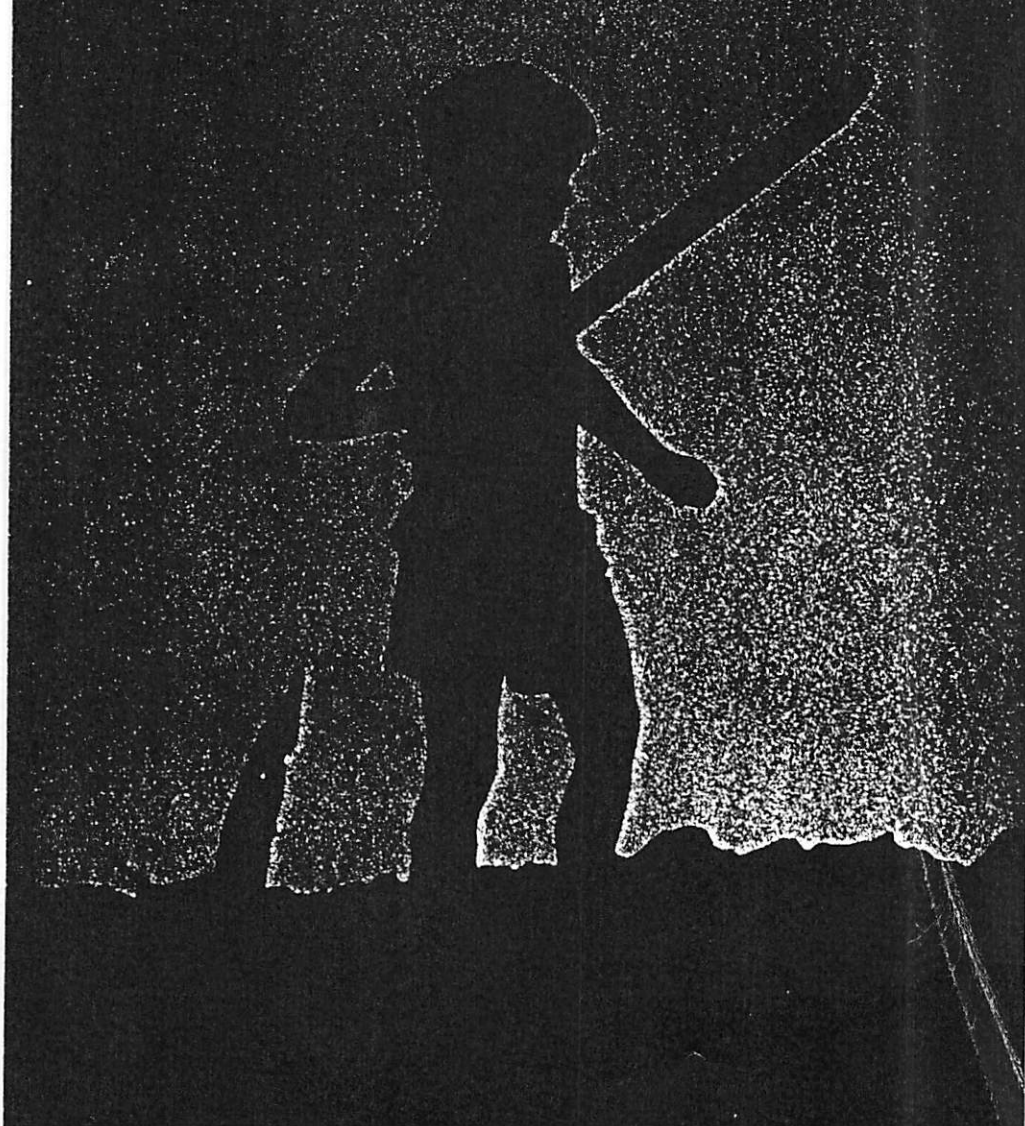


Cover story

Left defenseless

So much for children's rights: Justice Department hampers its own anti-child pornography efforts



Barbarian control was the issue when Roman Emperor Hadrian built his famous wall in 120 A.D., and 1,874 years later, it's still a problem. The barrier now may be laws and courts instead of rocks and ditches, but the purpose is still to keep the uncivilized separate from the civilized. There are more than a few chinks in the wall in New Orleans' French Quarter, one of the nation's clearest examples of a licentiousness "containment" policy. Even within the district, with its famous Bourbon Street, the boundaries between right and wrong are unclear. At one relatively upscale restaurant, Harry Connick Sr., the Orleans Parish district attorney, works his night job, singing in front of a big band with definite Lawrence Welk leanings. A few blocks away, tourists are standing in line to have their picture taken with female impersonators.

And at this Bourbon Street strip joint, one of dozens scattered between the jazz bars and the occasional voodoo memento store, a 19-year-old woman who calls herself Lorelei talks of her six years in "the business."

"I started at 13," she says. "I was modeling. The bad thing is that once you're in, you're locked in. I can't go to a job interview and tell them what I've been doing. So I guess I'll stay here. I make good money."

Lorelei has just gotten off the stage; now is when she finds a customer to provide special attention to, to offer light conversation and to wait for a proposition. She's stumped when asked how she spells her name, but she tells of a John who explained that the name comes from a German folk tale about a river siren on the Rhine.

She talks also about the bar's usual clientele—in addition to the men sitting by themselves or in groups, an Asian couple has just walked into the small, dark bar.

"Couples come in a lot," she says. "Mostly I think—I know—their husbands have been places like this before, but they won't admit it. And maybe the wives just want to see what it's like, what we're like. But that's okay; this is New Orleans, you know?"

A little bit of sin is part of the experience, she agrees. There are periodic crackdowns, but they're not serious. There are preachers on the corners, but they're outnumbered by con men at shoe-shine stands. The famous balconies, which appear on newscasts nationwide during Mardi Gras, are filled even though it's a drizzling Sunday night in October.

Another dancer is on stage now, and Lorelei is getting antsy. Do I want to buy her a bottle of champagne? Or something else?

When asked if there were photographs or videotapes of her early "modeling" work still floating around, materials which could come back to haunt her, she shrugs. If there are not pictures of her, she says, then there are of other young girls: there's a market for it. But since

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the passage of a 1984 law strengthening federal child pornography laws and the release in 1986 of the Meese commission report directing federal prosecutors to crack down on child pornography, that slice of the industry has been forced underground.

Anti-pornography activists say that Attorney General Janet Reno and the Clinton administration are backing away from punishing child pornographers: The government's arguments in two key child pornography cases—one argued this month; the other to be filed next month—make it all but impossible to win convictions against child-porn rackets, activists assert.

Further, the administration has demoralized the career federal prosecutors who specialize in obscenity and child pornography cases, according to H. Robert Showers, who headed the Child Exploitation and Obscenity Section in the Justice Department under President Reagan. Mr. Showers, president and general counsel for the National Law Center for Children and Families, notes that CEOS still labors under an acting section chief; no permanent director has been named. And the section's focus has shifted away from obscenity and child pornography prosecutions, he told *World*; it concentrates now on local child abuse cases on Indian reservations and other federal lands where the department has jurisdiction. Mr. Showers would not name those who are disaffected, because he did not want to subject them to reprisals.

Calls by *World* to the Justice Department were not returned. Miss Reno has, however, defended her CEOS in sworn testimony to Congress. Under questioning by Sen. Charles Grassley (R-Iowa) in a July 28 Senate Judiciary Committee hearing, the attorney general said the section in the past 19 months "has almost doubled the number of case and matter files as compared to the previous 19 months." Miss Reno said her prosecutors had "obtained 62 convictions for child exploitation and obscenity offenses in the same period." Since that hearing, the department has not provided information on what the convictions were for, leading former child pornography prosecutors like Mr. Showers to conclude that the attorney general's "clever wording lumps together Indian reservation child abuse convictions to disguise the dramatic shift in prosecution priorities away from interstate obscenity and international child pornography cases to local child abuse cases."

Miss Reno's conviction rate in Florida—where she served as a prosecutor before taking the attorney general post—was unimpressive. She has a history of failing to "seriously prosecute" obscenity and pornography cases, according to the American Family Association of Florida. That left Dade County with more hard-core pornography outlets than the rest of the state's counties combined.

That same window of opportunity, taken advantage of by porn purveyors in Florida, is now opening to the rest of the nation, according to experts. It will allow child pornography to find its way into the realm of the acceptable.

"As much child pornography that can be legitimately carved out will be," says Judith Reisman, who has spent 20 years debunking the Kinsey studies of the 1950s. Those studies declared that children are, from birth, sexual beings and therefore no "age of innocence" exists. Such thinking makes moot all age-of-consent laws and prosecution of child pornography, as long as it doesn't involve physical abuse.

"Kinsey serves their interests," Dr. Reisman says of those trying to further weaken the laws. "Whether the Supreme Court allows that [weakening] doesn't matter. What Reno has done is sent the message out to those around her—the entire law enforcement community, federal, local, and state—that she's not interested and doesn't want to hear from people about things that are not physically abusive to the children and involve coercion. And everyone has caught on fast."

A check last week of the legal "containment" boundary suggests that indeed many of the biggest holes in the wall were made not by the modern-day barbarians, but by the "emperor" himself—or at least by the emperor's staff. Attorney Clyde DeWitt, writing in the September issue of the porno trade journal *Adult Video News*, says the Clinton administration will be good for business. "The voice of reason has found its way into government," Mr. DeWitt, a well-known pornography defense attorney, writes of the Reno Justice Department. The porn-industry lawyer predicted "virulent attacks on the honor, integrity, and morality of Clinton, Reno, and anybody at the DOJ who had a hand in this fresh (!) approach to constitutional rights."

The nonfresh approach is currently the law of the land. Child pornography, under Reagan-era federal statutes and federal court

case law, is treated differently from so-called adult pornography. In short, pornographic material with adult actors or models is not, under some circumstances, illegal. For such pornography to lose First Amendment protection, it must rise to the level of "obscenity." Courts have formulated complex legal tests to determine when that line is crossed. But child pornography—material whose actors or models are under 18—does not have to be "obscene" to be unlawful. It has virtually no First Amendment protection and is much easier to prosecute.

All that is changing.

On Oct. 5, President Clinton's solicitor general, Drew Days III, presented oral arguments in a Supreme Court case known as *United States v. X-Citement Video*. That same week, Mr. Days asked the Supreme Court to give him another month to file the government's legal brief in *United States v. Knox*. Both cases are important, but *Knox* is potentially the more explosive case.

Knox began before Mr. Clinton took office. Stephen A. Knox, 38, was convicted in 1988 of possessing three child pornography videotapes in his home. The tapes contained visual depictions of girls as young as 8 years old in bikinis, underwear, and stockings. Promotional literature for the videos Mr. Knox purchased describes the tapes this way: "Every second is crammed with tender young girls in various revealing outfits. . . . We have some nice close-ups of the panties she's wearing under those shorts, too. . . . Just as you are recovering from all of the above, we bombard you with some nice teen and preteen panty close-ups."

The Bush administration pursued the case all the way to the Supreme Court. Before *Knox* was slated for argument, however, Mr. Bush was defeated in the 1992 election, and Mr. Clinton's solicitor general filed a new legal opinion with the court saying the new administration agreed with the defendant. At issue: whether federal child pornography laws were intended to cover sexually oriented material in which the child models are clothed. The court concluded they did; the pornographers and Mr. Days concluded they didn't.

That provoked a furor in Congress. The Senate passed a resolution 100-0 condemning the administration for reversing course in the case; the House, with only three members dissenting, passed a similar resolution. Mr. Clinton, in reaction to the rebuke, fired off a carefully worded letter to Miss Reno stating that since the Justice Department considered the

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child pornography laws deficient, she should prepare new legislation "to ensure that federal law reaches all forms of child pornography, including the kinds of child pornography at issue in the Senate resolution."

The administration could get no takers in the Congress, whose members insisted the laws were sufficient and that any deficiency was in the Clinton administration's legal interpretation.

Meanwhile, the matter was sent back to the appellate court for consideration in light of the new government position. But that court, the U.S. Court of Appeals for the 9th Circuit, again upheld Mr. Knox's conviction. Mr. Knox again appealed to the Supreme Court, and the court acceded to the administration's request to file its legal brief in the new appeal Nov. 10—two days after the congressional election.

Critics charged the administration wanted to avoid even more political damage on the issue so close to an election that even Democrats concede is shaping up to be a disaster for the president. "Everybody knows what everybody is going to say in this case," said John McMickle, litigation coordinator for Mr. Showers's National Law Center. Mr. McMickle told *The Washington Times*: "They are simply trying not to say something that Congress won't approve of prior to the elections."

Who is driving administration policy? It's a question anti-pornography groups are asking, in light of Mr. Clinton's stated desire to write a new child pornography law that would target for prosecution the kind of material his administration refuses to prosecute. Mr. McMickle and his colleague Cathleen A. Cleaver, interim program director of the National Law Center, point to Deputy Solicitor General Paul Bender.

Mr. Bender's government post is known as "the political deputy," Ms. Cleaver told *World*. That person's job is to ensure that the solicitor general's legal opinions conform to White House policy, which makes the post "very significant."

More significant is Mr. Bender's background. In 1970, he served as general counsel to President Nixon's Commission on Obscenity and Pornography. That panel's conclusion that all pornography laws should be abolished were rejected both by the White House and Congress as "morally bankrupt."

Mr. Bender resurfaced in 1977, then a law professor at the University of Pennsylvania. In a Senate Judiciary Committee hearing on a proposed new child pornography bill, Mr. Bender pronounced the legislation unconstitutional and urged the Senate not to adopt it. "I'm not sure why you ought to permit a variation in the definition of 'obscene' because children are actors in the film," Mr. Bender testified. "Obscenity law has always focused, at least the constitutional concept of obscenity has always focused, on the appeal of material for people who view it, and not on the effect that it has upon the actors or authors."


Advocates of stricter child pornography laws argue that the material represents photographic evidence of child abuse and should, therefore, not be accorded traditional First Amendment protection. Mr. Bender took issue with that characterization, suggesting that such a view would criminalize a

newspaper photographer who had snapped pictures of child abuse in progress. "Those pictures are not only enormously valuable but they are also protected by the First Amendment," he told the senators. "Yet that bill would prohibit that individual from taking those photographs because those pictures of child abuse are going to move interstate commerce. I doubt if that is the intention, but by focusing on the photographer, whether or not the photographer has any connection with the child abuse, it seems to me that this bill goes much too far."

Mr. Bender went on: "The fact that a picture depicts child abuse does not remove that picture from the protection of the First Amendment...."

That mirrors the ACLU's party line, which says that after a photo is taken or footage filmed, it should be fully protected on the grounds that while child abuse may be illegal





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watching it shouldn't be. In fact, some question whether child pornography is child abuse, if the child is willing.

"To speak today of paedophilia, which we understand to be consensual intergenerational sexual relationships is to speak of the politics of political oppression," states the *Journal of Paedophilia*, of which Knox attorney Lawrence Stanley is a manuscript editor. Also in that magazine, Stanley wrote an article titled "The Hysteria Over Child Pornography and Paedophilia," asserting that "children have enjoyed . . . adult-child sexual encounters . . . being nude before a camera."

Dr. Reisman disagrees strongly. "That child may not be slapped or scalded on film, but that child is being abused. There's no child pornography that is not abusive—that material is floating around all over the world, and that child suffers because of that."

Part of the Clinton administration's inter-

pretation of child pornography law is that, to prove a violation, prosecutors must show that the child was "lasciviously engaging in sexual conduct" and that the child's private parts were visible. That would "focus on the presence of, or the lascivious action by, the child rather than the photographer," complained Sen. Christopher "Kit" Bond (R-Mo.). In other words, the child is the suspect, not the pornographer.

Mr. Showers is appalled at the new attitude. "Pornography is directly related to rape, child molestation, sexual violence, and harassment. It's unbelievable when you have Hillary Clinton and Janet Reno saying they want to protect children that they would take such a position."

Also provoking much furor is the administration's legal stance in the *XCitement Video* case, which involves a statute designed to punish distributors of child pornography. Los Angeles pornographer Rubin Gottesman was arrested by undercover officers when he sold them videotapes featuring an underage actress. He was convicted, sentenced to one year in jail, and fined \$100,000. Mr. Gottesman's conviction was later overturned on a technicality.

The statute punishes anyone who "knowingly transports or ships . . . any visual depiction [involving] the use of a minor engaging in sexually explicit conduct." The San Francisco-based U.S. Court of Appeals for the 9th Circuit agreed with Mr. Gottesman's argument that the First Amendment requires that a defendant have knowledge of the "minority of the performers," and that the word "knowingly" in the statute refers only to the transportation of the materials, not to the age of the performers.

The administration is pushing to have the conviction reinstated, but on grounds that would make it difficult to prosecute other cases. Solicitor General Days argued that the "knowingly" requirement can be inferred, and that there is evidence in the trial court that Mr. Gottesman knew the actress was under 18.

What's so controversial about that? Mr. Showers says the argument over "knowingly" obscures the main point. "The courts have already ruled that the production of child pornography is in essence a strict liability offense—that you do not have to know the age of the minor." The analysis is similar to

that in statutory rape, he said. "Whether, in fact, you know the age of the girl being raped obviously had no effect on the girl; she was harmed just the same."

Mr. Showers says the government should pursue convictions on an objective "strict liability" analysis, and not bother with subjective inquiries as to what the pornographer knew, and when he knew it. The National Law Center's legal brief in *XCitement Video* urges the court to affirm its "strict liability" analysis. As a backup position, Mr. Showers's group suggested, if the court were to require a proof of knowledge, that it should mandate only "constructive or reckless knowledge"—that shippers should have known the age of the performers—and not "actual knowledge."

By arguing for "actual knowledge," Mr. Showers says, Mr. Days is taking a position that will hamstring prosecutors. "It is rare for the government to have undercover tape recordings of the pornographer saying that he knew the age of the child in the pornography," Mr. Showers explained.

Meanwhile in Los Angeles, the beat cops on Hollywood Boulevard acted as if they had felt the winds of prosecutorial change. Not far from the corner where Julia Roberts was picked up by Richard Gere in the movie *Pretty Woman*, prostitutes were leaning against buildings and standing below streetlights, in full view of the police who were diverting traffic around some earthquake repair work on the boulevard.

Down a side street, a 24-hour newsstand was selling magazines such as *Hustler's Barely Legal* and *Virgin*. A man in a jogging suit grabbed a copy of *Virgin*—its cover boasted of young girls revealing their true desires—and slapped a \$5 bill down on the folding table that held the cash register. His eyes didn't meet those of the cashier, an aging black man who seemed long past caring what anyone bought. The man in the jogging suit left with his change, getting into his Oldsmobile and driving away.

Under the old rules, a crime had in all likelihood just been committed. Kiddie porn had just changed hands, but the cops just watched the flow of the traffic.

—NICKOLAS S. EICHER AND ROY MAYNARD

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