

# Smothering Smut

*While the NEA controversy takes center stage, the federal government is carefully dismantling the porn industry—without media attention.*

**BY NINA REYES**

**L**ast spring, a series of swift and brutal government raids was launched on a multibillion dollar industry. Some businesses were forced to reexamine and pare down their inventory; others exited the field altogether. Curiously, while the businesses subjected to the search and seizures operate legally, the plundering they experienced at the hands of law enforcement agents received virtually no coverage in the press.

"Nobody cares about us because we're pornographers," states one businessperson simply. "Everyone is up in arms about the National Endowment for the Arts and censorship, but when we get

raided, no one writes about it."

Unfortunately, the allegation is all too accurate: Aside from several newsletters and publications specifically devoted to First Amendment issues, a coordinated effort—considered by experts to be one of the most serious assaults on freedom of speech to occur in the last few years—has surged ahead with almost no media attention. Even more alarming, the government-sponsored anti-obscenity unit behind the attack, which one commentator aptly termed "the national undercover morals squad," continues to receive plump annual allocations from the federal budget, acquires new litigators and has won

Photos: Robert Miller

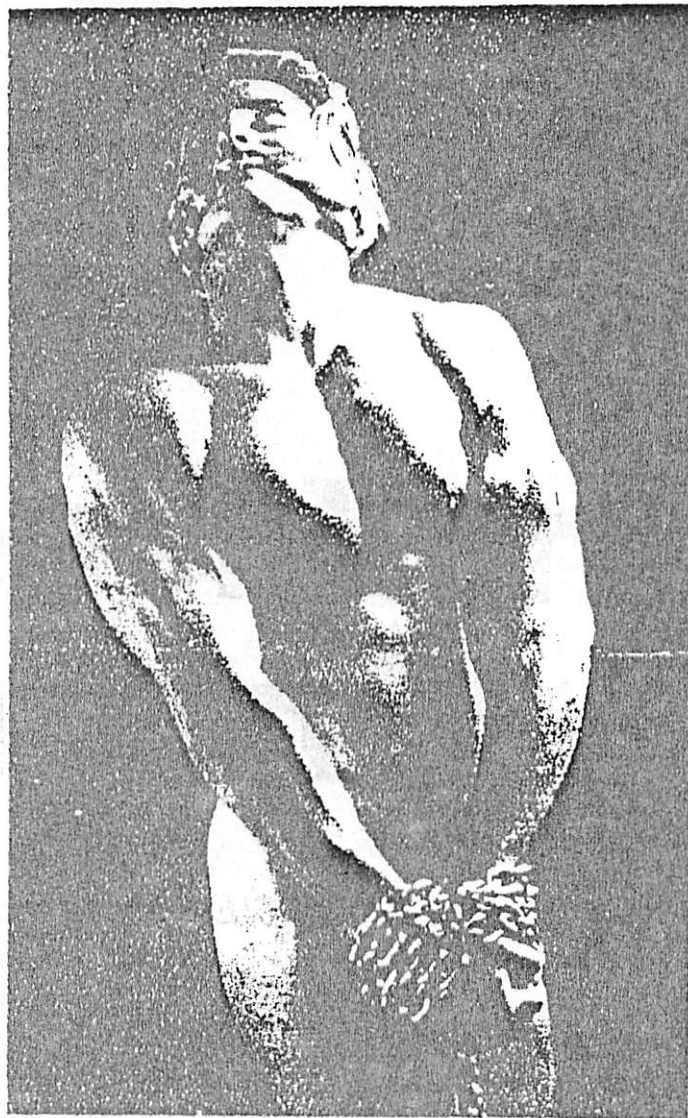
a fresh round of victories in the federal court system.

While many would agree that the government's morality brigade must be stopped, the public certainly isn't very interested in defending the rights of pornographers to distribute their dirty little pictures. And since the government anti-porn group recently changed its name from the bureaucratic-sounding National Obscenity Enforcement Unit to the more emotionally loaded Child Exploitation and Obscenity Section—due, a spokesperson claims, to the fact that half of the unit's staff hours are spent prosecuting child exploitation and abuse cases—which makes convincing the public to scrutinize its urge to censor even more problematic.

For lesbians and gay men, considering the role that visual erotica has played in the age of AIDS, and pondering the growing significance of pornography in the expression of lesbian sexuality, this latest assault on X-rated visuals is particularly chilling. Just as gay men and lesbians nationwide have once again seized on the power of visibility actions as a tool for liberation, prosecutors of porn have found that visuals featuring same-sex smut, particularly gay male sexual acts, are more likely to bring convictions than heterosexual romps in the hay.

The irony, of course, is that queers, as well as our liberal allies, have risen in eloquent defense of high-brow erotica, such as the late Robert Mapplethorpe's work, insisting that the images over which so much ink has been spilled are *art*, not *pornography*. The implication left lingering in the air, then, is that censorship of erotic visuals considered overtly pornographic will be tolerated.

And, unfortunately, in these times, as Mapplethorpe's lesbian and gay defenders have discovered, when censorship hits, queerly erotic images are burned first.



**T**he force behind this most recent crackdown on visual sexual images is no less a power than the United States Department of Justice, which, under the direction of Attorney General Dick Thornburgh, has lifted obscenity prosecutions out of the backwaters where they have resided since the Warren Court in 1973 broadly defined the parameters of the First Amendment to include most forms of sexually explicit material. With a little help from his predecessor, Edwin Meese, and the former attorney general's 1985 Commission on Pornography, Thornburgh has nurtured and refined a fighting force of litigators who are spearheading the national war on porn.

This anti-obscenity unit, created in consonance with the recommendations of the Meese commission, has access to resources far beyond its ten staff litigators and its annual \$1.7 million budget. In addition to the ten coordinating litiga-

tors on staff at the unit's Washington headquarters—a staff which is expected to grow to 13 in the near future—the unit may, at its choosing, use an assistant US attorney specially trained for obscenity prosecution in each of the 94 federal districts. Furthermore, for research and enforcement actions in the prosecution of individual adult entertainment businesses, the unit utilizes the Federal Bureau of Investigation, the Internal Revenue Service, the US Postal Service and local police.

It's no wonder, then, that the anti-porn unit has forged a novel approach to obscenity prosecution that melds modern legal tools and a medieval mentality with frighteningly successful results. By threatening legitimate businesses and their managers with simultaneous indictments from a number of jurisdictions, debilitating fines, years of incarceration for violation of

federal law, and, more recently, asset forfeiture, the obscenity unit can win without even going to trial.

Earlier this year, for example, the owner of a gay mail-order business in the Midwest returned from an 18-month stint in jail that had resulted from a series of indictments brought against him by the Justice Department task force, and last year, a West Coast distributor of gay porn videos closed its doors as part of a plea bargain in response to charges brought by the obscenity unit. Some companies have paid fines nearing \$1 million. Others have attempted to fight the charges brought against them and found that the cost of putting up a legal defense against a number of indictments forces them into bankruptcy.

"Even if the defendants win, it's a pyrrhic victory," comments John Weston, a West Coast attorney and member of the private bar of lawyers that specializes in advising and defending businesses within the X-rated industry.

During the two years the federal obscenity unit has been operating at full throttle, a working pattern has emerged that observers think belies the political agenda behind the unit's stated purpose of enforcing federal anti-obscenity laws.

The pattern involves the use of sting operations in small towns—where, presumably, an unjaded grand jury could be convened—followed by search-and-seizure raids conducted in conjunction with agents from the FBI, the IRS, the US Postal Service and local police, on out-of-state distributors. After indictments are returned, defendants are offered plea bargains that include astronomical fines and agreements to go out of business. Since the alternative is typically the prospect of a lengthy legal battle, followed by decades of incarceration if the defendant is convicted, an overwhelming number of defendants choose the plea bargain.

**O**ne of the more alarming aspects of the anti-obscenity unit's methodology is that there is no solid basis in the law for the charges they file against the purveyors of porn: Unlike narcotics, for example, the obscenity—and consequent illegality—of adult entertainment products is left to the judgment of the beholder. In other words, what may offend the community standard in one jurisdiction—and thereby be deemed illegal—may not raise hackles in a more cosmopolitan bailiwick, so while a video's producer languishes in a Tennessee jailhouse because a local jury finds the material obscene, hundreds of thousands of viewers enjoy the same tape with complete immunity in cities all across America.

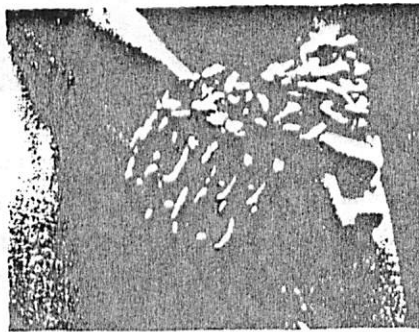
This seemingly arbitrary obscenity standard was carefully crafted in the 1973 Supreme Court ruling in *Miller v. California*. That decision included a three-pronged obscenity test: An "average person applying contemporary community standards" must find that that the work, taken as a whole, appeals to prurient interests; the work must depict or describe sexual conduct, explicitly defined by state law, in a patently offensive way; and "the work taken as a whole [must] lack serious literary, artistic, political or scientific value." The standard, particularly given the inclusion of the latter requirement, provides pomographers

with a virtually foolproof defense.

On the other hand, the fact that "contemporary community standards" play a role in deciding what constitutes obscenity has given prosecutors a huge loophole through which to make a legal leap. Given the right community, a zealous team of prosecutors could put the whole adult entertainment industry out of business.

And that is precisely what the Child Exploitation and Obscenity Section is attempting to do.

**I**n 1988, in conjunction with the FBI and the US Postal Service, the Child Exploitation and Obscenity Section initiated Project PostPorn, an anti-pornography prosecutorial blitz aimed at mail-order businesses that ship X-rated material. Filing charges that the targeted businesses had engaged in conspiracy and racketeering and had violated federal laws governing use of the postal system, the government sought to put



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adult entertainment operations out of business by employing a controversial tactic known as multiple prosecutions, or the simultaneous filing of charges from a number of separate jurisdictions.

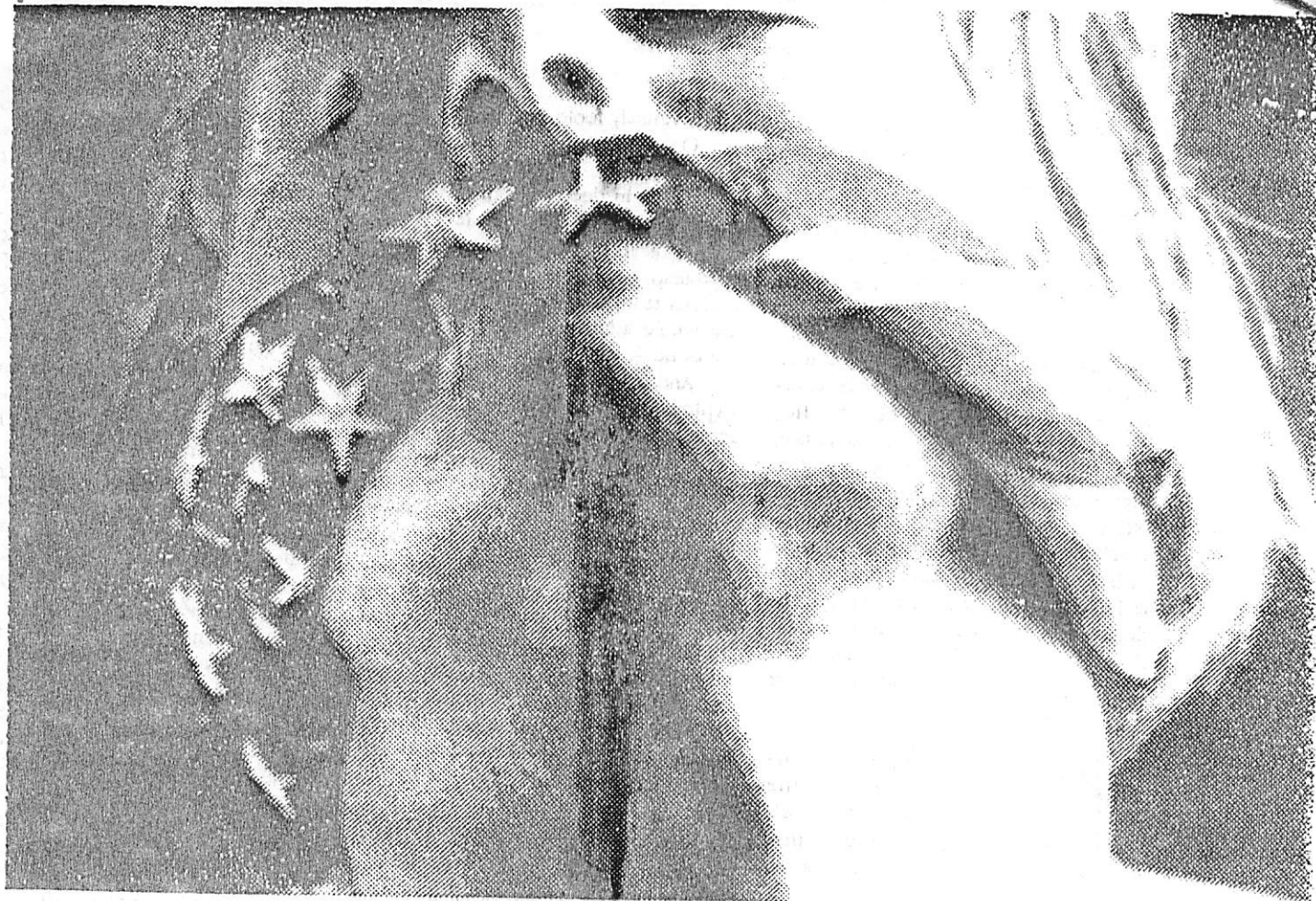
The financial drain of erecting a legal defense against a number of suits, the government correctly reasoned, would quickly drive even established X-rated businesses into bankruptcy. A secondary effect of the effort—and presumably the desired long-term goal—would be to frighten other businesses into a state of self-censorship.

The effectiveness of this strategy relies largely upon two things: first, the availability of multiple prosecutions as an anti-obscenity weapon; and second, the community standard element of the obscenity test devised by the Supreme Court.

According to Bruce Ennis, a First Amendment specialist who has closely followed the work of the government's anti-porn unit, and who has filed suit against the Department of Justice on behalf of a North Carolina mail-order distributor that has been subjected to harassment by the government's anti-obscenity agents, "The multiple prosecution approach is disfavored by the Justice Department in all contexts except this one."

However, the prosecution of obscenity, and consequently the federal anti-obscenity unit, is reportedly a top priority of US Attorney General Dick Thornburgh, so it is unlikely that multiple prosecutions will cease without direct intervention from the courts. Additionally—and this is where the community standards elements of the obscenity test comes into play—multiple prosecutions serve a utilitarian standard from a fiscal point of view: If a grand jury in one jurisdiction does not return a decision that the disputed material is obscene, a grand jury in a more conservative district may find just the opposite. In other words, filing multiple prosecutions reduces the hit-or-miss risk of going for an obscenity conviction.

From a First Amendment point of view, however, the fact that one community can determine the highest threshold of sexually explicit material that will be tolerated in another community poses a potentially grave threat to freedom of speech. In essence, it inverts the notion of the greatest good for the greatest number of people, because while a ruling against the defense may materially affect only



one manufacturer or distributor, it peripherally influences the entire industry.

The possibility also exists that one of these cases will end up before the Supreme Court, which would have the authority to devise a new obscenity standard. And while the existing law does not explicitly state what is legal and what is obscene, few First Amendment attorneys could look forward to the definition of obscenity that Chief Justice William Rehnquist's court would return.

Not coincidentally, a number of the videos and magazines selected for trial under Project PostPorn featured same-sex sexual acts. According to attorneys familiar with some of those cases, the prosecutors found gay male sex so offensive that they expected members of the grand jury to experience similar revulsion and consequently return indictments without worrying about the nuances of First Amendment protections.

**C**onsidering that, for most of us, adult entertainment enterprises exist in a kind

### *A zealous team of prosecutors could put the whole industry out of business.*

of hazy, red-lit netherworld, it doesn't seem like a very great leap of logic to go from netherworld to underworld and conclude that the X-rated industry is controlled by the Mafia. Perhaps it is for that reason that the heaviest artillery yet wheeled out in the government's war on porn is a law that was tailored specifically for use in the fight against organized crime.

While RICO, the federal Racketeer Influenced and Corrupt Organizations Act, allows the government to seize the assets of people charged with racketeering, it has not been used extensively so far. But a conviction under the federal racketeering statute recently upheld by the Fourth Circuit Court of Appeals in Virginia may have laid the groundwork for future application of the forfeiture law in obscenity cases.

"The thinking was that they would

hold off aggressively using RICO until they had a circuit court uphold it," explains Ennis. Other First Amendment experts concurred with Ennis' assessment but added that intensive application of RICO forfeiture to other obscenity cases may again be postponed, since two cases are currently working their way up to the Supreme Court, where the constitutional questions that arise when the statute's forfeiture provisions are invoked could be resolved.

The federal RICO statute was designed to help prosecutors dismantle mob empires by forcing the forfeiture of all property acquired or supported through racketeering activities. However, in 1984, by tacking on one of his infamous amendments, North Carolina Republican Sen. Jesse Helms added obscenity violations to the list of activities included under the scope of the federal RICO statute, and since then, prosecutors need only show a pattern of illegal activity—or a series of prosecutions on similar charges within a specific period of time—to justify starting RICO forfeiture proceedings against a defendant.

Although the obscenity provision of the federal RICO law was on the books for several years before prosecutors began filing charges under the statute, recent successes the government has scored with RICO obscenity cases suggest that the law will be more frequently applied in the future.

"They're going to bring more RICO cases because that conviction puts fear in the hearts of manufacturers and distributors," warns Barry Lynn, legislative counsel for the Washington office of the American Civil Liberties Union, pointing out once again that because producers can never be certain what will be deemed obscene, and because the prospect of losing an entire business due to an error in judgment is so devastating, the mere threat of RICO can be used as persuasion for compliance.

Interestingly, while specialists in the field of adult entertainment defense generally agree that beliefs that the erotic industry and the mob are closely allied owe more to the popular imagination than to fact, some people within the field say the charges may be accurate.

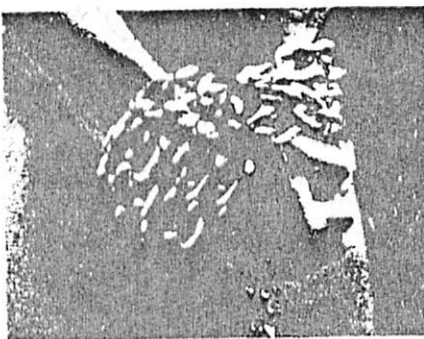
"When someone grows out [off] nowhere all of a sudden, supported by all of this upfront capital," said one gay producer, "it makes everyone else in the business wonder if they were loaned big chunks of money through one of these larger distributors, and they took it. It's a classic organized crime mechanism."

Furthermore, the producer explained, with the advent of the video boom, it suddenly became clear that hundreds of millions of dollars can be made in the production, manufacturing and distribution of erotic videos, and, at the same time, there were very few legitimate sources that would lend start-up capital to an X-rated entrepreneur because of the constant threat that the government's obscenity prosecutions pose. Noting the irony in the fact that the government efficiently creates a bogeyman where none need have existed (by keeping the heat on legal businesses, which forces them into such a high-risk category that traditional lenders will not do business with them, forcing them to seek initial investments from less respectable sources), the producer said, "The rea-

son that Mafia-like people are attracted to this business is that there's no sureness to it."

With the arrival of the AIDS epidemic and safer-sex campaigns, gay producers, manufacturers and would-be distributors, in particular, were vulnerable to the advances of shady venture capitalists from more established distribution houses.

At this point, whether or not the Mafia is involved is moot, considering that the RICO statute has been used with immense success by the government in a number of recorded cases. In the RICO conviction upheld before the Virginia Court of Appeals, Dennis Pryba forfeited over \$1 million worth of property after being convicted on charges resulting from the seizure of barely more than \$100 worth of X-rated videos and magazines. And after being convicted on federal charges in Minneapolis, adult bookstore— and



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theatre-owner Ferris Alexander faces nearly 120 years in prison, stands to pay \$1.6 million in fines and may ultimately lose millions of dollars worth of property to RICO forfeitures.

"I'm afraid of the authorities cracking down on me," explained the manager of a West Coast soft-core gay pornography vendor, echoing a sentiment expressed by every producer, distributor and manufacturer of X-rated material contacted for this article. "If we don't get some sort of Supreme Court ruling or something to stop this, I think that one by one they'll go after the hard-core companies, and then they'll work their way up the line."

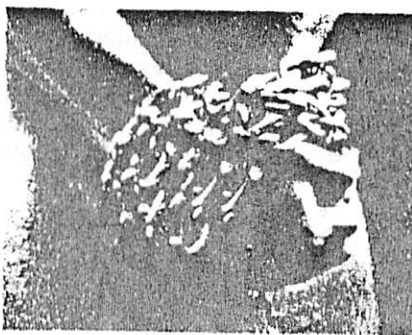
To forestall the manager's prediction, which a number of experts agree is a very real possibility, some people in the business are ceasing sale of sexually explicit products altogether. For instance, Malibu Sales, a division of Liberation Publications Inc., which publishes the *Advocate*, announced early this summer that it would no longer sell X-rated videos and magazines.

"This decision is the result of the continuing unfriendly business climate for sale of X-rated products," Malibu president John Knoebel wrote in a letter to the mail-order company's vendors. "The actions of the Justice Department in moving against many other firms over recent months have led us to reevaluate our own involvement in this area."

Other businesses have simply stopped shipping to states from which grand jury indictments are known to have come, and, in fact, some distributors are becoming more and more reluctant to deal with any orders outside major metropolitan areas at all. On the consumer level, video stores are increasingly unwilling to rent or sell sexually explicit videos to out-of-state customers for fear that they will be indicted on federal charges of sending obscene materials over state lines. "We're not doing this because we want to set any kind of precedent or anything," says the manager of a New York City video store. "We're just trying to make sure that we don't get involved with anything that will get us in trouble."

The climate of fear has become so intense that a number of businesses involved with the adult entertainment industry, particularly gay-owned enterprises, declined to attend one of the largest annual industry trade shows, which was held in August. According to several sources, word had gotten around that most of the businesses hit in the series of raids last spring had been visited by undercover authorities during a trade show in January. A lesser example of the pervasive paranoia was the consistent refusal of businesses to be interviewed for this article, lest their operations somehow end up under a higher level of scrutiny by the government. If the Department of Justice has not yet managed to destroy the porn industry, it has very successfully convinced the industry's managers that Big Brother is watching.

**T**he gay community nationally has suffered disproportionately from the new brand of redlining that has resulted from the government's crackdown on erotica. Although there is no way to accurately gauge the availability of new gay-oriented material in small-town America,



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considering that Project PostPorn sought to make gay-oriented sexually explicit products risky investments, and, given the comparative fragility of gay-owned and -operated X-rated businesses, some commentators are beginning to wonder if the Department of Justice is winning the war on porn.

Ultimately, the success of the government's anti-porn crusaders—short of forcing a more restrictive definition of obscenity into law—lies simply in its ability to harass and intimidate businesses who deal with X-rated products into leaving the market. At that point, the anti-porn forces will move on to torment more sophisticated players in the sexing of America, because, as one X-rated producer notes, "If you eliminate the leading edge, then all of the sudden all the people who are sort of respectable and stuff behind it are in jeopardy because they are the new leading edge."

"Censors always come back," explains the ACLU's Lynn wearily, pointing out that this latest assault on the First Amendment is hardly the government's first concerted effort at suppression of protected speech. "Censors will always find something to go after, and unless you stop them, they'll always come back." ▼

## PORN VS. ART?

### To the feds, it's all the same

While it stands on the front lines of the government's war on porn, the Child Exploitation and Obscenity Section (the Department of Justice's tactical strike-force), is not alone in the purge to rid us of what it deems evil. And what it deems evil clearly isn't always what's traditionally considered "porn."

The destruction of the porn industry is such a high priority for Attorney General Dick Thornburgh right now that enterprising prosecutors—eager to please the feds—are lining up left and right to bring forth high-profile suits based on the federal obscenity laws.

Witness, for instance, the Robert Mapplethorpe controversy at the Contemporary Arts Center in Cincinnati. Dennis Barrie, director of the Center, was

accused by a county prosecutor of pandering obscenity, and while the Child Exploitation and Obscenity Section claims that it had nothing to do with stirring up the brew that led to Barrie's indictment, the carefully orchestrated legal assault on erotic art bears all the hallmarks of the government's anti-obscenity unit. Indeed, news organizations covering the debacle came to the same conclusion: Although they have miserably failed to track the questionably constitutional modus operandi of the Department of Justice's porn prosecutors, both *The New York Times* and the *Boston Globe* linked the Child Exploitation and Obscenity Section with the First Amendment furor in Cincinnati.

In another example, for which the anti-porn unit has also demurred responsibility,

the studio of San Francisco photographer Jock Sturges, who has gained fame for his black-and-white portraits of families in the buff, was raided by the FBI.

At the very least, Thornburgh's bluenoses may take credit for creating a context in which the work of eminently respected photographers such as Sturges is construed to be obscene. Furthermore, since the government's anti-obscenity unit has a mandate both to provide law enforcement officials with research and technical assistance on obscenity prosecutions, and to help lawmakers draft anti-obscenity legislation, experts worry that the current actions of the Child Exploitation and Obscenity Section are a mere prelude to an imminent all-out war.

—N.R