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PART II
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

OCTOBER 1, 9, 22, DECEMBER 10, 1969

Serial No. 91–13

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

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
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U.S. GOVERNMENT PRINTING OFFICE
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OBSCENITY IN THE MAILS

WEDNESDAY, OCTOBER 1, 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 219, Cannon House Office Building, Hon. Robert N. C. Nix (chairman of the subcommittee) presiding.

Mr. NIX. The subcommittee will come to order.

Obscenity has been with civilization a long time, at least from the time the first disappointed suitor scrawled something ugly on a cave wall about the girl one cave removed. The difference between then and now is that the caveman used his own wall, but modern advertisers use your mailbox by means of your tax-supported mail system, joined with his computerized mailing lists, to dump smut mail in your home aimed for the most part at your curious children.

Mass mailings have added a new element to an age-old battle that every civilization has always fought over the question of obscenity. Each country no matter how tolerant has regulated obscenity in some fashion.

Our concern today is with the regulation of a billion-dollar industry that has poured out a river of degenerate filth with the aid of a great tax-supported mail system, and the mailing list industry. This mass distribution industry is an immediate threat, with its repeated mailings to youngsters and adults both. The practice of smut mailers has been to make three to four mailings to the same addressee in hopes of reaching children or the childlike. A 1- to 2-percent return from prospective customers is profitable to them and the names obtained will be used again and again and that name will be resold, so that the mail patron will have to move or die before the mailings stop.

The smut merchants and their allies who fear that the occasional use of the obscene may subject them to regulation, ask what interest does the Federal Government have in cleaning obscenity out of the mails. Is it in the protection of society from unwholesome ideas, pictures, or the propaganda of degenerates? If a restriction is to be imposed, what interest is to be protected?

The reason this subcommittee today is considering restrictive legislation is our concern with the right of Americans and their families to be let alone. An American has the right not to read unsolicited mail advertising that is offensive to him, is an insult to his wife, and a threat to the mental hygiene of his child. What is more, he should have the right to protect himself against repeated mailings and demands that he purchase pornography. The sale of his name through mailing lists

must be stopped if he wants it stopped. We made a start during the 90th Congress when under 39 U.S.C. 4009 it was possible for the first time for mail patrons to demand that their names and the names of their family members be stricken from mailing lists under threat of an eventual Federal court order. It is now clear that the administrative burden of such a law should be placed on the shoulders of the big mailers and their computer systems. A quarter of a million Americans have already used this statute. Its constitutionality will be decided during this fall term of the U.S. Supreme Court. We will still be in session when the decision is made.

The American who opens mailed advertisements containing pictures of homosexual activity and unnatural sex addressed to his son is angry about it and he has the right to be. An American whose wife opens the family mail and finds the same sort of material has a right to be upset. These Americans have a right to demand a remedy from the Congress and we are going to obtain legislative relief for them.

There are people in the publishing industry and elsewhere who believe that the privacy of their fellow Americans does not weigh in the balance against the interests of the smut mailers in demanding that the postal service supply them with a captive audience. No amount of reasoning will persuade them that the subcommittee is right.

I believe that what is good for Ralph Ginzburg is not necessarily good for the Nation. Freedom of expression is a two-way street. It includes the right to reject advertising.

We have as our first witness today the distinguished U.S. Senator from Arizona, and again I want to say to you, Senator Goldwater, I am deeply pleased and honored to have you here.

TESTIMONY OF HON. BARRY GOLDWATER, SENATOR FROM THE STATE OF ARIZONA

Senator GOLDWATER. Thank you, Congressman. I want to congratulate you on that statement and thank you as a grandfather for being so active in this field.

I have with me this morning my legal assistant, Mr. Terry Emerson.

Mr. Chairman and members of the subcommittee, it is a pleasure for me to visit with you today to discuss the ways in which we can combat the ever-increasing menace of obscenity in the mails. I only wish that my colleagues on the other side of the Hill would rev up their legislative machinery so that both Houses would be acting together on this.

Mr. Chairman, I want to open my remarks by saying that the members of this subcommittee have my utmost respect for the excellent record which they have made in this field. This group has the distinction of holding more sessions this year on the subject of smut mail than all of the other committees of Congress put together. Also, I know that this subcommittee handled five or six earlier measures designed to clean up the mails.

Mr. Chairman, it will be my purpose today to explore with you the ways in which Congress can build upon this record.

The present situation is completely baffling to most Americans. On the one hand there is a whole Government arsenal of antiobscenity laws, including an entire chapter of the U.S. Criminal Code and

several provisions of title 39, which are aimed at excluding indecent matter from the mails.

On the other hand there is a staggering number of complaints being made by individual citizens who protest that their homes are being inundated by a flood of unsolicited smut mail. The number of these complaints made to the Post Office Department alone has soared to well over one-half million in the past 3 years.

The actual number of Americans who are deeply irritated and offended by perversion in the mails can only be estimated. There is no question that it is enormous. A Gallup poll released just 3 months ago reveals that 85 out of every 100 adults interviewed said they favor stricter laws dealing with obscence literature sent through the mails. Translated into population figures, this means that 100 million persons are dissatisfied with the existing postal obscenity laws.

Why is this so? What is the real difficulty with our present laws?

These are questions which I have been examining very closely in recent months. I have sought to get to the bottom of the reasons why this terrible menace continues to threaten the sanctity of American homes. Also, I have attempted to learn what solutions, if any, exist to control it.

Mr. Chairman, as a result of this study, I have formed the following conclusions, which I would like to share with you on the chance that there may be a new idea or two among them to aid in the fight for decency in the mails.

First, the major source of outrage among our citizens is the unsolicited mass mailing of advertisements by some 15 to 20 large firms. These operators generally send out computerized first-class mailings, taken from regular mailing lists, to pander their filth. They are well-heeled businesses making as much as $10 million a year in a market that runs into billions of dollars.

Mr. Chairman, as any aside, my interest in this was really stimulated by my experience in learning that my name had been put on one of these mailing lists solely because as an amateur radio operator my name appears in a radio call book that has about 300,000 names in it. Now, I got my first license when I was 13 years old; and the mailings that I have received of smut unquestionably went to tens of thousands of children who, like myself, started in this service when they were very young.

Second, the next great source of public concern is the fear that sexually perverted material will endanger the ethical, mental, and moral health of children. Many of the current mailings are specifically aimed at teenage children. The remainder is sent indiscriminately with a reckless disregard to the fact that a substantial portion of this trash may reach the hands of young children.

Third, there are three primary reasons why this misuse of the mails has not halted——

The stringent and confusing definition of obscenity which different members of the Supreme Court have announced in recent years is one.

The fact that the newly enacted pandering law of the 90th Congress does not apply to unsolicited first mailings is another.

The fact that there is no national law aimed squarely at the protection of minors is the third one.

Mr. Chairman, it is clear that Congress can close up these loopholes. There is no longer any question that society may regulate the dissemination to youngsters of material which is objectionable as to them, but which could not be regulated as to adults. The landmark decision of 1968 in the second *Ginsberg* case persuades me that Congress has the constitutional power to enact a strong new law to restrict the distribution of pictures and printed matter that are obscene to minors.

In this case, the Court upheld a New York State law specifically designed to protect children from obscene matter. This ruling settled the authority of governments to adopt one set of obscenity standards for adults and a separate set for children. That this approach offers unusual chances for effective enforcement is shown in the fact that the conviction upheld in *Ginsberg* involved the sale to a 16-year-old of four "girlie" magazines.

If the Court is now willing to find that newsstand magazines are harmful to minors, I am certain it will find that the utter garbage which is infesting the mails is likewise obscene when sent to minors.

Thirty-nine of the State legislatures have adopted some type of special prohibition against the exposure of minors to obscene materials and it is high time that Congress does the same.

The second concept which I believe holds out a strong basis for cleaning up the mails lies in the power of society to protect the constitutional guarantee of freedom of privacy.

I might say as an aside here, Mr. Chairman, in this week's issue of Newsweek magazine they have discovered that the one thing the American person is griping about most has been the abuse of his privacy and I think it would be well for you to review it because it touches on what I know you are very aware of.

To me privacy deserves one of the highest spots on the list of individual freedoms. It embodies the essence of the sanctity of a man's home and the right to enjoy the privacies of his life.

The basic concepts underlying the right of privacy date back to the laws of ancient Greece and Rome. It has been defined as a distinct and separate right in American law for the past 80 years and is regularly winning expanded interpretations.

The reason for this is easy to see. As great improvements in the means of communications bring all of us closer and closer together, it becomes increasingly simple for the intimacies of life to be intruded upon by those who pander to commercialism. To cast the individual citizen upon his own resources in the setting of modern times would be to leave him without adequate means to protect his privacy.

Thus it is that the courts now recognize the authority of the State to protect a man's feelings as well as his limbs. The exercise of this power is particularly strong when the threat to privacy involves an invasion of a man's home.

There is a Supreme Court decision close at hand. In *Breard* v. *Alexandria*, 341 U.S. 622 (1951), the Court considered the validity of a municipal ordinance forbidding persons from going upon private residences to solicit orders for the sale of magazines, without prior invitation. The Court upheld the constitutionality of the ordinance as a proper means to protect householders against "uninvited intrusions into the privacy of their homes."

Perhaps the foremost principle stated by the Court is that in cases where the constitutional guarantees of free speech and free press collide with the fundamental personal right of privacy, there has to be an adjustment of these rights. In the words of the Court, the privilege to engage in interstate commerce of free speech cannot be permitted to crush "the living rights of others to privacy and repose."

As you know, the most recent enunciation of the rule was made by a three-judge Federal court convened in California to consider the pandering advertisement law. In upholding the power of Congress to restrict unwelcome mailings, the court said:

> 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.

In my opinion, these decisions lay a solid foundation for the enactment of strong new controls to enforce the right of an individual to choose what it is he desires to see and read within his own home.

Therefore I propose that we act on these cases without further delay by doing one of two things. We should frame a stringent new law that bans completely any mailings by commercial dealers of unsolicited advertisements for smut material. Or we should prohibit all mailings of such matter to persons who declare that they do not wish to receive this type of mail.

Mr. Chairman, I believe the adoption of the controls I have proposed would slam the door on the kind of sexually oriented mail which is inciting the Nation's anger. I might add, at this point, that I do not know of any single piece of legislation that could better carry out my objective than the bill introduced by Mr. Dulski and the gentleman from Pennsylvania, together with Mr. Corbett and Mr. Cunningham of this subcommittee.

For my part, I was pleased to be the coauthor of the first Senate bill that is aimed solely at protecting children against obscene matter. My bill is similar in many ways to the provisions of H.R. 10867 which pertain to minors.

One of the similarities of our bills is the fact that they each define obscene matter in a descriptive way. Each bill thereby follows the standards applied by the New York State statute that has been upheld by the Supreme Court.

Mr. Chairman, I urge that you do not change this approach. The need for a carefully drawn definition is crucial to the validity of obscenity convictions.

This point is emphasized in a decision handed down by the Supreme Court just after its approval of the New York law. In *Interstate Circuit* v. *Dallas*, 390 U.S. 678 (1968), the Court ruled that an ordinance of the city of Dallas was unconstitutional because the standards used to define obscenity were not definite and narrowly drawn. The Court said that this was so even though the ordinance had been adopted to protect children.

The Court specifically noted that the Dallas statute, unlike the New York one, was not drawn "in accordance with tests this Court has set forth for judging obscenity." In view of this signal by the Court, it is important that the "New York" type of definition is the one we should use.

Mr. Chairman, my studies in this field have turned up some data which increases my belief that Congress may enact much stricter controls over the dissemination of obscene materials to children. I will start with the fact that there is a child under 18 living in six out of every 10 American homes.

Next, we can note that there are 35 million children in the age group under 18. This is clearly a sufficient number to deserve protection at the national level.

Finally, the official Labor Department statistics disclose that at least one-third of American wives in families with children under 18 are employed outside the home. The highest working force rate among women of all ages is that of married women with children ages 6 to 17. These ladies represented 45 percent of the entire women's work force and totaled over 6 million persons.

From this, Congress might properly infer that several millions of children who have arrived at a crucial, inquisitive stage of life will have an unsupervised opportunity to open the mail before their working parents return home.

Based on the above facts, it can be concluded that the access of children to direct advertising mail is so great that additional requirements should be imposed to decrease the chances they will be exposed to matter which is harmful to them.

Mr. Chairman, I do not want to leave the subject of a child-oriented statute without stating my belief that exposure to pornographic material is definitely harmful to minors.

Commonsense will tell anyone as much. For the skeptics, however, the record contains many persuasive statements by responsible experts.

For example, in 1963 the New York Academy of Medicine published a report on the medical aspects of indecent publications sold at newsstands and circulated by mail. The academy stated its belief:

> That although some adolescents may not be affected by the reading of salacious literature, others 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. It is said to contribute to perversion.

In addition, competent medical witnesses have appeared before committees of the Congress to decry the harmful influence of obscene material on juvenile behavior. One of the worst possible relationships was discussed by Dr. Benjamin Karpman, then chief psychotherapist at St. Elizabeths Hospital, who said:

> You can take a perfectly healthy boy or girl and by exposing them to abnormalities you can virtually crystallize and settle their habits for the rest of their lives. If they are not exposed to that, they may develop to perfectly healthy, normal citizens. It is here that objection comes upon pornographic literature.

There are many distinguished professionals in the medical field who would be ready to add to this record, and I am hopeful that the subcommittee will invite a fair number of psychiatrists, law enforcement officers, and other experts who have had contacts with consumers of obscenity to appear before you during these hearings.

Turning to the specific provisions of H.R. 10867, I would like to make a few observations that might fit into the legislative record you are shaping.

The first question I want to raise is whether the new section 4011, which creates a category of nonmailable matter as to minors, is in-

tended to impose a strict liability upon the sender to know the recipient is a child.

It seems to me that it does, and I think this is an excellent way to attack the problem. But, in order to guarantee the law will pass the scrutiny of a permissive Supreme Court, I wonder if this feature should be limited to commercial dealers who do not take reasonable precautions to keep their trash out of the hands of minors.

It is true that under certain child protection laws, knowledge that the child is a child is not an essential element of the particular crime. The laws against furnishing liquor to children come to mind.

Lacking a clear precedent in the free speech area, however, I am not at all sure that we can brush aside the element of "knowledge" so easily.

What we could do is to put the smut merchant at his own risk on the question of age whenever he fails to have a professional assurance that the addressee is an adult. Under my proposal the dealer in smut would be required to show that he has taken all reasonable precautions to learn the age of the addressee.

I might say, as an aside, Mr. Chairman, that the people who sell mailing lists—and I have dealt with a lot of them in the course of my business life—tell me that they can sterilize lists and provide the knowledge of age if the buyer is willing to spend a little extra money to do it.

By making this one change in the section, I believe we would safely handle the constitutional thorns. Further, we might write into the section the defense which would be permitted. For example, the dealer might be allowed to rely upon a professionally designed mailing list that promises a high degree of certainty that it contains the names of adults only.

Such lists can be obtained. I am told that a good list compiler can select such detailed groups of people as new parents, parents of babies born only in private hospitals, or even parents who are new at being new parents. With such ingenuity, I am certain the list compilers and list brokers will be able to rise to the challenge given them to preselect families without children under a specific age. Of course, the list must be checked at regular intervals to be accurate and the statute should require that this be done.

Whatever degree of liability should be imposed on smut peddlers, I would suggest that the statute be made applicable only in a commercial setting. For example, the language should not catch the case of relatives or friends who use the mails without any purpose of material gain.

The source of the national uproar about obscene mail is a few major dealers and it would seem best to me to keep the bill on target by hitting straight at them.

The final change which I suggest is to expand the scope of the bill's criminal provisions. The only person who is covered by the offense seems to be the one who deposits matter in the mail. I fear that this might enable the maker of obscene films or the publishers of indecent literature to evade the penalties of the law by using an independent distributor to handle the mailing of his product. This could be avoided by applying the criminal sanctions to persons who manufacture or pub-

lish pornography knowing or intending that it will be sent in the mails in violation of section 4011.

Mr. Chairman, in looking at the ways in which the bill is designed to protect the right of privacy, I am satisfied that you have framed a valuable new approach. Sections 4012 and 4013 are expressly limited to advertisements only, and thereby, are wisely focused on the commercial aspects of the problem.

Also, the scheme used in section 4012 is effective. This provision requires that the disseminator of smut must refrain from mailing his product to anyone on the list of persons who have expressed their unwillingness to receive such matter. I realize this will force the distributor to use computers to scan the hundreds of thousands of names on such lists, but many, if not all, of the present merchants in this illicit industry are already using such equipment. In my opinion, it is high time Congress decided to shift the burden of keeping this unsought material out of homes where it is not wanted to the purveyors of filth, even if it ups the cost of their product.

In summary, Mr. Chairman, I can only recommend that the subcommittee continue its efforts until this public menace is stamped out once and for all.

Again, Mr. Chairman, I want to thank you for allowing me to appear here this morning.

Mr. NIX. Thank you, Senator Goldwater. I must make the observation that your statement constitutes a real contribution to what we are seeking to do here in this subcommittee. The questions raised and suggestions offered certainly will be most helpful in our deliberations. Thank you very much.

Mr. Dulski.

Mr. DULSKI. Thank you, Mr. Chairman. I want to commend the distinguished Senator, a distinguished citizen of our great country, for his great contribution here this morning. There is very lttle I could add to what the chairman has stated. I assure you that your testimony is going to give weight to the consideration of this bill.

Senator GOLDWATER. I might say that I have more than a slight interest in this because a great percentage of this material is printed in my hometown and I am ashamed of it. We have not been able to find any way to run them out of business but if we get this new approach started they are not going to be operating in the Sunshine City very long.

Mr. NIX. Mr. Cunningham.

Mr. CUNNINGHAM. I certainly want to compliment the Senator for this wonderful statement.

I think that with your permission, Mr. Chairman, I should review just as briefly as I can what has gone on before about this.

Mr. NIX. Certainly.

Mr. CUNNINGHAM. I have been a member of this subcommittee for 13 years. I became the ranking minority member about 10 years ago when Congresswoman Granahan was the chairman. There was no general attention paid to obscenity during those early years. The country was not aroused about it, but we began hearings and we went to Los Angeles and San Francisco, New York, on several occasions Philadelphia, and the Midwest, and my hometown of Omaha. We also had many hearings in Washington.

I imagine our testimony is about this high [indicating], and we began to get the country aroused about this problem.

Our main problem was the attitude of the Supreme Court. We had to do something to get around their continually letting these people off the hook.

We passed three statues. One was of minor significance but it established by law a judicial officer in the Post Office Department. I will not go into the details, but that had a lot to do with prosecutions if they could be gotten when complaints were brought before the Post Office Department.

We were successful, with the cooperation of the committee and the Congress, in making another major contribution to getting rid of this smut material. Previously, you could only bring prosecution where the material was mailed. If it was mailed from New York and landed in Omaha, the prosecution had to be made in New York. Or if it came from California, which is the real cesspool, the prosecution had to take place there. The juries and the judges in New York and California are much more liberal in their views of this and it was very difficult to get convictions.

We passed legislation which stated if smut was mailed in New York and sent to my hometown of Omaha, Nebr., the Post Office Department could go into Federal district court in any State through which it passed, and also into the city where it was received. This was a great boon, but it was only a beginning.

I am the father of six children—and we knew that something had to be done and we had to be very careful to get around the Supreme Court—and an idea occurred to me because it happened in my own family. My boy was 12 years old and a member of the Boy Scouts. He received a Boys Life magazine which had a little advertisement that said: "Send 25 cents and get a package of stamps and start a stamp collection." He sent his 25 cents and got his stamps and that was all fine. But about 6 months to a year later he started receiving this smut advertising through the mails.

This stamp company, in order to pick up a little pocket change, sold that mailing list to list brokers and these people are very clever, very smart. They know that most people start a stamp collection between 12 and 14 years or in that area. I am too old to start one. But they are smart enough to know that, so they wait a little while and then they start flooding these youngsters with this material.

Mrs. Granahan had left the committee because she was appointed Treasurer of the United States, and with the cooperation of Mr. Dulski and others, we finally came up with a bill. I have lectured all over the country on this, trying to get the people aroused. We came up with a bill and it was based on the idea that—under the old English law—a man's home is his castle, and I should not have this dumped into my mailbox or into my home without my permission.

In other words, no one can come into my home unless I invite them in or they have a search warrant, but that was not true with this smut material. So I felt that if this was addressed to me or my minor children I had a right to do something about it.

We drafted legislation which would accomplish that and it passed the 88th Congress overwhelmingly but it died in the Senate because the Kennedy-Johnson administrations were opposed to anything in this field and they got it bottled up over there.

For the 89th Congress, we changed a few words here and there but essentially we introduced the same bill. It passed overwhelmingly again in the House and went over to the Senate and Mr. Monroney bottled it up again.

We gave it further study and I had a firm of outside constitutional lawyers help me with it. The staff also helped me with it and some friends in the Justice and Post Office Departments, unbeknownst to their superiors, also helped me, and we came out with what we thought was the perfect language to use. This was in the last Congress.

President Johnson requested a postal rate increase bill and he wanted it very badly. He needed it. With the cooperation of our chairman, Mr. Dulski, and the Speaker of the House and others, I offered an amendment to the postal rate increase bill which is known as title 3, which was simply this law that we had been trying to get passed all these years. It went through and the President signed it because he wanted that rate increase bill, and he took along the antismut amendment.

Over 300,000 people who have received unsolicited smut have made complaints, and as you mentioned in your testimony, it has been upheld in Federal district courts. Of course, it has not been decided by the Supreme Court yet.

We changed the bill at the last minute. Originally we thought we would give the Postmaster General the discretion as to whether it was pandering advertisements or not, so we changed that and we said only the recipient would decide whether this was obscene and pornographic and did not want it into his home.

In this way, there is no censorship involved. If somebody across the street from me wants to receive smut, fine and dandy. We do not say anything to him about it. The only thing is, I do not want it in my home. And the law has been very effective.

But our main problem is to get this message throughout the country. We still have to do more to publicize this because it has been very effective. I have introduced, as many members have, other pieces of legislation in this field and we hope to make further progress.

But this was the first major breakthrough in a generation or more and we finally got the Congress and the American people aroused to this problem. I know that this committee, under Mr. Nix and Mr. Dulski and others, is going to really bring out more potent legislation.

Mr. NIX. Mr. Wilson.

Mr. WILSON. Thank you, Mr. Chairman.

Senator, I certainly want to join those who have commended you for your statement. I think it is a very fine statement and very objective and gives some recommendations that are worthwhile.

Your comment about privacy being so important to the American people today is so true. Just in the past week the House passed a bill, which is now in the Senate, dealing with individual privacy. This legislation affects the census procedures.

While the bill was a compromise, my Subcommittee on Census and Statistics, which reported out the legislation—H.R. 12884—recognized that privacy to the American people is something they demand these days and we hope our legislation will be effective.

I agree with what Mr. Cunningham said. I hope that the new Attorney General will bring a policy into the Department of Justice that will be helpful to Congress in developing legislation to solve this problem.

We had many ideas which former Justice Department officials told us were unconstitutional. We would then say, "Will you please tell us what is constitutional?" And whatever information they gave us was done reluctantly, and actually, they gave us very little. In other words, we had very little cooperation from the Justice Department.

I feel this is not a partisan issue. That was a Democratic administration Justice Department and they were very lacking in the help they gave us.

I think this is an extremely important problem and one every parent feels strongly about and I commend you for your statement.

Senator GOLDWATER. I have a strong feeling about this business of any lawyer trying to tell somebody else whether it is constitutional or not.

I remember when I was here before on the Labor Committee we were trying to write legislation in the field of education and we twice asked the Supreme Court if they would just give us an "off-the-cuff" opinion, and they said, "Pass the law and we will tell you."

That is my feeling. We are supposed to pass the laws and the Justice Department is supposed to enforce them until the Supreme Court says whether it is constitutional or not.

Mr. DULSKI. I agree.

Mr. NIX. Mr. Derwinski.

Mr. DERWINSKI. Senator, I would like to specifically cover a point or two in your statement. You hit the nail on the head when you pointed out that we have an arsenal of laws but the problem is continuing. It is obvious that the laws we have, either because of court decisions or lack of enforcement, just are not working.

What makes it even more worrisome, is that the type of pornographic matter being mailed in the last year or two makes the material of 8 or 10 years ago look mild in comparison. This stuff is getting out of hand.

You feel quite strongly, as your statement emphasized, that if we aim at the commercial aspects of smut even the permissive courts might not be able to interfere with the legislative machinery.

Senator GOLDWATER. I feel very strongly on that. The courts have been so wishy-washy about what is obscene and what is not obscene that this, as Congressman Cunningham so correctly pointed out, is a matter of individual judgment. But I do not think that commonsense can dictate what is and what is not obscene.

Speaking of some of the mail I got because of my name being on lists, I do not appreciate it as art and I do not appreciate it as anything but obscene material. I think any person would hold that view.

Mr. DERWINSKI. You made a very effective point that the technology of computers enables people using these lists to screen them properly, and if we put emphasis where it should be, why, they have the wherewithal, the technical capacity, to screen these lists and not to abuse minors.

Senator GOLDWATER. Yes. The responsible list companies—and all of us who work in business or politics know these companies—tell me it is no big trouble to screen for age and if there is any doubt they can just drop that particular address.

Mr. DERWINSKI. I certainly do not want to throw you a "hot potato," but supposing we do produce an effective bill on this side. Do you think the Senate might get into this with a little more dispatch than they have shown to date?

Senator GOLDWATER. Well, I am going to answer that in all candor. The House, to me, has become the responsible body, which is a little opposite to the intent of the Constitution. I can say that the administration wants legislation in this field and I have talked to the President about the language of his bill and the language of this bill—the bill that we have introduced in the Senate and you have introduced over here—and I think there is a very general agreement; and I can tell you that the Attorney General and his assistant both are extremely interested in getting legislation here so they can go to work on it.

They do not feel, outside of the bill that was passed last Congress, that they have much to work with. I know this is the feeling on down through the lower echelons of law enforcement.

I think we can get a bill through the Senate. We have 22 cosponsors of the legislation. It was introduced by Senator Allen of Alabama and myself as coauthor, and I think when it comes up we can increase that list tremendously.

Mr. DERWINSKI. Fine. Thank you, Mr. Chairman.

Mr. NIX. Mr. White.

Mr. WHITE. Senator, I want to echo the commendations of the other members of the committee and I agree with you and your objectives and most of your approaches.

Senator, I want to ask you about certain features of this bill, if I may—a feature I see built into most of the bills I have seen, which I regard as a loophole, and which I know is the language of the Supreme Court.

On page 4, down on line 20, section (B), "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors"—and then you go to subsection (C), "is utterly without redeeming social importance for minors."

It occurs to me that perhaps we ought to take the approach, instead of talking in terms of "utterly without redeeming social importance," we should say "in its individual sections is utterly without redeeming social importance." Because a publisher could take a book or a magazine and, with three-fourths or a half or whatever percentage, could make it something of social value, and then fill in the rest with stuff which are the obscenities.

If we talk about "is utterly without redeeming social importance," the defendant could go into the court and point to the two-thirds or one-half or whatever it might be to disprove that he has published anything without redeeming social importance.

Senator GOLDWATER. I see your point and I agree with you. This language is taken from the New York laws. You raise a very important question.

Mr. WHITE. I think we are trying to confine ourselves to too rigid a test.

Senator GOLDWATER. I would agree with you.

Mr. WHITE. Then I want to call your attention to page 7, Senator, of the bill. Now, you say, "It shall be the function of the division to administer the laws of the District of Columbia relating to obscenity and the laws of the United States relating to the mailing of obscene or crime-inciting matter" and so on.

Now, were you speaking of administering or were you speaking in terms of prosecuting? Because you go on in your bill speaking of treasonous books, harassing telephone calls and broadcasting, and so forth, that are administered by a number of different agencies, including the Post Office which administers the mailing of the material.

Senator GOLDWATER. I think if you go back to line 15 on page 6 you get the thought that I had, that we concentrate the responsibility——

Mr. WHITE. You mean for the administration or for the prosecution?

Senator GOLDWATER. For both, as I understand it. The division would be established in the Department of Justice. I think it would cover both administration and prosecution as needed to enforce the antiobscenity criminal statutes.

Mr. WHITE. Did you have in mind then that you would transpose these duties from these various agencies like the Post Office Department, or that the Post Office Department would continue to have investigatory powers but would make recommendations for prosecution?

Senator GOLDWATER. The Post Office Department would continue to act under the legislation already passed. However, they would work closely with the Department of Justice.

Actually, the purpose of the division under the Department of Justice would be to bring the prosecutions under the law. If you think the language "administer" is loose, we could add additional language in there to tie it down.

Mr. WHITE. Administrate or prosecute?

Senator GOLDWATER. Yes, anything like that. I am not a lawyer. I have to depend on my legal assistant here to get through this, but I talked to Mr. Kleindienst, the Assistant Attorney General, and he was very strong in his feeling that there should be a concentrated point of action on this under the Department of Justice. I think also that Congressman Cunningham has spoken to this a number of times.

By the way, I want to congratulate you on the work you have done, Mr. Cunningham. I have read a lot of your material.

Mr. WHITE. You mentioned something here which I think points out something rather sad in our American scene, and I would like to ask you about Phoenix, if I may. You said that Phoenix—you indicated that Phoenix had been unable to control the production of obscene material. Is this due to prohibitions of the Supreme Court or inability or reluctance on the part of city councils—I am not talking about Phoenix alone, but about other cities over the country.

Senator GOLDWATER. I wish I could give you a correct answer on that. Our mayor has been very active in trying to get this stopped but there just does not seem to be any law to cover it.

Mr. WHITE. What about contributing to the delinquency of a minor?

Senator GOLDWATER. Again, I wish I were a lawyer and could answer this correctly, but I think it would be a difficult thing to prove as far as the manufacturer goes.

Now, this material is not shipped from Phoenix. The bulk of it is shipped from Los Angeles and New York. They are the two big shipping points for this material that is printed in Phoenix.

Mr. WHITE. Are minors used in the production of this?

Senator GOLDWATER. I am sure they are not, although I do not know. I am sure they are not. We have a State law against minors working.

Mr. WHITE. I know I go into one city and it seems to be pretty clean and I go into another city and it seems to be pretty open, and I wonder if it is not a matter of the individual city's failure to stamp out or control production and dissemination of some of this material.

Senator GOLDWATER. It is very strange that this should be taking place in Phoenix. It is a city that has great pride in its morals.

To give you an example, one of our leading citizens, the manager of the statewide network of Paramount-Fox, resigned from his job the other day after 40 years in it because they had scheduled an "X" film against his wishes. It was "I am Curious, Yellow." And the newspaper, the newspaper that is largest in the Southwest, refuses to take any advertisements for it. I know that the city council and the police department are very interested in cleaning these people up, but I think it is a matter of proof. What is pornographic? What is obscene?

You refer to Mr. Ginzberg here. He and I have had occasion to meet—in fact, it is in the Supreme Court now—on what I would call pornographic and obscene and what he calls art; and he will point to examples that you can find in certain parts of the Orient which they classify as art.

For this reason, I think we have to try to sort of tie it down by definition. I think the New York approach is the first good approach at the State level we have had. I do not know how detailed we can get, but I know the city council and the mayor feel that the burden of proof is just too great and almost impossible.

Mr. WHITE. Well, I applaud you on your idea to concentrate the prosecution. I know I received a letter from some immigrant from Denmark who was soliciting purchases of material and he was in a certain city in this country in the West. I had his name and he had a Post Office box on the letter, and I called the Immigration Department, or had my staff call, and they said, "We cannot do anything about it unless you tell me his birth date."

Senator GOLDWATER. His birth date?

Mr. WHITE. Yes. They had to know his birthday before they could go pick him up because this is apparently how they categorize them.

So I am glad to see your concentrating on some active bureau.

Mr. DULSKI. Would the gentleman yield?

Mr. WHITE. Yes.

Mr. DULSKI. Mr. Chairman, from Mr. White's interrogation of the Senator, I think he and I are on the same track. I am not an attorney but I know what is obscene and what is not. A distinguished district attorney in Boston prosecuted many distributors and he put an awful dent in the distribution of this material.

I feel like you, Senator. Let's take a chance and beat them—go into court—and if we lose, take it to the Supreme Court. It costs money to go up there but we are going to deflate them in their ego and defeat them. That is my feeling.

Senator GOLDWATER. I agree with you. I think it was Tom Jefferson who said that there were too many lawyers in the Congress.

Mr. CUNNINGHAM. In reference to the *Ginzberg* case, he was not convicted on his magazine Eros. He was convicted on his pandering advertising to sell his magazine.

Senator GOLDWATER. That is right, and also the names of the towns he used from which he mailed this had great bearing on that decision.

Mr. CUNNINGHAM. I might say that some of the very worst material, advertising material, comes in from the Scandinavian countries.

Mr. NIX. Mr. Daniels.

Mr. DANIELS. Senator, I am sorry I was not here when you gave your testimony. Unfortunately, I had to attend another subcommittee meeting of the Education and Labor Committee to constitute a quorum. So I am sorry I was not here to listen to your testimony.

I would like to bring to your attention, as former chairman of the Select Subcommittee on Education, we were responsible for reporting out a bill possibly 2 years ago, which brought about the Presidential Commission of 18 members. The Commission was appointed by President Johnson and they are due to bring in a report sometime next year, I think by July 15.

However, the Commission recently released a 1-year interim report to which independent views were filed by one of the Commissioners, Father Hill of New York. He complained about the fact that this Commission, which has been in existence for more than a year and a half now, has spent no time whatsoever in dealing with the specific direction in the bill directing this Presidential Commission to make a study of all laws dealing with pornography and obscenity, constitutional precedent, and their recommendations as to what is or what is not obscene.

That is the big problem today, as I see it as a lawyer. I have been very much interested in this subject matter as has been Mr. Cunningham since I came to Congress, 11 years ago. I think a great service can be rendered by this Commission. Now, they were specifically directed also to ascertain if there is any casual relationship between pornography and antisocial behavior, particularly as it relates to children.

I think it would be most interesting to see the receipt of that report. Unfortunately, it has been brought to my attention that an attorney was retained to represent this Commission who is reputed to be an outstanding lawyer and who represented many defendants in these obscenity and pornography cases which have come before the courts. I do not know whether that is good or bad and I refrain to pass any comment at this particular time.

But I think the big problem is what is obscenity? Now, the court in the *Roth* case gave a definition of it and then later on they further expanded it and then finally here about 3 years ago, when a batch of cases were all consolidated and went before the Supreme Court, the Supreme Court seemed to take the approach, in reversing all the lower court convictions, that, first, the cases did not deal with children or how children would be affected by this material; and second, because they did not involve the subject matter of pandering; and third, because there was not an invasion of privacy.

That seems to be the latest pronouncement from the U.S. Supreme Court. I do think we should have a clear—if we can possibly get

it—definition of what is pornography and what is obscenity. That is the main point.

I think the problem in the prosecution of these cases is many of the lawyers who prosecute these cases do not understand the decisions of the Court and what the Court intended to convey; and second, when you try to analyze the language that the Court employed in defining obscenity, I think it is far above the head and comprehension of the jurors that are hearing these cases.

The stuff that is going through the mail today is absolutely shocking and revolting. By virtue of my association with this legislation, I have received hundreds and hundreds of letters from all parts of the country sending me the material they have received, and I do not know how any decent individual could, in his right senses, send that kind of material out.

The unfortunate thing is this. Many of the people that write to me—they did not want their wives to see it and they did not want their children to see it; and it would, in my own judgement, have an effect on these children, giving them the wrong ideas and the wrong thoughts.

I think this kind of stuff is contributing to the breakdown of our society today and also to the crime that is taking place on the streets.

So I want to commend you for coming here and supporting this legislation. It is an area where we must do something.

Mr. CUNNINGHAM. Would the gentleman yield?

Mr. DANIELS. Yes.

Senator GOLDWATER. In my testimony I used several quotations from psychiatrists and medical people pointing out just what you say is true, that it does have an effect upon the child's mind. As far as definition, I know it is hard to do, but I agree with Mr. Dulski that as a father and grandfather, that I know what is obscene in my mind and I think it would be generally upheld throughout the country.

As least we could try it and if the courts want to fight it we could try another route.

Mr. CUNNINGHAM. That is about what I was going to say. We had several physicians in Philadelphia as witnesses and we had psychiatrists and psychologists, and police officers and all kinds of people who were skilled in the field of treating youngsters. We have a book that thick [indicating] in which they said that pornographic materials have a direct bearing on antisocial behavior.

When we were in Philadelphia one of the morals squad people brought up to us an advertisement that was shocking. I think it was Benjamin Karpman of St. Elizabeths Hospital—who was going to be in Philadelphia within a few days to lecture and encourage a group of homosexuals up there.

Thank you.

Mr. NIX. Senator Goldwater, I can assure you that I speak for the feelings of the entire subcommittee and the chairman of the full committee when I again express our thanks for your being here.

Mr. DANIELS. I ask unanimous consent to insert at this point in the record the statement of Harley Staggers in support of the pending legislation, H.R. 10867 and others.

Mr. NIX. There being no objection, the statement will be placed in the record at this point.

(The statement follows:)

STATEMENT OF HON. HARLEY O. STAGGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. Chairman, this is to affirm my support of H. R. 10867 and similar bills which would exclude pornographic material from United States mails.

A nation has the duty, as well as the acknowledged right, to protect itself against external aggression. Its duty to guard against internal subversion is equally obligatory.

In nearly two hundred years of independent existence, this Nation has built up a social order based on morality, virtue and universal participation in the effort to achieve individual and group excellence. That social order has given us an unsurpassed wealth of material things, a high degree of enlightenment, and a consistent movement toward the ideals of justice. It is no idle boast to say that it is the best the world has ever seen.

It would be unpardonable folly to sacrifice this accomplishment to petty vice.

Vice has been the ruination of civilizations without number in the past. Uncontrolled, it will ruin this civilization, strong as it seems to be. In fact, there are signs of disintegration visible before our eyes today.

And pornography is indeed a petty vice. It has not a single element of need or usefulness to commend it to civilized society. To say that it is beastial is a slander on beastial nature. It appeals to the lowest instincts of human nature. The fact that its appeal is practically universal is no excuse for its sufferance. We want to elevate human nature, not depress it.

The sole reason for the existence of commercial pornography is that it pays the producer and the distributor. Vice always pays. An ancient people, the Carthaginians, reputedly would do anything for money. They are said to have had a saying something like this: Nothing can be considered immoral if it produces a profit. It would be a sad day if this Nation could accept, even by implication, such an excuse for pornography.

There is not the slightest necessity to find an exact definition for pornography. It is recognized instantly by even the weakest intelligence. Those who wish to side-step the issue indulge in legalistic palaver or pretend to find pornographic material in the Bible, or in Shakespeare, or elsewhere in the most highly respected literature. The fact that such material does not attract the pornographic mind, does not bring in the cash, is sufficient to exclude it from the accusation.

Exclusion of pornographic material from the mails will serve two purposes;

1. It will block the easy distribution of such material. Producers depend on the mail to make their product widely available. Other means of distribution become too costly. Experience has proven that denial of mailing rights is effective. Newspapers and magazines argue that without cheap mail rates they could never get their publications to the readers without excessive costs.

2. It would put the Government's stamp of disapproval on the whole pornographic trade. The guardians of the general welfare have the duty to do what they think is necessary to preserve and transmit our social order. They have the duty to protect our young, especially, against contaminating influences. Passage of this law will not eliminate pornography. Perhaps nothing will. This is not the millenium. But a good strong law, vigorously enforced, will reduce the evils of pornography materially. Government condemnation is still effective. People still respect Government decrees. Further, strong Government support will bolster the efforts of those agencies of society, such as the church, which have always fought the baser evils. It is time for this Congress to take a stand.

Mr. Chairman, I wish to thank you for your cordial invitation to appear before your Committee and make a statement. I respectfully request that this written statement be included in the report, and that you accept it as full support of the purpose of the bills which you have before you.

Mr. NIX. I want the record to show that our colleague from Pennsylvania, Congressman Joshua Eilberg, is here and has shown a great and deep interest in the subject matter. His statement will also be included in the record.

Mr. EILBERG. Mr. Chairman, may I just make a brief statement?

Mr. NIX. Yes, sir.

Mr. EILBERG. I learned last night of the hearing this morning. I apologize for not having a formal statement but when I heard that you were meeting and the work that you had been doing, I thought

I had to come here and give you support and encouragement for the obvious thrust of this committee.

I feel that I want to say here that I listened to Senator Goldwater's remarks with great interest, particularly because my own minor son is an amateur radio licensee and we receive smut mail in our own home.

I would also like to say that from perhaps a selfish point of view this affects my chances for reelection. This has become a major issue in my district. I have received hundreds of letters and numerous petitions, and I would say that my chances of reelection next fall would be improved if this Congress would adopt some legislation in this field.

I also listened with great interest to the remarks of Congressman Cunningham because of what happened in the State of Pennsylvania. Evidently Mr. Cunningham and others have been doing a good job inciting the State of Pennsylvania on this issue. So, we are very interested.

Finally, sir, there has been a lot of discussion about whether they have too many lawyers in the Congress or not, and I suspect at this point that it is a good thing that we have as many lawyers as we do. You know, of course, of my personal admiration for you, Congressman Nix. Really you are one of the most distinguished lawyers in the Pennsylvania community and I say this with all due respect and without difficulty, that you would have very little difficulty with the constitutional questions involved and I would be very surprised if a constitutional bill did not come out of this subcommittee.

Mr. Nix. Thank you. And I could not be other than grateful.

(The prepared statement follows:)

STATEMENT OF HON. JOSHUA EILBERG, A REPRESENTATIVE FROM THE STATE OF PENNSYLVANIA

Mr. Chairman and members of this distinguished subcommittee, it is a distinct pleasure for me to have the opportunity to appear before you this morning and testify about something which we all are in agreement on—that the purveyors of pornography should be precluded from randomly sending their product to the households of this nation.

This issue is one which is of increasing concern both to me and to my constituents in the Northeast section of Philadelphia. This concern is most assuredly justified when one considers the extensive flow through the U.S. mail of advertising material which can only be classified as hardcore pornography. My constituents and I believe that the present means of cutting off this flow of obscene material are ineffective.

I also am happy that this Subcommittee is chaired by my good friend Bob Nix who as you all know is a very able and astute constitutional lawyer. The thorny constitutional issues which surround efforts to cut off this flow will I am confident be handled in the usual excellent way by this subcommittee and its distinguished Chairman.

I believe that the mails should not be used to send unsolicited sexually provocative material into our homes. My son is a licensed amateur radio operator. Some smut purveyor has bought the mailing list of such licensees and as a regular item, we receive mail in our home which I can characterize without fear of overstatement as disgusting. The young, whose minds are in the formative stage, should not be subjected to such harrassment through the mails. Heaven knows there are so many other sources of corruption for them without pornography being sent unsolicited into their homes.

It is my hope that this Subcommittee will take prompt and effective action in reporting out a bill to deal with this problem which is constitutional but at the same time narrowly construed enough so that the sagging moral fiber of some of our nation can be prevented from being rent asunder any more than it already has been.

My constituents ask to be protected from smut mail as I am sure yours do. I urge you to act promptly to assure that protection.

Mr. NIX. Our next witness is Hon. Al Ullman, our distinguished colleague from the State of Oregon.

TESTIMONY OF HON. AL ULLMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. ULLMAN. I am getting a very good education this morning listening to the witnesses and the members of the committee. I am here to make a very brief statement, largely to congratulate the committee for the work that it has done in this field in the past and to encourage you to give us another bill this year that will advance the effort in this field. I think the beginning is excellent. You and your colleagues are dealing with one of the most disgraceful abuses of freedom that now exists in this country, and I commend your pursuit.

Former Chief Justice Earl Warren, in one of his last interviews before stepping down from the bench earlier this year, commented on this problem of obscenity in the U.S. mails.

"Some of the things that go through the mail," Mr. Warren said, "some of the things that are sent to my home are just unspeakable and under no decisions of this court are they justified. But still nobody seems to do anything about it."

Mr. Chairman, it is time for Congress to meet this challenge, and do something about the growing flood of unsolicited pornographic mail that is reaching our homes and businesses.

Among the bills that you have before you is one that I have introduced, H.R. 11110, which concentrates on the problem of advertising obscene matter through the mails. This is the wellspring of the flood. We must effectively check its damaging flow.

The bill would equip citizens with a weapon to keep unwanted, offensive mail out of their homes. It follows closely a proposal made by President Nixon in this area.

It encompasses part of the bill that Congressman Dulski and many others have sponsored, and I think it encompasses the part where we can get a unanimity of opinion and the kind of action that we want.

Its provisions would allow any person to protect himself, or any minor children below the age of 19, by filing a statement with the Postmaster General requesting that no further sexually oriented advertisements be delivered to his home. Direct-mail advertisers would be required to purchase lists of those who have so filed from the Post Office, and to insure that these names are omitted from future mailings. Injunctions and restraining orders are authorized to combat alleged offenders. Convicted violators would be subject to fines and imprisonment.

There are laws in some States designed to provide this sort of protection, but they are inadequate and unworkable. There is no recourse open to a family until after obscene mail is received in the home. By that time, damage is too often done. The envelope containing the material is usually unmarked, giving no clue to the contents.

Many citizens complain that when they do take steps locally to remove their names from a mailing list, their postmaster tells them he cannot guarantee against a future intrusion. We need Federal authority to insure that the citizen's request is uniformly respected.

The former Chief Justice has rightly pointed out that govern-

ment must be careful to balance the basic right to a decent society with the constitutional rights under the first amendment to speak and advertise freely. My bill would not interfere with the right of free expression. Nor would it preclude the right of citizens to request receipt of legally acceptable, if socially questionable, materials through the mail.

But in the case of an invasion of privacy by unwanted, unsolicited pandering, the courts have already made clear that action is legally and morally defensible.

I am not advocating that the Federal Government act as censor of the public's reading material. But it must give the citizen the arms to act effectively as his own censor.

I want to say in conclusion that if the committee does move into the area of censorship, I would certainly hope—and I have great confidence in this committee—I would hope that it would arrive at basic definitions that we have not yet achieved. This is the matter of what constitutes obscenity, what is pornography under the law.

But we are ready for action now in the area of self-censorship. We need to move the burden on to the offender rather than on the citizen, to carry one step forward our pandering control legislation and accompany this with a widespread public information campaign.

I think this is the best way to kill it off, by getting the vast majority to fill out the necessary forms and put the burden on the sender, this is the way we will rid our mails of this very obnoxious, obscene material.

Thank you.

Mr. NIX. Thank you very much. Mr. Cunningham.

Mr. CUNNINGHAM. Well, I want to thank Congressman Ullman. He voted for the bill that is now on the books, the most effective bill that has been passed in a generation, and he has always been interested in this subject.

I do not like to have—and it is not true—I do not like to have anybody refer to this statute that is outlined in this little pamphlet as censorship because it is not.

With my family, as a parent or my wife as a mother of my children, if my little 12-year-old daughter is watching some bad movie on television or something that she should not be watching, it is our parental duty to say, "Turn off that television set," or get a channel that is one that they can watch and not be affected by all the shooting and bad programs that we see so often.

So, there is no censorship.

Mr. ULLMAN. I think the gentleman misunderstood me because I——

Mr. CUNNINGHAM. The only thing is that that same principle applies to mail dumped into my mailbox. So, there is no censorship. I have a right to protect my children.

Mr. ULLMAN. I completely concur in this and this is the approach that I said we should be taking. The questionable matter is whether the Government should actually get into the area of censoring mail that is put in the mailbox. But I completely concur with the approach that this committee has taken in the past.

Now we should carry it one step further and put the burden on the sender and put the Postmaster and the Justice Department into

the business. If there is a violation of this request of the individual there will be automatic action taken.

Mr. NIX. Mr. Dulski.

Mr. DULSKI. Thank you, Mr. Chairman. I welcome my distinguished colleague to this committee and thank him for giving us the benefit of his opinion. I am pleased that so many sponsors have introduced bills in the House. It indicates that something has to be done in this field.

We do not want to get into censorship. The chairman of this subcommittee has done an outstanding job in holding hearings and trying to get all the witnesses so we have all the facts before us. And when the bill is finally reported I am sure it is going to be upheld by the Supreme Court.

I just want to welcome you and thank you for your contribution.

Mr. ULLMAN. I want to congratulate you for your efforts along with the chairman, a distinguished lawyer who has been very active in the field.

Mr. NIX. Mr. Daniels.

Mr. DANIELS. I have no questions, Mr. Ullman. I do, however, welcome you to this hearing and also I would welcome your support in this matter which deserves the serious attention of Congress. So we are happy to have you with us.

Mr. ULLMAN. Thank you. My committee is taking up the very mundane matter of unemployment compensation this morning in an open hearing, but the reason I am here is because I think this is such an important matter and I want to lend whatever support and encouragement I can to your chairman in your proceedings here.

Mr. NIX. Mr. White.

Mr. WHITE. Thank you, Mr. Chairman.

Mr. Ullman, I wonder if you had considered the possibility of going a little bit further and making solicitors using advertisements through mails mark their envelopes with some type of symbol or wording to indicate that it is of this sexually oriented material?

Mr. ULLMAN. I certainly would concur in that kind of procedure.

Mr. WHITE. Would you know of any constitutional prohibition against that?

Mr. ULLMAN. I would assume that this committee would examine that problem and I am not prepared to discuss it.

Mr. WHITE. I do not know myself. That is why I asked if you knew.

Mr. ULLMAN. I presume that this committee would write language that would be constitutional in that regard. I think that the people who run the U.S. Government and determine its duties in delivering the mail certainly would have that kind of authority.

Mr. WHITE. One other question. You made one statement toward the last that you feel that those who violate it should be precluded from mailing. Does your bill provide for an injunction or prohibition from using mailing if in violation, or for jailing and fine?

Mr. ULLMAN. It is first an injunction proceeding if there is a violation. The postmaster learns about it and then he turns it over to the courts to take action in an injunction. So you have an injunction shutdown of that mailing because of a violation of a statute, and then beyond that, there are criminal proceedings.

Mr. WHITE. Is this prohibition by injunction against any mailing, or just mailing of this nature.

Mr. ULLMAN. Any mailing that would be sexually oriented.

Mr. WHITE. Thank you very much.

Mr. NIX. Thank you very much.

Our next witness is the distinguished gentleman from Florida, Congressman Paul Rogers. I want to welcome you and express our great pleasure in having you appear.

TESTIMONY OF HON. PAUL G. ROGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. ROGERS. Thank you, Mr. Chairman.

Members of the committee and Mr. Dulski, chairman of the full committee, I appreciate being allowed to testify and I will not take much of your time. I would like permission to file my statement at this point.

Mr. NIX. Without objection, so ordered.

(The statement follows:)

STATEMENT OF HON. PAUL G. ROGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman, I appreciate very much the opportunity afforded me by the subcommittee to appear in support of H.R. 10867 and related bills which would exclude from the United States mails, as a special category of nonmailable matter, certain obscene material sold or offered for sale to minors.

I heartily endorse the effort and attention that this committee is giving to the problem of obscenity, and particularly the use of the United States Mails to distribute pornographic materials to minors.

Numerous complaints, some with samples of this smut literature, have been forwarded to my office from irate constituents who do not want the material for themselves, and more important, do not want it to fall into the hands of their children. They regard the material as appealing to their prurient interests and utterly without redeeming social value, yet this literature is being sent unsolicited to millions of homes throughout the United States, and the vehicle for this promotion is the United States Mails.

I believe that the Congress must move swiftly to meet this problem and I do not share the views of some who say that the Congress does not have the power to regulate such activity.

I further believe that the legislation presently being considered by this subcommittee, which I had the privilege to co-sponsor, represents a responsible, constitutional approach to solving the problem.

Recent decisions of the United States Supreme Court have held that obscenity is not within the area of protected speech and press under the First Amendment to the Constitution, yet many of the convictions have been reversed because of vagueness in the wording of an ordinance or statute, or because of the law's ambiguity.

However, the 1968 case of *Ginsberg* v. *New York* (390 U.S. 629) was encouraging because a New York State statute designed specifically to protect minors from objectional material was held consitutional. In that case a purveyor of pornography was convicted of selling a magazine containing pictures of nudes to a 16 year old boy. The rational of the Court was that the sexual effect of such material upon children will frequently be different from its effect upon adults, and that the New York State legislature could properly make such a distinction in the obscene character of literature for adults and for children.

The New York State statute precisely defined what material of this nature is "harmful to minors" and the state was able to enact the law pursuant to its power to protect the health, safety and welfare and morals of its communities. I submit that Congress, through its power to regulate the mails and interstate commerce, can also legislate to protect the children of this nation from receiving such material, and I believe the bill before the Committee accomplishes this goal.

Under this bill the textural material which would be barred would include books, magazines and other printed material and also sound recordings which contain "explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse" which taken as a whole is harmful to persons under 16 years of age.

Moreover, the terms "nudity," "sexual conduct," "sexual excitement" and "sado-masochistic abuse" are defined in this bill in explicit terms.

Mr. Chairman, I think it important to stress that to the smut peddlers, the use of the mails and the facilities of interstate commerce are essential to their business. It is estimated that 95 per cent of the more than 200,000 complaints received in fiscal year 1969 by the Post Office Department resulted from direct mail advertising of perhaps fifteen major promoters. They have adopted mass mailing techniques including the use of mailing lists obtained from a wide variety of sources. Such lists contain, for the most part, names of people who do not want this kind of mail and would like to see the practice of sending it to them stopped.

They can be stopped if the mails and facilities of interstate commerce are closed to them, and this legislation will contribute significantly to closing of these access roads into American homes to the billion dollar pornography industry.

In closing, Mr. Chairman, I would like to make one further point concerning the relationship between the spread of pornography and juvenile delinquency and crime. There is strong evidence that a causal relationship exists. The New York Academy of Medicine's Public Health Committee stated in an article published in 1963 in the Bulletin of the New York Academy of Medicine,

". . . although some adolescents may not be affected by the reading of salacious material, others may be more vulnerable. Such reading encourages a morbid preoccupation with sex and interferes with development of a healthy attitude and respect for the opposite sex. It is said to contribute to perversion. In the opinion of many psychiatrists, it may have an especially detrimental effect on disturbed adolescents. It may be postulated that there is a correlation between an increase in teenage venereal disease and illegitimacy and the apparent rise in the sale of salacious literature."

Thank you very much, Mr. Chairman, for the opportunity to appear before the Committee in support of this legislation and I sincerely hope the Committee will favorably report this legislation shortly.

Mr. ROGERS. As I think you know, Congress is looking to this committee to bring out some legislation. Members have been flooded in their officers, as each of you has and certainly I have, with examples of this pornography that is going all over our country. It is absolutely amazing the amount of increase in this type of mail.

Now, I do not think we need to be too hesitant about putting some provisions in just because the courts may determine it unconstitutional. I think we need to buoy them up and give them a little backbone and I think they will take some direction from the Congress.

As you know, courts change, even the Supreme Court. It is in the process of being changed now. Certainly we want to adhere to the Constitution but we want to give some body and direction to the Court and that is what I think this committee can do and the Congress can do; give them some direction on what we ourselves feel is permitted under the Constitution of the United States, speaking for the people of this Nation.

I am not going into the details of the items you have described, but I would like to suggest to the committee that you might want to look into the possibility of putting a real burden on the mailers of pornography.

Instead of doing it in a negative way, instead of saying, well, if someone does not want it in their household where the whole family is exposed to this, they must notify the postmaster and the Postmaster General and then he makes up a list; why not have a provision where anyone who puts this mark on their mail, which I hope

would be required on the envelope as Mr. White has pointed out earlier, anyone that plans to put such a mailing into the post office would be required at the time of that mailing to certify and offer proof that each person to whom that material is mailed has specifically asked for it.

In other words, I do not know why we cannot go to the point of putting a burden on the mailers. There are about 15 major companies involved. The Post Office could very quickly identify these.

The present thinking is that they must get a list from the Post Office. Well, why not make them furnish the Post Office a list of people who have asked. It could be held in confidence. But the Post Office could check this and it seems to me the more of a burden we place on these people the better. We are not preventing them from mailing anything as long as they have someone asking for this type of material. In effect, we take a positive approach on this rather than a negative. I hope the committee would consider this and go into the possibilities of placing more and more burden on the man that is going to flood this Nation with this type of material.

Mr. DANIELS. Would the gentleman yield at this point?

Mr. ROGERS. Certainly.

Mr. DANIELS. Don't you think you run into a question of constitutionality if you do that?

Mr. ROGERS. I think it is possible. It is possible.

Mr. DANIELS. Don't you and I have the freedom of writing a letter expressing our opinions to anyone else? The main question or issue that will arise here is what do you deem pornographic or obscene and what do I view as pornographic and obscene. It may not be the same.

Mr. ROGERS. I understand.

Mr. DANIELS. You are getting into the decisions of the courts.

Mr. ROGERS. I would like to see the committee go into this and I think some study would have to be given as to how far it could go, and perhaps put a provision in the law, an alternative here, so if this were declared unconstitutional at least let's try it. If it is declared unconstitutional, put in a provision that the rest of the provisions of the bill would not be unconstitutional if one certain section were declared unconstitutional.

Mr. DANIELS. I think the reason why the other procedure that you refer to as the negative procedure has been suggested is because of the fact it preserves the right of due process. Many of these cases have been thrown out—or the decisions of the trial courts or convictions are reversed because of the fact that the defendant has been denied due process.

So the idea here is first to give them a hearing or give them an opportunity to go to court, and then the matters are threshed out in court and the court makes its decision.

Mr. ROGERS. This could still be done by saying you must give us a list of those people who have asked you or certified that all of these mailings have come about from people who have requested this material.

We are not stopping people from getting it or mailing it to anybody who wants it. We are simply saying it is a congressional determination that this type of material ought not to be injected in the privacy of a man's home.

Mr. WHITE. Would the gentleman yield?

Mr. ROGERS. Yes, sir.

Mr. WHITE. In a sense, you are accomplishing the same thing if you eliminate entirely any unsolicited advertising by mail whether you require a list of people to be provided to the postmaster or any other agency or not. If you say there shall not be any unsolicited mailing of sexually oriented material and then define what you are talking about, would not this accomplish the same result, because each prosecution would rest on its own merit?

Mr. ROGERS. This is like saying every man is entitled to one accident. He can kill somebody one time before he gets insurance. This is what I would hope a positive approach would prevent. But more than that, it would put such a burden on these companies that I think they would finally determine it is not too attractive for him to continue in this type of operation. That is what we are going to have to get at.

Because as you know and I know, they can always try to find some loophole to get by unless we start putting this burden on them in the initial stage.

Mr. WHITE. What you are falling into, though, is an invasion of privacy area because those who are asking for this material might feel that if you advised the government of their names then——

Mr. ROGERS. You may just want to make him certify and be subject to proof in a court if you take him into court.

Mr. NIX. Mr. Dulski.

Mr. DULSKI. Thank you, Mr. Chairman.

Paul, I am very happy to see you here this morning because I know the great interest you have in this legislation.

I welcome you to the club of those who sponsored this legislation. I commend you for speaking on the House floor about the distribution of these objectionable materials in your district. I agree with you that we should take a positive approach and let the burden of proof lie on them. We are constrained somewhat on this question of legality meeting the standards of the Supreme Court.

By the time this committee reports out a bill, I assure you that it will be a bill that will stand up in court.

Again, Paul, I am very happy to welcome you here this morning.

Mr. NIX. Mr. Cunningham.

Mr. CUNNINGHAM. I have always been one that said we should pass legislation and not bring in this constitutional problem that we might run into, but as long as you brought it up, there is some question in my mind, even though I introduced this legislation along with the other members of the committee—that this item would withstand the court test.

The one bill that all of you helped me with, is going to stand the test of the courts. It already has in the Federal district court in California.

You said earlier you have had many many letters complaining about this. I would make a suggestion that you take this effective tool that we now have—and explain this to your people and enclose one of these post office form 123's. I did that in a mass mailing and I got tremendous numbers of people who took advantage of it. They did not know about it. That is our big problem.

Mr. ROGERS. They do not know how to handle it.

Mr. CUNNINGHAM. They do not even know it is there. That is why I have gone around the country talking about it.

Mr. ROGERS. That is a good suggestion. Of course, we have advised those people who have written us of this type of thing but I have not put it in a newsletter and I think that is a good suggestion.

Mr. CUNNINGHAM. I made a mass mailing and I even had to buy these—the Post Office gave me a few, but I had to buy some. This was my way of getting my message out and the tool that is available for them to use.

Mr. ROGERS. Let me just suggest to the committee one more thing. We are seeing a great change in our whole attitude on protection of the consumer in this country. The Federal Trade Commission and FCC—the FCC has even come out saying on the radio and television there shall be no advertising of cigarettes. Now, for what? For the protection of the health. Now, if this is tied also into health on the basis the Federal Trade Commission is going in and saying if there is going to be advertisements in the newspaper or any newspaper they have got to put certain warnings—they have got to do certain things—and it is being upheld by the courts. Now, this is a change in attitude.

What I am saying is you may want to broaden this also because it affects the health of the Nation in the crime area. This could be explored I think to lay a broader basis for a foundation to put a greater burden on these people. I think you are going to find if we will go ahead and act, and act in a decisive manner, we may be surprised as to what the courts may agree to if the Congress itself goes ahead and takes a positive approach in doing this.

Mr. CUNNINGHAM. I want to follow up on what Mr. White said. I sponsored and had passed as you remember, Paul, this bill to stop the free delivery of Communist political propaganda through the mail. A known Communist in New York brought an action against that bill and it was declared unconstitutional by the Supreme Court. The real guts of their reasoning was—and the point they made—was that the Post Office Department kept lists. The idea was that if you received Communist political propaganda you were to write the Post Office Department and say I do not want any more of this.

The Post Office Department did not follow up that directive. If you wrote in once, they kept a card file on you and they would not send you any more. The Supreme Court knocked out that bill on that very principle.

So that is why we have to be careful about the constitutionality.

Mr. ROGERS. I realize that, but I think still we have not tried to put the burden on the mailer. We have not been able to get a good definition of obscenity before. If we can do that, and the language is pretty explicit in here—although you may want to tighten it up a little more—but certain materials, particularly where there are pictures involved of specific acts, I think this could be clearly described and made constitutional and determined by the Congress that this is not the type of material we want to inject into the privacy of the people's home—then, I think you can require the mailers to come in and say before I mail this I have had a request.

I think it could be worked out if the committee has the time to go into it.

Mr. CUNNINGHAM. I just have one observation, if you would permit.

Mr. NIX. Yes.

Mr. CUNNINGHAM. There has been a tremendous flood in the last few months, much more than before, and I think these list brokers and

the purveyors of smut material see the handwriting on the wall. They are going to get all the business they can because this law has been upheld in Federal District Court. I think that is why we are getting this big flood right at the moment. They are just going to milk this for all they can because I think they feel that they are doomed. Even an American Civil Liberties Union man told a friend of mine that he thinks that there is no question about the constitutionality of the legislation referred to above.

Mr. DULSKI. Mr. Chairman.

Mr. NIX. Yes, sir.

Mr. DULSKI. Paul, I agree with the train of thought you expressed, let's take the positive approach. I have noticed in our city of Buffalo, the mayor and the attorney for the city put a closeout on a theater that was showing "I Am Curious (Yellow)." You know what they wrote? "Supreme Court says nudity is not obscenity." Have you seen that?

Mr. ROGERS. No.

Mr. DULSKI. They have it right in the advertisement that the Supreme Court found nudity was not obscenity. Where they got it, I do not know, but I was rather curious to find out. I do not know.

Mr. NIX. Our next witness will be the Honorable William Whitehurst, Representative from the State of Virginia.

TESTIMONY OF HON. G. WILLIAM WHITEHURST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. WHITEHURST. Mr. Chairman and members of the committee, thank you for giving me the opportunity to testify on a problem that concerns me deeply; the increasing traffic in sexually oriented material being transported through the U.S. mails.

Past Congresses have attempted to deal with this subject, and if the current situation is evidence of the results, they failed. There must be a solution to this problem, and I am hopeful it will be found by this committee as a result of these hearings. The peddlers of filth must be stopped.

If you or I, as adults, receive sexually provocative material in the mail, it might offend us, but if such material falls into the hands of our young people, it could prove harmful. As all parents are aware, one of the traits of adolescence is a strong interest and curiosity concerning sex. It is at this time that our youth are particularly vulnerable to this filth. Those of us who are parents are interested in providing our children with wholesome and factual information and guidance. As Members of Congress, we are in a position to eliminate at least some of the unwholesome material that might otherwise be available to them.

The postal obscenity law (19 U.S.C. 1461) reads as follows:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and . . . Is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

At first glance, it would seem that the problem is solved, but as we all know, it is not.

Many questions remain unanswered in defining the terms used in this law, and as a result, a flood of cases have been brought before the Supreme Court as tests of the constitutionality of section 1461.

When we seek to control material that goes to our citizens, regardless of how distasteful it may be to us personally, we must consider the first amendment to the Constitution guaranteeing freedom of speech and press.

In *Manual Enterprise, Inc.* v. *Day* (370 U.S. 479), the Supreme Court determined that matter cannot be excluded from constitutional protection unless it is "utterly without redeeming social importance" and that "the portrayal of sex * * * is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."

As a result of this case and other cases involving movies (*U.S.* v. *A Motion Picture Entitled, "I am Curious-Yellow"*), books (*Memoirs* v. *Mass.* 383 U.S. 413; "Fanny Hill"), and other material, the Supreme Court has determined that three tests must be applied before matter may be considered as legally obscene and without protection under the first amendment of the Constitution. They are:

1. Is the material patently offensive?
2. Does it appeal to prurient interests?
3. Is it without any redeeming social value?

These three tests must be applied independently.

Under these criteria, there have been few enforcements of section 1461, and instead of the traffic in sexually oriented material diminishing, it is on the rise.

In an attempt to deal with this problem, the 90th Congress passed a law, which became effective on April 14, 1968, to serve as a tool in fighting the spread of pornographic material. Under this new law (sec. 4009 of title 39 U.S.C.), those receiving offensive mail must return the matter, including the envelope, to the postmaster along with a statement that he considers the material erotically arousing or sexually provocative and that he does not want to receive the matter again. Of course, we may always refuse to accept a letter, but the new law is useless if parents do not receive the mail.

The problem we are attempting to solve is obviously not a simple one. The legislation being considered by this committee represents divergent views and avenues of approach. However, in view of the past attempts at dealing with this situation, I do not believe additional legislation along the lines of what has been done in the past will be effective.

It appears to me that we face three problems in coping with this situation:

1. The apparent high profit in pornography,
2. The question of constitutionality, and
3. The identification of the material for the purposes of section 4009, title 39, United States Code.

These three points are covered in my legislation. Additionally it quite properly shifts the burden of proof from those receiving the material to those mailing it. H.R. 13372 will first require that all sexually oriented material be identified as such on the outside of the envelope. Second, it will require that all such material be sent first-class registered mail. This will allow the material to be easily identified. and the signature required for registered mail will eliminate the possibility of its being left in the mail box.

Those caught violating these provisions will be subject to a fine of up to $10,000 and imprisonment for up to 5 years, or both.

Mr. Chairman, I believe H.R. 13372 deals directly with the problem at hand, without infringing upon anyone's freedom of speech or press.

Thank you again for giving me the opportunity to speak on this subject, and I certainly hope you will give my bill favorable consideration.

Mr. NIX. Thank you, Congressman, for your statement.

Our next witness will be the Honorable Watkins Abbitt, Representative from the State of Virginia.

TESTIMONY OF HON. WATKINS M. ABBITT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. ABBITT. Mr. Chairman, I am extremely interested in and concerned about the subject of pornography which is presently being considered by your subcommittee. I am particularly interested in the approach to this problem as provided in my bill, H.R. 13980, but feel that there are many other possibilities for dealing with this serious threat to the moral fiber of America.

I commend your subcommittee for its diligence in going into this problem and hope and trust that you will come up with an effective bill that will deal forthrightly with what I consider to be one of the most serious problems facing our country today. History has shown that great nations have most frequently faltered when the morals of their citizens became corrupted and I am convinced that there is more than simply a commercial interest in the dissemination of pornography in our country today. This is indeed a gigantic business enterprise inasmuch as estimates of the total annual cost of pornography in America vary from $500 million to over $1 billion. The Post Office Department in fiscal year 1968 received over 160,000 complaints about obscene mail and during the first 11 months of fiscal year 1969 the Postmaster General has reported that more than 200,000 such complaints were received. I think it is only fair to assume that many people who receive such material do not formally complain so the total output must be much greater than these figures indicate.

Those of us who have seen some of this material are aware of the incredible boldness with which it is presented and we, like many of the citizens we represent, are outraged at the continued expansion of the pornographic industry.

Sometime ago I introduced H.R. 6186 which is now pending before the Subcommittee No. 3 of the House Judiciary Committee where consideration is being given to similar bills which would prohibit the dissemination through interstate commerce or the mails of materials harmful to persons under the age of 18 years. I am hopeful that we can get favorable action on that legislation but in addition to this I feel that some legislation directly aimed at the pornographic business itself is most necessary. H.R. 13980 and other similar bills would, I believe, provide the vehicle for transferring the burden of policing such materials from the Post Office Department to the promoters themselves. It is estimated that 95 percent of the complaints received

by the Post Office Department result from direct mail advertising of the 15 major promoters. They have adopted a mass-mailing technique including the use of mailing lists obtained from many different sources.

These lists contain for the most part names of people who do not want this kind of mail and are now demanding that Congress do something to stop it. Obviously the purveyors of this pornographic material depend to a large extent on the use of the mails in order to promote their business. If the mail facilities are curtailed or limited in some way, they no longer will be able to distribute enough material to make their operations profitable. It seems to me that this is the only logical way that we can approach the problem in view of the Supreme Court decisions which seem to give aid and comfort to those who care very little about the moral fiber of the Nation.

I frankly do not believe that under the present laws and the interpretations by the courts we will be able to do much about policing the content of the material itself. The legal standards for establishing the obscenity of material are not set forth in detail in Federal statutes but have been laid down by the Supreme Court in a series of decisions which leave much to be desired. Nevertheless, until such decisions are overruled they are being used as the basis for denying legal redress and we need to look at this realistically.

The type of material which is now being widely circulated in my district and in other places throughout the country is disgraceful. The character of such advertisements would in fact be questionable if they were actually requested by the people who receive them. They are even more objectionable when they are mailed indiscriminately to addresses without regard as to who is likely to open them and be affected by them. I am convinced that the lowering of moral standards in the United States today is to a large extent attributed to the wide dissemination of material of this kind and those who are the promoters of such smut material appear to care little about the end results. It is high time that somebody step in and take a stand on it and I feel that the Government should do this. It is utterly ridiculous that the Government mail should be used to promote this sort of operation. It is perhaps impossible to stamp out pornography as such and it is questionable whether we could do this constitutionally anyway. Those who publish and distribute the pornographic books, magazines, films, and so forth will insist that they have a right to conduct their business no matter how degrading it is to the Nation. It is, however, within the constitutional rights of Congress to regulate the use of the mails for this purpose. If a person contacts one of these distributors and orders such material, both he and the distributor would have a legal right to engage in such business. However, the householder who receives such advertisements, unsolicited, in the mails has a clear right to object to any right which the Government bestows upon the mailer to send this material to his home.

The purpose of my bill would be to attack the pornography-in-the-home problem by prohibiting the use of the mails to send sexually provocative material (1) to any home whose householder has not asked for them and (2) to a minor in any State having laws against dissemination of obscene materials to minors. My understanding is that 36 States and the District of Columbia now have such laws.

The bill would place the administrative workload on the promoters of pornographic material rather than on the Post Office Department or the Department of Justice. Under the terms of the bill, a system would be set up where the advertiser must obtain the permission of the recipient before mailing the offensive material. It prohibits altogether the mailing of offensive material to minors where the minors' State of residence has a law prohibiting such dissemination but does not prohibit the mailing of sexually oriented material to persons ordering it for themselves. It seems to me that this is a better approach than one which would require persons who do not want to receive such material to file a statement with the Post Office Department. The latter would put the burden on the recipient, whereas my proposal would shift the responsibility to the people who should bear it.

I do not believe that we can take this problem lightly. In these days when we are battling the problems of juvenile delinquency, organized dissent and widely spread crime, we must realize that this problem of pornography is an integral part of the deterioration of moral standards. It is true that Congress cannot legislate morality. We do have an obligation to those who are outraged by the unsolicited mailing of such material to their homes. All of us have received quantities of this material from our constituents and we are aware of the scope and seriousness of the problem. It does not require any exhaustive examination of the facts; we know what they are. The question is whether Congress is prepared to forthrightly attack the problems. I hope that this will be done. In my opinion the overwhelming majority of the American people not only support us in this effort but will feel that we have reneged on our responsibility if we do not take corrective action.

Mr. Nix. Thank you, Congressman Abbitt for your contribution.

The House is about to go into session. The subcommittee will stand adjourned, subject to the call of the Chair.

(Whereupon at 12 noon, the subcommittee was adjourned, to reconvene at the call of the Chair.)

OBSCENITY IN THE MAILS

THURSDAY, OCTOBER 9, 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 210, Cannon House Office Building, Hon. Robert N. C. Nix (chairman of the subcommittee) presiding.

Mr. NIX. The subcommittee will be in order.

We are here today to take up the fight against obscenity once again. A great part of the obscenity produced today goes through the U.S. mail. This then is a Federal interest, since it is a Federal institution that serves as the mass distribution system for a type of material that is violently opposed by almost all family mail patrons. The material that is present on newsstands today is primarily the concern of State and local governments.

If a door-to-door salesman insisted on entrance to the average American home, a city ordinance could bar him from such entrance. The Green River ordinances have been upheld by the U.S. Supreme Court. Legislation dealing with intrusion into the home through the mailbox may be regulated as well.

This intrusion may be best understood by an example furnished the subcommittee by a Member of Congress. A person living in the Midwest sent him a boxload of material made up for the most part of advertising brochures which proved to be obscene, and illustrated homosexuality and unnatural and sadistic acts. There were at least 35 of these individual advertising folders enclosed in unopened envelopes. The mail patron was right in not opening this material and forwarding it to Congress. Enclosed in this mass of material was a well-known magazine entitled "Scientific American." Two issues of the magazine were included and unopened. The mail patron had received a gift subscription and missed the opportunity to read these magazines because of the trouble he had in sorting through garbage mail. He had been right about the content of the advertisements and material forwarded to him in all but two items out of 27.

What about his freedom to read? What about his right to receive decent material? Will he be obliged in the future to refuse all of third- or second-class or all of his mail in order to avoid an insult to himself, his wife, or his family? Why should not such a man have a remedy in the law to protect his home and his mailbox from this type of material? Does the publishing industry have the right to demand that their advertising, whether it be good, bad, awful, or pornographic be read and analyzed? I do not think so.

There should be a means of protecting these Americans who do not want advertising illustrating male and female sexual organs, homosexual acts, sadistic acts, or massive acts of intercourse. It may be true that advertisers cannot express themselves in any other way. That is just too bad. They are not going to express it in American homes in that way any longer unless they are welcome.

Our first witness today is one of our distinguished colleagues from the great State of Ohio—I want to express our pleasure at having him here—the Honorable William E. Minshall, Member of Congress from Ohio, accompanied by Mr. Edward Harris and Mr. Louis P. Hehman, International Rotary Organization.

Gentlemen, we welcome you, and you may proceed, sir.

TESTIMONY OF HON. WILLIAM E. MINSHALL, MEMBER OF CONGRESS FROM OHIO; ACCOMPANIED BY EDWARD HARRIS AND LOUIS P. HEHMAN, INTERNATIONAL ROTARY ORGANIZATION

Mr. MINSHALL. Mr. Chairman, distinguished members of the subcommittee, I am pleased to appear before you this morning. I very much regret that Mrs. Jeane Dixon, who had hoped to testify at yesterday's postponed hearings, had a long-standing commitment for this morning which prevents her from appearing with me. You are all acquainted with Mrs. Dixon's deep interest in the welfare of youth and her tireless efforts in behalf of her children-to-children program.

I had hoped to have her with me since, frankly—and this is no reflection on the yeoman efforts of this great subcommittee—I felt that these very important hearings have been sadly neglected by the press. Mrs. Dixon was—and is—most anxious to lend her famous and highly respected name to our efforts to wipe out pornographic material which corrupts our youth and taints the future of our Nation. More people should know about these hearings and the splendid work you are doing in trying to resolve this increasingly alarming problem.

It is a pleasure to have with me two gentlemen from Cleveland who have played a major role in alerting fellow Rotarians across the country to the obscenity issue—Mr. Edward B. Harris, and Mr. Louis P. Hehman, who will present their testimony to you a little later this morning.

I wish to urge your very serious consideration of my bill, H.R. 7742. It is a companion bill to my good friend Henry Schadeberg's and would require mailing list brokers to register with the Postmaster General. Suppliers and buyers of mailing lists would have to furnish certain information to the Postmaster General regarding their identity and transactions involving the sale or exchange of mailing lists. Members of my own office staff, as well as numerous constituents, have had the experience of subscribing to perfectly innocent publications or of ordering an item from a mail order house and suddenly finding their names on a dozen or more mailing lists, some of them dealers in pornography.

Thanks to legislation introduced and fought for by our colleague, Glenn Cunningham, laws were put on the books in 1967 giving a person who received unsolicited, salacious material the right to ask the Post Office to see that the sender removes his name from the list. This

does not, of course, forestall similar solicitations by mail from other pornographers. The burden of stopping this unwelcome mail is entirely upon the recipient.

My H.R. 7742 would inhibit the rampant abuse of address list sales to marketers of muck. As you know, smut mailers pay an extremely high price for the names of youngsters between 10 and 16, the most impressionable age group of all. I am extremely concerned about the effect these shocking advertisements—to say nothing of the movies, books, photographs, and other products sold by mail—have on these young people.

I would be remiss if I did not also add a word of support for Congressman Cunningham's bill, H.R. 6200, to take away from pornographers their second- and third-class mailing permits and the right to send material by fourth-class rates. A great deal of the profits would vanish from the despicable business of peddling pornography.

For the record, and to reveal a cross-section of opinion from the 23d District of Ohio which I have the honor to represent, I wish to include excerpts from letters I have had from constituents vigorously protesting the smut mail invasion of their homes. These are only a few of many, many hundred similar letters I have received since the first of this year.

Westlake mother, April 25, 1969:

I am writing to you as a concerned and somewhat frightened parent of two lovely and intelligent children, ages 12 and 14. I am at a loss to understand the newest trends in morality. I am not biased, unreasonable or inflexible. But I am frightened and concerned for the future of our young people. I feel that my rights have been violated. The purveyors of pornographic material have invaded my home. I looked around for protection and there is none. The purveyors are protected by law but I am not. The best I can do is to have the Post Office remove my name from the senders' mailing list. What consolation is this? One must receive the material first before one can be removed from a list. What is to prevent my children from receiving such material for the "first" time?

Cleveland businessman, Sept. 3, 1969:

Enclosed in a sealed envelope, to save your secretaries embarrassment, is the detestable pornographic advertising received here. We urge you to do whatever you can to stop this kind of unsolicited mail being delivered to the home or office. We urge you to institute and support on our behalf legislation to eliminate this filth from our public mails.

Parma man, Sept. 3, 1969:

This is the second time I have received one of these in the mail. If ever some young child or teenager should open this, it would be very embarrassing. I would like to see something done about using our mail service for such rubbish. What can you do to stop this, or how can I help you in doing so. Our board of trustees, members of St. Bartholomew Church in Middleburg Heights, think it is very disgusting to have such literature in the mail if any teenager might receive it by chance.

Lakewood dentist, August 25, 1969:

This is a sample of the smut we are being subjected to in the mail. There is no way to identify this filth except to open it. Would you like this to come to your home and have your wife or daughter innocently open it?

Maple Heights grandmother, August 10, 1969:

My grandson will be trudging off to kindergarten in a few weeks, the first steps out from the sheltered safety of his baby days. He enjoys visits to the library with his mother and returns home with books suited to his age. As he learns to read by himself, his eager mind will absorb more. And as he grows

up, the smut, the pornography that is unchecked will be all around him. I do not have much of worldly goods to give him, but for him and for other youngsters of this day, I would like to think that the world they will inherit from us is at least as clean, as moral for them, as it was for us at their age. *There is a dignity to mankind.* Please try to preserve some of it by curbing the money-hungry smut peddlers.

North Olmsted parent, July 16, 1969:

This trash was sent to my 18-year-old son in the mail. To the best of my knowledge he did not ask for this. I believe it is long past due that we have a reform or a penalty imposed for sending this type of mail.

Parma Height husband, July 27, 1969:

I am enclosing literature my wife received in the mail. We are not prudes, but I have never been so shocked or disgusted by anything before. If this isn't pornography, I don't know what is. I am very angry at the high cost of keeping our Postal Department in operation at the expense of the taxpayer to deliver filth and trash like this.

Cleveland executive, May 28, 1969:

As vice president of our firm, I feel it is my duty and obligation to express our objections to the obscene and embarrassing literature we received recently through the mail. In my particular case, my middle initial was incorrectly addressed, however, I do receive other mail and literature with the same error and this is the way my name appears in several business mailing lists, such as Dun & Bradstreet, Thomas Register, etc. Apparently the publishers of this immoral type literature have obtained such a mailing list for their distribution.

Parma businessman, May 1, 1969:

Since these people are using the U.S. mails to distribute this trash, is there some way the federal government can either stop this or raise the postal rates for bulk mailing that would make it uneconomical in its distribution.

Parma mother, March 22, 1969:

Enclosed please find dirty literature that was sent to my home without my consent. I do not know how they got my husband and I. We have four teenage children who we are truly trying to raise to respect all things in life. Imagine our dismay when we received such dirt.

Lakewood insurance man, March 9, 1969:

The enclosures are excellent examples of the smut mail to which your proposed legislation refers. Use it as you wish. Sure we are 50, but are not prudes. What irritates even more than having to get such mail is that we are totally unable to stop it arriving at our mail box.

Cleveland mother, March 12, 1969:

Attached are copies of literature I received in the mail, unasked for and most definitely unwanted!! What else could you possibly call this trash that was mailed to me without my consent, knowledge or solicitation but out-and-out pornography? I am angry, disgusted and resentful, as well as shocked and bewildered how such absolutely disgusting and depraved literature can be sent through the mail.

Cleveland churchman, February 8, 1969:

I am enclosing something that is disgraceful to mail to anyone. I am an elder in my church and my wife was sick all day when she glimpsed this trash. I cannot understand how any country could condone and permit such trash to be sent through the mail. Surely there must be some way of curtailing such a practice. I also sent these to the Cleveland postmaster.

Berea man, February 23, 1969:

We are incensed at receiving such a bawdy advertisement through the mail. We hope Congress will be able to take some action in the future to control the pornographic traffic. This problem is just as serious and harmful to the minds of our youth as is the drug problem.

Cleveland father, April 21, 1969:

Enclosed is material addressed to the 10-year-old son of one of our secretaries. I realize that you are working on a bill for restraint of this type of material and feel that this may assist you.

Mr. Harris and Mr. Hehman have no prepared statements, but they are ready and willing to respond to any questions you might have. They do have some exhibits and other material that they would like to leave with the committee for your files.

Thank you, Mr. Chairman, for your consideration.

Mr. NIX. Thank you, Congressman.

Mr. Harris, you may proceed.

Mr. HARRIS. Mr. Nix, I would like to give you a little background of how I got interested in this issue. This started back on January 10, of this year. I am the president of the Safety Clothing & Equipment Co. in Cleveland, Ohio, and past president of the Cleveland Rotary Club. We get, in our business, several of these pieces of pornographic material. And, like most people, we throw them in the wastebasket. But on January 10, my partner's 23-year-old daughter received through the mail this pornographic material from a company called Cybertype. And in this, it says: "Your new world of sexual power, exclusive dynamic intercourse, available only from us—nowhere else in the U.S.A."

When I read this, it made me mad. Here is a young girl. How did they get her name? It came off a mailing list.

I called the post office to find out exactly what could be done. They told me, as all the post offices will tell you, that you send the material to them with the actual name on it and they will in turn get in touch with the people who sent it. They will take the name off of the mailing list or else they will be prosecuted.

Well, I said, "This is good enough, but it is still not going to stop them from doing it and sending it all over the country." I said, "What else can I do?"

He said, "Well, why do you not write to your Congressman and Senator and Governor, telling them about it." And this, I did. And when I wrote to Congressman Minshall who is my Congressman, he told me about the two bills that he had, one before the Post Office Committee and one before the Judiciary Committee.

And I said, "Well, what can I do?"

He said, "Well, you can work through your Rotary Club on this."

And I said, "That is a good idea because I happen to be on the Community Service Committee. What I am going to do is actually purchase this material so that I can show it to them and show exactly what is coming through the mail."

I have here the first mailing, this one book called "Dynamic Intercourse," which leaves nothing unsaid. They were getting around the actual showing of pictures by having the type of print where you could transpose the picture of the man on the woman.

They also had one called the "ABZ of Love," which was written over in Sweden. This, they advertise as $18, and you got it at $9.98.

This happened back in March. After I got this, I took it before the Rotary committee and they all agreed that something should be done. We, as a Rotary Club, cannot say one thing as far as politics go because we have Democrats, Republicans, and Independents, but

when you come to sex and morality, it is something that concerns everyone. We agreed that the only way that this can be done is through the halls of justice. So as a result of our meeting, we placed this before the board of directors of our Rotary Club, and they agreed that a letter should go out under my signature as chairman of this subcommittee. I want to read this letter to you if I may which went to our 700 Rotarians of Cleveland Rotary which is the third largest club in the world.

Fellow Rotarians:

The length to which pornography peddlers go is appalling to most decent citizens. There seems to be little we can do about it. But I urge you to help to do that little bit. It all adds up to a great total. There are numerous bills before Congress. Only one of them needs to be passed into law. Let's let Congress decide which one, but I urge you to write a short note to one of the Committee members asking him to do something, to do what he can to insure the writing into law of one of these bills.

Your Community Service Committee with board approval asks your assistance. Something like the following would do nicely or, better yet, put it in your own words:

"Dear Sir:

"The peddlers of pornography are literally running wild. Decent citizens deplore this situation. I urge your efforts to get some control bill through this Congress. Believe me, a host of the quieter majority will applaud you. Thank you for your concern and your efforts."

These letters were sent to the Honorable Emanuel Celler, chairman of the Committee on the Judiciary and the Honorable Thaddeus J. Dulski who is the chairman of your Post Office and Civil Service Committee. Over 150 of these letters went out.

In addition to this, just a few weeks ago, Mr. Raymond Gauer who will also be testifying before this subcommittee gave a talk on pornography before our Rotary Club. At that time, over 250 signatures were made by Rotarians attending that meeting demanding that something be done about this deplorable situation.

As a followup to these original books this same outfit—Cybertype Corp.—came out with their latest one which they said for the first time recent court decisions opened the door to hard-core books and photographs. And then it goes on to say: "Remember, this is all shown in over 120 full-color and black-and-white photographs, Oriental love, plus oral-genital intercourse, shows each man and everyone photographed in each and every position vividly and clearly."

This is part of the advertising they have. Here are the books. The ones on Oriental love here show actual pictures, as you might call them, sketches. The story that it has in there is like a fairy story to a great degree, but not these pictures which are certainly obscene in themselves.

The other book shows actual couples in all embraces of sexual intercourse. It goes into every detail about it.

I want to submit this to you. This is your property now which you gentlemen can examine and look at at your own leisure because this is what we are sick about.

I bring from the Cleveland Rotary Club the fact to a man, and I had several of them afterward give me pornographic letters that they had received and also material which I will submit, but not only Cleveland Rotary, but every Rotary Club throughout the country as well as practically every Lions Club and Kiwanis Club feel the same way as we do.

We hope you gentlemen can take action in doing something about it because if this thing continues, then the moral structure of our country is going down hill. What can happen to us is what happened to Greece and to Rome. Alexander Pope very aptly phrased it when he said, "Vice is a monster of such hideous mein as to be hidden needs but to be seen, but seen too often familiar with a face we first endure, then pity, then embrace."

Rotary has a four-way test:

(1) Is it the truth?
(2) Is it fair to all concerned?
(3) Is it beneficial to all concerned?
(4) Will it build goodwill and better friendships?

Gentlemen, I say that this type of literature meets none of these requirements. Thank you.

Mr. NIX. Thank you very much, Mr. Harris. I can assure you that this subcommittee is determined to formulate legislation covering this subject in the not-too-distant future.

Mr. Hehman?

Mr. HEHMAN. I am Louis P. Hehman, president of the Louis P. Hehman Co. of Cleveland, Ohio, and a past director of the Rotary Club of Cleveland. I have brought a number of ads that have been directed to me or to my company, none of which have ever been solicited nor have I ever sent for or received anything in the mail that was at my request. I would like to bring out a few things.

One is the new law. And on the most recent envelopes I have received, the following is printed: "This envelope contains an unsolicited, illustrated brochure offering for sale, to adults only, a new marriage manual. If you do not wish the mail or if you are not over the age of 21 years, do not open this envelope, simply mark this envelope 'Refused,' sign your initials, and return it your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank you."

I somewhat object to this because to me this is openly soliciting people to look at pornography. It arouses their curiosity. It does the same thing as an X rating on a movie. It draws the crowds. And I think in this case the Post Office Department is purifying the mailing list of a pornographer at our expense.

I do not see why we as citizens should be required to help pornographers sell. And that is what we do by saying that they do not have to waste the money mailing to the deadbeats. All they have to do is purify their list and sell directly to those interested. If something is pornographic, if something is illegal, it should be illegal being sent to anybody, not just those who do not want it. If we come out and say that it is illegal to send it to people who do not want it, we are in effect saying it is legal to send to those who do want it. I do not feel that pornography should be legal to anybody.

I also feel that this 21 years of age is unenforceable. How do we know what age people are receiving it? We cannot come in and say, "If this goes into my home, as an example, one of my four children cannot pick it up and open it without my having any knowledge of it."

Now, granted, I should be able to control my family. All of us should. But can we? I do not think my boys would, I think I have trained them not to, but if they would see this, I think that this little

ad put on the envelope by our Post Office Department or as required by our Post Office Department is encouraging my kids to look at this material.

I would like to leave this material that I have received personally in the mail with you. And I thank you very much for giving me this opportunity to address this committee.

Mr. NIX. Thank you, Mr. Hehman, very much.

I want to particularly express my appreciation to the fact that you gentlemen took the time to come here and make the contribution that you have made. Obviously, your background and experience enables you to give this committee something of real value.

Mr. HARRIS. Thank you, sir.

Mr. NIX. Our next witness is one of my very dear friends, the distinguished Congressman from the State of South Carolina, Hon. William Jennings Bryan Dorn.

I want to say that when I first came to Congress, we served on the same committee. Mr. Dorn did me the honor of staying away from one of those early meetings and asking me to serve as chairman in his stead. For a very young Member, very new Member of Congress to have the opportunity to serve as the chairman is a rather frightening experience. But fortunately, I survived it.

It is a pleasure to have you here.

TESTIMONY OF HON. WILLIAM JENNINGS BRYAN DORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. DORN. Mr. Chairman, may I say that it is a great honor for me to appear before you this morning. And I would like to say that I feel that the Congress, all of us, and the people of this country are very fortunate in having you to look into this obscene literature and pornography which is pouring through the mails throughout our country.

I do want to say that our appearing here is no reflection on the youth of America. The distinguished chairman grew up on the campus and your father before you was a distinguished educator who is still revered and admired in the State of South Carolina. And you are familiar with young people. And looking into this is no reflection on the youth of America today. In fact, I think this is the finest generation of young people. And I say that coming straight from the campuses throughout the country and being the father of five children all of whom are in the public schools, one in college. This is the finest generation of young people in the history of our country or, for that matter, in the history of the world. And I have every confidence in them. But they have never before been subjected to the kind of obscene pornographic literature which is now coming through the mails.

I could present many examples here this morning. I know the committee has perhaps hundreds of pieces of this literature.

I served in the Armed Forces of our country 3½ years, many of those months camped on the back streets of Paris. I have never seen anything remotely compared to the kind of literature which has been sent to me from constituents throughout my congressional district this year, anywhere in the world—India, France, Italy, you name it.

I have never seen anything remotely compared with the literature that a lot of our people are being subjected to today.

I just feel it is my duty to come here and think with you a moment, Mr. Chairman, as well as to commend you and the members of the subcommittee for your time and effort in trying to come up with a solution. I would not suggest to the committee—the distinguished subcommittee chairman is a distinguished and able attorney—the exact specifics of the legislation, but something must be done to prevent this kind of material coming to children as young as 8, 9, or 10 years old. Of course, they are going to look at it.

J. Edgar Hoover and many psychiatrists and representatives of the American medical profession have publicly stated that this filthy literature is injurious to the mind, and to the moral well-being of the country. I would urge this subcommittee with all the sincerity at my command to do something about this and look into it.

I feel that your meeting and devoting your time to it, Mr. Chairman, is a manifestation of your desire and your concern to do something about this literature which is coming in unsolicited and being opened by minor children.

The bill that I have joined a number of my colleagues in introducing is 14061 which would prevent this literature from coming to young people under the age of 18.

Now, I realize that the court has rendered a decision, but I do not believe that the Supreme Court of the United States or any other court had in mind the type of literature which is being sent to the homes and the young people of our country today. This literature comes to me marked personal, confidential, secret, please do not open. There are hundreds of them. Several petitions have come to me urging that we do something about it.

It is true that I represent part of the so-called Bible belt of the country. And perhaps my people might be overly concerned, but I do not think so. I think this is something that is hitting at the very heart of America and the foundation of our civilization. No totalitarian nation in the world, Mr. Chairman, permits this kind of literature to go to its people. And here we have people who are advocating it in the name of freedom.

It will destroy freedom. Democracy, in order to survive, must practice certain restraints and respect for other people and discipline. This is true in a democracy more than any other form of government. Our democratic Republic, our people, must be disciplined and restrained and protected to a degree from this type of outrageous literature which I have noticed this year more than anytime before in my 21 years in Congress—much worse.

In fact, it is shocking to adults, Mr. Chairman, who have been all over the world and seen just about everything there is to see.

So I appreciate this opportunity of being with you. I wish I could remain longer. Mr. Chairman, may I say again we are proud of you in South Carolina. You are an American Congressman, representing the people of this country, not just Philadelphia. I want you to come back and see us sometime in South Carolina.

Mr. Nix. I intend to go back at the first opportunity.

I want to again express my deep appreciation of the fact that you came. I know of your deep interest in the elimination of what I con-

sider pernicious evil. I can assure you this subcommittee is determined to produce legislation in this field.

Mr. DORN. Thank you, Mr. Chairman, the American people will be grateful to you.

Mr. NIX. Thank you. Mr. Cunningham?

Mr. CUNNINGHAM. I want, of course, to commend our colleague for his interest.

We made a great breakthrough in the last rate bill 2 years ago. I think you recall that we passed the rate bill which included title III which we felt was unattackable by the Supreme Court. That particular section of the rate bill allows the parents to have their names and their minor children's names removed from mailing lists.

Since that bill was passed, there are upward of 300,000 parents who have taken advantage of it. I think the list brokers finally realize their backs are against the wall and we are going to keep the pressure on.

I was interested in your comment about the vicious material that is now flooding the country. They want to milk the people as much as they can because they are of the opinion that the bill this committee passed is going to be constitutional.

One of our main problems is to get the people throughout the country to recognize the bill this committee passed allowing one's name to be taken off these lists. And if you put out a newsletter, you should get the little pamphlet prepared by the Post Office Department and enclose it. That will be very helpful to us and to the people who receive obscene advertising.

But as I said, 300,000 people have taken advantage of this law. And it has been upheld by the Federal district court in California. We are making much progress.

We have been working on this for 10 years. And we have had hearings all over the country—Los Angeles, San Francisco, New Orleans, Philadelphia, several in New York, and a number here in Washington.

I am a little bit disturbed about your remark about pinpointing this to children under 18 because that will leave the adults subject to all this material, although I do believe that the children under 18 are the ones that are most affected. And this has a lot to do with crime.

In our Philadelphia hearings, Chairman Nix, when Mrs. Granahan was chairman, we had psychiatrists and other doctors and police officers testifying that youngsters who got into trouble invariably had this material stashed away in their homes unbeknown to their parents.

When we started out on this some 12 years ago, the public was not excited. But because of the various hearings we have had and the speeches we made around the country, the people are finally waking up to this problem.

We got no cooperation from the Kennedy and Johnson administrations. They opposed it. The bill I am speaking of that was the big breakthrough passed the House, and you supported it, in both the 88th and 89th Congresses overwhelmingly. Then it went over to the Senate and was bottled up. So when we had our rate bill up a couple of years ago, I tacked it on as title 3 because the President wanted the rate bill very badly. And he was not about to veto the bill. That is why we have this legislation in effect. And it is very effective.

I appreciate your testimony and your interest. And I hope we can keep this ball rolling.

Mr. NIX. I just would like to say that I do not know the feeling of the Members of the other body on this question of pornography, but even if we have to overcome their reluctance to act, even though we have to build a fire, I think we have the matches with which to do it.

Again, I thank you very much.

Mr. DORN. I want to thank my good friend, because the whole Nation is grateful to you, Mr. Cunningham. And they know about the great fight you have made over the years against this type of stuff.

Mr. CUNNINGHAM. I appreciate that.

Mr. DORN. And I might say, of course, we would not limit it to those under 18. I leave that to the good judgment of this committee.

Mr. CUNNINGHAM. I want you to know this committee, first under Mrs. Granahan and now under Mr. Nix, is equally interested and pushing this very hard.

Mr. DORN. I would, of course, deeply regret, too, that any administration—I was not aware of what you said about the two previous administrations—might be a little more lax than some other administration. The point I make is I never got this stuff until this year. This is the worst that I have ever seen in the history of the world. It started in January. But I am not blaming that on any particular administration. I want this effort to be nonpartisan for the American people of all political faiths.

Mr. CUNNINGHAM. As I said, even a spokesman for the American Civil Liberties Union, I am told, has said it feels this will be constitutional. So the smut peddlers are going to milk this as much as they can, while they can. I think they feel they are going to lose out so they are putting additional tons of this stuff out before the ax falls on them. It is the worst that I have seen except what comes over from the Scandinavian countries. That is worse.

Mr. DORN. Thank you again, Mr. Chairman. And thank you, Mr. Cunningham. I know you will come up with something.

Mr. NIX. Thank you.

(The prepared statement of Hon. William Jennings Bryan Dorn follows:)

PREPARED STATEMENT OF HON. WILLIAM JENNINGS BRYAN DORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman, I appreciate the opportunity of appearing before this great Committee this morning. I requested time to express my concern and the concern of the people of my District over the increasing flow of obscene material through the mail. In recent months, the flow of what I consider to be hard-core pornography has increased immeasurably. Constituents from every section of my District have sent me shocking material which they have received through the mail unsolicited. Some of this obscene filth was received by children 8 years of age. Of course, the reaction of these good people is the same as the reaction of any normal human being. They are shocked and appalled that traffic such as this would be allowed to come to them through the mail unsolicited, especially to minors.

The Postmaster General recently testified that the number of complaints has risen at an alarming rate. He indicated that in fiscal year 1968, the Post Office Department received over 167,000 complaints and during the first 11 months of fiscal year 1969 the Post Office Department had already received more than 200,000 such complaints.

Mr. Chairman, I know that it is a criminal offense to send obscene material through the mail. This Federal law has been in effect for more than 100 years. But the problem now is trying to get a court conviction under this statute.

Based upon recent decisions of the U.S. Supreme Court, it is impossible to enforce the law under the test of obscenity set by the Court. I think most of us would agree that the test of obscenity has been applied in such a way by the Supreme Court that almost anything today can pass the legal test. I have no complaints against the Post Office Department. In fact, I commend the Department for doing a good job under most difficult circumstances. According to Department figures, during the past 12 years, the Post Office Department has made over 100,000 investigations concerning use of the mails to transmit obscene materials. Criminal convictions based on the evidence obtained have been entered in nearly 5,000 cases in Federal and State Courts.

Mr. Chairman, there must be a greater effort made both by the Post Office Department and the Justice Department. There should be more prosecutions for the violations of the Postal Obscenity Law and most of all, more prosecutions directed against the volume mailers.

Too long we have heard the cry of the infringement of the right of free speech. But the so-called right of free speech is not absolute. The cry of free speech has been heard so often and so loud that we have become deaf to the pleas in the name of common decency. The material brought to my attention, to say the very least, is offensive, distasteful, and insulting. But the thing that concerns me most is the impact it has on the youth of our nation, the future leaders of our Country.

As the father of five children, I am alarmed that their names could appear on lists purchased from companies who specialize in compiling and selling such lists to anyone capable of paying the price. Testifying before a special Subcommittee of the United States Senate, one notorious peddler of indecent merchandise admitted that he maintained a list of approximately 400,000 names.

The New York Academy of Medicine is of the opinion that the reported increase in sales of salacious literature to adolescents is one of a number of social ills reflecting a breakdown in the home and an inadequate environment.

The Academy believes that "although some adolescents may not be affected by the reading of salacious literature, others may be more vulnerable." They say further that "it is said to contribute to perversion." In the opinion of some psychiatrists, it may have an especially detrimental effect on disturbed adolescents.

A prominent New York doctor, William P. Riley, states, "habitual reading of obscene literature and viewing smutty entertainment especially by impressionable children and young people, result in anti-social action. The effect may not be immediate, it may be tomorrow or years from now. That what an immature person reads, sees, ponders, and absorbs affects his character and hence his behavior is so obvious that it is not open to question."

On March 4th, I introduced a bill, H.R. 8155, to prohibit the dissemination through interstate commerce of the mails of materials harmful to persons under the age of eighteen years, and to restrict the exhibition of movies or other presentations harmful to such persons. On September 29th, I co-sponsored H.R. 14061, 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. One of the other cosponsors of this legislation may have already briefed the Subcommittee on what we propose. Briefly, our bill would attack the pornography-in-the-home problem by prohibiting use of the mails to send sexually provocative materials (1) to any home whose householder has not asked for them, and (2) to a minor in any state having laws against dissemination of obscene materials to minors (36 states and the District of Columbia). In controlling the flow of smut, it would place the burden on the purveyor, rather than on the Post Office or the Department of Justice. Of course, we believe it is constitutional. The bill provides for fines up to $50,000 or imprisonment of up to five years, or both, for violations.

Mr. Chairman the people of this country are determined to do something about this situation. I have never seen law enforcement officials, educators, civic leaders and other informed citizens so deeply concerned about the heavy traffic of filth and indecency. This is reflected by the fact that this great Subcommittee of the Post Office and Civil Service Committee, the Government Activities Subcommittee of the Committee on Government Operations and the Judiciary Committee have held or are holding hearings on several pending bills. It is no easy task, and I commend you for holding these hearings and giving us the opportunity to express our views. I assure you Mr. Chairman, the people are concerned.

Mr. NIX. Our next witness is our distinguished colleague from the great State of Illinois, Hon. John N. Erlenborn.

I want to welcome you to the committee and you may proceed.

TESTIMONY OF HON. JOHN N. ERLENBORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. ERLENBORN. I thank you for this opportunity to tell you about H.R. 13241, the Sexually Provocative Mail Regulation Act of 1969 and some identical bills numbering about 10.

It hardly seems necessary for me to tell you gentlemen about the need for regulation of unsolicited advertisements for obscene books and pictures. You certainly know the problem.

We have many different ways of attacking the problem.

Some bills that are now pending before this committee or the Judiciary Committee would prohibit purveyors from sending obscene matters to persons under a certain age—usually 18 or 19. Some would license the brokers of mailing lists. Some would deny second- or third-class mail privileges to purveyors of obscene materials. Still others would have the Postmaster General impound obscene mail while he gets a court order for an examination of suspect mail, and so on.

There are several variations of a proposal which would permit a householder to inform the post office that he does not want to receive mailings from purveyors of obscene material; and there is another proposal that these purveyors be required to place a symbol on the envelope. A postal patron could then direct the postmaster not to deliver mail so marked to his house.

All of these approaches are suspect on constitutional grounds or present the postmaster with administrative chores—and all of us know that postmasters have more than their share of chores. I believe that H.R. 13241 and the several identical bills would overcome both of these objections, and would be preferable.

The number of cosponsors has now passed 95—about 35 Democrats and 60 Republicans. It is a bipartisan measure. We believe that the Sexually Provocative Mail Regulation Act would, by constitutional means and following guidelines of recent court decisions, present us with nine principal advantages. And they are:

1. Protect the privacy of the American home;
2. Help parents protect their children from pornography;
3. Stop the unsolicited mailing of sexually provocative literature;
4. Define the materials we want to discourage;
5. Avoid government censorship;
6. Provide penalties for violators;
7. Relieve the householder of responsibility for stopping the flow of pornography into his mailbox;
8. Relieve the post office of an unwanted administrative burden; and
9. Avoid questions about the legality or propriety of mailing lists maintained by the Federal Government.

Let me go over these points briefly.

First, the privacy of the home. Our bill would prohibit any purveyor from sending sexually provocative materials unless he has been asked to do so by the householder. The protests which have come to my office—and, I venture to say, to your offices—carry a sense of outrage that these objectionable advertisements can come uninvited into a home.

These objectors are not much impressed by the present antipandering law. There are problems with this. That law does provide a way for a householder to say that he does not want these obscene materials to come into his home, but it has proved to be cumbersome and slow-moving. The antipandering law has, however, passed its first judicial test, as Congressman Cunningham has mentioned. In *Rowan* v. *Postmaster General*, a Federal district court in California rejected a constitutional challenge.

Our bill to regulate sexually provocative mail builds upon the same foundation as the antipandering bill. It, too, provides a way for the householder to say that he wants to keep these obscene materials out of his home.

Now, the second point: the parent who wants to protect his child from pornography. Our bill would prohibit the mailing of sexually provocative advertisements to a minor in any State whose laws prohibit the dissemination of obscene materials to minors.

Our bill makes no attempt to have the Federal Government define a minor. We leave that to the States. We avoid some constitutional problems, and we leave the determination of who is a minor to the States, where it should be.

We do, however, believe that the protection of young people from unhealthy influences is one of the important missions of whatever legislation results from these hearings that you are conducting. The Supreme Court has reiterated often that there is a difference in status between minors and adults. We believe our bill would take the States into partnership with the Federal Government in this regard. It would help those States which have laws against providing pornography to minors; and it would encourage other States to enact antipornography legislation as it relates to minors.

Moving on to my third point, the stopping of mail of a sexually provocative nature: This kind of mail has reached flood proportions as we all know. Section 3 of our bill would bring it to an abrupt stop everywhere—everywhere, that is, except the places where it is wanted. It would stop sexually provocative mail from ever getting to your homes. It would stop this intruder before it ever gets inside the door.

Before a purveyor could send you an enticing advertisement for his pornographic wares, the bill would require that he first get your request. He could write you, inviting your interest; but without your assent, he could not legally send you one of those tantalizing but objectionable advertisements.

The average householder may believe that he is being invited to indulge in something illegal; but this would not be so. Our bill does not suggest that sexually provocative mail is illegal—if it is wanted. Hence your committee may want to make clear in the assent letter or card if you should pass this legislation. A line might be added saying, "Returning this form in no way implies that I am asking for materials which cannot legally be sent through the mails."

With such assurance, I doubt that a court could hold that potential customers might be deterred, because of questions of legality, from asking for the advertisements.

Now, to my fourth point, the definitions: The Supreme Court has laid down the criteria for obscenity (patently offensive, appealing to the prurient interests without redeeming social value). Our bill does not deal with obscenity, and for that reason we make no attempt to define it.

Our bill does deal with sexually provocative advertisements, and we have defined these so as to leave no doubt about our meaning.

By not declaring this material to be illegal, but only sexually provocative, we have attempted to avoid the constitutional problems which have troubled the courts and the legislatures for many years. These problems have caused the courts to strike down numerous censorship and antiobscenity statutes.

The mention of censorship brings me to my fifth point. There is no Government censorship in our proposed law. Those who want to get sexually provocative advertising may request it. We pose no bar to their getting the advertising or the obscene literature if they want it.

I should mention that there is a class of published material which might be construed as falling within our definition of sexually provocative materials—textbooks, for example, or medical encyclopedias, and so forth. In section 3, subsection (f), we protect the rights of publishers of this class of material.

My sixth point is concerned with penalties. Our bill sets forth the penalties for violations, thus providing appropriate legal sanction as well as an effective deterrent.

I regard the next two points as the strongest arguments for this approach.

Our bill would place the burden for recordkeeping upon the purveyor who stands to profit. It places no burden on the postal patron who may be annoyed, or on the postmaster, who already is heavy laden with detail work.

The antipandering law, now in effect, requires the postal patron to make an effort, which may or may not prove to be effective. Other proposals now under consideration likewise require the postal patron to take an initiative to stop this unwanted mail.

The antipandering law and other proposals now being considered require the Post Office to keep records listing those who object to lurid advertisement.

And this is a considerable burden. During the first 15 months of the law's existence, the Post Office has received 334,928 requests for prohibiting orders from irate householders.

The Post Office has issued only 257,133 orders, however, and this underlines the argument about administrative problems. About 77,000 orders have not been issued because of defects in the householders requests. Mostly, this means that the complainant failed to include the pandering advertisement to which he objects, so the postmaster must ask him to bring it in. This is known as redtape.

Some of the proposals before you would improve the antipandering law by allowing a blanket refusal of sexually oriented materials. The burden for initiating the prohibition, however, would still be on the householder; and the burden of recordkeeping would be on the Post Office Department.

Thus, my eighth point, that our bill would shunt the extensive and expensive administrative workload on to the person who ought to have it, the purveyor. Our bill would not require the Nation's postmasters to keep any lists nor would it require that the postmasters keep the list of addresses current.

This is an important relief for the Post Office, but it is more than that. It enables us to avoid one more possible legal pitfall. In the case of *Lamont* v. *Postmaster General*, the Supreme Court cast a suspicious eye on a law which would set, in the Court's words, "administrative officials astride the flow of mail to inspect it, appraise it, write the addresses about it," and so on.

The Court noted these infirmities in a law which required the Post Office Department to hold mail from various Communist-front organizations while ascertaining whether the addressees wanted it. I believe we have avoided every one of these infirmities, and I believe we have avoided other dangerous legal questions, as well.

Our bill would add no administrative duties to those already performed by the Post Office. It does not require any inspection of the mail by any agent of the Post Office Department. There is no requirement that the postmaster write letters to addressees about this matter of sexually provocative mail.

No list would be kept by the postmaster because of this legislation. The list, instead, would be kept by the purveyor. In this connection, one legal scholar has suggested that this purveyor's list might be used for blackmail. It seems unlikely to me that, as a practical matter, anybody could be blackmailed merely for assenting to receive advertising materials—and that is the concern here.

I believe a purveyor might be able to mount a more effective blackmail of those who order his sexually provocative books or films; but that is a hazard which would exist under any of the proposals being considered.

As all of you know, congressional offices have gotten lots of letters about pornography. And so has the Post Office Department. I have learned that somebody else has gotten complaints. In my district, a large number of complaints have gone to William V. Hopf, State's attorney for DuPage County.

As a result of our correspondence about this matter, I sent him a draft of H.R. 13241, and he presented it as a topic for discussion at the annual summer meeting of the National District Attorneys Association. With this draft before them, they adopted the following resolution, endorsing this approach to stop the flow of pornographic mail.

(The resolution follows:)

RESOLUTION

Whereas there is pending before the United States House of Representatives, certain legislation dealing with the regulation of the dissemination of sexually provocative advertisement by use of the United States Mails, and

Whereas the National District Attorneys Association, having met at its regularly scheduled summer meeting of 1969, at Philadelphia, Pennsylvania, hereby finds that the indiscriminate dissemination of such advertisements constitutes an unwarranted invasion of the privacy and sanctity of the home: Now therefore, be it

Resolved, That the National District Attorneys Association does recommend to the Congress of the United States that it enact appropriate legislation regulating such indiscriminate use of the mails; and be it further

Resolved, That this resolution be spread of record on the minutes of the Na-

tional District Attorneys Association and that the Secretary be directed to forward copies thereof to those he deems appropriate.

Mr. ERLENBORN. Gentlemen, I believe H.R. 13241, if enacted, will afford an effective remedy which is within the scope of the powers allotted to the Government by the Constitution. I trust that your subcommittee will agree.

Mr. NIX. Thank you very much, Congressman Erlenborn. I think your statement has been a very clear explanation of the bill. And, of course, in the hearings we have the explanation submitted by you earlier. I have been very much impressed by the approach taken in your proposed legislation.

I want to say that we have a team of attorneys studying the bills that have been submitted in an effort to formulate language consistent with the rulings of the Court. And we want to add a new dimension to give the Court the greater responsibility of going further than they have gone. And I am certain because of the interest displayed by all of the members of the subcommittee, by the widespread consensus against this practice in the country, that this subcommittee will certainly come up with legislation in this field.

Mr. Cunningham.

Mr. CUNNINGHAM. I was just about to say that, Mr. Chairman. I am certain that we are going to come up with some very strict law on this. And I can assure Congressman Erlenborn this is going to be done. But our main problem through the years has been the constitutional problem.

Now, in the weapon we have which I described to the earlier witness, there is no censorship involved. I simply decide if I receive this or my minor children that it is obscene and provocative, and so forth, and I alone make the decision on that. We earlier had put that burden on the Postmaster General. But that would be censorship.

So I as a father am the sole judge of whether it is obscene or not. And when I make this decision, it is all automatic from then on. And if I receive further mailings or my children, it goes to the Justice Department, and they are empowered to go into Federal district court and get a cease-and-desist order.

If I get a third mailing from that same company, it can be held in contempt of court.

I want to bring out there is no censorship in the one weapon we have at the present time. And I don't agree that the Post Office Department shall keep lists because under the bill that we did pass, they do not keep lists. As you know, I was the author of the bill to stop the free delivery of Communist political propaganda that passed the House and Senate and became law. A known, identified Communist brought an action against that. It went to the Supreme Court and they declared it unconstitutional. The primary reason they gave was that the Post Office Department did keep lists. That was the key thing. So we are going to see to it that the Post Office Department does not keep lists of people who fill out the form and send it in.

But as a father of six children, it is my duty and obligation that if my little 13-year-old girl is watching a horror movie on television, it is my duty to say, "Do not watch that, either turn off the set or get something wholesome." And so it follows that when this comes into our home, I have the same responsibility.

Now, if my neighbor across the street wants to receive it, fine and dandy, no censorship. But if I do not want to receive it or I do not want my children to receive it, that is not censorship.

And as I mentioned to Mr. Dorn, even a spokesman for the Civil Liberties Union, I am told, feels that although it fought this all through the years, it will stand up in the courts.

But I do appreciate your interest. And I want to assure you as the chairman said, we are going to come up with some additional strong legislation.

Thank you.

Mr. NIX. Mr. White.

Mr. WHITE. Thank you very much, Mr. Chairman.

I certainly want to commend the gentleman for his efforts in this behalf. I think it is true that this committee is determined to discharge from this committee some meaningful legislation that will stop the flow of obscene literature.

I have been reading through some of the wording of the bill. I might ask you about one or two of those features.

I do not have the legislation in the form that you have it there. Therefore, I do not know what page to refer you to. But let us see if I can find it.

Mr. ERLENBORN. If you have the section number, I am sure I can find it.

Mr. WHITE. Section 4011. Does that conform with your bill there?

Mr. ERLENBORN. Right.

Mr. WHITE. You say there, "A sender shall not deposit in the mails, or have deposited in the mail, any sexually provocative material."

Now, the question I am going to ask you pertains to the matter of materials, the word.

Then, you have subsection (1). And that is: "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"—and so on.

Then, in your statement to the committee, you talk in terms of enticing advertisement. Now, do you really mean "material" or "advertisement"?

Mr. ERLENBORN. Advertisement.

Mr. WHITE. You see, under your bill before the company can send anything, even if it received an order, it has to have this form. That is why I suggest you may want to change that word to "advertisement" to pin it down.

Mr. ERLENBORN. I think the use of the word "material" here was to make it somewhat broader.

Mr. WHITE. I wonder if you want to be that broad. That is what I am asking.

Mr. ERLENBORN. Possibly not. The thought here is to stop the unsolicited sexually provocative advertisement and to stop it right at the start, not after the first, second, or third one has come to your house. And, of course, under the present antipandering law, you then put the burden on the householder to go to the postmaster, the postmaster to take certain action, the U.S. attorney to take certain action, which can be completely frustrated if the corporate identity of the sender is

changed or if the list is sold to another purveyor of this sort of material.

The thought here is to stop the first piece from coming in and yet not to be in the business of censorship. Any willing recipient can get the advertisement or the material if he so desires.

Mr. WHITE. Now, the advertiser would send a card that is designated by the Postmaster General.

Mr. ERLENBORN. Right.

Mr. WHITE. Who receives that card after the prospective recipient has filled it out?

Mr. ERLENBORN. It would go back to the purveyor of the material, the company that is trying to sell.

Mr. WHITE. Would he keep that card?

Mr. ERLENBORN. He would be required to keep that card so that if any question came up as to the propriety of his mailing to this customer, he could prove that the material had been requested according to the law.

Mr. WHITE. Then the purveyor wants to sell his list. And he would certify at the top that this list has been determined to be willing to receive such material.

Mr. ERLENBORN. Yes. But let me hasten to add here that the card is effective only to the one purveyor.

Mr. WHITE. That is what I was going to ask. Is it in your bill that way?

Mr. ERLENBORN. Yes; it is.

Mr. WHITE. I have not seen that.

Mr. ERLENBORN. It is carefully drawn so that, if the list is sold, and I can see a great value to these lists—there is no question about it—particularly a clean list like this, of people who have indicated their interest, anyone buying the list would then have to again send out the request for the return of a card before the new purveyor would be permitted to send the advertisement.

Mr. WHITE. Would it be any trouble at the moment to refer me to that section so we can read it to see how tight that language is? Because I see the possibility of a man sending a list with the cards to another advertiser.

If you cannot find it now, you can perhaps have your staff member notify counsel and point it out later.

Mr. ERLENBORN. Well, I think it is in section 4011—a sender shall not deposit in the mails this material.

Mr. NIX. It is page 6.

Mr. ERLENBORN. Unless the material is addressed to a person to whom notification has been sent and has requested such material.

It may be desirable to make the wording clearer, but it is our intention that there needs to be a specific request to this particular purveyor.

Mr. WHITE. I think perhaps we ought to really tighten that because I think you will have a loophole used by some of these advertisers if you do not.

Mr. ERLENBORN. Right.

Mr. WHITE. Now, a magazine is mailed through the mails to a recipient, a subscriber. The magazine contains advertisements. Some of these may fall within the consideration or at least definition of

features of your bill. What do you do in that situation when you have a magazine that contains advertisements that may have sexually provocative material in advertising?

Mr. ERLENBORN. If I can find the section here quickly—subsection (f) of section 4011:

> 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.

In other words, I think that this problem that you raise is covered specifically by that section.

Mr. WHITE. Yes; I think that is true. Thank you very much for answering my questions. I believe that you have a good approach.

Mr. ERLENBORN. Thank you.

Mr. NIX. Thank you, Congressman Erlenborn. It is nice to have had you here.

Mr. ERLENBORN. Thanks very much, Mr. Chairman.

Mr. NIX. Our next witness is Mr. Raymond Gauer, national director, Citizens for Decent Literature.

TESTIMONY OF RAYMOND GAUER, NATIONAL DIRECTOR, CITIZENS FOR DECENT LITERATURE

Mr. GAUER. Thank you very much. It is a real pleasure to be here. And I appreciate this opportunity. I have in the past submitted written statements to this committee but I have never had the opportunity or privilege to testify. And I very much appreciate it, Mr. Chairman.

I have a prepared statement which I would like to read, and then I would be happy to answer questions.

Mr. NIX. You may proceed.

Mr. GAUER. I am Raymond P. Gauer, the national director of Citizens for Decent Literature. In the past 2 years I have visited over 100 major cities of this country where I have met with prosecutors, judges, and other civic officials concerning the pornography problem, and where I have conducted press conferences, appeared on local radio and TV shows, and addressed literally hundreds of civic, service, and other community organizations.

My experience "in the field" as well as the tremendous volume of mail received at our Los Angeles headquarters from concerned citizens is most convincing proof that the American public is outraged at the flood of obscenity that is deluging the country—through the mail, on newsstands, and on more and more theater screens. Hardcore pornography that previously existed only in the black markets and gutters of our society is now being published and distributed openly. And the most despicable of all those involved in this sordid trade is the pornographer who invades the privacy and sacredness of the home by sending obscenity—unsolicited—through the U.S. mail.

More than 230,000 complaints were filed with postal authorities during the fiscal year ended June 30, 1969. When you consider that for each person who formally complains there are doubtless hundreds of others who are too embarrassed and humiliated to report the receipt of

such depravity, you get a better idea of the fantastic magnitude of the problem.

In 1966—just over 3 years ago—the U.S. Supreme Court upheld the conviction of Ralph Ginzburg for sending obscene material through the U.S. mail. The material for which Ginzburg was convicted is practically innocuous when compared to the incredible perversion being sent through the mail today. By no possible interpretation can the Supreme Court decisions since 1966 be said to clear such material. As a matter of fact, retired Chief Justice Earl Warren said in a recent interview:

> Some of the things that go through the mail are just unspeakable, and under no decision of this Court are they justified. Those who say the Supreme Court has put its approval on obscenity are just not aware of the facts because the Court has not done that.

Thus, a strong statement of support for positive and vigorous enforcement of existing Federal statutes against mail-order obscenity could well be the most effective action this committee could take.

While I appreciate the concern of this committee and the Congress at large for the mail-order obscenity problem, as evidenced by the many bills that have been introduced on the subject, I must register a strong note of caution. In its desire to satisfy the demands of outraged constituents Congress must not overlook the dangerous pitfalls that are inherent in much of the pending legislation. What on the surface may appear to be a most logical and effective solution may actually play right into the hands of the mail-order pornographer. I urge your most careful consideration of the following "traps":

1. A majority of the bills pending before this committee are aimed at making it a criminal offense to send obscene material through the mail—to juveniles. There is no question but that such legislation reflects a sincere and real concern—and that passage of such legislation would receive wide voter approval. However, consider these facts:

A. Most mail-order pornographers already mark their material "adults only" or "you must be 21 to order," et cetera. However, there is no way that the mail-order pornographer can know if the purchaser is a juvenile or not. Actually such labels serve to call attention to the material and, thus, can be considered a form of "pandering."

B. Pornographers do not direct their solicitations or products primarily—or even purposely—to juveniles. This fact can be confirmed by vice squad officers at all levels of jurisdiction and by postal inspectors. The pornographers' market is adults. It is a fact that much obscenity ends up in juvenile hands, but it is most often material that was originally sold or mailed to an adult. To pass legislation making it a crime to sell or direct obscenity to juveniles is in effect to say that it is legal to sell or direct obscenity to adults. Thus, the real culprit—the pornographer—is protected as long as he can establish a sincere intention not to solicit juveniles. His operation is legitimized by law—and there is no way to assure that the material will not fall into juvenile hands.

C. The most damning argument against legislation aimed at protecting juveniles relates to the so-called generation gap. Certainly there is a generation gap—there always has been, and no doubt, always will be. One of the reasons for a gap is the fact that young people are intelligent enough to spot phoney attitudes on the part of adults. For

adults to say, "It is OK for us to read dirty books, go to dirty movies, or receive dirty mail, but not you kids," is a phoney double standard that can be very easily seen through by young people and which can only contribute to the ever-widening generation gap. If material is obscene per the test in the law, it must be obscene—period—or else we create more problems than we solve.

2. Much of the pending legislation—and existing legislation as a matter of fact—would require Government maintenance of a master list of citizens who do not want to receive obscenity through the mail. The taxpayer expense of maintaining such a list could be absolutely staggering. For example, a recent Gallup poll indicates that 85 percent of Americans want stronger laws dealing with mail-order obscenity. Thus the Government could be saddled with maintaining a current address list of 170 million citizens.

Assuming the pornographer could figure out some practical way to match his mailing list against the master list, he might find the effort to be most worthwhile to him. I am sure that any legitimate mail-order dealer would be delighted to have the Government remove the deadbeats from his mailing list.

However the real trap in such legislation is that it in effect legalizes mail-order obscenity to those who have not indicated that they do not want to receive it. Certainly the pornographer would have a strong defense if he could prove that he mailed only to people who had not indicated that they did not want to receive his wares.

It would seem most logical that the major intent of any additions to existing Federal legislation against mail-order obscenity be directed at placing the burden of the law on the pornographer—not on the Government or the taxpayer. Features that would accomplish this goal and which may be worthy of your consideration include the following:

1. Considering the tremendous profits being made by mail-order pornographers, legislation should provide that legal fees incident to the defense of an obscenity prosecution not be deductible for Federal income tax purposes—if the obscenity of the material is upheld by the courts.

2. The major problem we face in the area of mail-order obscenity is the fact that it is obviously economically feasible for the pornographer to mail advertising brochures to huge mailing lists—unsolicited—and depend on a very small percentage of return in the form of orders. It is the blatantly obscene advertising brochures that are the subject of the vast majority of complaints received from concerned citizens. Thus the law should make it a crime to send sexually oriented advertising brochures—unsolicited—through the mail—to anyone—adults or juvenile. Such legislation would take the U.S. Government out of the advertising business for the pornographer and protect American homes against the invasion of privacy that is occurring so frequently today.

Before I close my comments, I would like just briefly to refer to what I consider to be another problem on the horizon. It is becoming more and more pronounced.

There was a reference made this morning to the obscenity being received in this country from Scandinavian nations, material that goes

far beyond the material that is currently being sent out even by our pornographers here which is of tremendous concern.

Despite the overwhelming majority of public opinion as indicated by the Gallup poll, and by the number of bills that have been introduced in Congress, which indicate that the citizens of this country are outraged, demanding stronger laws, I am convinced that there is a major effort being made today to follow the route of Denmark and to abolish all obscenity law.

I could point, for example, to the article in Look magazine about a month ago. Time magazine has discussed this. They make it sound as though once pornography becomes legal, it is no longer a forbidden fruit, everyone then kind of loses interest, and the problem goes away all by itself. As I said, there is major emphasis along these lines. And I am sure you are aware England is currently considering a 5-year moratorium on obscenity law.

The articles in Look magazine, for example, admitted that since the law was abolished, all over Copenhagen have sprung up what they call porno shops—literally dozens of them all over the city. Why would they exist unless there was a market for the product? Certainly, the market is there.

What has happened since the law has been abolished, is that competition has been drawn into the field, and there is an oversupply and not a lack of demand. And this oversupply, of course, is what is being exported to other countries throughout the world. This is becoming a very difficult situation to control in our country, for example.

These articles failed to point out the social problems that are being faced in Denmark.

Through correspondents directly in Denmark and Sweden and in articles I have seen—for example, the London Times had an article recently—it is indicated that Denmark and Sweden lead the world in the incidence of venereal disease, of illegitimacy, of narcotics addiction, of alcoholism, of marital infidelity, as reflected in the divorce rates, in suicide statistics. This was a bit difficult for me to relate until I heard of a case where a man in Sweden came home and found his wife living with some other guy. He ended up killing his two children and committing suicide. So you can see how marital infidelity promoted by pornography could lead to this problem. Denmark and Sweden have the lowest church attendance of any countries in the world.

So I say we should look at the other aspects of what happens by legalizing pornography and what it does to the moral climate of the Nation as a whole.

As I have said on several occasions, the only thing that has been proven to my satisfaction, at least, is that there is, indeed something rotten in Denmark. And I do not believe we need that situation here or want that situation here.

Again, it is my privilege to be here. I am very impressed, as Congressman Cunningham has indicated, by the tremendous interest that now exists in this country, not only among the citizens, but among the legislators. And I am confident that this committee will come up with legislation with real teeth in it. I would like to offer the services of our organization. We have chapters in over 400 communities

throughout the United States. We are an organization that takes a strictly legal approach to the solution of the obscenity problem. We say that the law is our weapon and, therefore, we rely very strongly on Congress to provide the citizens of this country with the laws they need. And I am confident that you will.

Thank you very much.

Mr. NIX. Thank you very much, Mr. Gauer. I think it would be most helpful to the deliberations of the subcommittee if you furnished the suggestion that you mentioned a moment ago as to what should be added to the present law.

Mr. GAUER. I would be very happy to.

Mr. NIX. You mentioned a generation gap. Would you elaborate on that? I think in that connection, you mentioned the fact that a parent reserves unto himself the right to read it and say to the children, "You must not read."

Mr. GAUER. I think that is one of the problems. On college campuses, for example, young people are more conscious of the double standards that too many adults have. And I think this is a legitimate complaint on the part of young people. I think for adults to say it is all right for us to read dirty books or go to dirty movies, is a phony, double standard. The law has never recognized it in the past and, such an attitude can do nothing in my opinion but contribute to the generation gap.

Somebody conducted a poll recently among young people asking what advertising slogan most attracts their attention. They expected perhaps the "Pepsi generation" etc. The one mentioned most frequently was "adults only." That is what attracted their attention.

Mr. NIX. That is like X ratings in the theaters, the pictures.

Mr. GAUER. Indeed, it is.

Mr. NIX. It is widespread.

You mentioned placing the burden on the pornographer.

Mr. GAUER. Yes.

Mr. NIX. Would you go into that?

Mr. GAUER. Again. I feel that the major emphasis of legislation should be to place the burden on the pornographer. I was impressed by Congressman Erlenborn's legislation which would require the pornographer to maintain the list and not the Government to maintain the list.

As I indicated, if the number of people who have already indicated their concern, if all of them would send their names in to a master list, it could include as many as 170 million people, which to me would be a completely impractical administrative burden for the Government to maintain. I like the approach in Mr. Erlenborn's legislation that would place the burden on the pornographer to maintain a list of those who do not want to receive the material in the first place. And, of course, for those who do want to receive it, the pornographer would still be subject to the obscenity law if he sent obscene materials even to those people. I think it is important to place the burden on the pornographer and not on the Government.

Mr. NIX. Mr. Cunningham.

Mr. CUNNINGHAM. I want to congratulate the witness because his organization has been pioneering in this field and has worked very hard. I think that has contributed to the renewed interest in this subject.

I remember working very closely with Mr. Keating. Where is he now?

Mr. GAUER. Mr. Keating is now a member of the Presidential Commission, by the way, just appointed by President Nixon. He, of course, is an attorney in Cincinnati and very active as a founder and national officer of our organization.

Mr. CUNNINGHAM. Through the years, we have made some progress. First of all, quite a few years ago we authorized a judicial officer in the Post Office Department. And that had a lot to do with pornography in the mails.

Then a more important piece of legislation was the one we enacted where you could bring prosecution against the pornography dealer through any State in which he sent the material and particularly in the State where it is received. That has been very helpful. Prior to that you could only bring an action where the material was deposited in the mails.

Mr. GAUER. Of course, that was effective in the *Ginzburg* case where they prosecuted him in Philadelphia rather than where he originated his material.

Mr. CUNNINGHAM. Prior to that, you could only prosecute where it was mailed—say, San Francisco, Los Angeles, or New York, where the real cesspools are.

Mr. GAUER. Yes.

Mr. CUNNINGHAM. And then we have the other piece of legislation which I referred to.

Mr. GAUER. I might point out again on this problem of legislation, California just passed a law. We had tried for 8 years to change the law in California through the legislation process. This year with the change in administration, the change in committee makeup, two bills were passed, one of which incorporates the *Ginzburg* pandering elements into our State penal code which was an excellent bill.

The other bill, however, is aimed specifically at sale of obscenity to juveniles. Again, this is very difficult legislation for any politician not to support. I have seven children—I think I have everybody outnumbered here this morning—I am concerned about juveniles. And I say it is a popular issue for politicians to take. And citizens appreciate this concern of their political leaders. And so it is hard for them to oppose that kind of legislation.

But to set up a separate section as we have done in California, aimed at the sale of obscenity to juveniles, has already created many problems and the law will not even go into effect until November. It is signed, but not in effect yet. But what does it do immediately? It has protected the very guy, in my opinion, who should be prosecuted most vigorously, the pornographer, the publisher. Because now he can just put "adults only" on the covers and he is off the hook. He can load down the retail outlets and place the entire burden at the retail level which is the most difficult level of all to enforce this kind of law.

No. 2, and this is what I think is really alarming, all over California, just in the past few weeks since this legislation has been signed in, every time I go out around the Los Angeles County area, I see a new store. And they are all over the State in residential areas now. "Adults only" type smut shops with big "adults only" signs, that sell

nothing but unbelievable pornography—pictures, books, peep show machines, and even display counters with artificial sexual devices. You would think you were in Hong Kong someplace. It is hard to imagine stores like that opening in residential areas. And they are all over California because the entire emphasis is now off of the enforcement of sales to adults. This emphasis on juvenile protection has in effect legalized this kind of operation.

No. 3, and this is a very convincing argument against this approach, if a parent finds a dirty book under his boy's mattress, I hope he will have a man-to-man talk with him and try to explain why it is a problem. But it is very difficult to get parents who are willing to involve their juvenile child in an obscenity prosecution as a prosecution witness in an obscenity case. This could be a traumatic experience in the life of a young person. And law enforcement people will tell you it is almost impossible to get parents who are willing to involve their children in this kind of a prosecution.

So you end up with a law which is seldom, if ever, enforced, which is worse than no law at all.

And, again, the other argument in connection with the generation gap, I really do think it is a phony, double standard for adults to say obscenity is OK for them. And, of course, once the obscenity is in the community, as it is in California with "adults only" shops, young people can obtain it in many different ways. So I cannot stress too strongly this concern about overemphasis on juvenile protection in so much pending legislation.

Mr. CUNNINGHAM. You mention the *Ginzburg* case. I am sure you are familiar with the fact that he put out a magazine called Eros.

Mr. GAUER. Yes.

Mr. CUNNINGHAM. But the Supreme Court did not convict him on that.

Mr. GAUER. The pandering element is what got him.

Mr. CUNNINGHAM. Yes, the advertising is what got him.

Mr. GAUER. Yes. I think this approach to the advertising is really the most effective that the Postal Committee could come up with where this sexually prurient advertising would not be able to be sent to anyone unsolicited. I think that could really kill the industry because they can now afford to send out huge lists first-class mail. I have some examples here, and I know you have many examples. All of these were sent first-class mail. And they are all from different pornographers. They can afford to send this out first-class mail to a mass list, relying on a very small percentage of returns in the form of orders because their material is so highly priced.

If we can avoid this problem by making it economically unfeasible for them to use the U.S. mail to send out this kind of stuff, I am convinced that would break the back of this industry.

Mr. CUNNINGHAM. I might say, getting back to the Scandinavian material that comes in here, that it is absolutely ridiculous and offensive. I have appeared before the Rules Committee to try to get authorization for the staff to attend the meeting of the International Postal Union, but I was not successful. The International Postal Union, as you know, is made up of some 175 countries. And it serves a good purpose. But when the nations meet it is just more or less a big drinking party and not much good comes out of their meetings when

they have them. I wanted to have a staff member go over there and put the pressure on them because they can control, the sending of this material into this country. That is something I will still work on because they need a good talking to.

Mr. GAUER. They really do. And that is a primary concern to me. I say I am convinced that if we clamp down on the mail-order pornographers in this country, they are going to work some kind of arrangement with the Scandinavian pornographers and share the profit——

Mr. CUNNINGHAM. No doubt about it.

Mr. GAUER (continuing). And get it in that way. So definitely that has to be approved.

Mr. CUNNINGHAM. I recall some 10 years ago when we had hearings in Los Angeles, we had the full cooperation of the police and the morals squad. Mrs. Granahan and I asked if we could see one of these places that they could not get a conviction on. They took us quite a distance from downtown Los Angeles to one of these places. It was just a little cubby hole. It was not one-fourth the size of this room. There were two Cadillacs parked outside that belonged to the owners. We went in there, and they had four people, one man and three girls. This was 4:30 in the afternoon. They were still opening up their mail that they had received early in the morning with all this money in it and checks to purchase this material they had advertised.

They were just making money hand over fist. No doubt about that. And it is for this reason that they can hire the smartest and cleverest lawyers that are on the face of this earth. And that is why they have gotten away with this for so long.

Mr. GAUER. That is another function of our organization—to provide legal competence on the side of prosecution. The average city attorney or district attorney who does not have the opportunity to specialize like the defense attorneys do has been at a disadvantage in these cases. And so through our legal counsel staff, we provide assistance to prosecution by filing amicus briefs to support their case. Right now, we are involved in many prosecutions all over the United States.

There is a very significant case, by the way, in Cincinnati, Ohio, on right now that I think will achieve national significance when it is finally resolved.

But again, I agree with you, the defense for this industry is highly specialized, highly competent, and that is why we have attempted to do what we can to provide the same degree of competence on the side of the prosecution.

Mr. CUNNINGHAM. Getting back to this business of adults only, one of our problems has been that this is sent to a juvenile and an action is brought, we will say, by the Post Office Department, and it gets to the courts. But the jury is made up of adults. Where it is offensive and damaging to the juvenile, it is not necessarily damaging to an adult mind. That is the reason we have been beaten on so many of these cases.

Mr. GAUER. The *Sam Ginsberg* case that the Supreme Court upheld last year under the New York statute incorporates the concept of variable obscenity, which the model penal code of the American institute recommends. Under this concept, you have two variables. You have the material and the audience to which it is aimed. Under this

concept, the most obscene material could be legal if it is aimed at the proper audience, like psychiatrists or sociologists or someone who has a legitimate need to understand that problem.

Under the same concept, material less obscene could be illegal if aimed at a more susceptible audience.

It was under the concept of variable obscenity in the New York statute that they were able to convict Sam Ginsberg. The New York statute incorporates the Roth definition. It does not set up a separate category, "Morally corrupt" or any other definition of what is obscene to juveniles. It uses the same definition that is in all laws, the Roth definition, but applies it to the specific circumstances, the audience to which the material is aimed.

Of all the approaches to protect juveniles, I consider this to be the most effective. But setting up a separate category is where you run into problems because then you take all the emphasis off of enforcement against adults.

Mr. CUNNINGHAM. Again, in closing, I want to congratulate you and your organization because you have done a tremendous job.

And thank you, Mr. Chairman.

Mr. NIX. Mr. White.

Mr. WHITE. Mr. Gauer, I certainly echo Mr. Cunningham's remarks as to the credit to your particular organization.

Mr. GAUER. Thank you.

Mr. WHITE. Do you possibly have any wording from your organization that you would recommend to this committee for passage of a bill?

Mr. GAUER. I would be very happy to provide that if you would like. We have some ideas that I have offered, I guess, to counsel, and I would be very happy to do that.

Mr. WHITE. Fine.

Could you recite for the record from the findings of your organization generally where this material is manufactured or produced in this country?

Mr. GAUER. I am from Los Angeles County, and that is, of course, the primary source. According to the attorney general of the State of California who conducted a survey about 2 years ago for the State legislature, he has indicated that over 60 percent of all commercial obscenity distributed throughout the United States originates in Los Angeles County. Certainly, the mail-order problem is headquartered primarily in California. There are other sources, but primarily in California. So the major center seems to be Los Angeles County.

Cleveland, Ohio, has one of the major producers.

Atlanta, Ga., has one of the major producers.

New York, of course, and a few in Chicago. So it is spread around the country. But the major concentration, of course, is in Los Angeles County.

Mr. WHITE. Now, I presume you are from Los Angeles.

Mr. GAUER. I am, Yes.

Mr. WHITE. Let us talk about Los Angeles, then. I am sure that your organization has made a study of municipal laws pertaining to this area.

Mr. GAUER. Yes, we have.

Mr. WHITE. Understanding that I think this particular committee is going to produce a bill that would be much tighter, we hope will

stem some of the flow of this pornographic material throughout the country, I am also looking to municipalities themselves. I am wondering if they themselves have a default in their particular commitment to the public.

Have you examined the ordinances of the city of Los Angeles to determine that they have gone to the maximum in trying to control the production and manufacture of this material?

Mr. GAUER. Yes, I have. As a matter of fact, in California, the State law preempts all the ordinances in this area so local ordinances have been very ineffective. The legislature just made it possible in the last session for local ordinances dealing with topless- and bottomless-type entertainment. But in this area of obscenity as defined by mail-order or newsstand-type material, the State law preempts.

Mr. WHITE. In other words, you are saying that the State law might have loosened the ties in some of the local communities?

Mr. GAUER. There is no question but that it did in 1961. Our State penal code in California was amended in 1961 for the first time in over 70 years. And most law-enforcement people will tell you that they made the situation much worse. Instead of correcting it or improving it, it made it much more difficult to prosecute. We have tried since 1961. There have been over 30 bills that were killed in one committee of the legislature.

We had an initiative on the ballot in 1966. To qualify initiative in California takes 485,000 signatures of registered voters. We did this all with volunteer help and got over 600,000 signatures. So it shows the tremendous concern of the citizens.

The polls that were taken at the time we qualified indicated a 3 to 1 majority for it to pass at the election. It looked like we could almost quit campaigning and get that through. Then the mass media came out with their campaign against it. And the distortions—it was my first involvement with a statewide measure. You would not believe the distortions that the press and the newspapers, the radio and TV commentators made relating to that legislation. They made it sound as though Shakespeare would be banned and that the police could go into a home and take books off your shelves.

It, of course, provided for none of those things. The initiative was basically this model penal code of the American Law Institute which we felt would put real teeth in the law. So that failed.

And as I say, this year they did pass these two bills, one of which I am convinced is going to make the situation much worse because of its overemphasis on juvenile protection.

Mr. WHITE. Then, let us see if we can approach that in a different manner than pornography as such. I presume each of these communities have laws concerning contributing to the delinquency of a minor or some nuance of it.

Mr. GAUER. Yes.

Mr. WHITE. In the production of this material, are minors used?

Mr. GAUER. Yes, they are.

Mr. WHITE. Have there been any prosecutions for the use of minors?

Mr. GAUER. Not to my knowledge. I agree with you that is an excellent avenue. And it is one that I—well, let us put it this way: I have sort of considered it in the past. I have not seen any prosecutions along this line. I think it is certainly worth investigation.

Mr. WHITE. Could a private citizen in Los Angeles file a complaint to the district attorney or the county attorney, whichever?

Mr. GAUER. Yes. Now, here again here is an area we have been very interested in. And as a matter of fact, we have had a degree of success in various parts of the county including California where we are working now to get a case started under public nuisance statutes against some of these adult shops and against some of these adult theaters. They spring up in storefronts, these theaters, and feature split-beaver-type movies.

We have one such theater in a community not far from where I live. The community is just outraged by this. There are nine churches within a few blocks of this little storefront theater.

It was granted a license by the police commissioner. The police commissioner's hands are tied. He has to grant the license unless there is a criminal conviction against those applying. Even if they have been arrested and the case was not appealed all the way through, they still have to issue the license. To me, this is unfortunate also.

So we are trying to get the licensing regulation changed so that the citizens in that area would have an opportunity to sign a petition whether or not they would agree to allow that type of theater in their area.

And, also, we are investigating the possibility of filing public nuisance charges to get a theater like that out of the community. These are areas where we think citizens' complaints could be effective.

Mr. WHITE. Has there ever been a case filed in Los Angeles County against one of the purveyors for contributing to the delinquency of a minor as to the recipients?

Mr. GAUER. Not to my knowledge.

Mr. WHITE. Do you not think this might be an interesting approach to see if it would work?

Mr. GAUER. I agree with you, and I can assure you I will investigate the possibility.

Mr. WHITE. What do you think would be the possibility of a national law on contributing to the delinquency of a minor in the use of interstate commerce?

Mr. GAUER. I think it is certainly an aspect of this problem. If they are directing it to a minor, it certainly would be. I would think any jury would agree that this could contribute to the delinquency of a minor.

Mr. NIX. Would the gentleman yield to me?

Mr. WHITE. Yes, sir.

Mr. NIX. I understand that these publications are directed to adults.

Mr. GAUER. Primarily, that is right.

Mr. NIX. Would not your prosecution of contributing to the delinquency of a minor fall apart for lack of proof?

Mr. GAUER. Again, you would have to prove that it was directed to a juvenile. I think the pornographer would be foolish to do this intentionally. But the lists that they buy and sell could very well contain names of juveniles.

Mr. WHITE. That is the point, Mr. Chairman. Would you not then be putting the burden on the mailer who was then certain that his list was authentic and adult?

Mr. NIX. That is the value of the suggestion. I wondered to what extent it would meet the problem that we face.

Mr. GAUER. I am sorry, I did not really understand your question.

Mr. NIX. I am wondering how great a number would such prosecution serve.

Mr. GAUER. I really do not think it is a substantial percentage of the problem. I really think the material addressed to adults falls into juvenile hands. I think this happens frequently. And that is the reason I think we have to concern ourselves primarily with the adults.

Getting back to your idea, though, Mr. White, I think it is excellent. You are talking about States, what can they do. There is legislation introduced by Everett Dirksen—it is Senate bill 1077—which would make the determination of the finding of fact in an obscenity matter a jury question, not subject to appeal beyond the State level. In other words, this would leave it up to the States to decide what their moral standards are going to be. Under that legislation, for example, if California wants to allow hard core pornography on newstands and if the citizens are willing to tolerate this—I do not think they are, but if they are—they should be able to allow it. But if Texas or Illinois or Pennsylvania want to maintain a higher level of morality, they should be allowed to do that.

But the way it is today, of course, all 50 States have been forced to accept the standards of the lowest State in the Union—which is California in most cases.

In addition, such legislation would place the responsibility where it belongs, with the State courts. Our State supreme court in California comes up with some really far-out decisions in this area of law. But they use the U.S. Supreme Court as a crutch. They kind of lay the blame off. They anticipate that the U.S. Supreme Court will reverse so they reverse.

Well, I say if they could be held directly responsible for their own decisions then citizens could hopefully exert the kind of pressure within the State that would remedy the situation much more easily than it can be done at the Federal level.

We are very impressed by this approach as a solution to the problem. I mean a real solution to give the States the power to control the morality of their own area.

And by way of interest to the committee, the day before Senator Dirksen went to the hospital—he, of course, passed away very suddenly—he released an article which will appear in the November issue of Reader's Digest. This article will by on the market on October 20 by Everett Dirksen explaining the value in this approach of allowing the States to establish their moral climate. I really think that in addition to what you are trying to do through the postal regulations, these two approaches could be tremendously effective.

Mr. WHITE. One reason I mention this contributing to the delinquency of a minor, I think the burden of proof is different than when you are speaking in terms of obscenity in written material, wherein you run afoul of the Constitution on the freedom of speech.

I would like to ask one other point, if I may, Mr. Chairman.

Mr. NIX. Certainly.

Mr. WHITE. Has your committee and organization considered that perhaps generally those who are fighting pornography have been restricting themselves to too rigid a test in interpreting Supreme Court decisions in this respect? As I recall, the Supreme Court's

wording was something to the effect that the material is utterly without redeeming social value. And if it is utterly without redeeming social value, then it might be pornography. This is generally taken, I think, to mean the entire work.

Now, has your organization considered interpretation of that particular ruling in its various aspects? In other words, to approach the courts on the basis that, yes, a total work may have social redeeming value, but in its individual parts, it does not have social redeeming value.

Mr. GAUER. Yes. I would like to comment on that because in my opinion—again, I am very close to the Supreme Court decisions and have been for many years, and I do not agree necessarily with their decisions, but I would like to point out that the confusion resulting from their decisions has been much more harmful than the decisions themselves. This is a little bit difficult to understand, but the fact is that in the *Roth* case, the landmark decision, the *Roth-Alberts* case in 1957 was the first time the Court ruled on the constitutionality of obscenity legislation. And they said flatly that obscenity is utterly without redeeming social importance. They said, therefore, that it is not constitutionally protected speech.

And then they went on to define what they meant by that word "obscene." And that is where they came up to the test of the average person applying contemporary community standards. The "predominant theme taken as a whole" means you are not just considering one element. In other words, you do not have to have it utterly without reedeming social value which is a redundancy. You must consider the material as a whole, not just one paragraph taken out of context.

Now, since that time, in other decisions, there have been "no clear majority" decisions which means, of course, it was not a majority of the Court that agreed on the reason for the reversal. They had different reasons adding up to a majority, but the majority never agreed on those reasons. And so, in no clear majority decision, there have been justices who have said the material must be utterly without redeeming social value. Justice Brennan, for example, said three elements must coalesce. And that is one of the elements. But that was never a majority opinion of the court itself, and is not the law.

The binding law in this area is still the *Roth* case where they said obscenity is utterly without redeeming social value.

Of course, there are people who will say that if you can burn a book and warm your hands from the fire, it has some social redeeming value. That word "utterly" is awfully inclusive. If that ever becomes the law, and I think we have got to be very careful we do not allow this to confuse this area, because if that ever becomes the law, I say we will be unable to do anything about the obscenity problem.

So as I said, there is confusion. It has resulted from the Supreme Court's no clear majority decisions where individual justices have held these views.

The other view that is widely misinterpreted is that the Court has required a "national standard" and not a "community standard." This came from the *Jacobellis* case, an Ohio case, against the movie "Lovers" which was, again, a no clear majority decision. Two justices said it is not a local, but a national standard. This has never been a

majority decision. Therefore, it is not the law. The law is still the community standard.

Mr. WHITE. Would it help if Congress in the appropriate place in this legislation defined obscenity and using the words "is utterly without redeeming social value in any of its individual parts?"

Mr. GAUER. Well, that is a possible out except I think we are even making a concession there because, as I said, the Court said flatly that obscenity is uttery without redeeming social importance. You cannot mail a book that deals with every imaginable sexual deviation everywhere throughout the book with every four-letter word to describe it and end up on the last page with the Pledge of Allegiance to the Flag and say that the book is redeemed.

Mr. WHITE. That is not the way it is interpreted.

Mr. GAUER. That is the way a lot of people are trying to interpret what the Court said. But they never said that. They said you must consider the work as a whole. This does not mean that one page is going to redeem the whole book because if the whole book is generally teeming with obscene material, then, as a whole, it could be considered obscene. You can consider the intent of the author as well as just the book itself.

Mr. WHITE. We are looking at it concave and convex, are we not, in a sense? I was looking at it using the words "as a whole" as a dodge. You are looking at "as a whole" as a protection.

Mr. GAUER. I think I would say it is that. I think that is what the Court intended.

And if you do not mind my just taking another minute, they said "to the average person"—they did not say just to the intellectual or the stupid or young or old or religious or irreligious—they said "to the average person" and the best way to measure this average person in our society is by a jury, selected from the community, by prosecution and defense challenging, getting an impartial panel. They then present evidence of both sides. And that jury, after hearing all the evidence, makes the decision. It is not up to me, not up to the policeman, not up to a judge. It is up to the "average person" as best represented by a jury.

Now the definition says "to the average person—applying contemporary community standards." That phrase is the real kicker in the definition because it places the burden on the citizens of the community to establish when their "standards" have been violated. That is the reason our organization exists, to try to get citizens to speak out and indicate the fact that their standards are being violated by the material.

This is an attempt by the Court to recognize that standards do tend to change. In other words, there was a time not too long ago in this country when a woman's ankle was considered kind of improper. Certainly that is far from true today. And the Court recognized that standards change. Therefore, they said instead of coming up with a very precise or specific definition—so many four-letter words or so much cleavage or something else—which no matter how carefully they could draft it it could be obsolete next week, they said they are going to leave it up to the community to decide. Whatever the community is willing to tolerate, the law will not interfere with, but that which is below the standard is subject to prosecution.

And I say the stuff on the market today is below the standard of Sodom and Gomorrah.

The definition again is to the average person, applying contemporary standards, the dominant theme of the material, taken as a whole, appeals to "prurient interest." That phrase "taken as a whole" is important because it is a fact that in the past there has been some group or other, at some time or other, that has tried to prosecute the works of Shakespeare, or even passages from the Bible, as being obscene. This, of course, is unfortunate and ridiculous. But it cannot happen under the modern definition which says you must consider the work "as a whole," not just one paragraph taken out of context.

This does provide essential protection for artistic or literary work.

And the Court defined prurient as "a shameful or morbid interest in nudity, sex, or excretion, that goes beyond customary limits of candor in description or representation of such matter." These two definitions are now part of all State and Federal law. The definitions in my opinion are perfectly adequate to apply to specific material, to a jury, to make the determination as to whether or not it is legally obscene.

Mr. WHITE. Thank you very much.

Thank you, Mr. Chairman.

Mr. NIX. Thank you.

Let me say just one thing. So far as I am concerned, I am inclined to, and I do approach, the problem in this way: I discount the confusion existent among a great segment of the population about what the Supreme Court meant. I am not concerned with it. I am concerned with the analysis of the reasoning and conclusions of the Supreme Court, whether it is a majority decision or not, because it is the law whether it is one or the other.

I would like to pursue this in this fashion: Formulating the legislation consistent with that which is decidedly positive about the Supreme Court analyzing the direction they are taking beyond the dicta of the Supreme Court and fashioning words that will carry the legislation even beyond that point that the Supreme Court indicated that it might go beyond its positive decision. And I think if we can do that, we shall have given the public something that is worthwhile.

Mr. GAUER. Again, I agree with Justice Warren who in his statement points out this very fact that it is confusion and not the decisions of the Court that have created so many problems. In their decisions the Court has consistently held that obscenity is not constitutionally protected. So I am convinced that the Court decisions are not going to harm us in the future. We should not be concerned about that.

I think if we begin with the work of this committee and with the other legislation that would give the States more control in this area, we could very easily solve this problem.

Mr. NIX. I will look forward to the suggestions you are going to submit.

Mr. GAUER. I will get them to you quickly. I appreciate the opportunity.

Mr. NIX. I thank you very much for being most helpful.

The subcommittee will adjourn subject to call of the Chair.

(Whereupon, at 11:53 a.m., the subcommittee adjourned, subject to the call of the Chair.)

OBSCENITY IN THE MAILS

WEDNESDAY, OCTOBER 22, 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 10:15 a.m., in room 210, Cannon House Office Building, Hon. Robert N. C. Nix (chairman of the subcommittee) presiding.

Mr. NIX. The Subcommittee on Postal Operations will be in order.

We have many witnesses scheduled today and we will have to move swiftly in order to hear everyone.

As our hearings go on, the focus of the hearings must narrow so that we arrive at the precise issue before us.

Part of the difficulty with Supreme Court cases in recent years has been the broad discussion by the Court on the issue of obscenity. Some judges, for instance, used terms such as "hard core pornography," which was defined by a member of the Court as undefinable in words but he knew it when he saw it.

Our concern here is limited to the use of the U.S. mails by pornographers in such a way as to interfere in the raising of children and with the privacy of the home itself through the intrusion of offensive mail advertising.

Our first witness today is a distinguished member of the full committee who has made outstanding contributions in this field and I particularly welcome the Honorable David N. Henderson of North Carolina.

TESTIMONY OF HON. DAVID N. HENDERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. HENDERSON. Mr. Chairman; first of all, I want to commend this subcommittee for the interest it has shown in moving to take prompt action to restrict smut mailers.

The press release issued by your Chairman Nix on October 6 was, I am sure, welcome news to thousands and thousands of citizens who have been outraged by the receipt, unsolicited, through the mails of pandering advertisements with pictures and descriptions lurid almost beyond belief.

All of us know the background which has brought us to our present state of affairs. Obviously, we do not all agree on what is and is not obscene and pornographic. It has been pointed out that the Venus de Milo and Michaelangelo's David might be considered obscene by some.

It has been pointed out that Shakespeare and the Holy Bible use four-letter words and describe sexual activity. And seizing upon this fact and the ruling by the Supreme Court that not only must material, to be obscene and pornographic under the meaning of present statutes, be designed to appeal primarily to prurient interests, but must also be utterly without redeeming social value; smut mailers have been able, virtually with impunity, to flood the mails with unsolicited advertisements that almost literally would make your hair stand on end.

I believe that no matter what this committee and this Congress do, the question of what is and is not obscene and pornographic is going to continue to be raised in the courts and is going to continue to plague us for a long time.

And as we all know, the House Judiciary Committee is going into this question in a broad and general way.

Our full committee reported; the Congress adopted and the President signed into law the present antipandering law. It is good, as far as it goes, but it does not go far enough. It provides a tool by which a recipient of offensive mail can sign a form which the local postmaster will send to the mailer and have the recipient's name taken off the list of that particular mailer. The weakness here is that the protection is only after-the-fact protection and protection against only a particular mailer.

In the President's proposal on this subject, which many of us have introduced, is a provision for a nationwide list to be made up of persons who do not want to receive pandering advertisements. The list would be sold, at cost, to those intending to mail out such advertisements, and the mailer would subject himself to penalty if anyone whose name had been on the list for as long as 30 days received any such material.

This is a step in the right direction, but in my judgment after considerable thought and study, it has three serious drawbacks. The first is that it is cumbersome, complicated and would undoubtedly result both in administrative headaches and considerable expense to the Post Office Department.

The second is that there is a 30-day time lapse between the placing of the name on the list and the affording of protection. Revised lists would have to be issued every month.

The third is that the smut mailer would be delighted to get his hands on such a list as he would save a lot of expense by deleting those names.

Last year the Congress created a Commission on Obscenity and Pornography and directed it to report back to us and to the President in January 1970, its findings and recommendations with regard to this vital subject. Although not directed to do so, this body filed an interim report in August of this year, and the only specific recommendation it made for action now is the provision incorporated into H.R. 13585 and related bills.

H.R. 13585 takes the approach of the President in establishing a list of mail patrons who do not wish to receive sexually oriented materials, but makes it a local list to be maintained at each local post office. The procedure is quite simple and should not involve any serious administrative burden or much cost.

The bill directs that the Postmaster General, through normal administrative action, devise a symbol. This symbol would be required to be

placed on the cover of any piece of mail containing sexually oriented matter as such matter is described in the bill. Then it provides that any mail patron can advise his local postmaster that he would like his name and the names of minor members of his household placed on a local list to be maintained in the local post office. Then any mail received bearing the designated symbol simply would not be delivered to anyone whose name was on the local list.

The bill does not attempt to declare that sexually oriented mail is obscene or pornographic. It does not attempt to declare that such material cannot be sent through the mails. It does not attempt to prohibit a transaction between consenting adults involving such material. For these reasons, I believe that the constitutional arguments involving the first amendment and freedom of expression do not come into play at all.

All the bill does is provide the mail patron with a mechanism for exercising his right not to receive any such mail unsolicited.

It is superior to the President's nationwide list in that: (1) It is much less of an administrative burden and much less expensive, (2) it affords the patron immediate protection from the time his name goes on the list, and (3) it does not do the smut mailer a favor by forewarning him not to send his materials to certain persons.

To guard against a mailer pleading that placing the symbol on the cover violates his constitutional rights against self-incrimination, the bill specifically provides that compliance by a mailer with this law cannot be used as evidence against him or as a basis for initiating or pursuing an investigation against him. It does not, of course, grant him immunity from prosecution under the basic laws governing obscenity, but it does guarantee him that the compliance with this particular law involving the symbol shall not be a basis for such prosecution.

We need other laws, such as the one so many of us have introduced providing for the protection of minors.

But this one bill, which goes a step beyond the present antipandering law, but which avoids the bramble thicket of what constitutes pornography and obscenity is one which we should enact separately and without delay. It is one in which this subcommittee and our full committee has unquestioned jurisdiction since it relates only to the use of the mails.

It has been cosponsored by a substantial majority of the members of our full committee, both Democrats and Republicans and thus would be assured of favorable consideration by the full committee if reported by this subcommittee.

Mr. Chairman, I urge this subcommittee report H.R. 13585 and its companion bills promptly as a separate measure; one which does not bog down in complications as so many of the other measures do, and one which we can use as the vehicle of fulfilling the pledge so many of us have made to give to our postal patrons some real protection against receiving unsolicited smut mail.

Mr. Chairman, in addition to my prepared statement, I would like to assure you and the members of your subcommittee that any other bills that the subcommittee reports to our full committee on this subject will certainly receive my support because it is my belief that the American public not only wants something done about this problem, but they want everything possible done about the problem.

While we may be concerned about the future actions of the courts with regard to legislation, I think the American public will overwhelmingly receive and support congressional action at this time even though the courts may later limit that action.

I thank you very much, sir.

Mr. NIX. I thank the gentleman from North Carolina very much for his appearance and his contribution. In addition, I want to say, of the 40 bills under consideration before this committee at the present time, it is my conviction that the bill submitted by the distinguished gentleman from North Carolina, Mr. Henderson, more nearly meets the problem than any of the others.

This subcommittee intends to proceed expeditiously with this matter and report a bill out to the full committee at the earliest possible date.

Mr. HENDERSON. Mr. Chairman, H.R. 13585, which I introduced solely, was a result of the recommendations, the very fine staff work of your subcommittee staff, the full committee staff and the House Legislative Counsel's Office, in order that the bill be as technically correct as we could get it.

I also introduced a subsequent bill, H.R. 13973, in which Chairman Dulski, you and Mr. Olsen and the other members of the subcommittee I referred to joined in.

This was done in order to get the first bill into print so that we could make it available to all the members of the committee for their advice. The subsequent bills were introduced in order to afford all the members of our committee who are so vitally interested in this problem an opportunity to join in sponsoring the legislation. The point I am trying to make is that while my name appears on the first bill, it was a joint effort of all the members of the committee that have joined in the sponsorship of the other bills and I want to thank you and the other members for your advice and support of this matter.

Mr. NIX. Thank you. Mr. Olsen?

Mr. OLSEN. Thank you very much, Mr. Chairman.

I wish to commend Mr. Henderson, our colleague, for his statement this morning and commend him for his activity in this field over the years. It has been a very difficult one because of the many legal complications involved and I think that you should get recognition for the fact that you have given attention to all those legal questions and tried to come to grips with the problem, with a new approach of solving the problem within the legal guidelines handed down by the Supreme Court. I am going to support the action of the subcommittee chairman. I know that Mr. Nix will come forth with some program in this area.

Mr. HENDERSON. If I may respond to Mr. Olsen, Mr. Chairman. Both you and Chairman Nix are distinguished attorneys and I am sure that you are aware that all the members of our full committee, especially of this subcommittee, have wrestled with the problems created by the Court's interpretation, created by our own basic understanding of what the Constitution means to our people, and with regard to the right of free speech and the right to use our mails to communicate with one another in a private manner, one that is protected perhaps by a greater system than any other system in the world.

But the present situation we find ourselves in with regard to pornography and obscene material moving through the mail requires drastic action by the Congress, perhaps if for no other reason than that

the American public is not fully understanding of the problem. I think if we can get immediate legislation that will prohibit, hamper or in any way restrict the use of the mails, unsolicited, to the patrons, we will receive the overwhelming support of the American people and as good lawyers, it is our task to find a way to do this within the framework of the Constitution and the decisions of the Court.

Mr. OLSEN. I find myself in agreement with you. I must say I think that the biggest problem is really outside the mails, though, in the newsstands of America today, in a far greater problem than faces the Post Office.

I am not minimizing that problem, but I think the American public doesn't realize that by far the largest purveyors of pornography are the newsstands of today rather than the Post Office Department.

But in any event, I find myself in agreement with you.

Mr. HENDERSON. The point the gentleman makes is a most valid one and I think he would agree with me that if we are successful in tightening or closing the mail, that problem will be even a greater one. The panderers will use the newsstands or other sources and the American public, if they are as incensed as they seem to be when they call on us for congressional action, will take local action through their local governments or voluntary committees to remove the smut from the newsstands.

Mr. Chairman, if I can return to the subcommittee at any time to assist you in any problems with regard to this or any other legislation before you, I am sure you will let me know.

Mr. NIX. Without question. And we welcome your offer of assistance. It is characteristic of your attitude as a public official.

Mr. HENDERSON. Thank you very much, Mr. Chairman and Mr. Olsen.

Mr. NIX. Our next witness is the Honorable Mario A. Procaccino, distinguished comptroller of the city of New York and the gentleman from Montana, our distinguished colleague on this committee, Mr. Olsen, will present Mr. Procaccino.

Mr. OLSEN. Thank you very much, Mr. Chairman, it is a real pleasure to present to the committee a very distinguished person, the comptroller of New York City, Mario Procaccino. I know that he has long been strong in support of law and order, and it is in keeping with his career that he would come here and support legislation that would protect people against the pandering of smut through the mails.

Mr. Chairman, it gives me great pleasure to present Mr. Mario Procaccino.

Mr. NIX. Thank you. You may proceed, sir.

TESTIMONY OF MARIO A. PROCACCINO, NEW YORK CITY COMPTROLLER

Mr. PROCACCINO. I am grateful for the opportunity you have afforded me to express my own views regarding this very serious problem, so that, at the outset, let me thank you, Mr. Chairman and the members of your committee for giving me this chance to be here today. I want to congratulate the committee on what it is doing to combat what I consider one of the most growing evils of our times, the peddling of smut through the mails.

I came to Washington from New York this morning because I am deeply troubled over what is happening. I speak not only as a parent concerned for his own family, as a citizen concerned for his neighbors, but as an American concerned for the future of our country.

There is no question that the way to destroy our Nation is to corrupt its youth, to capture the minds of the young, to enslave them to the evils of perversion. The easiest way to prey upon the unsuspecting and the innocent is through the mails.

The situation has become so bad that in New York City I have been stopped by many people in the streets begging me to do something to curb this vicious assault upon the senses of their growing children. Pornography has become a mailbox menace.

This crime against society does not stop with youth. It promotes perversion in all people at all ages. It seeps poison into the minds of the rich and the poor. It reaches into all levels of society and destroys not only the morals but the principles of every person it touches.

Unbridled pornography is a disease that can ravage a nation, rob it of its strength, dissipate its talents, and lay waste its national heritage. History, itself, proves that either we must destroy it or it will destroy us.

There has been testimony of national importance to prove that American homes are being bombarded with the largest volume of sex-oriented mail in its history.

This mail for the most part is unsolicited, unwanted and deeply offensive to those who receive it.

There is no question that the law of our States and our Nation must be strengthened to prevent this disease from spreading its infectious poison any further. Steps must be taken and ways must be found to deal with the people who make money out of pornography.

One of the things that moved me to take action myself against this menace was a note from a woman who refused to identify herself but just signed her plea "Desperate Mother."

She sent me a copy of a pornographic publication her 13-year-old son had received through the mail illustrated with nude men and women in various poses called Love's Picture Book.

Under it was the title—Love, Lust, and Pleasure. What startled me most was the fact that this unsolicited publication had come through the mail right out of my own city, the city of New York.

I am submitting this advertisement to this committee for examination, and with your permission I would like to read this very short letter that this lady wrote to me:

> Dear Mr. Procaccino, isn't it a disgrace right here in New York City. This was addressed to my 13-year-old son. Please save our children and adults, too, from this type of degeneracy. Signed, Desperate Mother.

With your permission I would like to submit this.

Mr. NIX. Without objection, it will be made part of the record.

Mr. PROCACCINO. Thank you very much.

One may argue all he wishes about the right of free speech and the liberty of human expression but there are other rights involved. For example, the right of a person not to have his privacy invaded, the right of a parent to shield his child from what he may consider harmful, the right of a community to maintain high moral standards.

Sending obscene and lewd material through the mail benefits no one but the peddlers of smut. No one becomes richer except hoodlums and racketeers.

As Congressman Olsen so very ably pointed out, the greater problem is what is being distributed right from the newsstands. I have here a complete package which was handed to me last night. It is almost frightening, and although this is not part of this committee's determination in hearing today, it is frightening to look and see some of the material that is being peddled. Some of this is peddled a few feet from city hall in New York City. A few feet.

It is bad enough to see the newsstands cluttered with filth and perversion, on a scale never before known. It is difficult enough to find a theater where one can take his child to see a good family movie.

However, and perhaps I should point out, not too long ago, I happened to walk with my wife and daughter into a theater. We had a little time to kill if you will pardon the vernacular. I was embarrassed, I walked out with my wife and daughter. This is what happened in this country.

But getting back to the mail—however, in dealing with mails we have an even more serious problem because the mails reach everybody. It goes into every street, and every highway, and to every city, every region, every State.

I know the problem of control is difficult. I know there will be opposition to those of us who wish to stop this menace. And, of course, I am mindful and I am sure the committee is of our constitutional guarantees—we must also respect our obligations to our families and the necessity of protecting our communities.

I believe that after these hearings are over, this committee in its wisdom will come up with the kind of meaningful legislation that will stop the mails from being used to distribute this smut.

The bill pending before your commitee H.R. 10867 represents a new legislative weapon to be used in attacking this issue. As a private citizen I support the passage of this bill vigorously.

In the general distribution of smut literature our powers of control have become weak because the courts have had great difficulty, as you know much better than I do, in wrestling with this problem.

The mail, however, offers us the one field in which we can fight for regulation and protection to some extent. The mail which is under Federal control is the one area which we can take some sort of a giant step to combat pornography.

The law must be strengthened to stop promotion of the kind of advertising that goes through the mails, that reaches not only into the home, but into colleges, yes, even seminaries, churches, and even prisons. The peddlers and dealers of smut must be dealt with harshly and the punishment made severe enough to discourage those who would make a business of it.

Once the profit is taken out of smut, the evil of pornography will die or destroy itself.

I think the job of this committee, if you will pardon my being presumptuous, is not merely to find ways and means of combating pornography in itself, but to help educate the public, the parent as well as the children and the need to maintain a vigorous and healthy society, and the need to conduct a higher state of well-being.

I thank you, Mr. Chairman, as I thank the members of your committee for giving me this opportunity to express my views.

And I feel very strongly about this, and I believe it is the obligation of every mayor in this country to do what he can in his own city to fight smut and to help Congress in every possible way he can in this area.

Again, my thanks and gratitude to you, Mr. Chairman.

Mr. NIX. Mr. Procaccino, let me say to you I think it is most encouraging to this committee that because of your deep concern over the pernicious evil that we have under discussion, that you come here at your busiest period in life to give us the benefit of your views and give the American people the benefit of your deep concern.

And I particularly wish to express my deep appreciation for the fact that you have come.

The chairman of the full committee, Mr. Dulski, who has long engaged in this fight, has just come in. The Honorable Mr. Dulski from the State of New York.

Mr. DULSKI. Thank you, Mr. Chairman. I would like to apologize for being late. I want to join my friend from Pennsylvania who has been in the forefront as the chairman of this subcommittee, and the other members of this committee, leading the attack against smut that is being carried on in our mails today.

We have had the privilege of being in New York City a few years ago and met with quite a few members of a committee of citizens dedicated to removing smut from the mails. I am very happy that you have endorsed the bill before us and I am sure the testimony you have given will help us in obtaining better legislation to remove smut from the mails.

I want to thank you and wish you every luck on November 4.

Mr. PROCACCINO. I feel my trip has been worthwhile, Mr. Chairman. Thank you, gentlemen, very much.

Mr. OLSEN. I want to join both of these gentlemen in commending Mr. Procaccino on his taking time from a very, very busy job. It demonstrates a genuine dedication to his point of view that he would come down here and take his whole day out of his campaign and I congratulate the gentleman and I sincerely hope that your message gets to the people of New York City, in this field and in all other fields, that they have the wisdom to elect a fine, leading Democrat to be mayor of the city of New York. Thank you very much.

Mr. PROCACCINO. Thank you very much, gentlemen, I didn't expect this. Thank you very much.

Mr. OLSEN. Mr. Chairman, I am supposed to go to a meeting downstairs, to another committee, and I ask unanimous consent at this time that I be permitted to enter in the record my own remarks and to include some appendixes.

Mr. NIX. Without objection, it is so ordered.

TESTIMONY OF HON. ARNOLD OLSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

Mr. OLSEN. Mr. Chairman, I want to take this opportunity to endorse the work of this subcommittee in taking up the matter of obscenity legislation. The subject is an emotional one. Those who express their oppo-

sition to any regulation of pornography do so by means of ridicule rather than meeting the issues. Over 250,000 Americans have applied for postal orders banning erotic advertising from their homes under the pandering law passed during the 90th Congress as the result of hearings held by this subcommittee and as a result of an amendment to the postal rate bill.

The pandering law authored by Congressman Cunningham went into effect a year and a half ago. It was a courageous first step on a long road. But much needs to be done and the quarter of a million Americans who have complained to the Post Office Department, and the thousands of outraged constituents who have complained to the Congress want more help and their voice will not be silenced by ridicule. I am confident that this subcommittee will answer their indignation with sensible and constitutional legislation.

There has been a great deal of misunderstanding about the position of the Supreme Court of the United States on the subject of obscenity regulation.

The Court's basic position in the case of *Roth* v. *United States*, 254 U.S. 476, 1957 was a commonsense one. This decision reversed a 100-year-old English case, *Regina* v. *Hicklin*, which held that the basis of obscenity legislation is the protection of weak persons from themselves by keeping pornography out of their hands.

It made the standard for all reading matter childlike in order to protect children and the immature. What is more, under the *Regina* v. *Hicklin* decision a book could be judged not only by its cover but by portions of it rather than as a whole.

The *Roth* case, while establishing a more restricted standard for obscenity regulation, should not have interfered with obscenity prosecutions. It did, however, cause controversy, because law enforcement officers prefer to proceed against a book or thing rather than against the person selling pornography. And these so-called in rem actions had been made more difficult as a result of the *Roth* decision.

Because of the conflict over procedure and the method of prosecution, court decisions became confusing in that the Court itself, as stated by Justice Marshall in *Redrup* v. *New York*, 386 U.S. 767, split into five schools of thought over the definition of obscenity on a nine-member court.

What has emerged, however, is a common front on the part of a majority of the Court on matters they do agree on and that agreement covers considerable territory. The Court in the *Redrup* case pointed out that the State and government in general had an interest in protecting the morals of children, in protecting the privacy of the home and individuals from offensive salesmanship and in protecting the public from what the Supreme Court had defined as pandering advertising in *Ginzburg* v. *United States* 383 U.S. 463, 1963.

This subcommittee has before it bills which specifically define nonmailable matter in medical terms, places the administrative burden for keeping pornography away from the homes of those who specifically request that the government so protect them, and protects children through provisions based on a New York State statute discussed in *Ginsberg* v. *New York*, 390 U.S. 629, 1968.

This is the approach taken in H.R. 10667, a bill by Mr. Dulski, the distinguished chairman of our committee. I agree with this approach and I support it.

I know that in the near future we are going to hear that Denmark has abolished its obscenity laws. The implication will be drawn that Denmark has little or no obscenity regulation. I disagree.

A staff study based on personal discussions with the subcommittee staff reveals that Denmark has extensive local regulation of obscenity. Shops, for instance, are not allowed to display erotic matter in shop windows. In addition, there is no large-scale mail advertising industry. As a result, the Denmark example has no bearing on the hearings today which are aimed at mail advertising and establishing protection for the privacy of individuals.

The problem we are all interested in is a specific one. It is a Federal problem and it deals with a Federal instrumentality—the U.S. postal service.

I congratulate the chairman of the subcommittee, Mr. Nix, in his effort to keep the issue specific. His diligence will overcome those who will attempt to escape from the need for sensible action by wrapping themselves in the flag and the Constitution.

Such individuals have their constituents and we have ours—the American people. I don't believe that 250,000 Americans are wrong, and I believe that literally millions more want action to protect the family mailbox and their children from smut mail.

Mr. Chairman, at this time I would like to have submitted for subcommittee files examples of the kind of material that my constituents have received and to also submit for the record an outstanding article on the subject of obscenity generally.

The article by Larry Elison of the University of Montana Law School entitled "Obscenity: A Compromise Proposal," suggests that what needs to be done is to establish firmly the right of privacy by providing a tort right for citizens so that they can protect themselves against any pornographer, no matter how important in the publishing industry, through litigation.

I would like to request that your staff look into the matter of providing a means of court action in our Federal courts so that citizens do not have to rely entirely on the criminal law. Whether or not such a provision is added to legislation recommended by this committee, the very fact that such a study is taking place should give smut mailers cause for concern. Thank you.

(The article follows:)

ARTICLES

OBSCENITY: A COMPROMISE PROPOSAL

By Larry M. Elison* and Gary L. Graham

Restrictions on free speech must be viewed with suspicion; restrictions in a system based on a concept of ordered liberty require meaningful guidelines. The following material suggests a new method of attack based on apparent Supreme Court attitudes, general social attitudes and the diversity of opinion in our Nation.

From Sir Charles Sedley's self exposure[1] to Stanley's self indulgence[2] the United States Supreme Court has been digging deeper and deeper into the quagmire of obscenity. The result is near total lack of predictibility. The cause lies in the nature of the subject matter and the method of attack as well as the number of opinions in each decision.

Two hundred years after an English Court found Sedley guilty of obscene conduct the U. S. Congress passed its first obscenity law.[3] This law barred obscenity in the mails. In the same decade, the English Courts formulated a definition of obscenity which was to last many years. Lord Cockburn, in *Regina v. Hicklin,* declared, "I think that the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."[4] Ultimately this standard was adopted by the U. S. Courts.

In subsequent decisions much language has been added without corresponding clarification. Judge Learned Hand suggested that the term "obscene" should describe the critical point in the compromise between candor and shame as judged by the community standards.[5] Judge Andrews, in *Halsey v. New York Society for the Suppression of Vice,*[6] stated that the work must be judged as a whole. Judge Woolsey, in dealing with the James Joyce novel, *Ulysses,*[7] said that the material

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[1]The King v. Sir Charles Sedley, 1 Keble 620 (K.B. 1663). Sedley also hurled bottles of 'offensive liquid' from the balcony he exposed himself from. Sir Charles was fined and imprisoned for a week for these imprudent actions.

[2]Stanley v. Georgia, 89 S.Ct. 1243 (1969).

[3]13 STAT 504 (1865). For a short history of the Act see PAUL AND SCHWARTZ, FEDERAL CENSORSHIP, OBSCENITY IN THE MAILS, New York: The Free Press of Glencoe, 1961. Pages 17-18.

[4]L.R. 3 Q.B. 360 (1868) at 371.

[5]U. S. v. Kennerly, 209 Fed. 119, 121 (1913). Judge Hand, in spite of his dissatisfaction with the Hicklin test, felt obliged to use it.

[6]234 N.Y. 1, 136 N.E. 219, 220 (1922). Judge Andrews indicated that even the Bible might be considered obscene if isolated passages were determinative.

[7]United States v. "*Ulysses*", 5 F.Supp. 182, 184 (1933), *Aff'd* 72 F.2d 706.

must stir the sexual impulses or lead to sexually impure and lustful thoughts in the person with average sex instincts.

As the Court became increasingly concerned about the scope and vitality of First Amendment freedoms new protective shields were constructed. A unanimous Court held unconstitutional a Michigan statute which prohibited publishing materials tending to corrupt the morals of minors.[8] Such a statute would reduce the adult population of the state to reading only that which would be fitting for children.

The unanimity of the Court was shattered in that same year when it was faced with the *Alberts* and *Roth* cases.[9] Justice Brennan noted magnanimously that sex was not *per se* obscene. The new language for obscenity was 'whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest'.[10]

The *Jacobellis* case[11] defined the community standard in the Roth test as national rather than local.

Finally, in 1966 the Supreme Court edged closer to a new approach, but without sureness or clarity. In *Memoirs of Fanny Hill*[12] Justice Brennan qualified *Roth* by saying that if pandering was present in a close case, the requirement that the material be utterly without redeeming social value might be satisfied by taking the panderors' evaluation at face value. The *Ginsburg* case[13] emphasized that, "Where the purveyors' sole emphasis is on the sexually provocative aspects of his publication, that fact may be decisive in the determination of obscenity."[14]

In *Redrup v. New York*,[15] the Court cautiously added to the new approach, looking to the right of privacy to support their decision. "In none was there any suggestion of an assault upon the individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."[16]

And where does the Supreme Court now stand. Not only is the area of obscenity without contour but the Court is without a core of agreement. The individual opinions of the different Justices have been summarized by Professor Magrath.[17]

[8]Butler v. Michigan, 352 U.S. 380 (1957).
[9]Roth v. United States, 354 U.S. 476 (1957).
[10]*Id.* at 489.
[11]Jacobellis v. Ohio, 378 U.S. 184 (1964).
[12]A Book v. Attorney General, 383 U.S. 413, 420 (1966).
[13]Ginzberg v. United States, 383 U.S. 463 (1963).
[14]*Id.* at 470.
[15]386 U.S. 767 (1967).
[16]*Id.* at 769.
[17]Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Sp. Ct. Rev. 7, 56-57.

(1) **Justices Black and Douglas:** All material is constitutionally protected except where it can be shown to be so brigaded with illegal action that it constitutes a clear and present danger to significant social interests.

(2) **Justice Stewart:** All material is constitutionally protected at both the state and local level except hardcore pornography.

(3) **Justice Harlan:** All material is constitutionally protected at the federal level except hard-core pornography; material may be suppressed at the state level if reasonable evidence supports a finding that it is salacious and prurient.

(4) **Justices Warren, Brennan, and Fortas:** Material may be suppressed both by the state and the federal governments when prurient appeal, patent offensiveness, and an utter lack of social value coalesce; in addition, in close cases evidence that the producer, or distributor commercially exploited the material so as to emphasize its pruriency withdraws constitutional protection from otherwise protected material.

(5) **Justices Clark and White:** Material may be suppressed if its dominant appeal taken as a whole is to prurient interest.

Professor Magrath has courteously labeled the efforts of the Supreme Court in this realm 'a disaster area'.[18]

Obscenity is enigmatic—the purpose of its regulation is as ill-conceived, poorly defined and unsupported as the resulting judicial decisions. What societal interests do we profess to protect by the regulation of obscenity? Professor Krislov suggests as the traditional bases for obscenity regulation:[19]

(1) The prevention of improper sexual behavior;

(2) The promotion and inculcation of desirable moral principles;

(3) The avoidance of public displays that are morally and emotionally reprehensible;

(4) The avoidance of public advocacy of unpopular, often illegal, sexual behavior.

Lockhart and McClure have classified the rationales supporting censorship of obscenity as: (1) Sexy thoughts; (2) Overt sexual misbehavior; (3) Exploitation of psychosexual tensions; (4) Community standards; and (5) Pornography.[20]

Among all of the interests named, the strongest theoretical basis for censorship would be the prevention of improper overt sexual behavior. This was the main supporting rationale of the Hicklin rule[21] and it is also part of the support for the Roth test which in modified form is used as the standard for censorship today. This basis is at best theoretical because there is no proof that obscenity 'depraves and corrupts'.[22] There is no credible empirical proof that obscenity contributes to sexual

[18] *Id.* at 59.

[19] Krislov, *From Ginzberg to Ginzberg*, 1968 Sp. Ct. Rev. 153, 157.

[20] Lockhart & McClure, *Why Obscene*, Printed in "To Deprave and Corrupt . . .", Edited by John Chandos, Great Britain: Association Press, 1962. Each of the rationale is critically analyzed in the article.

[21] The tendency of obscenity to deprave and corrupt was present in the statement of Hicklin test. See Text accompanying note 4, *Supra*.

crimes. It has been suggested by Justice Douglas that obscenity might provide a substitute rather than a stimulus for antisocial sexual conduct.[23] Again, there is no empirical evidence supporting this suggestion. One must conclude that the factual causal link between obscenity or pornography and specific antisocial behavior is too illusory to justify restrictions on free speech. The only concrete justification is the prevailing attitude that obscene-pornographic materials are *per se* antisocial apart from any direct or remote effects.

PRIVACY

"The principle which protects personal writings and any other production of the intellect or of the emotions, is the right of privacy, and the law has no new principle to formulate when it extends this protection to the personal appearence, saying, acts and to personal relations, domestic or otherwise".[24] The Brandeis-Warren theory of a 'right to be let alone' was based on a series of cases which referred to doctrines in the nature of a right of privacy.[25] In the past half century over 300 right of privacy cases have been decided.[26]

As developed, the right of privacy is divided into two distinct segments: the right against governmental invasion and the right against private invasion.[27] The most recent and most comprehensive case dealing with protection of the right of privacy from governmental invasion is the *Griswold* decision.[28] A Conneticut statute prohibiting the use of contraceptives was held unconstitutional as an invasion of the right of privacy. Justice Douglas, writing the opinion, stated, "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." He based the right of privacy on the 'zones of privacy' which are created by the various constitutional guarantees.[29] Justice Goldberg, concurring, said that the right of privacy was one of the fundemental rights that was protected from governmental interference by the Ninth Amendment. Also in the *Griswold* case, Justice Douglas spoke of the Freedom of Speech;

> In other words, the state may not consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right to freedom of speech and press includes, not only

[22] *Stanley v. Georgia*, *Supra*, note 2 at 1249. Particularly footnote 9 and accompanying text.

[23] *Supra*, note 12 at 432.

[24] Brandeis & Warren, *The Right to Privacy*, 4 Harv. L.Rev. 193, 213 (1890).

[25] *Id.* The language 'the right to be let alone' was later used by the then Justice Brandeis in Olmstead v. U.S., 277 U.S. 438, 478 (1928) in his dissenting opinion.

[26] WESTIN, PRIVACY AND FREEDOM, New York: Atheneum (1967) 346.

[27] The former would, of course, be based on the constitutional limitations on governmental action and the latter would be the tort action based either on the common law or upon statutory provisions. Both of these areas are currently expanding.

[28] Griswold v. Connecticut, 381 U.S. 479 (1965). See also, Mapp v. Ohio, 367 U.S. 643, 656.

[29] *Id.* at 483-485.

> the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach—indeed freedom of the entire university community.[30]

A recent California[31] decision applied the *Griswold* right of privacy to an obscenity case. The defendant was charged and convicted of the possession of lewd films. He contended that they were not meant to be sold until they had been edited. The court granted the relief sought by the defendant. In doing so the court said "No constitutionally punishable conduct appears in the case of an individual who prepares material for his own use or for such personal satisfaction as its creation affords him."[32] The same result was reached in a recent United States Supreme Court decision.[33]

Case law suggests a right of privacy broader than the specific constitutional guarantees and underscores the apparent trend toward a greater recognition of the right of privacy in today's world. Perhaps one of the reasons for the expansion of the right is the diminishing ability of a person to escape from people—masses of people. There are continual assaults by massive government, massive institutions, and mass communications. In an increasingly complex society, the quiet sanctuary of ones home is more psychologically sacred than ever.

The right of privacy in tort law encompasses four separate torts:

> (1) Intrusion upon the plaintiffs seclusion or solitude, or into his private affairs;
>
> (2) Public disclosure of embarassing private facts about the plaintiff;
>
> (3) Publicity which places the plaintiff in a false light in the public eye;
>
> (4) Appropriation, for the defendants advantage, of the plaintiffs name or likeness.[34]

Intrusion on the plaintiffs seclusion seems to be an expansion of the intentional trespass doctrine and is of principal concern in the development of a tort doctrine of obscenity.

In *LaCrone v. Ohio Bell,* the court recognizeed the first category and defined it as follows: "[T]he wrongful intrusion into ones private activities in such a manner as to outrage or to cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."[35] The Ohio court found that the tort consisted of several elements including; the invasion must be objectionable or offensive to the reasonable man; the

[30] *Id.* at 482.
[31] In re Klor, 51 Cal.Rptr. 903, 415 P.2d 791 (1966).
[32] *Id.* at 794.
[33] *Supra,* note 2.
[34] Prosser, *Privacy,* 48 Cal.L.Rev. 383 (1960).
[35] 120 O.A. 129, 201 N.E.2nd 533 (1963).

thing intruded on must be private; the interest to be protected is primarily a mental one; and actual damages need not be proven. The court said that this invasion of privacy was an intentional tort that was analagous to trespass.

With this definition of the tort and with the elements considered in its application as given above, it is an easy step to find that this tort action accrues at any time the home of a person is invaded by matters which would be offensive to a reasonable man. This, of course, would not apply to governmental actions such as search and seizure, where sufficient governmental interests are involved and where many constitutional safeguards protect the individual. The invasion by a private person is all that is spoken of here.

Montana,[36] along with a majority of other states,[37] has recognized the right of privacy. Some states have based their decisions on statutes which expressly create the right while other states have found the right to be of common law origin. Most state decisions are based on the protection of the right of privacy as enunciated by Brandeis and Warren. The right of privacy is recognized. The right is expanding. The right should accrue when one's seclusion is invaded by matter which would be offensive to a reasonable man.

PROPOSED THEORY

Obscenity control has properly been termed a "constitutional disaster area". The tests applied to determine obscenity have been characterized by changing standards and general confusion. Emphasis has been shifted from the 'badness' of the matter itself to the 'badness' of the conduct of those who pander it. With this shift in emphasis, it becomes difficult to determine which particular governmental interest or what combination of governmental interests support the imposition of criminal sanctions against the producer or distributor of such materials. With standards so vague and justification for control so nebulous *criminal law should withdraw from the area of obscenity.* The tremendous urge to make criminal all activity of which we disapprove has already cast an unrealistic and unnecessary burden on law enforcement. If control is necessary other methods are preferrable.

Based on the experience of Denmark, censorship is probably unjustified. It is reported that the abolition of all forms or censorship there has resulted in a depression in the sales of all obscene materials. This indicates that personal selectivity begins only when governmental censorship ends. At a minimum obscenity control should be removed from criminal law and placed in the field of general social sanction and tort law.

[36]Welsh v. Roehm, 125 Mont. 517, 241 P.2d 816 (1952).

[37]PROSSER, HANDBOOK OF THE LAW OF TORTS, West Publishing: St. Paul (3rd Ed. 1964) P. 831.

Informal social sanctions have probably existed since the first obscene publication. Among the informal censors who became well known for their crusades were Thomas Bowdler and Anthony Comstock. Bowdler purged Shakespeare's works while Comstock was engaged in lobbying for adoption of the first obscenity laws in the United States.[38] Although many individuals have been active in this area, their sphere of activity is usually limited to the smaller communities. Several organizations have as their goal the suppression of obscenity. Noteable among these is the National Organization for Decent Literature.[39] After a list of offensive books has been compiled by these organizations, they exert pressures on book sales outlets in various ways. If a bookseller refuses to sell the books that are on the organizations list, he receives a certificate of compliance. If not, he is threatened with a boycott. Occasionally the lists that are compiled by these organizations are used by law enforcement authorities as the basis for obscenity arrests. Other groups are active in purging school libraries of obscene and 'offensive' materials. As long as these groups function within the law and without the aid of criminal sanctions, they should be allowed to do their duty as they see it.

Another powerful group of informal censors are advertisers in the various forms of mass media. When 'offensive' material appears in one of the newspapers or television programs, an advertiser may withdraw his support from that medium or program in fear of large scale consumer reprisal. (Unfortunately material may be offensive to the advertiser because of its political, economic or social commentary quite apart from any obscenity.) If all criminal sanctions dealing with obscenity were removed there would still be a potent force working to rid the world of smut.

It is proposed that the only legal action that could be contemplated in the area of obscenity would be a tort action predicated on the general right of privacy. Under the proposed approach there would never be justification to look for, prosecute, or file civil charges against a man for producing, creating or possessing any variety of written, recorded or reproduced materials in the confines of his own home.[40] The action would be based on the right of privacy as discussed by Prosser[41] and would require a penetration of the zone of privacy of an individual with matters which are offensive to the local community standard. Four

[38]Comstock was said to have destroyed over 50 tons of 'vile' books and nearly 4 million obscene pictures. Excerpts from his book, *Traps for the Young*, are set forth in Appendix I to Justice Douglas's dissenting opinion in Ginzberg v. New York, 390 U.S. 629, 656 (1967). See also *Paul and Schwartz, Supra*, note 3 at 18-30: Alpert, *Judicial Censorship of Obscene Literature*, THE FIRST FREEDOM, Chicago: American Library Association, 1960.

[39]THE FIRST FREEDOM, *Supra*, note 38 at 133-159.

[40]This is in accord with recent decisions, *Stanley v. Georgia, supra*, note 2; *In re Klor, supra*, note 31.

[41]*Supra*, note 34.

elements would be necessary for the action: a (1) negligent (2) penetration of the (3) zone of privacy with (4) offensive matters as determined by local community standards. (General damage could be assumed if the proof of the basic elements of the cause of action was adequate. Special damage would have to be alleged and proved.)

Conceptually the most difficult and perhaps the most important element in the tort claim would be the delineation of the zone of privacy. This term was used in the *Griswold* case, but the limits of the zone were not specified. Although the cases since *Griswold* have given the term some content, most of them have dealt with the invasion of privacy of an individual by the state rather than by another individual.[42] It would be convenient to retain the criminal definition of the zone of privacy in the tort field, but not necessary nor necessarily desirable since the interests involved are substantially different.

Perhaps the best initial approach would be to define the zone of privacy as the home and allow for further expansion by the courts as it appears necessary in the particular case. This would allow the courts to vary the zone and would serve to keep the concept of privacy dynamic. It would give everyone the basic assurance that they would be free of unwanted 'offensive' materials in their own home. At the outset this would be the extent of the protection afforded adults. One apt area of expansion of the zone might be to unrequested personal solicitation of adults in public places.

The primary means of intrusion or penetration into the home is by television, radio, door-to-door printed or verbal solicitation, mail, delivered newspapers and telephone calls. Other more exceptional means might include mobile public address systems and paraded printed placards. There would be no need to demand physical trespass, since the invasion is to one's senses rather than his property.

The penetration of the zone of privacy would have to be by offensive matter. To be offensive, the material would have to offend the moral sensibilities of an individual rather than his political, economic or religious values. The definition of offensive matter could be narrowly or broadly interpreted by the jury based on a local community standard of morality. This position opts for recognition of a tremendous national diversity. A national standard certainly would be more practical. The danger of an overly broad definition of offensive matter and an unmanageable variety of standards is minimized, first because of the elimination of any criminal sanction, and second because such a determination would not prohibit production, possession or distribution of the

[42] *Stanley, supra,* note 2, and *Klor, supra,* note 31, both indicate that the right of privacy extends at least to the home. In Smayda v. U.S., 252 F.2d 251 (1965) the court refused to extend the right of privacy to a public toilet where there were reasonable suspicians that homosexual acts were taking place.

material but would merely prevent the distributor from foisting it upon the person who prefers to avoid it.

There are three alternatives for characterization of the tort: (1) Strict liability; (2) Negligent; and (3) Intentional. The strict liability theory would allow the plaintiff to recover on a showing of the last three elements of the tort. This theory may act too much to the detriment of the publishers and distributors. The intentional tort theory is more in line with the Supreme Court decisions dealing with the requirement of showing scienter. Proving both knowledge of the offensiveness of the material *and* an intent to invade the plaintiff's privacy would be exceedingly difficult and such requirement would probably make the proposal unacceptable.[43] The flaw in requiring a showing that the publisher or the distributor knew that the material was offensive and that they intended to invade the privacy of the plaintiff is that a heavy burden is placed on the individual plaintiff. The middle ground, negligence, seems on balance to be the most acceptable characterization. This would require the plaintiff to prove that the defendent knew or should have known that the material he was distributing was offensive and that he knew or should have known he was foisting upon unconsenting persons.

CLASSIFICATION

Under the proposed theory the zone of privacy of those under the age of 18 years would be expanded to preclude any exposure to matters which are offensive to local community standards. The only means by which this could be accomplished without interfering with an adult's right to be informed would be through classification which would assure that matters which are offensive would not be distributed to children. The basis for this expanded zone of privacy for children is an assumption that offensive materials will not corrupt adults, but may corrupt children. While this assumption is not supported or refuted by existing empirical evidence, moral values of adults are more firmly rooted and less susceptible to change. Children are still in the process of developing moral values. Until these moral values are developed, children may legitimately be considered incapable of dealing, as a matter of free choice, with materials which are generally deemed offensive.

Prince v. Commonwealth[44] recognized that the state has an interest in protecting the welfare of children and in seeing that they are 'safeguarded from abuses' which might prevent their 'growth into free, independent well-developed citizens'. The *Ginzberg* case[45] held that the state of New York had the power to prohibit the sale of matter to minors which could not properly be withheld from adults.

[43]Smith v. California, 361 U.S. 147 (1959).
[44]321 U.S. 158 (1944).
[45]Ginzberg v. New York, 390 U.S. 629 (1968).

The Court approved the idea of variable obscenity which seems to mean judicial approval of classification for morally offensive matters.[46] It held that it was not irrational for the New York legislature to find that exposure to materials which were obscene within the meaning of the statute was harmful to minors. There seems to be greater unanimity among the 'experts' (still without much empirical support) that obscenity may be harmful to children and may not be harmful to adults and therefore classification is a reasonable and legitimate approach.[47]

The determination of what could properly be withheld from children would not have to be based exclusively on sexual content. If obscenity can corrupt, so might depiction of violence. Presently there is substantial pressure to reduce the level of violence that is currently the vogue in children's television programs. Matters which are extremely and unnecessarily violent might be fairly determined to be morally offensive. If materials were found to be offensive to children, the distributor would be allowed to sell or present the material to adults but the material could not be distributed to children. A finding that particular materials were offensive would mean that the material could not be made available to children and could not be foisted upon adults within their home but could otherwise be made available to adults. There could never be and should never be total suppression of any material. This proposal would entitle an adult to purchase anything that anyone wanted to take the time to print, draw, photograph or otherwise prepare. To restrict the adult population to matters which are fit for children would be to "burn the whole house to roast the pig."[48]

Preferably there would be three classifications: adults, 13-18 year olds, and 12 and under. This would be in line with the *Butler*[49] idea that you should only prohibit matters which are assumed detrimental to the particular class. This would mean the development of a three-step classification in line with the maturing process of the individuals exposed. Even though three categories are recommended, for convenience it would probably be necessary to use only two. However, even with two categories an award of special damages would be avaibable which would consider the particular damage sustained by the plaintiff. Since the defendent takes the plaintiff as he finds him, special damages could be enhanced by a showing of special injury as a result of the plaintiff's chronological, social or moral immaturity.

The proposed classification system would not prevent children from gaining access to offensive material if the parents decide that the material is proper for their children. This is in accord with the prin-

[46] *Supra*, note 8.

[47] *Supra*, note 45.

[48] *Supra*, note 22. Also, any work written on obscenity has an opinion one way or the other concerning the harm if any that results from exposure to obscene materials.

[49] *Supra*, note 8.

ciple expressed in the *Ginzberg* case[50] that the primary responsibility for the well-being of the child is in the parents, but that this parental control cannot exist at all times. The evil that the classification scheme seeks to prevent is the purchase of offensive material by the young child without the consent or even the knowledge of the parent. With a classification scheme in operation, there would be no interference with the child's right to be informed if it is agreed that at this age he does not possess the capacity to determine what information he should be exposed to and that duty falls upon the parents.

And who shall assume the Olympian and tyrannical duty of classification? The rational choice, if there can be a rational choice, is the person who prepares the material to be disseminated. The publisher or producer is more intimately acquainted with the contents of the material than any other person in a position of control. This scheme of classification has already found general acceptance in the motion picture industry.

JUSTIFICATION FOR THE APPROACH

Great confusion exists as to what is obscene today and what may be termed obscene tomorrow. There is a real need to provide a more definite standard and to eliminate criminal sanctions. Under the suggested approach, the only sanctions that could be used against a person are civil sanctions, and if the person properly classifies the material and then distributes it according to the classification he would avoid susceptibility to all sanctions.

The suggested tort approach would also do away with the necessity of the head in the sand approach that free speech guarantees do not protect obscenity since obscenity is not within the guarantee and that obscenity is whatever we decide it to be. Such a tautalogical definition of the limits of free speech is not acceptable. In the hands of a 'moralistic' Court it allows limitless repression. The original basis for the exclusion of obscenity from the free speech guarantee was extremely weak as pointed out in the dissent by Mr. Justice Douglas to the majority decision in *Memoirs*.[51] One of the reasons that this theory seems ludicrous is that since the standards of the community are rapidly changing, things which were considered obscene a few years ago are now protected under the First Amendment. The material itself didn't change—only the attitude towards it. To base constitutional protection on the whim of the community standard seems the height of folly. Any material, reproduction, object of art or what have you should be available for purchase by the adult population with the only restriction being that it cannot be forced upon them.

[50] *Supra*, note 45.
[51] *Supra*, note 12.

Of all the reasons for the suppression of obscenity, the one which seems to be the least supportable from a purely statistical behavioral standpoint is the claim that obscenity tends to corrupt the reader or viewer.[52] There remains great conflict in this area. The tendency to corrupt is a segment of the vicious circle used to justify the present program of censorship. If material has a tendency to corrupt, it has no redeeming social value. If it does not have redeeming social value, it is not protected under the First Amendment. Since it is not protected under the First Amendment, the mere possibility that it may corrupt is enough to allow suppression. Such reasoning is illustrative of an approach which permits suppression of material without proof of its harmful effects. If the statement enunciated the idea that obscenity may corrupt, the rest could not follow and more has not been proved.

The suggested approach protects legitimate public interest in the suppression of offensive materials.[53] Adults who wish to be exposed to offensive material may risk corrupting themselves. This is a minor concession to free speech and to a more practical solution to the problem of morally offensive material. If obscene materials corrupt, who among us would risk corruption as a censor? In truth, if there is any validity in the thesis that obscenity will corrupt, it must be found to be limited to persons whose moral sensibilities have not matured. Then it would seem that any proposal which would protect the youth from exposure to morally offensive materials would satisfy any legitimate public policy. That which has been said about the tendency to corrupt is equally applicable to the tendency to trigger improper sexual conduct.

The suggested solution would be an easy move for the courts to make since they already seem aimed in the proper direction. The Court has been placing more and more emphasis on pandering, as an invasion of privacy. The Court has also made direct reference to privacy in connection with obscenity cases. In the *Redrup* case[54] the Court Per Curiam stated "In none [of the cases being considered] was there any suggestion of 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." The Court in *Stanley*, in reference to the distribution of obscene materials noted the objection as "[T]here is always the danger that obsene material might fall into the hands of children . . . or that it might intrude upon the sensibilities or privacy of the general public."[55] Control of offensive material through the use of the extended right of privacy is but a short step away.

[52] *Supra*, note 48.

[53] The *Stanley* case, *supra*, note 2, intimated that the two legitimate interests that obscenity regulation protects are isolation of children from the possible effects of obscenity and protection of adults right of privacy.

[54] *Supra*, note 15.

[55] *Supra*, note 2 at 1249.

HOW WOULD IT WORK?

Theory applied to the communications media.

Communications most likely to invade a man's castle include television, radio, newspapers, unsolicited mail and any form of uninvited door to door solicitation. To avoid civil litigation such communications would have to be inoffensive to the community moral standards. If there are any children in the home and it is reasonable to conclude that these materials will reach the children because of the time that they are presented or because of the manner in which they are distributed, they must conform to the community standards applicable to children. The general effect of placing the primary zone of privacy in the home might be to subject any form of communications that invades the home to the childs standard of scrutiny. This would not be in violation of the ideas expressed in *Butler* because this prohibition would only be effective as to those things which invade the home. An adult could voluntarily expose himself to anything outside the home. The main reason for reducing media such as television to programming that would be suitable for children is that parents should be given assurance that their children will be free from offensive matters in their own home. Parents can hardly be expected to be present at all times to control the materials that their children are exposed to on radio and television. This does not mean that the media will have to program pablum, only that they limit vivid portrayals of sex and violence. The standard applied to nationally produced and programmed material could be national. As to local production, sales and distribution, the standard could be local.

Once invasion of the home is no longer threatened, a system of classification would be invoked. If materials which are offensive to the local community moral standards are made available to children a cause of action would arise. This should prevent persons from selling or displaying offensive materials in any place where access to the materials cannot be controlled. In any case where a child was exposed to offensive materials, without parental consent an action could be brought. The determination of whether the exposure was negligent or could have been prevented would have to be made by the jury under their determination of whether the zone of privacy had been penetrated. Materials which would be considered offensive to children could be displayed and sold only in areas where the classification scheme could be enforced.

Bookstands

These would require implementation of the classification scheme previously considered. Any book that was not classified would be considered fit for sales to minors. The distributors would have the responsibility of separating the books that are expressly classified as being unfit for consumption by minors from those which are unclassified. Children under the age of 18 would not be allowed into the area which

contained classified books. If a right of action exists both the distributor and the publisher could be joined. What has been said about the classification of books would apply to all other forms of printed materials, recordings and photographs.

Theatres

The classification system which the motion pictures are using at the present time would probably be adequate. If the distributing company had not classified the film, it would become the responsibility of the local theatre manager to view and classify it. In this way the local community standard could be used in the classification. Not only would the films themselves have to be classified, but also the previews or trailers. This would be necessary to insure that offensive scenes were not shown to a general audience when the coming attraction is an adults-only film. Virtually the same method of classification would apply to live theatrical presentations. In some respects those would be easier to classify than movies since the presentation would be more localized and the local community standard could be readily determined before hand. However, preview of a live theatrical presentation might prove objectionable and difficult.

Libraries

These would require the same type of control features as bookstores discussed above. A separate area would be set aside for the display of materials which are restricted to adult reading. This would be based on the publishers classification. Any book that was classified would be restricted to adult readership. The library would also have the alternative of allowing only adults to select the books thus giving them the responsibility of classification in an informal way. This problem may be illusory since libraries probably have a very limited number of 'obscene' books on their shelves at the present time.

Schools

Since the only materials which would give rise to an action for invasion of privacy are those which are offensive to the morals of the community, there would be no problem with most textbooks. The main foreseeable problem would be sex education programs. The school library would operate in the same manner as any other library except that there would probably be no need for them to have any books that were classified as being unfit for children. By the time most persons reach university age they would no longer be considered children under the classification scheme and could voluntarily expose themselves to any material. Here the important thing would be to ensure that no person be *required* to read or view material which would be offensive to objective moral sensibilities. Thus required reading in required courses would

have to conform to the moral standards of the community.[56] If the course is not required for graduation, the instructor would be required to list potentially offensive materials prior to registration. An instructor in a required course could also avoid the invasion of privacy by using the questionable material as supplementary rather than required reading. The principal objective with college age persons would be to give them notice of the questionable nature of the material and then allow them free choice.

Public Gatherings

Unless an event is held in a location where attendance can be limited to certain age groups, the person making the presentation would be limited to presenting matters which would not be offensive to the moral sensibilities of those present. This follows the general theory that the zone of privacy of children follows them wherever they are and wherever they are permitted or encouraged to go.

The above descriptions of the practical applications of the proposed invasion-of-privacy tort do not pretend to cover all situations but should provide a basis from which an extrapolation can be made and a conclusion reached that will apply to most situations.

SHORTCOMINGS

The premise that obscenity is not harmful to adults as long as they have the choice of being exposed to it is probably the point most susceptible to criticism. As has been pointed out previously, there is a wealth of opinion supporting either side. However, it seems fallacious to base a restriction of free speech and the freedom to be informed on the tenuous assumption that obscenity has a tendency to stimulate sexual misbehavior. It is against the principles of freedom to treat suspicion as adequate grounds for supression. Neither the courts nor the legislatures should ever accept such a proposal.

As has been mentioned above, the courts are becoming more privacy conscious and might be willing, for the sake of ending the present confusion, to adopt such a theory. In states which consider the right of privacy a common law right, the courts would be free to develop such a theory without legislative intervention. Legislation would be needed to repeal criminal sanctions for the publishing and distribution of obscenity. Where the right of privacy is considered statutory, the entire adoption of the theory would be in the hands of the legislature. This would create substantial difficulty since those who are in favor of strict censorship and severe criminal sanctions are usually the most vocal.

[56]This approach is most compatible with the pedagogical view that required courses are mostly nonsense and university students should be encouraged to exercise greater freedom to learn rather than be poured into pre-determined educational molds.

The amount of increased informal censorship that might result from the adoption of this proposal can not be predetermined. It is generally assumed that when the state ceases to act as a censor, groups of interested citizens tend to assume that role. Since it is a matter of speculation it can only be mentioned here as a matter to be considered.

A final difficulty in making the proposal work is the requirement of classification. There are many dangers inherent in the idea of classification. The main fear of classification is that it may act as a prior restraint and discourage the production of materials which might be questionable. Under the theory as presented, this is an idle concern. The only thing that the classification will affect is the quality of material that is presented or made available to children. To classify an item as unfit for children means only that it would give rise to an action for invasion of privacy if it were made available to a child. The conclusion that a particular matter is obscene will not remove it from the reach of everyone but will merely restrict it so that it will not fall within the reach of the group that it is supposed it might harm.

CONCLUSION

Freedom of expression should be a most carefully guarded freedom. Nevertheless it can be wielded in a number of vicious and destructive ways. An accused person's right to a fair trial can be destroyed by unrestrained expression which creates an atmosphere of prejudice. The damage to the accused is unquestioned—it may cost him his liberty or his life. Neither the court nor the accused have legal authority to protect the criminal process from such outside interferences—freedom of expression is deemed too important![57]

People who speak plain lies about public figures stand protected unless malice is proved.[58] The damage to the individual maligned is unquestioned. The lies may cost him his job and his reputation but he is without legal remedy[59]—freedom of expression is too important!

By contrast it seems a strange and perverse twist that calls forth criminal sanctions to limit freedom of expression if it dallies too long

[57]The judicial system is forced to rely on continuances, changes of venue and reversals to protect the accused and purify its own processes. See Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); Sheppard v. Maxwell, 384 U.S. 333 (1965); State v. Dryman, 127 Mont. 579, 269 P.2d 796 (1954).

[58]A virtual impossibility. See New York Times v. Sullivan, 376 U.S. 254 (1964); Beckly Newspapers v. Hanks, 389 U.S. 81 (1967); Pickering v. Board of Education, 391 U.S. 563 (1968).

[59]He must rely on public refutation which is perhaps an adequate remedy in a free society.

on the subject of sex [60] even though there is a serious question as to the damage that flows therefrom.

In many respects our law is an image of our troubled society. Values have evolved from political and economic strength and from the strength of human emotions—not from empirical evidence and reasoned judgment.

Mr. NIX. Our next witness is Mr. Harry Thayer, owner of radio station WGHQ, Kingston, N.Y. It is a pleasure to have you here, Mr. Thayer.

Mr. THAYER. Thank you.

I have some copies here. I would like to ask you before I start, it was my desire to read into the record some quotes from some of this literature. Would you prefer I not do it?

Mr. NIX. I think it would be quite all right to do so.

TESTIMONY OF HARRY THAYER, OWNER OF RADIO STATION WGHQ, KINGSTON, N.Y.

Mr. THAYER. Mr. Chairman and members of the committee, I greatly appreciate the opportunity of being able to appear, and I am deeply indebted to Mr. Hamilton Fish, Jr., for gaining your interest to permit me to come here from Kingston to talk to you.

I greatly appreciate the opportunity of being able to appear before you with respect to a matter that has disturbed me very greatly over the past year. This has to do with obscene, pornographic sex mail, or whatever one wishes to describe it as.

Ulster County, where Kingston is located, has a population of 140,000 people. Kingston, where I am a major stockholder in one of the radio stations, and I also happen to be the major owner of one in New Rochelle, N.Y., has a population of 30,000. In the past 6 months we have been deluged with pornographic mail of one sort or another.

I do not mean to say that cities the size of Buffalo, Cleveland, Seattle, Atlanta, and Washington, D.C., do not get their share, but I do not think the effect of the mail is as unpleasant and as real as it is in a community the size of Kingston or an area the size of Ulster County.

As a result of some complaints to me, I did an editorial on the air concerning pornographic mail and sex literature. Then I was literally swamped with samples that were sent in to me or brought to the radio station. Believe me when I tell you that people in our community and our area were very distraught by this sudden deluge.

I am certain that most of you have seen, if not all, practically every sample that I have collected, and I do not propose to display it all before you, but I have brought some outstanding examples which I hope will be given some consideration, because some of them have been distributed as late as this week.

It would be impossible for me to bring—unless I used a station wagon—the entire collection I have assembled, in which, of course, there are hundreds upon hundreds of mail pieces which are duplicates.

I have read some of the proposed bills that have been introduced and I am highly in favor of them, but there are, to me, a number of loopholes that would permit the publishing, dissemination and distribution

[60] Supra, notes 1 through 13. Remember, no depiction of violence is too gross to call forth similar sanctions.

of this kind of filth to continue. I am certain I do not have the answers to all the questions of prevention of distribution for the vendors of this kind of material, but I believe there are one or two suggestions I have which might be worthy of your consideration.

I believe it is very important that the word and term, "minor," be very elaborately defined. I do not think that is true in the instances of the proposed legislation that I have seen to date.

In addition, I feel it imperative that adults have very thorough protection against receiving the kind of literature that I have brought with me, and it is not possible to prevent this by simply going to a post office and requesting that mail from a given mailer or specific return address be automatically withheld from delivery to the addressee.

And I heard a suggestion made just before, Mr. Chairman, about the publication of a list that would be sent to the distributors or mailers of this kind of literature, and I feel this should not be an imposition and cost to the taxpayers, and if such a thing is done, some obligatory way of making it mandatory that it would be paid for and I have an alternate proposal that I would like to suggest.

No one can anticipate that the Village Books & Press will be changed the following month to Elorac Books, Inc., or that Quality Products of Hawthorne, Calif., will suddenly change to Adult Novelty Co. As you can well imagine, it is very simple to change the name of the mailer from week to week and mailing by mailing by mailing exhibit 1, which I have here, and simply will put in the record before you. I will leave it. Exhibit 1 is Gargoyle.

Mr. NIX. Without objection, whatever material you submit may become part of the subcommittee files.

Mr. THAYER. Thank you.

What I propose for the consideration of this committee and our Congress is, any piece of mail and/or literature having to do with physical or sexual health or sexual acts may only be mailed after a permit has been granted by a U.S. Government agency which approves the text of the material and the illustrations of the material as being in the interest, welfare, morals and well-being, as it were, of the public. That a permit must be obtained by submitting 60 days in advance to some agency set up by the Congress with a fee to be paid for this inspection and approval. There should be a fee for examination of the material and a fee for the permit if and when it is issued that permits an individual and/or company to print, publish and distribute such material.

The reason I am concerned that there be a control over the mail that now evades such restrictions is that I am producing before you a number of pieces which are addressed to the names of business concerns in our area—exhibit 2.

These automatically evade any regulations or restrictions with respect to such material being mailed to minors. Many of the recipients of this particular piece of mail have, as you will see, contacted me because they resent it coming to their place of business, not only because they consider it unhealthy but because in most cases secretaries or female employees open the mail and in many instances are genuinely shocked by the contents.

As an example of how dangerous it is for minors or, in my judgment, people 16 or under, to be involved with this kind of mailing of porno-

graphic material, I wish to submit in evidence a copy of "Only the Weak Cry" as exhibit 3.

This is why I asked permission to read portions of it. I sent for this and I wanted it sent through the mail, and I opened it just like this. This has to do with homosexuality and anyone can get it by sending in $1.50 through the mail.

I don't have to go on. It gets worse as it goes on. This can be purchased simply by mailing a check, and it cannot be to anyone's interest to have that kind of material disseminated.

I found it revolting, and I believe I have had considerable experience in life, especially in view of the fact that my father was commissioner of correction for the State of New York and spent 35 years in the administration of penal institutions.

"Only the Weak Cry" is just one of a multitude of obscene bits of literature one can obtain from the Village Press, once his name is on the mailing list.

At this point, for your information, I would like to introduce two copies of the newspaper, Gargoyle, which is published in New Paltz, N.Y., and distributed by mail. I have my canceled check to prove that I was able to subscribe for it and arrange to have it transmitted by mail.

I contend that the use of mails for such a publication should not be permitted and if there is a loophole in the present laws with respect to use of mails for the mailing of alleged obscene publications they then should be modified or amended. This newspaper, Gargoyle, is unwholesome if not vulgar. It certainly should not be permitted to go through the mails, in my judgment.

I owned a newspaper before I got into the radio business, and I well know the restrictions of the freedom of the press as to what we should be permitted and be allowed to send. I will submit here exhibit 4.

I have been informed via a letter from the White House and a member of President Nixon's staff that legal action by the U.S. Government had been instituted against the publication, Pleasure. This information came to me at least 3 months ago. Since that time I have received two issues of Pleasure in the mail as a result of my subscribing to this horror publication in order to prove that it is obtainable via the U.S. mails. I display for your information and consideration two copies that I received as recently as September 26, 1969—exhibit 5.

I do want to get part of this in the record because it is not the naked pictures that are particularly vulgar in Pleasure; as you may well know, the centerfold of each issue of Pleasure has a naked woman and a naked man back to back. But it is the classified advertising and excuse me, I am going to read the title—Meet Cock and Pussy.

It says: "Handsome young artist"—this is a classified advertisement—"would like to meet lovely sexually aware young lady. * * *"

This, I say, can in no way be interpreted as being a publication that goes through the mail in newspaper form that complies with freedom of the press. It goes way out beyond that.

I cannot believe there is anyone in this room who will consider that such a publication is healthy and has any proper right of distribution through the mail service of our country. This Pleasure publication disturbs me greatly and I respectfully request your committee to make a thorough investigation of how it is permitted to continue its publication when I have been told that legal action had been instituted by the U.S. Government against the publishers.

There is another matter that should be looked into by your committee and that is the source of the mail lists that these purveyors of obscenity and junk use. For example, how do they obtain the list of funeral homes to mail such sex material as I now show you? (Exhibit 6.)

Now our funeral homes in Ulster County, all of them in the Hudson Valley, just got a very obscene piece of mail, and I have one with me that went to the ladies' auxiliary of the Independent Order of Odd Fellows, and it is just vulgar, but what chance have they got to stop that?

I want to say this much, that I have gone as far as Detroit and investigated the source of this, the lists of some of these lists, that are being used and I suggest and submit to you, sir, and I want it in the record if I may, the R. L. Polk Co. in Detroit is one of the biggest sources of such lists and one example of what they will do is this, printed here are 261,747 JC members. You can buy that list for $25 a thousand.

I called there and asked, can I get a list of radio stations I want to mail to, do I have to send a copy of what I am going to send them? No, no, just the ZIP code of the area you want to cover and a check for the number per thousand you want.

And I said, do you mail it or will I, and they said they would mail me the list and I can mail it from my own post office. No questions as to what I had intended to use it for.

This company for example has the entire mailing list of New York State motor vehicle registrations. I say it is violating a contract, but I realize that is not a Federal Government matter.

One of the chief executives of a leading industry in our area which employs some 2,500 people sent me a sample that was being received by their employees. He said, and I quote, "I find we are being flooded with this piece of junk." It is his contention that the source of the list came from the mailing list of a trade journal. I submit a sample of the material received by the employees, for your consideration—exhibit 7.

I have made as much investigation as I can with limited resources. I find that the sale of the registration lists of automobiles by the State of New York—since that time I found it is not—is made to one company which supposedly is restricted to using that list for the automobile manufacturing industry. I question whether or not the use of this list is limited to the automobile manufacturing industry. But please consider the names of how many people would be on such a list from the State of New York. In other words, this list comprises the names of all automobile owners.

I find that there is no specific regulation in New York State against the sale of voters' lists by, for example, the Ulster County Board of Elections, Ulster County being my home county, or by any other county, for that matter.

There is no restriction in the State of New York against the sale of voters' lists and I have asked our State senator to consider legislation against that.

There is no tight regulation that would prohibit the sale of these lists. As of now, it is a policy to limit the lists to a copy to each political party leader in the county. But he can dispense it in any way he wants

to. Once it is issued there is no control over what further use it might have.

I feel that Federal statutes should be instituted which would make it possible for the post office to determine from what source a mailer derives its list of names and, further, that the law prescribe that those mailing lists users be required to know the use of such lists are used for the mailing of such literature as I now show you in exhibit 8.

These are, by and large, the most despicable pieces of literature I have ever received. I ask you gentlemen to please make them a part of the permanent records of this committee, and if you will, I ask you each to view them before they are made a part of that file.

It is my contention there must be instituted legislation that will prevent such indecent and immoral material getting into the mail channels of the United States. I certainly believe that proper legal procedure can be established and be within the constitutional limits of our country.

In conclusion, I want to reiterate, I do not think that enough stress, as far as I can determine, is being placed in the legislation that is before Congress with respect to pornographic or sex and/or obscene mail, as to the adults' desires and revulsion to and by that which is now so rampantly distributed. Adults and grownups need this protection as well as the younger generation.

And let me tell you how they get names for young children. You will notice classified advertising or display advertising in youth books and magazines, perfectly, or more or less, decent ones, and they will say, for instance, send your name and age and address and 25 cents and we will give you five pencils with your name inscribed on them so you can use them in school. This is the way companies build a list of minors and young children.

In the mail that I have received from listeners to our editorials and to our news broadcasts on this subject, as well as from the many hundreds of people I have spoken before on the subject, I find there is a very sincere desire on the part of adults that a stop be put to this grim material and also that the public believes it is an indecent invasion of an aspect of their rights as an American citizen to be free of insults as to their health and capabilities, insofar as sex is concerned.

I cannot stress too strongly the need for control over the contents of this kind of literature before it gets to the post office with an address on the envelope. If there is any single indication that our postal rate system is unhealthy it certainly is this obscene, pornographic, and sex material that is currently pouring into our homes and offices.

Much of it on bulk rate terms.

It is simply not enough to be told one can go to the post office and say they do not desire to receive such mail. This does not work against the kind of purveyors that are in action in this day and age.

It is necessary that legislation be established that requires a mailer to have a postal permit based on examination of samples of the material he wishes to put through the mails. Again I say, this is particularly necessary wherein those pieces of mail have in any manner anything to do with the health and moral welfare of the individual.

I say health, for I am sure this should apply, if it does not already, to such things as patent medicines. I urge your committee to take action at the earliest possible moment that will lead to the removal of

this trash and vulgarity from the homes and businesses it is now permeating.

Mr. Chairman and members of your committee, thank you very much for your attention and your consideration, and if you have any questions I will be pleased to try and answer them, within the limits of my ability.

Mr. NIX. First of all, I want to thank you for your appearance, Mr. Thayer, and as I stated before, each exhibit submitted by you has been ordered placed in the subcommittee files.

It is really refreshing, Mr. Thayer, to hear a dedicated private citizen, businessman in the community, come here and express his deep concern about this particular subject.

It is an evil and it has to be eradicated. If we are to survive then we can only survive as a people dedicated to decency, and I think the action taken by you and the deep interest that you exhibit in the eradication of this pernicious evil is to be highly complimented, and I personally wish to express my deep gratitude for the work you have done and are doing in this field.

Mr. Chairman?

Mr. DULSKI. Thank you, Mr. Nix. I just want to echo the words of our distinguished chairman by complimenting you for coming forward with this information.

I have a few questions regarding this article that you have here, about Kingston, or Ulster County. A few years ago, did you have a committee organized there against pornography?

Mr. THAYER. Sir, I have been in Kingston now 10 years, as owner of one of the radio stations there. And not during that time.

Mr. DULSKI. During that time, Mrs. Granahan of Philadelphia was in charge of this subcommittee and we journeyed to New York City where we held a public hearing. I was pretty sure it was representatives of Kingston that appeared before us at that time, one was a psychiatrist, and the other was a doctor. That is almost 6 or 8 years ago.

Mr. THAYER. It might well have been. I am not familiar with it.

Mr. DULSKI. I want to show that we have been working on this problem a long time, trying to eradicate smut from the mail. As the father of five children, two of them teenagers, I am very much concerned about those lists.

But you can see the problem Congress faces trying to eradicate smut material. There are various organizations in the country crying about freedom of the press and freedom of the mails. It would be difficult not only to legislate but to regulate anything. But we are heading in the right direction and I assure you that the testimony you have given us today will play a very important role in trying to bring about legislation for the benefit of all of the people in this great country of ours.

Thank you.

Mr. THAYER. I don't know all the answers, but I think perhaps a lot of us, if we will take the time to serve our country and our fellow man, that some worthwhile good can come out of it, as Mr. Procaccino made a great contribution this morning.

I hope some of it is—for instance, I talked with our postmaster in Kingston who has been in the service a long time, and he says, for example, that I have no right to even ask, if you want to get a permit, as to what you want to use it for.

I don't know if it is in the constitutional rights to establish a law to permit the postmaster to say, what do you want to use it for? I feel strongly about it.

It has been classified, as Mr. Procaccino or someone of the other speakers said, it has been constituted by the Court as art and therefore no action is going to be taken, but what I am getting at, I don't know if you examine this, the high school students, this list from Polk is available and it categorizes every kind of person you want to circularize, and how much per thousand it is, based on the number there are, of course.

Maybe I don't have the solution of control over these mail lists sellers, but I offer it for some consideration and investigation. I do think that I was interested to hear Mr. Procaccino say that someone stopped him on the street. It's amazing, there are three radio stations in Kingston and I represent one of them, but it's amazing the number of people that have come to me and to the office and not only little old ladies, businessmen, bankers, lawyers, doctors. I am surprised that the Medical Association—because some of these exhibits I am going to leave with you have to do with gadgets for men, as you have probably seen. The Ulster County Medical Society is very much up in arms.

But today, as you know, sir, apathy is a tremendous defeatest and it is very hard to get people started. I don't know how much of a contribution I have made, but I am very concerned about this and I sincerely thank you for giving me the opportunity.

Mr. DULSKI. May I conclude that you made a contribution that I thank you for.

Mr. THAYER. We do editorials quite frequently and people stop on the street and people say, I don't always agree with you, and my answer is that Babe Ruth didn't bat a thousand either, but I am going to keep trying. Thank you. You have been very generous.

Mr. NIX. Thank you, Mr. Thayer.

(The letter which follows was received by the subcommittee for inclusion in the record.)

WGHQ, GENERAL HEADQUARTERS FOR NEWS AND WEATHER,
Kingston, N.Y., October 22, 1969.

Congressman ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: My brother, Walter N. Thayer (who, incidentally is President Nixon's personal representative on the Executive Department Reorganization Commission), told me long ago that every time he made a speech he made three: #1 being the one prepared, #2 the one he gave, #3 the one he wished he had given. Perhaps this has happened with you some time, on the House of Representatives floor. It certainly happened to me today and I wanted to write you immediately for two reasons.

First of all, you were most gracious in permitting me the time you did and in the very kind things you said in my behalf. Thank you, kind sir.

There are two points I wish you would file with my remarks before your Committee so that they will become a part of the permanent record.

1. There are two very vulgar pieces of mail that just started being circulated and I'm sure you have not seen them nor have the members of your Committee. I meant to walk up to the dais and present them to you to show to your fellow committeemen. One of them has to do with "*penis development*". The second piece is on a folder showing a very nude but a very "exhibiting" young woman stretched out. Inside the folder are many such examples of young women. They are much more crude and lewd and degenerate than anything I have seen up to now. I wish you would simply quote from the advertising copy that goes with these folders and insert that into the record.

2. Someone mentioned (right now I'm not certain who it was) that it is being considered that "Citizen John Smith" can go to the post office and say, "I do not want to receive any sex, pornographic, obscene or comparable mail. Put my name on the list to bar receipt of any or all of it." It is my understanding that such lists, compiled in each post office, would then be sent to a central point in the postal system where a total list would be compiled for the area, state and nation. It is my further understanding that this would be updated every thirty days.

We have something like forty post offices in Ulster County. Our radio station, because of its power and coverage, serves four counties. We must have 120 post offices in those four counties. Think of the cost. Does the taxpayer pay for the cost of putting together this list and making it compulsory that mailers of smut and sex and obscene literature be required to delete from their mailing any name on this list? This is not practical, in my estimation, because the cost would be prohibitive. And if the smut mailer had to pay a fee that would pay for the cost of compiling this list and updating it each month I doubt that even Macy's could afford it, and that is simply a figure of speech. Granted, this might put them out of business, but who is to pay for that original cost, certainly not the taxpayers. We just cannot take such added expense.

I sincerely believe my suggestion of making all mailers or purveyors or distributors, or what have you, of any mail pieces of any question that involves the health, well-being and/or morals of an individual, be granted a permit before it is submitted to the post office for mailing, and that a fee adequate to cover the cost of inspection by postal officials be charged. Certainly those "junkies" should have to pay and not the public. I think that if this were made a law wherein anyone who did not submit questionable pieces of advertising literature and/or information for postal approval was liable for severe penalties it would achieve the point.

I do not subscribe to the plan of making up a nation-wide list of people who do not wish to receive any or all pornographic mail, simply because of the cost and the cumbersomeness of this. It does not seem practical without extreme cost to the taxpayer.

These, of course, are my observations and I hope you will accept them in the same splendid fashion you received my comments today at the Hearing in Washington.

Again thank you, kind sir, and express to all your fellow committeemen the same sentiments.

Sincerely yours,

HARRY M. THAYER, *Chairman.*

Mr. NIX. Our next witness is Mr. Herald Stringer, legislative director for the American Legion. He is accompanied by Mr. Randel Shake, director of the National Child Welfare Commission of the American Legion, and Mr. Earl Franklin, chairman of the American Legion's National Child Welfare Commission.

Mr. STRINGER. Thank you Mr. Chairman.

Mr. NIX. I want to express the pleasure of the entire subcommittee for having made yourselves available for the presentation today.

Mr. STRINGER. We appreciate the opportunity to be here and commend you and the members of your subcommittee for your efforts in coming to grips with this very serious problem.

The Legion knows there is no easy answer. We are here to make whatever contribution we can and are delighted to have this opportunity.

Mr. Chairman, before I present the gentleman who will make our statement for the record, may I introduce Mr. Randel Shake, the director of the Legion's National Child Welfare Commission. Mr. Shake has been director of this commission for some 19 years. As you know, for almost a half century the Legion has been concerned with the problems of the youth and children of this country.

The gentleman who will present our statement has come here for that purpose from Sterling, Colo. He is the chairman of our National Child Welfare Commission, Mr. Earl Franklin. Mr. Franklin is very active in the civil and business life of his community. He is a former national vice commander of the American Legion. Mr. Chairman, he is here at the table with me this morning, and prepared to proceed with his statement.

TESTIMONY OF EARL FRANKLIN, CHAIRMAN, NATIONAL CHILD WELFARE COMMISSION, THE AMERICAN LEGION

Mr. FRANKLIN. Mr. Chairman and members of the subcommittee, on behalf of the American Legion, I thank you for the opportunity to place on the record our views on the dissemination of obscene and pornographic materials and may we say at this point, we do have some understanding of the tremendous complexity and intricacies inherent in this subject.

Like many other groups, including the Congress of the United States, the American Legion has wrestled with this problem in its present context since 1946. As an organization, we have adopted no less than 20 resolutions since that time and have worked with many different civic groups in an attempt to find an appropriate solution to this vexing and needless scourge which has and is inflicting itself on our society.

Yet we find today's kind of filth defies description. The American Legion deplores the further extension of the printing, publishing, and pandering by purveyors of these sexually provocative publications, whether they are distributed through the mails or in other ways.

We are in favor of prosecuting these merchants of filth. We endorse the position of the author of a book published last spring titled "Obscenity and Public Morality," who indicated true freedom of the press must be preserved, but obscenity is an evil of sufficient magnitude to require the attention of organized society.

Mr. Chairman, the American Legion as an organization does not assert that it qualifies as an expert in constitutional law, but we do not believe one has to be an expert in constitutional law to recognize and discuss pornography.

In order to save the time of this subcommittee and to avoid repetitive testimony, you have undoubtedly received from other sources, let us qualify ourselves as having at least some knowledge of this subject in this way: We have reviewed the relevant sections of title 18, United States Code, Annotated. We have examined Federal law pertaining to the postal service. We are acquainted with the series of decisions of the Supreme Court. We are familiar with the July 1969 progress report of the Commission on Obscenity and Pornography. We have read many treatises in various university and law reviews. We have talked with postmasters of different cities, and are aware of the constitutional lights and shadows involving first amendment protection versus Federal censorship.

We realize that although some would make the Postal Department the whipping boy and others would make the same Department the Nation's censor, the mailing of objectionable material is but one facet of the whole problem. We have discussed the subject with literally

thousands of people at our child welfare conferences held annually in five different areas of the United States. We have examined many of the approximately 140 bills introduced by about 175 Members of the Congress in this session. We have read studies on cause and effect, and have been unable to determine they are conclusive. We have read the testimony of the Postmaster General given on July 8, 1969, before a subcommittee of the House Committee on Government Operations.

These, Mr. Chairman, are some of the things the American Legion has done in order to have a better grasp and understanding of a very complex and intricate problem.

In order to contribute by way of active participation to the solution of this problem as an organization, the American Legion has in recent years tackled the problem in three specific ways. First, we have recommended to our members and to the general public that when they receive unsolicited offensive and objectionable material, they immediately contact the post office with the request that they, as addressees, receive no further material of this nature through the mail.

The second recommendation that we have made to our members is that they give strong support to their police departments, their prosecuting attorneys, law enforcement officials, and the Postal Department, and show a willingness to testify in cases in which they have firsthand knowledge.

We likewise suggest that our members encourage the prosecuting attorney in each of the States to take cases to the grand jury if he is undecided in the matter of contemporary community standards.

The third thing we have done as an organization is to transmit to our various American Legion State officials a copy of New York penal law No. 484–H, which has been declared constitutional by the U.S. Supreme Court. As I am sure this subcommittee is aware, this law addresses itself to the exposing of minors to harmful materials.

As a national child welfare commission, children are our primary concern. In our discussions with our members across the Nation we find increasing concern, indignation, and anger because so many advertisements which they consider obscene are mailed to juveniles. We find increasing hostility not only to those who mail such material, but also to those who in the judgment of some of our members, permit it to continue.

We find in discussions with postmasters of different sections of the Nation that this is a problem faced by rural areas, small towns, and large cities alike. We find that in perhaps the last 3 years there is an increase of possibly 100 percent in the amount of objectionable materials being mailed without solicitation.

We find, as this committee is undoubtedly aware, mass mailing techniques have been adopted by many distributors. Under Federal law, for more than 100 years, it has been a criminal offense to send obscene materials through the mail. On July 8, 1969, the Postmaster General testified that although some 400 commercial dealers were under investigation currently, an estimated 95 percent of all complaints resulted from the indiscriminate direct mail advertising of perhaps 15 major promoters. It is difficult to understand, and to us it seems almost unbelievable, that in a nation of over 200 million people, many must suffer what to them is the indignity of unsolicited obscenity, because of the actions of some 15 individuals or corporations.

These statistics cause one to wonder what has really happened to law enforcement in the United States. It is not difficult to understand, however, after reading a number of the decisions of the U.S. Supreme Court why there is confusion in the minds of postal officials, police officers, prosecuting attorneys, and other law enforcement officials, in the area of pornography and smut. That there is confusion is, in our judgment, beyond debate.

It appears to us the apparent and obvious reason for this confusion is that insufficient guidelines have been developed to dispel the no man's land, the gray area, in the minds of both the general public and particularly those charged with law enforcement.

Frankly, we have about reached the conclusion that in the matter of determining what is and what is not obscene, the Nation is not much further along than was chemistry in the days of alchemy.

In reading arguments, both pro and con, we have many times been reminded of the medieval philosopher who, by repute, arduously debated how many angels could stand on the point of a pin. We do not mean to be facetious, but the fact remains that no official body has been willing to define what is obscene and what is not. No one has been willing to delineate between what is constitutionally unlawful and what is morally sinful.

Since to us it seems to be essential that such distinctions be made in order to establish guidelines for the courts and other agencies of Government, it would appear that the Congress as the elected representatives of the people would be the logical body to make this determination. That this is a difficult job certainly goes without saying, but in the history of this Nation's growth, the Congress has debated and found solutions to many difficult issues that have been acceptable to the majority of citizens.

It is the position of the American Legion that while it too, may not be able to define hard core pornography, it, like Mr. Justice Potter Stewart, knows it when it sees it.

A great many of the bills introduced on this subject in the Congress contain one or more sections which provide that any person who mails sexually oriented advertisements must place his name and address on the envelope or cover, and such mark as a Postmaster General may prescribe, although some of the bills carry provisions for restrictive use.

As laymen in a lay organization, we wonder if the courts might not take the position that such a requirement violates the fifth amendment. Also, in some of the bills that have been introduced is a provision for amendment of chapter 51 of title 39, United States Code. Basically, such suggestions for amendment would make it possible for anyone, on his own behalf, or on behalf of children under 19 years of age who reside with him, to file a statement with the Postmaster General to the effect that he desires no sexually oriented advertisements to be sent to him through the mails from any source. The Postmaster General would maintain a list of the names and addresses of such persons, such list to be made available to any person on conditions established by the Postmaster General, including such service charges as he determines.

Any mailing of objectionable materials to anyone whose name appears on the prohibited list would be cause for civil action.

Mr. Chairman, we believe such amendment of the United States Code might be effective in helping stop the flood of materials now being mailed. However, we want to quickly point out that we are in no position to determine if such a plan would be administratively feasible. We know, from our own experience in mailing the American Legion magazine to each member on a monthly basis that we have about 25,000 changes of address per month. Based on current membership figures, this means that about nine-tenths of 1 percent of our members move each month. Should about the same percentage of persons moving hold good for the population in general, we would visualize a tremendous administrative job for the Post Office Department in keeping such prohibited lists up to date.

If one assumes that such a list could be administratively established and maintained, we believe it would be of value in several ways. First, it would remove many names from present mailing lists used by distributors for we feel sure than many organizations such as the American Legion, religious groups, and civic organizations, would make a concerted effort to get families with minor children to place their names on the Post Office list. It would also put the burden of proof on the distributor, rather than the receiver.

Under present regulations it is theoretically possible for one person who does not wish to receive such materials to be forced to file several hundred complaints with the Post Office. It would increase the administrative cost of the distributor, for not only would he be charged a service fee to obtain the Post Office list, but likewise, he would have to check his list against the Post Office list.

Regardless of whether the procedure we have been discussing is adopted as an amendment to title 39, United States Code, we still believe, Mr. Chairman, that the first order of business is to specifically define what is and what is not obscene.

As we mentioned earlier, we believe this is the responsibility of the elected representatives of the people. We recognize that Congress is confronting a time-consuming job. We suspect, however, that the Members of Congress on both sides of the aisle have been and are receiving a large volume of correspondence on this subject from their constituents.

As an organization, the American Legion believes that despite the difficulty of the subject matter, it is not insoluble. We also believe that the Congress can develop guidelines and definitions that will be acceptable to the majority of the citizens of the United States.

Again, Mr. Chairman and members of the subcommittee, let me express the appreciation of the American Legion for the opportunity to place our views on record.

Mr. NIX. Thank you. I might say, the American Legion is an organization that has done a great service in this area. The suggestions made in your presentation go to the very heart of the matter. We have had under discussion similar suggestions.

In formulating legislation, we have asked the legal staff of the committee to make a critical study of the decisions of the Supreme Court as they reflect their interpretation of present law. We have asked the legal staff to make an analysis of the dicta of those decisions, in order that the subcommittee in its deliberations may have an opportunity to go beyond the actual finding of the Court in particular cases, and consider the implications, the direction in which the Court might go.

This subcommittee in the formulation of its legislation intends to go beyond what has been decided, into the area of what the Court will permit and I am deeply appreciative of the kind of presentation you have made, particularly the impact of what you are doing will have on your membership and the general public.

One other thing I should like to say is, that I think that the National Bar Association has been remiss in its responsibility, because long ago it should have made an analysis of the decisions of the Court in this field, and disseminated that information to the general public through the local bar associations.

I can't expect the general public to interpret the decisions of the Supreme Court, because they are not attorneys. Someone, some agency should do that for them, and that duty is the responsibility of the National Bar Association and the lawyers of this country.

We are going to make that suggestion to the National Bar Association.

Mr. Chairman?

Mr. DULSKI. Thank you. I was very impressed with the statement that was made by the representative of the American Legion, Mr. Franklin. The words of wisdom of a great attorney who takes the time to come here and gives his views at this time is very enlightening. We in this committee are very much concerned about the problems of pornography.

Mr. Chairman, the American Legion magazine of August 1969 contains a very well-written article by a former Congressman, Mr. Armstrong, who is the Reader's Digest contributing editor and has closely followed the rise of pornography in America. I would like to insert that article in the record. I thank the representatives from the American Legion for their contribution.

(The article referred to is as follows:)

THE PROBLEMS OF PORNOGRAPHY

HOW PROTECTIVE LEGAL DECISIONS ENCOURAGED THE GROWTH OF THE SMUT BUSINESS AND SADDLED THE NATION WITH RAMPANT, OPEN OBSCENITY

(By O. K. Armstrong)

Speaking before a meeting of judges and lawyers, Earl Warren, Chief Justice of the United States, once declared:

"In all my years of service on the Supreme Court, the subject of obscenity and how to deal with it has given me the most difficulty."

Justice Warren was doubtless speaking the sentiments of his colleagues on the Court who have considered obscenity cases. If these highest experts in the law have let themselves be confused, how about parents and grandparents, ministers and teachers, who don't like to see their kids learn about sex through profit-seeking dirty literature and smutty entertainment?

The First Amendment to the Constitution declares that "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." But since the beginning of the Republic, materials that proved to be obscene or pornographic—the terms mean the same—have never had the protection of this guarantee of freedom. Obscenity shares this exception with blasphemy, libel and utterances that present what Justice Oliver Wendell Holmes called "a clear and present danger."

Every state in the Union has laws against obscenity. So does practically every municipality in the land, to back up those state laws. Pornography, therefore, has never enjoyed the legal approval of the vast majority of the people.

The problem of how to control the publishing, distribution and sale of obscene materials has been made one of the most complex of any subject before our courts today, as indicated by the remark of Chief Justice Warren. First, the *fact* of obscenity must be established—not by a board of censors, but in open court.

Next, there is the factor of *knowledge* on the part of the seller of obscene materials before he can be convicted. Finally, the question of whether all the *constitutional rights* of the accused have been protected must be settled.

The obscenity problem is a development of the post-WW2 era. From about 1950 to 1955, publishing and distributing literature considered by many citizens, prosecutors and courts to be obscene became big business. In that period, a half-dozen or so "girlie" magazines, showing young females in various stages of undress, with spicy stories to match the pictures, grew to at least 50. Several nudist magazines, showing everything in the raw, unblushingly appeared on the newsstands. Paperback books filled with stories of illicit normal and abnormal sex grew to a tide. Biggest center for the production of the stuff was Los Angeles, followed by New York and Chicago.

By 1955, the U.S. Post Office Department announced that publishing and selling literature considered by that agency to violate the laws against pornography had grown to a business of $1 billion a year. About half the publications went through the mail, and the rest were delivered to wholesalers and retailers by truck. The Post Office Department was struggling to stop the flow, and meeting a mess of conflicting court decisions.

As far back as 1927, in response to a hue and cry that movies were getting too immoral, and under pressure from the Catholic Legion of Decency, the Motion Picture Association of America adopted a "production code" that set moral standards for the film makers. The code was quite explicit. It said: "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 forbade "obscenity in words, gesture, song, joke or by suggestion. . . ."

By 1955, in order to cash in on the growing interest in sex, the movie producers began chipping away at the code, and within five years had thrown most of what were then called "Victorian" standards out the window.

In numerous states, cases were being tried to stop, or at least slow down, the rising tide of offensive materials in publications and entertainment. Some prosecutions succeeded; others, on the same types of materials, did not. Appellate courts in New York and Maryland struck down as unconstitutional the seizure of any materials *before* they were offered for sale or sold, as being "prior restraint"—prohibiting before being legally declared obscene. Several other decisions found publications and movies obscene in one state and not in another.

Some clarification was badly needed as to what materials were protected by the First Amendment, guaranteeing freedom of speech and the press, and what could legally be declared as pornographic.

In June 1957, the clarification came from the U.S. Supreme Court. Known as the *Roth-Alberts* ruling, it affirmed convictions of Samuel Roth of New York and David S. Alberts of California, both big firms in the obscenity field. Writing the historic opinion of the majority of the Court, Justice William J. Brennan said that obscenity *lacks any redeeming social importance* and therefore:

"We hold that obscenity is not within the area of constitutionally protected speech or press." Then came the definition of obscenity, which still holds: "Obscene material deals with sex in a manner appealing to prurient interest." The test, said Justice Brennan, is whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The word "prurient" comes straight from the Latin, meaning to itch, to long for, to be wanton. To decide if *alleged* pornography is *actual* pornography, the key question, according to the *Roth-Alberts* ruling, is to decide if it was designed to appeal to, or excite, a craving or itch for the details of sex or other lasciviousness. Thus a nude, if it appeals to prurient interests, is designed for its erotic appeal and not for its beauty as in the classic arts.

On the face of it, this must be a question of fact-finding for a jury at a trial. No law or court decision could cover all cases, and the fact of pruriency is a finding that is in the province of juries in each case.

One of our present difficulties is found in the numerous cases in which judges have reversed convictions while admitting that they found the alleged obscene material to be more than disgusting. Confusion and needless complexity are created by courts when they sometimes override the functions of juries, even while agreeing with them.

Justices Hugo Black and William O. Douglas strongly dissented in the *Roth-Alberts* decision, holding that the First Amendment guarantee of freedom of speech and press covers everything published—in effect, that all the laws against

obscenity—federal, state and local—are unconstitutional, however offensive to a majority of the people the material might be.

Despite the clear definition of obscenity by the Supreme Court, the history of the pornography business since 1957 has been one of tremendous growth on the part of the output, and a welter of conflicting court decisions that have spread confusion and frustration among the fighters of the filth.

By 1963, sexy paperbacks were rolling off the presses at the rate of several hundred titles a month. Publishers hired stables of hack writers, paying them about $600 per manuscript to turn out accounts of illicit sex acts, lesbianism (women making love to women), homosexuality, incest, fetishism, sadism (whipping and other tortures for sexual effect) and every type of perversion.

Then began the zig-zag course of court convictions, affirmations and reversals in obscenity trials that have resulted in the most amazing legal snafu in American history. In 1962, the case of *Manual Enterprises, Inc., vs Day* illustrated the pitfalls of improper procedure. The postmaster general, by an injunction, had seized a quantity of publications placed in the mail because he considered them obscene. The Supreme Court ruled that the Post Office Department could not seize material and require the seller, by an injunction, to prove his right to distribute it. Thus, "prior restraint"—censorship before distribution or sale—was outlawed.

In 1963, Judge J. Irwin Shapiro, in the trial court of Queens County, N.Y., sat on the case of a news-distributing company charged with selling books alleged by the district attorney to be obscene. Judge Shapiro admitted in his ruling that "fully 90% 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 that the books were "unvarnished trash." But, said the judge, "There are those who, because of lack of education, the meanness of their social existence, or mental insufficiency, cannot cope with anything better."

It is extremely difficult to understand what sort of a legal finding that is, or even what the judge meant. Was he saying that people who are poorly off and poorly educated are entitled to pornography, because that's all they can understand? Or was he saying that publishers have a right to make money and if they can't sell certain persons any reading material except illicit matter, then the law must step aside so that they can make their profit where they can?

Following several such setbacks for the obscenity fighters, there came two encouraging rulings. In 1964, a federal court in Grand Rapids, Mich., decided that publishers and distributors of pornographic materials could be prosecuted not only at their places of business, but also where their output was offered to the public for sale.

In 1963, a New York publisher of erotic literature, Ralph Ginzburg, was found guilty in a Philadelphia court of soliciting for sale and selling obscene publications. A New York court convicted Edward Mishkin, one of the country's most noted distributors of paperbacks on similar charges. On March 21, 1966, the U.S. Supreme Court upheld both convictions. The majority ruled that not only were Ginzburg's materials obscene but also that he had advertised his publications in a way to indicate they appealed to prurient interest. The *Ginzburg-Mishkin* decisions established a new principle: How the material is advertised and promoted for sale can be considered in determining obscenity.

"The decisions provide a powerful weapon in our drive to ban pornography from the mails," said Henry B. Montague, chief inspector of the Post Office Department. However, while one appeal by Ginzburg for a review of the decision was turned down by the Supreme Court, at this writing he has another appeal on file.

Among the more noted successful prosecutions for violation of obscenity laws from 1963 to 1967 were 22 that were tried in federal or state courts in 13 states. Eight of these convictions were by juries. The cases covered practically the entire range of items declared by the courts to be offensive, immoral and pornographic.

A typical case involved 20 paperback books, their titles indicating their contents, such as "Sex Life of a Cop," "Lust School," "Lust Web," "Orgy House"; 12 "bondage books," dealing with sex sadism; a series of nude females; ten "girlie" type magazines; one nudist publication, and several "underground" films.

Another case dealt with a lurid sex book, "Sin Whisper." Its seller, in Atlanta, Ga., was convicted in the state court of that city. An appeal was taken to the Georgia Supreme Court, which upheld the conviction in a decision that included these words: "The book is composed substantially of lengthy, detailed, and vivid accounts of preparations for the acts of normal and abnormal sexual relations between and among its characters . . . The book is filthy and disgusting.

Further description is not necessary and we do not wish to sully the pages of the reported opinions of this court with it."

Three short movies had been declared hard-core pornography by a jury in Los Angeles and by an appeals court of California. A judge described the action in these films, and, selecting one of the three films, number "0–7," declared; "The dominant theme of the material, taken as a whole, appeals to a prurient interest in sex of the viewer . . . The film is entirely without artistic or literary significance and is utterly without redeeming social importance."

All 22 cases, affirmed by higher courts in the 13 states, were appealed to the U.S. Supreme Court. In May and June 1967, came the decisions: All were reversed by the highest court—nearly all by a five to four ruling. Justices Black, Douglas, Stewart, White, and a then comparatively new member, Abe Fortas, made up the majority that struck down the work of years of efforts by thousands of fighters for decency.

The Court based the reversal of the 22 cases chiefly on a single less celebrated case that it had decided a few days earlier. *Redrup vs. New York.* What it had done in *Redrup vs. New York* was to declare that the obscenity in that case was "protected by the First and Fourteenth Amendments." That was such a flip-flop from the *Roth-Alberts* decision denying constitutional protection to pornography, that, in the dissent, Justices Harlan and Clark said: "These dispositions do not reflect well on the processes of the Court."

Following this bombshell ruling, all over the country cases that were in preparation or being tried were dismissed by judges and prosecutors. Many cases on appeal were dropped. "The sky is the limit!" became the slogan of the producers of pornography, for all types of publications and movies.

The sky might have remained the limit for peddling smut to both adults and minors had it not been for another landmark decision. In April 1968, the Supreme Court upheld a New York law prohibiting and setting penalties for the sale of obscene materials to persons under 17 years of age. This was hailed by many pornography fighters as a significant victory over the dealers in offensive literature and entertainment.

However, many leaders of organizations combatting the traffic in smut became alarmed. They believe that laws to protect minors are an open invitation to dealers in pornography to concentrate upon the adult market, whether on newsstands, mailings, films and all other media. Many contend that what is obscene for minors is obscene for adults, and, anyhow, about 75% of all obscene materials put out for adults gets into the hands of minors. They argue that it is folly to assume that when a teen-ager reaches a certain birthday, say 17, he or she may legally be exposed to obscenity; and furthermore, that many crimes of sex and violence are committed by subnormal adults.

Recent developments seem to support this viewpoint. The obscenity trade quickly put together the two Supreme Court decisions: The clear track for their output in the 22 reversals, and the restriction on sales to minors. The answer was plain, and the smut handlers shouted:

"Adults only, boys! Thar's gold in that slogan!"

So adults only it is, in bookstores and movie houses all over the country. In the nation's capital recently, within a few blocks of the White House—an area crowded with tourists of all ages from all areas of the country—I dropped into eight bookstores that had signs announcing "Adults Only" or "No Minors Allowed."

The stuff on the racks was as raw as ever imagined—principally a display of nudity in provocative poses, with female and male genitals the main event. In one place I counted 90 "imported" magazines with such displays, 39 different issues of nudist magazines, and 35 publications clearly—by pictures and texts—for the homosexual trade."

"What age do you set to keep minors out?" I asked, and got four different answers: 16, 17, 19 and 21.

As to movies: In 1966, Jack Valenti, former aide to Presidents Kennedy and Johnson, became president of the Motion Picture Association of America. He quickly announced that the old production code was to be scrapped and a new one introduced to give greater freedom to artistic expression. "The Green Sheet," a monthly publication of the association that presents reviews and "ratings" of current films, began to list increasing numbers of films rated "A," for adults only.

Of the 47 films reported in Valenti's Green Sheets for January, February and March 1969, only nine in the January and February reports were agreed by the reviewers to be fit for "general audience"—meaning for families with children.

The March report came up with *only one* for families. Among the remaining 37, adults-only drew 16 votes, while the remainder were labeled for adults and "mature youth," whatever that means. Thus the majority of films shown in America today are too offensive, by their own classification, to be shown to family audiences.

Among the gems of adult fare for the first three months of 1969 was *The Touchables*. The Green Sheet relates: *The Touchables* in the British sex fantasy are four sensual English girls . . . Each of them has a session with the lad on a huge, round, revolving bed, in which they all sleep together at night." In the film *Three in an Attic* we are told that: "The sexploitation film has a full share of racy dialogue, nudity and sex episodes." Concerning the film *Candy* one discovers: "Willing teen-ager Candy makes love in the back of a limousine, on a pool table, in an Army plane, in her father's sickbed . . ." and on and on.

But these are shown in the "established" theaters. Since the "anything-goes-for-adults" decisions, "art" movie houses have sprung up in communities everywhere. They specialize in films that formerly would have been shown only with an eye out for a police raid.

In November 1968, a case in the U.S. Court of Appeals in New York brought out clearly how far movie proprietors are ready to go to show raw sex. It also threw light on the sharp differences of opinion among judges, even on the same bench, on two important matters: what is obscene and what is not, and what the role of a jury should be in determining obscenity. The case involved the Swedish film *I Am Curious—Yellow*.

This two-hour show, according to its reviewers, abounds in nudity and scenes of sexual intercourse. The U.S. Customs Office tried to stop its importation. A New York federal court jury of seven men and five women declared the film obscene. On appeal to the Court of Appeals, two of the three judges overruled the jury and cleared the film for showing in the United States.

Judge Paul R. Hayes conceded that "the sexual content is presented with greater explicitness than has been seen in any other film produced for general viewing," but held it was not obscene, and furthermore, the fact of obscenity was a constitutional question. Judge Henry J. Friendly agreed, although "with no little distaste."

Chief Judge J. Edward Lumbard issued a vigorous dissent, in which he said the majority opinion meant that juries are not to be trusted, and added: "I submit that when it comes to a question of what goes beyond the permissible in arousing prurient interest in sex, the verdict of a jury of 12 men and women is a far better and more accurate reflection of community standards and social value."

So the matter is joined, and the fight against obscenity will continue so long as there is money in smut, and indignation on the part of those who oppose it. If *I Am Curious—Yellow* is not obscene under the *Roth-Alberts* definition covering prurient interest, then likely nothing in print or on film can be so classified.

One of the oddest twists of the *Roth-Alberts* decision is that one of its seemingly firmest statements has been turned around to provide an excuse for almost any pornography. The decision, you recall, excluded pornography from constitutional protections granted for freedom of the press because it lacks "redeeming social importance." What is happening now is that if anything in a dirty work can be claimed to have some sort of "redeeming social importance," that makes the whole thing all right.

Sen. Everet Dirksen recently quoted Barney Rosset, president of Grove Press and distributor of *I Am Curious—Yellow* in the United States, to the effect that "sex has its own redeeming social importance, because if it weren't for sex, we'd depopulate the entire world."

As Dirksen noted: "The vagueness of just what constitutes 'redeeming social importance' has produced many successful legal defenses of books and films" which, while containing disgusting and undisguised prurient material, "somewhere concern themselves with matters other than sex."

Meantime, this question looms ever larger. What has been, and what will be, the moral and social effects of the tide of obscenity in publications and entertainment? Some psychiatrists—occasionally hired as experts by defendants in pornography trials—contend that there is no scientific proof that the reading of pornographic literature and viewing of films of sex and violence by juveniles results in their anti-social behavior.

This is part of a modern confusion of science with justice and morals. The sciences that try to describe cause and effect in human behavior are so inexact that they go through periodic fads of supporting first this and then that theory.

If the law waited for such incontestable scientific proof in all things as it has found useful in considering physical evidence, such as fingerprints, we'd still be waiting for laws against stealing and murder. Morals and a sense of justice can say what is wrong with robbing and killing, but science cannot. Nor can science determine whether a nude is classical art or designed to appeal to prurient interest. In such things, the law must go to the experience and values of society and the judgment of men, not the laboratory.

Even so, a behavioral scientist who proclaimed that man is not prone to suggestion which may influence his acts would find a mountain of scientific evidence against him, and the experience of society does not give comfort to the idea that pornography is innocent of social harm.

FBI Director J. Edgar Hoover has repeatedly cited figures to show that the steady, alarming increase in juvenile delinquency and crime, especially in forcible rape, molestation and assault, parallels the increase in pornographic materials.

At a National Convention of The American Legion not long ago, Hoover bluntly warned that, "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."

In mid-1965, Herbert Case, formerly a Detroit police inspector, asserted, "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." Police and other law officials all over the nation agree. In a bulletin to the personnel of his department, Chicago Superintendent of Police 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 viscious assaults to homicide."

Under public pressure to do something official with respect to obscenity, in October 1967 Congress passed an act (Public Law 100), sponsored by Sen. Karl E. Mundt, of S.D., which established the Commission on Obscenity and Pornography. The 18-member agency has the duty to investigate problems of pornography in all media, and specifically the relationship between obscene materials and anti-social behavior. First report of this Commission will be made by January 1970.

Leading the private organizations constantly combating pornography is Citizens for Decent Literature, founded in 1957 by Charles H. Keating, a Cincinnati lawyer who serves as its legal counsel. Keating, a WW2 bomber pilot and father of six children, lead a successful movement to clean up the newsstands of his home city. The idea spread and "CDL" chapters are now active in more than 300 communities across the nation.

Citizens for Decent Literature emphasizes criminal prosecutions as the most effective challenge to the sellers of obscene literature and producers of offensive movies. Assisting the CDL groups in such prosecutions of persons indicted on charges of selling pornography is a battery of lawyers, headed by James J. Clancy, former assistant district attorney of the county of Los Angeles, Calif.

Another anti-pornography organization, "Morality in Media," was founded in New York City in 1965 by the Rev. Morton A. Hill (now a member of the President's Commission on Obscenity and Pornography) and several other clergymen of various faiths. This group has also organized chapters in many communities, dedicated "to counter the effects of obscene material on the young."

In Hollywood there is an organization of women called "Moral Upgrade," headed by Mrs. Van C. Newkirk, that rides herd on the motion picture industry. It issues monthly reports with critical analyses of most of the films being released, classifying them and pulling no punches on the ones its evaluation committee considers obscene. Mrs. Newkirk originated the presentation of the motion picture "halo" to movie performers selected for their parts in wholesome family films.

Many leaders of these and other groups active in campaigns against commercial filth are frank to acknowledge privately their discouragement since the Supreme Court reversals of pornography convictions in May and June 1967. Some concede that they have long been awaiting vacancies on the court, when several members who have reached retirement age step down. They hope for the appointment by the President of jurists who will hold the traditional view that pornography proved in court, has no protection under the Constitution.

Meantime, this question persists: What's the answer to the problem of how to deal with materials that concerned citizens believe violate the laws protecting the public against obscenity?

"If we quite now, we've lost the whole war on commercial filth. Let's keep moving with prosecutions and pressure of all kinds," says CDL's Keating.

From a wide range of opinions of judges, prosecutors, members of Congress and of state legislatures, and leaders of organizations fighting the obscenity racket, I find large agreement on these three areas of action:

1. The U.S. Supreme Court, and all other appellate courts, should stop trying to be a court of censors. They should voluntarily withdraw from deciding the questions of fact as to whether materials are pornographic, when the fact is already decided by a jury.

2. In case the Supreme Court will not follow this policy, then the Congress should pass legislation, as it has the constitutional power to do, taking away the jurisdiction of the Supreme Court to decide questions of fact as to pornography already decided by lower courts. As Judge Samuel H. Hofstadter of the New York Court of Appeals has said: "Essentially, the problem of obscenity is one of municipal order. It is not intrinsically a constitutional question."

3. Aroused citizens, unable to get the cooperation of newsstand proprietors and motion picture managers for a cleanup, should file suits against them on charges of violating local, state or federal laws against obscenity.

Not only should they file suits; they should follow up with three things: (1) furnish experienced legal counsel to assist prosecutors if the latter are inexperienced in handling pornography suits; (2) demand jury trials, since a local jury is the best possible judge of whether the material is obscene according to the Supreme Court definition in the *Roth-Alberts* ruling; (3) be willing to appear as witnesses.

In any battle to strengthen laws against obscenity, and in any legal action, legislators, prosecutors and citizens should keep in mind these principles, well established by court rulings:

While the definition of obscenity in *Roth-Alberts* still stands, the *fact* of obscenity must be proved. Prior restraint, or censorship, *before* the publishing or sale of literature or entertainment, is unconstitutional. Publishers and sellers of pornography can be prosecuted *wherever* their product is delivered and sold.

Nudity and sex are not synonymous with obscenity. The manner and purpose of displaying nudity and sex determine whether they are obscene.

One thing is obvious to everyone. The great bulk of all pornography today is a purely commercial attempt to make money by being dirty. In short, most of it is illegally obscene per se.

Concerned citizens should keep constant watch on what is offered on local newsstands and in movie theaters, especially those patronized by children and young people. And on the positive side, every possible program should be encouraged that makes available literature and entertainment that are clean and wholesome.

Mr. NIX. Our next witness is Mr. Lawrence Speiser, director, Washington office of the American Civil Liberties Union. Welcome, Mr. Speiser. You may proceed, sir.

TESTIMONY OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. SPEISER. I have a statement which I will not read in its entirety, but I would like it included in the record.

Mr. NIX. Without objection, it will be made a part of the record at the end of your testimony.

Mr. SPEISER. This committee is studying a problem which is of nationwide concern. It has been expressed, I believe, in the outpouring of mail to the Congressmen. I think it is also fairly evident from the wide range of legislative proposals that have been submitted to Congress, which number over 200 at the present time.

And although there is no proof that obscene materials do, in fact, cause antisocial conduct, this is a problem that is being studied by the Commission on Obscenity and Pornography. Nevertheless, there is still this concern and antipathy toward obscene materials and less than obscene materials, getting into the hands of the young.

Let's first of all be clear on what we are talking about. We do have on the books now obscenity laws which bar the use of the mails to obscene materials. In your introductory remarks, Mr. Chairman, you said you are concerned about the problem of pornography. There is a law on the books which bars pornography from the mails and this proposal before the committee, if it is studied carefully, can be seen to cover materials that are less than obscene.

By going below the judicial definition of obscenity, you run into a first amendment problem. It cannot be avoided.

There are guidelines which have been set up in some cases by the Supreme Court, notably in the case of *Ginsberg* v. *New York*.

Mr. NIX. May I interrupt you at this point. I am also concerned with the balance of equities. No one has any absolute right to do anything. And I wish you would go into that.

Mr. SPEISER. I will indeed, Mr. Chairman, and there is a balance of equities, and inevitably in this balance you do have to consider the impact on the first amendment.

Not only as far as getting at those who are engaged in commercial exploitation, but also what the potential impact might be on others who are not so engaged.

I think this is a problem that cannot be avoided in any type of legislation before the committee. I departed somewhat from the text, but let me continue in that vein for a moment because some of the previous speakers raised some questions which I would like to discuss while they are in mind, since I found something of value in both the two previous presentations. I was delighted to see the American Legion raise the question of privilege against self-incrimination with regard to a section of the proposed bill, and the representative of the radio station raised the question that the real problem is the question of control of mailing lists, and maybe that is what should be explored.

But let me refer back to the problem of whether the present laws are sufficient to handle the problem. The representative of the American Legion pointed out that the Postmaster General testified to the fact that the problem about the complaints, and there have been several hundred thousand complaints, seems to derive primarily from a relatively few number of mailers.

At one place in his testimony, the Postmaster General stated that he believed that there were only about 15 mailers who were responsible for 90 or 95 percent of the offensive mail, and then went on to say that of those 15, nine have been indicted at the present time—one was being prepared, and that there was an investigation with respect to each of the others.

In other testimony that was made before this committee by the Department of Justice, when Mr. Wilson was testifying as head of the Criminal Division, he indicated a different figure but again I am raising the question about whether or not, even though those complaints have come in and I understand there is a large volume of them, whether the Government is now operating against them with the criminal prosecutions that are possible under present law, and that the problem that you have is a time lag problem.

People complain, but that is true about almost any crime. A complaint has to be made, criminal prosecutions have to be instituted. But Mr. Wilson, Assistant Attorney General, stated:

We now have 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. We have matters which concern another fourteen major dealers in the investigative stage.

I quoted from Mr. Wilson on page 49 of your previous hearings of August 5 and 6, and Mr. Mahoney, an assistant to Mr. Wilson, stated:

Because there aren't that many people cranking the stuff out. There are only twenty or twenty-five and we have half of them under indictment right now.

So again, I am raising the question, recognizing the kind and volume of the mail that Congress has received, that you have in process the utilization of ordinary criminal prosecutions that are operating right now, and that this is a factor to be considered when you are considering the necessity for new legislation.

Just last year Congress passed the Pandering Advertising Act, that has been utilized by a great number of people and which was supposed to have provided the ability of an individual to object to receiving mail that was offensive to him. That bill probably had one advantage, which is not reflected in the proposed legislation here. There was no problem of trying to match a less than obscene standard as you do have in this proposed legislation, because it was clear from the remarks of Congressman Waldie, who is the coauthor of the bill as it finally was passed by the Congress, that in his view he didn't want the Postmaster General or anyone else making a determination as to what was offensive to a particular individual. If any individual said that any material that came to him was "erotically arousing or sexually provocative," and even if it were cabbages, as he put it, then that individual was not to be second-guessed.

As a matter of fact, it has been clearly established by the practice of the Post Office Department now that even if there isn't the remotest connection in the mailed material with sex, if it is a picture of heavy machinery, if an individual wants to object and is willing to say it is "erotically arousing and sexually provocative," the Post Office Department can't second-guess him. They have to send the complaint to the sender.

That law has been utilized in that way to send complaints against political publications or organizational publications that an individual doesn't want to receive. He just has to say it fits the category that is offensive. That law is presently on the books.

But with this proposal you have a problem, because you are attempting to create a standard that has to be applied administratively initially, and finally in the courts.

The standards that have been proposed in this particular bill are less than the standard that the Supreme Court upheld, particularly in the case involving giving or selling materials to minors.

You have a too broad a standard. It is constitutionally defective in several ways.

First of all, although there is a surface appearance in this bill to try to meet the standards of the Supreme Court, in *Ginsberg* v. *New York* in which the Court clearly upheld the variable obscenity standard, this bill does not do it. In *Ginsberg* v. *New York*, there was a State statute which held that materials could be considered obscene for minors if it depicted various sexual aspects or acts or states of nudity—but in addition to that, the materials also had to be designed

to appeal to the prurient interest of minors, they had to be patently offensive according to contemporary community standards as to what is suitable for minors, and third, they had to be utterly without redeeming social importance for minors. If all those criteria were satisfied then that statute was constitutional.

Those criteria are not included in H.R. 10867. Only one of those three factors, prurient interest is referred to, and it is referred to in a somewhat confusing fashion.

Only one of three. If you wanted to match what the Supreme Court has done in *Ginsberg* v. *New York*, then you would have to put in those three.

Now I notice in the testimony of the Assistant Attorney General Wilson, he even objected to the prurient interest standard. He thought that was going to be difficult to enforce. That may be true. There is a difficulty and it should be recognized when you are playing around with the first amendment, you have to have guidelines. The prior witness I think posed the difficulty of the problem in light of the continued historic concern of the American Legion in this area. Yet he was not able to suggest guidelines for Congress in order to pass a law of this kind.

Certainly it's not because of lack of interest. His account of the materials that he studied I think was impressive. They have done a good job in preparation for this hearing and yet with all that study, he was not able to suggest to this committee guidelines for legislation.

The only guidelines you have right now as far as constitutionality is concerned are *Ginsberg* v. *New York* and you don't have those in this bill.

I could go through some of the statements of definition and point out how they might easily be applied to great literature. For example, it bans sending materials to minors that contains descriptions of explicit sexual acts. I think it is clear that in the past books have been banned which are considered great classics, which would fall within these definitions in the bill.

Not just illustrations, but verbal descriptions as well.

Just in passing I might mention a number of books which have fallen under the censor's hand in the past which are considered classics now:

Balzac's "Droll Stories," Hawthorne's "The Scarlet Letter," Walt Whitman's "Leaves of Grass," Flaubert's "Madame Bovary," Emile Zola's "Nana," George Bernard Shaw's "Mrs. Warren's Profession," Theodore Dreiser's "Sister Carrie" and "An American Tragedy," Marie Stopes' "Married Love," James Joyce's "Ulysses," all of D. H. Lawrence's books, Sinclair Lewis' "Elmer Gantry," Eugene O'Neill's "Strange Interlude," Alfred Kinsey's "Sexual Behavior in the Human Male" and "Sexual Behavior in the Human Female," Aldous Huxley's "Brave New World," Nobel Prize winner William Faulkner's books, Lillian Smith's "Strange Fruit," Nobel Prize winner Ernest Hemingway's books, John Steinbeck's "Grapes of Wrath" and "The Wayward Bus," Erskine Caldwell's books, James T. Farrell's "Studs Lonigan" and "A World I Never Made."

All of these books have been banned at one time or another.

One of the sections you have in the bill covers sexually oriented advertising. I might point out just how widespread the use of sexually

oriented advertising is in this country. It is not just a question of these mass commercial pornographers. I have seen advertisements of the Reader's Digest in which they have promised articles on immorality or adultery, in which they are trying to get readers interested because of the sexual orientation to their advertising.

The same certainly is true about Life, Look, Time, Newsweek—they have all done recent articles, such as a roundup on the breakdown of morality on the American scene. The advertisements for those issues have a sexual orientation to them.

Now, even if the concern is limited to what is sent to minors, this bill goes beyond that because it covers adults with whom minors live.

The Supreme Court in *Butler* v. *Michigan* said, we can't reduce the level of what is available and what can be read to what is available for children. That is throwing out the baby with the bath water.

Now, how does a sender know whether a minor is living with an adult? How can he find out about that? This is not just a question of the list, but how can he find out? It's impossible for him to make that kind of determination. The result is that many senders who don't want to take advantage of putting a mark on the envelope, are going to find they are engaging in self-censorship in a way that hadn't been done before simply because they don't want to indicate they are engaged in sexually oriented mailings or advertising.

How is the bill to be enforced? There is section 4011, which has to do with mailing nonmailable matter to minors and to adults who live with minors—there is some confusion on this, and I don't know whether it is a misprint in the bill or not, because there is a section of the bill, on page 9, section 3, and under that section 1735 covering sexually oriented advertisements, but it doesn't refer to section 4012, which has to do with sexually oriented advertising but to 4011 which has to do with nonmailable matter and includes a criminal penalty. It is puzzling whether it should be 4012 there or not.

Second, it is also puzzling because, there is either a grammatical error or something, because it doesn't tie in with whoever willfully uses the mails, and so forth, with the penalty that is put below that. There is a period at the end of that sentence.

There is a problem with drafting that makes it difficult to understand. There probably is an intent to have a criminal penalty of $5,000 and 5 years or $10,000 and 10 years, for the second offense, but if you are getting into a criminal statute, you have to have foreknowledge.

That is fairly clear from the Supreme Court's decision. This makes no provision for that kind of problem, and in that way you could draw a distinction on a limitation on what the Federal Government can do as compared to what a seller can do, and in the control by a State law such as in *Ginsberg* v. *New York*.

A seller can see a person in front of him. He can demand identification. So you can put the onus on him as to whether or not he is in fact selling materials that should not be sold to a minor, getting over the definitial problem. The mail itself is a different problem unless you could demonstrably show that the mailer was getting a list solely of minors, picking it up from those who send in requests for Boy's Life or something of that kind, which I think is unlikely. Unless you can demonstrably show that the seller has some reason to know that the materials are going to minors, I think that you can't impose a criminal sentence on a mailer without something more. You are involved with

a criminal statute there and therefore, knowledge must be shown before a penalty can be imposed.

Now, the premise of this bill and some of the other bills that have been sent over by the administration is that you don't have to be concerned about first amendment problems for parts of these bills are covering commercial advertising.

They rely on a case which was decided back in 1942, *Valentine* v. *Christensen*, which didn't have anything to do with the obscenity question, and had nothing to do with a seller of printed material.

And this is what is being relied on. Justice Douglas in some later opinions has criticized this contention that commercial advertising for first amendment products are not encompassed within first amendment protection.

In other words, you have to show the material as obscene and merely because somebody is trying to sell a publication or some written material, doesn't mean that you can say, the first amendment doesn't apply, and that you can write whatever definition you want in the field of advertising.

In the testimony that I saw of the representatives of the administration, this seems to be their contention. All I am suggesting is that I don't think that the law is that definite that you can ignore, the first amendment concerns, the constitutional concerns, merely because you are saying we are only talking about advertising.

Advertising, I believe, for materials that are protected by the first amendment that are not obscene, is protected by the first amendment as well. You may have a different standard perhaps on the problem of minors as suggested by *Ginsberg* v. *New York*.

But, what is posited here are two conflicting constitutional concerns, and as is often the case, you find them somewhat head on or in some kind of collision course.

On the one hand, you have the first amendment, and on the other you have the right to privacy. They both exist. They are certainly both entitled to constitutional protection.

But when you are affecting first amendment freedoms, you can't go too far in trying to protect another constitutional right, and if the effect of a proposal of this kind in an effort to protect the right of privacy of individuals would be to cause a severe self-censorship on the part of the publishing industry, then it seems to me that the courts would strike it down without getting in to definitional problems and without getting into the questions of protecting minors. If because of apprehensions as to what might be done to them they engage in self-censorship, because of the interest of this committee in protecting minors from getting certain materials, the effect is that adults may not get those materials, then I think you do have a constitutional problem that cannot be ignored.

If you look at all these provisions together, you can see where a publisher would be effectively prevented from mailing a great deal of non-obscene but somehow sexually related material to anyone who has not ordered it.

He also would not be able to advertise through the mail, at least not if the advertising contains accurate descriptions, without risking a prison sentence if he happens to send it to someone on the Post Office list and without putting a mark on it that will probably result in its

not being read, and putting the burden on him to announce that what he is sending is sexually oriented.

I have tried to think of some alternatives, recognizing the pressures on the committee and the Congress from the public outcry that cannot be ignored.

Two fruitful areas of exploration occur to me, and what I am suggesting, incidentally, are my own thoughts, because neither of them have had the stamp of approval of the policy of ACLU, but I think they bear exploration.

One is one that was suggested by one of the prior witnesses, the control of mailing lists—selling, renting, and leasing. And there had been proposals, notably those by Congressman Zablocki in the past on this area.

The concern about mailing materials to people who don't want it principally arises from the buying, selling, and leasing of mailing lists.

The other suggestion I have—and it's been met with great disinterest as far as I can see, particularly by the direct mail industry—has been to require any advertisement sent through the mails to be labeled as such—advertisements.

This doesn't require a judgment as to whether it is sexually oriented or anything of the kind, but if it is a commercial advertisement, to get people to buy something, then to require that to be labeled on the piece of mail, first class or not.

Then I would permit individuals to make a judgment that they don't want to get any advertisements through the mail, they could notify their local postmaster of the fact, or if you want to have a central list that might be another way of doing it; but it seems to me that this is really a question of the local postmaster and local postman knowing that some people don't want any advertisements through the mail, junk mail, first class, or whatever.

There may be first amendment problems here, and I confess that I haven't thought it through that completely, but it seems it might be a fruitful suggestion. Political parties or publications of opinion may want to reach a wider audience and perhaps there is some kind of right to try to reach a wider audience to interest them in reading the publication and being persuaded to their point of view.

But the virtue of the suggestion is there is no standard to be defined—either administratively or by the courts—nor is there any labeling that is required in the sense of either the recipient saying I don't want that because it is sexually oriented, or the sender having to determine whether or not it is sexually oriented.

As I say, I have thrown this suggestion out a number of times and the interest in it has been underwhelming. However, I thought it ought to be given to your committee to consider as a possible way of handling this problem, the problem being unsolicited advertisements coming through the mail.

As the committee is aware, there are two or three developments in the field which I think are of interest. One is, there is a Commission on Obscenity and Pornography which has made an interim report. It is studying the problem, and is supposed to have a final report in July.

Considering the number of indictments obtained by the Justice Department, I suggest that here is the first real study that has been made

to try to determine causal relationships and to work on definitions; that perhaps should be the body to which Congress should defer at this time. You may not agree with their conclusions, but at least they are doing something in the field. They have let out contracts with scientific bodies to study the problem, and I think that for the 10 months, we ought to wait for that.

I may not agree with their conclusions when they come out, but at least someone is looking at the field, more than just reacting to the concerned outcry. which is not to be ignored. However, Congress, particularly in this field, should not pass something just to pass something, because the public is on its back.

This seems to me to put Congressmen to their mettle. It is no trick to be with the majority, and it is no trick to be with a majority of their constituents on something, but where Congressmen really demonstrate the highest levels of statesmanship is when they can withstand that and say, "We should look at this carefully and look at this and wait and see, and after that give it another look." But I recognize your concern.

The prosecutorial agencies are operating in the field; there is a lag, but there always is a lag, and I think we ought to go slow.

Second, I suppose everyone is aware of the fact that Denmark has recently abolished obcenity laws. and that there was a working committee of the Arts Council in Great Britain which recommended a similar provision there. There is a pornography fair in Denmark which was reported in the newspaper today in a bemused fashion. It was in the open, as if it were a country fair of some kind.

The facts are that in Denmark, as nearly as I can determine, with the abolition of pornography laws, the interest within Denmark both in sales has gone down tremendously, and there has been a decrease in sex crimes.

Now I'd be the last to suggest that this provides a causal relationship because of that, but for those who are concerned as to the impact of this material on antisocial action, here is one test case which shows the effect of eliminating the effects of obscenity laws.

Mr. Nix. Mr. Speiser, I take it you are in favor of the legislation in this field and feel that it is imperative that this committee act in this field, that we face formidable difficulties but not unsurmountable difficulties.

Taking that as your view, the committee would like to submit a number of questions to you. We would be most grateful for answers to them.

And in addition thereto, I feel that it would be helpful to the committee if you could give us a statement covering your views as to how this committee might formulate legislation meeting constitutional requirements and that has an excellent chance of getting the approval of the Supreme Court.

I would be most grateful.

Mr. Speiser. Mr. Chairman, I will attempt to do this, and you must recognize I am starting off in a slightly difficult organizational position, as I am sure you are aware of the position of the American Civil Liberties Union. I will attempt to do it and I will be as helpful as I possibly can to try to comply with your request.

Mr. DULSKI. I am intrigued with the statement the gentleman has made. Your statement points out that the Supreme Court has ruled that true obscenity is not protected by the first amendment. What is the position of the American Civil Liberties Union regarding this ruling?

Mr. SPEISER. We disagreed with the Supreme Court's definition of obscenity. We believed that it should be tied in with whether there is a proven relationship with antisocial action and if so that that can validly be banned, but as far as the definition that the Supreme Court has determined to be true obscenity, we disagree with that decision.

Mr. DULSKI. In your prepared statement, Mr. Speiser, you referred to many of those cases—in fact you referred to the Supreme Court Justice Frankfurter who once said: "Surely, this is to burn the house to roast the pig." When it fits to the policy of your organization, you agree with the Supreme Court. Where it doesn't, you disagree. Is that consistent?

Mr. SPEISER. No, I don't think there is any inconsistency in our position. No more than a Congressman who agrees with some decisions of the Supreme Court and disagrees with others. There are some decisions we agree with and some we disagree with and in my statement I trust I was not inconsistent.

I did not burden the committee, incidentally, with attempting to get the committee to adopt, or urging the committee to adopt our organizational view on obscenity. That is a matter for the courts, and I was, in preparing this testimony, attempting to spell out within the lines the Supreme Court has—in other words, I wasn't going to pinpoint in say this is a decision we agree with, this is a decision we disagree with, but accepting those decisions on the basis of attempting to spell out what I thought the limit of legislation is to the Congress.

I trust this was not being duplicitous in any way.

Mr. DULSKI. Thank you.

Mr. NIX. Mr. Speiser, I should never like to see the time come when I couldn't disagree with the Supreme Court, or agree while others disagree. It is one of those rare privileges that we enjoy in a democracy.

Mr. SPEISER. Yes, sir; I quite agree.

Mr. NIX. Of course, I look forward to the statement you are going to submit to us. I would also appreciate some private conversation at some mutually agreeable time.

Mr. SPEISER. I would be delighted, Mr. Congressman.

Mr. NIX. Again, I want to thank you for appearing today and I appreciate the fact that your statement has been a most excellent one, in my judgment a great contribution to the deliberations of the subcommittee.

Thank you very much.

Mr. SPEISER. Thank you.

(The prepared statement submitted by Mr. Speiser follows:)

STATEMENT OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman, the problems inherent in attempting to draft obscenity laws were well described in the 1969 Report of the Working Party of the British Conference on Obscenity Laws. The Report compared the position of legislators and draftsmen of obscenity legislation to that of—

"A coachman invited to drive us to an address that we are unable to specify. Nobody knows exactly where we want to go. All we seem to know is where we don't want to go. We don't want . . . a situation where it is a crime to shock or even disgust. We don't want to curtail the vital rights of free speech. We don't want repression for the sake of repression. We don't want to arraign bad taste or bad manners, for these are matters for social reprobation, not for penal law. We don't want to hobble the arts; still less to constrain them to a level fit for . . . 'the occasional 15-year old maladjusted delinquent.' "

In this country, the various courses which the British Working Party listed as undesirable would, of course, also be unconstitutional under the First Amendment.

The legislative proposals which this subcommittee is now studying reflect nationwide concerns. While no one has yet proved that obscene publications play any part in causing or encouraging sexual crime—or any other form of antisocial behavior—there is obviously a widespread antipathy to having such materials fall into the hands of young children. Equally troublesome is the sending of unsolicited and—to many—offensive advertising through the mails.

Congress has, in fact just last year passed legislation—known as the Pandering Advertising Act, aimed at just such a problem. Yet, there is an unhappy attribute of legislation in the sexual publication field. Its passage seems to intensify pressures for more legislation rather than less—a treadmill-like effect, that finally prompted Denmark to get off entirely.

Although, Congress can, perhaps, pass legislation controlling or limiting unsolicited advertisements without doing violence to the First Amendment, the specific proposals before the Committee cannot pass muster.

The provisions of H.R. 7375 and H.R. 10867 would apply too broadly. In clearing the mails of material possibly harmful to minors and offensive to unwilling recipients, these bills would also close the postal system to much that is constitutionally protected. They would virtually restrict what can be mailed to "only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, (1957). As Justice Frankfurter once said: "Surely, this is to burn the house to roast the pig." *Id.*

True obscenity, the Supreme Court has ruled, falls outside the protection of the First Amedment, and the Government can ban it from the mails without offending freedom of expression. *Roth* v. *United States*, 354 U.S. 476 (1959). Recently, the Supreme Court has held that a publication which would not be obscene if sold to an adult, may yet be obscene—and thus constitutionally unprotected—when sold to a minor. *Ginsberg* v. *New York*, 390 U.S. 629 (1968). But matter which does *not* fit the constitutional definition of obscenity, no matter how shocking or distasteful it might be, is still entitled to the full protection accorded by the guarantees of free speech and free press. And, because the non-obscene "is often separated from obscenity only by a dim and uncertain line," *Bantam Books, Inc.*, v. *Sullivan*, 372 U.S. 58, 66 (1963), anti-pornography legislation, if it is to withstand constitutional challenge, must err on the side of permissiveness. The Supreme Court has shown again and again that it will not uphold laws which punish or impede "protected" along with "unprotected" expression.

In dealing with those who distribute salacious material for personal profit, it is sometimes hard to remember that the First Amendment was intended to protect not only those who publish and distribute, but also those who read and receive. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1964).

Moreover, the preservation of this free interchange of ideas was—and is—thought by many to be essential to a stable, democratic society. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, *supra*, at 484. (See also *Whitney* v. *California*, 374 U.S. 357, 375 (concurring opinion of Brandeis and Holmes, J. J.)). Repress this interchange, and you risk clogging the channels by which our society insures peaceable and orderly change. Admittedly, not everyone believes in the power of uninhibited expression to keep a society both free and stable; but the authors of the Constitution have enshrined this belief in the First Amendment. As Judge Learned Hand once said, "To many this is, and always will be, folly, but we have staked upon it our all." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

When we debate whether a piece of legislation is consistent with the First Amendment, then, we must measure its impact not only upon the publishers and distributors of pornography or near-pornography, but also its impact upon all

publishers and all recipients—actual or potential—of information and ideas. In other words, we must consider its effect upon our entire system of free expression. Against this standard, and against the decisions of the Supreme Court which have applied it, these two bills clearly appear unconstitutional.

The easiest way to show this, I think, is to look at the bills section by section. Then we can look at their probable overall impact.

For convenience. I will refer only to H.R. 10867, which includes all of the relevant provisions of H.R. 7375.

The bill would add three new sections to the part of the United States Code which relates to non-mailable matter. The first, § 4011, would prohibit use of the mails to send certain kinds of publications to a minor. whether he had specifically requested them or not, or to anyone living with a minor who had not requested them. The bill attempts to define the kinds of publications which it would affect. Clearly, a good deal of what it would keep out of the mails would be pretty gamey. But the definition still does not meet the constitutional definition of obscenity—even of obscenity for children. In *Ginsberg*, the Supreme Court said that a state might adjust the definition of obscenity when it dealt with minors, not that it could invent a new definition.

The New York Statute involved in *Ginsberg* carefully followed the definition evolved by the Supreme Court in the series of decisions from *Roth, supra,* to *Mishkin* v. *New York*, 383 U.S. 502 (1966). It altered that definition only in that the tests as to (1) whether a publication appealed to a prurient interest, (2) whether it was patently offensive, and (3) whether it was utterly without socially redeeming value are all to be made with reference to the characteristics of a minor, rather than to the characteristics of an average adult. The Court, in judging that statute constitutional, said that a state, because of its special interest in the welfare of its minors, could take into account their immaturity and restrict their rights to judge and to determine for themselves what material they could see and read to a greater degree than it could with an adult. 390 U.S. at 637–38. However, the Court made clear that the state could only restrict this right where the material involved was obscene under the standard of *Roth*—though that standard would be applied from the perspective of a child. *Id.* at 641.

The bill before this Committee, although it appears to give lip service, does not, in fact, meet the standards of the New York law upheld in *Ginsberg*. There is no requirement that the publication be "utterly without socially redeeming value" for minors or that it be "patently offensive" in terms of what this society considers acceptable for minors. Certainly, nudity—even as it is defined in this section— is not necessarily patently offensive for children. Michaelangelo's "David" falls within this definition, and quite possibly a picture of it, along with other great paintings and pictures included in a book or magazine would be charged as "designed primarily to appeal to the prurient interest of the viewer." Under this provision, such a book or an advertisement for it could not be mailed to a person under the age of 16 or one with whom such a minor lived, even though it was not designed to appeal to the sexual interests of a child, and even though, in fact, it might not successfully appeal to the prurient interest of anyone, adult or child.

The same would be true of a book containing "explicit and detailed narrative accounts" of love-making. The list of good and great literature, including the Bible, that would fall under this description defies enumeration.

Even if this provision met the standard of obscenity for children laid down in *Ginsberg*, it would still remain unconstitutional, because it prohibits a mailing not only to minors, but to anyone living with a minor who does not himself request the mailing. Since it would be virtually impossible for a publisher or distributor to determine where children live and where they do not, the effect of § 4011 would be to keep all, of the material it describes out of the mails, unless it were specifically ordered. *Butler* v. *Michigan, supra,* firmly rejects the idea that the state, in attempting to protect minors from sexual material, can also keep nonobscene publications from adults, and the Court's opinion in *Ginsberg* made clear that the statute there was constitutional, in part, because it did not in any way impede sales to adults, 390 U.S. at 634–35.

Nor is it likely that Congress can constitutionally require adults who live with minors to request any material dealing with sex before they are able to receive it in the mail. The Supreme Court, in *Lamont* v. *Postmaster General*, 381 U.S. 301, 305 (1964), held that a similar provision, which required a specific request for delivery before the Post Office would send on "communist political propaganda," imposed upon the addressee "an affirmative obligation which we do not

think the government may impose on him." That statute was held to violate the First Amendment.

Finally, comes the question of how § 4011 is enforced. The text of the section itself mentions no sanctions. Presumably, it would be enforced simply by the refusal of the Post Office to deliver the proscribed matter, and, in addition, perhaps, by the Postmaster General's detaining and destroying it. Because a typical mailing list would include many households with children, a publisher would risk losing most of his mailing if he sent out anything which fitted the definitions in § 4011.

It may be, however, that criminal sanctions also attach to a violation of § 4011. The bill seems confused on this point. Section 3(a) of H.R. 10867 would make criminal any "willful" use of the mails to deliver a "sexually oriented advertisement in violation of Section 4011 of Title 39" and any willful violation of a "regulation of the Postmaster General issued under such section." While § 4011 does include advertising matter within its proscription, it is the proposed new § 4011 that deals expressly with "sexually oriented advertisements." Perhaps, then, my copy of the bill contains a misprint and should refer to § 4012 here. If the reference to § 4011 is correct, though, and mailing material in violation of that section is made criminal, then it will be triply unconstitutional; because neither it nor the provisions that would make its violation criminal contains any element of *scienter*. That is, a mailer could be prosecuted under § 4011 even though he had no idea—and no practical way of finding out—whether the person to whom he mailed one of the forbidden publications was under the age of 16. See *Smith* v. *California*, 361 U.S. 147 (1959). It may be that the word "willfully" in the criminal provision is supposed to mean "knowingly," but, if that is so, the provision is dangerously ambiguous.

The New York statute approved by the Supreme Court in *Ginsberg* prohibited only sales to minors, required that the seller have had some reason to believe the buyer was under age before he could be convicted and made an honest mistake of fact as to the buyer's age, a defense.

The bill before this Subcommittee would also add a § 4012 to Title 39, requiring that "sexually oriented advertisements" be specifically marked and sent only to addressees who had not requested the Post Office that they receive no such material. The mailer himself would have the responsibility of deciding whether his advertising was "sexually oriented" and had to bear the special mark, as well as the burden of obtaining (for a charge) from the Post Office a list of all those persons who did not wish sexually oriented advertisements sent to them. Apparently, if § 1735 was intended to refer to § 4012 instead of § 4011, failing to put the mark on sexually oriented advertising or sending it to anyone whose name had been on the Post Office's list for more than 30 days would be punishable by up to $5000 fine and 5 years in prison. In addition, the Postmaster General could ask the Attorney General to seek a court order which might not only enjoin the defendant from mailing any more of his advertising to anyone, but could also shut off from him all incoming mail having to do with the business he was advertising. In short, anyone who violated § 4012 could lose his money, his liberty, and his business.

What § 4012 defines as a "sexually oriented advertisement" would include a great deal of non-obscene advertising by almost any standard ever advanced. It includes descriptions or depictions, "in a predominately sexual context," of genitalia, intercourse, acts of sadism or masochism," or *any other erotic subject* directly related to the foregoing. There is no requirement that the advertisement appeal to a prurient interest, be patently offensive, or have no social importance. The only exception is for advertising matter in which the "sexually oriented" portion is "a small and insignificant part of the whole."

Nor does § 4012 limit sexually oriented advertisements to advertising for obscenity. A non-obscene advertisement for a non-obscene book can be well within the definition.

Apparently, the draftsmen of § 4012 believed they could take liberties with the constitutional definition of obscenity because the section deals only with advertising. But the theory that the First Amendment does not protect commercial advertising is a very shaky one. It is true that the Supreme Court, in *Valentine* v. *Christensen*, 316 U.S. 52 (1942), and *Breard* v. *Alexandria*, 341 U.S. 622 (1951) did say that commercial advertising did not enjoy the same degree of protection as noncommercial speech; but, as Justice Douglas has observed, these rulings were "casual, almost offhand" and have not "survived reflection." *Cammarano* v. *United States*, 358 U.S. 498, 514 (1959) (concurring opinion). On numerous oc-

casions, the Court has pointed out that First Amendment protection does not hinge on whether expression is commercially motivated or not. E.g., *Smith* v. *California, supra,* at 150; *Thomas* v. *Collin,* 323 U.S. 516, 531 (1945).

Even if advertising, in general, were outside the First Amendment, it hardly follows that the advertising of material clearly within the First Amendment does not have the protection afforded to the press. Advertising is as vital to a free market of ideas, as to any other kind of free market. (*Cf. Lamont* v. *Postmaster, supra,* at 308 (concurring) opinion of Brennan, J.). The Supreme Court in *Ginzberg* v. *United States,* 383 U.S. 463 (1966), held only that the manner in which marginally obscene material is advertised may be used to determine whether it fits the constitutional test of obscenity—not that advertising is without constitutional protection. If Congress relies on the *Valentine* case to save this bill from constitutional challenge, it will be resting on an old and feeble reed.

It is also doubtful that § 4012 can be defended as protecting the right of privacy. Perhaps, the right to privacy could justify this provision if its only effect were to keep "sexually oriented advertising" from the people who did not want it. But, necessarily, § 4012 will do much more than this. In the first place, it will be economically difficult for mailers to check continually and to update their lists to avoid sending material to the wrong people. That burden, in itself, might result ending all mailings of anything that could be classified as "sexually oriented advertisements."

Section 4012, however, has a much more certain way of closing the mails to "sexually oriented" advertising. The mailer must determine whether his advertisting falls within the definition. If he decides it doesn't, he risks a criminal prosecution or a civil action that could effectively shut down his business. Worse than that, people who fail to inform the Post Office that they do not want to receive "sexually oriented advertisements" may earn a neighborhood reputation as recipients of this kind of material. That, if nothing else, would probably make the Post Office list a very long one.

One way or another, then, § 4012, will effectively keep much non-obscene advertising out of the mails. It makes the mailer his own self-censor—and, with a criminal penalty hanging over him if he guesses wrong, he will necessarily be a very conservative censor—something which the Supreme Court found intolerable in *Smith* v. *California, supra.* It requires the addressee, if he wishes to exercise his right to receive such material, to expose himself to the possible scorn and distrust of his neighbors. The Court has also plainly hinted that this is unconstitutional. *Lamont* v. *Postmaster General, supra,* at 307. Finally, it provides the advertiser no opportunity for a judicial, or even an administrative determination that his advertising is really "sexually oriented" unless he is willing to risk criminal prosecution. There is no doubt that such informal, *in terrorem* censorship by the government violates the First Amendment. *Bantam Books, Inc.* v. *Sullivan, supra,* at 66.

Exactly how restrictive this bill is can best be seen by taking all of its provisions together. A publisher is effectively prevented from mailing a great deal of non-obscene, but somehow sexually-related material to anyone who has not ordered it. He also cannot advertise this material through the mails—at least not if the advertising contains any accurate descriptions—without risking a prison sentence if he happens to send it to someone on the Post Office list and without putting a mark on it that will probably result in its not being read. If "sexually oriented advertisements" of § 4012 are interpreted to be included in the nonmailable matter of § 4011, it may be that a publisher could not even send out his advertisements unless someone requested them. Even without taking the bill this far, however, it would effectively deny material which is plainly within the First Amendment access to the mails.

I urge this Committee, therefore, not to recommend its passage, and I would urge Congress not to waste its time and effort passing unconstitutional legislation. Moreover, at a time when the Supreme Court is in need of Congressional support, it seems unwise to place it in the dilemma of dealing with a law, clearly unconstitutional, which ostensibly deals with a matter of serious public concern.

The Commission on Obscenity and Pornography, which Congress set up for the express purpose of exploring this area, has yet to submit a final report. The Commission will not only have studied the legal and constitutional questions, but will have information on exactly what kind of harm, if any, obscenity causes and exactly what kind of measures, if any, are needed to deal with it. The Commission is supposed to submit its report next July, and a delay of some ten months cannot add much to a problem that has been going on for hundreds of years.

If the Congress is worried that there is no time to lose in dealing with obscenity, it might take some comfort in knowing that Denmark recently repealed all of its obscenity laws and the only results noticeable so far are significant declines both in the amount of pornography being produced and sold and in the number of sex crimes committed. Unless the Danes are remarkably dissimilar to Americans, this is some evidence that, the authors of the First Amendment were right in believing that unrestrained free interchange of ideas is the best means of putting an end to evil thoughts.

Mr. NIX. The Chair has statements from interested colleagues, which will be made a part of the record as though read in their entirety.

The statement of Hon. Bob Wilson will follow.

TESTIMONY OF HON. BOB WILSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WILSON. Mr. Chairman, I am grateful for the opportunity to appear before this subcommittee on behalf of two bills I have introduced dealing with pornographic material sent through the mails, a subject which concerns President Nixon and all decent Americans.

I am aware of the technical difficulties in dealing with such problems as the definition of obscenity and the need to protect free speech. But I am far more acutely aware of the rivers of smut which are pouring into our homes through the mails and refuse to believe we are without legal means to stem this tide.

Some steps have been taken. Currently a person receiving unsolicited pornographic mail can return it to the Postmaster with the request that his name be removed from the smut peddler's mailing list. There are two weaknesses here. First, the individual can take no action until he has already received at least one piece of objectionable literature. Second, the smut peddlers put out successive mailings under different company names. The Government's directive applies to the old company, but not to the new, though it is operated by the same persons.

The measures I have introduced seek a new approach to this problem. One measure, embracing President Nixon's proposal, would permit an individual to advise his Postmaster that he objects to receiving sexually oriented advertisements in the mail. The Postmaster General would maintain a current list of such persons and the smut peddlers would be required to cease mailings to them. The lists would be made available to the senders for a fee covering the Government's cost of compiling and mailing the lists. This procedure would hit the senders where it hurts the most—in their pocketbooks.

My second bill is also aimed at the sender's pocketbook. It would require him to pay the Government's administrative cost of removing the postal patron's name from his mailing list. In San Diego, my district, the cost is estimated at 50 cents per name. The San Diego Post Office handled more than 3,000 of these requests at a cost of $1,500. Certainly, the taxpayers are under no obligation to pay these costs.

Mr. Chairman, the flood of pornography I referred to a moment ago represents far more than an offense against the decent person's sense of morality. J. Edgar Hoover, FBI Director, states:

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.

It strikes me as ironic that we can become outraged at the sex criminal, yet all but ignore the sex peddler. We prefer to look the other way and let him go unpunished. Yet he is the man who helps to trigger the rapist. Police blotters across the country are full of cases showing the connection between pornography and crime, particularly sex deviation crimes.

I believe that if we enlarge our efforts against smut to include the smut peddler we shall have taken a major step forward.

For these reasons I respectfully request that my bills receive favorable consideration.

Mr. NIX. The statement of Hon. John H. Buchanan will be made a part of the record at this point.

TESTIMONY OF HON. JOHN H. BUCHANAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Mr. BUCHANAN. Mr. Chairman, certainly the very large number of bills to control the rapidly increasing traffic in pornography which are pending before your subcommittee as well as before the House Judiciary Committee attest to the tremendous concern about this problem among the Members of Congress. This is a direct reflection of the increasing distress expressed by thousands of citizens throughout this country who are receiving unsolicited obscene materials in their homes through the mail. I can honestly say that with the exception of letters regarding the Vietnam war, no other subject has been such a consistent and continuous object of my constituents' concern as the receipt of this pornography. I have been particularly alarmed, furthermore, by the significant rate with which such complaints have accelerated during the past year.

Mr. Chairman, I am well aware of the rights to freedom of speech and freedom of the press which are guaranteed by our Constitution and which have been used by the courts to overrule many convictions against the purveyors of obscenity in this country. While I have personally not agreed with many of these court decisions, the difficult responsibility of determining the obscene nature of particular materials and of assuring that constitutional rights are upheld in particular obscenity cases must remain with the courts. Notwithstanding court decisions affecting the rights of the purveyors of pornography, however, it is my firm conviction that the rights of the many who do not want the unsolicited intrusion in their homes of pandering materials which are completely offensive to them and which can be harmful to their children should also be protected. In the firm belief that the Congress must act now in providing this protection, I have sponsored two bills which are currently before this subcommittee—H.R. 11121 and H.R. 13477.

The first of these measures (H.R. 11121) is cited as the Offensive Intrusion of Sexually Oriented Mail Act of 1969. This act embodies the recommendations of the President which can be made after comprehensive study of this problem. The bill would require smut mailers to respect the expressed wishes of those citizens who do not wish to have offensive sex-oriented mail sent into their homes. A mailer would be required to place on the envelope of his material his name and address, together with any special mark or notice which the Postmaster General

may prescribe. The bill would also allow any person, for himself or on behalf of his minor children under 19 years of age, to file with the Postmaster General a statement that he desires to receive no sex-oriented materials through the mails. When such materials are sent to persons whose names are on the Postmaster General's list in violation of this act, the Postmaster General may request the Attorney General to commence a civil action in a U.S. district court. Willful use of the mails in violation of this statute, as well as unauthorized exchange of the mailing list maintained by the Postmaster General pursuant to this statute, would carry maximum penalties on a first offense of a $5,000 fine and 5 years imprisonment. Subsequent offenses would carry maximum penalties of a $10,000 fine and 10 years imprisonment.

The second bill—H.R. 13477—would go even further by shifting the burden to the mailer to obtain permission from the recipient before mailing any offensive material. The bill would, furthermore, prohibit altogether the mailing of offensive materials to any minors residing within States having laws prohibiting such mailings to minors. Violators of this act would be subject to maximum penalties of a $50,000 fine and 5 years imprisonment.

Mr. Chairman, the Congress has already acknowledged its responsibility in this area and did take an important first step in fulfilling this responsibility with the enactment in 1967 of Public Law 90–206. This law is also designed to deal with the problem of pandering advertisements sent through the mail. It allows a person who receives any such advertisements which he considers offensive to obtain from the Postmaster General a judicially enforceable order prohibiting the sender from making any further mailings to him or his children. Thousands of persons from all over the Nation have already requested such prohibitory orders and I would like to strongly commend Postmaster General Blount for his current efforts toward making all citizens aware of the recourse which they have under this law.

With the alarming increase in the amount of salacious material going through the mails, however, there is a critical need to expand and strengthen the provisions of this law. Perhaps the most important extensions provided by both H.R. 11121 and H.R. 13477 are contained in the provisions allowing a person to protect his home from the intrusion of offensive materials regardless of whether or not he has ever received such mailings. The authorization of such preventive action is particularly important to parents who are concerned about the damaging effects which even an initial exposure to pornography can have on the moral and psychological development of their children.

The threat to the normal and healthy development of our Nation's young people is, tragically, the greatest threat presented by the increasing traffic in pornography. Obscene materials too often fall into the hands of young people who do not yet possess the maturity with which to properly evaluate them and whose minds are very impressionable. The primary responsibility for the protection of children from such harmful influences must, of course, lie with the parents. However, even the most diligent parents are finding it impossible to keep all of the offensive material traveling through the mails out of the hands of their children.

Mr. Chairman, I have no illusions that these bills and the various other measures which have been introduced in the Congress can com-

pletely eliminate the growing problem of pornography dissemination in this country. Nor do I question the right of citizens to purchase and use anything which is in itself legal, regardless of my own feelings about its merits and social value. But we can and must help stem the tide of pornographic materials which are going to the many persons who do not want them, who are offended by them, and who wish to protect their children from the damaging influence of pornography.

Mr. NIX. The statement of Hon. William L. Hungate will be made a part of the record, as though read in its entirety.

TESTIMONY OF HON. WILLIAM L. HUNGATE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. HUNGATE. Mr. Chairman, from the number of letters from my constituents, I see a growing concern in my district over the increasing amount of unsolicited mail.

We cannot deny that pornography has a large market in our Nation. For whatever social and psychological reasons, sex has been exploited. A very good example of the seriousness of our problem is in the case of the German sex education film "Helga," used as just that in Germany, which was brought to the United States and advertised and sold as an adult sex film.

The burden on parents increases when they try to enlighten their children about sex in the right perspective and an abundance of pornographic literature and movies reaches our children with the message that sex is vulgar, lewd, and promiscuous.

One mother wrote that she wanted to "acquaint my children with decent worthwhile literature, in the hope that they will develop the good sense not to choose the trash." Here, a mother is trying to educate her children to have a healthy attitude about their bodies and a sense of responsible moral values. Then, why should her efforts be jeopardized by unsolicited prurient advertisements?

Distorted attitudes toward sex exist in our society, but they should not be imposed upon anyone. And, especially, they should not be imposed upon our children.

I have joined in sponsoring Representative John N. Erlenborn's bill to attack the problem of the use of the mails to send sexually provocative materials to (1) any home whose householder has not asked for them, and (2) a minor in those 36 States, including Missouri, which have laws against the dissemination of obscene materials to minors.

This bill would require peddlers to first ask permission of the prospective customer in a form letter which contains no pictures and no lurid language before any provocative literature or advertisements may be sent.

I urge full support of this legislation. And, I believe this approach—to protect those to whom obscene materials might be offensive, degrading, and even harmful—would be helpful in developing a broad national attitude toward sex that is educated and developed with correct knowledge about sex and value consciousness.

Hopefully, in the future, pornography will not hold the interest of so many Americans. But, now is the time to change the direction of the overabundance of pornography.

Mr. NIX. A statement by Hon. Seymour Halpern will be made a part of the record at this point.

TESTIMONY OF HON. SEYMOUR HALPERN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HALPERN. Mr. Chairman, it is hard to exaggerate either the offensive nature of obscene material going through the mails or the dimensions of the distribution system which is spreading it around the country.

I would like to emphasize that in recommending the adoption of new Federal legislation, I do not seek to restrict the right of any citizen to express his views on social customs, sexual customs, or any other aspect of social conduct or custom. I not only tolerate, but favor, an exchange of ideas however controversial. I know that social customs do not stand still and I am not trying to freeze social customs. What I am seeking is to place a check upon the dissemination of obscene material by those businesses which have no purpose, no reason for being, other than to make money by purveying filthy material throughout the country to children whose parents do not want them to have it.

I seek the enactment of laws which would reach those hustlers of obscenity who have no conscience, who do not confine themselves to an adult market for their products but who seek out the young, the vulnerable, the curious and seek to make them their customers. It is filth for money's sake, and as one of the State court judges has said, this is even worse than hardcore pornography which is filth for filth's sake which the Supreme Court has held is not protected by the first amendment.

The material which we would reach in our bill has little or no literary or artistic reason for its existence, usually there is no story line, no artistic merit, what there is is merely a framework upon which to hang the smut.

H.R. 6186, which I have cosponsored with Mr. Bennett and a number of other Members, would make it a Federal crime to sell, offer for sale, loan, or deliver in interstate commerce or through the mails to children under 18 years of age, material described in the bill as being harmful to such children, or to exhibit to children under 18 years of age motion pictures which were transported in interstate commerce or the mails which depict nudity, sexual conduct, or sado-masochistic abuse in a way harmful to minors.

The character of the material proscribed is described in our bill in very explicit terms.

While there are many who would prefer to see a Federal law enacted of broader scope, one which would put a stop to the transportation of material of this type to all persons regardless of their age, I believe it is wiser at this time to enact a Federal law which is specifically designed to protect children. I think this is so for several reasons.

One reason is that there seems to be more unanimity of opinion both in and out of Congress, that there is a need to especially protect children against obscene material than to protect adults. Although many people believe that even for adults this material is distasteful and perhaps harmful, they believe that adults can decide for themselves whether to keep it or throw it away and that it is appropriate that the adults make this judgment for themselves, others, especially Government officials, should not make the judgment for adults as to what they will read or see.

Most believe that the situation for children is different. Children under 18 years of age are still developing physically, sexually, and socially and their parents should be permitted to make the determination that they do not want them exposed to certain material and we in the Government should do our part to assist the parents to reenforce their judgment as to the kind of material they want their children to be exposed to. Certainly instrumentalities of the Government, such as the postal system, should not be used to thwart the parents in their efforts. Legislation of the type proposed in H.R. 6186 is designed to reinforce parental judgment to keep this type of material out of the home unless requested by an adult. If such material is desired by an adult, our proposed legislation would in no way interfere with the adult's right to receive it.

In addition to the sentiment for the enactment of a law to protect children from obscene material, judicial interpretations as to the scope of the guarantees of the first amendment's right to free speech and press lead us to believe that the courts will construe these requirements somewhat differently and more liberally in analyzing the constitutionality of law designed to protect children more than laws designed to protect adults. In the past, where laws have attempted to curb the dissemination of obscenity to adults, the courts required that very strict criteria be met before a work can be denied passage through the mails or in commerce because of its obscene character.

For adults, the Supreme Court has said, before material can be restricted by law, it must be demonstrated either that (1) it is hard core obscenity; that is, obscenity of the worst possible type with no redeeming social value (even material which is patently offensive and goes beyond community standards or candor cannot be barred if there is any redeeming social value, *a book named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966)) or (2) it is borderline obscenity but is sold or distributed in circumstances where there is "pandering." That is, the material was being sold for money solely to exploit its sexual content (*Ginzburg* v. *United States* 383 U.S. 463 (1966)).

In applying these tests, the courts have held a great deal of material not to be legally obscene and therefore such material is privileged to be freely disseminated through the mails and otherwise even though many parents and others were convinced that it was harmful to children.

The decision of the Supreme Court in a recent case, *Ginsberg* v. *New York*, 390 U.S. 629 (1968) has been interpreted by many as indicating that the Court will permit a different definition of obscenity to be applied to material destined for children than is required by law to be applied to material destined for adults. Using explicit-type language similar to that upheld by the Court in the *Ginsberg case*. H.R. 6186 contains very explicit definitions of what is proscribed and thus avoids the difficulties encountered by so many of the earlier laws which had been held to be void for vagueness (see *Interstate Circuit* v. *Dallas*, 390 U.S. 677 (1968) for examples).

Another reason for the courts finding that many of the earlier laws were invalid was because they imposed a prior restraint; that is, they required examination of the material by a government official before the material could be released to the public. This type of invalid prior restraint is avoided in H.R. 6186 which provides that one found guilty

of violating its provisions may be subject to punishment but it does not establish any system of prior censorship by Government officials.

In addition to many bills which would close the mails to obscene or objectionable material, there are more than 145 bills currently pending in the House of Representatives which are either expressly and exclusively designed to protect young children from exposure to obscene material or which contain such provisions in combination with other provisions. Since many of these bills are cosponsored by a number of Members, it is apparent that there is a good deal of sentiment in the House for the passage of legislation to curb the dissemination of obscene material. I believe that we can get together on the provisions of a law even if it means that we yield on some of the provisions in some of the bills so long as we save those provisions which most of us believe to be essential to an effective law.

For example, H.R. 6186, the bill I cosponsor, contains provisions which would remove the U.S. Supreme Court and the Federal appellate courts jurisdiction to review any determination made by a lower court that the material described in the bill is harmful to children. I am perfectly willing, indeed I would prefer, to sponsor a law which does not provide for withdrawal of appellate review in these circumstances.

I have consistently supported the courts in the past and anticipate doing so in the future. Moreover such provisions withdrawing appellate appeal where the basic constitutional right of free speech is involved may raise such controversial questions as to constitutionality that the whole proposed law might be jeopardized. It seems to me that it is better to obtain what benefits we can from legislation which would close the mails to obscene material destined for children than to imperil the whole proposed law by the inclusion of such provisions. There may be other differences in the bill which we can readily resolve, for example, the age group to be protected varies from 16 to 21 in the bills. Surely we can come to an agreement on this point as well as on other differences. I urge the committee to report out to the House a bill which will contain the essence of what we believe to be the best in the various bills pending. This I believe will be a real contribution to attempts by parents and other to protect the young from obscenity.

Mr. NIX. The next statement before the committee is that of Hon. Donald W. Riegle, Jr.

TESTIMONY OF HON. DONALD W. RIEGLE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. RIEGLE. Mr. Chairman, I wish to testify in support of my bill, H.R. 12301, which seeks to protect the homes of private citizens from the unwanted intrusion of pornographic literature and materials.

If the time of the committee members were less restricted, I believe that the most eloquent testimony I could produce in favor of this legislation would be to read, in their entirety, all the letters concerning pornographic literature which I have received during my years in Congress. Clearly, not enough time is available for me to do this. Nevertheless, I would like to quote a few excerpts from some of the letters written to me from concerned parents in the Seventh District of Michigan.

Their views are well represented by the letter which began "How long do we have to put up with this filth coming through the mail and into our home?" A friend wrote: "Don, I am no prude, but the junk mail that we are receiving at my home has reached a point of being absolutely ridiculous. The quantity is probably 15 or 20 pieces per week." Clearly my constituents are concerned for their children as one mother wrote: "We would like to see this stopped, not for ourselves alone but because of the thousands of young people who can be harmed by this junk material. The postal inspector in Flint had a complaint by a man whose 6-year-old son received such mail." And, Mr. Chairman, these people are turning to us—"I know I could have sent it on to the Postmaster General's attention; but I am forwarding it on to you with the hope that you may help pass legislation that would put a stop to such publications."

As you can see, their feeling is essentially one of frustration because they are unable to protect their own homes and their children from this unwarranted intrusion of their privacy and their personal lives. They realize that they are not able to do anything about this by themselves and they have turned to us—their elected Representatives—to request that we act for them. Time and again they have asked the question, "Don't we have any Federal laws to prevent this type of obscene material from being sent through the mails?" and "Is there no way to stop this type of smut peddling?"

I contend that we have such corrective legislation pending both in this Committee and in the Judiciary Committee. We must answer the charge made by one of my constituents that: "It appears that the smut peddlers are much better represented by a bunch of smart lawyers than the people are represented by all the Congress." The most astonishing thing about this entire situation is that an agency of the Federal Government is an unwilling participant in this growing problem because, under existing legislation, the U.S. postal authorities have been hamstrung in their efforts to stem the flow of pornographic mailings.

Postal officials have been able to introduce administrative procedures to reduce the flow of obscene mail. These measures, however, are not enough to halt the present commerce in obscenity. Realizing this, postal authorities have urged that additional legislation be adopted.

As we all know, there are no simple answers to this problem. The first amendment to the Constitution prohibits any law which would seek to abridge the "freedom of speech, or of the press." I believe H.R. 12301 clearly falls within the permissible limits of both the Constitution and the most recent decisions of the Supreme Court.

Today a citizen can refuse to receive pornographic material when it is delivered to his home. But how can a father tell that inside a plain white envelope—often addressed directly to the child—is an advertisement with obscene photos for offensive literature on sexual habits and positions? When his children have opened the mail before he gets home from work, it is too late for the father to return this mail unopened to the publisher—the damage is already done.

I believe we have within our power, and within the limits of the Constitution, the ability to prevent this kind of situation from occurring. My bill, H.R. 12301, would enable the Post Office to put together a national list, available in all post offices to all publishers, of those citizens who do not want obscene literature or advertisements

for such matter to be delivered to their homes. Someone could thus refuse such material before he gets it, rather than after it is delivered. Anyone who then sent such material to a person whose name and address was on the postal list at the time of mailing, would be in violation of the law.

I contend that my bill is fully within the limits of the guarantees of freedom of speech and of the press because it does not prohibit the manufacture of such offensive materials. It merely seeks to establish a fair balance between the rights of those who publish and exercise these constitutional liberties and those who maintain their right to privacy and protection from unwanted intrusion.

Further, this legislation would enable the Federal Government to become a full partner with parents and States in protecting children from much of the interstate commerce in pornography. It would be an effective response to the pleas for assistance which we receive daily from angered and helpless parents.

Certainly, there is difficulty in dealing legislatively with this problem so that all our freedoms are preserved. It is equally important, however, that these freedoms not be abused. As the father of three young children, I am a concerned parent, and I join with other concerned parents in proposing this corrective legislation to your committee. Let me urge its early adoption.

Mr. NIX. The subcommittee will be adjourned subject to the call of the Chair.

(Whereupon, at 12 noon, the subcommittee adjourned, subject to the call of the Chair.)

OBSCENITY IN THE MAILS

WEDNESDAY, DECEMBER 10, 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 219, Cannon House Office Building, Hon. Robert N. C. Nix, chairman of the subcommittee, presiding.

Mr. NIX. The subcommittee will come to order.

Our purpose today is to resume once again our consideration of anti-obscenity legislation.

We will hear from Senator Frank Carlson, as a representative of the direct mail industry on how we can practically meet the problem of pornographic mailings, which are unsolicited.

Distinguished Members of Congress are also here and we have in addition three gentlemen from Buffalo, N.Y., the Honorable Theodore S. Kasler, Mr. Julian Kubiniec and Dective Sgt. Frank V. Spano. They are the constituents of our distinguished chairman, Mr. Dulski, and they will discuss for us the effect of obscenity on the newsstands and in the mail on our local communities.

I feel that their testimony will be most valuable, and I know I express the sentiments of the other members of the subcommittee, and the members of the full committee, when I say so.

I would be more than happy, and the subcommittee would be honored to have our distinguished chairman of the full committee introduce our witnesses.

Mr. DULSKI. Thank you very much, Mr. Chairman.

Senator Carlson—a personal friend of mine, who is enjoying his retirement—Mr. Chairman, ladies and gentlemen.

I certainly appreciate your calling this hearing today, Mr. Chairman, on smut mail legislation. In particular, I am happy to be able to present three expert witnesses from my home city of Buffalo, N.Y., who have been working very diligently on this matter for a long period of time. I am confident that they will be able to contribute to the testimony which you already have developed on this subject which cries out for legislative action by our committee.

Of course, you have already introduced them.

We have with us our honorable city judge, Theodore Kasler, one of my neighbors; the senior assistant district attorney, Julian Kubiniec; and, of course, the man who has done a tremendous job in this field with the cooperation of his two colleagues, Detective Sgt. Frank V. Spano.

Thank you, Mr. Chairman.

Mr. NIX. Thank you.

I understand Judge Kasler and the other witnesses would like to present short statements, individual statements, and then answer questions as a team. Is that correct?

Judge KASLER. That is correct.

Mr. NIX. Judge, will you please begin?

TESTIMONY OF HON. THEODORE S. KASLER, ASSOCIATE JUDGE, CITY COURT, BUFFALO, N.Y.; ACCOMPANIED BY JULIAN KUBINIEC, SENIOR ASSISTANT DISTRICT ATTORNEY, ERIE COUNTY, N.Y.; AND DETECTIVE SGT. FRANK V. SPANO, BUFFALO POLICE DEPARTMENT, BUFFALO, N.Y.

Mr. KASLER. For the record, I am Theodore S. Kasler, an associate judge of the city court of Buffalo, N.Y., and I want to thank you for granting me this opportunity to address your subcommittee.

At the outset, let me indicate that my problem and that of all trial judges, whether they be on the Federal, State, county or municipal level, is in the interpretation of the obscenity laws, as governed by the interpretations of the U.S. Supreme Court, the various circuit courts of appeal, and the various appellate courts on the State level.

It is also obvious to the committee that all the State laws, and even the proposed bill which is before your committee now, being number H.R. 10867, are synthesized from these court decisions, and until each new law is finally tested by the U.S. Supreme Court, no trial court can ever be sure of its true meaning.

The nature of the problem which is the subject of the bill under consideration by your committee is one which has caused anguish to the courts and alarm to the Nation.

This committee is aware, Mr. Chairman, that distinguished lawyers, jurists, and public officials have become discouraged at the inability of government to stop the flow of hard-core pornography through the mails and the bookstands, and its open, brazen display, regardless of age, on the stage and on the screen. It has been my experience that the public does show some concern for pornography only when it "hits home." And, I repeat, it is only when sexually oriented advertising is received in the home that parents move into action, and then they demand immediate action from you gentlemen, from State legislators, from the Judges, and from the police.

Therefore, I commend this committee for taking action in this field, because I believe it is the function of the Government to do for the people what they cannot do for themselves, or, as in this instance, what they are not inclined to do for themselves.

It is my observation that, to many parents of minors, pornography is not a reality until they are faced with it in their homes, or it is found on the persons of their children. I have found that people have a vague idea of what hard-core pornography is, and their impression of it consists of mere nude figures.

However, on occasion, when I do take examples of the hard-core pornography which is received through the mails or which is found on the bookstands, and I describe the various sexual aberrations practiced in the movies bought by Sergeant Spano in the open market

and viewed by me, only then is the full impact of obscenity brought home.

In subsection B of section 1214, mailing of sexually oriented advertisements, the bill places the onus on the householder to file a statement with the Postmaster General, stating that he does not want to receive any sexually oriented advertisements through the mails. This, in my opinion, places too great a burden upon the citizen. It is simply human nature that the citizen will not be moved to action until he does receive such sexually oriented material through the mail. But, by that time, the minors for whose protection this bill is being enacted may have already examined this material, may have replaced it, and whatever damage has been done will remain permanent.

I agree with those advocates who are urging this Congress to make it strictly unlawful to send any sexually oriented advertisements to all classes, adults as well as juveniles.

In conclusion, may I state to this committee, Mr. Chairman, that a great document like the Constitution of the United States is being compromised and degraded for the benefit of the very few, for the sole purpose of making money, and in total disregard of the consequences. May I quote from an address by Mr. Richard L. Evans, delivered from the tabernacle in Salt Lake City, on November 9, 1969, wherein he stated:

> Evil is greedy. Evil is pursued by many to make money. And always we ought to remember that the more profitable evil is, the more powerful it is, and the more prevalent it will become. Evil will go just as far as we let it. If we patronize it, encourage it, it will go to unlimited lengths.

It is indeed a sad commentary upon our times when cynics can use the Constitution of the United States to promote pornography for profit, and I am in full accord with the conclusions reached by Mr. Edwin A. Roberts, Jr., editor for the National Observer's Newsbook series entitled, "The Smut Rakers," under a 1966 copyright by the Dow-Jones Co., Inc., wherein he stated, at page 127:

> Since the beginning of obscenity legislation in the United States, the cause and effect element has been a principal justification of relevant laws. But we might ask ourselves if such justification is necessary. Obscenity is more than "controversial sex speech," as one lawyer puts it. It is more than the "occasion of sin" of clerical parlance. And it doesn't have to be a threat to Western civilization to be intolerable. Obscenity is a nuisance worthy of legal control because it offends the dignity, spirit, and sensibilities of civilized people. If it did nothing more than that, it would be as suitable for censure as the power plant that fouls the air.
>
> The First Amendment? Americans may disagree on its application, but it seems at least arguable that the founding fathers did not consider every impression of ink upon paper to be automatically superior to all competing values.

Once again, I extend my thanks to the subcommittee for inviting us, and I am sure that I am extending the thanks of concerned people of the Niagara Frontier for having an opportunity to be heard.

Mr. NIX. Thank you, Judge Kasler.

You may proceed, Mr. Spano.

Mr. SPANO. Thank you, Mr. Chairman.

At the outset I want to thank you for affording me the opportunity to testify before your committee relating to pornography.

For the record, Mr. Chairman, I am Frank V. Spano, a detective sergeant in charge of the salacious literature squad of the City of Buffalo Police Department.

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Although my connection with the sending of smut through the mails may seem remote because I am not a member of the Postal Inspection Division of the Post Office, nevertheless I am certain that I received at the Buffalo Police Department, concerning smut mail, a substantial measure of the complaints, which I immediately refer to the postal inspectors.

May I add that I have received excellent cooperation from the postmaster of Buffalo, N.Y., and the Postal Inspection Service, and this cooperation has been reciprocated by the department by aiding in local prosecutions of obscenity cases.

Gentlemen, I think that I should inform you of my problem in enforcing the obscenity statutes of the State of New York in that, under *People* v. *Rothenberg* decided by the Court of Appeals of the State of New York, a police officer is not permitted to make a determination that any material is obscene. As a result, I must purchase or view film and other obscene material and present it to a judge for determination as to its obscenity before a search warrant directing the seizure of such material or the arrest of the promoter can be ordered.

As recently as October 6, 1969, the U.S. Court of Appeals for the Second Circuit in the *Bethview Amusement Corp.* v *William Cohn, District Attorney for Nassau County* case ruled that an "adversary hearing" must be held before a search warrant and/or an arrest warrant can be issued.

These judicial decisions have made it virtually impossible to enforce the obscenity laws of the State of New York; this fine bill, being H.R. 10867, is of no help to me as a police officer attempting to enforce any laws of obscenity, be they Federal or State.

In view of the recent Supreme Court ruling which now constitutionally protects the possession of obscene and pornographic material in the home, police officers are now prohibited from making arrests for such possession and this now raises the question: How does this obscene material get in the home? Undoubtedly the U.S. mails will be one of the main vehicles for bringing obscene material to the attention of the "consumer." A study of the present bill discloses that it is geared to protect the individual and his family who specifically make the effort to place their name on the "postmasters' list" indicating their desire not to receive sexually oriented advertisements.

I respectfully call this committee's attention to the Supreme Court's ruling in the *Ginzburg* case wherein it was held that a material which is advertised as having been created for the purpose of sexual stimulation is denied the protection of the first amendment. I would suggest to this committee that it study this aspect of the law as a solid basis for prohibiting from the mail any and all sexually oriented advertisements that key upon the aspect of sexual stimulation.

The heart of the proposed bill appears to be under section 4012, paragraph (b), which would proscribe the mailing of such material only to those persons and families who comply with this section.

Gentlemen, do you appreciate the fact that an extensive nationwide publicity campaign would be necessary to alert the public to this protective section? The burden is placed upon the citizen to take the first step in protecting himself from unwanted and offensive advertisements. Assuming that he does, what is to prevent the purveyor of filth from mailing his advertisements by merely addressing it to "Occupant."

It is my feeling as a police officer, that this bill should go further than it does. Under the above-mentioned *Ginzburg* case, I feel that this committee should make a thorough study of barring, prohibiting, and refusing to deliver any and all sexually oriented advertisements that meet the test expounded in this case. If such a prohibition were possible, then the police officer's present inability to arrest the home occupant for possession of pornographic material would become moot because the main source would then be local commercial outlets rather than through the mail.

Mr. Chairman, gentlemen, I thank you for affording me this opportunity to present my views regarding this legislation.

Mr. NIX. Thank you, Sergeant Spano.

Mr. Kubiniec?

Mr. KUBINIEC. Thank you, Mr. Chairman.

At the outset, I want to thank you for affording me the opportunity to testify before your committee relating to the problem of pornography and obscenity.

For the record, Mr. Chairman, I am Julian F. Kubiniec, an assistant district attorney in and for the County of Erie, Buffalo, N.Y. Among my other duties as an assistant district attorney in Erie County, I am in charge of the obscenity bureau in the district attorney's office with the responsibility of prosecuting local violations and in cooperating with and assisting local law enforcement agencies in the never-ending crusade against the dissemination of pornographic and obscene materials.

On the local—county—level, convictions for the possession of and/or the promotion of obscene materials are quickly becoming a rarity. Higher court opinions have imposed a quantum of proof upon the prosecutor so burdensome that it is beginning to appear that only photos or films actually depicting sexual intercourse, sodomy, et cetera, are deemed to have no constitutional protection. Yet, possession of a "stag" film, for private use in a home, have been recently cloaked with the protective mantle of the first amendment. In spite of these recent trends toward a complete carte blanche for the dissemination and possession of highly erotic books, films, and magazines, the Supreme Court has on several occasions, reaffirmed its feeling that the States are completely free to legislate against the sale, dissemination, and promotion of pornographic and obscene materials to minors.

New York State has an excellent statute prohibiting such dissemination to minors. The law is so explicit and firm that the book stores in Buffalo, which specialize in "girlie" and "nude" magazines, warn away minors with large signs displayed on their doors and windows. In the event that a retailer is arrested for an illegal sale to a minor, the prosecutor must prove that the particular book or magazine was "harmful to the minor." This element of proof requires the testimony of experts in various fields who may or may not be available to the prosecution and if so, at considerable expense.

Bill 10867, which is the subject of this committee, has as its theme the prevention of sexually oriented material from reaching minors through the mail. The definitions spelled out in the bill are excellent and would more than cover the types of magazines which I have brought for this committee's perusal. These magazines were purchased in retail stores in Buffalo which feature such works. Although these retailers appear to make an effort not to sell to minors, they can never-

theless be purchased by minors through the mail. You will note that each magazine has an advertisement touting other titles purported to be similar to the magazine in hand. The coupon may be cut out and forwarded to the publisher or distributor with the required price and the ordered magazine will then be mailed. The proposed bill will not prevent the mailing of such a magazine to a minor who places his order after the magazine was carelessly or deliberately passed on to him by an adult. However, I do believe that Postmasters in the various States are aware of publishers and distributors who mail out such magazines. Perhaps, by appropriate legislation, they could be required to prove or at least vouch that a specific mailing is not addressed to a minor. I feel that publishers and distributors of magazines which portray scenes, conduct, and activity as defined in this bill can legally be required, not only to submit them to the Postal Department for inspection and categorization, but can be further required to attest that none are being mailed out to minors. It may be impossible to prevent these publishers from running ads in their magazines—unless this can fall under the "pandering" doctrine of the *Ginzburg* case—but such requirements might eliminte or seriously curtail the sale of such magazine to minors through the mail. This would have the long-range effect of making the local retailer the only major source of distribution and he can be controlled at the local level by the police as far as illegal sales to minors are concerned.

By virtue of a contempt proceeding in Erie County court, it became public knowledge in the press that the October 1969 grand jury of Erie County is conducting an investigation under a new law in New York State which makes it a felony to "wholesale promote" obscene material. The legislation is aimed at the wholesaler who, by virtue of his operation, makes substantial profits on volume sales to various retailers. Police investigations reveal that large shipments of highly erotic and sexually oriented magazines are shipped by airfreight to distributors of various publishers.

I believe that the Postal Department has contracts with many airlines worth millions of dollars for transporting U.S. mail; in fact, a recent issue of Life magazine states that air mail brings in more revenue than passengers on a per pound basis. I propose that this committee study the feasibility of limiting or denying air mail contracts to airlines that transport magazines and materials that meet the definitional sections of this bill. Although the courts have, in a series of decisions, expanded individual rights in this area, yet their expression of serious concern for the protection of minors leaves open many roads to approach the curtailment and elimination of sexually oriented works.

The United States Government must now accept the responsibility of protecting its citizens, especially the children. The Federal judiciary ignited the civil rights explosion under the First Amendment and now is the time for our Federal legislators to use every tool at their disposal to regulate the flow of material which may fall into the hands of the youth of this Nation. Smut is a national business. Magazines printed in California are wholesaled and retailed in Buffalo, N.Y. This Bill proposes to stem the flow of sexually oriented material to those families who actively indicate their disgust. Cannot the might of the Postal Department be exerted in other legislation to reverse

the interstate movement of these types of magazines? The local prosecutor and law enforcement officer needs help and shackling the flow of obscene and pornographic material may very well be the first important step to a rededication to the moral values which we cherish.

Mr. NIX. Thank you very much, Mr. Kubiniec.

Mr. Dulski?

Mr. DULSKI. Thank you, Mr. Chairman.

Of course, being very partial, I have read with great interest every word of this testimony. I know of the work that has been done in this field by these three men from three different branches of government. You have a city judge, you have a district attorney and then you have a police officer who has the initial role in law enforcement.

I want to direct my first question to Judge Kasler.

Judge, as a Buffaloian, I have read numerous articles in our newspapers about the lack of convictions. In the last few months, I have gathered some information on this matter and—although I am not a lawyer—they tell me the reason they cannot make convictions is because of the restrictions of constitutional law. Let me just go a little bit further.

You are a member of the bar and I recall for you the case in the State of Massachusetts where the district attorney took it upon himself to act. He said that as long as it involved what he considers to be obscenity, he was going to start arresting. He did, and he cleaned out part of that State. The defendants went to the Supreme Court, where they won reversals.

What do we need? As I read the testimony of the three of you, H.R. 10867 doesn't go far enough you say. Could you give us the benefit or your thinking of the prosecutions we have in Buffalo?

Mr. KASLER. This is strictly my opinion, but I must allude to the case of "I Am Curious Yellow" which was decided by the Second Circuit Court of Appeals last year. And the majority opinion, and there was a strong dissent by Chief Judge Lombard, the appellate courts had in fact taken the questions of fact normally belonging to a jury—when you apply the three principles, three elements of the Roth U.S. Supreme Court decision, that it must have an absolute appeal to purient interests, it must go beyond the limits of ordinary candor, be utterly without social value. These three elements must coalesce. And appellate courts constantly find objections to charges by judges to the juries trying to explain and define for the juries the three elements, and the instructions that they must find these three elements together and before they can find a conviction.

If you have some of this pornographic material presented, such as Mr. Kubiniec has with him here and Sergeant Spano, juries will immediately make these findings, but unfortunately juries will not make specific findings, and they need not make specific findings. But then again, an appelate court, such as the majority in "I Am Curious Yellow" case, found there was some redeeming social value in the picture and therefore the jury was not justified in bringing a verdict of guilty.

This is the danger that is arising from appellate interpretation of factual situations which are traditionally belonging to juries, that the judges assume for themselves on the appellate level a fact-finding right in derogation of what the jury found.

Judge Lombard in that particular decision indicated that as far as obscenity was concerned, a question of fact has been taken away from the jury and they are mere rubber stamps as soon as it hits the appellate court.

I would say if some law could be passed by Congress to make sure that the Federal judiciary at the lowest levels will be bound by findings of fact of the jury, then we will have some convictions. But until that is done, we will never come across any convictions where you have a mixed appeal, of photographs, some literature, some writing, either expounding sexual aberration or being against it, and no jury or appellate judge will ever find that element. That is, it is utterly without social value. That is the answer.

The appellate courts have simply replaced the juries.

Mr. DULSKI. Thank you very much. I appreciate the Judge's observations in the light of various cases and the subsequent appellate division reviews. I have a question for the District Attorney.

Do you find in the city of Buffalo or the county of Erie, when a case on pornographic material is submitted and it is made with the cooperation of the police department, whether it be the sheriff or whatever, do you find that the jurisdiction of law is related many times to the prior decisions made by our judges?

Mr. KUBINIEC. Partly, Mr. Dulski.

I would like to assent to everything that Judge Kasler has said, and I would assume that the Judge would rather not comment and affirm what I am going to say, because it is my opinion of what judges think. But I have found that in the county of Erie that our city court judges, our Erie County court judges and our Supreme Court judges are straining as far as they can to help the prosecution; that the judges by a great majority—I would say 99 percent of our local judges, the city level, the county level, the Supreme Court level—are bending the law as much as they can to help me as a prosecutor get a conviction.

And off the record, they are very disturbed over the fact that in many instances they must throw a case out, that they must rule against the prosecution on the basis of the higher court law.

Mr. DULSKI. Let me interrupt you there, there is nothing off the record, it is all on the record.

Mr. KUBINIEC. All right. Judges tell me this off the record. They don't make these comments generally in the courtroom. Once in a while a judge will have the courage and say "I would love like hell to convict you but the law doesn't let me. I am bound by the circuit court of appeals, I am bound by the Supreme Court in Washington, I would just love to convict you because this book is obscene, it is pornographic in my estimation, but the definitions coming down save you, Mister."

Does that help you a little bit in explaining how the judges feel?

Mr. DULSKI. Let me just go a little further, Mr. Prosecutor.

Aren't some of the judges a little too protective of their court record, fearful that they would be reversed?

Mr. KUBINIEC. True.

Mr. DULSKI. I found this out in many of the cases, in reading our two wonderful Buffalo newspapers. And they are probably right. I know the judges, when they campaign, point with pride to their lack of reversals. I speak as a layman, and I can understand that some-

times, the judges, say, "Well, we don't want to set ourselves up to be reversed."

I think if our judges in Erie County would take a hard look and say, "All right, brother, as long as I think you are guilty, let the onus lie on the next court." Let them go a little higher if they wish. But if the defendant is let off, no penalty, there is no other expenditure. I say take him—the defendant—up the primrose path; let's find out where the fault lies.

I think the judge put his finger on it; let's take him to a higher court. At least the judge's conscience then is clear. He shouldn't have to worry in his campaign speeches whether his decisions have been reversed.

Mr. KUBINIEC. I agree with you. I know of one judge who is very proud of the fact that he has been reversed by many courts, but he has yet to be reversed by the International Court at the Hague, and he thinks that is very funny.

Mr. DULSKI. I have no further questions.

Mr. KASLER. May I elaborate on your statement, Mr. Dulski?

Mr. DULSKI. Mr. Chairman, would that be all right?

Mr. NIX. Yes, go ahead.

Mr. KASLER. Mr. Dulski, as for a judge being afraid of being reversed, that is a matter of philosophy. And there are judges, like you stated, who use this as campaign material. I may tell you I did not use it as campaign material in my last election. But my philosophy again is—and SergeantSpano will bear me out—that I want the initial good case, because hard cases make bad law. These reversals always result in more restriction on everyone. And I always instruct the police, especially—and I have worked with Sergeant Spano since 1964, so he is not new to this problem—I want the reverse-proof case going up there. When I write an opinion, I make sure that I use that appellate court as much as I can.

I try to force that appellate court to reverse itself by using its own opinion with good cases, rather than poor cases, because many cases in the criminal law are real flimsy cases and that is why we have restrictions. That is why we have moved the conscience of the court many times in, say, the exclusionary rule on evidence, *Mapp* v. *Ohio* to name a few, *Escobedo*. There are works of overzealous police officers who have not done their homework. The same in the field of obscenity. Only the good cases should go.

Mr. KUBINIEC. Mr. Chairman, may I ask a question?

Mr. NIX. Certainly.

Mr. KUBINIEC. Congressman Dulski, picking up on your well-taken thought that many judges are afraid of being reversed on appeal, it seems to me that in my reading of the newspaper and the national news magazines, at times I get the feeling that Senators and Congressmen get bogged down in sometimes what seems to be very meritorious legislation in their quibblings as to whether a particular piece of legislation will or will not be constitutional, whether it will or will not be sustained by the Supreme Court.

If I could humbly put one foot forward and say to Congress let it do what it thinks is right for the country and let the Supreme Court take its own course.

Mr. NIX. A part of what is right for the country is initiating legislation that is constitutional.

Mr. KUBINIEC. That is true. And I think we are now going into an era where people are beginning to seriously question the intent of the Constitution. As you will recall, when the Constitution was written several centuries ago the press that is referred to in the Constitution was a very simple machine that joined together one tiny piece of paper and left an impression and that was the printed word and that was the press. Little did they believe at that time that millions of copies of a magazine could be poured out in 1 hour's time and disseminated across the country in 3 hours by virtue of a great airliner.

Mr. NIX. Attorney Kubiniec, there will always be someone who will question something. But if it is basically sound and the Constitution of the United States is, then I don't think we have to worry about those who question the efficacy of it. What we need to do is to come up here in everything we do in the Congress of the United States with laws of substance.

Now I understand Judge Kasler's concern that the appellate court took over the interpretation of the facts in the case. I don't agree with you, of course, because I don't think they do, I think it is an interpretation as to whether the facts in the lower court were sufficient to meet the burden of proof required.

To that extent, of course, they interpret it. But I don't think they usurped a function that is not theirs under the law. I don't believe that.

Mr. KASLER. Well, Mr. Chairman, Judge Lombard seems to share my view.

Mr. NIX. Judge Lombard is in the minority and that is not the law.

Mr. KASLER. Two to one, that is right.

Mr. NIX. Mr. Chairman?

Mr. DULSKI. I have nothing more.

Thank you, Mr. Chairman.

Mr. NIX. I would like to ask you some questions.

Don't you think, Judge Kasler, and Mr. Kubiniec and Detective Spano, that if we, on this committee, are able to put together, as we are seeking to do, the legal staff to study the decisions of the Supreme Court on this question, to determine the length to which the Court has gone in its interpretation of the law as it presently is, to study the dicta of the Court to determine where it might go, how far it might go, and then with that background, to draw legislation, forward-looking legislation, we might give the courts and the district attorneys and the prosecuting agencies something in addition to that which they have now? Do you subscribe to that method of proceeding?

Mr. KASLER. I do most emphatically, sir.

Mr. NIX. Is there any specific suggestions that you gentlemen can make above and beyond what has already been said as to how this subcommittee should go about approaching the drawing of legislation in this case?

Mr. KASLER. Well, I would feel that since the subject of obscenity, as has been stated here and as has been stated in the Supreme Court decisions and especially the *Roth* decision, that obscenity is still considered a State problem. But the idea of its dissemination—well, obscenity in those particular problems concerns the written word. It didn't concern photographs or shall we say movies. But these cases can be relatively simple. We can call this as not having the constitutional protection, or at least I feel this needs no further explanation,

because it is merely visual, and it is purely there to arouse those sick minds to whom this material may appeal.

The written word is something different. Those are expressions of ideas. And those must be protected.

So therefore I have in mind "Lady Chatterly's Lover" and "Fanny Hill." There is a problem we can't do too much about. But also from common experience we will find that although these are on the best seller lists, they do not reach the number of people that this material can [indicating]. And there I believe this Congress should let the law rest where it is. It is only this material which can be, the visual material, which can be subscribed to and this should be restricted, as far as this Congress can go within the limits of the Constitution, controlling the mails specifically in this instance and the dissemination across State lines of this material, that this somehow or other should be taken out of the hands of the courts and left in the States. It should be considered for what it is under the definitions of the State law as well as the definitions of this bill, which go even further than the definitions in the State of New York. Let this remain in the States and let the States do this for themselves with the idea that the community is the best judge of this material, whether it will tolerate it or not.

Mr. DULSKI. Would the chairman yield?

Mr. NIX. Yes, of course.

Mr. DULSKI. In the discussion I have noticed that you contend my bill H.R. 10867 does not go far enough. In reading on page 3 of the bill, I call your attention to the definitions of what constitutes obscenity.

Do you feel that H.R. 10867 explains in detail what is necessary, what the chairman of the committee is trying to promote, does it explain what is actually obscenity?

Mr. KASLER. Absolutely. Your definition is very good. It goes further than New York's.

Mr. DULSKI. Let me ask you this: Suppose Sears, Roebuck prints a catalog and it shows a model wearing a bra and this—whatever they call it, I have forgotten, I have been married 30 years—but some claim this could be considered by some to be pornographic. The lawyers go to that extent.

Do you feel that this section is clear enough, that it explains what we mean by obscenity and are not going to cause unjustified harrassments?

Mr. SPANO. I think your interpretation of obscenity——

Mr. DULSKI. Explanation?

Mr. SPANO. Explanation of obscenity is very good in this particular bill. As the judge said, it goes further than the New York law does.

Mr. KASLER. Regarding your reference to the Sears, Roebuck ad, your bill says that if this is just an insignificant part of a publication, there is already an exemption.

Mr. DULSKI. Thank you, Mr. Chairman.

Mr. KUBINIEC. Congressman, could I add——

Mr. DULSKI. The chairman has the floor.

Mr. NIX. Go right ahead, Mr. Kubiniec.

Mr. KUBINIEC. Congressman, the definitions in your bill would indicate that the photograph I am showing you in a magazine called "Wild Couples" would definitely be obscene and pornographic.

Now whether this would be held to be pornographic or obscene by the Supreme Court in Washington, we don't know. This kind of a work has not reached the court here yet. But there is no question under your definitional sections that this is obscene. I consider it obscene.

Judges who have looked at this consider it obscene on the local level. What the Supreme Court will do, I know not.

And Mr. Chairman, you proposed a question to the trio here as to how to proceed, and I would like to respectfully call your attention to the fact that the most important Supreme Court decisions in defining obscenity and setting up standards are on a five to four basis. And although we pride ourselves on being a country ruled by a majority vote, when you get a judicial decision that is five to four and each one of the nine men is a distinguished jurist, I say to you that you don't have a clear decision, you still have a tremendous area that is open to discussion and to future change.

Mr. NIX. Mr. Kubiniec, I respect your view on that, but I hear it with deep regret. It is still the law of the land.

Mr. KUBINIEC. It is the law, and as a prosecutor, and speaking as a prosecutor, I am sworn to attempt to prosecute according to the laws that are on the books of the State of New York, and I must make every attempt to convince you and the Supreme Court to change their view just as eminent and worthy defense counsels have walked into that humble hall and convinced five jurists to vote a particular way. Those men were convinced by legal argument to vote a particular way.

Mr. NIX. Most of my life I have been against prosecutors.

Mr. DULSKI. I might add that Mr. Nix is a very distinguished lawyer.

Mr. SPANO. Mr. Chairman, any legislation that would stop this material from coming through the mails would be of great help to law enforcement officers.

May I show you this? This is something that just came through the mail, this brochure.

Mr. KASLER. This is sexually oriented advertising.

Mr. SPANO. This has come through the mail from Europe and they just send one copy. It was sent to what we call factories here in the States and they are reproduced here in the States from that one copy. This is material that is coming through the mail. If this could be stopped, that would be a great help.

Mr. KUBINIEC. Could the record indicate that this brochure Mr. Spano has shown the chairman is explicit. It portrays photographic scenes of actual acts of sexual intercourse and oral sodomy.

Mr. NIX. Without objection, the matter submitted will be accepted by the committee.

I want to call Judge Kasler's attention to page 3 of this bill, 10867, section A in particular. "Any picture, photograph," et cetera, and I want to come down to the words "designed primarily to appeal to prurient interests of the viewer."

Now there is where we get hung up. The interpretation as to whether it does in fact do what is prohibited. They say anything that is designed to do that.

Now the measure of proof would be that one must show it is in actuality, was in actuality, designed to do this particular thing. And that is always a stumbling block to convictions because of the difference in interpretation by persons who hear the facts in any given case. And in my view, in drawing up legislation, it seems to me that we must

draw up something consistent with the rulings of the Court, but we must avoid words of this type. And of course ultimately the Court has to decide as to the constitutionality of whatever legislation we enact.

But I only point to that one word as one of the stumbling blocks, and it has been a stumbling block for a long time.

Mr. KASLER. Mr. Chairman, "designed primarily," those are two words, and naturally that goes into the operation of the mind of the person who is viewing this material.

Mr. NIX. Absolutely.

Mr. KASLER. And with the many variations of mind, with the many levels of maturity among people, it has a different effect on each individual. And I think that designed primarily has to take into context the whole publication, rather than the isolated picture.

Mr. NIX. Yes, of course.

Mr. KASLER. And I think that you are going as far as you possibly can and then you must leave it to juries and again to appellate courts to find out if that particular individual, if he is affected, or that community. Then it should be left a question of fact and that is where I say the finding of the jury should be upheld.

That is what I am addressing myself to, trying to limit the question of fact when it goes up on appeal. And naturally that is the stumbling block. You have gone as far as you can.

Mr. NIX. Yes. It would be the saddest day in my life if the juries' verdicts were always made final. I of course understand your position. But I do agree with you when you say that the States should have great latitude in enacting legislation that would be suitable to this locality or that locality, different localities. I think that is being done. You mentioned New York State. I think New York State has made tremendous contributions in its legislation. I can give you the assurance, and I know I express the views of the chairman of the full committee, that we are going to do everything we can, because we recognize this as a pernicious evil, and it has to be, if not eradicated, because that is impossible, curbed in someway, and that is the objective of these hearings.

I want to particularly thank you. We are exceptionally honored to have had you and we hold our chairman of the full committee in the highest esteem. I would ask you, however, to try to prevail upon him not to work so hard. He is one of the hardest working committee chairmen in the Congress of the United States and that is saying an awful lot. The idea has been booted about that Members of Congress don't work very hard. Let me assure you I don't think any public officials in any segment of Government have ever worked as hard or have ever contributed as much to the United States and to its welfare as the Members of Congress, and particularly this chairman of the Committee on Post Office and Civil Service.

Again I want to thank you and we want to express our appreciation for your contributions.

Mr. Chairman?

Mr. DULSKI. Thank you very much.

Mr. NIX. Thank you.

Our next witness will be the distinguished Senator Frank Carlson, accompanied by Mr. John Jay Daly, vice president, Direct Mail Advertising Association.

TESTIMONY OF SENATOR FRANK CARLSON, ACCOMPANIED BY JOHN JAY DALY, VICE PRESIDENT, DIRECT MAIL ADVERTISING ASSOCIATION

Mr. NIX. Senator, it is a pleasure to see you again. Mr. Daly, we are very glad to welcome you. You may proceed.

Mr. CARLSON. Mr. Chairman, if you would permit, I would like to have Mr. Daly start, and I will follow.

Mr. NIX. Certainly. Mr. Daly.

Mr. DALY. Thank you, sir. We are pleased to appear before you this morning to discuss ways in which our association may be helpful in curbing—or eliminating entirely—pornography in the mails. Our remarks reflect the considered views of the board of directors of the Direct Mail Advertising Association. DMAA is the largest and oldest international trade association representing 1,600 firms which use the mails for business.

My name is John Jay Daly, and I am the vice president of DMAA in charge of its Washington office, located in the National Press Building; DMAA is headquartered in New York City at 230 Park Avenue.

Appearing with me this morning is a man who truly needs no introduction—certainly not to this committee—your former colleague and now DMAA's commissioner of mail practices, Senator Frank Carlson of Kansas. He is particularly well qualified to comment because, before he retired from Congress in January, he had 30 years congressional experience, 22 on Post Office Committees, 4 years in the House and 18 in the Senate. He was one of the driving forces behind the Postal Policy Act of 1958, and is a man exceedingly knowledgeable on this subject.

Before we begin our formal presentation, may we commend you, Mr. Chairman, and your subcommittee, for the positive role you are serving by holding continued dialog to obtain various views, particularly from the Members of Congress, about this continued problem. We were very interested to hear the comments of Judge Kasler, Mr. Spano and Mr. Kubiniec. We also commend Mr. Dulski for his suggestion about the legal study of a very nettlesome problem. We think you are very much on the right track.

We are all in agreement that this Nation, all business mailers, indeed every citizen, must be assured that our mail system not only is a viable communication network, but also is kept free from any impurity.

So you might place our remarks in perspective, for the record, we would like to insert a few attachments: "A" describes our trade association's place in the advertising industry and its role in stimulating the American economy. Attachment "B" lists our 27-man board of directors. The listing of the board and their company affiliations will give you a quick insight into the broad scope of DMAA membership.

Mr. NIX. Without objection, they will be placed in the record.

Mr. DALY. Before we comment about the technical aspects of this bill, at the outset we would like to make it absolutely clear that the Direct Mail Advertising Association fully supports any efforts which will curb or eliminate sexually oriented mailings.

I wonder if I may now turn the remainder over to Senator Carlson.

Mr. NIX. Fine.

Mr. CARLSON. Mr. Chairman, first I want to express my appreciation as a citizen and former Member of Congress for many years for your diligence and your efforts in behalf of a very difficult problem facing our country at the present time. You are entitled to much credit and great commendation and I want to be one citizen that does do that.

Second, I am so pleased that the distinguished chairman of this committee is here, a very personal friend of mine, the Honorable Thaddeus J. Dulski. We worked together for many years and I would commend him for his active concern and interest in this matter, as was evidenced in the legislation we approved in the 90th Congress, which the House Post Office and Civil Service Committee wrote and sent over, which is now of course the present law of the land.

It is very a difficult subject to work in and Mr. Chairman, I think your comment and the colloquy between Judge Kasler and yourself in regard to what you hoped this committee might do in the future is the sound way to approach this. It is a difficult subject.

Those of us who have dealt with it, we have emotions, we have feelings, but after all we have a constitution. And for that reason I did appreciate so much your comments to the judge in regard to this situation.

It is because we believe such matter harms the moral tone of this great country and, of course, the efforts of legitimate mailers, this association has long supported the various attempts to control pornography through the mails. Like yourselves, we are aware of the constitutional problems involved in this area, so we have had to be somewhat cautious in our approaches.

Before any individual or firm is accepted as a member of DMAA, it is an absolute requirement that he sign an agreement that his firm will abide and uphold the principles of our "Standards of Ethical Business Practice." A copy of our standards is attached and we would hope it might become incorporated into the record of this hearing.

Mr. NIX. Without objection.

Mr. CARLSON. Thank you, sir.

In addition, we would like at this time to read Operating Standard No. 11 which states:

> Mailings will not contain vulgar, immoral, profane or offensive matter nor will members use the mails to promote the sale of gambling devices, pornographic material or other matter not acceptable for mailing on moral grounds.

Some members of this committee are familiar with our previous testimony through the years about this problem and can attest that DMAA has used various efforts to curb pornographic mailings.

Our international trade association does not believe that it is morally sound or practical to engage in the types of mailings this subcommittee is faced with curbing. It is a continual source of embarassment that the U.S. Postal Service is contaminated with this type of material when the Service should be the communications and business system the Founding Fathers intended.

We believe that earlier testimony from postal officials, especially Chief Postal Inspector William J. Cotter, has revealed that the majority of matter you intend to curb is sent via first-class mail. Naturally, this is accorded the seal of privacy.

Although we are seldom privy to this type of material, it is our understanding that only a minimum amount is sent via bulk third-class mail—which is subject to more stringent rules such as opening and inspection by the U.S. Postal Service. We believe that if it is not a matter of open record, this subcommittee should seek specific studies to determine how much of this mail is sent via first-class mail.

In our continued efforts to eliminate pornographic mail, this association maintains an active committee to receive complaints and probe possible violations of the practice of our standards—by mailers who may or may not be members of DMAA. For a long period, we have vigorously engaged in efforts to curtail the mailing of pornographic materials.

In addition to our long-time standards of practice committee, we have also established, at the direction of our board of directors, a new committee—DMAA's Committee to Eliminate Pornography From the Mails—chaired by one of our board members, Thomas R. Knowlton, vice president/advertising, Book-of-the-Month Club, New York City.

I would like at this time to submit the names of the members of that committee for the record.

Mr. NIX. Without objection.

Mr. CARLSON. This committee is actively working to achieve its goal. It is the committee's fondest hope that its efforts—coupled with the activities of your own committee, Mr. Chairman, as well as other groups—will soon find that there might be no need for its existence.

After studying the section of the bill which specifically defines the term "sexually oriented advertising" and sets out procedures to control such mailings, we say that the association supports the intent of the plan. We wish to note, however, these two important caveats:

(1) We believe the language should be clarified to insure that the direct costs associated with administering this program be borne by the mailers of the sexually oriented materials. If all the procedures stated in the bill are to be complied with, these costs would be substantial. Therefore, we see no reason why legitimate mailers, such as exemplified by the membership of DMAA and other such groups, ought to bear the easily identifiable costs of this burden. While legitimate mailers might have to bear some of the indirect costs, some of which may be difficult to determine, it is our view that much of this expense could, and perhaps should be, included among the public service appropriations for the Post Office Department.

(2) If the law becomes effective, the present pandering law—Public Law 90–206—should be immediately repealed as unnecessary. After all, the present law only becomes effective after the receipt of such mail, while the new law would act as a future bar to restrict specific mailings. As we have earlier testified, the present pandering law serves, in far too many instances, as a serious nuisance for business mailers. Malicious mischiefmakers, aided and abetted by economic competitors to our medium, often twist its vague wording to serve their own objectives. It is quite easily done because the present law provides no objective standards whereby legitimate mailers can protect themselves against the eccentricities of anyone who wants to wreak havoc with business mailers regardless of the consequences.

We do believe that the present law, despite the abuses noted above, serves a useful purpose to eliminate those mailings which are in fact

pandering or truly offensive. This subcommittee, I believe, would be interested to know that the board of directors of the Direct Mail Advertising Association has recently authorized legal counsel to explore the possibility of entering an "amicus curiae" brief in the case which will soon be heard by the Supreme Court. In essence the position of our association is that the Court ought to find the law constitutional, provided the matter in question is in fact pandering.

If this bill becomes effective, we are certain that the officials of the Post Office Department will encounter difficulties in defining certain borderline materials. In addition, the Post Office will have problems in keeping its lists up to the minute and in assuring that its enforcement procedures do not violate any constitutional guarantees. We are sure, however, that by properly wording the language of the proposed law, many of these difficulties can be minimized.

We recognize that the Post Office Department will need certain expert advice in the maintenance of its massive lists. It will particularly need help in processing and updating these names on a monthly basis.

Therefore, in our continued effort to be "partners in postal progress," DMAA hereby offers to provide from among its membership, whatever expert counsel is requested so as to enable the Post Office Department to set up and begin administering their procedures most effectively.

Thank you, Mr. Chairman, and members of this subcommittee for your time. We will be happy to answer any questions you may care to ask.

Direct Mail Advertising Association, Inc.

The Direct Mail Advertising Association (DMAA), established in 1917, is the world's oldest and largest international trade association representing firms involved in direct mail, the nation's third largest advertising medium. The majority of DMAA's 2600 members, representing some 1600 companies, are "users" of direct mail, i.e., manufacturers, wholesalers, retailers, publishers, mail order houses, insurance companies, fund raisers, public utilities, financial services, etc. Those who "produce" or "create" direct mail are also members; advertising agencies, lettershops and printers are examples. Many firms which are "suppliers" to the medium, i.e., paper producers, envelope manufacturers, list brokers and compilers, etc., also belong to DMAA.

DMAA has members in 47 states, the District of Columbia and 31 foreign countries. DMAA's headquarters is located at 230 Park Avenue in New York City. The Washington office is located in the National Press Building. The Association maintains Direct Mail Idea libraries at the following locations: New York City, at the Association headquarters, 230 Park Avenue; Washington at 921 National Press Building; Chicago at 200 East Ontario Street and in Los Angeles at 1434 West Twelfth Street.

The DMAA membership represents a true cross-section of American business, from modest one-man operations to the largest corporations. Members are users of all classes of mail. They use the mails to reach pinpointed markets, all but impossible with most mass media. They use the mails to deliver products, raise funds for churches and educational institutions, collect bills, renew contracts, and to get elected to public office. They use the mails to make available and sell all types of goods and services to all types of people all over the globe.

The sales generated by the direct mail medium--at least $30 billion annually--add significantly and directly to the economy. The level of employment direct mail helps maintain most assuredly contributes to the economic health of the business sector. Sometimes called an "industry" and sometimes called a "medium" (as are magazines, television, radio and newspapers), direct mail is a widely accepted tool for advertising promotion, education, fundraising, etc. It even helps public servants get elected to office. As an alert national trade association, DMAA's every activity is dedicated to the more effective use of the direct mail medium.

In 1969, U. S. business invested about $2.8 billion to produce and distribute mail that promotes and sells a wide array of products and services, and this does not include the expenses for the creative talents involved. The total value is difficult to estimate, but it is at least ten times--and perhaps fifteen times--the $2.8 billion invested. This is estimated to be between $30 and $40 billion annually. Since direct mail is a most competitive advertising medium, business mailers must operate on a close profit margin. We point this out to scotch the fallacy that one can get rich quick in direct mail. It isn't so. Businessmen who use direct mail do not view it as a panacea, but rather as a sensible means to communicate their valuable offers to many specific publics.

There is one thing which sets direct mail apart from other media and that is its dependence on the postal system and the U. S. Post Office Department. At this point it seems appropriate to call attention to DMAA's Standards of Ethical Business Practice, a copy of which has been attached to the Committee's copies of our testimony. As much as, if not more than, anyone, DMAA is interested in making sure its members adhere to stringent rules of business practice in any and all so-called "sensitive" areas. DMAA is particularly proud of its long record of close cooperation with postal authorities at the national, regional and local level, perhaps best exemplified by the slogan our members try to live by: "Partners in Postal Progress."

Direct Mail Advertising Association, Inc.

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FROM THE MAILS

1969-1970

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312 944-1500

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DIRECT MAIL ADVERTISING ASS'N
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202 347-1222

STANDARDS OF ETHICAL BUSINESS PRACTICE OF THE DIRECT MAIL ADVERTISING ASSOCIATION

PREAMBLE

We hold that a responsibility of direct mail advertising users, producers and suppliers is to be a constructive and useful force in business and the economy in general.

We further hold that, to discharge this responsibility, direct mail advertising users, producers and suppliers must recognize their obligation not only to their clients, but also to the public, the medium they represent, and to each other.

Finally, we hold that this responsibility will best be discharged if all direct mail advertising users, producers and suppliers observe a common set of standards of practice.

To this end, the DMAA has adopted the following STANDARDS OF ETHICAL BUSINESS PRACTICE as being in the best interests of the public, and of direct mail advertising users, producers and suppliers.

These standards are intended to serve as a guide and code to the kind of business conduct which experience has shown to be wise, foresighted, and constructive.

It is recognized that direct mail is a business and as such must operate within the framework of competition. It is further recognized that keen and vigorous competition, honestly conducted is necessary to the growth and health of American business generally, of which direct mail is a part. However, unfair business and unfair competitive practices in the direct mail business weaken public confidence, both in direct mail and the institution of advertising in general.

DIRECT MAIL ADVERTISING ASSOCIATION, INC., 230 PARK AVENUE, NEW YORK, N.Y. 10017

BUSINESS ETHICS

(A) Acceptance of these business operative practices and standards is required of all individuals and firms who wish to become, or continue to be, members of the Direct Mail Advertising Association.

(B) Conscientious adherence to the letter and spirit of these standards will strengthen direct mail advertising and its effective use as an important part of the economy.

(C) The principles of sound business standards shall be observed. As members, we will prepare use and/or be suppliers to users and creators of direct mail advertising that serves the best interests of the public, for true service is the surest road to profit and satisfaction. Our statements and promises will be clear and understandable; our performance will match our promises; our products will match our claims–for faith grows on good experience. We will be business-like in our handling of mailings and servicing of returns. We will hold to high principles of business. We will not take unfair advantage of the innocence, sympathy or conscience of others.

(D) We will keep our mailings equal to or above the personal standard of decency as presently observed. Immoral, salacious or offensive mailings make enemies for our entire medium.

(E) Violation of these Standards shall be referred to the STANDARDS OF PRACTICE COMMITTEE of the DMAA for appropriate action as stipulated in the Constitution and Bylaws.

To further the interests of good business, whenever you receive or come across any item of direct mail advertising that violates the following Standards of Ethical Business Practice and the principles of truthfulness, honesty, decency, integrity, and/or good taste, please submit such items immediately to the headquarters of DMAA so that proper action can be taken by its Standards of Practice Committee.

OPERATING STANDARDS OF PRACTICE

1. Members will make their offers clear and honest. They will avoid misrepresentation of a product, service or solicitation and will not use false, misleading, half-true or exaggerated statements. Members will operate in accordance with the Fair Practice Code of the Association of Better Business Bureaus and adhere to the Postal Laws and Regulations.

2. If merchandise is offered on a satisfaction guaranteed or money back basis, refunds shall be made promptly on request. In an unqualified offer of refund or replacement, the customer's preference shall prevail.

3. Members should be prepared to make prompt delivery of orders solicited in their copy. Unforeseen contingencies which prevent prompt delivery should be reported to the customer with the option of money refunded if the customer chooses.

4. All orders will be acknowledged promptly when delivery is unavoidably delayed; all complaints, all inquiries, all correspondence will be answered as soon as possible.

5. The terms and conditions of guarantee shall be clearly and specifically set forth in immediate conjunction with the guarantee offer. Guarantees of performance shall be limited to the reasonable performance capabilities of the product advertised.

6. Members will not use exaggerated, fictitious price comparisons; non-existent discounts or savings; nor employ list prices known to be false or not current.

7. An article which is offered without cost or obligation to the recipient may be unqualifiedly described as "free." "Free" can also be used conditionally where the offer requires the recipient to purchase some other item, provided all terms and conditions are accurately and conspicuously disclosed in immediate conjunction with the use of the term "free" and further provided that the article required to be purchased is not increased in price or decreased in quality or quantity. However, if the "free" item is always provided with the purchased item it becomes a combination offer, no part of which is free.

8. Members will not use fictitious testimonials; or testimonials originally given for products other than that offered by the advertiser; or testimonials making statements or conclusions the advertiser knows to be incorrect. If testimonials are used they shall be the testimony of a competent and impartial person containing no misstatement of facts or misleading implications and should reflect the current opinion of the author.

9. If laboratory test data is used in advertising it shall be competent as to source and methodology. Members will not use excerpts of laboratory test material in support of claims which distort or fail to disclose the true test results.

10. Photographs and art work will be faithful reproductions of the article offered.

11. Mailings will not contain vulgar, immoral, profane or offensive matter nor will members use the mails to promote the sale of gambling devices, pornographic material or other matter not acceptable for mailing on moral grounds.

12. Members will not mail unordered merchandise for which payment is requested; nor will they use the pro-forma invoice deceptively.

13. Members shall not make offers which require the purchaser to return a notice that he does not wish further merchandise unless all the conditions are made clear in an initial offer. They will not initiate delivery of such merchandise without a bonafide order.

14. Members will not use false or deceptive devices for collecting money owed by delinquent accounts.

15. Members who sell instruction, catalogs, mailing lists or merchandise for re-sale will not use false or deceptive statements with respect to the earning possibilities, lack of risk, or ease of operation.

16. Members of the DMAA pledge to conduct product sampling by mail only in a manner that will provide reasonable safeguards against possibilities of injury to children or adults.

The specific provisions set forth above will be observed not only by advertisers but by all in our membership who service advertisers.

Any question as to interpretation of the Operating Standards of Ethical Business Practice will be referred to the President of DMAA. Any matter concerning these Standards which cannot be resolved by the President of DMAA and the member will be referred to the Standards of Practice Committee of DMAA.

FAIR PRACTICE CODE FOR ADVERTISING AND SELLING

1. Serve the public with honest values.

2. Tell the truth about what is offered.

3. Tell the truth in a forthright manner so its significance may be understood by the trusting as well as the analytical.

4. Tell customers what they want to know — what they have a right to know, and ought to know about what is offered so that they may buy wisely and obtain the maximum satisfaction from their purchase.

5. Be prepared and willing to make good as promised and without quibble on any guarantee offered.

6. Be sure that the normal use of merchandise or services offered will not be hazardous to public health or life.

7. Reveal material facts, the deceptive concealment of which might cause consumers to be misled.

8. Advertise and sell merchandise or service on its merits and refrain from attacking your competitors or reflecting unfairly upon their products, services, or methods of doing business.

9. If testimonials are used, use only those of competent witnesses who are sincere and honest in what they say about what you sell.

10. Avoid all tricky devices and schemes such as deceitful trade-in allowances, fictitious list prices, false and exaggerated comparative prices, bait advertising, misleading free offers, fake sales and similar practices which prey on human ignorance and gullibility.

(Association of Better Business Bureaus, Inc.)

PROCEDURE IN IMPLEMENTATION OF STANDARDS OF PRACTICE

DMAA believes most violations of the STANDARDS will be inadvertent and unintentional, and can be disposed of by the DMAA executive staff.

This will be accomplished by an informal exchange of views between the DMAA executive staff and the member who is believed to be in violation of the STANDARDS.

An initial letter will be sent outlining the reasons why the member is believed to be in violation, requesting it be corrected, and inviting rebuttal if the member does not agree he is in violation.

If the question involved cannot be adjusted by the DMAA executive staff, the case will be referred to the STANDARDS OF PRACTICE Committee for further action.

After the Committee has reached a determination, a formal letter will be mailed to the member, if adverse, requiring his answer as to whether he will make correction, and what steps he will take to accomplish this. If he fails to cooperate, the Committee will recommend suspension or expulsion to the Board of Directors, with subsequent action according to provision of the bylaws.

No publicity will be given on any casework until final action, and then only if no correction is accomplished, with the member either being expelled, suspended, or resigning of his own volition.

A formal report will be made and published in such cases.

The above is the procedure as it applies to DMAA members. When a non-member is thought to be in violation of the STANDARDS, every effort will be made to apprise them of this, and they will be urged to discontinue the violation, in the interests of more effective Direct Mail.

Mr. NIX. Thank you, Senator Carlson, it has been a real pleasure to have you.

Mr. Dulski?

Mr. DULSKI. First of all, it is always indeed a high privilege to welcome a distinguished friend whom I have worked with for many years. I know of the great contributions you have made in dealing with the problem of obscenity and pornography, and your wise judgment in bringing forth the testimony of DMAA.

I have no questions. The only thing I would like to add is that I appreciate the cooperation that you have offered our subcommittee if needed under the able guidance of our chairman. I am sure when the bill comes out of our committee and it is put into law, it will have real teeth in it.

Thank you very kindly, Mr. Chairman.

Mr. CARLSON. Mr. Chairman, may I comment here? I am glad you mentioned the hard-working Members of Congress. There is a feeling that Congress doesn't have much to do, the Members don't have much work. Having had 30 years experience, 12 in the House, 18 years in the Senate, I know something about the problems of Congress. I know how hard the Chairman of the House Post Office and Civil Service Committee works; I have observed him for years.

I would share with you the hope that he doesn't work too hard.

Mr. NIX. Thank you very much, Senator Carlson. Thank you, Mr. Daly.

Mr. CARLSON. Thank you very much for your time.

Mr. NIX. The subcommittee stands adjourned.

(Thereupon, at 11:15 a.m. the subcommittee adjourned, subject to the call of the Chair.)

(The material which follows was received by the subcommittee from interested persons who were not able to appear before the subcommittee during its hearings. As previously ordered, it is made a part of the record at this point.)

STATEMENT OF HON. SAMUEL S. STRATTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, members of the committee, I appear here today in support of legislation to curb the increasing flood of pornography which has been pouring into American homes unsolicited within the past few years, through the mails, and specifically in support of my own bill on this subject, H.R. 13547.

Like other Americans and other parents, I have been troubled not only by the flood of pornography in the mails but also by the vast amounts of the pornography that are appearing in other forms. We here at the Federal level, as well as those at other levels of government, are concerned about all of these materials and have had trouble in dealing effectively with them. However, in my judgment, it is the unsolicited flood of porography that comes directly into the home, through the mails, usually in a plain, harmless envelope, that creates the greatest threat, especially to our children. This surely is something which should be stopped and something which we in Congress can stop.

Whatever may be said for freedom of the press when it comes to offensive and obscene magazines on our newsstands and offensive films in our theaters, the most insidious kind of pornography campaign of all is the one conducted by the mass mailer of these materials into the home. More often than not the person to whom they are addressed is a child, perhaps somebody whose name appeared on some list of subscribers to "Boy's Life," or some other magazine. My office generally gets 1 or 2 letters every day from justifiably irate parents enclosing the offensive literature that some youngster in their home has just received unsolicited in the mail.

Two years ago we in Congress passed a law which allows anyone receiving such material to send it back with a demand that the sender remove his name from the list. I supported this legislation at the time, and, although it is hard to believe it now, even this rather modest bill was opposed and attacked at the time as an infringement on constitutional rights and privileges, which is of course nonsense. But this law has really not proven to be a very satisfactory solution to our problem. Often times it just doesn't work, because it is too cumbersome, and in any case, one exposure of a youngster to this sort of thing is one exposure too many.

The bill which I have introduced, H.R. 13547 would go further. It made it a crime to send such material through the mail to anyone under 18 or to anyone who has not specifically requested this material in the first place. This, I believe, is the most rigid ban that we could place on this type of activity.

Many bills of course have been introduced in Congress to tighten the present law. Most of them would make it a crime to send obscene material through the mails to anyone under 18. Since most of these mailings are usually done by buying up somebody's subscriber lists, this kind of a law would throw a real monkey wrench in the process because a mailer would then have to determine, in advance, which persons on the list he bought were under 18. And that would be hard to do.

However, I can't help but feel that an ingenious mailer might still find some way around that restriction, or else take his chances on an occasional mistake. So my bill goes one step farther. My bill would not only ban all such mailings of this kind to those *under* 18; it would also ban all *unsolicited* mailings to those over 18 as well. It would require that before such pornographic material could be sent in the mails the sender would need *a written request* for the material.

Under my bill, in other words, unless the sender hs received such a formal request from the addressee stating that he is at least 18 years old and wishes to receive such material, he would face a fine of $50,000 and five years in jail if he placed such material in the mail. This places the whole burden where it properly should be, on the sender. If he must first be certain that the people he sends the stuff to are all over 18, and that they have formally requested it, he just isn't going to be able to deluge the mails indiscriminately, or on the basis of some borrowed subscription lists. I think passage of my bill would close some very serious loopholes in our mail system, and I urge its adoption by this committee to bring to an end a condition that has gotten completely out of hand and is in fact already a national disgrace.

EAST ORANGE, N.J., *October 30, 1969.*

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
Washington, D.C.

DEAR CONGRESSMAN: I am only too happy to accede to your request for a statement of my views on pornography, which I am enclosing herewith. I wish you and your committee unmitigated success in this wholesome effort.

Cordially,

JACK CHERNUS, M.D.

Enclosure.

STATEMENT OF JACK CHERNUS, M.D., CHIEF OF PSYCHIATRY, ST. BARNABAS MEDICAL CENTER, LIVINGSTON, N.J.

In a previous hearing (June, 1967) I testified that in my opinion, the uncontrolled inundation of adolescents by pornographic material is injurious to their mental health. In the light of subsequent clinical experience, I wish to reaffirm this opinion with ever deepening convictions. In extension, not contradiction, of this opinion, I would like to add the following observations:

In the light of the current well-documented ferment of our younger generation, the unstemmed flow of pornography in the mails represents an extra hazard to the mental well-being of adolescents. It has been argued that the immediate, proximate danger of pornography—its direct baleful effect on the struggle to achieve a healthy state of mind on sex—affects only a portion of our youth—perhaps a small portion, at that. Be that as it may (and I do not subscribe to this view) the flood of pornography has another, *indirect* effect on mental health.

The profit motive in these mailings, and other attempts to "sell" pornography to young people, is so reprehensively blatant, that no young person can fail to get the message—and the message is "while they piously preach moral restraints and the absolute essentiality of ethics to govern our lives, they hypocritically allow a handful of gangsters to make a fast buck out of our tender, young sensibilities."

Now it has been said that the activist dissenters are no more than 2%–5% of our younger generation. It has been further claimed that this same percentage of our youth is neurotically ill, unfortunately, and that these groups are one and the same. I myself have clinically found that some of the activist dissenters are mentally ill, and that their shrill attacks on our society is perhaps but a symptom of their illness.

But even if this is true, the *content* of their symptom (social disaffection) is such that it perforce challenges *all* the young people, the healthy as well as the sick. Thus the *entire* young population has been keenly sensitized to the compelling question—"How shall I look upon my world?" Even non-neurotic youngsters, if they are forced to conclude that their elders' world is rotten, suffer a subtle, but persistent, damage to their mental well-being. Pornography in the mails, in my opinion, causes this type of indirect, subtle attack on the mental health of young people, on a wholesale scale.

TEMPLE UNIVERSITY,
Philadelphia, Pa., October 30, 1969.

THOMAS KENNEDY,
Subcommittee Counsel, Postal Operations Subcommittee,
Rayburn Building, Washington, D.C.

DEAR MR. KENNEDY: I regret that it was necessary to cancel the hearing scheduled for November 1, 1969, for discussion of the proposed legislation for the control of the distribution of obscene and pornographic material through the mails. Since I have not had the opportunity to read any of the proposed bills, it is impossible for me to comment on them. Nevertheless, I heartily endorse any legislation that would bring definition to the terms "pornographic" and "obscene", forbid the distribution of such materials in the mails without request of the sender and provide severe penalties for all persons apprehended for violations of the act.

Sincerely,

MILLARD E. GLADFELTER,
Chancellor.

CITIZENS FOR DECENT LITERATURE INC.,
Philadelphia, October 29, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Rayburn Building, Washington, D.C.

DEAR SIR: Enclosed is a statement of mine in regard to the obscenity problem. Listed are several cases that I am acquainted with personally. I hope this will be of some small help in preparing some type of legislation so desperately needed in this area.

I was not sure exactly what would be required and as a result have put down what I consider to be pertinent to the problem. I am hopeful that this will meet with your approval.

We have contacted our psychiatrist, Ann H. Ford, M.D., who will send a statement to you in the very near future.

Once again, on behalf of my wife and children I would like to thank you for what you are trying to do in this field. Please be assured of continued support, and our warmest personal regards.

Sincerely,

WILLIAM D. PFENDER,
Assistant National Director.

(Enclosure.)

STATEMENT BY WILLIAM D. PFENDER, ASSISTANT NATIONAL DIRECTOR, CITIZENS FOR DECENT LITERATURE

For the past seven years I have been engaged in anti-obscenity activity in and around the state of Pennsylvania. This seven years coupled with six years as a member of the Philadelphia Police Department, has given me a piercing insight into some of the problems that are disturbing the vast majority of our citizens. My conclusions are based on individual interviews, debates, lectures and correspondence with thousands of people during the last thirteen years.

The eastern branch of "Citizens For Decent Literature" is located in Philadelphia. We have operated in this area for the last one and one-half years, on a full time basis. First under the name of "Pennsylvania Morality in Media, Inc." and for the last few months under the name of Citizens For Decent Literature. We are authorized to operate as a Foreign Corporation, by the Commonwealth.

I have spoken and listened to students in most of the major colleges in this part of the country. We have presented our program to literally thousands of community organizations throughout the country. Our office is constantly the final resting place for much of the obscene material being sent to irate parents, who in turn send us this mail. We are very often the recipients of frantic calls from Mothers and Fathers, asking for information as to what can be done, to halt this flow of filth. The people in general feel very frustrated and helpless, because there does not seem to be any remedy to this problem.

Many persons who feel that this is not a serious problem, ask that we prove a relationship between the reading or viewing of pornography and the commission of anti-social sex crimes. Our answer is this, since it is the pornographer who wishes to change the social mores, than the burden of proof should rest with him. We ask those who feel that no harmful effects results in exposure to pornography, to point out the therapeutic value involved.

I would like to point out a case which one of our attorneys, G. Philip Stahl, Esq., was involved. It involves five children from a middle class neighborhood in Philadelphia, and we feel is indicative of any five children, in any neighborhood, of any city. All the names used are fictitious.

Mary was eleven and her brother John nine years old. They were the only children of Mr. and Mrs. Smith. Both of the parents worked every day, and as a result the children were on they're own for a period of about two hours a day, while school was in session. One day while looking thru the bureau drawers, the children found some pictures of the parents, nude. It seems that the parents belonged to what is called the "Velvet Underground" a type of voyeurism, where one party sends another party, nude pictures of themselves and vice-versa. Also found, was a deck of Japanese playing cards of a hard core pornographic nature, which it turned out was received thru the mails. The children enlisted three other children, ranging in age from eleven down to nine years.

The five children would then meet in the home of Mr. & Mrs. Smith after school. The cards and pictures would be spread on the bed face down. The participants would then each draw a card, and would act out the scene depicted. A german shepherd dog was involved in this orgy. The dog was the property of Mr. and Mrs. Smith. All five children and the animal were infected with venereal disease. The Mother of one of the children noticed that the child was having a vaginal discharge, and sent the child to the family Doctor. The Doctor called the women by in a day or so, and informed her that her ten year old daughter had gonorrhea. The children were taken into custody, and sent to a Psychiatrist for examination. The Doctor was not able to say at that time whether or not the emotional effect on the children would be permanent.

This is but one instance of where our youth are influenced by what they see or read. I have been told stories by parents that one need only get on a pornographers mailing list and a endless chain of obscenity begins, thru the U.S. mails. It seems that lists of newlyweds are sold to the panderers. In one case just brought to my attention by an angry Father, the daughter and her husband had obscene material awaiting them on the return from their honeymoon. Much of this material gets into the hands of our children before the parent has a chance to get to the mail.

In case after case in Philadelphia police records, sex offenders have been avid readers of pornographic material. There was a case in the twenty-sixth district, where a grandfather raped his granddaughter, eighteen months old. The child almost died as a result of this assault. The man was also a avid reader and subscriber of mail order obscenity.

We, the Citizens For Decent Literature, feel that the answer to this obscenity problem rests with the Congress of the United States. We are constantly urging our members and audiences to write their congressman, and let them know exactly how we feel. We feel that the current method of removing ones name from a pornographers list is an asset to the mailer, in as much as we are cleaning his mailing list, at the taxpayers expense.

The above statements are true and correct to the best of my knowledge. This statement is respectfully submitted to the Honorable Robert N. C. Nix, Chairman, Subcommittee on Postal Operations.

PHILADELPHIA, PA., *October 27, 1969.*

Representative ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
Rayburn Building,
Washington, D.C.

DEAR REPRESENTATIVE NIX: Thank you for the invitation to attend the hearings on the subject of anti-obscenity bills to be held Saturday, November 1, 1969, in Philadelphia.

Unfortunately, Saturday is not convenient for me personally to appear and testify. It is for this reason that I write and offer my views.

VIEWS ON RESTRUCTING THE MAILING OF OBSCENE JUNK MAIL OR ADVERTISING

This is a most difficult area to which one can respond. We have not arrived at a clear definition of obscenity. First, can we define obscenity without our becoming obscene? Second, is it possible to define obscenity when so many viewpoints exist on the issue? What is obscene for one—may not be obscene for another. Allow me to provide an example which may shock a few people. The word "Mother" has several connotations in today's society. Does the use of this word connotate obscenity? It depends, of course, on how it is used and, also, on how its use was conceived by the listener.

This is the difficulty we face.

Let us take another example. An illustrated book on sexual activity can be of educational value for one person, and an obscene experience for another person.

In other words, obscenity is in the eyes, ears, and feelings of the beholder.

Does obscenity relate only to that aspect of society which has to do with sex? Again, we find differences of opinion. For some, the killing of a human being through an act of war is considered obscene. For others, having to live in squalor is obscene.

Which view do we accept?

If we decide to concentrate on the sexual aspect of obscenity how do we go about seeking out specific material coming through the mails? This, of course, assumes a clear definition of what is obscene.

Do we open the mails for investigation? Does this encroach upon our values on privacy, free speech, etc.? How do we achieve this without losing a portion or all of our rights as people in a free and democratic society?

The use of the mails is for the purpose of communicating. We may not always agree on what is being communicated. We do have the right, as individuals, to accept that communication, ignore it or reciprocate. We do not, however, have the right to censor, destroy, control, etc.

What can we do?

I should like to suggest the following:

(*a*) Investigate the practice of selling mailing lists which is, in a sense, an invasion of privacy. This practice has made it possible for other firms to conveniently build a mailing list and provide rewards for those who make the sales.

(*b*) Prohibit special mailing allowances for all but non-profit organizations. The use of public funds for the advantage of private uses seems out of order. It will, one must be aware, be of limited determent since those involved in using the mails for special purpose have been using first-class mail. It will, possibly, deter a few who may find it expensive to use first-class mail.

I am not certain that I have been of much help. It is, as I stated earlier, a most difficult question.

Thank you for the opportunity to share my thoughts.

Sincerely,

BERNARD PLAWSKY.

PHILADELPHIA, PA., *October 27, 1969.*

THOMAS KENNEDY, Esquire,
Counsel to Subcommittee on Postal Operations,
Rayburn Building,
Washington, D.C.

DEAR MR. KENNEDY: Congressman Nix has kindly invited me to present my views on pending anti-obscenity legislation at a hearing to take place at the United States Courthouse on Saturday, November 1, 1969, from 9 to 5 p.m.

I regret exceedingly that I will be attending a conference at the University of Chicago this Friday and Saturday, and that I cannot be back in time to appear. I do believe strongly in this type of protective legislation which will curb strongly the possibility of pornographic and smut literature falling into the hands of young children. Congressman Nix knows my views, and in the chapter entitled "A is for Anguish" in my recent book, *The Throwaway Children*, I show how destructive and corrupting an environment in which this smut flourishes can be for a young boy.

Best wishes to you.

Sincerely,

LISA AVERSA RICHETTE,
Attorney at Law.

PHILADELPHIA, PA., *November 14, 1969.*

Hon. ROBERT N. C. NIX,
Rayburn House Office Building, Washington, D.C.

DEAR MR. NIX: I am concerned primarily about the difficulties the police are experiencing in interpreting the legal standing of obscene and pornographic materials. The Congress should consider a legal definition that would set certain standards for purposes of enforcement. At the present time, neither the police, the prosecutors, or the courts can determine, without an adversary hearing, material that is obscene or pornographic.

If we cannot reach a meeting of the legal minds on this matter, then we should attempt to set standards as to the type of material that can be sold to our youth. The printers of pornographic materials aim most of these books and magazines toward the young adults who are of an impressionable age.

The mailing of obscene material is currently regulated by several federal laws, but there is still much unsolicited material being sent through the mails to many of our people. These people are not familiar with the provisions of these laws and many of them are embarassed and timid about reporting these incidents to the authorities. Instead of putting the burden on the recipient of such material, the regulations should prohibit the unsolicited mailing of questionable materials at any time.

While there is much discussion pro and con concerning obscene or pornographic material, I believe we must all realize that the legislative body must take the lead in setting standards for materials that may be sent through the mails.

This material has been the subject of many court cases and the results have left us without a definition of obscenity that can be applied throughout the country.

I hope this committee will be able to write legislation that will clarify the situation for the entire community, as well as those of us in law enforcement.

Sincerely,

FRANK L. RIZZO,
Police Commissioner.

TEMPLE UNIVERSITY,
Philadelphia, Pa., June 5, 1967.

ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
Chairman, Subcommittee on Postal Operations, Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN NIX: Thank you for your kind letter of June 1, inviting me to present my views before your Subcommittee on the connection between obscenity and mental health and/or crime. Unfortunately, I have made plans with my family to be in Canada from June 7th through the 21st. I will be unable to present by views personally on June 9th, but I shall file the following statement as you requested.

I do not feel that it is fair to say that obscene materials or pornographic literature *per se* will cause people, especially young people, generally to commit crimes. It is safer to say that there are certain young people for whom this type of material acts in a catalytic fashion to stimulate them to aberrant behavior. Many young people with distorted views of life and sexuality live in a with-

drawn and fantasy world from which they rarely emerge to action. In some cases it is preferable to allow these young people to handle their distortions in this manner by use of such pornographic literature and obscene material, which completely satisfies their needs and does not lead to further misbehavior. Without such material, it is conceivable that they need to find outlet for their frustrations in a more anti-social manner.

However, it is just as true that there are young people who are overly stimulated to misbehavior and anti-social action by the reading of this material, which stimulates them to "try new methods". Also, this material tends to provide consensual validation for their internal fantasies, allowing them to express openly their distorted views because, "they read it in a book", or they saw others doing it in pictures.

Generally speaking, handling of obscene materials by adolescents and young people can be managed effectively in a healthy family environment. However, we are talking of the individuals who do not emerge from such healthy families and have no way of counter-balancing the effect of this material by the use of stable parental identification and intro-jection and incorporation of a sound and healthy parental ideal.

From the standpoint of community mental health, security and safety of our communities and progressive mental growth of our adolescents, I would encourage the prohibition of such pornographic junk mail from being distributed as it is at present. Specifically, however, I must stress the individual nature of the effect of obscenity and pornographic material on our young people. For some, again, this material will provide sufficient release for their internal distortions and frustrations and in that sense, will keep them from experimenting or acting out their internal frustrations on others. In this sense there is "therapeutic value" in the use of pornographic and obscene material. However, the danger of which we are concerned rests in those individuals for whom this material will stimulate anti-social behavior and give them "a feeling of license" to act out their internal conflicts. It is not safe nor correct to assume that pornographic material has the same effect upon all young people. To the contrary, the effect is individualized, and for some young people, this material will be read with revulsion and/or disdain.

Studies have been performed and clinical correlations have been made by psychiatrists working in the area of juvenile offenders and many have correlated crimes with the obscene reading material found in the possession of the young offenders. It is my feeling that one could find just as much of this material in the juvenile who is not an offender, and to make this correlation as cause and effect is unscientific and without the use of control studies.

In summary, I would favor a prohibition of the use of the mails for soliciting the attention of youngsters for obscene or pornographic materials. There are many other ways in which these youngsters who need or desire this material can obtain it without having our mails deluged as they are, I am sure, with pornographic junk material. In this way, Society, through its laws, will present to our adolescents a standard of morality on which they can identify and recognize as being one consistent with maturity and constructive growth. More so, however, I feel it is important ultimately, to educate parents in how to deal with children with immature sexual problems and to present a realistic picture of what life is, rather than the "fantasy-distortions" popularized by many of our pulp magazines, and more recently, our glossy editions.

But again, we are talking about ego strength, which deals in discrimination between reality and fantasy, between maturity and immaturity, ultimately between what one can do and what one may wish to do. The healthy, mature individual certainly recognizes the old aphorism, "we can't always do what we wish to do."

I hope this statement of my views on the connection between obscenity and mental health and/or crime is helpful to you in your legislative goals. If you wish any further statement or an elaboration on the above, please do not hesitate to call on me again. I shall plan to be back in Philadelphia on or about June 22nd. Thank you for your interest in my professional views.

Yours very sincerely,

ROBERT L. SADOFF, M.D.,
Lecturer in Law, Clinical Instructor in Psychiatry.

ROBERT L. SADOFF, M.D.,
Jenkintown, Pa., October 30, 1969.

HON. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. NIX: In response to your letter of October 20th, 1969, inviting me to appear as a witness in hearings for your Subcommittee on November 1, 1969, in Philadelphia, and subsequently learning that this hearing had been cancelled, I am sending the following statement to you in regard to your proposed legislation on obscenity and pornography in the mails.

I have read the material that you sent on the previous hearings and am basing my statement on my own experience as a psychiatrist who has worked in legal matters for the past several years. Briefly, I am currently Clinical Instructor in Psychiatry and Lecturer in Law at Temple University; Consultant in Forensic Psychiatry to the Norristown State Hospital—thereby consulting with the Courts of Montgomery and Bucks Counties. I have previously been Director of the Forensic Psychiatry Clinic at Temple University and Clinical Director of the State Maximum Security Forensic Diagnostic Hospital. I am Board Certified by the American Board of Psychiatry and Neurology and a member of the usual medical and and psychiatric organizations, including the American College of Legal Medicine and the American Academy of Psychiatry and Law.

I have been intrigued with the problems of the relationship between obscene material and the commission of crimes, specifically sexual crimes, for some time. I have applied to the National Commission on Obscenity and Pornography for a grant to help study this problem, with four other individuals who are non-psychiatrists. We have formed a Philadelphia Study Group to explore this relationship. We have not yet heard from the Commission regarding our application for a grant.

I wish to study the problem because in my research of literature and discussing the problem with other psychiatrists and lawyers, I find one of two things exists: [a] there is no good scientific study that has been reported and [b] psychiatrists differ in their personal and professional opinions regarding the relationship between obscenity and the commission of sexual crimes. A variety of situations exist: some sex crimes may be stimulated by pornography. Many crimes of a generally brutal nature are not stimulated by pornographic material. Also, there are many individuals who are not stimulated by this material to commit any crime. I think at this time we do not know the relationship that exists generally between obscene and pornographic material and the commission of crimes.

What I have observed is that there are many unstable adolescents who are affected by and influenced by this type of material. There are also many adolescents who are quite withdrawn and shy who are stimulated only onanistically (i.e., for self-sexual gratification by masturbation) with this material. There are some for whom it may be said that the presence of this material is therapeutic and thereby prevents the actual acting out of internal fantasies except in an onanistic fashion. For others, of course, the material gives them "license" to act on their perverted and distorted fantasies. At this time we have no way of knowing or predicting which individual will react in which manner.

A recent study by a Swedish team of investigators found that the showing of five popular "obscene" films to a group of normal adolescents, a group of disturbed adolescents, the parents of these adolescents and a control group of adults resulted in the most disturbance in the parents of the adolescents rather than in the adolescents themselves or in the control group of adults. What this means, we are not sure at present, but it does lead to speculation and hypotheses that need to be followed up scientifically.

Because of the possibility of stimulating some youngsters by this material, I would certainly favor the legislation that you propose, to ban the wholesale distribution of obscene and pornographic material through the mails. If the individuals requesting or requiring this kind of material wish to obtain it, there are many ways in which they can do so without the use of the wide distribution of our mail system. We are not now talking about the publication of this material, which has been argued on a Constitutional basis, involving many specific books and journals or magazines. We are talking about the manner of distribution especially in an unsolicited manner, to a number of teenagers who are most highly impressionable. My personal objection to the introduction of this material to

teenagers lies in the distortion of realistic values that it presents to a developing personality. For the most part, life is not as it is depicted in these specifically distorted publications.

While exposure to such is legitimate as a work of art to a fairly mature adult who is able to handle this material properly, I feel that it serves to present the developing youngster with a false impression of what sexuality and intimacy is all about. Disappointments and discouragements often result from an adolescent male, for example, expecting all females to react in the manner depicted in these publications.

The best defense we have against the influence of this material on our youth is a stable home and family life. Unfortunately for the youngsters we are concerned about, this type of stability does not exist and the counteracting influences that exist in many homes throughout our country is lacking, and the balancing influence is absent.

To summarize my statement: There is inadequate scientific data on which to base meaningful professional statements at present with respect to the relationship between obscenity and pornography and the commission of crimes. We need further study in this area.

Secondly, the Committee must be aware of the personal biases and the limited professional experience of those psychiatrists and psychologists testifying about this relationship.

Thank you very much for your interest in my opinion in this matter. If I can be of further service to you, please do not hesitate to call on me.

Respectfully submitted.

ROBERT L. SADOFF, M.D.

JOSEPH WM. SLAP, M.D.,
PHILADELPHIA, PA., *October 28, 1969.*

MR. THOMAS KENNEDY,
Postal Operations Subcommittee,
Rayburn Building, Washington, D.C.

DEAR MR. KENNEDY: The proposed bill seems to go too far and would all but eliminate this material from the mails. It would seem to me the families which do not wish to receive this type of mail should be able to register this at the post office and then be protected from all such mailings from whatever sender, publisher, film producer, etc. Thus all senders would have to first recognize that their material is pandering material; then they would have to strike from their mailing list all persons or families which have indicated that such material is offensive. Families not wishing to receive such material now have to fill out a form for each offensive sender. If the sender changes his name or has several "corporations" it puts the family head to a great deal of trouble and of course there are numerous senders popping up all the time.

Apparently the Congress does recognize the harmful effects of such material; else they would not have passed the existing legislation.

Sincerely,

JOSEPH WM. SLAP, M.D.

IRVING WALLACE,
Los Angeles, Calif., November 5, 1969.

HON. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
Rayburn House Office Building, Washington, D.C.

MY DEAR MR. NIX: I am in receipt of a letter from Representative John N. Erlenborn, 14th District, Illinois, who is the sponsor of H.R. 13241, the Sexually Provocative Mail Regulation Act of 1969. I note that in offering his bill, Representative Erlenborn has the support of twenty-four co-sponsors in the House of Representatives. Representative Erlenborn believes that on the subject of purveying pornography through the mail, my own views coincide with his, and he has written me "soliciting help in directing the Committee's attention" toward his bill.

In his letter to me, Representative Erlenborn writes: "If your opinions in this matter are as firm as I hope they are, will you write your views to the Committee?"

Accepting the Congressman's invitation to direct my views on the subject of mail censorship to you and to the Subcommittee on Postal Operations, I respectfully take this opportunity to outline my views on postal pornography, specifically, and on obscenity laws in general.

I might preface my views by stating my qualifications to speak out on this subject. I am the author of thirteen published books, seven of them works of fiction rooted in fact, such as The Chapman Report, The Three Sirens, The Prize, The Man, The Plot. Not only as an author, but as a parent, the father of a son and daughter, have I been interested in the subjects of pornography and of censorship. I have experienced censorship, and I have studied it, and in recent years I have published some of my ideas about it in Library Journal magazine (currently reprinted in the new volume, Book Selection and Censorship in the Sixties, edited by Eric Moon, published by R. R. Bowker), and in a symposium which appeared in Arts In Society magazine, summer issue, 1967, published by the University of Wisconsin.

Five years ago, I decided to write a book about pornography and censorship. I decided to make it a novel, instead of a nonfiction study, because I am primarily a novelist and because I felt that in examining the issue in a work of fiction with a compelling story I might interest a larger audience in the pros and cons of the subject. During these last five years, I researched pornography in depth and first-hand, and some weeks ago the result of my research, combined with an imagined suspense story, appeared. My novel is entitled The Seven Minutes, and is currently a best seller. These last weeks I have traveled to eight major American cities to give interviews on the subject of pornography, to discuss and debate it on television, radio, in the press, with fellow Americans with many divergent views. The experience of my research, coupled with dialogues I have held just now with so many mothers and fathers and young people, have truly been eye-openers. And out of these investigations and meetings, I have developed what I feel is a new approach to the entire subject of obscenity.

The subject of obscenity is one of the most difficult ones we must face in our society. Recently, when my publisher sent a copy of The Seven Minutes to President Nixon, I was asked to write a personal letter to the President. I wrote the President, in part, as follows:

"There is a growing polarization of opinion in our society on this grave issue. As one clergyman put it, this country is suffering from an orgy of open-mindedness. On the other hand, as a United States Chief Justice suggested, if the Bill of Rights were introduced as a new piece of legislation today, it is doubtful if Congress would vote it into law. In the days lying immediately ahead, the problem of too much freedom versus too little freedom will be debated more and more intensely . . .

"One character in my book admonishes us that we dare not accord complete license to sexual activities. He quotes an Englishman as saying, 'No society can do without intolerance, indignation and disgust; they are the forces behind moral law.' Another character in my book reminds us that, in the words of George Bernard Shaw, assassination is the final and extreme form of censorship. These opposing and hence troubling viewpoints are essentially what this book is about."

As a consequence of these opposing viewpoints, there can be no perfect solution to the pornography problem. There can only be imperfect solutions, yet ones closer to a spirit of compromise, ones that may satisfy a greater number of citizens in a democracy. My own views are projected in this spirit of compromise. I look upon them as transitional, as something workable during the period in which we educate our general public toward a condition of complete freedom.

Here, then, are my views:

Our ultimate goal should be the ending of all criminal obscenity laws in the federal government and in the forty-nine out of fifty states which have such laws today. Obscenity laws, according to the majority of jurists I have spoken to or read, cannot work—because obscenity cannot be defined. What may be pornographic to you may very well not be pornographic to me. Pornography has to do with people's feelings. You cannot legislate people's feelings. The ultimate goal should be no obscenity laws whatsoever. This will be achieved with education, and as our young people grow older and take on responsibilities. The result will undoubtedly be as it has been in Denmark—all sales of completely hardcore commercial pornographic smut, all mailings of such material, will cease. The smut will sink out of sight. Because in a truly free and open society, people will have a choice, and their choice will be those works of realistic merit that relate to their lives. I see this goal being achieved in about ten years. But, meanwhile, we do have ten years of transition and in the period ahead we must satisfy people who want complete freedom, as well as people who want limitations on freedom. How can this compromise be reached? Not through new definitions of obscenity, but rather through an absolutely new approach to the entire subject.

I would like to make the following specific proposals:

1. Concerning pornography, there should be complete freedom of choice in this country—free choice for those who read, see, hear anything they wish—and free choice for those who do not wish to read, see, hear questionable materials, who desire to be protected from having such materials foisted or forced upon them. If this balance can be achieved, every person's rights can be protected. I believe this can be achieved at once—through the work of your Subcommittee on Postal Operations, as well as through the recommendations of Representative Robert W. Kastenmeier's Judiciary Subcommittee—and in use of this new approach in all the individual states.

2. No written matter should be censored, as long as it is not forced upon anyone. A book, magazine, periodical, should be allowed to be sold publicly to any adult who desires or requests it—as long as it is not forced on the public at large through display or mailing. With a book, for example, a reader does have free choice. He may buy it and read it if he so desires. He may ignore it and not bring it into his home if he knows or suspects the contents will offend him. His first free choice is that he can accept or ignore a written work. Or, if he makes the mistake of beginning to read a work that offends him, he need only shut the book and cast it aside. He has free choice.

3. Similarly, all motion pictures and theatrical performances should be freely shown—since the public, which may consider advertisements or reviews of a work, has free choice to pay admission to see it or free choice to ignore and avoid it.

4. Concerning all other matter where there is not free choice—art exhibits, public speeches or happenings or performances—these should not be indicted or banned, but rather regulated. An art show might be confined to the interior of a gallery, not exhibited in display windows on public thoroughfares, so that those who wish to view it may go inside, and those who prefer to avoid it may do so by not attending it. As to speeches employing coarse language, or performances simulating explicit sexual acts, these could be licensed for performance in closed auditoriums—so that those who wish to see and hear may do so, and those who are offended by such speeches and performances may not have to sunbmit to them in public and may ignore them.

5. Free television presents a more difficult problem, since it is piped into every home at all hours. At best, the general public should be informed of anything questionable that may be shown at a certain hour on a certain night—so that individuals may guide their tuning and viewing, and guide the viewing of their young. The family should play a greater participating role with the networks and local stations in what is censored and what is not, to guarantee a maximum of free choice and protection.

6. Finally, we come to the area of immediate concern to your Subcommittee on Postal Operations. I feel firmly that, for the immediate future at least, all mailings of sexually provocative materials—be they advertisements, periodicals, books, dildos—should be controlled. No person should receive, through the mail, any such matter he has not requested or volunteered to receive. No individual or family should receive such mail without soliciting it. If you desire such material, you should be permitted to write for it. If you don't want it, you should not be subjected to receiving it.

I might add that, because of my research for The Seven Minutes, I have been on countless such pornographic mailing lists and I have been bombarded with such material. Much of it did not offend me. Much of it was attractive or merely amusing. But much of it was cheap trash and disgusting, and I am certain would cause great offense to many unsuspecting recipients. Such persons should be protected.

I have carefully read an analysis of Mr. Erlenborn's Sexually Provocative Mail Regulation Act of 1969. Of the many similar bills before your committee, I would consider his bill one of the most judicious. He wishes persons who have indicated a desire for such material through the mails to be allowed to receive it. He wishes no minors to receive this mail, and, in fact, no adults to receive it unless they have requested it. This seems fair enough to me. I would support all aspects of this bill except the provision that spells out a fine of $50,000 or imprisonment of up to five years, or both, for violations. These penalties seem excessive and unduly harsh when we are dealing with an offense where there is yet no scientific evidence that pornography harms anyone. It may disgust. It may degrade. It may even disturb. But in the firm opinion of 80% of 3,400 psychiatrists recently polled, such matter cannot drive a person

to commit antisocial behavior. However, I do believe that a law on mailings—but with more moderate penalties—should be supported and can be useful.

7. A general remark about pornography and minors. I would suggest that in these times, the usual age of eighteen to signify a minor is outdated. A young man of eighteen can drive a lethal car or go to war to kill or be killed. To consider someone of eighteen—the product of a nuclear and television society—vulnerable to obscene writings or pictures is to be unrealistic. In obscenity legislation, I believe laws should regard minors as those under sixteen or fifteen today.

Beyond postal regulations, I do not think obscenity laws for minors can be enacted in the old way. Most jurists dislike acting as wardens for our young. They feel the responsibility lies in the family and in the home. I concur. I feel that adult freedom should not be penalized to protect the very young. I hold with Justice Felix Frankfurter, who once remarked, "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote general welfare. Surely, this is to burn the house to roast the pig."

I believe that the task of protecting the young should belong to the family adult or adults in charge. As a compromise, I would suggest that no hardcore pornography be permitted to be sold to or shown to anyone under the age of fifteen—unless accompanied by a parent or relative or guardian who gives consent. In short, if I feel my young daughter can handle the contents of a book on sex, I should have the right to give censent that she acquire it. If you don't want your daughter to have the same book, you need not give consent. Now this will not prevent your daughter from borrowing such a work from my daughter—but these isolated private transactions are beyond parental control—and today, as in our day, there will remain a certain amount of secret and furtive reading.

As for school and public libraries, I believe that all librarians should continue to have independence in selecting what they place on their open shelves. If some parents are concerned about what is selected, these parents should take on the responsibility of regulating what their children read.

These, then, are my thoughts, based on considerable homework, about the pornography issue today. I hope that you and the committee members find them useful.

With every best wish,

Sincerely yours,

IRVING WALLACE.

STAHL & MCGREAL,

Philadelphia, Pa., November 28, 1969.

DEAR CONGRESSMAN: I am taking this opportunity to convey my thoughts on certain legislation that has been proposed. An indication of the "direction" the Presidential Commission on Obscenity and Pornography is taking, under the chairmanship of A.C.L.U. member William Lockhart and General Counsel A.C.L.U. member Paul Bender, can be gleaned from an analysis of the mail-order obscenity statute contained in the progress report issued by the Commission last July. Such an analysis lends credence to the views of those who are convinced that the final Commission Report—due in September, 1970 will, in effect, whitewash the obscenity problem and further obfuscate the law and law enforcement in this critical area of citizen concern.

This proposed legislation, while admittedly not a *formal* recommendation of the Commission, certainly must be said to represent the thinking of the Chairman and General Counsel—and of the majority of the Commission members. Following are some of the obvious reasons that anyone seeking a real solution to the mail-order obscenity problem should be concerned about this "proposal" of the Commission:

1. The purpose of the legislation as stated is "to afford mail recipients the option not to receive through the mail unsolicited potentially offensive sexual materials". A more positive purpose would be "to make it illegal to send potentially offensive sexual materials unsolicited through the mail" and thus place the burden of the law on the pornographer—not on the patron or the Post Office as this legislation proceeds to do. Of course such a negative purpose strongly implies that it is perfectly *legal* to send offensive sexual materials to anyone who has not gone to the considerable effort required to avoid receiving such material.

2. The legislation proposes that the Postmaster General design some kind of "symbol" that would be placed on envelopes containing offensive sexual materials. No recommendation is made as to what the "symbol" should be, except that it must not involve "significant extra expense" to the pornographer and it must obviously be something that will be universally recognized as a "warning" as to what the envelope contains and yet not be construed as a "judgment regarding the quality or value" of the contents. The symbol also must not constitute a form of "pandering" which of course much of the labeling currently employed by mail-order pornographers actually is. It would be quite a trick for the Postmaster General to come up with a symbol that will meet all these requirements.

3. The legislation provides that anyone who receives mail bearing the "symbol", and does not wish to open it, may either destroy it himself (which anyone may do now—with any mail—symbol or no) or return it to the Post Office where it will be destroyed—at taxpayer expense.

4. The legislation also provides that persons that do not want to receive unsolicited "potentially offensive sexual" mail in the first place may notify the Postmaster General, on a special form to be provided by the Postmaster—at taxpayer expense. (Revocation of notice forms will also be provided—at taxpayer expense.) The Postmaster General must then "devise and implement procedures" to prevent the delivery of mail containing the "symbol". In other words the Post Office would be required to maintain "master lists" of some kind, at taxpayer expense, by individual mail carrier route presumably, so that mail containing the "symbol" would not be delivered to those patrons who have made such a request. Theoretically at least, such a "master list" could contain as many as 170,000,000 names as a recent Gallup Poll indicates that 85% of those polled want stricter laws against mail-order obscenity. It is interesting to note that the "penalties" section of the legislation makes no provision for penalties against the Postmaster General if he delivers "symbol" mail to those who have specifically notified him they do not want to receive it. This may provide the "out" the Postmaster General needs to get out of the ridiculous bind in which the maintenance of such a list would place him.

The above points pretty well cover the impracticalities of the legislative proposal suggested by the Presidential Commission. The real problem of course is the fact that such legislation would create a tremendous administrative burden for the Post Office (and the taxpayer) and considerable effort on the part of decent citizens who are outraged at the invasion of privacy represented by such material—and yet, in effect, would legalize mail-order pornography to those who have not indicated that they do not want to receive it or who may not recognize the "symbol" that the Postmaster General must yet design. Certainly a pornographer would have a pretty good defense if he could prove that he made a sincere effort to comply with the unreasonable requirements of this legislation.

It will be interesting to see the final recommendations of the Commission but certainly their efforts thus far provide ample cause for alarm and concern. The enabling legislation that formed the Commission stated "The Congress finds that the traffic in obscenity and pornography is a matter of national concern". It seems obvious that the Chairman and Legal Counsel of the Commission, both of whom are active members of the American Civil Liberties Union—the most vocal national organization consistently opposing all forms of control of obscenity, do not share this "national concern". Certainly the vast majority of American citizens will be justifiably outraged if the final Commission report does not place the burden of the law on the pornographers who have created this "national concern".

Very truly yours,

GEORGE PHILIP STAHL, Jr.

HOUSE OF REPRESENTATIVES,
Washington, D.C., September 2, 1969.

Representative ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, Rayburn House Office Building, Washington, D.C.

DEAR COLLEAGUE: Enclosed is a letter from a constituent, Dean K. Johnson, dealing with the issue of obscenity and its transmission through the mails.

I hope that Mr. Johnson's letter and the accompanying articles can be included in the record of your subcommittee's hearings on the use of the mails by smut peddlers.

With best wishes.

Sincerely,

DONALD M. FRASER.

(Enclosure.)

HAGGLUND & JOHNSON,
ATTORNEYS AT LAW,
Minneapolis, Minn., August 25, 1969.

SUBCOMMITTEE ON POSTAL OPERATIONS OF THE COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
House of Representatives, Washington, D.C.

GENTLEMEN: With this letter you will find a copy of an article which appeared in the Minneapolis Tribune, Thursday, August 14, 1969 on the report of the Commission on Obscenity and Pornography; by way of contrast, I am sending along to you copy of an article which appeared in the Minneapolis Star the same day quoting Rev. Morton A. Hill, S.J. in opposition to the Commission's interim report.

I was schooled under Dean William Lockhart and have a high regard for his judgment, for his understanding of the freedoms which made this country great and for his sensitivity. Apart from that, I agree with the principles and the suggested mechanics for the control of obscenity which appear in the Minneapolis Tribune article.

Apart from that, it has long been my belief that, like beauty, obscenity is in the eye of the beholder. Thus, photographs of nude females mailed to my office and sent along by me to the office of Congressman Fraser were considered by me to be obscene. However, I have no way of knowing whether by others they might be considered obscene, until those others had in turn inspected the photographs and announced their judgment to me. In no way do I want to limit the right of other persons—even persons unknown to me—to send writings or illustrations to me through the mail for my judgment nor, for that matter, do I want the mail to impose a limitation on me which would prevent my mailing of writings and illustrations for the judgment of others. (How, for instance, could there be drafted a statute which I would not violate by mailing to Congressman Fraser the very photographs which I consider obscene? Would my only means of communicating them to him be hand delivery to his office?)

I want to continue to receive through our nation's mails anything that is chosen to be sent to me. On the other hand, I can believe that others might have a different point of view, particularly parents of children younger than mine who want to give guidance and exercise control. Accordingly, I subscribe wholeheartedly to the procedures evolved by the Commission chaired by Dean Lockhart, as described in the August 14, 1969 Minneapolis Tribune.

Sincerely,

DEAN K. JOHNSON.

[From the Minneapolis Tribune, Thursday, Aug. 14, 1969]

COMMISSION DRAFTS CURBS ON SEX MAIL

(By Frank Wright, Minneapolis Tribune Staff Correspondent)

WASHINGTON, D.C.—Broad new legislation designed to curb the flow of unwanted sex materials through the mails and into the nation's homes has been drafted by a presidential commission.

The Commission on Obscenity and Pornography, whose chairman is William Lockhart, dean of the University of Minnesota Law School, published its tentative proposal in a progress report Wednesday.

Persons sending unsolicited and "potentially offensive" sexual material through the mails would be required to place on the outside of the package a special identifying symbol to be designed by the Post Office Department.

Persons receiving mail bearing the symbol could destroy it without opening it or could return it to the Post Office for destruction. Parents would be given legal control over symbol-carrying mail addressed to their minor children.

Persons not wishing to receive such mail in the first place could so notify the Post Office Department, and it would not be delivered.

Material covered would include pictures, sexual devices, marriage manuals, sex novels and stories, anthropological sexual accounts and "similar material which may be exclusively textual or combine pictures with text."

The material would be considered "potentially offensive" if it fell into any of the following categories:

A picture of uncovered adult human genitalia or of human sexual intercourse or other sex practices, including the sadistic, or any advertisements that contain detailed descriptions of the pictures.

An artificial human penis or vagina or other device "primarily designed physically to simulate genitalia" or any advertisement for such a device which contains either a picture of it or a detailed verbal description.

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 an advertisement that contains detailed excerpts.

Failure to place the identifying symbol on such material could lead to a maximum fine of $50,000.

Some materials in those categories would be excluded from the symbol requirement. They would include material which is only a small part of a catalogue or book that is not primarily sexual, advertisements for works of fine art or solicitations of doctors and scientists.

THE LABELING of certain material as "potentially offensive" would not necessarily indicate it was legally obscene or pornographic, under the draft language, and could not be used as evidence that it was. Such determinations would have to be made under other laws.

The new proposal would go beyond last year's federal anti-pandering act, which permits persons who have received unwanted and unsolicited sexual material to require that their names be removed from the producer's mailing lists. Some 100,000 persons have taken that step.

The commission draft would attack what it called the "sizable problem" of initial offensive mailings, most of which are ads.

THE BASIC aim would be to permit persons to choose what material they wish to receive.

The commission said the tentative language would avoid impinging on the rights of those who consent to receive such material and the rights of the senders while protecting the interests of many who do not wish to be exposed to it.

Local community action groups, the commission said, could "greatly diminish" receipt of unsolicited mailings through campaigns informing residents of their rights under the statute, if it were passed, and through distribution of the forms requesting the Post Office Department to halt delivery of labeled items.

THE COMMISSION, formed last year under congressional directive, has taken no action on the draft proposal and said it would not act until after completion of a wide range of studies it is conducting on obscenity and pornography.

These include a new effort to define what is obscene and pornographic. The commission said its inquiries so far indicate great variation in contemporary community standards.

Congress has called for a report and recommendations by June 30, 1970.

It has been particularly interested in the growing use of the mails to transmit sexual material and recently held a new round of hearings at which postal officials testified at length about the problem.

The chairman is Dean William B. Lockhart of the University of Minnesota Law School.

[From the Minneapolis Star, Thursday, Aug. 14, 1969]

Can't Recommend Laws—"Smut" Commission Wants Facts

(By Gwenyth Jones, Minneapolis Star Staff Writer)

The Commission on Obscenity and Pornography needs more concrete information before it can recommend legislation, it said in an interim report to Congress Wednesday.

The report did include a tentative draft of a law governing the mailing of "potentially offensive" materials.

However, one member of the commission, the Rev. Morton A. Hill, S.J., in a separate report, declared that the commission "under the present chairmanship" is "moving toward permitting obscenity for adults."

Father Hill, president of Morality in Media, New York, said the commission is spending too much of its time and money studying the effects of pornography on behavior.

REVERSE TEST

He said the emphasis should be on how to "constitutionally present legislation to Congress which will reverse the mislabeled Supreme Court 'test' of 'utterly without redeeming social value.' "

Father Hill said the commission should hire "leading constitutional law authorities" to help.

Lockhart, who has lectured widely on obscenity and the Constitution, is the author, with Robert C. McClure, of a forthcoming book on the subject.

Father Hill urged the commission to cut back its allocations for research into the effects of pornography, and allocate its funds one-third to legal research, one-third to a study of the traffic in and distribution of pornography, and one-third for studies of effects.

The other commission members defended the allocation of 40 percent of commission funds to research into effects, 25 percent for traffic and distribution; 15 percent for legal research, and 20 percent for studies of "positive" (non-regulatory) approaches toward solving the problem.

The commission said that social science research into effects and some aspects of traffic and distribution is "far more expensive" than legal research.

LITTLE INFORMATION

The other commission members rejected Father Hill's claim that the commission was "moving toward permitting obscenity for adults." The said Congress had directed the commission to make a "thorough study" of the problem of pornography before making recommendations for new legislation.

The report said there is very little reliable information on most aspects of pornography, especially on its effects.

In fact, the commission said, it cannot even arrive at "any acceptable definition of obscenity" until it has greater and more accurate knowledge of what contemporary community standards are throughout the Nation.

The commission expects to make its final report and recommendations to Congress in July 1970.

The tentative draft of a law regulating the mailing of potentially offensive materials calls for a symbol of some sort to be put on every piece of mail containing such material. Addressees could reject the material piece by piece or inform the post office that they never wanted to receive mail carrying the symbol.

Parents could reject such mail addressed to their children, and there would be fines for mailing designated material without the symbol.

"Potentially offensive sexual material," which the draft law distinguishes from legal obscenity or pornography, would include artificial genitalia, sex manuals, advertisements for such materials, and pictorial representation of genitalia.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Wasington, D.C., December 23, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR MR. CHAIRMAN: Governor Forrest H. Anderson has just sent me a copy of his letter of December 16, addressed to you in regard to mass mailings of pornography. In that regard he raises the possibility of protests of pornographic materials being sent to Congressional committees instead of to the state. I hasten to advise you I have received numerous complaints, together with the pornography mailed to persons in Montana and they have been shocked to learn that such mailings can be made under any circumstances.

I would say that there is real concern among Montana recipients of the material, who appear to be rather widespread, and that I share that concern.

I very much hope your committee will draft legislation which will control this very serious situation.

Kindest regards.

Sincerely,

JOHN MELCHER,

OFFICE OF COUNTY ATTORNEY,
JUDITH BASIN COUNTY,
Stanford, Mont., November 19, 1969.

Representative ARNOLD OLSEN,
Member of Congress, Congressional Office Building,
Washington, D.C.

DEAR ARNOLD: I am enclosing a copy of a letter written today to our U.S. District Attorney Otis Packwood. I had heard and read a great deal of this obscene literature being sent through the mails. Now we are receiving much of it here locally. It certainly is ridiculous that the only recourse we apparently have is to compel the sender to eliminate us from his mailing list. If this is the only recourse we have then it is high time that laws are enacted with some teeth in them so that the use of the United States mail is denied to them. Criminal prosecution is not the answer as they would and do just use another name and address.

It could be that the postal department in lending its aid to the dissemination of this obscene literature could be placed in the position of being an accomplice. Montana and no doubt all of the other states do have statutes making it a misdemeanor to distribute this material. It appears on the face of the envelope there is sexually oriented material enclosed therein.

We would appreciate your reaction to this matter and what if anything can be done to stop the mailing of such filth.

Kindest personal regards,

PAUL J. MURPHY.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., October 23, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Rayburn HOB,
Washington, D.C.

DEAR CONGRESSMAN NIX: This is written in reference to legislation currently undergoing hearings before the Subcommittee on Postal Operations concerning obscene mail.

Enclosed is an example of the type of mail being received by my constituents. I certainly am aware that every Congressman is experiencing the same problem. However, the impact of such lurid literature is enhanced by the knowledge that a firm issuing pornographic literature is located in my district.

On behalf of my constituents, I wish to express my objection to people being exposed to this type of misleading, pandering material, and I urge that strong legislation be supported in an effort to curb such mailings.

Sincerely,

BARRY M. GOLDWATER, Jr.,
Member of Congress.

NORTHRIDGE CHAMBER OF COMMERCE,
Northridge, Calif., October 9, 1969.

Congressman BARRY GOLDWATER, Jr.
Longworth Building,
Washington, D.C.

DEAR MR. GOLDWATER: A Los Angeles Times article, dated October 2, 1969 states that Postmaster General Winton M. Blount has invoked a section of Postal Regulations allowing Post Office Box privileges to be cancelled if the box is used "for an immoral or improper purpose".

Northridge has been unfortunate in that we have had a pornographic operator operating in Northridge for some time. Some of the names he operates under are Adult Novelty Co., Cinema Products, and Consolidated Products, Inc. A fictitious firm name has been published in our local paper for Cinema Products by a Thomas S. Tierney. The material sent out is, in our opinion, hard core pornography. This firm previously had a location in Northridge and has moved. However, they still use a Northridge Box Number for their return address.

We enclose, for your information, some of the material mailed out by this firm. If you would care to check our files, we have more material and protests from citizens all over the United States who have been receiving this mail. We have done everything we can physically do. Now we demand that action be taken by Postmaster General Blount in cancelling this firm's rental of two Northridge Box Numbers—Box No. 511 and Box No. 333.

We cannot stress too strongly that this material being mailed out, totally unsolicited, is the lowest form of pornography and shows, among other things, photographs of the sex acts of lesbians and homosexuals. Needless to say, the letters we have in our files from distraught parents whose children have opened their mail and were confronted with this is frightening. We also understand that the citizens of Northridge are so outraged that there is talk of a picket line being placed around the Post Office in Northridge.

We, the Northridge Chamber of Commerce, hereby go on record as demanding that the rental by this firm of Post Office Box No. 511 and Box No. 333, Northridge, California, 91324, be cancelled immediately, as said Post Office Boxes are being used for an "immoral and improper purpose".

BETTY WAND-WILLIAMS,
Executive Manager.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., August 6, 1969.

HON. THADDEUS J. DULSKI,
Chairman, Committee on Post Office and Civil Service,
Cannon House Office Building,
Washington, D.C.

DEAR MR. CHAIRMAN: In view of the intense interest in legislation dealing with the problems of dissemination of obscene materials through the United States mails, I feel it is imperative that hearings on the various bills that have been introduced by Members of Congress be scheduled as quickly as possible.

Of the four bills I have introduced on the subject, one (H.R. 12225) was referred to the Committee on Post Office and Civil Service. It is my understanding that I am just one of 197 Members of the House who together have introduced 206 bills on this subject, on behalf of thousands of people across the United States who have informed us of their desire for such legislation.

In noting the concern of so many American people, and the backing of the President of the United States, it certainly appears to me that legislation on this matter is of prime importance at this time. Perhaps the establishment of a priority list, which would include bills on obscenity and pornography, would be in order so that hearings would not be delayed longer than is absolutely necessary to give attention to all the vital measures being considered.

I hope you will give some thought to the creation of this priority list to ensure an early hearing date for the bills which have been introduced on this timely subject.

Sincerely,

JAMES H. QUILLEN.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., September 9, 1969.

HON. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Post Office and Civil Service Committee, House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you very much for your letter of September 4, with reference to the action of your Subcommittee in combatting the flood of pornographic mail which is directed against American homes.

I am very happy to know that on September 30 the Postal Operations Subcommittee will hold hearings on H.R. 10867 and other bills dealing with this problem. I note the hearing will begin at 10 a.m. in Room 210 of the Cannon House Office Building.

It is my intention, at present, to appear personally before the Subcommittee. Should this not be possible, I will indeed present a written statement for including in the record.

Thank you again for giving me the opportunity of appearing. I agree with you wholeheartedly that this type of mail must be stopped.

With kind personal regards, I am

Sincerely yours,

HARLEY O. STAGGERS.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SAINT ELIZABETHS HOSPITAL,
Washington, D.C., June 2, 1967.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. NIX: I appreciate your invitation to appear before the Postal Operations Subcommittee hearings on the connection between pornography and crime to be held in Philadelphia on June 8 and 9.

I am sure that the hearings will be useful and that psychiatric witnesses should offer the Committee the benefit of our opinions based on the experience we have had in this field, since this is certainly a "gray" area where very little research exists. I was hopeful that I would be able to attend in view of my rather intensive involvement in this field for the past few years. I have made efforts to change some previous commitments for this time, in order to appear, but have been unsuccessful in doing so. I am wondering if subsequent hearings will be held and if it might be possible for me to appear at that time, if you or other members of the committee desire it. Should subsequent hearings be held and my appearance be desired, I will make every effort to be available.

I hope that the Subcommittee will understand my difficulties in appearing because of the previous commitments, but if I could be of any assistance in the future, I would certainly be delighted to do so. Again, I would like to thank the Subcommittee for extending the invitation to me to appear.

Sincerely yours,

DAVID J. OWENS, M.D.,
Clinical Director, John Howard Division.

WASHINGTON, D.C., *June 2, 1967.*

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, House of Representatives, Washington, D.C.

DEAR MR. NIX: I must regretfully decline your invitation to testify before your committee on June 8th or 9th in Philadelphia. I have previously agreed to testify in the District Court at about this time.

There is no question that obscene material should be kept out of the hands of children if possible, alhough I realize the great difficulties in accomplishing this end. While children have more facts about sex than they are generally credited with they have little of the understanding that must grow in an orderly manner with developing maturity. Properly they learn controls from the precepts and examples of elders they admire and respect. By arousing abnormal prurient curiosity and preoccupation with the purely physical side of sex there is often unconscious as well as conscious rebellion against our cultural and moral inhibitions and restrictions for which they have not learned the reasons.

Of course there are many factors other than obscene literature to bring this about. There are so many aspects to this problem I am sorry I can not cover them here.

I delayed answering your letter until I could poll the physicians at a psychiatric staff meeting at the Washington Hospital Center, which I believe is the tenth busiest hospital in the United States. They all agreed that such material should not reach children thru the mails.

I hope that the efforts of your committee will be fruitful in achieving its objective, in which which I am so very much interested.

Yours truly,

ALBERT E. MARLAND, Sr.

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON POSTAL OPERATIONS,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, D.C. January 6, 1970.

Mr. ANTHONY C. AMATO,
Clerk of Council,
Cleveland, Ohio.

DEAR MR. AMATO: We have received your very welcomed resolution of the City Council of Lyndhurst, Ohio, on the subject of obscene mailing.

I assure you that the Committee is very much interested in H.R. 10867 introduced by Mr. Dulski and H.R. 14061 by Mr. Erlenborn. These bills will be given every consideration possible by the Subcommittee when we report and recommend strong regulatory legislation on the subject of obscene mailings.

Your support is most appreciated.

Sincerely yours,

ROBERT N. C. NIX, *Chairman.*

RESOLUTION NO. 69-90—INTRODUCTION BY MR. MAPES

A RESOLUTION MEMORIALIZING THE CONGRESS OF THE UNITED STATES TO PROVIDE LEGISLATION FOR A NATIONAL POLICY LIMITING DISTRIBUTION OF PORNOGRAPHIC MATERIAL TO JUVENILES

Whereas, this Council has learned of the pendancy of H.R. 10867 introduced by Mr. Dulski and H.R. 14061 introduced by Mr. Erlenborn to exclude the pornographic material referred to in the drafts, from the U.S. mails, and

Whereas, this Council and members of this Community support the proposed legislation in the interest of establishing some national policies for the protection of the young from the onslaught of pornographic material wich now engulfs our culture under the protection of Constitutional liberties: Now, therefore, be it

Resolved by the Council of the City of Lyndhurst, State of Ohio:

Section 1. This Council on behalf of itself, the Administration, and People of the City of Lyndhurst, does herewith memorialize the Congress of the United States to favorably consider the proposals set forth in H.R. 10867, H.R. 14061 or similar legislation for the protection of the young of America from pornographic material transmitted through the mails, as a basis for furnishing national guidelines for testing in the Courts, and hopefully to provide practical standards for similar regulation of other areas of concern, in the local regions.

Section 2. Wherefore, this Resolution shall be in full force and effect from the earliest time allowed by law.

Passed: December 15, 1969.

LESTER C. EHRHARDT,
Mayor.
GEORGE W. VAN PELT,
Vice-Mayor.

Attest:

ANTHONY C. AMATO,
Clerk of Council.

DONALD W. FOUSE.
RAY J. GROVES.
LUCIEN B. KARLOVEC.
WILLIAM R. MAPES.
JAMES B. NAYLOR.
TIMOTHY J. RYAN.

STATEMENT OF ASSISTANT ATTORNEY GENERAL WILLIAM H. REHNQUIST

Mr. Chairman: I am pleased to appear before this Subcommittee today in support of H.R. 11031 and 11032, the Administration's proposals to curb the growing interstate traffic in salacious materials, especially advertisements. President Nixon summarized the problem to which these proposals are addressed in his recent message to the Congress. He stated:

"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."

Let me first turn to H.R. 11032, the Administration's antipandering bill.

A substantial proportion of the torrent of complaints about salacious materials concern advertisements received unsolicited in the mails and consisting almost entirely of blatant sexual appeals. It is difficult to estimate the volume of this kind of material in the mails today, but the thousands of complaints received by postal authorities indicate that volume is very high. In the *Ginzburg* case, which I shall discuss in more detail later and which involved advertisements of a kind that would be covered by the Administration's bill, several million prurient advertising circulars were mailed as part of the sales effort for only two publications. Most dealers in sex-oriented materials follow a similar pattern in their mail order operations. Consequently, the problem is, by any standard, one of major proportions.

Since many purveyors of salacious advertising rely heavily on interstate mailings, the need for a federal remedy is apparent. As a practical matter, individual States are powerless to stem the flow of offensive advertisements mailed to their residents from other States. An appropriate exercise of the plenary power of Congress over the mails and interstate commerce is needed to deal with this problem. There is ample precedent for a federal legislative response to problems of this kind.

Present laws banning interstate traffic in obscene materials and interstate transportation of women for immoral purposes instance the general "authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses." *Caminetti* v. *United States*, 242 U.S. 470 (1917).

Sections 1461 and 1465 of title 18 provide criminal sanctions for sending advertisements or other materials through the mails or other facilities of interstate commerce which are "obscene, lewd, lascivious or vile;" section 1461 adds the terms "indecent" and "filthy" for good measure. The courts have held, however, that these terms are virtually synonomous and that they reach only materials that are "obscene" in the narrow, constitutional sense. *Manual Enterprises* v. *Day*, 370 U.S. 478, 483–484 (1962). The effect of the judicial constructions of these statutes is that sexually-oriented advertisements may form the basis of a federal prosecution only if the advertisement is itself obscene or the materials it offers for sale are obscene. *United States* v. *Schillari*, 166 F. Supp. 303 (S.D.N.Y. 1958); *Poss* v. *Christenberry*, 170 F. Supp. 411 (S.D.N.Y. 1959).

The technical meaning of obscenity, as it has developed in the Supreme Court's decisions, includes a congeries of separate legal standards. In *Roth* v. *United States*, 354 U.S. 476 (1959), the Supreme Court established the test of obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth* v. *United States*, 354 U.S. 476, 489 (1959). The *Roth* test lent itself to a narrow reading, equating prurient appeal to obscenity. A subsequent decision, however, announced that "patent offensiveness" to current community standards of decency must be established independently of prurient appeal. *Manual Enterprises* v. *Day*, *supra*. A more recent decision added a third test of obscenity—the matter must be "utterly without redeeming social value," as well as prurient and patently offensive. *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). Although members of the present Court have disagreed concerning the test of obscenity—only Justices Brennan, Fortas and Chief Justice Warren have endorsed "redeeming social value" as an independent test—the lower courts are apt to follow this triple test unless and until a different standard is adopted by a majority of the Supreme Court. The result, of course, is that the federal government has a very heavy, and often impossible burden of proof in proceeding against prurient advertising under present laws.

Generally speaking, it is not particularly difficult to prove that an advertisement appeals to a prurient interest in sex. In the vast majority of salacious advertising matters referred to the Department of Justice for possible prosecution, the prurient appeal of the advertisement is self-evident. I would like to show the Subcommittee these examples of the kinds of advertisements to which I have reference. Since these particular advertisements are the subject of current investigations for possible violation of present law, we request that they not be included in the hearing record.

The examples I have shown you probably would be considered obscene in the ordinary sense of the word by the average person. However, our experience as prosecutors shows that most of the advertising of this kind would not be deemed "obscene" in the technical sense of the term under present law.

The bill would cover all of the advertising I have shown you by prohibiting the mailing or transporting in interstate commerce of any advertisement which is "designed or intended to appeal to a prurient interest in sex." It would be unnecessary to show, in contrast to present law, that the material is patently offensive to community standards or utterly lacking in redeeming social value. The bill prescribes penalties of imprisonment for not more than five years or a fine of $50,000, or both, for first offenses. These maximum penalties would be doubled for subsequent offenses.

In our judgment, the bill would give clear warning to those against whom it is principally directed. To be sure, the term "prurient", like "obscenity", is not susceptible of precise definition. Webster's Dictionary defines "prurient" as the "lascivious longings" of persons. But as the Supreme Court has recognized in the *Roth* case with respect to obscenity statutes, precision in terminology is neither practical or necessary in an area like salacious advertising. "All that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." *Roth* v. *United States*, *supra*, at 491, quoting *United States* v. *Petrillo*, 332 U.S. 1, 7–8 (1947).

I wish to emphasize that the bill is focused exclusively on the commercial exploitation of sex. The bill covers only sexually-oriented commercial advertisements for the sale of other materials. The character of the materials offered for sale would be irrelevant to whether a violation has occurred.

The bill would not infringe the Frst Amendment guarantee of freedom of speech. In *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), a unanimous Suprme Court held that the First Amendment does not apply to "purely commercial advertising." The doctrine has more than merely theoretical significance. For example, federal law prohibits deceptive advertising in a variety of interstate commercial contexts. See 15 U.S.C. 45, 77k(a). And literally hundreds of State and local laws regulating or prohibiting advertsing of various kinds—such as advertsing concerning contraceptives, gambling and alcohol—depend largely for their validity on the assumption that commercial advertising is not protected speech. See Note, "The Regulation of Advertising," 56 Columbia Law Review 1019 (19593.

The reason for excluding commercial advertising from First Amendment protection is apparent. The central purpose of the Amendment is to assure what Justice Holmes called the "free trade in ideas." *Abrams* v. *United States*, 250 U.S. 616, 630 (dissenting opinion). Thus a recent decision involving the impact of the Amendment on damage actions for alleged libels of public officials stresses the need to assure that debate on "public issues" be "uninhibited, robust, and wide open." *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964). This is not to suggest, of course, that the Amendment extends only to expressions of a philosophical or political character. Constitutionally protected speech may include artistic works, social commentary, and many other modes of expression by which ideas may be conveyed or public attitudes shaped. But the purpose of ordinary commercial advertising is to sell a product, not an idea. Accordingly, such advertising ranks low on the scale of values underlying the First Amendment. It may be suppressed when necessary to promote other legitimate interests.

The Supreme Court's recent decision in *Ginzburg* v. *United States*, 383 U.S. 463 (1966), supports the constitutional basis for the bill. In *Ginzburg*, the Court upheld a conviction for mailing obscene books because the books had been advertised solely on the basis of their prurient appeal. The Court noted that the "leer of the sensualist . . . permeates the advertising" for the publications in question, and that "the deliberate representation of petitioners' publications as erotically arousing . . . stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." *Id.* at 470. Citing the *Valentine* decision with approval, the Court said: "Material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech, or in other contexts might be recognized as speech." *Id.* at 474, note 17. If books and periodicals not otherwise obscene (an assumption made by the Court in *Ginzburg*) may, consistent with the Constitution, be deemed obscene when advertised solely for their prurient appeal, it follows that advertisements appealing to prurient interests may be banned. Indeed, the latter represents a lesser incursion on absolute freedom of expression.

Turning now to H.R. 11031, this bill is designed to prevent mailing or interstate delivery of sexually-oriented materials to minors. There is a broad consensus among American adults that books, magazines and other materials primarily oriented toward nudity and sexual conduct should not be readily available to the sexually immature. The courts have clearly indicated that special laws can be enacted to protect children from such materials, and approximately two-thirds of the States have adopted such measures. As in the case of prurient advertisements, however, the States are ill-equipped to handle this task alone. The support of a federal sanction is needed to suppress the interstate traffic in such materials.

The bill prohibits knowingly mailing or transporting in interstate commerce for delivery to a minor—defined to mean persons under age eighteen—matter which is "harmful to minors," or information as to how such matter may be obtained. The phrase "matter that is harmful to minors" is defined to mean books, magazines, photographs, recordings and other materials which describe nudity, sexual conduct, or sado-masochistic behavior and which are (1) offensive to prevailing standards in the adult community concerning what is suitable for minors, and (2) substantially without redeeming social value for minors. If matter harmful to minors is mailed or transported interstate to a residence in which a minor permanently resides, it must be completely concealed in a sealed envelope or wrapper and personally addressed to an adult residing at such residence. Otherwise, there is a conclusive presumption that the matter was mailed or transported for delivery to a minor. The statute provides an affirmative defense in situations where the sender of matter harmful to minors reasonably believed that the addressee was an adult. Such a belief may be based upon a declaration reasonably believed by the sender to have been executed by the addressee and representing the addressee to be an adult. The prescribed penalties are the same as under the prurient advertising bill.

The primary purpose of this bill is to prevent the indiscriminate interstate sale of sexually-oriented materials, such as so-called "girlie" magazines, to minors. The bill would not suppress or unduly burden interstate sales of sexually-oriented but non-obscene materials to adults. As a practical matter, it would require sellers of such materials to do two things: (1) secure a representation from subscribers that they are over eighteen, and (2) mail materials in sealed wrappers. Interstate deliveries in bulk form to dealers would not be covered, since they would not involve a delivery to a minor.

The bill is patterned after a similar New York statute which was recently held constitutional in *Ginsberg* v. *New York*, 390 U.S. 629 (1968). In that case, the Court accepted the principle that the scope of the First Amendment right to read or see materials concerned with sex may be made to depend upon whether the citizen is an adult or a minor. Recognizing that the States have an interest in the well-being of minor children, and that parents are entitled to the support of State laws in discharging their direct responsibilities for the welfare of their children, the validity of the statute was viewed as depending upon the reasonableness of the legislative judgment as to the harmfulness to children of the material proscribed by the statute. While existing studies do not afford conclusive proof of the harmfulness to children of sex materials, neither do they show a lack of harmful effects. Therefore the Court sustained the enactment as a reasonable exercise of legislative discretion. Since the basic features of the bill are substantially similar to the New York statute, we are confident that it would be held constitutional.

The urgency of the problems with which we are concerned today is evidenced not merely by the growing volume of citizen complaints, but also by the numerous bills introduced in both Houses of the Congress during this session. Some two hundred bills have been introduced in the House of Representatives since January. We have analyzed these bills and have concluded that H.R. 11031 and H.R. 11032 incorporate the most effective approaches, within constitutional limits. I urge their prompt enactment.

Censorship and the Middle American

(By R. M. Christenson, Department of Political Science, Miami University, Oxford, Ohio)

America's intellectuals and the "Middle American" are on a collision course over pornography. The former, joined by most college youth, the entertainment industry and sexual nonconformists, are almost solidly opposed to the stiffening

of censorship laws while an increasing percentage of average Americans favor a crackdown. In 1965, only 58 percent of the people wanted stricter censorship laws. In 1969 the figure rose to 76 percent—with 85 percent favoring tougher laws on the movement of pornography through the mails. In 1969, over 330,000 persons protested to the Post Office against the receipt, through the mails, of unsolicited pornography. The volume of letters was 300 percent higher than in 1964.

The current controversy over pornography is one of the most conspicuous and symbolically important aspects of the moral crisis of our times. The manifestations of that crises are seen in the decline of religion, the decline of respect for all forms of authority, the widespread challenge to institutions and values, increasing rejection of "The System" by college youth and a growing readiness to resort to force and violence to achieve political ends.

The underlying cause of dissensus (whatever these causes may be) are powerfully stimulated by music, movies and literature whose most profound message to the young is "let 'er rip". Future chroniclers of the social dissolution we are witnessing, it may be safely predicted, will give more attention to this factor than it now receives.

It is probable that all revolutionary periods involve, to some degree, an assault upon the sexual laws or mores of the times. Ours is no exception. With the topless and bottomless waitresses making more frequent appearances, homosexuals demanding recognition of their "rights", pre-marital virginity on the wane, the underground arts flourishing and motion pictures and Broadway becoming ever bolder in their portrayal of nakedness, sexual intercourse and sexual perversion—the challenge is mounted on many fronts. The controversy over obscenity and pornography is, then, only one facet of a larger struggle over morals, ethics, freedom and license which threatens to convulse our society.

Where issues of such far-reaching and fundamental import are involved, the Supreme Court can never resolve them. But it can—and will have a part in sharpening the debate and establishing the broad constitutional framework within which the struggle will largely rage. With Nixon appointments changing the composition and philosophy of the Court, it is altogether probable that the Court will move to the Right on obscenity.

The Court has come close, in recent years, to eliminating censorship altogether so far as adults are concerned. In the Roth case (1957) the Court declared that the test of obscenity was "Whether to the average person, applying contemporary community standards, the dominant theme of the material appealed to the purient interest." By later insisting that censorable publications must be "utterly without redeeming social importance," (with emphasis on the "utterly"), by declaring that the "contemporary community standards" test applies to the national, not the local community, by requiring that material must be "patently offensive", the Court has left precious little room for the censor to act. However, the Court still seems to regard "hard core" pornography as outside the pale, accepts carefully drawn statutes designed to protect children, has punished dealers in sado-masochistic literature directed at deviant groups, and upholds laws forbidding "pandering"—that is, advertising which flagrantly emphasizes the sexually provocative aspects of their material.

To most intellectuals these days, censorship is firmly identified with Puritans, country bumpkins, prim little old ladies, religious fundamentalists—and the Reader's Digest. Barbara Tuchman has observed that prominent writers who accept the necessity for censorship are afraid to speak out openly. Richard Kuh documents the point in a book which has received far too little attention—*Foolish Figleaves*. Being dropped in the lion's den is halcyonic compared to the wrath and scorn which liberal intellectuals visit upon those with the temerity to challenge their holy of holies. If the Supreme Court becomes less permissive, the cries of anguish from the intellectual community will be heard from Dan even unto Beersheba. Still, there are reasonably sensible, rational and liberal persons (ACLU members, no less, like me!) who believe the permissiveness pendulum has swung too far.

The case for stricter censorship is a simple one. Millions of Americans—apparently most—are affronted by books, magazines, movies, plays, erotic displays, film strips, pictures and records which seem to them to vulgarize, desecrate and cheapen sex, or which encourage or glamorize deviant sexual behavior. The Middle American has a deep-rooted suspicion that all of this will lead to no good—that it may well bring about the erosion and ultimate decay of moral values which are essential to an orderly and civilized society.

There is no way of knowing whether his suspicion is—or is not—well founded. But it is noteworthy that the public's suspicions about excessive sexual permis-

siveness are supported more than they are undermined by such inadequate empirical evidence as we have. In *The Sexual Wilderness*, Vance Packard summarizes the findings of those academicians who have given the most attention to the relation between sexual permissiveness and the progress of society as a whole. He cites the findings of Professor J. D. Unwin, whose massive studies of 80 primitive and civilized societies reveal a distinct correlation between increasing sexual freedom and social decline. The more sexually permissive a society becomes, the less creative energy it evidences and the slower its movement toward a higher degree of civilization. Professor Unwin notes however, that it may take up to three generations for the destructive effects of a decline in sexual restraints to be fully manifested. Professor Pitirim Sorokin's cross cultural studies resulted in conclusions somewhat similar to those expressed by Professor Unwin. Arnold Toynbee also concurs.

In a recent issue of the New York Times Magazine, Bruno Bettelheim observed that "If a society does not taboo sex, children will grow up in relative sex freedom. But so far, history has shown that such a society cannot create culture or civilization; it remains primitive."

Apparently the methodology employed by Professors Unwin and Sorokin does not meet the rigorous requirements of modern research. Anyone seeking to study the question with the necessary scientific rigor would find himself grappling with a problem which contemporary research tools are incapable of handling. The Middle American, then, can hardly be blamed for concluding that, in the absence of scientific knowledge one way or the other, majority views should prevail. Oliver Wendell Holmes once wrote that "the first requirement of a sound body of law is that it should correspond with the actual feelings and demand of the community, whether right or wrong." There is no real doubt where the feelings of the community lie in this matter. And Justice Harlan, in Alberts v. Calif., declared that "The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards."

This, then, is the basic rationale for more stringent pornographic and obscenity legislation and interpretation.

But what about democratic freedoms and the First Amendment? Do majorities have the right to deprive minorities of free expression, whatever their fears may be? On this question, three major views stand out. One school of thought holds that freedom of speech should be absolute. If the First Amendment says "Congress shall make no law . . . abridging freedom of speech or press," it should mean what it says—NO LAW. Justice Hugo Black and many others who haven't thought too much about it agree. But the First Amendment doesn't really mean "no law" and never has. We have had numerous laws abriding freedom of speech and press since the earliest days of our republic. We have even more today—most of which command nearly unanimous approval.

For example, we have federal laws forbidding: libel and slander; perjury; contempt of court; violation of copyright laws; anonymous abusive or obscene phone calls. Army regulations limit soldiers' freedom of speech toward their military superiors and forbid partisan political activities. Incitement to violence is outlawed; so is the discussion of a court case with non-jurors by jurors while the case is being tried. Disorderly conduct laws limit freedom of speech; you may not enter a church and seek to drown out the preacher by substituting a sermon of your own. Nor may you deliver a speech in a hospital ward or on a city street at 3:00 a.m.

Interestingly enough, the First Amendment not only forbids the abridgment of freedom of speech but it also requires it! The amendment prohibits the "establishment of religion" and the Court has interpreted this to mean that public school teachers and officials may not require school prayers, or permit Bible reading as a religious exercise, or advocate sectarian religious views in the classroom. Almost to a man, intellectuals applaud these restrictions on freedom of speech.

The Black view has an appealing ring to it but it is hopelessly romantic. The real meaning of the First Amednment is that Congress may place no "unreasonable" restraints on freedom of speech and press. Our entire history attests to this view.

The drafters of the Constitution probably intended an absolute ban on efforts by Washington to forbid the dissemination of any political, economic, religious or social ideas. And this form of "absolutism' can be cogently defended—as John Stuart Mill has so eloquently done. A free society must permit every one, how-

ever odious his views to a majority, the right to express and seek support for those views. There is a right, therefore, to advocate the most disgusting forms of sexual perversion—so long as the proponent is clearly atempting to persuade rather than to commercially entertain. But commercial entertainment cannot claim the same constitutional protection as normal political discourse.

To the extent that entertainment and persuasion are combined, the case for constitutional protection is proportionately enhanced. But no one can cogently contend that the effective dissemination of ideas demands the use of obscene or pornographic techniques. The latter are conceivably of peripheral persuasive value but surely no more than that. The marginal loss of free speech involved is no more serious than that sustained through restrictions already cited which are widely accepted as sensible and necessary. And they are more than counterbalanced by social gains of great importance to most citizens.

The same reasoning applies to the "right to read" and "the right to hear" arguments. Presumably some persons would like to read libelous statements and like to hear slanderous ones. Most enlisted men would relish hearing an unpopular C.O. chewed out. Many persons would like to hear the public school teacher advance religious views which they approve. But the right to hear or read what you please is no more absolute than the right of free expression.

Those who say, "Don't tell *me* what I can see or read" are being pretty solipsistic. A socially responsible person will forego the indulgence of a desire if the policy permitting that indulgence materially injures the well-being of others.

The ACLU takes no absolutist position on the 1st amendment but it does urge no limitation of speech and press unless it can be proved that a given expression creates a clear and present danger that it will trigger an act which society has a right to forbid. The ACLU is also convinced that it is impossible to supply scientifically valid proof that the consumption of pornography produces criminal behavior.

Obviously the ACLU wants to consider only short-run effects, since it regards long-run effects as unknowable. The truth is that short-range effects are also unknowable. The difficulties of delving into the depths of human motivations and sorting out from amidst the richly tangled psychic undergrowth those strands which can be said to have "caused" a given act are so formidable that root causes or even the relative importance of contributory factors may never be satisfactorily established. Unhappily, all of the major premises on which our society rests derive from the realm of intuition or hunch—i.e., the viscera. Can anyone prove that the family is a desirable institution? That higher education will promote human welfare? That technology makes men better or happier? That war is bad for mankind? That democracy is superior to an authoritarian system? None of these are provable. But this does not stop us from acting on our best judgment, knowing that judgment is fallible. If, then, the regulation of pornography comes down to a matter of visceral preferences, why should not the majority of viscera prevail?

For many who are deeply committed to democratic principles, this reasoning seems to lead to pure majoritarianism. Which it would, except that we have insisted unequivocally that the advocacy of ideas can not be proscribed, even by a majority.

Are "obscenity" and "pornography" such imprecise terms that they lack sufficient clarity to meet the "due process" test?

Current state laws could be both updated and made more explicit if they forbade:

a) the display or sale of materials which contain pictorial representations of sexual intercourse or sexual perversion when such materials are primarily intended for commercial entertainment rather than for information.

b) actual or simulated exhibitions or cinematic portrayals of sexual intercourse or sexual perversion where these are presented for purposes of commercial entertainment.

c) the sale or display of materials to persons under 18 for commercial purposes, which depict other than heterosexual relations in such a way as to make these appear to be either desirable or unobjectionable, or which depict such relations at all for purposes of entertainment; or which seek to entertain through portraying sado-masochistic abuse.

These provisions would correspond to the sentiments entertained by the overwhelming majority of Americans. They would draw a sharp line where one must be drawn if this society is not to lapse into what can only be called debauchery.

Admittedly a few playwrights or motion picture directors might be able to handle scenes of intercourse or perversion in a sensitive and illuminating manner but for every artist who can do so, a hundred interpreneurs will use those themes in a fashion which can only cheapen and degrade sex. The interests of the American public are considerably more important that gratifying the erotic-esthetic yearnings of the avant-garde. On a gains-losses scale, the social advantage of a restrictive policy can be safely predicted.

Even with the suggested clarifications, obscenity *is* a vague term and we do not have a wholly satisfactory definition of it. But the same applies to numerous other laws. The Sherman Anti-Trust law forbids monopolies. What is a monopoly? When one firm (or an oligopoly?) controls 30% of the output in a field? 50% 75%? 90%? No one knows and the Supreme Court has never been able to tell us.

What is an "unfair trade practice"? Businessmen are forever groping in the dark. They never know until the Federal Trade Commission or the Supreme Court tells them. What is a merger which "substantially" reduces competition? No one can possibly know in advance of a decision. What is negligent manslaughter? Juries have an agonizing time trying to decide whether negligence has been involved, and whether guilt is proved "beyond a reasonable doubt"? What is "beyond a reasonable doubt"? That which is reasonable to one person is not reasonable to another.

Thus obscenity statutes are not that much different in terms of imprecision, from many other laws. They exist on a continuum. At one end of the continuum, it is clear that the involved citizen has not been breaking the law and no one will take him to court. At the other end, he has so clearly broken the law that he will not bother to appeal the case. But movement toward the center leads to more difficult decisions, until a middle zone is reached in which it is anyone's guess whether the courts will find you guilty. Decisions here will always involve a certain amount of arbitrariness, inconsistency and raw subjectivity, just as is true of other judicial "middle zones" which are much less publicized. Yet those who evidence indignation over the lack of specificity in pornography laws are quite complacent about vagueness elsewhere. Imagine the New Left worrying about the due process complications involved in the Sherman, Clayton and Celler acts!

Since negative judicial decisions on literary obscenity are sure to be subjected to scathing attacks by intellectuals—as judges well know—there is much more likelihood of excessive judicial indulgence than of excessive restraint. Perhaps it is best to err on the side of leniency, while imposing sufficiently severe penalties where guilt is found to discourage those who specialize in exploiting the margins of decency. Those who choose to walk the tight rope along the boundaries of the law should expect to pay the price of uncertainty. After all, dealing in pornography and near pornography is a pretty profitable business. The possibility of large profits logically carries the burden of large risks.

Judges, it is said, are not really qualified to make expert judgments about obscenity. Nothing in their legal training confers expertise upon them in matters of obscenity, sex or art. Why should they decide what you or I may publish or read? The Roth case held that the "prurient interest" test should be applied to the "average man," (not to those most susceptible to injury from pornography). Judges aren't average men. Besides, look at all the blunders the censors have made over the centuries, judges included.

True, judges have no special expertise on on sexual proprieties. But if they can bring no special wisdom to bear, they are likely to bring moderation to bear. And that is no small asset.

True, they are not average men; they are somewhat above the average in experience, intelligence and judgment. If entrusting this responsibility to them represents a somewhat aristocratic choice, so be it. The important thing is that a) judges are usually temperate men and b) citiens will accept decisions by them which they would not as readily accept from others. In brief, entrusting these decisions to the judiciary is a good practical solution to the problem.

It is easy to produce a long list of worthwhile books which have been banned, and to make the censors look ridiculous in the light of modern opinion. But each generation has a right to set its own standards, and if pornographic criteria change from time to time, the same is true of legal criteria in other fields. Each generation must use its best judgment, rather than permit outmoded previous standards to paralyze its capacity for action today.

Of course, critics think the only censorship blunders are those of commission, never of omission. But it is unfair to exhibit the "failures" of censorship without considering the other side of the coin. If all of the loathesome materials which

the post office has removed from the mails were also considered, as well as similar materials confiscated by other public officers, and balanced against the Chamber of Horrors exhibits displayed for us, the balance would look much less damning.

Finally, society does make some advances in wisdom. We have probably won the struggle to give writers and artists the freedom they need to realistically portray life, including its ugly aspects. This is all to the good, but it does not mean that people who traffic in filth or cater to the lowest human tastes must be freed from all social constraint. There is no principle which cannot be pressed so far that it loses legitimacy.

Even total candor is not an absolute virtue—as every husband and wife who have made a successful marriage know. And a society is not hypocritical or unduly repressive because it draws a distinction between open discussion of sex and the commercial debasement of sex.

Opponents of censorship sometimes contend that the state should not try to be the moral custodian of the people, whether it represents majority opinion or not. The setting of moral standards allegedly belongs to the church, the home and the school.

Yet every criminal law represents a moral judgment. And every law constitutes a coercion of the minority by the majority. Presumably bigamists dislike laws against bigamy, polygamists oppose laws against polygamy and exhibitionists dislike laws against indecent exposure. Their objections are not decisive once society regards these restrictions as reasonable. The same is true of obscenity laws.

If the home, the church and the school provided adequate sex education and moral training, we might not need pornography laws. But a substantial minority of homes apparently give their children virtually no moral training, and little if any instruction on sex behavior. A large percentage of children don't attend church, which offers no sex education in any case. Most schools do not do so either, and certainly they do not educate young people about perversion. Since we cannot rely upon church, home and school to protect our youth from unscrupulous exploiters of pornography, we must rely partly upon the law.

Pornography, it is further argued, may actually serve a useful public purpose. It may help us overcome our Puritan heritage, which has so long poisoned our attitude toward sex. If we can learn to treat sex as a normal and joyous part of life instead of viewing it as a somewhat shameful hush-hush activity, we can free it from the destructive and crippling inhibitions which formal and informal censorship have nourished over the centuries.

It also has a cathartic value for some people, enabling them to discharge sexual tensions in a harmless way which might otherwise find antisocial outlets.

The dread word "Puritan" has long been employed by censorship foes as their ultimate weapon. The fear of being labeled "Puritan" is enough to make strong men quiver and quake. A Puritan, of course, is someone whose views on sex are less permissive than yours. Perhaps I may be forgiven for regarding this pejorative as an inadequate substitute for reasoned argument.

Most of us welcome today's freedom to explore sexual questions and seek greater sexual satisfactions through increased education and scientific knowledge. The censorship of pornography will not interfere with this salubrious development. It is a mistake however, to believe that the commercial exploitation of certain facets of sex promotes a healthy attitude toward it. Pornography is more likely to deposit ugly images in the consciousness or subconsciousness of the young man than it is to contribute toward the formation of a wholesome attitude toward sex.

The New York Academy of Medicine declared that reading salacious literature "encourages a morbid preoccupation with sex and interferes with the development of a healthy attitude and respect for the opposite sex." Certainly if young people are stimulated to experiment with forms of perversion before they understand their implications, traumatic experiences may occur which leave them psychologically scarred for life. Parents who strongly oppose the introduction of unsolicited pornography into their homes display an eminently sensible attitude toward the protection of their children. This outrage, said to affect over a million children a year, obviously must be halted.

People who "need" pornography probably need psychiatric care even more. However, since they are unlikely to get the latter, it would probably be unwise to try to eliminate all of the dealers in pornography. If they leave children strictly alone, do not advertise their wares, and limit their sales to adults who seek them out, perhaps it is best to leave such traffic alone.

Are pornography laws unenforceable? Do they tend to make pornography more attractive, since it becomes forbidden fruit?

Enforcement is admittedly very difficult. We haven't been able to prevent drunken driving, either, but we don't proceed to make it legal. We seem to be having little success in preventing burglary, super-market theft and income tax evasion, but we are seeking more effective enforcement techniques in these fields rather than repealing the laws. That a more intensified effort should be made to reduce traffic in pornography is a premise of this article.

Laws may make pornography somewhat more attractive to certain persons, just as laws against vandalism make vandalism more fun for the rebel. The same goes for speed laws and heaven knows how many others.

Repealing certain laws does not eliminate the social disapproval associated with the behavior involved. This social disapproval continues the "forbidden fruit" effect, even in the absence of law.

Denmark's experiment with the repeal of pornography laws is said to have led to a decline in pornography sales. Doesn't this prove that censorship should be abolished?

First, Denmark has not repealed all of its pornography laws. Children are still protected. Offensive public advertising and displays are still forbidden.

Denmark is not America in any case, and the trial period is far too short to enable us to draw any firm conclusions. That interest in sex perversion and aberrations has not been dramatically affected is suggested by its recent sex fair which ran for six days, attracted huge crowds, featured displays of erotic lingerie, sado-masochistic devices, sexual stimulators and pornographic jewelry for men and women. Newsweek calls Copenhagen "a veritable showcase of pornography," bristling with shops specializing in every conceivable variety of sex attraction. This may be an appealing demonstration of the delights of a free and liberated society but some people might dissent.

Paradoxically, the existence of censorship probably assures greater freedom in America than its absence. Morris Ernst e.g., agrees that the elimination of public censorship would bring an increase in private censorship. If, somehow, the tiny minority (perhaps six percent) who want no censorship were to have their way, it would be an open invitation for vigilante groups to take over. Outraged at those who violated the bounds of human decency, as they conceived them, the Middle American would employ extra-legal pressures as a substitute for law. And a sorry substitute they would be. Controlling pornography by legal means and orderly institutions gives us the best assurance that society's concern will be dealt with in a civilized manner. Those who want maximum literary freedom should be the strongest supporters of at least minimal censorship.

All reasonably healthy societies require a certain amount of moral consensus, a generally accepted sense of "this you do and this you do not do." This consensus seems to be breaking down today. Not only do entrepreneurs exploit every possible source of shock but there is a spirit verging upon moral nihilism among many writers, artists and promoters. They manifest a kind of defiant contempt for whatever is regarded as conventional. They flout almost every accepted standard—often arrogantly and self-righteously. Nothing gives them more pleasure than outraging the Middle Americans.

To those in the entertainment world, freedom is the supreme value. Whatever makes men more free is believed ipso facto good. But freedom is not, standing alone, the summum bonum of human society. If it were, we would need no government. Freedom is valuable only as it is balanced with other social values: the need for some order, for some sense of community, for a measure of respect for the beliefs and sensitivities of those who differ from you. Unless freedom embraces self-restraint and social responsibiltiy it can become a destructive force. I see neither this self-restraint nor this sense of social responsibility being manifested in the entertainment world.

Our society is becoming increasingly undisciplined; restraints of all kinds are losing their force; people are increasingly prepared to give their impulses and their passions free play. For the record, I find much to applaud in our revolutionary age. The refusal to support a senseless war; the challenge to the military-industrial coalition; the so-called "Equality Revolution,"; the demand for justice to the blacks and the poor; the call for educational reform; the insistence on higher standards of public morality. But the stresses and strains involved in these movements are hard enough for the body politic to bear. Add to these a sexual revolution powerfully stimulated by the entertainment industry and society may be bearing an overload of tension.

A society can tolerate only so much emotional turmoil, so much disruption, so many assaults upon its sensibilities and its mores. At some point, the public's patience becomes exhausted; it cries, "Enough." This denouement may not be far off in America. When it comes, the entertainment industry should be assigned its full share of responsibility for the repression which follows.

A final word. Maybe all the "dumb people" are not so dumb after all. Maybe they are right in sensing that sex needs to be treated with some caution, that there is an essential element of privacy which needs to be preserved from commercial degradation, that sexual relations must not be divested of all sanctity, all mystery and reduced to the yuk-yuk level.

What a disturbingly democratic idea that the "dumb people" just might be smarter now and then, than the avant-garde intellectuals!

THE EVENING STAR-THE SUNDAY STAR,
Washington, D.C.

Representative ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
Committee on Post Office and Civil Service,
Washington, D.C.

DEAR MR. NIX: As you requested, I am sending you copies of the articles dealing with obscenity which appeared in the Washington Star on September 14 and September 18. I am forwarding originals rather than Xerox copies on the theory that if you want to make additional copies, the originals are better for reproducing.

You asked if I would testify at the hearings. I really don't feel that I am expert on the subject and I prefer my stories to speak for me. I would much rather that the time at your disposal for the hearing be occupied by postal authorities and others who have not only investigated in depth but are extremely well informed on the extent of the public reaction.

I wish you all the luck in the world in putting an end to the particularly offensive mailed obscenity.

Sincerely,

MIRIAM OTTENBERG.

(Enclosures.)

[From the Washington Star, Sept. 14, 1969]

COMPLAINTS SPUR POSTAL WAR ON SMUT ADS

(By Miriam Ottenberg, Star Staff Writer)

Spurred by more than a quarter of a million complaints from outraged citizens over the past year, the Postal Inspection Service has launched an all-out war on smut dealers in the one area where they're believed most vulnerable—mail order advertising.

The Justice Department agrees with postal authorities that the advertising of pornographic material today is so objectionable that the purveyors would be convicted even under the most literal interpretation of recent Supreme Court obscenity decisions.

As a result, 10 of the approximately 15 dealers whose activities are responsible for 95 percent of the public complaints are now under federal indictment.

Evidence against four more is currently before United States attorneys and indictments are believed imminent.

One of the biggest dealers was convicted, but prosecutors and postal inspectors are taking a new look at his operation because he has continued peddling smut while his conviction is being appealed.

In all, some 40 major dealers in obscenity are either under arrest and-or indictment or awaiting prosecutive decision. Postal inspectors meanwhile are concentrating on the larger dealers whose unsolicited sex advertisements intrude into American homes.

"The smut dealers have gone too far," says Chief Postal Inspector W. J. Cotter. "They have completely misread the Supreme Court decisions. They think they have a license to mail out this fifth and they're going to be surprised to have their license revoked."

Cotter is optimistic about the outcome of these cases once they get before a judge and jury, but the big if is getting them that far.

Some indictments go back more than a year and are no nearer to trial now than they were then. Court dockets are crowded with crimes of violence so nonviolent crimes are forced into a back seat despite the public outcry.

Adding to the delay are stacks of motions filed by a small cadre of lawyers who show up with curious regularity all over the country whenever a major smut peddler is indicted.

Anxious to get these cases to trial, Postmaster General Winton M. Blount has written Attorney General John N. Mitchell specifically about the obscene ads.

"I know you share my distress at the increasing volume of offensive sex-oriented matter, much of which can only be characterized as unbridled obscenity, now being thrust unsolicited and unwanted into the homes of this country through the mail box," he wrote.

After reviewing the status of obscenity investigations, Blount urged Mitchell to take "all practicable measures to facilitate the early resolution of these cases in court."

Mitchell promptly assured the postmaster general that "the prosecutive efforts of the Department of Justice are aimed at bringing to trial at the earliest possible dates the large mail-order distributors presently under indictment."

The attorney general also promised "expeditious review" of investigations completed by the Postal Inspection Service.

This determination, said to be shared by United States attorneys appointed by the new administration, contrasts with the negative attitude of previous administrations,

In the past, prosecutors got tired of seing their obscenity cases reversed on appeal. Discouraged and uncertain about what constituted obscenity, they often were inclined to refuse prosecution.

Several elements have now combined to alter their attitude. First, the advertisements going through the mail have become so blatant that even the most case-hardened prosecutor doubts that judge and jury would let it go by.

MAILING'S SCRUTINY

Second, the Supreme Court, although narrowing its definition of obscenity, has twice made it clear that indiscriminate mailings of the pandering type would be viewed with concern.

In a series of decisions beginning with the 1957 Roth opinion, the Supreme Court declared the test for obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material appeals to prurient interest. The material must be "patently offensive" and "utterly" without social importance, the court held.

The letters of protest—reaching the Post Office by the carload—enclose advertisements that to the complainants clearly meet the Supreme Court test—particularly since most of the ads don't even have the theoretically redeeming social value of the printed word.

Typical ads, on slick paper and in full color, show nude women sprawled with their legs apart. Advertisements for films show women on top of women. An accompanying blurb advertises: "Now every passion-filled detail is caught by our cameras! These are all blushing young girls, each with a partner and you will be able to view every detail and movement of their young bodies as they are caught up in love."

"PLEASE UNDERSTAND"

Another ad, promoting what is described as a "carnal display," comments: "Please understand, we may be taking a great risk . . . if you know what we mean. Order quickly!"

Contrasting the ads with books upheld by Supreme Court obscenity decisions, the chief postal inspector commented: "There's no message, no plot in the ads—other than the plot to sell obscenity."

Typical complaints go even further than postal officials in castigating the ads.

"As a certified specialist and invsetigator in obstetrics and gynecology," a Philadelphia doctor wrote, "I believe I am quite capable of discerning between material for sex education and that of other material intended for sex stimulation.

COMPLAINT STRESSED

"I am enclosing the latest in a series of advertisements that I have received and ask that your department give the consideration due its low character. . . . Not only is this material distressing to me, but it is extremely upsetting to my secretary, who opens my mail.

A South Carolina mayor forwarded an ad with a plea to take whatever legal steps are available to prohibit the sending of this type of material through the mail.

A New York doctor's wife said she would be glad to be a witness in court against "this disgusting use of United States mails."

A San Antonio businessman wrote that he couldn't understand why the Supreme Court is so lax and asked the postmaster general to use his influence to get laws passed to stop such mailings.

A Minnesota woman called the ad she enclosed a "one way track to insanity."

Most of the letters are forwarded by congressmen whose constituents are deluging them with protests. But thousands of complaints are going directly to the postmaster general—including a number from mailmen protesting against carrying this mail and from local postmasters who bear the brunt of neighborhood protests.

Postal authorities are convinced that conviction of some of the major dealers will put a damper on the smut purveyors for at least a while and reduce the complaints.

That's what happened in 1966 after the Supreme Court upheld the conviction of publisher Ralph Ginzburg on charges of mailing obscene material in connection with the magazine "Eros" and two other publications. In the six months immediately following that decision, public complaints to the Post Office Department dropped by 34 percent.

COUNTRY FLOODED

But Ginzburg proved that the Supreme Court is not the end of the line after all and smut publishers, with renewed confidence, started flooding the country with their ads.

As a result, public complaints which had dropped from a high of 197,277 in fiscal 1966 to 140,786 in fiscal 1967, rose to 167,792 in fiscal 1968 and to an all-time high of 232,072 in fiscal 1969.

Ginzburg is still free despite the fact that his 1963 conviction was upheld three years ago. After the Supreme Court ruling, Ginzburg asked federal court in Philadelphia for a hearing on a possible reduction of his five-year sentence.

The federal judge denied the motion for a hearing, but Ginzburg appealed and the Court of Appeals on July 3, 1968, ordered that a hearing be held. But before District Court could hold a hearing, Ginzburg filed a motion on October 7, 1968, to disqualify Judge Ralph C. Body from presiding at the hearing. Judge Body had been the judge at Ginzburg's 1963 trial and Ginzburg claimed the judge had personal prejudice.

Judge Body responded by asking the chief judge of District Court to appoint a three-judge panel to hold the hearing. The panel was appointed but has not yet handed down a decision.

The delay encountered in the Ginsburg case is another reason postal authorities are so anxious to proceed with the cases now awaiting trial.

In recent cases, with the cooperation of the Justice Department, they have moved to avoid the overcrowded big city courts by using a 1958 amendment to postal laws which allows cases to be brought where the mail is received as well as where the mail is sent.

Since New York and Los Angeles courts have big backlogs of criminal cases, mail-order obscenity cases are now being presented where the objectionable material reaches the smaller city mail box. Thus a Los Angeles promoter advertising homosexual material has been indicted in Bismarck, N.D. And federal prosecutors in other delivery districts are currently readying big-city smut cases for prosecution.

Postal authorities believe swift prosecution is the surest way to halt the flow of unsolicited, unwanted obscenity, but the official position is that more laws are needed, too.

The Nixon administration has a package of anti-obscenity laws now pending in Congress and at least 200 congressmen have introduced bills aimed at curbing hardcore pornography, particularly when children are the targets.

There's considerable agreement that legislation is needed to provide a clearer definition of obscenity to meet Supreme Court restrictions and to help judges and juries recognize exactly what is meant when obscenity is charged.

A recent Gallup survey shows that 85 out of every 100 adults interviewed favor stricter state and local laws dealing with obscene literature sent through the mails.

The people want more law. The prosecutors want more prosecutions. And the smut purveyors just want more money. It could be a stand-off, but the postal inspectors who bear the brunt of the smut investigations believe they're on the winning side.

[From the Washington Star, Sept. 18, 1969]

New Smut Indictment Hits Convicted Publisher

(By Miriam Ottenberg, Star Staff Writer)

Marvin Miller, who grosses $10 million a year from sales of pornography, finds himself in trouble again.

The 40-year-old West Coast publisher and his publishing company have been indicted on 27 counts of violating federal obscenity statutes and interstate shipments of obscene material.

Miller is free on bond pending appeal from a federal conviction last December, in that case, he was convicted on three counts of mailing obscene matter, sentenced to five years in prison and fined $7,500. His Covina Publishing, Inc., a corporation doing business as Collectors Publications, the Collectors Group and G & M Enterprises, Inc. was fined $15,000.

OBSCENITY DENIED

Testimony at the earlier trial revealed that Miller's publishing enterprises had gross publication sales in 1967 and 1968 of $10 million. Miller, who puts his net worth at more than $1 million—said to be a conservative estimate—advertises his publications as pornography, but denies they are obscene under present Supreme Court definitions.

Prosecutors and postal authorities contend that his products are actionable smut even under liberal court rulings.

Miller's new indictment by a federal grand jury at Los Angeles was handed down Tuesday but kept secret until his attorney was notified and arrangements were made for Miller's arraignment in District Court in Los Angeles on Dec. 29. Bond has been set at $5,000.

United States Atty. Matt Byrne said the new indictment resulted from a lengthy investigation by U.S. postal inspectors.

The indictment alleges that Miller and his publishing company mailed various obscene books and magazines. Named were "Groovy Gypsy," "Pussy Willow," "Topsey-Turvey," "Go Down Bruno," "Love Letters of Lauralee," "My Sexy Aunt," "Lovers," "Gander," "Continental Cuties," "Parlay," "Upon," "Special," and "Open House."

SENT TO SCHOOLS

One of the recipients of what were described as "obscene, lewd, indecent, lascivious and filthy advertisements" was the Holy Ghost Catholic School at Hammond, La., according to the indictment. Another recipient of the ads was a Baptist Sunday school in Nashville, Tenn., and a YWCA.

The indictment charged that similar material was sent to "The President—personal," at a California address.

The first 13 counts of the indictment charged the mailing of obscene advertising. The next four counts charged the mailing of ads and notices giving information on how to get the material. Nine counts charged the mailing of obscene matter and two counts charged interstate shipment of obsecene matter—specifically the "Love Letters of Lauralee" and "My Sexy Aunt."

Miller's new indictment comes at a time when the Postal Inspection Service has embarked on an all-out war against mail-order obscenity, with special emphasis on the advertising of obscene publications.

Ten of the 15 dealers prompting most of a quarter-million complaints from the public are now under federal indictment. Miller is the 11th to be indicted in the new drive.

He faces a maximum penalty of 10 years imprisonment and a fine of $10,000 on each count since this is his second offense. Covina Publishing also faces a maximum fine of $10,000 on each count.

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON POSTAL OPERATIONS,
OF THE COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, D.C., January 16, 1970.

MEMORANDUM

To: Hon. Robert N. C. Nix, chairman.
From: Thomas R. Kennedy, subcommittee counsel.

The following statements from The Authors League of America, Inc. and American Book Publishers Council Council, Inc., plus the news clippings on the obscenity problem, set out some of the issues involved.

Freedom of communication has great economic value to publishers. Their right to profit from erotic material is limited by the right of the defenseless public to be let alone by powerful publishing and advertising interests. The clippings and the statements of the Authors League, Inc. and the American Book Publishers Council, Inc., by being juxtaposed in the hearing record, set out the problems in this field.

STATEMENT OF IRWIN KARP, COUNSEL, AUTHORS LEAGUE OF AMERICA

Mr. Chairman, my name is Irwin Karp and I am counsel to the Authors League of America, a national society of professional writers and dramatists. As an organization of writers, it is especially concerned with legislation which may effect freedom to speak and to read. This concern stems not only from the author's interest that freedom of expression be safeguarded, but also from the deep conviction that freedom of expression, and freedom to read, are the very foundations of a democratic society and must be carefully guarded against restraints that can impair their effectiveness.

Furthermore, the mail is one of the most important means by which authors and publishers can communicate with the public to convey information about books, and to distribute books. A restraint on the fundamental right to use the mails, although aimed at obscene materials, or offensive advertising, may seriously inhibit the distribution of literary and artistic works of merit and social importance, which are not obscene—works which are entitled to the protection of the First Amendment.

H.R. 7375 and H.R. 10867 are intended to bar from the mails: (i) material "harmful to minors," and (ii) "sexually oriented advertisements," sent to individuals who inform the Post Office that they do not wish to receive them. For the reasons I will discuss, I believe that each Bill would prevent publishers from mailing non-books and non-obscene advertisements for such works; and that both statutes, if enacted, would violate the First Amendment rights of authors and publishers of such works; and of adults who may wish to receive such books, or advertisements.

Since H.R. 10867 contains all of the relevant provisions of H.R. 7375, I will address my comments to H.R. 10867.

THE PRESENT LAW

Aside from the constitutional deficiencies of H.R. 10867, it is doubtful that there is any substantial need for it. Existing law (18 U.S.C. Sec. 1461) already bans the mailing of obscent materials, non-obscene advertisements for such material, and also advertisements which are in themselves obscene.

Testifying before your Subcommittee on August 6, 1969, Mr. David Nelson, General Counsel to the Post Office, said that about—

"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.

"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 re-

turned promptly." (Hearings before the Subcommittee on Postal Operations, Committee on Post Office and Civil Service, Ninety First Congress, 1st Sess. H.R. 10867 (Serial No. 91–12).

The Chief Postal Inspector, Mr. William J. Cotter, summarized the prosecutions in progress (p. 21) and said they were being conducted—

"under Section 1461, the existing one. It is our position that the real effective solution to this problem is criminal prosecution of these fellows. . . . We believe that 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 moe offensive today."

Asked "What is lacking in 1461 that you would like to see in it"?, Mr. Cotter said: "A more precise definition of what is obscenity."

He then said: "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."

If Congress wanted to meet Mr. Cotter's needs, it could enact a Bill to amend Section 1461 by adding to it the definition of hard-core pornography set forth in Mr. Justice Stewart's dissenting opinion in *Ralph Ginzburg* v. *United States*, 383 U.S. 463 (1966).

Mr. Justice Stewart defined hard-core pornography as follows:

"Such materials include photographs, both still and motion picture, with no pretense of artisitc value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-like format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value." (383 U.S. at p. 499)

This definition would also eliminate much of the difficulty with the three-part *Roth* standard (*Roth* v. *United States*, 354 U.S. 456 (1957); *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418–419 (1966) that has led courts and prosecutors to attempt to restrict works that are entitled to the protection of the First Amendment. * * *

As Mr. Justice Stewart noted, the category of hard-core pornography which he defined is a "distinct and easily identifiable class of material in which all of these elements (of the *Roth* standard) coalesce." (383 U.S. at 499)

Moreover, he said: "It is that (hard-core pornography) and that alone, which I think government may constitutionally suppress, whether by criminal or civil sanctions." (Ibid.) Mr. Justice Stewart was, of course, referring to the power to restrain the distribtuion of materials to adults. In both his *Ginzburg* dissent, and his concurring opinion in *Sam Ginsberg* v. *New York*, 390 U.S. 629 (1968), he agreed that statutes drawn to limit distribution to minors could reach a broader range of materials. Mr. Justice Harlan agrees that the Federal Government may only ban the distribution to adults of 'hard-core" pornography. *Ralph Ginzburg* v. *United States*, 383 U.S. 464, 493 (1966). And some of the highest state appellate courts read *Roth* as impliedly banning only hard-core pornography (e.g., *Zeitlin* v. *Arnebergh*, 59 C. 2d 901, 911 (Cal. 19).

SECTION 4011

Section 2(a) of H.R. 10867 would add to Title 39, a new Section 4011 which defines a special category of "nonmailable matter" which may not be sent to minors, or sent without request to any adult with whom a minor resides. The special category includes books, photographs and other materials, and advertisements for such materials.

Section 4011 borrows some portions of Section 484(h) of the New York Penal Law which was sustained by the Supreme Court in *Sam Ginsberg* v. *New York*, 390 U.S. 629 (1968). However, there are significant differences. The New York law has a three-part formula, based on the *Roth* standard and adapted to apply each of the three tests to minors. The first New York criterion is that the material must "predominantly appeal to the prurient, shameful or morbid interest of minors." Section 4011 does not require that material be tested by its "*predominant* appeal" or that it appeal to the prurient interest of "a minor." Conceivably, the intention of the Bill is that the prurient interest appealed to be that of minors (not of *any* reader); and that material be evaluated in terms of its *predominant* appeal, rather than the much vaguer standard of "primary"

intent (design). However, even if this test were construed as equivalent to the first part of the New York formula, the definition of Section 4011 is constitutionally defective, since it completely omits the second and third parts of the New York (and *Roth*) standard.

The second New York criterion is that material must be "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." The third New York criterion requires that the material be "utterly without redeeming social importance for minors." Since Section 4011 omits both of these criteria, it would prohibit the mailing of many books, reproductions of paintings and other works that had substantial social importance for minors, and which were *not* patently offensive (or offensive at all) according to adult standards of suitability for minors. It would prohibit the mailing to minors of works that could not constitutionally be prohibited to minors. (Cf. *Sam Ginsberg* v. *New York*, 390 U.S. at p. 637–8).

Aside from the defects in its definitions, the Bill also imposes a serious restraint on the right of publishers to mail to adults books—or advertisements for books—that are not obscene for adults. This invades the rights guaranteed to authors, publishers and adult readers by the First Amendment. *Butler* v. *Michigan*, 352 U.S. 380 (1957); *Redrup* v. *New York*, 386 U.S. 767 (1967). The Supreme Court reaffirmed, in *Sam Ginsberg* v. *New York*, that a statute to protect minors could not be so drawn that it would infringe these constitutional rights (390 U.S. at p. 634–635).

The restraint arises because a publisher does not know, and has no way of determining, whether some recipients of a mailing are minors. As Mr. Speiser of the American Civil Liberties Union previously testified, it is not clear whether this Section is to be enforced by criminal penalties. If that is the intention, then a publisher could be punished even though there is no requirement (or proof) of scienter. The Supreme Court has held that this may not be done, *Smith* v. *California*, 361 U.S. 147 (1959). If the section is to be enforced by barring any mailing of "nonmailable matter" if some of the recipients may be minors, then the publisher would effectively be barred from using the mails to send non-obscene books, or advertisements, to adults.

Most books and other materials sold by mail are mailed in response to orders. It is doubtful that purveyors of hard-core pornography send many books by mail without an order. Obviously, the Bill will do little to prevent minors from ordering "harmful" material by mail. If they are old enough to order the material, they are old enough to mis-state their age on the order blank to get it: and they will. The fact that the form calls for the information will make it clear they must do so; if not, one rejection will; and it doesn't take long for the "word" to get around.

Section 4011 also would drastically restrict, if not completely prevent, book and magazine publishers from using the mails to advertise or solicit orders (from adults) for innumerable non-obscene books, magazines, reproductions of paintings, photographs and other material. Many works of outstanding literary, scientific or social value (and many which normal adults choose to read for entertainment) may fall within the definition of "nonmailable matter" under Section 4011. Publishers would be "entitled" to mail advertisements for these works to adults. But Section 4011 would prevent them from doing so.

An advertisement for a book or magazine may be mailed to hundreds of individuals[1] whose names appear on a mailing list. The list may have been compiled by the publisher; usually it is borrowed or leased from another publisher, a company which compiles these lists, a public agency (such as a state motor vehicle bureau) or similar sources. The lists seldom contain the ages of the addressees. It would be impossible to obtain the ages; the cost would be prohibitive. The result is obvious. The publisher of a non-obscene book or magazine would be effectively barred from using the mails to send adults advertisements for many books and other publications protected by the First Amendment. Moreover, the publishers of magazines and newspapers would be faced with the choice of (i) determining the age of every mail subscriber; or (ii) refusing to accept an advertisement for any book or motion picture that might be "nonmailable matter" for minors; or (iii) discontinue mailing or transporting their publications

[1] Some mailings reach "as many as eight million or more." "What Happens in Book Publishing" (p. 401), (Columbia University Press, New York, 1967.) Sellers by mail include most trade publishers, large book clubs, specialized publishers such as Time-Life Books and American Heritage, and many smaller publishers for whom the mails are the only accessible form of advertising and selling.

outside of the state in which they are printed. I do not believe that the Supreme Court of the United States could reconcile the restraints imposed by this Bill with the principles stated in *Butler* v. *Michigan*, 352 U.S. 380 (1956); *Redrup* v. *New York*, 386 U.S. 767; *Lamont* v. *Postmaster General*, 381 U.S. 301. In *Time, Inc.* v. *Hill*, 385 U.S. 378, 389 (1966), the Court emphasized that to "saddle the press with (an) impossible burden" of verification, to expose it to the risk of large *expense* (in defending "right of privacy" suits) "must inevitably cause publishers to 'steer . . . wider of the unlawful zone'." The burdens which this Bill would impose on innumerable publishers are far more restrictive than the license fees condemned in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), cited by the Court when it invalidated the Post Office regulations in the *Lamont* case.

There is considerable difference in purpose and effect between Section 4011 and the New York statute which was sustained in *Sam Ginsberg* v. *New York*. The New York law deals with different media of distribution (not the mails) and different circumstances. It does not involve a serious restraint on the dissemination to adults materials that are "harmful" to minors.

A teenager's parents cannot remain at his side all day. They cannot stop him from walking into a book store and buying "nonmailable matter." Since the parents' control and guidance of their child's reading (primarily their responsibility) cannot be exercised for most of the day, the state provides them with the "support of laws designed to aid discharge of that responsibility." *Sam Ginsberg* v. *New York*, 390 U.S. 629, 639.

But the mails do not pose the same problem. The parents' "authority in their own households to direct the reading of their children . . . (basic in the structure of our society)"[2] can be exercised—by the parents. Mail arrives in the home, usually once a day. All of it, including mail addressed to their children, can be physically controlled by them. Books or magazines are easy to recognize, by their very appearance. A concerned parent can open the packages; a more relaxed one might be content to check the sender's name, or trust his children to follow his instructions. Advertising can be monitored the same way.

Moreover, the existing regulations assist a concerned parent who cannot outrace his children to the box (or is not home when mail is delivered) and cannot trust them not to open their mail before he screens it. 39 C.F.R. Sec. 154.2(b) ("Addressed Mail to Minors") provides that "a minor's guardian may control delivery of mail addressed to the minor" and permits the father or mother to receive delivery. If tighter controls are needed to enable a parent to get the "first look" at his children's mail—if he wants to—it could be accomplished by amendment of this regulation.

As I have mentioned, the New York law does not generate the same heavy restraint on dissemination to adults. It applies to book stores, motion picture theatres and other face-to-face media. An advertisement for a book or magazine may be mailed to hundreds of thousands of people, unknown and unseen to the publisher. A bookseller deals with a small number of people each day; like the cashier in a theatre, he can see each one. They do not have to ask each customer who is obviously in his thirties, forties or seventies if he is over 18. To safely comply with H.R. 11031, a publisher would have to determine the age of each of the thousands or millions of people on a mailing list.

Finally, I should note that most of the material which caused the concern which prompted the drafting of Section 4011 is already prohibited and punishable by Section 1461 of Title 38. I refer again to the testimony of Chief Postal Inpector Cotter, when asked if he thought he could prosecute more effectively under "Mr. Dulski's bill" (H.R. 10867), replied—

"We could, I personally think we could go under the present statute (Sec. 1461), I think it would be more solid if we had a more precise definition of obscenity."

SECTION 4012

H.R. 10867 would also add to Title 39 a new Section 4012 relating to the mailing of "sexually oriented advertisements." Every envelope bearing such an advertisement be marked with a special symbol. The Postmaster General is to compile (and keep current) a list of persons who do not wish to receive such mail. Anyone may place his name (or the name of his children under 19) on the list. No publisher or other person may send a sexually oriented advertisement to any individual whose name has been on the list for 30 days.

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[2] 390 U.S. at p. 639.

At the outset, it should be noted that the Bill is unnecessary. Most of the advertisements it is aimed at are already banned by Section 1461; and as indicated in the Post Office testimony discussed above, the most effective method of dealing with these is by prosecution under the present statute.

Moreover, the definition in paragraph (d) does reach advertising that is not hard-core pornography or otherwise obscene under the *Roth* standard. And since publishers must decide for themselves whether particular advertisements are "sexually oriented," on pain of imprisonment and fine, it is likely that the symbol will be affixed by respectable publishers to non-obscene advertisements for works of substantial literary or artistic value.

The publisher's difficulties are magnified because the definitions in paragraph (d) apply to advertisements which do not contain illustrations, as well as those which contain photographs or drawings. As Judge Prettyman said in *United States* v. *Womack*, 294 F. 2d 204, 205–6 (D.C. Cir.): "Most of the difficulty" in determining whether a work is obscene involves "books and magazine articles." "[H]ere arise problems of scienter, the meaning and effect of the whole, the value of the work to proper interests of the public, the contemporary community standards in similar matters, and other baffling problems under our precious right of free speech, discussed in the several opinions in *Smith* v. *California*."

But, as he stated, there was "no such problem" in the case before the Court of Appeals because it involved "stark unretouched photographs"—no text. As Judge Prettyman indicates, it is simpler to give a precise definition of "hard-core" pornography where photographs are involved than it is in the case of text material without illustrations. Moreover, there is a great difference between the effect on readers of advertisements which do not contain illustrations and those that contain photographs and other graphic material within Mr. Justice Stewart's definition of hard-core pornography.

Moreover, the system of restraint provided in Section 4012 is particularly repugnant to the First Amendment. People who believe in the First Amendment would prefer not to receive advertisements containing hard-core pornography. But they feel it is far more important to preserve their right to determine what they will read. They do not wish to be forced into the position of asking the government to cut off some of their mail (by placing their names on the black-list) or risk being branded dirty-minded perverts if they retain their rights to determine what they will receive through the mails. Yet the Bill creates the risk of their being branded, boycotted and pressured. The lists will be made public. And the absence of one's name from such a list—when he has the option of joining it—can as easily brand him as if he were required to place his name on a list of those who wished to receive sexually oriented advertisements. Moreover, the mark on some of his mail—plus a talkative postman—can also brand him as a low-minded devotee of "sexually oriented advertisements."

An individual may not be too threatened in the anonymity of a large city. But the threat is real in smaller cities, suburban communities and towns and villages. Timidity will generate a lot of self-censorship. And the lists and mark could enable organized groups to pressure many individuals to surrender their right to determine what they should receive and read—including advertisements that are not obscene, for books that are not obscene; and those which have been branded with the symbol because the publisher did not wish to risk jail because he feared a jury might disagree with his judgment.

The listing and marking requirements achieve, in reverse, the same restraint which the Supreme Court held unconstitutional in *Lamont* v. *Postmaster General*, 381 U.S. 301, 305. There, the individual had to ask for the delivery of "Communist" mail addressed to him. Here, his failure to ask that delivery be stopped is a matter of public record. In *Lamont* the requirement that he ask was held likely to "inhibit" him from accepting the mail. Here, the public knowledge that he does not act (to cut off mail) is as likely to inhibit him from preserving his constitutional right to receive the branded mail. In *Lamont*, the Court recognized that the First Amendment protected the right to *receive* publications and that "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." (309) The listing and labeling requirements of H.R. 10867 would also inhibit this fundamental right. The labeling bill proposed by the President's Commission has the same defects.

Aside from these deterrant effects, Section 4012 imposes a staggering burden on publishers who advertise by mail. The cost of continually revising mailing lists (often rented from publishers or other sources) which contains hundreds of thousands or millions of names is in itself so formidable a bar to the mails as to violate the First Amendment.

Clearly, it would be unconstitutional to prohibit the mailing to adults of nonobscene advertisements (for non-obscene books) because they were objectionable to some recipients, just as it would be unconstitutional to ban the mailing of a political advertisement or circular because its contents were objectionable to some recipients. The mail—and the mailing of unsolicited advertisements—is a fundamental means of communications and expression. For many individuals and groups, it is now the only effective means by which they can afford to communicate with the public. The Supreme Court emphasized this again when it quoted Mr. Justice Holmes' famous statement in support of its decision in *Lamont* v. *Postmaster General*:

"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 tongues. . . ." (*Milwaukee Pub. Co.* v. *Burleson*, 255 U.S. 407, 437)

The rights of publishers and authors to use the mails cannot be restricted on the theory that the first amendment does not protect nonobscene advertisements for nonobscene books and other works that are safeguarded by the amendment. Mail advertising is an essential link in the chain of communication by which books are distributed. It is as essential as wholesale distribution or retail bookselling, which are unquestionably safeguarded by the amendment. Otherwise, the right to publish and the right to read could be made formalities. I submit that advertisements for books are safeguarded by the constitutional guarantees of free speech and free press.

In *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 296, the Court said:

"We are in an area where, as *Shelton* v. *Tucker*, 364 U.S. 479, emphasized, any regulation must be highly selective in order to survive challenge under the first amendment. As we there stated: ' . . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved'."

Section 4012 enacts a means of regulation which "broadly stifles fundamental personal liberties." The constitutionally permissible "end can be more narrowly achieved" as Mr. Cotter testified "by the real effective solution"—"Criminal prosecution of these fellows"—"under the present statute."

STATEMENT OF HORACE S. MANGES, COUNSEL, AMERICAN BOOK PUBLISHERS COUNCIL, INC.

This statement is submitted on behalf of American Book Publishers Council, Inc., New York City.

The council is the national trade association of general book publishers. Its members account for more than 85 percent of the sales of general books, including adult trade books, university press books, technical, scientific and medical books, paperbound books, children's books, and religious books.

H.R. 7375 and H.R. 10867 both provide that the mails may not be used to deliver to a minor under the age of 16 or to an adult with whom such minor resides any matter which depicts nudity, sexual conduct, or sadomasochistic abuse; and is designed primarily to appeal to the prurient interests of the reader, unless solicited by an adult with whom such minor resides.

H.R. 10867 also prohibits, as does title II of postal rate bill H.R. 10877, the mailing of sexually oriented advertisements to any person

who places his name and address on a list to be maintained by the Postmaster General.

We vigorously oppose these three bills.

With respect to the provisions of H.R. 7375 and H.R. 10867 which would prohibit mailing of the matter proscribed thereby to minors under 16, we recognize that they are adapted from the decision of the Supreme Court in *Sam Ginsberg* v. *New York*, 390 U.S. 629 (1968). That case upheld a State statute regulating a face-to-face contact between the bookseller and the minor. Obviously, in such a situation, the bookseller by merely looking at the prospective buyer would usually be aware of whether or not the buyer was likely to be a minor under 16 and so be able to act to protect himself from statutory liability. But this is not possible in the use of direct mail advertisements. Take the situation of a bookseller attempting to sell by direct mail to what he believes in good faith is a group of adults. He may be mailing to a list comprised of subscribers to a magazine aimed at a mature audience or of persons who have charge accounts with a department store. Yet, such lists may also contain the names of some minors, so that unbeknownst to the bookseller he would be violating a statute. This would obviously be unfair.

Further, these bills go beyond the *Sam Ginsberg* case in banning the mailing of any such unsolicited material not only to a minor under 16 but to an adult residing with a minor. Obviously, the intent of the bills is to protect minors but their effect is also to restrict the material which an adult who happens to live with a minor can receive. This group is so substantial as to include a large proportion of the adults in the country. These bills would restrict proscribed advertisements sent to minors or to adults, thus quarantining a large part of the general reading public against advertisements "not too rugged for grown men and women in order to shield juvenile innocence." Mr. Justice Frankfurter, speaking for the Supreme Court in the case of *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957), stated of such a statute "Surely, this is to burn the house to roast the pig."

With respect to the provisions of H.R. 10867 and title II of H.R. 10877 which prohibit mailing of sexually oriented advertisements to persons who place their names and addresses on a list to be maintained by the Postmaster General, these bills take no cognizance of the commercial realities of direct mail advertisements. Such advertising is sent to all names on mailing lists compiled from a number of legitimate sources. It is not now economically feasible for a direct mailer to weed out duplicate names or even the names of persons known to have defaulted on prior direct mail commitments from what is increasingly a computer operation. Under these bills, mailers would be required to remove all names on the Postmaster General's list from their mailing lists to receive advertisements which are not themselves obscene and hence are protected by the first amendment. The applicability of that amendment to advertisements for books is clear, despite the case of *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) which concerned advertising for the commercial exhibition of an old submarine, an activity which is outside the protection of the first amendment. As early as 1878, the U.S. Supreme Court, in the case of *Ex parte Jackson*, 96 U.S. 727, 733 recognized that the constitutionally protected right of freedom to publish was meaningless unless a publisher's right to

freely disseminate his material to the public was also constitutionally protected (See *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938); *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Bantam Books* v. *Sullivan*, 372 U.S. 58, 64, note 6 (1963)). And advertising is obviously one of the most important activities making up the process of dissemination. Moreover, the process of weeding out names under these bills must be continually brought up to date. There is also a requirement for the deletion of names within 30 days after they are added to the Postmaster General's list. The net effect would be to impose an unjustifiable and probably prohibitory expense on constitutionally protected activity and hence would constitute a violation of the mailer's rights, both under the first amendment and under the due process clause of the fifth amendment.

This effect is even more dangerous because of the vagueness of the statutory criteria. A mailer could not know whether or not any particular advertisement would be subject to the bills. He would then have three alternatives—(1) mail an advertisement without regard to the Postmaster General's list and thereby subject himself to possible penalties, (2) got to the expense and inconvenience of removing the names on the Postmaster General's list from his mailing list, or (3) mail only the most innocuous material. Obviously, the third is the alternative most likely to be chosen by any prudent mailer. But that would mean that the practical effect of the bills would be much greater than would appear on their face. First, the mailer would have refused to mail not only matter covered by the bills but matter which arguably might be covered thereby. Second, he would have refused to mail not only to the persons who had objected but to everybody, including those who would welcome such advertisements for nonobscene matter.

The Supreme Court has struck down a number of restrictions, ostensibly, to prevent dissemination of obscene matter precisely because such restrictions have had a chilling effect upon the dissemination of nonobscene matter. *Smith* v. *California*, 361 U.S. 147 (1959); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963).

Further, the enforcement provisions of H.R. 10867 and title II H.R. 10877 are excessive, even assuming constitutionality. Thus, a permanent injunction permitted to be issued under these bills may include a direction to the defendant to refrain from mailing any sexually oriented advertisement not only to a specific addressee but "to any group of addressees, or to all persons." Likewise a temporary restraining order or preliminary injunction to be issued may enjoin the defendant from mailing any sexually oriented advertisement to "any person or class of persons." Accordingly, these bills could prohibit someone from sending a sexually oriented advertisement to anyone, whether or not he objects.

In conclusion, it is our firm belief that the three bills to which we have addressed ourselves are unconstitutional and we urge that they should not be recommended by your committee for enactment. Moreover, we respectfully suggest that before this committee takes any affirmative action on any of these bills it await the submission of the final report and recommendations of the 18-member Commission on Obscenity and Pornography created by the Congress. These are due next summer.

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[From the New York Times, Aug. 7, 1969]

Does Sex Sell? Ask "Penelope Ashe"

(By Henry Ramont)

A new sex-in-the-suburbs success novel. "Naked Came the Stranger," although credited to one author—Penelope Ashe—was put together by 25 writers—all editors and reporters of Newsday.

Although the enterprise was conceived as a parody on bad writing, the book has already sold 20,000 hardcover copies at $5.95 each since it appeared in bookstores during the last two weeks. The paperback rights were sold for $127,500 and 20 producers and directors are competing for the movie rights.

HOW IT ALL BEGAN

The idea originated three years ago with Mike McGrady, a columnist for the Garden City, L.I., newspaper, when he sent the following memorandum to his 4 collaborators.

"As one of Newsday's truly outstanding literary talents you are hereby officially invited to become the coauthor of a best-selling novel. There will be an unremitting emphasis on sex. Also, true excellence in writing will be quickly blue-penciled into oblivion."

Among those who had accepted were William F. McIlwain Jr., Newsday's editor; Gene Goltz, who won a 1965 Pulitzer Prize for reporting and shared in another last year; Harvey Aronson, a feature columnist; Jack Schwartz, a former city editor, and Bernard Bookbinder, a science reporter.

Beyond circulating a number of "style guidelines" outlining the characters and basic plot—the sexual exploits of a radio celebrity, Gillian Blake, in her suburban neighborhood—Mr. McGrady let each of his collaborators develop his own chapter without specific knowledge of what the other had written.

PHYSICAL ATTRIBUTES

Describing Gillian, he wrote: "She is slender, as opposed to voluptuous; think, if you will, of Lauren Bacall, as she appears in 'To Have or Have Not.' "

The 35-year-old columnist also wrote this note: "Four chapters have described Gillian's body in terms of alabaster; two have insisted she is heavily tanned. For future reference: She will be lightly tanned during the summer months; the word 'alabaster' will be appropriate beginning midways through the month of November. Also bear in mind that Gillian Blake is a human being."

Though the initial draft was written in one week—between June 20 and June 27, 1966—the completion of the manuscript was interrupted several times. First, when Mr. McGrady was sent out to cover the Vietnam war (he wrote a series "A Dove in Vietnam," which won him last year's Overseas Press Club award for foreign reporting) and then when he went to Harvard last year on a Nieman Fellowship.

While at Harvard, where he took courses in psychology and sociology and attended a creative writing seminar given by Carter Wilson, Mr. McGrady rewrote the final draft with Mr. Aronson, exchanging the various chapters by mail between Cambridge, Mass., and Garden City.

Mrs. Billie Young, a Long Island housewife and Mr. McGrady's sister-in-law, cheerfully agreed to impersonate Penelope.

In February she took the manuscript to Lyle Stuart, Inc., a small publisher with a big advertising budget who last year helped make Ferdinand Lundberg's "The Rich and the Super Rich," a $15 book, into a best seller.

Mr. Stuart said he was told that the book was a hoax only when Mr. McGrady arrived with Mrs. Young to sign the contract. When he sold the paperback rights to the Dell Publishing Company, he hinted there would be "some cute developments" concerning the book but gave no details.

"I told them this afternoon and they simply laughed," Mr. Stuart added with a chuckle.

Mr. Stuart said yesterday that the promotion budget for the book had already exceeded $50,000. For the last two weeks "Naked Came the Stranger" has been advertised with portraits of some of the authors—still unidentified—impersonating characters of the novel.

On the back of the book is a photograph of Mrs. Young posing as a Penelope Ashe, "a demure Long Island housewife" with an Afghan hound. The portrait

of a young woman's nude back on the cover was posed by an unidentified model.

Meanwhile, Mrs. Young, an attractive brunette who is a freelance writer, has been appearing on television and radio shows as "Penelope Ashe" to boost the book with such deliberate cliché as "A writer's job got to impale his guts on the typewriter."

Mr. McGrady and his 24 co-authors, including five women, will split the royalties wrom the book and the subsidiary rights in equal parts. He said that once the publishers' commission was deducted he doubted if they would get more than $4,000 each. Mrs. Young's financial interest was not disclosed.

"We're thinking of doing a sequal," Mr. Aronson said. "I wanted to call it 'Son of Naked Came a Stranger,' but Mike came up with a better one: 'Stranger Than Naked.' "

[From the New York Times, Jan. 6, 1970]

CENSORS' FOE SEES NEED FOR LIMITS—"DISPLAY OF SEX AND SADISM" CRITICIZED BY MORRIS ERNST

(By Irving Spiegel)

Morris Ernst, the noted civil-liberties lawyer and a long-time opponent of censorship, declared yesterday that he would not choose "to live in a society without limits to freedom."

The 82-year-old Mr. Ernst described the present "display of sex and sadism" both on "the streets and on the stage" as "legal and cheap."

Recalling his defense of James Joyce's "Ulysses," he said: "Whereas I defended the book and legitimatized a four-letter word, that doesn't mean that the four-letter word, out of context, should be spread and used—or sodomy on the stage or masturbation in the public arena here and the world over."

His remarks were made in an interview after a taped appearance last night on the WPIX–TV program "New York Close-Up," at which Robert Moses served as host.

"HUNDREDS OF CASES"

"I have had hundreds of cases in court," Mr. Ernst said, referring to his defense of civil liberties and books, "and I think won them, in part because I made clear to the judge that I would hate to live in a world with utter freedom."

By "utter freedom," Mr. Ernst explained he meant loose moral behavior standards concerning sex on stage and on the streets.

"I deeply resent," he said, 'the idea that the lowest common denominator, the most tawdry magazine, pandering for profit, to use the Supreme Court word, should be able to compete in the marketplace with no restraints."

"I'm not saying where to draw the line," Mr. Ernst said. "I'm not as wise as people who say they'll draw it here or there. I think we should draw it [from time to time] as society constantly changes."

In his championship of literary works in the fight against censorship, Mr. Ernst's legal victories included those in which he won the right of general sale for such books as Dr. Marie Stopes's "Married Love," Radclyffe Hall's "The Well of Loneliness" and Arthur Schnitzler's "Casanova's Homecoming."

[From the Washington Evening Star, May 20, 1969]

ACTORS EQUITY SETS ON-STAGE SEX RULES

NEW YORK (AP).—Actors Equity says actors must be warned before they sign a contract if they will be required to perform nude or engage in simulated sex acts.

Angus Duncan, executive secretary of the 16,000-member union, said yesterday he hoped "hard sex acts, actual sex acts," would be ruled out altogether. But he said Equity would not rule them out, leaving the choice to the individual actor.

Under Equity policy, a producer must indemnify a performer in case of arrest, furnish bail, fines and legal counsel, Duncan said.

A recent wave of bare scenes, both on Broadway and off-Broadway, has discomfited some people.

[From the Washington Evening Star, Oct. 30, 1969]

Obscenity Unit Likely To Offer Useless Report

(By James J. Kilpatrick)

It was not until this past weekend, in the midst of a flight from Kansas City to St. Louis, at a point 33,000 feet above Sedalia, Mo., that I suddenly perceived, with great insight and clarity, why the Commission on Obscenity and Pornography is almost certain to bring in a useless report.

It was at this moment in time and space that I first stumbled over Professor C. Northcote Parkinson's masterful essay on "Directors and Councils, or the Coefficient of Inefficiency," which appears in a collection of the master's works that I had purchased only moments before at the airport. Thus it was that Keats encountered Chapman's Homer; I was as stunned as stout Cortez upon that peak in Darien.

To judge from internal evidence (the work itself is not dated), Parkinson's preliminary conclusions upon the science of comitology must have appeared in the summer of 1953, not long after the creation in April of the U.S. Department of Health, Education and Welfare. This was the tenth department of our government. Ideally, as Parkinson shows, a Cabinet should have not more than five members, which was how the Republic began.

Obedient to those principles of expanding bureaucracy that Parkinson has expounded in other essays, our Cabinet grew to seven, then to nine. Before the Departments of War and Navy were merged into a Department of Defense, the number stood at ten. With that amalgamation, the number gratifyingly dropped back to nine, but Parkinson thought it doubtful that such statecraft could be maintained. How right our master was! The Congress gave us HEW in 1953, HUD in 1965, and Transportation in 1966, bringing the total to twelve and reducing the efficiency of government accordingly.

As Parkinson shows, this is always the case with committees, subcommittees, and committee memberships.

The difficulties that arise from an excessive number of committee members, all of whom must be notified, recorded, marked present, and provided with tablets, are magnified when the members have been specifically and not generally chosen. This is the case with the Commission on Obscenity and Pornography. The total membership is 18, which is dangerously large but not necessarily fatal.

But the act creating the commission provided specifically for psychiatrists, sociologists, psychologists, criminologists, jurists and lawyers, all of whom, in defense of their own specialties, are excessively long-winded. In fifteen months, this commission has returned but one small report.

Parkinson's prophetic insights, drawn from a British point of view, are confirmed by observations on Capitol Hill today.

The Senate has 20 standing committees, three selects and one special. The standing committees range in size from District of Columbia, with seven members, to Appropriations, with 24. It is universally remarked that the D.C. Committee performs with 3.5 times the celerity and effectiveness of Appropriations.

The 23 standing committees of the House range from Internal Security, with nine members, to Appropriations, with 51. Here again, the Parkinson Correlation may be seen. Internal Security (formerly the Committee on Un-American Activities) goes at its work head down, with bull-like dispatch.

It is true that in our system most of the work is done by subcommittees. many of which embrace but three to five members. We should be altogether lost without them. But if Professor Parkinson wishes to examine our Congress at its best, he should marvel at the Senate Subcommittee on Federal Charters, Holidays and Celebrations.

This adjunct of the Judiciary Committee formerly consisted of two members only, Dirksen of Illinois and McClellan of Arkansas. With Sen. Dirksen's death, the subcommittee has attained the irreducible ideal. And it is fair to say, with deference, that its work never has been performed with greater dispatch.

[From the Philadelphia Enquirer, Aug. 7, 1969]

PORNOGRAPHY CALLED TRIGGER FOR DEVIATES

(By Edward N. Eisen)

Pornography on the newesstands is the trigger that motivates the deviate, a national authority on the abnormal sex offender told 300 district attorneys meeting here Wednesday.

And it's a lucrative "racket" involving more than 200 companies in the United States grossing over $200 million a year, said Walter V. McLaughlin, special FBI agent.

BOSTON STRANGLER

McLaughlin, who once trained a squad of 40 police who tracked down the infamous Boston Strangler, spoke at the 20th annual summer conference of the National District Attorneys Association at the Bellevue Stratford.

The Philadelphia-based agent did not attempt to offer any solutions to the growing problem. But he urged more police training to help detect and apprehend the deviate.

CAUSE DOESN'T MATTER

"We are not concerned with the cause that impels him to commit the deed, nor are we concerned with the possible cure," said McLaughlin. "Our responsibility is to protect, to detect, apprehend and present effective evidence in a court of law."

He referred to the deviate as a "walking time bomb of violence" whose needs are triggered by the purveyor of pornography.

[From the Washington Post, June 29, 1969]

PORNOGRAPHY PRODUCER KEEPS SAMPLES FROM STAFF

(By Frank Murray)

LOS ANGELES, June 28 (AP).—Marvin Miller has one unbreakable rule for the 50 employes who print and ship pornographic books at his factory—no free samples.

Even Miller's 16-year-old son, in the mail room sending out books and magazines with pictures that make the Playboy style of nudity look like kid stuff, can't carry home any of the 500 titles.

Miller doesn't want gifts or free-lance sales by his employes cutting into his $10 million annual volume as one of the Nation's major producers of erotic material which he advertises as pornographic but denies is obscene legally.

"I'm in the business primarily to make money," said the graying and bearded Miller at his desk before a map of his marketplace, the United States.

Pornography is big business in America. It's made millionaires of Miller and others. And its made monumental problems for parents and public officials.

An Associated Press investigation disclosed:

About 200 companies in the country produce pornographic books, magazines and films. Their works flood, uninvited, into millions of American mailboxes and through a chain of distributors, onto the shelves of bookstores across the country.

Total sales of pornographic material are staggering. Estimates range upward from $500 million a year, dwarfing the likes of the huge Government Printing Office ($17 million annual sales). Miller says his hottest item, an amply illustrated handbook on intercourse, sold 500,000 copies in a year—or roughly equal to first-year sales of William Manchester's "Death of a President," 1967's best seller.

Postal authorities are swamped with complaints—167,792 in 1968 alone—from people who receive lurid advertising. President Nixon has demanded a law to keep offensive sex ads out of the mails, and 187 bills are pending in Congress to control the tidal wave of pornography.

Since 1957, when the Supreme Court decided the case of Roth vs. U.S., meeting the legal definition of obscenity has been as difficult as holding a greased pig. The Roth decision said that, to be obscene, the dominant appeal of material must be to prurient interest in sex, must affront community standards and must be utterly without redeeming social value.

In the dozen years since that decision, a flood of pornographic mail has inundated American mailboxes.

New court decisions generally have reinforced Roth. Almost any printed material with a story line, no matter how thin, is redeeming to a book of pictures otherwise obscene. And the community standard is being met, the courts have held, so long as others are selling material as explicit and lurid as what you've got to offer.

The latest decision, in a Georgia case, overturned laws forbidding possession of material admitted to be obscene.

". . . The mere private possession of obscene matter cannot constitutionally be made a crime," said the court. "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."

Miller has cashed in on the court rulings. He reprinted the most recent decision as the cover page on his latest catalogue of sex publications. It not only helps sales but, he says, it reinforces "my moralistic point of view: that the establishment shouldn't control the thoughts nor the ways in which people wish to enjoy themselves."

Sales have been good. By his own accounting, Miller went into business three years ago with $25,000. Now, he says, his annual profit is several hundred thousand dollars and his net worth more than a million dollars. Evidence indicates his figures may be conservative. For example, his initial investment in the top-selling sexual manual was $2000, including $1000 to the couple who posed for the photos. His sales so far: $2.5 million or a thousand times his initial investment.

But other business costs run dear. Miller, 40, says he's been arrested 30 times in two years. Last December he was convicted on three counts of mailing obscene matter and sentenced to five years in prison. He's free on bail while he appeals.

In Los Angeles alone, Miller is fighting 54 counts of selling obscene books. He says his legal expenses last year topped $200,000.

Police say that of the more than 200 companies in the erotic sex trade, 75 per cent of them are in Los Angeles and suburbs.

[From the Eagle Magazine]

Winning the Battle Against Smut Peddlers

(By Representative Clement J. Zablocki)

In mid-1965, in an article for *Eagle* Magazine, I expressed my deep concern about the rising tide of pornographic materials which were being made available to our Nation's children by heartless, greedy smut peddlers. My study of the problem at that time indicated that those racketeers were operating wide open because of a reluctance on the part of authorities to attempt prosecution.

Both Post Office and Justice Department officials with whom I conferred seemed loath to press existing obscenity laws in the belief that if cases were appealed to the United States Supreme Court, the defendants would almost certainly be acquitted.

The situation has changed drastically since March, 1966, when the High Court, in two landmark decisions, affirmed the will of the great majority of the American people that our society must not be polluted by lewd and perverted materials.

Not only did the court uphold existing obscenity tests, but it added two new dimensions to the grounds for finding that materials are pornographic.

In affirming the conviction of Ralph Ginzberg, publisher of the notorious *Eros* magazine, the Court majority ruled that titillating advertising which panders to the baser appetites of the audience can be evidence that the material advertised is intended by the publisher to appeal to the erotic interests of his customers.

Second, in the *Mishkin* case, it ruled that material which depicts deviate sexual practices can be considered obscene even though it appeals only to the prurient interests of a sexually deviant audience and not to the general public.

These two rulings have put new backbone in our laws against smut. Authorities are now showing renewed vigor in investigating and indicting the pornography racketeers.

Recently in Sioux City, Iowa, Milton Luros, a Los Angeles publisher, was sentenced to five years in a federal penitentiary and fined almost $100,000 for send-

ing obscene materials into Iowa. The federal district attorney in the case called Luros the "king of the smut dealers" on the West Coast.

The same day, Oscar Roganson, alias Rogy, described by authorities as the operator of one of the country's major "date bureaus" for homosexuals and lesbians, was arrested in Hollywood, Fla., and charged with three counts of possession, distribution and sale of obscene literature.

For months previously, Roganson had operated almost openly from locations in southern California. When I requested that postal authorities take action against him in 1965, they refused on the grounds that Rogy's materials were "borderline" and he could not be prosecuted under existing laws.

The Supreme Court decision in the *Mishkin* case effectively shifted the border and now this man must stand trial.

The events of the past few months have convinced me that the tide is turning against the smut peddlers. This has not occurred by chance but rather because an aroused public in this country made it clear that the decent people are not going to stand by while racketeers undermine the moral fiber of our youth. Undoubtedly this concensus affected the Supreme Court decision.

To assume victory, however, would be premature. For every Ginzburg or Luros convicted, a dozen more continue to operate. If pornography is to be controlled and ultimately eliminated from our society, renewed efforts are necessary.

For that reason I have introduced into the 90th Congress a bill to curb the traffic in mail-order smut through new regulations affecting the buying and selling of mailing lists. These lists are a multi-million dollar a year business. If your child is old enough to sign his name, lick a stamp and mail a letter, chances are he is old enough to be on a list.

Being on a mailing list may bring him a Boy Scout catalog, but it may also bring him a come-on ad for dirty pictures. My bill would attempt to stop such mailings by requiring mailers to keep records of what is sent to whom, records which would be available to postal authorities. Failure to keep records would be punishable by a fine or jail sentence or both.

No mailing can take place without a list, and inspection at the point where the sale or use of lists takes place offers, in my opinion, the most practical means of eliminating pornographic mailings.

The proposal has been endorsed by representatives of the direct mail industry, individuals and groups interested in fighting pornography, and federal authorities, including former Postmaster General John Gronouski.

In Congress, the Senate Subcommittee to Investigate Juvenile Delinquency has now undertaken a study of the links between mailing lists and the traffic in pornography. The Sub-committee has asked me to testify on the problem. In the House, my bill, H.R. 2382, is pending before the House Post Office and Civil Service Committee. It is my hope that Congress will take action on the proposal during the current session.

One thing is clear: The public must continue to express its indignation at the tremendous circulation of pornography in our society and must demand that it be stopped. The Supreme Court decisions have started the job; it is up to us to finish it.

[From the Reader's Digest, November 1969]

A New Plan to Fight Pornography

(By Sen. Everett McKinley Dirksen (R., Ill.))

(Senator Dirksen completed work on this article barely a week before he died on September 7. W are convinced that the objective it espouses—that only juries of local citizens should make the final determination of what is obscene—is not only valid but attainable. The passing of the Dirksen anti-obscenity bill (S. 1077) would, in our opinion, constitute an appropriate memorial to this distinguished lawmaker.—The Editors.)

The United States is overwhelmed with smut. Like some medieval plague, the mounting flow of obscene books, films and magazines surrounds us, threatening our national health. Consider just a few of the symptoms accompanying this plague:

A multimillion-dollar printing factory in Phoenix, Ariz., keeps its presses rolling 24 hours a day, five days a week, turning out 35,000 lewd books each day. A Los Angeles, Calif., smut publisher who went into business just three years ago

with $25,000 capital now grosses over a million dollars annually. A jury recently found two of his books to be hard-core pornography, and by his own admission he is in the business primarily to make money.

● In recent years, the rapidly proliferating sleazy bookstores in cities throughout the nation have added a new attraction: filmed peep shows. For 25 cents, the customer can peer through a slot and watch naked men and women gyrate for a few moments. New York City alone now has some 400 peep-show machines scattered about.

● Books, magazines and sometimes movies now show full genital exposure. Sexual intercourse has been shown in commercially exhibited films which are raking in millions of dollars across the country. Tabloid newspapers with such names as *Screw*, *Pleasure* and the *New York Review of Sex*—with pictures to match—are sold over hundreds of newsstands.

These are far from isolated cases. The business of pornography has reachd such immense proportions that 200 companies are producing hard-core filth, with sales reaching over $500 million a year. Postal authorities are swamped with complaints from citizens objecting to the pornographer's lurid sex ads. In fiscal 1969 alone, 234,692 such protests were registered. A recent Gallup poll showed that 76 percent of the American people insist that tougher laws are needed to keep obscene publications off newsstands.

How did we reach such a state?

For some 12 years, the U.S. Supreme Court has labored to define what may be banned as obscene. In June 1957, the Court handed down a landmark decision in the case of *Roth* v. *United States*. Declaring that the First Amendment guarantees of free speech have never applied to obscene material, the Court held that "obscenity is not within the area of constitutionally protected speech or press."

The test of obscenity, as spelled out in this and later cases, is: Whether to the average person, applying contemporary community standards, the "dominant theme of the material taken as a whole appeals to prurient interest" and is "utterly without redeeming social importance." A key point in the declaration: a book or film must be judged in its entirity, not on the basis of isolated passages.

This legal definition, admittedly not perfect, is at least workable. Unfortunately, the courts—and, too often, the Supreme Court itself—have not permitted it to work. Time after time, juries have sought to apply the Supreme Court's guidelines to a book or movie, only to have their decision on the facts summarily overturned.

Here is a sampling of the most important recent cases:

● A Redwood City, Calif., nudie-film merchant named Sam Ratner exhibited an 8-millimeter strip-film entitled *Honey Bee*. It showed a well-endowed model, clad only in garter belt and stockings, undulating on a couch, moving her hands, torso, lips and pelvis to suggest sexual intercourse. A jury found the film to be pornography, without artistic significance or even a modicum of redeeming social importance. The appellate department of the superior court of California upheld this finding. Yet, incredibly, the U.S. Supreme Court overturned Ratner's jury conviction. Thus, the film was, in effect, declared *not* obscene, and was therefore protected by the First and Fourteenth Amendments.

● In Rochester, N.Y., David E. Keney ran a bookstore featuring what he told customers were called "spicy hot" books. Three of his paperback books carried the titles *Lust School*, *Lust Web* and *Sin Servant*. Their message: detailed descriptions of sexual aberrations of all kinds. A jury found the books obscene. An appellate court agreed with the jury's decision, and New York State's highest court turned down the appeal. Nevertheles, this case was among a group of 26 obscenity-conviction appeals considered by the U.S. Supreme Court during its October 1966 term.

As in the Ratner case, the Supreme Court reversed Keney's conviction. In neither instance was the Court ruling on the legal correctness of the case, but rather was making its own value judgment that the materials involved were *not* obscene. By these declarations, it switched from being a conservator of legal tradition to being a censor of individual books and films—a most unfortunate switch.

In all, the Court reversed the obscenity determinations in 22 of the 26 October-term cases involving material ranging from homosexuality to sadism. With its decisions, the Court overturned the obscenity finding of eight juries and wiped out the attempts of 13 separate states to control the distribution of salacious material.

● In Portland, Ore., newsstand operator Harold G. Childs was arrested for selling a book entitled *Lesbian Roommate*. A Portland jury found the book obscene and convicted Childs. On appeal, the supreme court of Oregon upheld the jury decision, describing *Lesbian Roommate* as "a series of sexual descriptions, tending to and produced solely for the arousal of erotic sexual fantasies."

The U.S. Supreme Court turned down a petition to consider the Childs case. But, just three months later, on June 23, 1969, a federal district judge made a remarkable intervention, granting a writ of habeas corpus to free Childs on the ground that *Lesbian Roommate* was *not* obscene. In his opinion, the book did not appeal to prurient interests, nor did it offend contemporary community standards. By this ruling, a federal judge overruled the judgment of a community jury and of the state supreme court, and made a shambles of that state's efforts to curb smut.

What can be done about this court-approved filth?

The Constitution of the United States provides us with an answer. Article III specifically empowers Congress to make "exceptions and regulations" to the Supreme Court's appellate jurisdiction. Thus, explained *The Federalist*—that historic group of essays written by early supporters of the Constitution—the Legislative Branch "would certainly have full power to provide that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried by juries."

The pornography problem is so grave that Congressional action along such lines is desperately needed. Accordingly, I have introduced a bill (S. 1077) which would, if passed, free juries of local citizens *to make the final determination as to whether a book, magazine or movie is obscene.* In prosecutions under state or federal obscenity laws, the verdicts of juries as to the question of obscenity would *not* be subject to review by federal courts. The Supreme Court could, as always, review the *legal correctness* of any such prosecution, but it would no longer be allowed to look behind the lower court's findings of fact. (My bill would affect appeals to federal courts only, but I urge state legislatures to adopt similar rules for their appellate courts.)

Thus, the people of our *communities* would decide what they think the moral standards under which their youngsters are to be reared should be. This procedure would avoid the dread hand of unreasonable censorship and would be in keeping with the best of American legal tradition. As Judge Learned Hand, one of our greatest jurists, once pointed out: "In this country the jury must determine, under instructions, whether a book is obscene. The court's only power is to decide whether the book is so clearly innocent that the jury should not pass on it at all."

Enactment of my proposal would not foreclose other steps urgently needed to win the fight against pornography. Local prosecutors, police and citizens must redouble their efforts to keep the filth peddlers at bay. The Administration's tough new program to crack down on the smut advertising now being mailed into the nation's homes must be passed. However, laws cannot do the job without the goad of public opinion. In the words of President Nixon: "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."

For my part, I intend to use every means at any disposal to see that my bill is enacted. But I need the backing of an aroused citizenry. Every one of you can help, individually and through civic groups and local organizations, by writing your Congressman and both of your Senators expressing your outrage at the filth now engulfing our land and urging their support of S. 1077. If all of us pull together, *we can win this fight!*

[From Redbook Magazine, January 1970]

A REACTIONARY VIEW OF OBSCENITY AND BRUTALITY

(By Benjamin Spock, M.D.)

(*In this and the next two issues* REDBOOK *is pleased to publish excerpts from Dr. Spock's forthcoming book, his most provocative since the classic* Baby and Child Care. *The book will be published in January by The McCall Publishing Company and is titled* Decent and Indecent: Our Personal and Political Be-

havior. *It is Dr. Spock's prescription for a better world. In it he discusses how men must deal with their self-deceptions if they are to avoid war and neuroses; and for the first time he applies the whole range of his experience to adult as well as to child behavior.*)

For decades I was an uncompromising civil libertarian and scorned the hypocrisy usually involved in the enforcement of obscenity laws. But recent trends in movies, literature and art toward what I think of as shock obscenity, and the courts' acceptance of it, have made me change my position—particularly in view of other brutalizing trends.

Civil libertarians have argued their objections to censorship and to obscenity laws on several bases: that there are no such fixed entities as obscenity or propriety, since interpretations keep shifting with time and place; that under censorship what is honest and morally well-intentioned is apt to be penalized and what is sniggering escapes; that there's no proof that obscenity ever depraved anyone; that if children need protection, it's up to their parents to provide it.

There's considerable truth in all these claims. But they don't touch on any of the positive reasons for obscenity laws or standards.

In the climate of mid-20th-century America, sophisticated citizens and the higher courts have rapidly pushed back the boundaries of what is considered obscene. Very little territory is left for "hard-core" pornography—and the boundary seems hard to determine. In the case of Ralph Ginzburg's publications, the Supreme Court had to rely on the smirking tone of the advertisements in order to decide that lewdness was intended.

The civil libertarians with whom I've argued don't admit that any form of art or entertainment they've seen is obscene or detrimental. But their personal reactions don't erase my doubts, since sophisticated people take pride in refusing to be shocked. However, if pressed, they'll agree that there are certains acts—excretory or amatory, for instance—which they might consider offensive if carried out or crudely depicted in public. This admission—that a citizen's sense of decency can be offended—is the crux of my viewpoint.

To justify legal or customary standards of decency I don't think it should be necessary to prove that adults have committed sex crimes or that adolescents have lost their virtue as a direct result of reading a story or looking at a picture. No single experience will cause that to happen. However, various psychological observations have shown clearly that people's standards have always being modified—sometimes down, sometimes up—by the ethical atmosphere in which they find themselves. This applies to sexual behavior and to violence. Experiments have proved that after viewing films of violence, people become more cruel in their relations with others.

Man raised himself from barbarism by visualizing higher values, inhibiting and sublimating his cruder drives. His values shift, of course, as he gains new insights into the universe and into himself, as his means of existence change and as styles swing. He tries to live up to his values at his better moments, and he tries to buttress them with social and legal codes. These codes are particularly for the benefit of children, because of the sensitivity of their feelings and because of their trust that adults will give them guidance. Codes are also necessary to restrain those adults who have little in the way of standards or self-discipline.

I'd say there is no evidence that the need for such codes has been outgrown. We merely are living in a period when the pendulum of style has swung far—from the emphasis of propriety at the end of the 19th century to the emphasis on tolerance today.

In previous times it was relatively easy for parents with idealistic concepts of sexual love and a disapproval of violence to keep their children from more than accidental exposures to other views (usually those of other children, as most of us remember). Children did not attend theaters unless their parents took them to what was considered suitable. The law and the censor were relatively strict about the books and magazines children say in the neighborhood stationery store.

The situation is different today. The luridness of what is found on newsstands is limited in many places only by the personal ethics of the proprietor. Television delivers progressively cruder dramas in highly realistic form within a few feet of children's noses in their own living rooms. Adolescents from even protective families are allowed to choose their own movies.

Yet in a recent Federal court decision concerning a film about delinquency that depicted "scenes of brutality, prostitution, homosexuality and sodomy," two of the three judges agreed that, although they were "revolted," the film was not

obscene according to the stipulations of the Supreme Court because (1) it was not "designed to appeal to the prurience of the average American" and (2) was not "utterly without redeeming social significance." Another recent film that was not judged to be obscene showed a mother practicing a perversion on her child.

In our so-called emancipation from our Puritan past I think we've lost our bearings about sexuality and brutality. Many enlightened parents still have inner convictions, but are afraid that they don't have a sure basis for teaching them to their children. Some of their children are quite bewildered, as child psychiatrists and school counselors report. Sophisticated justices are afraid of being considered illiberal. (I'm glad that two of them had the forthrightness to say at least that they were revolted.)

I'd sugest that for public presentation there be standards of tolerance or taboo. What is allowed for open display on newsstands and in bookstores—for children as well as for adults to buy—and what is shown on television during children's viewing hours and in theaters open to all ages should be only what average citizens would consider not disturbing to children, not debasing to their ideals. This would not mean that immorality, coarseness or social wrongs could not be indicated, provided this was done in a way that would not crudely shock the average child.

I agree that plays, movies, late-night TV programs, books and magazines should be able to deal seriously or lightly with themes that involve sexuality and immorality—for the purpose of education, catharsis of the emotions, escape or titillation—without harm to adults over 18. I appreciate all these kinds of works. But I think they should be labeled and reserved for adults. To be sure, many an adolescent will see them, but only after taking the initiative in circumventing the law or his parents—which makes the experience have a different meaning for him from what it has if society allows the producer to offer him such material openly. I don't feel that society needs to prevent adults and enterprising youths from ferreting out erotica from the library stacks when that is what they are eager for. The same goes for men's organizations that want to show privately produced movies.

I'd distinguish today a third category of movies, plays, novels, articles, paintings and photographs in which a primary aim is to shock, revolt or embarrass by explicitly depicting sexual intimacies—especially those of a loveless, perverse or brutal kind—and also acts of nonsexual brutality. Most, though not all, of these works are obviously feeble in their artistic or social significance. As I see it, the motivation of such authors and producers—in addition to making easy money—is to experience the same particular pleasure that peddlers of lurid gossip enjoy or that loosely brought up children gain from expounding crude sex "information" to protectively reared children.

I think such works are unhealthy for society because they assult the carefully constructed inhibitions and sublimations of sexuality and violence that are normal for all human beings (except those raised without any morals at all) and that are essential to the foundations of civilization. These taboos explain why human beings seek privacy for their own sexual activity and are embarrassed when they see the intimacies of others and why they are horrified when they view cruelty. This is not to deny that at the same time people have a morbid curiosity in these respects.

The abrupt and aggressive breaking down of inhibitions can be disturbing to a society as a whole and particularly to its children, even if sincere efforts are made to shield the children. This seems riskier when a society already has soaring rates of delinquency and crime, an insatiable appetite for brutality on television and what I consider an unprecedented loss of belief in man's worthiness.

I agree that writers considered great by the test of time have occasionally and discriminately introduced material that shocked, in order to confront people with certain significant social, moral or artistic issues. I agree that a culture like that of late-19th-century America, which had become constricted with prudery and propriety, had to be shocked somewhat in order to be restored to honesty. That is what happened gradually over a half century: judges acknowledged, in effect, in a succession of key cases, that the social, moral and artistic value of certain controversial new works was great enough to overbalance the judges' initial reaction of shock.

But I feel that this past process of rectification was quite different from today's situation. Now it is mainly those writers, artists and producers with little discernible artistic or social integrity who are leading the assault on standards.

And the courts are using as their only criteria for guilt the "appeal to prurience" and the "utter lack of social significance," which are too limited and technical to bar the kinds of material I consider destructive.

Of course I'd be best satisfied if people would decline in such great numbers to support shocking literature and presentations that the producers would give up in discouragement. This is the ideal way to bring about change—without submitting to the arbitrariness of laws and judges.

But it is because I don't believe an overwhelming revulsion is likely to occur for another ten or 20 years that I would now join a majority, if such developed, in favor of new laws that would determine guilt simply on the basis of judges' and juries' sense of shock and revulsion. (I realize that almost no liberals or intellectuals, young or old, would go along with me.) I'd want such laws to specify that they are not intended to discourage the presentation of themes involving immorality, lawlessness, cruelty or perversion (all of which have regularly been dealt with in great literature and art), but only to curb a shocking manner of presentation.

I do realize that what is considered shocking or brutalizing will vary with the times. I admit that the laws I suggest might delay the publication of a future *Lady Chatterly's Lover*, which would be a substantial literary loss in the interval; but any work of artistic worth would be vindicated in the end. I agree that my reasoning is the same that all censors and predictors of doom have used. On the other hand, nations and civilizations have actually disintegrated when their belief in themselves and their adherence to standards were lost.

While I'm confessing my views, I want to add that when writers sprinkle their sentences with obscene words that have no particular connection with the topic, but are added for exclamatory effect, it alienates rather than impresses me. Maybe I'm an exception, but maybe not. There has been a belief since ancient times that trying to strengthen your prose or speech with blasphemies and obscenities weakens it instead. I think this still holds true. What embarrasses me is that these writers give the impression that they think they are being emancipated and sophisticated. Actually this has always been a four-year-old's style. That's the age when children say to each other, "I'll flush you down the toilet," or "You're a pee-pee," and then are convulsed with laughter at how witty and wicked they are.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 399

DANIEL ROWAN, D.B.A. AMERICAN BOOK SERVICE, ET AL., APPELLANTS

v.

UNITED STATES POST OFFICE DEPARTMENT, ET AL.

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Solicitor General, on behalf of appellees, moves that the judgment of the district court be affirmed.

STATEMENT

Appellants have taken this direct appeal, under 28 U.S.C. 1253, from an order of a three-judge district court, convened pursuant to 28 U.S.C. 2284, denying injunctive relief and granting appellees' motion to dismiss the complaint (J.S. 10–11). Appellants herein are, *inter alia,* book publishers and distributors, operators of mail order houses, and mailing-list brokers. All are connected, in one manner or another, with commercial solicitation through use of the mails.

On December 16, 1967, heeding the "[h]undreds of thousands of complaints [which] are received annually by the Post Office Department and individual Members of Congress about the repeated receipt of unsolicited mail which is obscene, obnoxious, or otherwise offensive to the recipient,"[1] Congress enacted Public Law 90–206 (81 Stat. 645), which was subsequently codified as 39 U.S.C. (Supp. IV) 4009. Under Section 4009, effective as of April 15, 1968, any private citizen who receives any "pandering advertisements" offering for sale any materials which he "in his sole discretion believes to be erotically arousing or sexually provocative," may request the Postmaster General to direct the mailer to refrain from further mailings of such materials.[2] Upon receipt of such a request, the Postmaster General is authorized to issue an order prohibiting future mailings of such materials to the designated addressee. Prior to the enforcement of any such order, the mailer has a right to an administrative and a judicial hearing.

During the period following April 15, 1968, various addressees who had received what they considered to be such pandering advertisements of obscene materials from one or another of appellants, notified the Postmaster General of that fact and requested the issuance of the prohibitory orders authorized by Section 4009. Such orders were issued and many are currently outstanding against appellants.

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[1] S. Rep. No. 801, 90th Cong., 1st Sess., p. 37.

[2] The full text of 39 U.S.C. 4009 is set out in the Appendix, *infra*, pp. 11–13.

By complaint filed September 18, 1968, appellants collectively sought to enjoin the Postmaster General from enforcing Section 4009 and to have that provision declared unconstitutional on the grounds, *inter alia,* that insofar as it inhibits the circulation of their advertisements it violates their rights to freedom of speech and press protected by the First Amendment. Appellants also claimed various deprivations of their right to due process in violation of the Fifth Amendment.

The three-judge district court, with one judge concurring specially but without dissent, dismissed the complaint. It concluded, in effect, that Section 4009 merely authorizes the Postmaster General to prohibit mailings of unwanted materials to unwilling recipients, not to the community in general (J.S. App. 6). In the court's view, appellants have no constitutionally protected right to impose their materials on persons who have affirmatively indicated that they desire not to receive them.

ARGUMENT

The district court correctly concluded that 39 U.S.C. 4009 violates none of appellants' constitutional rights. The points raised by appellants are not sufficiently substantial to warrant plenary consideration by this Court. Accordingly, it would be appropriate for the Court to affirm the judgment below summarily.

1. Section 4009 provides a procedure whereby an individual addressee may decide, for himself and his family, to keep from his home pandering advertisements which he considers to be personally offensive and obscene. The addressee may then enlist the aid

of the Post Office Department and the courts in enforcing that determination. Thus, the statute does not invest the Postmaster General with the functions of a public censor; instead, it simply allows him to carry out the wishes of private citizens who do not wish to receive certain types of mail.[3] Indeed, no other feasible way of accomplishing this objective is readily apparent.

The remedy thus accorded private individuals is based upon a simple proposition: the right to speak to the community at large may be made to yield to a citizen's countervailing right to privacy in his own home. Resort to this Court's First Amendment teachings reveals that this proposition is plainly valid.

First, we emphasize the fact that Section 4009 does not purport to authorize any curtailment whatever of the flow of books, pamphlets, pictures or other forms of traditionally protected written materials. The statute authorizes the Postmaster General, upon request, to prohibit future mailings of *pandering advertisements only* (J.S. App. 9); 39 U.S.C. 4009(a). In these circumstances, it is pertinent to recall that, whatever may be the limitations on Congress' right to control the free flow of ideas, The "Constitution imposes no

[3] Under the original, draft version of Section 4009 (H.R. 7977), the discretion to decide which advertisements were "erotically arousing or sexually provocative" (and hence non-mailable to designated addressees) would have been invested, not in the individual addressee involved, but in the Postmaster General. See H. Rep. No. 722, 90th Cong., 1st Sess., p. 125. Substitution of the present statutory scheme was designed to remove any constitutional objection on grounds of censorship by the Postmaster General. 113 Cong. Rec. 28659–28661.

such [First Amendment] restraint on government as respects purely commercial advertising." *Valentine* v. *Chrestensen,* 316 U.S. 52.[4] Compare *Jamison* v. *Texas,* 318 U.S. 413, 417.[5]

But even assuming *arguendo* that appellants' materials enjoy the same range of First Amendment privileges accorded to other forms of expression, that fact would not render Section 4009 unconstitutional. Appellants' right to disseminate their materials would

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[4] As summarized in *Breard* v. *Alexandria*, 341 U.S. 622, 627: "[E]xigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquility of the fireside * * *." And see *Ginzburg* v. *United States* 383 U.S. 463, 474, n. 17, stating: "Material sold solely to produce sexual arousal, *like commercial advertising*, does not escape regulation because it has been dressed up as speech * * *" (emphasis added).

[5] Application of the principles of *Valentine* seems especially justified in the instant case. Section 4009 has the effect of curbing the flow of mail only to those who already have shown that they do not wish to receive it. It scarcely can be claimed that the right to continue to send mail to persons who do not wish to receive it is one of value requiring protection by this Court. Yet, that is the essence of the constitutional right appellants seek to claim here—the right to be wholly unfettered in sending, through the mails, commercial advertisements to those who have indicated a specific aversion to receiving such materials from them. Nothing in this Court's First Amendment precedents, nor in the history of that constitutional provision, recognizes such a right. Nor, apparently, are appellants actually concerned with protecting that right. While framing their papers below in terms of the right of free speech, appellants' supporting affidavits reveal that actually it is not this right which they seek to vindicate. Rather, their principal objective is simply to avoid the costs, imposed as a result of compliance with prohibitory orders issued pursuant to Section 4009, of deleting the names of complaining addressees from their mailing lists (see J.S. App. 21). Thus, appellants invoke the First Amendment to help them keep down the costs of doing business as publishers, distributors, and brokers.

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in no event be absolute, but would have to be exercised so as not to interfere with the countervailing rights of others. See, *e.g., Cameron* v. *Johnson,* 390 U.S. 611; *Poulos* v. *New Hampshire,* 345 U.S. 395; *Feiner* v. *New York,* 340 U.S. 315; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568; *Cox* v. *New Hampshire,* 312 U.S. 569. Indeed, as this Court has said, where the countervailing right involved is the paramount right to the privacy and enjoyment of one's own home, the right to speak must yield. *Breard* v. *Alexandria,* 341 U.S. 622; *Kovacs* v. *Cooper,* 336 U.S. 77; *Saia* v. *New York,* 334 U.S. 558.[6] Cf. *Griswold* v. *Connecticut,* 381 U.S. 479; *Camara* v. *Municipal Court,* 387 U.S. 523; *See* v. *City of Seattle,* 387 U.S. 541.

To be sure, this Court has questioned the community's right to decide beforehand just which speech will or will not be acceptable to all of its inhabitants within the privacy of their own homes. To paraphrase Mr. Justice Black, in such situations involving prior restraint government should not offer to protect the interests of all of their citizens, whether particular citizens want that protection or not. *Martin* v. *City of Struthers,* 319 U.S. 141, 143. At the same time, however, this Court has plainly recognized that, even where the effect is to curtail speech, it is perfectly

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[6] As observed in *Kovacs* v. *Cooper*, *supra*, 336 U.S. at 88, relied upon by the court below:

"The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be unsensible 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* * * *" (emphasis added).

permissible for each resident to make that determination for himself. *Martin* v. *City of Struthers, supra,* 319 U.S. at 142, 147, 148; *Breard* v. *Alexandria, supra,* 341 U.S. at 632–633, 641–645; see *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (Brennan, J., concurring).[7] In *Lamont,* it should be noted, the Court was principally concerned with "a limitation on the unfettered exercise of the addressee's First Amendment rights" (*id.* at 305). Indeed, the Court there impliedly approved a Post Office regulation which, for First Amendment purposes, is identical to the statute here at issue (*id.* at 304, n. 2; 310). Appellants' extensive reliance on *Lamont* is thus misplaced.[8]

As the district court found, Section 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" (J.S. App. 7). Since the right to speak confers no right to intrude on an unwilling listener within the confines of his own residence, appellants cannot complain that Section 4009 has infringed that right.

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[7] Of course, once a resident has chosen to invoke his right to the privacy of his own home, the community is free to see to it that that choice is respected. *Martin* v. *City of Struthers, supra,* 319 U.S. at 148. Cf. *United States* v. *Raines,* 362 U.S. 17, 27; *United Steelworkers* v. *United States,* 361 U.S. 39, 43.

[8] Similarly, *Speiser* v. *Randall,* 357 U.S. 513, on which appellants also rely, does not support their position. There the burden was placed on individuals to come forward and take an oath to support their claim to certain tax exemptions, in circumstances where, the Court concluded, "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech" (*id.* at 519). No such situation exists under the statute here challenged.

2. The district court also properly concluded that Section 4009 deprived appellants of no other constitutional rights.

a. The statute authorizes any addressee to take steps to cut off the flow to his home of "pandering advertisements" which he, in his sole discretion, believes to be "erotically arousing or sexually provocative." Appellants contend that, as thus framed, Section 4009 is void for vagueness. This contention is untenable. Initially, there is nothing intrinsically vague about the foregoing phrases. Indeed, variations of these terms have long been used by the federal courts in obscenity litigation. See, *e.g., Ginzburg* v. *United States,* 383 U.S. 463, 467, 470; *Roth* v. *United States,* 354 U.S. 476, 490, 491.

In any event, appellants can hardly claim injury by reason of vagueness. A statute generally is considered fatally vague only where it exposes a potential actor to some risk or detriment for the performance of particular conduct, without giving fair warning of the nature of that conduct. *United States* v. *Cardiff,* 344 U.S. 174; *American Communications Ass'n* v. *Douds,* 339 U.S. 382.[9]

Appellants, however, run no risks of miscalculation here. See *Boutilier* v. *Immigration & Naturalization Service,* 387 U.S. 118, 123. Even after the entry of a prohibitory order, relating to one or more individual

[9] Of course the risk need not be penal in nature. In the freedom of speech area, for example, one who cannot understand in advance which types of expression have been curbed runs the risk of being unable to disseminate his ideas to the community at large. See, *e.g., Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 684.

addressees, appellants' materials continue to enjoy free access to the remainder of the community. Nor is there any risk of punishment for unwittingly offending a particular addressee. One who has mailed objectionable materials is merely subject to an order to refrain from future mailings of similar matter to the same addressee. And even if the mailer continues to send such materials to that particular addressee, in direct violation of the Postmaster General's order, he is still subject to no sanctions until the Attorney General has first secured a compliance order from a district court. 39 U.S.C. 4009(d). Only at that point does the mailer—already keenly aware of which types of materials, sent to which individuals, have been proscribed—become subject to penalty, *i.e.,* contempt for continued disregard of the order. 39 U.S.C. 4009(e).

b. Appellants' other contentions are equally devoid of merit. There is no problem here of an unlawful delegation of the congressional power to legislate; for it is Congress which has determined which types of mail matter may be barred from the home, *i.e.,* pandering advertisements which the addressee finds erotic or sexually arousing. The addressee's authority to determine when such materials have been received is merely an exercise of discretion under existing law. See *United States* v. *Rock Royal Co-op.,* 307 U.S. 533, 577; *Currin* v. *Wallace,* 306 U.S. 1, 15–16; *Cusack Co.* v. *City of Chicago,* 242 U.S. 526, 529–531. Indeed, since Section 4009 seeks to protect the addressee's right of privacy, the addressee is best suited to decide, at least in the first instance, the situations in which he will invoke the statute.

Finally, appellants have been deprived of no right to due process of the law. Before they can be punished for violating the Postmaster General's prohibitory order they are accorded the right to an administrative hearing, at which point they may establish that they have not violated his order. 39 U.S.C. 4009(d). In addition to this hearing, we view the statute as granting appellants an additional opportunity to present their views during the compliance proceedings before the district court (*ibid.*). This is followed by still a third opportunity at any contempt proceedings which might ensue, at which a mailer may seek to justify his actions. These guaranteed opportunities for a judicial determination of the matter are plainly sufficient to protect appellants' rights and guard against any denial of due process.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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AUGUST 1969.

APPENDIX

39 U.S.C. (Supp. IV) 4009:

§ 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 rebut-

table 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.

APPENDIX

(The correspondence contained herein consists of letters from representatives of various States and local governments. Also included is material from various embassies. The enclosures mentioned herein are, in most instances, retained in the subcommittee files.)

CORRESPONDENCE FROM STATE GOVERNMENTS

STATE OF ALABAMA,
GOVERNOR'S OFFICE,
Montgomery, November 24, 1969.

Mr. THOMAS KENNEDY,
U.S. House of Representatives, Rayburn Building,
Washington, D.C.

DEAR MR. KENNEDY: I have received Mr. Nix's recent letter and the accompanying material resulting from your hearings on anti-obscenity legislation.

As has been the case in other states, Alabama has been deluged with every conceivable kind of pornographic material. I assure you that I endorse wholeheartedly your deliberations in this matter.

Last summer I became quite concerned about the movies which were being viewed at many motion picture theaters in our state, especially the ones at drive-in theaters. Realizing the moral decay resulting from our young people's viewing these films designed solely to arouse prurient interests, we seized films at six theaters located throughout Alabama.

Subsequently, civil actions were filed against us in the United States District Court and injunctive requests were granted. A copy of the order and the Court's opinion is hereby enclosed for your use. Included in the opinion are obscenity statutes pertinent to the case. I am also attaching copies of new statutes passed during a recent regular session of our Legislature which convened subsequent to the seizure of these films.

I trust that this material will be of value to you, and please do not hesitate to contact me if I can be of additional assistance.

With best wishes, I am

Sincerely yours,

ALBERT P. BREWER,
Governor.

OFFICE OF THE GOVERNOR,
STATE HOUSE,
Phoenix, Ariz., December 4, 1969.

Congressman ROBERT C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Thank you for sending me material from your hearing records on obscenity in the mail.

In 1964 the legislature completely revised the Arizona Statutes concerning obscenity to bring them in line with the current supreme court opinions. In February, 1969 a bill was introduced in the senate providing for restrictions on the sale and distribution of pornographic literature to minors under 18 years of age. This bill did not get out of the senate committee during that session. Between the revision in 1964 and the latest introduction in 1969, several bills were introduced in our legislature but none were passed.

Arizona does have a continuing problem with pornography, but I do not think it is as serious here as it is in many states. However, it is a problem that we must continue to deal with.

I completely support your efforts to introduce more legislation controlling pornography.

Best wishes in this endeavor.

Sincerely,

JACK WILLIAMS.

DEPARTMENT OF LAW,
OFFICE OF THE ATTORNEY GENERAL,
STATE CAPITOL,
Phoenix, Ariz., September 10, 1969.

Hon. ROBERT N. C. NIX,
Chairman, U.S. House of Representatives, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

MY DEAR MR. NIX: Your letter of August 14, 1969, has been referred to me by the Attorney General for response.

On June 17, 1969, the United States Court of Appeals for the Ninth Circuit announced its decision in *Spillman v. United States*, Cause No. 23,092. The Court confirmed the conviction of the appellant, who was charged with conspiracy and violation of 18 U.S.C., § 1461. That section provides as follows, so far as it pertained to the *Spillman* case:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; * * * is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, * * *."

The Court observed:

"The main thrust of the appellant's argument is that the prosecution of the appellant violated a policy of the Department of Justice. The appellant pointed out that the United States Department of Justice circulated a memorandum, dated August 31, 1964, to all United States Attorneys which, to quote the United States Supreme Court in Redmond v. United States, 384 U.S. 264, declares:

" 'The memorandum states, in pertinent part, that prosecution for mailing private correspondence which is allegedly obscene should be the exception confined to those cases involving repeated offenders or other circumstances which may fairly be characterized as aggravated.'

"This court cannot inquire into the motives of the United States Attorney for prosecuting this appellant. The United States Attorney must be given wide latitude in order to effectively enforce the federal criminal laws. The policy which the appellant complains of is wholly voluntary in nature and is not founded on case law which would require this court to implement such a policy. Ackerman v. United States, 293 F.2d 449 (9th Cir. 1961); Armijo v. United States, 384 F.2d 694 (9th Cir. 1967), certiorari denied, 390 U.S. 974; 33 S.Ct. 1074; 19 L.Ed.2d 1186 (1968). The cases which the appellant cited involve instances where a dismissal is requested by the United States of America. There has been no such request made by the United States of America in this case.

"The policy complained of by the appellants does not envision prosecution of obscenity offenses committed by sex offenders, repeated violators, or cases involving aggravated circumstances. Unlike the situation in Cox v. United States, 370 F.2d 563 (9th Cir. 1967), the record fails to establish that the film was to be used solely for the amusement of the appellant. Also, the obscene pictures were of individuals who were 'actors' rather than of the defendants. See, Redmond v. United States, supra. The trial court did not err in denying motion for judgment of acquittal made on the grounds that a governmental policy had been violated."

It appears to us that the Congress has done its work well; that legislation is on the books sufficient to deal with the problem; but that perhaps the Department of Justice might be influenced so as to bring about a more uniform and vigorous prosecution of all offenders.

A xerox copy of Arizona Revised Statutes, §§ 13–531 through 13–535 is enclosed for your reference.

Legislation calculated to end the flood of unwanted and unsolicited mail of all sorts would be welcomed by those of us who feel the burden of subsidizing the advertising budgets of those who clog the mails with what is commonly referred to as "junk mail".

In all my life, 50 years, I have received only two letters advertising publications or materials which some persons might regard as offensive. I find myself quite capable of protecting my children from such mailed material without the assistance of either state or federal authority; however, I am unable to protect myself in any way from the expense and annoyance of the constant flood of "junk mail".

Sincerely,

CARL WAAG,
Assistant Attorney General.

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF JUSTICE,
San Francisco, October 29, 1969.

THOMAS R. KENNEDY, Esq.,
Counsel, Postal Operations Subcommittee,
Rayburn House Office Building,
Washington, D.C.

DEAR MR. KENNEDY: This will respond to the letter of the Honorable Robert N. C. Nix, Chairman, Subcommittee on Postal Operations, to Attorney General Lynch dated October 2, 1969 which has been referred to me for reply. You have asked us to comment on the status of our obscenity law and to forward copies of our statutes. We are pleased to do so.

During the past legislative year, the California Legislature substantially revised our obscenity laws. The revisions sought to take advantage of the areas opened to legislation by the decisions of the Supreme Court in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), *Ginzburg* v. *United States*, 383 U.S. 463 (1969), and *Mishkin* v. *New York*, 383 U.S. 502 (1966). Copies of these new statutory provisions which become effective on November 10, 1969, are enclosed.

California decisional law treats both substantive and procedural problems involved in obscenity regulation. We mention several of the more significant cases, considering the substantive area first. In *Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152, 10 A.L.R. 3rd 707 (1963), the California Supreme Court held that our statutes only prohibit the distribution of "hard core pornography." Later, in *People* v. *Noroff*, 67 Cal. 2d 791, 63 Cal. Rptr. 575, 433 P. 2d 479 (1967, the Court concluded that nudity alone without the portrayal of sexual activity could not be proscribed under the First Amendment. Thus, graphic photographs emphasizing and focusing upon genitalia but not depicting overt sexual activity have been found non-obscene. *In re Panchot*, 70 A.C. 109, 73 Cal. Rptr. 689, 448 P. 2d 385 (1968). Moreover, our statutes have been interpreted to prohibit only possession with intent to distribute. "Mere possession" is not a crime. *In re Klor*, 64 Cal. 2d 816, 51 Cal. Rptr. 903, 415 P. 2d 791 (1966). The Court has also held that the contemporary community standard by which allegedly obscene matter is to be judged is the standard of the People of the State of California as a whole, not of any lesser geographical area or political subdivision nor of the nation as a while. *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535 (1968).

Of considerable current interest is a case presently pending before the California Supreme Court in which the Court asked counsel to submit supplemental briefs on the meaning of *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Defense counsel in California are now contending that *Stanley* signals a new change in direction for constitutional law in the obscenity area. They vigorously assert that *Stanley* must be read to stand for the proposition that the only legitimate areas in which states may constitutionally regulate commercial distribution of pornographic material is in the area of sale to minors (the immaturity theory) or under circumstances where such material is foisted upon an unwilling audience (the nuisance rationale).

The argument stems from *Stanley's* extension of the First Amendment's protections to private possession of obscene matter which, they believe, represents a retreat from the position taken in the *Roth-Alberts* cases that obscene material is beyond the protection of the First Amendment. *Stanley* holds that private possession of obscene matter is protected. Since one can now possess obscene matter in the privacy of his own home, it is argued that there must be a correlative right to obtain obscene matter. Likewise, since there is a right to obtain such material, there must be a right in someone to produce it and to distribute it so long as it is not done in a manner which offends persons who do not wish unwillingly to be exposed to such matter or in a manner which would permit it

to fall into the hands of the immature who may be harmed by exposure to it. Whether the Court will accept this neatly syllogistic argument is anyone's guess. The same argument, however, is being advanced in attacks upon our obscenity statutes before three-judge federal courts in both Northern and Southern California. We understand that a similar attack was successful in a case arising in the Northern District of Texas.

Turning now to the procedural aspects of our decisional law, we find ourselves enmeshed in considerable litigation at the present time over whether there is a requirement for a prior adversary hearing before allegedly obscene material can be seized. It has been clear for some time that officers may not make a seizure incident to an arrest, but must first obtain a search warrant. *Flack* v. *Municipal Court*, 66 Cal.2d 981, 59 Cal.Rptr. 872, 429 P.2d 192 (1967). The only exception recognized was a legitimate emergency. However, since the *Flack* decision, lower federal courts in California have held that even a detailed affidavit in support of a search warrant is an insufficient basis for a seizure. The District Court for the Northern District of California has held that purveyors of pornographic material must be afforded an opportunity to litigate the question of whether material is prima facie obscene before a seizure can be made. Our state appellate courts had ruled to the contrary. *People* v. *DeRenzy*, 275 A.C.A. 419, 70 Cal.Rptr. 777 (1969). However, a single federal judge has seen fit to overturn this decision. His ruling is being appealed to the Circuit Court of Appeals for the Ninth Circuit.

California has a requirement that contemporary statewide community standards must be proven through the use of an expert witness. *In re Giannini, supra.* We do not believe, however, that this rule was constitutionally required. Hence we sought and successfully obtained a legislative reversal of that requirement. A copy of the statute obviating this rule is also attached. It, too, takes effect on November 10, 1969.

Another area is currently the subject of considerable controversy and litigation in this state. This is the whole field of obscene live performances. The *Giannini* case held that "topless" dancing in a night club was a form of "expression" to which First Amendment protections were applicable. Another case presently pending before our high court raises the issue of whether a lewd act committed during a theatrical performance can constitutionally be the subject of a prosecution outside of the First Amendment protections.

There are many other aspects of our decisional law which are of lesser significance and do not seem important enough to mention in the confines of this letter. But we trust the foregoing will be of some assistance to you. Should you desire further information, please do not hesitate to call upon us.

Very truly yours,

MICHAEL J. PHELAN,
Deputy Attorney General.

STATE OF COLORADO,
Executive Chambers,
Denver, January 12, 1970.

Mr. THOMAS KENNEDY,
Subcommittee Counsel,
U. S. House of Representatives,
Washington, D.C.

DEAR MR. KENNEDY: At the request of Representative Robert N. C. Nix, I submit the following statement on the problems of obscenity in Colorado. My comments are predicated on my belief that the inconsistencies of the Supreme Court decisions in specific cases since 1957, these decisions have never changed the basic premise that obscenity is not constitutionally protected; that obscenity laws exist because of the recognition by the courts that the distribution of obscenity in a community is harmful to the pubic morality and thus the greater good of the community at large transcends any right of a person to disseminate what he wishes.

This premise was mirrored in the 1957 case of *Roth* v. *U.S.* when the high court stated:

"The unconditional phrasing of the 1st Amendment was not intended to protect every utterance . . . all ideas . . . having even the slightest redeeming social value have the full protection of the guarantee . . . but implicit in the 1st 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 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 . . ."

My information is that our experiences in Colorado with sex oriented materials is quite similar to the experience of other states and major metropolitan areas. In the past two years there has occurred a many fold increase in the dissemination of sex oriented materials, i.e. magazines, books, photographs, drawings, movies, and so forth. A few months ago, the Denver Post carried an article wherein a survey estimated that these materials, valued at approximately five million dollars, were being disseminated annually in the metropolitan Denver area. Law enforcement agencies, especially in Denver, now receive complaints almost every day from concerned citizens protesting the flood of pornographic or otherwise sex oriented materials into the community. At least an equal number of complaints are related to the unsolicited receipt of sex oriented advertisements through the mail. Although a warning will sometimes be printed on the outside of the envelope concerning the nature of the materials inside, there is almost no way to totally prevent these materials from reaching children or teenagers.

One of the most disconcerting problems has been the change in the movie fare presented in many of the so-called "neighborhood" theatres. Theatres which in the past have catered to "family" fare now exhibit movies of a nature quite similar to a "stag" movie. Their explanation generally is that because of television, etc. they cannot make money by playing only family fare unless it is a Walt Disney or similar movie, and since the vast majority of the movie-going public is under the age of thirty, they can only make money with a sex or violence oriented movie.

The Colorado Legislature passed a new obscenity law which went into effect on July 1, 1969. Prior to that time, the dissemintaion of obscenity had been infrequently prosecuted under a law which was of questionable constitutional validity. The new law was divided ito two parts, i.e. an adult law and a minor's law. The main difference between the two laws is the difference in the burden of proof wherein material that could not be deemed obscene for an adult could be deemed "harmful to minors". The minors law is patterned, of course, after the pertinent New York statute.

Subsequent to the date the law took effect, the Denver District Attorney brought two civil actions against two different movies and nine criminal actions against nine different book dealers. Both civil actions were dismissed because of procedural defects in the statute. Both of these cases are now being appealed to the Colorado Supreme Court. The nine criminal actions are still pending with trials commencing around February first.

I believe that in the main the new law is sufficient, but there are obviously some procedural aspects of the statute which are vague and violate due process in the minds of some judges. Of course, the drafting of an air tight statute has been made more difficult by the fact that the U.S. Supreme Court, in the vast majority of cases, has been unable to reach a majority decision. There is no question that the drafters of obscenity laws, as well as the lower courts themselves, are confused as to just what the Constitution prescribes, and the precise procedures by which obscenity may be regulated and prohibited. It seems very important to me that the U.S. Supreme Court clarify their past decisions as soon as possible, in order to give guidance to those who must administer these laws.

Sincerely,

JOHN A. LOVE.

33-407 O—70—pt. 2——16

THE STATE OF COLORADO,
DEPARTMENT OF LAW,
OFFICE OF THE ATTORNEY GENERAL,
Denver, Colo., August 19, 1969.

Hon. ROBERT N. C. NIX,
U.S. House of Representatives,
Subcommittee on Postal Operations, Washington, D.C.

DEAR CONGRESSMAN NIX: I am enclosing a copy of Senate Bill 59 which was passed in the last session of the Colorado General Assembly. This Act embodies the present law of the State of Colorado relating to porngraphy.

Since the law is of recent origin we have neither enforcement nor practical experience to pass on to you. However, the statute is presently under attack in the District Court in and for the City and County of Denver following actions taken by the District Attorney.

I suggest perhaps you may wish to contact James D. McKevitt, who is the District Attorney for the City and County of Denver. It was largely through Mr. McKevitt's efforts that the Assembly adopted Senate Bill 59. Perhaps he will be able to expand upon the subject on the basis of his own experience. His address is West Side Court Building, Denver, Colorado 80204.

Very truly yours,

JOHN P. MOORE,
Deputy Attorney General.

STATE OF CONNECTICUT, EXECUTIVE CHAMBERS,
Hartford, November 13, 1969.

Mr. THOMAS KENNEDY,
Rayburn Building,
U.S. House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: In response to the inquiry received by General Dempsey from Representative Robert N. C. Nix, I am enclosing a copy of Special Act 252 of the Connecticut General Assembly's 1969 session.

The duties assigned to the special Commission created by the act, as outlined in Section 2, indicate that it will be developing information which would be of interest to the Subcommittee on Postal Operations.

The chairman of the Commission is State Representative William E. Strada, Jr., a Stamford attorney.

Since our General Assembly is not now in session, I would suggest the use of Representative Strada's office address (750 Summer Street, Stamford, Connecticut) or his home address (8 Hickory Drive, Stamford), should you wish to communicate with him.

I have no basis on which to assess the extent to which the mass mailing of pornography presents a problem in Connecticut, although I can report that this year, for the first time, several residents of the State have sent to this office examples of pornographic advertising received from California based concerns, and our State Police report that a number of similar communications have reached them.

Also, of course, the fact that the General Assembly saw fit to adopt Special Act 252 is an indication that the problem is one meriting concern here.

Sincerely,

GEORGE MACKIE,
Special Research Assistant.

STATE OF CONNECTICUT,
ATTORNEY GENERAL'S OFFICE,
Hartford, August 21, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the
Committee on Post Office and Civil Service,
Washington, D.C.

DEAR CONGRESSMAN NIX: I have your letter to the Attorney General dated August 14. 1969 which I have forwarded to the Honorable John P. Evans, Chief Prosecutor of the Circuit Court of this State, from whom I am sure you will

hear in due course. Mr. Evans has an office at Amity Road, Woodbridge, Connecticut.

Very truly yours,

T. F. GILROY DALY,
Deputy Attorney General.

STATE OF CONNECTICUT,
CIRCUIT COURT,
OFFICE OF THE CHIEF PROSECUTOR,
Woodbridge, Conn., September 15, 1969.

Re: Subcommittee hearings on mailing of obscene material.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
U.S. House of Representatives, Washington, D.C.

DEAR SIR: Your letter of August 14, 1969, addressed to Hon. Robert K. Killian, Attorney General, State of Connecticut, has been referred to this office.

Prosecutions of obscenity cases in this State are usually initiated in the Circuit Courts which have misdemeanor jurisdiction and jurisdiction over felonies where the maximum penalty to be imposed is not to exceed one year of incarceration. Over the past few years our Circuit Court prosecutors have been flooded with obscenity complaints from members of local policing agencies, parents, and other concerned citizens. Because of the serious constitutional problems often posed in obscenity prosecutions, this office is constantly receiving inquiries from our prosecutors concerning the procedures to be followed.

A principal problem has concerned the requirement of an adversary hearing prior to any seizure. Cases in which the police and local prosecutors did not avail defendants of such prior hearings usually ended up as the subject matter of a civil injunction proceeding in the federal District Court. However, in most of these instances we were able to secure orders (in some cases by stipulation) requiring production of the obscene material for purposes of a subsequent adversary proceeding or for the criminal trial. However, these orders were based on decisions of a few federal Circuit Courts of Appeal and not on a specific Supreme Court authority. Thus, it would be helpful, we think, if there was a federal statutory scheme embracing a procedure for a prior adversary hearing which the states could model and imitate.

On the substantive question of obscenity, our state judges and prosecutors have much difficulty with the application and interpretation of the *Roth* standard. The principle difficulty, I believe, relates to the third requirement of the *Roth* test, that is, that the material be "utterly devoid of social value." This enlargement of the *Roth* test, effectuated by the opinion in *Memoirs v. Attorney General*, 383 U.S. 413 (1966), constitutionally protects, as a practical matter, almost all offensive and objectionable material. However, we have attempted to impress upon our courts the Supreme Court decisions in *Ginzberg v. United States*, 383 U.S. 463 (1965), and *Mishkin v. New York*, 383 U.S. 502 (1966). These cases would appear to allow the trier to consider the purpose and manner of the distribution and advertisement of obscene material in applying *Roth*. However, most of our local courts are confused with the obscenity test as it is set down in the *Roth* and *Memoirs* cases. Therefore, these courts are most reserve in ruling any material obscene as a matter of law.

There can be no question that the "utterly without redeeming social value standard has caused most, if not all, of the confusion among our local judiciary. It is interesting to note that of the three Justices who wrote the Opinion of the Court in *Memoirs*, which added to *Roth* this third requirement, only one remains, that is, Mr. Justice Brennan. Thus, perhaps a less restrictive and more workable legal definition of obscenity will emerge from the *Berger* court. We certainly hope so.

We believe that much more, even at this time, could be done by Federal authorities in regulating and preventing the mailing of obscene material into Connecticut. I am enclosing a very small sampling of the voluminous collection of unsolicited filth which has resulted in complaints to this office. It is our opinion that these enclosed documents clearly demonstrate that the material is being created and exploited entirely on the basis of its appeal to prurient interests within the purview of the *Ginzberg* decision. It is, thus, not entirely clear to us why the mailers of this material are not being prosecuted under the federal obscenity statute, Title 18, U.S. Code, Section 1461.

I note from the third paragraph of your letter that an anti-pandering provision is being considered as a possible answer to this problem. In our opinion, a statute which allows recipients of unsolicited mail to contact postal authorities and thus terminate deliveries merely benefits the smut peddlers as it avails them of an easy means of updating their mailing lists. In considering such a statute you refer to the definition of obscenity set forth in the New York statute as it was upheld by the Supreme Court. However, in *Mishkin* the high court considers the New York definition of obscenity as equal to, if not more restrictive than, the *Roth* definition.

Your letter requested our opinion as to the effect of obscenity on society and individuals. It is our belief that the dissenting opinion of Mr. Justice Clark in the *Memoirs* decision, supra, 383 U.S. at page 441, 451, 452, presents an accurate, persuasive, and compelling statement on the adverse social effects of obscenity.

I am enclosing herewith copies of the obscenity provision of our recently enacted penal code. This statute becomes effective October 1, 1971.

It is hoped that the information herein will be of some assistance to you. If we can do anything further please contact us.

Very truly yours,

JOHN F. MULCAHY, Jr.,
Deputy Chief Prosecutor, Circuit Court, State of Connecticut.

STATE OF DELAWARE,
EXECUTIVE DEPARTMENT,
Dover, November 17, 1969.

Mr. THOMAS KENNEDY,
Subcommittee Counsel, Rayburn Building, U.S. House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: In response to Congressman Robert N. C. Nix' letter of November 4, 1969, to Governor Peterson, I am enclosing a photocopy of the Delaware law on obscenity and obscene literature. In my opinion, this law does not go far enough and should be expanded to incorporate the features of the New York law upheld in recent U.S. Supreme Court cases. I am also enclosing a copy of a proposed city ordinance in the City of Wilmington dealing with obscene literature. It is being offered to the City Council there to correct the inadequacies of the State law.

I know that there is an increasing concern among the legislators about obscenity, pornography, and the status of our present statutory law. I would like to state that before I came to this job I was a member of the State's Attorney General's Office, and we received a great number of complaints from private citizens about pornographic literature, solicitation for pornographic literature and obscene movies. It is my opinion that, with the highly restrictive rules which the U.S. Supreme Court has placed on state laws and state prosecutions, the problem is better handled through tighter and greater federal legislation.

The vast majority of this material is sent through the mail or is shipped as interstate commerce, and it seems to me that it would be a lot easier to stop the problem at its source rather than requiring 50 suits by each state, which consume time, cause unnecessary publicity and in many cases achieve no results. A great many of the solicitations for pornographic literature, which in no way are anything but the worst of obscenity, come from California, Georgia and New York. The warning on the envelopes for such solicitations, that no one under 18 should open the envelope, has to be the most ridiculous statement contained on any piece of mail. I realize, of course, that the customs and postal authorities are faced with many of the same restrictions that are placed on the states, but how can a state stop imports and the United States Mail?

I would hope that something could be done to put an end to this filth in the mails, but I believe that obscene movies may have to wait until the public shows by its pocketbook that it does not want to see these movies. This latter point, however, should not deter appropriate action in legislation.

If you desire any further information or comments, please do not hesitate to contact me.

Yours truly,

JEROME O. HERLIHY,
Counsel to the Governor.

STATE OF FLORIDA,
DEPARTMENT OF LEGAL AFFAIRS,
THE CAPITOL,
Tallahassee, Fla., December 17, 1969.

Hon. ROBERT C. NIX,
U.S. House of Representatives, Subcommittee on Postal Operations, Washington, D.C.

DEAR CONGRESSMAN NIX: Thank you for your request concerning the laws dealing with obscenity.

In the 1969 session of the Florida legislature Chapters 69–10 and 69–41 relating to the exposure of minors to harmful motion picture exhibition or presentation and prohibiting the exposure of juveniles to harmful literature and materials were enacted, copies of which are enclosed. I believe that these statutes conform to recent decisions of the Federal courts and, hopefully, any action taken by Florida enforcement authorities will be upheld by the judiciary.

I am enclosing a copy of Chapter 847, Florida Statutes, relating to obscene and lewd literature together with a copy of an opinion of the Supreme Court of Florida of May 7, 1969 (State vs. Reese, 222 So. 2d 732), sustaining the validity of portions of Chapter 847, Florida Statutes.

There has been an upsurge in the sale of raw pornography that requires concerted opposition at both the local and Federal levels.

Sincerely,

EARL FAIRCLOTH,
Attorney General.

THE DEPARTMENT OF LAW,
STATE OF GEORGIA,
Atlanta, August 2, 1969.

Hon. ROBERT N. C. NIX,
Subcommittee on Postal Operations,
Rayburn House Office Building,
Washington, D.C.

DEAR REPRESENTATIVE NIX: This will acknowledge receipt of and reply to your letter dated August 14, 1969, in which you inquire about the law on obscenity in Georgia and the problems encountered by local district attorneys in enforcing this law.

As the result of the definition of obscenity by the United States Supreme Court, the definition in Georgia is the same as it is, presumably, nationally. The legislative history of obscenity statutes in Georgia has reflected an almost annual concern with revising the statute so as to make it conform with the latest enunciations of the United States Supreme Court. Both the 1968 and 1969 Sessions of the General Assembly saw the passage of statutes specifically aimed at controlling the distribution of obscenity to minors.

I believe that a fair assessment of the major problems encountered by Georgia district attorneys in enforcing the obscenity statute relates to the apparent difference of opinion which exists between the people of our community and the Court concerning the obscenity of a specific work. To put it bluntly, it appears that the individual members of the "community" have a more conservative approach to what is acceptable than do those who ultimately decide what is acceptable by the community. It appears almost invariably that the submission of material to a jury results in a conviction. Georgia's appellate decisions in the past several years have been few, but convictions based upon obscenity determinations by trial juries have invariably been affirmed in the Georgia Supreme Court. Appellate review of the decisions of the Georgia Supreme Court by the United States Supreme Court in the past three years has resulted in reversal of the Supreme Court of Georgia. Georgia's experience has apparently been quite similar to that of other states.

Very truly yours,

ARTHUR K. BOLTON,
Attorney General.

STATE OF IDAHO,
OFFICE OF THE GOVERNOR,
Boise, November 13, 1969.

Hon. ROBERT N. C. NIX,
Chairman, U.S. House of Representatives, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, Washington, D.C.

DEAR CONGRESSMAN NIX: I appreciate the efforts of your subcommittee on postal operations of the U.S. House of Representatives to protect American homes from mass mailings of pornography.

In the State of Idaho, in recent months the volume of unsolicited mail advertisements for what is obviously obscene and pornographic material has been on a sharp increase. My office is receiving numerous complaints from irate Idaho citizens who have received such mailed advertisements and in many instances their children have received them. I have forwarded these complaints on to the U.S. Post Office for whatever appropriate action that Department can take. The people of my State are upset about the use of the mails for distribution of this filthy material and I'm certainly glad that your committee is giving attention to this problem.

In your letter to me, you asked for a report from Idaho on the current status of state anti-pornography law and our attempts to deal with this problem on the state level. I am enclosing for your information, a copy of an issue of the criminal law newsletter published by our Attorney General's office, dealing with the current status of Idaho anti-obscenity law as it applies to juveniles and adults. You will note that the 1969 session of the Idaho Legislature enacted a new anti-obscenity statute applying to juveniles. A juvenile is defined in the act as a person under the age of 18. In my opinion, this new statute is a good strong one, drafted as carefully as our lawyers could draft it in light with recent court decisions on this subject. As the Attorney General's report mentions, this statute has not yet been tested in the courts. However, it has had the effect of causing movie house operators in particular to be very restrictive on admitting youths under the age of 18 to movies that might be covered by the provisions of the act. Many movie houses are carefully checking identification. It is difficult to say whether it has had a similar effect on printed material.

You will also note that current Idaho anti-obscenity law as it applies to adults is in a state of confusion, and in the opinion of many prosecuting attorneys unenforceable. Additional attention will be given to this matter by forthcoming sessions of the legislature.

To the best of my knowledge, there have been no recent published surveys or studies completed in the State of Idaho on the problem of obscenity. I will be glad to submit to you any such information that we can find and any action taken in the near future on this subject by the Idaho legislature, city ordinances, etc.

I am very interested in being helpful to your committee and do hope that what I have been able to supply will be of some assistance in your deliberations.

Best wishes.

Sincerely,

DON SAMUELSON,
Governor.

STATE OF IDAHO,
OFFICE OF THE ATTORNEY GENERAL,
Boise, October 14, 1969.

Attention: Mr. Thomas R. Kennedy, Postal Operations Subcommittee.

Hon. ROBERT N. C. NIX,
U.S. House of Representatives,
Rayburn House Office Building, Washington, D.C.

DEAR SIR: This office is in receipt of your recent letter wherein you pose questions in regard to Idaho statutes pertaining to obscenity. You specifically request comment on the state of the obscenity law in Idaho. Perhaps the best answer to this question is that laws pertaining to obscenity are in a state of flux. The following comments will attempt to clarify this statement.

The Idaho Legislature in its last legislative session enacted House Bill 342. This bill is concerned with prohibiting pandering or purveying obscene materials to minors. It is directed toward those of the age of 18 years or under. This law has not, as of this date, been subject to court test. In view of recent United States Supreme Court decisions, it is this writer's opinion that House Bill 342 would be upheld as constitutional and does provide effective protection so far as those of the age of 18 years and under are concerned.

The other Idaho statutory law pertaining to obscenity is found in Chapter 41, Title 18, *Idaho Code*. These provisions are impliedly repealed by House Bill 342 insofar as they relate to minors. They are, however, the only existing legislation proscribing obscenity applicable to adults. This statute is, in this writer's opinion, unenforceable in that it authorizes the seizure of allegedly obscene materials without compliance with certain procedures currently required as a result of recent Supreme Court decisions. The section I refer to in this instance is Section 18–4102, *Idaho Code*. The prohibitions contained in Section 18–4101, *Idaho Code*. may well be enforceable provided current constitutionally required procedures are adhered to.

A summation, then, of the current state of obscenity laws in Idaho should divulge the following:

(1) the law pertaining to minors is effective and enforceable.

(2) the law pertaining to adults is subject to question in light of recent United States Supreme Court decisions.

I hope this information will be useful to you.

Very truly yours,

RICHARD GREENER,
Assistant Attorney General
(For the attorney general).

STATE OF INDIANA,
ATTORNEY GENERAL,
Indianapolis, September 3, 1969.

Hon. ROBERT N. C. NIX,
U.S. House of Representatives, Subcommittee on Postal Operations, Washington, D.C.

DEAR REPRESENTATIVE NIX: The following is in response to your communication of August 14, 1969, requesting the status of obscenity prosecutions and anti-obscenity legislation in this state.

Enclosed you will find copies of existing legislation including new and amended legislation as passed by the 1969 Indiana General Assembly on the subject of control of obscenity and pornography. However, it should be noted at this time that the Indiana Attorney General's Office has rather limited contact with actual prosecution in this area. Our office only becomes actively involved if an appeal in such a case should reach the Indiana Supreme Court, at which time our office assumes the duty of presenting the State's prosecution.

However, indirectly this office does have a role in determining the ultimate form of such legislation, as such is reviewed for constitutionality and form before signature by the Governor. Also this office takes every opportunity to aid county prosecutors when they request such aid. We also attempt to aid outside agencies and commissioners whenever called upon to do so. For instance, in responding to recent questionnaires from the Commission on Obscenity and Pornography.

However, as far as recommending legislation or providing information as to the effects of "obscenity on society and individuals" as mentioned in your letter, this office lacks the data and information to be of empirical assistance at this time. Such insight could better be obtained and a more meaningful evaluation gained by inquiry at levels directly participating in prosecution and enforcement of our existing regulations, such as by contacting individual county prosecutors.

Yours truly,

THEODORE L. SENDAK,
Attorney General of Indiana.

DEPARTMENT OF JUSTICE,
September 9, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE NIX: Thank you for your letter of August 14, 1969, which indicates that you and your subcommittee are taking steps to curb the operations of smut merchants.

I have enclosed a copy of the Iowa law which purports to make illegal certain conduct and "obscene material."

Previous to this administration, the Attorney General's office handled obscene materials cases only on appeal. However, this office has a policy of investigating, preparing and actually trying or participating in the trial of such cases.

In the past year this office has prosecuted or helped prosecute nine individuals under § 725.1, Code of Iowa, 1966, a copy of which is enclosed. The lower court convictions are now on appeal. We have also investigated and are presently in court on a case involving §§ 725.4, 725.6 and 725.8 of the enclosed law.

Whenever obscene material is sent into the State of Iowa from another jurisdiction, and such material comes to our attention, we immediately notify postal authorities, the U.S. District Attorney and the proper authorities in the jurisdiction from which the material was mailed or delivered.

It is our belief that this office is capable of handling obscene material problems when they originate and are confined to our jurisdiction. However, this state cannot effectively control materials coming into the state from other jurisdictions.

It is the position of this office that if the federal government attempts to regular smut merchants in the manner in which you indicate, that many states may assume that the federal government is prepared and willing to shoulder the responsibility for almost complete control of the area. If such is not the case, then any laws considered by your subcommittee should outline in detail the areas of responsibility for the postal authority, and the procedures by which state and local authorities may ask for and receive assistance.

We are most anxious to receive any material your subcommittee may be able to provide concerning new laws and methods of effectively controlling obscene materials.

Very truly yours,

RICHARD C. TURNER,
Attorney General of Iowa.

STATE OF KANSAS,
OFFICE OF THE GOVERNOR,
STATE CAPITOL BUILDING,
Topeka, Kans., November 25, 1969.

Hon. ROBERT N. C. NIX,
U.S. Representative.
Washington, D.C.

DEAR CONGRESSMAN NIX: Thank you for your recent letter in which you requested information regarding obscenity in Kansas.

Currently, the Judiciary Committee of the Kansas Senate is conducting hearings on this matter; however, there is no information available at this time.

As information is made available, or as studies are completed, I will forward the information to you.

If I can be of further assistance, please do not hesitate to contact me.

With every good wish.

Yours sincerely,

ROBERT DOCKING,
Governor of Kansas.

STATE OF KANSAS,
OFFICE OF THE ATTORNEY GENERAL,
Topeka, Kans., September 18, 1969.

Attention: Mr. Thomas Kennedy, Rayburn House Office Building, Washington, D.C.

Hon. ROBERT N. C. NIX,
U.S. House of Representatives,
Chairman, Subcommittee on Postal Operations,
Washington, D.C.

DEAR REPRESENTATIVE NIX: In reply to your letter of August 14 we are enclosing a copy of Sec. 21–4301 of the Revised Kansas Criminal Code which takes effect on July 1, 1970.

We are glad to see that steps are being taken to halt use of the mails for distribution of obscene solicitations. This is an area in which the abuse is great and in which the states are not really capable of adequate enforcement.

We hope this will be of assistance.

Very truly yours,

KENT FRIZZELL,
Attorney General.
RICHARD H. SEATON,
Assistant Attorney General.

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE ATTORNEY GENERAL,
Frankfort, September 9, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
U.S. House of Representatives, Washington, D.C.

DEAR MR. NIX: In answer to your recent letter requesting this office to comment on the Kentucky law dealing with obscenity, you are advised that in 1966 the Kenutcky Legislature enacted the "model" statute on obscenity which is now compiled as Section 436.101 of the Kentucky Revised Statutes. A copy of the Kentucky law is attached. This law was held to be constitutional by our Court of Appeals in the recent case of *Cain* v. *Commonwealth, Ky.*, 437 S.W.2d 769 (February 14, 1969), in which a conviction for exhibiting the motion picture film "I, A Woman" was upheld.

The chief problem that prosecutors have in this state in enforcing the law against the sale of obscene literature or the exhibition of obscene motion pictures is the uncertainty and doubt created by the decisions of the United States Supreme Court in this field. It may be noted that the case of *Cain* v. *Commonwealth*, supra, is now being appealed to that Court. If we could rely on the definition of obscenity laid down by the Supreme Court in the *Roth* case decided in 1957 (354 U.S. 476), there would not be as great a problem in enforcing the law as to obscenity. However, separate opinions handed down by several of the Justices in recent obscenity cases have indicated that certain "modifications" may have been made to the *Roth* definition. One of the most troublesome of these is that there is a separate and independent test of "utterly without redeeming social value" which must be met before anything can be declared to be obscene. This has the tendency to discourage attempts to enforce the obscenity statute since it has been said that only a minor part of the salacious material on the market is *utterly* without any redeeming social value. Future clarification by the Supreme Court will no doubt lessen the problems that prosecutors in our state have found in enforcing the law.

Kentucky does not have a statute narrowly and specifically drawn for the protection of minors only. We believe that our latest statute enacted in 1966 is adequate. We may have to change our minds about this if the Supreme Court should ultimately adopt the approach that only the protection of minors warrants anything being subject to prosecution, or if the Court should otherwise dispose of the appeal in the *Cain* case in such manner as to indicate a defect in KRS 436.101.

There has recently been in our state a spate of publicity regarding obscene mailings soliciting sales of pornographic material. Complaining citizens resent this material coming into their homes in the mail and believe that the Post Office Department should do something to curb such solicitation. We, of course, appreciate the difficulties inherent in attempting to control the dissemination of material on the ground that it is obscene. However, this office would like to see the enactment of legislation by Congress which would give the Post Office Department some measure of authority to control mailing of material by smut merchants soliciting the purchase of pornographic literature.

We are unable to comply with your request for examples of the effect of obscenity on society and individuals since we do not have such information. We might note that in the case of *Cain* v. *Commonwealth*, Ky., 437 S.W.2d 769 (February 14, 1969), our Court of Appeals stated in its opinion:

"Many times the right to pose a question is tantamount to the right to answer or at least partially so. Down through the years we have been asking ourselves when dealing with pornography and obscenity, 'It it harmful?' Of course, this answer can not come without a certain amount of reservation because the proof is hard to come by and often inconclusive. Therefore, we keep asking the same question and giving the same answers with reservations. If we were to change the form of the question and ask, 'Is it beneficial?' the answer would come loud and clear. Certainly no benefit can come to any individual or any society by the use or dissemination of pornographic and obscene material. This being so why should we longer expend the time and energies of the greatest minds of this country in preserving its presence upon the newsstands and in the theatres. . . ."

Sincerely,

JOHN B. BRECKINRIDGE.

STATE OF LOUISIANA,
DEPARTMENT OF JUSTICE,
New Orleans, La., August 19, 1969.

Mr. THOMAS KENNEDY,
Subcommittee Counsel, Rayburn House Office Building,
U.S. House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: Mr. Robert N. C. Nix's letter dated August 14, 1969 regarding your investigations and hearings on the use of the U.S. Mails to disseminate "sex oriented advertising" has arrived at a most appropriate time in our own investigations of such matters in the State of Louisiana.

The State of Louisiana's "Obscenity Statute" is contained in our statutes at Louisiana Revised Statutes 14:106; a copy of this statute is attached to this letter for your examination.

The public prosecutors of this state in the persons of the local District Attorneys and our Sheriffs, have diligently attempted to seek out and prosecute persons who violate this statute. One of our most recent cases entitled *Delta Book Distributors, Inc. vs. Alwynn J. Cronvich, Sheriff of the Parish of Jefferson, et al*, C.A. 68–1927, U.S.D.C., Eastern District of Louisiana, New Orleans Division, was made the subject of a suit in the local federal courts on an allegation of the unconstitutionality of our obscenity statute. We are enclosing a copy of the judgment of the Court for your examination.

In the above mentioned proceeding, the defendants have also made allegations regarding the alleged improper arrest and seizure of the books and materials in question.

In our modern "permissive" society, we are met daily with publications on our newsstands and with "sex oriented advertising" that comes into our homes through the mails. While there may be serious questions of Freedom of Speech and of the Press, on the part of the publishers, there is also the all too often ignored Freedom of Choice on the part of the individual which can and must be protected.

May I wish you the greatest success in your undertaking and request that you keep us informed of your progress.

Sincerely,

JACK P. F. GREMILLION,
Attorney General, State of Louisiana.

OFFICES OF THE ATTORNEY GENERAL,
Baltimore, Md., October 16, 1969.

THOMAS R. KENNEDY, Esq.,
Postal Operations Subcommittee,
Rayburn House Office Building, Washington, D.C.

DEAR MR. KENNEDY: Congressman Robert N. C. Mix, Chairman of the Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, has requested that I comment on the law in Maryland as to the obscenity problem, and that I forward copies of the relevant statutes. I am happy to do so.

Obscenity law in the State of Maryland is divided into two areas of emphasis depending upon the media involved. Obscenity in commercial motion pictures is regulated by Article 66A of our Code which establishes a Motion Picture Censor Board to serve as a licensing body for movies. The Censor Board can refuse to license any motion picture which it finds to be obscene, and this finding is subject to judicial review. The court proceeding is a civil action, and the Board has the burden of proof on the obscenity issue. The failure to submit a film for licensing to the Board is a criminal offense.

Obscenity in areas other than motion pictures is proscribed by Article 27 of our Code. This is a criminal statute which depends for its enforcement on the local law enforcement officials. There is also provision in this Article for injunctive proceedings against obscene materials.

Maryland law provides an adequate framework for effective governmental action against obscene matters sold or distributed within the state, but it does not and cannot, reach obscene materials coming to Marylanders from out of state through the mails. I feel that it is most important to have strong Federal legislation proscribing the transmission of obscene materials through the mails.

Very truly yours,

FRANCIS B. BURCH,
Attorney General.

STATE OF MICHIGAN,
DEPARTMENT OF ATTORNEY GENERAL,
Lansing, November 20, 1969.

Mr. THOMAS KENNEDY,
Counsel, Subcommittee on Postal Operations,
Rayburn House Office Building,
Washington, D.C.

DEAR MR. KENNEDY: At the request of Robert N. C. Nix, Chairman of the Subcommittee on Postal Operations, I am enclosing herein xeroxed copies of Michigan statutes regulating pornography. For your further information I am also enclosing copy of a recent opinion handed down by the Michigan Court of Appeals—*Wayne County Prosecutor* v. *Doerfler* (1968), 14 Mich App 428, which comprehensive reviews the subject as it applies to Michigan.

Very truly yours,

FRANK J. KELLEY,
Attorney General.
SOLOMON BIENENFELD,
Assistant Attorney General.

STATE OF MINNESOTA,
OFFICE OF THE ATTORNEY GENERAL,
St. Paul, Minn., September 16, 1969.

Mr. THOMAS KENNEDY,
Subcommittee Counsel,
Rayburn House Office Building,
U.S. House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: Honorable Robert N. C. Nix's letter of August 14, 1969 to Attorney General Douglas M. Head has been referred to the undersigned for reply.

Attorney General Head strongly supports the efforts of your subcommittee in the matter of control of obscene materials. Although Minnesota has legislation specifically prohibiting the distribution of "(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 and which is harmful to minors, or (b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in clause (a), or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse which, taken as a whole, is harmful to minors", the interstate aspects of this business leads to the conclusion that effective control must necessarily come from efforts of the federal government.

If we can be of service, please do not hesitate to advise.

Very truly yours,

JAMES J. O'CONNOR,
Special Assistant Attorney General.

THE STATE OF MISSISSIPPI,
DEPARTMENT OF JUSTICE,
OFFICE OF THE ATTORNEY GENERAL,
Jackson, August 27, 1969.

Mr. THOMAS KENNEDY,
Subcommittee Counsel,
Rayburn House Office Building,
U.S. House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: This is in reply to Chairman Robert N. C. Nix's letter of August 14, 1969, requesting a comment from this office on Mississippi's laws dealing with obscenity and the enforcement problems in enforcing our laws. He also inquired as to whether or not we believed the Federal Government has done enough in this field in prosecuting these cases.

Mississippi has several obscenity statutes, but it is my opinion that most of them would not stand in tests established by the United States Supreme Court except that the 1968 Session of the Legislature enacted a law similar to the New York State statute, which was upheld by the Supreme Court. To my knowledge, we have very few State court prosecutions. Of course, neither I nor anyone else

has any available statistics, but the writer having been in the prosecution field for over 14 years, it is my observation that prosecutions are few and far between and the offenders are let off with relatively small fines.

Here in the City of Jackson, the Mayor's office last year launched a campaign which resulted in the removal from news stands and magazine racks of patently obscene publications, but there were no prosecutions. In some areas of the State, including Jackson, there are some traffic in under the counter sales of obscene material but this is believed to be at a minimum.

As to what the Federal Government has done in this field in prosecuting cases, it is my definite opinion that there has been dereliction of the worst sort. This writer has had personal experience in advising recipients, mostly middle age or older people, such as a retired Veterans Administration doctor, to turn the material over to the Federal authorities and to my knowledge no complaint has ever been filed. I am definitely of the opinion that it would do practically no good to enact legislature in respect to mail patrons registering with the Post Office Department so as to put mailers on notice as to "sex oriented adverstising" to be mailed to homes.

Most of that material found in Mississippi has been shipped in interstate commerce and to us the only practical thing to do is to prosecute the mailers in Federal Court.

Very truly yours,

A. F. SUMMER, *Attorney General.*
By: G. GARLAND LYELL, JR.,
Assistant Attorney General.

EXECUTIVE OFFICE,
Jefferson City, Mo., November 18, 1969.

Mr. THOMAS KENNEDY,
U.S. House of Representatives,
Rayburn Building, Washington, D.C.

DEAR MR. KENNEDY: In response to the recent letter received from Congressman Nix relative to pornography in this State, let me say that many of the answers which you seek are "judgment calls" and it is difficult if not impossible, to reliably state the extent of our problem with pornography. It, of course, exists here, and there is some traffic in it; however, I could not give you mathematical and precise figures. To the best of my knowledge there have been no official surveys or studies on this question and I have not been given the benefit of any private surveys that may have been made. It is the position of this office that existing laws in most cases are adequate if vigorously enforced. If, as a result of your investigations, any type of model law to increase the effectiveness of the regulation of obscene mail, etc. is developed, I would certainly appreciate having a copy of same.

The citizens of Missouri are quite concerned about this matter as evidenced by the mail received in this office, but to the best of my knowledge there has been no official tabulation or evaluation of this matter.

I am sorry I could not be more helpful.

With kindest personal regards, I am

Sincerely yours,

WARREN E. HEARNES.

OFFICES OF THE ATTORNEY GENERAL OF MISSOURI,
Jefferson City, August 20, 1969

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives,
Washington, D.C.

DEAR MR. NIX: This will acknowledge receipt of your letter of August 14, 1969, which has been referred to me for reply.

As an ex-prosecutor, I think the major problem is getting 12 jurors to agree that a particular item (be it mail, film, book, etc.) is "obscene" within the meaning of our statute. The juror is often willing to say that *he* thinks the item is obscene, but is unwilling to impose his standard upon others under any of the definitions which we presently have to work with.

As an example I would cite a recent matter in Springfield, Missouri, wherein a small "art" theater was opened in a new shopping center in a residential area. The theater showed and promoted various "skin" films which carried the movie rating of "X". A rather concentrated movement was begun by residents of the

area as well as the local prosecutor's office to attempt to see what could be done about the matter. There were three major colleges in the Springfield area and an attempt was made by the prosecutor's office to obtain expert testimony from members of the faculty of the literature and communication arts departments that the films had no literary or redeeming value. As a result of the inability to reconcile the individual's feelings (and many of the potential expert witnesses felt the films were "obscene") with the possibility that they were being placed in the position of imposing their censorship upon others, the prosecution was unable to obtain sufficient witnesses to make a cast and the matter was dropped.

I would draw your attention to an article in the Washington University Law Quarterly, Volume 1964, p. 96, entitled "Obscenity Regulation and Enforcement in St. Louis and St. Louis County" by Raymond I. Parnas of the University of Arkansas School of Law. You might find this article interesting if not already discovered it.

I would hasten to add my own feelings with the caveat that these are my personal opinions and not the official opinions of the office of the Missouri Attorney General:

I feel that the direction of your obscenity attacks have been somewhat off course. There is a fairly strong argument to which this writer subscribes that if an *adult* wants to obtain, read, or in any way use pornography, he has a right to do so. Therefore, I feel we should concentrate our attack, not on prohibiting the dissemination of pornography, but in restricting its availability to children and young people. Granted, this requires the arbitrary selection of an age at which everything printable or viewable becomes available, but we have been successfully able to do this in such other areas as drivers licensing, drinking, voting, etc. It is this writer's view that we probably will never be able to come to a workable definition of pornography which can be applied on a broad basis. What is "obscene" to a Missouri Ozarker is not obscene to a California suburbanite.

Within the last few days this office has completed a survey of Attorneys General presented to us by the Commission on Obscenity and Pornography, 1016—16th Street, N.W., Washington, D.C. For your information I am attaching a copy of our response to this questionnaire.

If we can be of further service, please do not hesitate to call.

Respectfully,

DALE L. ROLLINGS,
Chief Counsel, Criminal Division.

(The questionnaire mentioned above follows on next page.)

SURVEY OF ATTORNEYS GENERAL

I. Evaluation of the Problem.

A. Are the volume of traffic and patterns of distribution in obscene and pornographic materials within your state sufficient to constitute a matter of serious concern?

X Yes ____ No

B. If your answer to (A) was "yes," what are the factors which you think are primarily responsible for this concern? If your answer to (A) was "no," to what do you attribute this fact? There appears to be more awareness of the existence of a flow of pornography than there was say, one or two years ago.

C. Has the seriousness of the problem changed in the past two years?

X No, it has remained essentially the same.
____ It is more serious now.
____ It is less serious now.

II. Role of the Office of Attorney General in Prosecution.

A. What role, if any, does your office play in the actual prosecution of cases (both civil and criminal) arising under your State's obscenity statutes?
Normally none; we only participate in actual prosecution upon request of the Governor. All appeals from convictions are handled by this office.

B. Are there any categories of obscenity actions in which the county or municipal attorney's offices are required to consult with your office before initiating a prosecution or civil action?

____ Yes X No

If "yes," please describe.

C. Are there any outstanding general directives or policy statements concerning obscenity cases or prosecutions which your office has issued for the guidance of the various county and municipal attorney's offices in your State?

____ Yes X No

D. If the answer to (C) is "yes," please attach copies of these directives or statements to this questionnaire. They will, of course, be kept confidential unless you give specific authorization to attribute them to you.

E. If your office plays any other role in obscenity law enforcement, please describe.

None

III. Enforcement Data.

A. Does your office collect and retain any statistics relative to obscenity cases (seizures, arrests, convictions, etc.) arising in your State?

_____Yes __X__No

B. If your answer to (A) is "yes," please attach a copy of these statistics (for the years 1966, 1967, and 1968) to this questionnaire.

C. Estimate the number of man-days over the past three years which your office has devoted to the issue of obscenity and pornography and the proportion of the total work of your office which this number represents.

1. Number of man-days. Less than 10

2. Proportion of total work of your office. Less than 1%

IV. Legislative Changes and Enforcement Problems.

A. Has obscenity legislation in your jurisdiction been changed in any way during the last three years?

_____Yes __X__No

B. If your answer to (A) is "yes," please describe briefly the change(s). If possible, attach copies of the changes to this questionnaire and give citations of the statutes.

C. Do you believe that existing obscenity legislation in your State needs to be changed in some way?

__X__Yes _____No

D. If the answer to (C) is "yes," please describe briefly the change(s) you believe desirable.

Virtually impossible to determine what is "obscene" under present statute.

E. Are any proposed changes now pending? If so, please describe and attach copies of draft legislation, if possible.

_____Yes _____No

None that are known to us at this time.

F. Would you recommend any changes in Federal statutes regarding obscenity?

_____Yes _____No

I feel unqualified to answer that question.

G. If the answer to (F) is "yes," please explain briefly the change(s) you believe desirable.

H. Listed below are the various components applied in whole or in part by some jurisdictions as the test for obscenity, though no majority Supreme Court opinion requires all of these components. If you have had experience with the prosecution of obscenity actions (either in the role of adviser or of prosecutor), please check the components, if any applied in your jurisdiction that you have found to be serious obstacles to successful enforcement of your obscenity laws, and indicate by "1" and "2" those you have found to be the greatest and second greatest obstacle to successful enforcement.

_____Whether to the average person
_____or the deviant group to which the material is primarily disseminated
_____the dominant theme of the material taken as a whole
_____appeals to the prurient interest,
_____and is patently offensive
_____by contemporary community standards,
_____and is utterly without redeeming social value.
_____The requirement of scienter.
_____Other (explain)
_____None of these components have been a serious obstacle to enforcement.
__X__No experience with the prosecution of obscenity actions.

I. Please indicate how these obstacles have been manifested:

_____Reversal of convictions
_____Acquittals by jury or judge
_____Directed verdicts or other judicial action terminating prosecution for failure to prove requisite components
_____Decision not to prosecute or dismissal by prosecutor for inability to prove requisite components
_____Other (please explain)

J. Please add below any comments you believe might be useful in explaining your answers to questions H and I.

K. Do you have any suggestions for overcoming these obstacles? Please explain.

V. Obscenity Commissions and Citizens Groups.

A. Is there a official licensing board, or obscenity commission of some type, within your State?

_____Yes ___X___No

B. If your answer to (A) is "yes," what is the function of this board or commission? (Please provide the citation to the statute which provides for this commission.)

C. Do you consider private citizens' groups, organized for the purpose of suppressing or regulating obscenity and pornography, to be a help or a hinderance to the proper enforcement of obscenity laws?

_____I have had no contact or experience with such groups.
_____In my experience, I have found them to be a help.
_____In my experience, I have found that they are not much help.
___X___In my experience, I have found them to be a definite hinderance.

D. If you have had experience with such a group, please explain briefly why you consider it to be a help or hinderance (or neither) to the efficient functioning of your office.

They seem always to tend to be organized for the purpose of eliminating one problem (i.e. a "dirty movie" house, or "cleaning up a newsstand") and seldom seem to have any long-range or long-term goals.

VI. Comments.

Are there other comments or suggestions you would care to make concerning the Commission's tasks? Any suggestions you might have concerning obscenity regulation, on a local, statewide, or national basis, will be welcomed and given careful consideration by the Commission and its staff.

The feelings expressed below are those of the writer and are not official opinions of the office of the Missouri Attorney General:

I feel that the direction of our obscenity attacks have been somewhat off course. There is a fairly strong argument to which this writer subscribes that if an adult wants to obtain, read, or in any way use pornography, he has a right to do so. Therefore, I feel we should concentrate our attack, not on prohibiting the dissemination of pornography, but restricting its availability to children and young people. Granted, this probably requires the arbitrary selection of an age at which everything printable or viewable becomes available, but we have been successfully able to do this in such areas as drivers licensing, drinking, voting, etc.

It is this writer's view that we probably will never be able to come to a workable definition of pornography which can be applied on a broad basis. (See attachment)

* *

Signature _____ Address _____

Title _____

STATE OF MONTANA,
OFFICE OF THE ATTORNEY GENERAL,
Helena, September 12, 1969.

Mr. THOMAS KENNEDY,
Subcommittee Counsel,
Rayburn House Office Building,
U.S. House of Representatives, Washington, D.C.

DEAR TOM: I have received Mr. Robert Nix's letter of August 14, 1969 in which he asked for my comments on Montana law dealing with obscenity.

Montanans are becoming increasingly upset because of the surge of obscene mail which has been coming into the state. In turn my office has been receiving a flood of obscene mail from irate citizens.

To cope with the problem, I have proceeded on a federal rather than a state level. This was done by sending the obscene mail my office received to R. E. Anderson, Postal Inspector In Charge. His office will investigate and try to have the senders of this obscene mail prosecuted.

I have proceeded on a federal rather than a state level for several reasons, all of which indicate deficiencies in Montana's law on obscene material. First, Montana law enforcement personnel feel that prosecution of the senders of this obscene mail would be nearly impossible. The reason for this is that they must prove beyond a reasonable doubt the elements of obscenity as laid down in Roth v. United States, 354 U.S. 476, 77 S. Ct. 1302, 1 L. Ed. 2d 1498 (1957) and its progeny.

The second reason is that almost all obscene material comes into Montana from out of state through the mail. This creates a crime that is interstate in character which our local law enforcement agencies cannot very easily cope with.

Third, there is doubt as to the constitutionality of section 94–3601, Revised Codes of Montana 1947, which is the bulwark of our law on obscenity. This can be demonstrated by an examination of the enclosed photostatic copy of the Montana sections on obscenity.

As far as the federal legislation on obscene mail is concerned, I feel that the punishment inflicted upon the senders when convicted is insufficient to discourage their practices. I also feel it is too difficult to obtain convictions under federal legislation.

If there is anything that I can do on a state level to assist your committee, please let me know.

Very truly yours,

ROBERT L. WOODAHL,
Attorney General.

STATE OF MONTANA,
OFFICE OF THE ATTORNEY GENERAL,
Helena, October 14, 1969.

Mr. THOMAS R. KENNEDY,
Subcommittee Counsel, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR TOM: I would like to acknowledge the receipt of your letter of October 7, 1969, and the enclosed copy of Part I of the hearings on *Obscenity in the Mails.*

I have been deeply concerned over the obscene mail problem in Montana as I previously indicated and so I have been corresponding with the late United States Senator Everett Dirksen up until his untimely death. Through this means I was able to keep abreast of federal legislation in the area. Through the hearing report you sent me, I am again abreast of federal legislation and I appreciate it very much.

Again, thank you for the copy of the hearings and I will be looking forward to the positive law which will most surely result from the subcommittee's action.

Very truly yours,

ROBERT L. WOODAHL,
Attorney General.

THE STATE OF NEVADA,
Carson City, Nev., November 21, 1969.

Mr. THOMAS KENNEDY,
Counsel, Subcommittee on Postal Operations,
Rayburn Building, U.S. House of Representatives,
Washington, D.C.

DEAR MR. KENNEDY: Congressman Nix wrote me concerning obscenity in the mails and bills designed to eliminate mass mailings of pornography.

There are attached the Nevada statutes pertaining to obscenity.

I have reviewed the report, Part I, "Obscenity in the Mail", of the hearings on H.R. 10867.

Having been a district attorney here in Nevada and also a sponsor privately of campaigns against obscene materials, I found the reported testimony of the Post Office Department General Counsel, Mr. David Nelson, revelatory and to the point.

The problem is national, it would appear, rather than local. Mr. Nelson's testimony reflecting 15 major national promoters of pornographic material are responsible for 95 percent of the complaints received by the Post Office is interesting as is the fact that of the 15, one has been convicted and is on appeal; ten of them are under indictment; while the remainder have been presented to United States Attorneys for prosecution.

While the gray area of Supreme Court definition of obscenity may be a hindrance, the score above reflects no laxness in enforcing the existing laws.

And when we consider the status of literature and motion pictures and the pornography we find commonly on news stands in magazines, it might be we should look not to the corrections imposed by law but to a regeneration of our national philosophy and a distinction between liberty and license. This seems to be sorely lacking today.

Thank you.

Sincerely,

PAUL LAXALT,
Governor of Nevada.

STATE OF NEVADA,
DEPARTMENT OF ATTORNEY GENERAL,
Carson City, August 19, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
Committee on Post Office and Civil Service,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In reply to your letter of August 14, 1969, I am pleased to advise you as follows:

Up until the 1969 session of our Legislature Nevada has had, since 1955, a general obscenity statute as per the copy enclosed (NRS 201.250). My office has had a small measure of success in using the injunctive process whenever smut peddlers have attempted to establish a base of operations in Nevada. This only results, however, in their leaving Nevada to establish a base elsewhere.

I suggested to the Legislature at the 1969 session the passage of legislation in line with New York's Penal Law § 484. h, sustained by the Supreme Court in Ginsberg v. U.S., 390 U.S. 629, 20 L. Ed. 195. This gives us added enforcement provisions where minors are concerned. A copy of this legislation is enclosed. (Chap. 300, 1969 Stat. Nevada).

I certainly believe the Federal Government should have the toughest approach possible under constitutional guidelines. The shipment and mailing interstate of smut has become so prevalent that no home in America can guard against its receipt by children.

I certainly believe that Federal legislation permitting mail patrons to register with the Post Office Department so that sex-oriented advertising would not be delivered to their homes is a step in the right direction.

Trusting this has met the requirement of your inquiry, I am

Sincerely,

HARVEY DICKERSON,
Attorney General.

STATE OF NEW HAMPSHIRE,
Concord, November 17, 1969.

Mr. THOMAS KENNEDY,
Subcommittee Counsel, Rayburn Building,
U.S. House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: This letter is a response to Mr. Robert N. C. Nix's letter of November 4 requesting a statement on the problem of obscenity in New Hampshire.

The problem of obscenity is one that has caused and continues to cause great concern here in New Hampshire, but fortunately, we do not seem to have the problem with pornography that states with larger, denser metropolitan areas have. Our lack of population and urbanization have been advantages to us in this case as they seem to discourage the growth of this menacing problem.

Due perhaps to a lack of public demand, new legislation and adverse public reaction, we do not have a great number of vendors offering to the public the obscene home movies and publications; and most of the pornography in New Hampshire has been brought into the state; little originates here.

In recent years much serious consideration has been devoted to this topic by our Legislature in hopes of ameliorating the problem. Our obscenity laws were revamped in 1965, and enclosed is a copy of the statute. This was proposed by our Judicial Council in order that our laws might more fully conform with Supreme Court decisions on this subject.

Two bills relative to obscene materials were passed by our 1969 Legislature, and copies of both of these have been enclosed for your information. SB 167 added Chapter 571–B to our statutes, and this legislation is self-explanatory. Hopefully it will have an effect in restricting the showing of obscene films to minors. HB 204 changed the existing law only by adding the phrase, "who are not under eighteen years of age."

I hope this material will be useful to you in your most worthwhile attempt to curb the flow of pornography.

Sincerely,

WALTER PETERSON.

STATE OF NEW MEXICO,
Santa Fe, December 5, 1969.

Hon. ROBERT N. C. NIX,
U.S. Representative, Chairman of Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR REPRESENTATIVE NIX: With reference to your letter concerning anti-obscenity legislation in New Mexico, there has been one pornography bill introduced in each of the last three sessions. I am attaching copies of these bills.

House Bill 297 was introduced in 1965, passed the House by a vote of 43 to 28, and was killed in the Senate by a voice vote of an unfavorable Senate Judiciary Committee report.

In 1967, Senate Bill 110 was killed in the Senate by a voice vote on an unfavorable Senate Judiciary Committee report.

The House Judiciary Committee gave an unfavorable committee report to House Bill 326 which was then killed by the House on a voice vote.

The problem has been the difficulty in finding language which describes workable and objective standards. Most of the proposed bills have followed the language of the Supreme Court, which subject the bills to the argument that the only way to *know* the law has been violated is conviction for violating it.

New Mexico does allow municipalities to enact municipal ordinances on the subject.

I hope the above information and enclosures will be of some assistance to you.

Sincerely yours,

DAVID F. CARGO, *Governor.*

STATE OF NEW JERSEY,
COMMISSION TO STUDY OBSCENITY, AND DEPRAVITY IN PUBLIC MEDIA,
Trenton, N.J., November 14, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN: Your letter of November 4, addressed to Governor Hughes has been referred to my attention. Governor Hughes wrote you under date of

November 7, explaining that a legislative commission (of which I am chairman) has been established to study obscenity in New Jersey.

Our commission is very anxious to cooperate with you in every way possible. I am sure that there are many areas in which we can be mutually helpful. For example, at our commission hearing on October 15 in Newark, we received testimony from Newark Postmaster Benucci on many of the problems that he is facing in respect to pornography sent through the mail.

Perhaps one of your staff members might like to attend our hearings and/or consult with our staff. After the hearing scheduled for November 14, we have another one which is going to be held on December 10. In any event, we will send you a full report of our activities when we have completed our work early in 1970.

I am enclosing a copy of my opening remarks at our first public hearing. This will give you a better idea of the objectives of our commission in New Jersey.

Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

WILLIAM E. SCHLUTER,
Assemblyman, District 6A, Chairman.

OPENING REMARKS—OBSCENITY STUDY COMMISSION, SEPTEMBER 30, 1969

(By William E. Schluter, Chairman)

At the start of hearings on obscenity in New Jersey, it is appropriate that we clearly define the objectives of our Commission and the scope of its activities. Officially, we are known as the *Commission to Study Obscenity and Depravity in Public Media*, established by Chapter 121 of the laws of 1969. Our membership consists of 9 persons: 3 appointed by the Governor, 3 by the Senate President, and 3 by the Speaker of the Assembly. Having organized on August 19, we have until February 19, 1970 to complete our work.

The subject of obscenity is a *controversial* one. There are numerous shades of opinion relative to the role of government in this area, a condition which is intensified by the basic difficulty in defining the word "obscenity".

This Commission is beginning its work without preconceived notions as to what should or should not be done by way of law in New Jersey. We intend to be objective and fair in our deliberations. We call on all of those who will be participating in the public phase of our work to respect this position, and to consider this question in a like manner.

Chapter 121 of 1969 defines the responsibility of our Commission as follows:

"It shall be the duty of the commission to conduct a comprehensive survey and study of the dissemination in this State of obscene and depraved matter through the public media, and of the actual condition of law and law-enforcement activities designed to control such dissemination; to compile, review and evaluate the legal, psychological and sociological knowledge bearing upon the accurate and objective definition of materials whose dissemination should and legally can be prohibited or controlled in the interest of public morality, decency and order; to recommend to the Legislature what, if any, new legislation or changes in existing legislation ought to be enacted in order to place the State's regulation of such material upon a sound, rational and beneficial basis."

Further, the Commission shall give particular attention to:

(*a*) Evaluating, on the basis of available data and knowledge, and to the extent that such data and knowledge make such evaluation feasible, the degree of actual danger which may be anticipated from the tendency of obscene and depraved material disseminated through the public media to incite its audiences—and in particular juvenile and immature audiences—to violent or immoral acts, or to corrupt the character and judgment of such audiences;

(*b*) Assaying the feasibility, in light of recent Federal Supreme Court decisions, of establishing a system for the review and classification of motion pictures with regard to their suitability for presentation to immature audiences;

(*c*) Considering the desirability of establishing a permanent commission for the continuing review of law and law-enforcement activities relating to obscenity and depravity in public media, to the end that the State's efforts in this field may benefit from a close attention to changing concepts and techniques in this area.

I would add that the Commission will only concern itself with this subject in New Jersey.

In my opinion, the work of this Commission will fall into three categories:

1. We will ascertain the existence and the extent of what may seem to be obscenity and pornography in New Jersey.

2. We will evaluate present and potential laws of our State which relate to this matter.

3. We will draft a report indicating our findings and our recommendations.

The mere existence of a Commission to study obscenity suggests that there is a growing concern about this matter in New Jersey. True, many people have expressed alarm at what they view as the rapidly increasing and intensifying dissemination of pornography. On the other hand, many of our citizens are equally concerned about present and potential conflicts with our basic right of free expression.

The need for a study of obscenity at this time is indicated for the following reasons:

(*a*) It has been over nine years since the previous Commission started to investigate this area. In 1966, the legislature authorized another study, but this study was not implemented.

(*b*) Supreme Court decisions in the last dozen years have changed many of the concepts in such areas as possession of pornographic materials, movie classifications, varying standards of obscenity for youth, and others.

(*c*) There have been rapidly changing techniques in the presentation and distribution of seeming pornography.

(*d*) The New Jersey legislature has several bills before it on this subject, and would benefit from an up-to-date study in this area.

I think I speak for every member of the Commission when I say that we are very much aware of the significance and sanctity of the first amendment of our Constitution which guarantees freedom of expression.

But, also, we are cognizant of the Supreme Court's edict in the 1957 Roth case which indicates that obscenity, as defined by the U.S. Supreme Court, is not protected by the first amendment. Consequently, legislatures have a responsibility to concern themselves with this subject.

For these reasons, our Commission has a very definite and viable function to perform for the citizens of our State.

STATE OF NEW YORK,
EXECUTIVE CHAMBER,
Albany, November 17, 1969.

Hon. ROBERT N. C. NIX,
U.S. Representative, House Office Building, Washington, D.C.

DEAR MR. NIX: Your letter of November fourth has provided a welcome opportunity for the expression of my views in regard to the need for more effective Federal restriction on the use of the United States mail to distribute pornography. Clearly, this is a problem that can only be solved by vigorous Federal action.

In recent months, I have received a flood of letters from citizens both in New York and throughout the Nation who are extremely concerned by an alarming increase in the dissemination by mail of obscene materials. These people include deeply distressed parents whose children have been subjected to pornography by greedy smut merchants, and other adults whose own privacy has been callously invaded by the receipt of unsolicited, offensive materials.

The State of New York has been a leader in securing protection of minors from exposure to potentially harmful materials. As President Nixon pointed out in his May second message to Congress, New York State has—

"taken substantial strides toward protecting . . . [its] 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 Statutes."

New York's completely revised Penal Law, which became effective in 1967, contains provisions penalizing the promotion of obscene materials or performances and the dissemination of indecent materials to minors under seventeen years of age. This year, I signed into law two bills that increased the penalties for commission of these crimes. The wholesale promotion of obscene material is

now punishable by imprisonment for up to seven years; dissemination of indecent materials to a minor can draw a prison sentence of up to four years.

Further steps now, to be effective, must come at the Federal level. For example, only the Federal Government can effectively control the use and abuse of the mails, which is a growing channel for this offensive merchandising of filth. I believe that restrictions on the promotion of pornography can be achieved well within our constitutional safeguards of free expression.

The President included three specific proposals in his message:

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;

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; and

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.

There are several proposals now before Congress that embody the President's recommendations. I strongly urge your Committee and all members of the House of Representatives and the Senate to approve legislation including these essential steps as soon as possible.

Sincerely,

NELSON A. ROCKEFELLER

STATE OF NEW YORK,
New York, N.Y., August 25, 1969.

HON. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR SIR: I am in receipt of your letter of August 4, 1969 requesting my comments with respect to the hearings of your Committee into the "operations of smut merchants who are engaged in the business of mass mailings of obscenity to our young people."

Please be advised that my office does not have jurisdiction with respect to New York laws dealing with obscenity (Penal Law, Article 235). The responsibility for the prosecution of such laws rests with the local District Attorneys in the counties in which violations occur.

However, I have received numerous letters from private citizens complaining about receiving unsolicited smut mail which often contains obscene photographs as part of advertising circulars promoting the sale of books or magazines dealing with sexual conduct. Most of these letters are from parents who justly complain that the contents of such mail fall into the hands of their children. I have advised such citizens of their right to request the Post Office Department to prohibit the future mailing of offensive materials from the particular sender.

I agree with your statement that the Federal Government should do more to curb the spread of unsolicited smut mail. At present, citizens may only complain to the Post Office after they have received offensive mail which might already have been seen by their children and the prohibitory order they may request from the Post Office only applies to the particular firm that mailed them offensive materials in the past. The present laws do not protect a family from receiving offensive materials from firms or persons that have not previously been named in a prohibitory order.

I, therefore, support the legislation you are submitting which would permit mail patrons to register their names and names of family members with the Post Office Department to put mailers on notice that "sex oriented advertising" is not to be mailed to such homes, as being in the public interest. I would appreciate receiving a copy of the latter bill.

Sincerely,

LOUIS J. LEFKOWITZ,
Attorney General.

STATE OF NORTH CAROLINA,
DEPARTMENT OF JUSTICE,
Raleigh, November 26, 1969.

Hon. THOMAS R. KENNEDY,
Postal Operations Subcommittee,
Rayburn House Office Building,
Washington, D.C.

DEAR MR. KENNEDY: Congressman Nix requested that I forward to you comments on the laws of obscenity in North Carolina.

I welcome this opportunity since hardly a day goes by that I do not receive erotic pamphlets, brochures, pictures, or books sent to me by concerned citizens. Most of these are letters from parents pleading with me to prevent their sons and daughters from receiving such "literature" in the mail or from purchasing it at news stands.

Enclosed are Xerox copies of the General Statutes of North Carolina relating to the subject of obscenity. As can be seen, North Carolina has enacted legislation to protect the public from obscene and erotic literature, pictures and movies and forbidden the use of the mails for transmitting such materials. The law further prohibits indecent acts in public or where the public is invited. It also makes illegal profane or indecent language in public or over the telephone. Indecent exposure and indecent liberties with children under sixteen years of age are also prohibited.

There is undoubtedly more that North Carolina could do as far as legislation against obscenity is concerned. However, the key to the problem rests with the definition of obscenity, and the states' hands are tied by the United States Supreme Court's rulings on the matter. The definition of obscenity in North Carolina [(G. S. 14–189.1(b))] when enacted by the 1957 General Assembly conformed to the then existing Federal case decisions; yet, there is a question whether such definition would stand in light of the more recent decisions of the United States Supreme Court.

I would like to make it clear that I am unalterably opposed to the dissemination of materials, through the mail and otherwise, which exploit the perverted, erotic and morbid aspects of sex. Especially when these materials come into the hands of minors, which is happening more frequently today, the citizens of my state and the United States have a right to be concerned and to demand action. They are looking to Congress for the answer.

Freedom of speech and of the press are not absolute and certainly should not be used as protection for moral decadence. I strongly urge the United States Congress to assure the public through legislation that such filth will not be protected behind supposed constitutional guarantees.

Sincerely yours,

ROBERT MORGAN,
Attorney General.

ATTORNEY GENERAL,
STATE OF NORTH DAKOTA,
Bismarck, N. Dak., August 19, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN NIX: This letter is in reply to yours of August 14, 1969, wherein you inquired as to obscenity legislation in North Dakota. North Dakota has not passed any recent laws dealing with obscenity. The present laws can be found at sections 12–21–07 through 12–21–13.1 of the North Dakota Century Code. There has been no attempt to define the terms "obscene," "lewd," "salacious," or "lascivious," within the Code itself.

The Attorney General's office does not receive a great number of complaints concerning obscenity. Those complaints which are received usually involve organizations operating from outside the state by means of the mails. For this reason, complaints are turned over to the Postal Inspector of the Post Office Department. Local violations of the obscenity laws are prosecuted by the State's Attorneys for the various counties in the state.

Attempts to define what is "obscene" have largely been unsuccessful from an objective approach. For this reason legislation which attempts such a definition is frequently, and understandably, futile. The solution, if there is one, then, would seem to be in legislation which takes a subjective approach. This is ap-

parently what you are presently attempting to do. Although the right to privacy is not a specific constitutionally protected right, Supreme Court decisions have made it clear that there is a "right to privacy' which emanates from the total import of the Constitution. It would seem, therefore, that individuals who do not desire to be the objects of panderers of obscene materials utilizing the mails should be provided with some protection. By the same token, persons who desire to receive such matter should probably have the right to do so unless it can be shown that such would have a detrimental effect on society, which is yet another issue. The real problem at this point is protecting persons who do not wish to receive what they consider obscene material. This is necessarily a subjective determination.

The right to mail unsolicited, "arguably" obscene material seems to be difficult to justify as a constitutionally protected right, and to my knowledge has not been given such protection. Yet, the proposed legislation requires that the individual citizen notify the Post Office Department that he does not wish to receive obscene material; and if he does not, he must be presumed to be a passive acceptor of such material. In addition, this proposed law indicates an additional administrative burden on the Department at a time when it is already overburdened.

It would seem that the simpler approach would be to propose a law which would prohibit the mailing of "arguably" obscene matter to individuals unless they solicited such material. This places the burden on the various panderers using the mails and subjects them to criminal sanctions if they ignore the law. Since the Supreme Court has not explicitly stated that such would be an infringement upon constitutionally protected rights, an attempt to enact such legislation could not be said to be a useless act. Should the Court strike down such legislation, then recourse can be had to a law which would require the individual to actively protect his right to privacy in this area, as your present proposed legislation does.

I trust that these observations will be of interest to you, although understandably they have been asserted before with regard to this type of legislation.

Very truly yours,

ROBERT P. BRADY,
Special Assistant Attorney General.

STATE OF OHIO,
OFFICE OF THE GOVERNOR,
Columbus, November 10, 1969.

Hon. ROBERT N. C. NIX,
U.S. House of Representatives,
Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN NIX: Governor Rhodes has asked me to acknowledge on his behalf your recent letter inquiring about anti-obscenity legislation in Ohio.

The current session of the Ohio General Assembly, which reconvenes in January, has before it two measures on this subject: Substitute House Bill 84, which defines what materials can be considered obscene, and Senate Bill 320, which would establish a state commission to conduct a study of obscenity and pornography.

Sincerely,

LEWIS R. FREEMAN, Jr.,
Deputy Assistant to the Governor.

OFFICE OF THE ATTORNEY GENERAL,
STATE OF OHIO,
Columbus, October 20, 1969.

Hon. ROBERT N. C. NIX,
House of Representatives,
Washington, D.C.

DEAR SIR: Attorney General Paul W. Brown requested me to answer your letter dated October 2 relative to obscenity laws in the State of Ohio.

Under Section 109.40, Ohio Revised Code, the attorney general is charged with the duty of compiling all statutes relative to obscenity in a pamphlet and keeping the compilation current.

We are mailing under separate cover a copy of *Obscenity Laws* prepared in 1966, and the June, 1969 compilation.

Recently, we have heard of some Ohio prosecuting attorneys who have attempted to close the showing of "I am Curious (Yellow)." Action was brought under Section 3767.01(C), Ohio Revised Code, which defines "nuisance" as, among other things, any place in which lewd, indecent, or obscene film is shown, and Section 3767.03, Ohio Revised Code, which provides that the county prosecuting attorney may bring an action to abate the nuisance and to enjoin the maintenance thereof. A copy of these statutes is being sent.

Also under separate cover is a copy of H.B. 84 which was considered in committee in the House this session but did not get out on the floor.

S.B. 320 proposed a commission to study obscenity but did not pass the legislature.

Thank you for the copy of Part I *Obscenity in the Mails* for our files.

Your plan to continue hearings on the problem of obscenity is commendable, and we will be most interested in your findings.

Sincerely,

Col. GEORGE MINGLE,
Chief, Consumer Frauds and Crimes Section.

CONSUMER FRAUDS AND CRIMES BULLETIN

Re Current Compilation of Court Decisions Relating to Obscenity.

Section 109.40 of the Ohio Revised Code requires the attorney general to compile all statutes relative to obscenity in a convenient pamphlet and to supplement and keep the compilation current. The following court decisions update *Obscenity Laws*.

In *A Book Named John Cleland's Memoirs* v. *Mass.*, 383 U.S. 413 (1966), the United States Supreme Court held that a publication cannot be condemned because the dominant theme of material taken as a whole appeals to a prurient interest in sex and the material is patently offensive because it affronts contemporary standards in the community *unless* it is found also to be utterly without redeeming social value. Each of the three federal constitutional criteria named in *Roth* v. *United States*, 354 U.S. 476, 489 (1957), must be applied independently.

In *Redrup* v. *New York*, 386 U.S. 767 (1967), the United States Supreme Court held that certain books and magazines in issue were not obscene; and hence, they were protected by the Fourteenth Amendment. It held that the materials did not meet the test of *Roth* and that they were not "hard core" pornography.

Two Ohio cases have been reversed on the basis of *Redrup*. *State* v. *I. M. Amusement Corp.*, 10 O. App. 2d 153, 226 N. E. 567, reversed, 389 U.S. 573 (1968). In *Mazes* v. *Ohio*, 388 U.S. 453 (1967), the United States Supreme Court reversed the holding in *State* v. *Mazes*, 7 O. S. 2d 136, 218 N. E. 2d 725.

The Court found that the material in *Mazes* was not obscene but did not rule on the constitutionality of the Ohio statute (Section 2905.34) under which Mazes was prosecuted.

Furthermore, in *State* v. *J. L. Marshall News Co.*, 13 Ohio Misc. 60 (1967), the Court felt constrained to dismiss an indictment because of *Redrup*.

The United States Supreme Court has upheld a New York statute aimed at protecting juveniles from "harmful materials" (N.Y. Penal Law Section 484–h). Although the materials in many cases would not be obscene by adult standards, the Court held that the state's interest in protecting children justified the statute, and the statute itself did not invade the area of freedom of expression constitutionally secured to minors. *Ginsberg* v. *New York*, 20 L. Ed. 2d 195 (1968). The issue in *Ginsberg* was the sale of "girlie" magazines to children under 17. The Court appears to reaffirm the rights of the state to treat children with a paternal solicitude unwarranted for adults.

In *Rabeck* v. *New York*, 20 L. Ed. 2d 741 (1968), Section 484–i of that same New York Penal Law (since repealed) was declared unconstitutionally vague. The difference between the two statutes should be noted. While Section 484–h took great pains to point out specifically what "harmful materials" means, Section 484–i stated merely that sale of "any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes . . ." is prohibited.

Interstate Circuit v. *Dallas*, 20 L. Ed 2d 225 (1968), declared unconstitutionally

vague an ordinance that sought to accomplish the same end. The Court found the ordinance deficient because it did not define "sexual promiscuity" and because the standards to govern the board of censors were too indefinite. In the closing words of the Court, "Here we conclude only that the absence of narrowly drawn, reasonable and definite standards for the officials (board) to follow, *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951), is fatal."

Two recent cases, *State of Ohio* v. *Ross*, 12 O. S. 2d 37 (1967) and *State of Ohio* v. *Potts*, 16 O. S. 2d 111 (1968), discuss violation of Section 2905.34, R. C., concluding that an indictment in order to be sufficient must go beyond the statutory language and state the criminal element of *intent* to use, exhibit or sell the offending obscene material.

Stanley v. *Georgia*, No. 293, U.S. Supreme Court (April 7, 1969), held that the First and Fourteenth amendments prohibit making mere private possession of obscene materials a crime.

THE ATTORNEY GENERAL OF OKLAHOMA,
Oklahoma City, Okla., October 9, 1969.

Mr. THOMAS KENNEDY,
Subcommittee Council on Postal Operations, Rayburn House Office Building, House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: This letter is in response to a request made by Representative Robert Nix for copies of Oklahoma's laws dealing with obscenity. Enclosed you will find copies of Title 21 O. S. Supp. 1969, §§ 1021–1040.51.

Mr. Nix requested that I also comment on the laws dealing with obscenity in Oklahoma and the problems that we have in enforcing these laws. Our State's definition of obscenity is taken almost directly from *Roth* vs. *U.S.* The definition of prurient interest was, as I'm sure you are aware, found further restricted in the *Mishkin* case. The whole effect of these cases in Oklahoma is that we consider prosecution almost impossible under our present statutes in the light of the way they have been interpreted by the United States Supreme Court.

This office's position is that we whole heartedly support any legislation which the Sub-Committee on Postal Operations may propose which would restrict the mailing of obscene materials to our young people because without statutory law aimed directly at protecting minors there is no way, presently in Oklahoma, that obscene materials can be kept out of the hands of young minors.

If you need any further information in this matter, please feel free to contact me.

Sincerely,

G. T. BLANKENSHIP.

OFFICE OF THE GOVERNOR,
STATE CAPITOL,
Salem, November 21, 1969.

Mr. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. NIX: I am delighted to have the opportunity to convey my thoughts to you on anti-obscenity legislation to protect American homes from mass mailings of pornography. Though I oppose any effort to infringe the right of an adult person to read whatever he pleases, I believe it is equally his right not to have offensive material delivered to his home against his will. I believe government has the duty to impose restrictions on printed material and films to keep them out of the hands of children, if it concludes that children would be adversely affected thereby.

I enclose a copy of ORS 167.151, the existing Oregon law on dissemination of obscene matter. This statute is of questionable constitutionality as applied to adults. At the 1969 session of our Legislative Assembly, a measure was introduced which would have imposed more specific controls to protect children 16 years of age or younger. This bill, Senate Bill 92, was patterned after the New York obscenity law. A copy is enclosed. Unfortunately, it did not pass.

Also enclosed with this letter is a copy of chapter 169, Oregon Laws 1969, a bill relating to motion picture employes. It was brought to our attention that managers and owners of motion picture theaters should be held accountable at law for showing obscene films, but that the ends of justice usually were not

served by prosecuting ticket sellers, projectionists and popcorn girls. Chapter 169 corrected the problem.

Surveys and studies on this subject have been conducted by a committee under the leadership of Mayor Terry Schrunk of Portland. I suggest that you contact Mayor Schrunk and ask him for any additional information you require that is not included with this letter.

Sincerely,

TOM MCCALL, *Governor.*

STATE OF OREGON,
DEPARTMENT OF JUSTICE,
Salem, Oreg., October 3, 1969.

Mr. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. NIX: I appreciate your solicitation of my views. The only prosecutorial tool in Oregon regarding obscenity is the standard sort of Dissemination of Obscenity statute. Consequently the district attorneys have the standard sort of difficulty of prosecution: uncertainty as to the definition of obscenity, proof of scienter, question as to the validity of seizure, etc.

While there is much the states can do by way of additional legislation (for example, forbidding sales to minors), I do not see many feasible remedies enforceable by the federal government beyond the present postal customs laws.

I would be most interested in seeing such materials as you may have regarding the effect of obscenity as to mental hygiene referred to in your letter.

Thank you for your interest.

Sincerely,

LEE JOHNSON,
Attorney General.

COMMONWEALTH OF PENNSYLVANIA,
GOVERNOR'S OFFICE,
Harrisburg, November 19, 1969.

Mr. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR BOB: Thank you for your recent letter concerning anti-obscenity legislation directed at mass mailings of pornography. All complaints on this subject are referred to our Attorney General, who in turn maintains liaison with the Chief Postal Inspector in Philadelphia. This is necessary because our law prohibits sale or distribution only within the Commonwealth and, to date, all complaints have been received from out-of-state mailings. Upon the advice of the inspector, all complainants are furnished with the appropriate forms to have their names removed from the mailing list.

Pennsylvania recently amended its obscenity statute making it a separate offense to sell or distribute obscene materials to persons under the age of seventeen. As I am sure you realize, the United States Supreme Court over the last few years has taken a permissive view in this area and relatively few criminal prosecutions have taken place.

If you desire any further information, please do not hesitate to contact me.

Sincerely,

RAYMOND P. SHAFER.

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS,
EXECUTIVE CHAMBER,
Providence, December 2, 1969.

Mr. THOMAS KENNEDY,
Rayburn Building, House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: Efforts to control obscenity by law in Rhode Island have been limited to the classification of motion pictures.

In 1968 the General Assembly created a board for the classification of motion pictures by Chapter 51. This board reviews films, shows, performances and exhibitions to determine if such shows and films are obscene. Included in Chapter 42–43 of the General Laws are provisions for board appointments, administra-

tion of the act, duties of the board, judicial review of board decisions, and penalties for offenses.

In 1969 Chapter 42–43 was amended by Chapter 112 of the Public Laws of 1969. This act provides that exhibitors of motion pictures may file a proposed classification of the performance within seven days of the initial exhibition instead of the thirty days previously required.

The board for the classification of motion pictures has met with mixed emotions by the industry and the populace; some agreeing with its decisions and others opposed. Nevertheless, the board does provide a vehicle for evaluation of questionable films and does have the authority to classify them.

Warm personal regards.

Very truly yours,

DONALD F. SHEA,
Executive Assistant to the Governor.

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS,
DEPARTMENT OF THE ATTORNEY GENERAL,
Providence, November 6, 1969.

Mr. THOMAS R. KENNEDY,
Counsel for Representative Robert N. C. Nix,
Postal Operations Subcommittee,
Rayburn Office Building, Washington, D.C.

DEAR SIR: I have your letter of October 2, 1969 regarding your Subcommittee hearings on obscenity this Fall.

I am enclosing copies of a statute providing for *in rem* proceeding against obscenity, which we have used with success against offensive magazines and books. Also enclosed are copies of a film rating statute which has at least alerted parents to the contents of movie films.

As you are well aware there is a much more serious problem connected with the mailing of sexually offensive material. The purchase of obscene books or magazines ordinarily require the viewer to go to the place where they are shown. The watching of indecent commercial films requires one to go to the theater. But mail comes into the privacy of the home. Children bear it proudly and lovingly to their parents. Youngsters just approaching the age of reason open mail addressed to "Household" or "Family of . . .", or "Resident". Boys and girls get on mailing lists.

Into the privacy of anyone's living room this filth makes its way. To my mind this is a violation of privacy. It is a deliberate corruption of the right and duty of every parent to raise his children into decent citizens. It must be stopped.

Not a day passes but that some citizen, hurt, irate, outraged or disgusted, depending on his temperament, calls some member of my staff. The same story is told: "My fourteen year old daughter received a pamphlet in the mail . . ."; "My boy is only ten. Yesterday he opened an envelope addressed to my household . . ."

If you wish I would be pleased to appear and testify publicly before your subcommittee.

Very truly yours,

HERBERT F. DESIMONE,
Attorney General.

STATE OF SOUTH DAKOTA,
OFFICE OF ATTORNEY GENERAL,
Pierre, August 18, 1969.

Mr. THOMAS KENNEDY,
Counsel, Subcommittee on Postal Operations, Rayburn House Office Building, House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: This is in reply to the letter addressed to Attorney General Gordon Mydland by Rep. Robert Nix, subcommittee chairman. General Mydland has asked me to offer his assistance personally and that of our office generally in this matter.

Enclosed are photocopies of the South Dakota laws on obscenity. The major portion of these sections were passed by the 1968 Legislature and became law on July 1, 1968. As you can imagine, there has been little time in which to test the

effectiveness of these laws. There have been almost no cases under these sections. Our reaction from local prosecutors has been that the tests are still too vague to be considered very useful.

South Dakota has little or no problem with obscenity produced locally. Most of our problem originates in other states, primarily California and New York. Both the solicitations and the material sold arrives in this state via the United States Mails. This presents a problem of jurisdiction, extradition, witnesses, etc. Such prosecutions would have to be handled on a county level and the counties would have to bear the costs individually. Few counties are either able or willing to do so. We feel, therefore, that the most effective control of such interstate traffic in obscene material must, of necessity, come from federal legislation.

This office has rather mixed reactions about the present practice of notifying the publishers to stop mailing pandering material, as well as the proposed legislation which provides for a register of those who do not want such material. On the one hand, it does (or should) keep such material from being sent to those on the register; while on the other hand, it aids the publishers financially by making certain that there are few if any dead names on their mailing list.

It is good to know that proposed legislation intends to define obscenity specifically. It has long been the feeling of this writer that existing obscenity statutes are so general, and vague in their language as to be virtually unenforceable. We would appreciate it if a copy of the proposed legislation could be sent to us.

Examples of the effect of obscenity on society and individuals are most difficult to obtain. Through our research in this area, it appears that the "experts" such as doctors, sociologists and psychologists differ widely on this point with no apparent consensus appearing. However, I will await with great interest the testimony before your subcommittee on this particular point.

If there is anything further we can do to assist, please do not hesitate to call on us. I hope the enclosed material is of some help.

Sincerely yours,

LEONARD E. ANDERA,
Assistant Attorney General.

STATE OF SOUTH CAROLINA,
OFFICE OF THE ATTORNEY GENERAL,
Columbia, S.C., August 29, 1969.

HON. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR SIR: In response to your letter of August 14, 1969, you will find enclosed a copy of South Carolina's law regarding obscenity. 54 STAT. Act No. 914 at 2273 (1966). See also: CODE OF LAWS OF SOUTH CAROLINA, *Cumulative Supplement* §§ 16–414.1, *et seq.* Also enclosed is an article that recently appeared in the *South Carolina Law Review*. 21 S.C.L.R. 357.

As to the problems that prosecutors in this State have had in enforcing South Carolina law, there has not been any case recently submitted to the South Carolina Supreme Court for appellate review; however, an appeal relating to a conviction for the violation of South Carolina's obscenity law is being processed. That case is *State* v. *Mary J. Urbanek, et al.*, and involves "My Secret Life" and "The Short, Happy Sex Life of Stud Sorrell and Sixty-nine Other Flights of Fancy."

Sincerely,

C. TOLBERT GOOLSBY, JR.,
Assistant Attorney General.

PRESTON SMITH,
GOVERNOR OF TEXAS,
November 17, 1969.

HON. ROBERT N.C. NIX,
House of Representatives,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN NIX: I am pleased to learn of your Subcommittee's interest in the control or eventual elimination of obscene material being mailed out by various firms throughout the United States.

Summary references to new state legislation in Texas for the attention of Mr. Thomas Kennedy, Counsel to your Subcommittee, is attached to this letter.

Since I have been Governor of Texas, I have received quite a few letters from concerned Texans who have complained that obscene material has reached them or their children through the United States mail. I have seen some of the literature of which these Texans rightfully complain. Some of these advertisements contain statements that the products offered are of "educational value," which is to me unfounded and untrue.

One instance which comes to mind occurred in a small central Texas town during last summer, and resulted in a large number of inquiries to my office. An unusually large number of persons received an advertisement of the above mentioned "educational material" and were quite shocked to open the envelope and find a display of extremely disgusting photographs and printed texts. Obviously, a mailing list had been carelessly traded among mailing services, and the above instance occurred.

The recipients of this circular varied from school teachers to their students, and from housewives to community business leaders.

I concur with you in saying that the American people are becoming increasingly concerned about the problem of obscene advertisements received through the mails. I personally feel that the present federal statutes must be amended in order to safeguard the public against further unsolicited pandering advertisements delivered to them through the United States mail.

As stated above, we have directed a memorandum to your Subcommittee counsel, which outlines the actions taken by the Texas Legislature relative to this situation, as well as statements by me as the state's chief executive.

Sincerely,

PRESTON SMITH,
Governor of Texas.

MEMORANDUM

NOVEMBER 17, 1969.

To: Mr. Thomas Kennedy, Counsel, House Subcommittee on Postal Operations.
From: Preston Smith, Governor of Texas.
Re: Summary of recent Texas State legislation, obscenity in the mails.

Two enactments this year by the Texas Legislature may be pertinent to the subject being examined by Congressman Nix and his subcommittee colleagues.

1. Texas' Penal Code was amended to bring the definition of obscene materials into conformity with the three coalescing elements specified by the U.S. Supreme Court in Roth v. United States, 254 U.S. 476, 1957.

For reference, the state amending act is Chapter 468, Acts 61st Texas Legislature, 1969, R.S. (H.B. No. 235), codified in Vernon's Annotated Texas Penal Code as Article 527.

Sale or distribution of obscene matter is punishable by a maximum fine of $1,000 plus $5 for each additional unit of obscene material, not to exceed $10,000; a maximum jail sentence of six months plus one day for each additional unit of obscene material, not to exceed 360 days; or by both. If a person has been previously convicted of a violation of the Act, the second offense is punishable as a felony with a maximum fine of $2,000 plus $5 for each additional unit not to exceed $25,000; or by a maximum sentence to the penitentiary of five years; or by both.

A somewhat similar pattern of penalties is prescribed for employing minors to assist in the sale or distribution of obscene materials, and for a conspiracy by two or more persons to commit any of the offenses.

Distribution of obscene matter to minors, however, is made subject to the provisions of the particular law described below.

2. The Texas Law on the Protection of Minors from Harmful Materials is the title of the second enactment, Chapter 284, Acts, 61st Texas Legislature, 1969, R.S. (S.B. No. 661), codified in Vernon's Annotated Texas Penal Code as Article 534b.

That enactment apparently sought to track the conditions specified by the Court in Redrup v. New York, 386 U.S. 767, 1967. It frankly recognizes a double standard, one for adults and one for minors. It specifies civil proceedings as the basis for criminal proceeding which can culminate in a maximum penalty of $2,500 in fines or jail imprisonment for two years or both.

As nearly as my staff has been able to determine, both enactments followed unrecorded verbal testimony to legislative committees and rather extensive of-

ferings of exhibits of obscene materials from angry citizens. Most of that material reportedly had been delivered through the U.S. mails from purveyors in California and New York. Much fewer exhibits were traceable to sources beyond our international border.

We are not aware of any extensive surveys or special studies of the subject which have been completed.

Both legislative debate and citizens' discussions have made clear the astonishment of Texans that our national government, so vigorous in requiring local actions to control the pollution of air, water, and land, should be so timid in controlling the pollution of minds.

Our astonishment is underscored by the realization that pollution by obscenities is fully controllable by the U.S. Government which operates the Post Office Department, vigorously controls many aspects of interstate commerce, and supposedly safeguards the constitutional guarantee of privacy.

Many Texans find it especially difficult to favor salary increases for U.S. postal employees who facilitate the delivery of unwanted obscene materials to private home and offices.

It is my considered opinion that most Texans readily recognize that human judgments, rather than objective criteria, mark this controversial subject; and that moral standards are not invariably identical and uniform throughout the nation.

Texans are willing to recognize the right of Californians and New Yorkers to choose their own modes of conduct that pose no threat to the common national interest. Texans are unwilling to accept standards in sexual matters which are imposed upon their communities from afar, and prefer to judge for themselves what constitutes "redeeming social values."

This preference for self-determination is evident in the state law on obscene materials. No city, county, or other political subdivision may enact any regulation of obscene material which conflicts with the state law; but *every* city, county, and local political subdivision is specifically authorized to regulate *further* the means and manner of distributing and exhibiting such materials.

Is the Congress willing to grant the same right to further regulation by the States?

THE ATTORNEY GENERAL OF TEXAS,
Austin, Tex., August 20, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. NIX: I was pleased to learn from your letter of August 14, 1969, that your Postal Operations Subcommittee is devoting its efforts toward restricting the mailing of obscene materials.

Texas has recently passed new legislation in the obscenity field in an effort to comply with recent Supreme Court decisions, and copies of two new statutes, one dealing solely with distribution to minors, are enclosed. While our office assisted in drafting this legislation, I personally think that the holdings of the Supreme Court in the obscenity area, make any significant curtailment of objectionable books, magazines and movies a very difficult, if not impossible, job.

The enclosed statute relating to obscenity generally, House Bill 235, is already under attack in the federal courts. Our former obscenity statute is also the subject of a large number of federal court cases and has been held to be unconstitutional by a three-judge federal court sitting in Dallas. This case is being appealed to the Supreme Court, and I enclose a copy of our Notice of Appeal which sets out questions which we feel should be answered by the Court. Also attached is a brief filed with the three-judge court which delineates our position with regard to many of the problems in obscenity legislation and criminal prosecution. These enclosures may prove to be of interest to your staff.

Again, let me congratulate you on your interest in this problem. You have my best wishes in the drafting and passage of meaningful legislation that will attack the mailing of obscene materials.

Sincerely,

CRAWFORD C. MARTIN.

STATE OF UTAH,
OFFICE OF THE GOVERNOR,
Salt Lake City, November 21, 1969.

Hon. ROBERT N. C. NIX,
House of Representatives,
Subcommittee on Postal Operations,
Washington, D.C.

DEAR MR. NIX: Governor Rampton has asked that I comply with your request for information for a statement on the problem of obscenity in Utah.

Enclosed you will find S. B. No. 133 under 76–39–5 Utah Code, annotated 1953, which deals with hard core pornography, this being the latest statutory attempt to control obscene materials in Utah.

Utah has had considerable success with citizens' committees in opposing the sale and distribution of pornography at the local level. The enclosed bill was drafted by one such committee. In a conversation with the chairman of the statewide Decency Committee, I was informed that they are pleased with the legislalation that has been passed but dismayed by the reluctance of the courts to enforce the punitive provisions of the law.

They would urge adoption of S. B. 1077 that would curtail the original jurisdiction of the Supreme Court in reviewing obscenity cases.

Sincerely,

K. GUNN MCKAY,
Administrative Assistant.

STATE OF UTAH,
OFFICE OF THE ATTORNEY GENERAL,
Salt Lake City, November 17, 1969.

Mr. THOMAS KENNEDY,
Counsel, Subcommittee on Postal Operations,
Rayburn House Office Building,
Washington, D.C.

GENTLEMEN: In response to your letter of November 12, you will find enclosed a copy of our laws on obscenity. You will note that they were rewritten by 1967 Legislature to conform to decisions of the United States Supreme Court rendered shortly prior thereto. You will note the special sections of 77–39–5 which seeks to protect young people from such material. It is our opinion that the circulation of obscenity among our young people would produce much immoral conduct that might not otherwise occur and that such conduct contributes greatly to the problems of juvenile delinquency and to poor marriages and family life thereafter. However, we are unable to supply any factual evidence to support this conviction. The absence of such proof, however, should not deter all interested parties from doing everything possible to curb obscenity.

We believe that vigorous prosecution of the Federal laws on this subject will be an effective deterrent. This is particularly true with respect to a small state such as Utah since practically all of the material is produced in the larger states and the prosecution of the distributors is like severing the tips of the octopus's tentacles as compared with striking at the body of the octopus where the materials originate. In addition, it must be recognized that local prosecutors seldom, if ever, develop the expertise necessary to effectively prosecute in this highly technical field and, hence, are reluctant to do so. Also, the available man power and means is usually limited and the more obvious type criminal activity consequently is concentrated upon where success is much more likely.

We are not in a position to comment intelligently as to whether the Justice Department has been sufficiently active concerning such prosecutions except to say that we know of no cases in our area that should be prosecuted that have not been.

The purification of publishers' lists of sex orientated materials will have only a limited value in our opinion, as the homes who would utilize that remedy are least likely to be the source of problem behavior from such material. Its main value would seem to be the psychological one of at least doing something.

We commend you for your efforts in this importance field and wish we could be of more assistance to you in it.

Very truly yours,

VERNON B. ROMNEY,
Attorney General.
By ROBERT B. HANSEN,
Deputy Attorney General.

STATE OF VERMONT,
OFFICE OF THE ATTORNEY GENERAL,
Montpelier, August 28, 1969.

Hon. N. C. NIX,
Chairman, Subcommittee, on Postal Operations, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Thank you for your letter of August 14. I am quite concerned about the problem of obscene literature. The main problem in this state is from the influx of material from the State of California through the mails. These usually consist of lewd pictures and an invitation to purchase material. The normal method of operation is to try and equate the material with some sort of education or art approach. Generally speaking the material carried in our stores and news shops is nowhere as objectionable as you might find in larger cities.

I believe an effective means of controlling this type of operation, and consistent with U.S. Supreme Court decisions, would be to establish some sort of a regulatory system which would require registration of all those sending out material which is, as you described "sex oriented advertising". I believe that regulations which would attempt to obtain a guarantee from those sending out the literature that they would not violate the laws of the states to where they are sent, in particular that they would not be received by any minors would be constitutional and effective.

We have in our state passed a law which is similar to the New York statute which was upheld by the United States Supreme Court. Although this law has been in effect for approximately two years, we have not had any prosecutions. This is due largely to the fact that the law is practically unenforcible. As I stated above the real abuse we wish to have controlled is the influx of materials through the mails. The standards of morality in a rural state such as ours makes it practically impossible for offenders to distribute material in their stores without considerable adverse comment from the community.

Very truly yours,

JAMES M. JEFFORDS, *Attorney General.*

COMMONWEALTH OF VIRGINIA,
GOVERNOR'S OFFICE,
Richmond, November 7, 1969.

Mr. THOMAS KENNEDY,
Rayburn Building,
House of Representatives,
Washington, D.C.

DEAR MR. KENNEDY: Please thank Representative Nix for the report of the hearings before the Subcommittee on Postal Operations with respect to obscene material.

This has concerned us here in Virginia, particularly with respect to recent Supreme Court decisions which make it almost impossible to arrive at a legal definition of obscenity that will stand the test of jurisprudence.

As a consequence, Virginia's Legislature has not attempted regulatory statutes. At the same time, I am certain that the people of Virginia would heartily favor legislation which would protect them from the mass mailings of pornography.

With kindest regards, I am

Sincerely,

MILLS E. GODWIN, JR., *Governor.*

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
Richmond, August 15, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
House of Representatives, Washington, D.C.

MY DEAR MR. NIX: I have your letter of August 14th, advising that there will be a series of hearings held on the subject of the operations of smut merchants.

The Honorable James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, has had several cases in the Federal and State courts involving this matter, and I believe he is in a better position to be helpful to you than this office. I am, therefore, taking the liberty of forwarding your letter of August 14th to Mr. Wilkinson, with the request that he reply to you direct.

Very truly yours,

ROBERT Y. BUTTON,
Attorney General.

OFFICE OF THE COMMONWEALTH'S ATTORNEY,
Richmond, Va., September 15, 1969.

Mr ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
House of Representatives, Washington, D.C.

DEAR MR. NIX: Your letter of August 14, 1969, addressed to the Honorable Robert Y. Button, The Attorney General of Virgina, State Capital, Richmond, Virginia, has been referred to me for reply.

Mr. Button, our Attorney General, referred your letter to me because as Commonwealth's Attorney for the City of Richmond my office has been quite active in obscenity prosecutions since 1966. We have been in all of the State courts and Federal courts endeavoring to bring some sanity back into this particular aspect of the criminal law. Thus far, from a legal point of view, we have not been successful. Much of the useless effort at public expense in this field has been caused by decisions of the United States Supreme Court.

No matter how fair we endeavor to be and regardless of the safeguards used by the prosecutors to distinguish obscenity from free speech we are constantly stopped by Federal intervention. Now this is being done by the lower Federal courts.

We now have a case pending in the United States Supreme Court under the style of Wilkinson vs. Tyrone, Inc. and is designated in the October term 1969 as number 409. I can state without hesitation that this office has, with fairness, endeavored to enforce the valid criminal laws of this State against obscenity, but through Federal intervention our task has become very difficult, if not impossible.

Many of the residents of the Richmond area have complained to me about the publications coming through the mails. There is hardly a week that passes that some citizen does not make a complaint to this office relative to sex oriented materials they are receiving through the mails. Quite frankly, it is a deplorable situation when the privacy of a man's home is invaded by the smut dealers of this country. In the past few weeks this office received a complaint from a man who opened his mail in the presence of his family and the pictures were so vile that he was embarrassed.

I have a desk drawer full of publications that come through the mail or are otherwise transported in interstate commerce. Local prosecutors cannot look favorably on assistance from the Federal government in this particular field of law enforcement. Yet 75% of the American people by a recent poll repudiated the flow of obscene material in this country.

Why should citizens be put to the trouble of notifying the Post Office to stop the flood of obscene material coming to their homes? It would appear that the law-abiding taxpaying citizens should be entitled to enjoy and relax in their own homes without this nuisance. Stop the source and we won't have to worry about the mails.

It would appear that legislation to the effect of taking the jurisdiction of the Federal courts away in these particular cases would be a great help in stemming the tide of the flow of pornography in the country. Each State has a Supreme Court and I am sure that those Justices are just as dedicated to the preservation of the United States Constitution as Federal Judges. In our State we enjoy the privilege of having excellent trial judges and Supreme Court Justices. Criminal matters should be left to local officials.

I am told that all fifty States of this nation have laws against obscenity and it has been universally held that obscenity, as such, is not entitled to constitutional protection awarded free speech. We all know that no benefit can come to any individual or any society by the use or dissemination of pornographic and obscene material. Obscenity, as other criminal prosecutions, should be presented to a jury under proper instructions from the court and let the people decide. This is our system of ordered liberty.

No one in the United States can give a clear-cut opinion as to whether or not obscene materials lead to criminal activity. On the other hand no one will say that obscene materials are helpful to an orderly society. Under these circumstances, it would appear that we would not want to commit a generation to national suicide while the theoretical discussion of pornography continues. I can say that many persons arrested for criminal sex crimes have in their possession pictures which I would deem to be obscene.

I would like to state without reservation the freedoms under the First Amendment must be protected. Some of the books, magazines and motion pictures on the American market today are not free speech but hard core pornography which has never been protected under our Constitution.

Perhaps I made this letter a bit too long but I endeavored to point out the problems in this field of law enforcement and many of them have to be cured at the national level.

If you desire any specific information from this jurisdiction I will be glad to furnish it to you without delay.

Very truly yours,

JAMES B. WILKINSON,
Commonwealth's Attorney.

STATE OF WASHINGTON,
OFFICE OF ATTORNEY GENERAL,
Olympia, August 28, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, House of Representatives, Washington, D.C.

Dear REPRESENTATIVE NIX: This is in response to your August 14 letter concerning your subcommittee's hearings on the subject of obscenity.

Co-incidentally, I have just completed answering a confidential survey on the same subject at the request of the Commission on Obscenity and Pornography.

Since the confidential survey is fairly comprehensive, I am enclosing a copy of my response. Should you desire any additional comments, please do not hesitate to contact me.

Sincerely,

SLADE GORTON,
Attorney General.

THE STATE OF WISCONSIN,
DEPARTMENT OF JUSTICE,
Madison, September 19, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: I received your letter of August 14, 1969, and wish to commend the efforts of your Subcommittee in meeting what I believe to be a problem of utmost magnitude.

My office receives several complaints each week from people all over the state whose homes and places of business are being besieged by obscene solicitation mailings. The solicitations usually are directed at business or professional men, and are addressed to homes, stores and offices in every corner of the state. In several instances, such mailing are addressed to minors.

I have enclosed copies of secs. 944.20 to 944.23 of the Wisconsin Statutes, dealing with the dissemination of obscene materials. Our basic obscenity law has been upheld by the Wisconsin Supreme Court, and the legislature is presently considering a law directed to minors which is closely patterned after the New York Statute recently upheld by the United States Supreme Court.

You are aware, I am sure, that state criminal laws are largely unsuited to deal with the mail-order obscenity problem because of the virtual impossibility of obtaining jurisdiction over the sender. For this reason I have expressed support for tighter and more effective federal controls which would provide effective and readily accessible remedies to individual citizens—controls similar to those in HR 11742, 11743 and 11744 recently introduced by Representative John W. Byrnes.

To my knowledge, there have been few federal obscenity prosecutions in Wisconsin, and I would hope that stronger and better legislation in this field would

be coupled with vigorous federal enforcement so that the people of Wisconsin and other states could be free from the invasion of unsolicited, pornographic materials brought to their homes and offices through the U.S. mails.

Since criminal prosecutions in Wisconsin are the sole responsibility of the local district attorneys, my office has had virtually no prosecutorial experience in this area. It is quite obvious, however, that the growing rash of mass obscene mailings is reaching serious proportions, and I respectfully urge your subcommittee to help bring the full weight of the federal government into play to provide effective and accessible sanctions against these smut merchants.

If there is any way I can aid the subcommittee in its work in this area, I would be most happy to do so.

Sincerely yours,

ROBERT W. WARREN,
Attorney General.

LETTERS FROM CITY GOVERNMENTS

CITY OF ATLANTA,
Atlanta, Ga., August 19, 1969.

CITY OF ATLANTA,
Atlanta, Ga., August 19, 1969.
Congressman ROBERT N. C. NIX,
House of Representatives, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR REPRESENTATIVE NIX: Since Mayor Allen is out of the city, I would like to acknowledge receipt of your letter requesting his views on the problem of mailed obscenity.

Upon his return to the city next week, this will be brought to his attention and I'm sure you will hear from him shortly.

Sincerely,

MRS. ANN M. MOSES,
Executive Secretary.

CITY OF BIRMINGHAM, ALA.,
OFFICE OF THE MAYOR,
October 29, 1969.

Mr. ROBERT N. C. NIX,
Chairman, U.S. House of Representatives, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR MR. NIX: In answer to your communication of September 30, 1969, Mayor Seibels has asked that I respond to your inquiry.

As to the question concerning the availability of obscene material in our community the answer is a definite yes. There has been a tremendous increase in the amount of material which is definitely more obscene than that which first appeared.

Whether there is any connection between obscenity and crime is difficult to determine without a more thorough study. The first influx of obscene material occurred approximately six months ago and we have been unable to discern any connection between this material and our crime rate.

As to health problems, the answer will be substantially the same.

In answer to the question concerning our success in court with city ordinances I would like to say that recently a State Supreme Court Panel of Judges was highly commendable of our obscenity ordinance. However, the ruling in the particular case neither upheld nor negated our city ordinance.

In the particular case, as in all others, the question arises as to the definition of obscenity.

The guidelines that we use for determining obscenity are as follows:

1. That to the average person applying contemporary community standards the predominant theme of the material when taken as a whole appeals to the prurient interest in sex.

2. That in the description or representation of such matters the material is characterized by patent offensiveness in that it goes substantially beyond the customary limits of candor.

3. That the material or matter is utterly without social importance.

A quick look at these three rules for determining obscenity reveals the futility in trying to make an obscenity case stick in a court trial.

No. 1 sounds reasonable enough, but No. 2 completely negates No. 1, and No. 3 practically makes the case impossible.

The citizens of this city are very much alarmed by the increase in pornographic traffic. However, most of them cannot understand the limits placed on the officials of this city in curtailing the problem. They have been unable to organize themselves in such a manner as to be an unofficial threat to the people who benefit economically from the pornographic material.

I certainly hope that you and your committee will be able to assist our local government in abating this nuisance.

Sincerely,

JUDSON P. HODGES,
Chief Administrative Assistant to the Mayor.

CITY OF BIRMINGHAM, ALA.,
OFFICE OF THE MAYOR,
January 9, 1970.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, House of Representatives, Washington, D.C.

DEAR MR. NIX: Please excuse the delay in answering your very good letter of August 15th, but it was apparently misplaced. I am enclosing various bits of information concerning my feeling about pornography and in this letter, I will try to describe to you our situation and answer some of the questions that you ask. We have taken a very strong stand against this garbage that is being put out locally at our bookstores and also through the mail. I feel very strongly about it and at the State Convention of the American Legion they unanimously passed the enclosed resolution. It will take more than resolutions, but an irate public all across the nation can have a lot to do with rejecting this filth that is dumped into the mail and is available at some of these bookstores. We have closed up the Paris Bookstore and then they were able, through the courts, to open up again. We hope to have some success in winning this case, but we have got to have more support from the Supreme Court and the Appellate Courts, etc. Hope you or your assistants can take the time to read some of the material that I am sending you. Our Council and this Mayor are unalterably opposed to the distribution or sale of some of this filth and garbage, as I have just said, that has been dumped into this community.

Thank you for your efforts and that of your committee in doing all that you can to approach the problem nationally. With every good wish.

Sincerely,

GEORGE G. SEIBELS, Jr., *Mayor.*

CITY OF BALTIMORE,
October 22, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. CONGRESSMAN: Thank you for your letter of August 15, regarding the problem of mailed obscenity. In attempting to supply you with the information you requested, I have referred the matter to the Police Department of the City of Baltimore, which has provided me with the following information:

Many phone calls have been received by the Vice Control Section of our Department from concerned and indeed, enraged citizens who have received smut mail at their homes. Complainants have been referred to Mr. Morris Eisenberg, superintendent of Claims and Inquiries, local U.S. Post Office, who is charged with postal violations enforcement.

Mr. Eisenberg advises that since the first of this year his office has received some 2,000 complaints. Twenty-five-to-thirty percent of these complaints involve persons under 19 years of age.

Postal athorities order the sender to remove the name of the Complainant from their mailing list within 30 days. Failure to follow this direction results in a charge of violating a Federal Order.

The Police Department is unable to provide documentary evidence of the harmful effects of such literature. The commanding officer of the Department's Vice Control Section believes that such smut literature is, indeed, dangerous to certain youth.

Several inquiries have been made outside law enforcement. No known studies are available as to the effects of such literature on young people.

The City of Baltimore has taken legislative action on the dissemination of pornography. A copy of City Ordinance No. 467 is attached.

I am hopeful that this information will be of help to you in preparing national legislation on this issue.

Sincerely,

THOMAS J. D'ALESANDRO III, *Mayor.*

CITY OF BOSTON,
Boston, Mass., October 3, 1969.

Representative ROBERT N. C. NIX,
House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE NIX: Mayor White has asked me to answer your letter of September 30th. While we cannot give you a capsule report on obscenity in our community, it may be helpful for you to have a copy of the ordinance which was passed by the City Council on April 28, 1969 which seeks to require vendors of materials restricted to Adults Only to register with the City Clerk.

The constitutionality of this ordinance is now being challenged in the Federal Court in Boston, and we do not yet know what the outcome of that case may be.

Yours very truly,

HERBERT P. GLEASON,
Corporation Counsel.

CITY OF BUFFALO,
OFFICE OF THE MAYOR,
August 20, 1969.

Hon. ROBERT N. C. NIX,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Thank you for your letter of August 15. I have been deeply concerned about the obscenity situation in this area especially as it relates to motion pictures recently a chain operation opened a movie house on Buffalo's Main Street which features garish advertisement for "nudie movies" and has been found to be extremely offensive to many of our citizens. A member of the Salacious Literature Squad of the Buffalo Police Department, together with a Buffalo City Court Judge, visited the theater on several occasions. Warrants were issued and proceedings commenced to revoke the movie license.

That matter is still pending and although I may not properly comment on it, you may be interested to know that we have police officers assigned full-time to the task of visiting book stores and movies to determine whether our obscenity statutes are being violated.

Sincerely,

FRANK A. SEDITA, *Mayor.*

CITY OF CHICAGO,
DEPARTMENT OF LAW,
October 8, 1969.

Hon. ROBERT N. C. NIX,
House of Representatives, Chairman, Subcommittee on Postal Operations, Washington, D.C.

DEAR CONGRESSMAN NIX: Your letter of September 30, 1969 to Mayor Richard J. Daley has been referred to this office for reply.

Initially, let me assure you that Mayor Daley appreciates and sympathizes with, the important task your Subcommittee has undertaken to investigate the proliferation of obscenity through the mail. Following are our responses to the questions posed in your letter.

(1) There has been a marked increase in the quantity and the offensive character of pornographic material being purveyed in the City of Chicago.

(2) A major step in alleviating this problem would be to tighten federal laws to eliminate the interstate shipment of these materials.

(3) The City of Chicago and the State of Illinois have several obscenity laws. For the most part, these laws are geared toward the protection of children. It is our opinion that children require the greater protection in that they do not have the maturity to accept or reject obscene material and are the group most greatly affected by this material.

(4) It is the experience of our local prosecutors and other law enforcement officials that obscenity plays an important role in the development of antisocial conduct in a young person. As you know, there are many psychiatric and sociological studies in this area reaching divergent conclusions.

(5) Private groups, and law enforcement officials as well, have had only moderate success in eliminating obscenity for public consumption. This is primarily because the obscenity laws as enumerated by the United States Supreme Court are most limiting as to what material may be legally labeled and prosecuted as obscene.

(6) One of the major problems of local law enforcement in the area of obscenity is to convey to the public the notion that although certain material may be extremely offensive, the law permits no official action against it.

Again, let me assure you that Mayor Daley is grateful for the important work your Subcommittee is undertaking and that he wishes you well in its endeavors.

Very truly yours,

MARVIN E. ASPEN,
Head of Appeals and Review Division.

CITY OF CINCINNATI,
OFFICE OF THE MAYOR,
November 5, 1969.

Representative ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: This is in reply to your recent letters of August 15, and September 30, concerning the problem of obscene materials in the mail.

Mailed obscenity has become a problem in Cincinnati as most everywhere else. However, the particular problem seems to be mailed advertisements for photographic movies, books, magazines, pictures, etc. The head of our Vice Control Bureau reveals that many people in Cincinnati receive these mailed advertisements and send them to our Bureau which in turn generally forwards them to the Postal Inspector's office.

There does not seem to be an effect of obscene materials in our jurisdiction on young people under 18 years of age, as these advertisements seem to go mostly to adults. However, we have no way of knowing how much of these advertisements come from the mail into our city or how much of it does go to minors under 18 years of age. By the same token we have no way of knowing how much of the actual merchandise is sent for and received in Cincinnati. It is a known fact that mailing lists are sold over and over. Therefore we must assume that any number of children could conceivably get on a pornographic mailing list.

It is the feeling of our Vice Control unit that the advertising materials sent through the mail far surpass in obscenity any other material that can be purchased in Cincinnati. Should such material appear in Cincinnati our Police Division would act on existing ordinances calling for the arrest of such individuals. I hope this information will be of some use to you and your committee during their deliberations.

Sincerely,

EUGENE P. RUEHLMANN, *Mayor.*

CITY OF CLEVELAND,
September 12, 1969.

Mr. ROBERT N. C. NIX,
Chairman, House of Representatives, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR MR. NIX: Your recent and timely inquiry concerning the issue of mass mailings by smut merchants is currently a pressing problem in the City of Cleveland. Not only is the mailing of smut a current problem, but also the retail sales by wholesale and retail smut merchants to people supposedly over 21, is a problem that we have tried to curb on previous occasions. In fact, in March of this year, our police force did investigate and was able to confiscate a large amount of obscene literature, film and photographs from a very large wholesale distributor in the City of Cleveland. However, our efforts were in vain due to the very permissive and broad rulings by the United States Supreme Court by which an adversary hearing must be initiated before the issuance of a search warrant to determine whether the material to be seized is obscene. (The case in point is *Quantity of Books vs. Kansas*) which is found in 370 U.S. 205 (1964); also *Marcus vs. Search Warrant*, 367 U.S. 717 (1961). This adversary hearing,

in effect, notifies the smut merchant that the seizure of his property will take place and alerts him and his attorneys to make every effort to prevent the seizure of his material. We did not provide an adversary hearing because we did not want to alert the smut merchant, we had to return a vast quantity of this literature, books and other obscene materials.

At the present time we are investigating a recent Ohio statute which allows the Mayor or chief legal officer of a municipal corporation to declare materials as being obscene and allows the municipal corporation to get an injunction prohibiting the distributor from distributing his goods; (ORC, Section 2905.39). Our Law Department, under Director Clarence L. James, Jr., has also come up with several proposals in this area which may be of some interest to you. These proposals we have enclosed. I believe that the Federal Government must take steps to curb the mailing of smut materials and I will be happy to testify before your committee concerning our proposals and the effects of pornography in our Cleveland area. The City of Cleveland is presently being barraged with flyers for obscene literature. I am concerned about this and any aid I can render to you, please feel free to call on me.

Sincerely,

CARL B. STOKES.

PROPOSAL NO. 1: FEDERAL LEGISLATION TO PROTECT MINORS FROM MAILED OBSCENE LITERATURE

Federal assistance is needed to protect minors under 18 in local communities from exposure to obscene literature. The question of assessing the effect of smut on young minds should be left to the psychologists. However, organizations in the City of Cleveland have expressed strong views regarding the unnecessary exposure and availability of smut materials to minors. This exposure, if no mental or criminal effects can be directly proven, probably has at least brought out the curiosity element which could lead to unhealthy outlook of natural biological functions, the explanation of which should be left to the proper methods.

Therefore, we recommend strong Federal legislation aimed at assisting local communities in curbing smut dissemination to minors. This legislation must be broken down into two separate areas:

1. Over the counter sales to minors; and
2. Mailed obscene literature which reaches minors.

Over the counter sales to minors should be prohibited and a strict liability provision should be adopted whereby the seller is bound at his risk to know the age of the purchaser. This is analogous to the sale of liquor, and more recently the sale of firearms and the sale of certain drugs. The legislation in this area probably would be local in nature, though a strong argument can be made for Federal legislation in this area.

In the case of mailed obscene literature which reaches minors, this strict liability provision would probably be in direct conflict with the First Amendment against prior restriction of protected matter. In other words, it is an impossible standard for a seller through the mails to know the age of the buyer and if the seller were bound to know the age every time he mailed objectionable matter, the natural response would be to refrain from mailing any matter. Although at a first blush this standard appears to be an effective curb on all mailed obscene literature, its unconstitutional framework would cause it to be probably declared void.

Instead of a strict liability standard prior to sale, we recommend comprehensive postal regulations to prevent indiscriminate mailing of smut from falling into the hands of minors. A skeleton outline which follows sets in substance our regulatory scheme.

1. Post Master General can assign a restricted classification on mailed matter following the general regulatory scheme now in effect for granting second class mailing privileges to potentially objectionable matter. This restricted classification would in no way alter the sending of said matter per se. It would only designate that such matter would not be mailed directly to the addressee, but would have to be called for at the local post office.

2. At the time the person comes to the post office to receive the objectionable matter, he would have to present some identification proving hat he is 18 or over. In that way the mailed material could not be indiscriminately sent to any person who happens to fall on a mailing list and a party under 18 is protected. Also, a provision should be included in such a scheme which would give local postal offi-

cials the right to declare literature fit only for those 18 or above which would seem to go in line with proposal two in giving local communities a broader means of control over what is objectionable in the community standard. In other words, by declaring a certain magazine, book, or other materials that are mailed to be received only by 18 years old or above, local communities can further curb smut literature from reaching the hands of minors.

PROPOSAL NO. 2: LOCAL LAW ENFORCEMENT AGENCIES NEED FEDERAL LEGISLATION TO HELP CURB OBSCENITY DISTRIBUTION IN THEIR AREA

The legal test of obscenity must be set down precisely and simply, so that local prosecutors are relieved of the sometimes impossible task of proving matter obscene. Significantly, we would recommend that Congress take a stand on a legal question of whether the Supreme Court test relating to offensiveness of matter to the community standards refers to a national or local determination. We feel strongly that a local determination as to what offends the community must be written into any current legislation. It would seem clear, for example, that what would offend a Pennsylvania Quaker is quite different from what would offend the sensibility of a New York City Policeman. The whole point with respect to protecting the community from obscene literature is whether they want to be protected. Thus local officials, including the Mayor, the local prosecutor or chief legal officer of a municipality (including the United States Attorney), should be able to declare a certain piece of matter as being obscene and then an injunction should be obtained using the local community standards as a basis to stop distribution and sale of this literature.

Thus, in effect, a person still can go to another locality, obtain any matter he wishes and bring it back to the local community provided that he doesn't sell this material, or distribute this matter to an unwilling community. Local enforcement would seem to be an effective curb on local over the counter sales, and since most obscene literature comes in contact with interstate commerce, Congress has jurisdiction over this area.

Furthermore, Congress must set down the requirements to obtain a search warrant at the adversary hearing which precedes any issuance of a search warrant. In other words, before the prosecutor can obtain a search warrant, he must go before a judge with the defendant being notified, and determine whether a piece of literature is to be declared obscene. This determination is supposed to be made by the judge, however, how the defendant is to be notified, whether a jury should be allowed, and other procedures, are still in a state of "limbo" and Congress might want to proceed in this area. However, in the long run, civil injunctive remedies, similar to Ohio Revised Code 2905.39, are most effective.

Practical provisions which should go into any bill in this area are the following:

1. Give Local Law Enforcement Officials standing to go into Federal Court.
2. Include a long arm provision to go against publishers who are flooding the locality by out of state hig volume computerized printing operations.
3. Provide injunctive remedies and set down pretrial procedures in criminal cases.
4. Provide possible criminal remedies in the area.

CITY OF COLUMBUS, OHIO,
OFFICE OF THE MAYOR,
September 10, 1969.

ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR SIR: In answer to your letter concerning the problem of smut mail, I want to assure you that I am in favor of any proper legislation designed to eliminate this problem. State laws and Columbus city ordinances are ineffective in dealing the the problem of smut mail since most of this mail originates outside of the state and/or the country. For this reason it appears to me that Federal legislative restrictions are the only answer.

For the past few years the Police Department has received hundreds of complaints from citizens regarding the postal delivery to the very front steps of their residences of obscene publications. These complainants have been alarmed and disgusted by this intrusion by mail of unwanted and downright dirty publications. Since all complaints of this nature directed to the Columbus Police

Department were referred to the Columbus Post Office. I cannot give you an accurate figure as to the number of complaints received by our department. However, in checking with the Columbus Branch of the Postal Service which services 32 counties, including Franklin County, in the State of Ohio (the city of Columbus is the only large metropolitan area included in the 32 counties), their records indicate that from September, 1968 thru August, 1969 they have received and processed 2,837 complaints.

It is my understanding that upon receipt of a complaint of this type the Post Office officials advise the complainant that upon the request of the complainant the Post Office Department will place a "stop" on this type of publication to his individual residence. I am sure the Postal Service is doing everything within their power to eliminate this type of problem, however, it is obvious they are limited as to what they can do because of the lack of restrictive legislation.

Sincerely,

M. E. SENSENBRENNER, *Mayor.*

CITY OF DALLAS, TEX.,
September 15, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operation of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE NIX: Thank you for your letter of August 15 and especially for the interest of the Subcommittee on Postal Operation in reversing the national trend toward increased and unsolicited mailing of obscene material. I enclose copies of articles from our local papers in which efforts were made to assess and report the extent our own community suffers from this. I also attach hereto a copy of a summary memorandum prepared as a response to an inquiry I made as a result of your letter. I hope that all of it is helpful for I feel very strongly about the need for control in this matter. Citizens do from time to time forward such material to me with a plea for its elimination. As with our Dallas Police, I, of course, have only the recourse of referral to the postal system.

With thanks and warm best wishes.

Sincerely,

ERIK JONNSON, *Mayor.*

CITY AND COUNTY OF DENVER,
Denver, Colo., August 21, 1969.

Hon. ROBERT N. C. NIX,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: As you and your committee are undoubtedly aware, the basic question involved in the question you posed to me in your letter of August 15th is one of Constitutional freedoms of press and choice versus obscenity and pornography.

We in Denver and Colorado have attempted to grapple with this problem with varying degrees of success. Enclosed are copies of Denver city ordinances and the recently adopted state statute dealing with this problem. The attached clippings indicate some of the public reaction to the District Attorney's action in seizing a controversial film under the powers set forth in this statute. This seizure is now the subject of a legal battle which will eventually determine the constitutionality of the statute.

I hope this information is of some assistance to your subcommittee.

Sincerely,

W. H. MCNICHOLS, Jr., *Mayor.*

CITY OF DETROIT,
September 19, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
Washington, D.C.

DEAR CONGRESSMAN NIX: In response to your inquiry concerning the experience of Detroit with respect to the problem of salacious mail reaching young persons, I enclose herewith a memorandum prepared by our Commission on Children and Youth.

I hope it will be helpful to you and your committee.

Sincerely,

JEROME P. CAVANAGH, *Mayor.*

CITY OF DETROIT,
COMMISSION ON CHILDREN AND YOUTH,
Detroit, Mich., September 15, 1969.

Mr. MORRIS KELLMAN,
Special Counselor to the Mayor,
1126 City-County Building, Detroit, Mich.

DEAR MR. KELLMAN: Please find enclosed a report in response to your recent request regarding obscene materials mailed to youth.

This report was prepared by Mr. David Schey of our Community Youth Services staff. Although Mr. Schey had some difficulty in gathering definitive data in this area within the time allotted, he was able to make the following general conclusions:

1. Although there is a problem locally, it is not one of an alarming or serious nature in terms of the numbers involved or general impact on the total youth population.

2. The situation locally is generally symptomatic of a national phenomenon.

3. That better utilization of existing postal laws and support for passage of Senator Hart's proposed legislation (Bill S. 2676) would go a long way toward alleviating the problem.

Thank you for letting us assist in this matter. If we can be of further assistance, please let me know.

Sincerely,

EDWARD LITTLEJOHN,
Administrative Assistant.

CITY OF DETROIT,
COMMISSION ON CHILDREN AND YOUTH,
Detroit, Mich., September 12, 1969.

Re obscene mailings to youth.

To: Edward Littlejohn.
From: David Schey.

Attached is the report you requested. These were my main sources of material:

1. A bound pamphlet issued by the United States Senate Subcommittee on Juvenile Delinquency on proceedings of December 16, 1966—dated January, 1967. Obtained from Wayne State University Library files.

2. Leaflets from Washington office of Senator Hart, including a partial photostat of the Congressional Record of Tuesday, July 22, 1969.

3. A personal interview with Richard Jones, postal inspector at the Main Post Office.

4. An article in the January, 1968, issue of the *Detroit News* and a brief phone conversation with Assistant Corporation Counsel William Doran.

I was unable to find information both relevant and current in magazines or other newspaper articles. I went through all articles listed in the Reader's Guide for the last two years, and through the clippings in the subject files at the *News* and *Free Press*. Most material was either badly dated or did not discuss the problem of obscenity related to the *mails*.

I contacted several different bureaus within the Police Department. None of them could give me any information.

The Board of Education library had no files on the subject.

SMUT IN THE MAILS

The amount of sexually arousing, suggestive, and pornographic material which passes through the United States mail each year has become a problem of serious proportions. William K. Doran, Assistant Corporation Counsel of the City of Detroit, estimates that two billion dollars worth of pornography goes through the U.S. postal system illegally each year. Doran adds that the amount of "marginal" material, just on the borderline of pornography, accounts for a figure many times this amount.

In a speech before the United States Senate in July, 1969, Senator Philip Hart of Michigan stated, ". . . as much as seventy-five percent of the pornographic material circulated in this country eventually falls into the hands of minors. I am concerned," he said, "that much of this material reaches the unformed minds and emotions of young boys and girls."

Senator Hart quoted from the findings of the New York Academy of Medicine that this material, "interfered with the development of a healthy attitude and respect for the opposite sex. I am convinced," the Senator said, "by the expressed views of noted psychiatrists that by exposing healthy boys and girls to abnormalities you might do permanent character damage."

Like all large urban areas, Detroit is receiving its share of this smut mail. On April 14, 1968, Detroit's Main Post Office began keeping records of complaints on "erotically arousing or sexually provocative" mail received from cities throughout the state. From then until July, 1969, 14,961 such complaints were received. Postal Inspector Richard Jones stated he believes people who submitted complaints account for less than 10% of the actual number who unwillingly received smut mail.

The extent of this problem on a national level was brought to light in a report presented to the United States Senate Subcommittee on Juvenile Delinquency. This report, published in January, 1967, was prepared by Alvin Zumbrun, Executive Director of the Maryland Crime Investigating Committee. Calling for stronger legal action against smut mail, Mr. Zumbrun brought forth two graphic illustrations of the seriousness of the problem.

The first piece of evidence was an experiment conducted by a member of his staff over a seven year period, from August, 1959 to August, 1966. This man selected a "girlie" magazine from a Baltimore newsstand, and picked out five ads at random. He then answered all five ads, using the name and address of his seven-year-old son.

In a seven year period, over 500 unsolicited advertisements were sent to the son's name. The overwhelming majority were sex orientated. The total included the following items:

1. 201 advertisements for "art study" photos, slides, and films of a sexual nature. The brochures offering these items were generously illustrated.
2. 196 advertisements for all types of sexual literature. There were works dealing with scientific information on sex, information on sex techniques and on sex deviations as well as fiction with sexual themes.
3. 56 advertisements for other magazines, most of which had a sexual emphasis.
4. 30 advertisements for contraceptives and mechanical devices to aid the impotent male.
5. 21 advertisements for "lonely hearts" materials, featuring, for example, lists of "400 lovely maidens, widows, divorcees, lonely widowers and handsome bachelors."
6. 15 advertisements for so-called "party records" and tapes which could not be broadcast publicly.
7. 14 invitations to join a club which claims to have hundreds of members throughout the country wishing to engage in erotic activities.
8. 13 advertisements for medicines and tonics, most of which purported to restore flagging sexual powers.
9. 4 advertisements for stories about beatings, tortures and horrors, all of which had sexual emphasis.

The remainder of the ads were for various mail order items and insurance. Some were legitimate, some not.

Director Zumbrun's report listed the points of origin for these materials. 251 came from Los Angeles and surrounding communities; 106 from the New York City area, and 15 from the vicinity of Chicago. The rest came from cities scattered throughout the country, with only one from Detroit.

Zumbrun's experiment was designed to show that any child could be the unwilling recipient of hundreds of pieces of smut mail by showing interest in one seemingly harmless advertisement. Furthermore, Zumbrun added, once a person's name is included on a questionable mailing list, that person may expect to receive mail from all types of organizations—legally and illegally conducted, for a period of years.

The second illustration used in Zumbrun's report to the Senate subcommittee had to do with unscrupulous sales of mailing lists. He told how the manager of a West Coast magazine sold the names and addresses of 10,000 teenage girls to a purveyor of pornography in Chicago. The man in Chicago in turn sold these names and addresses at the rate of fifty for two dollars to any buyer who had the money. Buyers were led to believe that the girls had volunteered their names and were looking for "fast company."

The 10,000 girls and their families were flooded with objectionable mail. In most cases, letters from parents addressed to the mailing houses were completely ignored.

The conclusion of Director Zumbrun's report was that under present laws nothing can be done to penalize the advertisers in the "girlie" magazine or unscrupulous magazine manager. Recent Supreme Court decisions have left the American public with safeguards against pornography—even pornography placed in the hands of minors. As a solution, Zumbrun proposed three bills:

1. The first would make it a felony for any person to knowingly sell or give a mailing list to any organization whose business is advertising erotically oriented materials.

2. The second would make it a felony for any person whose business is erotically-oriented to give the name of any female over twenty-one to any other person without her consent, and to prohibit entirely giving the names of females under 21, with or without consent.

3. The third would make it a felony to send any erotically oriented material to any person under 18 except when expressly requested.

Director Zumbrun's proposal did not go beyond the Senate Subcommittee. Its chief flaw, by Zumbrun's own admission, is difficulty of enforcement. It would be an unreasonable demand to require businesses to obtain proof of age by mail.

In April, 1968, the United States Post Office enacted another measure designed to curb the flow of obscenity through the mails. This measure seems to be achieving a considerable amount of success.

Under Public Law 90–206, Title 39, U.S. Code #4009, persons receiving advertising which is, "in their opinion, erotically arousing or sexually provocative," can submit a request to the postmaster that the promoter send no more mail of any kind to them. On receiving the formal request, the Post Office Department sends a "prohibitory order" directing the sender to refrain from sending further mailing to the complainant.

The order is effective thirty days after receipt. If the sender violates the prohibitory order, and the complainant gives evidence to this effect, the Postmaster General asks the Attorney General to apply for a Federal Court Order directing compliance. Failure to observe the court's order may be punishable by a fine or imprisonment.

Since the passage of this law last year, postal inspectors in Detroit have submitted 11,962 prohibitory orders from the whole state of Michigan. However, Postal Inspector Jones stated that the complaints received and prohibitory orders issued are not an accurate measure of the extent of the problem of smut mail in Michigan. For instance, although most of this kind of mail is probably directed to the Detroit area, the majority of the complaints come from smaller outstate communities. The reason for this, Jones says, is that receiving objectionable mail is probably a more unusual occurrence in the smaller communities.

In discussing the areas from which this mail originates, Inspector Jones confirmed the statistics of the report to the Senate Subcommittee. According to his figures, over 95% of the objectionable mail originated from the Los Angeles and New York areas. Each city, he said, usually contributes between forty-five and fifty per cent of the total each month.

Commenting on the effectiveness of the Post Office's new procedure, Jones cited two encouraging statistics. The first was that out of the approximately 12,000 prohibitory orders issued in the past year, not one has required a follow up. All of the senders have apparently discontinued mailing operations to the complainants. The other statistic is that the number of complaints has shown a decrease for the past few months. Jones added, however, that this decrease may be only temporary. It is too early to draw any conclusions.

Despite the inconclusiveness of the statistics, however, Inspector Jones feels that there is good reason to believe the Title 39 law may be a strong force against the flow of objectionable material through the U.S. Mails. What he feels is needed is for information on the law to be widely disseminated throughout the country. If a sufficient number of parents and concerned individuals throughout the country took immediate action in filing for prohibitory orders, he said, the problem of smut in the mails could be effectively dealt with.

On July 22, 1969, Senator Hart introduced another public safeguard potentially even more effective—Bill S. 2676. This bill, submitted before the Senate, is designed solely for the protection of minors. If enacted into law, it would prohibit the sale to minors (defined as any persons less than 16 years old) of obscene materials which have been transported by interstate commerce or by the United States mails.

The legal basis of Senator Hart's bill is four propositions set out in a series of Supreme Court decisions, the most recent being the 1968 ruling in *Ginsberg* v. *New York*. The first is that obscenity is not protected by constitutional guarantees of freedom of speech and of the press. The second states that obscene material can be defined. The third says that the state has broader authority to control the conduct of minors than of adults. The fourth says the state is not prohibited from defining obscene material in terms of its effect on minors.

Senator Hart's bill has several functions. First, it explicitly defines obscenity in terms of its effect on minors. It devotes several paragraphs to definitions of the kind of material considered pornographic. Then it defines circumstances under which the seller would be held accountable for the sale of such material. Next, the bill sets legal penalties for selling or exhibiting obscene material. A fine of not more than $5,000 and/or imprisonment of not more than 5 years are the maximum penalties set for first offenders. Next, the bill protects the rights of the accused by requiring a jury trial. Finally, the bill would permit the sale of material coming under the definition of obscenity to minors accompanied by a parent or legal guardian, or to schools, museums or libraries.

As of September, 1969, the bill was still pending before the Juvenile Delinquency Subcommittee. Senator Hart is urging support of the bill. He emphasizes the concern American parents feel over the problem of smut mail. The Senator says that, aside from complaints on taxes, his constituents write more letters on this subject than on any other. He feels there is a clear need for more effective legal action against men "whose trade endangers the impressionable minds of our children."

GOVERNMENT OF THE DISTRICT OF COLUMBIA,
EXECUTIVE OFFICE,
Washington, D.C., December 10, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR MR. NIX: You have asked me, in letters dated August 15 and September 30, 1969, for information concerning the obscene mail traffic in the District of Columbia. You have asked for advice concerning the nature of the problem in the District, from both a police standpoint and a health standpoint. I have contacted both the Metropolitan Police Department and the District of Columbia Department of Public Health in order to determine whether there is any measurable relationship between the acquisition of easily-obtainable obscene material through the mails and problems encountered by these agencies.

The Sex Unit of the Metropolitan Police Department of the District of Columbia deals with sex crimes in the District. The commanding officer of the unit reports little measurable connection between sex crimes and the possession of salacious material—let alone salacious material obtained through the mails. During the last three years he reports that of all the suspects arrested for sex crimes in the District of Columbia, only three suspects had in their possession literature which could be described as pornographic.

The Morals Division of the Metropolitan Police Department, which handles all complaints regarding obscenity brought to the attention of the Department, reports no proven connection between the distribution of obscene material through the mails and the occurrence of sex-oriented criminal activity. Nevertheless, many complaints handled by the Division are relative to the salacious matter which comes through the mail. The Morals Division works with the United States postal authorities regarding such complaints. The postal inspectors are well aware that this type of material is being sent through the mails, but they are not permitted to open first-class mail.

However, there is a recourse available to persons receiving this type of mail. The recipient may go to any post office and obtain a "Pandering Advertisement Form." This is P.O.D. Publication No. 123, which is an explanatory booklet. Along with this, they receive P.O.D. Form 2150, which is to be filled out. The form along with the objectionable material is left with an official at the post office. This action will cause the removal of their names from a particular mailing list, and any further mailing of such type of material to them from that mailing firm will result in prosecution against that firm by the postal authorities, under section 4009 of title 39, United States Code. Such action is taken if there is persistence in mailing after a thirty day period.

The Morals Division is quite active in its investigation of any violations of the obscenity laws in the District of Columbia in regard to sales at bookstores and magazine stands. Further, the motion pictures shown at the local theaters featuring possible objectionable films are checked. Whenever violations are observed, the matter is presented to an Assistant United States Attorney in the District of Columbia Court of General Sessions for possible prosecution. In former years, it was the practice of the Morals Division to make summary arrests in obscenity cases where misdemeanors were committed in the presence of police officers. In recent years, however, due to the difficulties encountered in obscenity prosecution, and the "gray area" of borderline "permissible" obscenity, this Division does not make summary arrests for any matter pertaining to obscenity. In keeping with the cooperative spirit between the Department and the Office of the United States Attorney, this Division has strictly complied with the instructions of the Assistant United States Attorneys who have indicated that all matters concerning obscenity be brought to them for judgment prior to any enforcement procedures.

In regard to the health aspects, the chief of the Venereal Disease Control Division of the Department of Public Health states that there is no proven or measurable connection between mail availability of pornography and the incidence of venereal disease. Additionally, Dr. Raymond L. Standard, the Acting Director of Public Health, states, "With the increasingly liberal view of modern society toward sex, it becomes impossible to define, from a health or mental health standpoint, what materials are of pornographic or obscene significance. Certainly, I am not aware of any relationship between the dissemination and reading of pornography and its affects on the incidence of criminal insanity, nor do we have any direct evidence to indicate that the viewing of pornographic material in any way affects an individual's mental health. Psychiatrically, it would seem to us that society's current attitude toward sex is a healthier one than that which existed 75 years ago."

Regarding the effect of obscene material on young people in the District of Columbia, section 22–2001 of the District of Columbia Code explicitly states that no minor under the age of seventeen years shall be exposed to such material. The Morals Division strongly enforces this law, and there has been no evidence of minors frequenting the suspected bookstores, magazine stands, and theaters. However, it would be completely unrealistic to believe that such objectionable material is not falling into the hands of minors. With the large amount of tourism conducted in the District, much of which is in the high school and junior high school age bracket, it can be assumed that obscene material is being passed to youngsters under the age of seventeen years by those who have passed this age.

Finally, as to the general effects of the availability of obscene material I would refer the Chairman to Chapter 4 of *Obscenity and Public Morality* by Harry M. Clor and, more specifically, to the following observation of Judge Frank:

"To date there exist, I think, no thoroughgoing studies by competent persons which justify the conclusion that normal adults' reading or seeing of the 'obscene' probably induces antisocial conduct. Such competent studies as have been made do conclude that so complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that 'obscenity' represents a ponderable causal factor in sexually deviant adult behavior. . . . What little competent research has been done points definitely in a direction precisely opposite to that assumption. *United States* v. *Roth*, 237 F. 2d 796, at 811–12 (2d Cir., 1956)."

I hope this satisfactorily answers your inquiry. If I can be of any further help in this matter, please do not hesitate to call on me.

Sincerely yours,

WALTER E. WASHINGTON, *Commissioner.*

OFFICE OF THE MAYOR,
El Paso, Tex., October 17, 1969.

Hon. ROBERT N. C. NIX,
U.S. House of Representatives, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR MR. NIX: Thank you for your letter of September 30, 1969, concerning the smut mail traffic. El Paso has of recent date been inundated with pornographic devices, so much so that the City and County have joined hands in an

all-out effort to put a stop to this cancerous growth in our community. I am enclosing a copy of a story appearing in the El Paso Herald-Post of October 16, 1969, and a copy of Ordinance No. 4290 which the City Council passed on an emergency reading, for your study.

Although there has been no recent case which we can point to where pornographic literature has been directly related to a crime, the underlying feel among our police officials seems to be that this is certainly a factor to be considered in our overall crime prevention activities.

I would wholeheartedly endorse a Federal statute which would restrict the type of literature which has been inundating El Paso for the past year. The type of material which has been sold here in El Paso does nothing but eat away at the moral fiber of our community, and particularly our young people, and we are determined to do all we can locally to eradicate this mess.

Sincerely,

PETER DE WETTER, *Mayor.*

CITY AND COUNTY OF HONOLULU,
OFFICE OF THE MAYOR,
Honolulu, Hawaii, August 26, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

MY DEAR MR. NIX: Thank you for taking the time to write to me in connection with your Subcommittee's study of the problem of mailed obscenity.

I cannot help but agree that the specific problem now under study is but a part of the larger national problem, and that is the freedom with which matters appearing to be obscene are able to be circulated under the present state of the law.

You inquired about the state of the problem in this community.

To be specific, nonhard-core pornographic printed matter is openly displayed and is readily available to the purchasing public. Hard-core, so-called, pornographic materials are almost as freely available, but are not publicly displayed as is the soft-core material.

Recently, I instructed my prosecuting attorney to prosecute to the maximum extent the display of what clearly appeared to be pornographic motion pictures being publicly shown. Arrests were made and film and movie apparatus were confiscated. However, after a hearing before the U.S. District Court for the District of Hawaii, we were ordered to return the film and apparatus forthwith in that it seems the constitutional guarantees afforded the defendants required that a civil injunctive proceeding first be held to determine whether or not the confiscated film was indeed pornographic. Since the ruling, the films are being freely shown in public movie houses. Presumably, we are required to seek an injunction whereby the defendant would be ordered to appear before a civil judge, and after the film is displayed, show cause why a warrant for arrest should not be made if indeed the court found the film to be pornographic. If, following the injunction hearing, the court determines the film to be pornographic, then a warrant for arrest and seizure would issue. Whether or not the film would still be available at that time is conjectural, but one need not guess as to what the movie-house operator would do with the film at such time.

We have not made any study as to the type of persons who purchase the pornographic material or who view the pornographic films, and thus are unable to aid you in the sociological aspects of your study. There is no accurate way of determining, for example, whether or not the pornographic material reaches the hands of young people who are not yet fully developed emotionally, or what effects it might have upon them if it did reach them. There is something, however, in our Christian-Judaic philosophy that causes us to instinctively react to the free distribution of such materials as being morally wrong. One would not, it seems, need make an intense sociological study to determine that the new social order depicted in *Walden II* could lead to complete decay and ultimate collapse of our inner moral fiber. Perhaps we will soon witness successful sociological arguments made before the Supreme Court in defense of stronger pornographic laws and permitted enforcement thereof, much like those of Gunnar Myrdal presented by counsel in the first of the school segregation cases.

As to my thoughts in connection with Federal assistance in this area, I would think that legislation leading to stiffer sentences for purveyors of pornographic materials being transported in interstate commerce might provide a partial, tem-

porary solution to the problem. It would serve to provide us with a "moratorium," if you will, until such time as we are able to fully assess the problem. However, we all realize how difficult it is to legislate moral behavior.

The desire to view pornographic and salacious materials is only symptomatic of a general moral decay that we must get at. Pornography, as such, is only a genre of the general problem of decay of which drug usage is a part. The connection may not be readily apparent; but it seems to me that the present Federal program dedicated to assist the cities in the eradication of substandard living conditions and to provide employment for those who desire to work, play a very important role in rehabilitating those in our nation who have become morally destitute.

In closing, let me summarize by stating that we do not have sufficient statistics to aid your Subcommittee of the effect of obscene materials in this jurisdiction on young people under 18 years of age. Nor do we know whether or not this problem in relationship to young people is a mental hygiene problem or primarily a criminal problem. However, some of my personal thoughts expressed hereinabove might cause all of us to call upon our great universities to carry on the much-needed research that will hopefully provide some of the answers to these national problems. There must be some answer other than to go the route of the Danes who have permitted pornographic materials to be freely available so as to have caused the general populace to become rather blase about it all. I personally do not subscribe to the theory that things narcotic in nature are controlled by over-indulgence.

Thank you for the opportunity to present my views on the subject matter of your inquiry.

Sincerely,

FRANK F. FASI, *Mayor.*

OFFICE OF THE MAYOR,
Houston Tex., September 9, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR REPRESENTATIVE NIX: I am most pleased to see that your subcommittee is concerned with the problems of obscene mail and I share with you your concern over the difficulties of pinpointing the exact nature of the problem.

Apparently, in Houston, the bulk of any such obscene mail is not called to the attention of the City administration and it is my presumption that most people who receive this type of mail are aware that it is a Federal rather than a local matter. Only on rare occasions have such problems been brought to the attention of my office, so I am fearful that I canot advise you on the basis of actual information in regard to the nature of the problem in this community.

We do have, unfortunately, a more serious problem which is only remotely related to this. That is the problem of publications which, under present Federal law and rulings, can legally be displayed in public newsstands without action by local police. These publications, which quite probably do arrive in the United States mail, are regarded by many psychologists and social experts as both a mental hygiene problem and a crime problem and I would sincerely hope that you and your committee would be able to give some consideration to the proliferation of the country by such publications as well as salacious junk mail.

Sincerely,

LOUIS WELCH, *Mayor.*

CITY OF INDIANAPOLIS,
August 20, 1969.

Hon. ROBERT N. C. NIX,
Chairman of the Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Many citizens of our community have complained about receiving obscene materials in the mail. Your committee is aware of their concern and likewise could probably document the numbers of letters which have come from Indianapolis and central Indiana asking that the Post Office takes steps to eliminate the names of innocent citizens from the mailing list of firms selling or distributing obscene materials.

In the life of our community, the distribution of obscene materials has not posed a serious problem. By and large, the Indianapolis Police Force working in cooperation with the Marion County Prosecutor have maintained a high degree

of control. Very fortunately, book stores and other outlets for magazines and potentially difficult materials have cooperated with our law enforcement officials to separate juveniles from allegedly obscene literature. It would be hard to document in terms of our community experience a correlation between criminal activities and obscene literature. I suspect it would be much easier to obtain testimony of parents and religious leaders who point out the difficult problems posed by easy access to obscene literature in terms of formation of value judgments and proper development of young lives.

I believe that the Federal government can best assist us through the rigorous control of the mailing of obscene literature or advertisements in behalf of such distribution. Other helpful developments might come from United States Supreme Court rulings which offer definition of obscenity and the powers of law enforcement officers in this area.

Sincerely,

RICHARD G. LUGAR, *Mayor.*

OFFICE OF THE MAYOR,
August 26, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: In response to your letter of August 15, I can most certainly agree that the majority of the people of this country, as evidenced by the cross section of our community, are greatly concerned about the prolific distribution of obscenity and pornography.

Repeated efforts at the local and state level to stem the flood of this material seem continuously to be thwarted.

Our police officials charged with controlling vice are alarmed at the conditions they are confronted with every day. They have reported to me that the kind of "hard core" pornographic material that just a few years ago could be obtained only from "underground" sources is now blatantly displaced in magazines on newsstands. The Sheriff's Office further reports that while statistics are not readily available, there is a definite and abundant correlation between arrests made for sexual perversion, child molesting and similar offenses and the presence of obscene material at the scene or in the possession of those arrested.

While our laws prohibit sale of this material to persons under 18 years of age, with it blatantly displayed on newsstands it is very difficult to keep it from filtering into the hands of minors. Also, a publisher or distributor mailing such material directly to a home has no way of knowing the age of the addressee.

The apparent misty nature of a definition of obscenity by our courts is one of the greatest obstacles in the enforcement of our obscenity ordinances and statutes, according to our experienced police officers. They have recently reported to me that they would not even attempt to make a criminal case out of circumstances today that several years ago, given the same circumstances, they would not hesitate one moment to make an arrest. This is because of the vague definitions given by the courts to what is or is not obscene.

While it has no bearing here in Jacksonville, there is the potential psychological inhibition imposed on a police officer to make an arrest in this gray area because of the constant threat of civil action against the officer for alleged false arrest. At present, a case against our Sheriff for damages is pending in the U.S. District Court for alleged violation of civil rights as the result of an arrest of a newsstand operator on charges of violation of the Florida Obscenity Statute. Any average citizen, I am certain, would commend the Sheriff's officers for their action. But, we are obliged to go to court now to defend the police.

For the information of your committee, I am forwarding to you copies of two recently adopted ordinances of the City of Jacksonville concerned with exhibition and distribution of obscene material along with a comment to the press at the time the ordinances were introduced.

These ordinances in the opinion of the Chief Judge of the Municipal Court are good ordinances. They have not been tested as yet in the higher courts, but we are most hopeful they will be sustained if so tested.

The Chief Judge of the Municipal Court, the Honorable John E. Santora, Jr., advises that Jacksonville so far has been spared an influx of material from foreign countries and from domestic sources that is undisputably suggestive of

immorality and would be, in our opinion, most detrimental in its psychological impact on minors with respect to standards of morality.

I hope these comments are useful in the researches and deliberations of your committee.

Sincerely yours,

HANS G. TANZLER, Jr., *Mayor.*

OFFICE OF THE MAYOR,
Los Angeles, Calif., November 10, 1969.

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 NIX: The Mayor has asked me to reply to your letter of September 30th, concerning salacious mail being received by the citizens of our City.

It is believed that in his letter to you dated September 16th, Police Chief Edward Davis has taken under consideration all of the information requested.

Please be assured of our cooperation and interest in assisting your subcommittee in this matter.

Sincerely,

RONALD J. ELLENSOHN,
Executive Assistant.

KANSAS CITY, MO.,
August 26, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

SIR: I am responding to your letter of August 15, 1969, wherein you request information about the nature of the problem in our community as a result of the flood of smut mail here.

I have made specific inquiries of our Police Department and find they have received numerous complaints about such mail. No tabulation has been made of these, except that the amount has been so significantly large that it is obvious many of our citizens object to their indiscriminate receipt. Some have said that, inadvertently, copies go into the hands of juveniles in the home and they resent this deeply. I cannot say the problem presented is one of mental hygiene or one of crime, but at any rate I see no reason why we should have continuation of this circulation and thereby compound an already acute situation. Certainly this type of literature cannot be considered educational in view of our well established and properly oriented programs on sex education. We have no way of knowing the affect of this salacious material on our youngsters, except to assume that it cannot be for good.

I subscribe to the institution of appropriate controls and am very much in accord with efforts to protect the privacy of our Kansas City homes from the introduction of this filth into these homes. All of us appreciate your efforts and those of your associates in Congress to do something about the problem. I hope you do persist in your efforts to bring about some relief from this condition.

Very truly yours,

ILUS W. DAVIS, *Mayor.*

CITY OF MEMPHIS, TENN.,
September 2, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Thank you so much for your letter of August 15th which arrived while I was on vacation.

In order that you might receive a prompt answer to the questions in your letter, my Assistant advises that he forwarded a copy of your letter to Mr. Lewie Polk. Chairman of our Review Board, and to Mr. George Morrow, Attorney, asking that they review your letter and that one of them reply directly to you with a copy of their answer to me.

I am sorry that I was out of town and unable to handle this matter personally, because this is something that is of utmost concern to me.

Sincere best wishes, and thank you again for your letter.

Yours truly,

HENRY LOEB, *Mayor.*

MARTIN, TATE, MORROW, & MARSTON,
ATTORNEYS AND COUNSELORS,
Memphis, Tenn., September 8, 1969.

Hon. ROBERT C. NIX,
Chairman, Subcommittee of Postal Operations, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Mayor Henry Loeb has requested that we reply to you in more detail concerning the questions which were asked in your letter to him of August 15, 1969 concerning the obscenity problem in Memphis.

As a member of the Board of Review of the City, I have been approached by innumerable citizens who have expressed to me their extreme concern over the increasing flood of filth, smut and perversion which now fills many of our movies screens and magazine racks.

Judge Kenneth Turner of the Memphis and Shelby County Juvenile Court, who once served as a police officer on the Vice Squad of the Memphis Police Department advises that:

Obscene literature is definitely known to excite adults to abnormal and anti-social and sexual behavior, and that it certainly leads to sexual excitement in youth and affects the morals and conduct of children who are subjected to it;

That once obscenity is in a community in quantity, it cannot be kept out of the hands of children and youth;

Concomitant with the increase in sex-oriented books, magazines and movies over the last few years, there has been a substantial and continuing increase in cases involving sexual promiscuity among juveniles in this community.

There now exists in Memphis an "Adult Book Center" which specializes in nothing but the most perverted and obnoxious filth. The Police and Attorney General have been working diligently ever since the store opened last April, in an attempt to close it down. Despite their efforts, the store is still open and doing a brisk business in obscene materials. Obviously the present state of law stacks the cards so strongly against the forces of law and decency that it is almost impossible to have effective control.

The most difficult hurdle in the path of law enforcement officers who are trying to maintain decency in their communities is the proposition that, in order for something to be obscene, it must be "utterly without redeeming social value." Almost no one seems to realize that this test has never been upheld by an Opinion of the Supreme Court. In fact, in the case of Roth vs. U.S. 354 U.S. 476, the Court said exactly the opposite, i.e. that obscenity was "utterly without redeeming social importance", and this is the reason why it is not protected by the First Amendment. The subsequent case of Memoirs vs Massachusetts 383 U.S. 413 (The Fanny Hill case) contained an opinion joined in by only three Justices (Brennon, Warren and Fortas) which added to the two tests of the Roth case a third independent test that the material had to be "utterly without redeeming social value" in order to be obscene. This was not an opinion of the Court, because the majority refused to go along with it. Justices Clark, Harlan and White each, in a separate opinion, made the point that this was a complete reversal of the *Roth* test.

In my opinion, one of the greatest contributions which Congress could make to the clearing up of the law in this befuddled area is to pass legislation directly attacking the "redeeming social value" test as being constitutionally unnecessary. This could be done by an Amendment to the Federal Obscenity Statutes.

Finally the situation had gotten so bad by the first of this year that the Tennessee Legislature passed a Resolution memorializing Congress to divest the Supreme Court of jurisdiction to hear obscenity cases. With the Court in the process of change, I would doubt that such legislation would be necessary at this time. Nevertheless, the passage of the Resolution indicates the seriousness with which the legislative officials of Tennessee regard this problem. The Resolution was introduced by an outstanding young Senator from Shelby County, Senator William R. Bruce.

We in Memphis greatly appreciate the interest shown by you and your Committee in this area. We want to help you all we can. Please feel free to call on us.

Since beginning this letter, there has come to my desk an advertisement for filthy sex literature which clearly meets the test laid down for pandering by the Supreme Court in the Ginsberg case. I hesitate to send it through the mail, but it is put out by Book Bargains, Inc. P. O. Box 4040, Grand Central Station, New York 10017. The book which is advertised is called "The Porno-Photographia", and is advertised as a "Book of Dazzling Sex Photography" and tells of Snow

White and the Dwarfs frolicing "in an orgy of sexuality", as well as a lesbian orgy and "a woman performing an act of fellatio."

I will be happy to hand this to any representative of the Post Office or one of your Committee who desires to see it for purposes of prosecution.

Sincerely,

GEORGE E. MORROW.

CITY OF MEMPHIS, TENN.,
BOARD OF REVIEW,
September 5, 1969.

Hon. ROBERT NIX,
Chairman, Subcommittee on Postal Operations, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Mayor Henry Loeb forwarded to me a copy of your letter to him dated August 15 and we appreciate this opportunity to give you our views concerning dissemination of pornography to the young people of our community. For the past year and a half we have worked with a group of citizens seeking a way to curtail the availability of obscene materials in the City of Memphis. Unfortunately, the problem has increased in its severity until now we find the most lewd publications and films being shown in the city. I believe that we are in dire need of laws to restrict the mailing of obscene materials and the interstate transportation of obscene films.

Even though some attempt is made by the purveyor of this filth not to sell it to the youth of our city, we find the infiltration of such materials in the adult population soon filters down to minors.

We are presently involved in a number of court cases concerning enforcement of state statutes and are attempting to secure local laws to prohibit the dissemination of obscene Materials to minors. We do appreciate your interest and trust that by some congressional action the post office department can remove such smut from the mail into the various communities of our nation. If we can provide any additional information or help in any way, please let us know.

Sincerely,

L. R. POLK, *Chairman.*

CITY OF MINNEAPOLIS,
October 14, 1969.

Congressman ROBERT N. C. NIX,
Chairman, U.S. House of Representatives, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR CONGRESSMAN NIX: I have just received a report from Mr. Jon F. Prentice, who is Supervisor of the Morals Squad of the Minneapolis Police Department, relating to obscenity.

This report is being sent to you in reply to your recent letters. In my opinion, Mr. Prentice's statements accurately reflect the situation in Minneapolis.

I am very concerned about the problem and congratulate you on your efforts to pass legislation to curb the flow of this material.

Sincerely yours,

CHARLES STENVIG, *Mayor.*

To: Chief Basil J. Lutz.
Subject: In re a letter on postal regulations on obscenity.

In reviewing the letter from Robert Nix, Chairman of the Subcommittee on Postal Regulations, I would suppose they could best draw a picture of our community by asking the questions he asked.

1. Have police officials seen a connection between obscenity and crime?

It appears to those in our division that the majority of the people in our city who are connected with pornography are generally of some questionable character. It is obvious to us that the enormous profit has made this a lucrative field. Our office is unsure as to the wholesale distributors, but a logical conclusion seems to be that it is a well-controlled monopoly type organization which in some way restricts the retail outlets.

2. Do health problems result?

We hesitate to document any areas where health, both physical and mental, are effected by pornography. In our readings in the area one finds that medical experts even differ as to their viewpoints. In our dealings with those who generally are interested in pornographic material, we have reached the conclusion

that their mentality is generally lower than that of the average citizen. We feel that these people probably react to this material in what one would consider an unhealthy manner. We again hesitate to document any cases.

3. What success have you had with city ordinances?

By almost any standard of law enforcement the ordinances under which we work must be considered totally inadequate. The punishment for conviction is limited to a $100 fine with no possibility of a jail sentence. The regulation is considered a laughing matter for those who peddle pornography. Our only tool of cost to the distributor is that of seizing the large amount of pornography and hoping the court will order it destroyed. We now have one case pending. We find that in applying the ordinances we must also be concerned with the Supreme Court decision and those handed down by lower courts. These decisions have attempted to define pornography, but in effect have in our opinion created an enormous grey area and have legally created loopholes which we are sure will compound the area of pornography. One of these loopholes has been shown dramatically by a ruling from the Circuit Court of Appeals, Judge Hayes, Friendly and Lumbard. In effect, their ruling did two things. The first is that it omitted a jury from hearing a case and returning a verdict based on Supreme Court decisions. Secondly, it permitted that in a motion picture anything could be shown including oral sodomy, sexual intercourse, etc., providing it was only part of a story, which was not utterly without redeeming social value. Enclosed with this letter is a brief review of the decision.

4. Is the quality of obscene matter getting worse, and is there a greater quantity of it available?

In speaking of the quality of pornography, one could hardly picture how much worse it could become. We suppose that in dealing with obscenity there is a limit as to how bad bad can be. This limit, we feel, was reached some time ago. The quality of the material, however, has become a great deal more professional. Pictures are produced with a quality equal to that of professional photographers and the techniques employed also appear to be that of a professional. As to availability, the only limit we now see which can even in the least way be enforced is that of preventing or attempting to prevent those under 18 years of age from having an easy access.

5. Have private groups had any success in cleaning up the newsstands, etc.?

At this time we are not aware of any specific action being taken by any single group in our city. It should be noted, however, that one group pressured our last state legislature to institute a law regarding those under 18 years of age from purchasing pornography (we generally feel this statute unenforceable and of little or no use to us).

It is the feeling of this office that the laws relating to pornography are generally insufficient to cope with the problem and that the Supreme Court decisions have so drastically opened the doors to pornography that our problems are just beginning. If new laws and limits are not established, we feel certain that the flood of pornography will in the near future overwhelm us. We also notice with some regret that the Commission of Obscenity and Pornography has absolutely no representation in the field of law enforcement.

JON F. PRENTICE,
Supervisor, Morals Squad.

SUBJECT: "I AM CURIOUS-YELLOW"

In 1964 a jury ordered the forfeiture and confiscation of this motion picture under Section 305 of the Tariff Act of 1930. This was in the U.S. District Court of the Southern District of New York. On July 22, 1968, this case was appealed to a U.S. Court of Appeals by Grove Press Incorporated, the distributor of the film. This court ruled in a 2 to 1 decision that the motion picture, "I AM CURIOUS-YELLOW," while having sexual content presented with greater explicitness than has been seen in any other film produced for general viewing, could not be classified as obscene, as it could be said that the dominant theme of the material taken as a whole appealed to the prurient interest in sex or that the picture was utterly without redeeming social value.

Hays, Circuit Judge (concurring): This is an appeal from a judgment of the district court, after a jury trial, ordering the forfeiture and confiscation under Section 305 of the Tariff Act of 1930, of the motion picture entitled "I AM CURIOUS-YELLOW." We reverse the judgment on the ground that under standards established by the Supreme Court the *showing of the picture cannot be inhibited.*

Friendly, Circuit Judge (concurring): Our duty as an inferior federal court is to apply, as best we can, the standards the Supreme Court has decreed with regard to obscenity. With reservations and with no little distaste, I concur for reversal. (He, therefore, voted that the showing of this picture could not be inhibited.)

Lumbard, Chief Judge (dissenting): I dissent and vote to affirm the judgment of the district court which held that the film, "I AM CURIOUS-YELLOW", should be barred from importation into the United States. That judgment was entered upon the verdict of a jury, which after seeing the motion picture and hearing the "experts" regarding its significance, unanimously found that its dominant theme appeals to a prurient interest in sex, that it is patently offensive because it affronts contemporary community standards, and that it is utterly without redeeming social value. I see no good reason why that jury verdict should be disturbed.

My colleagues give no satisfactory explanation why jurors are not as qualified as they to pass upon such questions. The conclusion is inescapable that they really think that the issue of obscenity can be entrusted to juries only if judges themselves (or, as here, a majority of them) think the matters in question go beyond the limits allowed by law. I had not supposed that only those who wear federal judicial robes are qualified to decide whether a motion picture has any redeeming social value.

THE CITY OF NEW YORK,
OFFICE OF THE MAYOR,
New York, N.Y., December 19, 1969.

Hon. ROBERT N. NIX,
Rayburn House Office Building,
Washington, D.C.

DEAR CHAIRMAN NIX: This is in reply to your request for our views relative to the control of pornography and the smut mail traffic.

In this regard, I have enclosed herein a statement on pornography prepared at my request by the Corporation Counsel of the City of New York and issued to the press on September 25, 1969. This is an in depth review of the pornography problem in New York and our position concerning its control.

As you will note from the report, the City of New York has been concerned with the problem of enforcing the laws relating to pornography and the difficulties attendant thereto.

There is no doubt that a progressive change has been taking place in the nature of sex oriented materials now available and that complaints from the public are increasing. At the same time, we are faced with a complex constitutional question which must be dealt with in enforcing the law.

The smut mail traffic is a problem which concerns a great number of people, particularly because it increases the likelihood that pornographic material will be seen by minors. Local governments which have strong programs of law enforcement and civil action to control pornography need concurrent federal support to restrict smut mail traffic in order to make their activities totally effective. Your efforts to achieve this goal through the implementation of a federal law which meets constitutional requirements has my complete support.

I hope that the enclosed material and my comments will be of some assistance to you.

Sincerely,

JOHN V. LINDSAY, *Mayor.*

PRESS BRIEFING: PORNOGRAPHY

This Press Conference is taking place in response to a number of inquiries from the Press directed to the Mayor and other City officials on the subject of Pornography. Because many of the problems in this area are legal and because of the impact of any official statements on pending litigation, it was decided that the proper place to hold this conference would be in the City's Law Department and that there should be present for the purpose of answering questions, the people who have expertise and operational responsibility in these matters.

The principal question which the Press has put to us, and to which this conference is directed is "What is the City doing about Pornography?" Before answering the question, it is necessary to place the City in its proper perspective in terms of governmental control of pornography:

1. The Federal Government has sole responsibility for prohibiting the importation of contraband pornographic material into the United States, interstate transportation within the United States, and the mailing of pornographic matter.

2. The Federal Courts have twin responsibilties: (a) to try persons charged with violation of Federal statutes regulating importation, transportation and mailing of pornographic matter; (b) to adjudicate cases in which it is claimed that the action of Federal, State and local officials, including State court judges, in attempting to regulate traffic in pornography has violated Federal Constitutional rights.

3. The States have the responsibility of enacting and enforcing state-wide criminal statutes including those having to do with the manufacture, possession, sale, distribution and exhibition of pornographic materials within the boundaries of the State. The State Courts have the responsibility for trying violations of State laws and of adjudicating claims made in the State courts that the action of State and local officials in attempting to regulate traffic in pornography has violated provisions of State law and the Federal and State Constitutions.

4. Finally, we come to New York City's responsibilities. In legal parlance, New York City is the creature of New York State. It has only those powers which are delegated to it by the State Constitution and State statutes. It has limited powers to enact local laws and its agencies have limited powers to issue rules and regulations in the area of pornography. It has a large police force which has the responsibility, among other things, for charging persons with violating criminal provisions of State laws in regard to pornography, local laws and administrative rules and regulations. The five District Attorneys of the five counties located in the City of New York are elected officials with the exclusive responsibility for prosecuting felonies and misdemeanors under State law and the chief responsibility for prosecuting major criminal violations of local laws, rules and regulations. The City's own Law Department has joint jurisdiction to prosecute criminal violations of local laws and administrative rules and regulations. The District Attorneys and the City Corporation Counsel have joint jurisdiction to enjoint publication, distribution and sale of pornographic matter within the City's limits.

Despite the City's limited powers and the number of adverse federal court decisions during this period, the City has followed a policy of vigorous prosecution. City-wide arrest figures for the last five years and the first seven months of 1969 for the sale of obscene material (including books, magazines, newspapers, films and novelties) are as follows:

1964	93
1965	80
1966	163
1967	206
1968	416
1969 (1st 7 months)	208

In New York County alone in the 2½ year period ending June 30, 1969, 305 convictions were obtained by District Attorney Hogan's office in hard-core pornography cases and 11 in border-line pornography cases. In each of the hard-core cases it was necessary for the purchase to be made by a plainclothesman acting under-cover.

The so-called pornography explosion is by no means solely a New York City phenomenon. Many cities throughout the United States, and indeed, throughout the world, are experiencing the same phenomenon. Much of the so-called hard-core material is manufactured outside of the United States and is distributed worldwide. Obviously, the problem cannot be attributed to a single scapegoat.

New York City's problem then is to deal with a problem which is national and international in scope. It can only exercise its own limited powers and must stay within the Constitutional and statutory framework which has been delineated by the highest courts of our State and Nation.

Pornography, of course, has many faces. The term encompasses not only books, magazines, and pictures, but also movies, plays and cabaret performances. It is a changing scene, marked by fads and new forms of expression. Frequently, the scene changes faster than the Legislature can act and react. It is part of the lawyer's job to apply existing statutes and court decisions to new practices which were scarcely contemplated by the legislators and judges whose written word must guide him.

Let us proceed therefore to discuss the problem of pornography in New York City under four principal categories:

1. Underground newspapers.
2. Underground bookstores (smut shops)
3. Topless waitresses and performers
4. Plays and Movies

1. *Underground Newspapers.* This phenomenon appeared in 1968. There are now five principal examples of this tabloid form newspaper featuring sex-oriented subject matter. These publications claim that as "newspapers" they are entirely exempt from the obscenity laws. The responsible law officers of the City, the Corporation Counsel and the five District Attorneys, decided that the proper way to test the Constitutional question which had been raised was to bring a civil injunction action in the Supreme Court of the State of New York. It was agreed the action should be brought in the name of all six officers and that the Corporation Counsel should have the responsibility of preparing and trying the case.

Such a case was brought against the publishers, distributors and two major retailers of the May 12th, 1969 issue of KISS magazine. After a lengthy hearing, a temporary restraining order was issued by Mr. Justice Irwin D. Davidson the day after the issue in question was put on sale. After trial, a permanent injunction was issued by Mr. Justice Harold Baer and the Sheriff was directed to destroy all remaining copies (more than 12,000) of that issue. More important than this result was the decision of a Supreme Court Justice that the issue in question contained hard-core obscenity and that the obscenity laws applied to so-called underground newspapers. After a temporary injunction in this case was issued, the District Attorneys acting independently within their own counties, took appropriate action to arrest persons who violated the law in connection with the publication, distribution and sale of underground newspapers. Six publishers, one printer, four distributors were arrested in New York County alone. Approximately fifty retailers were arrested throughout the City.

No arrest was made for selling any of these publications until a warrant had been issued by a Criminal Court judge who had viewed the particular publication involved. Nevertheless, a number of the publishers brought an action against the District Attorney of New York County and the Police Commissioner seeking to enjoin further arrests and prosecution on the ground that they constituted harassment which abridged freedom of the press. The publisher of the largest underground newspaper claimed that the arrests and threats of arrests and prosecution had resulted in a reduction of the distribution of his publication in New York City from 75,000 to 17,000. A three-judge court has been convened and heard argument on two of these cases yesterday (September 24, 1969).

2. *Smut Shops (Underground Bookstores).* Another fairly recent phenomenon is the proliferation of stores, particularly in the Times Square area, dealing exclusively in sex-oriented material: i.e., books, magazines, photographs, movie film and peep shows. Virtually all of the material openly displayed is Constitutionally protected under a long line of State and Federal court cases. Some of these stores, however, also sell contraband hard-core pornography under the counter or by appointment out of subway lockers and other storage places. The City Police experimented with stationing uniformed policemen in those stores where there had been repeated convictions for illegal sales. They proposed thereby to be able to observe and stamp out the illegal practices more effectively. This police procedure was also attacked promptly in the courts and resulted in an order forbidding the practice of stationing uniformed policemen in these stores on the ground that they discouraged lawful sales of Constitutionally protected material. The decision does, however, uphold the right of the City Police Department to station plainclothesmen in these stores.

The Police, the Corporation Counsel and the District Attorneys are working together on legislation which would regulate offensive window displays by these smut shops which intrude on the privacy of passers-by. A bill along these lines was introduced in the State Legislature last year but did not emerge from committee. The entire obscenity question has been and continues to be the subject of vigorous Grand Jury concern and investigation.

3. *Topless Waitresses and Performers.*—Late in 1966 the topless waitress phenomenon appeared in New York City in certain cabarets. In quick succession the City Police arrested the proprietor of the most notorious such establishment and two waitresses, the State Liquor Authority revoked the liquor license and the New York City License Commissioner revoked the cabaret license. The proprietor counter-attacked by seeking restraining orders against the State Liquor Author-

ity and the City Commissioner in both the State and Federal courts. These proceedings were successfully defended by the City's Law Department and by the State Attorney General and the topless waitress phenomenon ended. Subsequently the criminal case against the employees of the cabaret were dismissed because the trial judge found it to be a necessary element of the crime that the defendants hold cabaret identification cards. Before the topless waitresses could reappear, however, this loophole was closed by the adoption of appropriate regulations and statutory amendments.

With topless waitresses no longer permitted, the offending cabarets turned to topless entertainers, principally dancers and musicians. The City's License Commissioner had promulgated a new regulation to meet this practice and summonses were served by the City Police. The first case referred to the City's Law Department for prosecution resulted in a precedent-setting conviction of the owner of the cabaret and the imposition of the maximum fine.

Complete toplessness by waitresses and female performers is now banned in New York City by statute and regulations although the regulations are under attack in the courts. This is to be contrasted to a situation in some other cities in the United States which sanction virtually complete nudity in cabarets and similar establishments.

4. *Plays and Movies.* This is an area which has been largely preempted from City action by judicial decisions. Total nudity has been condoned by a number of high court decisions including the recent Federal Circuit Court decision in the "I am Curious, Yellow" case. The United States Government chose not to appeal to the Supreme Court despite the stinging dissent by Chief Judge J. Edward Lumbard.

In the past year, the City Police and the District Attorneys have been active and successful in the areas open to them. In the "Che" case the producer of a play combined nudity with on-stage sex acts. The District Attorney's office arranged for a Criminal Court judge to attend the performance, after which he issued a warrant and the Police made arrests. The defendants in the criminal case then sought relief in the Federal Court in the form of an injunction against further arrests and prosecution. The District Attorney and the Corporation Counsel defeated this legal maneuver and the play was closed down for about a month, after which it reopened with a far less offensive format.

In the movie field, the District Attorney of New York County only last week successfully prosecuted the manager of a movie theater exhibiting Andy Warhol's "Blue Movie" which also featured sex acts and that movie appears to have been taken out of circulation in New York City. The District Attorneys in several of the other counties also successfully prosecuted movie theater personnel.

The District Attorney has the responsibility for determining whether plays and movies featuring nudity can be successfully prosecuted under existing law. An unsuccessful prosecution accomplishes nothing except to confer priceless free advertising on the offending work.

CONCLUSION

The Corporation Counsel, the Police and the District Attorneys have worked together in complete cooperation in enforcing available laws dealing with the illegal commercial exploitation of sex themes. They have reacted quickly and successfully to new fads in the pornographic field which violated these laws. They have experimented successfully in extending the outer limit of law enforcement efforts in this area. They cannot, however, exceed the powers which they have under State and Federal law and court decisions.

The Police Department, the Corporation Counsel and the District Attorneys have pooled their expertise in drafting new State and local legislation to facilitate successful prosecution in this area. Some of this legislation has been adopted and some will soon be ready for submission after months of hard work.

The District Attorney of New York County has received special recognition for his activity in this field and for the significant role he played in drafting the current State law prohibiting the dissemination of indecent material to minors. He was also successful in sustaining the Constitutionality of this law in the United States Supreme Court. As a result, according to a recent New York Times survey, fourteen states have used this law as model for their own.

All of these officials have been under great pressure from interested members of the public to bring legal proceedings even though there is no chance of success, if only to harass alleged pornographers. These officials have resisted these importunities not only because they are unwilling to violate their oath to support the

Constitution, but also because any such action would succeed only in losing the confidence of the courts, creating harmful precedents, corrupting governmental processes and diluting respect for law.

CITY OF NORFOLK,
Norfolk, Va., October 6, 1969.

Hon. ROBERT N. C. NIX,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. NIX: I am in receipt of your letter of September 30th, and appreciate your sending me Part I of the hearings on obscenity in the mails.

I am enclosing a copy of the letter written to you by Chief of Police Claude J. Staylor concerning the traffic of smut mail in the City of Norfolk. I trust that Chief Staylor's letter will answer the questions raised in your most recent letter.

Sincerely yours,

ROY B. MARTIN, Jr., *Mayor.*

CITY OF NORFOLK,
Norfolk, Va., November 14, 1969.

Hon. ROBERT N. C. NIX,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. NIX: Reference is made to your letter of August 15, 1969, addressed to The Honorable Roy B. Martin, Jr., Mayor of Norfolk, in which you requested information on the nature of the problem in this community relative to availability of obscene material and its effect on the youth of this city.

Insofar as the actual possession of obscene material by youth under eighteen years of age, not too many cases of this nature have come to our attention; however, we do receive numerous complaints from adults relative to the receipt of pornographic literature through the mail.

It appears that the main effect of pornographic literature on the youth is probably manifested by male adults who expose themselves to young children and who attempt to molest young children. The effect may also be seen in the increase in promiscuous conduct on the part of both boys and girls. From a police standpoint, the effect may also be observed in the increase in the use of drugs by an increasing number of young persons.

I feel that is is extremely difficult to establish specific instances where exposure to obscene material was the cause of misconduct or the violation of law. In police work we recognize that exposure of youth to smut literature causes the youth to resort to unorthodox sexual activity. It is the exposure that does the damage, and this is true of any degenerating influence, whether it be pornography, drugs, alcohol, or a morally-depraved or otherwise worthless individual, for that matter.

I feel it is also pertinent to note the figures of the American Social Health Association, reflecting an increase in venereal disease throughout the Nation.

Yours sincerely,

C. J. STAYLOR, *Chief of Police.*

CITY OF PHOENIX,
Phoenix, Ariz., August 27, 1969.

Mr. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR MR. NIX: Thank you very much for your letter inviting my comments as to the work of your Committee concerning the control of obscene junk mail. This has become quite an issue in Phoenix since the Mayor's Office launched a campaign to control the distribution and production of obscene material.

We find that our problem is not in the proper enforcement, but with the judicial interpretations of our court. Our prosecutors seldom have the assurance of standing on firm ground when we take a case to court. We recently passed an ordinance which would prohibit the purchase or sale of grossly obscene materials to juveniles. The Federal District Court ruled in favor of this ordinance, but again our problem arises when trying to put a definition on what is obscene.

Our most recent effort was to secure as many signatures as possible on petitions in an effort to convey the sentiment of the community to the court on control of

pornographic materials. A San Francisco court ruled that the display and sale of obscene materials was legal, since this had been established in the community for a long period of time and, therefore, had become an accepted community standard. We hope to convey to the court the community's opinion that certain obscene displays or materials definitely do not conform to the community standards.

As far as the specific task of your Committee, I receive many complaints from our citizens who receive unsolicited obscene mail. I am sure many people in Phoenix would be appreciative if you and your colleagues could come up with meaningful legislation to control such activities. Presently, there is on way to determine if these materials are being sent to juveniles or if the person is legitimately on the "mailing list" of these organizations. This type of activity is extremely profitable and will only be controlled through strong measures adopted by Congress and enforced through the U.S. Postal System.

I very much appreciate your efforts to protect the rights of our citizens. If I may be of further assistance, please advise.

Very truly yours,

MILT GRAHAM, *Mayor.*

CITY OF PITTSBURGH, PA.,
September 23, 1969.

ROBERT C. NIX,
U.S. House of Representatives, Subcommittee on Postal Operations, Washington, D.C.

DEAR MR. NIX: I am writing in answer to your letter of August 15, 1969, to Joseph M. Barr, Mayor of the City of Pittsburgh regarding obscene mail. I am in complete agreement that obscene literature is certainly a national problem regardless whether it is sent through the mail or sold over the counters in numerous stores in every city in this country.

We are attempting locally to curb the problem of over the counter sales of obscene literature and have several cases pending in our local courts at present. I might add that we are not very optimistic about the outcome of these court cases due to recent Supreme Court decisions regarding obscene literature. I believe, as do many others, that the magnitude of the problem is the result of some recent Supreme Court decisions pertaining to the question of obscenity. I personally believe that the problem of obscene and pornographic pictures, movies and literature will be completely out of control within the next few years unless the Supreme Court hands down stricter guidelines or better yet, would permit each state to legislate individually on matters of obscenity.

It has been stated, even by President Nixon, that the problem has no simple solution. I do not agree with this statement. I do not agree that nudity per se is certainly not obscene yet I do believe that the portrayal of nude males and females in hundreds of different positions in expensive types of magazines are printed solely to appeal to the prurient interest of the readers or the viewers with no consideration for the moral integrity of the decent people in this country. The paperback novels should be considered even worse in that they literally describe every type of perverted sex act that can possibly be conceived by a perverted writer. Yet this type of literature is exposed for sale in the windows of the retail book stores within one block of the Justice Department Building in Washington, D.C. That is what makes this situation appear very hopeless at the present time.

I do not believe that the present restrictions covered under the provisions of Title 39, United States Code, 4009, provide the proper protection for the citizens of this country. The publishing companies and distributors that mail out the type of literature that is so very offensive to decent-minded individuals could care less about the fact that they have been ordered to remove several thousand names from their mailing list after notification by the Post Office and upon request by the recipient of the literature. I have no doubt that they send out perhaps millions of pieces of mail advertising their films and literature for sale and the fact that a few thousand are returned to them is rather insignificant. I am enclosing with this letter just one sample of the type of advertising that is being received by people in this city. You will note that it is quite obvious that once this type of mail has been opened whether by an adult or by a ten or twelve year old youngster, the damage has been done. You will also note that on the order blank there is no reference as to age so that actually any minor could order this particular type of film. I am sure your investigation will reveal numerous and far more revealing types of advertising than this particular piece of material.

In your letter you state that you think that the federal government should do more to be of assistance to local communities. The only assistance that is needed is to legally define what is and is not obscene based not on the broad view of what is constitutionally right but rather on a detailed view as to what is morally and basically wrong in the eyes of the great, great majority of the people of this country and that which may jeopardize the survival of this country. I believe it is common and accepted knowledge that the really great concern lies with the youth of our country and it should be understood that a great deal of this type of literature does eventually get into their hands, and I would like to quote a psychiatrist who stated "anyone who would deliberately arouse the child's curiosity or stimulate his unready mind to troubled sexual preoccupation aught to have a millstone tied around his nevk and be cast into the sea".

I wish you and your committee the very best of luck in your endeavors to arrive at a solution to this problem. I repeat, and hope you keep in mind, that in my personal opinion the only solution is in having very strict federal or state laws written very clearly and with no loopholes so that the federal and local police can act immediately in solving the problems and thereby hopefully preserving the morals of the peoples in these United States.

Yours very truly,

STEPHEN A. JOYCE, *Asst. Supt., Inspections Branch.*

CITY OF SAINT LOUIS, MO.,
August 25, 1969.

Hon. ROBERT N. C. NIX,
Subcommittee on Postal Operations, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: I was very pleased to learn that the Subcommittee on Postal Operations is inquiring into the effect of obscene material mailed to young people under 18. The problems of smut and obscene materials, either mailed or obtained through local bookstores, is of great concern to our community.

I have appointed a Citizens Committee on Decent Literature to help devise a workable plan for the City to deal with some of these undesirable materials. I am informed by our Police Department that the number of complaints they receive concerning receipt of obscene material through the mails by young persons under the age of 18 is very negligible. They do relate that the local Postal Inspectors Office does receive a number of these complaints. However I am confident this information is available to you through Post Office sources.

We in Saint Louis are very definitely interested in the work of your committee and are desirous of cooperating with you in any way that will bring about a termination of materials unfit for our community. I am informed that it is extremely difficult to obtain a conviction on obscene material because of liberalized court interpretations. This, however, cannot be changed through legislation.

I was particularly interested in the second sentence of your last paragraph of your letter which requested my thoughts on the idea of the federal government doing more to be of assistance to local communities. This is certainly a very open-ended subject, but I believe it will suffice to say that Saint Louis, like the other major cities of America, is on the verge of fiscal bankruptcy. Our situation is created primarily by an influx of high-cost citizens and an exodus of high tax paying citizens. Our income is geared to an archaic tax system, most of which is gobbled up by the state and federal governments. We receive from the state in assistance and services only $1 for every $3 in tax money we sent to the state Capitol. A plan for revenue sharing, either on the federal or state level, must be immediately implemented. This philosophy has already borne fruit in a number of states, and we were encouraged by President Nixon's overtures for federal legislation in this regard. With 90 per cent of our population residing on 1 per cent of our land mass, the needs of the cities, which are unable to continue to subsidize the state, must be considered foremost in the minds of our legislators. Our great nation is composed of great cities, and so long as the cities survive, so shall the nation.

Please feel free to call upon me should you require any additional information or if my office can be of further service to your Subcommittee.

Kind regards.

Sincerely,

ALFONSO J. CERVANTES,
Mayor.

CITY OF SAN DIEGO, CALIF.,
September 9, 1969.

Hon. ROBERT N. C. NIX,
House of Representatives,
Washington, D.C.

DEAR MR. NIX: Your letter of August 15th regarding automated mass mailings by smut merchants has been received.

I have forwarded your request to the City Manager for reply. You should be hearing from him shortly.

Sincerely,

FRANK CURRAN, *Mayor.*

CITY OF SAN DIEGO,
San Diego, Calif., January 8, 1970.

ROBERT N. C. NIX,
Congressman, Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Your letter of August 15, in which you asked San Diego Mayor Frank Curran to submit information and suggestions regarding the problem of mailed obscenity, was referred to this office for a reply.

I must apologize for the delay in responding to this request and hope that the enclosed information will be of value to your subcommittee on postal operations as it considers legislation which might be beneficial in combatting this problem.

Enclosed is an evaluation of the problem prepared by San Diego Police Chief O. J. Roed. The City Manager's office endorses Chief Roed's remarks and conclusions, and we wish to underscore his statement that while the postal forms are an important step in the right direction, we hope that a more efficient means can be developed to enable parents to cut off the delivery of obscenity and offers to purchase obscenity addressed to their minor children. We appreciate the difficulty which this involves.

We had hoped to forward some comments from the San Diego City Attorney, but his reply to our request for comments apparently has either been misplaced or has not been forwarded to this office.

We hope that these comments and those of Chief Roed will be of assistance to you. Also, you are no doubt aware that California Attorney General Thomas Lynch has conducted an extensive study of these and related problems through a statewide committee, and I am sure that the reports prepared by this committee would be of great value to your committee in this matter.

Sincerely,

GEORGE STORY,
Citizens Assistance Officer.

CITY OF SAN DIEGO—MEMORANDUM

September 23, 1969.

To: WALTER H. HAHN, *City Manager.*
From: O. J. ROED, *Chief of Police.*
Subject: Mailing of obscene materials.

Investigation reveals there are approximately 250 merchants dealing with the mailing of objectionable and obscene materials within the United States. From the number of complaints locally, it is obvious the mailing of such material is increasing at an alarming rate. During the early part of 1969, San Diego residents received approximately 50,000 items of unsolicited mail containing objectionable and obscene material. Many of the items found their way into the hands of young juveniles. In some instances the mail was directly addressed to the juvenile, and in other cases was left by postal authorities at homes with easy access to prying children while the adults were away at work or shopping. As a result of the numerous complaints, the San Diego branch of the United States Post Office mailed 4,222 prohibitory forms to various distributors to cease mailings to the complainants. Due to the large number of distributors involved, the method of issuing prohibitory forms was found ineffective and very trying upon the citizens involved.

Locally, we have approximately 14 mail order distributors who generally mail their material to areas outside this jurisdiction. In a few instances we were successful in prosecuting local distributors who mailed obscene material to local residents or who failed to obtain business licenses. In other instances we were

successful in obtaining criminal complaints against distributors located *within* California for material sent to residents of San Diego. We have had no success in obtaining criminal action against distributors located outside the State of California, as this is an area that appears to be handled only by federal law.

Locally, pornography and obscenity problems have increased greatly. San Diego's geographical location and the fact that it is one of the world's largest military areas has a direct relationship to our existing obscenity problem. This is primarily due to the young age group of servicemen and their potential as customers for persons operating establishments dealing in objectionable and obscene material. We have experienced an alarming increase in adult theaters, arcades (peep shows) and book stores which in themselves are classified as legitimate in all respects. The types of materials offered for viewing or sale in these establishments span an area from objectionable to obscene and are a source of constant complaints from responsible citizens. As a result we must expend a great deal of enforcement time to inspection of these establishments for juvenile patrons, criminal activity (predominantly homosexuality), and the content of materials offered for sale or viewing. Much of the material found in these establishments has been imported locally via postal mail, air express and rail express.

Numerous arrests have been made locally for obscenity violations, but due to court decisions these have met with little success in curbing the problem. Due to constant inspection by our local Police Department, we are not experiencing a severe problem with juveniles patronizing these establishments or purchasing the materials offered. At the present time we have state and local laws restricting the pandering or sale of objectionable or obscene materials to persons under the age of 18, and we are confident this has curbed some of the potential problems concerning juveniles in this area. Based on our investigations, observations and arrests, we are of the opinion that these type establishments attract a highly undesirable element to our community. Numerous occurrences, including solicitations by homosexuals, and young males masturbating, are reported frequently. It is only through the use of strict enforcement, strong regulations and constant inspections of establishments dealing in questionable material that juvenile involvement in the area of obscenity will be curbed.

Nationally, the area of unsolicited mail involving questionable or obscene material is of prime concern to many of our citizens. More controls must be implemented to guard our responsible citizens from involuntary confrontations with repulsive and obscene matter. There must be methods designed to assure that material intended for mature adults does not easily fall into the hands of young people, particularly in the methods of delivery of such material by postal authorities. Perhaps a method similar to registered mail could be developed, with the burden of costs placed on the distributor. Whatever method is devised should be with the intent of giving our responsible citizens, adults and youths, the protection against receiving unwanted mail and the authority to *easily* reject or stop further mailing. The use of prohibitory forms by the postal authorities has proved to be ineffective and a great inconvenience to the general public.

O. J. ROED, *Chief of Police.*

OFFICE OF THE MAYOR,
San Francisco, October 15, 1969.

Hon. ROBERT N. C. NIX,
Chairman, U.S. House of Representatives, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR CONGRESSMAN NIX: Thank you for your recent letter asking for information regarding the smut mail traffic. I am in the process of compiling information which I believe will be relevant to your subcommittee's investigation. I will mail this to you as soon as it is ready.

Sincerely,

JOSEPH L. ALIOTO, *Mayor.*

CITY OF SAN JOSE, CALIF.,
September 3, 1969.

ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Upon receipt of your letter, I asked for response both from our Chief of Police and the local Postmaster. Attached are copies of

both responses indicating their feelings regarding the nature of the problems in our area.

With kindest regards,

RONALD R. JAMES, *Mayor.*

CITY OF SAN JOSE—MEMORANDUM

August 27, 1969.

To: Mayor RONALD R. JAMES

From: Chief of Police
Subject: Junk Mail

Reference your request for comment on a letter received by Robert Nix, Chairman, U.S. House of Representatives, Subcommittee on Postal Operations, please be advised that we have had numerous complaints, with evidence, on junk and obscene mail which were turned over to the Postal Inspector. We have been instructed by the District Attorney to turn such material over to the Post Office.

When detention of juveniles is made, in many cases, we have found copies of smut material in their possession. We understand that they are engaged in selling such material to their friends, and much of it is found discarded in areas where juveniles congregate.

We would appreciate any legislation in this area that would strengthen the position of law enforcement and aid in making the purveyors of this material vulnerable to prosecution.

J. R. BLACKMORE,
Chief of Police.

U.S. POST OFFICE,
San Jose, Calif., August 27, 1969.

Hon. RONALD JAMES,
Mayor of San Jose,
San Jose, Calif.

DEAR MR. MAYOR: I am unable to comment on the general subject from a lack of knowledge about the danger to citizens of such material.

Currently, a person receiving such mail may have their names removed from the list by a prohibitory order. In addition investigation and possible prosecution is the responsibility of the Postal Inspection Service.

Sincerely yours,

WILLIAM H. LAWRENCE, *Postmaster.*

LETTERS FROM VARIOUS EMBASSIES

EMBASSY OF AUSTRALIA,
Washington, D.C., August 12, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

DEAR MR. NIX: In the Ambassador's absence from Washington on leave and consultation, I have pleasure in advising you that I have today asked the Post-Master General's Department in Australia to supply the information requested in your letter dated 11th August.

Yours sincerely,

J. E. RYAN,
Chargé d'Affaires.

EMBASSY OF AUSTRALIA,
Washington, D.C., September 18, 1969.

Hon. ROBERT N. C. NIX
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

DEAR MR. NIX: With reference to the Chargé d'Affaires' letter to you, dated 12th August, I have now received a reply from the Post-Master General's Department in Australia which I quote:

"OBSCENITY IN THE MAILS

"I refer to your teleprinter message of the 13th August concerning information on mailed obscenity sought from the Australian Ambassador in Washington by the Honourable Robert N. C. Nix. The position in this country is shown hereunder.

"The Australian Post Office has not developed any special techniques to detect obscene material in the mail stream. Complaints made by addressees who have received indecent, obscene or grossly offensive material in the mail are investigated and the Department prosecutes if the material violates the postal legislation and it is considered that legal action is likely to be successful.

"Customs Officers maintain information on the known purveyors of pornography and postal articles from overseas countries are screened to detect items from those places whose mailings are recognised. The detection of material which is enclosed in plain sealed envelopes or covers is difficult, unless the recipient draws attention to it.

"Should an examining officer have reason to believe that a sealed article contains pornographic material, a notice is sent to the addressee asking him to call and open the article in the presence of a Department officer. In the event of the addressee's failure to respond to a second notice, the article is opened in the Dead Letter Office and its disposal depends on the nature of its contents.

"As far as discouraging the use of the mails for pornographic material, Postal Regulation 139 (copy attached) provides for the concellation of the tenancy of a private box if the Postmaster-General has reason to believe that the box has been used for any illegal, fraudulent, indecent, or immoral purpose. Cancellation of the private boxes of persons engaged in the pornographic mail order business is an effective method of hampering their operations as it prevents them benefiting from the anonymity of a private box address. Such action is taken where justified.

"The question of what is an indecent or obscene publication is a difficult one to determine, especially when literary merit is claimed. Attitudes vary widely between our State Authorities and between individuals and the complexities of the issues have been demonstrated by Court hearings on the subject. In this area the Post Office usually follows the guidance of Commonwealth or State

authorities with responsibility for censorship and endeavours to avoid setting itself up as an independent moral censor.

"Attached are relevant extracts from the postal legislation which may be of interest."

I hope the information provided will be of assistance to your Subcommittee.

Yours sincerely,

KEITH WALLER, *Ambassador.*

Enclosure.

POST AND TELEGRAPH ACT

SECTION 43

The Postmaster-General or any Director may at any time cause any postal article having anything profane blasphemous indecent obscene offensive or libellous written or drawn on the outside thereof or any obscene enclosure in any postal article to be destroyed.

No action shall be brought against the Postmaster-General or any officer of the Department for anything done under the provisions of this section but any person aggrieved by anything done by the Postmaster-General or a Director under this section may appeal to a Justice of the High Court or to a Judge of a Supreme Court of a State by summons or petition in a summary manner.

SECTION 44

The Postmaster-General or any Director may refuse to transmit or deliver any newspaper packet or parcel containing any article book picture or advertisement or any printed or written matter in the nature of an advertisement, which article book picture advertisement or matter is of an indecent or obscene nature, and may cause any such newspaper packet or parcel to be destroyed.

SECTION 107

Any person who knowingly sends or attempts to send by post any postal article which—

(a) encloses an explosive or a dangerous filthy noxious or deleterious substance or a sharp instrument not properly protected or a living noxious creature or any other thing likely to injure other postal articles in courses of conveyance or to injure an officer of the department or other person; or

(b) encloses an indecent or obscene print painting photograph lithograph engraving book card or article; or

(c) has thereon or therein or on the envelope or cover thereof any words marks or designs of an indecent obscene blasphemous libellous or grossly offensive character,

shall be liable to a penalty not exceeding two hundred dollars or to imprisonment with or without hard labour for a term not exceeding two years.

POSTAL REGULATIONS

REGULATION 139

The Postmaster-General may cancel the tenancy of a private box at any time if the person who rents such box fails to comply with these Regulations or if the Postmaster-General has reason to believe that the box—

(a) is being used for any purpose, or in connexion with any matter mentioned in paragraphs (a) to (c) inclusive of sub-section (1) of section 57 of the Act; or

(b) has been used by, or by the permission of, the tenant for or in connexion with any illegal, fradulent, indecent, or immoral purpose; or

(c) is held, used, or controlled by a person who has been convicted of any offence involving fraud or dishonesty;

(d) is held by any person using a fictitious name or who in his application for the private box service gave a fictitious or assumed name or address.

Where the tenancy of a private box is so cancelled no portion of the rental fee for the box nor the amount paid for the use of the keys shall be refunded.

BRAZILIAN EMBASSY,
Washington, August 18, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

MY DEAR MR. NIX: I have the pleasure to acknowledge receipt of your letter dated August 11, requesting information on the Brazilian laws regulating the mailing of obscene materials.

In order to provide you with the correct information I have transmitted the request to the Ministry of External Relations of my country. As soon as the material is received it will be forwarded to you.

Sincerely yours,

MARIO GIBSON BARBOZA,
Ambassador.

BRAZILIAN EMBASSY,
Washington, D.C., December 3, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: With further reference to our letter of August 18, I am pleased to transmit the following information regulating the mailing of obscene materials which was sent to us by the Ministry of External Relations:

"The only item covering the mailing of obscene material is in letter "e" of paragraph 18 of the Regulations of Postal and Telecommunication Services which was approved by Decree No. 29151 of January 17, 1951.

Art. 18: The Postal Service will not send or distribute

(a) objects, publications or artefacts with address, wording or indecent drawings or pictures injurious, threatening or offensive to morality or to public order or the interests of the country."

Sincerely,

CELSO DINIZ,
Chargé d'Affaires, a.i.

BRITISH EMBASSY,
Washington, August 14, 1969.

HON. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: The Ambassador, who is out of Washington at present, has asked me to thank you for your letter of 11 August about obscene materials and the mail. I enclose some material which you may find useful.

The Post Office Act of 1953, para. 11, of which I enclose a photocopy, is the relevant legislation concerning the mailing of obscene publications.

This topic has been causing concern in the U.K., not only because of the mailing of obscene publications but also their sale and distribution, and I enclose an extract from Hansard of 18 July, a statement by the Under Secretary of State for the Home Department, which sets out the position at some length. I also enclose a copy of the Obscene Publications Act, 1964, which amends the similar Act of 1959, also enclosed, which you may find of interest.

The Arts Council, a Government subsidised body for the promotion of the arts, has recently set up a Working Party to report on the present state of obscenity laws in the U.K. and it proposed to repeal the Obscene Publications Acts of 1959 and 1964 and to amend or repeal other relevant Acts. The Working Party's report has not been accepted by the Government and the Home Secretary is very unlikely to take any action. I enclose a copy of the report as printed in the "New Statesman and Nation" of 8 August (since we do not yet have a printed copy). The cartoon and opening comment are, of course, by the "New Statesman" but I think you might be interested in general in this report in spite of its controversial nature and its unofficial status.

Yours sincerely,

C. F. HILL,
First Secretary.

ROYAL DANISH EMBASSY,
Washington, D.C., September 5, 1969.

Mr. THOMAS R. KENNEDY,
Subcommittee on Postal Operations, U.S. House of Representatives, House Office Building, Washington, D.C.

DEAR MR. KENNEDY: With reference to our telephone conversation of today I forward enclosed a fact sheet on the present Danish legislation concerning pornography. The Danish parliament as it will appear from this paper passed earlier this year two bills which came into force on July 1, 1969 and by which censureship on film and restrictions on the sale of pornographic pictures to persons over 16 years were abolished. This, however, only concerns the legislative status within Denmark and as Denmark is a member of the international postal agreement it remains an offence to send pornographic material by mail from Denmark to another country.

Furthermore I enclose two background articles from the Danish Journal published by the Danish Foreign Ministry on the new Danish legislation on pornography and also a memorandum dated October 29, 1968 by the Ministry of Justice on the possibilities of intervention against export of pornography.

I trust the above material will prove to be of interest in reply to the questions raised by the chairman Robert N. C. Nix of the subcommittee of postal operations in his letter of August 11 to this Embassy and I shall be looking forward to further discussing the matter with you at your convenience.

Sincerely yours,

JOHS. FONS BUHL,
Secretary of Embassy.

Enclosures.

LEGISLATION CONCERNING PORNOGRAPHY STATUS, JULY 1, 1969

In a period of about two years, Danish legislation on pornography has been completely revised.

The first step was taken on June 9, 1967, when the Folketing approved by 159 votes to 13 with no abstentions, a bill that removed all restriction on the publication or sale of pornographic literature in Denmark.

This law left some restrictions in force on the production or sale of pornographic pictures and/or films. These restrictions were completely removed as far as the adult population was concerned by two bills passed in 1969, both of which came into force on July 1, 1969.

The first of these bills, on film censorship, was approved by 152 votes with one against and nine abstentions on March 18, 1969. This removed all censorship on films intended for exhibition to adult audiences, but established a censorship system that gives three classifications: for general exhibition, for exhibition to children over 12, or for adult exhibition (to persons over 16 years). The censors can order cuts made in films for exhibition to persons under 12 or under 16 years.

On May 30, 1969, the Folketing approved by 112 in favour, with 25 against and no abstentions, a bill that removed all restriction on the sale of pornographic pictures or objects to persons over 16 years. A penalty in the form of a fine can be given for sales of pornographic pictures to minors under 16 years.

At the same time, the Ministry of Justice tightened local ordinances controlling window displays, to prevent offence being given to persons who did not wish to be confronted with pornography in public.

Since Denmark is a signatory to the International Postal agreement, which prohibits use of the mails to distribute pornographic materials, it is an offence to send pornography by mail from Denmark to another country.

MEMORANDUM ON THE POSSIBILITIES OF INTERVENTION AGAINST EXPORT OF PORNOGRAPHY

I. PUBLICATIONS

1. The Criminal Code Amending Act of 1967 repealed the Criminal Code provisions on written pornography.

Obscene literature—also in a foreign language—can, therefore, be produced freely in Denmark.

2. The Parliament Committee considered the possibility of preserving a general prohibition in the Criminal Code against export, but abandoned such a rule.

3. After the repeal of the Criminal Code provisions there is still the possibility of intervening against postal matters to foreign countries. This may take place under the Postal Act (§ 3c), as, according to the Postal Conventions, it is prohibited to send "obscene or immoral objects" to foreign countries.

II. PICTURES ETC.

1. The picture pornography can, for the time being, be punished under the rules of § 234 of the Criminal Code still in force.
2. There is no intention of preserving a special Criminal Code provision on export, if § 234 is to be repealed apart from that. Against such a special rule the same doubts could be raised that decided Parliament in 1967 not to propose such a special rule as to publications, of above under I, 2.
3. Postal matters to foreign countries will still be liable to prosecution under the Postal Act, cf. above under I, 3.

If other methods of transport are used, however, it will be impossible to agree to foreign requests to prosecute. On the other hand, in these cases, the countries of import will have better possibilities of controlling the import.

EMBASSY OF FINLAND,
Washington, D.C., September 12, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Postal Operations Subcommittee, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Referring to your letter of August 11th concerning the subject of mail obscenity, the Embassy of Finland is able to inform you of the following:

The Act concerning the distribution of obscene material (January 28, 1927/23) orders a penalty for a person who makes for distribution, sells, or distributes material that is offensive to the sexual discipline or decency. The penalty is a fine or at the most a 6 month prison sentence. If the subsequent authority has declared that a print, writing, film, or other material offends the sexual discipline or decency, it must confiscate that material and destroy it.

The Embassy has requested information from Finland regarding the postal service regulations for obscene material. The Embassy will return to this matter once the postal authorities have supplied the information.

Sincerely yours,

LAURI HANNIKAINEN, *Attaché.*

EMBASSY OF FINLAND,
Washington, D.C., November 25, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Postal Operations Subcommittee, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Referring to the Embassy's letter of September 12th I am now able to inform you that the Mail and Telegraph bureau has sent the following reply.

The 20th paragraph of the Post Act regulations states that the post officials do not carry a) an item that has as its cover something illegal, b) such things of which the import and distribution to and in Finland is prohibited.

The Mail and Telegraph bureau points out that obscene publications have not been discovered in the mail because the officials do not check the contents of the items.

Among mail from abroad, especially Sweden and Denmark, the customs has found at times obscene material. This has been confiscated and destroyed.

I hope that this further information will be useful to you.

Sincerely yours,

LAURI HANNIKAINEN, *Attaché.*

AMBASSADE DE FRANCE AUX ETATS-UNIS,
Washington, le August 26, 1969.

Hon. ROBERT N. C. NIX,
Chairman of The Subcommittee on Postal Operation, U.S. House of Representatives, Washington, D.C.

MY DEAR MR. NIX: In the absence of the Ambassador, I wish to acknowledge receipt of your letter of August 11, requesting information on the subject of distribution of obscenity and the laws regulating it in France.

I appreciate your interest and that of the members of your subcommittee for the procedures in force in my country on that particular problem. Since this Embassy is, at the present time, lacking the relevant documentation, I have forwarded your request to the proper services in France asking them to send me information on the matter.

I shall not fail to communicate again with you as soon as I receive the results of this inquiry.

Yours sincerely,

JACQUES LEPRETTE,
Chargé d'Affaires a.i.

AMBASSADE DE FRANCE,
New York, N.Y., September 10, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR MR. NIX: The French Embassy in Washington has forwarded to this office your letter of August 11, 1969 requesting information on the French regulations concerning the mailing of obscenity.

As the documentation on hand does not cover the subject fully, I have asked my Paris office for additional data.

I will forward it to you as it is received. In the meantime, you will find enclosed an English translation of the articles 283 to 290 of the French Penal Code.

Please feel free to call on us again if we can be of any further assistance to you.

Sincerely yours,

ALAIN CHAILLOUS, *Director.*

AMBASSADE DE FRANCE,
New York, N.Y., October 21, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. NIX: In your letter of August 11, addressed to the French Ambassador, Mr. Charles Lucet, you requested information on French postal regulations regarding the distribution of materials of an indecent nature. You should have received the extracts of the French Penal Code which we forwarded to you on September 10. I am enclosing a note obtained from the Ministry of Posts and Telecommunication, which I believe will complete your information.

Enclosure.

Sincerely yours,

MONIQUE POLGAR.

FRENCH REGULATIONS CONCERNING CONTROL OF DOCUMENTS OR PUBLICATIONS OF AN INDECENT NATURE

Generally speaking, the French Postal Administration is bound by the principle of the inviolability of correspondence.

The postal administration cannot therefore confiscate or open any correspondence.

Therefore indecent material mailed in a sealed *envelope or parcel* escapes any inspection by the postal service.

However, under Article 119 of the Decree-Law of July 29, 1939 which defines and lays down the punishment for immoral offenses, indecent matter (printed or written matter, drawings, posters, engravings, paintings, photographs, films or negatives, phonograph master records or reproductions, emblems, objects or pictures of an indecent nature) mailed in *a wrapper, or in any unsealed envelope or parcel* shall be stopped and, if there is occasion, handed to the public prosecutor for purposes of pressing charges.

These provisions also apply to obscene or indecent *post cards not in an envelope*. However, these are not handed to the public prosecutor but are thrown away if their offensive nature is clearly established.

As for periodicals which come under special regulations and notably, on certain conditions, which have very low postage rates provided they are mailed in an *unsealed* wrapping whose contents can be checked, the bans regarding indecent publications are the responsibility of the Ministry of the Interior.

The latter, under the legal provisions regarding publications for young people (Law of July 16, 1949 amended in 1958 and 1967) is empowered to forbid:

The offering, giving or sale to minors under 18 years of age, of all publications which due to their indecent or pornographic nature or to their emphasis on crime or violence would present a danger to young people;

Placing such literature on public view anywhere notably outside or inside shops or newspaper stands or advertising them on posters.

Advertising such publications by means of handbills, advertisements or notices in the press, circulars sent to possible buyers or radio or television commercials.

These bans may be introduced simultaneously or individually.

In fact, only the second has any impact on the postal service.

For, the ban on the placing of such literature on public view anywhere means that the publications concerned must be mailed *in a sealed envelope.* Consequently such matter cannot be mailed at the printed matter rate but at the slow first-class rate.

In view of the resulting difference in rate (0.45 F instead of 0.007 F for a publication weighing 3.5 oz.) the measures applied by the post office in this field may contribute to some extent to limiting the number of these publications.

GERMAN EMBASSY,
Washington, D.C., August 15, 1969.

Hon. ROBERT N. C. NIX,
Chairman, U.S. House of Representatives, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, Washington, D.C.

DEAR MR. NIX: On behalf of the German Ambassador who is at present on leave I should like to acknowledge with thanks your letter of August 11, 1969, concerning the hearings of the Postal Operations Subcommittee of the U.S. House of Representatives dealing with the subject of mailed obscenity.

Under section 184 of the German Penal Code the distribution of pornographic writings, drawings or photographs is punishable with imprisonment up to one year and/or a fine. In addition it is a criminal offense to offer for sale publicly any articles to be used for immoral purposes and also any media for the prevention of venereal diseases, provided that morality and decency are violated thereby.

I enclose for your information a photostat of the relevant text of the German law compendium "Beck'sche Kurz-Kommentare" containing a detailed analysis of section 184.

Hoping that the enclosures will be of assistance to you for your study of legislative devices, I remain,

Yours sincerely,

DIRK ONCKEN, *Minister.*

EMBASSY OF IRELAND,
Washington, D.C., August 19, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR MR. NIX: In the absence of Ambassador Fay in Ireland, I am writing to acknowledge receipt of your letter of August 11, 1969, in relation to your Subcommittee's hearings on obscene advertising and the sending of obscene materials through the mail.

I have written to my authorities in Dublin and, on hearing from them, will be glad to supply information on the subject in which your committee is interested.

Meanwhile, I would be glad to have some background documentation on the enquiry and, if available, any reports of the hearings on August 5th and 6th.

Yours sincerely,

Dr. SEAN Ó hÉIDEÁIN,
Chargé d'Affaires, a.i.

EMBASSY OF IRELAND,
Washington, D.C., January 5, 1970.

Hon. ROBERT N. C. NIX,
House of Representatives, Rayburn House Office Building,
Washington, D.C.

DEAR MR. NIX: Further to my letter of August 19, 1969 regarding your request to the late Ambassador Fay for information regarding Irish law on the distribu-

tion of obscenity, with particular reference to the duties and rights of the postal service, I have the honour to forward, for your information, the attached information on

A. Post Office legislation and

B. Censorship of Publications Acts.

I regret the delay in obtaining for you this information which will, I hope, be of interest.

Yours sincerely,

Dr. Seán Ó hÉideáin,
Chargé d'Affaires, a.i.

Enclosure.

Legislation

The basic Post Office legislation dealing with the sending of indecent etc. articles by post is contained in the Post Office Act, 1908 (Section 63). The relevant portions of the Section are as follows:

"A person shall not send or attempt to send a postal packet which . . . encloses any indecent or obscene print, painting, photograph, lithograph, engraving, book or card or any indecent article whether similar to the above or not; has on the packet, or on the cover thereof any words, marks or designs of an indecent, obscene or grossly offensive character; if any person acts in contravention of this Section he shall be guilty of a misdemeanor and shall be liable on summary conviction to a fine not exceeding ten pounds, and on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding twelve months".

Books, periodicals, etc. are, however, dealt with specially in accordance with the Censorship of Publications Acts 1929 to 1967.

If any postal packets coming from other countries are suspected of containing articles prohibited under Section 63 they are transferred to the Customs authorities for examination. The relevant Section (18) of Post Office Act dealing with this procedure reads as follows:

"The Postmaster-General may detain any postal packet suspected to contain contraband goods and forward the packet to the Commissioners of . . . Customs, and those Commissioners, in the presence of the person to whom the packet is addressed, or if, after notice in writing from them requiring his attendance, left at or forwarded to the address on the packet, he fails to attend, then in his absence, may open and examine the packet, and, if they find any contraband goods, may detain packet and its contents for the purpose of prosecution . . ."

In the case of postal packets posted in the internal service for delivery internally, no special examination of postal packets is carried out.

In the case of sealed postal packets the Post Office is precluded from opening such packets, unless on the authority of a warrant from the Minister for Justice, except where the packet is undeliverable (e.g. insufficient address, addressee dead, etc.) and it is necessary to open it to establish who is the sender. Where any article prohibited under Section 63 comes under notice in the internal service, the question of prosecution, where appropriate, is pursued by the Post Office and not by the Customs authorities.

Publications prohibited under the Censorship of Publications Acts, 1929 to 1967, are treated as contraband if sent through the post from abroad, and if they are detected being sent in the internal post, they are withdrawn from the post. Postmasters are given a list of prohibited periodicals, but it is not practicable to maintain lists of all prohibited publications at each Post Office.

Summary of Censorship of Publications Acts, 1929 to 1967

1. The Censorship of Publications Act, 1946 provides for the establishment of a Censorship Board consisting of a Chairman and four ordinary members. The term of office is five years but members are eligible for re-appointment.

2. An Officer of Customs and Excise may detain, for the purpose of referring it to the Board, any book (other than a book forming part of the personal luggage of a traveller) which is being imported and which in his opinion ought to be examined by the Board. The Board is obliged to examine such a book. Similarly they are obliged to examine any book in respect of which a complaint is made in the prescribed form by a member of the public and they may examine a book on their own initiative.

3. Officers of Customs and Excise are not entitled to detain periodical publications for reference to the Board nor is the Board entitled to examine period-

ical publications on their own initiative. They may act only on complaints made in the prescribed form (i.e. complaints made by members of the public).

4. When examining a book, the Board is obliged to have regard to the following matters:

(a) the literary, artistic, scientific or historic merit or importance, and the general tenor of, the book;

(b) the language in which it is written;

(c) the nature and extent of the circulation which, in their opinion, it is likely to have;

(d) the class of reader which, in their opinion, may reasonably be expected to read it;

(e) any other matter relating to the book which appears to them to be relevant.

5. The Act provides that if the Board, having duly examined a book, is of the opinion:

(a) that it is indecent or obscene or

(b) that it advocates the unnatural prevention of conception or the procurement of abortion or miscarriage or the use of any method, treatment or appliance for the purpose of such prevention or procurement,

and that for any of the said reasons its sale and distribution in the State should be prohibited, they shall by order prohibit its sale and distribution.

6. The provisions referred to in paragraph 4 (i.e. the matters to which the Board must have regard) are not applicable to periodical publications but the Board may ban periodical publications only if "the *issues* recently . . . published" are such as to warrant prohibition. (This provision is interpreted in the Regulations as meaning at least three issues.) The grounds for prohibition are the same as those applicable to a book (paragraph 5 above) with one additional ground, namely that the issues in question "have devoted an unduly large proportion of space to the publication of matter relating to crime". (In practice, this latter provision has been interpreted as referring to actual, as distinct from fictional, crime.)

A prohibition order in respect of a book may be in respect of one, some or all editions and, subject to the time-limitation referred to at paragraph 16 below, it remains in force unless revoked or modified on appeal to the Appeal Board. A prohibition order in respect of a periodical publication which has not previously been prohibited lasts (unless revoked on appeal) for a period which depends on the frequency of issue: 3 months for a daily or weekly publication, six months for a monthly publication and a year for a publication published at greater intervals than a month.

8. The Act provides for an Appeal Board consisting of a Chairman and four ordinary members. The Chairman must be a Judge of the Supreme Court, High Court, or Circuit Court or a practising barrister or practising solicitor of not less than seven years' standing. The period of office of the Board is three years and members are eligible for re-appointment.

9. One appeal only may be made in respect of a book by the author, editor or publisher, or by any five members of the Oireachtas acting jointly. The Appeal Board may affirm or revoke the order or may vary it so as to exclude any particular edition of the book.

10. *Procedure:* Four members of the Censorship Board constitute a quorum. A prohibition order may not be made unless there are at least three votes in favour of it and unless there is not more than one vote against it. Four members of the Appeal Board constitute a quorum and a revocation or variation order may not be made unless at least three of the members vote in favour of it.

11. *Definitions:* "Obscene" is not defined in the Act. As regards the word "indecent", the provision is as follows:

"the word 'indecent' includes suggestive or, or inciting to, sexual immorality or unnatural vice or likely in any other similar way to corrupt or deprave".

12. It is an offence (except under and in accordance with a permit granted by the Minister for Justice):

(a) to sell, or expose, offer, advertise or keep for sale, or

(b) to distribute or offer to keep for distribution any prohibited book or any prohibited periodical publication.

13. It is an offence to print or publish in relation to any judicial proceedings any indecent matter the publication of which would be calculated to injure

public morals or any indecent medical, surgical or physiological details the publication of which would be calculated to injure public morals. (An exception is made for Law Reports, reports in medical journals, etc.).

14. It is an offense to sell, or offer, expose or keep for sale or import for sale any indecent pictures.

15. A search warrant may be issued by a District Justice on the sworn information of a Garda Officer not below the rank of Chief Superintendent that there is reasonable ground for suspecting that indecent pictures are kept for sale or that prohibited books or periodical publication are kept for sale or distribution in a specified premises.

16. The Censorship of Publications Act, 1967 provides that a prohibition order in relation to a book that was prohibited on the ground that it is indecent or obscene will lapse automatically after twelve years.

AMBASCIATA D'ITALIA,
Washington, D.C., August 13, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: With reference to your letter dated August 11, 1969, I wish to inform you that article 528 of the Italian Penal Code provides that anyone who produces, imports, buys, stores, exports or puts in circulation: writings, designs, figures or other obscene items, is punishable with the imprisonment from three months to three years and with a fine of not less than eight thousand lire. The same punishment is applicable to the person who trades or displays to the public said items.

With my best regards, I am
Sincerely yours,

GIULIO TERRUZZI,
Chargé d'Affaires.

THE LIBRARY OF CONGRESS,
Washington, D.C., October 3, 1969.

Hon. ROBERT N. C. NIX,
House of Representatives,
Washington, D.C.

DEAR MR. NIX: Your request of September 30, 1969 to the Legislative Reference Service for translation of a communication from the Mexican Director General of Postal Services and Telecommunications was forwarded to the Law Library for attention. Mrs. Helen L. Clagett, Chief of the Hispanic Law Division, has prepared the enclosed translation. We return herewith the copy of the communication.

Sincerely yours,

CARLETON W. KENYON,
Associate Law Librarian.

Enclosure.

[Translation of a communication from the Mexican Director General of Postal Services and Telecommunications, addressed to the Director General of American and Far Eastern Affairs of the Ministry of Foreign Relations, in response to a request for information on postal laws of Mexico from Representative Nix]

Referring to your communication . . . of 22 August, and complying with its contents, pursuant to the report requested by the Chairman of the Subcommittee on Postal Operations of the House of Representatives, Mr. Robert N. C. Nix, of Pennsylvania, through our Embassy in Washington, I have the honor of forwarding to Your Excellency a literal copy of the articles of the Regulation on Postal Services, in force, concerning the circulation of pornographic publications through our Service, and the implications of same. These provisions are as follows:

CHAPTER II.—PROHIBITED MATTER

Article 12. *Definition.*—The use of mail by the public has restrictions placed thereon for reasons of general use; in defense of public morals, security and health; in the interest of the Treasury; and for the guarantee of the postal administration proper.

Article 13. *Enumeration.*—1. Pursuant to the principles enunciated in the preceding article, the following matter may not be included in any class of postal shipment:

* * * * * * *

(3) Obscene or immoral matters, and shipments whose wraps or covers contain textural material or illustrations offensive to morals or contrary to public order.

* * * * * * *

Article 18. *Procedure to be observed with respect to prohibited matter:*

* * * * * * *

(f) Prohibited matter specifically enumerated in groups 2, 3, 4 and 5, whose circulation constitutes a violation shall be forwarded to the competent Authority.

* * * * * * *

3. The Office which has handled matters of prohibited circulation in any of the forms stipulated in the two preceding sections, shall make a record thereof, of which one copy shall be filed, another forwarded to the sender, a third one to the administrative Center, and finally, if pertinent, another to the Office from which it originated.

WASHINGTON, *August 26, 1969.*

Hon. ROBERT N. C. NIX,
Chairman of the Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR MR. NIX: With reference to your letter of August 11, 1969, I have the honour to enclose a brief statement on the subject of legislation in the Netherlands regarding the distribution of obscene materials by mail.

Sincerely yours,

H. C. MACLAINE PONT,
Charge d'Affaires a.i. of the Netherlands.

Enclosure.

In the Netherlands the law governing obscenity is basically laid down in the Articles 240 and 240 bis of the Penal Code, of which Articles an unofficial translation is attached.

The law does not treat the distribution of obscene materials by mail as a separate problem. The distribution of such materials is punishable regardless of what means of distribution are used.

The Netherlands postal authorities play no real part in the enforcement of the law on obscenity nor is the search for or the seizure of obscene materials in any way concentrated in the post offices.

The Act on Postal Services ("Postwet") of 1954 merely authorizes the refusal by the post offices of documents or parcels that may endanger public safety or public order. No such authorization was included for documents of an indecent or immoral nature, as it was considered impracticable to make the postal services, being primarily a transportation agency, the arbiter of what is indecent, immoral or obscene.

When introducing this legislation, the Government felt there was no need for a legal provision to have obscene materials excluded from the mails, as the Penal Code already provided a basis for judicial action.

Before the Act on Postal Services was passed, the matter of excluding obscene materials from the mails was raised during a debate in Parliament. At that occasion the responsible Cabinet Minister stated that as a rule documents of which the indecent nature is evident, are placed in the hands of the judicial authorities. He added, however, that the great quantities of mail handled by the post offices, make it virtually impossible for them to meet any legal obligations in this respect. Also the constitutional inviolability of letters in the mail forbids the inspection of mail in closed envelopes or covers. Finally, it was submitted that there are no generally accepted views as to what constitutes indecent, immoral or obscene material.

The Act was subsequently passed without any provision for the exclusion of obscene materials from the mails.

ARTICLE 240 OF THE NETHERLANDS PENAL CODE

Whoever either distributes or publicly displays or manufactures, imports, forwards, exports or holds in stock for the purpose of distribution or public display,

any written material, of which the contents are known to him, or any picture or object known to him, that is offensive to decency, or, other than upon request, offers, whether publicly or in distributed writings, such offensive material or gives information on its availability, shall be punished by a prison term of not more than one year or a fine of not more than 6000 guilders. The same penalty applies to any person who publicly recites such material, if the contents are known to him.

Whoever either distributes or publicly displays or imports, forwards, exports or holds in stock for the purpose of distribution or public display, any written material, any picture or any object that is offensive to decency, or, other than upon request, offers, whether publicly or in distributed writings, such offensive material or gives information on its availability, shall, if he has good reason to suspect that the material, the picture or the object is offensive to decency, be punished by a prison term or detention of not more than six months or a fine of not more than 6000 guilders. The same penalty applies to any person who publicly recites such material, if he has good reason to suspect that its contents are offensive to decency.

If whoever is guilty of the crime defined in the first paragraph of this Article, makes a profession or a habit of committing this crime, he shall be punished by a prison term of not more than two years or a fine of not more than 10.000 guilders.

ARTICLE 240 BIS.

Whoever offers, permanently or temporarily lends, hands or shows either any written material, any picture or any object that is offensive to decency, or any device for the prevention of or the interference with pregnancy to a minor whom he knows or reasonably should presume not to have reached the age of eighteen, shall, if the contents of such material, the picture or the object are known to him, be punished by a prison term of not more than six months or a fine of not more than 1200 guilders.

The same penalty applies to any person who, in the presence of a minor as referred to in the previous paragraph, recites written material that is offensive to decency, if the contents are known to him.

Whoever offers, permanently or temporarily lends, hands or shows either any written material, any picture or any object that is offensive to decency, or any device for the prevention of or the interference with pregnancy to a minor as referred to in the first paragraph, or recites in the presence of a minor, as referred to in the first paragraph, written material that is offensive to decency, shall, if he has good reason to suspect that the material, picture or object is offensive to decency or that the device is a device for the prevention of or the interference with pregnancy, be punished by a prison term or detention of not more than three months or a fine of not more than 1200 guilders.

ROYAL NORWEGIAN EMBASSY,
Washington, D.C., August 18, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR SIR: In references to your letter of August 11, 1969 to Ambassador Arne Gunneng concerning mailed obscenity I would like, in the Ambassador's absence, to inform you that the Embassy has requested that a discussion of Norwegian law in this field be provided for your Committee by the competent Norwegian authorities. I shall write you again when the Embassy has received their reply.

Sincerely,

G. O. HAERUM,
Chargé d'Affaires a.i.

ROYAL NORWEGIAN EMBASSY,
Washington, D.C., October 7, 1969.

Hon. ROBERT N. C. NIX,
Chairman, Subcommittee on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR SIR: In further references to your letter of August 11, 1969, to Ambassador Arne Gunneng concerning mailing of obscene advertising and materials I have the honour to give you the following information:

Norwegian law has no provisions specially covering distribution of such items through the *postal* system. Article 211 of our General Civil Penal Code of May 22, 1902, No. 10, has, however, provisions relating to pornography. In English translation that article reads as follows:

"1. Punishment of up to two years imprisonment may be imposed upon anybody who—

(a) gives a public lecture or arranges a public performance or exhibition with obscene content, or is accessory to the occurrence of such lecture, performance or exhibition,

(b) publishes, offers for sale, exhibits or otherwise seeks to spread, obscene writings, pictures or similar objects, or who is accessory thereto,

(c) delivers obscene writings, pictures or similar objects to persons under eighteen years of age or who is accessory thereto.

2. Anybody who commits such an act as mentioned in No. 1 by negligence, shall be punished by fines or by imprisonment up to six months.

A proprietor or superior who intentionally or by negligence omits to prevent such act as mentioned in this section from occurring within his enterprise, shall be punished similarly."

I might add that Norway is a party to the Convention of the Universal Postal Union of July 1964 which, as you know, in article 28 has provisions stipulating what may not be sent in the mail.

Sincerely,

G. O. HAERUM,
Counselor of Embassy.

PORTUGUESE EMBASSY,
Washington, November 17, 1969.

Hon. ROBERT N. C. NIX,
Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: Reference is made to your inquiry of August 11, 1969. We have now received from the Post Office Department in Portugal, the following reply to your query:

The Portuguese Post Office neither transports nor distributes obscene material (Article 130, sections 1 and 12 of the Bill regulating the post office services, dated June 14, 1902). In the terms of Article 131 of the same Bill, such material is removed from the stations where it is found, is then classified as refuse, after which the competent section of the post office proceeds in its destruction.

Sincerely yours,

ANTONIO RESSANO GARCIA,
Minister Counselor.

○

Bob Hentzen
Topeka Capital
only 6856 round shafts to go!