern; 2) the variety of supposed consequences of exposure; 3) isolating the

effects of exposure from the effects of other influences; and 4) the sensitivity of research and inquiry in the sexual realm.

One of the first activities of the Commission was to review the existing social and behavioral science literature relevant to its tasks. A review of this literature published in 1962 reached the following conclusions: 1) there was only meager research available at that time and much of it was open to criticism on methodological grounds; 2) the reported empirical research related to "immediate, transient responses," and there was as yet no empirical evidence to answer the questions "how long the conditions of arousal last and how this stimulation might affect overt behavior, attitudes governing behavior and mental health." Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009, 1032, 1034 (1962). A Commission-conducted review of the literature published in the years 1960-1968 reveals that the situation has not changed substantially in the 7-year period since that previous review.

The Commission has only limited resources and limited time, and recognizes that it cannot completely remedy this absence of information. Nevertheless, the study of effects is one of the Commission's principal tasks, and the Commission believes that in the time available it can provide helpful scientific information to guide legislative judgments, even though the answers may be tentative. Because of our almost complete empirical ignorance in the area of effects, even tentative answers should have a value.

The panel has established a series of research goals: 1) to ascertain the relationship between use of erotic material and sexual and nonsexual behavior; 2) to ascertain the relationship between use of erotic materials and attitudes toward sex, moral outlook regarding sex, and standards of conduct in sex; 3) to ascertain the relationship between cumulative exposure over time to erotic materials and arousal and interest in such materials; 4) to ascertain the relationship between exposure to erotic materials and general social attitudes and ideas; and 5) to ascertain the relationship between exposure to or use of erotic materials and mental health or psychopathology.

The panel has defined several methods of research that should contribute to the achieving of these goals: 1) survey research with national samples of persons; 2) intensive, "clinical" research on selected populations of persons (e.g., comparison of sex offenders or juvenile delinquents with nonoffenders in terms of history of experience with erotic materials); 3) studies of incidence and rates at the community level (e.g., to study the relationship between the amount of erotic material sold and the number of sex crimes in a sample of cities with differing characteristics); 4) experimental studies (e.g., rating the degree of offensiveness of erotic stimuli presented in a controlled laboratory situation); and 5) international comparative studies.

The panel has also agreed upon a strategy for implementing the research program in the Commission's situation of limited funds at present, uncertainty

regarding the total amount of funds to be available, and limited time. The strategy adopted is to work first on the creation of relatively standardized research instruments to be used in the survey and clinical (quasi-experimental) research, the identification of specific research situations, and exploratory feasibility studies, and to postpone large commitments to data gathering activities. Thus, we will be able to move rapidly into the data collection phase as soon as funds are available in FY '70.

A consequence of the necessity for relying on this two-phase research strategy is that much of the information regarding effects will not be available until near the end of the Commission's tenure. The results of these studies will be scheduled to be reported to the Commission in the spring of 1970 and will thus be available for the Commission to consider in making its recommendations and for inclusion in its final report.

Examples of exploratory and feasibility studies that are currently underway are: 1) the relationship between availability of pornography and sex crimes; 2) the consequences of exposure to erotic materials among college students; 3) the judgments by adults of the degree of intensity of various erotic stimuli; 4) the cumulative effects of large scale exposure to erotic materials, i.e., satiation or increased appetite; 5) adolescents' reports of the effects of erotic stimuli they have encountered in the "ordinary course of events"; and 6) potentially erotic stimuli associated with the dating experience of junior college girls and of unwed pregnant high school girls.

The Commission has also let contracts for the development and pre-testing of an adult survey research instrument, a clinical interview procedure, a test of moral reasoning regarding sex, and a high school student interview instrument.

Positive Approaches

The purpose of the Positive Approaches Panel is to explore and evaluate alternatives to legislative controls. The importance of this direction of inquiry has recently been pointed up by President Nixon, "The ultimate answer lies not with the government but with the people..Government can maintain the dikes against obscenity, but only people can turn back the tide." The panel is focusing on four types of alternatives: sex information programs, programs to encourage good reading by children, industry self-regulation, and citizen action groups.

A number of studies have shown that adolescents are generally characterized by a combination of strong curiosity about sex and a wealth of misinformation about the subject. Adolescents report that the principal source of sex information is their peers. Parents, church, and school are almost insignificant as sources of information in this area. The panel is investigating

two central questions regarding sex information: 1) whether the availability to children of sex information in the home, school, or church prevents an obsessive interest in obscene and pornographic materials; and 2) whether sex education in the home, church, or other institutions prevents potentially harmful effects of later exposure to obscene and pornographic materials. These questions can be tested by empirical research. One feasibility study in this area is underway. We are conducting a number of discussions trying to identify further appropriate research settings to inquire into these questions.

The panel is exploring the possibility of testing whether programs to encourage the reading of good books may serve as an alternative to interest in obscene materials.

Most of the mass media industries have promulgated codes that supply guidelines to the members of the industry in fulfilling their responsibilities to the society and the public, and these codes often contain sections dealing with erotic stimuli. The effectiveness of these industry self-regulating attempts is a much debated issue. The panel desires not only to analyze the provisions of such codes, but also to examine their effectiveness. The recently instituted movie-rating system of the motion picture industry offers an opportunity to study the operation of such an attempt at industry self-regulation. The Commission has contracted for an independent evaluation of the effectiveness of the new movie-rating system with an emphasis on the questions of the validity of the ratings and the enforcement of the admission standards regarding minors.

Citizen action groups may perform many functions relating to the control of erotic materials within a community. These ad hoc groups arise in a variety of circumstances, manifest a variety of organizational structures, achieve a variety of specific aims, and maintain viable existences for variable periods. No one, however, has attempted to describe the social dynamics of their emergence and operations; and no general statements, based on observation and analysis, can be made regarding them. Several ad hoc citizen groups have indicated to the Commission a desire to cooperate with the Commission and to be studied as a case history. The panel has initiated one research contract to investigate the feasibility of such studies. The complete results are not yet in, but the preliminary reports indicate that a valuable contribution will result. A second research site is now being explored as a possibility for a second case history as a test of the generalizability of the tentative description of the social dynamics of such groups.

Conclusions

This brief description of the current status of the Commission's work indicates the many specific tasks being undertaken to fulfill its assignments: to analyze the legal problems and develop useful definitions; to ascertain volume of

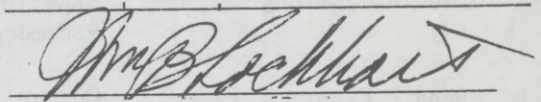
traffic and patterns of distribution; to study effects; and to recommend action. The presentation does not adequately reflect the degree of integration among the work of the various panels. The work of the various panels is intentionally coordinated, however, and one research project often serves several of the panels and several goals simultaneously.

One example of the integration of the work of the several panels may be found in the instance of the national survey. The Legal Panel requires information on community standards. The Traffic Panel requires information on how many people have been exposed to what kinds of material. The Effects Panel requires information on behavioral and attitudinal correlates of exposure to erotic materials. These three different information requirements are joined together in a single research project--a national sample survey.

Congress assigned to the Commission a tremendous task that is complicated by the primitive state of knowledge in this very complex area. The Commission feels that it is making progress in its program to remedy this lack of information. The direction of our studies will continue to be flexible as we seek the best means of securing the information needed for the recommendations requested by Congress. Although the Commission cannot exhaust the studies that need to be made in this huge and difficult area within the limited time and funds available, the Commission believes it will be able to make significant contributions by the summer of 1970 when it plans to make its report and recommendations in accordance with the assigned deadline.

All members of the Commission concur in the foregoing Progress Report as accurately reflecting the Commission's activities. A separate Statement by Commissioner Morton A. Hill will be attached, together with a brief response by the other members of the Commission.

Report Approved June 5, 1969

A handwritten signature in dark ink, appearing to read "W. B. Lockhart", is written over a horizontal line.

William B. Lockhart
Chairman

APPENDIX A

COMMISSION ON OBSCENITY AND PORNOGRAPHY

CHAIRMAN

William B. Lockhart	Dean, University of Minnesota Law School Minneapolis, Minnesota
---------------------	--

MEMBERS

Edward E. Elson	President, Atlanta News Agency, Inc. Atlanta, Georgia
Thomas D. Gill	Chief Judge, Juvenile Court for the State of Connecticut, Hartford, Connecticut
Edward D. Greenwood	Child Psychiatrist, The Menninger Foundation, Topeka, Kansas
Morton A. Hill, S.J.	President, Morality in Media New York, New York
G. William Jones	Assistant Professor of Broadcast - Film Art, Southern Methodist University Dallas, Texas
*Kenneth B. Keating	Judge, New York Court of Appeals Rochester, New York
Joseph T. Klapper	Director, Office of Social Research, Columbia Broadcasting System New York, New York
Otto N. Larsen	Professor of Sociology, University of Washington, Seattle, Washington
Irving Lehrman	Rabbi, Temple Emanu-El Miami Beach, Florida

*After approval of the Progress Report, Judge Keating resigned from the Commission to become U.S. Ambassador to India.

MEMBERS

Freeman Lewis	Vice President - Publishing, Simon & Schuster, Inc., New York, New York
Winfrey C. Link	Tennessee Annual Conference, Methodist Church, Hermitage, Tennessee
Morris A. Lipton	Professor of Psychiatry, University of North Carolina Medical School Chapel Hill, North Carolina
Thomas C. Lynch	Attorney General, California Sacramento, California
Barbara Scott	Attorney, Motion Picture Association of America, New York, New York
Cathryn A. Spelts (Mrs.)	Instructor in English, South Dakota School of Mines, Rapid City, South Dakota
Frederick H. Wagman (Vice Chairman)	Director, University Library, University of Michigan, Ann Arbor, Michigan
Marvin E. Wolfgang	Professor of Sociology, University of Pennsylvania, Philadelphia, Pennsylvania

APPENDIX B

COMMISSION ON OBSCENITY AND PORNOGRAPHY

PROFESSIONAL STAFF

W. Cody Wilson, Ph. D., Executive Director (August 1968)	Social Psychologist
Paul Bender, LL.B., General Counsel (August 1968)	Lawyer
Jane M. Friedman, LL.B. (January 1969)	Lawyer
Karen I. Green, M.A. (October 1968)	Clinical Psychologist
Bernard Horowitz, Ph. D. (September 1968)	Educational Psychologist
Weldon T. Johnson, Ph. D. (June 1969)	Sociologist
Lenore R. Kupperstein, M.A. (May 1969)	Criminologist
John J. Sampson, LL.B. (June 1969)	Lawyer
Virginia P. Banister (August 1968)	Administrative Officer

SECRETARIAL AND CLERICAL STAFF

Alfred S. Carter
Kathy I. Deister
Dorothy A. Gooding
Muriel L. Montgomery
Anna M. Zerega

Tentative Draft
of
STATUTE REGULATING UNSOLICITED MAILINGS OF
POTENTIALLY OFFENSIVE MATERIALS

The following tentative draft of possible legislation regarding the unsolicited mailings of potentially offensive sexual materials is presented only as an example of the Legal Panel's work in exploring the problems of drafting effective legislation to regulate the flow of traffic in erotic materials without in any way interfering with constitutional rights, as directed by Congress. This experiment in drafting legislation has been extremely instructive to the Commission and the result may be helpful to others who are struggling with similar issues. Whether this draft will ultimately emerge as a specific recommendation of the Commission must, of course, await the completion of the studies designed to bring the total problem into as accurate focus as possible. The definition it contains of "offensive sexual material" should not be misread as the Commission's attempt to define the "obscene" or the "pornographic."

STATUTE

Title—S.—UNSOLICITED MAILING OF POTENTIALLY OFFENSIVE MATERIAL

(a) *Purpose* - It is the purpose of this section to afford mail recipients the option not to receive through the mail unsolicited potentially offensive sexual materials.

(b) *Requirement of Symbol* - Every person who, for himself or by his agents, mails or causes to be mailed potentially offensive sexual material, as defined in subsection (h) herein, to an addressee or addressees who have not expressly requested receipt of the mailed material from the sender, shall place a symbol upon the envelope or outer wrapping thereof. The form, placement, size and other attributes of the required symbol, and the effective date of the requirement of this subsection, shall be set forth in regulations promulgated by the Postmaster General of the United States; *Provided that* (i) the regulations shall not, insofar as possible, require significant extra expense to be incurred by persons subject thereto in order to comply with their requirements, nor shall the symbol prescribed under this subsection contain language or signs indicating a judgment regarding the quality or value of the

materials to which it is required to be affixed; and, (ii) the regulations shall not require compliance therewith sooner than 90 days after publication of such regulations both in the Federal Register and by the posting thereof at all United States Post Offices.

(c) *Publication of Symbol and Return of Mail* - The Postmaster General shall take suitable steps to acquaint the public with the symbol required by subsection (b) and with the definition of potentially offensive material contained in subsection (h) of this section. Any person who receives mail bearing the symbol required by subsection (b) of this section, and who does not wish to open such mail, may either destroy it or mark it "refused," in which case he may redeliver it to the Post Office from which delivery was made, where it shall be destroyed. The right of destruction or refusal under this subsection may be made by a parent or guardian on behalf of his or her minor children who reside with the parent or guardian.

(d) *Exercise of Option by Mail Recipients* - Every person who wishes not to receive unsolicited mailings of any potentially offensive sexual materials, as defined in subsection (h) herein, may so notify the Postmaster General on a form provided by the Postmaster for that purpose. Such forms, which shall contain the definition of potentially offensive sexual materials set forth in subsection (h) of this section, shall be made available to the public at every United States Post Office and shall be deliverable to the Postmaster through any Post Office. A notification under this subsection may be made by a parent or guardian on behalf of his or her minor children who reside with the parent or guardian and, when expressly authorized by them to do so, a person may give such notice on behalf of other adults receiving mail at the same mail address. The Postmaster General shall take suitable steps to inform mail recipients of their option under this subsection.

(e) *Revocation of Exercise of Option* - Any person who, having notified the Postmaster General pursuant to subsection (d) of this section, wishes to revoke that notification, may do so on a form provided by the Postmaster General for that purpose. Such forms shall be made available to the public at every United States Post Office and shall be deliverable to the Postmaster through any Post Office. The Postmaster General may, by regulation, prescribe a reasonable period of time before such revocation shall become effective and the Postmaster may further provide, by regulation, reasonable restrictions upon the frequency with which the powers conferred upon mail addressees by subsections (d) and (e) of this section may be alternatively exercised.

(f) *Non-Delivery of Mail Carrying Symbol to Persons Exercising Option* - The Postmaster General shall, after enactment of this section, devise and implement procedures to prevent the delivery of mail bearing the symbol required by subsection (b) of this section to persons who notify him pursuant to subsection (d) of this section; *Provided that*, if practical considerations so require the Postmaster may restrict the application of such procedures to mail

addresses where the option under subsection (d) of this section has been exercised by or on behalf of all persons residing at that address.

(g) *Penalties* - Whoever violates the requirement of subsection (b) of this section shall be guilty of a misdemeanor and liable to pay a fine of not more than \$1,000, if the violation consists of the mailing of unsolicited material without the required symbol to no more than 25 addressees, or to pay a fine of not more than \$50,000, if the violation consists of the contemporaneous mailing of unsolicited material without the required symbol to more than 25 addressees.

(h) *Definitions* - For the purposes of this section:

- (i) Person means natural person, corporation or other legal entity;
- (ii) Potentially offensive sexual material means:

(A) Any pictorial representation, photographic or otherwise, of uncovered adult human genitalia or pubic areas, of human sexual intercourse, sodomy, masturbation, or direct physical stimulation of clothed or unclothed genitalia, or of flagellation or torture indicating an erotic relationship, or any description, advertisement or offer to sell such pictorial material where such description or advertisement presents an excerpt or excerpts from or a detailed verbal description of such material; or

(B) Any artificial human penis or vagina or device primarily designed physically to stimulate genitalia, or any description, advertisement or offer to sell or distribute such an artificial organ or device where such description or advertisement presents either a pictorial representation or a detailed verbal description of such organ or device or its manner of use; or

(C) Any pictorial or verbal material consisting primarily of instructions in or depictions of human sexual techniques or of detailed fictional or factual descriptions or depictions of human sexual practices, or any description, advertisement or offer to sell or distribute such materials, where such advertisement or description presents an excerpt or excerpts from such material incorporating detailed descriptions or depictions of sexual techniques or practices or presents a summary of the contents of the material describing in detail its treatment of sexual techniques or practices;

Provided that, material otherwise within the definition of this subsection shall not be deemed to be potentially offensive sexual material if it constitutes only a small and insignificant part of the whole of a single catalogue, book or other work the remainder of which does not primarily treat sexual matters and, *provided further*, that the Postmaster General shall, from time to time,

issue regulations of general applicability exempting certain types of material, or material addressed to certain categories of addressees, such as advertisements for works of fine art or solicitations of a medical, scientific or other similar nature addressed to a specialized audience, from the definition of potentially offensive sexual material contained in this subsection, where the purpose of this section does not call for application of the requirements of this section.

(i) *Prohibition Upon Use of Symbol in Prosecution* - The compliance by any person with the requirement of subsection (b) of this section shall not be used against him, either as evidence of his violation of laws pertaining to obscenity or related matters or as a reason for initiating or pursuing any investigation of him for violations of such laws, or in any other manner whatsoever. The prohibition of this subsection shall be applicable to all law enforcement officers and all proceedings within the United States, whether federal, state or local.

COMMENTARY

This statute would be designed to cope with the problem of the use of the Federal mails to engage in unsolicited distributions of explicit sexual material--almost always in the form of advertisements for the mail order sale of such material--which distributions may cause serious offense to recipients who do not wish to be exposed to such matter. This is one of the principal obscenity problems presently falling within Federal jurisdiction. The statute would be a supplement to the recently enacted Federal Anti-Pandering Act, 39 U.S.C. 4009, which permits persons who have once received unwanted sexual advertising material in the mail to have their names removed from the mailing lists of the mailer responsible for the offending material. The Anti-Pandering Act, as noted, comes into play only after an offending mailing has been received, and it applies only to prevent future mailings flowing from the source of the prior offending material. There were well over 100,000 complaints under the Act during its first year of operation. (The Act became operative on April 14, 1968.) The present proposal would go further than the Anti-Pandering Act in protecting postal patrons, since it would screen them from unwanted material regardless of whether they had previously received material from the source involved, thus attacking the sizeable problem of initial offense mailings.

The basic aim of the statute is to use Federal power to permit persons to choose what sexual material they wish to receive through the mail. The regulatory technique used is that of a Federal labelling requirement, placed upon the mailer of material which comes within the definitional subsection of the statute. The definitions describe the sexual material capable of causing significant offense when received through the mail by persons who do not wish it. The labelling requirement thus imposed is enforced through Federal criminal penalties. A structure is then created whereby mail recipients may decline to receive and be exposed to labelled potentially offensive material if they so choose, and the Postmaster is further directed to establish procedures to prevent such material from being delivered to those who do not wish it. Labelled material may, at the same time, be freely distributed to other persons who do not exercise their option not to receive such mail. The statute would then avoid impinging upon the constitutional rights of those who consent to receive sexual material and the rights of those who wish to send material to such consenting persons, while it fully protects the interest of many persons not to be exposed to such material through the mail.

This statute would establish procedures by which local community action groups could greatly diminish receipt of unsolicited mailings of offensive sex materials through concerted drives informing local residents of their rights under the statute and distributing the requisite forms for signatures.

Subsection (a) of the proposal states its purpose. Subsection (b) imposes the labelling requirement upon mailers of explicit sexual material which falls within the definitional provision of subsection (h) of the statute. The labelling requirement applies only to unsolicited material; it would not apply, for example, to magazines distributed to subscribers or to material distributed upon receipt of an order. The core of the material to which it would apply is that sent out as mail advertisements to persons whose names appear upon lists, which are ordinarily "rented" by the mail order house from mailing list brokers. As a consequence of this commerce in lists of names, persons who belong to certain organizations, who subscribe to certain publications, or who appear in other compilations--such as a compilation of licensed automobile drivers--may be solicited to buy explicit sexual material because pre-testing of the list on which they appear by the mail order house indicates to it that a profit is to be made through solicitation of all persons on the list. Persons may thus be exposed to sexual material coming into their homes because of some wholly sex-unrelated activity of theirs which has resulted in their names being placed upon a list: These are the recipients of mail for whose benefit the present statute is designed.

Subsection (b) does not itself prescribe the label which its terms require, but leaves this prescription to the Postmaster General, since the exact content and form of the label may need to depend upon the procedures to be devised by the Postmaster, under subsection (f) of the statute, for preventing the delivery of labelled mail to those who do not wish it. Subsection (b) does require, however, that the Postmaster's decision as to the content and placement of the label not cause undue expense nor require mailers to label their material with a symbol expressing any judgment as to the quality or suitability of the material. By this latter provision, it is hoped to prevent the required label from being used for pandering purposes.

Subsection (c) provides for self-enforcement of the purpose of the Section by giving mail recipients the option to refuse or destroy individual pieces of mail which are labelled in accordance with subsection (b). The concept of self enforcement includes the right of a parent to make the decision to return or destroy mail on behalf of minor children living with the parent.

Subsections (d), (e), and (f) provide an additional means of enforcement to that authorized by subsection (c). A mail recipient may "opt out" of receiving all mail which bears the label required by subsection (b), by requesting the Postmaster not to deliver such mail to him; a parent or guardian may, as in subsection (c), make this decision on behalf of a minor child residing in the home. These provisions for Post Office enforcement are included in the draft--in addition to the self-enforcement procedures of subsection (c)--largely in response to the problem created by children in the home. Where there are such children, it may not be a satisfactory solution to

parents, who do not wish their children to see the material covered by the statute, to provide for self-enforcement within the home, since the children may have unsupervised access to mail deliveries. In addition, there may be thought to be social value in permitting persons who object to the receipt of explicit sexual material the option not to be confronted with such material directly, even in the form of an unopened envelope indicating, but not openly displaying its sexual content.

Subsection (g) provides the penalty to be imposed for violations of the labelling requirement. This penalty is the key to the effective operation of the statute. Its deterrent effect is the means of compelling persons who mail unsolicited material to affix the label which permits the enforcement procedures of subsections (c) through (f) to be operative.

The definition of potentially offensive sexual material set forth in paragraph (ii) of subsection (h) was constructed after examination of a large range of material which has recently given rise to complaints to the Post Office Department both generally and under the recent Anti-Pandering Act. Each of the three parts of paragraph (ii) responds to a class of material productive of a substantial number of complaints; in each case an attempt was made to require a label not only for the precise type of material now being distributed through unsolicited mail campaigns, but also to require the label for similar types of material which might be distributed in the future and which would have the same potentiality to cause offense. Subparagraph (A) deals with pictorial material; subparagraph (B) with sexual "devices;" and subparagraph (C) with marriage manuals, sex novels and stories, and anthropological sexual accounts and similar material which may be exclusively textual or combine pictures with text. Each subparagraph applies to the complete material itself as well as to certain advertisements for that material. (It is probable that most and perhaps all of the actual application of the definitions will be to advertising material, since unsolicited mailings are ordinarily advertisements which do not usually contain a full sample of what is being offered.) Not all advertisements for material which would require a label are subjected to the labelling requirement; for the advertisement must, itself contain offensive matter beyond the fact that it offers offensive matter for sale. Thus, a bland "tombstone" type advertisement for a nudist publication or a marriage manual, which merely sets forth the fact that such a publication is offered, without presenting excerpts from the offered material or detailed descriptions thereof capable of causing affront, would not require a label.

The proviso paragraph to subsection (h) makes two classes of exemptions-for matter which constitutes such a small part of a whole work, not generally sexual in nature, that its inclusion in the work would not be capable of causing significant offense, and for material exempted by general regulation of the Postmaster from the requirements of the section because the language,

but not the purpose, of the section is applicable to such material. The Postmaster is given the power to act to grant exemptions only with regard to general classes of material; not to particular mailings by specific mailers. Thus, he does not act as an arbiter about changes to be made in particular direct mail solicitation campaigns. This rule making power would be subject to the procedural requirements of the Administrative Procedure Act.

Subsection (i) prohibits compliance with the Section from being used against a person so complying. An absolute immunity from all prosecution is not accorded to persons who comply with the labelling requirements, since such persons may, despite their compliance, violate other laws prohibiting the distribution of "obscene" material. However, fairness and, perhaps, the requirements of the self-incrimination clause of the Fifth Amendment, would seem to require that the fact of compliance with the labelling requirement of this statute should not itself subject a person to an increased likelihood of prosecution as compared with persons who refuse or omit to comply with the labelling requirement.

SEPARATE REMARKS

COMMISSIONER MORTON A. HILL, S.J.

The foregoing report accurately and appropriately states that the Commission on Obscenity and Pornography has no recommendations to make at this time. It also states that it relates the directions in which the Commission is moving.

The report is not complete, however, because it does not record the vigorous dissent of Commissioner Hill, precisely on the subject of the direction in which the Commission is moving. It is becoming an "effects" commission, and this is not what Congress intended.

Public Law 90-100 states, as reported here, "after a thorough study, *which shall include* a study of the causal relationship of such materials to anti-social behavior, to recommend advisable, appropriate, effective and constitutional means to deal effectively with such traffic in obscenity and pornography." Congress did not intend that the study of effects be the principal task of this Commission, and that all recommendations be contingent upon the results of this study. Congress did not mandate us to prove that there must be a "clear and present danger" of anti-social behavior before we make recommendations. Congress is concerned about the traffic in obscenity and pornography. Effects studies are only *one* of the tasks of the Commission.

Even a cursory examination of the foregoing report, and the amount of space devoted to the section on effects, as compared to other areas, indicates that the greatest proportion of the Commission's efforts is being expended on effects studies. The major portion of funds allocated to contract studies will be channeled into effects studies.

Now, behavioral scientists who have worked in this area concede that causal relationship is extremely difficult, if not impossible to prove.

If the Commission continues in the direction in which it is going, i.e., expending the major portion of effort and funds on effects studies and making recommendations contingent on these studies, it will come full circle, and the traffic in obscenity will continue to flow. It must be repeated: this is not what Congress intended.

Legal research is suffering because of the over-emphasis on effects studies. For example:

(1) The foregoing report states that obscenity statutes of the Federal Government and of the fifty (50) states have been assembled and are under review.

Congress mandated that analysis of these laws and evaluation and recommendation of definitions be carried out with the aid of "leading constitutional law authorities." To my knowledge no "leading constitutional law authority" has been hired. In fact, the phrase itself was omitted, in the listing of Commission duties, from every draft of the foregoing report,

including the final draft which was approved by the Commission on June 5. It was inserted as a "stylistic change," after these separate remarks were presented, at or after a subcommittee meeting convened June 23.

(2) The nagging problem of "utterly without redeeming social value" should be analyzed and studied. I maintain that this is not a constitutional standard, since it was the opinion of merely three justices and not of the Court majority. Yet, it is being applied in lower courts as a test and being adopted into the language of state statutes.

This is open to serious study, for this "utterly without redeeming social value" so-called "test" has led to an enormous increase in the traffic in pornography in all media. This question is not being thoroughly studied, and after six weeks of debate was included incidentally in the questionnaire to prosecutors. An oral commentary on the issue, delivered by a staff member at a legal panel meeting after my request for study, was based on the incorrect proposition that "utterly without redeeming social value" is a constitutional decision of the Court. I repeat, it is simply the opinion of three justices. Thorough analysis of this issue could lead to a re-definition of obscenity. However, the decision was made that re-definition should await "the outcome of our effects research."

(3) Reported "descriptive" reviews of activities of Post Office and Customs Departments are in actuality editorial-type articles written in law review article style, somewhat critical of both departments, and so of little objective assistance.

(4) In the area of traffic and distribution, which is a matter of intensive investigations as well as academic research: to my knowledge no investigators have been hired. One lawyer has joined the staff to work in this area.

(5) Public hearings have not been planned. Hearings would be invaluable, in the ascertainment of methods of distribution as well as in the ascertainment of community standards for legal research.

In general, I believe the foregoing report could be misleading, for it leaves the public with the impression that programs initiated are geared toward resolving the problem of the traffic in obscenity. A careful reading will show quite clearly that there is no program pointing in the direction of regulating this traffic. Of the three directions for additional effective legislative action pointed to, those dealing with obscene material and the adult community are in the areas of pandering and invasion of privacy. (Item (2) above makes one wonder if we are leaving open the possibility of other types of legislation) In other words, under the present chairmanship, the Commission appears to be moving toward permitting obscenity for adults, and therefore, will not provide constitutional "means to deal effectively with such traffic in obscenity and pornography." How can children be prevented from exposure if

this situation prevails? With this in mind, I make the following recommendations:

1. That each commissioner, under the direction of the Chairman, with the aid of staff, undertake a personal content analysis of one area of obscene material, so that the entire Commission will be aware of the rapidly changing situation. The expertise of commissioners has not been adequately utilized in this area, and this could perhaps lead to re-definition.
2. That the Commission cut back on contract research into effects, and allocate - over and above staff and expenses - one-third of its appropriation to legal research, one-third to research and investigation into traffic and distribution and one-third into effects.
3. That the Commission retain leading constitutional law authorities to guide us as to how we can constitutionally present legislation to Congress which will reverse the mislabeled Supreme Court "test" of "utterly without redeeming social value." *Roth* is the only case (except for the recent *Stanley v. Georgia* decision on the invasion of privacy) in which a majority of the Supreme Court agreed. In that case, the Court said:

"The unconditional phrasing of the First Amendment was not intended to protect every utterance. . . All ideas . . . having even the slightest redeeming social importance have the full protection of the guarantee. . . but implicit in the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of all 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*. . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . such utterances. . . are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . We hold that obscenity is not within the area of constitutionally protected speech or press. . . The test (is): whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Justice Clark, in a dissenting opinion in *Fanny Hill*, called the "utterly without redeeming social value" so-called "test" novel and noted that only three members of the Court held to it. He maintained that it rejects the basic holding of *Roth*.

4. That the Commission plan public hearings to assist in ascertaining methods employed in the distribution of obscene materials and exploring the nature and value of traffic; and, in ascertaining from the American public themselves, what community standards are.
5. That the Commission work diligently to recommend definitions of obscenity and pornography, as mandated by Congress in creating this Commission; noting particularly, that we are not restricted to the opinions of individual members of the Supreme Court, which are mistakenly called tests.
6. That the Commission work to recommend legislation when the above have been completed - not awaiting the results of effect studies which will be admittedly incomplete, undoubtedly inconclusive, and unnecessary under the *Roth* decision. In the matter of effects, the Court said in *Roth*:

"It is insisted that the constitutional guarantees are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois*..." Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or from the State Courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances."

7. That the Commission move more practically to fulfill our mandate to "recommend such legislative, administrative, or other advisable and appropriate action . . . to regulate effectively the flow of such traffic, without in any way interfering with constitutional rights."

Failing action on these recommendations, it is difficult to see how the Commission, under its present leadership, can produce the results Congress intended. If the Commission continues in the direction in which it is now moving, it will simply propose laws on pandering, invasion of privacy and sales to minors. Congress does not need a Commission to recommend legislation of this sort. Such limited proposals will not "regulate effectively the flow of such traffic."

RESPONSE TO SEPARATE REMARKS BY COMMISSIONER MORTON A. HILL

All members of the Commission, other than Commissioner Hill, join in the following response to Commissioner Hill's Separate Remarks:

1. The study into the effects of obscene and pornographic material is only one of the four principal areas of study undertaken by the Commission. The Progress Report reflects the broad, inclusive scope of the Commission's studies into the various areas of inquiry directed by Congress. In order to carry out the research and study program outlined in the Progress Report, we estimate that the expenditures among the four principal areas for both staff work and contract research will be approximately as follows:

Effects	40%
Traffic and Distribution	25%
Positive Approaches	20%
Legal	15%

This relative allocation of funds was given to the Congress at the Senate and House Appropriations Subcommittee hearings on the Commission's 1970 budget. These estimates do not reflect judgments as to relative importance, but variations in the costs of different kinds of investigation, research and study. Social science research into such matters as effects and some aspects of traffic and distribution is far more expensive than study of legal problems.

2. As with all Commissions concerned with controversial topics, there have been healthy differences of opinion among the Commissioners concerning the major thrust of the Commission's activities and the priorities of our efforts. But the Commission has achieved the results reported in the foregoing Progress Report by careful consideration and nearly always without dissenting vote. The future direction of our studies will continue to be flexible as we seek the best means of securing the information needed for the final report. As changes are made in research plans, some changes in the estimated expenditures in the various areas of study and research will necessarily occur.

3. Commissioner Hill's statement that the "Commission appears to be moving toward permitting obscenity for adults" is a dissent as to our procedure and not a fair report as to our intent or future actions. The Commission will consider adult obscenity legislation, along with all other aspects of control over traffic and distribution in obscenity, when the studies directed by Congress have progressed to the point where such consideration is appropriate. To attempt to form judgments on this and other questions at this time would be premature and inconsistent with the Congressional directive to make recommendations "after a thorough study."

4. At its November 8, 1968, meeting the Commission unanimously concluded that in the first stage of its work public hearings would not be a likely source of accurate data or a wise expenditure of its limited resources. It concluded that other methods of ascertaining the facts concerning traffic and distribution and community standards would be less expensive and more productive. In addition to the research outlined in the Progress Report, national organizations are being invited to express their views on the problems of obscenity and pornography by submitting written statements. The Commission has directed the solicitation of views from those involved in law enforcement, from the legal profession generally, and from constitutional law experts. The Commission has left open the possibility of holding public hearings at a later date when it would be possible to invite witnesses to focus on particular issues and proposals as those evolve from the Commission's studies and discussions.

Respectfully submitted,

Edward E. Elson
 Thomas D. Gill
 Edward D. Greenwood
 G. William Jones
 Joseph T. Klapper
 Otto N. Larsen
 Irving Lehrman
 Freeman Lewis
 Winfrey C. Link
 Morris A. Lipton
 William B. Lockhart
 Thomas C. Lynch
 Barbara Scott
 Cathryn A. Spelts
 Frederick H. Wagman
 Marvin E. Wolfgang

PROPOSALS ON SEX-ORIENTED MAIL

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

REGARDING

LEGISLATIVE PROPOSALS TO DEAL WITH THE FLOW OF
SEX-ORIENTED MAIL

MAY 5, 1969.—Referred to the Committee on Post Office and Civil Service
and ordered to be printed

To the Congress of the United States:

American homes are being bombarded with the largest volume of sex-oriented mail in history. Most of it is unsolicited, unwanted, and deeply offensive to those who receive it. Since 1964, the number of complaints to the Post Office about this salacious mail has almost doubled. One hundred and forty thousand letters of protest came in during the last nine months alone, and the volume is increasing. Mothers and fathers by the tens of thousands have written to the White House and the Congress. They resent these intrusions into their homes, and they are asking for federal assistance to protect their children against exposure to erotic publications.

The problem has no simple solution. Many publications dealing with sex—in a way that is offensive to many people—are protected under the broad umbrella of the First Amendment prohibition against any law “abridging the freedom of speech, or of the press.”

However, there are constitutional means available to assist parents seeking to protect their children from the flood of sex-oriented materials moving through the mails. The Courts have not left society defenseless against the smut peddler; they have not ruled out reasonable government action.

Cognizant of the constitutional structures, aware of recent Supreme Court decisions, this Administration has carefully studied the legal terrain of this problem.

We believe we have discovered some untried and hopeful approaches that will enable the federal government to become a full partner with states and individual citizens in drying up a primary source of this social evil. I have asked the Attorney General and the Postmaster General to submit to Congress three new legislative proposals.

The first would prohibit outright the sending of offensive sex materials to any child or teenager under 18. The second would prohibit the sending of advertising designed to appeal to a prurient interest in sex. It would apply regardless of the age of the recipient. The third measure complements the second by providing added protection from the kind of smut advertising now being mailed, unsolicited, into so many homes.

PROTECTING MINORS

Many states have moved ahead of the federal government in drawing distinctions between materials considered obscene for adults and materials considered obscene for children. Some of these states, such as New York, have taken substantial strides toward protecting their youth from materials that may not be obscene by adult standards but which could be damaging to the healthy growth and development of a child. The United States Supreme Court has recognized, in repeated decisions, the unique status of minors and has upheld the New York Statute. Building on judicial precedent, we hope to provide a new measure of federal protection for the young.

I ask Congress to make it a federal crime to use the mails or other facilities of commerce to deliver to anyone under 18 years of age material dealing with a sexual subject in a manner unsuitable for young people.

The proposed legislation would not go into effect until the sixth month after passage. The delay would provide mailers of these materials time to remove from their mailing lists the names of all youngsters under 18. The federal government would become a full partner with parents and states in protecting children from much of the interstate commerce in pornography. A first violation of this statute would be punishable by a maximum penalty of five years in prison and a \$50,000 fine; subsequent violations carry greater penalties.

PRURIENT ADVERTISING

Many complaints about salacious literature coming through the mails focus on advertisements. Many of these ads are designed by the advertiser to appeal exclusively to a prurient interest. This is clearly a form of pandering.

I ask the Congress to make it a federal crime to use the mails, or other facilities of commerce, for the commercial exploitation of a prurient interest in sex through advertising.

This measure focuses on the intent of the dealer in sex-oriented materials and his methods of marketing his materials. Through the legislation we hope to impose restrictions on dealers who flood the mails with grossly offensive advertisements intended to produce a market for their smut materials by stimulating the prurient interest of the recipient. Under the new legislation, this form of pandering could bring a maximum penalty of 5 years imprisonment, and a fine of \$50,000 for a first offense and 10 years and a fine of \$100,000 for subsequent offenses.

INVASION OF PRIVACY

There are other erotic, sex-oriented advertisements that may be constitutionally protected but which are, nonetheless, offensive to the citizen who receives them in his home. No American should be forced to accept this kind of advertising through the mails.

In 1967 Congress passed a law to help deal with this kind of pandering. The law permits an addressee to determine himself whether he considers the material offensive in that he finds it "erotically arousing or sexually provocative." If the recipient deems it so, he can obtain from the Postmaster General a judicially enforceable order prohibiting the sender from making any further mailings to him or his children, and requiring the mailer to delete them from all his mailing lists.

More than 170,000 persons have requested such orders. Many citizens however, are still unaware of this legislation, or do not know how to utilize its provisions. Accordingly, I have directed the Postmaster General to provide every Congressional office with pamphlets explaining how each citizen can use this law to protect his home from offensive advertising. I urge Congress to assist our effort for the widest possible distribution of these pamphlets.

This pandering law was based on the principle that no citizen should be forced to receive advertisements for sex-oriented matter he finds offensive. I endorse that principle and believe its application should be broadened.

I therefore ask Congress to extend the existing law to enable a citizen to protect his home from any intrusion of sex-oriented advertising—regardless of whether or not a citizen has ever received such mailings.

This new stronger measure would require mailers and potential mailers to respect the expressed wishes of those citizens who do not wish to have sex-oriented advertising sent into their homes. These citizens will put smut-mailers on notice simply by filing their objections with a designated postal authority. To deliberately send such advertising to their homes would be an offense subject to both civil and criminal penalties.

As I have stated earlier, there is no simple solution to this problem. However, the measures I have proposed will go far toward protecting our youth from smut coming through the mails; they will place new restrictions upon the abuse of the postal service for pandering purposes; they will reinforce a man's right to privacy in his own home. These proposals, however, are not the whole answer.

The ultimate answer lies not with the government but with the people. What is required is a citizens' crusade against the obscene.

When indecent books no longer find a market, when pornographic films can no longer draw an audience, when obscene plays open to empty houses, then the tide will turn. Government can maintain the dikes against obscenity, but only people can turn back the tide.

RICHARD NIXON.

THE WHITE HOUSE, May 2, 1969.

4 TITLE II—INVASION OF PRIVACY BY MAILING
5 OF SEXUALLY ORIENTED ADVERTISEMENTS

6 SEC. 201. The Congress finds—

7 that the United States mails are being used for the
8 indiscriminate dissemination of advertising matter so de-
9 signed and so presented as to exploit sexual sensational-
10 ism for commercial gain;

11 that such matter is profoundly shocking to many
12 persons who receive it, unsolicited, through the mails;

13 that such use of the mails subjects these persons to
14 offensive and unwarranted intrusions upon their right
15 to privacy; and

16 that such use of the mails reduces the ability of re-
17 sponsible parents to protect their minor children from
18 exposure to material which they as parents believe to be
19 harmful to their children.

20 On the basis of the foregoing the Congress determines
21 that it is contrary to the public policy of the United States
22 for the facilities and services of the United States Post Office
23 Department to be used for the distribution of such materials
24 to persons who do not want their privacy invaded in this

1 manner or to persons who wish to protect their minor children
2 from exposure to such material.

3 SEC. 202. (a) Chapter 51 of title 39, United States
4 Code, is amended by adding at the end thereof the following
5 new sections:

6 **“§ 4011. Mailing of sexually oriented advertisements**

7 “(a) Any person who mails or causes to be mailed any
8 sexually oriented advertisement shall place on the envelope
9 or cover thereof his name and address as the sender thereof
10 and such mark or notice as the Postmaster General may
11 prescribe.

12 “(b) Any person, on his own behalf or on the behalf
13 of any of his children who have not attained the age of nine-
14 teen years and who reside with him, may file with the Post-
15 master General a statement, in such form and manner as the
16 Postmaster General may prescribe, that he desires to receive
17 no sexually oriented advertisements through the mails. The
18 Postmaster General shall maintain and keep current, insofar
19 as practicable, a list of the names and addresses of such
20 persons and shall make the list (including portions thereof or
21 changes therein) available to any person, upon such reason-
22 able terms and conditions as he may prescribe, including the
23 payment of such service charge as he determines to be neces-

1 sary to defray the costs of compiling and maintaining the
 2 list, keeping it current, and making it available as provided
 3 in this sentence. No person shall mail or cause to be mailed
 4 any sexually oriented advertisement to any individual whose
 5 name and address has been on the list for more than thirty
 6 days.

7 “(c) No person shall sell, lease, lend, exchange, or
 8 license the use of, or, except for the purpose expressly au-
 9 thorized by this section, use any mailing list compiled in
 10 whole or in part from the list maintained by the Postmaster
 11 General pursuant to this section.

12 “(d) ‘Sexually oriented advertisement’ means any ad-
 13 vertisement that depicts, in actual or simulated form, or ex-
 14 plicitly describes, in a predominantly sexual context, human
 15 genitalia, any act of natural or unnatural sexual intercourse,
 16 any act of sadism or masochism, or any other erotic subject
 17 directly related to the foregoing. Material otherwise within
 18 the definition of this subsection shall be deemed not to con-
 19 stitute a sexually oriented advertisement if it constitutes only
 20 a small and insignificant part of the whole of a single catalog,
 21 book, periodical, or other work the remainder of which is
 22 not primarily devoted to sexual matters.

23 **“§ 4012. Judicial enforcement**

24 “(a) Whenever the Postmaster General believes that
 25 any person is mailing or causing to be mailed any sexually

1 oriented advertisement in violation of section 4011 of this
2 title, he may request the Attorney General to commence a
3 civil action against such person in a district court of the
4 United States. Upon a finding by the court of a violation of
5 that section, it may issue an order including one or more of
6 the following provisions as the court deems just under the
7 circumstances:

8 “(1) a direction to the defendant to refrain from
9 mailing any sexually oriented advertisement to a specific
10 addressee, to any group of addressees, or to all persons;

11 “(2) a direction to any postmaster to whom sex-
12 ually oriented advertisements originating with such de-
13 fendant are tendered for transmission through the mails
14 to refuse to accept such advertisements for mailing; and

15 “(3) a direction to any postmaster at the office at
16 which registered or certified letters or other letters or
17 mail arrive, addressed to the defendant or his repre-
18 sentative, to return the registered or certified letters or
19 other letters or mail to the sender appropriately marked
20 as being in response to mail in violation of section 4011
21 of this title, after the defendant, or his representative,
22 has been notified and given reasonable opportunity to
23 examine such letters or mail and to obtain delivery of
24 mail which is clearly not connected with activity alleged
25 to be in violation of section 4011 of this title.

1 “(b) The statement that remittances may be made to
2 a person named in a sexually oriented advertisement is prima
3 facie evidence that such named person is the agent or repre-
4 sentative of the mailer for the receipt of remittances on his
5 behalf. The court is not precluded from ascertaining the
6 existence of the agency on the basis of any other evidence.

7 “(c) In preparation for or during the pendency of a
8 civil action under subsection (a) of this section, a district
9 court of the United States, upon application therefor by the
10 Attorney General and upon a showing of probable cause
11 to believe the statute is being violated, may enter a tem-
12 porary restraining order or preliminary injunction containing
13 such terms as the court deems just, including, but not limited
14 to, provisions enjoining the defendant from mailing any
15 sexually oriented advertisement to any person or class of
16 persons, directing any postmaster to refuse to accept such
17 defendant's sexually oriented advertisements for mailing, and
18 directing the detention of the defendant's incoming mail
19 by any postmaster pending the conclusion of the judicial
20 proceedings. Any action taken by a court under this sub-
21 section does not affect or determine any fact at issue in any
22 other proceeding under this section.

23 “(d) A civil action under this section may be brought
24 in the judicial district in which the defendant resides, or has
25 his principal place of business, or in which any sexually

1 oriented advertisement mailed in violation of section 4011
 2 has been delivered by mail according to the direction
 3 thereon.

4 “(e) Nothing in this section or in section 4011 shall
 5 be construed as amending, preempting, limiting, modifying,
 6 or otherwise in any way affecting section 1461, or 1463 of
 7 title 18, United States Code, or section 4006, 4007, or
 8 4009 of title 39, United States Code.”

9 (b) The table of contents of chapter 51 of title 39,
 10 United States Code, is amended by adding at the end thereof
 11 the following:

“4011. Mailing of sexually oriented advertisements.

“4012. Judicial enforcement.

12 SEC. 203. (a) Chapter 83 of title 18, United States
 13 Code, relating to offenses against the postal service, is
 14 amended by adding at the end thereof the following new
 15 sections:

16 **“§ 1735. Sexually oriented advertisements**

17 “Whoever willfully uses the mails for the mailing, carri-
 18 age in the mails, or delivery of any sexually oriented adver-
 19 tisement in violation of section 4011 of title 39, or willfully
 20 violates any regulation of the Postmaster General issued
 21 under such section; or

22 “Whoever sells, leases, rents, lends, exchanges, or li-
 23 censes the use of, or, except for the purpose expressly au-

1 thorized by section 4011 of title 39, uses a mailing list main-
2 tained by the Postmaster General pursuant to such section;

3 "Shall be fined not more than \$5,000 or imprisoned not
4 more than five years, or both, for the first offense, and shall
5 be fined not more than \$10,000 or imprisoned not more
6 than ten years, or both, for any second or subsequent offense.

7 **"§ 1736. Restrictive use of information**

8 "(a) No information or evidence obtained by reason of
9 compliance by a natural person with any provision of section
10 4011 of title 39, or regulations issued thereunder, shall, ex-
11 cept as provided in subsection (c) of this section, be used,
12 directly or indirectly, as evidence against that person in a
13 criminal proceeding.

14 "(b) The fact of the performance of any act by a natural
15 person in compliance with any provision of section 4011 of
16 title 39, or regulations issued thereunder, shall not be deemed
17 the admission of any fact, or otherwise be used, directly or
18 indirectly, as evidence against that person in a criminal pro-
19 ceeding, except as provided in subsection (c) of this section.

20 "(c) Subsections (a) and (b) of this section shall not
21 preclude the use of any such information or evidence in a
22 prosecution or other action under any applicable provision
23 of law with respect to the furnishing of false information."

1 (b) The table of contents of such chapter 83 is amended
2 by adding at the end thereof the following:

“1735. Sexually oriented advertisements.

“1736. Restrictive use of information.”

3 SEC. 204. If any provision of title II of this Act or the
4 application thereof to any person or circumstance is held in-
5 valid, the remainder of title II of this Act and the application
6 of such provision to other persons not similarly situated or to
7 other circumstances shall not be affected thereby.

8 SEC. 205. The provisions of title II of this Act shall be-
9 come effective on the first day of the sixth month which be-
10 gins after the date of enactment.

EXPLANATION OF TITLE II

TITLE II—INVASION OF PRIVACY BY MAILING OF SEXUALLY ORIENTED ADVERTISEMENTS

Section 201.—This section sets forth congressional findings to the effect that sensational, sexually oriented advertisements are being sent through the mails, unsolicited, to persons who find such material profoundly shocking and who do not want the privacy of their homes invaded in this manner. The section goes on to state that it is contrary to the public policy of the United States for the Post Office Department to be used as an instrumentality for the distribution of such material to persons who do not want their privacy to be so invaded, or who wish to protect their minor children from exposure to such material.

Section 202.—This section adds two new sections to chapter 51 of title 39, United States Code, relating to mailability.

Subsection (a) of the first new section, 4011, requires any person who mails sexually oriented advertisements, as subsequently defined, to place his name and return address on the cover of this type of mail, and authorizes the Postmaster General to require that such mail carry a distinctive mark or notice. This requirement is designed to facilitate enforcement of other provisions of the law, and to enable unwilling recipients to refuse or otherwise dispose of such mail without opening the envelope.

Subsection (b) permits any person to place his name as well as the names of his children under the age of 19 on a list of those desiring not to receive sexually oriented advertisements. All mailers are prohibited from sending any sexually oriented advertisement to any person whose name has been on the list for more than 30 days. The list is to be maintained by the Postmaster General, and is to be made available to mailers upon payment of a reasonable service charge. The imposition of the service charge, in an amount determined by the Postmaster General, should result in the mailers of sexually oriented advertisements bearing a significant part of the economic burden entailed in providing a mechanism to keep this type of mail out of homes where it is not wanted.

Subsection (c) prohibits any traffic in the list compiled by the Postmaster General, and restricts its use to the purging from private mailing lists of the names and addresses of persons who do not want to receive sexually oriented advertisements. These limitations are intended to prevent the misuse of the Postmaster General's list to the annoyance of those who have requested that their names be placed on it and to prevent mailers from obtaining copies of the list without paying the service charge.

Subsection (d) defines the term "sexually oriented advertisement" in a manner designed to cover the type of material that has been found to be most offensive to substantial numbers of citizens. The remedies provided under the present pandering advertisement statute, 39 United States Code section 4009, continue to be available with respect

to advertisements whether or not they are within the statutory definition set forth in subsection (d).

The second new section of chapter 51 of title 39, section 4012, provides machinery for judicial enforcement of section 4011.

Subsection (a) authorizes the Attorney General, upon request by the Postmaster General, to seek an order from a U.S. district court directing an offending mailer to refrain from mailing sexually oriented advertising to specified persons or groups or to the public at large. Authority is also provided for the inclusion in such an order of provisions directing postmasters to refuse to accept for mailing sexually oriented advertisements sent by the offending mailer, and to withhold relevant mail addressed to such a mailer.

Subsection (b), like present section 4005(b) of title 39, provides a simplified method of proving a relationship between a mailer and his agent, thereby making subsection (a) more readily enforceable.

Subsection (c) authorizes U.S. district courts to issue temporary restraining orders and preliminary injunctions either before or during the course of judicial enforcement proceedings. The order or injunction may include provisions similar to the provisions authorized in subsection (b), as well as other appropriate provisions. This subsection is analogous to section 4007 of title 39.

Subsection (d) prescribes the venue for civil actions instituted under subsections (a) and (c), and states that such actions may be brought in the district in which the mailer resides or has his place of business, or in the district to which mail has been sent in violation of section 4011.

Subsection (e) makes it clear that the new statute is not intended to amend or repeal any of the postal obscenity laws or the pandering advertisements statute.

Section 203.—This section adds two new sections to chapter 83 of title 18, United States Code, relating to postal offenses.

The first new section, 1735, makes willful violators of section 4011 of title 39 liable to a fine of \$5,000 and 5 years imprisonment for a first offense and a fine of \$10,000 and 10 years imprisonment for subsequent offenses.

The other new section, 1736, is designed to avoid the possibility of a natural person's incriminating himself by complying with the requirements of section 4011 of title 39.

Subsection (a) prohibits the Government from using information or evidence supplied by a natural person in compliance with section 4011 of title 39 as evidence in a criminal proceeding against him.

Subsection (b), similarly, provides that the fact of compliance by a natural person with the requirements of section 4011 of title 39 shall not be used against him in a criminal proceeding.

Subsection (c) provides that the grant of immunity contained in the preceding subsections shall not extend to prosecutions for furnishing false information.

A fast-growing national organization shows how any community can chase pornography off the newsstands—if its citizens care enough

Poison in Print— And How to Get Rid of It

BY CLARENCE W. HALL

FEW EVILS in American life provide cause for more widespread alarm than the flood of obscene literature currently engulfing U.S. communities. Operated by shady entrepreneurs, the smut industry is approaching an estimated two-billion-dollar-a-year volume, rapidly turning this country into the pornographic capital of the world.* In addition, even reputable publishers are today hurrying into print scabrous "classics" formerly available only abroad.

A U.S. Senate committee investigating juvenile delinquency recently asserted that "the moral fiber of the country is being undermined by a deluge of vile and filthy books, pictures and other pornographic material. Worst of all, up to 75 percent

of it falls into the hands of minors." Yet the filthy tide sweeps on.

Why? One answer is public apathy. Another is timidity.

Says Charles H. Keating, Jr., of Cincinnati, Ohio, founder of a fast-growing organization called Citizens for Decent Literature (CDL): "Fearing a phony cry of censorship, we have been jeered into a national sheepishness about taking action against this evil. Lick that timidity and you've gone a long way toward licking the problem."

Keating should know. A former All-America swimming champion and U.S. Navy fighter pilot, the six-foot-four young lawyer and his CDL have effectively proved that the tide *can* be swept back by concerted community action. The two instruments of his attack are: 1) an aroused citizenry; 2) enforcement of

*See "The Battle Against Mail-Order Pornography," *The Reader's Digest*, February '64.

POISON IN PRINT—AND HOW TO GET RID OF IT

existing laws that make the distribution and sale of obscenity a crime.

Keating's concern over the flood of printed poison was galvanized one day in 1956, when he noticed youngsters at a newsstand snickering over a display set apart from the rest of the magazines and paperbacks. Moving over for a look, Keating was shocked. Besides the "girly" magazines featuring nudes in suggestive poses, dozens of publications depicted not only raw sex but stories of abnormal sex behavior. By any decent citizen's definition, this was pornography, dirt for dirt's sake.

"Sure, There's a Law." The same fare was available on other stands, Keating found. At Cincinnati's police headquarters he was told, "Sure, there's a law against it. It says, 'Whoever shall offer for sale, exhibit or publish, or have in his possession, any obscene book, pamphlet or paper shall be fined, imprisoned—or both.'" But, Chief of Police Stanley R. Schrotel said, "we make arrests, bring these smut sellers into court, only to find ourselves pitted against high-priced legal talent, hired by well-heeled publishers, yowling about 'censorship' and 'freedom of the press.' The public is nowhere around to back us up."

Keating dug into the whole problem, the law and its loopholes, records of citizen action elsewhere. He found that community action had usually followed a pattern: a flurry of shocked concern, a flash of action, a quick newsstand cleanup—then

relaxation and the problem's return.

His homework done, Keating called together a group of business and professional friends, all fathers of young families. He took them on a tour of offending newsstands, invited them to join him in a drive to rid stands of filth. These men became a speakers' bureau, going out to address any group that would hear them: women's clubs, church societies, PTA's, fraternal organizations. As each speaker showed samples of smutty magazines and paperbacks, the first audience reaction was invariably shock and outrage, then a demand for harsh action—blacklists, boycotts, even book-burnings.

"That's not the way," said Keating and his task force. "We have a law, and we have enforcement officials. Let's let them know we're behind them." Soon city officials were flooded with protests against pornography on the newsstands and with pledges of cooperation in a drive to wipe it out.

The biggest obstacle to a successful campaign was the lack of any clear-cut definition of obscenity. In hundreds of cases, hard-won victories in local courts had been nullified by higher courts holding that "obscenity" was an imprecise term. Only a few months after CDL set to work, however, the U.S. Supreme Court, in upholding the conviction of a mail-order peddler named Roth, came up with a definition of obscenity: "*Material which deals with*

THE READER'S DIGEST

sex in a manner appealing to prurient interest," that is, "having a tendency to excite lustful thoughts." And the yardstick for judging it: Whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The definition in the Roth case was historic. Lawmakers, municipal and state, began rewriting ordinances and statutes to include its exact wording. To the Cincinnati police Keating said, "Now you can make arrests with some hope of getting convictions."

The first arrest in the Cincinnati drive was that of a stationery- and candy-store proprietor caught selling lewd publications to grade-school students. Prosecutor Lyle Castle based his case squarely on the illegality of obscene literature, and won. Immediately, other dealers began cleaning up their stands. When they asked CDL for a list of offending magazines, Keating sent them instead a copy of the city ordinance. "We're not a censoring body," he said. "The law is plain enough." During the next two years, seven other dirt peddlers were brought into court. All were convicted. All but one appealed; all appeals failed.

In 1959, a motion came before the city council to stiffen the fines and imprisonment penalties for selling smut. The CDL women's division crammed the council chamber with hundreds of supporters. The measure passed. To further demonstrate

public concern, CDL women got Mayor Donald Clancy to declare a "Decency Day," collected 70,000 signatures in support of CDL aims.

"Perversion for Profit." News of Cincinnati's success brought hundreds of appeals for guidance from other communities. In September 1962, CDL went "national," with headquarters—a clearinghouse of information freely supplied to any community—in Keating's law office. CDL's biweekly publication, "The National Decency Reporter," alerts all chapters to significant court decisions, analyzes cases where convictions have been overturned. Its compelling film, "Perversion for Profit," is a shattering exposé of the obscenity racket.

A growingly potent arm of CDL is its youth division, with more than 200 chapters. Its members, carefully chosen from school leaders and top athletes, are given training in the art of letter-writing to law-enforcement officials. They attend court trials in force, serve as volunteers in getting out CDL mailings, publish their own nationally distributed newsletter. "It's great training for citizen action in later life," says Keating.

CDL advises all chapters, adult and youth: "Demand only that the laws against distribution and sale of obscene publications be enforced. Don't tell people what they can or cannot read. Limit yourself to calling attention to materials you believe violate community standards, and leave it to the proper authorities—preferably a jury decision—to de-

POISON IN PRINT—AND HOW TO GET RID OF IT

termine whether the material is in fact obscene."

The national office makes available to local prosecutors expert psychiatric and sociological testimony on the effects of obscene publications, offers summaries of successful prosecutions and how they were won, submits *amicus curiae* ("friend of the court") briefs to judges. And CDL's department of legal counsel, composed of attorneys skilled in obscenity law, offers to help prosecute any case in the nation.

Freedom of the Press? Obscenity's defenders like to plead the First Amendment's guarantee of freedom of speech and press. "But," says Keating, "remember the Supreme Court's ruling in the Roth case: '*Obscenity, being utterly without redeeming social importance, is not within the area of constitutionally protected speech or press.*' In short, obscenity has no rights before the law."

Legal counsel for the smut merchants frequently demands proof of "causal relationship" between smut and crime. CDL has testimony from police chiefs, court psychotherapists and FBI Director J. Edgar Hoover establishing a direct relationship between the stimulus of obscene publications and criminal behavior, both adult and juvenile.

Keating's fighting spirit has spread to many communities. In Fort Wayne, Ind., 15 of the city's young businessmen, after hearing Keating speak in May 1958, promptly formed a CDL unit of their own and gave

100 talks to over 5000 persons.

After one speech before the local Retail Druggists Association, which controlled some 60 percent of the community's newsstands, the druggists began removing objectionable magazines and paperbacks. A letter addressed to the governor resulted in the removal of questionable publications from newsstands on the Indiana toll road. When a new and stronger state law was passed in 1961, copies of it were distributed to newsdealers by Fort Wayne's mayor. By May 1962, dealers had voluntarily removed more than 80 offensive publications from their stands. Says Ed Dahm, CDL head in Fort Wayne: "The battle is not over. Our biggest fight now is against complacency."

Elsewhere, not all dealers are affected by the pressure of public opinion. The profits on sales of salacious magazines and paperbacks, often as high as 60 cents on a \$1 item, are too attractive. In such places the second phase of CDL's two-pronged attack—legal action—must be used. Chicago, long one of the nation's biggest markets for obscene publications, offers a spectacular example of the effect of CDL-sparked police action.

Chicago's CDL, organized by Edward Rekruciak, a young insurance executive, found that only two police officers in Chicago were assigned to the surveillance of obscene literature, and those part-time. Their record showed one arrest, for a pornographic paperback, in five years. When police claimed that they could not find offending material, Rekruciak

THE READER'S DIGEST

supplied them with names and addresses of vendors. When arrests under the state law were slow in coming, individual CDL members became complaining witnesses.

As a result of this activity, Police Superintendent O. W. Wilson created a program of attack that is now hailed as a model for police. Making district police heads co-responsible with the Vice Control Division, Wilson placed pornography control with the cop on the beat. A series of training bulletins spelled out the problem and how to proceed against it. In 20 months, Wilson's police made 115 arrests, with only seven defendants dismissed on technicalities and only one found not guilty. Hundreds of dealers cleaned up their stands voluntarily.

Says Keating: "We are often asked why, instead of promoting community cleanups, we don't strike at the source of the muck—the publishers. The trouble is, most such cases wind up in federal courts, where dockets are so glutted that a case may be delayed for years. The community approach is actually the easiest. The United States is a nation of communities, and it is in the community that acceptance of citizen responsibility must begin."

For further information, write Citizens for Decent Literature, Inc., 3701 Carew Tower, Cincinnati, Ohio 45202.

Reprints of this article are available. Prices, postpaid to one address: 10—50¢; 50—\$2; 100—\$3.50; 500—\$12.50; 1000—\$18. Address Reprint Editor, The Reader's Digest, Pleasantville, N.Y.

THE FIGHT AGAINST THE SMUT PEDDLERS

The balance of power is shifting toward the decent-minded public, but the drive will fail unless a carefully mapped program is followed in every community

BY O. K. ARMSTRONG

A DRAMATIC and significant battle is swirling across the United States today. Fighting on one side are the publishers, distributors and sellers of obscene material—a business estimated to gross currently more than a billion dollars a year. In the opposite camp are public prosecutors, parents, teachers and other citizens alarmed at the rising tide of newsstand and mail-order pornography and determined to do something about it.

The stakes in this battle are high.

For the peddlers of smut it means the right to maintain and expand their markets. Newsstands flaunt magazines loaded with suggestive nudity and paperback books filled with detailed portrayals of illicit and abnormal sexual relations. To impressionable youths, this flood of pornography conveys the notion that adultery and perversion are acceptable, that moral standards are *passé*.

Appealing to the Prurient. The battle began in earnest in 1955, when, following a Kefauver Com-

THE FIGHT AGAINST THE SMUT PEDDLERS

mittee investigation of the pornography racket, U.S. cities launched intensive crackdowns against obscenity. But the resulting court cases produced conflicting rulings and confusion over what is legally obscene. Guidelines were imperative if the drive on obscenity was not to collapse.

In June 1957 a decision by the U.S. Supreme Court supplied those guidelines—most important, an explicit definition of obscenity. Known as the *Roth* ruling, it affirmed convictions of Samuel Roth of New York and David S. Alberts of California, both possessors of long records as pornography distributors. Writing the historic opinion for the majority of the Court, Justice William J. Brennan declared:

"Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. We hold that obscenity is not within the area of constitutionally protected speech or press." The ruling then proceeded to this definition: "Obscene material . . . deals with sex in a manner appealing to prurient interest." The test should be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole" makes such a prurient appeal.

Champions of decency hoped that the new decision would clarify the issues in obscenity cases once and for all. Among them was Charles H. Keating, Jr., a Cincinnati, Ohio, at-

torney who, in 1956, founded Citizens for Decent Literature.* Keating recognized that the *Roth* ruling, along with the state and local laws it guarded, could serve as a powerful weapon in the attack on commercialized filth.

Lawyers who defended pornography dealers, however, immediately denounced the *Roth* decision as "vague and unworkable." And, apart from the *Roth* ruling, other problems were apparent. A bookseller in Detroit, for example, had sold a paperback novel to a detective. He was convicted of violating a Michigan law forbidding the sale of publications containing materials injurious to youth. Then the U.S. Supreme Court struck down the state law. The Court ruled that the law's effect was "to reduce the adult population of Michigan to reading only what is fit for children." This decision made it clear that laws covering the sale of materials objectionable for children must not be applied to the public in general.

Another case, *Manual Enterprises, Inc., vs. Day*, which came before the Supreme Court in 1962, illustrated a pitfall of improper procedure. In this case, three members of the Court stated that the Postmaster General should not seize material and require the vendor, through an injunctive action, to prove his right to distribute it. Thus, "prior restraint"—censorship *before* distribution or sale—by the Postmaster General was

*See "Poison in Print—And How to Get Rid of It," *The Reader's Digest*, May '64.

THE FIGHT AGAINST THE SMUT PEDDLERS

a major factor in this reversal of a lower-court judgment.

Learning the Pitfalls. Keating was not disheartened by such decisions. The trouble, he saw, was that the smut dealers were often represented by wily specialists in obscenity law who were ready and willing to pull every legal trick in the book to defend their clients. On the other side were police chiefs and district attorneys with heavy case loads and limited, sometimes inexperienced staffs.

Keating now began an intensive study of the legal pitfalls, to help representatives of the public to compete. He talked with police officials and public prosecutors and examined the obscenity statutes in the 50 states. During his researches, he met James J. Clancy, a deputy district attorney in Burbank, Calif., who had been highly successful in preparing obscenity cases for prosecution.

Both men saw that obscenity laws varied from state to state. Some of these statutes needed updating, others rephrasing to bring them into line with the *Roth* ruling. Citizens for Decent Literature started an educational campaign for the revision and strengthening of these laws.

Next, Keating and Clancy offered their knowledge and experience to any prosecutor who wanted it. Today Keating spends a substantial amount of his time helping to prepare briefs and advising prosecutors on details of obscenity statutes. Clancy's CDL work became so demanding that he joined the national staff as full-time legal counsel. The two

men have filed *amicus curiae* (friend of the court) briefs to assist prosecutions in a number of obscenity cases.

Another strong arm is the U.S. Department of Justice. Because of the big increase in obscenity cases in recent years, the department's general-crime division has established a staff of legal experts responsible for dealing with pornography in the mail and in interstate commerce. Two specialists in this field, Edward J. Pesce and Theodore Kleinman, are assigned full-time to the work. They help federal district attorneys follow correct procedures.

Shifting the Balance. Through such efforts, the balance of power is now shifting in the legal fight against obscenity. Since the *Roth* decision, scores of convictions in obscenity cases, obtained in state and federal courts, have not been appealed to the U.S. Supreme Court. Records also disclose that from June 1957 to June 1965 the highest court has denied review in 22 criminal convictions for obscenity-law violations.

While these signs are encouraging, some court decisions are alarming—as, for example, a 1963 ruling by Judge J. Irwin Shapiro in the trial court of Queens County, N.Y. The officials of a news-distributing company had been arrested on charges of selling books alleged by the district attorney to be obscene. Judge Shapiro admitted in his ruling that “fully 90 percent of each book is filled with lurid descriptions of sexual activities, in sufficient detail

THE FIGHT AGAINST THE SMUT PEDDLERS

to act as an erotic stimulus to those so inclined," and then dismissed the defendants with this astonishing dictum:

"In the opinion of the court these books are unvarnished trash, but novels and stories of no literary merit have a place in our society. There are those who, because of lack of education, the meanness of their social existence, or mental insufficiency, cannot cope with anything better." Shapiro's ruling prompted *Life* magazine to ask editorially, "Is any book legally obscene anymore?" The case is currently on appeal.

More ominous still was the thinking of two U.S. Supreme Court Justices in voting to reverse two Florida civil-proceedings decisions which found the books *Tropic of Cancer* and *Pleasure Was My Business* to be obscene. The Supreme Court reversed these judgments in June 1964 by a close 5-4 verdict, with concurring votes cast by Justices Hugo Black and William O. Douglas. In their opinion, the *Roth* test was unconstitutional. Both Black and Douglas hold that freedom-of-press guarantees forbid restraint on what may be published.

Fortunately, this is a minority view among Supreme Court Justices. To date, the Court has never ruled in favor of pornography or obscenity *per se*. In a recent decision, Chief Justice Earl Warren underscored the responsibilities that officials and citizens must face:

"Courts are often presented with procedurally bad cases, and in deal-

ing with them appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity."

Meeting the Challenge. This challenge can be met if a three-point program is followed:

1. *Police and prosecutors must study obscenity laws and know the proper procedures to enforce them.* If prosecutors are inexperienced in handling pornography cases, they should secure the aid of veteran legal fighters of the racket. District attorneys should concentrate on prosecuting the worst smut peddlers in their areas, attacking the sale of filth so offensive that its meaning and menace are self-evident.

Laws and ordinances should, if necessary, be revised so that their wording is consistent with that of the Supreme Court's decision in the *Roth* case. State legislatures and municipal councils should keep in mind these principles:

(a) Prior censorship (before distribution, showing or sale) has been practically outlawed by the courts.

(b) Nudity and obscenity are not synonymous; the manner and purpose of the showing of nudity, and the intent to arouse prurient interest, determine the offense.

(c) District attorneys should draw on a federal law enacted in 1958, which allows prosecution of pornography purveyors not only in the locality where they mail their filth

THE FIGHT AGAINST THE SMUT PEDDLERS

but also where it is delivered. This law is proving a powerful weapon.

2. *Try all obscenity cases in a criminal court, before a jury.* The criminal court, with jury, is the forum that assures the greatest chance of success, for the 12-person jury, drawn from the local community, can best assess offending materials on the basis of known "community standards." Chief Justice Warren has declared: "It is my belief that when the court said in *Roth* that obscenity is to be defined by reference to 'community standards' it meant *community* standards—not a national standard, as is sometimes argued."

Appellate courts are reluctant to overturn verdicts of juries in criminal trials that are properly conducted. In some states, however, the prosecution does not have the right to a jury trial if the defendant waives it. The law should be changed to give the prosecution this right in *all* criminal cases.

3. *The public must strengthen and*

use every legal means to fight obscenity. "The main reason obscenity laws are not enforced," says Keating, "is public apathy." Citizens in any community can organize to battle the traffic in filth. They should be widely representative of all churches, of parent-teacher associations, women's clubs, civic clubs, business and labor organizations. These citizen groups should study the newsstands and bookstores and file complaints with public prosecutors when material appears to violate obscenity laws. In addition, they should become familiar with the laws that control obscenity, demand revisions where necessary, and insist upon enforcement.

Here is a crusade against a rising evil which all of us—with our courts—should pitch into and win!

Reprints of this article are available. Prices, postpaid to one address: 10—50¢; 50—\$2; 100—\$3.50; 500—\$12.50; 1000—\$18. Address Reprint Editor, The Reader's Digest, Pleasantville, N.Y.

Immorality, infidelity, prostitution, rape—such are the subjects currently highlighted on movie marquees across the nation. Here's what you can do to help fight an alarming trend

Must Our Movies Be Obscene?

By O. K. ARMSTRONG

IN NEW YORK City recently I viewed a movie advertised at the theater marquee by photos of near-naked men and women. The story of a girl who finds a job as a model, the film proved to be a cheap concoction of bedroom and bathtub scenes, almost nude embraces, strip-poker parties and a wild orgy. Meanwhile, on other midtown theater marquees that same evening were announcements of a variety of provocatively titled films, all of which promised scenes of torrid love and nudity—with sadism, lesbianism and homosexuality often openly suggested.

Such movies, known to exhibitors as breast-and-buttocks shows or "nudies," used to be shown only in seedy slum theaters, at half-price rates. Today they are frequently booked at regular prices in neighborhood theaters or drive-ins, where

they catch the affluent teen-age audience.

Such films represent the most debased product of the motion-picture industry. Yet they have been profitable, and, more important, their competition has had a distinct effect in lowering the general standards of screen entertainment. They have helped influence big producers to abandon former restraints, to feature adultery, prostitution and perversion as major themes for movies.

The nation's seven major film companies are pledged to observe standards of morality and propriety set out in a code adopted in 1930 (and revised in 1956) by members of the Motion Picture Association of America. The code embodies principles of conduct generally accepted as fundamental to our civilization: "The sympathy of the audience shall never be thrown to the side of crime,

MUST OUR MOVIES BE OBSCENE?

wrongdoing, evil or sin. The sanctity of marriage and the home shall be upheld. No film shall infer that casual or promiscuous sex relationships are the accepted thing." It forbids "obscenity in words, gesture, song, joke or by suggestion. Sex perversion or any inference of it is forbidden." A seal of approval is given to films passed by the code administrator.

While some producers still observe these principles, it is obvious to any regular movie-goer that the code is now more ignored than followed. The Catholic Legion of Decency reviews and classifies all major films for the guidance of Catholics. Of the 258 feature motion pictures screened from October 1963 to October 1964, it rated only 52 as morally unobjectionable for general patronage by adults, adolescents and children. Sixteen (13 of them of foreign make) were condemned as "positively bad," too offensive for any audience; 45 were rated as in part morally objectionable.

Each month the Film Estimate Board of National Organizations issues the *Green Sheet*, a survey of current films with audience classifications compiled from the estimates of such organizations as the American Library Association, the General Federation of Women's Clubs, the American Jewish Committee. In one recent issue of the *Green Sheet*, 19 films are reviewed. Seven are recommended for adults only, seven for adults and "mature" youth. Only one

is marked for general audience viewing. (The description of one "adult" film, not untypical, indicates that it concerns a 14-year-old girl who, "after being raped by her drunken stepfather, enters a life of prostitution.") By its distribution of the *Green Sheet*, the film industry itself tacitly acknowledges that many modern movies are dubious, unfit for family viewing.

There are some signs that the public is ready to demand a cleanup. One example: in Laguna Beach, Calif., recently, irate parents protested the showing of *Malamondo*, an "adults only" movie advertised as "a frenzied, frantic, fantastic ride on this wide, wide world." Citizens picketed the movie house carrying placards that read: "Liberty from filth!" "Dirt is not art" "Give us decent movies!" The proprietor withdrew the film.

Certainly, public protest *can* be effective in helping to clean up the movies. Some suggestions:

1. *Patronize decent films only.* The *Green Sheet* is available in many public libraries. The Protestant Motion Picture Council and the National Congress of Parents and Teachers, as well as the Catholic Legion of Decency, make estimates of major films. Consult them when in doubt.

The idea that movies must be in low taste to make big profits has been proved false. Three of the biggest moneymakers in 1965 have been *My Fair Lady*, *Mary Poppins* and *The*

THE READER'S DIGEST

Greatest Story Ever Told. Each of these is suitable for the entire family. So are such excellent current films as *The Sound of Music*, *A Boy Ten Feet Tall*, *Those Calloways*, *World Without Sun*, *Those Magnificent Men in Their Flying Machines*. Among the great box-office champions of all time are such top-quality films as *Around the World in Eighty Days*, *The Bridge on the River Kwai*, and *Gone With the Wind*.

2. *Demand self-regulation by the industry.* If the present code is too Victorian, as some producers say, let the industry revise it to conform to modern standards of decency—but then observe it. Exhibitors can enforce it by refusing to handle or show non-code films, or any films that are morally offensive.

In many European countries, the law demands that theater owners display a symbol—either on the marquee or in some prominent position near the box office—clearly designating whether the film is legally prohibited to youngsters. It is a program that might well be emulated in the United States.

3. *Support vigorous legal action.* In 1964, the manager and the owner of a movie theater in Louisville, Ky., were indicted on charges of exhibiting obscene motion pictures, and also for selling obscene literature. The theater, which had a consistent policy of showing “girlie” films, was described as a “cancer” in the com-

munity by prosecuting attorney Edwin A. Schroering. On the day the trial was scheduled, some 50 citizens, including a lawyer for Citizens for Decent Literature, were observers in the courtroom when the defense attorney announced that the theater was going out of business. Box-office receipts had dwindled following the indictment and the refusal of community newspapers to accept the theater's advertisements.

In an increasing number of cases, vigorous legal action, where tried, has been successful in stopping exhibition of the really pornographic films. A California firm pleaded guilty to charges of distributing obscene films and was assessed the maximum fine. In Luzerne County, Pa., the district attorney successfully prosecuted two drive-in movie operators for “exhibiting obscene films and corrupting the morals of minors.” One was fined \$1000 and sentenced to up to six months in prison.

It will take coöperation between citizens and law-enforcement officials—and intelligent self-regulation by the motion-picture industry in its own interest—if confidence is to be restored in this giant of art, education and entertainment.

Reprints of this article are available. Prices, postpaid to one address: 10—50¢; 50—\$2; 100—\$3.50; 500—\$12.50; 1000—\$18. Address Reprint Editor, The Reader's Digest, Pleasantville, N.Y.

A
Reader's Digest

REPRINT

Police chiefs, judges, doctors, psychiatrists and leaders of religious, educational and civic groups all over the nation testify to the causal relationship between crime and the tide of obscenity in publications and motion pictures

By O. K. ARMSTRONG

The Damning Case Against Pornography

IN THE Southwest recently a 15-year-old girl was arrested following a series of sex escapades with students from nearby colleges. She confessed that she had begun selling her "favors" to teen-age youths after reading several paperback novels glamorizing the lives of prostitutes.

In a secluded spot near Nashville, Tenn., last June a man sexually attacked, then murdered, a 17-year-old girl. Searching the suspect's home, the police found huge quantities of obscene literature and pictures—

some depicting precisely the crimes he is alleged to have committed.

These examples can be multiplied by the hundreds, all indicating a direct connection between the enormous tide of obscenity in publications and entertainment and the alarming increase in delinquency and crime—especially among children and youths.

Federal Bureau of Investigation statistics reveal that during the decade 1955-64 the rate of forcible rape increased 37 percent. *The greatest increase among those committing*

THE READER'S DIGEST

this crime was in youths in their late teens. Paralleling the growth of such crimes in the last decade has been the increase in salacious literature and lewd entertainment.

There can be no doubt about the increase in the dirty-book business. The New York Times, in an article by Paul L. Montgomery, recently reported: "The pulp sex novel, once considered the preserve of pasty-faced men in shabby overcoats, has emerged from underground to become an 18-million-dollar-a-year business. This year, by conservative estimate, the burgeoning industry will produce 500 lurid books exploring lesbianism, nymphomania, male homosexuality, sado-masochism, fetishism, incest and other pursuits that used to be treated primarily in medical journals."

FBI director J. Edgar Hoover has more than once called attention to the causal relationship of pornography and crime. He has bluntly said: "The circulation of periodicals containing salacious material, and highly suggestive and offensive motion pictures and television, play an important part in the development of crime among our youth."

"There has not been a sex murder in the history of our department in which the killer was not an avid reader of lewd magazines," said Herbert W. Case, former Detroit police inspector.

As a result of an investigation of pornography by a U.S. Senate committee in 1956, the late Sen. Estes Kefauver, the committee's chairman,

announced: "The impulses that spur young people to sex crimes are unquestionably intensified by reading obscene periodicals."

There is ample evidence that religious, educational, business, labor and civic organizations of all kinds are prepared to campaign vigorously against this monstrous public enemy. Still they must meet those who advocate an astonishing theory: that there is no proof that pornography causes antisocial actions.

This theory flies in the face of clinical studies of the behavior of children—based upon direct examinations and reactions to given situations—made in New York under the direction of Dr. Fredric Wertham and a team of psychiatrists.

"Children's attitudes and consequent actions are definitely affected by the reading of literature suggestive of a combination of sex and violence," says Dr. Wertham. "I am convinced that this combination is creating in the minds of children the ego ideal of the brute who by physical strength takes the law into his own hands, makes his own rules and solves all his problems by force."

Yet the 1965 report of the Institute for Sex Research, founded by the late Dr. Alfred Kinsey, attempts to create doubt that sex offenders are greatly influenced by reading obscene literature. One author of the report, who interviewed a number of men imprisoned for sex offenses, makes this assertion: "Their disinterested and indeed scornful attitude toward pornography was perhaps

THE DAMNING CASE AGAINST PORNOGRAPHY

WHAT FOOLS we be! We ask the church to teach standards, and the police to protect us, and then like a nation of sheep we accept the torrent of filth that floods the country. We remain quiet and tolerant when a 'controversial best-seller' tears down every door and drapery and brings into the public realm what decency, modesty and restraint forbid in every other medium of communication. As clergy, teachers, writers, parents, we must prepare people for battle with the corruption that surrounds us, and help them to face frankly the increasing degeneracy of American life.

—The Rt. Rev. Richard S. Emrich, Episcopal bishop of Michigan

best summed up by one fairly typical prisoner who told me, 'You can't do nothin' with a pitcher [picture].'

Law officials and courts dealing with sex offenders could challenge the Kinsey sex researchers on that score. Police chief Paul E. Blubaum of Phoenix, Ariz., declares, "Our city has experienced many crimes of sexual deviation, such as child molestation and indecent exposure. We find that most of these deviates read obscene materials and often exhibit them to children in an effort to arouse sexual excitement among their victims." *That's what can be done with pictures!*

Police and other law officers dealing with problem children and maladjusted adults constantly see the connection between obscenity and crime. In a bulletin to the Chicago police department, Superintendent O. W. Wilson warned: "Obscene literature is a primary problem in the United States today. Sexual arousals from obscene literature have been responsible for criminal behavior from vicious assaults to homicide." A survey of police chiefs of cities widely scattered over the nation

reveals their general agreement.

A resolution of the National Council of Juvenile Court Judges states: "The character of juvenile delinquency has changed as a consequence of the stimulation of salacious publications, being no longer the mischievous acts of children, but acts of violence, armed robbery, rape, torture and even homicide, for which the vicious publications condition the minds of our children."

Many leading doctors and psychiatrists have confirmed the tragic effects of obscenity in literature and entertainment, on both young and mature persons. Dr. William P. Riley, member of the Citizens Anti-Pornography Commission, an agency appointed by the mayor of New York City to combat obscenity, says: "I am certain that a vast majority of my fellow physicians agree that habitual reading of obscene literature and viewing smutty entertainment, especially by impressionable children and young people, result in antisocial actions. The effect may not be immediate; it may be tomorrow or years from now. That what an immature person

THE READER'S DIGEST

reads, sees, ponders and absorbs affects his character, and hence his behavior, is so obvious that it is not open to question."

In 1963 the New York Academy of Medicine made a survey of the effects of obscenity upon public health. The study covered magazines, paperback books, records, and illustrated advertising materials. A report of the survey described the material as "erotic through libidinous, to outright lascivious and lecherous." It noted that although some samples were marked "for adults," it was apparent that the greater proportion of the subject matter was purposefully directed toward teen-agers.

Indeed, surveys reveal that young people compose a major part of the readership of salacious publications. The results are matters of record: the shocking rise in sex crimes and social disease in teen-agers, the thousands of unmarried teen-age mothers, and the blighted lives of many other young people. The total result is a lowering of our moral standards, resulting in misery and unhappiness.

The most tragic effect of the current outpouring of obscene literature and films is the progressive destruction of personal and community morality. The foundation of society is the home, built upon love, respect and morality. Obscenity attacks all these by ridiculing virtue, chastity, fidelity and restraint. So the battle against the evils of obscenity must be

a battle also for that which is wholesome and good.

"Civilized man must exercise self-control," says Dr. Ollie Goodloe, director of the Columbus, Ohio, board of health. "This is just as true in sex as in other fields. Self-control is much easier if we have definite goals and ideals to guide conduct. Therefore, *we must have more effective sex education*, designed to create ideals and standards of conduct in our youth that will guide them toward successful marriage and away from the promiscuity made so alluring by obscene materials today."

Emphasizing the importance of proper sex education to overcome the effects of pornography, Dr. Max Levin, noted psychiatrist, writes: "Sex is more than a mechanism for procreation, and it is more than a self-indulgence. Sex plays a vital role in the growth of character. A good sexual relationship strengthens the bond between man and wife and fortifies the home in which they raise their children."

Let's get the degenerate smut off the newsstands, out of the mails, away from the films, and get on with the task of building solidly the structure of decent American life.

Reprints of this article are available. Prices, postpaid to one address: 10—50¢; 50—\$2; 100—\$3.50; 500—\$12.50; 1000—\$18. Address Reprint Editor, The Reader's Digest, Pleasantville, N.Y.

Filth for Profit

The Big Business of Pornography

*A behind-the-scenes report on the merchants of smut—
and how you can help put them out of business*

BY Q. K. ARMSTRONG

Former member of the U.S. House of Representatives, from Missouri

“We are starting a new line of paperbacks and need tough, hard-hitting, sex-action-filled books, geared to the demands of today's competitive market. What we seek is offbeat sex, with emphasis on deviations. The sex must be as strong and as offbeat as possible.”

The above was sent by a publisher to prospective writers in November 1963. Sick as it may seem, it offers only a glimpse into one corner of a huge underworld—the extremely profitable business of pornography.

Until the early 1950's obscene materials were sold privately. Now hard-core obscenity has emerged into the open. On countless newsstands, paperback books by the score present explicit accounts of sexual perversion. “Stag” movies and slides, records of obscene songs

and humor, pornographic pictures and comic books—all are available on the open market, to buyers of any age.

According to Henry B. Montague, chief inspector of the U.S. Post Office Department, at least 100 million copies of “objectionable” publications go through the mail each year. The Department estimates that a half-billion-dollars' worth of obscene materials is distributed, by mail or truck and express.

Who produces this filth? Most pornographers are reluctant to discuss their trade. But since many are under indictment, or have been convicted, for violating laws against obscenity, the major facts about the lucrative racket can be established from court records.

According to James J. Clancy, a former assistant district attorney of

THE READER'S DIGEST

Los Angeles County who has been active in the prosecution of many big smut peddlers, about 60 percent of the lewd magazines and paperbacks that circulate in the United States are published by California firms. Two big West Coast producers of magazines or books declared obscene by the courts are Sanford E. Aday of Fresno and Milton Luros of Los Angeles. Aday began publishing paperbacks as early as 1952. Records show that, operating under several firm names, he produced 826,840 volumes featuring lurid sex in one five-month period. He has been indicted numerous times, and he and an associate were convicted in a federal court in Grand Rapids, Mich., in 1963, under a law which permits prosecution of a publisher wherever his obscenity is sold. The court assessed heavy fines and imposed a prison sentence, but the case is on appeal. Meanwhile, Aday's firm continues in business.

The companies controlled by Luros turn out a tremendous volume of offensive literature, some paperbacks featuring lesbianism, incest, perversion, sadism and homosexuality. Court records show that from July 1963 through July 1964 Luros also published 2,490,000 copies of girlie magazines, retailing for an average \$1.50 a copy. In that same 12-month period, he turned out at least 28 nudist magazines, averaging 25,000 copies of each. His total annual sales approximate six million dollars. Luros has been indicted four

times, convicted twice. (The second conviction, at Sioux City, Iowa, in January 1966, will be appealed.)

In the New York area, Edward Mishkin has held front rank among numerous publishers and sellers of sex literature. In 1960, New York City police, armed with a search warrant, seized 42 different titles of paperbacks in one of Mishkin's retail stores. The writers testified that Mishkin had directed them to fill the books with raw sex scenes. Leotha Hackshaw, one of the authors, told the court: "The sex had to be very strong; it had to be rough; it had to be clearly spelled out. He wanted scenes in which women were making love to women, men with men—sex in an abnormal and irregular fashion."

Mishkin was convicted, and the verdict was upheld by the New York Court of Appeals. His case is on appeal before the Supreme Court.

By late 1965, according to the National Office for Decent Literature (an organization that screens all paperbacks for guidance of Catholic families), the offensive soft-bound books were hitting the market at the rate of about 200 new titles a month. In addition, magazines for the "homosexual trade" have multiplied. Last fall, I counted 19 in one bookstore in Washington within a block of the White House.

After the opening of the first "sunbathing" camps in the United States during the early 1930's, a few nudist cults issued privately circu-

THE BIG BUSINESS OF PORNOGRAPHY

lated publications, using photographs taken at the camps. They were not pornographic. "But today the situation is changed," declares Mervin Mounce, editor and publisher of *Eden*, one of the legitimate nudist magazines. "The new so-called nudist publications, which number more than 100, are simply girlie magazines." They use pictures of professional models posed to excite prurient interest.

How do the publishers of pornography operate? The going rate of pay to an author of a smutty paperback is \$600. The author grinds out a manuscript in about a week. Retail price per copy, when published, is 95 cents. Paper, artwork for the cover, and printing cost a total of about 10 cents. National and local wholesale distributors, retailers and transportation expenses take another 45 cents or so. That leaves 40 cents for the publisher. If all of a standard printing (30,000 copies) is sold, he stands to realize approximately \$12,000—minus the \$600 for the author.

"And many of these publishers make no capital investment," says Clancy. "Their business is done on credit."

One of the biggest mail-order smut dealers in the nation is John Amslow and Associates, of Culver City, Calif. Amslow uses an assortment of pseudonyms, selling by direct mail such items as nudist films, pornographic records, pictures and playing cards, and lingerie. One enormous mailing recently went out

advertising records that present "the actual sounds of erotic love." During 1965, thousands of families received advertising matter from "X Sales, Winnetka, Calif.," openly soliciting the purchase of stag movies. The films portray the worst in perverted sex.

Printing the magazine and paperback smut is itself a substantial business. At least 25 firms work at the job in the Los Angeles area. Two of these are Nu Cal Litho and London Press, the latter owned by Milton Luros. Gross income for the printer runs about 15 cents for a magazine, 10 cents for a paperback. Also, many small legitimate firms take on print orders for a girlie magazine or two for the extra profit. At one plant I saw presses, which had just completed 100,000 "nudies," being readied for a run of a monthly religious publication.

The final step for the pornography publisher is distribution. Ordinarily he tries to arrange for a wholesaler to handle his wares. "We leave with each retail outlet, on consignment, the number of copies of each publication we think that outlet will sell, based on past performance," a big distributor told me. Most general distributors protest that they do not pressure retailers to take the sexy magazines and paperbacks. But many retailers say: "We have to take the bad publications with the good, or be penalized."

Some big distributors have taken the ultimate step in merchandising: they underwrite their own retail

THE READER'S DIGEST

stores. Shops have been opened in many large cities to handle lewd magazines and paperbacks almost exclusively.

If this tide of obscenity is to be beaten back, citizens must recognize pornographic materials as the public enemies they are—destructive of the values essential to a wholesome, law-abiding society. We need not stand by helplessly; the multi-million-dollar smut industry is vulnerable to determined, united effort by concerned citizens. The First Amendment to the Constitution, which guarantees free speech, does not make the smut peddlers immune to prosecution. The U.S. Supreme Court has declared: "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Obscenity is not within the area of constitutionally protected speech or press."

Here is a program of action that citizens of any community can follow:

1. *Speak out.* The spread of pornography results from public apathy and ignorance of the problem. Do *not* act as a self-proclaimed censor, but make your voice heard. Exam-

ine the paperback books, magazines and films sold in your community. If you think some material is offensive, say so. Ask your town attorney if it violates any law.

2. *Organize community support.* Clergymen, parents, civic, business and labor groups can form an effective committee to demand action from law-enforcement officials. Citizens for Decent Literature, Inc., 3300 Carew Tower, Cincinnati, Ohio, has helped to establish 300 such committees across the country.*

3. *Secure expert legal advice.* The battle against pornography is often won or lost in the courtroom. Convictions depend upon vigorous prosecution backed by strong laws. Make certain that the anti-obscenity statutes in your state are powerful and consistent with the latest Supreme Court decisions, and that your police officials know the proper procedures to enforce them. Urge that all cases be tried in a criminal court before a jury, by an attorney experienced in obscenity law.

*See "Poison in Print—And How to Get Rid of It," The Reader's Digest, May '64.

SOCIETY AND THE SEX CRIMINAL

Condensed from "HOW MANY MORE VICTIMS?"

GLADYS DENNY SHULTZ

As I can testify from my own experience of 20 years on the Criminal Court Bench and almost a dozen years as Commissioner of Correction of the City of New York, imprisonment per se is perhaps the least effective cure that has ever been devised for sexual offenses. True security for the community can be spelled out in two words: prevention and rehabilitation.

Gladys Denny Shultz writes from the vantage point of an intended victim of a rapist. Her horrifying experience led her to consult with leading legal, judicial and penological authorities on sex crimes across the land. Her book, "How Many More Victims?", stresses the need for scientific research geared toward both prevention of sexual assaults and effective treatment of sexual offenders.

—Judge Anna M. Kross in *Saturday Review*

THERE ARE nights when cold fear suddenly comes over me as I sit alone in my house. I know that I will carry this fear as long as I live. Six years ago I was the victim of an attempted rape in these very rooms, and I can never forget the horrifying sensation of helplessness a woman feels when pitted against a powerful, sex-crazed deviate. I would prefer any kind of quick, clean death to another sordid struggle with such a man.

Yet I was one of the lucky ones. I was not raped, and I escaped from an experience which many women do not live to tell about. But I do have reason to speak out, for I have

witnessed the vast misunderstanding which exists regarding the problem of sexually sick men, and I have seen how our laws fail to protect us against repetition of sex crimes.

Let me trace the legal tangles that took place after my attacker's arrest. My assailant, whom I shall call Jack Smith, was indicted by a grand jury. A month later, state psychiatrists declared him to be a paranoid schizophrenic (an insane person with delusions of persecution), and he was sent to a state hospital for the criminally insane. I was told that he would probably remain there for life.

Imagine my shock when, 22 months later, Smith was released

THE READER'S DIGEST

from the hospital to stand trial in our county court. No matter how the trial ended Smith would go free! If the jury decided that he was insane when he attacked me, he would be free, since the hospital had released him. If found guilty, he would also be free, having already served more time than the highest sentence for his crime demanded. But I worried as to whether Smith had been cured. Would he attack again?

It was plain that even the defense lawyer did not believe Smith had been cured. In a talk with me and the prosecuting attorney, he said he had been involved in many similar cases, in one of which he had advised against the release of his client. "The judge said he didn't think I had represented my client's interests," he recalled. The reprimand stung; the client was freed. But, not long afterward, the "client" tied up his own ten-year-old daughter and a friend of hers and raped them. He then went into the street and knifed two girls.

The lawyer wanted no such development in this case. He proposed a plan whereby authorities could maintain some control over Smith's activities. Everyone agreed, and

Smith pleaded guilty on a charge that would permit a longer sentence. The court ruled that he would be paroled for psychiatric care while reporting monthly to a probation officer. Hardly an ideal solution, but it was the best that our state laws and facilities allowed.

The Danger in Our Streets

SHOCKED by this experience, I decided to find out what other states were doing to protect their citizens from sex crimes. Drawing on my experience as a former staff writer for *Ladies' Home Journal*, I started a coast-to-coast investigation during which I talked with psychiatric and penal experts, visited several institutions and interviewed many men convicted of sex offenses. What I learned convinces me that, with few exceptions, our handling of sex crimes is a national scandal.

Almost every day our prisons release unrehabilitated sex deviates who may prey virtually at will upon the public. Consider the rape-murder of the 19-year-old daughter of a Hollywood screen writer. She was attacked on the campus of Los Angeles City College. Her assailant was arrested on the scene. Only two years earlier he had been convicted of rape and paroled. In Levittown, Pa., a 21-year-old housewife was raped by a man who held a knife to her throat. He was on probation under a one-year sentence for a morals offense committed some five months before.

When police dragged the Ohio

GLADYS DENNY SHULTZ is the author of numerous articles and books, including the biography *Jenny Lind, the Swedish Nightingale*. The experience described in her anonymous article, "A Woman Attacked," condensed in the July '60 Reader's Digest, led her to undertake the research for *How Many More Victims?*

SOCIETY AND THE SEX CRIMINAL

River and found the dismembered body of 11-year-old Avril Terry, the community of Boonville, Ind., rose up in anger, and a lynching was narrowly averted. Emotions had been heightened by the revelation that the murderer, a 53-year-old convict, possessed a 33-year record of crimes against children; two years before, he had been paroled from a sentence for sodomy.

Women and children have been attacked when doing the most ordinary things. One elderly rape-murder victim was killed as she walked home from a Wednesday-night prayer meeting. A young girl was brutally slain while canvassing her own neighborhood, selling candy. Women have been assaulted in brightly lighted self-service laundries, and in the parking lots of supermarkets.

There is no safety either in old age or extreme youth. The oldest rape victim to come to my attention was 81; the youngest, a three-year-old girl. There is not necessarily safety in numbers. Three wives of prominent businessmen, out for a walk in an Illinois park, were clubbed to death and sexually molested after they refused the advances of a man who approached them in a secluded spot.

Our Failing Laws

A RECENT FBI report shows that somewhere in the nation a sexual assault occurs every 26 minutes. But almost all statistics on sex crimes are misleading. Many authorities

are convinced that only a small proportion—perhaps less than one fourth—of rape attacks and molestations are reported.

For example, many cases of sexual tampering with children do not come to the attention of the police. Children often do not tell their parents of these occurrences, and when parents become aware of them they are reluctant to subject the child to questioning by police. Similarly, many women do not report attacks, out of shame or fear of reprisal.

Another factor that destroys the validity of sex-crime statistics is the practice of allowing men charged with serious offenses to plead guilty to lesser charges. This avoids long, costly trials, and is most common in large cities where court dockets are overcrowded and sex-crime rates high. One survey of 1219 of New York State's accused rapists showed that only 138 were convicted of rape. Twenty-eight were placed on probation, 11 were given suspended sentences, and four were merely fined.

Almost every state has been faced with a rising rate of sex crimes, and almost all attempts to correct the situation have failed. Twenty-three of our states, for example, have enacted the so-called indeterminate sentence—ranging from one day to life in prison—which permits indefinite custody of men, including certain sex offenders, who are potentially dangerous. However, this sentence is supposed to guarantee intensive psychiatric care, and only

THE READER'S DIGEST

those men who are cured are to be released. But since most states have failed to provide the necessary psychiatric care, the courts rarely invoke the sentence lest a man be unfairly imprisoned for life.

Thus a pattern is established whereby many psychopaths carry on long, sordid careers with very little interference. To understand the significance of the situation, consider the psychiatric study made of 102 sex offenders in New York's Sing Sing prison. Eighteen of these men were deemed incurably disturbed and predisposed to violence; psychiatrists believed they would repeat their crimes if released. Thirty-two more were judged untreatable at present; if released, they would probably continue as a danger to public morals and to women and children. Yet 15 of these 50 men—with convictions ranging from rape to carnal abuse of children—were released and returned to society.

Sharp Dividing Line

WHAT IS known about the sex offender? Over the years, a vast literature has collected on the subject. For example, more than 1000 sex criminals have been examined in Maryland, at the Baltimore courts' psychiatric clinic, headed for more than 30 years by Dr. Manfred S. Guttmacher. One of the clinic's studies, in which 172 sex offenders were matched against a control group of 172 non-sex offenders, revealed many interesting facts.

The highest incidence of sex crime

was found among native-born white men. The average sex offender was found to be six years older than the average general offender, and nearly half the sex group were, or had been, married—indicating that early marriage can't be considered the solution to all sex problems. The sex offenders had somewhat lower I.Q.'s and less education than the general group, and all but ten percent of both groups said they had had some religious training in childhood.

There was a sharp dividing line, however, drawn among the sex offenders according to their offense. The child molesters, the exhibitionists, and those who had committed incest were considerably older than the forcible rapists. These older men were found to be so lacking in self-confidence that they did not have the courage to approach mature women. They were unable to have a satisfying relationship on a mature basis.

With the forcible rapists the story was quite different. According to Dr. Guttmacher's study, the majority of these men married young and had children. They had *not* been deprived of normal sex. Their psychiatric-test responses revealed a great deal of conflict and inner disharmony beneath a rigidly controlled surface. If anything, these men tended to be over-controlled. When this discipline was weakened, sometimes under the effects of alcohol, the result was explosive and violent behavior.

But *why* does the forcible rapist so

SOCIETY AND THE SEX CRIMINAL

often beat, choke, kick or stab a woman? Whence comes the need to abase and abuse some member of the opposite sex whom he has never seen before, and against whom he has no shred of personal grievance? This is the crux of the problem of sexually violent men, and it deserves thorough understanding.

Mother, Father and Child

THE ILLNESS of men who force sex relations on women, who maul and sometimes kill, is a sickness of hate—hate of the female. The inherent male protectiveness toward women has turned into a desire to ravish and degrade, not for gratification but for revenge.

According to some authorities, the sex criminal's problem begins with his parents and home background. While the same can be said about most offenders, there is a difference in the case of the aggressive sex criminal. Here, resentment and hatred were hammered into the child at an early age—along with distorted concepts of sex.

Another element often found in the background of the violent sex deviate is an unwholesome relationship with the mother during the offender's childhood. Case studies show that a large proportion of the mothers of aggressive sex criminals behaved toward their children in a seductive manner. This seduction was seldom overt, and the mother may not have been aware of what she was doing, but her emotional needs led her to act in such a

way as to arouse sex feelings in her child.

"With such mothers," psychiatrist Dr. Robert Linder has written, "the child is conceived of as a lover. This stems from the fact that the mothers of psychopaths are usually unrequited in their feelings for their husbands or otherwise starved for love."

The Sing Sing study of 102 sex offenders also points to the influence of family life upon the deviate. These men were all found to have had childhoods marked by severe emotional deprivation. In a number of cases this deprivation took the form of over-indulgence and over-protection—a sign of parental selfishness rather than love.

"Pampering fathers and mothers dominate their children by bribing them, thus trying to possess them completely," the final report declared. It is interesting that 14 of the 102 criminals had been considered model children, and 32 others appeared to have been "good boys." One young man, who had brutally raped an older woman, had been extremely well behaved as a child, was always neatly dressed, and looked like "a little angel."

Actually, the boys had been submissive as children because they were afraid to assert themselves. The offenses they committed later were an expression of long-suppressed resentment against the authority of parents with whom they had never had a satisfactory relationship. Many displayed, to a dangerous degree, a hatred of authority.

THE READER'S DIGEST

Most of the 102 offenders had not developed normal sexual concepts. They were *not* over-sexed, as one might imagine. Rather, they proved as a group to be sexually and emotionally immature—which explains why a number sought out small children as objects of sexual attention. The Michigan Governor's Study on the Deviated Criminal Sex Offender reported in 1951: "The childhood of nearly every deviated offender contained signs of a gathering storm, and by the same token presented a series of opportunities which were too often misunderstood or ignored."

There are some attitudes in youngsters which might indicate a possibility of later criminal sexual behavior. Among them are the lack of guilt feelings about sex misconduct; unusually aggressive, hostile attitudes toward others; abnormal lack of affection for family and intimates; and a tendency to seek immediate gratification regardless of the rights of others. High on the list of warning signals is sadism toward animals or younger playmates.

Thus, one key to preventing sex crimes lies in establishing better attitudes within the home. Dr. O. Spurgeon English, former head of the department of psychiatry at Temple University, offers three cardinal rules for improvement:

- 1) The child should have warmth from his parents, particularly his mother, so that he will want to re-establish ties of intimacy with women later in life.

- 2) He should be raised in an atmosphere of enlightenment, free of taboos or disgust in relation to heterosexual union.
- 3) He should have the interest of a man during his growth, so that he identifies with masculine attitudes, particularly those pertaining to responsibility, home formation and satisfaction in parenthood.

The challenge is stated clearly in the Michigan Governor's Study: "The next generation can have fewer sex offenders if the misinformed and anxiety-ridden attitudes of many adults can be corrected."

Treating the Deviate

BUT WHAT can be done after the boy has become a sexually sick man? As this is written, only two states—California and Massachusetts—have separate institutions for the study and treatment of sex offenders. Wisconsin has plans for such an institution, and currently offers a program of treatment under the supervision of the courts and the Division of Corrections of the State Department of Public Welfare.

Wisconsin's program has had astonishing success. Under the state's landmark Sex Crime Law, courts *must* commit men convicted of rape or of attempted sex crimes involving children to the Public Welfare Department for a thorough mental and physical examination. If the Department's psychiatrists decide that a criminal is sexually deviated, the courts then *must* either place him

SOCIETY AND THE SEX CRIMINAL

on probation—under state-supervised psychiatric care—or recommit him to the Department for treatment.

Since the Department is held responsible for these men, a Sex Offender Facility was established at the Wisconsin State Prison at Waupun in 1951—the nation's first center for such specialized treatment. There the offender undergoes further examination and an intensive program of corrective group and individual therapy. He may be paroled upon recommendation of a special review board whenever the Department believes he can live safely in a community, or he may be held indefinitely, with consent of the courts. Thus, the all-important determination of the sex offender's mental status rests with impartial psychiatrists, and the courts follow their findings while retaining final power of commitment.

In 15 years of operation, the Department has studied 2619 sex offenders sent to it by the courts and, after examination, 1097 were recommitted to the Department for treatment. Of those accepted, 905 have been paroled. Best of all, only 10.6 percent of those paroled were returned for other sex offenses—a spectacular achievement, since the repeater-rate of general offenders runs between 30 and 35 percent.

Further evidence that deviates can be treated successfully appears in the records of California's Atascadero State Hospital, the nation's first non-penal institution for treating sex criminals. Dr. G. Lee Sandritter, superintendent of Atasca-

dero at the time of my visit, stated that of every 50 men accepted for treatment 40 are eventually discharged. Of these, ten are completely rehabilitated. Twenty have problems, but manage to stay out of trouble. Only ten repeat their offenses, and even they commit fewer crimes than they would have otherwise.

A few other states have a special facility for treatment in a mental hospital, similar to the one at Waupun, but nothing approaching a complete attack on the problem is being made on a national basis. When I asked, during my countrywide survey, who was responsible for setting up new and better laws and systems, I was told: "Officials won't do it; psychiatrists won't do it; lawyers won't do it." Whose job, then, is it?

It is the job of citizens—people like you and me.

Progress has been made largely through the pressures put on state legislatures by local citizens' groups. The revision of Wisconsin's criminal code is a perfect example. In 1947, Wisconsin, like many other states, passed a "sexual psychopath" law with a provision for an indeterminate sentence. It was never applied. Instead, in 1950, a citizens' committee was formed to see if a better law could be devised.

The committee was made up of judges, lawyers, psychiatrists, social workers, professors and leading members of organized labor, church groups, PTA's and community organizations. After careful study of

THE READER'S DIGEST

the state's Criminal Code and the yet unused "sexual psychopath" law, the committee drew up the present Sex Crimes Law—establishing the procedures which permit treatment at the Waupun Facility—and sponsored it through the legislature. It passed *without a dissenting vote*.

Thus, both Wisconsin and California have established successful systems which prove that the problem of dealing with the sex criminal *can* be solved. Any other state can follow their lead. How many more victims, how many more rapes and attacks on children and legal fiascoes will it take, before we call for action elsewhere?

A Tragic Plea

THERE ARE other steps that citizens may add to a comprehensive program for dealing with sex offenders. For example:

- Michigan has a humane law which declares that persons diagnosed prior to trial as criminal sexual psychopaths, in need of medical treatment, may not be tried after being treated and cured.

- Several states now have laws requiring the serious offender on parole to undergo periodic psychiatric examinations. This prevents a sex offender from "dropping out of sight," since qualified psychiatrists

can usually spot changing patterns that foreshadow further criminal behavior.

- California permits help to any man who *requests* treatment because he fears he might commit a sex crime. In other states, men with sexual problems have applied for help and have been turned away—often with puritanical lectures—only to commit serious crimes at a later date.

One other step that I consider to be of prime importance is best expressed in the words of one of the many offenders I interviewed during my research for this book.

This man had raped four women. He told me of his childhood at home: of his fear of his father, who was given to violent rages; of the resentment he felt toward his mother, who constantly goaded her husband into quarrels. I asked him what he would say if he could speak to all parents, everywhere. After a second or so, he replied, "I would say to them: 'Talk to your children. Help them to understand you.'"

Suddenly he bowed his head into his hands and began to sob. It was several minutes before he could control himself sufficiently to go on.

"I guess what I mean is," he said, head still bowed, tears trickling through his fingers, "I'd say, 'Love your children.'"

A
Reader's Digest

REPRINT

By upholding the convictions of two publishers of pornography, the Supreme Court has put new teeth into laws designed to protect the public from obscenity

A Victory Over the Smut Peddlers

By O. K. ARMSTRONG

LATE IN December 1965, while gathering information on obscene literature for a series of articles in *The Reader's Digest*, I interviewed publisher Ralph Ginzburg. He had been convicted by a federal court in Philadelphia on charges of selling *Eros*, a magazine which he described as "devoted to the subjects of love and sex," and two other publications that were also declared obscene by the court. He had been fined and sentenced to five years in prison. He had appealed the conviction to the U.S. Supreme Court.

From across his desk high in a

New York office building, Ginzburg told me with emphatic self-assurance: "The Supreme Court will reverse my conviction! No one can define obscenity."

Ginzburg proudly admitted that his publications had proved very profitable. He told me that he had sent out about nine million pieces of advertising matter to promote *Eros*, resulting in 150,000 subscriptions and three million dollars in gross revenues. When I reminded him that federal and state laws prohibit circulation of obscene materials, he exploded: "All such laws are unjust! The First Amendment to the Con-

A VICTORY OVER THE SMUT PEDDLERS

stitution guarantees complete freedom of speech and press, and that covers everything. In 20 years all laws against so-called obscenity will be wiped from the books!"

In decisions announced last March 21, the Supreme Court replied. In a five-to-four ruling, it affirmed Ginzburg's conviction and sentence. At the same time the conviction of Edward Mishkin, one of the country's more notorious distributors of pornography, was also upheld.

These two decisions greatly strengthen previous rulings. Heretofore, the test for obscenity had been based on the decision in *Roth v. U.S.* in 1957. The Supreme Court then held that material is obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." In the Ginzburg decision, the Supreme Court went a step further, bringing into clear focus a principle long recognized by fighters for decency: *The material itself need not be the only consideration. How the material is advertised and promoted for sale to the public can be considered. If the obvious purpose of the publisher or seller is to appeal to lustful interest, he can be held accountable.* In effect, the court said, *motive* may determine legality.

In the ruling that confirmed Mishkin's conviction, Justice William J. Brennan took notice of the nature of the materials in this purveyor's magazines and books: fetish-

ism, sex scenes between women, flagellation and other sadistic tortures to satisfy the perversions of sexually deviant groups. "The evidence fully establishes that these books were specifically conceived and marketed for such groups," he declared.

This decision clarified an important legal point: a pornographer can no longer plead that his offensive output was issued for a special group—such as artists, doctors or psychiatrists—if he offers his material to the general public.

The majority opinions in the Ginzburg and Mishkin cases were hailed by church leaders, public officials and news media alike. Francis Cardinal Spellman, Dr. Norman Vincent Peale and Rabbi Abraham B. Hecht, president of the Rabbinical Alliance of America, joined other religious spokesmen in a statement: "It is a matter of profound gratification to all God-loving people that the Court has served notice that panderers of filth for profit will no longer be given a free hand in contaminating our society."

The New York Times commented in an editorial: "Mr. Justice Brennan and his majority colleagues have shown wisdom and moral courage in the subtle and arduous task of upholding the law against obscenity while still protecting liberty of expression. . . . The Court inescapably concluded that Ginzburg had no scholarly, literary, or scientific interests; he was strictly an entrepreneur in a disreputable business

A VICTORY OVER THE SMUT PEDDLERS

who took his chances on the borderline of the law and lost. He is no different from Edward Mishkin . . . who was convicted for hiring hack writers to produce books deliberately aimed at an audience of sexual deviates. . . . The public clearly has the right through the enforcement of laws to curb this 'sordid business of pandering.' "

Charles H. Keating, Jr., chairman of Citizens for Decent Literature*—a national organization with more than 300 chapters—says, "The Supreme Court decisions of last March 21 make it a different ball game. . . . Any area that decides to rid itself of obscenity can do so by competent enforcement and vigorous prosecution. There is no excuse for pornographers to be in business after the Court's decision."

"The decisions provide a powerful weapon in our drive to ban pornography from the mails," says Henry B. Montague, chief of inspection of the Post Office Department.

Throughout the nation, evidence is clear that the new rulings are having a profound effect on the legal war against filth. A survey of recent trial-court decisions reveals that, in the five months following the *Ginzburg* and *Mishkin* judgments, 40 convictions in obscenity cases were rendered across the country. During the same period, 11 appellate-court decisions either affirmed lower-court convictions or reversed dismissals.

*See "Poison in Print—And How to Get Rid of It," *The Reader's Digest*, May '64.

Increasingly, judges have cited the new Supreme Court opinions in their decisions. In considering one book, a New York judge noted that the *Ginzburg* case had "introduced a new factor in deciding what is obscene. The court will now examine the method of advertising and exploiting the book. If the publisher or distributor sells his material as pornography . . . it will determine the result."

The judge also declared that "the *Mishkin* opinion has removed any doubt that the book in the instant case is obscene. The Supreme Court has now removed the outer limit that only 'hard-core pornography' will be barred. The rule is now more elastic."

Last July 14, the Kansas supreme court reversed the ruling of a lower court that had dismissed charges of obscenity in a case which involved 11 books filled with lurid sex stories. In its decision, the highest court of Kansas declared, "If the obscene nature of these books be deemed doubtful, that doubt would certainly have to be resolved against them when we consider their packaging in the light of the positive judgments in *Ginzburg* and *Mishkin*."

The Supreme Court decisions may provide guidelines for determining obscenity in entertainment media as well. Within six weeks of the new rulings, a dozen movies were found obscene in decisions given in California, Missouri, Louisiana, Connecticut and Tennessee.

Last September 27 a U.S. District

A VICTORY OVER THE SMUT PEDDLERS

Court in California declared that certain "nude" magazines and peep-show films sold or displayed by a Los Angeles defendant were "patently offensive and utterly without redeeming social importance," and continued with this statement: "The court concludes as a matter of law that the exhibits are clearly, unequivocally and incontrovertibly obscene . . . because they come within the reasonable purview and ambit of both the federal judicial definition of obscenity and hard-core pornography (*Roth v. U.S.*, *Mishkin v. New York*, *Ginzburg v. U.S.*)."

Encouraged by these courtroom triumphs, prosecutors in numerous communities are drawing up new indictments against suspected pornography dealers and distributors. From April through July 1966, more than 25 complaints were filed in

California alone—the state where much obscene literature originates—and scores of new charges have been filed in many other states.

Today, decent citizens can look forward to the time when the blight of pornography is swept from our newsstands, theaters and mail. As James J. Clancy of Los Angeles, chief counsel for Citizens for Decent Literature, declares, "The Supreme Court has charted the prosecutor's blueprint for success. The people's forum is the criminal court. The attack should be against those who willfully violate the community's standards of decency. In this fight, the people cannot lose."

Reprints of this article are available. Prices, postpaid to one address: 10—50¢; 50—\$2; 100—\$3.50; 500—\$12.50; 1000—\$18. Address Reprint Editor, The Reader's Digest, Pleasantville, N.Y. 10570

Concerned citizens of Cincinnati have shown that a community *can* win the legal battle against newsstand smut

LANDMARK DECISION IN THE WAR ON PORNOGRAPHY

By O. K. ARMSTRONG

ON APRIL 12, 1967, after a three-and-a-half-week trial in Cincinnati in the Court of Common Pleas of Hamilton County, three defendants heard a jury return a verdict on two counts: "Guilty as charged."

The defendants, charged with knowingly selling obscene books in violation of the laws of Ohio, were Mrs. David (Polly) King, proprietor of a bookstore and news outlet she had formerly operated with her late husband, and two of her employees. The books in question were four paperbacks filled with lurid descriptions of both normal and perverted

sex activities: *The Sex Seller*, *Super Dyke*, *Sex Class* and *Hush Hush Sweet Harlot*.

Following the verdict, Judge John W. Keefe sentenced Polly King to two consecutive terms of one to seven years in the state reformatory for women and fined her \$4000. He assessed stiff fines against the two employees. In imposing sentence, Judge Keefe declared: "Mrs. King, the selling of obscenity is a filthy business for a man, but it is unbelievably vile for a woman."

The victory of the people of Cincinnati in the King case stands as proof that concerned citizens in any

THE READER'S DIGEST

community *can* lick the purveyors of newsstand obscenity—if they move with intelligence and determination, and if their police and prosecutors avoid the legal pitfalls that those engaged in publishing and selling pornography know so well how to use in their defense.

"From beginning to end, the case was a model of excellent work by police, prosecutor and judge," says Charles H. Keating, Jr., of Cincinnati, legal counsel of the national organization of Citizens for Decent Literature. "The thoroughness of the police investigation, the competence of the prosecution, and the dignity and understanding of the judge were hallmarks of responsible public officials."

The factors that won the King case are essential for success against the menace of pornographic literature in *any* community:

1. *A Vigilant Citizens Group.* Citizens for Decent Literature, which began as a local organization in 1957 and now counts chapters in more than 300 communities all over the United States,* furnished the public backing for legal action against the smut peddlers. The organization also furnished the first hard evidence that the obscenity laws of the state were being violated by the King bookstore. David King had operated in several other states as a newsstand and bookstore proprietor, and had been convicted for selling pornographic materials.

*See "Poison in Print—And How to Get Rid of It," *The Reader's Digest*, May '64.

During 1964 and 1965, CDL members in Cincinnati quietly purchased several of the more offensive magazines and paperbacks at Mrs. King's place. They briefed the contents, page by page, showing the repetitious descriptions of perversion, lesbianism, voyeurism, sadism. They delivered the briefs to Cincinnati's then chief of police, Col. Stanley R. Schrotel, and to the county's prosecuting attorney, Melvin G. Rueger.

2. *Thorough Police Investigation.* Armed with tangible evidence and assurances of citizen support, officials moved to enforce the law. Chief Schrotel instructed his vice squad to make its own careful investigation. For several months, plainclothesmen bought pornographic magazines and books at the King store, read them and reported their findings. Prosecutor Rueger counseled the police as to the constitutional rights of those involved and other possible legal pitfalls on the road to prosecution. He also held weekly meetings with his staff and the vice-squad officers, so that all would be kept abreast of the investigation.

Cincinnati's smut fighters understood the importance of being able to prove *knowledge of the contents* of publications on the part of those responsible for their display and sale. Time after time, obscenity prosecutions have failed because the proprietors and employes of newsstands and bookstores have pleaded ignorance of the type of literature they sold. Alerted to this danger, the Cin-

LANDMARK DECISION IN THE WAR ON PORNOGRAPHY

cinnati police shaped their investigation accordingly. They noted that the most offensive of the paperbacks in the King establishment were grouped on racks in the back of the store. This is general practice by pornography sellers, so that customers looking for publications of this kind can find them conveniently. Signs in the area read: "YOU MUST BE 21 TO LOOK AT THESE BOOKS." Occasionally, the vice-squad men talked to store employes, and were given suggestions as to where the "hot" books were.

In September 1966, armed with search/warrants, police raided Polly King's place and seized 2313 publications. Officers were careful to pick up all those paperbacks they had briefed during the investigation. Rueger promptly placed the case before the county grand jury, and with the carefully documented evidence he obtained indictments.

3. *Well-Planned Prosecution.* Prosecuting Attorney Rueger realized that an important element in any successful prosecution of smut peddlers is a jury truly representative of the community's citizens—in age, race, social and economic level. By careful challenging, a real cross section was obtained. One man was vice president of a bank, another was foreman of a car-repair shop, another a laborer. One of the eight women jurors was unmarried. Two jurors were Negroes—a man and a woman.

"We discussed among ourselves why we were selected," one juror

told me, "and decided that it was because we were all so different."

Rueger assigned two of his most competent young assistants, Frederick J. Cartolano and Carl W. Vollman, both experienced in criminal trials, to handle the case in the courtroom. They had the task of proving to the jury the obscenity of the four books on which the prosecution finally based its case. To accomplish this, they proposed to have the books read word for word in court—by a professional actor, so that jurors might not be prejudiced by a reader likely to be considered partial to one side or the other. Attorneys for Mrs. King and one of her employes agreed. (Attorneys for the other employe did not.)

For days the hired reader droned on, through passages "so lurid," as one juror declared, "that they would have brought blushes to the cheeks of a stone statue." The reading, along with the cover illustrations, established in the jurors' minds that the real purpose of the publications was to appeal to readers' "prurient interest"—an important point in the U.S. Supreme Court's current definition of what constitutes obscenity.

"We were shocked and embarrassed," one of the women jurors told me later. "It came as a jolt to learn that such stuff was being sold in my town."

4. *Anticipating the Defense.* When Polly King took the stand, she pleaded that she could not possibly have read all the paperbacks and magazines that came to her

THE READER'S DIGEST

store and therefore could not be held responsible for their contents. In view of the "You MUST BE 21 . . ." signs and the "hot" tips from the employes, the plea had a hollow ring. Also, as the judge commented at the time of sentencing, Mrs. King had been with her husband in 1959 when he was sentenced for dealing in obscene literature. After Mrs. King became proprietor, she continued to order publications from the same firms—principally in California—which had for years specialized in newsstand filth.

Mrs. King's attorneys fell back on a standard tactic in obscenity suits: calling "experts" to testify that the books actually were not obscene. They brought in as an expert Dr. Wardell Pomeroy, of New York City, a marriage counselor and psychotherapist. Dr. Pomeroy testified that he had read the four books in question, and that he believed each one had what he called a "moral"—a defense attempt to establish that the books had what several court decisions have termed "some redeeming social importance."

The defense tried time and again to get on the record statements to the effect that the four paperbacks were no more offensive than *Fanny Hill*, *Candy* or other kindred examples of "adult" literature. The prosecution objected, and Judge Keefe upheld the objections on the ground that comparisons with other literary works were irrelevant. He declared that the books for which the defendants were being tried would have to

stand on their own as to whether their display and sale violated the laws against obscenity. ("It is extremely important in such prosecutions *not* to let the defense fog the issue by making comparisons with other works," Assistant Prosecutor Cartolano explains.)

Thus the issue was narrowed down to: *Were the four books read to the jury obscene, thus making their sale a crime?*

On that point, Dr. Pomeroy testified that in his opinion the books did not go substantially beyond contemporary community standards. Asked whether he would say that *The Sex Seller* went substantially beyond the customary limit of candor tolerated in describing and discussing sex matters today, Dr. Pomeroy said, "No, the book does not."

"That last statement really made us angry," one of the jurors told me later. "It was *our* town, *our* community, he was talking about. We knew that such scenes of depravity as were described over and over in those books were not accepted as the standard in our city. We knew also that they were not accepted by normal people in any other community of the nation today."

5. *A Careful Judge*. In his instructions to the jury, Judge Keefe made the required charge that the defendants were presumed innocent until "guilt is established beyond a reasonable doubt." He explained in detail the law of Ohio, which makes it an offense for any person " . . . know-

LANDMARK DECISION IN THE WAR ON PORNOGRAPHY

ingly to . . . have in his possession or under his control an obscene book, magazine . . . with a guilty purpose, which means the purpose to exhibit them publicly or a purpose to sell or disseminate such material." He carefully instructed the jury on what "knowingly" means, and stated an important principle of law in these words: "A defendant cannot escape guilt by denying knowledge of the character of books by purposely and with calculation avoiding looking at them. A bookstore owner or bookseller cannot escape knowledge by purposely shutting his eyes to something which he could and would readily see in the ordinary course of his duties."

Judge Keefe pointed out what the U.S. Supreme Court has repeatedly affirmed: "Obscenity is not protected by any constitutional provisions or guarantees. Specifically, obscenity is not protected by the federal Constitution's guarantees of freedom of speech and press." Finally, the jurist told the jury: "You ladies and gentlemen are average persons. As such you are in a position to assess the evidence in this case. Are the books

obscene according to contemporary community standards in the sense of society, the public, people in general?"

The jury has given its answer, and of course the defense has appealed the convictions. In the meantime, Raymond P. Gauer, national executive secretary of Citizens for Decent Literature, has said: "The rulings of Judge Keefe in this Ohio case, unless overturned by higher courts, have set precedents which will be controlling in all future obscenity prosecutions. Especially is this true with respect to finding comparisons with other publications immaterial in judging the obscenity of materials before the court, and the instruction to the jury that a seller of publications cannot escape knowledge of their contents by purposely closing his eyes to them."

Cincinnati citizens and officials have shown that the battle for decency on the newsstands *can* be won.

Reprints of this article are available. Prices, postpaid to one address: 10—50¢; 50—\$2; 100—\$3.50; 500—\$12.50; 1000—\$18. Address Reprint Editor, The Reader's Digest, Pleasantville, N.Y. 10570

SMUT PEDDLERS—PART I

HON. THADDEUS J. DULSKI

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Tuesday, July 8, 1969

Mr. DULSKI. Mr. Speaker, hardly a day goes by that I do not receive complaints from individuals within my district or from elsewhere in the country complaining about the flow of pornographic and smut material through the mails.

The complaints are well justified. Our Post Office and Civil Service Committee has been working constantly on this problem, carefully considering every suggestion on how to curb the flow.

I have introduced new legislation aimed at blocking the mailing of smut into homes where minors reside. This is an area where I believe we can reasonably legislate and our subcommittee will be scheduling hearings soon.

Already on the books is the law which permits any postal patron to demand that his name be taken off a mailing list used to send him smut through the mails. While helpful, that protection comes after the fact; that is, the first mailing has been delivered.

The public justifiably is becoming alarmed at the ever-increasing flow of this material through the mails and the inability of legal authorities to be effective under present laws.

Indeed, the most effective deterrent has been the local volunteer effort which has been started in many communities.

A former House colleague, the Honorable O. K. Armstrong, wrote an article for the September 1965 issue of *Reader's Digest* which is still very timely. The article follows:

THE FIGHT AGAINST SMUT PEDDLERS

(By O. K. Armstrong)

A dramatic and significant battle is swirling across the United States today. Fighting on one side are the publishers, distributors and sellers of obscene material—a business estimated to gross currently more than a billion dollars a year. In the opposite camp are public prosecutors, parents, teachers and other citizens alarmed at the rising tide of newsstand and mail-order pornography and determined to do something about it.

The stakes in this battle are high. For the peddlers of smut it means the right to maintain and expand their markets. Newsstands flaunt magazines loaded with suggestive nudity and paperback books filled with detailed portrayals of illicit and abnormal sexual relations. To impressionable youths, this flood of pornography conveys the notion that adultery and perversion are acceptable, that moral standards are *passé*.

APPEALING TO THE PRURIENT

The battle began in earnest in 1955, when, following a Kefauver Committee investigation of the pornography racket, U.S. cities launched intensive crackdowns against obscenity. But the resulting court cases produced conflicting rulings and confusion over what is legally obscene. Guidelines were imperative if the drive on obscenity was not to collapse.

In June 1957 a decision by the U.S. Supreme Court supplied those guidelines—most important, an explicit definition of obscenity. Known as the *Roth* ruling, it affirmed convictions of Samuel Roth of New York and David S. Alberts of California, both possessors of long records as pornography distributors. Writing the historic opinion for the majority of the Court, Justice William J. Brennan declared:

"Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. We hold that obscenity is not within the area of constitutionally protected speech or press." The ruling then proceeded to this definition: "Obscene material . . . deals with sex in a manner appealing to prurient interest." The test should be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole" makes such a prurient appeal.

Champions of decency hoped that the new decision would clarify the issues in obscenity cases once and for all. Among them was Charles H. Keating, Jr., a Cincinnati, Ohio, attorney who, in 1956, founded *Citizens for Decent Literature*. Keating recognized that the *Roth* ruling, along with the state and local laws it guarded, could serve as a powerful weapon in the attack on commercialized filth.

Lawyers who defended pornography dealers, however, immediately denounced the *Roth* decision as "vague and unworkable." And, apart from the *Roth* ruling, other problems were apparent. A bookseller in Detroit, for example, had sold a paperback novel to a detective. He was convicted of violating a Michigan law forbidding the sale of publications containing materials injurious to youth. Then the U.S. Supreme Court struck down the state law. The Court ruled that the law's effect was "to reduce the adult population of Michigan to reading only what is fit for children." This decision made it clear that laws covering the sale of materials objectionable for children must not be applied to the public in general.

Another case, *Manual Enterprises, Inc. vs. Day*, which came before the Supreme Court in 1962, illustrated a pitfall of improper procedure. In this case, three members of the Court stated that the Postmaster General should not seize material and require the vendor, through an injunctive action, to prove his right to distribute it. Thus, "prior restraint"—censorship before distribution or sale—by the Postmaster General was a major factor in this reversal of a lower-court judgment.

LEARNING THE PITFALLS

Keating was not disheartened by such decisions. The trouble, he saw, was that the

smut dealers were often represented by wily specialists in obscenity law who were ready and willing to pull every legal trick in the book to defend their clients. On the other side were police chiefs and district attorneys with heavy case loads and limited, sometimes inexperienced staffs.

Keating now began an intensive study of the legal pitfalls, to help representatives of the public to compete. He talked with police officials and public prosecutors and examined the obscenity statutes in the 50 states. During his researches, he met James J. Clancy, a deputy district attorney in Burbank, Calif., who had been highly successful in preparing obscenity cases for prosecution.

Both men saw that obscenity laws varied from state to state. Some of these statutes needed updating, others rephrasing to bring them into line with the *Roth* ruling. Citizens for Decent Literature started an educational campaign for the revision and strengthening of these laws.

Next, Keating and Clancy offered their knowledge and experience to any prosecutor who wanted it. Today Keating spends a substantial amount of his time helping to prepare briefs and advising prosecutors on details of obscenity statutes. Clancy's CDL work became so demanding that he joined the national staff as full-time legal counsel. The two men have filed *amicus curiae* (friend of the court) briefs to assist prosecutions in a number of obscenity cases.

Another strong arm is the U.S. Department of Justice. Because of the big increase in obscenity cases in recent years, the department's general-crime division has established a staff of legal experts responsible for dealing with pornography in the mail and in interstate commerce. Two specialists in this field, Edward J. Pesce and Theodore Kleinman, are assigned full-time to the work. They help federal district attorneys follow correct procedures.

SHIFTING THE BALANCE

Through such efforts, the balance of power is now shifting in the legal fight against obscenity. Since the *Roth* decision, scores of convictions in obscenity cases, obtained in state and federal courts, have not been appealed to the U.S. Supreme Court. Records also disclose that from June 1957 to June 1965 the highest court has denied review in 22 criminal convictions for obscenity-law violations.

While these signs are encouraging, some court decisions are alarming—as, for example, a 1963 ruling by Judge J. Irwin Shapiro in the trial court of Queens County, N.Y. The officials of a news-distributing company had been arrested on charges of selling books alleged by the district attorney to be obscene. Judge Shapiro admitted in his ruling that “fully 90 percent of each book is filled with lurid descriptions of sexual activities, in sufficient detail to act as an erotic stimulus to those so inclined,” and then dismissed the defendants with this astonishing dictum:

“In the opinion of the court these books are unvarnished trash, but novels and stories of no literary merit have a place in our society. There are those who, because of lack of education, the meanness of their social

existence, or mental insufficiency, cannot cope with anything better.” Shapiro's ruling prompted *Life* magazine to ask editorially, “Is any book legally obscene anymore?” The case is currently on appeal.

More ominous still was the thinking of two U.S. Supreme Court Justices in voting to reverse two Florida civil-proceedings decisions which found the books *Tropic of Cancer* and *Pleasure Was My Business* to be obscene. The Supreme Court reversed these judgments in June 1964 by a close 5-4 verdict, with concurring votes cast by Justices Hugo Black and William O. Douglas. In their opinion, the *Roth* test was unconstitutional. Both Black and Douglas hold that freedom-of-press guarantees forbid restraint on what may be published.

Fortunately, this is a minority view among Supreme Court Justices. To date, the Court has never ruled in favor of pornography or obscenity *per se*. In a recent decision, Chief Justice Earl Warren underscored the responsibilities that officials and citizens must face:

“Courts are often presented with procedurally bad cases, and in dealing with them appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity.”

MEETING THE CHALLENGE

This challenge can be met if a three-point program is followed:

1. Police and prosecutors must study obscenity laws and know the proper procedures to enforce them. If prosecutors are inexperienced in handling pornography cases, they should secure the aid of veteran legal fighters of the racket. District attorneys should concentrate on prosecuting the worst smut peddlers in their areas, attacking the sale of filth so offensive that its meaning and menace are self-evident.

Laws and ordinances should, if necessary, be revised so that their wording is consistent with that of the Supreme Court's decision in the *Roth* case. State legislatures and municipal councils should keep in mind these principles:

- (a) Prior censorship (before distribution, showing or sale) has been practically outlawed by the courts.

- (b) Nudity and obscenity are not synonymous; the manner and purpose of the showing of nudity, and the intent to arouse prurient interest, determine the offense.

- (c) District attorneys should draw on a federal law enacted in 1958, which allows prosecution of pornography purveyors not only in the locality where they mail their filth but also where it is delivered. This law is proving a powerful weapon.

2. Try all obscenity cases in a criminal court, before a jury. The criminal court, with jury, is the forum that assures the greatest chance of success, for the 12 person jury, drawn from the local community, can best assess offending materials on the basis of known “community standards.” Chief Justice Warren has declared: “It is my belief that when the court said in *Roth* that ob-

scenity is to be defined by reference to 'community standards' it meant *community standards*—not a national standard, as is sometimes argued."

Appellate courts are reluctant to overturn verdicts of juries in criminal trials that are properly conducted. In some states, however, the prosecution does not have the right to a jury trial if the defendant waives it. The law should be changed to give the prosecution this right in all criminal cases.

3. *The public must strengthen and use every legal means to fight obscenity.* "The main reason obscenity laws are not enforced," says Keating, "is public apathy." Citizens in any community can organize to battle the traffic in filth. They should be widely representative of all churches, of parent-teacher associations, women's clubs, civic clubs, business and labor organizations. These citizen groups should study the news stands and bookstores and file complaints with public prosecutors when material appears to violate obscenity laws. In addition, they should become familiar with the laws that control obscenity, demand revisions where necessary, and insist upon enforcement.

Here is a crusade against a rising evil which all of us—with our courts—should pitch into and win!

SMUT PEDDLERS—PART II

HON. THADDEUS J. DULSKI

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 9, 1969

Mr. DULSKI. Mr. Speaker, the merchants of smut can be put out of business, but it will take the combined efforts of all of us.

Legislation can help in its own way. But the most effective attack is on the local scene.

A former House colleague, the Honorable O. K. Armstrong from Missouri, wrote an interesting article for the March 1966 edition of Reader's Digest—an article which is quite timely. The text follows:

FILTH FOR PROFIT: THE BIG BUSINESS OF PORNOGRAPHY

(By O. K. Armstrong)

"We are starting a new line of paperbacks and need tough, hard-hitting, sex-action-filled books, geared to the demands of today's competitive market. What we seek is offbeat sex, with emphasis on deviations. The sex must be as strong and as offbeat as possible.

The above was sent by a publisher to prospective writers in November 1963. Sick as it may seem, it offers only a glimpse into one corner of a huge underworld—the extremely profitable business of pornography.

Until the early 1950's obscene materials were sold privately. Now hard-core obscenity has emerged into the open. On countless newsstands, paperback books by the score

present explicit accounts of sexual perversion. "Stag" movies and slides, records of obscene songs and humor, pornographic pictures and comic books—all are available on the open market, to buyers of any age.

According to Henry B. Montague, chief inspector of the U.S. Post Office Department, at least 100 million copies of "objectionable" publications go through the mail each year. The Department estimates that a half-billion-dollars' worth of obscene materials is distributed, by mail or truck and express.

Who produces this filth? Most pornographers are reluctant to discuss their trade. But since many are under indictment, or have been convicted, for violating laws against obscenity, the major facts about the lucrative racket can be established from court records.

According to James J. Clancy, a former assistant district attorney of Los Angeles County who has been active in the prosecution of many big smut peddlers, about 60 percent of the lewd magazines and paperbacks that circulate in the United States are published by California firms. Two big West Coast producers of magazines or books declared obscene by the courts are Sanford E. Aday of Fresno and Milton Luros of Los Angeles. Aday began publishing paperbacks as early as 1952. Records show that, operating under several firm names, he produced

826,840 volumes featuring lurid sex in one five-month period. He has been indicted numerous times, and he and an associate were convicted in a federal court in Grand Rapids, Mich., in 1963, under a law which permits prosecution of a publisher wherever his obscenity is sold. The court assessed heavy fines and imposed a prison sentence, but the case is on appeal. Meanwhile, Aday's firm continues in business.

The companies controlled by Luros turn out a tremendous volume of offensive literature, some paperbacks featuring lesbianism, incest, perversion, sadism and homosexuality. Court records show that from July 1963 through July 1964 Luros also published 2,490,000 copies of girlie magazines, retailing for an average \$1.50 a copy. In that same 12-month period, he turned out at least 28 nudist magazines, averaging 25,000 copies of each. His total annual sales approximate six million dollars. Luros has been indicted four times, convicted twice. (The second conviction, at Sioux City, Iowa, in January 1966, will be appealed.)

In the New York area, Edward Mishkin has held front rank among numerous publishers and sellers of sex literature. In 1960, New York City police, armed with a search warrant, seized 42 different titles of paperbacks in one of Mishkin's retail stores. The writers testified that Mishkin had directed them to fill the books with raw sex scenes. Leatha Hackshaw, one of the authors, told the court: "The sex had to be very strong; it had to be rough; it had to be clearly spelled out. He wanted scenes in which women were making love to women, men with men—sex in an abnormal and irregular fashion."

Mishkin was convicted, and the verdict was upheld by the New York Court of Ap-

peals. His case is on appeal before the Supreme Court.

By late 1965, according to the National Office for Decent Literature (an organization that screens all paperbacks for guidance of Catholic families), the offensive soft-bound books were hitting the market at the rate of about 200 new titles a month. In addition, magazines for the "homosexual trade" have multiplied. Last fall, I counted 19 in one bookstore in Washington within a block of the White House.

After the opening of the first "sunbathing" camps in the United States during the early 1930's, a few nudist cults issued privately circulated publications, using photographs taken at the camps. They were not pornographic. "But today the situation is changed," declares Mervin Mounce, editor and publisher of *Eden*, one of the legitimate nudist magazines. "The new so-called nudist publications, which number more than 100, are simply girls' magazines." They use pictures of professional models posed to excite prurient interest.

How do the publishers of pornography operate? The going rate of pay to an author of a smutty paperback is \$600. The author grinds out a manuscript in about a week. Retail price per copy, when published, is 95 cents. Paper, artwork for the cover, and printing cost a total of about 10 cents. National and local wholesale distributors, retailers and transportation expenses take another 45 cents or so. That leaves 40 cents for the publisher. If all of a standard printing (30,000 copies) is sold, he stands to realize approximately \$12,000—minus the \$600 for the author.

"And many of these publishers make no capital investment," says Clancy. "Their business is done on credit."

One of the biggest mail-order smut dealers in the nation is John Amslow and Associates, of Culver City, Calif. Amslow uses an assortment of pseudonyms, selling by direct mail such items as nudist films, pornographic records, pictures and playing cards, and lingerie. One enormous mailing recently went out advertising records that present "the actual sounds of erotic love." During 1965, thousands of families received advertising matter from "X Sales, Winnetka, Calif.," openly soliciting the purchase of stag movies. The films portray the worst in perverted sex.

Printing the magazine and paperback smut is itself a substantial business. At least 25 firms work at the job in the Los Angeles area. Two of these are Nu Cal Litho and London Press, the latter owned by Milton Lueros. Gross income for the printer runs about 15 cents for a magazine, 10 cents for a paperback. Also, many small legitimate firms take on print orders for a girls' magazine or two for the extra profit. At one plant I saw presses, which had just completed 100,000 "nudies," being readied for a run of a monthly religious publication.

The final step for the pornography publisher is distribution. Ordinarily he tries to arrange for a wholesaler to handle his wares. "We leave with each retail outlet, on consignment, the number of copies of each pub-

lication we think that outlet will sell, based on past performance," a big distributor told me. Most general distributors protest that they do not pressure retailers to take the sexy magazines and paperbacks. But many retailers say: "We have to take the bad publications with the good, or be penalized."

Some big distributors have taken the ultimate step in merchandising: they underwrite their own retail stores. Shops have been opened in many large cities to handle lewd magazines and paperbacks almost exclusively.

If this tide of obscenity is to be beaten back, citizens must recognize pornographic materials as the public enemies they are—destructive of the values essential to a wholesome, law-abiding society. We need not stand by helplessly; the multi-million-dollar smut industry is vulnerable to determined, united effort by concerned citizens. The first Amendment to the Constitution, which guarantees free speech, does not make the smut peddlers immune to prosecution. The U.S. Supreme Court has declared: "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Obscenity is not within the area of constitutionally protected speech or press."

Here is a program of action that citizens of any community can follow:

1. *Speak out.* The spread of pornography results from public apathy and ignorance of the problem. Do not act as a self-proclaimed censor, but make your voice heard. Examine the paperback books, magazines and films sold in your community. If you think some material is offensive, say so. Ask your town attorney if it violates any law.

2. *Organize community support.* Clergymen, parents, civic, business and labor groups can form an effective committee to demand action from law-enforcement officials. Citizens for Decent Literature, Inc., 3300 Carew Tower, Cincinnati, Ohio, has helped to establish 300 such committees across the country.*

3. *Secure expert legal advice.* The battle against pornography is often won or lost in the courtroom. Convictions depend upon vigorous prosecution backed by strong laws. Make certain that the anti-obscenity statutes in your state are powerful and consistent with the latest Supreme Court decisions, and that your police officials know the proper procedures to enforce them. Urge that all cases be tried in a criminal court before a jury, by an attorney experienced in obscenity law.

SMUT PEDDLERS—PART III

HON. THADDEUS J. DULSKI

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Thursday, July 10, 1969

Mr. DULSKI. Mr. Speaker, the fight against smut peddlers has wide support, but it is going to take even more vigorous effort on the local front. Public influence

can be the greatest deterrent to the spread of pornography.

A former colleague in the House, the Honorable O. K. Armstrong, wrote an interesting article on smut peddlers for the February 1967 edition of Reader's Digest, as follows:

A VICTORY OVER THE SMUT PEDDLERS
(By O. K. Armstrong)

Late in December 1965, while gathering information on obscene literature for a series of articles in The Reader's Digest, I interviewed publisher Ralph Ginzburg. He had been convicted by a federal court in Philadelphia on charges of selling *Eros*, a magazine which he described as "devoted to the subjects of love and sex," and two other publications that were also declared obscene by the court. He had been fined and sentenced to five years in prison. He had appealed the conviction to the U.S. Supreme Court.

From across his desk high in a New York office building, Ginzburg told me with emphatic self-assurance: "The Supreme Court will reverse my conviction! No one can define obscenity."

Ginzburg proudly admitted that his publications had proved very profitable. He told me that he had sent out about nine million pieces of advertising matter to promote *Eros* resulting in 150,000 subscriptions and three million dollars in gross revenues. When I reminded him that federal and state laws prohibit circulation of obscene materials, he exploded: "All such laws are unjust! The First Amendment to the Constitution guarantees complete freedom of speech and press, and that covers everything. In 20 years all laws against so-called obscenity will be wiped from the books!"

In decisions announced last March 21, the Supreme Court replied. In a five-to-four ruling, it affirmed Ginzburg's conviction and sentence. At the same time the conviction of Edward Mishkin, one of the country's more notorious distributors of pornography, was also upheld.

These two decisions greatly strengthen previous rulings. Heretofore, the test for obscenity had been based on the decision in *Roth v. U.S.* in 1957. The Supreme Court then held that material is obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." In the Ginzburg decision, the Supreme Court went a step further, bringing into clear focus a principle long recognized by fighters for decency: *The material itself need not be the only consideration. How the material is advertised and promoted for sale to the public can be considered. If the obvious purpose of the publisher or seller is to appeal to lustful interest, he can be held accountable.* In effect, the court said, motive may determine legality.

In the ruling that confirmed Mishkin's conviction, Justice William J. Brennan took notice of the nature of the materials in this purveyor's magazines and books: fetishism,

sex scenes between women, flagellation and other sadistic tortures to satisfy the perversions of sexually deviant groups. "The evidence fully establishes that these books were specifically conceived and marketed for such groups," he declared.

This decision clarified an important legal point: a pornographer can no longer plead that his offensive output was issued for a special group—such as artists, doctors or psychiatrists—if he offers his material to the general public.

The majority opinions in the Ginzburg and Mishkin cases were hailed by church leaders, public officials and news media alike. Francis Cardinal Spellman, Dr. Norman Vincent Peale and Rabbi Abraham B. Hecht, president of the Rabbinical Alliance of America, joined other religious spokesmen in a statement: "It is a matter of profound gratification to all God-loving people that the Court has served notice that panderers of filth for profit will no longer be given a free hand in contaminating our society."

The New York Times commented in an editorial: "Mr. Justice Brennan and his majority colleagues have shown wisdom and moral courage in the subtle and arduous task of upholding the law against obscenity while still protecting liberty of expression. . . . The Court inescapably concluded that Ginzburg had no scholarly, literary, or scientific interests; he was strictly an entrepreneur in a disreputable business who took his chances on the borderline of the law and lost. He is no different from Edward Mishkin . . . who was convicted for hiring hack writers to produce books deliberately aimed at an audience of sexual deviates. . . . The public clearly has the right through the enforcement of laws to curb this 'sordid business of pandering.'"

Charles H. Keating, Jr., chairman of Citizens for Decent Literature—a national organization with more than 300 chapters—says, "The Supreme Court decisions of last March 21 make it a different ball game. . . . Any area that decides to rid itself of obscenity can do so by competent enforcement and vigorous prosecution. There is no excuse for pornographers to be in business after the Court's decision."

"The decisions provide a powerful weapon in our drive to ban pornography from the mails," says Henry B. Montague, chief of inspection of the Post Office Department.

Throughout the nation, evidence is clear that the new rulings are having a profound effect on the legal war against filth. A survey of recent trial-court decisions reveals that, in the five months following the Ginzburg and Mishkin judgments, 40 convictions in obscenity cases were rendered across the country. During the same period, 11 appellate-court decisions either affirmed lower-court convictions or reversed dismissals.

Increasingly, judges have cited the new Supreme Court opinions in their decisions. In considering one book, a New York judge noted that the Ginzburg case had "introduced a new factor in deciding what is obscene. The court will now examine the method of advertising and exploiting the book. If the

publisher or distributor sells his material as pornography . . . it will determine the result."

The judge also declared that "the *Mishkin* opinion has removed any doubt that the book in the instant case is obscene. The Supreme Court has now removed the outer limit that only 'hard-core pornography' will be barred. The rule is now more elastic."

Last July 14, the Kansas supreme court reversed the ruling of a lower court that had dismissed charges of obscenity in a case which involved 11 books filled with lurid sex stories. In its decision, the highest court of Kansas declared, "If the obscene nature of these books be deemed doubtful, that doubt would certainly have to be resolved against them when we consider their packaging in the light of the positive judgments in *Ginzburg* and *Mishkin*."

The Supreme Court decisions may provide guidelines for determining obscenity in entertainment media as well. Within six weeks of the new rulings, a dozen movies were found obscene in decisions given in California, Missouri, Louisiana, Connecticut, and Tennessee.

Last September 27 a U.S. District Court in California declared that certain "nude" magazines and peep-show films sold or displayed by a Los Angeles defendant were "patently offensive and utterly without redeeming social importance," and continued with this statement: "The court concludes as a matter of law that the exhibits are clearly, unequivocally and incontrovertibly obscene . . . because they come within the reasonable purview and ambit of both of the federal judicial definition of obscenity and hard-core pornography (*Roth v. U.S.*, *Mishkin v. New York*, *Ginzburg v. U.S.*)."

Encouraged by these courtroom triumphs, prosecutors in numerous communities are drawing up new indictments against suspected pornography dealers and distributors. From April through July 1966, more than 25 complaints were filed in California alone—the state where much obscene literature originates—and scores of new charges have been filed in many other states.

Today, decent citizens can look forward to the time when the blight of pornography is swept from our newsstands, theaters and mail. As James J. Clancy of Los Angeles, chief counsel for Citizens for Decent Literature, declares, "The Supreme Court has charted the prosecutor's blueprint for success. The people's forum is the criminal court. The attack should be against those who willfully violate the community's standards of decency. In this fight, the people cannot lose."

SMUT PEDDLERS—PART IV

HON. THADDEUS J. DULSKI

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Thursday, July 10, 1969

Mr. DULSKI. Mr. Speaker, California can claim many firsts, including the lead

in State population—much to the chagrin of we New Yorkers who have led the States for years.

There is one first of which California rightfully is not proud. That is the conclusion by many that California is the pornography capital of the United States.

Californians, as well as others of us, are trying to do something about the flow of smut through the mails. It is not an easy task simply because of the difficulty in acting without infringing upon the right of we Americans to certain privacy.

So the battle against the smut kings is not an easy one. It requires the cooperation of everyone and we cannot rely on legislation. There are things which we can do and they have been spelled out by Max Rafferty, a Californian, in an article in the November 1968 issue of *Reader's Digest*.

Mr. Rafferty served as a public school teacher, principal, and superintendent in California for 22 years before being elected in 1963 as the State's superintendent of public instruction.

Following is his article:

CRACK DOWN ON THE SMUT KINGS

(By Max Rafferty)

I'm a Californian. I've lived in the Golden State nearly all my life, and I'm proud of her. She has so many "firsts" in such fields as industry, agriculture, education and entertainment that it's not easy to find another state to compare her with.

But one of those "firsts" I'm not proud of: California is the pornography capital of the United States. On my desk as I write are stacks of books, magazines, movies, tapes, photographs and picture postcards. All of them portray, in meticulous detail and in living color, acts of sodomy, bestiality, lesbianism, sadism and masochism that turn the stomach—and pander to the rottenness that all of us have a little of. All of them were made, processed and distributed in California.

Before me is a pocket book with the title *Memoirs of Josephine M.* It's purportedly the diary of a prostitute, and it chronicles 192 pages of alleged sexual activities from the time the authoress was five. Over and over she mouths the same Anglo-Saxon words, does the same things with a succession of carboncopy males, and experiences the same highly unlikely marathon ecstasies. There are only a relatively few ways in which the sex act can be performed, and after you've read about them or seen them pictured once, a constant succession of unreasonable facsimiles loses its allure, except for the mentally defective and the childish. Any adult with an I.Q. above 65 must find *Memoirs of Josephine M.* as boring as an endless recital of identical corned-beef-hash recipes. It was sold by an outdoor bookstore in a sunny San Fernando Valley suburb.

On another corner of my desk is a reel of color film which portrays a so-called Hollywood sex orgy. All the actors and actresses are nude (which gets to be pretty depressing in itself); all of them are apparently sexual athletes; and all of them take turns doing the same thing to each other. The photography is good. The lighting is excellent. The plot leaves something to be desired. This film came from a downtown Los Angeles smut store.

Then there are the slides and the picture postcards from San Francisco. These show men and women all tumbled about in postures which would challenge a contortionist, and all wearing nothing but interchangeable leers.

The production of pornography is a \$19-million annual business in my state. Nationwide, the production and sale of pornography is perhaps a \$500-million industry. I estimate that more than 50,000 Californians participate in some way in the filth racket. Out of our state's school population of almost six million children, half a million have been mailed, sold, handed or shown the kind of sordidness I have been describing.

Here are some sad facts about my home state:

Los Angeles is the home of the undisputed top publisher of "girlie" and "nude" magazines. Each month, more than 700,000 copies of sex-oriented magazines are printed here, and pour out across the land.

California's eight major publishers of dirty paperback turn out 1,500,000 books a month.

In 1967, four of the nation's six major publishers in the bondage-flagellation-fetish field were located in Los Angeles and San Diego.

The sale of mechanical sex devices is centered in Los Angeles, with more than 100 firms engaged in the mail-order business.

Obscene photos and films bring a million-dollar profit to California each year. The still photos sell at \$2 a six-pack, usually in "twilight" bookstores, sex-oriented theaters, and arcades. The movies—ordinarily 200 feet of 8-mm. film with a running time of 12 minutes—wholesale for \$2 and retail at around \$10 each. Female participants are usually prostitutes, who get paid \$50 per film; the male participants don't get paid.

Made as a sideline by cameramen, technicians and processors already employed in the vast motion-picture industry, the films and stills bear the unmistakable hallmark of Hollywood know-how—the gloss, the technical excellence which have made the California label a byword for quality around the planet. It's as though the hard-won research findings and marketing techniques of top pharmaceutical companies were suddenly put to use in packaging deadly poison for distribution among the children of the nation.

For the pornographer victimizes juveniles especially. Juveniles are his natural prey. They're curious, they're naive, they want to pose as adults, they have plenty of money. Often the slime salesman uses youthful pushers to do his dirty business of merchandising the stuff; sometimes it's sold in the

classroom, almost under the nose of the teacher. What helps the smut seller most is the pervasive climate of parental permissiveness and downright indifference to what young sons are doing.

If I read the future aright, the most damnable after-effects of the Sick Sixties may be the young lives that have been wrecked and shattered by the refusal of mothers and fathers to direct their children's lives and to supervise their daily activities. Parents today should take considerably more interest in where Jimmy is and what he is doing in his spare time. It's a disheartening thing to have to say, but it's true: Jimmy just isn't safe anymore on the loose.

Veneral disease among our California youth has more than doubled in five years. Premarital pregnancies are running off the top of the graphs. Sex crimes, especially against children, are proliferating in such ghastly profusion that many California parents are afraid to send their youngsters to the grocery store. Law-enforcement officers in my state tell me that they find stacks of printed nastiness in the possession of almost every juvenile sex offender they pick up. If you doubt this, I suggest that you ask your own police chief.

No, I can't prove definitely that pornography causes such tragedies, any more than I can prove beyond peradventure that fleas cause a dog to scratch. But the evidence is overwhelming. For almost 30 years I've been an educator and worked among the young, and never have I seen a direr, dirtier danger to our youth than this avalanche of obscenity that is now burying us. In its own way, this material is as dangerous for them as a diet of strychnine.

Besides showing more concern as parents, what can we do to dethrone the smut kings?

First, encourage judges to hand down more severe penalties for producing and peddling commercial pornography. As it is now, the fines are so light and the jail sentences so nearly non-existent that the smut salesman has almost no roadblocks.

Second, elect a President of the United States who will appoint Justices of the Supreme Court who recognize pornography as such when they see it. (Happily, the Court recently upheld a decision that stricter standards can be applied in determining what is and is not salable to minors.)

Third, pick city and county prosecutors who will put the obscenity racket high on their target lists, and who will track down the sex racketeers through bush, brake and mire.

Fourth, support such national organizations as Citizens for Decent Literature (5670 Wilshire Blvd., Los Angeles, Calif. 90036). CDL wars ceaselessly on the dirt mongers.

Finally, lead neighborhood boycotts of stores and newsstands that sell this vileness. Placard them, agitate, protest.

And don't get sidetracked by sneers that you are showing an "unhealthy interest" in pornography, that you are interfering with "freedom of artistic expression," or that a "new morality" abroad in the land has outmoded your own repressed Puritanism. Horse-

feathers! Money is the only god the pornographer has, the only thing he has ever been interested in. He couldn't care less about avant-garde literature, artistic expression, or morality of any kind, new or old.

The stakes are too high to be lost sight of in a cloud of semantics. The issue is more than a temporary loosening of our moral fiber. The issue is our children. And our grandchildren. They are our responsibility, nobody else's. They are worth fighting for, worth saving. And nobody can do the fighting but you.

SMUT PEDDLERS—PART V

HON. THADDEUS J. DULSKI

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Monday, July 14, 1969

Mr. DULSKI. Mr. Speaker, dealing with the problem of pornography is always difficult because of the varying legal interpretations.

But there is one area where we must move forward. We must make the legislative effort to keep smut and obscene materials from reaching our young people through the mails.

I have introduced legislation to prohibit the mailing of such material to a household in which a minor resides. My bill would prohibit not only a mailing to the minor as an individual, but also to anyone in the household in which a minor resides.

My bill is very specific on what is considered to be obscene, spelling out exactly what material is to be banned. The ban applies to solicitation, sale, delivery or distribution of such material to a minor through the mails.

Present law permits a householder to request through his postmaster that his name be removed from a mailing list after he has received an objectionable mailing. This is one way and the best we have so far, but it comes after the fact—the first mailing; what we want to prohibit is that first mailing into a home where a minor resides.

Several months ago, a distinguished American author, who is constitutionally opposed to censorship, had some strong words to say about distribution of smut to minors. Following is the article from the December 1968 issue of *Reader's Digest*:

THE WEAPONS WE NEED TO FIGHT PORNOGRAPHY

(By James A. Michener)

Recently a friend of mine found his 13-year-old son secretly reading a sex book. The

father assumed that it was the typical erotic nonsense that teen-agers have surreptitiously read for the last 200 years with awe, and usually with no bad aftermath.

But he was wrong. When he inspected the book he found to his horror that it was not primarily a sex yarn. It was a savage blend of sadism, masochism and violence made attractive and exciting by an intermixture of sex. Even the sex was perverted and hideously brutal.

Let's be specific. This is a problem that many American families are facing right now and we all need some kind of guidance.

The book was sadistic in that the men tortured the women. It was masochistic in that the men asked the women to beat them with whips. It was violent in that the men killed one of the women. And it was perverted in that normal sexual relations between men and women were never referred to, where as various abnormal practices were paraded as natural.

In disgust, and in defense of his children, my friend began to ask why the sale of such books was permitted in his city. He discovered that last April the Supreme Court upheld a state statute banning the dissemination of indecent material to juveniles. But he also found, to his astonishment, that recent Supreme Court decisions have made it difficult, if not impossible, for local communities or states to know what standards to apply in obscenity cases, especially in dealing with books.

"In any case, such material will continue to get into the hands of teen-agers as long as it is printed," my friend complained to me. And he asked me what I thought ought to be done. Here is what I think.

ESTABLISHING THE GUIDELINES

I am enthusiastically in favor of sex. It is one of the finest of all human experiences, the somewhat mystical means whereby our race perpetuates itself. And it is also the source of enormous human pleasure. I have found sex to be ennobling, hilarious, tender, ribald and creative, and I would never agree to anything which diminished its free exercise.

As a writer I am professionally interested in sex, since it provides the artist with a large portion of his best material. In my novels dealing with the great conflicts that engulf men and women in love, I have written about some fairly robust situations and have never held back from using four-letter words to describe the actions of my characters when such words were germane to the situation. The older I grow, the more impressed I am with the marvelous force of sex in art, from Shakespeare's stunning tragedy of *Romeo and Juliet* through Verdi's *Aida* and on to the powerful novels and plays being offered today. I would deplore any act of my society which deprived artists of this greatest of subject matters. I am constitutionally opposed to censorship.

Nevertheless, today's traffic among our teen-agers in books of perverted sex and violence should be stopped. If present laws are unable to handle this problem, new ones should be passed. And if present constitu-

tional or judicial interpretations make more difficult the enforcement of such laws, then changes must be made in either the Constitution or the judicial interpretation, or both.

If you ask, "Are you then recommending censorship?" I will have to reply, "Yes." But I want to make one point very clear.

I am against this flood of sex-sadism for one specific reason, a reason so solid that I cannot imagine opposition to it.

It is wrong, and terribly dangerous, to put into the hands of young people—who are in the process of establishing the guidelines for their sexual behavior—books and pictures which would pervert or prevent the development of satisfactory habits. I do not want young boys seduced into homosexual relations before they have even had a chance to discover for themselves how satisfactory heterosexual relations can be. I do not want girls to be taught that whips and chains are normal concomitants of sex before they find out for themselves that they are not.

I realize, of course, that chances are small that permanent damage will result from just a passing exposure to pornography. That's not my point. My point is that such material has absolutely no place in the lives of children.

UNFETTERED SQUALOR

Children under certain ages cannot buy cigarettes or whiskey. They are forbidden to drive cars, can't have guns, contract bills or get married. Yet in this most difficult of areas, our nation has failed to set clear and enforceable standards to prevent the sale of sexually destructive material to minors.

Take three startling cases.

In Fresno, Calif., Sanford E. Aday conducted a flourishing business publishing lurid paperback books; in one five-month period, he distributed 826,840 volumes. One well-known book was *Sex Life of a Cop*, in which two policemen in a prowler car engage in sadism and in a series of rapid and bizarre conquests featuring virgins, prostitutes, the wife of the mayor, a policewoman and waitresses, not to mention each other's wives. How *Sex Life of a Cop* could circulate under the protection of the First Amendment, which guarantees freedom of the press, is impossible for an average citizen to explain, but the book is still available in hot-item newsstands across the country.

In New York City's Times Square, Sidney Friedman ran a bookstore featuring "bondage" books and magazines. Two of the books' titles will indicate their emphasis on flagellation and other sexual deviations: *Bondage Boarding School* and *Travelling Saleslady Gets Spanked*. I cannot see how the average reader could find any literary merit whatever in them, nor how young children could fail to get from them a perverted attitude toward sex.

In Los Angeles, Calif., Harry Schackman and associates operated a nude film arcade in which they exhibited 16-millimeter films which are known by curious titles such as O-7 O-12 and D-15. O-12 showed a buxom model, almost fully exposed above the waist and wearing transparent panties, through

which the viewer could see her complete anatomy, which she twitched and twisted through a series of provocative poses. The camera kept returning to the model's pelvic area, and wandered to her face so that the viewer could see her lips move as she clearly spoke inviting vulgarisms.

Many even worse books and films are being distributed freely in our nation today. Has there been no public attempt to halt this wretched flow?

SUPREME COURT VS. THE LOWER COURTS

As a matter of fact, society has made a rather strong effort to stamp out the worst of this material. Citizen's committees, watchful district attorneys, police forces and ordinary mothers and fathers have vigorously advocated enforcement of obscenity laws or have brought suit in local, state and federal courts. And they have won some striking successes.

Let's follow the three cases described previously.

Aday and his associate were brought to trial in Grand Rapids, Mich., where a federal jury found *Sex Life of a Cop* to be unredeemed pornography. When this verdict was appealed by the publisher and his associate, the Court of Appeals, Sixth Circuit, confirmed the judgment.

In the case of the Times Square "bondage" books and magazines, a three-judge lower court ruled the books to be hard-core pornography. Then a three-judge intermediate court approved the findings.

An Los Angeles jury found Schackman's nude films to be obscene, a judgment which the Appellate Department of the Los Angeles Superior Court affirmed. A federal district judge held the films to be obscene.

Similar cases were being similarly decided in other states, and it looked as if at last our country had found a proper balance between permitting true freedom of the press, even on sexual material, and protecting itself against hard-core pornography wedded to violence.

Then something went wrong! Something went badly wrong, and America found that *Sex Life of a Cop* and a flood of things infinitely worse were again free to circulate openly.

In the October 1968 term, appeals were considered by the Supreme Court against convictions in the three cases we have been talking about, plus 23 others. The nine Justices conducted extended private debates among themselves, trying to decide what pornography was. In May and June 1967 the Supreme Court handed down a series of startling decisions on the 26 cases. Schackman's nude films, Friedman's "bondage" books and magazines and *Sex Life of a Cop*, among others, must be allowed to circulate freely.

With these decisions the Supreme Court destroyed the attempts of 13 separate states to control the dissemination of salacious material, and reversed eight juries which had held that insofar as their communities were concerned, the books and films in question were offensive to public taste.

A LANDMARK DECISION

Observe that the Court did not pass on the legal correctness of the cases, but rather upon the question of whether a book like *Sex Life of a Cop* is protected by the First Amendment to the Constitution, that is, was it indeed pornography. By this switch the nine Justices passed over from being conservators of legal tradition to being censors of individual books and films. This is a most unfortunate conversion, and if the Justices persist, they will outrage their society, waste their time and tarnish their effectiveness as judges of legal matters.

How did our Supreme Court stumble into this mess?

When I was a boy, American communities made damned fools of themselves by censoring everything. Boston banned perfectly good books. Police sergeants in small cities decided what movies could be screened. Postal inspectors decided on their own as to what printed matter one could receive through the mails.

Then famous trials were held on acknowledged works of art like D. H. Lawrence's *Lady Chatterley's Lover* and James Joyce's *Ulysses*, and the courts, striking down narrow mindedness, decided that such books ought to be allowed to circulate.

So things progressed in what I would considered normal patterns through June 1957, when the Court handed down its extremely wise decision in the Roth Case: "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. We hold that obscenity is not within the area of constitutionally protected speech or press." The test was to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Thus, if anyone wanted to censor my novels, or anyone else's, he must judge "the dominant theme of the material taken as a whole." He could not pick out a sentence here and a sentence there to prove that I had used a couple of dirty words. I thought this a sterling decision and one that I could live under.

What went wrong?

FROM JURISTS TO CENSORS

In subsequent cases the Supreme Court began to entrap itself by handing down judgments on individual works. Justice Hugo Black had warned against this very pitfall: "My belief is that this Court is about the most inappropriate supreme board of censors that could be found. So far as I know, judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the nation. In addition, the Justices of this Court seem especially unsuited to make the kind of value

judgments . . . as to what movies are good or bad for local communities."

The trouble with recent decisions is that any sane man can look at the filth thus protected and say, "No matter what anyone says, this stuff has got to be pornographic, and I don't want my kids reading it." When an average citizen finds a governmental decision ridiculous on the face of it, government is in trouble.

I believe that a three-point program will provide the way out of this mess.

(1) The Supreme Court should refuse to review individual works to determine whether or not they are pornographic.

(2) Congress should pass a law empowering the highest courts of the 50 states, or subsidiary courts nominated by the states, to serve as courts of last appeal as to whether a work is pornographic. The U.S. Supreme Court would continue, of course, to review the legal proceedings of such courts to ensure protection under the law, but it would no longer be allowed to go behind the lower court's findings of fact.

(3) Each state would thus return to the principle enumerated in Roth of "applying contemporary community standards" in judging pornography. Trials would be by a jury of citizens, who would be presumed to know what the standards of their community were. If they ran hogwild and turned in arbitrary or illegal verdicts, a higher state court would redress the balance.

Judge Samuel Hofstadter, of New York's Supreme Court, has spoken wisely on the problem: "Essentially the problem of obscenity is one of municipal order. It is not intrinsically a constitutional question. Hence it cannot be decided properly at the summit but must be disposed of at the base."

One final word. Although most recent Supreme Court decisions have made it easier for smut peddlers to hawk their wares, local communities must not give up in this field. An arrest based on a proper warrant, a trial which observes the fine points of law, a district attorney well prepared to present his case, a fair judge and an intelligent jury can combine to convict such people. Says Arien Specter, the hardworking district attorney in Philadelphia, "I intend to keep fighting these cases. While adults may decide for themselves what to read, the Supreme Court says that juveniles require protection during their tender years. We have followed up on that new ruling by bringing prosecutions."

We must remember what we are fighting against. Not sexy or bawdy stories. But works in which perversion, sadism and brutality are paraded. The other day, to check on what is now being peddled publicly, I picked up a magazine which showed two nude young men committing multiple perversions upon each other. The picture revolted me, but so far as I know it didn't harm me. But to a 12-year-old boy trying to find out what sex is all about, it might be tragically harmful.

Mailing Lists and Pornography

by J. Edward Day

• of the Illinois and District of Columbia Bars

Mr. Day, Postmaster General in President Kennedy's Cabinet, believes that the public is entitled to protection against the indiscriminate and wholesale use of the mails and mailing lists to advertise smut. He declares that the pandering test posited by the Supreme Court in the *Ginzburg* case provides the proper course for the Post Office to follow in fulfilling its statutory responsibilities, rather than using advance censorship.

THE TELEPHONE rings in your home. Your fourteen-year-old daughter answers.

A stranger's voice says: "Would you like to become a subscriber to a new magazine which handles the subject of love and sex with complete candor? For example, one article in this magazine discusses cases of insatiable sexual passion. Another article gives a guided tour of the quarters of sin where nude women publicly made love to men and/or beasts. A leading newspaper has described it as 'Dirty' and a magazine has called this new publication: 'a disgrace to the whole field of magazine publication'. Our company guarantees full refund of the price if the periodical fails to reach you because of United States Post Office censorship interference."

This telephone call is hypothetical. But the language used in it is taken from an advertisement, widely mailed in 1962 at the third-class bulk rate, for *EROS*, one of the three publications involved in *Ginzburg v. United States*, 383 U. S. 463 (1966).

There may be a few who would defend such a telephone call—but very few. No doubt it would be defended by the ordained minister who testified in the *Ginzburg* trial that *The Housewife's Handbook on Selective Promiscuity* "should be in every home and available for teen-agers".¹

There is a close parallel between a campaign of indiscriminate telephone calls to residences touting sex publications and mass mailings of provocative advertisements for sex publications to hundreds of thousands of names, including those of children. In this article I shall discuss only that part of the obscenity problem involving use of the mails, and particularly the promotion of sex publications through use of mailing lists.

On April 26, 1966, the following from a lady in Bethesda, Maryland, appeared in the *Washington Post*:

... Evidently those who weep over [Ginzburg's] fate did not have a 12-year-old son bombarded by the most provocative brochures I have ever seen. And these brochures, with their

FOOTNOTES ARE AT END OF ARTICLE.

suggestive pictures and texts, were sent through the mails, to my son over a period of a year. It was no reading for a 12- or 13-year old. It was on this basis that I complained to the Post Office Department.

This letter is typical of the complaints we received at the Post Office Department during the period, beginning in the spring of 1962 when Ginzburg's blizzard of mail advertising was in progress. There were over 35,000 complaints in writing. Many people telephoned me with their complaints or told me in person of their shock and anger. Some individuals said they had received as many as ten different mailings of the same material. Many reported that the offensive advertisements had come addressed to their children. There was an unprecedented volume of mail from members of Congress forwarding complaints and demanding that the department take action.

It soon became apparent that there was one person who seemed to be even more eager that the department take action than were these members of Congress and the public.

That person was Ralph Ginzburg himself.

There were repeated indications that he was conducting a studiously contrived nose-thumbing campaign in an effort to needle the Post Office Department into taking action. He attempted to obtain mailing privileges from the postmasters of Intercourse, Pennsylvania, and of Blue Ball, Pennsylvania, so that the envelopes containing his ads would carry a mailing permit imprint with the name of one or the other of those little villages. When he was denied mass mailing privileges

from the two Pennsylvania locations, he mailed millions of his promotional pieces from Middlesex, New Jersey. Inserted in each advertisement for one of his items was a slip labeled "GUARANTEE" and reading "Documentary Books, Inc. unconditionally guarantees full refund of the price of THE HOUSEWIFE'S HANDBOOK OF SELECTIVE PROMISCUITY if the book fails to reach you because of U. S. Post Office censorship interference". Similar slips appeared in the advertising for his other offerings, the magazine *EROS* and the "newsletter" *Liaison*. One of the advertisements for *EROS*, mailed at the third-class bulk rate, quoted a comment on the first issue of the magazine: "It's a wonder that they allow it through the mails."

"Taking action", as Ginzburg no doubt contemplated it, would be administrative action by the Post Office Department to bar his publications from moving through the mails.

Prior to 1961, this type of administrative stop order had been used many times. However, it had often proved relatively easy for the mailer to get a court to issue a temporary restraining order suspending the ban. Then the mailings would go on during an extended period of court proceedings. In the meantime, the publicity about the attempted ban provided priceless advertising for the questionable publication. If the court eventually sustained the ban it was then no trick for the offender to start business again under a new corporate name or with slightly revised merchandise. The stop-order procedure involved no penalty.

After I was designated for appointment as Postmaster General, and even before I was sworn in, I saw that Post

Office responsibilities in the pornography area were something to which I would have to give prompt personal attention. Very early in my administration I decided to make three major changes.

1. Less Press Agency. For my predecessor as Postmaster General, the war on smut had become the favorite speech-making topic. Three highly paid consultants were retained by the department for full-time duty making speeches about the smut problem all over the country—but particularly, prior to the 1960 election, in certain key Congressional districts. Incredible as it seems, my predecessor set up, in a large conference room across from his office, a “museum” with samples of pornography divided among various perversions. Members of the press, of Congress and of the public, both men and women, were given guided tours through this room, which came to be known as the Chamber of Horrors. The worst items were behind a black curtain equipped with a draw string for display as the climax of the tour. When I took over, this place was cleaned out and the contents destroyed or returned to the case files where they belonged.

I also put a stop to the speechmaking and press releases about the smut problem. I ordered discontinuance of a department-distributed postmark die bearing the words “Report Obscene Mail to Your Postmaster”. Many members of the public had found this highly offensive, especially when the cancellation appeared on their Christmas cards or on their children’s mail.

My feeling was that there was no point in advertising and ballyhooing pornography. Some “decent literature”

and “antismut” organizations became irked at me because I wouldn’t supply such groups with “samples” of dirty books and pictures for them to use in their crusades to tell people how bad the problem was. I felt people didn’t have to sample narcotics to know there was a dope problem, and they didn’t have to sample smut to know there was a pornography problem.

In a policy statement on obscenity in the mails, issued May 3, 1961, I said:

Following sound law enforcement practice, we are going to enforce the antiobscenity laws without press agency. We do not want to jeopardize successful prosecutions in pending cases by seeking headlines. We are not going to stimulate young minds to look for pornography by continually talking about it.

2. Criminal Prosecution Rather Than Administrative Action. I concluded that grand juries and petit juries—representing community standards—are more appropriate bodies for deciding whether or not mail is obscene than are administrative officials at the Post Office. In addition, as I have already mentioned, there are serious practical weaknesses in the administrative stop-order procedure. In early 1961 when we dropped the administrative stop-order approach, we announced a crackdown on obscenity in the mails.

3. Discontinuation of Criticism of Courts. The Post Office Department’s previous press agency and speechmaking on the obscenity problem had included criticism of the courts for supposedly over-lenient interpretations of the obscenity law. Shortly after I took office a federal judge complained to me about this past carping at courts and insisted that it was unjustified. In any event, I did

not consider it appropriate for a Cabinet-level department to be conducting a cold war with the courts. All criticism of the courts was discontinued by the Post Office.

Post Office Involvement Based on Statute

It should be recognized that those who do not think the Post Office should have any responsibilities in the obscenity area should take their views to Congress. Congress put the "Comstock Act" (18 U.S.C.A. § 1461) on the books and I have never heard of a bill being introduced to repeal or even tone down that law. It is settled that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by the Constitution. In *Public Clearing House v. Coyne*, 194 U. S. 497, 506-508, the Supreme Court said:

The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson*, 96 U. S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded. . . . It may . . . refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy. . . . For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails.

Bills are introduced at every Congress to attempt to tighten up and

toughen the law on postal obscenity. In 1955 Congress amended the statute "to enlarge section 1461 of Title 18, United States Code, so as to include within the prohibition of said section all matter of obscene nature, whether or not said matter had fallen within the more restricted definition contained in the statute".²

In 1958 Congress amended the statute to permit prosecution at the place of address or delivery as well as the place of mailing.³ The strength of Congressional feeling on the postal obscenity problem is indicated by the willingness of Congress thus to override the important policy considerations behind Rule 21(b) of the Federal Rules of Criminal Procedure, which was enacted to alleviate the undue hardships defendants sometimes suffer when forced to defend themselves in places far distant from their homes.⁴

Twenty obscenity laws have been enacted by Congress, starting in 1842; fifty nations have joined in the international "Agreement for the Suppression of the Circulation of Obscene Publications"; and every one of the states has an obscenity law.⁵

I see no chance whatever that in the foreseeable future Congress will repeal or substantially liberalize the postal obscenity statute. An argument can be made that the law should not attempt to penalize those who sell even sickening and depraved obscene material to adults who come seeking it out, just as an argument can be and is being made by some that homosexual acts between consenting adults should not be illegal. But even if such an argument were to be accepted it does not dispose of an important aspect—in my opinion, *the* most important aspect—of the postal

obscenity laws. That is the "right of privacy" of postal patrons—the right to be protected from receiving, unsolicited, through the mails, offers of material that is described or promoted as obscene. That right and that protection, long recognized in the federal statute, is to me so basic that it should continue to be enforced with severe measures.

A person who sells a sex publication to one who comes looking for it is one thing. But the indiscriminate mailing to addresses taken from mailing lists of advertisements touting sensationalized sex publications is quite another. The wrong, serious enough in itself, is compounded when there is deliberate use of mailing lists containing names of children, women and others who have never shown the slightest interest in purchasing sex publications, spicy items or anything close thereto.

The *Washington Post* in a Sunday feature article entitled "Warren Finally Puts Arm on the Dirty Little Men", April 10, 1966, says "an American taking the middle road . . . is worried that profitminded pitchmen are willing to assault the sensibilities of nice people to expand their markets. . . . Millions of Americans who are easy-going about sex nevertheless resent a pornographer's promotion. They can be shocked and they can become fearful for the morals of others, including the very young, who supposedly have still weaker defenses. Legitimate or not, the fears are real, and obscenity laws exist not so much to protect people who enjoy pornography's 'prurient appeal' as those who are offended by it."

Legislation To Stop Repeated Mailings

In recent years members of Con-

gress have shown intense concern with the problem of use of mailing lists to promote morally offensive material. In their attempts to grapple with the problem they have proposed legislation which has been opposed as "unnecessary" by the Post Office Department and as unconstitutional by the Department of Justice.

In 1963 five days of hearings were held by the House Committee on Post Office and Civil Service on bills designed to stop repeated mailings of material which was, in the opinion of the recipient, "morally offensive". The recipient in such a case would request the Postmaster General to notify the sender not to send him any further unsolicited mail. If the sender then violated the notice he could, under some of the bills, have all his mailing permits cancelled. An amended version of this legislation provided for a court order commanding compliance with the notice and for punishment for contempt of court for failure to obey the order. A bill (H.R. 319) in the amended form passed the House in 1964 by 325 to 19.⁶

In 1965 H.R. 980, similar to H.R. 319, was passed by the House. The changes from the first bill are described in the 1965 House report as follows:

The differences are that H.R. 980 characterizes the mail matter as "obscene, lewd, lascivious, indecent, filthy, or vile" rather than "morally offensive." Second, H.R. 980 makes provision for barring subsequent mailings of "additional such mail" to the objecting recipient rather than barring all mail. Third, H.R. 980 affords an opportunity to a sender to have an "appropriate hearing" before request is made of the Attorney General to apply for a court order directing com-

pliance with the Postmaster General's notice directing the sender to refrain from sending mail to the complainant.

The House report gave the following explanation of the policy behind the bill:

The policy embodied in H.R. 980 is preventive, rather than remedial. The bill is designed to stop repeated mailings of obscene matter before they start, not to punish such mailings after they have occurred. It rests upon the principle that "nothing is law that is not reason." Any proposition that the U.S. mails ever were intended for use to subject a postal patron to forced receipt of indecencies mailed by another certainly is beyond reason, and is an unconscionable distortion of legislative and constitutional purpose.

More specifically, this bill reaffirms the fundamental right of the individual to privacy and refuge in his home. Over 400 years ago an eminent English jurist wrote: "The house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose" and that is still sound law today. Our Constitution bars search and seizure without a warrant and guarantees each citizen the right to restrain and deny unauthorized persons from entering his home. The exercise of this basic human right to prevent the entry of harmful materials as well as persons is certainly implicit, if not explicit, in the Constitution.

* * *

Nevertheless, the committee is convinced after an objective evaluation of all pertinent factors that but one conclusion is possible: The right of an individual to protect his home and his children from damaging moral influences must prevail, both in reason and in law, over the right of another to send morally offensive mail into that home or to those children.

The opponents of the bill argued that the sanctity and right of privacy

of the home is not "invaded by the delivery of mail which can be rejected and discarded, even left unopened".⁷ To me that is similar to saying that obscene or threatening telephone calls should not be unlawful because it is not necessary to pay attention to the call or even to answer the telephone.

H.R. 980 and similar proposals are unacceptable as solutions to the problem of abuse of mailing lists because they leave the decision as to whether the material is "morally offensive" or "obscene" in the hands of the individual recipient. Private persons under these bills would be empowered to set in motion a series of governmental actions that could seriously impede the dissemination of material to the general public despite the fact the material itself was not objectionable by objective standards.

The *Ginzburg* decision gets to the heart of the problem at which H. R. 980 and similar bills are directed. For it is not the isolated, limited case of distributing or promoting questionable material by mail that is the proper subject of public concern. The real problem is wholesale, deliberate, indiscriminate exploitation of the mailing list device, such as by *Ginzburg's* mailing of over five million advertising pieces to promote items the advertisements themselves boasted a leading newspaper had called "dirty".

It's a Crime To Advertise Obscene Material by Mail

For decades the postal obscenity statute has made it a crime to mail advertisements for obscene material. In the same district and circuit in which *Ginzburg* was tried and convicted, it was held in 1956 that it was a crime to mail advertisements for ob-

scene material even though the material actually sent in response to orders resulting from the advertisement was not obscene. In *United States v. Hornick*, 229 F. 2d 120 (1956), affirming 131 F. Supp. 603 (E.D. Pa.), the Court of Appeals for the Third Circuit said:

... It is to be noted that the counts on which the trial judge found the defendants guilty are not those charging the mailing of obscene matter but for mailing advertisements and a notice giving information where and how obscene matter could be obtained. This is one of the matters included in section 1461 above cited.

That section declares certain matter nonmailable and provides punishment for one who knowingly deposits for mailing matter declared by the section to be nonmailable. The fourth paragraph of the section declares nonmailable "[e]very written or printed card . . . advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained . . .".

It will be seen that advertising or giving information about any of these nonmailable things, if done by mail, is made a crime in the same fashion as the use of the mails to send any of the prohibited articles.

Did the defendants use the mails for such advertising? The court has made findings of fact which are not disputed. They show the nature of the advertisements which the defendants made.

* * *

We have no doubt that the whole tone of both of these advertisements gives the leer that promises the customer some obscene pictures. Indeed, it has been held that under this section the announcement itself is not required on its face to promise obscene material if that is its purpose. But here the represented nature of what the customer is to receive is, we think, too clear for argument.

When the case was presented to the court a great deal of the discussion by counsel on each side had to do with whether the specimens of nude or nearly nude "art" fell within the description of obscenity. We do not think that matters. As the Seventh Circuit said in *De Gignac v. United States*, 1902, 113 F. 197, 201, certiorari denied 1902, 186 U. S. 482, 22 S. Ct. 941, 46 L. Ed. 1266: "The offense here denounced is the giving of information by mail where obscene matter may be obtained. Any communication by mail which does this is actionable. The gist of the offense is the giving of the information by mail. It is not necessary to aver ownership or possession of the obscene matter."

As we have already said, information as to where such obscene matter can be obtained shouts loudly from the words used by the advertising of the defendants. We do not think it is necessary that representations made in these advertisements be true. The statute says "advertisement . . . giving information." The statute does not say that the advertisement must be true or that the information must be accurate. What is forbidden is advertising this kind of stuff by means of the United States mails. *We think that the offense of using the mails to give information for obtaining obscene matter is committed even though what is sent in response to the advertisement to the gullible purchasers is as innocent as a Currier and Ives print or a Turner landscape.* [Emphasis added.]

It is not, therefore, necessary for us to determine whether these pictures were obscene. The defendants did purport to give information as to where obscene matter could be obtained. That is enough to make them guilty under the statute.

In *United States v. Perkins*, 286 F. 2d 150 (1961), the Sixth Circuit followed this same rule, saying:

... Upon the trial, and over defendant's objection, the "catalogues" obtained from the defendant at the

time of his arrest were admitted in evidence. The defendant claims that the admission of this material into evidence was reversible error in that the material was not proof of the fact that obscene material would, in fact, have been sent to a person ordering it from one of the concerns on defendant's list. He contends that the admission of this evidence allowed hearsay evidence to be used to prove that the materials which would have been sent would have been obscene. However, it was not necessary that the Government establish that material which would have been supplied in response to orders solicited by the defendant's advertising circulars would, in fact, have been obscene. *United States v. Hornick*, 3 Cir., 1956, 229 F. 2d 120, 122.

There has been favorable comment on the *Hornick* holding.⁸ Others have been critical of the *Hornick* decision.⁹ The Post Office Department has given public notice of its support of the *Hornick* rule.¹⁰

Serious enterprises in the direct mail business have long been on the alert to try to police abuses of mailing list advertising by smut peddlers. When Ginzburg got under way with his advertising campaign, the Direct Mail Advertising Association of America, of which Ginzburg was a member, complained to the Post Office Department, the District Attorney of New York County and the Attorney General of New York. The D.M.A.A. requested the assistant publisher of Ginzburg's magazine, *EROS*, to appear before its board of governors. Thereupon Ginzburg resigned his D.M.A.A. membership. This was all before the criminal prosecution against him had begun.¹¹

Hornick Rule Provided Ample Warning

I strongly favor the *Hornick* rule as

providing the protection I feel the statute attempts to give and the public is entitled to have against receipt in the mail of advertisements for material held out as being obscene. But regardless of whether one agrees with the holding in *Hornick*, it was still very much on the books in the Third Circuit in 1962. Anyone who in that year made a brazen decision to go to the limit of the law in making mass mailings of dubious advertisements should certainly have had *Hornick* and *Perkins* very much in mind. Since these cases were in the reports, giving their warning in the clearest language, it will hardly do to say that one who ignored these decisions—blatantly, brazenly, on a wholesale scale—had no way of knowing that when he did so, in a postal obscenity case, the circumstances of promotion and advertising of the material would be considered a pertinent item.

This is particularly true when the exact pattern of signaling in the advertisement that smut was forthcoming was followed as that in *Hornick*. In that case the advertisements said: "These cards cannot be sent through the mail—so this should give you an idea of their nature and of what we are talking about." In other words, the material is such that the Post Office would consider it unmailable. In the *Ginzburg* case the advertising promised a refund if the material failed to arrive "because of United States Post Office censorship interference".

The Supreme Court in *Ginzburg* actually took a milder view than the *Hornick* rule. Under *Hornick* a conviction could be upheld without either the advertisement or the material advertised being in fact obscene—provided the advertising indicated the material

being advertised was obscene. In *Ginzburg* the Court's majority held that the convictions on the counts for mailing the advertising could be sustained only if the material advertised was obscene—but that the circumstances of advertising and promotion was a pertinent factor in determining whether the material advertised was obscene.

Thus, in *Ginzburg* the Court, by putting emphasis on the pandering of the material, adopted the commendable result of *Hornick* and came around to the view expressed by Chief Justice Warren in 1957 in his concurring opinion in *Roth v. United States*, 354 U. S. 476, 494. There the Chief Justice said:

... It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

* * *

... The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.

Prior to *Ginzburg*, other decisions had provided ample warning that the question of pandering was relevant to the obscenity issue.¹²

In *United States v. Rebhuhn*, 109 F. 2d 512, 514-515 (2d Cir. 1940), Judge Learned Hand said:

... [T]he works themselves had a place, though a limited one, in anthropology and in psychotherapy. They

might also have been lawfully sold to laymen who wished seriously to study the sexual practices of savage or barbarous peoples, or sexual aberrations; in other words most of them were not obscene per se. In several decisions we have held that the statute does not in all circumstances forbid the dissemination of such publications. . . . However, in the case at bar, the prosecution succeeded . . . when it showed that the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limits; the circulars were no more than appeals to the salaciously disposed, and no [fact finder] could have failed to pierce the fragile screen, set up to cover that purpose.

In *Kahm v. United States*, 300 F. 2d 78 (5th Cir. 1962), an extract from *Peyton Place*, merchandized with comparable extracts from other books, was held obscene, although "[h]ad the appellant undertaken to send through the mail the book *Peyton Place* a different problem would be presented. . . ."¹³ In the same opinion the court said at pages 86-87: "The circumstances surrounding the establishment and the conduct of appellant's mail order business was [sic] sufficient to show not only that he knew the contents of the mailed material but he knew that he was engaged in the business of pandering to a taste for obscenity."

Grove Press v. Christenberry, 175 F. Supp. 488 (S.D. N.Y. 1959), affirmed, 276 F. 2d 433 (2d Cir. 1960), involved

an action to restrain enforcement of a decision of the Post Office Department that the unexpurgated edition of *Lady Chatterley's Lover* and circulars announcing its availability were nonmailable under the statute barring obscene matter from the mails.

In an advertisement for *EROS* widely mailed in January, 1962, the following appeared:

EROS has been born as a result of the recent series of court decisions that have realistically interpreted America's obscenity laws. . . . We refer to the decisions which have enabled the publication of such heretofore suppressed literary masterworks as *Lady Chatterley's Lover*.

The *Grove Press* case, however, far from providing license for indiscriminate mailing list promotion of sex publications, made clear that the methods of promotion and distribution were a key factor in determining the obscenity issue in a post office case. The opinion by Judge Frederick van Pelt Bryan in the district court included the following at 175 F. Supp. 496-497:

No one is naïve enough to think that *Grove Press* did not expect to profit from the book. Nevertheless the format and composition of the volume, the advertising and promotional material and the whole approach to publication, treat the book as a serious work of literature. The book is distributed through leading bookstores throughout the country. There has been no attempt by the publisher to appeal to prurience or the prurient minded.

The *Grove* edition has a preface by Archibald MacLeish, former Librarian of Congress, Pulitzer Prize winner, and one of this country's most distinguished poets and literary figures, giving his appraisal of the novel.

There follows an introduction by Mark Schorer, Professor of English Literature at the University of California, a leading scholar of D. H. Lawrence and his work. The introduction is a critique of the novel against the background of Lawrence's life, work and philosophy. At the end of the novel there is a bibliographical note as to the circumstances under which it was written and first published. Thus, the novel is placed in a setting which emphasizes its literary qualities and its place as a significant work of a major English novelist.

Readers' Subscription has handled the book in the same vein. The relatively small number of Readers' Subscription subscribers is composed largely of people in academic, literary and scholarly fields. Its list of books includes works of high literary merit, including books by and about D. H. Lawrence.

There is nothing of "the leer of the sensualist" in the promotion or methods of distribution of this book. There is no suggestion of any attempt to pander to the lewd and lascivious minded for profit. The facts are all to the contrary. [Emphasis added.]

The Court of Appeals for the Third Circuit in *Ginzburg*, 338 F. 2d at 14, 15, highlighted the distinction between that case and *Grove Press* as follows:

We are not dealing with a novel by a well known novelist, written as and for a work of fiction with a firm base of opposition to well defined then existing social conditions, which was held mailable because its ". . . predominant appeal . . . [was] demonstrably not to 'prurient interest'". *Grove Press v. Christenberry*, 276 F. 2d 433, 437 (2d Cir. 1960).

* * *

What confronts us is a sui generis operation on the part of experts in the shoddy business of pandering to and exploiting for money one of the great weaknesses of human being. Appellants' fundamental objective obviously

was and is to, more or less openly, force their invitations to obscenity upon the American public through the United States mails. They did this in reliance on their own ill conceived theory that all barriers to obscenity have in effect been removed. They were not concerned with trying to circulate authentic artistic efforts that may incidentally have four letter words or nudity or sex as an integral part of a work, whatever art form it may be. Eros was declared as avowedly concerned with one thing, what in the prospectus is described as "erotica" and which, it is stated, has been enabled to be published "by recent court decisions." [Emphasis supplied.]

It is worthy of note that in *Grove Press* the district court pointed out (175 F. Supp. at 502) that there had been unanimous acceptance of *Lady Chatterley's Lover* by the press. The court said:

The record . . . indicates general acceptance of the book throughout the country and nothing was shown to the contrary. The critics were unanimous. Editorial comment by leading journals of opinion welcomed the publication and decried any attempts to ban it.

It is true that the editorial comment was excluded by the Judicial Officer at the hearing. But it seems to me that this was error. These expressions were relevant and material on the question of whether the book exceeded the limits of freedom of expression in matters involving sex and sex relations tolerated by the community at large in these times.

The contemporary standards of the community and the limits of its tolerance cannot be measured or ascertained accurately. There is no poll available to determine such questions. Surely expressions by leading newspapers, with circulations of millions, are some evidence at least as to what the limits of tolerance by present day community standards are, if we must embark upon a journey of exploration into such uncharted territory.

However, in *Ginzburg* there was not only much violently critical press comment, but the mailed advertising for the book pointedly quoted this press comment, thereby exploiting these third-party testimonials that the publications were highly questionable. These quotations, in addition to those already given, included the following

Lurid—blatant—brazen. It's real motive is to titillate sex curiosity.

We feel sick over *EROS*—It is noxious—[It] deserves strong public protest.—[It is] a disgrace to the whole field of magazine publication.

Another flood is upon us, a flood of pornography from *EROS*.—We do not need hydrogen bombs to destroy us. [*EROS*] will do the job.

It has long been settled that it is not necessary for a conviction under the postal obscenity statute that the defendant must have had a specific intent to mail what he knew and believed to be obscene material.¹⁴

The pandering test is a practical substitute for the *Hornick* rule in enabling the Post Office, in fulfilling its thankless responsibilities under Section 1461, to concentrate on cases where the access of the mails into the privacy of the household is being abused for indiscriminate promotion of what is or is held out to be smut. Such a continued and wholesale assault on the general public through use of mailing lists to advertise smut is an offense the public is entitled to be protected against. It is an offense that can only be effectively dealt with by criminal prosecution and not by the discarded "advance censorship" method of Post Office administrative action or by the "private person determination" method contemplated by H.R. 980 and similar bills.

EDITOR'S NOTE: The right to permit republication in whole or in part of this article is reserved by J. Edward Day.

1. 224 F. Supp. 129 at 136.
2. S. REP. No. 113 to accompany S. 600, 84th Cong., 1st Sess. (1955); 1955 U. S. CODE CONG. & AD. NEWS 2210.
3. S. REP. No. 1839, 85th Cong., 2d Sess. (1958) and CONF. REP. No. 2624, 85th Cong., 2d Sess. to accompany H.R. 6239 (1958).
4. See *United States v. Luros*, 243 F. Supp. 160, 176 (N.D. Iowa, 1965).
5. See *Roth v. United States*, 354 U. S. 476 at 485 (1957).
6. H. REP. No. 1506, 88th Cong., 2d Sess. to accompany H.R. 319 (1964); H. REP. 219, 89th Cong., 1st Sess. to accompany H.R. 980 (1965).
7. H. REP. No. 219, 89th Cong., 1st Sess. 26 (1965).
8. *United States v. Frew*, 187 F. Supp. 500 (E.D. Mich. 1960).
9. *Poss v. Christenberry*, 179 F. Supp. 411 (S.D. N.Y. 1959); opinion of Justices Harlan and Stewart in *Manual Enterprises v. Day*, 370 U. S. 478 (1962).
10. Cf. 1962 ANNUAL REPORT OF THE POSTMASTER GENERAL 110.
11. Reporter of Direct Mail Advertising, May, 1966, page 68; *Hearings Before the House Committee on Post Office and Civil Service on H.R. 142, H.R. 319 and Similar Bills*, 88th Cong., 1st Sess. 148 (1963).
12. In addition to the cases discussed following in the text, see *United States v. One Book Entitled "Ulysses"*, 5 F. Supp. 182 (S.D. N.Y. 1933), *aff'd* 72 F. 2d 705 (2d Cir. 1934); *Hanson v. United States*, 157 Fed. 749 (7th Cir. 1907).
13. Cf. *Halsey v. New York Society for Suppression of Vice*, 234 N. Y. 1, 136 N. E. 219 (1922).
14. *Rosen v. United States*, 161 U. S. 29 (1896); *Kahn v. United States*, 300 F. 2d 78 (1962).

