The problems that can arise because of such ambiguity and silence on important matters are vividly illustrated in United States v. Fousek.[101] In Fousek, the defendant, a bankruptcy trustee, pleaded guilty to embezzling from a some Chapter 13 debtors. In sentencing the defendant, the district court not only adjusted for abuse of a position of trust but also departed upwards from the sentencing range indicated by the Guidelines because the offense "caused a loss of confidence in an important institution [i.e., the bankruptcy system]."[102] The Eighth Circuit Court of Appeals affirmed, rejecting Fousek's argument that the combination of the adjustment and the departure resulted in "double counting." The result for Fousek was that he not only may have been punished twice for abuse of a position of trust (once because of the adjustment provided for in section 3B1.3 and once because the base offense level for the offense may have already accounted for the abuse), but he also was punished for the effect of that abuse. The reasoning in Fousek reveals as much: "[W]hen a person in a position of public trust, as was Fousek, embezzles money from those he is bound to aid, it stands to reason that there will be some resulting loss of public confidence in that institution."[103] Fousek could reasonably argue that he was punished twice for the cause and once for the effect of his abuse.

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[101] Fousek, No. 89-5358, slip op. at __.

[102] See id. (departing by analogy to Guidelines Manual § 2F1.1, Commentary, Application Note 9, at 2.73, which states that an upward departure may be appropriate where "the offense caused a loss of confidence in an important institution").

[103] Fousek, No. 89-5358, slip op. at __.

V. THE ADJUSTMENT IN SPECIFIC OFFENSE CHARACTERISTICS

At various points in the Guidelines, the abuse of a position of trust adjustment appears as a "specific offense characteristic." Unlike general adjustments, which appear in chapter three of the Guidelines, "specific offense characteristics" appear as subsections in base offense level guidelines in chapter two. As the name indicates, "specific offense characteristics" provide offense-specific adjustments for certain kinds of defendants and conduct. Where a base offense level does not account for particularly egregious conduct, a "specific offense characteristic" will often make amends.

The "abuse of a position of trust" enhancement appears in a slightly modified form as a "specific offense characteristic" where the base offense level guideline describes criminal conduct by certain public officials. For instance, a specific offense characteristic in section 2C1.2 provides for an adjustment where an "elected official" or "any official holding a high level decision-making or sensitive position" offers, gives, solicits, or receives a gratuity with respect to an official act.[104] Likewise, specific offense characteristics of sections 2H1.2 (Conspiracy to Interfere with Civil Rights) and 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property) also both provide adjustments for crimes in which "public officials" are involved.[105]

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[104] See id. § 2C1.2(b)(2)(B), at 2.35.

[105] See id. §§ 2H1.2, 2H1.3, at 2.84-.85.

The Commission has evidently chosen to treat differently abuses of trust by "public officials" because it views such abuses as among the most egregious possible. This is evident from the degree of enhancement accorded such "public officials." Instead of receiving the two-point upward adjustment of section 3B1.3, such "public officials" receive from four to eight-point upward adjustments when they commit the above-discussed offenses.[106]

VI. PROPOSALS

The "abuse of a position of trust" concept suffers from ambiguity and misdirection in the Guidelines. It is difficult, if not impossible, to understand in the abstract what it means to "abuse a position of trust."[107] The Commission has not made the task any easier. The present Commentary to section 3B1.3 creates more problems than it solves. The example of the "ordinary bank teller" is misleading,[108] and words such as "substantial," "significantly," and "easily," which appear in the Commentary apparently to limit the scope of the enhancement, betrays a futile

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[106]See id. §§ 2C1.2(b)(2)(b), at 2.35; 2H1.2, at 2.84; 2H1.3, at 2.85.

[107]See supra, at 7-13.

[108]The Commission's decision to use a negative example (i.e., those who do not run afoul of section 3B1.3) to describe the operation of section 3B1.3 of the Guidelines was a poor choice. The problems that the courts are having in interpreting section 3B1.3 might have been reduced if the Commission had used positive examples instead. Similar difficulties will almost certainly be avoided with the "special skill" enhancement of section 3B1.3. The commentary to that enhancement provision contains affirmative examples which provide much clearer guidance. See Guidelines Manual § 3B1.3, Commentary, Application Note 2, at 3.7 (reproduced in Appendix to this article).

effort to circumscribe a concept whose bounds are unclear.

The courts to date have accepted the invitation to uneven and ultimately unfair application extended by the Commission. The only consistent factor in applying the adjustment appears to be the scope of employment.[109] There are, moreover, signs that the adjustment may even have a broader reach.[110] Potential "positions of trust" abound in our society.[111] If the Commission does not amend section 3B1.3, the only real question is where the courts will draw the line. Line drawing will be a difficult task in the federal circuit courts. They are ill-equipped to delimit the enhancement for the Commission when they review district court decisions for clear error only.[112]

The "abuse of a position of trust" concept is not, however, devoid of meaning and potential application. Defendants who abuse positions of trust in such a way as to facilitate the commission or concealment of the offense are "more culpable" than their non-abusing counterparts.[113] The law has long recognized such abuse as

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[109]See supra note 36.

[110]See e.g., United States v. Foreman, No. 89-50038, slip op. 6191, 6201 (9th Cir. June 19, 1990) (upholding application of adjustment where defendant attempted to conceal crime by using police badge to escape search).

[111]It may not be too much to say that every person occupies, in the broad sense, a "position of trust" with respect to someone or something. Most of us sustain multiple trust relationships. Because these relationships are so common, sentence enhancement that arises out of these relationships has almost limitless potential.

[112]See supra note 43.

[113]See Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7.

an aspect of criminal conduct in certain crimes.[114]

A good idea, however, does not always translate into a good rule. Moral philosophers may agree that a public official who takes a bribe is more culpable than the private citizen who offers it; but would they agree that a union officer who embezzles money from the union coffers is more culpable than the bank teller who embezzles money from the bank?[115] Here, the line drawing becomes more post hoc rationalization than principled distinction between levels of culpability.

To continue to permit sentence enhancement for those who "abuse a position of trust," it seems the Commission will first have to acknowledge that there is much social policy invested in the terms of section 3B1.3. Like the concept of "duty" in the law of torts, "trust" is a conclusion that is disguised in moral garb. The goal in sentencing under this section should be to isolate those instances where social policy and common sense dictate that the defendant should receive additional punishment. This will, of course, be an imperfect process; there may be those who "deserve" the extra punishment, but do not receive it. This process, however, will not force judges to become philosophers and sweep in defendants for sentence enhancement whose extra-culpable conduct is merely the commission of an offense within the scope of employment.

The first step in implementing such a process would be to

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[114] See supra at 18-21.

[115] Compare Guidelines Manual § 2#5.4, at 2.69 (union officer receives adjustment) with id. § 3B1.3, Commentary, Application Note 1, at 3.7 ("ordinary bank teller" does not).

limit the application of section 3B1.3. As currently drafted, that section has a general application as a "role in the offense" enhancement.[116] This article proposes that section 3B1.3 be amended to state that it is applicable only where the commentary to a certain guideline specifies its applicability. This will not affect those few guidelines where the enhancement is already accounted for as a specific offense characteristic.[117] The amendment, however, would eliminate any confusion about whether the enhancement is already built into the base offense level for the offense.[118] Where the enhancement is not explicitly provided for, the courts should assume it does not apply.

The commentary to section 3B1.3 should next be amended to account for the new limitation. The bank teller example would no longer be necessary because the commentaries to the other guideline provisions will provide particularized examples of when the enhancement should be applied. The commentary should be amended to make explicit that the enhancement does not apply to a defendant who attempts to facilitate the commission or concealment of the offense through his abuse of a position of trust.[119] Attempts are

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[116]See Guidelines Manual §§ 3B1.1-3B1.3, at 3.5-.7 ("role in the offense" enhancement provisions include those for an "aggravating role" or "mitigating role" in the offense).

[117]See id. §§ 2C1.2, 2H1.2-.3, at 2.35, 2.84-.85.

[118]Because the general enhancement will no longer apply, those portions of guidelines commentaries which currently state that section 3B1.3 does not apply would have to be deleted. See, e.g., id. § 2C1.3, at 2.36 (application note indicates that section 3B1.3 does not apply).

[119]This amendment would overrule Foreman, No. 89-50038, slip op. at 6210, in which the Ninth Circuit applied the enhancement where the defendant attempted to conceal her offense by flashing

already adequately accounted for in the base offense levels for the various crimes and in section 3C1.1, which provides for an upward adjustment where a defendant "willfully ...attempted to impede or obstruct the administration of justice."[120]

Once the Commission has amended section 3B1.3 and its commentary in this fashion, it should then address the specific areas where the enhancement should apply. The Commission has already indicated that certain crimes contain a built-in adjustment for abuse of a position of trust.[121] For these crimes, it would be inappropriate to indicate that the adjustment is applicable under any circumstances. The Commission need only concentrate its efforts on those crimes where the enhancement is not already built into the offense. While not an exclusive list, these crimes would appear to include the following: insider trading, embezzlement, criminal sexual abuse, kidnaping, abduction, theft, commercial bribery and kickbacks. For these crimes, the Commission should tailor commentary to describe the types of defendants and conduct that shall give rise to an enhancement under section 3B1.3.

In crafting such commentary, the focus should be on the nexus between the thing entrusted and the criminal offense for which the defendant has been convicted. For instance, a janitor who steals money or traveler's checks from the bank where he works should not

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an out-of-state police badge. As discussed above, the reasoning of that case is suspect, at best. See supra at 15-18.

[120]Guidelines Manual § 3C1.1, at 3.9.

[121]See, e.g., id. § 2C1.3, at 2.36.

receive the enhancement.[122] The bank has not entrusted money or checks to him.[123] Conversely, the babysitter who sexually abuses the child he is hired to watch should receive the enhancement.[124] The child has been entrusted to the babysitter by the parents.[125]

Phrases like "special trust," however, will not be useful in fashioning commentary. The Commission uses this term in the area of insider trading to distinguish between corporate insiders and tipees.[126] This distinction, however, does not rest on some easily intelligible difference between "special" and "ordinary" trust. The distinction is based on a judgment that a factual distinction between two types of defendants should have some relevance in

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[122]I refer here, of course, to United States v. Drabeck, No. 89-30237, slip op. 6083 (9th Cir. June 14, 1990), where the Ninth Circuit upheld application of the enhancement. See id. at 6088.

[123]This reasoning would also reverse the result in Foreman, where the Ninth Circuit upheld the enhancement for a Missouri police officer who attempted to conceal her offense of possessing narcotics by flashing her police badge. See Foreman, No. 89-50038, slip op. at 6196. Here there is little or no nexus between the criminal act (possession of narcotics) and the position of trust -- the job as a police officer. Similarly, in United States v. Parker, Nos. 89-1390, 89-1391, 89-1402, slip op. 3491 (2d Cir. May 7, 1990), the check cashing firm's delivery vehicle had not been entrusted to the defendant or his co-defendants in any way. See id. at 3494-96.

[124]This example is based on United States v. Zamarripa, No. 89-2145, slip op. at ___ (10th Cir. June 11, 1990).

[125]Similarly, the bank loan clerk in Ehrlich would receive the enhancement (unless embezzlement already contains a built-in adjustment) because she was entrusted with the very accounts from which she embezzled. See United States v. Ehrlich, 902 F.2d 327, 330-31 (5th Cir. 1990).

[126]See Guidelines Manual § 2F1.2, at 2.74.

of trust" enhancement. At the outset, however, the Commission should revise its approach to prevent overuse of an ambiguous and dubious sentencing tool.

APPENDIX

Selected Provisions of the Federal Sentencing Guidelines:

§3B1.3 Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed in addition to that provided for in §3B1.1, nor may it be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

Commentary

Application Notes:

1. The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller.

2. "Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.

Background: This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. Such persons generally are viewed as more culpable.

§3C1.1 Willfully Obstructing or Impeding Proceedings

If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

Commentary

This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in

respect to the instant offense.

Application Notes:

1. The following conduct, while not exclusive, may provide a basis for applying this adjustment:

(a) destroying or concealing material evidence, or attempting to do so;

(b) directing or procuring another person to destroy or conceal material evidence, or attempting to do so;

(c) testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding or any other judicial proceeding;

(d) threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly;

(e) furnishing material falsehoods to a

probation officer in the course of a presentence or other investigation for the court.

2. In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant.

3. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision.

4. Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury), §2J1.8 (Bribery of Witness), or §2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

MORALITY IN MEDIA, INC. 475 RIVERSIDE DRIVE, NEW YORK, NY 10115 (212) 870-3222

April 5, 1989

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

Attn.: Paul Martin

Re: Proposed Amendments 126-128, Pertaining To Obscenity

Dear Mr. Chairman:

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

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

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

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

Sincerely,

Robert Peters
Attorney

RP/mtb

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

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

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

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

Base Offense Level: 6

Specific Offense Characteristics:
(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material but in no event by less than 5 levels
(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

A. "Base Offense Level: 6"

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

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

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

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

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

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

B. "Specific Offense Characteristics

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

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

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

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

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

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

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

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

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

C. "Specific Offense Characteristics

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

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

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

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

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

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

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

The Paris Court continued:

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

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

> It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society.
>
> [E]ven assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the [government] may be protected by the prohibition placed on such materials. The [government] can reasonably draw the inference that over a long period of time the indiscriminant dissemination of materials, the essential nature of which is to degrade sex, will have an eroding effect on moral standards. (emphasis supplied)

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

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

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

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

(b) Specific Offense Characteristics

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

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

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

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

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

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

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

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

Dr. Cline continues:

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

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

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

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

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

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

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

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

B. "(b) Specific Offense Characteristics

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

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

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

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

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

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

128. Proposed Amendment: Adding An Additional Guideline, §2G3.3 [pertaining to Sections 1464 and 1468 of Title 18]

"§263.3 Broadcasting Obscene Material

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

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

Conclusion

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

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

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

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

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

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

ADL
Anti-Defamation League
of B'nai B'rith

April 6, 1990

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attention: Paul K. Martin, Communications Director

Re: Public Comment on Proposals Relating to Sentencing of Hate Crimes

Dear Mr. Wilkins:

As per my conversation with Benson B. Weintraub, this letter offers the Anti-Defamation League's comments to the proposed amendments to the United States Sentencing Commission sentencing guidelines which would enhance or adjust the sentences for various bias-motivated offenses. We appreciate the opportunity to share our thoughts on this subject with you.

Crimes motivated by bias have a devastating emotional impact on both the victim and the victim's community. They create an atmosphere of intimidation for others in the victim's community, causing them to feel isolated and unprotected by the law. By dealing effectively with this type of crime, government and law enforcement authorities can signal to both victims and perpetrators that hate crimes will be taken seriously. ADL therefore strongly supports the enhancement of criminal sanctions in this area.

The League's support for the enhancement of penalties for hate crimes at the federal level is a logical extension of our longstanding campaign against hate crimes in this country. As a human relations organization with a 77-year history of combatting bigotry and prejudice, ADL has focused its efforts on both anti-Semitism and hate crimes in general. ADL has been tracking anti-Semitic incidents nationwide annually since 1979. (A copy of the League's 1989 Audit, as well as our Reports on Hate Crimes Statutes, are enclosed with these comments.)

823 United Nations Plaza, New York, NY 10017 (212) 490-2525 Cable: ANTIDEFAME/Telex: 649278/FAX: (212) 867-0779

In the course of the past decade, the League has engaged in combatting hate crimes on several fronts. In 1981, ADL's National Legal Affairs Department drafted a model hate crimes statute for introduction in state legislatures. Most states now have statutes dealing with hate crimes; twenty-one of these states have legislation based on or similar to ADL's model. At the federal level, ADL made the recent passage of the Federal Hate Crime Statistics Act a top domestic priority.

Moreover, the League has traditionally worked closely with law enforcement officials and has now produced with the New Jersey Attorney General's Office a training film for police departments on how to deal with hate crimes. We have also produced model guidelines for law enforcement (copy enclosed) to aid police officers in the investigation and identification of hate crimes.

The results of ADL's 1989 Audit of Anti-Semitic Incidents strongly indicate a need for the upgrading in sentencing for hate crimes proposed in the sentencing guidelines. The Audit reported that anti-Semitic incidents in the United States in 1989 rose to their highest level in at least 11 years--totalling 1,432. This total comprised 845 incidents of anti-Jewish vandalism and desecrations and 587 episodes of harassments, assaults or threats against Jews or Jewish institutions. The vandalism figure includes arson, bombings, cemetery desecrations and swastika markings against Jewish institutions, Jewish-owned property and public property. As alarming as these statistics are, the incidence of hate crimes is still probably underreported.

The 845 incidents of vandalism reflect a 3% increase over the 1988 total of 823, which in turn was 18.5% higher than the 1987 total of 694. An unprecedented number of Jewish cemetery desecrations--21 in 14 states--was largely responsible for the overall figure. There were five bombings, including four in California alone, and eight arson attacks on synagogues.

The total of 587 incidents of harassments, assaults and threats was the second highest number ever recorded by ADL and included one murder. It was a 28% increase over the 1988 total of 458 and marked the fifth straight year in which there was a rise in this category.

A record 116 anti-Semitic incidents in 24 states were attributed to neo-Nazi "Skinheads," 180% more than in 1988 when there were 41 incidents in 15 states. These shaven-headed youths typically sport Nazi insignia and preach violence against Blacks, Hispanics, Jews, Asians and homosexuals. Their numbers have grown in recent years, as has their tendency towards increasingly violent crime. Of the 116 incidents, 22 involved vandalism against Jewish institutions; 18 were aimed at homes and other property owned by Jews; and at least 38 incidents of anti-Semitic graffiti and swastika markings bore "Skinhead" signatures on public property. Neo-Nazi Skinheads were also involved in 13 incidents in which hate messages and threats were made against Jewish institutions. Racist Skinheads have been implicated in harassment cases in which the victims were either Jews or those they thought to be Jews.

As mentioned earlier, ADL has pursued the policy of stepped-up criminal penalties for hate crimes at the state level by promoting the passage of hate crimes statutes based on our model statute. We believe that increased penalties make it more worthwhile for the public to report such offenses and for prosecutors to pursue convictions.

Enhanced penalties should be sufficiently severe to give the relevant criminal statutes their deterrent effect. Increasing the penalties for hate crimes sends the message to both the perpetrator and victim that society will not tolerate crimes motivate by bigotry and prejudice. We therefore respectfully urge the Commission to increase the level of societal accountability for hate crime offenders at the federal level.

Sincerely,

Jane Coleman

Jane Coleman
Assistant Director
Legal Affairs Department

JC:sjs

cc: Benson B. Weintraub