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# Commentaries

## The Pornography Report: Epistemology, Methodology and Ideology<sup>†</sup>

Weldon T. Johnson\*

In a summary section of *The Report of the Commission on Obscenity and Pornography*, my colleagues and I wrote that “. . . persons who are unfamiliar with erotic materials may experience strong and conflicting emotional reactions when first exposed to sexual stimuli. Multiple responses, such as attraction and repulsion to an unfamiliar object, are commonly observed in the research literature on psycho-sensory stimulation from a variety of nonsexual as well as sexual stimuli.”<sup>1</sup> It may be ironic (but not unpredictable) that the *Report* we were writing would subsequently generate similarly strong and conflicting emotional responses, for the same reasons: it is so unfamiliar. As I review available evidence concerning the impact of the *Report*, I detect strength, emotion, repulsion and attraction. And, as in the area of human sexuality, there is considerable misunderstanding.

It is now a year since the *Report* was published, since the United States Senate voted 60 to 5 to “reject the findings and recommendations,”<sup>2</sup> since the President described the *Report* as “morally bankrupt,”<sup>3</sup> since the Vice President and Attorney General dissociated the Administration with the *Report*,<sup>4</sup> and since the *Report* was evaluated as, “one of the worst and most diabolical ever made by a Presidential commission and one which no Christian or believing Jew could sup-

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† The judgments and evaluations of the author do not necessarily represent those of the commissioners or other members of the professional staff of the Commission on Obscenity and Pornography.

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1. *The Report of the Commission on Obscenity and Pornography* 26 (1970) [hereinafter cited as *Commission*].

2. N.Y. Times, Oct. 14, 1970, at 30, col. 4.

3. *Id.*, Oct. 25, 1970, at 1, col. 8.

4. *Id.*, Sept. 29, 1970, at 11, col. 1.

port.”<sup>5</sup> In response to these and other public reactions the chairman of the Commission on Obscenity and Pornography, William B. Lockhart, remarked that “my hope and expectation is that when the research papers are studied in a calm atmosphere uncomplicated by election appeals, the result will be a far more careful appraisal of public policy in this emotion-charged area.”<sup>6</sup> Lockhart’s expectation of calm and careful appraisals are beginning to appear.<sup>7</sup>

However, any effort at a dispassionate analysis of the *Report* and the reactions to it, ought to recognize the continuing efficacy of certain delimiting *political* and *emotional* conditions. These conditions are not only responsible for the creation of the Commission in 1967, but helped shape the actual work of the Commission, its *Report*, and the manner in which we respond to it now.

#### DELIMITING CONDITIONS: POLITICS AND EMOTION

It should be recognized that federal commissions, either congressional or presidential, are designed to serve rather special kinds of needs and interests. Federal commissions are often created by public law or executive order as a means of dealing with politically delicate issues, *i.e.*, they are frequently designed to cope with “political hot potatoes” upon which government is unready to act, but about which it is desirable to show concern. It is useful for government to demonstrate interest in these issues by appointing blue ribbon panels to study them, and, of course, to be able to postpone action until the panel has filed its report. Whatever the particular “potato,” its temperature is presumably lowered through the prescribed two years of discussion by prominent persons, carefully organized public hearings, and an interim report and the final report. By the time the report is filed, the “potato” is presumed to be cold.

The defusing function of commissions is facilitated by their composition. The commissioners, typically *appointed* by the Congress or the President, are less likely to behave as fact-finders than as case-builders. The composition of commissions is not left to chance, and

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5. Quote attributed to Billy Graham in *CHRISTIAN CENTURY*, November 11, 1970, at 1339.

6. *THE NATION*, Nov. 9, 1970, at 453.

7. See Address by L. Berkowitz, American Psychological Association Meetings, in Washington, D.C., September, 1971; Clor, *Science, Eros and the Law: A Critique of the Obscenity Commission Report*, 10 *DUQUESNE L. REV.* 63 (1971) [hereinafter cited as Clor]; Wilson, *Violence Pornography, and Social Science*, *THE PUBLIC INTEREST*, Winter, 1971, at 45.

individual commissioners are apparently selected according to their prominence, competence, long-suffering loyalty to the chairman of a Senate subcommittee, or all of the above.<sup>8</sup> This does not necessarily constitute a serious criticism of how commissions operate, but rather an indication that commissions are often necessarily selective in the problems they choose to study, the methods utilized, and the range of interpretations and recommendations considered. It is impossible to divorce all pre-existing orientations to the subject matter, including professional and ideological commitments, from *all* of a commission's activity. Commissions reach objectivity only by approximation.<sup>9</sup>

Another important dimension of the political condition within which government commissions operate is the criteria by which the reports of findings and recommendations are evaluated. Commission reports, whose findings and recommendations are liked, tend to be described as landmark studies, as important and significant contributions to knowledge and the common good. On the other hand, commission reports whose findings and recommendations are not liked are dismissed, or criticized as invalid or biased. In regard to the studies conducted for the Commission on Obscenity and Pornography this "double bookkeeping" has generated discussion of *methodological flaws* disproportionate to their actual importance.<sup>10</sup> Such discussions of weakness in method invariably conclude not only that limitations in the quality of inquiry preclude definitive conclusions, but also undermine corresponding recommendations which call for change.

The above mentioned characteristics inherent to federal commissions affect what commissioners do, how they do what they do, and how what they do is received and assessed. These considerations apply *mutatis mutandis* to the Commission on Obscenity and Pornography.

The other important condition which influenced this Commission's work, and reactions to it, is the inherent emotional character of the subject matter. Pornography is not a topic which lends itself to de-

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8. In the cases of commissions whose charge directs them to pornography, alcohol, or sexuality, an additional criterion is used. It is desirable to appoint persons who have been officially designated as guardians of the public morality—at least one priest, minister and rabbi.

9. For an interesting analysis of government commissions generally, see F. POPPER, *THE PRESIDENT'S COMMISSIONS* (1970).

10. The "double bookkeeping" criterion of evaluation is straightforward: "if the findings fit the political necessities, fragile studies are accepted as rigorous; if the findings do not fit the political necessities, rigorous studies are disparaged as inconclusive." Pettigrew, *Sociological Consulting in Race Relations*, *AMERICAN SOCIOLOGIST*, June, 1971, at 46. I should also note that the Commission on Obscenity and Pornography itself has been criticized for "double bookkeeping."

tached, analytic discussion. A number of observers have noted the surprisingly intemperate language used in discussions of pornography—"flood," "indulgence," "growing weeds," "creeping obscenity," "filth," "smut," etc.<sup>11</sup> It became apparent quite early in the Commission's work that its subject matter evoked strong and emotional responses during exposure to it, discussions of it, or merely thinking about it. The *Report*, correctly I think, emphasized the tendency of many persons to be offended or disgusted by explicit sexual materials. Pornography, the Commission found, is often regarded as a stench in the public nostril, "quite analogous to keeping a goat in a residential area or urinating in public."<sup>12</sup> I am suggesting that these emotional and attitudinal predispositions continue to influence our most rational attempts to discuss the subject, its Commission, and its *Report*.

Another dimension of the emotional context which surrounds the topic of pornography is the difficulty in dealing with public responses to research on human sexual behavior.<sup>13</sup> The Commission's research program necessarily led to scientific treatment of topics, such as masturbatory and coital behavior, penile tumescence and detumescence, vaginal lubrication, etc. Such research has a short history in this country and, as is well known, public response to such studies has often been hostile. First, the scientific study of human sexual behavior is still often regarded as a kind of pseudo-scientific slum into which the responsible, or at least respectable, scholar has no rightful entry. Despite serious efforts, sex researchers are regarded by many as harboring something more than academic or professional scientific motivation.

Another difficulty encountered in sex research, more directly relevant to the current evaluations of the studies conducted for the Commission, is the tendency of sex research (more so than research in other areas) to generate public sensitivity to *methodology*. This phenomenon was first observed after publication of *Sexual Behavior in the Human Male* in 1948 by Kinsey and his colleagues.<sup>14</sup> One consequence of the

11. Even dissent within the *Report* and some of its reviews have what has been called "an intemperate, unpleasantly ad hominem creed in which interesting and perhaps important objections are frequently obscured by a ranting tone." Wilson, *supra* note 7, at 54.

12. Gagnon and Simon, *Pornography—Raging Menace or Paper Tiger?*, TRANS-ACTION, July-August, 1967, at 42.

13. For a good discussion of these problems, see W.B. Pomeroy, *Human Sexual Behavior*, in TABOO TOPICS 22-32 (N. Farberow ed. 1963).

14. More than thirty books have appeared as commentaries or summaries of KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948) and SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953). See Pomeroy, *supra* note 13, at 22. It was apparently at this point in the intellectual history of American society, as discussed above, that the words "probability sampling," "sampling error" and "sample tolerance limits" were ushered into the popular vocabulary.

public response, much of which consisted of moral outrage, was that the Commission on Statistical Standards of the American Statistical Association appointed a committee to review and evaluate the *methodological* adequacy of Kinsey's study. Such a response to sex studies relates more generally to how laymen typically respond to social science research. When social science produces findings or relationships whose validity is compatible with a layman's own personal experience, the findings are dismissed as "common sense" or at least as "uninteresting."<sup>15</sup> On the other hand, when social science produces findings which are incompatible with a layman's own experience, the data are regarded as invalid or unreliable. The popular tendency to validate social science studies with the criterion of personal experience apparently assumes that because all of us are human, we are entitled to hold perfectly reasonable theories of human behavior that are immune from disconfirmation by actual data.

Predisposed skepticism toward social science research generally, and sex research in particular, will influence the most rational attempts to discuss much of the work of the Commission on Obscenity and Pornography. With the general caveats about the political and emotional context identified at the outset, let me move to a consideration of the specific judgments and criticisms directed at the *Report*.

Much of the public evaluation of the *Report*, scholarly or otherwise, may be organized around three general themes: (1) The Commission, or its professional staff, failed to study the question of effects properly, so that it did not raise the appropriate questions, or select the appropriate methodology; (2) The Commission's research is so badly flawed methodologically that its findings have a questionable certainty; and (3) The Commission's research, as well as its *Report*, constitute a gross mixture of objectivity and ideology, or is so heavily influenced by

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15. This is a continuing source of annoyance in various evaluations of the Commission's research, particularly in comments about the three-week exposure (satiation) study. The study found that continued or repeated exposure to erotic material over fifteen days resulted in satiation (marked diminution) of sexual arousal and interest in such material. One reviewer dismissed this research as having "pretty well demonstrated the obvious (e.g., that people can get weary of it)." V. Cline, *Critique of Commission Behavioral Science Research*, Commission at 408 [hereinafter cited as Cline]. Another critic writes, "These results are not surprising. It would be more surprising if an individual's patterns of sexual behavior could be altered by a couple of erotic films or if basic attitudes would be revised as a result of three weeks of experimental exposure to erotic materials." Clor at 66. The criterion of surprise is not ordinarily used to evaluate scientific research, social or otherwise. Still another reviewer views this study as "trivial and of doubtful relevance," saying that the eventual findings were something "anyone could have told the experimenters." Packer, *The Pornography Caper*, COMMENTARY, February, 1971, at 75. The eventual results were not, of course, obvious to the Commission, the researchers, or the subjects prior to the experiment. Only in retrospect are they so uninteresting.

ideological considerations that the entire *Report* reflects more point of view than value-free truth. Each of these themes will be discussed separately and in detail.

### EPISTEMOLOGY AND PORNOGRAPHY: THE RELEVANCE OF EFFECTS

The Commission devoted considerable resources to studying the effects of exposure to erotic material, and this aspect of the Commission's work has generated considerable critical comment. Three issues have emerged. It has been argued that: (a) the investigation of effects is irrelevant to dealing with the pornography problem; (b) the actual effects of exposure to erotic materials are not measureable within the framework of social science research; and (c) the effects, particularly the presumed pernicious effects, are obvious but have not been recognized generally or in the *Report*.

*Effects are Irrelevant.* The argument concerning the relevance of effects studies is tied to varying interpretations of the constitutional bases for obscenity prohibitions and the Commission's mandate from Congress. The first issue is still argued widely among legal scholars and within the courts, and it is inappropriate for me to discuss this issue in detail. Suffice it to say that the Commission's viewpoint was that "developments since the *Roth*<sup>16</sup> decision have suggested both practical and constitutional doubts about the appropriateness of its [*Roth's*] conclusion that distribution of 'obscene' material to consenting adults may constitutionally be broadly prohibited without reference to considerations of social harm."<sup>17</sup>

The actual basis, however, of the Commission's activity in the area of social effects was established by the Congress. When the Commission was established, it was instructed "after a thorough study *which shall include a study of the causal relationship of such materials to antisocial behavior* (italics added), to recommend advisable, appropriate, effective and constitutional means to deal effectively with such traffic in obscenity and pornography."<sup>18</sup> Specifically, the Congress assigned four duties for the Commission:

- (1) with the aid of leading constitutional law authorities, to analyze the laws pertaining to the control of obscenity and pornogra-

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16. *Roth v. United States*, 354 U.S. 476 (1957).

17. Commission at 358.

18. 18 U.S.C.A. § 1461 (Supp. 1971).

phy; and to evaluate and recommend definitions of obscenity and pornography;

(2) to ascertain the methods employed in the distribution of obscene and pornographic materials and to explore the nature and volume of traffic in such materials;

(3) to study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other antisocial behavior; and

(4) to recommend such legislative, administrative, or other advisable and appropriate action as the Commission deems necessary to regulate effectively the flow of such traffic without in any way interfering with constitutional rights.<sup>19</sup>

In response to this congressional mandate, the Commission organized itself into four working panels: a Legal Panel, a Traffic and Distribution Panel, an Effects Panel, and a Positive Approaches Panel.<sup>20</sup>

In short the Commission's study of social effects was generated by congressional intent,<sup>21</sup> and coexisted with the three other assigned duties in the allocation of time, effort and funds.<sup>22</sup> The relevance of the study of social effects became even clearer after the Commission began its inquiry into this area. First, Commission reviews of both the popular and scientific literature revealed that much of what has been written about "pornography" pertains to its presumed effects—effects on individual behavior, social morality and cultural progress.<sup>23</sup> The Commission's inventory of these presumed effects is listed in Figure 1.

Second, the relevance of considering social effects became evident from the Commission's research findings on contemporary public opin-

19. *Id.*

20. The composition of each panel was: Legal Panel (Thomas D. Gill, Morton A. Hill, Barbara Scott, and Kenneth B. Keating), Traffic and Distribution Panel (Thomas C. Lynch, Edward E. Elson, Freeman Lewis and Winfrey C. Link); Effects Panel (Otto N. Larsen, G. William Jones, Joseph T. Klapper, Morris A. Lipton and Marvin E. Wolfgang); Positive Approaches Panel (Edward D. Greenwood, Irving Lehrman, Cathryn A. Spelts and Frederick Wagman). The chairman, William B. Lockhart, was an ex officio member of each panel. Kenneth Keating, who resigned to become Ambassador to India, was replaced by Charles H. Keating, who elected not to participate in panel activities.

21. Among the unfortunate and unnecessarily personal criticisms of the Commission's chairman, William B. Lockhart, it has been alleged that the Commission's research activity in the area of effects reflected an undesirable influence of both the American Civil Liberties Union and the scholarly papers published in this area by Lockhart. See *Statement of Morton A. Hill and Winfrey C. Link*, Commission at 388-90; *Statement of Charles H. Keating, Jr.*, Commission at 516-520.

22. Of the Commission's research budget 40% was spent on effects studies, 25% on traffic and distribution studies, 20% in the area of "positive approaches" and 15% for legal analyses.

23. Berns has added a new one in his statement about the relationship between censorship and republican virtue. See Berns, *Pornography vs. Democracy: The Case for Censorship*, THE PUBLIC INTEREST, Winter, 1971, at 3.



FIGURE 1  
PRESUMED CONSEQUENCES OF EXPOSURE TO EROTICA

Sexual	Nonsexual
<b>Criminal or Generally Regarded as Harmful</b>	
1. sexually aggressive acts of a criminal nature	17. homicide
2. unlawful sexual practices	18. suicide
3. nonconsensual sex acts	19. delinquency
4. incest	20. criminal acts
5. sexually perverse behavior	21. indecent personal habits
6. adultery	22. unhealthy habits
7. illegal sexual activities	23. unhealthy thoughts
8. socially disapproved sexual behavior	24. reject reality
9. sexual practices harmful to self	25. ennui
10. deadly serious pursuit of sexual satisfaction	26. submission to authoritarianism
11. dehumanized sexual acts	
12. preoccupation (obsession) with sex	
13. change direction of sexual development from natural pathway	
14. block psychosexual maturation	
15. misinformation about sex	
16. moral breakdown	
<b>Neutral</b>	
27. sex attitudes	
28. sex values	
29. sex information	
30. sex habits	
<b>Beneficial/Helpful</b>	
31. drains off illegitimate sexual desires	
32. provides outlet for otherwise frustrated sexual drives	
33. releases strong sexual urges without harming others	
34. pleasure	
35. provides discharge of "antisocial" sexual appetites	
36. assists consummation of legitimate sexual responsibilities	

ion. The research found not only do most Americans express beliefs about how erotic materials affect the user, but also that opinions about the availability of such materials are linked to, if not based on, beliefs about the effects. One of the key, and controversial,<sup>24</sup> findings of the Commission funded national survey was that the question of the effect of erotic materials is an important one in determining public attitudes on the issue of availability. In their report to the Commission, survey analysts wrote:

Perhaps most significantly, nearly half of adults apparently condition their views regarding erotic materials on the alleged effects

24. This finding probably affected some of the Commission's subsequent recommendations in an important way, and this is discussed *infra* in the text accompanying notes 55-64.

of such materials upon those who are exposed to them. In other words, the data suggest that about *one-half* of adults would be inclined to sanction availability of erotic materials if they felt sure that such materials would have no harmful effects; or, on the other hand, *eight persons in ten* would oppose availability of such materials if they were convinced that such materials were harmful.<sup>25</sup>

In brief, the study of effects was *relevant* for the Commission because it was directed specifically to work in the area, and because it found subsequently, that insofar as public opinion is regarded as *one* basis for legislative action, the effects of exposure to pornography are of general social concern.

*Effects are Unmeasurable.* It is occasionally argued that pornographic materials do have social effects, but these effects are not measurable. A previous contributor to this journal, for example, has been critical of "the Commission's exclusive reliance upon statistical and 'behavioral science' techniques of analysis"<sup>26</sup> and argues that ". . . it is illusory to believe that the most fundamental changes in human values can be conclusively explained by scientific data, . . ."<sup>27</sup> Such an assertion usually indicates a commitment to the viewpoint that human behavior, unlike the behavior of atoms or cells, is not amenable to the scientific framework of counting, measuring and comparing. This line of argument, (and it has a long and continuing history), is generally unproductive because it is always only argument. Discussions of the issue often end with the conciliatory observation that the science of human behavior has not experienced a development comparable, to that of physics or biology, either because the behavioral sciences haven't been at it as long, or because human behavior is inherently more complicated than physical or biological behavior. It has been said, "The factors that shape the life experience, dispositions, and attitudes of a human being are extremely complex, subtle, and inter-related."<sup>28</sup> The apparent complexity of human behavior, however, may be a result of our comparative ignorance of it. I agree that "one can always argue that human behavior is a particularly difficult field. It is, and we are especially likely to think so just because we are so inept in dealing with it."<sup>29</sup>

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25. H. Abelson, R. Cohen, E. Heaton and C. Slider, *Public Attitudes Toward and Experience With Erotic Materials*, 6 TECHNICAL REPORTS OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 93 (1971) [hereinafter cited as Abelson].

26. *Id.* at 65.

27. *Id.* at 69.

28. *Id.* at 68.

29. B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* 6 (1971).

Although I do not want to dismiss the conceptual and methodological limitations of contemporary behavioral science, I believe that a large part of the "unmeasurability" argument involves the common inability to specify precisely what we are talking about when we discuss people and their behavior.<sup>30</sup> Specification has been particularly problematic in discussions of the effects of comic books, motion pictures, television and pornography. Several years ago, a psychologist reviewed scientific and popular opinions concerning the relationship between reading and antisocial behavior. The reviewer found little consensus on what constituted a "bad" book beyond the tautological statement that a "bad" book is one that has a "bad" effect. What is absent in most expressions of popular concern about pornography or television, or books, or motion pictures, is a specification of three answerable questions: what is the nature of the presumed effective agent? (*what* is it that is said to have an impact on human beings?); what is the nature of the presumed effect? (*how* are human beings influenced by the affecting agent?); and who are the persons or group on whom the agent is said to have an influence? (*who* is affected?).<sup>31</sup>

The Commission attempted to translate many of these imprecise formulations into researchable—measurable—propositions. The term

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30. Clor's advice that "we may continue to doubt that the subtleties of moral character are measurable by psychological tests and questionnaires" and his concern that "the Commission has properly defined delinquency" (Clor at 67-68) illustrate some popular misunderstandings usually corrected in introductory social science courses. The confusion concerns the relationship between general concepts and their specific indicators, or what sociologists call nominal and operational definitions. In order to study crime, for example, it is necessary to connect it with something observable. A nominal definition is a dictionary definition and involves only the assignment of meaning to a term by a substitute expression. For example, a nominal definition of crime might be behavior that violates a legislative code of conduct and is subject to formally administered punitive action. An operational definition specifies the procedures of observation that are necessary to identify the term's referent. For example, crime may be operationally defined as the number of arrests or convictions (note that these particular indicators are often supplemented with other indicators such as self-reported crime or estimates which derive from studies of victimization). Similarly an IQ test score may be regarded as an indicator of intelligence, or an educational level may be used as an indicator of social class. One may always quibble with a researcher's interpretation of what his indicators actually indicate. Does an IQ test score really measure intelligence? The important problem is not with what indicators actually indicate, but with the communication of measurement procedures so that one researcher's findings may be tested by another. There is another issue here as well. The assertion that something is not measurable may reflect more the limitations of ordinary language than the limitations of measurement. The words we use every day such as "mind" and "character" are not very precise, and we probably have other words which communicate more efficiently. Finally, there is always the possibility that some of the words we use in ordinary language have no physical referents, and this problem may not be limited to "unicorn" and "phlogiston." For these reasons, statements such as ". . . even if it has been shown that obscenity is not an important 'cause' of juvenile delinquency or sexual deviancy, this would not establish its harmlessness to mind and character" (Clor at 69) is not so much wrong as simply impossible to deal with at the level of research. What indeed are we talking about?

31. See M. Jahoda, *The Impact of Literature, 1954* (unpublished manuscript of American Book Publishers Council).

“pornography” is a good place to start. By now it is certainly well understood that there is an enormous confusion over the terms pornography and obscenity. Some persons equate obscenity with pornography and use both terms to designate any type of explicit sexual material. Other persons intend differences of various degrees in the use of these terms. It is important to note that the Commission’s *Report* did not use the term pornography because the term has no legal significance and because, in ordinary parlance, its use typically denotes subjective disapproval of certain materials rather than content or effect. In the absence of generally acceptable definitions of pornography, the Commission conceptualized the relevant stimuli as *erotic materials*, *sexual materials* or *explicit sexual materials*, or some variant thereof. By materials the Commission meant depictions or descriptions in both textual and pictorial form—primarily books, magazines, photographs, and motion pictures. By erotic or sexual or explicit sexual, the Commission meant themes such as—scenes whose purpose is to show the sex organs of a man or a woman, a man and a woman having sexual intercourse, mouth-sex organ contact between a man and a woman, sexual activities between people of the same sex, and sex activities which include whips, belts or spankings.

The Commission also attempted to specify the presumed effects of exposure to erotic material. The act creating the Commission mentions specifically the term “antisocial” behavior, and the Commission recognized very early that “antisocial” behavior also does not carry consensual limits. Various behaviors and attitudes regarded by some as antisocial are not so regarded by others. Within its resources of time and budget, the Commission could not address itself to the relationship between erotic material and every behavior or attitude which might be regarded as antisocial. Decisions and compromises were made, therefore, as to which antisocial behaviors would be investigated. With varying degrees of depth, the Commission investigated (a) relationships between availability of erotic materials and the incidence of juvenile and adult sex offenses; (b) the similarities and differences in experiences with erotic materials between delinquent and non-delinquent youth, and between non-offender adults and adult sex offenders, and (c) experimental analyses of the effects of exposure to erotic stimuli on physosexual, behavioral, and emotional behaviors. Other behaviors, or responses, which might be regarded as antisocial by some (e.g., venereal disease, divorce) were not addressed by the Commission’s research.

In sum, many of the assertions that have been made about the effects of erotic materials are not researchable as formulated. Regarding the measurement of effects, the critical question for both the theorist and the researcher is: how would you recognize these presumed effects if they were present and how would you detect their absence if they did not exist? The importance of this kind of rigor, the importance of formulating researchable questions, tends not to be appreciated or understood by those persons who are most concerned about the effects of pornography. Until such requirements are met, scientific research in the area will remain immature and ineffectual as a guideline to policy.

*Effects are Obvious.* Some critics of the Commission believe that the effects of exposure to pornography are obvious and cannot understand why such obvious relationships were not obvious to the Commission. Two critics state “. . . pornography has an eroding effect on society, on public morality, on respect for human worth, on attitudes toward family love, on culture. We believe it is impossible, *and totally unnecessary*, to attempt to prove or disprove a cause-effect relationship between pornography and criminal behavior (italics added).”<sup>32</sup> Another critic has asserted, “one can consult all the experts he chooses, can write reports, make studies, etc., but the fact that obscenity corrupts lies within the common sense, the reason, and the logic of every man.”<sup>33</sup> Predictably, behavioral scientists are troubled by assertions such as these. Apart from the recurring problem of imprecision (e.g., what is to be the indicator of “corruption”?), the behavioral scientist prefers to examine empirically the relationship between, for example, use of erotic materials and rape or sexual promiscuity or whatever. The important term here is *relationship*, and it matters whether these relationships, if they are found, are spurious (coincidental), sequential (contributory), or causal (in which case directionality must be established). The importance of empirically investigating relationships and specifying the nature of such relationships is not often appreciated by those to whom the pernicious effects of pornography are obvious.

Even when some appreciation of empiricism is evident, there is often confusion about what constitutes a statistical relationship. For example, a number of psychiatrists and police and court officials find their empirical relationships in observations such as the following:

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32. M. Hill and W. Link, *supra* note 21, at 386.

33. C. Keating, *supra* note 21, at 544.

Many of the delinquent boys and girls and adults who come to the attention of the court on charges of assault, robbery, larceny, burglary, carrying concealed and deadly weapons, are readers of smut, masochistic and fetishistic magazines, obscene comic books and lewd writings.<sup>34</sup>

The problem is not the validity of the observation but the implicit logic: many delinquents are known to have read pornographic literature, and *therefore* reading pornographic literature leads to delinquency. The syllogism is incomplete, for we do not know about the reading habits of nondelinquent youth. Suppose that we find that many nondelinquent youth also read pornographic literature. What do we conclude? We conclude that there is no relationship between committing delinquent acts and reading pornographic literature. If, on the other hand, we find that nondelinquent youth, unlike their delinquent counterparts, do not read pornographic literature, then we have isolated a relationship between reading pornography and delinquency, although we have not yet determined that the relationship is either spurious, sequential or causal.<sup>35</sup>

The interpretation of these relationships, once established, is both difficult and important. This is where *causation* becomes one of several candidates for conclusion, and where the *Report* has been seriously criticized for "omitting some critical data on negative effects."<sup>36</sup> The same critic has also suggested, "A number of the research studies upon which the report is based suggest significant statistical relationships

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34. Statement of Dr. Nicholas G. Frignito, Medical Director of Philadelphia County Court, Hearings on H.R. 521 before a Subcomm. of the House Comm. on Education and Labor, 90th Cong. 1st Sess. (1967).

35. It has been suggested recently that the most suitable mode of participation by the behavioral sciences in constitutional litigation is the investigation of the empirical and logical foundations alleged to justify the casual inferences and assumptions. While there are undoubtedly serious shortcomings in the ability of the social sciences to provide accurate, precise, error-free casual interpretations of social phenomena, their analytic techniques are by now sophisticated enough to identify the logical fallacies, contradictory and inaccurate premises, faulty or inadequate techniques of research design, or confused reasoning employed by decision makers in arriving at their views of the casual factors responsible for situations defined by them as problematic and in need of governmental intervention. Put another way, although social scientists are still circumscribed by their limited ability to explain casual sequences or the relationships between social events or phenomena, the 'logic of social inquiry' enables them to demonstrate the inadequacy of explanations offered to support outmoded public policies by disclosing the inadequacies or insufficiencies in method, looseness in reasoning, or paucity of evidence relied upon to construct the casual model upon which the policy rests.

Katz, *The Unmasking of Dishonest Pretensions: Toward An Interpretation of the Role of Social Science in Constitutional Litigation*, AMERICAN SOCIOLOGIST, June, 1971, at 54.

36. Cline at 390.

between pornography, sexual deviancy and promiscuity. Yet vital data suggesting this linkage are omitted or 'concealed'.<sup>37</sup> Another critic has reminded the Commission that, "statistical correlations or non-correlations do not definitively prove or disprove causal relationships."<sup>38</sup> These judgments seem unwarranted in light of the Commission's caution in reporting many statistical relationships concerning exposure to erotic materials and sexual behavior which might be regarded as undesirable, and in discussing the range of alternative interpretations for these relationships. The *Report* also outlines its reasoning and states its conclusions "with due and perhaps excessive caution."<sup>39</sup> Various surveys conducted for the Commission found the following statistically significant relationships:

American adults who are sexually active are likely to have seen or read erotic materials;

American adults who are most experienced recently with erotic materials are more likely to have begun heterosexual intercourse at an earlier age than persons with less (or no) recent experience;

American men and women 21-29 with the most experience recently report higher frequencies of current sexual intercourse; (this relationship does not hold for other age categories)

Among American college students, frequency of exposure to erotic materials is associated with relatively high rates of sociosexual experimentation (hugging, kissing, light and heavy petting, coitus) during both high school and college years, especially among males;

Among Swedish adults, persons with more experience recently with erotic materials were also more likely to have begun heterosexual intercourse at an earlier age, to have higher rates of current intercourse, to have had more sexual experience, and to report more sexual satisfaction;

American adults with the most experience recently with sexual material are more likely than others to report earlier ages of first masturbation, although frequency of exposure is unrelated to frequency of masturbation during high school and college years;

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37. *Id.*

38. Clor at 69.

39. The *Report* said:

[I]t is obviously not possible, and never would be possible, to state that never on any occasion, under any conditions, did any erotic material ever contribute in any way to the likelihood of any individual committing a sex crime. On the basis of the available data, however, it is not possible to conclude that erotic material is a significant cause of crime.

Commission at 243.

A survey of American men 18 to 30, including imprisoned offenders, college and theology students, found that persons reporting earlier and more frequent heterosexual petting, coitus, and masturbation were also more likely to report having more exposure to a range of erotic materials; both exposure and sexual activity were strongly associated with reported peer approval and encouragement to engage in a variety of sexual activities.<sup>40</sup>

After reporting these findings, and identifying them as *real statistical relationships*, the Commission suggested three alternative explanations or hypotheses:

*First*, that relatively frequent exposure to sexual stimuli, or to large amounts of sexual stimuli, predisposes the viewer or user to relatively early and frequent sexual activity. In this case, exposure may either generate new sexual behaviors or activate (increase the probability of) already established behaviors.

*Second*, that high frequencies of established sexual activity predispose the individual to earlier or more frequent experience with erotic materials. Here, sexually active individuals may, as a consequence of their sexuality, become more interested in erotic materials, or may find that the socio-sexual environment in which they participate also includes greater availability of erotic materials, and hence increases the probability of early and frequent exposure.

*Third*, both sexual activity and exposure to erotica may be a function of some other condition or circumstance which makes both events highly probable. In this case, the third variable may be a friendship (peer) group in a variety of socioeconomic contexts, such as working class neighborhoods, industrial work groups or fraternal organizations which encourage, value, and reward certain modes of sexual expression.<sup>41</sup>

Any one of these explanations is compatible with the survey findings reported above. At this point the Commission's analysis turned to experimental studies of exposure which, because of their before-after character, might be used to clarify the direction of the relationships and suggest which, if any, interpretation was appropriate. The findings of the experiments indicated that neither single nor repeated exposure produced any qualitative or even any long-lasting quantitative effects on the populations studied.<sup>42</sup> The analysis concluded:

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40. *Id.* at 182.

41. *Id.* at 183-4.

42. *Id.* at 184-93.



[T]hese findings cast considerable doubt on the thesis that erotica is a determinant of habitual extent or nature of sexual behavior among youth of college age or older adults. The data remain susceptible to either of the other two explanations, *viz.*, that persons who are more sexually active are, therefore, likely to see more erotica, or that the relationship is a product of a third variable such as differences in overall life style.<sup>43</sup>

I believe it is fair to say that the Commission's *Report* exercised considerable effort in communicating its findings, and the logic of its analysis. Not all persons may find the conclusions agreeable, but it seems inappropriate to charge that "those data 'not favorable' to the majority point of view are either played down or not mentioned"<sup>44</sup> or that "the Commission Report fails in fully informing its readers about such associations or linkages."<sup>45</sup>

#### METHODOLOGY AND PORNOGRAPHY: THE PROBLEM OF VALIDITY

The methodological criticism is the easiest of all possible evaluations for one familiar with the techniques of data collection and analysis in the behavioral sciences. Never has a study been done the way the textbooks say they should be done and in any given collection of studies, some are always more adequate and better executed than others. When the Commission staff planned its research program, it began with some wisdom collected from the experiences of commissions and sex researchers past. That wisdom involved the expectation of methodological criticism, some of it professionally motivated and some not. One consequence was a special motivation to avoid as many methodological errors as possible; another was the realization that however strong that motivation, no study would be perfect, and some less so than others. For this reason the Commission has invited discussion of these issues by the scientific community and is publishing all the research conducted for the Commission in a series of ten volumes of *TECHNICAL REPORTS*.<sup>46</sup>

The large technical literature on behavioral methodology cannot be discussed here. I would, however, like to address some of the questions that have been raised about the use of (a) verbal reports in data collection and (b) controlled experimentation in the Commission's research.

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43. *Id.* at 193.

44. Cline at 394.

45. *Id.* at 395.

46. *TECHNICAL REPORTS OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY* (1971).

*Verbal Reports.* In reviews of the *Report*, critics have correctly noted the comparatively heavy reliance upon introspective or retrospective reporting. Both Cline and Clor have recited caveats about "question wording," and it has been suggested that, "the Commission Report writers tend to treat 'verbal report' as fact, and when there are discrepancies they consider as significant, they present or emphasize that data which favor their point of view."<sup>47</sup>

The argument that the Commission was unaware of these problems seems inappropriate in light of the Commission's own warnings about them. The *Report* said:

The limitations of survey design generally, and the survey findings presented in this Report should be noted. Data collection procedures, either face-to-face interview or self-administered questionnaires, may be affected by inaccurate recall or by dissimulation, i.e., respondents may not remember past experiences, or they may inaccurately report them, particularly in the area of private behavior. Although various methods may be employed to detect either, findings based on data provided by the respondent should be qualified in terms of these problems.<sup>48</sup>

Regarding the use of verbal reports in controlled experiments, the *Report* said that "reliance upon self reported responses may create problems of interpretation, especially introspective reports."<sup>49</sup> The *Report* also said:

Opinion researchers have become increasingly sensitive to the difficulty of probing beyond 'social rhetoric' in attitude surveys. It has been found that certain topics, and certain forms of questioning, tend to elicit stereotyped responses. This is a particular danger in questions about morality; especially in the realm of sex. One of the important contributions of the Institute for Sex Research (Kinsey) studies was the finding of differences between private and public reporting of sexual behavior. A recent study of moral issues revealed the ease with which persons respond with 'a whole string of old verities of morality'.<sup>50</sup>

Regarding the measurement of sexual arousal, the Commission found some evidence that the assessment of psychosexual stimulation varies according to the reporting or recording method. The *Report* said:

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47. Cline at 403.

48. Commission at 152.

49. *Id.* at 153.

50. *Id.* note 8 at 157.

Retrospective reports, in which respondents are asked to recall an experience which occurred months and years past, yield more conservative estimates than introspective reports during, or immediately after, exposure. Physiological assessment, especially penile plethysmography for males, indicates greater arousal than accompanying verbal reports. These studies also suggest that females are more similar to males when asked to report certain physiological manifestations of arousal such as genital sensations, vaginal lubrication, etc.<sup>51</sup>

The *Report* also indicated that the self-administration of sexological inventories in and of itself may produce some sexual arousal as may the attachment of instrumentation to measure physiological correlates of sexual arousal.<sup>52</sup>

The fact is that the *Report* stated methodological caveats such as these at length and, in fairness, little more could have been expected. The pioneering research which the Commission was able to accomplish in two years "is not and could not be either complete or flawless, nor indeed could it have been so if five years had been available."<sup>53</sup> What then does one do with research that is neither complete nor flawless? What one does, and what the scientifically oriented reader does, is work with the best empirical information that is available, recognizing that *not all of the data are yet in* and displaying an appropriate sensitivity to the limitations of available information. In scientific work, the baby is not ordinarily thrown out with the bath: studies are not eliminated from consideration because of methodological shortcomings. For the empiricist, the data are always right, although he may certainly feel more confident about some findings than others.

One specific area in which the Commission has been criticized for misuse of questionnaire and verbal self report data<sup>54</sup> is in its finding that "51% of the population would be inclined to sanction availability of erotic materials if it were clearly demonstrated that such materials had no harmful effects on the user."<sup>55</sup> This particular finding emerged from the Commission-funded national survey (whose epistemological importance Packer has compared to "a pretty damp firecracker")<sup>56</sup> and has generated more attention than probably any other single finding in the entire *Report*. Clor, for example, observes:

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51. *Id.* note 20 at 166.

52. *Id.* at 178.

53. Statement of Joseph T. Klapper, Commission at 373.

54. Cline at 402.

55. Commission at 157.

56. Packer, *supra* note 15, at 75.

Thus far, this is the only public opinion research to have produced that result. All such research that I know of has produced quite different results. For example, a recent Gallup poll found that 85% of the adult population "favor stricter laws on pornography" and a Harris poll has found that 76% "want pornographic literature outlawed and 72% believe smut is taking the beauty out of sex."<sup>57</sup>

Cline also has been critical of this finding. He writes:

They [the Commission] are basing this only on *some* of the responses of U.S. citizens to Abelson's [the opinion research contractor for the Commission] survey but not to other data from the *same* survey (e.g., 88% would prohibit putting sex scenes in the movies that were put there for entertainment) and of course are rejecting out-of-the-hand results of the Harris and Gallup polls who have been in business for several decades. *This kind of manipulation of statistics and reporting of data is indefensible especially when most Americans or even social scientists will never have an opportunity to view the original data on which these recommendations are based.* (italics added)<sup>58</sup>

Again, the Commission anticipated criticism and stated at length why its own findings did not contradict, or were inconsistent or incompatible with, the findings of Gallup and Harris.<sup>59</sup> The following findings are all *true*:

85% of American adults "favor stricter laws on pornography;"<sup>60</sup>  
76% of American adults "want pornographic literature outlawed and 72% believe smut is taking the beauty out of sex;"<sup>61</sup>

51% of American adults would be inclined to sanction availability of erotic materials if it were demonstrated that such materials had no harmful effects on the user.<sup>62</sup>

The Commission's national survey found that, when provided the opportunity, persons on both sides of the issue tend to qualify their opinions about the availability of erotic material. Like the Harris and Gallup surveys, the Commission found that 68% of the sample agreed that "some people should not be allowed to read or see some" sexual

57. Clor at 71.

58. Cline at 403.

59. Commission at 156-157.

60. THE GALLUP OPINION INDEX, No. 49, July, 1969.

61. THE HARRIS INDEX TO PUBLIC OPINION, May, 1969.

62. Abelson, *supra* note 25, at 92. This finding of the Abelson Study is presented in the Effects Panel Report, Commission at 156-157. Subsequently, further analysis of the Abelson Study indicated that the 51% figure may be a slightly conservative estimate, the actual figure being closer to 55%. See Abelson, *supra* note 25 at 92-93.

materials (32% felt that "people should be allowed to read or see anything they want to").<sup>63</sup> Further questioning (two questions later) revealed that opinions on both sides of the issue are actually conditional or qualified. Those respondents who earlier indicated agreement that "some people should not be allowed to read or see some" sexual materials were now asked: "You said that some things should not be allowed. Would you change your mind if it were clearly demonstrated that materials dealing with sex had *no harmful effects?*" Persons who earlier agreed that "people should be allowed to read or see anything they want to" were asked: "Now in thinking about what you just said, would you change your mind if it were clearly demonstrated that materials dealing with sex *had harmful effects?*" Analysis of these data showed that, although substantial proportions of the population endorse some form of restriction on the availability of erotic material, nearly half (44%) qualify their response in terms of knowledge about the effects of such material. It was found that 51% of the population would be inclined to sanction availability if it were clearly demonstrated that such materials had no harmful effects on the user. Eight persons in ten (79%) would oppose availability of such materials if they were convinced the materials were harmful. About a third of the population (35%) would oppose availability even if it were shown that such materials were not harmful and 7% would favor availability even if it were shown that there were harmful effects.<sup>64</sup>

However, the Commission could not please anyone all of the time and it has been suggested that even assuming the research to be correct, 51% "is not a very large majority willing to abandon all censorship"<sup>65</sup> and that "fifty-one percent is a pretty slim majority, particularly considering the quoted qualifications."<sup>66</sup> This is quite true. Fifty-one percent is only 51% *and all this could possibly mean is that 51% of the population would be inclined to sanction availability of erotic materials if it were clearly demonstrated that such materials had no harmful effects on the user.*

Finally, it has been argued that these data are incompatible with other data from the same survey.<sup>67</sup> Elsewhere in the interview, respondents were asked for their opinions about sexual scenes in com-

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63. Commission at 157.

64. *Id.*

65. Clor at 72.

66. Packer, *supra* note 15, at 75.

67. Cline at 402.

mercial motion pictures and on television. The findings indicated that there is considerable opposition to sexual scenes in commercial films and on television even when such scenes are related to plot development. Over half (69%) of adults contend that sexual scenes should "definitely not be allowed in movies" even where these scenes "help tell the story," although for motion pictures this is not the case among adults who constitute a prime film-going audience (age 21-29); here, 63% of the men and 44% of the women believe that such scenes "should be allowed."<sup>68</sup> In regard to the findings reported above, however, the important point is that the line of questioning concerning erotic content in film and television is independent of the earlier line of questioning. Just as the former questioning did not invite respondent qualifications concerning media and relevance to storyline, the latter questioning did not invite respondent qualification concerning the demonstration of harmful or harmless *effects*. The two sets of data are not incompatible or contradictory.

*Controlled Experimentation.* Both the purpose and relationship of the Commission's experimental research to "real world" phenomena have been badly understood. The effects studies, funded by the Commission, were actually designed as a *multiple method program* of research containing interlocking questions and interdependent analyses. It is generally understood that various behavioral science methods are differentially suitable for certain purposes. Nonexperimental methods, for example, are especially useful for descriptive purposes but less suitable to causal analysis; experimental methods provide the most rigorous test of causality, but are less useful for description. Nonexperimental studies, particularly probability sample surveys, are often useful for generalizing research findings to unstudied populations; in experimental research the generalizing question usually remains a question, although an empirical one. Often the variables or relationships studied experimentally are originally observed and identified through nonexperimental research in the natural environment. Correspondingly, laboratory experiments often suggest which variables might be manipulated in a field experiment in the natural environment.

There is an important sense in which many behavioral science methods may complement and supplement one another in an area such as the Commission's field of study. Within the limitations of time and other resources, a serious effort was launched by the Commission

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68. Abelson, *supra* note 25, at 164.

to examine carefully *the conditions under which certain effects of exposure to erotic stimuli take place*. Using survey methods, controlled experiments, and quasi-experimental studies, the research program attempted first to identify possible statistical relationships between exposure to erotic material and other relevant variables, and second, to clarify the nature, the directionality, of these relationships experimentally. Third, an attempt was made to employ quasi-experimental methods to supplement laboratory observations with comparisons from the natural environment. Time may judge that the Commission failed in its efforts, but probably never before has a government commission launched a behavioral science research effort of comparable magnitude and sophistication.

The *Report* notes that experimental analyses are especially suited to providing the most rigorous test of causality. Such studies also have important limitations and these are also discussed, if not read.<sup>69</sup> The dulling protests of Clor<sup>70</sup> and Cline<sup>71</sup> about volunteer subjects, reliance upon verbal reports, experimenter bias, duration of stimulus exposure, college-age subjects, artificiality, subject awareness, etc., constitute little more than a cataloguing of possible sources of bias common to laboratory experiments. This is not a useful criticism because it simply reifies the methodological issues known to all sociologists, psychologists, and social psychologists who work in the area. The critical issue (not yet addressed by those who fault the Commission's research) is whether any methodological flaws are of sufficient importance to force *alternative explanations of the experimental findings*. The minimum criterion question for any experiment is: Did in fact the experimental manipulation make a difference in this specific instance? What is important is not a listing of all the ways in which the experimental procedure departed from the text book, but rather a formulation of rival hypotheses or explanations for what happened during the experiment. The second criterion question which is often asked about experiments is: Does the experimental finding meet the requirements for being a generalization? As noted earlier, this is always an empirical question, and experimenters are typically, and appropriately, cautious about such extensions. The traditional "artificiality" criticism of behavioral science experimentation ordinarily reflects concern that the experimental conditions and subjects are not typical, or

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69. Commission at 153-154.

70. Clor at 67.

71. Cline at 410-11.

representative, of people and things in the natural environment. In the case of the Commission's experiments, neither their internal validity nor their external validity have yet been challenged with alternative explanations, or with additional studies which show these experiments to be in error.<sup>72</sup>

Predictably, the Commission's research has also been criticized for its failure to conduct *longitudinal* studies despite its announcement in the preface to the Effects Panel Report that "long-term effects could not be adequately investigated."<sup>73</sup> There is little to discuss except to say that the Commission's resources precluded such studies but recommended them in the future.<sup>74</sup>

#### IDEOLOGY AND PORNOGRAPHY: WHAT'S GOING ON HERE?

Critical comments concerning the role of ideology in the work of the Commission contain some obvious truths, obvious nonsense and more ideology. Indeed, "It would be difficult to argue that, in interpreting and organizing its data, the Obscenity Commission has been wholly uninfluenced by ideology."<sup>75</sup> It is certainly less obvious, however, that "libertarian ideology has presided over the doings of the Obscenity Commission."<sup>76</sup> The charge that, "for scientists to confidently conclude that there are essentially no significant behavior changes or increase in antisocial sex activity on the basis of these kinds of data takes a considerable amount of 'faith, ESP, and some admixture of divine revelation,'" <sup>77</sup> reflects a fundamental misunderstanding of actual findings and the methodological resources available to the Commission. Other criticisms are themselves ideological: "the 'burden of proof' or demonstration of no harm in a situation such as this is ordinarily considered to be on the shoulders of he who wishes to introduce change or inno-

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72. A useful discussion of the problems of internal and external validity is found in D. Campbell and J. Stanley, *Experimental and Quasi-experimental Designs for Research on Teaching*, HANDBOOK OF RESEARCH ON TEACHING 171-246 (N. Gage ed. 1963).

73. Commission at 139.

74. By now the amusing double-bind character of Commission criticism should be fully apparent: variously, the Commission is criticized for not doing what it did (*e.g.*, reporting and interpreting statistical relationships, discussing methodological limitations, executing clinical research); for not doing what it said it would not do (*e.g.*, longitudinal studies), and for not doing what it could not do (*e.g.*, studies of children). See Cline at 410-11. Elizabeth Drew once described participation on Presidential commissions as "self-inflicted hotfoots." ATLANTIC May, 1968, at 45.

75. Clor at 69-70.

76. *Id.* at 18.

77. Cline at 406. Note that the Commission did not find no effects.



vation"<sup>78</sup> and "There are opposing social philosophies and different ways of interpreting common experience, and these are the crucial battlegrounds."<sup>79</sup> What's going on here?

The common references to the Commission's ideology have had some undesirable consequences for understanding the actual impact of individual commissioner's values on the work of the Commission, the character of the Commission's deliberations and its conclusions and recommendations. Apparently unable to understand or accept the Commission's methods, conclusions and recommendations, many observers have attributed its behavior to *ideology*, something neither seen nor heard but presumably lurking in a nearby subversive corner. It is difficult to know what specifically the ideological criticism means. Despite visionary theorizing by one or two commissioners at various points during the Commission's life, to interpret the entire Commission's activity as characteristic of an established politico-social program seems incredible in light of what is known about this Commission and its commissioners. The ideological explanation for the Commission's behavior is nonetheless appealing in its simplicity: *everyone knows that libertarians are against censorship and nonlibertarians (whatever they are to be called) are not against censorship; the Commission recommended against censorship (it is commonly believed); and the reason it did so is because of its libertarian ideology.* This sort of explanation or criticism is unsatisfying because it too crudely summarizes the actual factors which account for the Commission's work. The actual factors,

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78. *Id.* at 412. In this regard, one of the commissioners, a physician, has argued that pornography, like new drugs should be considered dangerous until proven innocent. He observes that,

[A] drug is investigated by purposely exposing large numbers of people to it under specified conditions. Through such studies efficacy, toxicity, side effects and idiosyncratic adverse reactions are evaluated. The drug is then released with appropriate warnings and safeguards. Acceptance of a drug for use depends almost always upon demonstrated effectiveness and the failure to demonstrate acute toxicity. If chronic toxicity shows up in further studies, the drug may later be withdrawn.

By these standards, erotic materials, to the extent that they have been examined, would get a clean bill of health. In the several experimental situations where erotic materials have been purposely given or made available to subjects who are being tested, there is a transient sexual arousal (which is what the product is supposed to achieve) and no evidence of acute or delayed behavioral toxicity. There is no drug which is absolutely safe and which cannot be misused. This may well be true for erotic materials as well. But drugs are not withheld because occasional annoying side effects are found in a very small population nor should erotic materials. . . . If the drug analogy is to be followed, experiments should now be performed in which large numbers of individuals at different ages and with different backgrounds, are exposed in different social milieus in order to define and refine the full limits of safety.

Statements of Morris A. Lipton and Edward D. Greenwood, Commission at 381.

79. *Clor* at 76.

however, are less exciting and mysterious than the ideological explanation.

Earlier in this essay it was observed that government commissioners, as real people, do not divorce all pre-existing orientations to subject matter from their work and, in fact, much of their work amounts to case-building. Commissioners are selective in the problems they choose to address, the methods they use, and the range of interpretations and recommendations they consider. A recent analysis of government commissions proposes that every commissioner represents a constituency,

He may combine constituencies, but a commission generally includes at least one businessman, labor leader, lawyer, educator, editor, farmer, woman, Negro, Protestant, Catholic, Jew, Easterner, Midwesterner, Southerner, Westerner, federal government official, state government official, city government official, Congressman, member of a previous administration, enlightened amateur, and friend of the President. This iron law of presidential appointment . . . is called "interest group liberalism": representatives of major sectors of American society participate, collectively, in arriving at consensus on policy.<sup>80</sup>

The composition of the Commission on Obscenity and Pornography was conspicuous in not reflecting the usual number of represented constituencies in accordance with the dictates of "interest group liberalism." Power, wealth and influence were notably absent from the roster of seven university professors, five lawyers, three clergymen, one nonacademic sociologist, one clinical psychiatrist, and one retired vice president of a publishing house. Although some have argued that vested interests were represented by the four commissioners affiliated with publishing, television and motion pictures, the constituencies of the professors (law, English, communications, sociology, psychiatry, library science) and the two psychiatrists are less obvious.<sup>81</sup> Only in the case of two commissioners, each affiliated with organized antipornography citizens groups, are the represented constituency and vested interest immediately apparent.<sup>82</sup> But the pre-existing commitment of the

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80. Popper, *supra* note 9, at 15.

81. At least one critic has suggested that the professors' constituency is a library full of books or at least a commitment to the potential moral efficacy of books. Kristol suggests that ". . . if you believe that no one was ever corrupted by a book, you have also to believe that no one was ever improved by a book (or a play or a movie). You have to believe, in other words, that all art is morally trivial and that, consequently, all education is morally irrelevant. No one, not even a university professor, really believes that." Kristol, *Pornography, Obscenity and the Case for Censorship*, N.Y. Times, March 28, 1971 (Magazine) at 24.

82. Both commissioners eventually identified themselves as "dissenters" from the full

## Commentaries

commissioners generally more closely resembled *disinterest* than anything else.<sup>83</sup>

It is easier to see why the Commission was oriented toward behavioral science research. In addition to the Congressional charge to undertake such studies, the established research orientation of at least six commissioners facilitated this emphasis in the Commission's work. Two of the commissioner-sociologists have spent most of their professional careers conducting research on the social effects of mass communication, and another has analyzed the area of criminal behavior. The past research activity of the commissioners presumably had something to do with their Presidential appointments, although they were more aware than others that "research answers complex questions only by a series of approximations."<sup>84</sup>

What, then, constituted the bases for the Commission's conclusions and recommendations? Two commissioners, in their separate statement, analyzed the general decision-making this way:

The Commission is . . . not only a group which has worked conscientiously at its task, but it is also 18 separate individuals, each of whom made his own decisions. Such decisions are inevitably the result of the personal blend of each Commissioner's background and values, plus the learning that came from the information generated by the Commission's research and the discussion and debate which occurred in the many meetings of the panels and the full Commission. It is not likely that every Commissioner reached his decision for the same reasons, but the individual reactions are masked by the consensus.<sup>85</sup>

Individual and idiosyncratic reactions were not fully apparent until some agonizing hours of deliberation during the final days of the Commission. The initial opportunity for commissioners formally to describe and defend their own conclusions came in July of 1970 at a

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Commission, and each alleged to have found vested interests other than his own. The Commission's chairman, and its general counsel, were identified as members of the American Civil Liberties Union, "whose subversive nature apparently requires no comment." Packer, *supra* note 15, at 74.

83. The general disinterest was apparent to the dissenting commissioners early in the Commission's life. They believed that commissioners and staff could be productive only with developed interests in the topic. One continually requested that all commissioners be put into direct contact with the problem of obscenity in the concrete, by doing content analyses of erotic material, and another complained that the professional staff had no background or familiarity with the problem. Other commissioners regarded the general unfamiliarity, and inexperience, as desirable attributes for persons working in an emotion-charged area such as this one.

84. Klapper, *supra* note 53, at 373.

85. Lipton and Greenwood, *supra* note 78, at 379.

conference refuge near Washington. One entire day was devoted to reading, questioning and revising the four panel reports, of which the Effects Panel Report received the closest scrutiny and penetrating discussion. On that day considerable conversation concerned probability sampling, interview completion rates, sample size, question wording, official crime statistics, and what the word "scientific" really means. On the second day, devoted entirely to individual commissioner's conclusions, however, comparatively little reference was made to the first day or to the discussion of the research findings which took place that day. Statements of conclusion by individual commissioners resembled most closely the dialogue characteristic of the first meetings of the Commission in July, 1968. One major difference was that discussion was now directed toward specific legal issues such as the desirability of declaratory judgments, distinctions between textual and pictorial obscenity, and the appropriate age to be specified in juvenile obscenity statutes. Another important difference was that the same opinions and positions could now be embellished at each commissioner's convenience with research findings whose uniformity either supported the viewpoint or whose inconclusiveness could be used to justify restraint or indecision. And, of course, when a commissioner's position was incompatible with a particular research finding, the finding could be dismissed as irrelevant or invalid because of some methodological problem. The available behavioral science evidence was more or less cut out and tailored to suit particular commitments, and virtually all of the commissioners found some piece of data which suited their interests.<sup>86</sup>

Perhaps the most illuminating truth to emerge from the Commission's deliberative activity confirmed what behavioral scientists have known for a long time: first, human behavior, particularly that which has been maintained for forty to fifty years, is exceedingly difficult to change, and second, the purpose to which human beings put new information is typically one of reinforcing existing predispositions, attitudes and beliefs. It is in this sense that Clor's conclusion about the utility of behavioral science research in policy making is right but for the wrong reasons. He concludes that "The most important consideration is what the Commission's work has to tell us about the limitations

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86. A colleague and I speculated at the time about the role of chance in these deliberations. We both had been impressed by the behavior of one commissioner during these long deliberation meetings. After being repeatedly asked to come to a decision concerning preference for one of four model statutes, this commissioner paused with eyes closed for about as long as it takes to flip a coin mentally and then suddenly in a burst of radiant enthusiasm shouted: "I'll take number two!"

of behavioral science as a resolver of controversial questions in public policy."<sup>87</sup> Certainly it is true that behavioral science *can* contribute to *some* of the issues raised by concern about pornography, and that potential contribution probably is in the clarification of logical and empirical assumptions underlying various policy strategies, such as the pernicious effects argument or the state of public opinion. And certainly the limitations of contemporary behavioral science, such as the technical problems associated with longitudinal studies and the ethical issues involved in experimentation, particularly with children, often preclude the definitive conclusions that are badly wanted and needed. But it is also certifiably true that the utility of behavioral science findings is mediated by the behavior of the policy makers, whether they be commissioners, governors, senators or voters. The Commission on Obscenity and Pornography succeeded more in identifying, and warning about, the few facts and the many fears and prejudices surrounding popular discussions of pornography than in bringing its new facts to bear on its own established fears, prejudices and commitments.

This Commission asserted that "much of the 'problem' regarding materials which depict explicit sexual activity stems from the inability or reluctance of people in our society to be open and direct in dealing with sexual matters,"<sup>88</sup> although it could not consistently discipline itself to deal openly and directly with *all* of the questions it confronted. It could not, for example, adopt a straightforward stance regarding the question of juveniles. In this area, the Commission ultimately recommended ". . . the adoption by the States of legislation . . . prohibiting the commercial distribution or display for sale of certain sexual materials to young persons."<sup>89</sup> The Commission reasoned that "insufficient research is presently available on the effect of the exposure of children to sexually explicit materials to enable us to reach conclusions with the same degree of confidence as for adult exposure,"<sup>90</sup> and indicated that it has been influenced "to a considerable degree, by its findings that a large majority of Americans believe that children should not be exposed to certain sexual materials."<sup>91</sup> This particular recommendation, and its supporting rationale, seems peculiar in light of certain

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87. Clor at 76.

88. Commission at 47.

89. *Id.* at 56.

90. *Id.* at 57.

91. *Id.*

other data developed by the Commission. The Commission also found, of course, that (a) despite existing legislation, the experience of juveniles with erotic materials is widespread, and it occurs relatively early (by age 18, 80% of males and 70% of females have read or seen explicit depictions of sexual intercourse; half of American males have had such experience by age 15);<sup>92</sup> (b) the principal source of erotic materials for juveniles is rarely commercial, but social networks of same-age friends;<sup>93</sup> (c) the interest of juveniles in such materials must be regarded as "natural;" most young persons experience such a curiosity and it is correlated with a developing sexual orientation (or the absence of, or inability to obtain, adequate sex information);<sup>94</sup> and (d) that although there is a paucity of research on the effects of erotic materials upon juveniles, there is a growing body of research pertaining to adults which provides no reason to anticipate harmful effects among juveniles.<sup>95</sup>

It would appear that the Commission's recommendation concerning juvenile legislation also was formulated independently of its own informational resources but justified selectively by some of those resources. Again, however, the "ideological conspiracy" explanation is less reasonable than a behavioral explanation. Despite the evidence, commissioners probably sensed that a nonrestrictive recommendation concerning juveniles would be regarded by the Congress as offensive, and would hence jeopardize a favorable response to the Commission's entire program of recommendations. But probably, the critical criterion was that the commissioners felt, intuitively, that there was "something just not quite right" about children reading and looking at dirty

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92. *Id.* at 123-27.

93. *Id.* at 127.

94. The Commission's findings in this area are not well known. It was found that there is a considerable discontinuity in American society between preferred sources of sex information for young persons (mothers and fathers) and actual sources (same-age friends). Most Americans learn about sexual matters from their peers, and a substantial amount of exposure to pornography occurs in this context. It was also found that:

[I]n the case of both sexes, there was, in fact, a relatively high proportion whose source of sex information had been friends or books, or both, and who also had been comparatively heavy users of explicit sexual materials . . . . [P]eople whose major source of sex information was their parents were less likely to use explicit sexual information, whereas people for whom friends about the same age were the major source of sex information were more likely to use explicit sexual materials.

*Id.* at 268-71.

95. Several completed studies, which compared delinquent and nondelinquent youth in terms of their mutual experiences with erotic material, indicated that these two groups of minors have substantially similar experiences with erotic material in terms of the age of first exposure, the amount of exposure, and the kinds of materials seen or read. *Id.* at 220-26.

books and pictures. The reasoning is not logical, but neither is it ideological. It is cultural.<sup>96</sup>

In short, the special wisdom and systematic ideology that are often attributed to our great deliberative bodies may be importantly undeserved. Commissioners are real people—some brilliant—some foolish—and commissions *are behavior*, sometimes creative and sometimes conventional. One promise of behavioral science is that it will also shed some light on our brilliance, foolishness, creativity and convention.

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96. The impact of cultural values on the interpretation of research findings has also been suggested in the case of the National Commission on the Causes and Prevention of Violence. Some critics (*e.g.*, Berkowitz, *supra* note 7, and Wilson, *supra* note 7, at 45) have compared the respective research and recommendations of the Violence and Pornography Commissions as a presumed illustration of how similar data can yield dissimilar conclusions when the analytic apparatus is mediated by values. Some have argued that the Violence Commission was "hard on violence" while the pornography Commission was "soft on pornography." These arguments, however, have overlooked the disparity in the two commission's actual recommendations—the Pornography Commission's proposed legislation on public display, the mails, and concerning juveniles is considerably stronger, *i.e.*, "tougher," than the Violence Commission's proposals concerning regulation or control of displays of aggressive or violent depictions. In regard to each Commission's actual research findings, I agree with Berkowitz and Wilson that the Violence Commission generally overstated and exaggerated the case for harmful effects of film-depicted aggression. I also agree with Berkowitz and Wilson that the research on the effects of both erotic and aggressive depictions has produced essentially similar findings: that the media are comparatively impotent in generating behavioral or attitudinal change; that modeling (imitation) effects do occur, but their occurrence is contingent upon circumstances so limited and special that the main effects do not often nor ordinarily take place in the natural environment; that, finally, there is a very small probability (a small probability but greater than zero) of harmful effects actually occurring. It is this last finding which raises the question of cultural values. In describing and discussing some of these studies, the behavioral scientists' term "a small probability but still greater than zero" is often made functionally equivalent to the layman's phrase "some people might." Such translation probably does not constitute a serious etymological error except that the consequences of using each term take rather different directions. The scientist's description of findings in terms of "small but greater than zero probabilities" leads him to attempt to define the quantitative value of the probability. The "some people might" description, however, inevitably leads to speculation and, hence, invites exaggeration. Within American society, it is true, although grossly stated, that sexual behavior is more highly valued than aggressive behavior. From here it is just one short step to conclude that the *possibility*, even if it is a small possibility, of aggression is abhorred even more than the possibility of sexual misconduct. Finally, I think it is clear that the failure of research in both areas to link either type of media depiction to undesirable behavior has actually perpetuated the problem of value intrusion. Our value orientations, particularly in the area of violence, lead us to abhor not only violence *but depictions of it*. Similarly, the Pornography Commission found that although substantial proportions of people are worried about the effects of erotic materials, there is also considerable annoyance that such materials *merely exist*.