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## Obscenity and pornography: A historical look at the American Library Association, the Commission on Obscenity and Pornography, and the Supreme Court

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OBSCENITY AND PORNOGRAPHY: A HISTORICAL LOOK AT THE AMERICAN  
LIBRARY ASSOCIATION, THE COMMISSION ON OBSCENITY AND  
PORNOGRAPHY, AND THE SUPREME COURT

An Abstract of a Thesis  
Submitted  
in Partial Fulfillment  
of the Requirements for the Degree  
Master of Arts

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## ABSTRACT

There was a time when accessing pornographic and obscene materials was much more difficult than it is today. Prosecuted in 1868, *Regina v. Hicklin* was the first known obscenity case tried under the Obscene Publications Act in Great Britain. The United States Supreme Court first addressed obscenity in the 1957 case of *Roth v. United States* and grappled with setting standards or creating criteria by which obscenity could be defined. In the 1960s, multiple proposals for federal legislation to crack down on obscenity were offered. The American Library Association (ALA) stepped in to voice its concern and provide professional input in the debate over obscenity. The ALA's central tenets of librarianship are freedom of speech and freedom from censorship. This was evident with the creation of the "Library Bill of Rights" in 1948 and the "Freedom to Read Statement" in 1953. To address the various facets of obscenity and pornography in a comprehensive way, Congress enacted legislation that established the Commission on Obscenity and Pornography in 1967.

This thesis will explore the political and legal impact of the creation, the duties, and the findings of the Commission on Obscenity and Pornography. It will examine the final report issued by the Commission on Obscenity and Pornography in September of 1970 and probe the myriad reactions to the Commission's most controversial recommendation: "that federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed." Why did this specific recommendation cause such controversy? What impact did it have on later Supreme Court opinions involving obscenity and the First Amendment? What impact

did it have on library practices and how did the ALA respond? By examining these issues, this thesis will help to define the effects of obscenity and pornography between the late 1960s and the early 1980s. In addition, this thesis briefly discusses the 1986 Meese Commission and the current definition and regulation of obscenity and pornography.

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has been approved as meeting the thesis requirement for the

Degree of Master of Arts.

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To my father, George A. Gould, and my mother, Judith A. Gould

I would not be where I am today without your love, support, and encouragement.

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## TABLE OF CONTENTS

	PAGE
INTRODUCTION. WHY OBSCENITY, PORNOGRAPHY AND CENSORSHIP? .....	1
CHAPTER 1. HISTORIOGRAPHY .....	10
CHAPTER 2. THE ORIGINS OF THE COMMISSION .....	17
CHAPTER 3. THE COMMISSION'S CHALLENGE .....	39
CHAPTER 4. THE "MAGNA CARTA" OF PORNOGRAPHY .....	69
CHAPTER 5. FROM 1970 TO THE MEESE COMMISSION .....	106
CONCLUSION. A WHOLE NEW BALL GAME .....	125
BIBLIOGRAPHY.....	142

## INTRODUCTION

### WHY OBSCENITY, PORNOGRAPHY AND CENSORSHIP?

In today's age of rapidly changing and evolving technologies, it is very easy to "get online" and find pornographic and obscene images, videos and stories in a split second. Teenagers are getting in trouble, both with their parents and the law, for "sexting" -- the act of sending sexually explicit messages or photos electronically, primarily between cell phones. With all of our concern about the Internet today, we tend to forget that there was a time in which it was not always this easy to access pornographic and obscene materials. It is important to take a step back and look at these issues in a historical context.

As an academic librarian, I am interested in censorship and freedom of speech as they are central to the tenets of librarianship. The American Library Association (ALA) was founded in 1876. However, the issue of censorship was not addressed until 1948 when the ALA came out with its "Library Bill of Rights." The "Library Bill of Rights" sent a strong message to the people and the government that censorship was unacceptable.<sup>1</sup> In 1953, at the height of the Cold War and the Army-McCarthy hearings, the ALA adopted a "Freedom to Read Statement."<sup>2</sup> The ALA generally cited these two statements as the foundation of its argument favoring intellectual freedom when

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<sup>1</sup> American Library Association, "Library Bill of Rights," American Library Association, <http://www.ala.org/ala/aboutala/offices/oif/statementspols/statementsif/librarybillrights.cfm> (accessed March 9, 2010).

<sup>2</sup> American Library Association, "The Freedom to Read Statement," American Library Association, <http://www.ala.org/ala/aboutala/offices/oif/statementspols/firstatement/freedomreadstatement.cfm> (accessed March 9, 2010).

obscenity issues came about. These issues all came together in October of 1967 when Congress established a Commission on Obscenity and Pornography to address national concerns.<sup>3</sup>

This thesis will explore the political and legal impact of the creation, the duties, and the findings of the Commission on Obscenity and Pornography. It will focus on the work of the legal panel exclusively. It will examine the final report issued by the Commission on Obscenity and Pornography in September of 1970 and probe the myriad reactions to the Commission's most controversial recommendation: "that federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed."<sup>4</sup> Why did this specific recommendation set off such a firestorm? Was this a "missed moment" politically? What impact did it have on later Supreme Court opinions that involved obscenity and First Amendment issues? What impact did it have on the American Library Association (ALA) and its response? By examining these issues, this thesis will help to define the role of obscenity and pornography between the late 1960s and the early 1980s.

### Obscenity and Pornography: A Historical View

Obscenity began to emerge as an important issue in Great Britain about 150 years ago. In 1857, the Obscene Publications Act was passed in Great Britain. Although the

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<sup>3</sup> *Creation of the Commission on Obscenity and Pornography*, Public Law 100, 90<sup>th</sup> Cong. 1<sup>st</sup> sess. (October 3, 1967). Full text of this public law can be found in Appendix A of the *Report of the Commission on Obscenity and Pornography* (Washington, DC: Government Printing Office, 1970), 631.

<sup>4</sup> United States Commission on Obscenity and Pornography, *Report of the Commission on Obscenity and Pornography* (Washington, DC: Government Printing Office, 1970), 51.

House of Lords was uneasy about this act, the Lord Chief Justice Campbell informed the body that “the measure was intended to apply exclusively to works written for the single purpose of corrupting morals of youth, and of a nature calculated to shock the common feelings of decency in any well-regulated mind.”<sup>5</sup> Prosecuted in 1868, *Regina v. Hicklin* was the first known obscenity case tried under the Obscene Publications Act. *Regina v. Hicklin* addressed the issue of obscene material: an anti-Catholic pamphlet titled “*The Confessional Unmasked*” and published by the Protestant Electoral Union.<sup>6</sup> Lord Cockburn, the judge in the case, stated that material was considered obscene, “. . . 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.”<sup>7</sup>

The *Hicklin* test soon became the standard for obscenity cases in the United States. It was strengthened by statutory regulations that were passed in the late nineteenth century. In 1873, Anthony Comstock, a private citizen with a great deal of influence, succeeded in persuading Congress to pass an “Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use (17 Stat. 598 (1873)),” more popularly known as the Comstock Act. The Comstock Act basically

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<sup>5</sup> Robert W. Haney, *Comstockery in America: Patterns of Censorship and Control* (Boston: Beacon Press, 1960), 16.

<sup>6</sup> Charles Rembar, *The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer, and Fanny Hill* (New York: Random House, 1968), 20.

<sup>7</sup> Lester A. Sobel, ed., *Pornography, Obscenity & The Law* (New York: Facts on File, 1979), 8.

controlled the circulation of obscene materials through the mail. Comstock felt it was his obligation to “attempt to improve the morals of other people by rendering obscene literature and photographs inaccessible.”<sup>8</sup> Comstock went so far as to get himself appointed a special postal agent to directly play a role in the suppression of obscenity.<sup>9</sup> In fact, Comstock bragged that he was personally responsible for destroying more than fifty tons of indecent books, over 28,000 pounds of book printing plates, around four million obscene pictures, over 16,000 negatives, and driving fifteen people to suicide.<sup>10</sup>

In 1913, the *Hicklin* test faced resistance from Judge Learned Hand of the United States District Court of Southern New York in the case of *United States v. Kennerly*.<sup>11</sup> *Kennerly* involved mailing a book defined as “obscene” by the criteria of the Comstock Act. Judge Hand did not agree with the *Hicklin* test but felt that he had to follow it since it was the precedent in legal cases dealing with obscene materials.<sup>12</sup> The issue of shifting towards “contemporary community standards” was first enunciated in the *Kennerly* case.<sup>13</sup> Judge Hand felt the “average conscience” of people was the right approach to take in viewing materials that were thought to be obscene. Hand elaborated on this

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<sup>8</sup> Haney, *Comstockery in America*, 20.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *United States v. Kennerly*, 209 Fed. 119 (S.D.N.Y. 1913).

<sup>12</sup> Haney, *Comstockery in America*, 24.

<sup>13</sup> Chris Hunt, “Community Standards in Obscenity Adjudication,” *California Law Review* 66 (1978): 1279.

approach by pointing out that it “freed literature from . . . the dead hand of ‘mid-Victorian morality’ by which the *Hicklin* test focused on the most sensitive person, while accommodating the legislatively perceived need for some regulation.”<sup>14</sup>

The next major legal challenge to come before the courts was the Tariff Act of 1930, which banned the importation of immoral materials into the United States.<sup>15</sup> James Joyce’s book, *Ulysses*, was considered immoral and obscene by the United States government, and copies of his book were seized and burned by the United States Post Office. Alexander Lindey, one of the defense lawyers for the publisher, eventually petitioned the Treasury Department to import *Ulysses* as a classic for non-commercial use and it complied.<sup>16</sup> However, the end result was a court decision that lifted the importation ban on *Ulysses* and the adoption of a new rule for judging obscenity. Judge John M. Woolsey of the U.S. District Court and Judge Augustus N. Hand of the New York Circuit Court of Appeals both decided that *Ulysses* should not be considered obscene.<sup>17</sup> They established several points to be considered regarding any case of obscenity.<sup>18</sup> These points included: the purpose of the author, the dominant effect of obscenity on the average reader, and literary and artistic merit of a work based upon the testimony of

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<sup>14</sup> Hunt, “Community Standards in Obscenity Adjudication,” 1279.

<sup>15</sup> Tariff Act of 1930, U.S. Code 19(1930) Sec. 1305(a)

<sup>16</sup> Haney, “*Comstockery in America*,” 26.

<sup>17</sup> *Ibid*, 27-29.

<sup>18</sup> *Ibid*.

literary critics.<sup>19</sup> In *Ulysses*, Judge Woolsey and Judge Hand determined the merits of the book, as a whole, and how it would affect the average person in society. This test became the new post-*Hicklin* standard in most courts.<sup>20</sup> The *Ulysses* case and the decision by Judge Woolsey and Judge Hand reflected an intuitive shift towards considering obscenity issues in a much broader cultural and social context. Judges Woolsey and Hand loosened the standards from the tight grip of the *Hicklin* test and moved towards a test that allowed for a more flexible interpretation.

### The Game Changer: The United States Supreme Court

In 1957, the Supreme Court heard arguments in the case of *Roth v. United States* and its companion case, *Alberts v. California*. Both Roth and Alberts were convicted under statutes that prohibited the mailing of obscene materials. They argued that the statutes violated their First Amendment rights to free speech and that their convictions should be overturned. The Supreme Court, in its opinion in *Roth v. United States*, affirmed that “. . . obscenity was not within the area of constitutionally protected speech or press.”<sup>21</sup> In addition, the Court rejected the infamous *Hicklin* test and a new test defining obscenity was enacted. In *Roth*, material was considered to be obscene “whether, to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appealed to prurient interest.”<sup>22</sup>

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<sup>19</sup> Haney, “*Comstockery in America*,” 27-29.

<sup>20</sup> *Ibid*, 29.

<sup>21</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>22</sup> *Ibid*.



In 1964, the issue of obscenity was before the United States Supreme Court again in the case of *Jacobellis v. Ohio*. Jacobellis was convicted for possessing and exhibiting an obscene film. The Supreme Court applied the *Roth* test and determined that the film, in fact, was not obscene and overturned Jacobellis's conviction. The Supreme Court had a hard time defining obscenity in the *Jacobellis* case so Justice Potter Stewart famously described obscenity by stating, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."<sup>23</sup>

Other Players: The United States Congress,  
the American Library Association (ALA), and the Commission

At the time of *Jacobellis*, there were several postal regulations on the books that dealt with obscene material. Numerous proposals for the regulation of obscene materials were raised in Congress in the middle 1960s. The ALA kept close tabs on all of these proposed regulations and expressed concerns when necessary. Congress first proposed a commission dealing with noxious and obscene materials in 1965. The ALA strongly reacted to the suggestion of this commission. It believed that the Constitution forbade governmental interference with expression, regardless of whether it might seem noxious or obscene to any such group or commission.<sup>24</sup> The ALA also thought that, before any

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<sup>23</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

<sup>24</sup> Robert Vosper to Honorable John H. Dent, September 24, 1965, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

commission was created, studies should be carried out at university or research institutions.<sup>25</sup>

In 1967, Congress held hearings regarding the creation of a commission on obscenity and pornography. On October 3, 1967, Public Law 90-100 was enacted and the Commission on Obscenity and Pornography was established. Congress felt that traffic in obscenity and pornography was a “matter of national concern.”<sup>26</sup> Among other things, the Commission was charged with analysis of the laws dealing with pornography and obscenity as well as evaluating and recommending definitions of obscenity and pornography.<sup>27</sup> From this point on, the ALA vigorously attempted to have a professional librarian named to the Commission.<sup>28</sup> The ALA may have felt this was a fallback position since its earlier objections were not taken into consideration. On January 2, 1968, President Lyndon B. Johnson appointed eighteen people to the Commission, including Dr. Frederick Wagman, who was the director of the library at the University of

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<sup>25</sup> Robert Vosper to Honorable John H. Dent, September 24, 1965.

<sup>26</sup> *Creation of the Commission on Obscenity and Pornography*, Public Law 100, 90<sup>th</sup> Cong. 1<sup>st</sup> sess. (October 3, 1967). Full text of this public law can be found in Appendix A of the *Report of the Commission on Obscenity and Pornography* (Washington, DC: Government Printing Office, 1970), 631.

<sup>27</sup> *Ibid*, 632.

<sup>28</sup> Ervin J. Gaines to David H. Clift, October 9, 1967, American Library Association Archives at the University of Illinois Archives, Record Series 69/2/6, University of Illinois at Urbana-Champaign.

Michigan.<sup>29</sup> William B. Lockhart, Dean of the University of Minnesota School of Law, was selected as the Commission's Chairman.<sup>30</sup>

The tasks assigned by Congress would not be easy for the Commission to accomplish. Could the commissioners collaborate and work together? It would be challenging, considering the various educational backgrounds, personalities, and political convictions of the selected commissioners. Could the Commission objectively analyze the laws dealing with pornography and obscenity? Could it objectively evaluate and recommend definitions of obscenity and pornography? It was anyone's guess as to what the Commission would do. Only time would tell.

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<sup>29</sup> Office of the White House Press Secretary, January 2, 1968. American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>30</sup> Ibid.

## CHAPTER 1

### HISTORIOGRAPHY

Scholarly research on the history of the Commission on Obscenity and Pornography (hereafter referred to as the “Lockhart Commission” or just “The Commission”) and its report is not as plentiful as might be expected, given the contentious nature of the topics of obscenity and pornography. The Commission’s report is often cited in the footnotes of court cases. For example, when the Supreme Court issued its opinion in the case of *Miller v. California* in 1973, Justice William O. Douglas cited the Commission’s report in his dissent.<sup>31</sup> It is also discussed briefly in books and articles and has been compared to the Attorney General’s Commission on Pornography (Meese Commission) in 1986.<sup>32</sup>

Some scholarly research on the Commission stemmed from people directly involved with the Commission and its work. At a symposium in 1971 at the University of Oklahoma College of Law, William B. Lockhart, the Chairman of the Commission, addressed the findings and recommendations of the Commission, specifically its most

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<sup>31</sup> *Miller v. California*, 413 U.S. 39-40 (1973). Justice Douglas cited the Commission’s report in his dissent: “At the conclusion of a two-year study, the U.S. Commission on Obscenity and Pornography determined that the standards we have written interfere with constitutionally protected material.”

<sup>32</sup> See, for example, Felice Flannery Lewis, *Literature, Obscenity, & Law* (Carbondale, Illinois: Southern Illinois University Press, 1976), 224-247; Lester A. Sobel, ed., *Pornography, Obscenity & The Law* (New York: Facts on File, 1979), 30-43, 148-149; Louis A. Zurcher, Jr., and R. George Kirkpatrick, *Citizens for Decency: Antipornography Crusades as Status Defense* (Austin: University of Texas Press, 1976), 170-171, 334-345; and Susan Gubar and Joan Hoff, eds., *The Dilemma of Violent Pornography: For Adult Users Only* (Bloomington and Indianapolis: Indiana University Press, 1989), 18-19, 28-31, 86-93, 170, 218-219, 222-223.

controversial recommendation. Lockhart indicated that there was “no community consensus supporting the laws prohibiting the sale or exhibition of explicit sexual material to adults” and concluded “society’s attempt to legislate for adults in this area have not been successful.”<sup>33</sup> Contrary to President Richard M. Nixon’s and the Senate’s reaction to the report, Lockhart stated that the reaction of people from all different walks of life affirmed the Commission’s recommendation that adults should be able to read or look at whatever they want.<sup>34</sup> Lockhart concluded that the Commission felt that, as an agent of the government, it could not impose restrictions on obscene materials nor control morality.<sup>35</sup>

Weldon T. Johnson, a member of the professional staff of the Commission, wrote a commentary in the *Duquesne Law Review* that addressed the Commission’s findings and the responses to it. He argued that the report spawned “strength, emotion, repulsion, and attraction,” along with considerable misunderstanding.<sup>36</sup> Johnson stressed that reactions to the report were colored with “political and emotional conditions.”<sup>37</sup> He pointed out “commission reports that are not liked are dismissed, or criticized as invalid

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<sup>33</sup> William B. Lockhart, “The Findings and Recommendations of the Commission on Obscenity and Pornography: A Case Study of the Role of Social Science in Formulating Public Policy,” *Oklahoma Law Review* 29 (1971): 218-219.

<sup>34</sup> *Ibid.*, 220.

<sup>35</sup> *Ibid.*

<sup>36</sup> Weldon T. Johnson, “The Pornography Report: Epistemology, Methodology and Ideology,” *Duquesne Law Review*, 10 (1971-72): 190.

<sup>37</sup> *Ibid.*, 191.

or biased.”<sup>38</sup> Johnson said that, in order to get a balanced perspective of the Commission’s findings, both the behaviors of the commissioners and the scientific research should be examined.<sup>39</sup>

Other scholars in the field and in no way involved with the Commission directly also discussed the Commission in their works. Harry M. Clor, a political science professor at Kenyon College, wrote an article in the *Duquesne Law Review* critiquing the Commission’s report. Clor felt that the report consistently elected to support the open-minded view of obscenity.<sup>40</sup> He argued that the Commission’s recommendations were tainted by discrepancies, ignorance of certain facts, and ideology. Clor felt scientific research could not intellectually or morally measure the effect of literature, good or bad, on the community.<sup>41</sup> He concluded by stressing that “social philosophy” and “sober reflection upon common experience” should be the tools used in addressing issues of obscenity and pornography.<sup>42</sup>

In 1970, Eli M. Oboler, the head librarian at Idaho State University, published his reaction to the United States Senate’s rejection of the Commission’s report in *Library Journal*. He pointed out that the Senate’s rejection of the Commission’s report might

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<sup>38</sup> Johnson, “The Pornography Report: Epistemology, Methodology and Ideology,” 192.

<sup>39</sup> *Ibid*, 219.

<sup>40</sup> Harry M. Clor, “Science, Eros and the Law: A Critique of the Obscenity Commission Report,” *Duquesne Law Review*, 10 (1971-72): 70.

<sup>41</sup> *Ibid*, 76.

<sup>42</sup> *Ibid*.

have been influenced by the fact that it was issued “three weeks before a Congressional election.”<sup>43</sup> He also wondered if the public would notice that one-third of the Senate actually did not stand up even to be counted on this important issue, and that even those who did, did so without any real debate or discussion worth counting as such.<sup>44</sup>

The ALA joined a coalition of twenty-four other national organizations and urged a “full and fair public debate” of the Commission’s report.<sup>45</sup> It “deplored the rejection of the report ‘by government officials based mainly on pre-conceived premises.’”<sup>46</sup> Furthermore, the coalition stated that “the abolition of those obscenity laws which prohibit distribution of obscene materials to adults who choose to receive them . . . was not a radical innovation . . . The Supreme Court had ruled that the First Amendment protects an adult’s right to read and see whatever he chooses.”<sup>47</sup>

The research on the Commission shows that its recommendations were received by many, including the American Library Association (ALA), with mixed emotions and may not have resolved any differences over the definitions of obscenity and pornography.

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<sup>43</sup> Eli M. Oboler, “The Politics of Pornography,” *Library Journal* (December 15, 1970): 4225.

<sup>44</sup> *Ibid.*, 4227.

<sup>45</sup> National Book Committee, “25 National Organizations Urge Wide Public Debate on Report of Commission on Obscenity and Pornography,” January 21, 1971. American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

This thesis will contribute to areas of political and legal history and librarianship in the United States by examining the role of the American Library Association and its efforts to preserve First Amendment rights. Obscenity and pornography, as important social and legal issues, will also be examined. The first attempts to define and regulate obscenity and pornography are briefly reviewed. Legislation and court decisions in the United States and Great Britain will be analyzed. Internal and external documents as well as declarations about intellectual freedom formulated and published by the American Library Association (ALA) are included. This research tracks government attempts to address issues of intellectual freedom and First Amendment rights versus public protection through the formation of various commissions and committees, legislative enactments of regulations, and criteria established in court decisions. I first became interested in censorship and freedom of speech when I took a course on constitutional law and the First Amendment as an undergraduate. As a professional librarian, I am even more interested in censorship and freedom of speech as these are core issues that librarians face every day.

I used primary and secondary sources from Rod Library at the University of Northern Iowa for this thesis topic. The primary sources included the Commission's final report, the technical volume related to the legal recommendations of the Commission, numerous United States Supreme Court decisions, public laws, the *Congressional Record*, the *Congressional Record Index*, articles from the *New York Times*, and the final report of the Attorney General's Commission on Pornography. I was able to access some press releases from President Nixon online. I used law review



articles, books that covered obscenity and pornography, and articles from journals as secondary sources.

In September of 2009, I traveled to the American Library Association (ALA) Archives at the University of Illinois at Urbana-Champaign to obtain more primary source evidence. I looked at all the Record Series available that dealt with obscene or pornographic matter. The ALA Archives house a significant amount of primary source materials that cover the Commission on Obscenity and Pornography. The ALA Archives include government documents not available elsewhere. Specific government documents used included a copy of an amicus curiae brief filed on behalf of the ALA in the Supreme Court case of *Smith v. California*,<sup>48</sup> a copy of the *Progress Report* that the Commission issued in July of 1969, and a copy of the White House press release that announced the names of the people appointed to the Commission. Primary source materials from the ALA itself included internal and external correspondence from the ALA, correspondence from congressional members and committees to the ALA, the text of ALA statements and testimony given to congressional members and committees, text of resolutions the ALA passed, and some ALA press releases and newsletters. I was also able to access some of the ALA core documents, such as the “Library Bill of Rights” and the “Freedom to Read Statement,” online at the ALA website.

I also searched for dissertations and theses that were written on the Commission of Obscenity and Pornography. I searched the *Dissertation and Theses: A&I Database* for the specific phrase: “Commission on Obscenity and Pornography” which returned a

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<sup>48</sup> *Smith v. California*, 375 U.S. 259 (1963).

total of four results. None of the dissertations or theses had been written from the historical perspective of librarianship.<sup>49</sup> Lane Von Sunderland's dissertation, "The Obscenity Commission, Methodology, and the Law: A Case Study of the Commission on Obscenity and Pornography," is the closest in focus to this thesis. It is written from a political science perspective and does not offer the perspective of librarianship. Suki Wellman and Elizabeth Alison Smith wrote dissertations, which addressed obscenity and pornography historically from a journalistic perspective and a women's studies perspective. Patricia Ann Sullivan's dissertation further analyzed a scientific study that had been conducted by the Commission on Obscenity and Pornography. These dissertations did not focus on issues central to defining and regulating obscenity and pornography.

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<sup>49</sup> Lane Von Sunderland, "The Obscenity Commission, Methodology, and the Law: A Case Study of the Commission on Obscenity and Pornography" (Ph.D. diss., The Claremont Graduate University, 1973); Patricia Ann Sullivan, "A Reinvestigation Of Exposure To Sexually Oriented Materials Among Young Male Prison Offenders" (Ph.D. diss., Fordham University, 1982); Elizabeth Alison Smith, "Charged with sexuality: Feminism, liberalism, and pornography, 1970-1982" (Ph.D. diss., University of Pennsylvania, 1990); Suki Wellman, "Shooting the Smut Stork: The American Print Media Confronts Two Federal Pornography Commissions, 1970-1986." (M.A. diss., Concordia University (Canada), 2007).

## CHAPTER 2

## THE ORIGINS OF THE COMMISSION

The pressures that led to the creation of the Commission and the role of the ALA in addressing the public issues surrounding obscenity and pornography commence in the early 1960s. The first glimpse of the ALA's position on obscenity is in a Supreme Court amicus curiae brief in the 1963 case of *Smith v. California*.<sup>50</sup> Bradley Reed Smith was found guilty for exhibiting and distributing the book, *Tropic of Cancer*, defined as obscene under the California Penal Code.<sup>51</sup> In the amicus curiae brief, the ALA argued that the First Amendment and intellectual freedom principles were at issue and reaffirmed its position on the freedom to read. While the ALA admitted there were some problems imposed by the definition of obscenity, it felt the issue of obscenity was a personal problem and should be resolved through each individual's moral beliefs.<sup>52</sup> It argued that a "categorical definition for obscenity could not constitutionally be made the basis of a statute which prescribed criminal penalties for the sale or distribution of literature."<sup>53</sup> The ALA also argued that the California statute and the *Roth* decision gave "legislative

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<sup>50</sup> *Smith v. California*, 375 U.S. 259 (1963).

<sup>51</sup> California Penal Code § 311.2

<sup>52</sup> Brief for American Library Association as Amicus Curiae supporting Defendant-Appellant *Smith v. California* 375 U.S. 259 (1963) (No. 812). A copy of the ALA's amicus curiae brief was made available through the American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>53</sup> *Ibid*, 1.

authority to condemn a book and imprison its author, publisher, seller and exhibitor.”<sup>54</sup>

The ALA then attacked the *Roth* decision and the three postulates on which the majority of the Supreme Court had based its decision: “obscenity is outside the protection of the First and Fourteenth Amendments because it always has been; obscenity is utterly without redeeming social importance and is thus not within the protection of the First Amendment; and obscenity, like other classes of utterances, such as libel, may be excluded from the protections of the First Amendment because it encroaches upon a limited area of more important interests.”<sup>55</sup> The ALA strongly urged the Supreme Court to re-examine the grounds and theory that the *Roth* decision and the California statute were based upon. The ALA concluded its arguments with a powerful statement:

To call a book obscene is to apply a label that has no semantic referent. To conclude that a book has no social importance answers no First Amendment problem. In such areas, the persuasion of public opinion should be the only acceptable censor. Only where a book or writing is shown to damage society or one of its members wrongfully—be it libelous, seditious or “obscene”—should freedom of the press give way to more important social interests and Government have the power to restrain and punish.<sup>56</sup>

The United States Supreme Court vacated the conviction and remanded the case to the courts in California. The California Supreme Court found that the *Tropic of Cancer* was

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<sup>54</sup> Brief for American Library Association as Amicus Curiae supporting Defendant-Appellant *Smith v. California*, 1.

<sup>55</sup> *Ibid*, 1-2.

<sup>56</sup> *Ibid*, 10.

not hard-core pornography and, therefore, not obscene.<sup>57</sup> As a result, Bradley Reed Smith's conviction was overturned. He was not tried again.

### Battles in the Halls of Congress

In the middle 1960s, there were several postal regulations on the books that dealt with obscene material. Even though the Supreme Court had handed down decisions that addressed obscenity issues, numerous proposals for regulation of obscene materials kept being raised in Congress. Of course, the ALA kept close tabs on all of these proposed regulations and expressed concerns when necessary. In 1965, H.R. 980 and six other related bills, which addressed issues of obscene mail matter, were proposed in the House of Representatives. The House Committee on Post Office and Civil Service held hearings on these bills. John A. Gronouski, the United States Postmaster General, wrote to the chairman of the committee, Congressman Tom Murray, and expressed his concerns about the two bills. Postmaster Gronouski recommended against the legislative enactment of the two bills since there were already federal statutes and postal regulations in place that addressed obscene matter. In addition, he expressed concern that the "proposed legislation raised grave constitutional questions in the area of freedom of speech."<sup>58</sup> Gronouski indicated that what constituted obscenity was already established by the Supreme Court and other federal courts. He said the proposed legislation ignored the idea that each individual had a personal opinion of what obscenity was. Also,

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<sup>57</sup> *Zeitlin v. Arnebergh*, 59 Cal. 2d 901 (1963).

<sup>58</sup> John A. Gronouski to Honorable Tom Murray, March 24, 1965, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

Gronouski felt the courts had already determined what was considered to be obscene. He further stated that this legislation violated due process of law and presented more constitutional questions and pointed out that it was similar to previously proposed legislation that failed to pass in the House of Representatives.<sup>59</sup>

Ramsey Clark, Deputy Attorney General, also wrote to Chairman Murray expressing his concerns about these two bills. Clark worried that the proposed legislation ignored recent cases that indicated “the constitutional need for more protective and reasonable procedures with respect to restraints on allegedly obscene materials.”<sup>60</sup> Clark stated that, while the Department of Justice supported the objective of the proposed legislation, it was unable to recommend its enactment.<sup>61</sup>

#### The American Library Association (ALA) Enters the Battle

Edwin Castagna, the president of the ALA, sent Chairman Murray a lengthy statement for the record on behalf of the ALA regarding the proposed legislation. In his statement, Castagna cited “The Freedom to Read” statement and indicated that the ALA’s Intellectual Freedom Committee (IFC) had held a conference on censorship and intellectual freedom. Castagna felt the work that came out of the IFC conference could possibly help to influence the proposed legislation and the issue of obscene materials being sent through the mail. Castagna concurred with Gronouski and Clark that the

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<sup>59</sup> Gronouski to Murray, March 24, 1965.

<sup>60</sup> Ramsey Clark to Honorable Tom Murray, March 25, 1965, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>61</sup> Ibid.

proposed legislation was unacceptable in terms of freedom of speech and freedom of the press. Castagna wrote that the courts had encountered difficulty in identifying obscene materials versus dealing with materials of a sexual nature, which are not considered obscene, and whose circulation was constitutionally protected by the First Amendment.<sup>62</sup> Castagna criticized the proposed legislation for not meeting the requirements and tests specifically laid out by the Supreme Court for the legal governmental regulation of supposed obscenity.<sup>63</sup> Castagna strenuously challenged the view that the proposed legislation eroded the judicial standards in terms of freedom to read and freedom of expression.<sup>64</sup> He pointed out that anything could be called “obscene” or “indecent” by someone and that “what [was] obscene to one may [have been] the laughter of genius to another.”<sup>65</sup> Castagna echoed Gronouski and Clark in the opinion that the proposed legislation did not follow “due process” and would most likely be considered to be “constitutionally defective” under the freedom of speech and the freedom to read.<sup>66</sup> Castagna ultimately recommended against the enactment of the proposed legislation. As a result of the backlash, these proposed bills never made it to final votes. H.R.980 was referred to the Senate Committee on Post Office and Civil Service but never made it out

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<sup>62</sup> Edwin Castagna to Honorable Thomas Murray, March 31, 1965, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign, 4.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid, 5.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid, 6-7.

of the Senate committee.<sup>67</sup> Five other bills only made it as far as the House Committee on Post Office and Civil Service.<sup>68</sup>

The House of Representatives decided to take another approach to the matter of obscenity. In September of 1965, the House Committee on Education and Labor appointed the House Select Subcommittee on Education to hold hearings on H.R. 7465, a bill that would create a commission on noxious and obscene matters and materials. The ALA strongly reacted to this proposed commission. Robert Vosper, the president of the ALA at the time, submitted to Congressman Dent, chairman of the House Select Subcommittee on Education, a statement for the record. As with other statements, the ALA's "Freedom to Read" statement was cited. Vosper indicated that an "authoritative" commission on noxious and obscene materials might offer relief to librarians in terms of relief from censorship problems.<sup>69</sup> However, Vosper stated that it was "impossible to constitute any such authoritative commission" as any single group cannot define what is noxious and obscene. Vosper indicated that "the Constitution forbade governmental interference with expression, regardless of whether it might seem noxious or obscene to

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<sup>67</sup> H.R.980, 89<sup>th</sup> Cong., 1<sup>st</sup> sess., *Congressional Record Index* 111, no. 22: 1308.

<sup>68</sup> H.R. 3402, 89<sup>th</sup> Cong., 1<sup>st</sup> sess., *Congressional Record Index* 111, no. 22: 1364; H.R. 4241, 89<sup>th</sup> Cong., 1<sup>st</sup> sess., *Congressional Record Index* 111, no. 22: 1382; H.R. 4794, 89<sup>th</sup> Cong., 1<sup>st</sup> sess., *Congressional Record Index* 111, no. 22: 1396; H.R. 4943, 89<sup>th</sup> Cong., 1<sup>st</sup> sess., *Congressional Record Index* 111, no. 22: 1399; and H.R. 6394, 89<sup>th</sup> Cong., 1<sup>st</sup> sess., *Congressional Record Index* 111, no. 22: 1435.

<sup>69</sup> Robert Vosper to Honorable John H. Dent, September 24, 1965, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign, 2.



any such group or commission.”<sup>70</sup> Vosper felt that any governmental commission, no matter how fair, would violate prior restraint and engage in censorship and go against “its proposed mandate to operate without in any way interfering with constitutional safeguards of freedom of speech or freedom of the press.”<sup>71</sup> Vosper took issue with the fact that there was very little evidence, if any, which reflected the impact of reading or viewing “obscene” and “noxious” materials upon one’s behavior.<sup>72</sup> Vosper did not elaborate on the specifics of the evidence he was referring to. Vosper then reiterated what Professor Lee A. Burgess, Jr., Chairman of the English Department at Wisconsin State College, had said at a Southern Wisconsin Education Meeting:

There is no evidence that bad literature is an important or significant cause of delinquency. Although many persons have offered their opinion that literature causes delinquency, there is little evidence that is acceptable by legal or medical standards that literature contributes to juvenile delinquency. In fact, delinquents tend to be non-readers. They are rarely found in libraries. They tend to be school dropouts – little acquainted with libraries and books. If we are to risk the dangers of censorship, we should be sure that evidence is shown to us that it is necessary.<sup>73</sup>

Vosper understood that the proposed commission would conduct a study that would “develop scientific data measuring the effects of obscene matter” and “clarify the premises underlying obscenity laws.” Vosper said that before the creation of any kind of commission, a “careful study of the nature of the evil which the commission is to uncover

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<sup>70</sup> Robert Vosper to Honorable John H. Dent, September 24, 1965, 2.

<sup>71</sup> *Ibid*, 3.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid*, 4.

should be carried out,” and that the study should be carried out under “unimpeachable auspices, outside the influence of the Government, at one or more of our better universities or research institutions, or by a consortium of them.”<sup>74</sup> Vosper stressed that the studies should reflect the “impact of the enforcement of censorship laws upon the persons who conduct our institutions of free expression, including the mass media of communication,” and suggested that the ALA would be in a position to offer additional suggestions or advice.<sup>75</sup> Ultimately, Vosper and the ALA recommended that H.R. 7465 not be enacted without a careful study.<sup>76</sup> As with similar bills in previous Congresses, H.R. 7465 never made it out of the House of Representatives.

### The Showdown

In April of 1967, the House Select Subcommittee on Education held hearings on three related bills, H.R. 2525, S. 188, and S. 1584. The intent of each was to create a commission on obscenity and pornography.<sup>77</sup> Dominick V. Daniels, a Democrat from New Jersey, was the chairman of the select subcommittee. The ALA again submitted a statement to the select subcommittee regarding H.R. 2525. The ALA could not support H.R. 2525 because the proposed legislation did not offer any way for studies to be carried out scientifically by research institutions. Instead, the members of the proposed

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<sup>74</sup> Robert Vosper to Honorable John H. Dent, September 24, 1965, 4.

<sup>75</sup> Ibid, 4.

<sup>76</sup> Ibid, 5.

<sup>77</sup> The House Select Subcommittee on Education was a subcommittee of the Committee on Education and Labor

commission were supposed to carry out studies through hearings, collection of information and suggestions from agencies and groups, and consultations with government organizations and private groups.<sup>78</sup> The ALA also felt the decision in *Ginzburg v. United States*<sup>79</sup> eliminated the need for a national commission to arrive at a new definition of obscenity and pornography, as proposed in H.R. 2525.<sup>80</sup> The ALA requested that, before H.R. 2525 was passed, the legislation be limited in scope and include scientific research by responsible institutions.<sup>81</sup> There were minor changes made to H.R. 2525 and it then went forward as H.R. 10347.

In the days before voting on the creation of the commission, debates were held in both the House and Senate chambers. On September 20, 1967, on the floor of the Senate, Senator Karl Mundt, a Republican from South Dakota, put forth an amendment to

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<sup>78</sup> American Library Association, "Statement of the American Library Association on H.R. 2525 before the Select Subcommittee on Education of the House Committee on Education and Labor, May 9, 1967" American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign, 2.

<sup>79</sup> *Ginzburg v. United States* 383 U.S. 463 (1966). The Ginzburg case dealt with mailed circulars that advertised erotic materials. The Court reasoned that where the sole emphasis of an advertisement is the commercial exploitation of erotica for prurient appeal, it shall be deemed "pornographic" communication that lies beyond the scope of First Amendment speech protections. The Court cautioned, however, that the distribution of materials containing sexuality in the context of art, literature, or science is not per se prohibited under the obscenity statute if it can be shown to advance human knowledge or understanding.

<sup>80</sup> American Library Association, "Statement of the American Library Association on H.R. 2525 before the Select Subcommittee on Education of the House Committee on Education and Labor, May 9, 1967," 4.

<sup>81</sup> Ibid.

change the title of Senate Bill 188, “Commission on Noxious and Obscene Matters and Materials” to match the House of Representatives Bill 10347, which was titled, “Commission on Obscenity and Pornography.” Senator Mundt voiced frustration that he and co-sponsors of Senate Bill 188<sup>82</sup> had seen three previously passed Senate bills of similar nature die in the House of Representatives while Americans wanted to see some action taken.<sup>83</sup> Senator Gordon Allott, a Republican from Colorado, was the only other senator who spoke. Senator Allott and Senator Mundt got into a disagreement when Allott said, “Much of the literature on our news racks in this country is still literature which cannot fail to bring offense to any person with normal instincts and normal feelings.”<sup>84</sup> Mundt retorted, “Much of which does violence to the term literature, by the way.”<sup>85</sup> Allott responded apologetically, “Yes. Perhaps I should not have used the word literature. I should say printed material.”<sup>86</sup> Mundt appeared to accept Allott’s clarification. Allott also mentioned that this piece of legislation was the result of “eight

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<sup>82</sup> Senate Bill 188, titled “Commission on Noxious and Obscene Matters and Materials” was the companion bill to the House of Representatives Bill 10347, “Commission on Obscenity and Pornography.”

<sup>83</sup> *Commission on Noxious and Obscene Matters and Materials*, S 188, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., Congressional Record 113, no. 19 (September 20, 1967): S 26234.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, S 26235.

<sup>86</sup> *Ibid.*

years of effort in this direction,” and ended his remarks with, “Ultimately, right will prevail.”<sup>87</sup>

On September 21, 1967, on the floor of the House of Representatives, Congressman Dominick V. Daniels, a Democrat from New Jersey, acknowledged that First Amendment issues, “made the responsibility of dealing with the problem of obscenity and pornography both difficult and complex.”<sup>88</sup> Congressman Daniels felt this legislation was “imperative” as “the U.S. Supreme Court had not succeeded in formulating a satisfactory definition of ‘pornography.’”<sup>89</sup> Congressman Glenn Cunningham, a Republican from Nebraska, strongly echoed both Senators Mundt and Allott and Congressman Daniels in wanting to see this legislation passed.<sup>90</sup> Thus, with the exception of the disagreement over the use of the word “literature,” there was bipartisan support for the passage of this legislation.

#### The Creation of the Commission

On October 3, 1967, Public Law 90-100 was enacted which established the Commission on Obscenity and Pornography. Congress felt that traffic in obscenity and

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<sup>87</sup> *Commission on Noxious and Obscene Matters and Materials*, S 188, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., Congressional Record 113, no. 19 (September 20, 1967): S 26236.

<sup>88</sup> *Commission on Obscenity and Pornography*, HR 10347, 90<sup>th</sup> Cong, 1<sup>st</sup> sess., *Congressional Record* 113, no. 20 (September 21, 1967): H 26374.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, H 26375.

pornography was a “matter of national concern.”<sup>91</sup> Among other things, the Commission was charged with analysis of the laws dealing with pornography and obscenity as well as evaluating and recommending definitions of obscenity and pornography.<sup>92</sup> It was also charged with recommending legislative, administrative, or other advisable and appropriate action deemed necessary to effectively regulate the trafficking of obscene and pornographic materials, without in any way interfering with constitutional rights.<sup>93</sup> The law allowed the Commission to contract with universities and other research institutions to gather scientific data related to the causal relationship between obscene material and antisocial behavior.<sup>94</sup>

The law called for eighteen members to be appointed to the Commission by the President of the United States. The members were to be people who had expert knowledge in obscenity and antisocial behavior, including “psychiatrists, sociologists, psychologists, criminologists, jurists, lawyers and others from organizations and professions who have special and practical competence or experience with respect to

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<sup>91</sup> *Creation of the Commission on Obscenity and Pornography*, Public Law 100, 90<sup>th</sup> Cong. 1<sup>st</sup> sess. (October 3, 1967). Full text of this public law can be found in Appendix A of the *Report of the Commission on Obscenity and Pornography* (Washington, DC: Government Printing Office, 1970), 631.

<sup>92</sup> *Ibid*, 632.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid*, 633.

obscenity laws and their application to juveniles.”<sup>95</sup> Immediately, the ALA vigorously lobbied to have a professional librarian named to the Commission.<sup>96</sup>

On October 31, 1967, the ALA Intellectual Freedom Committee (IFC) issued a “Recommended Resolution on Presidential Commission on Obscenity and Pornography” in which the ALA endorsed and supported the idea of the Commission. It urged the appointment of people of the highest qualifications to the Commission and it pledged its cooperation to the work of the Commission. The ALA qualified its support of the Commission given an apprehension that the Commission may be led into “sensational and superficial analyses of the evidence.”<sup>97</sup> The ALA also regretted that the Commission only had two years to complete its work but felt that some useful data would be gathered within the two years.<sup>98</sup> The ALA ended the resolution with a request that the President of the United States permit the ALA to nominate one or more members of the ALA for appointment to the Commission.<sup>99</sup>

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<sup>95</sup> *Creation of the Commission on Obscenity and Pornography*, Public Law 100, 90<sup>th</sup> Cong. 1<sup>st</sup> sess. (October 3, 1967). Full text of this public law can be found in Appendix A of the *Report of the Commission on Obscenity and Pornography* (Washington, DC: Government Printing Office, 1970), 631-2.

<sup>96</sup> Ervin J. Gaines to David H. Clift, October 9, 1967, American Library Association Archives at the University of Illinois Archives, Record Series 69/2/6, University of Illinois at Urbana-Champaign.

<sup>97</sup> American Library Association Intellectual Freedom Committee, “Recommended Resolution on Presidential Commission on Obscenity and Pornography,” October 3, 1967, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

In a letter to Ervin Gaines, the chairman of the ALA Committee on Intellectual Freedom, Germaine Krettek, the director of the ALA Washington Office, wrote of her trepidation that librarians fell within the “and others” category for appointments to the Commission and that there would be competition with others in the educational field and the publishing, television, and radio industries. Krettek pointed out that it was not the usual practice of professional organizations to formally designate individuals they wished to have appointed to presidential commissions. Krettek hoped that a librarian would be appointed to the Commission but, if not, there would still be opportunities for librarians to provide input to the Commission. Krettek ended her letter with an interesting statement: “Inasmuch as we opposed all of the legislation in this area until this final version was enacted, I think we would be well advised to keep our enthusiasm for the Commission in low key until we see how it is going to operate and what the prospects are for a meaningful objective report.”<sup>100</sup>

### The Moment of Truth

On January 2, 1968, the White House issued a press release naming the eighteen individuals President Johnson had appointed to the Commission.<sup>101</sup> Sixteen men and two women were chosen to be on the Commission. The final membership included a law

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<sup>100</sup> Germaine Krettek to Ervin J. Gaines, November 3, 1967, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>101</sup> Office of the White House Press Secretary, January 2, 1968. American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.



school dean, a librarian, three sociologists, two psychiatrists, three religious leaders, five lawyers, two professors, and a representative of the book publishing industry.

William B. Lockhart, Dean of the University of Minnesota School of Law, was chosen to be the chairman of the Commission. Commissioner Lockhart was born on May 25, 1906 in Des Moines, Iowa. He earned a bachelor of arts degree from Drake University. Lockhart went to Harvard Law School where he earned a master of arts degree in 1930, a bachelor of law degree in 1933, and a doctor of judicial science degree in 1943. While at Harvard Law, he was on the editorial board of the *Harvard Law Review*. After graduating from Harvard, Lockhart served in the U.S. Navy during World War II. In 1946, he started teaching at the University of Minnesota School of Law and was the dean from 1956 to 1972. He became a well-known expert in the field of constitutional law during the course of his fifty years as an academic lawyer. Lockhart published a series of articles on obscenity, beginning in 1940. In 1955, Lockhart and Robert C. McClure, another law professor at the University of Minnesota, wrote an article titled "Obscenity in the Courts."<sup>102</sup> Lockhart's articles on obscenity strongly influenced the Supreme Court in its decisions and Lockhart's works were often cited in Supreme Court opinions. Lockhart's position on obscenity was that anything sex-related, except hard-core pornography, should be protected speech under the First Amendment. Over the course of his career, he collaboratively published eight editions of a

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<sup>102</sup> William B. Lockhart and Robert C. McClure, "Obscenity in the Courts," *Law and Contemporary Problems* 20 (1955): 587-607.

constitutional law casebook.<sup>103</sup> He was an excellent choice for the Commission based on his expertise in constitutional law and obscenity. Lockhart donated his papers to the University of Minnesota Archives in 1976. His donation included materials that covered the Commission, his work on constitutional law, and his teaching career. However, on the University of Minnesota Archives website, it is explicitly stated that these files related to the Commission are not presently there and the location of the files is unknown.<sup>104</sup> Lockhart died in 1995 in Salt Lake City at the age of eighty-nine.

Dr. Frederick H. Wagman was the lone librarian on the Commission. He was the director of the library at the University of Michigan. Commissioner Wagman was president-elect of the ALA at the time that *Smith v. California* was taking place. Wagman suggested that the ALA's Intellectual Freedom Committee (IFC) set up a defense fund and affiliate with the American Civil Liberties Union (ACLU) to provide legal aid to librarians in intellectual freedom matters.<sup>105</sup> He was appointed as the vice-chair to the Commission and was named Michigan's Librarian of the Year in 1970, the

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<sup>103</sup> See Jesse H. Choper, "Lockhart, William B. (1906-1995)," *Encyclopedia of the American Constitution* (Detroit: Macmillan Reference USA, 2000), 1640-41 and Penelope Krosch, "Biographical Sketch of William B. Lockhart (1906-1995)", University of Minnesota Archives, William Bailey Lockhart Papers, Circa 1930, 1956-1969, <http://special.lib.umn.edu/findaid/xml/uarc00079.xml> (Accessed June 14, 2010).

<sup>104</sup> Penelope Krosch, "Biographical Sketch of William B. Lockhart (1906-1995)", University of Minnesota Archives, William Bailey Lockhart Papers, Circa 1930, 1956-1969, <http://special.lib.umn.edu/findaid/xml/uarc00079.xml> (Accessed June 14, 2010).

<sup>105</sup> Louise S. Robbins, *Censorship and the American Library: The American Library Association's Response to Threats to Intellectual Freedom, 1939-1969* (Westport, CT: Greenwood Press: 1996), 125.

same year as the final report of the Commission was issued.<sup>106</sup> Wagman passed away in 1994 at the age of eighty-one.

The three sociologists on the Commission were Joseph T. Klapper, Otto N. Larsen, and Marvin E. Wolfgang. Dr. Joseph T. Klapper was the director of Social Research at CBS in New York City. He had received his bachelor of science degree from Harvard University and his Ph.D. in Sociology from Columbia University. Klapper had been a professor at the University of Washington and Stanford University. He was interested in communications research and had served as a consultant to a number of national groups.<sup>107</sup> Dr. Otto Larsen was a professor of Sociology at the University of Washington, Seattle and also received his Ph.D. from here. Larsen was very involved in sociological research. He was also involved in the editing and publishing of research about causes of violence and how violence influenced information and the mass media.<sup>108</sup> Dr. Marvin E. Wolfgang was the director of the Center of Criminological Research at the University of Pennsylvania. Wolfgang had been a consultant on the President's Commission on Law Enforcement and Administration of Justice, a member of the

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<sup>106</sup> "Obituary: Frederick H. Wagman," *The University Record*, University of Michigan, March 28, 1994, [http://www.ur.umich.edu/9394/Mar28\\_94/8.htm](http://www.ur.umich.edu/9394/Mar28_94/8.htm) (Accessed June 14, 2010).

<sup>107</sup> United States Commission on Obscenity and Pornography, *Report of the Commission on Obscenity and Pornography* (Washington, DC: Government Printing Office, 1970), 636.

<sup>108</sup> *Ibid.*

advisory Committee on Reform of the Federal Criminal Law, and the director of social research on the National Commission on the Causes and Prevention of Violence.<sup>109</sup>

The two commissioners who had psychiatric backgrounds were Dr. Edward D. Greenwood and Dr. Morris A. Lipton. Edward D. Greenwood was a psychiatrist from the Menninger Clinic in Topeka, Kansas. Commissioner Greenwood had an extensive background at the national and international level when it came to issues involving children, juvenile delinquency, and mental health. Greenwood had consulted or served on numerous boards and commissions in the ten years before being appointed to this Commission.<sup>110</sup> Dr. Morris A. Lipton was a professor of psychiatry and director of research development at the School of Medicine, University of North Carolina, Chapel Hill. Commissioner Lipton received his Ph.D. from the University of Wisconsin and his M.D. from the University of Chicago. Lipton was involved with psychiatric research both through the National Institutes of Health and the American Psychiatric Association. He focused on researching the effects of drugs on the psyche. He was an editor of the *American Journal of Psychiatry* and had published a total of fifty-eight scientific publications.<sup>111</sup>

The three religious leaders appointed to the Commission were Reverend Morton A. Hill, Rabbi Irving Lehrman and Reverend Winfrey C. Link. Commissioner Hill was one of the founders of Morality in Media and was elected president and administrative

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<sup>109</sup> *Report of the Commission on Obscenity and Pornography*, 639.

<sup>110</sup> *Ibid*, 634.

<sup>111</sup> *Ibid*, 638.

director of the organization. In his biography for the Commission, Hill wrote, “Morality in Media is the interfaith organization working to counter the effects of obscene material on the young, and working toward media based on the principles of truth, taste, inspiration and love.”<sup>112</sup> Rabbi Irving Lehrman received his Doctorate of Hebrew Literature from the Jewish Theological Seminary of America in 1958. Since 1943, Commissioner Lehrman had been the rabbi at Temple Emanu-El located in Miami Beach, Florida. He served on the boards of numerous national Jewish organizations and was also a member of UNESCO’s Executive Committee.<sup>113</sup> Reverend Winfrey C. Link was from Nashville, Tennessee and was an administrator for a United Methodist church retirement home at the time of his appointment to the Commission. Commissioner Link had previously served as a delegate to the 1960 President’s White House Conference on Children and Youth. After the White House conference, he was chosen to chair a Tennessee state subcommittee on pornographic and obscene literature.<sup>114</sup>

The five lawyers appointed to the Commission were Charles H. Keating, Jr., Thomas D. Gill, Thomas C. Lynch, Edward E. Elson, and Barbara Scott. Judge Kenneth B. Keating was appointed to the Commission by President Johnson but resigned from the Commission to become the ambassador to India. Charles H. Keating, Jr. was the only

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<sup>112</sup> *Report of the Commission on Obscenity and Pornography*, 635.

<sup>113</sup> *Ibid*, 636-637.

<sup>114</sup> *Ibid*, 637-638.

member appointed to the Commission by President Nixon.<sup>115</sup> Keating founded Citizens for Decent Literature (CDL), a major anti-pornography organization. Keating believed pornography caused child abuse and violence. Keating, whenever he could, attempted to pressure politicians and judges into enforcing obscenity laws. According to *West's Encyclopedia of American Law*, Keating and the CDL submitted amicus curiae briefs in twenty-seven obscenity cases heard by the U.S. Supreme Court. However, specific cases were not named.<sup>116</sup> Keating actually submitted an amicus curiae brief in support of the state of California in the case of *Smith v. California*. Keating objected to the findings of the Commission and filed a lawsuit to allow his dissenting report to be published along with the findings of the Commission. He would later become infamous as part of the "Keating Five" and was convicted of racketeering and fraud.<sup>117</sup> He is still alive and living in Arizona.

Thomas D. Gill was the chief judge for the juvenile court in Hartford, Connecticut. He received his L.L.M. from Yale University in 1932. He also served on the Council of Judges and the National Council on Crime and Delinquency.<sup>118</sup> Thomas C. Lynch was the Attorney General for California at the time of his appointment to the

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<sup>115</sup> Charles H. Keating, Jr. replaced Kenneth B. Keating (no relation) on the Commission.

<sup>116</sup> "Citizens for Decency through Law," *West's Encyclopedia of American Law, 2<sup>nd</sup> Edition* (Detroit: Thomson/Gale, 2005) 387. Gale Virtual Reference Library (Accessed September 26, 2010).

<sup>117</sup> Ibid.

<sup>118</sup> *Report of the Commission on Obscenity and Pornography*, 634.

Commission. He had received his J.D. from the University of San Francisco and served on President Johnson's Commission on Crime.<sup>119</sup> Edward E. Elson was the president of the Atlanta News Agency and had earned his L.L.M. from Emory University in 1959.<sup>120</sup> Barbara Scott was the associate counsel of the Motion Picture Association of America (MPAA) in New York City. Commissioner Scott received her law degree from Yale University. She served on the American Bar Association's Committee on Obscenity. Her two areas of expertise were civil rights law and family law.<sup>121</sup>

The two university professors on the Commission were G. William Jones and Cathryn A. Spelts. Commissioner Jones was an assistant professor of Broadcast--Film Art at Southern Methodist University in Dallas, Texas.<sup>122</sup> Commissioner Spelts was an assistant professor of English at the South Dakota School of Mines and Technology. She participated in civic, social, and church activities on local and state levels.<sup>123</sup>

The lone representative of the book publishing industry appointed to the Commission was Freeman Lewis. He was the executive vice president of Pocket Books in New York City and the director of the American Book Publisher's Council.<sup>124</sup>

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<sup>119</sup> *Report of the Commission on Obscenity and Pornography*, 638-639.

<sup>120</sup> *Ibid*, 634.

<sup>121</sup> *Ibid*, 639.

<sup>122</sup> *Ibid*, 635.

<sup>123</sup> *Ibid*, 639.

<sup>124</sup> *Ibid*, 637.

There were diverse backgrounds and personalities within the group of commissioners. People with legal backgrounds composed a third of the Commission's membership. In a handwritten memo, Germaine Krettek noted that she had received a response from the White House regarding appointments to the Commission. Krettek wrote, "Isn't this an interesting reply? The lack of any mention of the subject shows how confidential the matter of possible appts is handled prior to official announcement."<sup>125</sup> On the same day, Krettek wrote to Ervin Gaines, the Chairman of the ALA Committee on Intellectual Freedom. In this letter, Krettek wrote about appointments to the Commission and reminded Gaines that, "Librarians, of course, fall in the 'and others' category and would be in competition with all others in the field of education, the publishing industry, T.V., radio, etc."<sup>126</sup> Krettek elaborated that the White House would give priority to people with legal knowledge. Thus, Krettek felt the ALA should keep a low profile.<sup>127</sup> Since the selection process had been so secretive, one can only wonder how the White House and President Johnson came to pick these eighteen people to serve on the Commission.

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<sup>125</sup> Germaine Krettek to David Clift, November 3, 1967, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>126</sup> Germaine Krettek to Ervin J. Gaines, November 3, 1967, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>127</sup> Ibid.



## CHAPTER 3

### THE COMMISSION'S CHALLENGE

With the passage of Public Law 90-100, Congress assigned four definitive tasks to the Commission:

- (1) With the aid of leading constitutional law authorities, to analyze the laws pertaining to the control of obscenity and pornography; and to evaluate and recommend definitions of obscenity and pornography;
- (2) To ascertain the methods employed in the distribution of obscene and pornographic materials and to explore the nature and volume of traffic in such materials;
- (3) To study the effects of obscenity and pornography upon the public and particularly minors, and its relationship to crime and other antisocial behavior; and
- (4) To recommend such legislative, administrative, or other advisable and appropriate action as the Commission deems necessary to regulate effectively the flow of such traffic, without in any way interfering with constitutional rights.<sup>128</sup>

The Commission started its work in July of 1968 and had two years to complete and publish any necessary studies. It divided itself into four working panels: 1) Legal; 2) Traffic and Distribution; 3) Effects; and 4) Positive Approaches. The Commission appointed an executive director and general counsel and they started their work in August of 1968.<sup>129</sup>

The Commission took its work seriously and felt that, for its work to be thorough and to make well-founded recommendations, confidentiality between all of the commissioners was necessary. Confidentiality allowed for frank discussions and

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<sup>128</sup> United States Commission on Obscenity and Pornography, *Report of the Commission on Obscenity and Pornography* (Washington, DC: Government Printing Office, 1970), 1.

<sup>129</sup> *Ibid*, 2.

objective investigations. It also prevented the public from misinterpreting or making premature conclusions about the work and findings of the Commission. The Commission felt it would also be wise to have a single spokesperson for the Commission before the completion of its work. Only one Commissioner, Charles H. Keating, Jr., did not agree with this procedure.<sup>130</sup>

As a result of scant factual evidence, the Commission felt it was necessary to set up studies that would produce findings and enable it to make recommendations to Congress. Each working panel was responsible for setting up empirical research studies in its respective area and for providing occasional progress reports to the Commission. In the beginning, a significant amount of energy was devoted to the planning and implementation of the research.<sup>131</sup> Later, the research was integrated into the Commission's findings and assisted the Commission in its decisions and recommendations.

While some commissioners felt public hearings should be held in the beginning stages of its work, the Commission, as a whole, felt doing so "would not be a likely source of accurate data or a wise expenditure of its limited resources."<sup>132</sup> However, the Commission invited around one hundred national organizations to express their views through written statements. It also invited written feedback from law enforcement, the

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<sup>130</sup> *Report of the Commission on Obscenity and Pornography*, 2. Charles H. Keating, Jr. had previously replaced Kenneth B. Keating (no relation) on the Commission.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

legal profession, and constitutional law experts. The Commission delayed any hearings until the end as it wished to have witnesses provide feedback on its particular issues and proposals. It invited fifty-five witnesses, covering a wide spectrum of views on the issues of obscenity and pornography. Thirty-one witnesses took the Commission up on its offer to testify. The Commission decided, due to financial constraints, not to print the transcripts from the public hearings. But, it made them available through the National Archives and Records Administration.<sup>133</sup>

The Commission stated that obscenity was a term generally used to define materials of a violent, sexual, religious, political, or scatological nature. For the Commission, the meaning of obscenity was limited to sexual obscenity and included sadomasochistic material. Congress had indicated that sexual obscenity was the main concern when it passed Public Law 90-100. Also, the history of obscenity laws had focused almost entirely on sexual obscenity. However, in a footnote, the Commission indicated that its work had been marked by confusion over terminology. In some cases, obscenity was equated with pornography when it came to “sexually explicit materials.” In other cases, the terms obscenity and pornography were used to express differences of various degrees.<sup>134</sup> The Commission used the terms “obscene” and “obscenity” exclusively in its work. These terms “refer [red] to the legal concept of prohibited sexual materials.”<sup>135</sup> The term “pornography” was not used because there was no legal

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<sup>133</sup> *Report of the Commission on Obscenity and Pornography*, 2-3.

<sup>134</sup> *Ibid*, 3, footnote 4.

<sup>135</sup> *Ibid*.

foundation to the term and it was used in a subjective manner. The Commission used the terms “explicit sexual materials,” “sexually oriented materials,” “erotica,” or variants of these terms in its work. It also used the term “materials” to mean “the entire range of depictions or descriptions in both textual and pictorial form – primarily books, magazines, photographs, films, sound recordings, statuary, and sex devices.”<sup>136</sup>

The Commission did not address simulated and explicit acts of a sexual nature since there were already a number of existing local laws in place.<sup>137</sup> In brief, the Commission focused its work on a broad spectrum of “explicit sexual depictions in pictorial and textual media.”<sup>138</sup> Due to its time constraints, the Commission chose to focus on sexual and anti-social behavior, which included “premarital intercourse, sex crimes, illegitimacy, and similar items.”<sup>139</sup>

#### The 1969 Progress Report

The Commission started its work in July 1968. Due to the confidentiality of its activities, not much, if anything, was heard about the Commission’s progress until 1969. The first signs of trouble came in July 1969 when the Commission issued a progress report. The progress report’s introduction emphasized that it was premature to include

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<sup>136</sup> *Report of the Commission on Obscenity and Pornography*, 3.

<sup>137</sup> *Ibid*, 3, footnote 5.

<sup>138</sup> *Ibid*, 3.

<sup>139</sup> *Ibid*, 4.

findings or recommendations. The progress report only detailed the direction and manner of the Commission's work and where it was headed.<sup>140</sup>

According to the progress report, the legal panel examined recent case law regarding obscenity and pornography to determine what legislative action would be acceptable. There were three directions in which erotic materials could be controlled legislatively after the legal panel had examined constitutional precedents: "1) statutes with specific concern for juveniles; 2) statutes dealing with assaults upon individual privacy and offensive public displays; and 3) statutes prohibiting pandering."<sup>141</sup> The legal panel had drafted some possible local, state, and federal legislative statutes addressing the issue of obscenity. The legal panel also reviewed obscenity statutes from all fifty states and the federal government. In addition, the legal panel looked at federal agencies, such as the FBI, Department of Justice, Treasury Department and Post Office and their role in the enforcement of obscenity laws.<sup>142</sup> The legal panel was then in the process of surveying municipal and state prosecutors and police officials. These surveys asked the prosecutors and police officials what experiences and problems, if any, they had encountered with obscenity statutes in their jurisdictions. The legal panel also asked for any recommendations that might help in the enforcement of obscenity statutes. State

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<sup>140</sup> United States Commission on Obscenity and Pornography, *Progress Report, July 1969* (Washington, DC: Government Printing Office, 1969), 1. Obtained copy from the American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>141</sup> *Ibid*, 3.

<sup>142</sup> *Ibid*.

attorneys general and constitutional lawyers were also consulted. Even though the surveys were sent out to over seven hundred prosecutors, public defenders and defense attorneys were not included in the survey sample.<sup>143</sup>

Commissioner Morton A. Hill issued separate remarks in the progress report. Commissioner Hill objected to the direction the Commission was moving with its work. Hill felt that the Commission placed too much emphasis and spent too much money on the “effects” portion of its work. In turn, other areas of its work, like legal research, suffered. Hill alleged that the Commission had not hired a “leading constitutional law authority” as instructed by Congress.<sup>144</sup> In fact, Hill wrote that the term, “leading constitutional law authority” had been omitted from drafts of the progress report and only added back in as a “stylistic change” after Hill submitted his remarks and the subcommittee met.<sup>145</sup> Hill argued that the term, “utterly without redeeming social value” was not a constitutional standard – only the opinion of three Supreme Court justices. Yet, it was incorporated into state statutes and used in lower courts. As a result, Hill felt this “standard” increased the traffic of pornography in all media. Hill did not feel that this issue was being studied extensively enough and that it was incorrectly considered by others to be a constitutional standard. Hill concluded that a “thorough analysis” of the issue could lead to the term “obscenity” being redefined. Hill thought Chairman Lockhart was moving towards making obscene materials available to adults and stressed

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<sup>143</sup> *Progress Report, July 1969*, 3.

<sup>144</sup> *Ibid*, 21.

<sup>145</sup> *Ibid*, 21-22.

that this did not provide constitutional “means to deal effectively with such traffic in obscenity and pornography.”<sup>146</sup> Hill fretted that, if adults were able to get their hands on obscene materials, it would then also open the door for children to be exposed to obscene materials as well. Hill recommended that the Commission utilize its existing expertise and come to a new definition for obscenity. Hill also wanted the Commission to allocate one-third of its total appropriation to legal research and said the Commission needed to retain leading constitutional law authorities. These authorities would ideally guide the Commission on how to present constitutional legislation to Congress. In turn, Congress would hopefully reverse the “mislabelled Supreme Court ‘test’ of ‘utterly without redeeming social value.’”<sup>147</sup> Hill cited the *Roth* case and noted it was the only obscenity case in which the majority of the Supreme Court had concurred.<sup>148</sup> He called for public hearings to be held and that the Commission “work diligently to recommend definitions of obscenity and pornography” and not restrict itself to the opinions of individual Supreme Court justices.<sup>149</sup> His desire was to see the Commission move in a direction that would meet the mandates given by Congress.

Sixteen of the commissioners challenged Hill’s allegations. They countered that they had requested views on obscenity from people involved with law enforcement, the

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<sup>146</sup> *Progress Report, July 1969*, 22.

<sup>147</sup> *Ibid*, 23.

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid*, 24.

legal profession and constitutional law experts.<sup>150</sup> They said expenditures allotted to the legal panel accounted for fifteen percent of the total allotted to the Commission by Congress. They also said that legal research was still valuable, but less expensive than social science research.<sup>151</sup> They recognized the achievements that had been accomplished so far, even though there had been some disagreements. They stressed that flexibility was important and that changes would be incorporated throughout the process. The sixteen commissioners felt Hill's statement that the Commission was moving towards "permitting obscenity for adults" was a dissent to its process and not reflective of its intent or future actions. They noted that the timing was premature and inconsistent with the instruction to make recommendations "after a thorough study."<sup>152</sup> Lastly, they felt written statements on obscenity and pornography from national organizations were far more useful than holding public hearings.<sup>153</sup>

#### The Legal Panel's Work

The legal panel's work was devoted to legal analysis entirely. The Commission's general counsel, Paul Bender, wrote two essays, in which he analyzed Supreme Court decisions on obscenity and pornography from 1955 to 1970. Jane Friedman, a professional staff member of the Commission, analyzed state obscenity statutes. Martha Alschuler, a law professor at the University of Pennsylvania, wrote two pieces on the

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<sup>150</sup> *Progress Report, July 1969*, 25

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*, 26.



historical and philosophical perspectives of obscenity and pornography. The legal panel also looked at fifteen other countries and how they viewed obscenity and pornography.

Paul Bender addressed existing obscenity laws and the definition of obscenity. Bender elaborated on the parts of the definition that were disputed. Bender also focused on the two major sources of confusion: what was permitted under specific statutes versus general statutes and what was permitted at the time versus what might be permitted in the future.<sup>154</sup> Bender pointed out that the present obscenity laws had been developed without any proof or empirical data that showed any harm resulting from distribution of obscene materials. If the data proved or disproved harm, the laws could be altered significantly. Bender hoped the Commission's legal recommendations would be based upon the empirical data gathered and that the courts would take this data into account. Bender discussed a history of cases before *Roth* and emphasized that, for approximately one hundred years, the *Hicklin* test addressed religious materials that were considered obscene, not materials of a sexual nature.<sup>155</sup> Bender discussed the *Hicklin* test, but made it clear that the number of different courts involved and the number of decades that *Hicklin* was used as a precedent complicated his understanding and interpretation of the matter. Over the years, two areas of the *Hicklin* precedent had been refined: the specific portion of the work considered to be obscene and the type of audience that judged the work to be obscene. Bender pointed out that judges had become increasingly dissatisfied

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<sup>154</sup> United States Commission on Obscenity and Pornography, *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis* (Washington, DC: Government Printing Office, 1970) 5-6.

<sup>155</sup> *Ibid*, 6-7.

with *Hicklin* over time. These judges included: Learned Hand in the case of *United States v. Kennerly* in 1913, Augustus Hand and Learned Hand in the 1934 *Ulysses* case, and Judge Curtis Bok in several cases, including the Harold Robbins's book, *Never Love a Stranger* in 1949. These judges generally felt that the entire work, not just isolated passages or sections, should be examined for obscenity. They also felt that literary value was important in determining if a work was obscene and that the reader should be considered average and modern.<sup>156</sup> A case in point was the Supreme Court case of *Butler v. Michigan*. The entire Supreme Court bench voted to overturn the conviction in the *Butler* case because the Court felt that the restrictions in *Hicklin* and the Michigan state statute were aimed at the "most susceptible in society" and not the adult population as a whole. The Court said, "[s]urely this is to burn the house to roast the pig" in reference to the fact that the State of Michigan statute was overbroad.<sup>157</sup> The Supreme Court found in *Butler* that adults had liberties to read what they desired and should not be subjected to the same restrictions imposed on minors when it came to obscenity, whereas *Hicklin* focused on the depravation and corruption of those whose minds were open to such immoral influences.

According to Bender, dissatisfaction with *Hicklin* led to the Supreme Court's decision in the *Roth* case. It reshaped the *Hicklin* precedent to address "prurient" appeal

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<sup>156</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 9-10.

<sup>157</sup> *Ibid*, 10.

and lust and not material that caused depravity or corruption.<sup>158</sup> *Roth* replaced *Hicklin* and eliminated the use of isolated passages and replaced it with the entire work, as a whole. *Roth* also substituted the effect of the material on “particularly susceptible persons” with the “average person.”<sup>159</sup> Bender said that *Roth* muddied the waters when it came to the meaning of “prurient interest.” He felt the Supreme Court had meant for “prurient interest” to mean “material which excites lustful thoughts.” The definition of “prurient interest” in *Webster’s* and the Model Penal Code of the American Law Institute differed from the Supreme Court’s.<sup>160</sup> Bender stated that the Supreme Court’s discussion on the application of the First Amendment to obscene material in *Roth* added more confusion and cited a passage from *Roth* to this effect:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees [of the First and Fourteenth Amendments], unless they encroach upon the limited area of important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.<sup>161</sup>

Bender felt this was a justification for the Supreme Court to exclude obscenity from constitutional protection. He pointed out that it was contradictory for the Supreme Court to say, on the one hand that obscenity was “utterly without redeeming social importance” while, at the same time, maintaining that “all ideas having even the slightest redeeming

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<sup>158</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 11.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*, 12.

<sup>161</sup> *Ibid.*, 13.

social importance” were protected under the Constitution. Bender stated that a necessary test for obscenity was:

whether the material in question is indeed “utterly without redeeming social importance.” If it is not utterly without such value, then the material would be entitled to full constitutional protection and thus could not be considered legally obscene.<sup>162</sup>

Bender indicated that the *Roth* decision had not found a solution to the problem of defining obscenity and that the Court had been plagued ever since.<sup>163</sup>

Bender briefly discussed other Supreme Court cases that followed *Roth*. After *Roth*, the Court wrestled with the definition of obscenity. The cases cited included: *Manual Enterprises v. Day*, *Jacobellis v. Ohio*, *A Book Named John Cleland’s Memoirs of a Woman of Pleasure v. Massachusetts*, *Mishkin v. New York*, *Ginzburg v. United States*, and *Redrup v. New York*.<sup>164</sup>

Bender ended with the state of obscenity laws and the courts in 1970. He referred to the *Roth* decision as the rule of law when it came to obscenity because the majority opinion stood as the legal precedent.<sup>165</sup> He questioned the two areas of obscenity law that were still unclear: the meaning of “prurient interest” material and the relevance of “redeeming social value.”<sup>166</sup> Bender said that the Supreme Court, as a whole had not

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<sup>162</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 13.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*, 14-19.

<sup>165</sup> *Ibid.*, 20.

<sup>166</sup> *Ibid.*

articulated and agreed upon what obscenity actually meant and that for the Supreme Court to approve and accept a viable definition of obscenity, it should contain the theory of “utter absence of redeeming social value.”<sup>167</sup>

Bender also discussed “specific” obscenity statutes that addressed obscenity and juveniles, obscenity and invasion of privacy, and obscenity and pandering. Bender noted that the law had been hardly developed, if at all, when it came to “specific” obscenity statutes. Thus, the existing laws were excessively vague and possibly impermissible.<sup>168</sup> Bender felt there was more work to be done on “specific” obscenity statutes in order for them to really be effective.<sup>169</sup> In general, Bender’s essay reflected how tenuous and hazy the legal concept of obscenity was at the time. In Bender’s mind, he was aware that there might never be a concrete and discrete definition of obscenity, even within the Supreme Court.

Bender’s second essay, “Implications of *Stanley v. Georgia*,”<sup>170</sup> addressed the impact that the *Stanley* case had on the Commission’s work as well as on the precedent set by *Roth*. Stanley was convicted in Georgia for possession of “obscene” films within his own home. The Supreme Court ruled, “The mere private possession of obscene

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<sup>167</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 22-23.

<sup>168</sup> *Ibid*, 26-27.

<sup>169</sup> *Ibid*, 27.

<sup>170</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969).

matter cannot constitutionally be made a crime.”<sup>171</sup> Bender argued that the possession statute in Georgia was geared more towards possession of obscene matter with the intent to distribute, not possession for one’s personal use in the privacy of the home.<sup>172</sup> Bender noted that *Stanley* had been decided by a majority of the Supreme Court and felt one statement in the Court’s opinion on *Stanley* would have a significant impact on present (1970) policy and law by clarifying the phrase “redeeming social value.” The Court stated:

Nor is it relevant that obscenity in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. If the line cannot, in fact, be drawn, and if “mere entertainment” value is thus equated with “ideological content” in the decision of obscenity cases, then it must be concluded that the prospects for a successful obscenity action under the tripartite test are extremely dismal.<sup>173</sup>

The Court also held private possession statutes unconstitutional in spite of the obscenity of the material in question. Bender felt this reflected a change from *Roth* with “extremely important ramifications for future legislative recommendations.”<sup>174</sup> Bender concluded that *Stanley* eliminated the provision in *Roth* that obscene material was

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<sup>171</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 28.

<sup>172</sup> *Ibid*, 29.

<sup>173</sup> *Ibid*, 30.

<sup>174</sup> *Ibid*.

constitutionally unprotected speech and brought the First Amendment back into play.<sup>175</sup> Furthermore, with the *Stanley* decision, the Court stated, “if the First Amendment means anything, it means the State has no business telling a man, sitting in his own house, what books he may read or what films he may watch. Our constitutional heritage rebels at the thought of giving government the power to control men’s minds.”<sup>176</sup> Bender thought that the *Stanley* decision changed the framework and interpretation of obscenity laws.

#### Obscenity Statutes in the States

Jane Friedman, a professional staff member of the Commission, wrote on the obscenity statutes in all fifty states and the District of Columbia. With the exception of New Mexico, all states and the District of Columbia had general obscenity statutes on their books in 1970. However, only thirty-one states defined obscenity with language used from the *Roth* case.<sup>177</sup> The Commission had mailed out surveys to prosecutors across the country which asked if they had any difficulties in the enforcement of existing obscenity laws. Prosecutors who answered affirmatively to the question indicated the definitions of obscenity were too subjective and vague.<sup>178</sup> Friedman outlined existing penalties for violations of obscenity statutes in a majority of the states. These included financial penalties and jail time for first-time and repeat offenders. California and Kentucky were the toughest with a \$10,000 dollar maximum fine for first-time offenders.

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<sup>175</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 31.

<sup>176</sup> *Ibid*, 32.

<sup>177</sup> *Ibid*, 37-38.

<sup>178</sup> *Ibid*, 38-39.

In addition, repeat offenders paid up to \$25,000 dollars in fines. Oklahoma was the most unforgiving as first-time offenders spent up to ten years in prison.<sup>179</sup> Friedman discussed the varying issues and conflicts that arose as a result of existing obscenity statutes. They included: exemptions and immunities from prosecution, prohibitions, miscellaneous provisions, minors' statutes, and civil enforcement procedures.<sup>180</sup>

Martha Alschuler, a law professor, wrote on the historical and philosophical perspectives of obscenity. Her first essay addressed the origins of the law of obscenity and contained the same information covered in the introduction of this work. Her second essay was on the theoretical approach to "morals" legislation and essentially confirmed Bender's work in that individual choice outweighed governmental interference when it came to obscenity.<sup>181</sup>

#### International Comparative Perspectives

The legal panel's final portion examined fifteen other countries and the comparative perspectives on obscenity and pornography. These countries were Argentina, Australia, Denmark, Sweden, Norway, France, Hungary and the Soviet Union, Israel, Italy, Japan, Mexico, the United Kingdom, West Germany, and Yugoslavia. Each country had its own unique governmental structure and process when it came to handling

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<sup>179</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 40-41.

<sup>180</sup> *Ibid*, 41-61.

<sup>181</sup> *Ibid*, 65-89.



obscenity and pornography. It was interesting to get a taste of each country's beliefs and laws regarding obscenity and pornography.

Not surprisingly, the United Kingdom was most similar to the United States when it came to obscenity and pornography. In the United Kingdom, the 1959 Obscene Offences Act was an updated version of *Hicklin* and *Roth*, essentially judging the obscenity of the material based on the whole work and whether or not it "tend[ed] to deprave and corrupt."<sup>182</sup> This is further clarified in the statement that the "tendency must be to deprave and corrupt and it is not sufficient that the article be vulgar, shocking, or disgusting."<sup>183</sup>

Sweden, Italy, West Germany, and Yugoslavia took a common sense approach when it came to obscenity and pornography. Their laws and courts appealed to the morality and decency of its people. At the time, Sweden's obscenity laws were based on whether the material "offended morality and decency." The obscenity laws also encompassed illegal behaviors, like indecent exposure or offensive sexual behavior, and whether this behavior took place in public.<sup>184</sup> Unlike the United States, the civil and criminal laws were combined into one. However, the Swedish courts chose to look at whether printed material "offended morality and decency" very narrowly and stated, "... a printed representation will be considered an offense to morality and decency only in

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<sup>182</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 209.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, 138-139.

cases where it is of a particularly sadistic, perverse or brutalizing character.”<sup>185</sup> The Italian Code of 1931 said, “acts and objects shall be obscene which according to the common sentiment are offensive to shame.” The Italian courts defined “offensiveness to shame as injury to the ‘usual feelings of reserve.’”<sup>186</sup> Italy was similar to the United States because it looked at how the obscene material in question affected the average person and also examined the entire work, not just isolated sections.<sup>187</sup> West Germany used the term “objectionable sexual expression” instead of the terms obscene and pornographic.<sup>188</sup> The courts in West Germany looked at the “lewdness” of the “objectionable sexual expression.” The courts felt that something was considered “lewd” if it relate[d] to sexual matters and was “grossly offensive to the sentiments of shame and morality.”<sup>189</sup> This view was based on the average adult person but the West Germany courts grappled with determining how to measure the “reactions of the average person.” Judges tended to “follow their hunches about the average man’s reactions to an allegedly lewd matter.”<sup>190</sup> Eventually, the German supreme court was able to narrow down the

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<sup>185</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 139.

<sup>186</sup> *Ibid*, 175.

<sup>187</sup> *Ibid*, 175-176.

<sup>188</sup> *Ibid*, 222.

<sup>189</sup> *Ibid*, 222-223.

<sup>190</sup> *Ibid*, 223.

concept of “lewd” to encompass only “pure, unadulterated smut.”<sup>191</sup> This then limited the ability of the judges to influence and interpret lewdness based on their hunches. Yugoslavia defined obscenity and pornography in broad terms of “moral reference,” referring to the concept that the expression or material was “seriously injurious to [sexual] morality.”<sup>192</sup> Hard-core pornography was not defined in any Yugoslavian court.<sup>193</sup> In addition, a rapid cultural change occurred in Yugoslavia during this time and the courts attempted to keep up with this. As Yugoslavian attitudes changed, the courts tried to adapt to those changes as well. This led to vagueness and uncertainty in the legal interpretation of the phrase “seriously injurious to [sexual] morality.”<sup>194</sup>

The governments of Australia, Hungary, the Soviet Union, and Japan had high levels of control over how obscenity and pornography were addressed. In addition, there were no definitions of obscenity in Soviet Union and Japan. In Australia, a majority of the literature was imported. This influenced how the censorship of obscene materials was carried out. The Customs Department and the National Literature Board of Review enforced and censored what it considered to be obscene material. The Australian Parliament had not fully debated the censorship policy in place at that time. The Australian Minister could give permission to import censored material, but only after reports from the National Literature Board of Review chairman or the Director-General

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<sup>191</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 225.

<sup>192</sup> *Ibid*, 234.

<sup>193</sup> *Ibid*.

<sup>194</sup> *Ibid*, 234, 236-237.

of Health were received. In addition, the National Literature Board of Review was nebulous and secretive about its membership and its decision-making process.<sup>195</sup> As a socialist country in the 1960s, the government of Hungary tightly controlled the social standards. The Hungarian courts found materials obscene if it “seriously offend[ed] the general moral sentiment by reason of its orientation to the sexual.”<sup>196</sup> If convicted, a person could be jailed for up to one year. There was very little information provided on the laws in the Soviet Union. The legal code in the Soviet Union did not even define what pornography entailed. The mere personal possession of a “pornographic product” was a crime and could land an offender in jail for up to three years.<sup>197</sup> Obscenity was not defined in Japan. The Japanese Customs Department was powerful as it was the governmental agency that decided what was obscene and actually seized the alleged obscene material. The Japanese courts and constitution had little actual power. The Japanese constitution had an equivalent to the First Amendment, but public welfare prevailed over individual rights and was to be the “supreme consideration in legislation and in other governmental affairs.”<sup>198</sup> If a case actually made it to the Japanese courts, it only viewed obscenity as a concept that related to “man’s sense of shame.”<sup>199</sup> Mostly

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<sup>195</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 109-112.

<sup>196</sup> *Ibid*, 160-162.

<sup>197</sup> *Ibid*, 161-162.

<sup>198</sup> *Ibid*, 187.

<sup>199</sup> *Ibid*.

powerless, the Japanese courts felt that a minimum standard of sexual order and morality needed to be maintained.<sup>200</sup>

There was even less governmental control over obscenity and pornography in France, Israel, and Norway. However, there was little guidance as to what obscenity and pornography entailed. By 1968, the word obscenity was no longer a technical legal term in French law. The phrase, “outrage to good morals” was used to describe sexual expression. At the time, the French courts had failed to create an acceptable definition to address “morally outrageous sexual expression.” The French courts also felt it was not the responsibility of the court, but the “trier” of the facts to determine what “outrage to good morals” meant. This meant the higher courts in France could not review cases or establish uniform case law.<sup>201</sup> Israeli law tended to follow English law when it came to obscenity and pornography. Otherwise, there was little developed case law. Apparently, Israel did not even have textbooks on obscenity and pornography laws. The only commentary found on obscenity and pornography was a digest of cases written in Hebrew.<sup>202</sup> The Israeli high court used the *Hicklin* and/or *Roth* precedents in the sporadic pornography and obscenity cases that came about.<sup>203</sup> In Norway, the obscenity laws dated back to 1902. In 1957, the Norwegian Minister of Justice proposed some changes

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<sup>200</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 186-189.

<sup>201</sup> *Ibid*, 148-150.

<sup>202</sup> *Ibid*, 165.

<sup>203</sup> *Ibid*, 166-167.

to the 1902 law. The 1902 law did not clearly define obscenity. If something was considered offensive, it was not necessarily obscene. The Norwegian supreme court wanted to modify the law so that offensive materials could be classified as obscene, if necessary.<sup>204</sup>

In Mexico, the judges were in control as they interpreted what acts or materials were considered obscene. Apparently, this did not violate any Mexican constitutional guarantees since it was “the general tendency of Mexican case law to affirm the presence of obscenity.”<sup>205</sup>

Argentina left obscenity up to the individual as long as no one else was harmed. Article 19 of Argentina’s national constitution stated, “The private actions of men which in no way either offend public order or morality or harm a third party, are reserved to [the judgment of] God alone and are exempt from the authority of [worldly] magistrates. No inhabitant of this Nation shall be obligated to do anything the law does not command nor prohibited from doing anything it does not prohibit.”<sup>206</sup> Essentially, people could do as they pleased as long as no one was offended or harmed. However, the subject of obscenity in Argentina was “many-sided” and that it could not be addressed in a definite and confined manner.<sup>207</sup>

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<sup>204</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 144-147.

<sup>205</sup> *Ibid*, 198-199.

<sup>206</sup> *Ibid*, 94.

<sup>207</sup> *Ibid*, 107-108.

Denmark was the most liberal country surveyed on obscenity and pornography. By 1967, it had practically decriminalized pornography. The only provision that remained on the books was: "Any person who sells obscene pictures or objects to any person below 16 years of age, shall be liable to a fine."<sup>208</sup> That was it. The law had just been changed at the time of the Commission's report, so it had not yet been repealed by the parliament, but a statement made in the *Technical Report* inferred that it might be a possibility in the future.<sup>209</sup>

The perspectives of fifteen different countries on obscenity and pornography reflected the fact that each country handled obscenity and pornography in its own way. The differences may have been the reason that no comparative and comprehensive analysis between the fifteen different countries was done. Or, perhaps, the Commission's legal panel wanted to review the information provided, perform an objective analysis, and come to an unbiased conclusion.

#### Conclusions of the Legal Panel

The commissioners who were on the legal panel were Thomas D. Gill, Morton A. Hill, Barbara Scott, and Kenneth B. Keating (who resigned in 1969). William B. Lockhart was an *ex officio* member of the panel. Paul Bender, Jane Friedman, and W. Cody Wilson were staff members assigned to the legal panel. Bender and Friedman contributed to the work of the legal panel through their legal analyses in the *Technical*

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<sup>208</sup> *Technical Report of the Commission on Obscenity and Pornography, Volume II, Legal Analysis*, 128.

<sup>209</sup> *Ibid.*

*Report.* W. Cody Wilson was the executive director and director of research who oversaw all of the Commission's working panels.<sup>210</sup>

The legal panel's report, "Legal Considerations Relating to Erotica," was seventy-six pages long. The introduction stated that the legal panel decided to study how obscenity laws were being enforced at the time and the problems encountered, the history of obscenity legislation, and obscenity legislation in other countries. The Commission's legal staff did most of the work, but outside experts, including constitutional law professors and state and municipal prosecutors, were consulted. The legal panel incorporated results from a national public opinion survey related to definitions of obscenity at the time and American attitudes towards the "wisdom and appropriateness of various types of obscenity publications."<sup>211</sup> The legal panel submitted drafts of legislative statutes that addressed obscenity to the Commission. The Commission decided not to use these legislative drafts in its final report.<sup>212</sup>

The legal panel reviewed the history of obscenity in England and the United States. It also extensively discussed the constitutionality of general prohibitions on obscenity as accepted in the *Roth* opinion as well as the reversal of general prohibitions on obscenity in *Stanley*. It also used a significant portion of Bender's contributions in its

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<sup>210</sup> United States Commission on Obscenity and Pornography, *Report of the Commission on Obscenity and Pornography*, 293. Also see pages 72, 138, and 264.

<sup>211</sup> *Ibid*, 295.

<sup>212</sup> *Ibid*, 296.



deliberations. It compiled all of the contributions from the *Technical Report* and condensed them into a summary document for the final report.

The legal panel also incorporated the results from a national public opinion survey. Sixty percent of adults surveyed felt adults should be allowed to read or view sexually explicit materials.<sup>213</sup> Interestingly, forty percent of the adults changed their views when asked if it would still be acceptable to read or view sexual materials shown to have harmful effects.<sup>214</sup> Textual materials describing sexual organs were accepted more than movies showing sadomasochism and bondage.<sup>215</sup> There was no consensus among Americans that explicit sadomasochism be subjected to legal prohibition for adults.<sup>216</sup> Only seven percent felt that it was acceptable for individuals sixteen and under to access obscene materials.<sup>217</sup> Half of the respondents felt that laws against obscene materials were impossible to enforce and sixty-two percent felt if there were to be obscenity laws passed, federal laws should be in place rather than state or community laws.<sup>218</sup>

The results of the survey reflected the demographics of people who favored restrictions on obscenity. They tended to be less accepting of freedom of expression, believed newspaper and book publishers should not have the right to print negative

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<sup>213</sup> *Report of the Commission on Obscenity and Pornography*, 352.

<sup>214</sup> *Ibid*, 353.

<sup>215</sup> *Ibid*, 352-353.

<sup>216</sup> *Ibid*, 353.

<sup>217</sup> *Ibid*.

<sup>218</sup> *Ibid*, 354.

criticisms against the police and government, and that people should not be able to speak out against God.<sup>219</sup> When it came to obscene materials, women tended to be more reserved and conservative than men, younger adults were more tolerant than older adults, the more educated were more accepting than the less educated, and regular religious worshippers were more conservative than people who rarely, if ever, attended church.<sup>220</sup>

The legal panel gathered empirical data for three standards presented in constitutional obscenity law at the time: prurient interest, offensiveness, and social value. It was hard to utilize the empirical data because there was still a problem when it came to defining obscenity. There were several variables from the empirical data that could have potentially fallen under prurient interest or social value.<sup>221</sup> Also, there was disagreement about whether or not “a given sexual stimulus is ‘sexually arousing,’ ‘offensive,’ or ‘pornographic.’”<sup>222</sup> This was a result of conducting multiple studies with multiple subjects and not using a standardized scale. Different demographics had different judgments when it came to obscene material, sexual arousal and offensiveness. These three things were independent of one another and a substantial portion of the population attributed “social value” to obscene materials.<sup>223</sup> The legal panel raised doubts about the “empirical validity of the concepts of ‘prurient interest of the average person’ or

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<sup>219</sup> *Report of the Commission on Obscenity and Pornography*, 354.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*, 354-355.

<sup>222</sup> *Ibid.*, 355.

<sup>223</sup> *Ibid.*, 356.

‘offensive according to contemporary community standards.’” In 1970, most people in society felt obscene materials were acceptable for adults.<sup>224</sup> The 1960s and 1970s were a time of change in America. Attitudes about many things, including sex, changed and people were more relaxed and accepting.

#### Recommendations of the Legal Panel

In its recommendations, the legal panel discussed the difficulties in the enforcement and prosecution of general obscenity statutes under *Roth*. Changing public opinion, along with the vagueness and subjectivity of general obscenity statutes, made it impossible for people to know what was constitutionally protected. Different courts applied the legal standards of obscenity differently. The legal panel felt that this was not “satisfactory criminal law” and that the vagueness and subjectivity made obscenity law decidedly ambiguous.<sup>225</sup> In addition, the tripartite *Roth* standard did not “prevent any recognizable evil.”<sup>226</sup> The legal panel expressed its desire to come up with an objective definition of obscenity specifically describing materials that were prohibited. The legal panel recognized the difficulty in constructing an objective definition.<sup>227</sup> The idea that statutory definitions should not define obscenity in the abstract, but in the concrete and objective, was brought forth.<sup>228</sup> The legal panel ultimately recommended against a

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<sup>224</sup> *Report of the Commission on Obscenity and Pornography*, 356-357.

<sup>225</sup> *Ibid*, 358-359.

<sup>226</sup> *Ibid*, 360.

<sup>227</sup> *Report of the Commission on Obscenity and Pornography*, 360-361.

<sup>228</sup> *Ibid*, 361.

general obscenity statute forbidding sales to adults and stressed that there appeared to be no constitutional or legal basis for recommending the expansion of present controls upon materials for consenting adults.<sup>229</sup> The findings from the *Stanley* case were reiterated in that thoughts, attitude, morality and anti-social behavior cannot be regulated by the government and, thus, cannot be prosecuted or enforced.<sup>230</sup> If it could be proven that obscene materials caused harm, then regulation might be acceptable. If this approach were to be taken, it would be rife with problems.<sup>231</sup> It was agreed that juveniles and people who did not wish to be exposed to obscene materials should have protections.<sup>232</sup> The legal panel also decided against the recommendation of requirements for distributors and retailers to label obscene materials due to the lack of a specific and objective definition of obscenity.<sup>233</sup> Finally, the legal panel recommended against withdrawal of appellate jurisdiction over the issue of obscenity as it felt constitutional protection of free expression would be eroded if it were left to federal and/or state juries and courts.<sup>234</sup>

#### What did the Commission Ultimately Recommend?

With the work and recommendations of the legal panel complete, the Commission, as a whole, was ready to make a decision on the recommendations of the

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<sup>229</sup> *Report of the Commission on Obscenity and Pornography*, 362-363.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*, 364.

<sup>232</sup> *Ibid.*, 365.

<sup>233</sup> *Ibid.*, 368.

<sup>234</sup> *Ibid.*, 369.

legal panel. A definition of what was “obscene” for adults was not proposed. The Commission believed there was insufficient social justification for broad legislation that prohibited the “consensual distribution of sexual materials to adults.”<sup>235</sup> It noted that Denmark had repealed its adult obscenity legislation and retained juvenile and “nonconsensual exposure” restrictions.<sup>236</sup>

The Commission’s final non-legislative recommendations were: “1) that a massive sex education effort be launched; 2) that there be continued and open discussion, based on factual information, on the issues regarding obscenity and pornography; 3) that additional factual recommendations be developed; and 4) that citizens organize themselves at local, regional, and national levels to aid in the implementation of the foregoing recommendations.”<sup>237</sup>

The Commission’s final legislative recommendations were: “1) that federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed; 2) the adoption by the States of draft legislation set forth prohibiting the commercial distribution or display for sale of certain sexual materials to young persons; 3) enactment of state and local legislation prohibiting public displays of sexually explicit pictorial materials, and . . . the mailing of unsolicited advertisements of a sexually explicit nature; and 4) against the adoption of any legislation

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<sup>235</sup> *Report of the Commission on Obscenity and Pornography*, 41-42.

<sup>236</sup> *Ibid*, 44.

<sup>237</sup> *Ibid*, 47-49.

which would limit or abolish the jurisdiction of the Supreme Court of the United States or of other federal judges and courts in obscenity cases.”<sup>238</sup>

The legislative recommendations were met with vigorous opposition from some of the commissioners. Commissioners Link, Hill, and Keating filed a joint dissenting statement and Commissioners Keating and Link also submitted separate remarks. Commissioner Keating chose not to participate in the deliberation and formulation of any of the Commission’s recommendations. Commissioners Larsen and Wolfgang filed statements explaining their dissent from certain Commission recommendations and other Commissioners filed short separate statements.<sup>239</sup>

How would the recommendations be received in the halls of Congress? After the amount of time and energy that was put into the work of the Commission, the fact that there was noticeable and significant dissension from within was troubling. Since there was a significant amount of conflict amongst the Commissioners over the recommendations, would the credibility of the Commission’s final report be damaged?

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<sup>238</sup> *Report of the Commission on Obscenity and Pornography*, 51-64.

<sup>239</sup> *Ibid*, 51.

## CHAPTER 4

## THE "MAGNA CARTA" OF PORNOGRAPHY

Even before the formal release and publication of the Commission's recommendations, trouble was brewing. The Commission chose to hold private, not public, hearings. In addition, transcripts from those hearings were only available from the National Archives and Records Administration.<sup>240</sup> Commissioners Morton A. Hill and Winfrey Link, acting as individuals, decided to hold hearings in which twenty-seven people testified about their opposition to obscenity and criticized the Supreme Court on its definitions of obscenity.<sup>241</sup> One witness, Mrs. David McInnes, who was a women's club president in Forest Hills, Queens, swore that, "a Communist conspiracy must be at work when prayers were prohibited in schools and pornography was permitted in the theaters."<sup>242</sup> Samuel H. Hofstadter, a former state supreme court justice, stated under oath that "all pornography cases should be tried by juries so as to reflect the community view, and that the United States Supreme Court should 'desist from acting as a national censor.'"<sup>243</sup> The testimony from these hearings was not included in the Commission's final report.

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<sup>240</sup> United States Commission on Obscenity and Pornography, *Report of the Commission on Obscenity and Pornography* (Washington, DC: Government Printing Office, 1970), 2-3.

<sup>241</sup> Arnold H. Lubasch, "Hearing Assails the Smut 'Flood,'" *New York Times*, February 19, 1970, 44.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

In August of 1970, the *New York Times* ran an article from the Associated Press on the draft recommendations of the Commission. The article, without any attribution, observed that the Commission's recommendations would make the United States nearly as liberal as Denmark.<sup>244</sup> The Commission viewed it as extremely foolish to attempt legislating the standards and moral values of individuals when it came to "consensual communications."<sup>245</sup> The article also mentioned that the draft recommendations would most likely draw fire in Congress.<sup>246</sup>

A few weeks later, buried in a *New York Times* column, the White House said it was "eager to disassociate itself" from the Commission and its recommendations.<sup>247</sup> The White House press secretary, Ronald L. Ziegler, said the White House opposed the Commission's views.<sup>248</sup> Attorney General Mitchell stated, "that pornography should be banned even if it is not harmful."<sup>249</sup> Not surprisingly, the piece noted that all of the commissioners, except one, were "miffed that their work ha[d] been so arbitrarily

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<sup>244</sup> *New York Times*, "Panel's Draft Urges Liberal Pornography Laws,"[AP] August 9, 1970, 31.

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

<sup>247</sup> Christopher Lydon, "Doubts on SST Rising in the Senate,"[Special to the *New York Times*], *New York Times*, August 26, 1970, 26. The snippet related to the Commission is the last item in this column and has no unique identifying information.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*



discredited.”<sup>250</sup> While sixteen of the commissioners would endorse the recommendations, Hill and Keating would not. Instead, Hill and Keating would be more vehement and almost as voluminous in their dissent.<sup>251</sup>

### Widening Cracks and More Leaks

In September of 1970, journalist Richard Halloran wrote in the *New York Times* that six or seven of the commissioners were opposed, to different degrees, to the Commission’s recommendations. Halloran’s piece explained that this dissent was “extraordinarily strong”<sup>252</sup> as commissions “usually come close to unanimity in their proposals.” Hill, one of the strongest dissenters, said the recommendations would make the report “a Magna Carta for pornographers in America.”<sup>253</sup> President Nixon and his administration refused to acknowledge the report and washed their hands of the Commission itself. Commissioners, out of concern that the report would be hidden or watered down by political pressures, leaked portions of the report, as it was likely to invoke controversy and debate when it was released at the end of September. Hill felt the commissioners wanted to make the United States another Denmark in removing “all

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<sup>250</sup> Lydon, “Doubts on SST Rising in the Senate,” *New York Times*, August 26, 1970, 26.

<sup>251</sup> *Ibid.*

<sup>252</sup> Richard Halloran, “Federal Commission on Pornography is Now Divided on the Easing of Legal Controls,” [Special to the *New York Times*], *New York Times*, September 6, 1970, 42.

<sup>253</sup> *Ibid.*

restrictions on pornography for adults.”<sup>254</sup> Spelts could not go along with the recommendations because she felt “our country was not ready for this dramatic change in one fell swoop.”<sup>255</sup> Link felt the studies were not “conclusive or broad enough to warrant this drastic step.”<sup>256</sup> Keating refused to vote on the report, as “there’s no point in voting on such a hodgepodge.”<sup>257</sup> Link, Hill and Keating wrote long dissents that were included in the Commission’s final report. Other commissioners included their criticisms. Keating wrote a separate opinion because he was concerned that the courts would be unduly swayed by the Commission’s report. As a lawyer, Keating wanted judges to have his complete dissent at hand.<sup>258</sup> Gill voted in favor for the repeal of all laws where consenting adults were concerned with the condition that all of the other recommended restrictions be enacted first.<sup>259</sup>

On the other side, Frederick A. Wagman, director of the University of Michigan library and vice chairman of the Commission, supported the Commission’s report “as a carefully worded document.”<sup>260</sup> Commissioner Wagman stated they were “very careful

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<sup>254</sup> Halloran, “Federal Commission on Pornography is Now Divided on the Easing of Legal Controls,” *New York Times*, September 6, 1970, 42.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

about the conclusions . . . derived from the research.”<sup>261</sup> Commissioner Lipton indicated it was “impossible to legislate good taste or morality.”<sup>262</sup> Commissioner Lewis said, “Considering the grief and confusion which have been caused by defining, legislating, enforcing, and judging laws in this area . . . it would be a public service for the Commission to recommend a return to a literal interpretation of the First Amendment.”<sup>263</sup>

At a meeting of the commissioners held in July of 1970, Commissioner Lewis felt “that no wholly satisfactory definition can ever be constructed for legislative purposes.”<sup>264</sup> He then made a profound statement:

Pornography is not a thing or a series of things . . . it is an individual’s reaction, and the number of sources and varieties of reaction are so nearly infinite as to make a clear, legally viable and constitutional definition impossible.<sup>265</sup>

As a result, the Commissioners agreed with Lewis and chose not to include definitions for obscenity and pornography in the final report.

Commissioner Link was opposed to the recommendation that all laws involving consenting adults be repealed. He wanted to include his “mild” differences in the text of the final report but indicated, “the others wanted no censorship but they censored me right out of the report” even though Link pleaded his case as hard as he could to the other

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<sup>261</sup> Halloran, “Federal Commission on Pornography is Now Divided on the Easing of Legal Controls,” *New York Times*, September 6, 1970, 42.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

Commissioners.<sup>266</sup> Commissioners Spelts and Lehrman changed their positions on the recommendations of the Commission as well. Commissioner Spelts said she “represented a segment of the population in the Middle West that just does not subscribe to liberal policies.”<sup>267</sup> The commissioners in the minority were skeptical of the majority within the Commission because they felt almost all of the commissioners in the majority were associated with the book and film distribution industry.<sup>268</sup>

#### Keating Goes to Court

Commissioner Keating did not participate in the work of the Commission and was “acidly” criticized by others for “his total opposition to everything in the Commission’s work and his failure to inform himself of what was being done.”<sup>269</sup> Keating was widely characterized as “the Nixon representative” and warned the Commission “of the political opposition the report would generate.”<sup>270</sup> Commissioner Scott said the Commission did not heed Keating’s warnings and “made its decisions on the interpretation of the material

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<sup>266</sup> Halloran, “Federal Commission on Pornography is Now Divided on the Easing of Legal Controls,” *New York Times*, September 6, 1970, 42.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

and on its own thinking.”<sup>271</sup> In the end, the only thing that all of the Commissioners agreed on was that they were all “weary of pornography.”<sup>272</sup>

Keating then sought a court order to prevent the Commission from publishing its “report on smut in America.”<sup>273</sup> Keating also hinted that the Nixon administration supported his actions. Keating “believed this was the first time that a member of a Federal Commission had gone to court to stop the publication of a report from the Commission on which he had served.”<sup>274</sup> Keating hoped to get a temporary restraining order to prevent publication of the report. In addition, he also hoped to go further and permanently stop the report from ever being made public. Keating had issues with the research, the findings and the “confidentiality” of the Commission in its work. Lockhart indicated Keating’s actions would be contested in court and “maintained the Commission could not operate effectively unless its deliberations and draft reports were kept secret.”<sup>275</sup>

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<sup>271</sup> Halloran, “Federal Commission on Pornography is Now Divided on the Easing of Legal Controls,” *New York Times*, September 6, 1970, 42.

<sup>272</sup> *Ibid.*

<sup>273</sup> Richard Halloran, “Dissenter Seeks Smut Report Ban,” [Special to the *New York Times*] *New York Times*, September 9, 1970, 8.

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*

On September 9, 1970, a Federal District Court judge issued a temporary restraining order.<sup>276</sup> A hearing was set for September 18, 1970 to determine if the report should be held up for a more extensive period of time. This caused Keating and Lockhart to argue if the final report of the Commission should ever be published. If the report was not finalized and released by September 30, 1970, it stood an “excellent chance of ending up on a shelf.”<sup>277</sup> Keating wanted thirty to forty-five days to “study all of the material and write a comprehensive dissent.”<sup>278</sup> However, Keating agreed it was possible for the report to be thrown out and that would serve his purpose if he were not allowed enough time to file his dissenting opinion. Keating preferred that both sides of the report be issued as that “would lead to a healthy public debate.”<sup>279</sup>

Four days later, in a special *New York Times* article, journalist Richard Halloran indicated the fight between Keating and Lockhart was becoming more heated. Lockhart and the majority of the Commission had been resisting pressures to water down the report. Keating wanted time to write a dissenting opinion to be included in the final report.<sup>280</sup> September 30, 1970 was the absolute deadline for the Commission to submit its final report and it would “most likely end up in the ash can” if it was not submitted by

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<sup>276</sup> Richard Halloran, “Report on Smut Held Up by Court,” [Special to the New York Times] *New York Times*, September 10, 1970, 23.

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

<sup>280</sup> Richard Halloran, “Sharp Conflict Over Report on Smut,” *New York Times*, September 13, 1970, E5.

that date. The Commission was scheduled to be disbanded once its report was submitted.

<sup>281</sup> Conservatives and liberals were divided on the pornography issue. Liberals pushed for the “freest possible speech,” and conservatives saw “pornography as a disease eating away at the vitals of society.”<sup>282</sup> Vice President Spiro Agnew even said, “How do you fathom the thinking of these radical-liberals who work themselves into a lather over an alleged shortage of nutrients in a child’s box of Wheaties—but who cannot get exercised at all over the same child’s constant exposure to a flood of hard-core pornography that could warp his moral outlook for a lifetime?”<sup>283</sup>

The White House distanced itself from the Commission, and discredited the majority findings and recommendations. In addition, it supported Keating’s legal actions, and assigned Presidential speechwriter Patrick Buchanan “to take a strong hand in writing the dissenting report.”<sup>284</sup> President Nixon’s reaction and response to the Commission’s report would ultimately impact the success of his future political career. As a result, the White House took a defensive position against the majority opinion of the Commission because, according to *New York Times* columnist Richard Halloran, it felt this was what the people and “mores of Middle America” wanted and desired. More importantly,

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<sup>281</sup> Halloran, “Sharp Conflict Over Report on Smut,” *New York Times*, September 13, 1970, E5.

<sup>282</sup> Ibid.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

President Nixon and the White House were targeting “Middle America” for its support in future political elections.<sup>285</sup>

While the White House and Commissioner Keating distanced themselves from the final report of the Commission, twelve of the eighteen Commissioners formally “recommended the repeal of all federal, state and local laws pertaining to ‘consenting adults’ who wanted to obtain explicit sexually-oriented books, pictures and films.”<sup>286</sup> Commissioners Wolfgang and Larsen, both sociologists, felt there should be no restrictions at all as “all such legislation was ambiguous and unenforceable.”<sup>287</sup>

A surprise twist came when Keating and Lockhart settled out of court. Chairman Lockhart agreed to turn over all documents to Keating, needed for his comprehensive dissent. Keating agreed to have his dissent filed by September 29, 1970 so that the final report could be released by the September 30, 1970 deadline.<sup>288</sup>

Reactions from Capitol Hill were varied as well. Congressman Robert N.C. Nix, chairman of the House Subcommittee on Postal Operations, planned to hold hearings at the end of September 1970.<sup>289</sup> Senator Thomas J. Dodd, a Democrat from Connecticut

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<sup>285</sup> Halloran, “Sharp Conflict Over Report on Smut,” *New York Times*, September 13, 1970, E5.

<sup>286</sup> Ibid.

<sup>287</sup> Ibid.

<sup>288</sup> “Panelists Agree on Smut Report,” [Special to the New York Times] *New York Times*, September 15, 1970, 23.

<sup>289</sup> Richard Halloran, “Sharp Conflict Over Report on Smut,” *New York Times*, September 13, 1970, E5.



and chairman of the Senate Juvenile Delinquency Subcommittee, said he was “shocked by a report that the Commission may call for the elimination of legislation currently on the books” and planned a Senate hearing.<sup>290</sup>

#### The Commission’s Final Word . . . With Caveats

On September 30, 1970, the Commission on Obscenity and Pornography issued its final report, which included all of its findings and recommendations along with statements of dissent. Officially, twelve Commissioners voted for the recommendations, five dissented and one abstained.<sup>291</sup> The dissenters alleged “scanty and manipulated evidence” along with fraud.<sup>292</sup> They also felt pornography had “an eroding effect on society, on public morality, on respect for human worth, on attitudes toward family love, on culture.”<sup>293</sup>

The final report was 646 pages long. It included Keating’s 117-page dissent as well as a 128-page dissent by Hill and Link. Lehrman, Klapper, Jones, and Link submitted separate short statements. Larsen and Wolfgang submitted a separate joint statement as well as Lipton and Greenwood.

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<sup>290</sup> “Smut Hearing Planned,” [AP] *New York Times*, September 23, 1970, 30.

<sup>291</sup> Richard Halloran, “A Federal Panel Asks Relaxation of Curbs on Smut,” [Special to the *New York Times*] *New York Times*, October 1, 1970, 1.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

Lehrman felt the studies had not allowed enough time for any long-range effects to appear and the findings were not “sufficiently conclusive to warrant drastic steps.”<sup>294</sup> Lehrman recommended no action be taken and that a new Commission be set up for a period of five years.<sup>295</sup> Klapper cited his support of the statements made by Lipton and Greenwood. Klapper expressed his personal affirmation for the freedom to read and his “wish to protect it from any encroachment not dictated by clear, unambiguous evidence of significant social danger.”<sup>296</sup> As a result, Klapper chose to vote with the majority and confirmed this in his statement. Jones wrote that the work of the Commission was a “milestone in the history of human communications—the first time in history in which men cared about the problem enough to seek the truth about it through the best methods known to science.”<sup>297</sup>

Larsen and Wolfgang, in a joint statement, recommended “no specific statutory restrictions on obscenity and pornography.”<sup>298</sup> They said the problems with defining obscenity and pornography would continue to exist and changes would not be that significant from existing legislation, statutes, and environments. They also said that

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<sup>294</sup> United States Commission on Obscenity and Pornography, *Report of the Commission on Obscenity and Pornography* (Washington, DC: Government Printing Office, 1970), 373.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid, 373-374.

<sup>297</sup> Ibid, 374.

<sup>298</sup> Ibid, 375.

“informal social controls would work better without the confusion of ambiguous and arbitrarily administered laws” and that “advocating repeal is not advocating anarchy.”<sup>299</sup>

Link turned a statement made by the Commission against it. In its report, the Commission stated, “Coercion, repression, and censorship in order to promote a given set of views are not tolerable in our society.”<sup>300</sup> Link then wrote of the coercion, repression, and censorship from the leadership of the Commission since the beginning so that a “certain set of views might be promoted.”<sup>301</sup> He alleged that dissenting and minority views of the Commission had been suppressed, as it was “not in keeping with the preconceived ideas of the Commission leadership, to the exclusion of those of opposing views from certain decision making.”<sup>302</sup> Link also alleged that Lockhart refused to allow the commissioners to hear the results from the public hearings held by Link and Hill.<sup>303</sup> He further accused the Commission of withholding information from him and removing his dissent from the footnotes of the final report. He concluded: “Because full consideration and study have been thwarted I submit that any recognition of the validity of the majority report will be to the detriment of our nation.”<sup>304</sup>

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<sup>299</sup> *Report of the Commission on Obscenity and Pornography*, 375-376.

<sup>300</sup> *Ibid*, 377.

<sup>301</sup> *Ibid*.

<sup>302</sup> *Ibid*.

<sup>303</sup> *Ibid*, 378.

<sup>304</sup> *Ibid*, 378-379.

Lipton and Greenwood, in a separate joint statement, expressed reservations about the time the Commission had been allotted to complete its work. Even though the studies were short and were not repeated, Lipton and Greenwood felt that they provided valuable evidence under the circumstances.<sup>305</sup> However, they did not “condone or approve of hard-core pornography” as it is “vulgar, distasteful, dull, a waste of money and rapidly boring.”<sup>306</sup> They felt obscenity and pornography were more of an educational issue than legislative, as it would not raise “the many controversies which exist regarding definitions of obscenity and pornography and the kinds of material which may or may not be protected by the First Amendment.”<sup>307</sup>

#### The Hill-Link Minority Report

Commissioners Hill and Link issued a long dissent, in which Commissioner Keating concurred. The very first sentence of their dissent was, “The Commission’s majority report is a Magna Carta for the pornographer.”<sup>308</sup> They alleged the majority of the Commission was protecting the pornography business and assumed “the role of counsel for the filth merchant.” Hill and Link alleged that Chairman Lockhart’s and legal counsel Paul Bender’s ties to the American Civil Liberties Union and the Philadelphia Civil Liberties Union motivated them to make findings and recommendations “most

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<sup>305</sup> *Report of the Commission on Obscenity and Pornography*, 379-380.

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*, 381-382.

<sup>308</sup> *Ibid.*, 385.

compatible with the viewpoint of the American Civil Liberties Union.”<sup>309</sup> They stated, “The policy of ACLU has been that obscenity is protected speech.”<sup>310</sup> They were also concerned with bringing sex education into the schools as teachers might bring “the hard-core pornography into the grammar schools.”<sup>311</sup> Hill and Link also felt that “children cannot grow in love if they are trained with pornography. Pornography is loveless; it degrades the human being, reduces him to the level of the animal.”<sup>312</sup> Hill and Link claimed the hearings they held proved the Commission’s findings were wrong and believed that the “government must legislate to regulate pornography, in order to protect the ‘social interest in order and morality.’”<sup>313</sup> They also went into significant detail to show the “astonishing bias of the Commission majority report” and revealed “the heretofore secret operation of the Commission.”<sup>314</sup> They also indicated the legal area of the report asked Americans to accept a “misleading philosophy of law.”<sup>315</sup> They voiced their discontent with the confidentiality of the Commission and its unwillingness to hear

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<sup>309</sup> *Report of the Commission on Obscenity and Pornography*, 386.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

<sup>312</sup> *Ibid.*, 387.

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*, 387-388.

<sup>315</sup> *Ibid.*, 388.

different perspectives and views on the topic. They also said none of the working panels knew what transpired in the other working panels except through word of mouth.<sup>316</sup>

Hill and Link critiqued numerous aspects of the Commission's work. In their opinion, the legal findings of the Commission and its interpretation of the Supreme Court's view on obscenity was incorrect. They argued that Paul Bender, the Commission's legal counsel, should have known that this was incorrect. Bender was the one who wrote, in the legal panel report, that "NO MAJORITY OF THE U.S. SUPREME COURT has ever accepted the proposition that 'utterly without redeeming social value' is a 'test' for obscenity."<sup>317</sup> Hill and Link said, as far as obscenity is concerned, "NO SUPREME COURT OPINION SO HOLDS" that all three criteria are needed to find an item obscene.<sup>318</sup> They said this was the opinion of three Supreme Court justices and thus cannot be law or precedent.<sup>319</sup> They felt *Roth* should stand as the ultimate test for obscenity. They objected to the findings of the "Bender-Lockhart" legal panel report. In a footnote, Hill and Link alleged that Lockhart called Gill and instructed him to make certain modifications in the legal panel report. The legal panel report no longer read the same as it did when the Commission used the report in its decision to vote for the legislation of obscenity at the two meetings held in August of 1970.<sup>320</sup> They disputed

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<sup>316</sup> *Report of the Commission on Obscenity and Pornography*, 389.

<sup>317</sup> *Ibid*, 412.

<sup>318</sup> *Ibid*.

<sup>319</sup> *Ibid*, 413.

<sup>320</sup> *Ibid*.

that the *Stanley* opinion overrode *Roth* and felt that “they (Bender and Lockhart) would like *Stanley v. Georgia* to say what they say it says but that desire is not borne out by the facts of the case.”<sup>321</sup> They questioned the term “consenting adults” as it had not been cited in any court opinions or explained. They insinuated that the legal panel report was faulty in its reasoning and evidence of numerous obscenity cases and reiterated that *Roth* is the law of the land in obscenity cases.<sup>322</sup>

Hill and Link wanted the legislative recommendations of the majority of the Commission thrown out as, “it is irrelevant legislation and deserves condemnation as inimical to the welfare of the United States, its citizens, and its children.”<sup>323</sup> They also wrote, “that the purpose of the Commission’s report is to legalize pornography.”<sup>324</sup> They felt obscenity laws were necessary to keep morality alive and keep forces of evil away and that a nation reflected moral character—“*the essence of which is determined by a general consensus of individual standards.*”<sup>325</sup> Hill and Link felt the “obvious morals protected are chastity, modesty, temperance, and self-sacrificing love.”<sup>326</sup> If obscenity laws and a moral society existed, Hill and Link thought “lust, excess, adultery, incest,

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<sup>321</sup> *Report of the Commission on Obscenity and Pornography*, 415.

<sup>322</sup> *Ibid*, 415-418.

<sup>323</sup> *Ibid*, 418.

<sup>324</sup> *Ibid*.

<sup>325</sup> *Ibid*, 418-419.

<sup>326</sup> *Ibid*, 420.

homosexuality, bestiality, masturbation and fornication,” which were “obvious evils” would be repressed.<sup>327</sup>

Interestingly, Hill and Link recommended that a “National Crime Research and Reference Library on the Law of Obscenity” be established since, “such a library would be unique and unduplicated as a single collection.”<sup>328</sup> No library focused on obscenity has ever been established.

### The Extensive Dissent

Commissioner Keating’s dissent was 117 pages long. Keating wrote that it was “difficult to comprehend” the “shocking and anarchistic recommendation” made by the majority of the Commission.<sup>329</sup> Keating went on:

Such presumption! Such an advocacy of moral anarchy! Such a defiance of the mandate of the Congress which created the Commission! Such a bold advocacy of a libertine philosophy! Truly, it is difficult to believe that to which the majority of this Commission has given birth.<sup>330</sup>

Keating cited God, the Greeks, the traditional Judeo-Christian ethic, and Proust in his argument against the majority of the Commission and obscenity and pornography in general.<sup>331</sup> Keating said commissions never work and are not a “valid part of the

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<sup>327</sup> *Report of the Commission on Obscenity and Pornography*, 420.

<sup>328</sup> *Ibid*, 421.

<sup>329</sup> *Ibid*, 514.

<sup>330</sup> *Ibid*, 515.

<sup>331</sup> *Ibid*, 515-516.



American political system.”<sup>332</sup> Keating also said that the staff who did the bulk of the work for the Commission were “persons of mediocre talent, hangers-on in government, or individuals not yet settled on a course in life who accept interim work on a Commission staff as a place to light and learn.”<sup>333</sup>

Keating called for investigations into the illegality of Lockhart’s appointment as Chairman, the influence Lockhart had on the selection of other Commission members, the expenditure of Commission funds, the flaunting of the mandate of Public Law 90-100 by the Commission, the bias of Commission members in favor of industries affected by the work of the Commission, and the failure of the Commission to provide its members with various materials and chances to participate.<sup>334</sup> Keating alleged that Lockhart would not serve on the Commission unless Paul Bender was retained as legal counsel and attacked Lockhart’s affiliation with the American Civil Liberties Union and its influential role within the Commission and its findings.<sup>335</sup>

Keating detailed all the ways in which he was shut out of Commission deliberations. He called Lockhart a tyrant and the Commission staff a runaway staff.<sup>336</sup> Keating, in his own admission of irony, said while the Commission wanted “absolute freedom for pornographers,” it invoked a shroud of secrecy and silence on all of the

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<sup>332</sup> *Report of the Commission on Obscenity and Pornography*, 516.

<sup>333</sup> *Ibid*, 517.

<sup>334</sup> *Ibid*.

<sup>335</sup> *Ibid*, 518-519.

<sup>336</sup> *Ibid*, 522-527.

commissioners.<sup>337</sup> Keating said he was amazed, incredulous and could not believe that the Commission would not admit the press to any of its meetings.<sup>338</sup> Keating also had to go to court for his dissenting opinion to be accepted.<sup>339</sup> Keating accused the Supreme Court justices of unrealistically looking at the facts. He felt since the Supreme Court's actions threw morality out the window, and reduced society to an "animalistic" and "pagan" level.<sup>340</sup> Keating equated the Commission's findings with a government gone wild.<sup>341</sup>

### Into the Public Eye

On the afternoon of September 30, Lockhart and Keating met with the media and brought their bitter and personal controversy into the open. Lockhart "defended his position on obscenity, his actions as chairman of the Commission, and the performance of the Commission's staff."<sup>342</sup> Lockhart indicated that he had approached the Commission "without preconceived ideas of what it should recommend, that he had not 'brainwashed' the other commissioners into following his lead, and that the staff had

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<sup>337</sup> *Report of the Commission on Obscenity and Pornography*, 527.

<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*, 547.

<sup>341</sup> *Ibid.*, 548.

<sup>342</sup> Richard Halloran, "A Federal Panel Asks Relaxation of Curbs on Smut," [Special to the New York Times] *New York Times*, October 1, 1970, 1.

been ‘natural and fair’ in its work.”<sup>343</sup> Keating alleged that Lockhart and other commissioners “held ‘highly slanted and biased’ preconceptions, that many Commissioners were either from the ivory towers of universities or connected with industries that distributed sexually oriented motion pictures or books, and that the staff had guided the research toward predetermined conclusions.”<sup>344</sup> Richard Halloran wrote that the members of the Commission, both majority and minority, expected the impact of their work to be felt by the courts as the issue focused on “the constitutional right to free speech vs. the Government’s obligation to protect the right of privacy and to help foster public morality.”<sup>345</sup>

Vice President Spiro Agnew said pornography was evidence of a “permissive society.”<sup>346</sup> While Senate leaders from both sides of the aisle criticized the findings.<sup>347</sup> Senator Robert C. Byrd, a Democrat from West Virginia, said the report was “shameful” and “that this outrageously permissive commission shows how far this nation has traveled down the road of moral decadence.”<sup>348</sup> Byrd also felt that the majority of the

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<sup>343</sup> Richard Halloran, “A Federal Panel Asks Relaxation of Curbs on Smut,” [Special to the New York Times] *New York Times*, October 1, 1970, 1.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> “Senate Leaders in Both Parties Denounce Findings of Pornography Panel,” [Special to the New York Times] *New York Times*, October 2, 1970, 50.

<sup>348</sup> Ibid.

Commission was “malicious or misguided or both.”<sup>349</sup> Postmaster General Winton M. Blount predicted there would be an immense public debate on the matter and hoped, as the dialogue moved forward, that we could “avoid the tactics of demagoguery—of questioning the motives and impugning the character of the members of the Commission.”<sup>350</sup> Blount said the findings should not be construed as “conclusive.” In addition, he said, “neither are the findings in any sense binding—not on the President, nor on the American people, nor on their legislators, nor on their courts of law.”<sup>351</sup>

The Nixon administration used the Commission’s report to a political advantage in a campaign against “radical-liberals” and the “permissive society.” The Nixon administration deployed presidential speechwriter Patrick Buchanan to assist Commissioner Keating in writing the dissenting opinion for the Commission’s report. This was done to bolster political support for Nixon’s platform on obscenity and pornography.<sup>352</sup> The Nixon administration also pointed out that it was President Johnson, not Nixon, who had appointed the members of the Commission with the exception of Charles H. Keating, Jr. Robert Finch, Nixon’s counsel, said the Commission’s recommendations on pornography reduced “morality to the lowest common denominator

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<sup>349</sup> “Senate Leaders in Both Parties Denounce Findings of Pornography Panel,” [Special to the New York Times] *New York Times*, October 2, 1970, 50.

<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.* See also Richard Halloran, “Sharp Conflict Over Report on Smut,” *New York Times*, September 13, 1970.

of a passing fad.”<sup>353</sup> In addition, Finch rejected the approach that “permissiveness be sanctioned and even promoted it as an official national policy.”<sup>354</sup>

On October 13, 1970, the Senate voted sixty to five to reject and condemn the Commission’s report.<sup>355</sup> Senator John L. McClellan (D-AK) sponsored this move after thirty-four Republican senators urged President Nixon to reject the report. The vote was not legally binding but placed the opposition from the Senate on the record. Senator McClellan said, “Congress might have just as well have asked pornographers to write this report, although I doubt that even they would have had the temerity and effrontery to make the ridiculous recommendations that were made by the Commission.” McClellan also stated “the Commission was, as a three-man minority of its membership charged, ‘slanted and biased in favor of protecting the business of obscenity and pornography which the Commission was mandated by Congress to regulate.’” The five senators who voted against the rejection and condemnation of the Commission’s report were: Senator Clifford Case (R-NJ), Senator Jacob K. Javits (R-NY), Senator George S. McGovern (D-SD), Senator Walter F. Mondale (D-MN), and Senator Stephen M. Young (D-OH).<sup>356</sup>

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<sup>353</sup> “Senate Leaders in Both Parties Denounce Findings of Pornography Panel,” [Special to the New York Times] *New York Times*, October 2, 1970, 50.

<sup>354</sup> *Ibid.*

<sup>355</sup> “Senate Votes, 60 to 5, to Reject and Censure Obscenity Report,” [AP] *New York Times*, October 14, 1970, 30.

<sup>356</sup> *Ibid.*

### President Nixon's Reaction

On October 24, President Nixon released a passionate and strong statement on the Commission's findings. Nixon rejected "its morally bankrupt conclusions and major recommendations."<sup>357</sup> He separated himself from the Commission and said that a previous administration had appointed the Commission. As long as he was in the White House, Nixon said he would aggressively fight and support the effort to control and rid our nation of smut.<sup>358</sup> He said the Commission was wrong in its findings and recommendations because the entire history of civilization and common sense indicated otherwise.<sup>359</sup> He felt that even though the Commission made recommendations to protect juveniles from obscenity and pornography, they would be "inundated by the flood" from the rising level of filth in the adult community.<sup>360</sup> Nixon felt pornography would corrupt, poison, and pollute civilization. Elected representatives needed to prevent that from happening and the steps that were needed to outlaw smut should be taken. Nixon supported freedom of expression but felt "pornography is to freedom of expression what anarchy is to liberty," and "we must draw the line against pornography to protect freedom

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<sup>357</sup> Richard Nixon, "Statement about the Report of the Commission on Obscenity and Pornography," October 24, 1970, American Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=2759> (accessed March 9, 2010).

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid.

of expression.”<sup>361</sup> Nixon pointed to the Supreme Court and said that the Court had found obscenity was not in the area of protected speech and that “those who attempt to break down the barriers against obscenity and pornography deal a severe blow to the very freedom of expression they profess to espouse.”<sup>362</sup> Nixon felt if we adopted a permissive attitude towards pornography, it “would contribute to an atmosphere condoning anarchy in every field—and would increase the threat to our social order . . . and moral principles.”<sup>363</sup> Nixon cited Alexis de Tocqueville: “America is great because she is good—and if America ceases to be good, America will cease to be great.”<sup>364</sup> Nixon ended his statement thusly: “American morality is not to be trifled with. The Commission on Obscenity and Pornography has performed a disservice, and I totally reject its report.”<sup>365</sup> Interestingly, Nixon’s statement was distributed “at a union hall in a working class district of Baltimore” while he was campaigning in Maryland for Republican candidates.<sup>366</sup>

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<sup>361</sup> Richard Nixon, “Statement about the Report of the Commission on Obscenity and Pornography,” October 24, 1970, American Presidency Project.

<sup>362</sup> Ibid.

<sup>363</sup> Ibid.

<sup>364</sup> Ibid.

<sup>365</sup> Ibid.

<sup>366</sup> Warren Weaver, Jr., “Nixon Repudiates Obscenity Report as Morally Void,” [Special to the New York Times] *New York Times*, October 25, 1970, 1.

### Other Reactions

William Lockhart did not comment. But the Commission's former executive director, W. Cody Wilson said, "the Commission's recommendations overlapped to a large extent the recommendations that Mr. Nixon himself made to Congress in 1969."<sup>367</sup> Wilson also stated, "the Commission recognized the importance of sound moral standards but that 'these standards must be based on deep personal commitment flowing from the values instilled in the home, in religious training, and through individual resolutions of personal confrontation with human experience.'"<sup>368</sup> Wilson questioned, "Does Mr. Nixon reject these ideas and substitute instead a legislated morality which reflects only his moral conceptions?"<sup>369</sup> Wilson elaborated: The "Commission had asked that the discussion on pornography 'be continued on a new plane based on facts rather than fear,' and asked if Nixon rejected 'this rational approach to policy-making?'"<sup>370</sup> Warren Weaver, a *New York Times* correspondent, wrote that the last president to reject a commission's report was President Hoover. In 1931, Hoover refused to accept recommendations from a commission that the Prohibition laws be revised or repealed.<sup>371</sup>

In a Reuters column published in the *New York Times*, Lockhart was quoted to the effect that President Nixon had rejected the Commission's report for "political

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<sup>367</sup> Warren Weaver, Jr., "Nixon Repudiates Obscenity Report as Morally Void," [Special to the *New York Times*] *New York Times*, October 25, 1970, 1.

<sup>368</sup> Ibid.

<sup>369</sup> Ibid.

<sup>370</sup> Ibid.

<sup>371</sup> Ibid.



reasons.”<sup>372</sup> Lockhart “assumed Mr. Nixon had not read the report, and that it was unfortunate that the President’s advisers had led him to reject its findings.”<sup>373</sup> Lockhart said the Commission and its work were not intended “to please the President,” and it was his “hope and expectation . . . when the research papers were studied in a calm atmosphere uncomplicated by election appeals, the result would be a far more careful appraisal of public policy in this emotion-charged area.”<sup>374</sup>

#### The American Library Association’s Reaction

At the end of October, the American Library Association’s (ALA) Office for Intellectual Freedom (OIF) released a memorandum to all of the state intellectual freedom committee chairmen. The ominous headline questioned whether the Commission’s report would survive.<sup>375</sup> The publication of the report and the technical volumes was addressed. In addition, Office of Intellectual Freedom felt that the discouraging series of “statements and events” had successfully diluted its effect.<sup>376</sup> The memorandum included details of Commissioner Keating’s court battle and expressed

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<sup>372</sup> “Smut Panelist Sees Politics in Rebuke,” [Reuters] *New York Times*, October 26, 1970, 74.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid.

<sup>375</sup> Judith F. Krug and James A. Harvey to State Intellectual Freedom Committee Chairmen, October 28, 1970, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign, 1. The headline of the memorandum read: “Commission on Obscenity and Pornography Report: Buried Alive?”

<sup>376</sup> Ibid, 1.

concern that the Commission's report "has been 'tried and found guilty' by many factions, because it failed to confirm long-held 'folk-beliefs' about the 'evil' of obscenity and pornography."<sup>377</sup> The Office of Intellectual Freedom expressed concern that there would be a legal overreaction to the recommendations and restrictions would be "tightened" instead of lifted. A source close to the Commission was "sadly" quoted as saying, "The Commission majority is twenty years ahead of the rest of the nation."<sup>378</sup>

The memorandum closed with the following:

H. L. Mencken seems to have provided a suitable epitaph for the Commission on Obscenity and Pornography: "Human beings never welcome the news that something they have long cherished is untrue; they almost always reply to that news by reviling its promulgator. Nevertheless, a minority of bold and energetic men keep plugging away, and as a result of their hard labors and resultant infamy, the sum of human knowledge gradually increases."<sup>379</sup>

The *New York Times* published another article on November 4, 1970. It quoted Lockhart to the effect, "that smut still turn[ed] him off but predicted that the Commission's findings would help form a more enlightened society that knows the truth."<sup>380</sup> In the article, Lockhart said that even though the Commission members knew

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<sup>377</sup> Judith F. Krug and James A. Harvey to State Intellectual Freedom Committee Chairmen, October 28, 1970, 2.

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

<sup>380</sup> "Obscenity Panel Head Says Report Will Help Society," [UPI] *New York Times*, November 4, 1970, 22.

its findings would be denounced, they “felt the public should decide about the findings, and in the long run, the public will decide.”<sup>381</sup>

In December of 1970, the American Library Association’s (ALA) Intellectual Freedom Committee (IFC) adopted a resolution which supported the work and findings of the Commission. The IFC called for the Senate and the President to reconsider their rejection and “to encourage the dissemination and evaluation of these materials by the citizenry of the United States.”<sup>382</sup> It also recommended that all libraries give complete access to the report and the technical volumes “in consonance with the library’s role in the dissemination of information vital to the communities they serve.”<sup>383</sup>

Eli M. Oboler, the head librarian at Idaho State University, published his reaction to the United States Senate rejection of the report of the Commission in *Library Journal*. He pointed out that the Senate’s rejection of the Commission’s report might have been influenced by the fact that it was issued “three weeks before a Congressional election.”<sup>384</sup> He also wondered if the public would notice “one-third of the Senate actually did not

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<sup>381</sup> “Obscenity Panel Head Says Report Will Help Society,” [UPI] *New York Times*, November 4, 1970, 22.

<sup>382</sup> American Library Association, Intellectual Freedom Committee, “Resolution on the Report of the President’s Commission on Obscenity and Pornography,” December 2, 1970, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>383</sup> *Ibid.*

<sup>384</sup> Eli M. Oboler, “The Politics of Pornography,” *Library Journal* (December 15, 1970): 4225.

stand up even to be counted on this important issue, and, that those who did, did so without any real debate or discussion worth counting as such.”<sup>385</sup>

The ALA joined a coalition of twenty-four other national organizations<sup>386</sup> and urged a “full and fair public debate” of the Commission’s report.<sup>387</sup> It “deplored the rejection of the report ‘by government officials based mainly on pre-conceived premises.’”<sup>388</sup> Furthermore, the coalition stated that “the abolition of those obscenity laws which prohibit distribution of obscene materials to adults who choose to receive them . . . was not a radical innovation . . . .The Supreme Court had ruled that the First Amendment

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<sup>385</sup> Eli M. Oboler, “The Politics of Pornography,” *Library Journal*, 4227.

<sup>386</sup> These organizations included: the American Civil Liberties Union (ACLU), the American Federation of Teachers, the American Jewish Committee, the American Library Association, the American Orthopsychiatric Association, the Association of American University Presses, the Association of American Publishers, the American Public Health Association, the Author’s League of America, the Bureau of Independent Publishers and Distributors, the International Reading Association, the Jewish War Veterans of the U.S.A., the National Book Committee, the National Council of Jewish Women, the National Council of Teachers of English, the National Education Association, the National Library Week Program, the National Board of the YWCA, the Periodicals and Book Association of America, the Sex Information and Education Council of the United States, P.E.N—American Center, the Union of Hebrew Congregations, the Women’s National Book Association, the National Association of Theatre Owners, and the National Council of Churches in Christ in the U.S.A.

<sup>387</sup> National Book Committee, “25 National Organizations Urge Wide Public Debate on Report of Commission on Obscenity and Pornography,” January 21, 1971. American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign. The text of the coalition statement was attached to this press release.

<sup>388</sup> *Ibid.*

protects an adult's right to read and see whatever he chooses."<sup>389</sup> The coalition concluded: "we are united in our concern about censorship, and the need for freedom of thought and freedom of expression—freedom of choice—in all areas of human existence."<sup>390</sup> The coalition did not endorse or oppose the Commission's report and called for people to "fully and rationally participate in the process . . . a venture which can enlarge intelligent understanding of a social question that requires wise decision-making."<sup>391</sup>

The director of the ALA's Office for Intellectual Freedom (OIF), Judith F. Krug, sent letters to members of Congress, along with copies of the coalition's statement, urging them to reconsider. Congressman Bill Chapell (D-FL) responded that he would "give the Commission's findings a serious and thorough study," and he "appreciated the concern and interest in helping us eliminate obscenity and pornography."<sup>392</sup> Senator John G. Tower (R-TX) replied to Krug that the findings "should be subjected to close scrutiny, and he supported the 'reasonable approach' and would study all sides of the issue before

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<sup>389</sup> National Book Committee, "25 National Organizations Urge Wide Public Debate on Report of Commission on Obscenity and Pornography," January 21, 1971.

<sup>390</sup> *Ibid.*, 2.

<sup>391</sup> *Ibid.*

<sup>392</sup> Congressman Bill Chappell to Judith F. Krug, March 9, 1971, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

reaching a final decision.”<sup>393</sup> Senator Allen J. Ellender (D-LA) agreed in his response that “we should not ‘prejudge’ reports based on ‘leaked’ information as to its contents.”<sup>394</sup> He also felt that “acceptance or rejection should depend on first hand knowledge, considering both sides of the subject,” but he “frankly had not had the time to read the full Report of this Commission and, therefore, would reserve further comment.”<sup>395</sup>

### Stirring the Pot Again

Senator McClellan took action after receiving the letter and coalition statement from Krug. McClellan contacted Lillian Bradshaw, the president of the American Library Association (ALA). McClellan, a member of the Senate Committee on the Judiciary, was looking into the “activities and recommendations of the Commission on Obscenity and Pornography,” and felt he needed to comment on “certain statements” that appeared in the coalition statement.<sup>396</sup> McClellan welcomed the “interest of the ALA in ‘the issue of obscenity and its significance in American life,’” but felt the context in which the coalition statement was written suggested “an effort to promote the recommendations of the Commission and to counter the decisive rejection of the Report

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<sup>393</sup> Senator John G. Tower to Judith F. Krug, March 13, 1971, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>394</sup> Senator Allen J. Ellender to Judith F. Krug, March 25, 1971, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>395</sup> *Ibid.*

<sup>396</sup> Senator John L. McClellan to Lillian Bradshaw, March 23, 1971, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

by the President, the Senate and the American people.”<sup>397</sup> McClellan rejected the notion that he and others had been “acting mainly on preconceived premises,” and alleged that the majority views of the Commission represented “the preconceived views of the Chairman and his appointed counsel.”<sup>398</sup> McClellan also alleged that the Commission ignored research and evidence and that the entire report was “lacking in credibility.”<sup>399</sup> He said the “performance of the Commission failed to comply with the terms of the mandate given to it by the Congress.” He reiterated his comments that the report would represent the “bible . . . to those who wish to subvert our values by inciting immoral and antisocial activity.”<sup>400</sup> McClellan accused the coalition of gearing the coalition statement towards “the philosophy reflected in the majority report of the Commission.” He felt the minority report should be addressed in the coalition’s “responsible discussions,” and said that a “balanced statement would also have considered the role of public morality in the survival of a civilization and the function of government in preventing moral corruption.”<sup>401</sup> McClellan indicated that his committee had “commissioned a historian to prepare a survey of what the leading scholars through the ages have concluded concerning the relationship between public morality and the wellbeing of a nation.”

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<sup>397</sup> Senator John L. McClellan to Lillian Bradshaw, March 23, 1971, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>398</sup> Ibid.

<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

<sup>401</sup> Ibid.

McClellan requested that Bradshaw provide him with evidence that supported the “extent of participation by the general membership of the ALA in the preparation of the coalition statement, the text of any resolutions adopted by ALA related to the Commission or similar subject matter, and a list of reports, studies or documents on the obscenity question recommended to the ALA membership other than the Commission report.”<sup>402</sup>

Germaine Krettek, the director of the ALA’s Washington Office, contacted Krug. Krettek did not feel duplication was customary and was concerned that the ALA had passed its own resolution on the Commission’s report and then joined the coalition statement. Krettek wrote, “in order to be most effective, ALA should limit its pronouncements on pertinent topics to one forceful public statement.”<sup>403</sup> Krettek expressed irritation that the ALA’s Committee on Legislation had not been consulted before the ALA resolution and the coalition statement had been released. As a result, Krettek asked Krug to provide her with a draft of the reply Krug was writing to Senator McClellan’s letter “since there are many ramifications which are not related to the Obscenity Commission report in any way.” Krettek advised, “delay in replying” and instructed Krug to “say as little as possible when you do write.”<sup>404</sup>

On May 17, 1971, David K. Berninghausen, chairman of the ALA’s Intellectual Freedom Committee (IFC) wrote to the IFC members: “I am sure that you know that

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<sup>402</sup> McClellan to Bradshaw, March 23, 1971.

<sup>403</sup> Germaine Krettek to Judith F. Krug, April 29, 1971, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>404</sup> Ibid.



there are many members of the ALA who are unhappy with the resolution on the Pornography Report taken by ALA, and with the coalition resolution also. On the other hand, there are others who believe that the ALA should endorse the findings of the Commission report."<sup>405</sup> He asked members to think about this and expressed that the ALA legislative committee was "particularly concerned about the impact on the Senate of the ALA's two resolutions, and what should be done about it."<sup>406</sup> Berninghausen indicated it was "another thing for a library association to endorse the findings of any particular group of scientists or scholars."<sup>407</sup> He included a copy of an interview with Chairman Lockhart about the Commission and its work that had been published in the May 1971 edition of the *Minnesota Journal of Education*. In addition, he included an article that he had written that was also published in the same edition of the *Minnesota Journal of Education*.<sup>408</sup>

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<sup>405</sup> David K. Berninghausen to IFC members, May 17, 1971, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>406</sup> Ibid.

<sup>407</sup> Ibid.

<sup>408</sup> "I Don't Want Anyone Telling Me What I Can Read or View: A Deep Rooted Desire for Freedom. An Interview with William B. Lockhart, Chairman, President's Commission on Obscenity and Pornography," *Minnesota Journal of Education* (May 1971): 19-23; David K. Berninghausen, "Censorship versus the Right to Read," *Minnesota Journal of Education* (May 1971): 17, 24-27. Interview and article enclosed with correspondence to IFC members. Copy of article obtained from American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

On May 28, 1971, Senator McClellan wrote Bradshaw again and indicated he had not yet received a reply. He wanted to give Bradshaw another chance to provide him with the information he had requested in his letter of March 23, 1971.<sup>409</sup> On June 3, 1971, Lillian Bradshaw finally responded to Senator McClellan and cited the "Library Bill of Rights" from 1948 and the "Freedom to Read Statement" from 1953 as evidence of the ALA beliefs. Bradshaw wrote, "the ALA seeks to make books and ideas vital forces in American life and to provide easy access to libraries and information to all people from all walks of life. It has long been the position of the Association to defend the right of the individual to read any book. The freedom to read is basic to our American way of life; censorship in any form infringes on this freedom."<sup>410</sup> Bradshaw cited the ALA amicus curiae brief before the Supreme Court in the 1964 *Tropic of Cancer* case and two other ALA supported publications dealing with intellectual freedom, censorship and obscenity.<sup>411</sup> Bradshaw closed with the comment, "librarians believe that each American can debate, evaluate, accept or reject as his individual conscience dictates."<sup>412</sup>

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<sup>409</sup> Senator John L. McClellan to Lillian Bradshaw, May 28, 1971, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>410</sup> Lillian Bradshaw to the Honorable John L. McClellan, June 3, 1971, American Library Association Archives at the University of Illinois Archives, Record Series 17/1/6, University of Illinois at Urbana-Champaign.

<sup>411</sup> Ibid.

<sup>412</sup> Lillian Bradshaw to the Honorable John L. McClellan, June 3, 1971.

It appeared that Senator McClellan chose not to pursue this matter any further. No additional correspondence was found in the American Library Association (ALA) Archives nor has any evidence been found that Senator McClellan or the Senate Committee on the Judiciary weighed in again on the subject of the Lockhart Commission report.

## CHAPTER 5

## FROM 1970 TO THE MEESE COMMISSION

People eventually cooled down after the firestorm of reactions to the Commission's findings. Chairman Lockhart spoke at "Symposium '71: The American Constitution" at the University of Oklahoma College of Law. Lockhart addressed the findings and recommendations of the commission, specifically the most controversial of its recommendations. He lamented that there was "no community consensus supporting the laws prohibiting the sale or exhibition of explicit sexual material to adults," and that "society's attempt to legislate for adults in this area have not been successful."<sup>413</sup> Contrary to President Nixon's and the Senate's reaction to the report, Lockhart stated, "the reaction of the rank and file--not the politicians--has demonstrated how right we were . . . a great many people from all walks of life . . . have said to me: 'You are absolutely right. No one has the right to tell another adult what he can read or look at.'"<sup>414</sup> Lockhart concluded that "ideals of morality cannot be imposed by government controls" and thus, the Commission did not feel that it was its place to impose restriction on obscene materials.<sup>415</sup>

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<sup>413</sup> William B. Lockhart, "The Findings and Recommendations of the Commission on Obscenity and Pornography: A Case Study of the Role of Social Science in Formulating Public Policy," *Oklahoma Law Review* 29 (1971): 218-219.

<sup>414</sup> *Ibid.*, 220.

<sup>415</sup> *Ibid.*

In an interview published in the *Minnesota Journal of Education* in May of 1971, Lockhart reflected on his tenure as chairman of the Commission. He indicated he was “neither extremely liberal nor conservative” when President Johnson appointed him to the commission, and, while he favored freedom of expression, he also favored regulation of “more objectionable material” when it came to adults.<sup>416</sup> He also wanted tighter controls when it came to children.<sup>417</sup> Lockhart said that he resisted the appointment to the Commission at first, but “could not responsibly turn it down since Congress directed the Commission to make the very kind of study I had been urging.”<sup>418</sup> When questioned about the attitudes of the commissioners as they began their work, Lockhart indicated that most commissioners kept their views from interfering with the work of the Commission, but others “seemed to cling strongly to their preconceived views.”<sup>419</sup> Lockhart said that the work of the Commission found that pornography and obscenity did not harm adults; it was “simply offensive.”<sup>420</sup> In addition, he said the Commission chose not to recommend any controls for pornography to consenting adults because there was not a wide

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<sup>416</sup> “I Don’t Want Anyone Telling Me What I Can Read or View: A Deep Rooted Desire for Freedom. An Interview with William B. Lockhart, Chairman, President’s Commission on Obscenity and Pornography,” *Minnesota Journal of Education* (May 1971): 19-23.

<sup>417</sup> Ibid.

<sup>418</sup> Ibid, 20.

<sup>419</sup> Ibid.

<sup>420</sup> Ibid.

consensus of support for a morals law to be effective.<sup>421</sup> Lockhart pointed out that, “if this support is lacking, the law becomes a façade; it is unenforceable.”<sup>422</sup> When asked about the attempt to define pornography, Lockhart responded that the Commission used descriptive definitions, as the statutory definitions of pornography were “too vague.”<sup>423</sup> After the Commission’s report was released, Lockhart said that he avoided going to church for a while as he was worried how his friends would react to the Commission’s findings. Lockhart was surprised to find that many members of his church actually supported the Commission’s position on the freedom of choice.<sup>424</sup> Many people, strongly and unexpectedly, told Lockhart that they did not want anyone telling them what they could read or view.<sup>425</sup> As for President Nixon’s rejection of the Commission’s report, Lockhart pointed out that their “assignment was not to please the President or anyone else, but to provide an informed factual basis for future policymaking.”<sup>426</sup> He also said that, since this was the first time this sort of study has been done, a number of people are

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<sup>421</sup> “I Don’t Want Anyone Telling Me What I Can Read or View: A Deep Rooted Desire for Freedom. An Interview with William B. Lockhart, Chairman, President’s Commission on Obscenity and Pornography,” *Minnesota Journal of Education* (May 1971): 21.

<sup>422</sup> Ibid.

<sup>423</sup> Ibid.

<sup>424</sup> Ibid.

<sup>425</sup> Ibid.

<sup>426</sup> Ibid.

not going to be comfortable with the recommendations made.<sup>427</sup> Lockhart observed that it would “take time for politicians to recognize that only a minority of persons believe there should be controls over materials available to adults.”<sup>428</sup> He predicted that the younger generation would have a “marked impact on the viewpoint in this country within the next ten years.”<sup>429</sup>

A copy of Lockhart’s written response to President Nixon’s rejection of the Commission’s report was included at the end of the interview. In his response, Lockhart felt the President personally did not have the time to study the report, as Nixon was busy with his campaign and “preoccupied with war and peace.”<sup>430</sup> He thought Nixon’s advisors had unfortunately led Nixon to believe and regurgitate the same old arguments that had been around for decades against explicit sexual materials. As a result, Nixon was unhappy that the studies conducted by the Commission did not fall in line with his beliefs. Lockhart emphasized that the Commission’s task was to objectively report its findings, not to please everyone. The Commission’s responsibility was not to interpret or

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<sup>427</sup> “I Don’t Want Anyone Telling Me What I Can Read or View: A Deep Rooted Desire for Freedom. An Interview with William B. Lockhart, Chairman, President’s Commission on Obscenity and Pornography,” *Minnesota Journal of Education* (May 1971): 21.

<sup>428</sup> Ibid.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid, 23.

act upon the findings and scientific reports in any way.<sup>431</sup> Lockhart said the technical reports would be released within the next six months for the public to read. He hoped that the technical reports would be examined with a calm and objective view without being clouded by emotions or politics. He felt this approach would allow for a “careful and thoughtful development of public policy in this emotion-charged area because all concerned will be far better informed.”<sup>432</sup>

### Other Perspectives

Weldon T. Johnson, a member of the professional staff of the Commission, wrote a commentary in the *Duquesne Law Review* addressing the Commission’s findings and the responses to it. He argued that the report spawned “strength, emotion, repulsion, and attraction,” along with considerable misunderstanding.<sup>433</sup> He stressed that “political and emotional conditions” are inevitably shaping the way the report is looked at and responded to.<sup>434</sup> Johnson said: “Commission reports that are not liked are dismissed, or criticized as invalid or biased.”<sup>435</sup> He stated that, in order to get a balanced perspective of

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<sup>431</sup> “I Don’t Want Anyone Telling Me What I Can Read or View: A Deep Rooted Desire for Freedom. An Interview with William B. Lockhart, Chairman, President’s Commission on Obscenity and Pornography,” *Minnesota Journal of Education* (May 1971): 21.

<sup>432</sup> *Ibid.*

<sup>433</sup> Weldon T. Johnson, “The Pornography Report: Epistemology, Methodology and Ideology,” *Duquesne Law Review* 10 (1971-72): 190.

<sup>434</sup> *Ibid.*, 191.

<sup>435</sup> *Ibid.*, 192.



the Commission's findings, both the behaviors of the commissioners and the scientific research should be examined.<sup>436</sup>

Harry M. Clor, a political science professor at Kenyon College, also wrote an article in the *Duquesne Law Review* critiquing the Commission's report. Clor felt that the report, without fail, always chose to go with the liberal view of obscenity.<sup>437</sup> Throughout his article, he argued that the Commission's recommendations were tainted by discrepancies, ignorance of certain facts, and ideology. Clor felt scientific research could not intellectually or morally measure the extent and impact of literature, good and bad, on the life of a community.<sup>438</sup> Clor stressed that "social philosophy" and "sober reflection upon common experience" should be the tools used in addressing issues of obscenity and pornography.<sup>439</sup>

In a 1971 reprint of the Commission's report published by Random House, Clive Barnes, a theater critic for the *New York Times*, wrote a special introduction. In it, he pointed out that obscenity, like beauty, is in the eye of the beholder.<sup>440</sup> Barnes also stressed that, regardless of what each person might feel, everyone should read the

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<sup>436</sup> Weldon T. Johnson, "The Pornography Report: Epistemology, Methodology and Ideology," *Duquesne Law Review* 10 (1971-72): 192, 219.

<sup>437</sup> Harry M. Clor, "Science, Eros and the Law: A Critique of the Obscenity Commission Report," *Duquesne Law Review*, 10 (1971-72): 70.

<sup>438</sup> *Ibid.*, 76.

<sup>439</sup> *Ibid.*

<sup>440</sup> United States Commission on Obscenity and Pornography, *Report of the Commission on Obscenity and Pornography. Special Introduction by Clive Barnes* (New York: Random House, 1971), 6.

Commission's report. Barnes ended his introduction: "As much as any other public document, it represents United States of America, 1970. Read it. You may love it or hate it, accept it or challenge it, but you shouldn't ignore it."<sup>441</sup>

### Back in Front of the Supreme Court Again

Regardless of the reactions to the Commission's report, the issues of obscenity and pornography were quickly in the news again. In 1972, the United States Supreme Court heard two cases: *Miller v. California* and *Paris Adult Theatre I v. Slaton* that both dealt with obscenity issues.

The *Miller* case dealt with a defendant's conviction for sending sexually explicit advertisements through the mail to unwilling recipients. The recipients were offended and contacted police. The defendant was convicted by a jury in a California state court under a California statute that utilized the test in the *Memoirs* case. The "trial court had instructed the jury to evaluate the materials by the contemporary community standards of California."<sup>442</sup> The conviction was upheld on appeal to the Appellate Department of the Superior Court of California in Orange County. The conviction was vacated and remanded by the Supreme Court.

*Paris Adult Theatre I v. Slaton* involved the exhibition of two allegedly obscene films. The trial court in Georgia decided that the showing of these two films in theaters to consenting adults was permissible under the First Amendment of the Constitution. The

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<sup>441</sup> United States Commission on Obscenity and Pornography, *Report of the Commission on Obscenity and Pornography. Special Introduction by Clive Barnes* (New York: Random House, 1971), 9.

<sup>442</sup> *Miller v. California*, 413 U.S. 15 (1973).

Georgia Supreme Court reversed the decision and said that these films were not protected under the First Amendment because they depicted “hard core” pornography.<sup>443</sup> The Supreme Court vacated and remanded this case back to the Georgia Supreme Court.

On June 21, 1973, the Supreme Court handed down the decisions in *Miller* and *Paris*. The Supreme Court took a big step towards further defining obscenity in the *Miller* case. The court developed a new test in *Miller*: “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>444</sup> The Supreme Court decided the test used in the *Memoirs* case that obscene material must be “utterly without redeeming social value” did not meet constitutional standards.<sup>445</sup> Lastly, the Court decided that a jury could use a “forum community standard”<sup>446</sup> instead of a national standard when deciding on prurient appeal and patent offensiveness.<sup>447</sup> In the *Paris* case, decided on the same day as *Miller*, the Supreme

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<sup>443</sup> *Paris Adult Theatre I et al v. Slaton, District Attorney, et al*, 413 U.S. 49 (1973).

<sup>444</sup> *Miller*, 413 U.S. 24 (1973).

<sup>445</sup> *Ibid*, 24-25.

<sup>446</sup> A “forum community standard” is a standard that allowed juries to determine what was acceptable in their specific geographical community when it came to obscenity cases. The Court realized that no two communities are the same and that a national standard does not take that into account.

<sup>447</sup> *Miller*, 413 U.S. 30-34 (1973).

Court held that, as long as state laws met the *Miller* test, states could regulate hard-core pornography even if it was only shown to consenting adults.

The *Miller* decision reiterated the Court's *Roth* opinion that obscenity and pornography did not fall under First Amendment protections. Chief Justice Warren Burger delivered the opinion of the Court. Burger defined what could be considered hard-core pornography as a guideline for states by giving examples, such as "(a) patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated; and (b) patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."<sup>448</sup> Burger replaced the requirement that obscene material had to be "utterly without redeeming social value" with a more specific, concrete requirement of "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."<sup>449</sup> Burger made note of the fact that no majority of the Court had been able to agree on an obscenity standard. The test developed in *Memoirs* had even been abandoned by its author, Justice William Brennan. Burger further stated the Court had confined the scope of obscenity to depictions or descriptions of sexual conduct but that the states must define the conduct. In doing that, a person was supposed to know what was and was not considered offensive hard-core sexual conduct by the states and could not claim that they did not know something was obscene. Burger noted that a "prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit

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<sup>448</sup> *Miller*, 413 U.S. 25 (1973).

<sup>449</sup> *Ibid*, 24-25.

First Amendment protection.”<sup>450</sup> Burger illustrated this comment by noting that graphic displays of anatomy for medical education are necessary and, therefore, protected under the First Amendment. Burger felt that *Miller* was the first time since *Roth* that a majority of the Court had agreed on what isolated hard-core pornography from protected expression. Burger reaffirmed the position of the California courts that community standards were “constitutionally adequate” in *Miller* and that national standards would not serve the intended purpose. Burger closed by reaffirming that obscene materials have never impeded the expression of literary, artistic, political, or scientific ideas and thanked the sexual revolution for bringing the obscenity issue to light.<sup>451</sup>

In dissent, Justice William O. Douglas said that the standards devised by the Court in the *Miller* case already existed in the Constitution.<sup>452</sup> He referenced the Commission’s report and said it had determined that the Court’s standards “interfered with constitutionally protected materials.”<sup>453</sup> Also in dissent, Justice William J. Brennan wrote: “the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face.”<sup>454</sup> Brennan mentioned he had departed from his position on prior obscenity cases because, “the state courts have as yet had no

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<sup>450</sup> *Miller*, 413 U.S. 26 (1973).

<sup>451</sup> *Ibid*, 34-36.

<sup>452</sup> *Ibid*, 39-40.

<sup>453</sup> *Ibid*, 39-40, footnote 5.

<sup>454</sup> *Ibid*, 47.

opportunity to consider whether a 'readily apparent construction suggests itself as a vehicle for rehabilitating the [statute] in a single prosecution.'"<sup>455</sup>

In the opinion of the Court for the *Paris* decision, Chief Justice Warren Burger cited the Hill-Link Minority Report to support the proposition that there was a possible connection between obscene material and crime. Burger felt that the Hill-Link Minority Report gave credence to states that were interested in stopping "commercialized obscenity" from reaching juveniles.<sup>456</sup>

In dissent in *Paris*, Justice Brennan wrote of the diverging opinions on obscenity that caused the Court to begin the practice of "per curiam reversals of convictions for the dissemination of materials that, at least five members of the Court, applying their separate tests, deemed not to be obscene."<sup>457</sup> Brennan further stated, "I am convinced that a definition of obscenity in terms of physical conduct cannot provide sufficient clarity to afford fair notice, to avoid a chill on protected expression, and to minimize the institutional stress, so long as that definition is used to justify the outright suppression of any material that is asserted to fall within its terms."<sup>458</sup> It is obvious Brennan struggled with reconciling states' rights against protecting the First Amendment in his *Miller* and *Paris* dissents. Obscenity has been and will continue to be such a subjective issue and it will never be solidly defined with unanimous agreement. There is too much vagueness

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<sup>455</sup> *Miller*, 413 U.S. 48 (1973).

<sup>456</sup> *Paris Adult Theatre I v. Slaton*, 413 U.S. 57-58 (1973), footnotes 7 and 8.

<sup>457</sup> *Ibid*, 82, 93.

<sup>458</sup> *Ibid*, 101.

and ambiguity in the areas of obscenity and pornography. However, the *Miller* test still stands as precedent in twenty-first century obscenity cases.

After the *Miller* and *Paris* decisions in 1973, the states and the courts had a new test for obscenity that allowed for community standards and not national standards. Nevertheless, obscenity and pornography were still political hot topics for years after the 1970 Commission's report and the *Miller* and *Paris* decisions.

In 1985, at the request of President Ronald Reagan, United States Attorney General Edwin Meese established the Commission on Pornography (Meese Commission). This Commission was charged with "determin[ing] the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees."<sup>459</sup> Unlike the 1970 Commission on Obscenity and Pornography, the Meese Commission did not analyze constitutional laws or attempt to evaluate and recommend definitions of obscenity and pornography.

The Meese Commission explored issues that were not addressed in the Lockhart Commission's work. These issues included child pornography, the role of organized crime, and the impact that technology had on the spread of pornography and child pornography.<sup>460</sup> It also operated under a more restricted budget and timeline than the

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<sup>459</sup> United States Attorney General's Commission on Pornography, *Attorney General's Commission on Pornography: Final Report* (Washington, DC: Government Printing Office, 1986), 1957.

<sup>460</sup> *Ibid.*

Lockhart Commission.<sup>461</sup> While the Lockhart Commission had two years and a \$2 million dollar budget, the Meese Commission only had one year and a \$500,000 budget. The Meese Commission's report even pointed out that, with the value of the dollar, the Lockhart Commission's budget was about sixteen times as large as the budget for the Meese Commission.<sup>462</sup>

### The Meese Commissioners

The commissioners on the Meese Commission were Henry E. Hudson, Judith Veronica Becker, Diane D. Cusack, Park Elliot Dietz, James C. Dobson, Edward J. Garcia, Ellen Levine, Tex Lezar, Reverend Bruce Ritter, Frederick Schauer, and Deanne Tilton. The Executive Director of the Meese Commission was Alan E. Sears.<sup>463</sup>

The Meese Commission was composed of three attorneys, one judge, two government officials, two doctors, two law professors, one reverend, and one magazine editor. One commissioner, Park Elliot Dietz, had a background both in medicine and law.

The three attorneys on the Commission were Henry E. Hudson, Tex Lezar, and Alan E. Sears. Commissioner Henry E. Hudson was the Chairman for the Meese Commission. At the time of his appointment to the Commission, Commissioner Hudson was serving a second term as the Commonwealth Attorney in Arlington County, Virginia

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<sup>461</sup> United States Attorney General's Commission on Pornography, *Attorney General's Commission on Pornography: Final Report*, 224-227.

<sup>462</sup> *Ibid*, 224-227.

<sup>463</sup> *Ibid*, 3-21.



and had a background in law enforcement and the courts.<sup>464</sup> Commissioner Tex Lezar was in the private practice of law at the time he was appointed. Before that, he had served in several different capacities at the federal level, which included being a staff assistant and speechwriter to President Richard Nixon.<sup>465</sup> Commissioner Alan E. Sears, who was appointed as the executive director of the Meese Commission, had previously been the chief of the criminal division and an assistant United States attorney in the western district of Kentucky. His background included investigations and prosecutions of obscenity cases.<sup>466</sup>

The lone judge on the Commission was Commissioner Edward J. Garcia. He was a judge in the United States District Court for the Eastern District of California at the time of his appointment to the Commission. He had also served in several other legal capacities before being appointed to the District Court.<sup>467</sup>

The two government officials on the Meese Commission were Diane D. Cusack and Deanne Tilton. Cusack was a councilwoman on the Scottsdale, Arizona City Council and the president of the Maricopa County Board of Health at the time of her appointment.<sup>468</sup> Tilton was president of the California Consortium of Child Abuse Councils. Tilton was also the administrative director of the Los Angeles County Inter-

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<sup>464</sup> United States Attorney General's Commission on Pornography, *Attorney General's Commission on Pornography: Final Report*, 3-4.

<sup>465</sup> *Ibid*, 15.

<sup>466</sup> *Ibid*, 21.

<sup>467</sup> *Ibid*, 13.

<sup>468</sup> *Ibid*, 6-7.

agency Council on Child Abuse and Neglect and had served in several capacities at the county and state government level.<sup>469</sup>

The two doctors on the Meese Commission were Judith Veronica Becker and James C. Dobson. Becker was an associate professor of clinical psychology in psychiatry at Columbia University. She was also the director at the Sexual Behavior Clinic located at the New York State Psychiatric Institute. Her research interests at the time included sexual aggression, rape victimization, human sexuality and behavior therapy.<sup>470</sup>

Commissioner James C. Dobson had a background in pediatrics, medical genetics, and behavioral research in child development at the time of his appointment to the Meese Commission. In addition, Dobson was president of Focus on the Family, which was a non-profit organization devoted to the preservation of the home life. He had served on several other federal task forces and panels and was also a high profile speaker and writer.<sup>471</sup>

The two law professors on the Meese Commission were Park Elliot Dietz and Frederick Schauer. Commissioner Dietz was unique in that he had a law background as well as a medical background. Dietz was a law professor of behavioral medicine and psychiatry and medical director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia, Charlottesville at the time of his appointment. Dietz had an

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<sup>469</sup> United States Attorney General's Commission on Pornography, *Attorney General's Commission on Pornography: Final Report*, 19-20.

<sup>470</sup> *Ibid*, 5.

<sup>471</sup> *Ibid*, 11-12.

extensive background and a long history of experience in these areas of specialty.<sup>472</sup>

Commissioner Frederick Schauer was a law professor at the University of Michigan at the time. His background included extensive writings on the First Amendment, obscenity, and constitutional law; he was well known in legal circles.<sup>473</sup>

The lone clergyman on the Meese Commission was Reverend Bruce Ritter. Ritter was the founder and president of Covenant House, which was an international childcare agency that operated short-term crisis centers in several major cities across the United States. Ritter had been recognized nationally for his work with homeless and runaway youth.<sup>474</sup>

The only person representing the publishing industry on the Meese Commission was Commissioner Ellen Levine. Levine was editor-in-chief of *Woman's Day* and vice president of CBS Magazines at the time of her appointment.<sup>475</sup>

The Lockhart Commission had only two females serving on a commission of eighteen people. The Meese Commission had four women serving on its commission of eleven members. Although the Lockhart Commission was composed of people representing libraries, book publishers, the motion picture industry, different religions, news agencies, and academic fields such as sociology and the arts, the composition of the 1986 Meese Commission was different. The Meese Commission focused on

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<sup>472</sup> United States Attorney General's Commission on Pornography, *Attorney General's Commission on Pornography: Final Report*, 8-10.

<sup>473</sup> *Ibid*, 17-18.

<sup>474</sup> *Ibid*, 16.

<sup>475</sup> *Ibid*, 14.

pornography and its impact on children. It examined how the courts, medicine, psychology, psychiatry, and law enforcement handled the problem of pornography. Ellen Levine was the only publishing industry representative on the Meese Commission. There were no commissioners representing libraries, book publishers and the motion picture industry. The Meese Commission's professional staff was supported by the United States Department of Justice and included investigators from police departments, the United States Postal Service, the United States Customs Service, and the Federal Bureau of Investigation.<sup>476</sup>

The Meese Commission was also different from the Lockhart Commission in that it held multiple hearings across the country in which people from all backgrounds were able to testify. Over two hundred and twenty-five people testified in six different cities.<sup>477</sup> One hundred and twenty-eight people, many anonymous, submitted written statements to the Meese Commission.<sup>478</sup> This included children as young as eleven who had suffered sexual abuse as a result of the alleged abusers using pornographic materials.<sup>479</sup> Beverly Lynch, the president of the American Library Association (ALA) at the time, testified in Chicago, Illinois.<sup>480</sup>

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<sup>476</sup> United States Attorney General's Commission on Pornography, *Attorney General's Commission on Pornography: Final Report*, 1933.

<sup>477</sup> *Ibid*, 1845-1859.

<sup>478</sup> *Ibid*, 1865-1871.

<sup>479</sup> *Ibid*, 1845-1846. These pages list the children who testified before the Meese Commission.

<sup>480</sup> *Ibid*, 1849.

The Meese Commission also gave examples of obscene materials in its report. Very explicit passages and/or descriptions of pornographic materials from magazines, paperback books, motion pictures, videotape cassettes, and the like were included.<sup>481</sup> There were no actual pornographic photographs included in the report. The Meese Commission felt that the Supreme Court's decision in *Miller* and *Paris* was incorrect because of the dissent and disagreement that already existed among the justices on this matter.<sup>482</sup> This Commission wished "to find protected that which the Supreme Court found unprotected."<sup>483</sup> The report included hundreds of pages on the issue of obscenity, pornography and the First Amendment.

In the end, the Meese Commission made ninety-two recommendations but only one recommendation was written for the courts.<sup>484</sup> Child pornography was specifically addressed in six recommendations.<sup>485</sup> Many recommendations were made to change federal and state law but none of these changes involved the First Amendment. Other recommendations were directed towards the United States Department of Justice, state and local prosecutors, law enforcement agencies at all levels, the Federal

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<sup>481</sup> *Attorney General's Commission on Pornography: Final Report*, 1614-1744.

<sup>482</sup> *Ibid*, 261.

<sup>483</sup> *Ibid*.

<sup>484</sup> *Ibid*, 441.

<sup>485</sup> *Ibid*, 452-454.

Communications Commission, correctional facilities, and public and private social services agencies.<sup>486</sup>

The Meese Commission took a much different approach than the Lockhart Commission. Perhaps this was because of the reactions to the controversial Lockhart Commission findings. Child pornography was not even addressed in the Lockhart Commission's work. Also, the Lockhart Commission's findings offered more of a philosophical and theoretical approach to obscenity and pornography, whereas the Meese Commission took an applied approach to real life situations and concerns. The Meese Commission's ultimate findings were a reversal of the Lockhart Commission's work. Also, the Meese Commission bypassed the judicial system in its recommendations. In doing this, it took the power away from the First Amendment and the courts and placed it in the hands of law enforcement and prosecutors.

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<sup>486</sup> United States Attorney General's Commission on Pornography, *Attorney General's Commission on Pornography: Final Report*, 433-458. All ninety-two recommendations can be found on these pages.

## CONCLUSION

### A WHOLE NEW BALL GAME

Today, with the major advances in technology, computers and the Internet, pornography and obscenity exist at a whole new level. Concerns about adult use of pornography and obscenity have taken a back seat to the perils of child pornography. As a result of the Internet's fluidity, no one can accurately determine how much money is spent on adult and child pornography each year. These technological advances have elevated First Amendment and obscenity issues to a new realm. In the past fifteen years, a number of cases dealing with the First Amendment in an online environment have come about. Two of the cases pitted groups, such as the American Civil Liberties Union (ACLU) and the American Library Association (ALA) against the United States government. These cases, *Reno v. ACLU* and *United States v. American Library Association (ALA)*, eventually made it to the Supreme Court.<sup>487</sup>

#### Round One: *Reno v. ACLU* (1997)

The Communications Decency Act (CDA) of 1996 sought to shield minors from being exposed to obscene material on the Internet. The two sections that dealt specifically with this were Section 223(a)(B)(ii) (Supp. 1997) which criminalize[d] "the 'knowing' transmissions of 'obscene or indecent' messages to any recipient under 18 years of age."<sup>488</sup> Section 223(d) "prohibit[ed] the 'knowin[g]' sending or displaying to a person under 18 years of age of any message 'that, in context, depicts or describes, in

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<sup>487</sup> *United States v. American Library Association (ALA)*, 539 U.S. 194 (2003).

<sup>488</sup> *Reno v. American Civil Liberties Union (ACLU)*, 521 U.S. 844 (1997).

terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”<sup>489</sup> The American Civil Liberties Union (ACLU) challenged the constitutionality of these two sections in the United States District Court for the Eastern District of Pennsylvania. The District Court found that these two sections went against the First and Fifth Amendments as the language was overbroad and unclear and subsequently ordered that the government could not enforce these two sections of the CDA. The one exception to the District Court’s order dealt with child pornography. The two sections of the CDA, otherwise considered unconstitutional, could still be applied if child pornography was involved.<sup>490</sup>

In the meantime, the United States government appealed the United States District Court’s decision to the Supreme Court. The Supreme Court agreed to hear the case. Oral arguments from both sides were heard on March 19, 1997. The Supreme Court, in a 9-0 decision in favor of the ACLU, agreed with the District Court that certain aspects of the provisions violated freedom of speech, which is protected under the First Amendment.

It found that the CDA failed to define “indecent” and forgot to include that “patently offensive” material must lack socially redeeming value to be considered obscene.<sup>491</sup> The Court submitted that these two sections of the CDA had an “obvious chilling effect on free speech.”<sup>492</sup> The government had attempted to argue that the CDA

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<sup>489</sup> *Reno v. ACLU*, 844.

<sup>490</sup> *Ibid.*

<sup>491</sup> *Ibid.*, 845.

<sup>492</sup> *Ibid.*



followed the *Miller* obscenity test. The Court rejected that argument and held that the CDA had butchered the application of the *Miller* obscenity test by disregarding two out of the three prongs. These two prongs that CDA had ignored were in place to prevent “the uncertain sweep of the obscenity definition.”<sup>493</sup> Therefore, it found the CDA was not written to be “carefully tailored to the congressional goal of protecting minors from potentially harmful materials.”<sup>494</sup>

Furthermore, the Court said that the CDA, in its pursuit to protect minors, censored significant amounts of speech that adults had a constitutional right to send and receive. The CDA ignored other alternatives that would have been effective in achieving the CDA’s legal principles. The Court was not convinced that the CDA had been crafted with care.<sup>495</sup>

The Court found, “even the strongest reading of the ‘specific person’ requirement would confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech.”<sup>496</sup> The Court said that was impossible given that the Internet is open to people of all ages. The CDA did not provide any language that said “material having scientific, educational, or other redeeming social value” would fall outside of the CDA’s prohibitions.<sup>497</sup>

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<sup>493</sup> *Reno v. ACLU*, 845-846.

<sup>494</sup> *Ibid*, 846.

<sup>495</sup> *Ibid*.

<sup>496</sup> *Ibid*, 847.

<sup>497</sup> *Ibid*.

Lastly, the Court found the government's argument that software was available for recipients to filter and block materials marked as indecent was unacceptable, as the software did not exist at the time. The Court was not persuaded by the government's argument that the constitutionality of the CDA could be upheld with the government's vested interest in nurturing the Internet's growth. The fact that the Internet was expanding so rapidly undermined the government's contention "that the unregulated availability of 'indecent' and 'patently offensive' material was driving people away from the Internet."<sup>498</sup>

#### Round Two: The Children's Internet Protection Act (CIPA)

In December of 2000, as part of the "Consolidated Appropriations Act of 2001," Congress passed the "Children's Internet Protection Act" (CIPA). CIPA required school and public libraries to install filtering technologies on all computers with Internet access in order to prevent access to visual depictions of obscene material, child pornography or materials considered to be harmful to minors.<sup>499</sup> The language used in CIPA to define what is considered harmful to minors is almost directly taken from the three-pronged test developed in the *Miller* case:

The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that: taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex or excretion; depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted

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<sup>498</sup> *Reno v. ACLU*, 847.

<sup>499</sup> *Consolidated Appropriations Act, 2001*, Public Law 106-554, *U.S. Statutes at Large* 114 (2001): 336. Text specifically addressing the *Children's Internet Protection Act* can be found at <http://thomas.loc.gov/bss/d106/d106laws.html>.

sexual acts, or a lewd exhibition of the genitals; and taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.<sup>500</sup>

In order to receive federal subsidies for Internet access and support under the Telecommunications Act, school and public libraries were required to comply with CIPA by installing filtering technologies on any and all computers with Internet access. CIPA included an exception to the filtering software by allowing for “an administrator, supervisor, or person authorized” in a school or public library to disable the filter “to enable access for bona fide research or other lawful purposes.”<sup>501</sup> Finally, CIPA declared that any civil action challenging the constitutionality of CIPA should be heard by a district court of three judges. If the district court should find CIPA unconstitutional, the matter would be directly appealed to the United States Supreme Court.<sup>502</sup>

#### The American Library Association (ALA) Preemptively Strikes

The case of the *American Library Association v. United States* was very critical to the American Library Association. In 2001, the American Library Association (ALA), along with multiple libraries, library associations, and web publishers filed a civil suit against the United States government in the United States District Court for the Eastern District of Pennsylvania in the case of the *American Library Association v. United*

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<sup>500</sup> *Consolidated Appropriations Act, 2001*, Public Law 106-554, *U.S. Statutes at Large* 114 (2001): 336.

<sup>501</sup> *Ibid*, 338.

<sup>502</sup> *Ibid*, 350.

*States*.<sup>503</sup> The ALA claimed that CIPA was unconstitutional and alleged that the required use of filtering software by public libraries to receive federal funds was unconstitutional.<sup>504</sup> Allegedly, CIPA forced individual libraries to violate patrons' First Amendment rights in order to receive the funding. In addition, the ALA alleged that Congress had overstepped its powers under the Spending Clause of the U.S. Constitution. CIPA was "therefore impermissible under the doctrine of unconstitutional conditions."<sup>505</sup> The ALA showed the court numerous examples of web pages that contained protected speech but were wrongly blocked by the four leading filtering programs.<sup>506</sup> It contended that the filtering technology was ineffective and forced libraries to impose content-based restrictions on constitutionally protected speech. The ALA argued the content-based restrictions in this case should be subjected to strict scrutiny since it considered Internet access in libraries to fall under a public forum doctrine. As a result, the ALA alleged there were only very few situations in which content-based restrictions could be considered permissible.<sup>507</sup> The government argued CIPA would not force public libraries to violate the First Amendment because it was possible for some public libraries to

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<sup>503</sup> *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pen. 2002). The text of the District Court's decision can be found at <http://www.paed.uscourts.gov/documents/opinions/3jic/02D0414P.pdf> (accessed November 4, 2010)

<sup>504</sup> *Ibid*, 4.

<sup>505</sup> *Ibid*, 7.

<sup>506</sup> *Ibid*, 9.

<sup>507</sup> *Ibid*, 7.

constitutionally comply with CIPA. CIPA could only be facially invalidated if it was impossible for *any* public library to comply with its conditions without violating the First Amendment.<sup>508</sup>

A three-judge panel from the United States District Court for the Eastern District of Pennsylvania decided in favor of the American Library Association (ALA) and agreed that CIPA was unconstitutional and prevented the government from enforcing it. In a lengthy opinion, Chief Circuit Judge Edward R. Becker wrote of the challenges CIPA presented. Judge Becker agreed filtering software was a positive tool to use in blocking out pornographic material. However, he wrote that the filtering software was not effective because it did not filter out substantial amounts of pornographic or obscene content, as it should. The filters also blocked large quantities of constitutionally protected content.<sup>509</sup>

Judge Becker held that the “Spending Clause jurisprudence” had only one disputed condition: “whether CIPA required libraries that received funds to violate the constitutional rights of their patrons.”<sup>510</sup> Several factors were involved, including whether the level of scrutiny applicable “to a public library’s content-based restrictions on patrons’ Internet access” fell under strict scrutiny or a rational basis review and whether

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<sup>508</sup> *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pen. 2002), 8.

<sup>509</sup> *Ibid*, 5.

<sup>510</sup> *Ibid*, 11.

CIPA fell under a public forum doctrine.<sup>511</sup> Becker said even filtered Internet access in a library promotes First Amendment values and should be considered a public forum. Becker wrote: “The state’s decision selectively to exclude from the forum speech whose content the state disfavors is subject to strict scrutiny, as such exclusions risk distorting the marketplace of ideas that the state has facilitated.”<sup>512</sup> Becker felt that none of the category definitions used by the blocking programs was equivalent to the legal definitions of obscenity, child pornography, or material harmful to minors. “Filtering programs failed to block access to a substantial amount of content on the Internet that falls into the categories defined by CIPA.”<sup>513</sup> The District Court held that CIPA was subject to strict scrutiny because there were less restrictive alternatives that the government could have imposed as well as the fact that they found the Internet to be a public forum.<sup>514</sup> The District Court found in favor of the American Library Association (ALA) and held that CIPA was “facially invalid under the First Amendment and permanently enjoined the enforcement of CIPA.”<sup>515</sup>

#### The United States Government Strikes Back

The United States appealed the District Court’s decision in the *American Library Association v. United States* case to the United States Supreme Court. In June of 2003,

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<sup>511</sup> *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pen. 2002), 11.

<sup>512</sup> *Ibid*, 12.

<sup>513</sup> *Ibid*, 13.

<sup>514</sup> *Ibid*, 13-14.

<sup>515</sup> *Ibid*, 16.

the Supreme Court handed down its decision, 6-3, in favor of the United States government and reversed the judgment of the District Court. Chief Justice William Rehnquist, joined by Justices O'Connor, Scalia and Thomas, concluded that the filtering software under CIPA did not violate patrons' First Amendment rights; did not force libraries to violate the Constitution; and that Congress had properly exercised its spending power.<sup>516</sup> The Court further found that Internet access in libraries was not considered a "traditional" or "designated" public forum<sup>517</sup> and likened Internet access to collection development in libraries. Librarians differed with the Court on this. The Court said that, while Internet access in libraries is not a public forum in the traditional sense, it could be considered a public forum in the 21<sup>st</sup> century. Internet access is analogous to encountering people talking on sidewalks. People have a right to voice their opinions in a public setting and not to be censored by the government—whether it is on a sidewalk or on the Internet.

Librarians have discretion in deciding what materials to purchase for a library that would best suit its primary clientele and, as the Court saw it, Internet access under CIPA fell under that same discretion. The Court said libraries are not subjected to a "heightened scrutiny" when they choose not to purchase pornographic materials. Thus, they should be treated the same when choosing to filter Internet access.<sup>518</sup> Librarians make individual content-based decisions on which materials to purchase for their

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<sup>516</sup> *United States v. American Library Association (ALA)*, 539 U.S. 194 (2003).

<sup>517</sup> *Ibid*, 195.

<sup>518</sup> *Ibid*.

libraries, taking into account space and financial constraints. They also take into consideration what materials would best serve the primary users of the library. They do not consider whether materials are offensive or might cause harm to a minor. Under CIPA, Internet access to materials is censored through filters that use predetermined words and phrases considered to be obscene. The filters do not have the capability to examine the content as a whole and interpret whether or not it is obscene. In the library world, filters are equivalent to an unknown person censoring materials librarians want to purchase based on words only. The overall content of the material does not matter. For example, a book titled *The Best American Erotic Poems from 1800 to the Present* could be censored because it contains the word "erotic." The fact that the contents of this book may serve a purpose in studying literature over time does not even enter into consideration.

The Court also dismissed concerns about the filters excessively blocking access to constitutionally protected speech. It reasoned that it was easy for a patron to simply request to have the filtering software disabled.<sup>519</sup> The Court found that there were no unconstitutional conditions imposed by CIPA, as the government is entitled to define the limits and benefits of public funds.<sup>520</sup> Again, the Court reiterated its position by stating, "Especially because public libraries have traditionally excluded pornographic materials

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<sup>519</sup> *United States v. American Library Association (ALA)*, 195-196.

<sup>520</sup> *Ibid*, 196.



from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance program.”<sup>521</sup>

Chief Justice Rehnquist delivered the opinion of the Court. Rehnquist wrote that forum analysis and heightened judicial scrutiny do not fit with the discretion of libraries to follow their traditional missions.<sup>522</sup> Library staffs consider content in their collection decisions and have the discretion to do so.<sup>523</sup> Rehnquist argued doctrines surrounding traditional public forums might not be extended to situations where such history is lacking, so Internet access cannot be considered a traditional public forum.<sup>524</sup> Internet access is not owned by the government so therefore it is not considered to be a designated public forum.<sup>525</sup> Rehnquist stated that libraries provide Internet access for patrons to research and learn through the use of requisite and appropriate quality materials.<sup>526</sup> Rehnquist drew the analogy of the Internet being “a technological extension of the book stack.”<sup>527</sup> Rehnquist disagreed with the District Court’s opinion that the option to unblock and disable the filters was inadequate because patrons may be too embarrassed to ask. He stated: “But the Constitution does not guarantee the right to acquire

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<sup>521</sup> *United States v. American Library Association (ALA)*, 539 U.S. 196 (2003).

<sup>522</sup> *Ibid*, 205.

<sup>523</sup> *Ibid*.

<sup>524</sup> *Ibid*, 206.

<sup>525</sup> *Ibid*.

<sup>526</sup> *Ibid*.

<sup>527</sup> *Ibid*, 207.

information at a public library without any risk of embarrassment.”<sup>528</sup> Rehnquist emphasized that “that there were no unconstitutional conditions imposed by CIPA as the government is entitled and authorized to define the limits and benefits of public funds being spent.”<sup>529</sup>

Justice Anthony Kennedy concurred and stated that there was little to this case since CIPA allowed for the disabling of the filtering software when requested by an adult. This allowed the government to protect minors from inappropriate materials while unblocking access for adults. As a result, CIPA to him was not facially unconstitutional.<sup>530</sup>

In his concurrence, Justice Stephen Breyer found that the Internet as a public forum was not applicable in this case and that the filters did not violate the First Amendment. Breyer concluded strict scrutiny was not warranted as it unreasonably interfered with the discretion of materials libraries selected for their collections. Breyer concluded that government interests in protecting minors are legitimate and compelling and outweigh the possible harm the filters might present. Breyer also pointed out that adults did have the right to request that a filter be disabled so there was a limit to the potential harm.<sup>531</sup>

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<sup>528</sup> *United States v. American Library Association (ALA)*, 539 U.S. 209 (2003).

<sup>529</sup> *Ibid*, 196, 211.

<sup>530</sup> *Ibid*, 196.

<sup>531</sup> *Ibid*, 196-97.

In dissent, Justice John P. Stevens wrote that CIPA operated as a blunt nationwide restraint on adult access to valuable and constitutionally protected information that cannot be reviewed by individual librarians. Justice Stevens viewed this restraint as unconstitutional.<sup>532</sup> Stevens agreed with the District Court that the software relied on key words or phrases to block undesirable sites and could not block a category of images.<sup>533</sup> How are these filters expected to block out images if all they really block out is text? Stevens also stated that the government's interests should not justify a broad restriction on protected speech for adults.<sup>534</sup> Stevens further pointed out that patrons are unlikely to know what content or material is being blocked by the filters and therefore one cannot ask for access to material they do not know exists in the first place.<sup>535</sup> Stevens wrote that libraries are entitled to First Amendment protection with respect to their collections and this was crucial given the nation's commitment to academic freedom and the exchange of ideas. In addition, to penalize a library for not installing filtering software on every single Internet-accessible computer would violate the First Amendment.<sup>536</sup> Stevens closed with a pointed comment towards the government: "The abridgment of

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<sup>532</sup> *United States v. American Library Association (ALA)*, 539 U.S. 220 (2003).

<sup>533</sup> *Ibid*, 221.

<sup>534</sup> *Ibid*, 222.

<sup>535</sup> *Ibid*, 224.

<sup>536</sup> *Ibid*, 226.

speech is equally obnoxious whether a rule like this one is enforced by a threat of penalties or by a threat to withhold a benefit.”<sup>537</sup>

Also in dissent, Justice David Souter agreed with Stevens and the American Library Association (ALA) that the requirements to receive funding subsidies under CIPA were unconstitutional.<sup>538</sup> Souter had problems with the language of CIPA and raised a few critical points. He first pointed out that CIPA says that a library “may” unblock, not that it must and felt the criteria of unblocking for “bona fide research or other lawful purposes” was too vague and overbroad. Souter felt that this would give library staff total control over who will actually receive access to blocked material.<sup>539</sup> He took issue with the fact that the filtering software was considered “proprietary information” and unavailable to the libraries for review. Souter thought this hindered public libraries from making educated decisions on the filters. The public libraries are essentially blocking material not really knowing what is truly being blocked.<sup>540</sup> He likened the use of the filters by public libraries to censorship because the unblocking is considered to be discretionary. Souter did not agree with his colleagues that CIPA was analogous to deciding what materials to purchase and make available in the library. He stated that money and space are requirements libraries must take into consideration when purchasing print materials but that blocking Internet access is a choice that is not

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<sup>537</sup> *United States v. American Library Association (ALA)*, 539 U.S. 231 (2003).

<sup>538</sup> *Ibid.*

<sup>539</sup> *Ibid.*, 233.

<sup>540</sup> *Ibid.*, 234.

necessary by the lack of money or space.<sup>541</sup> Souter concluded that blocking equaled censorship and said there was no support for this kind of behavior in the history of libraries. Hence, he felt that strict scrutiny should be upheld in this matter.<sup>542</sup> Even though the Supreme Court reached a 6-3 decision on this case, it is apparent that there was no real consensus on the underlying reasons for the decision.

### Final Thoughts

As the “last word” on obscenity, the *United States v. American Library Association* decision reinforced the Court’s position in *Roth* and *Miller* that the First Amendment does not protect obscenity and pornography. The Court felt that these filters were not unconstitutional because patrons could request that the filters be disabled. The Court said obscenity and pornography did not fall under “obtaining material of requisite and appropriate quality for educational and informational purposes.”<sup>543</sup> This follows the position the Court took in *Miller* that the work, taken as a whole, has to have serious literary, artistic, political, or scientific value to be protected under the First Amendment.

The problem remains, though, that Supreme Court has not agreed on a definition of obscenity and pornography. Both the Lockhart Commission and the Meese Commission came to very different conclusions. The aim of CIPA was to prevent minors from accessing pornographic or obscene images on the Internet. The new element of the Internet just added to the confusion. If the Court cannot even agree on what level of

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<sup>541</sup> *United States v. American Library Association (ALA)*, 236-237.

<sup>542</sup> *Ibid*, 241-243.

<sup>543</sup> *United States v. American Library Association (ALA)*, 539 U.S. 196 (2003).

scrutiny to apply and what type of forum the Internet really is, a clear, united decision will be elusive. The District Court was right that the filters were unconstitutional. The fact that the Court likened the filters to collection management or acquisitions of print materials is imprecise in the eyes of many librarians. The filters are overbroad and inefficient as they obviously blocked out protected and accepted forms of speech, and they did not always block out materials that contained pornographic or obscene images and/or text. CIPA was written with the intent of blocking visual depictions of pornographic and obscene materials from minors. However, one flaw of the filters is that they only block out text, not images. CIPA required that filters had to be installed on *all* library computers to receive funding. This is an excessive requirement as not all computers purchased by libraries are purchased with federal funds. Perhaps, in another ten to fifteen years, the filtering technology will effectively filter out pornographic and obscene images and text.

From *Hicklin* to CIPA, with two commissions in between, obscenity and pornography issues remain ambiguous and muddled. The courts and society have yet to arrive at a definition of what obscenity is and is not. As technology advances even further, obscenity and pornography issues will continue to change and evolve. However, the obscenity issue is never going to be completely resolved because of the simple fact that obscenity is an extremely subjective concept. Every single person has a definition for what is considered obscene to him or her, personally. In a country this large, there will never likely be an agreement on the obscenity issue. The American Library Association will remain a staunch defender of First Amendment rights. From the Cold

War era to the CIPA case, the ALA made its presence and beliefs known. Librarians are always going to be vocal advocates for freedom of speech and freedom to read.

Campaigns, elections, and political parties will continue to play a part in First Amendment issues. Appointments to the Supreme Court are driven by the politics of the party in power. If nothing else, this thesis shows that the Lockhart Commission at least threw open the door and sparked an ongoing national dialogue on obscenity and pornography. But the room is still crowded and even messier than in 1970.

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