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The Supreme Court and Obscenity: An Exercise in Empirical Constitutional Policy-Making

STEPHEN DANIELS*

During this century, constitutional interpretation has been marked by a shift from a formal, deductive approach toward one more empirical and instrumental in character. The shift has been especially pronounced in the area of civil liberties. This essay analyzes that approach as reflected in the Supreme Court's attempt to devise a constitutional policy on obscenity. Five empirical propositions underlying that attempt are isolated and analyzed in terms of the empirical evidence presently available. The analysis finds little empirical substantiation for those propositions, casting doubt on the Court's policy and suggesting a skeptical view of empirical constitutional policy-making.

INTRODUCTION

Freedom of expression is the paramount liberty in a liberal policy. As such, any exceptions to it must be narrowly and clearly defined, and carefully justified. Obscenity is one of the exceptions—it is not and has not been considered constitutionally protected expression. Yet it remains to be precisely defined, and the reasons for its status as unprotected expression remain unclear. Questions of defining and justifying obscenity are basic to the following analysis and critique of the Supreme Court's approach to obscenity as a constitutional issue.

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The approach taken by the Supreme Court since 1957, when it first considered obscenity as a constitutional issue in *United States v. Roth*,¹ has been an empirical and utilitarian one. In this respect, obscenity has been treated like many other civil liberties questions.² This is a result of a shift in constitutional interpretation during this century from a formal, deductive approach toward an explicitly policy-oriented approach.³ Starting with sociological jurisprudence, the formal approach has been criticized as being a masquerade for judicial bias. The reliance upon empirical facts in an explicitly policy-oriented approach is the remedy to this problem.

To understand the implications of this shift it is important to evaluate the empirical approach⁴ in operation, especially examining the accuracy of the propositions, generalizations, and data concerning social behavior used to support a conclusion. Such an analysis is perhaps best done not by considering a single case, but rather a series of cases in a single substantive policy area. The approach becomes more clear and visible when viewed in such a context. The series of Supreme Court decisions involving obscenity offer an especially fruitful area for investigating the empirical-instrumental approach to policy-making—especially given the place of free expression in the liberal polity. This article seeks to show that the Supreme Court's approach to policy-making in this area has been less than successful. Though only a case study of one area, the article raises serious questions about the empirical approach to policy-making in general.⁵

BACKGROUND

In the broadest sense, the Supreme Court's approach has centered around the effects of materials depicting sexual activities. Both the definition of obscenity and the justification for its consti-

1. 354 U.S. 476 (1957).

2. See, e.g., *Ballew v. Georgia*, 435 U.S. 223 (1978) (juries); *Gregg v. Georgia*, 428 U.S. 153 (1976) (death penalty); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (equality).

3. R. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 192-300 (1976).

4. Robert Summers calls this approach "pragmatic instrumentalism" and claims it to be the dominant approach. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978).

5. Policy-making in this context is defined "as (1) a problem-solving endeavor or enterprise in which conscious articulation and choice of alternatives is directed to the removal or change of conditions which combine to form an identifiable problem, or (2) a way of living with a problem with no effort at immediate or drastic solution—either due to lack of resources or low priority—but constant vigil to maintain the status quo." Wells & Grossman, *The Concept of Judicial Policy-Making: A Critique*, 15 J. PUB. L. 287, 293 (1967).

tutional status are built upon a harm principle—that obscenity has deleterious effects on people and society. According to E.F. Kenyon: “If it [the corrupting hypotheses] means anything at all it is to cause a person to act in a manner contrary to his own moral principles. The corrupting may be of a non-sexual kind and affect not only the individual but society at large.”⁶ We find the harm principle not only in *Roth* and all subsequent decisions, but also in the earlier precedents which set the direction of legal debate over obscenity.

The most important pre-*Roth* precedent was the nineteenth century British case—*Regina v. Hicklin*.⁷ Until *Roth*, obscenity legislation and judicial decisions were usually based upon the so-called *Hicklin* test, which stressed the presumed effects of sexually oriented materials. In *Hicklin*, Lord Cockburn summarized the test as follows: “I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”⁸ Under the *Hicklin* test isolated passages of a work were judged on their harmful effects upon susceptible people, such as children, not the average person. This was a rather strict test; and “in general censorship under the *Hicklin* rule was severe.”⁹

There were several challenges in the American courts to the *Hicklin* test in the first half of this century, which led slowly to its explicit rejection in *Roth*. However, these challenges, including *Roth*, continued to approach the legal question of obscenity in an empirical fashion, trying to form policy around the effects of certain materials on individuals and the community.

The first challenge was Judge Learned Hand’s opinion in *United States v. Kennerley*.¹⁰ Judge Hand criticized the British precedent for limiting the community as a whole to the legal use of material which would not harm susceptible persons. According to Harry M. Clor, “[t]he immediate practical import of [*Kennerley*] lies in its condemnation of a system which, in order to protect the young and the infirm, denies to the mature community its rightful

6. Kenyon, *Pornography, the Law and Mental Health*, 126 BRIT. J. PSYCH. 229, 230 (1975).

7. L.R. 3 Q.B. 360 (1868).

8. *Id.* at 371.

9. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 470 (1970).

10. 209 F. 119 (S.D.N.Y. 1913).

share of serious literature and new insights.”¹¹ Equally important in Judge Hand’s opinion, Clor notes, was its “philosophy.”¹² Judge Hand said: “I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time.”¹³ Here we find the beginning of the “contemporary community standards” test which became a crucial part of the *Roth* decision. Judge Hand’s idea of judging obscenity, at least in part, on the basis of *present* community standards is quite consistent with the tenets of an empirical approach. Relativistic, skeptical, and implying that there is no single standard of judgment about obscenity, Judge Hand’s ideas continue to influence present policy decisions on obscenity.

The second decision was Judge Woolsey’s in *United States v. One Book Entitled “Ulysses”*.¹⁴ In deciding that James Joyce’s *Ulysses* was not obscene, Woolsey explicitly rejected the *Hicklin* test. Rather than basing his decision on the alleged obscene nature of isolated passages of the book, Woolsey said that the work should be judged in its entirety. It should be judged not by its alleged effects on the most susceptible people, but on the basis of its effects upon the average person. Finally, according to Woolsey the test was not whether the work tended to deprave morals, an idea of dangerously broad sweep, but whether the work tended to stir sexual impulses or lead to sexually impure thoughts. While this is still a broad test, by comparison to *Hicklin* it signalled a significant loosening of standards. And it is clearly an empirical approach, one still concerned with effects.¹⁵

When the Supreme Court finally faced the constitutional issue of obscenity in 1957, it rejected any abstract definition of obscenity as well as the *Hicklin* test in upholding both a federal and a state obscenity law. Yet, in Justice Brennan’s *Roth* opinion the justification for obscenity’s constitutional status as unprotected expression was empirical as was the test for judging something’s obscenity. While rejecting the substance of the *Hicklin* test, the Court in *Roth* did not apparently reject the empirical, utilitarian approach found in earlier decisions which was based upon the alleged harmful effect of obscenity. Much like Judge Learned

11. H. CLOR, *OBSCENITY AND PUBLIC MORALITY* 20 (1969).

12. *Id.*

13. 209 F. at 120.

14. 5 F. Supp. 182 (S.D.N.Y. 1933).

15. The *Hicklin* test lasted well into this century in the United States notwithstanding such criticisms. As late as 1951, we find it alive and well in *United States v. Two Obscene Books*, 99 F. Supp. 760 (1951), where the United States District Court for the District of Northern California, per Judge Goodman, held Henry Miller’s *Tropic of Cancer* and *Tropic of Capricorn* obscene.

Hand's approach, we find in *Roth* and its progeny an approach which is skeptical of abstract a priori answers, which seeks to adjust the substance of the law to the present nature of society and change law as society and its members change, and which seeks to anchor a major portion of the specific decision as firmly as possible in social reality and not in some "brooding omnipresence in the sky."

Essentially, Justice Brennan's justification for placing obscenity beyond the pale of the Constitution was based upon the concept of "redeeming social importance." Materials having any redeeming social importance are, he said, protected by the first amendment. "But implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance."¹⁶ Beyond the mention that materials with redeeming social importance help bring about political and social changes desired by the people, Justice Brennan said nothing about the meaning of the concept nor why obscenity is without it and hence unprotected. However, Justice Brennan implied that materials without redeeming social importance were those which must give way, legally, to more important interests.¹⁷ This suggests a utilitarian justification: that other interests (the protection of society and the individual) outweigh the protection of pornographic materials and that such materials are without redeeming social importance because of adverse effect.

Justice Brennan's explicit test for obscenity was an attempt to revise the "susceptible person" standard of *Hicklin*. (In defining obscenity Justice Brennan again relied partially upon the effects of such materials). Specifically, the test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."¹⁸ This test illustrates the skepticism of a priori standards and the relativistic character of the Court's empirical approach to obscenity policy.

EMPIRICAL PROPOSITIONS UNDERLYING OBSCENITY POLICY

In viewing the Court's approach to the constitutional issue of obscenity as an exercise in empirical policy-making, five empirical

16. 354 U.S. at 484.

17. See T. EMERSON, *supra* note 9, at 489.

18. 354 U.S. at 489.

propositions (with variations within some) can be isolated which underlie the Court's decisions. They are:

- (1) generally speaking, obscenity is harmful to society in the long run;
- (2) more specifically, it will appeal to the prurient interest of the average person or to the prurient appeal of some "deviant" group;
- (3) there is a single, identifiable standard on (a) the national level, or (b) the state/local level for what constitutes the obscene;
- (4) most specifically, it will lead directly to overt antisocial or illegal behavior—either of a sexual nature or of a general criminal nature;
- (5) it will adversely affect the development of the young.

On the most general level, all decisions which have upheld obscenity statutes include some element of a harm principle—that obscenity regulation is a justifiable exception to the first amendment because of obscenity's long-run harmful effects on society. Second, and more specifically, the decisions claim that pornography appeals to the prurient interest in the average person—that it will cause lustful and lascivious thoughts and hence desires (a particular physiological reaction). In Justice Brennan's opinion in *Mishkin v. New York*¹⁹ there is a variation of this proposition. There Justice Brennan suggested that what appeals to the prurient interest varies with audience, so that what is prurient to the average person differs from what is prurient to the average member of a "deviant" sexual group. As a result, the substance of obscenity varies accordingly.

The third proposition is on a somewhat different order and is concerned with contemporary community standards. There are two versions of this proposition. First, there is a single, identifiable national standard on what is obscene. This is from Justice Brennan's opinion in *Jacobellis v. Ohio*²⁰ and in part from Justice Harlan's opinion in *Manual Enterprises v. Day*.²¹ The second version, originally a dissent in *Jacobellis*, stems from Chief Justice Warren's notion that the relevant standard should be local. This presumes on the state or local level a single identifiable standard of what is obscene. This became a majority view with Chief Justice Burger's opinion for the Court in *Miller v. California*.²²

The fourth proposition is specific. It holds that there is a direct

19. 383 U.S. 502 (1966).

20. 378 U.S. 184 (1964) (plurality opinion).

21. 370 U.S. 478 (1962) (plurality opinion).

22. 413 U.S. 15 (1973).

cause-effect relationship between obscenity and antisocial (illegal) conduct. Such conduct may be sexual or criminal behavior in general. The strongest support of the fourth proposition was espoused by Justice Clark in his dissenting opinion in *A Book Named John Cleland's Memoirs of a Woman of Pleasure (Fanny Hill) v. Attorney General of Massachusetts*,²³ although the proposition appears to underlie—implicitly if not explicitly—all decisions upholding regulation. Justice Brennan's dissent in *Paris Adult Theatre v. Slaton*²⁴ proposes a contrary proposition—that explicitly sexual materials at times serve the constructive function of increasing and facilitating communication about sexual matters.

The final proposition claims that obscenity has adverse effects on the development of the young. These adverse effects may be manifested in their sexual development or as juvenile delinquency. The final proposition can be traced to Justice Brennan's opinion in *Ginsberg v. New York*.²⁵

THE EMPIRICAL BASIS FOR REGULATION

Considering the significance of first amendment liberties in the American liberal polity and the empirical-instrumental approach to obscenity taken by the Court, it becomes important to view the rationale for an empirical basis for regulation. The Court's policies have been based upon the five propositions outlined above, but the Court has not relied extensively upon empirical data. The task of measuring the Court's decisions against the available data has been left to commentators, and a number of empirical analyses have been done.²⁶ However, none has done so from the perspective of empirical constitutional policy-making and the underlying propositions outlined above. Each of the five propositions underlying obscenity policy will be analyzed in terms of the best evidence presently available.

23. 383 U.S. 413 (1966) (Clark, J., dissenting).

24. 413 U.S. 49 (1973) (Brennan, J., dissenting).

25. 390 U.S. 629 (1968).

26. Lockhard & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954); Lockhard & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 1009 (1962); Cairns, *Psychological Assumptions in Sex Censorship: An Evaluative Review of Recent Research* (1961-68), 1 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 5 (1971); see also Clor, *Science, Eros and the Law: A Critique of the Obscenity Commission Report*, 10 DUQ. L. REV. 63 (1971).

Proposition One: The General Harm Principle

The general harm principle holds that pornography will have an adverse effect upon the individual and community in the long run. In comparison with the other propositions, it is not as specific in what it includes. It seems to be concerned, primarily, with obscenity's effects on the moral life and attitudes of individuals and communities. If explicit sexual materials are not strictly regulated or censored, people's attitudes about sex and sexual behavior will change, and the moral fabric of the community will inevitably decay. It should be noted at the outset that the Obscenity Commission (the major sponsor of most of the available studies on pornography) admitted that it simply did not have the time under its statutory guidelines to even attempt to study the possible long-term effects of pornography.²⁷ No other study unconnected with the Commission has tried to directly assess the possible long-term effects either.

Long-term effects of pornography are difficult to study empirically. The only empirically based speculation that the long run effect will be adverse is by Harry M. Clor, a frequent commentator on the obscenity issue. Offering little direct evidence (since little exists), Clor offers logical inferences from studies on the effects of reading and mass media. He cites empirical studies on both, suggesting that they can change attitudes over the long term.²⁸ As regards the influence of obscenity on mind and character, Clor notes the paucity of empirical studies and cites three social scientists who have studied the "evil social consequences" of obscenity: sociologist Pitrim Sorokin, anthropologist Margaret Mead, and social philosopher-psychoanalyst Ernest van den Haag. Clor especially notes Sorokin's cross-cultural study, *The American Sexual Revolution*, in which Sorokin claims:

[T]he incidence of immoral or antisocial behavior is demonstrably greater in cultures or societies where the erotic sub-arts flourish than in those where these forms are kept under strict control. And he claims to be able to show conclusively that when a society moves from restraint toward permissiveness in this area a steady increase in such conduct tends to follow. (The "fall of Rome" argument).²⁹

While admitting that Mead and van den Haag do not go quite this far, Clor thought that their analyses were not inconsistent with Sorokin's, a view which Clor apparently accepts.³⁰

Given the paucity of empirical studies, Clor suggests that the

27. The State of Georgia's brief in *Paris Adult Theatre* took note of this. Brief for Respondent at 45, *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973).

28. H. CLOR, *supra* note 11.

29. *Id.* at 145-46.

30. *Id.* at 146.

views of Sorokin, Mead, and van den Haag should be regarded as the "common sense of the matter"³¹ or experience informed by reflection. Such common sense tells Clor that obscenity will have a serious effect on morals and ethical standards.

The free circulation of obscenity can, in time, lead many to the conclusion that there is nothing wrong with the values implicit in it—since their open promulgation is tolerated by the public. They will come to the conclusion that public standards have changed—or that there are no public standards.³²

He continues:

But obscenity promotes the grosser passions; its corroding effect is upon the higher or more refined feelings—those upon which ethical and aesthetic discrimination depend. Men who are long accustomed to the experiences of the obscene may not simply *feel* the same way about ethical matters. This is what is meant by 'an erosion of the moral fabric.'³³

Although there is virtually no evidence on long-term effects, there have been a number of studies dealing with the possible short-term effects of obscenity on attitudes and sexual behavior which may shed some light on the harm principle. Generally, studies have found no harmful effects. For instance, two studies of college student views on pornography done for the Obscenity Commission found, among other things, that students reported exposure to pornography during childhood or adolescence but reported few or no adverse effects.³⁴

The Commission's Technical Report also includes a number of experimental studies relevant to the general harm principle. James Howard, Clifford Reifler, and Myron Liptzin designed and executed an experiment "to evaluate the hypothesis that repeated

31. *Id.* at 166-67.

32. *Id.* at 170.

33. *Id.* at 171.

34. The first study, White & Barnett, *College Students' Attitudes on Pornography*, 1 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 181 (1971), involved the interviewing of 300 college students during the summer of 1969. The students were enrolled in summer school at one of the following: Boston University, Brooklyn College, Brown University, Harvard University, or New York University. The sample consisted of students who regularly attended one of over 50 schools throughout the country. The second, Roach & Kreisberg, *Westchester College Students' Views on Pornography*, 1 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 185 (1971), was based upon self-administered questionnaires at eight colleges in Westchester County, New York. The sample consisted of 625 students from the following schools: Sarah Lawrence College, SUNY at Purchase, Westchester Community College, Iona College, King's College, Briarcliffe College, Pace College, and Good Counsel College. The questionnaire used was adapted from White's interview schedule from the White and Barnett study.

exposure to pornography causes decreased interest in it, less response to it, and no lasting effect from it.”³⁵ Their results confirmed the hypothesis, leading them to the conclusion “that exposure to pornography was a relatively innocuous stimulus without lasting or detrimental effect on the individual or his behavior.”³⁶

The Howard, Reifler, and Liptzin study, using experimental and control subjects, tested the effects of viewing three “stag films” as measured by physiological responses, questionnaire responses, subjective reports, and a psychiatric interview. After the screening process experimental subjects were shown the first of three “stag films.” During all three of the movies a variety of physiological measures were taken to measure arousal. Each subject viewed the films alone. Then began a series of fifteen daily ninety-minute sessions, for four weeks, in which each individual was placed in a separate room with certain materials to read or look at. The first week served as a base-line or control with no pornography available during these sessions. During the next three weeks the subjects had a variety of materials available—including pornographic and non-pornographic materials. For the last two days all non-pornographic material was removed. During the daily sessions each subject recorded his activity and was tested for physiological responses. The second film was shown during the daily sessions after the third week of pornography. After the viewing the subjects filled out additional questionnaires and went through another psychiatric interview. Eight weeks later the subjects returned for the final movie, before which they again filled out questionnaires and after which they had a final psychiatric interview. The control subjects saw only the first two films at about the same time as the experimental subjects. They did not have the intervening daily exposure to pornography.³⁷

The results of the physiological measures support the hypothesis that repeated exposure to pornography leads to satiation—decreased responsiveness. Although experimental and control subjects exhibited similar responses to the first film, there were marked differences in response to the second film on the part of the experimental subjects indicating lessened responsiveness. On viewing the final film shown eight weeks later the experimental subjects showed that the decreased responsiveness had subsided and their physiological responses were at an intermediate

35. Howard, Reifler & Liptzin, *Effects of Exposure to Pornography*, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 97 (1971).

36. *Id.*

37. *Id.* at 102-03.

level between their responses to the first two films.³⁸

Another measure of satiation was the degree of interest in or attraction to the stimuli. Howard, et al. noted that at the beginning of the individual daily sessions involving exposure to erotica, all experimental subjects were interested in seeing the material offered. After the third movie, the subjects reported being bored by the thought of pornography. Daily activity reports made during those individual sessions bear this out. The amount of time spent on pornography declined as time went on. It was only when all nonpornographic materials were removed and subjects *told* to occupy their time with pornography that the amount of time spent on it approached initial levels. Howard, et al. summarized these two findings thusly: "We feel, therefore, the subjects demonstrated satiation to pornography in both senses of the word in that they manifested both diminished response and diminished interest."³⁹

As a result of the series of psychological tests, Howard, et al. concluded that there was no evidence "that this massive exposure to erotically stimulating material had any major lasting effect upon their attitudes or behavior."⁴⁰ The only enduring changes found were an increased attitude of repression toward certain kinds of sexual activity and a marked change in attitude toward pornography. They found, in this regard:

The change in attitude toward pornography and toward the legal control of such material was the most striking result of this project. The subject's initial attitudes were varied, ranging from a desire to maintain current controls to feeling that all controls for adults should be abolished. After the experiment all subjects except the two most conservative moved toward a more permissive attitude. The agreement was unanimous (after the experiment) that pornography would not harm an adult or stable adolescent, and subjects' opinions moved significantly in the direction of feeling that those who were most interested in controlling pornography must have sexual problems of their own.⁴¹

The data from this study were also reported in two subsequent articles, both, of course, reaching the same conclusion.⁴²

38. *Id.* at 125.

39. *Id.*

40. *Id.*

41. *Id.* at 126.

42. See Reifler, Howard, Lipton, Liptzin & Widmann, *Pornography: An Experimental Study of Effects*, 128 AM. J. PSYCH. 67 (1971); Howard, Liptzin & Reifler, *Is Pornography a Problem?*, 29 J. SOC. ISSUES 133 (1973). In response to the question posed by the second article, Howard, et al. conclude: "It would seem that our title question, 'is pornography a problem?' should be answered in the negative. Cer-

A "pilot experiment" by Berl Kutschinsky done in 1971 in Denmark resulted in findings consistent with those of Howard, et al. The subjects were seventy-two Danish university students of both sexes, most of whom were married. There was no attempt to use a control group or stratify the sample in any way. The experiment used "before and after" questionnaires—the subjects viewing hard-core pornographic movies and pictorial materials. Some of the subjects were retested four days after and another group ten days after viewing.⁴³

Kutschinsky tested three hypotheses that are relevant: (a) that exposure to hard-core pornography would create strong emotional reactions in the subjects such as an irresistible urge for sex, horror, fear, or shame; (b) that viewing such material would create an increased interest in "deviant" sexual practices; and (c) that viewing hard-core pornography would create a craving for more of the same. Each of these three hypotheses was based upon what Kutschinsky refers to as the traditional view on pornography.⁴⁴

Kutschinsky's findings lead to the rejection of each of the three hypotheses. First, strong emotional reactions were rare; the most frequent reactions were vague feelings of mirth and boredom. Second, there was a decrease in interest in "deviant" sexual practices. Finally, the general reaction was "over-satiation," with only a few people left with the desire for more hard-core pornography. Even after the post-experiment retests only one person said that his interest in pornography had increased.⁴⁵

A twelve-week study by Jay Mann, Jack Sidman, and Sheldon Starr also came to conclusions consistent with those of Howard, et al. Mann, et al. studied eighty-five married couples to determine the effects upon attitudes and behavior of viewing erotic films as compared with nonerotic films or no films at all.⁴⁶ The experiment consisted of three groups, one viewing erotic films, another nonerotic films, and the third—a control—viewing no films. The two groups viewing films submitted detailed reports of sexual and marital behaviors daily for four weeks during film viewing and for four weeks afterward. Subjects in these two groups

tainly the results presented here suggest that pornography is an innocuous stimulus and that exposure to it on an ad lib basis will lead to decreased interest in it." *Id.* at 145.

43. Kutschinsky, *The Effect of Pornography: A Pilot Experiment on Perception, Behavior, and Attitudes*, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 133, 157 (1971).

44. *Id.* at 157-58.

45. *Id.* at 158.

46. Mann, Sidman & Starr, *Effects of Erotic Films on Sexual Behavior of Married Couples*, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 170 (1971).

viewed at least one film per week. Members of the erotic film group viewed as many as seven films depicting a variety of standard and non-standard sexual practices. The other group viewed four nonerotic films. All subjects, including the control group, were then given post-experiment tests (all subjects were given a pre-test before the experiment was conducted).⁴⁷

Mann, et al. briefly summarized their findings thusly:

Results indicated that viewing erotic films, as compared with viewing non-erotic films or no films, produced no significant differential changes in subjects' attitudes except that female subjects viewing non-erotic films became significantly less permissive toward legalization of pornography relative to female subjects viewing erotic films. No sustained changes in behavior were found for subjects who viewed erotic films relative to other subjects; however, they exhibited significantly greater activity on film-viewing nights than did subjects who viewed non-erotic films. Some subjects in all conditions reported that participation in the study benefitted their marital and sexual relationship.⁴⁸

The results suggested that no lasting changes will result in "well-socialized" adults from viewing the films. (Mann, et al. specifically note that this study is not applicable to children). The results did not demonstrate specifically that viewing such films was directly beneficial.⁴⁹

Another study, also a part of the Technical Report, by Keith Davis and George Braucht is also relevant.⁵⁰ Theirs was a retrospective study of young males between the ages of eighteen and thirty with a wide range of character types and records of deviance. They investigated relationships between exposure to pornography and scores on character tests and sexual deviancy. Their two alternative hypotheses with regard to character are, basically: (a) that exposure to pornography has a detrimental effect on character; or (b) that exposure reflects the person's already formed

47. *Id.* at 170-71.

48. *Id.* at 171.

49. *Id.* at 252. Two studies on a somewhat different plane, Mosher, *Psychological Reactions to Pornographic Films*, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 313 (1971) and Mosher & Katz, *Pornography Films, Male Verbal Aggression Against Women, and Guilt*, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 357 (1971) found no direct relationship between such films and sexually calloused attitudes toward women—such attitudes actually decreasing—or such films leading to sexual violence towards women.

50. Davis & Braucht, *Exposure to Pornography, Character and Sexual Deviance*, 7 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 173 (1971).

character.⁵¹

Davis and Braucht found a negative relationship between exposure and character, but a very modest one. However, other factors, especially deviant families, deviant neighbor groups, and deviant peer groups have "a very marked detrimental impact on character."⁵² They found that an early age of exposure to pornography is strongly related to poor family and peer circumstances, but they note: "It may well be that an early age of exposure had no impact on character over and beyond that of a generally deviant background."⁵³

When testing for the possibility of detrimental effect as a function of age of exposure, Davis and Braucht found that the quality of family life is the best predictor for those first exposed at thirteen or under and for those between fourteen and sixteen. For those whose first exposure came at seventeen or over, peer and neighborhood conditions are the best predictors of detrimental effect, and exposure to pornography is negatively related to character. "That is, those who see a great deal (but primarily after age 17) have lower character scores than those who do not expose themselves to pornography."⁵⁴ Davis and Braucht concluded that there is little or no evidence for a detrimental effect of pornography on character. Their second hypothesis is confirmed: "In the late-age-of-exposure subgroup, it looks as though those with low character scores seek out pornography and that this pattern is strongly associated ($r=.585$) with having highly deviant friends and neighbors."⁵⁵

In a study not a part of the Technical Report, Douglas Wallace and Gerald Wehmer investigated the relationship between erotic materials and attitude/value change.⁵⁶ They used a simple pre-test/post-test control group design. Their hypothesis was that no change would result from a three-hour exposure to erotic materials (some of which the researchers considered to be "legally" obscene). The basis for this is that the stability of a person's attitudes and values would prevail against such an exposure. They claimed that just the opposite hypothesis underlies current

51. *Id.* at 200.

52. *Id.* at 201.

53. *Id.*

54. *Id.* at 202.

55. *Id.* As far as sexual deviance is concerned, Davis and Braucht found pornography to be a part "of a strongly deviant life style . . ." *Id.* at 211. Data from this study were also reported in Davis & Braucht, *Exposure to Pornography, Character, and Sexual Deviance: A Retrospective Survey*, 29 J. SOC. ISSUES 183 (1973).

56. Wallace & Wehmer, *Pornography and Attitude Change*, 7 J. SEX RESEARCH 116 (1971).

obscenity laws.⁵⁷

Wallace's and Wehmer's experimental group consisted of forty male undergraduates between eighteen and forty-seven years of age. The experiment was conducted during the summer of 1968. The experiment yielded no significant differences between the experimental group—which had been exposed to the erotic materials—and the control group which had not. A short exposure to such material apparently does not lead to attitude change. As a result, they stated that “the results are in contradiction to the hypothesis, derived from the obscenity statutes, that exposure to such materials would cause an increase in anti-social ideation and would promote a disruption of a person's morals.”⁵⁸

It must be noted in conclusion that each of these studies deals with potential immediate or short-term adverse effects upon attitudes and values, something critics are quick to point out. James Q. Wilson observed: “One cannot simulate in the laboratory the existence or non-existence of a life-long exposure to or preoccupation with obscenity, any more than one can simulate a life-long exposure to racist or radical opinions.”⁵⁹ In fact, Wilson felt that social science probably cannot answer this sort of question: “The irony is that social science may be weakest in detecting the broadest and most fundamental changes in social values, precisely because they *are* broad and fundamental.”⁶⁰

Even though the empirical evidence provides no direct clues as to the long-term effects of pornography, it is clear that there is little proof of any adverse short-term effects. Based upon available data, it is at least reasonable to doubt the possibility of long-term effects of an adverse nature on the “moral character” of society.

Proposition Two: Prurient Appeal

It would seem impossible to empirically test a concept as subjective as “pruriency.” Nonetheless, there have been a number of experimental studies of sexual arousal, which appear to be the best possible way to operationalize “prurient appeal.” These studies show that empirically prurient appeal (even when nar-

57. *Id.* at 118.

58. *Id.* at 124.

59. Wilson, *Violence, Pornography, and Social Science*, 22 PUB. INTEREST 45, 56 (1971).

60. *Id.* at 58.

rowed down to include specific depictions, *i.e.*, full frontal nudity or heterosexual intercourse) as a test is far too simplistic, if not senseless. It is an obvious truism that many people will find explicitly sexual materials arousing, but many people also find less explicit sexual materials arousing. For some people hard-core pornography is indeed very arousing; for others it does little or is actually repulsive. The underlying hypothesis of prurient appeal is that there will be a uniform reaction by people (sexual arousal) to a particular kind of material. As a result, that material is adjudged legally obscene and hence beyond the Constitution's protection. Empirical data suggest the need for reassessment.

While much empirical research and debate about pornography is concerned with the effects of pornography, pornography is by no means the only factor to be considered in defining the obscene. Another set of questions, not completely unconnected with the matter of effects, is important. These questions include not only the prurient appeal proposition but also the community standard proposition. There is some empirical research quite relevant to both. Again, most of it originates with the Obscenity Commission's Technical Report.

Prior to the late 1960's and early 1970's there was little empirical study of sexual arousal pertinent to the legal issue of obscenity. Most early research has been dismissed as practically useless because of serious methodological problems (such as experimenter bias).⁶¹ Perhaps the most notable exceptions are the Kinsey studies (1948, 1953).⁶² Two important findings emerged from the Kinsey studies which are relevant. First, both males and females report experiencing sexual arousal from written or pictorial materials portraying sexual behavior or nudity. Second, there are differences between males and females in reports of those materials each sees as being sexually arousing. Males tend toward more direct and unambiguous cues; females, on the other hand, tend toward indirect "romantic psychosexual" cues.⁶³ A 1962 review of research related to obscenity summarized such early subjective or self-reports of arousal by noting that "each of the studies reflects considerable differences among individuals in response to sexually relevant material."⁶⁴ The review also points out a number of physiological studies of arousal whose findings are highly consistent with the results of subjective report studies, es-

61. Cairns, Paul & Wisner, *Sex Censorship: The Assumptions of Anti-obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1016-18 (1962).

62. *Id.* at 1019.

63. *Id.* at 1020.

64. *Id.* at 1021.

pecially Kinsey.⁶⁵ Other studies suggest that situational factors may affect arousal.⁶⁶

The one certain thing which emerges from the few early studies is that the idea of prurient appeal as a way of defining obscenity or justifying its status is too simplistic. The concept of prurient appeal assumes simply that sexually explicit material will have a particular effect on people in a direct "stimulus-response" fashion. In the most general sense, early empirical evidence suggests that such material can arouse sexual thoughts and desires, but not in a simple and direct "if *A* then *B*" fashion. There are a number of important intervening variables: sex, age, physiological and psychological makeup, environment, as well as the specific content of the material. The idea of prurient appeal does not take any of these possible intervening variables into account.⁶⁷ More recent and more directly pertinent studies clearly demonstrate the importance of such intervening variables.

Along with others, Byrne and Lambreth's experiment shows the complexities of trying to define the obscene on the basis of arousal.⁶⁸ Theirs was a pre-test/post-test experiment involving forty-two married couples (all volunteers) at Purdue University. They tested no hypotheses. Rather, they sought to explore the effects of a variety of erotic stimuli in three different stimulus conditions (a photographic stimuli condition, literary stimuli condition, and imaginary stimuli conditions where subjects were asked to imagine what a series of themes or activities would look like in movies, books, etc.). The forty-two couples were randomly assigned to one of the three stimuli conditions. Specifically, Byrne and Lambreth were interested in the effects on sexual arousal, evaluative responses (whether the subjects felt the material to be pornographic), restrictiveness (whether the subjects felt

65. *Id.* at 1031.

66. *Id.* at 1027.

67. According to Jay Mann, sexual arousal "is a complex physiological and psychological process, comprising many response components and influenced by numerous individual, stimulus, and environmental variables. Responses may vary in strength and affective toning within different situational contexts; stimuli may vary in erotic value within different situational contexts; stimuli may vary in erotic value within different social contexts." Mann, *Experimental Induction of Human Sexual Arousal*, 1 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 23, 53 (1971).

68. Byrne & Lambreth, *The Effect of Erotic Stimuli on Sex Arousal, Evaluative Responses, and Subsequent Behavior*, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 41 (1971).

access to such materials should be restricted), and self-reports of subsequent behavior. In addition, they were interested in the intervening effects of two personality variables (authoritarianism and repression-sensitization) and some background variables, including religion, political party preference, frequency of church attendance, and size of the community in which the subjects were raised.⁶⁹

Byrne and Lambreth found overall male/female emotional response to the three stimuli conditions to be relatively consistent. However, there were two general clusters of responses—positive (sexually aroused, entertained, curious, and excited) and negative (disgusted, angry, nauseated, bored, afraid, and depressed).⁷⁰ They found personality variables and responses to be related. For example, authoritarianism was associated with disgust. Religious preference and frequency of church attendance were also related to response, especially disgust. Demographic variables—religion, frequency of church attendance, and size of community in which the subject was raised—were also related to differential arousal by specific themes depicted in the nineteen stimuli.⁷¹ While they found no sex differences in overall sexual arousal, they found differential arousal levels to specific themes. The imaginary stimuli were the most arousing, the literary stimuli condition the least.

Byrne and Lambreth found in regard to judgments on pornographic content that, for both sexes, authoritarianism related to the number of themes judged pornographic. The largest total pornography score (on a scale of zero to nineteen, based on how many themes were judged pornographic) was that of weekly church attenders and/or Catholics.⁷² Certain negative feeling responses were also related positively to the number of themes judged pornographic for both sexes. Overall, the “most pornographic themes are seen as homosexual anal intercourse, homosexual fellatio, group sex, male torturing female, and homosexual

69. In each of the three stimuli conditions the subjects were exposed to 19 different stimuli ranging from a clothed female to sado-masochism, and included homosexual as well as heterosexual activity. The subjects were exposed to the 19 stimuli twice. After the first they rated the degree of arousal of each on a 0 to 5 scale. After the second viewing they were asked to judge whether any were pornographic. The subjects were given a dictionary definition of pornography. They were further asked what the authorities should do about such materials, which they would buy, display, and which were the most surprising. The subjects were given a post-test questionnaire on subsequent sexual behavior to be returned one week after the experiment. Prior to the experiment all subjects were given a series of personality and feelings tests. The feelings test was repeated after the second exposure to the 19 stimuli.

70. Byrne & Lambreth, *supra* note 68, at 51.

71. *Id.*

72. *Id.* at 54.

cunnilingus. The least pornographic themes were a clothed female, a male in undershorts, a nude female, a nude male, and semiclothed petting.⁷³ The more "deviant" the theme the more pornographic it is likely to be judged.⁷⁴

In summary, Byrne and Lambreth found strong emotional reactions to sexual stimuli and that for some the responses were positive and for others negative. They found among those responses sexual arousal, which varied according to personality and demographic variables but not by sex. As authoritarianism increased in the experimental group, so did the number of stimuli perceived as pornographic: "It may be inferred that sexual stimuli are most likely to be judged as pornographic by those individuals whose parents were punitive and restrictive and who themselves tend to be racially prejudiced, hostile, politically and economically conservative, conforming, and rigid."⁷⁵ Those reporting the most negative feelings perceived the greatest amount of pornography. Most importantly, Byrne and Lambreth found that arousal and judgment of pornography are independent, that both may vary according to a person's background and personality and that reactions to pornography are partially a function of familiarity.⁷⁶ In other words, different depictions of sexual themes evoke different responses in different people. There is no one uniform reaction to or perception of such materials.

Another, less comprehensive, experiment by Davis and Braucht reached conclusions consistent with those of Byrne and Lambreth.⁷⁷ Davis and Braucht studied the effects of viewing three films of erotically realistic heterosexual behavior. They were interested in: (1) self-reports of sexual arousal; (2) physiological

73. *Id.* at 55.

74. Interestingly, Byrne and Lambreth found little or no significant relationships between sexual arousal qualities of the themes and their pornographic judgments. "All possible combinations of arousingness and pornography occur." *Id.* at 56. They found no changes in sexual behavior reported in the post-test questionnaire responses. *Id.* at 58-59.

75. *Id.* at 63.

76. According to Byrne and Lambreth, "the negative affective responses are the basic determinant of judgments about pornography. It should be noted also that such judgments are independent of sexual arousal. Pornography is not perceived as that which is sexually arousing but as that which 'makes me feel bad.'" *Id.*

77. Davis & Braucht, *Reactions to Viewing Films of Erotically Realistic Heterosexual Behavior*, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 68 (1971).

arousal; (3) changes in sexual behavior; (4) changes in thoughts, fantasies, dreams, or discussions of sex; (5) changes in emotional tension and sense of well-being; (6) changes in judgments about the availability of such material; and (7) changes in beliefs about the impact of pornography on oneself. In general, they hypothesized that those with a greater amount of prior exposure to pornography and experience in sexual deviance would be aroused more and be more likely to act on their sexual arousal.⁷⁸ Davis and Braucht could find no evidence to substantiate either part of the hypothesis with any confidence.

Davis and Braucht found that on viewing the films, immediately and afterward:

Subjects became more sexually aroused, less likely to label themselves as deviant for watching pornography, and more likely to recommend that the availability of such films be restricted

Relative to the 24-hour period prior to seeing the films . . . during the 24 hours *after* seeing the films, subjects became more tense, engaged in more substitute (for sex) behavior, felt more desire for sex, engaged in more pornography-stimulated or pornography-sided sex, masturbated more . . . but engaged in no more petting or coitus than prior to the film.⁷⁹

They could find no relation between prior history of exposure to pornography and degree of arousal, nor any strong relation between degree of arousal and sexual liberalism or heterosexual experience. No strong relation was found between degree of arousal and history of sexual deviance, character scores, or beliefs in the detrimental impact of pornography. Physiological arousal was, to some degree, positively related to greater exposure to pornography, higher character scores, greater prior belief in the detrimental impact of pornography, age of first heterosexual experience, frequency of masturbation in high school, and for homosexuals, the number of partners. Davis and Braucht also found a moderate stability in sexual behavior before and after viewing the films.

Implicit in the prurient appeal proposition is that after being exposed to certain materials people will do, or attempt to do, things of a sexual nature they may not have otherwise done. Relevant to this, Davis and Braucht found that “[t]hose persons who masturbated before tended to do so after with about the same frequency . . . likewise for petting . . . and coitus. The same kind of trend held for sexual fantasies . . . tension . . . and desire. The pattern is even stronger in the case of talking with a man or woman about sex”⁸⁰ In short, the subjects’ actions stayed

78. *Id.* at 69. The sample consisted of 120 men.

79. *Id.* at 77.

80. *Id.* at 84.

within a stable pattern. Other studies also demonstrate the arousal value of explicitly sexual material, but they show too that on repeated exposure arousal gives way to satiation, if not outright boredom. Each found no significant changes in stable sexual patterns.⁸¹

An experiment by Donald Mosher dealing with undergraduate males and females falls into the same general pattern as the Byrne and Lambreth and the Davis and Braucht studies.⁸² Mosher's results showed that pornographic films (one involving heterosexual coitus, the other petting) are sexually arousing, that there are some differences on what was more arousing to females in contrast to males, and that judgments on degree of pornographic quality and negative responses vary. He found no significant changes in sexual behavior twenty-four hours after viewing the films, but he did find an increase in sexual fantasies and conversations. He found some sex differences in arousal reactions that are different from those found by Byrne and Lambreth. Males reported more affective arousal, females registered more negative responses. However, Mosher tested for somewhat different things. In particular, he was not concerned with the kinds of personality variables Byrne and Lambreth were. Mosher was more interested in the possible influences of sex guilt and prior sexual experience.

In general, while both sexes reported a moderate level of sexual arousal, males reported a marginally stronger level than females. Both sexes were about equally aroused by the coitus film; males were more aroused and females less aroused by the petting film.⁸³ Both sexes reported strong physiological reactions, the females reacting stronger to the coitus film. For both sexes high sex guilt subjects reported more minor physiological changes than the less guilty. Mosher found for both sexes no relation between sex guilt and reports of nonphysiological arousal. He concluded that the two are independent, though guilt is related to negative feelings following exposure. However, he found that sex guilt may be completely related to physiological reaction.⁸⁴

For both sexes, the more sexually experienced subjects had

81. Howard, Reifler & Liptzin, *supra* note 35; Kutschinsky, *supra* note 43.

82. Mosher, *Psychological Reactions to Pornographic Films*, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 255 (1971).

83. *Id.* at 299.

84. *Id.* at 300.

more of an increase in sexual desire after viewing the petting film. The less experienced had a greater increase in sexual desire after watching the coitus film. "Females and high sex guilt subjects increased in nervousness, internal unrest, and guilt. Males increased more in aggressiveness than the females."⁸⁵ The less experienced, especially the females, had increases in feelings of guilt after film viewing. Finally, he found significant sex differences in the rating of the films as being pornographic or not. Sex guilt played an important intervening role. Overall, the more guilty, less experienced, and females tended to make similar judgments about the films. These three traits were all related to a more conservative stance.⁸⁶

These studies show reactions to erotic materials, including sexual arousal, to be varied and complex with a number of important intervening variables shaping the varying reactions. They also show that exposure to such materials does not lead to any significant behavior or attitudinal changes. Subjects continue much the same sexual behavior and keep much the same attitudes as before exposure. There is no apparent disruption of stable patterns, whatever they might be. Furthermore, a study by Patricia Schiller indicates that nonerotic materials may have a powerful influence on sexual behavior.⁸⁷ If indeed this is so, it undermines the entire prurient appeal definition of obscenity. If explicitly erotic materials have little effect on behavior because of their arousal value, and nonerotic materials do, then why are the nonerotic materials not banned?

The available evidence does show that exposure to explicitly sexual material (including so-called hard-core pornography) results in sexual arousal and desire, but so may far less explicit materials. The data also show that specific reactions vary in their nature and strength, with a number of background, demographic, and personality/character variables having important intervening effects on those varying reactions. In other words, different people will perceive such material differently, and as a result will respond to arousal differently. While such material may result in predictable psychological and physiological responses, it causes no significant changes in stable patterns of behavior and attitude.

85. *Id.* at 304.

86. Mosher's findings indicate that material is judged pornographic not merely because it is arousing. His findings seem to indicate a relation between judgments of pornography and negative affective states. Other studies bear this out. See Amoroso, *The Effects of Physiological Measurement and Presence of Others on Ratings of Erotic Stimuli*, 4 CAN. J. BEHAV. SCI. 191 (1972).

87. Schiller, *Effects of Mass Media on the Sexual Behavior of Adolescent Females*, 1 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 191 (1971).

In light of the studies discussed, it seems apparent that the available evidence demonstrates the inadequacy of the prurient appeal proposition as a definition of obscenity.

Proposition Three: Community Standards

The contemporary community standard proposition claims that there is a single, identifiable standard for what is obscene. Since the Supreme Court first faced the obscenity question there have been two versions of this test: Justice Brennan's national standard and Chief Justice Warren's more local standard (which has been adopted by Chief Justice Burger's majority in the 1973 decisions). Both assume a single, identifiable standard, though at different levels.

The results of the studies concerning arousal effects of erotica suggest that there is no evidence for such standards. The studies showed that judgments about obscenity varied greatly and are independent of sexual arousal. The obscene is not simply that which is arousing. People seem to judge obscenity more on the basis of what evokes unpleasant or negative feelings. But these studies also have shown that what makes people feel bad varies. Intervening variables may also affect judgment. Marshall Katzman found that men differ in rating the sexually stimulating quality of photographs and differ even more in rating the obscenity of the same photographs. "Differences in ratings of sexual stimulation exist among groups of varying occupations and educational background."⁸⁸ Katzman also found a low positive relationship between judgments of obscenity and stimulation.⁸⁹ In another study he again found that there is some evidence that different socioeconomic groups use different standards in judging obscenity.⁹⁰

Local Standards

Douglas Wallace, Gerald Wehmer, and Edward Podany studied the community standard proposition by investigating the ques-

88. Katzman, *Relationship of Socioeconomic Background to Judgments of Sexual Stimulation: Correlation with Judgments of Obscenity*, 9 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 1 (1971).

89. *Id.* at 7.

90. Katzman, *Photograph Characteristics Influencing Judgment of Obscenity*, 9 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 9, 25-26 (1971).

tions: "what does the 'average' American citizen think and believe about obscenity?" and "[i]s there agreement among several 'average' citizens as to what is 'obscene' or even merely 'offensive'?"⁹¹

In the standard pre-test/post-test mode, over one thousand subjects from the metropolitan Detroit area evaluated sixty slides depicting a variety of sexual themes. The subjects were asked to evaluate the slides on the basis of seven scales: sexual arousal, offensiveness, artistic value, educational value, entertainment value, availability, and acceptance.⁹² On the basis of a pre-test questionnaire on attitudes toward sexual materials, Wallace, et al. found that most of the sample had at one time seen some type of erotic material. Over half reported being at least occasionally aroused by such materials. Almost 40%, however, reported mixed feelings or disgust reactions. A little over half of the subjects believed sexual materials should be available to those who want them. Approximately 80% agreed with the idea that education is the best method of regulating sexual materials. In response to the statement that "erotic materials are always obscene" only one quarter agreed. The rest felt that "there were at least two categories of erotic materials—those that were merely erotic and those that were obscene."⁹³ A little less than half (45.7%) agreed with the statement that "obscene" is equivalent to "tasteless" in describing a picture. Over half (57.7%) would agree to abolish obscenity laws if it were demonstrated that obscene material had no harmful effects. As a result of these responses, Wallace, et al. concluded that there is a bimodal distribution in attitudes toward sexual materials and their restrictions.

Another set of questions probed attitudes toward sexual behavior. Wallace, et al. found approximately a two-thirds/one-third split, skewed towards liberalism. There was a 56-44% split in favor of the importance of the government strongly enforcing existing state laws. Eighty-five and one-half percent felt that there is a difference (of varying degree) between most people's sexual desire and sexual behavior. About 70% thought that the law should not regulate sexual behavior between consenting adults, though 29% thought the law should have some role in such behavior. When asked to evaluate the statement that sexual materials lead to rape, 43.2% agreed and 56.8% disagreed. On whether sex-

91. Wallace, Wehmer & Podany, *Contemporary Community Standards of Visual Erotica*, 9 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27 (1971).

92. *Id.* at 30.

93. *Id.* at 34-38.

ual materials lead to a breakdown of morals, about 47% agreed; 52% did not.

Based upon this questionnaire, Wallace, et al. ranked the subjects along a conservative-restrictive/liberal-tolerant scale. Since the subjects for the study were recruited because of their membership in particular organizations, they were grouped into four categories: church, social service, professional, and student. The order of this list was also the ranking on the scale, with "church" the most conservative-restrictive and "student" the most liberal-tolerant. They found "that as a person becomes more religious he becomes less permissive with respect to the availability of sexual materials and less likely to agree to changes in obscenity statutes as a result of newly developed empirical evidence."⁹⁴ Further, those who obtain or have seen explicit sexual materials "frequently are more often than not somewhat aroused by the material as opposed to being disgusted by it, and because they do attempt to see some of these materials they believe they should be available for those who want them."⁹⁵ Another group could be contrasted with these people—those who never would attempt to see or obtain erotic materials, who find sexual arousal from such materials disgusting, and who therefore avoid exposure.

Turning to the ratings of the sexual stimuli—the sixty pictures—Wallace, et al. found further evidence of bimodality. Younger people tended to be more accepting, on the whole, of sexual material than older people. Highly religious people found the material more offensive and less acceptable, and the relationship increased with the degree of religiosity.

[As one] becomes more religious [one] tends to become more conservative sexually, to obtain pornographic or erotic materials less frequently, to respond to erotic materials with disgust rather than sexual arousal, to hold the opinion that sexual materials should not be made available in bookstores, and to maintain the position that erotic materials must be legally restricted even if they are not harmful.⁹⁶

They found two distinct types of people when religiosity was associated with offensiveness and acceptability: Those who are more tolerant and those who are not.

When picture themes were rated on the offensiveness scale, Wallace, et al. noted a general trend moving from the least to most offensive: "[I]t becomes apparent that as the amount of

94. *Id.* at 42.

95. *Id.*

96. *Id.* at 43.

nudity increases, the explicitness of sexual cues increases . . . and the social desirability of the behavior represented declines.”⁹⁷ The ranking of themes on the sexual arousal scale was less clear. In some respects there is a trend in terms of nudity—arousal increasing with the degree of nudity. But they also found exceptions; for instance, a theme depicting a female with a raised skirt was more arousing than a petting and a coital theme. They concluded that several factors were operating in the sexual arousal dimension. When they attempted to find a relationship between the themes as ranked on the two scales, they found none.⁹⁸

Wallace, et al. looked for possible differences among the subject categories (church, social service, professional, and student) and the picture rankings on three scales (offensiveness, sexual arousal, and acceptance). They found a high degree of consistency demonstrated by each category in their respective rankings. Overall, they found that “knowing the category one can predict with about 88% accuracy the rank to which that category will be assigned for any given picture,”⁹⁹ on the offensiveness scale (the order being church, social service, professional, and student, going from most to least offensive). There were considerable differences among the categories on what each found arousing, and no ordering of subject categories on the sexual arousal scale was possible. It was possible to order the categories on the acceptance scale: “[F]or any given picture one would be correct 95.8% of the time in predicting that the categories would fall in the order listed: ‘student’ most accepting, ‘professional’ second most accepting, ‘social services’ third most accepting, and ‘church’ the least accepting.”¹⁰⁰ This demonstrates both a high degree of homogeneity of opinion within categories and basic differences among categories on acceptability and offensiveness.

Wallace, et al. emphasized the existence of a genuine dichotomy in the public’s response to erotic materials in their study: tolerant and intolerant. On the individual level, there was less than 50% agreement on the modal response, and there was insignificant agreement on acceptance. On the category level, combining church with social service and professional with student, they found two groups of responses: conservative-intolerant and lib-

97. *Id.* at 45.

98. They also found no significant correlation between the overall rank orders on the offensiveness and arousal scales. This means that there is little or no relationship between the offensiveness of a picture and its arousal value. *Id.* at 46. This is consistent with the findings of other experimental studies on arousal such as those done by Davis and Braucht and Byrne and Lambreth.

99. *Id.* at 47.

100. *Id.* at 48.

eral-tolerant, which can be used on the offensiveness and acceptance scales. "The ratings on the sexual arousal scale are less clearcut, although they follow the same general pattern."¹⁰¹

In trying to explain these results, Wallace, et al. suggested that "the single variable of religiosity accounts to the greatest extent for the existence of the dichotomy."¹⁰² In addition, as religiosity increased, pictures were found to be more offensive and less acceptable. This indicates that the most striking characteristic of the conservative-intolerant group was their high level of religiosity. The "church" category also was the only one to show a strong association between the offensiveness and arousal scales.¹⁰³

The available evidence would seem to indicate the existence of no single, identifiable local contemporary community standard on what constitutes obscenity or even on what basis to make the judgment.¹⁰⁴ The empirical evidence indicates that the lack of agreement is more than simply a difference of opinion. It is an artifact of a heterogeneous community, the individual judgments and standards traceable to differences in socioeconomic, demographic, religious, and personality variables.

A National Standard

Logically, if a local standard does not exist empirically, then neither does a more general national standard. But for a good many years it was the law of the land. Though it is presently out of favor there is the chance that it may once again gain predominance. We should not completely dismiss this possibility in light of a decision such as *Jenkins v. Georgia*,¹⁰⁵ in which the Supreme Court overruled the determination of the Georgia courts that the movie *Carnal Knowledge* was legally obscene.

101. *Id.* at 52.

102. *Id.*

103. *Id.*

104. A study by John and Robin Reed investigated the varying definitions of obscenity between individual and group judgments. In their sample of college students in a southern school, individuals were more likely to label something as pornographic than a group. While the group judgment generally tended to eliminate minority views—whatever they may be—there were certain characteristics of both individuals and groups that related to their judgments on obscenity. It is in this regard that the Reeds' study is consistent with Wallace, et al. and other studies, and bolsters their findings. Reed & Reed, *P.R.U.D.E.S., Pornography Research Using Direct Erotic Stimuli*, 3 J. SEX RESEARCH 237 (1972).

105. 418 U.S. 153 (1974).

As a part of its task the Obscenity Commission conducted a national probability sample survey to investigate the possibility of a national standard. Given the findings of the studies relating to local standards, one would hypothesize that no national standard exists. As expected, this is exactly what the Commission's national survey found.¹⁰⁶ For the sake of brevity in an already lengthy discussion, I shall rely upon W. Cody Wilson and Herbert I. Abelson's abbreviated report of the data from the survey.¹⁰⁷

The data were based upon face-to-face personal interviews with a sample of 2,486 adults conducted in early 1970. The data show that an overwhelming majority of adults has been exposed to explicit sexual materials. A majority of both sexes was first exposed to explicit materials before the age of twenty-one; the median was seventeen for men and twenty for women. Sixty-six percent of the males reported seeing a pictorial depiction of heterosexual intercourse some time in their life; however, only 40% reported seeing such a picture in the two years prior to the survey. In general, 52% of the males and 37% of the females reported seeing depictions of explicit sexual material of some kind in the two years prior to the survey. The survey found that exposure tended to occur in a social context, most commonly among friends.¹⁰⁸

Although the survey found exposure generally widespread, there were recognizable differences related to the contents of the depictions, the mode of depiction, and the characteristics of the viewer. The depictions most widely seen were those of heterosexual intercourse and the genitals; next and slightly over half as likely to be seen were depictions of heterosexual oral-genital contact and homosexual themes; and the least likely were depictions of sado-masochistic themes.¹⁰⁹

In general, men were more likely to have had experience with

106. The survey had three objectives:

- 1) To determine the extent of public exposure to and exposure with erotic materials including the media in which erotica are experienced, circumstances of experience, and experience with particular types of erotic content;
- 2) To assess attitudes towards the desirability of controlling availability of erotic materials, the means for effecting such control, and the gradations of control for erotic materials in general, and for particular kinds of such material; and
- 3) To examine some of the demographic and attitudinal correlates of experience with erotica as well as other relationships between individuals and group characteristics and attitudes and behavior related to erotic material.

Abelson, Cohen, Heaton, & Suder, *Public Attitudes Toward and Experience with Erotic Materials*, 6 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 1 (1971).

107. Wilson & Abelson, *Experience with and Attitudes Toward Explicit Sexual Materials*, 29 J. SOC. ISSUES 19 (1973).

108. *Id.* at 27.

109. *Id.* at 28.

explicit sexual materials. The survey found recent experience with such material among men to be associated with age, education, size of community, and geographical region.¹¹⁰ In addition, associations were found between recent female experience and age, education, and income.¹¹¹ Social and political attitudes and behaviors were also related to recent experience.

Men who consume more general books, magazines, and movies, who report a higher level of social-political activism, who are supportive of First Amendment freedoms, who designate themselves as liberal in political orientation, and who have not attended religious services during the month prior to the interview are more likely to have had recent experience with explicit sexual materials. Similar relationships hold for women.¹¹²

In assessing the data on attitudes toward the availability of explicit materials, Cody and Abelson concluded that *empirically* there is no single, identifiable, national standard: "First, there is nothing approaching consensus in attitudes regarding the availability of sexual materials; second, the attitudes vary with the circumstances of availability; and, third, there is considerable variability in these attitudes among groups of people with different characteristics."¹¹³

The survey found a wide variety of beliefs about the effects of erotica.¹¹⁴

The survey found that groups with different characteristics have quite different attitudes on availability. Women are consistently more restrictive than men. Several demographic variables are related to attitudes on availability. For women, the data show that:

Age correlates substantially with attitude toward availability (younger women are more accepting and older women are more restrictive), and education correlates moderately (women with only an elementary school education are more restrictive and those with at least some high school are more accepting). The correlations between attitude and community size, geographical region, and family income are statistically significant but small (women from non-metropolitan areas, from the North Central states, and with less than \$10,000 annual family income tend to be more restrictive). Similar relationships were obtained for men.¹¹⁵

110. *Id.*

111. *Id.*

112. *Id.* at 29-30.

113. *Id.* at 31.

114. *Id.* at 34.

115. *Id.* at 35. The survey also found statistically significant but small relationships for women between attitudes toward availability and consumption of mass media ("high consumption of general media goes with acceptance of sexual materials . . ."), *id.* at 37; activity on political and social issues ("those who are more

Consistent with the more micro-analytical studies on local community standards, and with the studies on sexual arousal, the national survey provides no empirical basis on which to reasonably presume a single, identifiable standard.

Proposition Four: Antisocial Conduct Effect

The available data provide little support for the notion that exposure to obscene material is a direct or major determinant of antisocial conduct (such conduct including sex crimes, sexual deviance, and criminal offenses in general). Perhaps the most comprehensive effort related to the antisocial conduct proposition is the Michael Goldstein, Harold Kent, and J.J. Hartman study.¹¹⁶ Goldstein, et al. attempted to answer the "basic question . . . whether or not the use of pornography is injurious to society."¹¹⁷ They presented two crucial aspects of this question. First, are "serious deviations in sexual behavior . . . correlated with the type and frequency of exposure to erotic stimuli, or the age at which exposure occurs?"¹¹⁸ And second, does pornography represent "a clear and present danger to our social organization, justifying governmental censorship over the production and distribution of these materials?"¹¹⁹

To answer these questions Goldstein, et al. conducted in-depth interviews with six groups of people. The first three groups were incarcerated/institutionalized sex offenders: rapists, male-object pedophiles, and female-object pedophiles.¹²⁰ The other three groups were noninstitutionalized homosexuals, a sample of male transsexuals, and a sample of acknowledged, male, heavy consumers of pornography. As a base line for contrast there was a control group.

active are more accepting . . ."), *id.*; and church attendance ("those who attend tend to be less accepting . . ."), *id.* Furthermore, a "stronger relationship exists between attitudes toward availability and attitudes toward the first amendment . . . (those who support first amendment freedoms are more accepting) and political orientation (self-labeled liberals are more accepting and self-labeled conservatives are more restrictive). Similar relationships are found for men." *Id.*

116. M. GOLDSTEIN, H. KENT & J. HARTMAN, *PORNOGRAPHY AND SEXUAL DEVIANCE* (1973).

117. *Id.* at 3. Goldstein, et al. focused on five things: (1) the frequency of exposure to explicit materials in the formative preadolescent and adolescent years; (2) the impact which the most vivid adolescent experience with erotica may have had upon a subject's sexual attitudes and behavior; (3) the frequency of exposure to erotica in the year prior to the study; (4) a comparable survey of the most vivid experience with erotica in the previous year; and (5) the relationship between a subject's sexual daydreams and fantasies and his reactions to erotica. *Id.* at 10.

118. *Id.* at 11.

119. *Id.*

120. *Id.* at 46-47.

Goldstein, et al. found that all had been exposed to some form of erotica in preadolescent years, usually depictions of nudity. They found striking contrasts among sex offenders, transsexuals, homosexuals, users, and controls in regard to adolescent exposure.¹²¹ Rapists and pedophiles reported seeing *less* erotica than the controls. Heavy users of pornography also showed a pattern of *less* exposure in preadolescent years than the controls, as was the case for homosexuals and, to a lesser extent, the transsexuals. According to Goldstein, et al.: "All our noncontrol groups, then, were markedly lacking in adolescent experience with stimuli that represent the culture's definition of the sex act."¹²² The sex offenders also reported *less* exposure to erotica than controls in terms of recent adult experience. The same pattern was found with transsexuals. Homosexuals and users, on the other hand, reported an extremely high degree of current exposure.

On the basis of these reports, Goldstein, et al. concluded:

The fact that all our noncontrol groups, no matter what their age, education, or occupation, reported less exposure to erotica when they were adolescents than did our controls (black or white), suggests that a reasonable exposure to erotica, particularly during adolescence, reflects a high degree of sexual interests and curiosity that coincides with adult patterns of heterosexual interest and practice. Contrary to our expectations, and those of many popular writers, less-than-average adolescent exposure to pornography reflects either active avoidance of heterosexual stimuli, or limitation to an environment where such materials are unavailable. It appears that the amount of exposure to pornography is a surface manifestation of the total pattern of sexual development. If sexual development proceeds along an unorthodox track, then unorthodox patterns of sexual behavior will result, including either underexposure to pornography or an obsessive interest in it.¹²³

As far as adult experience was concerned, adults found exposure far less educational or informational than they did as adolescents. Not unexpectedly, the predominant reaction by adults was "sexual arousal . . . experienced pleasurable by the controls and more ambivalently by the sex offenders."¹²⁴ No clear-cut pattern of sexual conduct was found as a result of this state of arousal. Whatever the pattern of behavior, it appears as a response to a highly complex set of stimuli of which pornography is only one factor.¹²⁵ Stimuli often mentioned by offenders were those ex-

121. *Id.* at 69.

122. *Id.*

123. *Id.* at 70.

124. *Id.* at 108.

125. *Id.*

pressing brutality, with or without sexual behavior, which "raises the question of whether the stimulus most likely to release anti-social sexual behavior is one representing sexuality, or one representing aggression."¹²⁶

Goldstein, et al. reported a significant difference between the sex offenders and the controls in the type of activity associated with exposure to erotica. They found that even as adults the offenders continued the practices associated with erotica reported as adolescents.¹²⁷ As adults, homosexuals and users do not report the same pattern of mixed emotions of arousal and disgust or guilt that the offenders do. Rather, as do the controls, they experience sexual arousal as stimulating and pleasant.¹²⁸ The transsexuals, on the other hand, reported a limited interest in and contact with erotica as adults. For them erotica has only a minimal arousal value.

A crucial question for these researchers was the role of erotica in stimulating direct sexual expression. They found no such connection.¹²⁹ On the question of whether such fantasy is a stimulating or cathartic agent, Goldstein, et al. found no simple answer emerging from the data. However, there was no evidence "that erotica per se triggers antisocial sexual behavior. . . . The use of erotica seems to be part of a larger fantasy sexual life,"¹³⁰ and any actions associated with erotica were a part of an already established pattern of behavior. This latter point, they asserted, is especially important. The individual's reaction to various sexual stimuli "apparently relates to his previously established sexual identity, rather than influencing the development of that identity."¹³¹ In other words, sex role identity is a significant factor in determining one's response to erotica, not vice versa.

Goldstein, et al. concluded that obscenity does not cause sexual deviancy or crime. They said:

The research reported in this work clearly tends to support the view that pornography does not incite criminal or antisocial acts. Indeed, some of the data suggest the reverse may be true; greater and earlier exposure to erotic material might have been educational and lessened the develop-

126. *Id.* at 109.

127. *Id.*

128. *Id.* at 120.

129. *See, e.g., id.* at 135. The erotic appeal of pornographic materials stems from two functions of erotica in fantasy. The first is expressive, and serves as an outlet for suppressed desires. *Id.* at 136. The second is defensive, and seems to disguise conscious or unconscious fantasies productive of anxiety and guilt. *Id.* at 137.

130. *Id.* at 138.

131. *Id.* at 149.

ment of deviant and antisocial attitudes and behavior in certain persons so disposed.¹³²

A related study by Glen Kercher and C. Eugene Walker of convicted rapists also found no evidence that sexually explicit material leads to criminal behavior.¹³³ Kercher and Walker examined the validity of the "rationale for censorship laws"¹³⁴ by testing twenty-eight convicted rapists and twenty-eight other convicts not convicted of sex related offenses. While a series of slides depicting various sexual themes were shown, physiological measures of arousal were taken—penile volume and galvanic skin response (GSR) along with subjective self-reports of arousal. They found no significant differences in penile volume response between rapists and non-rapists. There were significant differences in GSR, the rapists having higher responsivity. However, "[t]he results of the subjective rating data showed that convicted rapists evaluated the erotic stimuli more negatively than did the nonrapists."¹³⁵ In other words, even though aroused, the rapists' reactions were displeasurable, something not likely to move them toward the commission of sexual offenses.¹³⁶

In a study of forty-seven sex offenders and their experience with erotica, Weldon Johnson, Lenore Kupperstein, and Joseph Peters found that, in general, the offenders did not differ substantially from a nonoffender control sample with respect to amount, frequency, or circumstances of exposure. The authors noted that their data suggested that "if sex offenders and non-offenders differ in certain critical respects . . . their experience with erotic material is not one of the differentiating factors."¹³⁷

132. *Id.* at 161. Data from this study were also reported in Goldstein, *Exposure to Erotic Stimuli and Sexual Deviance*, 29 J. SOC. ISSUES 197 (1973).

133. Kercher & Walker, *Reactions of Convicted Rapists to Sexually Explicit Stimuli*, 81 J. ABNORMAL PSYCH. 46 (1973).

134. *Id.* at 46.

135. *Id.* at 49.

136. An earlier study by Robert Cook and Robert Fosen reported similar conclusions. They concluded that "the contention that pre-adolescent and adolescent exposure to pornography contributes to later commitment of a sexual offense is simply not supported by this research. On the contrary, if there is a relationship between early exposure to pornography and the tendency to commit a sex crime, it would appear to be negative." Cook & Fosen, *Pornography and the Sex Offender: Patterns of Exposure and Immediate Arousal Effects of Pornographic Stimuli*, 7 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 149, 160 (1971).

137. Johnson, Kupperstein & Peters, *Sex Offenders' Experience with Erotica*, 7 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 163, 171 (1971).

C. Eugene Walker, in another study, investigated the possible relationships between exposure to pornography and sexual offenses.¹³⁸ Testing two experimental groups of sex offenders and five control groups (consisting of two college student groups, a men's service club group, a group of mental patients incarcerated for nonsexual offenses, and a group of male prisoners incarcerated for nonsexual offenses), Walker was interested in two questions. First, had the sex offenders been exposed to pornography more frequently than the controls? Second, had different thoughts, fantasies, and ideas occurred to the sex offenders when viewing pornography than those which occurred to the controls?¹³⁹

Walker found no significant differences between experimental and control groups with respect to frequency of exposure, age of first exposure, reactions to exposure, whether or not they collected pornography, and other items dealing with one's general experience with such material. "However, there was an observable trend in the data for the control group to have had more experience with this material than the experimentals."¹⁴⁰ Walker also discovered the "startling" fact that a small but significant minority of the experimental groups reported that pornography did have an effect on them and was partially responsible for their offense. Walker was unsure of how to interpret this since it countered most of the other studies in the area. He reviewed a number of plausible alternative explanations including the idea that the response was given as a ploy by the sex offenders to aid themselves in later dealings about their sentences, etc. Nonetheless, Walker left open the possibility that for a small minority pornography might have played some role in their offenses.

Walker found that the experimental group reported that exposure to pornography increased their sexual activity and that they found intercourse "very enjoyable" more than had the controls. As far as sexual behavior in general was concerned, though, Walker found the sex offenders and controls to be very similar on most variables studied. One important difference was that the controls tended to have had more experience with pornography than the experimental subjects.¹⁴¹ Walker reported no differences in reaction to viewing pornography. His data do not show the aggressive sex offenders "as responding . . . with greater sexual arousal, more pathological sexualideation, or more aggressive sex-

138. Walker, *Erotic Stimuli and the Aggressive Sexual Offender*, 7 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 91 (1971).

139. *Id.* at 96.

140. *Id.* at 128.

141. *Id.* at 128-29.

ual fantasies."¹⁴²

Given these findings, Walker cautiously concluded that, first, sex offenders have not had more experience with pornography. On the contrary, they tended to have less. Second, while a small minority of sex offenders indicated that pornography played a role in their offense, "expert clinical judges did not rate the fantasy productions of the sex offenders in response to projective stimuli as indicating significantly more pathological sexual thought, sexual arousal, or aggressive sexual inclinations."¹⁴³

The available evidence casts doubt on the validity of the obscenity-antisocial conduct proposition. Of course, these data do not *disprove* the proposition. To *disprove* the proposition convincingly would mean proving conclusively the various causes of the behavior in question, a task all agree to be impossible at this time.¹⁴⁴

Proposition Five: Obscenity's Effect on the Young

The final, and for some the most persuasive, justifications for placing obscenity beyond first amendment protection are the alleged effects on the young. The adverse effect may be either on sexual development or delinquency, the latter argument predominating. However, the available evidence shows no link between obscenity and either juvenile delinquency or sexual development problems. Although the question of effect on development remains unanswered since it remains largely unexplored, there

142. *Id.* at 130.

143. *Id.* In a related vein a recent article by Robert Barron and Paul Bell investigated the possible effects of explicit sexual material and sexual arousal on aggression in males. They hypothesized a curvilinear relationship between sexual arousal and aggression—that aggression would be inhibited by exposure to mildly arousing stimuli, would neither be enhanced nor reduced by scenes of lovemaking, and would be increased by highly erotic stimuli. The results of their study provide partial support for their hypothesis. Barron & Bell, *Sexual Arousal and Aggression by Males: Effects of Type of Erotic Stimuli and Prior Provocation*, 35 J. PERSONALITY & SOC. PSYCH. 79 (1977).

144. A unique opportunity for a rough test of the proposition was provided by Denmark's liberalization of obscenity laws in the 1960's. Three studies reported decreases in sex crimes in Copenhagen after liberalization. While not directly applicable to the American experience, at the very least they cast further doubt on the obscenity-antisocial conduct proposition. See Ben-Veniste, *Pornography and Sex Crime: The Danish Experience*, 7 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 245 (1971); Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience*, 29 J. SOC. ISSUES 163 (1973).

have been a number of studies on juvenile delinquency which can aid in the assessment of this proposition.¹⁴⁵

Available evidence indicates that most young people have had some exposure to pornographic material by the time they finish college or the equivalent. Rates of exposure vary by sex, religiosity, and sexual experience. In other words, the varying rates of exposure do not differ appreciably from those for adults. In a study of young male prisoners' exposure to pornography, Martin Propper found a large minority had been exposed to a variety of explicit materials.¹⁴⁶ Usually the place of exposure was at a friend's home, and as one would expect, most reported they were sexually aroused. Most of the young prisoners had been exposed to erotica before sixteen years of age. Propper found no relationship between degree of exposure and frequency of homosexual experiences prior to incarceration. He did find a relationship between frequency of exposure and "unusual" sexual practices. Sexual and antisocial activities of the subject's peer group appear to have had a stronger influence even on those highly exposed to pornography. In other words, there was little direct connection between erotica and delinquency.

In another study, Alan Berger, William Simon, and John Gagnon found no evidence that massive amounts of pornography circulate through the adolescent environment.¹⁴⁷ Nor did they find any evidence which showed pornography to be a "powerful behavior-shaping, disease-like force."¹⁴⁸ Even though they found a relation between consumption of erotica and sexual behavior, underlying social position and personal characteristics were considered the cause of both.¹⁴⁹

Lenore Kupperstein and W. Cody Wilson explored the question whether "the heightened availability of erotica during the past decade (the 1960's) has been accompanied by a parallel rise in the rates of juvenile delinquency and crime, especially sex crimes."¹⁵⁰ They relied upon Uniform Crime Report statistics to answer that

145. A number of studies discussed under proposition four—Goldstein, *supra* note 116; Walker, *supra* note 138; Kercher & Walker, *supra* note 133; and Cook & Fosen, *supra* note 136—include a partial investigation of childhood and/or adolescent experience with pornography in their studies of erotica and antisocial behavior. Taken together, these studies tend to cast doubt on the validity of an obscenity-juvenile delinquency proposition.

146. Propper, *Exposure to Sexually Oriented Materials Among Young Male Prisoners*, 9 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 313 (1971).

147. Berger, Simon, & Gagnon, *Youth and Pornography in Social Context*, 2 ARCHIVES SEXUAL BEHAVIOR 279 (1973).

148. *Id.* at 307.

149. *Id.*

150. Kupperstein & Wilson, *Erotica and Antisocial Behavior: An Analysis of*

question. Correcting for population change and controlling for age and sex, no evidence was found for the proposition that the increased availability of erotica had led to an increase in the rate of juvenile arrests for sexual offenses. However, they did admit that their data did not disprove a connection either.

Terrence Thornberry and Robert Silverman also investigated the possible connection between exposure to pornography and juvenile delinquency.¹⁵¹ They examined the records of a selected sample of juvenile delinquents brought to the attention of the neuropsychiatric division of the Philadelphia courts in 1968. The files contained information on the subject and his family and included reports by psychologists and/or psychiatrists, probation officers' reports, reports of previous offenses, and so on. In the 436 files examined they found no mention of pornography or erotica. The neuropsychiatric staff apparently believed pornography to be so unimportant that they did not systematically inquire into this area.¹⁵² They concluded:

The fact that there was not one instance in which experience with pornography was mentioned in the total case records of this sample of 436 juvenile offenders would be consistent with the argument that there is no relationship between use of pornography and sex crimes among juveniles, and would further suggest that the use of pornography is not a very salient issue among either juveniles or the police and the courts at a practical level.¹⁵³

As with proposition four on obscenity-antisocial conduct, there is no evidence of a relationship between erotica and juvenile delinquency. The preponderance of the evidence indicates little or no direct relationship, hence adverse effects on the young cannot provide empirical justification for obscenity's constitutional status.

Recapitulation: The Evidence and the Court's Reaction

From the first time the Supreme Court addressed the constitutional status of obscenity in 1957, there has not been an empirical basis for the Court's policy. Yet, the Court has consistently upheld regulation on the basis of an approach which is essentially

Selected Social Indicator Statistics, 7 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 311, 312 (1971).

151. Thornberry & Silverman, *Exposure to Pornography and Juvenile Delinquency: The Relationship as Indicated by Juvenile Court Records*, 1 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 175 (1971).

152. *Id.* at 178.

153. *Id.* at 179.

empirical in character. The Court has done this in the face of inadequate and, in some areas, contrary evidence. If the Court were to be true to an empirical approach, the decisions would have to be much more consistent with the available evidence, or at the least have a well reasoned argument within an empirical approach for having such decisions. This would require more than simply noting disagreement among the experts. While a totally rational approach cannot be realistically expected, there should minimally be a clear idea of the kind and amount of proof required, some agreement on the conclusiveness of the evidence and which data are pertinent (or at least how to make these judgments), and knowledge and understanding of available data. What the Court has done illustrates none of these.

The Available Data

The first requirement for empirical policy-making by the Court is evidence sufficient to answer the questions about social reality the Court must ask. Problems in this area have plagued the Court's attempts to create an empirical policy in the area of obscenity. Until the 1973 cases, as a number of commentators have shown, the Court was working with little or no data pertinent to questions about obscenity and its effects. These articles, which appeared periodically since 1954, gave very thorough analyses of the research on sexual behavior available at different times, specifically noting the relevancy or irrelevancy of the data to the Court's concerns.¹⁵⁴

The point about the lack of data is a simple one, but one which cannot be overstated. The idea of an empirical approach depends upon available data. Without evidence upon which to rely the approach fails. But, as the obscenity decisions show, this has not prevented the Court from proceeding as if there were adequate data. Returning to the original purpose of an empirical approach—to have law reflect social reality and not personal biases—it becomes obvious that making policy without data to rely upon defeats that purpose. With little or no data available, what we find in many of the Court's obscenity decisions may be nothing more than personal beliefs masquerading as empirical propositions.

Even when pertinent evidence is available, as with the 1973 cases, the problem of informing the judicial mind remains. As a practical matter, the Justices must rely upon briefs, records, and oral arguments. But in the obscenity cases, including the 1973

154. See note 26 *supra*.

cases, the briefs, records, and even the oral arguments were of little help in informing the Justices about the state and substance of the empirical materials.¹⁵⁵ In addition, there is no consensus on what kind of evidence is required to justify obscenity's constitutional status. The possibilities run from Justice Douglas' demand for scientific evidence to Justice Clark's acceptance of the opinions of law enforcement officials and clergymen, and ultimately to Chief Justice Burger's unprovable assumptions gleaned from the sum of human experience.

Inconclusive Data

While there were some pertinent data available at the time of many of the obscenity decisions, much of that evidence proved inconclusive, or at least was viewed as inconclusive by the Justices (this would include even the evidence available at the time of the 1973 decisions). How the inconclusive data were handled is important to the assessment of an empirical approach; the key is found in the kind of evidence and level of proof required by the decision-makers. Just as there is no agreement on the kind of evidence required, there is no agreement on the level of empirical proof required to define obscenity and justify its status. Without some agreed-upon and well reasoned requisite level of proof, once again it becomes doubtful whether the Court's decisions are anything but personal beliefs presented in the form of empirical propositions.

The simplest and most straightforward statements on the issue of proof have been those of Justices Douglas and Black from *Roth* onward and that of Justice Marshall in *Stanley v. Georgia*.¹⁵⁶ To justify obscenity's status as an exception to the first amendment's protection, they require conclusive scientific evidence of some relationship between exposure to pornography and conduct the government may legitimately prohibit.¹⁵⁷

This was also the view of Justice Brennan in his *Paris Adult*

155. OBSCENITY: THE COMPLETE ORAL ARGUMENTS BEFORE THE SUPREME COURT IN THE MAJOR OBSCENITY CASES (L. Friedman ed. 1970).

156. 394 U.S. 557 (1969).

157. For Justices Douglas and Black, cause-effect relationships were crucial, since government should concern itself with actions, not thought: "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." *United States v. Roth*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting). The then available evidence could not demonstrate such relationships. *Id.* at 510-11. Justice Black concurred in Justice Doug-

Theatre dissent,¹⁵⁸ where he quoted Justice Marshall's *Stanley* opinion on the lack of empirical evidence.¹⁵⁹ Cutting in the opposite direction, Justices Harlan in *Roth*, Clark in *Fanny Hill*, and (as applied to children) Brennan in *Ginsberg* asked only whether it was irrational to presume a relationship between obscenity and conduct.¹⁶⁰ But what, precisely, does this mean? In *Roth*, Justice Harlan said:

It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree. Clearly it is not our function to decide this question. That function belongs to the state legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. 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. In fact that very division of opinion on the subject counsels us to respect the choice made by the State.¹⁶¹

Justice Clark's position is almost identical; he too said that the presumption in question was not irrational, given the division of thought he had found among behavioral scientists.¹⁶²

For Justice Brennan it was the same when he specified a level of proof for the presumption of effect on children. Given the disa-

las' *Roth* dissent. Justice Douglas made the same argument, perhaps more forcefully, in *Fanny Hill*.

In his *Stanley* opinion, Justice Marshall offered the following comment on the harmful effects of obscenity:

There appears to be little empirical basis for that assertion . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. 394 U.S. at 566-67 (emphasis added).

158. 413 U.S. at 73.

159. *Id.* at 107-08 (Brennan, J., dissenting). In addition, Justice Brennan chastised Chief Justice Burger for relying upon "unprovable assumptions" in his *Paris Adult Theatre* majority opinion. If a state were allowed to legislate on the basis of such assumptions about the possible effects of pornography "then it is hard to see how state-ordered regimentation of our minds can ever be forestalled." *Id.* at 110 (Brennan, J., dissenting).

160. *See, e.g.,* *United States v. Roth*, 354 U.S. 476, 501-02 (1957) (Harlan, J., dissenting in part and concurring in part). For Justice Clark, even though the scientific evidence proved inconclusive, there was sufficient evidence from law enforcement officials, legislative investigations, the clergy, and others to show the reasonableness of obscenity's harmful effects. *See A Book Named John Cleland's Memoirs of a Woman of Pleasure (Fanny Hill) v. Attorney Gen. of Mass.*, 383 U.S. 413, 451-54 (1966) (Clark, J., dissenting). For Justice Brennan in *Ginsberg*, the question was whether it was irrational to assume that obscenity would be harmful to the young. In his estimation it was not. *Ginsberg v. New York*, 390 U.S. 629, 643 (1968).

161. 354 U.S. at 501-02 (Harlan, J., dissenting in part and concurring in part).

162. 383 U.S. at 451-54 (Clark, J., dissenting).

greement among the experts, the presumption of adverse effect was not irrational. New York had passed legislation based upon the presumption that pornographic materials would have a harmful effect on the development of children.¹⁶³ Justice Brennan admitted that this did not express an accepted scientific fact.¹⁶⁴ Taking a position analogous to Justice Harlan's, all he required was that New York's presumption not be irrational. Since the scientific literature offered no conclusive answer to the question of harmful effects on the young, and especially since the link had not been disproven, New York's presumption could not be held to be irrational. The Justice stated: "We do not demand of legislatures 'scientifically certain criteria of legislation.'"¹⁶⁵ However, he was demanding scientifically certain criteria for challengers of such legislation.

Under this approach to the level of proof required, there is in effect no certain standard. A test of irrationality based upon any indication of disagreement or uncertainty among the experts would allow almost any presumption to be judged not irrational. There are very few areas of knowledge involving human behavior where high levels of certainty and agreement have been reached. Consequently, it would be impossible to empirically challenge legislation based upon factual presumptions. With the exception of Chief Justice Burger in *Paris Adult Theatre v. Slaton*,¹⁶⁶ the other Justices directly addressed the question of the level of proof required. But to the extent they accepted the regulation of pornography as somehow justifiable, and did not reject the empirical approach, it can reasonably be assumed that they accepted the Harlan-Clark position.

The lowest level of proof required is found in Chief Justice Burger's opinion for the Court in *Paris Adult Theatre*.¹⁶⁷ The Chief Justice was trying to deal with at least some of the findings of the Obscenity Commission, findings which would not provide justification for continued regulation. He also took note of the fact that not everyone agreed with the Commission's findings and recom-

163. N.Y. PENAL LAW § 484-h (1965 Consol.). The full text of § 484-h appeared as Appendix A to the opinion of the Court in *Ginsberg*. 390 U.S. at 645-47.

164. 390 U.S. at 641.

165. *Id.* at 642-43.

166. 413 U.S. 49 (1973).

167. Chief Justice Burger, it seems, was willing to accept as sufficient the kinds of "unprovable assumptions" upon which he claimed officials in all "civilized societies" acted. *Id.* at 61-63.

mendations and that a connection between obscenity and crime had not been disproven. Referring to Justice Clark's *Fanny Hill* dissent, Chief Justice Burger appeared to be saying that the presumption of a connection was not irrational, again because of disagreement and uncertainty. But given the growing body of pertinent data, the preponderance of which indicated no empirical basis for regulation, upholding regulation because there is not *total* agreement and certainty seems unrealistic and completely antithetical to an empirical approach to constitutional policymaking. The social and behavioral sciences simply cannot give absolute certainty, and to expect them to do so is senseless. Given the preponderance of the evidence, continued regulation is irrational. Chief Justice Burger had three choices. He could have gone with the preponderance of the evidence; he could have challenged the studies themselves; or he could have opted for an alternative approach to the empirical one. The latter alternative could easily have been used in combination with a rigorous challenge to the studies. But Chief Justice Burger did none of these. He used the empirical approach and for the most part ignored the contradiction between the evidence and the decisions. It is hard to see, therefore, how the Chief Justice could avoid the criticism that, in effect, he was writing his own beliefs into law.

Chief Justice Burger, in fact, specifically rejected the argument made in *Paris Adult Theatre* that regulation was prohibited since there were no scientific data to substantiate the alleged harmful effects of obscenity.¹⁶⁸ The state could still *presume* such a connection. Chief Justice Burger claimed that in all civilized societies officials have acted upon unprovable assumptions.¹⁶⁹ He did not explain why this was legitimate in the face of directly contrary evidence.

CONCLUSION

That the Court's exercise in empirical policymaking has failed to result in a constitutional policy on obscenity reflective of social reality is clear. The question left is whether the Court could have been more successful. For too long there was virtually no pertinent evidence and continual disagreement on how to interpret what scraps there were. But more importantly, it is evident that certain members of the Court were not prepared to change their minds and change obscenity policy regardless of the empirical data available, especially in regard to the 1973 decisions. Despite the sizable amount of evidence available, the Justices still appear

168. *Id.* at 60.

169. *Id.* at 61.

to be justifying decisions based upon the actual or likely effects of obscene materials. If the Justices continue to take an empirical approach while ignoring the data presented to them, or casually dismissing it as inconclusive, it will be hard to avoid the conclusion that they are writing their personal views into constitutional law. If so, the idea of an empirical approach has been defeated and reduced to a masquerade for the problem it sought to avoid.

There is no reason to presume that the Court's obscenity decisions are a true representation of all decisions; hence no general conclusions can be drawn from them. They have been treated as a case study. However, based upon what is found in the obscenity cases we should be skeptical of an empirical approach. In fact, we could hypothesize, based upon this case study, that the use of an empirical approach and social science will lead to conservative or status quo outcomes since the evidence will typically be interpreted as inconclusive or not understandable and hence not sufficient to justify change.¹⁷⁰ In addition, we could hypothesize that social science is not likely to change a Justice's position no matter what the evidence suggests. The one exception in the obscenity decisions was Justice Brennan who did change his position, it seems, in part because of the evidence regarding obscenity's effects. But this may be simply the exception which proves the rule.

170. D. HOROWITZ, *THE COURTS AND SOCIAL POLICY*, 283-84 (1977); Daniels, *Social Science and Death Penalty Cases: Reflections on Change and the Empirical Justification of Constitutional Policy*, 1 L. & POL. Q. 336 (1979).

