

FINAL REPORT
OBSCENITY LAW STUDY COMMITTEE

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Availability of Minutes

Copies of the minutes of the Committee meetings are available from the Legislative Service Bureau.

F I N A L R E P O R T
OBSCENITY LAW STUDY COMMITTEE
January, 1989

MEMBERSHIP

The Obscenity Law Study Committee was established by the Legislative Council with the following membership:

Senator Donald V. Doyle, Co-chairperson
Representative Daniel J. Jay, Co-chairperson
Senator C. Joseph Coleman
Senator Linn Fuhrman
Senator Jack Hester
Senator Wally Horn
Representative Minnette Doderer
Representative Teresa Garman
Representative Jack Holveck
Representative Vic Stueland

CHARGE OF COMMITTEE

The charge of the Obscenity Law Study Committee was to review and research Iowa's laws on obscenity and review pertinent Supreme Court Decisions and other states' laws on obscenity and compile information and action other states have taken to curtail obscenity.

MEETINGS

The Obscenity Law Study Committee conducted two meetings. In the meeting held on September 28, 1988, the Study Committee heard presentations and received testimony from Mr. Ray Smith, Chairperson, Iowans Concerned About Pornography; Mr. Alan E. Sears, Legal Counsel, Citizens for Decency Through Law; Ms. Lorna Truck, Iowa Library Association; Mr. Charles Young, Citizens Concerned About Pornography; Mr. Herb Strentz, Freedom of Information Council; Mr. Paul Stanfield, Inter-Church Agency for Peace and Justice; Reverend Larry Johnson, Citizens for Decency; and Ms. Cryss Farley, Executive Director, Iowa Civil Liberties Union.

In testimony before the Committee, Mr. Ray Smith stated that the purpose of his organization was to create a network within the religious community of Iowa for the purpose of coordinating educational efforts and action related to the elimination of the pornography industry in Iowa; distributed a fact sheet listing certain assertions concerning pornography; and introduced Mr. Alan Sears. Mr. Sears noted that part of Iowa's problem with pornography is the result of a tougher law being passed in Nebraska which has resulted in individuals associated with pornography moving across the Missouri River into Iowa. He indicated that he had two goals concerning statutory recommendations to be offered to the Committee, the first goal was that the legislation be enforceable and the second was that the legislation be constitutional. He noted that Iowa obscenity law is limited in the types of material which are covered; claimed that less than 10 percent of the material depicts heterosexual activity; indicated that the largest consumer group reading hard-core pornographic material in America is persons between the ages of 12 and 17 years; queried whether there might not be some correlation between exposing obscene literature to females on dates and the escalating number of cases of "date rape"; and indicated that hard-core pornography and child pornography are not protected under the First Amendment.

Mr. Sears stated that the United States Supreme Court established a three-part test for determining what is pornography in Miller v. California, and that the three-part test is: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, as written or authoritatively construed; and (3) whether the work, taken as a whole, lacks serious literary, artistic, or political value. Mr. Sears asserted that organized crime is the distributor and controller of pornographic material and stated his belief that establishments providing outlets for this material also provide peep shows which result in anonymous sex between individuals in adjoining booths, creating a potentially serious health problem with respect to sexually transmitted diseases.

Mr. Sears distributed to members of the Study Committee recommendations for changes in the Iowa Code which included the following: (1) add a new section to Chapter 728 containing a definition of the term "obscene" using the language of the three-prong test enunciated within Miller; (2) eliminate current language relating to obscene material distributed to minors and replace it with language defining harmful material to minors; (3) change the

Iowa Code to prohibit the sale of all obscene material rather than just hard-core material; (4) make second and subsequent violations for sale of obscene material to be classed "D" felonies; (5) make mere possession of any material depicting a child engaging in a prohibited sexual act as a crime.

Ms. Truck stated that the Iowa Library Association supports the current Iowa obscenity law providing a statewide definition which is adequate; noted that the definition of obscenity varies greatly from individual to individual; pointed out that books which have been banned in the past, but now are considered literary classics, include Grapes of Wrath, The Adventures of Tom Sawyer, and The Color Purple; noted that lack of a precise statewide definition might cause publishers to choose simply not to sell materials in Iowa in order to protect themselves from prosecution, rather than trying to determine local law before filling an order for a book; and urged that current language under section 728.7 protecting educational institutions and public libraries from the obscenity law remain in effect.

Mr. Charles Young noted that Council Bluffs has three book stores which are havens for homosexuals; stated that he used to be of the genre of men who believe that women want to be molested by men; and stated that in instances of rape, incest, and child abuse, the perpetrator often sees or reads pornographic material concerning these acts, fantasizes about these acts, and then the fantasy becomes reality. In making reference to children who seek pornographic materials, he stated that if they see it, they do it, and once they start doing it, they do it often. He commented that obscenity is big business in Iowa but it is business which is resulting in a bad reputation for the city of Council Bluffs, and asked for a statute to be adopted which would result in Iowa communities reacquiring the right of self-determination on the issue of obscenity.

Mr. Herb Strentz testified that the Freedom of Information Council shares the same concerns as the Iowa Library Association; expressed satisfaction with Iowa's current law and voiced opposition to local ordinances governing this subject matter; indicated that the Freedom of Information Council believes Chapters 709 and 728 provide satisfactory protections with respect to pornography; stated that the Council would not be supportive of changes which would result in varying local ordinances; indicated that the Council does not oppose inclusion of rental of hard-core pornography, as currently defined, among the state's proscriptions; and noted that current law does not appear to be inappropriately weak or ill-founded.

Mr. Paul Stanfield stated that the Iowa Inter-Church Agency for Peace and Justice believes that some local option can be granted without creating the problems expressed by critics; proposed that if the language suggested by Mr. Sears is not adopted, communities should at least be provided the option of adopting specific language drafted so that the standard to be used in the language would be uniform among jurisdictions adopting the language; and said that rentals should be included within the section prohibiting sale of hard-core pornographic material.

Reverend Larry Johnson recommended that action be taken to enact an adequate state law concerning pornography, and failing that, Iowa communities should be permitted to enact local ordinances in an effort to deal with this problem; stated that a major problem in Cedar Rapids is that one pornography outlet is situated across the street from a facility where mentally unstable persons reside and that the residents periodically, while waiting for buses, wander over to the shop and view the material. With regard to the banning of the sale of Penthouse, Playboy, etc., he stated that it is his belief that some of these publications are illegal and could be banned and indicated that he had witnessed instances when pornographic material had led to acts of sexual abuse.

Ms. Cryss Farley criticized the lengthy agenda before the Committee and the shortage of individuals speaking on behalf of freedom of expression; asked that a nationally known speaker appear before the Committee at a later meeting on behalf of freedom of expression; expressed the belief that the movement to expand Iowa's obscenity law is a movement to police the minds of Iowa's citizens and to impose a narrow moral code on all Iowans; noted that the First Amendment was created to protect unpopular expression; suggested that if the First Amendment is to have any meaning, books, magazines, movies, and other forms of expression cannot be restricted simply because they are offensive to some; commented that adults must be free to read and view the materials of their choice; stated that there is no reliable data demonstrating a causal link between pornography and acts of violence; and referred to data suggesting the opposite and cited figures from several foreign countries showing reductions in sexually related crimes after the legalization of the purchase of pornography.

At the December 29, 1988, meeting, the Study Committee received testimony and comments from the Honorable Thomas J. Miller, Iowa Attorney General; Mr. Michael A. Bamberger, Attorney, Sonnenschein, Carlin, Nath, and Rosenthal, representing The Media, Inc.; Mr. William Brosnahan, Division of Criminal Investigation, Department of Public Safety; Mr. Art Small and Mr. Pat White, Iowa County Attorneys Association; Mr. Ryan Montague, Owner, Adult Shop and Adult Odyssey; Mr. Don Paulin, Governor's Office; Ms. Dena Sleeth, Owner, 2565 Book and Video.

Attorney General Miller suggested that the Committee consider four changes to the Code of Iowa: (1) amend the Code to clearly prohibit the rental of hard-core pornography, as well as the sale of hard-core pornography; (2) amend the Code to prohibit the mere possession of child pornography; (3) amend the Code to raise the prohibition of the use of young persons for the production of pornography from age 14 to age 18; (4) include the portrayal of ultimate sex acts and lewd exhibition of genitals in the definition of obscenity in the Code. Attorney General Miller endorsed the bill draft which was disseminated to Committee members entitled "Rough Draft 1"; stated that should a law on mere private possession of child pornography be challenged, that he is prepared to take the case to the United States Supreme Court to determine its constitutionality; claimed that all but four states in the nation prohibit portraying ultimate sex acts and that only three do not prohibit the lewd exhibition of genitals; with regard to the controversy on pornography in the correctional institution, expressed support for the recent policy adopted by the Corrections Board, and indicated that the state will be closely watched by other states; and indicated that the prohibition of ultimate sex acts and materials would meet the criteria of the Miller decision.

Mr. Bamberger observed that the criteria developed by the Supreme Court are necessarily vague and stated that this vagueness presents a threat in that a well-publicized but unfounded criminal charge for obscenity can seriously jeopardize the business of a bookseller who had no intention of selling obscene material; noted that this threat could cause people involved in the publishing industry to needlessly censor works for fear of an unfounded charge and that this would have a chilling effect on sale of legitimate work; commented that the large number of works handled by a typical bookseller during the course of the year prohibit an item-by-item review of each work and as a result many booksellers would exercise self-censorship and eliminate materials that might not be judged obscene.

He noted that with the changes in the Iowa obscenity law proposed by Alan Sears, that the amount of literature and media items that could be potentially attacked as obscene would be increased; stated that he believes the new proposed category called "harmful to minors" creates a category which would have a greater chilling effect on the currently existing Iowa law. Mr. Bamberger stated his view that the Sears proposal to widen the ban on hard-core pornography sold to adults to prohibit the sale of "obscene" pornography shifts the emphasis of Iowa law from one prohibiting the depiction of deviant sexual behavior to a ban on the portrayal of sexual content and suggested that a result of this change could be that a bookseller who twice mistakenly sells a work subsequently

declared to be obscene could then be convicted as a felon. He suggested that the current Iowa obscenity law is well-suited for the purpose of eliminating hard-core obscenity without eliminating First Amendment rights; and suggested that the alarm over pornography comes from small, well-organized anti-pornography groups rather than from the general public.

Mr. Bamberger reviewed the history leading to the Meese Commission commenting that in contrast to previous obscenity studies by the federal government, the Meese Commission spent little time and little money. He suggested that the Federal Executive Branch's actions following the Meese Commission's Report exceed what is necessary to prevent adult materials from getting into the hands of children and that state governments should be able to take a more reasonable approach; and noted in light of a new federal law that a bookseller or wholesaler who receives or possesses for resale material that is later found to be obscene under state law can be punished with a jail term from two to five years in a federal penitentiary, and that the federal government has power to confiscate all the business property of a person who makes the mistake of selling two copies of work that is subsequently declared to be obscene. He reviewed the role of the states throughout history in protecting individual rights from excesses of central authority and urged the Committee to protect books, those who sell them, and other media items against major changes in the current law. In response to questioning, Mr. Bamberger stated that his clients have no strong belief in child pornography, but he expressed that limitation of rights in one area can lead to an expansion of that limitation for reasons of consistency at a later date; pointed to the list of banned books or books attempted to be banned that was published by the American Library Association to illustrate how broadly drafted statutes can permit the censorship of books that none on the Committee would consider obscene; and noted that the Congressional change in the federal law does not affect the Supreme Court's definition of obscenity, but federal penalties could be applied to convictions under state statute.

Mr. Brosnahan stated that the Department of Public Safety recommends: (1) adoption of the language incorporated in Rough Draft 2 as distributed to the members of the Study Committee; (2) amending section 728.12 to include in the child pornography provisions relating to pornography involving persons under the age of 18; and (3) requiring mandatory reporting for photofinishing laboratories to report suspected child pornography. In response to questioning, Mr. Brosnahan stated that the Department of Public Safety noted that other priorities with more immediate consequences such as violent crime have generally attracted the Department of Public Safety's attention more than obscenity, but agreed with Mr.

Sears' contention that pornography is a nationwide problem, and referred to federal studies which have shown that the pornography industry is associated with organized crime but noted that he knows of no arrests made for this purpose in Iowa.

Mr. Small stated that the Iowa County Attorneys Association is in favor of closing the loophole which exists under current law which permits the rental of pornographic materials which are prohibited from being sold in the state, and stated that the Association does not support local option for determination of obscenity but prefers a statewide standard. Mr. White added that the Association agrees with the rental prohibition but that he thought that purveyors would try to find another way to avoid the intent of the statute and continue distribution and stated that the Association would submit language to try to circumvent this sort of activity at a later date. Mr. White recommended that possession of child pornography be prohibited and recommended that graduated penalties be applied for repeat offenses.

Mr. Montague introduced himself as the owner of two adult book stores in the Cedar Rapids area, stated that he has no involvement in organized crime, drugs, child pornography, or prostitution, and that he is a regular taxpayer. He expressed the belief that the Sears proposal as presented in Rough Draft 2 would be a violation of constitutional rights and would affect cable television and certain network television, and particular issues of mainstream magazines such as Time and Newsweek. He opined that there is no harm in pornography and that the Meese Commission found no fault with the type of pornography which is legally sold in Iowa under current law; supported the language in Rough Draft 1 closing the loophole that prevents rental of the material which is illegal to sell in Iowa; and criticized allegations that pornography causes rape and child molestation by stating that the Meese Commission found no support for the allegations regarding the material that is available under current Iowa law. Mr. Montague noted that the characterization of Iowa as the "Porn state" should be dismissed by noting that ten adult bookstores have been closed in eastern Iowa during the past five years. Mr. Montague stated that he does not sell material which is prohibited under Chapter 728 or sell to persons who are underage as to do so would put at risk the investment in his bookstore.

Mr. Paulin stated that the Governor has supported a change in the obscenity law for the past several years; suggested that the recent prison controversy has heightened public awareness; and made the following recommendations to the Committee: (1) prohibit the rental of items which are currently illegal to sell in the state; (2) broaden the definition of obscenity as proposed by Mr. Sears and expressed in Rough Draft 2; (3) toughen penalties levied on

persons convicted; (4) prohibit the possession of child pornography; (5) increase the age under section 728.12 concerning sexual exploitation from age 14 to age 18. Mr. Paulin stated that one of the results of these changes would be a broader power for state prison officials to control the existence of pornography within the prisons, and noted that the Governor does not intend to advocate legislation for more local control of pornography unless the Legislature is unable to pass new statutes that the Governor would find satisfactory.

Ms. Sleeth gave her interpretation of the work of the Meese Commission on Pornography; stated that the Meese Report and Mr. Sears' report held positions that organized crime was involved in pornography based on documentation and allegations that are slight and erroneous; and indicated she found error in the allegations that there is a direct link between sex and violence, link between sale of pornography and organized crime, and linkage between child abuse and pornography. She indicated that a Gallup Poll commissioned by Newsweek magazine and published in March 1985 showed that 50 percent of Americans thought that restrictions on pornography should be made less strict or kept the same.

Ms. Sleeth expressed the opinion that politicians who oppose pornography are not in the mainstream of American political thought; emphasized the popularity of erotic materials among many traditional couples, and noted that the use of such materials often allows the couples to enjoy more frequent and more intense sex; and indicated that she believes that the enactment of Rough Draft 2, would necessitate the closing of her adult bookstores. Ms. Sleeth noted that a review of the material in her shops is conducted by officials of the Department of Public Safety, Division of Criminal Investigation, and by police to ensure that her shops are in compliance with the Iowa obscenity statutes.

RECOMMENDATIONS

The Study Committee noted that its charge by the Legislative Council asked it to review and research obscenity laws and to compile information and action that other states have taken to curtail obscenity. The Study Committee chose not to recommend any specific legislation but asked that its Final Report contain both Rough Drafts I and II, comments submitted pertaining to those drafts, complete minutes of the testimony, and a summarization of the recommendations that had been heard by the Committee. Rough Drafts I and II are attached as are comments filed with the Obscenity Law Study Committee regarding those drafts.

INFORMATIONAL MATERIALS

The following informational materials were distributed to the members of the Obscenity Law Study Committee:

1. Chapter 728, Iowa Code, Obscenity.
2. Letter from Bruce Taylor, General Counsel, Citizens for Decency Through Law.
3. Article from Playboy Magazine, The Child - Pornography Myth.
4. Article from Playboy Magazine, The Big Lie: Reisman Revisited.
5. Commonwealth v. Oakes; statute proscribing knowingly permitting child under 18 years of age to pose in state of nudity for purposes of visual representation in photograph or other medium was unconstitutionally overbroad.
6. Amicus Curiae Brief of the American Sunbathing Association for Commonwealth v. Oakes.
7. Article submitted by the Naturist Society, from Clothed With the Sun, "Naturists" and the "Meese Commission Report", "Non-Obscene Nudity Displayed on Postcards is Okay for Mailing", and "U. S. Postal Service Creating a Market in Child Pornography to State Buyers."
8. Revision to Iowa Obscenity Code submitted by Mr. Alan Sears.
9. Rough Draft 1.
10. Rough Draft 2.
11. Memo from the American Sunbathing Association: Proposals for legislative changes to the Iowa Code concerning obscenity.
12. Letter from Mr. Lee Baxandall, President, The Naturists Society.
13. Letter and Material submitted by Mr. Eldon Pape, Oelwein, Iowa.
14. Letter from Ms. Dena Sleeth, 2565 Book and Video, Cedar Rapids, Iowa.

15. Article from Liberty Magazine, Censorship -- Is It The Real Issue?
16. Article by Park Dietz and Alan Sears, Pornography and Obscenity Sold in "Adult Bookstores": A Survey of 5132 Books, Magazines, and Films.
17. Memorandum from Randall C. Wilson, Legal Director, Iowa Civil Liberties Union.
18. Letter from Ms. Dena Sleeth, 2565 Book and Video, Cedar Rapids, Iowa.
19. The judgment, order adopting report and recommendations as modified and order for judgments, and report and recommendations in Dawson v. Scurr; which is a case on the issue of banning certain adult materials in prisons in Iowa.
20. Letter from the Iowa Freedom of Information Council making comments on the Sears proposal and Rough Draft 2.
21. Memo from Ms. Lorna Truck, Iowa Library Association, making comments on Rough Drafts 1 and 2.
22. Letter from Mr. Sean M. Benson, Cedar Rapids, Iowa.
23. Letter and material submitted by Dr. John W. Lemmon, Washington, Iowa.

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A P P E N D I X

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S.F. _____ H.F. _____

1 Section 1. Section 728.4, Code 1989, is amended to read as
2 follows:

3 728.4 RENTAL OR SALE OF HARD CORE PORNOGRAPHY.

4 A person who knowingly rents, sells, or offers for rental
5 or sale material depicting a sex act involving sadomasochistic
6 abuse, excretory functions, or bestiality, which the average
7 adult taking the material as a whole in applying contemporary
8 community standards would find appeals to the prurient
9 interest and is patently offensive; and which material, taken
10 as a whole, lacks serious literary, scientific, political, or
11 artistic value, upon conviction is guilty of an aggravated
12 misdemeanor. Charges under this section may only be brought
13 by a county attorney or by the attorney general.

14 EXPLANATION

15 This bill prohibits the rental or offering for rental of
16 material depicting a sex act involving sadomasochistic abuse,
17 excretory functions, or bestiality, which the average adult
18 taking the material as a whole in apply contemporary community
19 standards would find appeals to the prurient interest and is
20 patently offensive, and which material, taken as a whole,
21 lacks serious literary, scientific, political, or artistic
22 value. A person, upon conviction, is guilty of an aggravated
23 misdemeanor.

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DRAFT
FOR INFORMATION PURPOSES ONLY

1 Section 1. Section 728.1, subsection 1, Code 1989, is
2 amended to read as follows:

3 1. ~~"Obscene material" is any material depicting or~~
4 ~~describing the genitals, sex acts, masturbation, excretory~~
5 ~~functions or sado-masochistic abuse when the average person,~~
6 ~~taking the material as a whole and applying contemporary~~
7 ~~community standards with respect to what is suitable material~~
8 ~~for minors, would find appeals to the prurient interest and is~~
9 ~~patently offensive, and the material, taken as a whole, lacks~~
10 ~~serious literary, scientific, political or artistic value.~~

11 "Harmful material" means any material that meets all of the
12 following:

13 a. Taken as a whole, the average person, applying con-
14 temporary community standards, would find the material to have
15 a tendency to excite lustful or erotic thoughts in minors or
16 appeal to the prurient interest in sex of minors.

17 b. (1) Depicts or describes a sex act, excretory
18 functions, sado-masochistic abuse, or exhibition of the
19 genitals, buttocks or female breast.

20 (2) The depiction or description is in a way that is
21 patently offensive to prevailing standards in the adult
22 community with respect to what is suitable for minors.

23 c. Taken as a whole, the material lacks serious literary,
24 artistic, political, or scientific value.

25 Sec. 2. Section 728.1, Code 1989, is amended by adding the
26 following new subsections:

27 NEW SUBSECTION. 10. "Obscene material" means any material
28 that meets all of the following:

29 a. The average person, applying contemporary adult
30 community standards, would find that taken as a whole, the
31 material appeals to the prurient interest in sex.

32 b. Depicts or describes any of the following:

33 (1) Patently offensive representations or descriptions of
34 sex acts, actual or simulated.

35 (2) Patently offensive representations or descriptions of

1 masturbation, excretory functions, sado-masochistic abuse, or
2 exhibition of the genitals, actual or simulated.

3 c. A reasonable person would find, taken as a whole, the
4 material lacks serious literary, artistic, political, or
5 scientific value.

6 Sec. 3. Section 728.2, Code 1989, is amended to read as
7 follows:

8 728.2 DISSEMINATION AND EXHIBITION OF OBSCENE HARMFUL
9 MATERIAL TO MINORS.

10 Any person, other than the parent or guardian of the minor,
11 who knowingly disseminates or exhibits obscene harmful
12 material to a minor, including the exhibition of obscene
13 harmful material so that it can be observed by a minor on or
14 off the premises where it is displayed, is guilty of a public
15 offense and shall upon conviction be guilty of a serious
16 misdemeanor.

17 Sec. 4. Section 728.3, Code 1989, is amended to read as
18 follows:

19 728.3 ADMITTING MINORS TO PREMISES WHERE OBSCENE HARMFUL
20 MATERIAL IS EXHIBITED.

21 1. A person who knowingly sells, gives, delivers, or
22 provides a minor who is not a child with a pass or admits the
23 minor to premises where obscene harmful material is exhibited
24 is guilty of a public offense and upon conviction is guilty of
25 a serious misdemeanor.

26 2. A person who knowingly sells, gives, delivers, or
27 provides a child with a pass or admits a child to a premise
28 where obscene harmful material is exhibited is guilty of a
29 public offense and upon conviction is guilty of an aggravated
30 misdemeanor.

31 Sec. 5. Section 728.4, Code 1989, is amended to read as
32 follows:

33 728.4 RENTAL OR SALE OF HARD-CORE-PORNOGRAPHY OBSCENE
34 MATERIALS.

35 1. A person who knowingly rents, sells, or offers for

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1 rental or sale obscene material depicting a sex act involving
 2 sado-masochistic abuse, excretory functions, or bestiality,
 3 which the average adult taking the material as a whole in
 4 applying contemporary community standards would find appeals
 5 to the prurient interest and is patently offensive, and which
 6 material, taken as a whole, lacks serious literary,
 7 scientific, political, or artistic value, upon conviction is
 8 guilty of an aggravated misdemeanor. Second and subsequent
 9 violations of this subsection by a person who has previously
 10 been convicted of violating this subsection are class "D"
 11 felonies.

12 2. A person who knowingly imports or causes to be brought
 13 or sent into this state, for purposes of sale or rental, any
 14 obscene material upon conviction is guilty of a class "D"
 15 felony.

16 3. Charges under this section may only be brought by a
 17 county attorney or by the attorney general.

18 Sec. 6. Section 728.6, Code 1989, is amended to read as
 19 follows:

20 728.6 CIVIL SUIT TO DETERMINE ~~OBSCENITY~~ MATERIAL HARMFUL
 21 TO MINORS.

22 Whenever the county attorney of any county has reasonable
 23 cause to believe that any person is engaged or plans to engage
 24 in the dissemination or exhibition of obscene harmful material
 25 to a minor within the county attorney's county, ~~to minors~~ the
 26 county attorney may institute a civil proceeding in the
 27 district court of the county to enjoin the dissemination or
 28 exhibition of obscene harmful material to minors. Such
 29 application for injunction is optional and not mandatory and
 30 shall not be construed as a prerequisite to criminal
 31 prosecution for a violation of this chapter.

32 Sec. 7. Section 728.10, Code 1989, is amended to read as
 33 follows:

34 728.10 AFFIRMATIVE DEFENSE.

35 In any prosecution for disseminating or exhibiting obscene

1 harmful material to minors, it is an affirmative defense that
2 the defendant had reasonable cause to believe that the minor
3 involved was eighteen years old or more and the minor
4 exhibited to the defendant a draft card, driver's license,
5 birth certificate or other official or apparently official
6 document purporting to establish that such minor was eighteen
7 years old or more or was accompanied by a parent or spouse
8 eighteen years of age or more.

9 Sec. 8. Section 728.11, Code 1989, is amended to read as
10 follows:

11 728.11 UNIFORM APPLICATION.

12 In order to provide for the uniform application of the
13 provisions of this chapter relating to obscene ~~material~~ and
14 harmful materials applicable to minors within this state, it
15 is intended that the sole and only regulation of obscene or
16 harmful material shall be under the provisions of this
17 chapter, and no municipality, county or other governmental
18 unit within this state shall make any law, ordinance or
19 regulation relating to the availability of obscene or harmful
20 materials. All such laws, ordinances or regulations shall be
21 or become void, unenforceable and of no effect on January 1,
22 1978. Nothing in this section shall restrict the zoning
23 authority of cities and counties.

24 Sec. 9. Section 728.12, subsection 3, Code 1989, is
25 amended to read as follows:

26 3. A person who knowingly purchases or possesses any
27 negative, slide, book, magazine or other print or visual
28 medium depicting a child engaging in a prohibited sexual act
29 or the simulation of a prohibited sexual act commits a serious
30 misdemeanor.

31 EXPLANATION

32 Section 1 of this bill replaces the definition of "obscene
33 material" as it relates to minors and replaces it with a
34 definition of "harmful material". New features included in
35 the new definition which were not included previously was the

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1 inclusion of material which depicts or describes the
2 exhibition of the buttocks or female breast. Under the new
3 definition, the material need not appeal to the prurient
4 interest in sex of minors if the material would have the
5 tendency to excite lustful or erotic thoughts in minors.
6 However, the material would still have to be of a depiction or
7 description which is in a way that is patently offensive to
8 prevailing standards in the adult community with respect to
9 what is suitable for minors, and would have to, taken as a
10 whole, lack serious literary, artistic, political or
11 scientific value.

12 Section 2 of the bill adds a definition of obscene material
13 which is now applicable to adults as well as minors. Section
14 5 prohibits the rental or sale of obscene material, thus not
15 only are the current prohibitions against sale of material
16 depicting a sex act involving sado-masochistic abuse,
17 excretory functions, or bestiality covered, but also
18 prohibited are the rental and sale of descriptions or
19 representations of sex acts, masturbation, or exhibition of
20 the genitals. However, before the material meets the
21 definition of obscene material, an average person, applying
22 contemporary adult community standards, would have to find
23 that taken as a whole, the material appeals to the prurient
24 interest in sex, is patently offensive, and taken as a whole,
25 the material lacks serious literary, artistic, political, or
26 scientific value.

27 Section 5 includes a prohibition on the rental as well as
28 the sale of obscene materials. Current provisions are silent
29 as to whether rental of material constitutes a "sale" for
30 purposes of the criminal statute. Section 5 also raises the
31 penalty for second and subsequent violations of the sale and
32 rental of obscene material to a class "D" felony from the
33 current penalty which is an aggravated misdemeanor. Section 5
34 makes it a class "D" felony for a person to knowingly import
35 or cause to be brought or sent into the state, for purposes of

1 sale or rental, any obscene material.

2 Section 9 makes it a serious misdemeanor for a person to
3 knowingly possess various materials depicting a child engaging
4 in a prohibited sexual act or the simulation of a prohibited
5 sexual act. Current law makes it a crime to purchase such ma-
6 terial but does not make mere possession a crime.

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GENERAL ASSEMBLY OF IOWA

EXHIBIT 3

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MEMORANDUM

December 7, 1988

To: CO-CHAIRPERSONS DOYLE AND JAY AND THE
MEMBERS OF THE OBSCENITY LAW STUDY COMMITTEE

From: Gary L. Kaufman, Legal Counsel *GLK*

RE: POSSESSION OF CHILD PORNOGRAPHY & THE CONSTITUTION

Private possession of pornography has certain constitutional protections under the First and Fourteenth Amendments to the U. S. Constitution.

U. S. SUPREME COURT

The United States Supreme Court addressed the issue of punishment for the private possession of obscene material in Stanley v. Georgia, 394 U.S. 557 (1969). In Stanley the obscene matter in question consisted of films which had been seized from a desk drawer in the defendant's home bedroom. The Court, in rather strong language stated, "[M]ere private possession of obscene matter cannot constitutionally be made a crime." 394 U.S. at 559.

The Court went on to state that the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." 394 U.S. at 564. The Court went on to describe the meaning of the First Amendment and the rights the appellant was asserting:

He is asserting the right to read or observe what he pleases--the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. . . .Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it meant that a [s]tate has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. 394 U.S. at 565.

The Court was confronted with the argument that prohibition of possession of obscene materials was necessary to statutory schemes prohibiting distribution:

That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. . . . 394 U.S. at 567-568

In conclusion the Court said:

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. . . . As we have said, the [s]tates retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. 494 U.S. at 568.

A copy of Stanley v. Georgia is enclosed. Also attached to the decision is an annotation by the U. S. Supreme Court Reports of the constitutionality of regulation of obscene motion pictures--federal cases. Please note that it was written prior to Miller v. California. The annotation on laws prohibiting private possession and a discussion of Stanley is on the last page.

State Supreme Courts

The rather strong language of the United States Supreme Court notwithstanding, three state supreme courts have ruled that their own state's prohibition of possession of child pornography is constitutional. The United States Supreme Court has so far chosen not to review these cases. One was declined for lack of jurisdiction, and in the other certiorari was denied. This does not necessarily mean the Supreme Court approves of the rulings of the lower courts, but indicates a lack of willingness to take on the issue at this time and perhaps reflects a reluctance to differentiate child pornography and obscene material which are unprotected by the First Amendment under New York v. Ferber, 458 U.S. 747 (1982) and Miller v. California, 413 U.S. 15 (1973), and material which is protected under Stanley for purposes of mere possession in the privacy of one's own home.

The three state supreme court rulings which found that mere possession of child pornography may be proscribed are: State v. Meadows, 503 N.E.2d 697 (Ohio 1986), cert. denied, 480 U.S. (1987); Felton v. State, 526 So.2d 638 (Ala. 1988); People v. Geever, 522 N.E.2d 1200 (Ill. 1988), appeal dismissed, U.S. (1988).

All three rulings depend heavily on a footnote in Stanley. The footnote stated that Stanley in no way infringed on the governments power to make possession of other items, such as narcotics, firearms, or stolen goods, a crime, as the holding turns on fundamental liberties protected by the First and Fourteenth Amendments. The footnote also stated that the Court did not mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials and gave the example of possession of materials which the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation. In such instances, the Court stated, compelling interests may exist for overriding the right of the individual to possess those materials.

The courts noted that in Ferber the U. S. Supreme Court had recognized that states have a compelling interest in the protection of the health and welfare of children and thus the states are entitled to greater leeway in the regulation of pornographic depictions of children. The state courts then balanced the interest of the state versus the First Amendment interest of the individual. The Illinois court found:

The purpose [of the Illinois prohibition of possession of child pornography] . . . is to prevent the sexual

abuse and exploitation of children by "drying up" the market for child pornography. . . . In prohibiting without restriction possession of child pornography, the legislature has sought to "dry up" the final and most important link in the chain of distribution of child pornography. Unlike Stanley, where the Court determined there was no empirical data to link the private possession in the home of obscenity with deviate sexual behaviour or crimes of sexual violence, the private possession of child pornography further exacerbates the harm and abuse to the child victim. 522 N.E.2d at 1206.

The Illinois court also cites with favor language from the Ohio court's decision in justifying the state's interest:

Unlike the obscene materials considered in Stanley, Miller, et. al., child pornography involves, by its nature, the physical, mental and sexual abuse, seduction and harmful exploitation of children. The depictions sought to be banned by the state are but memorializations of cruel mistreatment and unlawful conduct. Additionally, such material would continue to exploit and victimize the children shown by haunting them in the future. . . . We believe the interests of the state in protecting the privacy, health, emotional welfare and well-rounded growth of its young citizens, together with its undeniable interest of safeguarding the future of society as a whole, comprise exactly the type of "compelling reasons" justifying a "very limited" First Amendment intrusion envisioned by the Stanley court. 522 N. E. 2d at 1207 citing with approval 503 N.E.2d 697, 703.

The only dissenting opinion filed in the three cases was by Justice Clark of Illinois. Justice Clark first outlines the importance of free speech as protected by the First Amendment:

It is . . . protected for independent reasons: because it plays an essential role in the intellectual and moral development of a free people; because governmental censorship of its production has, historically, undermined the ability of artists to create works of import and value; and because the leisure to exchange and enjoy our creative expressions is one of the goods people seek from life in a civilized society. . . . [F]ree speech serves a psychological purpose. It grants wide latitude even to the passive consumer of speech. It guarantees to adults the right to form their own personalities and

tastes by their own choice of written, printed, or visual matter. . . .As a general rule it forbids the government from attempting through criminal sanctions to control what people privately read, view, or think. . . .The qualities of mind and spirit needed by adult members of a free society will not often be found among people who fear governmental intrusion into their bedrooms and reading rooms. 522 N.E.2d at 1209.

Justice Clark stated that the majority's heavy reliance upon Ferber was misplaced and noted that Ferber had only addressed the question of whether a state could constitutionally ban the production and distribution of child pornography not meeting the legal definition of obscenity and did not address the issue of a ban on private possession.

The conclusion reached in Ferber--that child pornography enjoyed no more protection than conventional obscenity--in no way affects the validity of Stanley. The obscenity at issue in Stanley enjoyed no more protection than the material at issue here. 522 N.E.2d at 1210.

Justice Clark concluded his analysis by observing that the state must not only show its interest as "compelling", but also must show that its restriction is "narrowly tailored" to serve that interest.

The true question is whether the interest in preventing such abuse can only be served by a ban on private possession. The majority reasons that such a ban is needed as a necessary adjunct to bans on production and distribution. Supposedly it is not possible to prevent production and distribution without "drying up" the market for child pornography by banning its consumption. If there is any empirical evidence for this proposition, it had escaped me. But more importantly, this is the very argument which was rejected by the Court in Stanley. . . .Indeed, acceptance of such an argument would render Stanley meaningless, because the [s]tate could always argue that a ban on private possession of otherwise unprotected speech was a necessary incident to statutes banning its production or distribution. . . . For these reasons, I believe that this statute violates the speech clause of the First Amendment to the Federal Constitution, as applied to the [s]tates through the due process clause of the Fourteenth Amendment. 522 N.E.2d at 1210-1211.

A copy of the full texts of the decisions of State v. Meadows, People v. Geever, and Felton v. State are attached.

TO: All Members of the State of Iowa Obscenity Law Study
Commission
FROM: The American Sunbathing Association, 1703 N. Main Street,
Kissimmee, Florida 32743
RE: Proposals for Legislative changes to the Iowa Code concern-
ing obscenity - (Rough Drafts, 1 and 2)

WHAT IS THE ASA?

The American Sunbathing Association, Inc. (ASA) is a nonprofit corporation organized under the laws of the State of Florida. The organization serves as the principal interest group and spokesman for social nudism in North America. At its founding in 1931, the ASA adopted the following Principles and Standards:

"We believe in the essential wholesomeness of all human bodies and of the natural functions and activities which they perform. We believe in the naturalness of social nudism, and we consider that exposure of the entire human body to sunlight, and air is beneficial. We believe that we have the right to practice social nudism provided that we do not infringe upon the rights of others." ASA Bylaws, Article II (1987 ed.)

Each of the members of the Commission is being provided herewith a copy of the Amicus Curiae brief filed by Robert T. Page, attorney for the ASA, in the case of Commonwealth of Massachusetts v. Douglas L. Oakes, which is now pending before the United States Supreme Court. The members of this Commission are urged to read the entire brief. The section entitled "Interest of the Amicus Curiae" contains an excellent summation of ASA principles, and goals. It also includes a summation of the various nudist publications which often include pictures of nudist children.

The ASA wants the Commission to consider its comments prior to voting on any proposed legislative changes because:

EXHIBIT 4

"They believe that wholesome photographic portrayal of the nude form is essential to the education of the general public and to the documentation of the nudist movement and that such photography is protected by the First Amendment to the Constitution of the United States. We express our concern and disagreement with broadbrush lawmaking which attempts to criminalize portrayals or consent thereof, of a child in a state of nudity." (Brief of Amicus Curiae, Commonwealth of Massachusetts v. Douglas L. Oakes.)

COMMENTS CONCERNING THE LEGISLATIVE PROPOSALS

Rough Draft #1

The ASA has no objection to the changes proposed in this draft. It is understood that, in part, this proposal is made to close a "loophole," in the law which has allowed hard core pornography to flourish since it is being "rented" and not sold.

These changes would not effect the sale and/or rental of ASA video or photographic material, as that material does not depict a "sex act involving sadomasochistic abuse, excretory functions, or bestiality."

Rough Draft #2

The Proposed Changes Cannot Withstand Constitutional Challenge

In the minutes of the commission's meeting of September 28, 1988, Mr. Alan Sears, Legal Counsel, Citizens for Decency Through Law, is paraphrased as warning the committee

"That any change would be tested in Court by those affected and suggested that the use of language from the court cases should be used in any statute to ease the burden in defending the constitutionality of that statute." (Commission minutes of September 28, 1988, page 3-4)

In his presentation Mr. Sears correctly told the commission pornography is not protected under the First Amendment, and there is a three prong test set forth in Miller v. California 413 U.S.

15 (1973) to determine what is not protected. That test is as follows:

1. Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, as written or authoritatively construed.
3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Given the guidelines in Miller and other United States' Supreme Court Cases which have established that "nudity without more is protected expression" (New York v. Ferber, 458 U.S. 747 (1982) and that "mere nudity is not illegal absent circumstances or environments where regulation is otherwise appropriate". (Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) and numerous other cases, cited in Amicus Curiae Brief, portions of the proposed changes for rough draft #2 will not stand up to constitutional scrutiny.

Current Iowa law Section 728.1 meets the Miller test in that it describes particular prohibited conduct, thus ASA believes no changes are warranted.

The ASA objects to the specific proposed changes in Section 1 of Proposal Number 2, as follows:

- I. Subsection A - Line 15, "a tendency to excite lustful or erotic thoughts in minors,"

Comment

This language is vague and overbroad, and does not meet the test set forth in Miller. Minors could have lustful or erotic

EXHIBIT 4

thoughts about virtually anything at anytime and probably do in the teenage years'

This may be true for nudist children as well as non-nudist children.

Lustful or erotic thoughts could arise from sex education texts, biology texts, medical literature, and nudists publications just to name a few sources. All of these sources are protected under the First Amendment and are not obscene as that definition has been established in Miller. This provision, as written will not stand up to Constitutional review.

II. Subsection B(1), "or exhibition of the genitals, buttocks or female breast."

Comment

This section would provide that "mere nudity" would be the basis for a criminal act. The U.S. Supreme Court, as has been shown, does not agree with that proposition. "Mere nudity is not illegal."

This proposed change sweeps so broad that it would include numerous items that the legislature could not wish to include. (Textbooks, medical journals, nudist literature, and photographs taken by parents of their children. How many of us haven't innocently taken a picture, of our son's or daughter's "first" bath or other bath tub activity? We may now all be criminals if this amendment is passed.

The harm which obscenity statutes seek to curtail is abusive and sexual in nature and which appeals to the prurient interest. The ASA believes that its literature is none of these. (All members of the commission should have been given an ASA Press Pac.

Please review its contents which are representative of the material produced by ASA. Even if you are offended by nudity, I think you will see the material is not abusive in nature or sexually explicit.

ASA would request that any amendment remove the language which included in its definition elements of "nudity" alone, as a basis for criminal prosecution. This would be consistent with the language found in proposed Draft #1 which describes the behavior prohibited.

III. Section 1(2), "The depiction or description is in a way that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors."

Comment

This section does not state the law as set forth in Miller and is different from the standards set forth in the new proposed Subsection 10.

For these reasons alone this section can not withstand Constitutional scrutiny. The ASA believes current Iowa law is sufficient.

IV. New Subsection 10, "exhibition of the genitals, actual or simulated."

Comment

ASA objects to this inclusion of "mere nudity" as obscene as more fully set forth in the discussion under Section 1(b)(1). This section also can not meet constitutional scrutiny.

CONCLUSION

The ASA requests the Commission to make no amendments to current Iowa law which include "nudity alone as a basis for finding matter "harmful to minors" or obscene. Many Iowans

EXHIBIT 4

practice social nudism. Look around. A nudist may be sitting next to you.

Many Iowans have taken pictures of their children, without clothing. Are these the people Iowa legislators want as the subjects of criminal indictment? Do Iowa legislators want to fight an expensive battle in the courts to establish the Constitutionality of a proposal like Draft #2?

The ASA believes the answer to these questions are no, and that after you review all of the facts, including the information provided by ASA, you will eliminate these elements of the proposed draft and focus your work on the real problems: the kiddie pornographers, who deal in abuse and degradation by photographing sexual acts, to appeal to the prurient interest of a minority of adults. ASA respectfully requests your denial of Proposal Number 2, and the recognition of Social Nudists First Amendment Rights.
Respectfully submitted,

By:


Jawn J. Bauer, Attorney
American Sunbathing Association, Inc.
205 N. College Avenue
Post Office Box 1332
Bloomington, IN 47402

Dated: December 8, 1988

MEMORANDUM

DATE: 10-16-88

FROM: Randall C. Wilson, ICLU Legal Director

TO: Hon. Representative Dan Jay

RE: Proposed changes to obscenity statute

Thank you for requesting our views on Mr. Sears' proposal to rewrite Iowa's obscenity statutes. As you may know, the Civil Liberties Union is fundamentally opposed to the concept of censorship so it is impossible for us to endorse any legislation expanding the exercise of state power in this area.

Iowa's present censorship scheme is heavily dependent on criminal sanctions with weighty penalties. This approach provides a constant threat to freedom of speech, privacy, and the physical liberty of those who would exercise such rights. The concept of punishing thought and expression is inherently antithetical to the operation of a democratic society.

While we have no general interest in defending such things as child pornography, we are very concerned that overly ambitious legislation could have a carryover effect on legitimate speech and privacy rights.

In spite of a decades long struggle, the U.S. Supreme Court has been unable to reach a firm consensus on what is obscene or how such material can safely be defined. Thus, even "constitutionally adequate" statutes can have unwanted "chilling effects". To avoid these, we hope that any obscenity law revision will clearly "zero in" on narrowly defined activities which are closely associated with truly criminal conduct.

Presumably, a targeted approach would not only best serve freedom of speech, but actually focus resources on the core problems which obscenity statutes seek to address, e.g., sexual abuse and exploitation of children, protection of non-consenting persons, and parental control. Where possible, proscriptions on behaviors and activities are preferable to criminalizing speech or its possession. For example, any criminal statutes should single out materials

EXHIBIT 5

which cannot be produced without involving live children in sexual crimes whereas other types of depictions should remain exempt from punishment.

When considering revisions, please keep in mind that it may be necessary to decriminalize less serious forms of obscenity in order to fully protect freedom of speech and the right to privacy. We believe that criminal sanctions are far from the ideal means of controlling "objectionable materials". There are other forms of governmental influence and power which do not have such an intimidating and invasive effect upon personal expression and privacy.

Although we have carefully reviewed Mr. Sears' draft, we are reluctant at this stage to endorse or agree to any of his specific language. There is so much new in what Mr. Sears has to propose, that it is difficult to anticipate all the doors left open for overreaching and confusion. There do appear to be many. We would rather respond to a scaled down version which dispenses with the need for so much new and potentially dangerous verbage.

Any new draft should conform to the following principles:

1. We agree with the approach of separate regulation of activities involving minors (as opposed to the general public)--both with respect to what exposures are allowable and how children may be depicted. This is consistent with a targeted approach, existing case law, and the most demonstrable interests in controlling obscenity.

2. We agree that the present scheme of a statewide obscenity definitions should be preserved. More localized authority would encourage poorly written laws and violations of free speech, due to local "mob rule". Moreover, the flow of commerce, communications, and ideas would be seriously stymied. Local input into standards is effectively preserved through the selection of local juries.

3. We resist efforts to expand the definition of obscenity to matters which are not clearly sexual in nature. While the Sears proposal and the present law may not be intended to operate in this way, there are sections in both which require further explication to avoid this interpretation.

4. We resist the augmentation and enhancement of criminal penalties for obscenity violations due to the chilling effect they have on legitimate speech and commerce in information and ideas. As penalties increase citizens tend to lower voices or cease from engaging in free speech activities. Please keep in mind that obscenity statutes have been used throughout our country's history to jail social reformers regardless of what their authors intended.

5. We are totally opposed to efforts to define the private and personal possession of obscene materials as a crime. Regardless of the interests involved, this approach is an invasion of personal libraries and bedrooms, either of which should be sacrosanct. If possession is to be made criminal in spite of the consequences, we are adamant that the TYPE of material and the CIRCUMSTANCES of illegal possession be strictly defined--i.e. the crime should require the presence of a specific criminal intent and the materials banned should be defined in extremely narrow terms.

Please feel free to address any specific questions to our lobbyist, Mark Lambert as your study of these issues continues.

IOWA FREEDOM OF INFORMATION COUNCIL

School of Journalism and Mass Communication
 Drake University, Des Moines, Iowa, 50311
 (515) 271-3194; EMC (515) 271-2295

SUSTAINING MEMBERS

December 21, 1988

Black Hawk Broadcasting
 KWAW-TV, KTHV-TV

Cedar Rapids
 Gazette Company

Daily Ames Tribune

Des Moines Register
 and Tribune Company

Heritage Communications

Iowa Broadcasters
 Association

Iowa Broadcast News
 Association

Iowa Cable Television
 Association

Iowa Newspaper
 Association

Iowa Radio Network

KCCU-TV,
 HNC Communications

KCRG-TV, Cedar Rapids
 Television Company

KGAN-TV
 Cox-Clannett Broadcasting

Meredith Corporation

Palmer Communications,
 WHO-TV, WHO-AM,
 KLYE-FM, KWQC-TV

Quad City Times

WME, Cedar Rapids

Gary L. Kaufman
 Legal Counsel, Legislative Service Bureau
 State Capitol
 Des Moines, IA 50319

Dear Mr. Kaufman:

Thank you for the opportunity to share with the Legislative Study Committee our comments and concerns regarding proposed changes in Chapter 728 of the Code of Iowa.

The Iowa Freedom of Information Council has previously submitted oral and written comments to the Committee, and I'll enclose a copy of those, too. I'll be out of town over the Christmas holidays, but we'd be delighted to respond to any questions in early January or during the legislative session.

Upon review of the proposed legislation, we have no changes or amendments to make in our previous comments. The proposed changes do merit extensive comment, however, and we thank you and the committee members for taking the time to review our concerns.

The Iowa Freedom of Information Council is an umbrella organization of newspapers, broadcast stations, news media associations and others concerned with openness in Iowa government. Consequently, our primary concerns are with Chapters 21 and 22 of the Code, the sections dealing with Iowa laws on open meetings and open records. Our concerns with First Amendment freedoms are paramount, however, and that is why we must engage in the debate over the obscenity law -- even though that appears to be more and more of a tar baby that is sticky for all of us.

Some have declared Iowa to be a porn -- not a corn -- capital, trying to change opinions by fiat rather than by facts. Iowa is a healthy state in many ways, including freedom of expression and openness in government. The proposed changes, as our review suggests, will cause problems rather than solve them. We have little or no objection to amending the current law to include punishment for rental, as well as for sale, of obscene material. Apart from that, however, we have the following specific concerns with proposed legislation.

DEC 21

EXHIBIT 5

1. Addition of the separate definitional category "harmful to minors."

a. While the U.S. Supreme Court has previously concluded that a state may prohibit the distribution to minors of materials that could not be barred from adults, Ginsberg v. New York, 390 U.S. 629 (1968), the present

Chapter 728 already accomplishes this objective. See SS 728.2, 728.3. Thus, to the extent that the inclusion of this new definitional category is prompted by an effort to make the dissemination of sexually explicit material more restrictive with respect to minors than adults, it is unnecessary.

b. In addition to being unnecessary, the creation of a separate definitional category makes the legislation even more difficult to understand and to apply. If the proposed amendment is adopted, publishers and book store owners will be faced with two definitional tests to be employed. The amendment thus makes application of the statute more difficult and more uncertain, a result that should be avoided in all instances -- particularly where the amendment is not necessary to achieve what is assumed to be its primary objective.

c. Although the U.S. Supreme Court has previously concluded that prurient appeal may be defined in terms of the target audience, such as children, e.g., Ginsberg, this conclusion may not permit a legislature to substantially modify the definitional framework by also permitting material to be banned if it is found "to have a tendency to excite lustful or erotic thoughts in minors. . . ." The inclusion of this additional language departs from the constitutionally permissible definition for sexually explicit material which can be banned by the government. This "tendency test" raises a serious question concerning the constitutionality of the proposed amendment in part because it does not comport with the applicable "strict scrutiny" standard of review for regulations impacting rights of expression.

d. In addition, the inclusion of the language "tendency to excite lustful or erotic thoughts in minors" raises concerns that the amendment would be unconstitutionally vague and overbroad. The alternative standard suggested conceivably covers a myriad of materials that would not ordinarily be viewed as appealing to the prurient interest of minors, and it is impossible to determine just which materials would be covered by the definition.

e. Closely related to the above are the practical difficulties that would result to publishers, book store owners and others with respect to all materials. Because the amendment also broadens the means of expression that may be regulated to include "performances," see proposed S 728.1 (11), the practical difficulties noted above would also apply to a variety of other persons, including schools and other groups.

2. Revision of the definition of "obscene" in S 728.1 (10).

a. The present definition of obscenity is a workable one that is based directly upon the decisions of the U.S. Supreme Court. There is no need to revise the definition as is proposed by the amendment.

3. The addition of a definitional category titled "performance" in S 728.1 (11).

a. As noted briefly above, the inclusion of this new definitional category would significantly broaden the reach of the obscenity legislation. There has been no showing, however, that the present obscenity statute, taken together with other provisions, does not

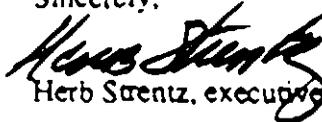
already regulate this kind of activity in Iowa. In addition, by adopting this proposal, the legislation would reach whole new areas and would present practical problems for many additional persons. Absent a strong showing of necessity, a change of this nature should not be made.

4. The proposed changes to SS 728.2 and 728.3 would present all of the problems delineated with respect to the definitional category "harmful to minors." The present statute provides sweeping sanctions against the dissemination of obscene material to minors, and adequately protects and addresses this issue. As noted above, there is no need to provide a second definitional category, along with the attendant problems it would bring, to protect children against the dissemination of sexually explicit material.

5. The proposed revision to S 728.4 would prohibit the sale or offering for sale of "obscene" pornography. Given the proposed change in the definition of obscene material, this amendment would substantially broaden the reach of Iowa's obscenity law, and this amendment will compound the definitional and enforcement problems mentioned above. Because the amendment would substitute the general, and difficult to understand, definition of obscenity, in place of the place of the specifically defined categories of "hard core pornography" which are now prohibited, it will be increasingly difficult for persons to predict in advance whether the materials they are publishing or distributing are in fact prohibited under the law. The end result of such an amendment would be to place even greater pressure on a publisher or distributor to conform to the lowest common denominator of acceptability, thus increasing the very substantial risk that works which would not be deemed "obscene" will nonetheless be made unavailable to Iowans. Absent a strong showing of necessity, a change of this nature should not be undertaken.

Again, thank you for taking the time to review our thoughts about the obscenity tar baby.

Sincerely,


Herb Strentz, executive secretary

IOWA FREEDOM OF INFORMATION COUNCIL

Statement prepared for delivery Wednesday, September 28, 1988, before the Legislature's Interim Study Committee on Iowa's obscenity laws.

The Iowa Freedom of Information Council is a non-profit corporation, incorporated under Iowa law in 1977. The Council is an umbrella organization of news media associations, newspapers, radio and television stations and other publishers, broadcasters and individuals concerned with issues related to First Amendment freedoms and openness in government. In Iowa, the primary concerns of the Council have been with the open meetings law, Chapter 21 of the Code of Iowa, and with the open records law, Chapter 22. We were pleased to participate in the drafting of major revisions in the open meetings law in the 1978 General Assembly and with the revisions of the records law in 1984. Under Canon 3A(7) of the Iowa Supreme Court, the Iowa FOI Council coordinates the Expanded Media Coverage program of the Supreme Court--the program that permits broadcast coverage of judicial proceedings from within Iowa courtrooms.

My name is Herb Strentz. I am a professor of Journalism and Mass Communication at Drake University and I have served as the unsalaried executive secretary of the Iowa Freedom of Information Council since its founding in late 1976. We have an annual budget of about \$14,000, most of which supports two graduate assistants at Drake University and pays for publications and special activities.

The Iowa Freedom of Information Council appreciates the opportunity to present before the Legislature's interim committee on obscenity two observations: (1) Generally, with one small exception, we believe there is satisfaction with the operation of current state law as found in Chapters 709 and 728 of the Code of Iowa; (2) We are troubled by proposals that would rescind 728.11 of the Code and encourage local governmental units to adopt their own obscenity ordinances.

The current status of the law

Chapter 709, the Chapter on Sexual Abuse, provides considerable protection against exploitation of children in the production of obscene material. In this regard, Iowa legislation addresses issues of obscenity and pornography by striking at the source--primarily with regard to involvement of minors.

Chapter 728, the Chapter on Obscenity, provides workable definitions, based upon United States Supreme Court decisions, for enforcement of the law and provides relatively sweeping sanctions against dissemination of obscene material to minors.

728.1(1) (a) provides a detailed description of obscene materials, (b) recognizes the right of a jury to apply "contemporary community standards" in determining whether material is obscene, and (c) declares that the material must be considered in totality--that a word or picture or two of literary, scientific, political or artistic value may not be sufficient to offset the overall, patently offensive nature of the material. A similar definition is followed in 728.4 which deals with the sale of hard core pornography.

728.1(3) provides, again, a sweeping definition of what it means to "disseminate" obscene material: "...to transfer possession with or without consideration."

728.1(6) defines a "minor" for purposes of this act as a person under the age of 18. 728.2 provides a rather firm foundation for legal action against a person who disseminates obscene material to a minor: "Any person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be guilty of a serious misdemeanor."

These and other provisions of the Iowa Code suggest that the approaches in state law are generally sound and on their face consistent with constitutional protections of freedom of expression, which under prevailing views of the First Amendment to the U.S. Constitution and Article I Section 7 of the Iowa Constitution do not extend to obscenity. The Iowa statutory law has obviously been drafted so as to be consistent with decisions of the U.S. Supreme Court.

Proposals to Change the Law

We have three related concerns with regard to proposals to amend Chapter 728: (1) The measure is said not to cover the "rental" of obscene materials or hard core pornography. (2) Prosecutors are said to have difficulty obtaining convictions under current law. (3) There is dissatisfaction on the part of some citizens that Section 728.11, prohibits local governments from passing their own obscenity laws.

(1) Concern with rented materials appears to stem from 728.4 which makes it an aggravated misdemeanor to knowingly sell or offer for sale [but not to rent or offer for rental] "hard core pornography" that fits the definition of material listed in 728.1(1). If it is appropriate to prohibit sale, we think it is equally appropriate to ban rentals, although there may be some merit in considering a broader approach of using the term "dissemination" as defined in 728.1(3).

(2) Prosecutors should have difficulty in obtaining convictions. It has never been the goal of American law to make the prosecutor's job easy. In criminal cases, to start with, there is the difficult test of proof beyond a reasonable doubt. The first, fourth, fifth and fourteenth amendments to the U.S. Constitution and Sections 7, 8, 9 and 10 of the Iowa Bill of Rights safeguard individual freedoms, even to the point of assuring protection to those believed guilty as well as those assuredly innocent. Whether prosecutors find it easy or difficult to obtain convictions is irrelevant except to the extent that the ease or difficulty exposes technical problems with current law. And, as noted above, the current law does not appear to be inappropriately weak or ill-founded. Efforts to "toughen" that law would almost surely violate constitutional standards developed by the U.S. Supreme Court, which form the basis for Chapter 728.

(3) Proposals to rescind 728.11 are philosophically and practically unsound. Such action would invite a myriad of unnecessary, uncoordinated, and likely unconstitutional law making at the local level.

a. The action is unnecessary because of the adequacy of current law as discussed above. Local controls do already exist in terms of the ability of individual citizens to exercise their rights to purchase or not to purchase questionable material, to in effect bring economic sanctions against those who purvey objectionable material, or to seek convictions under state law.

b. The action invites Iowa's local governments to adopt hundreds of different obscenity laws that would figuratively put buckets of tar and bags of feathers into the hands of every local jurisdiction allowing each to decide who the local pornographers are, based on their dislike of the content of the material disseminated. Such a patchwork of laws in Iowa is pernicious in a state as homogeneous as Iowa and on an issue as open to demagoguery as "obscenity."

c. Given the current state of Iowa law, it is difficult to see how that law could be made more restrictive at the local level--which is the goal of advocates of local option--and still pass constitutional muster. It seems to us that local taxpayers would be spending great sums of tax dollars drafting and defending obscenity laws. The way to avoid such problems and the way to avoid an unconstitutional law is not to pass it in the first place.

Conclusion

In summary, Iowa has a workable state law. If the General Assembly is unhappy with that law it should seek amendments to it and not compound perceived problems by inviting more serious problems at the local level. Also, proposals to amend state law would at least provide some specificity for discussion instead of the quagmire of the "Pandora's Box" concept of local control. Finally, avenues already exist for considerable local influence and control over dissemination of allegedly obscene and pornographic material--those include local economic pressures, zoning regulations, persecutory discretion, etc. There is no need to subvert sound state law under the guise of providing "local control."

The offices of the Iowa Freedom of Information Council are in the School of Journalism and Mass Communication, Drake University, Des Moines, Iowa 50311

Date: December 30, 1988

From: Lorna Truck, Iowa Library Association

To: Members of the Obscenity Law Study Committee

Re: Proposed changes to the Iowa obscenity law

Thank you for the opportunity to respond to the proposed revised drafts of the Iowa obscenity law. I have been asked to write on behalf of the Board of the Iowa Library Association and the membership of the Iowa Library Association. As I mentioned in my remarks to your committee on September 28, 1988, the primary concern of our professional association is that the provisions in Chapter 728.7 of the current Iowa law which protect public libraries and educational institutions from censorship be retained in any revision of the obscenity statutes.

The Iowa Library Association does not object to the concept of Rough Draft 1 which adds the term "rental" to the section of the law related to selling of pornography as long as the law remains clear that public libraries and educational institutions are protected in the rental and lending of materials as well as in the use of materials within these institutions.

Librarians have a professional responsibility to support free access to information and to protect First Amendment rights for all citizens. As a result, we have concerns about several aspects of Rough Draft 2. In particular, we feel that the broadening of the definition of obscene materials to include the depiction of female nudity and descriptions of sex acts actual and simulated will include many erotic materials which are not considered obscene by a majority of adults. In addition this broadened definition most certainly could have a chilling effect on freedom of information within our state.

We do not believe it necessary to increase the penalties in the law and we are quite disturbed by the addition of the penalty for the possession of child pornography. Our members do not condone the production or sale of child pornography and feel that Iowa's strict statute related to its production is indeed justified; however there is never a justification for making the simple possession of such material a crime.

During the two days of testimony before your committee, we have heard the argument a number of times that all serious literature, art and serious sex

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education materials would be protected under the new draft law because all criteria would need to be met, including the test of: "Taken as a whole, the materials lack serious literary, artistic, political, or scientific value." Most thinking adults would not feel that such materials would meet this test. Unfortunately there are some organized groups who would like to ban not only the flagrantly offensive materials and child pornography, but also any materials with erotic content and even teen novels about love and growing up and some picture books containing concepts they consider unsuitable for children!

Many make the argument that persons challenged by such groups can go to court and would be protected under the serious literary, artistic, political or scientific value clause. However, what bookseller, business person or librarian wants to go through a major public controversy, public hearing or the expense and emotional stress of a court battle? Often it would seem better not to provide the questionable material rather than to face a public controversy. This is the "chilling effect" which concerns us. Often materials will not be available simply because they have been censored either consciously or unconsciously by the provider and have never been made available to the public.

The Iowa Library Association urges you to maintain the basic right of free access to information for the citizens of Iowa by maintaining the Iowa obscenity law in its current form with the minor addition of revision Draft 1 which prohibits the rental of material defined as obscene in the current statutes.

IOWA DEPARTMENT OF PUBLIC SAFETY
OBSCENITY LAW REVIEW

The Department of Public Safety supports legislation that would strengthen the obscenity laws in Iowa. The majority of obscene material is produced and distributed by elements of organized crime.

The Department of Public Safety has reviewed present state law--Chapter 728, State Code of Iowa--(Obscenity), the proposals from the Obscenity Law Study Committee, and the United States Attorney General's Commission on Pornography Report.

The effective enforcement of obscenity laws necessarily involves a concerted and responsive effort on the part of each facet of the criminal justice system:

1. Investigative
2. Prosecutorial
3. Judicial

The Department of Public Safety offers the following recommendations:

1. Present state law, Chapter 728.1(1)--Obscenity, defines "obscene material" as material that is not suitable for MINORS.

Recommendation: Amend Chapter 728.1(1)--"Obscene Material" to adopt the amendment that defines "obscenity" which relates to material that is not suitable for anyone--minor or adult. Enact legislation to define "harmful material" which relates to material that is not suitable for MINORS.

2. Present state law, Chapter 728.4--Sale of Hardcore Pornography. Hardcore is defined as a sex act involving:

1. Sadomasochistic abuse
2. Excretory functions
3. Bestiality

Recommendation: Amend Chapter 728.4 to adopt the amendment that defines rental or sale of "OBSCENE" materials.

3. Present state law, Chapter 728.4--Sale of Hardcore Pornography--that upon conviction a person is guilty of an aggravated misdemeanor.

Recommendation: Amend Chapter 728.4 to make the second and subsequent violation(s) a felony.

EXHIBIT 3

4. Present state law, Chapter 728.12--Sexual Exploitation of Children. State law defines "child" as a person under the age of fourteen.

Recommendation: Amend Chapter 728.12 defining "child" for the purposes of that chapter to be a person under the age of eighteen.

5. Present state law, Chapter 728.12--Sexual Exploitation of Children. Possession of child pornography is not illegal.

Recommendation: Amend Chapter 728.12(3) by adding after the word purchases the following, "or possesses".

6. Present state law Chapter 728--Obscenity, does not require mandatory reporting for photo finishing laboratories to report suspected child pornography.

Recommendation: Enact legislation that would require mandatory reporting for photo finishing laboratories to report suspected child pornography.

Attorney General Miller's statement to Obscenity Law Study Committee--Dec. 29, 1988.

Thank you for the invitation to testify before your committee today. Hopefully, my testimony can help provide some light in a controversial area which has seen more heat than light. We need to calmly consider the options we have--balancing Iowans' desire to limit the availability of hard core pornography and the constitutional First Amendment rights of free speech.

With those values in mind, I advocate strengthening the Iowa laws governing pornography in four ways--all, I believe, within constitutional requirements.

1. The Code needs to be amended to clearly prohibit the rental of hard core pornography, as well as the sale of pornography. On Dec. 16, 1988, my office argued the case of State v. Applause Video in the Iowa Supreme Court concerning this issue. This is a Pottawattamie County case in which the District Court judge ruled that the current statute did not cover rental. We appealed that decision. While we may win the case in the Supreme Court--there should be a decision in early 1989--a legislative amendment would put an end to the issue. The current statute was written before the advent of video stores and the rental of VCR tapes--including pornographic tapes. I would endorse your Rough Draft 1 amending Iowa Code §728.4 (1989) to prohibit the rental of hard core pornography.

2. I recommend amending the Iowa Code to prohibit the possession of child pornography. In 1983 my office took the lead in toughening the Iowa laws governing child pornography. They are now among the toughest in the nation. It is illegal to

obtain child pornography in any way. I believe that it should be illegal to even possess these materials. This area is not without constitutional question. As research done by Gary Kaufman of your staff indicates, the U.S. Supreme Court has held in Stanley v. Georgia that mere private possession of generally obscene material cannot constitutionally be made a crime. Yet the state Supreme Courts of three other states--Ohio, Alabama, and Illinois--have upheld statutes prohibiting the possession of child pornography, citing the compelling interest of society in protecting our children. I believe Iowa should take the same step--and, if it is challenged, I am prepared to take this case all the way to the United States Supreme Court.

3. Iowa law currently prohibits using children under the age of 14 for the production of pornography. I strongly believe that we should prohibit the use of any young person under the age of 18 for the production of pornography. Young people in their developing teen-age years should have the same protection from this type of exploitation that we provide for younger children.

4. Iowa law on obscenity is generally in the mainstream of what other states provide. There is one exception--the kind of sex act that is depicted. Iowa's law applies only to portrayals of bestiality, excretory functions, and sadomasochistic abuse. All other states, except four, prohibit portraying ultimate sex acts. Only Iowa, Alaska, and Ohio do not prohibit the lewd exhibition of genitals. Iowa should join the mainstream and prohibit all that constitutionally can be prohibited under the case of Miller v. California--the portrayal of ultimate sex acts

and the lewd exhibition of genitals. (The other requirements of Miller v. California would, also, have to be met to prohibit the material--that the work appeals to the prurient interest and that the work lacks serious literary, artistic, political, or scientific value.)

I believe these changes would substantially strengthen Iowa's pornography laws and allow us to fight situations in border cities where Iowa risks becoming a regional source of pornographic materials.

Finally, one other issue should be addressed--pornography in the prisons. While that is a side issue to the primary problems before your committee, it is an issue which has received a good deal of attention recently. If you adopt my recommendations on pornography, they would, of course, apply to prisoners as well as all other Iowans. It would give prison officials additional grounds to control pornography in our correctional facilities. Beyond that, we continue to work with prison officials to provide the strongest restrictions permissible under the constitution on the flow of pornography into our institutions.

I believe that these recommendations will put Iowa's pornography laws in the position where they belong--as tough as constitutionally possible.