"son"?), to Social Security benefits, and to life insurance ratings and, in certain jurisdictions, their marital rights. The decision will also affect their criminal liability under female impersonation and homosexuality statutes.[70]

One overriding issue remains, and its resolution will solve the quandry that transsexuals have set before our courts. Judge Pecora[71] has phrased this issue succinctly and sympathetically: Should the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sex orientation? I think not.

[70] *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236 (1971).

[71] *In re* Anonymous, 57 Misc. 2d 813, 293 N.Y.S.2d 834 (Civ. Ct. 1968).

NOTES

CHILD PORNOGRAPHY LEGISLATION

I. INTRODUCTION

"I think we have an obligation to provide legislation which conforms, if possible, with the Constitution."[1]

The past two years have seen a movement of national proportions directed at the enactment of legislation to curb the growth of child pornography in this country. This Note will critically examine that legislation against the framework of constitutional restrictions and practical limitations of enforcement.

At the outset, the scope of this article can be clarified by noting those topics related to child pornography which this article will not explore. There will be no treatment here of child prostitution or the sexual assault of children. It is the position of the author that there is an elemental difference between criminal sexual conduct and obscene speech (literature, photography, film, etc.), although both may properly be punished under the law.

Second, rather than inquire into the ethical and psychological aspects of child pornography, this article will accept as given the societal consensus that participation by children in the production of pornography is harmful to them. However, this premise must be viewed against a first commitment to the constitutional integrity of legislation.

Third, this Note will not present an in-depth journalistic account of porno-culture, but rather will concentrate primarily on the mechanics of legislative remedies. The curious

[1] *Sexual Exploitation of Children, Hearings Before the Subcommittee on Crime of the House Committee of the Judiciary and the Subcommittee on Select Education of the House Committee of Education and Labor*, 95th Cong., 1st Sess. 16 (1977)(statement of Hon. Ertel)[hereinafter cited as *House 1977 Hearings*].

reader is referred to several excellent sources which focus on case studies and surveys of pornographic material.[2]

This Note begins by examining the background of child pornography legislation, particularly child pornography and the reform movement that has sprung up in reaction to this phenomenon. Pertinent federal legislation, with emphasis on the various provisions passed in 1978, is examined. State laws regulating child pornography are surveyed followed by an investigation into issues of actual and potential constitutional litigation. Finally, the writer articulates generalizations that emerge from an analysis of the material cited.

While this treatment of child pornography may seem a rather clinical approach to a poignant human problem, nevertheless, an emotional "waving the bloody shirt" approach is less likely to produce sound legislation than is deliberate and reasoned analysis. While it is impossible to assess the merits of a statute apart from the social problem it was designed to correct, dwelling on pathetic incidents can only prejudice an objective evaluation of legislative alternatives.

II. Background

A. *Pedophilia*

A pedophile is "an adult person who is sexually attracted to an immature child of either sex."[3] While those in the anti-child pornography movement date the advent of child erotica from the late 1960's,[4] such material is not wholly a recent phenomenon. Nineteenth Century authors Lewis Carroll and J.M. Barrie collected nude photographs of child acquaintances.[5]

[2] R. Lloyd, For Money or Love: Boy Prostitution in America (1976) [hereinafter cited as For Money or Love]; Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 Pepperdine L. Rev. 809 (1978) [hereinafter cited as *Preying on Playgrounds*]; *Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee of the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Senate 1977 Hearings*].

[3] Fraser, *Child Pornography*, New Statesman, Feb. 17, 1978, at 213 [hereinafter cited as *Fraser*].

[4] Comment, *Preying on Playgrounds*, *supra* note 2, at 810.

[5] Fraser, *supra* note 3, at 213.

Psychiatrists, notably Freud,[6] have analyzed the pedophile as a narcissist, one who takes himself for a love object:

> "As he grows older he can no longer love the child he was then, as this child no longer exists, so he has to project on to other children, who from then on become his prime loveobjects." But he remains above all a narcissist, and the origin of his deviance is often clearly visible in the work of artists and writers with a paedophilic interest. He is for example, Peter Pan fascinated by his shadow, Alice before her looking glass, Dorian Gray captive to his self-portrait.[7]

A lay observer has suggested that the current popularity of certain works may indicate a curiosity in the general population as to pedophiliac themes.[8] Needless to say, curiosity is not the equivalent of deviance.

Historical-cultural observations aside, the commercial exploitation of pedophilia does seem to have mushroomed from the late 1960's into the 1970's, coincidental with the general "sexplosion"[9] of hardcore pornography.[10] Of particular concern is the fact that whereas child pornography was produced at first outside this country with European children as models, in recent years it has become more of an American problem, as child pornography operations have surfaced in Chicago, Los Angeles, Houston, and New York.[11]

Estimates of the number of children involved range from 100[12] to 100,000.[13] While statistics on child participants are

[6] S. Freud, *Essay on Leonardo* (1909).

[7] Fraser, *supra* note 3, at 213.

[8] Interview with attorney Stanley Fleishman, *Kiddie Porn*, CBS' 60 Minutes (aired May 15, 1977):

> Mr. Fleishman: It seems to me to be no different than the book "Lolita," for example. People came to "Lolita" because they have an interest in that subject. They read it and it satisfies something inside of them.
>
> Mr. Wallace: That's written by Vladimir Nabokov. That is different from some two-bit photographer . . . .

[9] "Sexplosion" has also been referred to as "a sudden flood of . . . pornography and prostitution." Comment, *Preying on Playgrounds*, *supra* note 2, at 809.

[10] *Porno Plague*, Time, April 5, 1976, at 58-63.

[11] Dudar, *America Discovers Child Pornography*, Ms., Aug. 1977, at 80 [hereinafter cited as Dudar].

[12] This was the estimate of Father Bruce Ritter, who operates a shelter in New York for runaways. Dudar, *supra* note 11, at 80.

of dubious worth because of the lack of reliable underlying data,[14] the increase in publication of "kiddie-porn" maga-

[13] *Child Pornography: Sickness for Sale*, Chicago Tribune, May 15, 1977, § 1, at 1, col. 1, citing anonymous "authoritative estimate."

[14] Lloyd Martin testified before the House Subcommittee on Crime, Committee of the Judiciary: "In the City of Los Angeles, it was estimated, not by the Los Angeles Police Department, but people in the street that we have 30,000 sexually exploited children in that city." *House 1977 Hearings*, *supra* note 1, at 59. Judianne Densen-Gerber of the Odyssey Institute has written:

> Robin Lloyd's book [FOR MONEY OR LOVE, *supra* note 2] documented the involvement of 300,000 boys, aged eight to 16 (sic); in activities revolving around sex for sale, including both pornography and prostitution. A common-sense "guesstimate" on my part leads me to believe that if there are 300,000 boys, there must be a like number of girls, but no one has bothered to count the females involved. (Lloyd postulated but cannot substantiate that only half the true number of these children is known. That would put the figure closer to 1.2 million nationwide—a figure that is not improbable to me, considering the nation's one million runaways.)

Densen-Gerber, *What Pornographers are Doing to Children: A Shocking Report*, REDBOOK, Aug. 1977, at 86-89, citing FOR MONEY OR LOVE, *supra* note 2.

Paul Bender, Professor of Law, University of Pennsylvania and former General Counsel to the President's Commission on Obscenity, explained the deceptive nature of the data to the Senate Subcommittee to Investigate Juvenile Delinquency.

> Senator Mathias: In this field we are told that there may be more than 200 magazines that regularly carry pictures of child pornography. Would that give us any kind of clue as to the number of children that may be involved?
>
> Mr. Bender: It would help if you saw the magazines. Some of these pictures may be old. If I am right, and I think I am, the pictures have existed for many years. Many of these magazines may carry pictures that are not recently taken.
>
> Some of the pictures may come from abroad. That is a common phenomenon in this business. That may involve child abuse, but I do not think it is child abuse that we are primarily concerned with if the pictures come from Scandinavia, let's say.
>
> If you saw the magazines you might have some clue as to that. You could also see how many of the magazines are using the same pictures, which can also happen, or the same models. In the pornography business generally, especially where you are talking about males, there are talents to being a male model in pornography that not everyone has. There are a limited number of males who act as models and as actors in these films. It would not surprise me at all if you found the same people reappearing in magazine after magazine and also in issue after issue of the same magazine.
>
> So, if you did collect these magazines and analyzed them in those ways, I think you could get a clue as to how many children are actually involved and as to whether they are children in this country and also as to whether they are children living now or were children 10 years ago.
>
> Senator Mathias: The implication of your testimony is that we should be very careful about speculating on the size of the problem; is that right?
>
> Mr. Bender: Yes. In my experience the estimates of the size of the pornography problem are usually much, much too large. For example, at the time of the Obscenity Commission in 1970 the estimates about the size of the market in pornographic materials which were commonly given in Congress bore almost no relationship to the size of the industry as we found it.

Senate 1977 Hearings, *supra* note 2, at 110-111.

zines can be verified and is cause for alarm. In 1976, when Robin Lloyd's *For Money or Love: Boy Prostitution in America*[15] was published, there were 264 magazines containing sexually explicit material with child models.[16] These ranged from publications featuring no more than nudity to those running more lurid material.

As for the child participants, there is some incidence of parents introducing their own children into pornographic modeling, as well as situations where surrogate parents exploit their charges. However, the consensus of those studying the problem is that child models tend to be runaways.[17] The fact that runaways are involved gives rise to another dilemma: when the homeless child looks to the pornographer for economic and emotional support, he is unlikely to cooperate with the police.[18] Coupled with the difficulty of tracing the victim models, this problem of finding a prosecuting witness to the crime is a major obstacle to prosecution.[19] It was in part due to the resulting frustration of local law enforcement officials that the movement to combat child pornography arose.

[15] FOR MONEY OR LOVE, *supra* note 2.

[16] *Id.*

[17] *Senate Committee on the Judiciary Report on S. 1585, Protection of Children Against Sexual Exploitation Act of 1977*, S. REP. No. 95-138, 95th Cong., 1st Sess. 8 (1977): "The child victims are typically runaways who come to the city with no money or only enough to sustain themselves for two or three days."

[18] Lloyd Martin, head of the Los Angeles Police Department's sexually abused child unit stated: "Sometimes for the price of an ice cream cone a kid of eight will pose for a producer. He usually trusts the guy because he's getting from him what he can't get from his parents—love." *Child's Garden of Perversity*, TIME, Apr. 4, 1977, at 55.

[19] Lloyd Martin testified before the House Subcommittee on Crime, Committee of the Judiciary: "No. 1 problem (sic) that I have is locating who the victim is. I don't have any laws currently that would help and assist me in identifying the victims of child pornograpny." *House 1977 Hearings*, *supra* note 1, at 72.

B. *The Movement for Reform*

While the movement to legislate against child pornography did not lack for media or political support, the "barnstorming" efforts of four persons were key to the legislative action later undertaken. Judianne Densen-Gerber, psychiatrist, lawyer, and founder of the Odyssey Institute, became aware of the problem through her multi-service social agency's work with drug addicts. Also instrumental was Robin Lloyd, an investigative reporter for NBC News in Los Angeles, who authored the book, *For Money or Love: Boy Prostitution in America.*[20] Frank Osanka, associate professor of social justice and sociology at Lewis University in Glen Ellyn, Illinois, learned of child pornography while teaching a class on child abuse, but cites his own experience as an orphan as a major impetus to his involvement.[21] In the area of law enforcement, Lloyd H. Martin, investigator for the Los Angeles Police Department, heads the Sexually Exploited Child Unit, the only one of its kind in the country in 1977.[22]

While naturally there has been no contingent of support behind the continued production of child pornography,[23] there have been elements of opposition to certain of the proposed anti-child pornography measures, such opposition turning on constitutional reservations. The result has been an odd alignment of opinion with traditional allies squared off against each other. The American Civil Liberties Union, the Association of American Publishers, and the Office of Children's Services for the New York Public Library have played devil's advocate to proposals by *Ms.* magazine, "60 Minutes," noted obscenity lawyers,[24] and more conservative organizations. To understand the zone of contention between these two viewpoints, it is necessary to examine the legislation at issue.

[20] FOR MONEY OR LOVE, *supra* note 2.

[21] Bridge, *What Parents Should Know and Do About Kiddie Porn*, PARENTS MAGAZINE, Jan. 1978, at 67.

[22] *House 1977 Hearings*, *supra* note 1, at 67.

[23] Still there are those who would frame the issue in terms of being for or against child pornography. Senator Barry Goldwater, speaking on the floor of the Senate in opposition to the Justice Department's criticisms of certain proposed legislation, declared, "But I cannot for the life of me understand how President Carter, himself a religious man and a father has failed to overrule the Department." 123 CONG. REC. S16,822 (daily ed. Oct. 10, 1977) (remarks of Sen. Goldwater).

III. THE FEDERAL ACT

A. *Pre-1978 Federal Law*

In 1977, at the time of the congressional committee hearings on the various child pornography proposals, there were five Federal laws prohibiting the distribution of obscene materials in the United States: 18 U.S.C. § 1461 (1976), prohibiting the mailing of obscene materials; 18 U.S.C. § 1462 (1958) and 19 U.S.C. § 1305 (1976), prohibiting the importation of obscene matter into the United States; 18 U.S.C. § 1464 (1976), restricting the broadcasting of obscenity; and 18 U.S.C. § 1465 (1976), prohibiting the transportation of obscene materials and the use of common carriers to transport such materials.

In addition, there existed a Federal Anti-Pandering Act,[25] authorizing postal patrons to request that mailings of unsolicited advertisements be stopped, and the Mann Act,[26] prohibiting the interstate transportation of female minors for the purpose of prostitution.

The Federal Child Abuse Prevention and Treatment Act[27] is concerned primarily with the funding of programs, the punishment of child abuse having been viewed largely as a local problem. However, there is some statutory precedent for federal intervention in the Child Labor Act.[28]

B. *The 1978 Legislation*

The Protection of Children Against Sexual Exploitation

[24] Charles Rembar who represented the defendants in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (*Fanny Hill*) argued against extending first amendment protection to child pornography. *House 1977 Hearings*, *supra* note 1, at 35.

[25] 39 U.S.C. § 3008 (1976).

[26] 18 U.S.C. § 2423 (1976).

[27] 42 U.S.C. § 5101 (1976).

[28] 29 U.S.C. § 212 (1976).

Act of 1977,[29] passed in January, 1978, consists of four sections. Specifically, 18 U.S.C. § 2251 applies to parents and those directly involved in employing child models for the production of sexually explicit material shipped in interstate commerce.[30] A kindred statute, 18 U.S.C. § 2252, prohibits the shipping of obscene child pornography in interstate commerce and the receiving of such material for the purpose of distribution and sale.[31] The definitional section is 18 U.S.C.

[29] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978).

[30] 18 U.S.C. § 2251 (1978), Sexual exploitation of children:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(c) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.

[31] 18 U.S.C. § 2252 (1978), Certain activities relating to material involving the sexual exploitation of minors:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; or

(2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

§ 2253,[32] while 18 U.S.C. § 2423 amends the Mann Act to extend coverage to males as well as females and adds as a prohibited purpose the causing of a minor to engage in sexual conduct for commercial exploitation.[33] The Act as a whole took effect February, 1978.

(B) such visual or print medium depicts such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more that $15,000, or imprisoned not less than two years nor more than 15 years, or both.

[32] 18 U.S.C. § 2253 (1978), Definitions for chapter:

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of sixteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sado-masochistic abuse (for the purpose of sexual stimulation); or

(E) lewd exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit; and

(4) "visual or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium.

[33] 18 U.S.C. § 2423 (1978), Transportation of minors

(a) Any person who transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of, any minor in interstate or foreign commerce, or within the District of Columbia or any territory or other possession of the United States, with the intent—

(1) that such minor engage in prostitution; or

(2) that such minor engage in prohibited sexual conduct, if such person so transporting, financing, causing, or facilitating movement knows or has reason to know that such prohibited sexual conduct will be commercially exploited by any person;

shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in this section—

(1) the term "minor" means a person under the age of eighteen years;

(2) the term "prohibited sexual conduct" means—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

This Act was the end result of much negotiation in the House and Senate. Sixteen House bills[31] and four Senate bills[32] were introduced to deal with the problem of child pornography. The most significant of these proposals was the Roth Bill, S.1011, which was the first Senate bill on the subject; the Kildee Amendment to H.R.6693, a House bill on child abuse; H.R.8059, the final House version of the child pornography act; the Mathias/Culver Bill, S.1585 which the Senate ultimately passed; and the Roth Amendment to S.1585, which the Senate also adopted. H.R.8059 and the amended S.1585 were sent to a Senate and House Conference Committee, which preferring the Senate version, further amended S.1585 and reported it out. The bill was soon passed by both Houses and enacted into law.

S.1011, the prototype bill, had two major thrusts. The first section prohibited photographing a child in explicit sexual activity and permitting a child to engage in such activity if the film or photograph might enter interstate commerce. The second section provided penalties for the shipping or receiving for the purpose of sale or selling of photographs or films of children engaging in prohibited sex acts.

This bill evoked a very thorough letter of criticism from the Justice Department.[33] Among the objections noted were: (1) that the bill was jurisdictionally deficient in extending liability to cases where a child "may" be filmed and the resultant material "may" enter the mailstream or enter or

(D) sado-masochistic abuse (for the purpose of sexual stimulation); or

(E) lewd exhibition of the genitals or pubic area of any person; and

(3) the term "commercial exploitation" means having as a direct or indirect goal monetary or other material gain.

[31] H.R. 3913, H.R. 3914, H.R. 4571, H.R. 5326, H.R. 5474, H.R. 5499, H.R. 5522, H.R. 6351, H.R. 6734, H.R. 6747, H.R. 7254, H.R. 7468, H.R. 7522, H.R. 7834, H.R. 7895, and H.R. 8059, 95th Cong., 1st Sess. (1977). Also pertinent was the Kildee Amendment to H.R. 6693, 95th Cong., 1st Sess. (1977), although the original bill was not a child pornography measure.

[32] S. 1011, S. 1040, S. 1499, and S. 1585, 95th Cong., 1st Sess. (1977).

[33] Letter from Assistant Attorney General Patricia Wald to Senator James P. Eastland, Chairman, Committee on the Judiciary (June 14, 1977).

affect interstate commerce;[37] (2) that the bill did not distinguish between obscene material and material protected by the First Amendment; and (3) that the definition of "prohibited sexual acts" covered activities which were neither pornographic nor an abuse of children.

In regard to the third objection, the Department considered the catch-all phrase, "any other sexual activity," overinclusive. It also preferred the phrase "lewd exhibition of the genitals" to "nudity depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction," the former phrase having been approved by the Supreme Court in *Miller v. California.*[38] The Department further suggested modification of "sadism" and "masochism" with the phrase "sexually oriented."

The Department noted two other objections. There would be difficulties of proof as to the age of the child model,[39] and the penalties were excessive to the point of hindering successful prosecution.[40] In response, the Senate subcommittee[41] decided against reporting out the Roth Bill.

Similar to the Roth Bill was the Kildee Amendment to H.R. 6693, which joined criminal penalties for activities in child pornography to a bill providing for the extension of the Child Abuse Prevention and Treatment Act.[42] The rationale of the Kildee Amendment was (1) that the legislation was directed at abuse, not obscenity; (2) that child pornography should be treated as contraband, just as the product of child labor is treated as contraband under the Child Labor Act;[43] and (3) that those who distribute and sell child pornography are accessories after the fact to the crime of child abuse.[44]

[37] *Id.*

[38] 413 U.S. 15 (1973).

[39] Letter from Assistant Attorney General Patricia Wald to Sen. James P. Eastland, Chairman, Committee on the Judiciary (June 14, 1977).

[40] *Id.*

[41] The Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, was the subcommittee assigned child pornography legislation in the Senate.

[42] 42 U.S.C. § 5101 (1976).

[43] 29 U.S.C. § 212 (1976).

[44] 123 CONG. REC. H10,064-65 (daily ed. Sept. 26, 1977) (remarks of Rep. Kildee).

While Representative Hyde objected on grounds that the constitutional issues made this measure more appropriate for the House Judiciary Committee,[45] and while Representative Conger argued that criminal penalties did not belong in legislation funding child abuse programs, the House nevertheless passed the amended bill by a margin of 375 to 12.[46]

The House bill which ultimately reached the conference committee was H.R. 8059. Its major provisions were (1) a section amending the Mann Act, and (2) a section prohibiting the use of child models in films and in photographs of sexually explicit conduct where such material would be shipped in interstate commerce and prohibiting parents from permitting such activity.

The Mathias-Culver Senate bill was similar to H.R. 8059, but also included a section increasing the penalties for violation of existing obscenity laws where participant models were under sixteen years old.

The Roth Amendment to the Mathias-Culver bill provided criminal penalties for knowing distribution of child

[45] 123 CONG. REC. H10,065 (daily ed. Sept. 26, 1977) (remarks of Rep. Hyde). Particularly cogent was Representative Ashbrook's response to the rationale behind the Kildee Amendment:

> It is just that we do honestly recognize some of the constitutional problems which cannot be swept away. If I were to reduce the problem to a somewhat simplistic portrayal, it would be basically this. Everyone agrees we can pass laws to prohibit the horrendous sexual acts which involve children and the abuse of children. However, if you do not catch them in the act and this action is reduced to a picture, if it is in a magazine, if it is in a film, at that point it becomes an entirely different constitutional problem. I do not like this. I wish it were not that way, but that basically is the problem as the Supreme Court has looked at it. Once it becomes something that is on film, at that point the ability of the legislator to circumscribe that activity, like it or not, and I do not like it, has been severely handicapped by court decision. When on a film and distributed in interstate commerce, the court looks at these sexual activities in a different light.

123 CONG. REC. H10,069 (daily ed. Sept. 26, 1977) (remarks of Rep. Ashbrook).

[46] 123 CONG. REC. H10,061-69 (daily ed. Sept. 21, 1977). The compromise version of H.R. 6693 enacted into law did not contain the Kildee Amendment. Joint Explanatory Statement of the Senate Committee on Education and Labor on the Compromise Version of H.R. 6693. 124 CONG. REC. E1809 (daily ed. April 11, 1978).

pornography, whether or not it was deemed obscene. After an impassioned plea from Senator Hatch,[47] and despite a statement from Senator Culver, that every legal witness before his subcommitee[48] had testified that the Roth Amendment "could not pass constitutional muster," the amendment was adopted 73 to 13.[49]

When H.R. 8059 and the Mathias-Culver bill went to the conference committee, it adopted the latter bill with two changes. The committee added a requirement that the material referred to in the Roth Amendment be obscene and it deleted the extra penalties for existing obscenity statutes, regarding that purpose as served by the Roth Amendment.[50]

This rather lengthy exploration of the legislative history of the new federal statutes has a twofold purpose. First, through a review of what has been deleted, one can better appreciate the significance of what remains. The bill enacted into law is a series of statutes, two of which are essentially child abuse laws and one which is directed primarily at the product of child abusive activity. 18 U.S.C. § 2251 (1978), which prohibits the employment or enticement of child models (or parental permission for such activity), does not require that the end product be obscene,[51] nor does 18 U.S.C.

[47] 123 CONG. REC. S16,826 (daily ed. Oct. 10, 1977) (remarks of Sen. Hatch):

> If we truly want to rid this country of child pornography, then we must go after the distributors of this filth with tough standards, not the watered-down obscenity standards that are applied to adults. We need only take a walk through the streets of Washington, or any city in this country, to see that adult obscenity standards are not going to rescue our children from the adults who are exploiting our children in ways that will affect their hearts and minds for the rest of their lives.

[48] Culver chaired the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee of the Judiciary.

[49] 123 CONG. REC. S16,834 (daily ed. Oct. 10, 1977).

[50] Joint Explanatory Statement of the Committee of Conference, H.R. REP. No. 95-811, 95th Cong., 1st Sess. 7 (1977).

[51] 18 U.S.C. § 2253 (1978), states:

> (2) "sexually explicit conduct" means actual or simulated—
>
> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (B) bestiality;
>
> (C) masturbation;

§ 2423 (1978), the amended Mann Act.[52] However, 18 U.S.C. § 2252 (1978), dealing with the shipping, receiving for purposes of sale, or selling of pornographic medium, does utilize the obscenity standard. While the statutes dealing directly with conduct are broader than those dealing with speech, the definitions in sections 2253 and 2423 of the 1978 Act are nevertheless very specific: no longer is there a prohibition against "nudity . . . for . . . sexual gratification of any person who may view such depiction"; the nebulous "any other sexual activity"[53] is not retained in the final statute. Moreover, the penalties have been reduced to some extent.[54]

The second purpose of the preceding discussion is that the issues encountered in the drafting of the federal legislation are indicative of the problems facing state legislatures. The child abuse approach versus the obscenity approach and the problem of vagueness and over-broad provisions drawn to close loopholes for pornographers are recurrent issues, as are the issues of whether one can punish conduct through punishing speech, and the question of what are reasonable penalites. These issues have been debated in similar state legislative skirmishes and are mirrored in the litigation which is beginning to develop.

C. Federal Legislation as Contrasted with State Legislation

While interstate trafficking in child pornography is a serious problem, the Congressional hearings indicate that federal legislation arose primarily from a desire on the part of local law enforcement officials to obtain federal financial

(D) sado-masochistic abuse (for the purpose of sexual stimulation); or

(E) lewd exhibition of the genitals or pubic area of any person.

[52] The definition of "prohibited sexual conduct" under 18 U.S.C. § 2423(b)(2) is identical to that of "sexually explicit conduct" in 18 U.S.C. § 2253 (2) *supra* note 51, except that the former does not include simulated activity.

[53] S. 1011, 95th Cong., 1st Sess. (1977).

[54] 18 U.S.C. § 2251(c) (1978) provides for a fine of up to $10,000 and imprisonment up to ten years for the first offense; thereafter the fine is not more than $15,000 and imprisonment is from two to fifteen years. 18 U.S.C. § 2252(b) (1978) provides similar penalties. 18 U.S.C. § 2423(a) (1978) provides for a fine of up to $10,000 and imprisonment of not more than ten years.

assistance and the resources of federal law enforcement agencies.[55] Nevertheless, the federal legislation differs from similar state legislation in that child pornography, like child abuse, is not intrinsically a federal concern. Under the 1978 Act, the federal courts have jurisdiction only where there is some connection with interstate commerce or with the mail. In 18 U.S.C. § 2251, the offending material must have been intended for interstate commerce or mailing.[56] 18 U.S.C. § 2252 requires that the shipping already have taken place.[57] 18 U.S.C. § 2423 requires that the minor himself be moved through interstate commerce.[58]

IV. State Legislation

A. Pre-1977 Legislation

Aside from general obscenity law and statutes prohibiting the sexual abuse of minors, prior to 1977, only one state had enacted a statute directed at the use of children in pornographic media. Tennessee law prohibits the publishing, exhibiting, and distributing of obscene matter and further prohibits the employment of minors to assist in those activities.[59] The statute has been held to apply to a parent having

[55] Testimony of John C. Kenney, Deputy Assistant Attorney General, *House 1977 Hearings*, *supra* note 1, at 155. *See also* testimony of Richard R. Weir, Attorney General of Delaware, *House 1977 Hearings*, *supra* note 1, at 279; testimony of Robert G. Gernignani, First Assistant County Attorney, Winnebago, Illinois, *House 1977 Hearings*, *supra* note 1, at 304.

[56] 18 U.S.C. § 2251 (1978).

[57] 18 U.S.C. § 2252 (1978).

[58] 18 U.S.C. § 2423 (1978).

[59] Tenn. Code Ann. § 39-3013 (1975) provides:

39-3013. Importing or preparing in state for sale, distribution, or exhibition—Distribution to or employment of minors—Penalties.— (A) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

. . .

(C) It shall be unlawful to hire, employ, or use a minor to do or assist

his child pose for nude photographs.[60]

Three things are notable about the Tennessee statute as compared to later child pornography statutes: (1) the law provides a round-about method of dealing with child pornography; the statute appears to have been written originally to reach minors employed as projectionists or sales clerks in adult entertainment establishments; (2) the statute is directed at conduct rather than speech; there is no sister statute aimed at the product of child pornography; and (3) the statute specifically refers to "obscene" material *even though* the provision concerning children is directed at conduct rather than speech.

The anti-child pornography movement was dissatisfied with existing state legislation, finding the child molestation statutes to present a problem of proof, and the obscenity statutes too narrow and lenient.[61] One would expect that the Tennessee statute would also fail to meet this group's expectations. On the other hand, the statute presents no constitutional problems.

B. *The New Legislation*

The wave of child pornography legislation that swept the statehouses *circa* 1977 and 1978 was not based on any uniform act. This section will isolate a few patterns in what appears at first to be a chaotic jumble of prohibitions.

One starting place is the current definition of obscenity, *i.e.*, what the *Miller v. California*[62] Court set apart as speech

in doing any of the acts described in subsection (A) with knowledge that a person is a minor under eighteen (18) years of age, or while in possession of such facts that he or she should reasonably know that such person is a minor under eighteen (18) years of age.

Tennessee uses the *Miller* definition of obscene. TENN. CODE ANN. § 39-3010(A) (1975).

[60] Mallicoati v. State, 539 S.W.2d 54 (Tenn. Crim. App. 1976).

[61] "To make prosecutions easier, angry legislators in several states and Congress are proposing a kind of end run around the obscenity laws— a bar on sexually explicit pictures of children, whether legally obscene or not." *Child's Garden of Perversity*, *supra* note 18, at 55-56.

[62] 413 U.S. 15 (1973).

unprotected by the first amendment. The Court in that case held:

> The basic guidelines for the trier of fact must be: (a) Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[63]

The Court gave examples of what would be sufficiently specific within the meaning of (b): "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[64]

Some states have adopted the obscenity standard: New Hampshire's child pornography act simply amended its existing obscenity law to provide stronger penalties where "the content thereof involves a child in the material deemed obscene."[65]

Illinois' child pornography law is entitled "An Act in

[63] *Id.* at 24.

[64] *Id.* at 25.

[65] N.H. REV. STAT. ANN. § 650.2 (1977) provides:

Offenses.

I. A person is guilty of a misdemeanor if he commits obscenity when, with knowledge of the nature of content thereof, he:

(a) sells, delivers or provides, or offers or agrees to sell, deliver, or provide, any obscene material; or

(b) presents or directs an obscene play, dance, or performance, or participates in that portion thereof which makes it obscene; or

(c) publishes, exhibits or otherwise makes available any obscene material; or

(d) possesses any obscene material for purposes of sale or other commercial dissemination; or

(e) sells, advertises or otherwise commercially disseminates material, whether or not obscene, by representing or suggesting that it is obscene.

II. A person is guilty of a class B felony, if he commits obscenity when, with knowledge that the content thereof involves a child in material deemed obscene pursuant to this chapter, he commits any of the acts specified in subparagraphs (a) through (e) of paragraph I.

Relation to Obscenity Involving a Minor."[66] While the Act prohibits the publishing, selling, exhibiting or possessing with intent to sell "child pornography," the definition of child pornography incorporates the definition of obscenity.[67] The prohibitions in that Act against photographing, soliciting, and parental permission of pornographic modeling apply the same standard, *i.e.*, the material which is the product of the prohibited activity must also be obscene.

Minnesota, on the other hand, has a law "prohibiting

[66] ILL. REV. STAT. ch. 38, § 11-20a (1978).

[67] ILL. REV. STAT. ch. 38, § 11-20a (1978) provides in pertinent part:

(a) Definitions.

(1) Matter or a performance, whether live, cinematic or over broadcast media, of whatever nature, is "child pornography" for purposes of this section if:

(A) it has as one of its participants or portrayed observers a child under the age of 16 or who appears as prepubescent; and

(B) it contains depictions or descriptions of sexual conduct which are patently offensive; and

(C) taken as a whole, the average person, applying contemporary standards of this State, would find it has as its dominant theme an appeal to prurient interest; and

(D) taken as a whole, it lacks serious literary, artistic, educational, political or scientific purpose or value.

(2) "Sexual conduct" includes any of the following:

(A) sexual intercourse, which for purposes of this Section includes any intercourse which is normal or perverted, actual or simulated;

(B) deviate sexual conduct as defined in Section 11-2 of this Act;

(C) acts of masturbation;

(D) acts of sadomasochistic abuse, which includes but is not limited to (1) flagellation or torture by or upon any person who is nude or clad in undergarments or in a costume which is of a revealing nature or (2) the condition of being fettered, bound or otherwise physically restrained on the part of one who is nude or so clothed;

(E) acts of excretion in a sexual context; or

(F) exhibition of post-pubertal human genitals or pubic areas.

The above types of sexual conduct in subsections (a)(2) (A) through (F) are intended to include situations where, when appropriate to the type of conduct, the conduct is performed alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification. A thing is child pornography even though the pornographic element is latent, as in the case of undeveloped photographs.

promotion of minors to engage in obscene works."[68] Promotion includes producing, directing, publishing, manufacturing, issuing and advertising. However, the statute is also directed at those who employ, use, or permit minors to engage in pornographic modeling as well as those who own a business which they know distributes child pornography.[69] Throughout the statute, it specifies that the prohibited material must be obscene; however, obscenity is defined as a work appealing "to pedophiles or the prurient interest in sex of the average person."[70]

At first glance, the Minnesota legislation seems to provide a less restrictive standard than the *Miller* test. Presumably, if one were inclined toward pedophilia, any depiction of a nude child would be appealing, even a Cassatt portrait of a toddler undressing. However, the Supreme Court in *Mishkin v. New York*,[71] held:

> When the material is designed for and primarily disseminates to a clearly defined deviant sex group, rather than the public at large, the prurient appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of that group.

In Minnesota's statute, the requirements that the work as a whole lack artistic value and that it depict "patently offensive sexual conduct,"[72] would seem to restrict the object of the statute to what is generally considered obscene.

[68] MINN. STAT. § 617.246 (1977).

[69] *Id.*

[70] MINN. STAT. § 617.246 (1977) provides in part:

(c) "An obscene work" is a picture, a film, photograph, negative, slide, drawing or similar visual representation depicting a minor, which taken as a whole appeals to pedophiles or to the prurient interest in sex of the average person, which portrays patently offensive sexual conduct and which, taken as a whole does not have serious literary, artistic, political or scientific value. In determining whether or not a work is an obscene work the trier of the fact must find: (i) that the average person, applying contemporary community standards would find that the work, taken as a whole appeals to pedophiles or to the prurient interest in sex of the average person; and (ii) that the work depicts patently offensive sexual conduct specifically defined by clause (f); and (iii) that the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

[71] 383 U.S. 502, 508 (1966).

[72] MINN STAT. § 617.246 (f) (1977).

Several of the state's statutes use the terminology "harmful to minors,"[73] and "obscene as to minors."[74] This concept originated in *Ginsberg v. New York*,[75] which upheld a New York statute prohibiting the sale to a minor of material which was "harmful to minors." The Court held that a state court could set a different standard of obscenity for minors' consumption than for adult viewing.

The child pornography statutes differ somewhat from the statute considered in *Ginsberg*, in that the minors involved in the former are not the consumers of the pornographic material, but rather participant-models. Indeed, the Connecticut statute prohibits "a performance or material which is obscene as to minors *notwithstanding* such performance or material is intended for an adult audience."[76] In *Butler v. Michigan*,[77] the Supreme Court held that a state could not ban from the general reading public material "tending to the corruption of morals of youth."[78] The Court remonstrated that "the incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual now enshrined in the Due Process Clause of the Fourteenth Amendment."[79]

Thus, while it is not impossible that the Supreme Court will carve out another exception to first amendment protection for expressive material which was produced through acts harmful to minors,[80] under present obscenity case law, statutes banning material thus produced would be unconstitutional insofar as they suppress publishing and distribution of non-obscene erotica.

[73] ARIZ. REV. STAT. § 13-538 (1977); FLA. STAT. § 847.014 (1977).

[74] 1978 Conn. Pub. Acts 345.

[75] 390 U.S. 629 (1968).

[76] 1978 Conn. Pub. Act 345, § 2(a) (emphasis added).

[77] 352 U.S. 380 (1957).

[78] MICH. STAT. ANN. § 28.575 (1953).

[79] 352 U.S. at 383-384.

[80] Some legislatures have taken a "let's see" approach to drafting child pornography statutes. In Illinois, Rep. Thomas W. Ewing of Pontiac made the following comment quoted in *Illinois House OK's Jail Term for Child Porn*, Chicago Daily News, March 25, 1977, "Let's pass the bill and if it's not constitutional, let the court strike it down." Congressman Biaggi commented before the House Subcommittee that the short term effects of an unconstitutional statute might be salutary in themselves:

> I refer to history when President Roosevelt had the Congress enact the National Recovery Act. It was clearly unconstitutional and it was contended at this point there was a critical problem in our nation that needed dealing with. By the time that act was declared unconstitutional the problem had been met and resolved. I suggest that constitutional or otherwise, which will be an open question until the courts decide, that legislation dealing with this problem forthrightly would have similar effect. Most of the people involved in my judgment are just merchants out there trying to make money and they know there is no penal sanction at this point. Once a law falls in place, with personal sanctions, the results might be rather salutary in that there will be a fall off of production and penalty may not be worth profit . . . .

House 1977 Hearings, *supra* note 1, at 153.

Under the Florida statute, the standard for direct participation in child abusive conduct differs from that for dealing in child pornography materials. However, unlike the federal statute, the provision regarding exhibition, sale, distribution and possession with intent to sell, applies to material which is "harmful to minors" rather than only to obscene material. The provisions barring producing, hiring and procuring merely require that the offending material depict "sexual conduct, sexual excitement, or sado-masochistic abuse."[81]

The New York child pornography law is more curious in that it provides two standards for the same offense. Section 263.10 of the penal code prohibits "promoting an obscene sexual performance by a child," while section 263.15 prohibits "promoting a sexual performance by a child."[82] The latter varies from the former only in its omission of the word "obscene."

The majority of state statutes stray further from the *Miller* test by not requiring that the material *as a whole* appeal to prurient interests.[83] The Roth Bill[84] drew fire for this reason from the Justice Department which pointed to

[81] FLA. STAT. § 847.014 (2)(a) (1977).

[82] N.Y. Penal Law § 263.10, § 263.15 (McKinney 1977).

[83] The definition of "harmful to minors" includes the test: "predominantly appeals to the prurient, shameful, or morbid interests of minors." FLA. STAT. § 847.019 (1)(f)(1) (1977).

[84] S. 1011, 95th Cong., 1st Sess. (1977).

the motion picture "The Exorcist" as a film in which there was explicit sexual conduct by a child, which was not, when viewed as a whole, obscene.[85]

At this point, one might fairly ask if such legislation does not prohibit obscenity or material "harmful to minors," what does it prohibit? Although the taboo is variously referred to as "sexual conduct,"[86] "prohibited sexual act,"[87] "listed sexual act,"[88] and "sexually explicit conduct,"[89] a more meaningful discrimination can be made by examining the definitions rather than the generic terms.

Three states appear to adopt *Miller* in prohibiting conduct which is specific and patently offensive sexual conduct.[90] These states—Kentucky, New York, and Wisconsin—bar nudity only insofar as it is obscene[91] or lewd.[92] The statutes of Delaware and Pennsylvania, while listing specific and narrowly proscribed conduct, are reminiscent of the Roth bill in their use of the phrase "nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or sexual gratification of any individual who may view such depiction."[93]

Massachusetts prohibits all nude depictions of children.[91] In *Erznoznik v. City of Jacksonville*,[95] the Court overturned a municipal ordinance barring all drive-in movies which displayed nudity. Reversing the Florida court's decision upholding the ordinance, the Supreme Court held that all nudity was not obscene and further that although lewd nudity could be censored, a blanket prohibition against all nudity was unconstitutional.[96]

Michigan prohibits depictions of "passive sexual in-

[85] See letter from Assistant Attorney General Patricia Wald to Sen. James P. Eastland, Chairman, Committee on the Judiciary (June 14, 1977) in which she argued on behalf of the Justice Department:

> Secondly, the bill does not distinguish between material which is obscene and material which is protected by the First Amendment. In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court required that material be evaluated as a whole in determining whether it is obscene. However, the present bill would forbid the manufacture and distribution of a film containing one brief scene of prohibited conduct and otherwise innocuous. For example, the bill would apply to the film "The Exorcist," which contains a scene in which a minor simulates masturbation but is clearly not legally obscene.
>
> I would like to emphasize at this point two very significant results which would follow from the enactment of this legislation. First, an existing motion picture, such as "The Exorcist," could no longer be distributed in interstate commerce so long as the simulated scene involving the minor is retained in the film, and second, any future production of a motion picture film which contains a depiction of a minor engaged in a prohibited sexual act would be criminally proscribed even though, as in the case of "The Exorcist," the offensive scene is merely a small part of the film which, taken as a whole, would not be legally obscene under the standards set forth by the Supreme Court in *Miller*. This would be a clear statement of public policy by the Congress which would undoubtedly create severe problems for the courts, particularly in situations where the offensive material is a small part of what is otherwise a socially acceptable product.

[86] 1978 KY. ACTS ch. 219; LA. REV. STAT. ANN. § 14:81.1 (West 1977); MASS. GEN. LAWS ANN. ch. 917, § 104A, ch. 272, § 29A, 30D (West 1978); N.Y. PENAL LAW § 263.00, § 263.15 (McKinney) (1977); TEX. PENAL CODE ANN. tit. 9, § 43.25 (Vernon 1977).

[87] DEL. CODE, tit. 11, § 1103, § 1108 (1977); 18 PA. CONS. STAT. § 6312 (1977).

[88] MICH. COMP. LAWS ANN. § 750.145(c) (1978).

[89] WIS. STAT. § 940.203 (1978).

[90] 1978 KY. ACTS ch. 219; N.Y. PENAL LAW § 263.00 (McKinney 1977); WIS. STAT. § 940.203 (1978).

[91] 1978 KY. ACTS ch. 219.

[92] N.Y. PENAL LAW § 263.00 (McKinney 1977); WIS. STAT. § 940.203 (1978). Michigan prohibits "erotic nudity," a term which borrows from the concept of obscenity. MICH. COMP. LAWS ANN. § 750.145(c)(1)(d) (1978) reads:

> "Erotic nudity" means the display of the human male or female genital or pubic area, or developed or developing female breast, in a manner which lacks primary literary, artistic, educational, political, or scientific value and which the average person applying contemporary community standards would find appeals to prurient interests. As used in the subdivision, "community" means the state of Michigan.

[93] DEL. CODE tit. 11, § 1103 (1977); 18 PA. CONS. STAT. § 6312 (1977).

[91] MASS. GEN. LAWS ANN. ch. 917, § 104A, ch. 272, § 29A, 30D (West 1978). *See also* ch. 272, § 31, where nudity is defined without reference to obscenity, lewdness, or sexual gratification.

[95] 422 U.S. 205 (1975).

[96] The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus, it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly, all nudity cannot be deemed obscene even as to minors . . . .

422 U.S. at 213.

volvement."[97] While the definition of "passive sexual involvement" is wondrously vague,[98] it appears to be directed at situations where children are portrayed as watching acts of sexual intercourse or "erotic fondling" or are exposed to "erotic nudity."[99] Texas also prohibits the sale and exhibition of photographs and films "showing a person younger than 17 years of age observing sexual conduct."[100]

These statutes seem to be the product of the following reasoning process: 1. Child pornography is generated by the participation of children in explicit sexual activity and therefore, should be excluded from first amendment protection because it is the product of child abuse; 2. erotic materials that involve child actors or models are child pornography; and 3. erotic materials that involve child actors or models may be excluded from first amendment protection, even if no child abuse activity occurs.[101]

Two state statutes, those of Louisiana and Texas, do not define "sexual conduct,"[102] and thus clearly depart from the *Miller* prescription that sexual conduct whose depiction is prohibited be "specifically defined by applicable state law."[103] Such statutes are vague and overbroad, first because as penal statutes, they give no notice of what activity is prohibited, and secondly, because the provisions conceivably extend to such non-obscene conduct as kissing.

Two statutes which do not require that the work as a whole appeal to prurient interests allow, as an affirmative

[97] MICH.COMP. LAWS ANN. § 750.145(c)(1)(f) (1978).

[98] MICH. COMP. LAWS ANN. § 750.145(c)(1)(h) (1978).

[99] An example is found in "Pretty Baby," a film in which Violet, growing up in a brothel, watches adults engaged in "erotic fondling" and "erotic nudity." Another example is the movie "The Go-Between" in which the child messenger catches the heroine and her paramour in the act of making love.

[100] TEX. PENAL CODE ANN. tit. 9, § 43.25 (Vernon 1977). Note that the sexual conduct itself need not even be shown in the offending film or photograph.

[101] This is not to say that a young child may not suffer psychological damage coming unexpected and unprepared upon persons engaged in sexual activity. However, it would be presumptious to say that any exposure of a teenager to nudity, even in the controlled atmosphere of a movie set would be child abuse.

[102] LA. REV. STAT. ANN. § 14:81.1 (West 1977); TEX. PENAL CODE ANN. tit. 9, § 43.25 (Vernon 1977).

[103] 413 U.S. at 24.

defense, proof that the work has some merit.[104] The Massachusetts law, which includes non-obscene nudity in its proscriptions, provides:

> It shall be an affirmative defense in any prosecution pursuant to this section that such dissemination of any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum, or library . . . .[105]

Note that there is no allowance for non-obscene nudity in films which are shown in "respectable" theatres,[106] nor is there allowance for artistic works not specifically produced "for a bona fide school, museum or library."[107]

In a similar fashion, the Texas statute provides inter alia:

> It is affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.[108]

While the above quoted provision uses the word "obscene," the prohibitory section which it modifies applies to "any motion picture or photograph showing a person younger than 17 years of age observing or engaging in sexual conduct."[109] Such sexual conduct is not defined. In other words, obscenity is the standard in the statutory exception but is not the standard for the general rule. The reader should note that there is no provision whatsoever for works having artistic or cultural merit, and that "justification" in the Texas statute modifies the possessor rather than the work itself.[110]

[104] MASS. GEN. LAWS ANN. ch. 917, § 104A, ch. 272, § 29A (West 1978); TEX. PENAL CODE ANN. tit. 9, § 43.25 (1977).

[105] MASS. GEN. LAWS ANN. ch. 272, § 29A (Vernon 1978).

[106] *E.g.*, "Romeo and Juliet"; "A Separate Peace."

[107] A book containing Renaissance paintings of cherubs might be contraband in Massachusetts under the statute, since the paintings were not originally produced for a "bona fide . . . museum."

[108] TEX. PENAL CODE ANN. tit. 9, § 43.25(b) (Vernon 1977).

[109] TEX. PENAL CODE ANN. tit. 9, § 43.25(a) (Vernon 1977).

[110] In other words, a copy of an issue of *National Geographic* in the hands of an ordinary sales clerk would not have the justification it would have in the hands

Yet the concept of merit as an affirmative defense deserves closer attention. Essentially, statutes like those of Texas and Massachusetts create a presumption of obscenity on a showing that "sexual conduct" is depicted. Then the burden of proof is shifted back to the seller or exhibitor to show that the work is not obscene. Certainly there is no precedent for either the presumption or the shifting of the burden of proof in first amendment case law. The Supreme Court stated in *Speiser v. Randall*[111] "where the transcendent value of speech is involved, due process certainly requires . . . that the state bear the burden of persuasion to show the appellants engaged in criminal speech." Similarly in *Freedman v. Maryland*,[112] the Court held, "The burden of proving that the film is unprotected expression must rest on the censor."

A few other observations about the state legislation on child pornography will be helpful. Legislation from sixteen states has been reviewed. All of the statutes, except Minnesota's § 617.246 and California's Labor Code § 1309.5 provide for felony penalties. Michigan's § 750.145(c) provides for imprisonment of up to twenty years.

California's Labor Code § 1309.5 is novel in that it requires sellers, distributors, and exhibitors to record the names and addresses of persons from whom such material is obtained.

The definition of minor ranges from "under 16"[113] to "18 years or less."[114] The Illinois law prohibits the sale of pornography where one of the participants is a child "under the age of 16 or who appears pre-pubescent."[115]

of an anthropologist.

[111] 357 U.S. 513, 516 (1958).

[112] 380 U.S. 51, 58 (1965). *Speiser* concerned political speech; *Freedman* involved the censoring of motion pictures.

[113] CAL. PENAL CODE § 311.4 (West 1977); N.Y. PENAL LAW §§ 263.00-263.25 (McKinney 1977); 18 PA. CONS. STAT. § 6312 (1977).

[114] DEL. CODE tit. 11, § 1103, 1108 (1977).

[115] It is possible that this is a violation of equal protection in that the statute may tend to discourage employers from hiring adults with pre-pubescent appearances over other adults. It is unlikely that the state would have an interest in protecting adults who resemble minors. While there might be an equal protection problem, the Illinois statute does not impinge upon the right of free speech, since it incorporates the obscenity standard.

Few generalizations can be stated about these statutes. As a rule, they are broader than the federal legislation. They tend to focus on depictions of certain acts rather than view the works as a whole. Unlike the federal legislation, state law usually does not provide separate standards for regulation of speech as opposed to conduct. However, no two statutes on child pornography are identical; they seem to be more the products of individual statehouses than of any lobbying groups.

V. CONSTITUTIONAL TESTS[116]

Challenges to the constitutionality of child pornography legislation have thus far produced two judicial opinions, both unfavorable to the legislation.[117]

A. *St. Martin's Press v. Carey*[118]

This case arose from a challenge to New York's Penal Law § 263.15, "Promoting a sexual performance by a child," which reads as follows:

> A person is guilty of promoting[119] a sexual performance by a child, when, knowing the character and content thereof, he produces, directs, or promotes any performance[120] which includes sexual conduct[121] by a child less than sixteen years of age . . . .

[116] The author acknowledges the kind assistance of the plaintiffs' attorneys in *St. Martin's Press v. Carey*, for this section: Thomas B. Stoddard of Norwick Raggio Jaffee & Kayser and David N. Kay of Szold Brandwin Meyers & Altman.

[117] Subsequent to the drafting of this Note, a lower level New York court upheld the indictment of a merchant for violation of N.Y. PENAL LAW § 263.10 and § 263.15 (McKinney 1977). People v. Ferber, ___ Misc. 2d ___, 409 N.Y.S.2d 632 (Sup. Ct. 1978). Curiously, the *Ferber* court did not even mention *St. Martin's Press v. Carey*, 440 F. Supp. 1196 (S.D.N.Y. 1977), which is discussed below.

[118] 440 F. Supp. 1196 (S.D.N.Y. 1977).

[119] N.Y. PENAL LAW § 263.00 (McKinney 1977) states:

> 5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

[120] 4. "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

N.Y. PENAL LAW § 263.00(4) (McKinney 1977).

The suit for declaratory and injunctive relief was brought by the publishers and retail sellers of the book *Show Me! A Picture Book of Sex for Children and Parents* [hereinafter referred to as *Show Me!*].[122] The book, photographed in Munich between 1969 and 1973, contains pictures of a young boy and girl exploring each other's bodies, accompanied by brief captions taken from the children's conversations. Its authors intended *Show Me!* to be a vehicle to assist parents in educating their children about sex.

Plaintiffs argued that section 263.15 was unconstitutionally overbroad on its face because the statute did not distinguish obscene and non-obscene works. Further, they argued the section was unconstitutional as applied to *Show Me!* for three reasons. First, the book was "not obscene but [was] a serious artistic, educational and scientific book designed for parents to use in educating their children about the emotional and physical aspects of sex." Second, insofar as the statute's purpose was to prevent children of that state "from being exploited or otherwise affected by their unwitting involvement in sexual enterprises" it had no rational application to *Show Me!*, which was photographed in Germany. Therefore, the statute's application to this book would be a denial of substantive due process, the legislature having exceeded its police powers. Third, the statute infringed upon the constitutional right of privacy of parents to teach their children about sex.[123]

The ruling, which defendants are presently appealing to the Court of Appeals of the Second Circuit, was rendered in response to plaintiffs' motion that prosecution be enjoined pending a final decision on the statute's constitutionality. After finding the case to be ripe for adjudication and holding that plaintiffs had met the standard to obtain a preliminary

[121] 3. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.
N.Y. PENAL LAW § 263.00(3) (McKinney 1977).

[122] W. MCBRIDE & H. HEISHHAUER-HARDT, SHOW ME! A PICTURE BOOK OF SEX FOR CHILDREN AND PARENTS (1975) [hereinafter cited as SHOW ME!].

[123] 440 F. Supp. at 1199.

injunction, the court examined the merits of plaintiffs' constitutional argument.

On this issue the court found that *Show Me!* was not obscene under the *Miller* test, since it did not, taken as a whole, lack serious literary, artistic or scientific value.[124] The court also cited decisions of courts in three other states holding *Show Me!* not to be obscene.[125] The court acknowledged that in *Young v. American Mini Theatres, Inc.*,[126] the Supreme Court had upheld limited regulation of non-obscene motion pictures and photographs.[127] However, the New York statute at issue in *Show Me!* differed from the zoning ordinance challenged in *Mini Theatres:* "The use of felony statutes to prohibit dissemination of such material is constitutionally suspect."[128]

Yet the reasoning which the court found most persuasive was plaintiffs' substantive due process argument.[129] Citing *Roe v. Wade*,[130] the court held:

> Where a statute affects such fundamental rights as are at stake in this case, it "must be narrowly drawn to express only the legitimate state interests at stake, . . . and to foster them by the least drastic means possible . . . ." While New York's interest in protecting children from exploitation is both legitimate and important, the question remains whether it has pursued rational and least drastic means for effectuating that interest. [131]

The court then questioned whether the legislature's ap-

[124] 440 F. Supp. at 1205.

[125] Droney v. A Book Named "Show Me!," No. 75-6471 (Sup. Ct. Middlesex, Mass. 1976); New Hampshire v. Neilson (Portsmouth Dist. Ct. N.H. 1976); Okla. ex. rel. Robinson, No. Crim. 76-1274 (Dist. Ct. Okla. 1976), said cases cited in 440 F. Supp. at 1205 n.12.

[126] 427 U.S. 50 (1976).

[127] In *Mini Theatres*, theatre operators challenged a zoning ordinance regulating the location of adult entertainment establishments. The standard employed by the ordinance was not obscenity but "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.'" 427 U.S. at 53.

[128] 440 F. Supp. at 1204-05.

[129] The court did not reach plaintiffs' constitutional right of privacy argument, as plaintiffs' other arguments raised "substantial questions going to the merits." 440 F. Supp. at 1199-1200 n.7.

[130] 410 U.S. 113 (1973).

[131] 440 F. Supp. at 1205.

proach of "going after demand" for the pornographic product would be a legitimate means of attacking child abuse, particularly when it entails suppression of a non-obscene book.[132]

The *St. Martin* court issued the preliminary injunction but did not declare the challenged law unconstitutional.[133] Nevertheless, language in this decision that suppression of non-obscene speech is not a legitimate means of indirectly reaching illegal conduct, is applicable to the majority of state statutes on child pornography.

B. *Graham v. Hill*[134]

Graham v. Hill concerned Texas Penal Code § 43.25 (1977), which provides as follows:

> (a) A person commits an offense if, knowing the content of the material he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any motion picture or photograph showing a person younger than 17 years of age observing or engaging in sexual conduct.
> (b) It is an affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.
> (c) An offense under this section is a felony of the third degree.[135]

The owner and the manager of a combination movie theatre and bookstore instituted this action seeking a declaratory judgment that the Texas statute is overbroad and unconstitutional on its face. The complaint was filed one month after the plaintiff had been indicted by the county grand jury for violating section 43.25.[136] The state court

[132] *Id.* at 1206.
[133] Only prosecutions of the book SHOW ME! were enjoined.
[134] 444 F. Supp. 584 (W.D. Tex. 1978).
[135] Section 43.25 was hurriedly enacted by the Texas legislature in the Spring of 1977. On May 21 the section was passed by the House of Representatives and on May 27 by the Senate. It was approved on June 10 and made effective the same day because it was declared to be emergency legislation.
444 F. Supp. at 590.
[136] The indictment alleges that Graham did "knowingly and intentionally sell and possess for sale a motion picture, knowing the content of the motion picture. Said motion picture showing a person younger than seventeen years of age engaging in sexual conduct . . . ."
444 F. Supp. at 587, n.2.

agreed to the trial pending a ruling by the federal court on the statute's constitutionality.[137]

After finding that plaintiffs had standing and ruling that the abstention doctrine was not controlling here, the court considered the merits of the constitutional issue. Citing *Doran v. Salem Inn, Inc.*,[138] the court stated:

> The crucial question in an overbreadth case is whether the legislation under attack sweeps within its ambit speech or conduct which is not subject to suppression . . . . If so, the statute must be declared unconstitutional on its face, regardless of the fact that the conduct of the particular person presenting the challenge could be regulated by a narrower statute.[139]

Lack of a requirement that the material suppressed be obscene was found to be a fatal defect.[140] However, the court suggested that were the statute firmly buttressed by the state's interest in the protection of "the safety or welfare of minors or [in preventing] their exploitation and abuse," a more lenient first amendment standard would have been applied.[141]

> But the blanket prohibition in § 43.25 against exhibiting motion pictures just because they contain a scene in which a young person is shown observing sexual conduct, without any prerequisite that the film be obscene or that the minor's part in the film in

[137] *Id.* at 587-88.
[138] 422 U.S. 922 (1975). The challenged ordinance prohibited topless dancing. The Court speculated that the ordinance as written would apply to a "performance of the 'Ballet Africans'" and held;
> [E]ven though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court.

Id. at 933.
[139] 444 F. Supp. at 590-91.
[140] In fact, the statute literally makes it unlawful to exhibit a movie which "shows" a person under 17 years of age "observing . . . sexual conduct" even if the conduct being observed is never itself depicted on the film. Such a film clearly would not be obscene.
444 F. Supp. at 592.
[141] *Id.* at 592.

> any way involves sexual exploitation renders the statute overbroad.[142]

The court further assailed the affirmative defense section:

> If by referring to "the obscene material" only in the affirmative defense section of the statute, the Texas legislature intended to create a presumption that all material prohibited by § 43.25(a) is obscene, then the statute clearly is defective and invalid, for a motion picture or photograph cannot be presumed to be obscene . . . .[143]

Finally, the court declined to construe the statute narrowly, reading into section 43.25(a) the requirement of obscenity. The court referred to *Erznoznik* in which the Supreme Court declined to narrowly construe an ordinance where only rewriting could bring the ordinance within limits of the first amendment.[144]

While the declaratory relief granted plaintiffs in *Graham* was not binding on the state except as to these particular plaintiffs,[145] there are useful lessons to be garnered from *Graham v. Hill.* First, a strategy of selective enforcement whereby only hardcore pornography is singled out for prosecution will not save an overbroad statute which could suppress protected speech. Secondly, while courts may defer

[142] *Id.* at 592-93.

[143] *Id.* at 593.

[144] "Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." 422 U.S. at 217-18.

[145] The Court notes that this decision will not necessarily preclude the state courts from placing their own construction on § 43.25. A federal court's declaratory judgment of unconstitutionality does not have the disruptive effect on state regulation that would be created by a broad injunction against enforcement of the statute; in fact, the declaratory relief granted in this case cannot directly affect or interfere with the state's enforcement of the statute except with respect to Jay Battershell, the federal plaintiff involved in this ruling.

444 F. Supp. at 594. Only a state's highest court or the United States Supreme Court can definitely declare a statute unconstitutional. A federal district court's declaratory ruling is binding only as to the plaintiff who requested the ruling.

"Moreover, neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

to the state's interest in protecting the welfare of its children,[146] such a state interest must be evidenced by a statute strictly tailored to serve that purpose.

C. *Other Potential Issues*

Both the *St. Martin's Press* court and the *Graham* court dealt with child pornography statutes as quasi-obscenity statutes which looked for justification to the state's interest in the protection of its children. However, child pornography statutes have been criticized from other frameworks. The following are a few issues which may arise in future legislation.

One issue is whether child pornography should be viewed as pure speech. *United States v. O'Brien*[147] held that where " 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech elements, can justify incidental limitations on First Amendment freedoms." It further held:

> A governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[148]

In *O'Brien*, the "speech" and "non-speech" elements

[146] A case often cited for this point is Prince v. Mass., 321 U.S. 158 (1944). In *Prince*, a statute forbidding parents to permit their minor children to work was held constitutional as applied to a Jehovah's Witness who encouraged her ward to distribute religious literature.

> It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

Id. at 167. *Prince* can be viewed as subordinating freedom of religion to the state's interest in protecting children and as opening the way for subordinating freedom of speech to the state's interest in protecting children. Nevertheless, with religion a distinction can be made between freedom to practice and freedom to believe. *See* Reynolds v. United States, 98 U.S. 145 (1879).

[147] 391 U.S. 367, 376 (1968). The case arose out of the appeal of a draft card burner's conviction under 50 U.S.C. § 462 (b)(3) (1965) which was challenged as encroaching upon appellant's freedom of symbolic speech.

[148] 391 U.S. at 368.

were combined in symbolic speech. In the case of child pornography, the non-speech elements sought to be regulated generate the speech elements. One can only speculate as to whether *O'Brien* was intended to cover the sort of non-contemporaneous combination of child abuse and child pornography. If statutes regulating the sale and distribution of child pornography are regulating pure speech, as some believe,[149] then the appropriate rule is to be found in *Brandenburg v. Ohio*,[150] which held that a restriction on free speech may be justified by a showing of incitement to "imminent lawless action." The plaintiffs, in *St. Martin's Press*, anticipated this issue in their brief on appeal:

> ——Section 263.15 could never, for example, pass muster under the traditional first amendment clear and present danger or incitement to imminent lawless action analysis. The act of publication under 263.15, by definition occurs after any putative child abuse and the danger of further child abuse as a result of viewing such materials is hardly proven to be imminent.[151]

If, on the other hand, a combination of speech and non-speech elements were found, there would still be a question under *O'Brien* as to whether the regulation of speech was incidental to the regulation of conduct or whether it was more properly the regulation of conduct which was incidental to the regulation of speech.[152] Also, there are problems related heretofore which were brought out in the Congressional hearings as to whether the incidental regulation is no greater than is essential to the furtherance of state interest.

[149] Paul Bender, Professor of Law at University of Pennsylvania and former General Counsel to the President's Commission on Obscenity told the Senate Subcommittee: "You are dealing here with what amounts to pure speech." *Senate 1977 Hearings, supra* note 2, at 105.

[150] 395 U.S. 444, 447 (1969). In this case, a Ku Klux Klan leader was charged with criminal syndicalism.

[151] *Amicus* Brief by Association of American Publishers, Inc. at 14, St. Martin's Press v. Carey, 440 F. Supp. 1196 (S.D.N.Y. 1977).

[152] Also you would have to show that there is no adequate alternative toward prohibiting the speech. You're doing something unusual. You're trying to get to conduct through speech. Normally, as Justice Brandeis said in *Whitney v. California*, we do not do this in this country. Normally, if we're after conduct we penalize the conduct. We do not try to reach conduct through speech.

Senate 1977 Hearings, supra note 2, at 106 (statement of Paul Bender).

The American Civil Liberties Union, in its statement to the Senate Subcommittee to Investigate Juvenile Delinquency, explored and countered other possible justifications for restrictions on the publication and sale of child pornography.[153] As to the basic immorality of erotic materials involving children, *Cohen v. California*[154] held that speech may not be proscribed on the basis that it is offensive;[155] *Kingsley Pictures Corp. v. Regents*[156] held that a state may not ban films on the basis that they present seductive portrayals of illegal conduct; and *New York Times v. United States*[157] can be read for the proposition that dissemination of published material obtained by illegal means can not be proscribed.[158] In a similar vein, one can think of examples of recordings of illegal events which have historically been afforded the protection of the first amendment, *e.g.*, film documentaries and newspaper photographs of crimes being committed.

Two other issues deserve attention. The *St. Martin's* plaintiffs' brief, on appeal, questioned whether the publisher or bookseller can be said technically to be an accomplice of the child abuser. While there may be a logical connection, plaintiffs argued persuasively that the relationship between the publisher or bookseller and the child abuser is

[153] *Senate 1977 Hearings, supra* note 2, at 97-99.

[154] 403 U.S. 15 (1971). Here defendant appealed his conviction of disturbing the peace for the wearing of a jacket bearing the words "Fuck the Draft."

[155] *See also:* Erynoznick v. City of Jacksonville, 422 U.S. 205 (1975).

[156] 360 U.S. 684 (1959). The distributor of the movie "Lady Chatterly's Lover" challenged New York's law banning films which privileged adultery in a desirable light. N.Y. EDUCATION LAW § 124 (McKinney 1953).

[157] 403 U.S. 713 (1971). The case is familiar to many as the Pentagon Papers Case.

[158] While the case was decided primarily on the issue of national security, Justice Harlan, dissenting, argued that one of the issues was:

> [w]hether newspapers are entitled to retain and use documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspaper received them with knowledge that they had been feloniously acquired.

403 U.S. at 754 (Harland, J., dissenting). One can argue that since the majority did not address this issue, that they started from the premise that the theft was immaterial to the right to publish.

too tenuous to constitute complicity within the legal meaning of the word.[159]

Lastly, an issue was raised by Senator Helms in the floor debate on the Roth Amendment. There are state statutes which prohibit the publishing of the name of a rape victim on the basis that it is an invasion of the victim's right to privacy. Could not the dissemination of films and photographs of the sexual exploitation of the children be prohibited on the same basis, in that under the reasoning of statutory rape, the child lacks the ability to consent?[160] This is an imaginative argument. The most appropriate response seems to be the analogy to *Begelow v. Virginia*,[161] that the *St. Martin's* plaintiffs made in their motion for a preliminary injunction. In *Bigelow*, the Court held:

> [A state] may not, under the guise of exercising internal police powers, bar a citizen of another state from disseminating information about an activity that is legal in that state.[162]

Since child pornography is often photographed outside this country, the *Bigelow* analogy is particularly apt.

VI. Conclusion

To recapitulate briefly, the law on child pornography consists of (1) a federal law with a bifurcated standard of

[159] A legislative presumption that a publisher or bookseller is necessarily a principal in, or an aider and abettor of, child abuse that may be depicted in a book he or she publishes, distributes or sells would be entirely irrational and therefore invalid as a violation of due process. Publishers more often than not deal with manuscripts prepared by independent authors. In fact, *Show Me!* is the U.S. edition of a book apparently initially produced and published by a West German concern entirely independent from plaintiff St. Martin's Press. Booksellers typically have no relationship of any kind with publishers or authors except as the purchaser of an independently produced product. Similarly, it is not difficult to imagine other entirely innocent third-parties (sic) who may come into possession of photographs depicting sexual child abuse and then exhibit, distribute or republish them for entirely legitimate purposes.

Amicus Brief, *supra* note 151 at 12.

[160] 123 Cong. Rec. S16,830 (daily ed. Oct. 10, 1977).

[161] 421 U.S. 809 (1975). *Bigelow* concerned an advertisement for an abortion referral agency.

[162] 421 U.S. at 824-25.

proof, requiring that material be obscene before it is suppressed, but allowing conduct to be regulated without regard to obscenity; (2) state legislation which ranges from a narrower application than the federal law,[163] to the more typical statute banning the publication and sale of all materials depicting children engaged in sexual conduct without regard to whether those works can be classified as obscene; and (3) the holdings of two federal courts that to be enforced, such statutes must comply with the Supreme Court's guidelines on obscenity.

Where do we go from here? Most of what is popularly conceived of as child pornography is obscene under present law.[164] Obscenity no longer requires that a work be "utterly without redeeming social value."[165] No longer can "[a] quotation from Voltaire in the flyleaf of a book . . . constitutionally redeem an otherwise obscene publication."[166] What is needed is an enforcement of obscenity laws,[167] and the best

[163] Tenn. Code Ann. § 39-3013 (1975); N.H. Rev. Stat. Ann. § 650.211 (1977); Ill. Rev. Stat. ch. 38, § 11-20a (1978); Minn. Stat. § 617.246(f) (1977).

[164] *See* U.S. v. Dost, 575 F.2d 1303 (10th Cir. 1978) in which child pornography was deemed obscene within the meaning of 18 U.S.C. § 1461 (1958). Paul Bender has commented that "Most of the things that people think of as child pornography it seems to me are obscene under present law." He qualified his statement, however:

> "The Exorcist" is not obscene and therefore if you are worried about whatever the child did in "The Exorcist," then you could not reach that through prohibiting "The Exorcist." I'm not sure you should be worried about a child acting in a film that is protected by the first amendment under present obscenity standards. It is hard for me to conceive of a child acting in a film like "The Exorcist" as being child abuse of the sort that I think you are mostly worried about. After all, that takes place in a more or less open situation with a well-established business. There are guardians around who are looking after their child's best interest. This is not some child that they are abusing in the ordinary sense of that word. It's a child that they are using as an actor. Although the child may be doing things that you or I would not want our children to do, I do not think there is a major social problem when you are dealing with material protected by the first amendment. I think the major social problem here is children being abused in ways that show up in material that is not protected by the first amendment under present constitutional doctrine.

Senate 1977 Hearings, *supra* note 2, at 107-08.

[165] This test of Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966) was abrogated by *Miller*, 413 U.S. at 24-25.

[166] Kois v. Wisconsin, 408 U.S. 229, 231 (1972).

[167] "Legislators and law-enforcement officials tend to think in terms

method to accomplish this is through citizen action.

But together with the attack on the market for child pornography materials, attention should also be devoted to the source of supply. States should insure through their licensing laws and through inspection and supervision that all boarding schools, camps, group homes, and institutions for minors are safe and decent places in which to raise children. It is small comfort to hear of the prosecution of child pornographers when conscientious investigations by the state might have prevented the abuse altogether.

Further, since most of the children who are exploited in this manner are runaways,[168] reconsideration needs to be given to existing methods of coping with the runaway problem. As one speaker told the Senate Subcommittee on Juvenile Delinquency:

> It is clear that many of the children who are paid by adults to perform sexual acts are homeless for all practical purposes. They resort to these activities because they have few alternatives for survival.
> State laws significantly interfere with the opportunity for youths who are not living with their families to work or to obtain welfare. In light of this, it is not surprising that some of these children turn to the only sources for making money available to them—pimps and pornographers. What's worse, these children are compelled to live as fugitives or to be locked in reformatories as runaways. It is particularly ironic moreover that in many of the institutions to which these runaways are sent, they are subjected to sexual abuse, including gang rapes, that are as bad if not worse than the sexual exploitation which the Mathias-Culver bill addresses.
> It is time for the Government to recognize that a significant number of children are living on their own trying to survive without support from their families. If we fail to provide them with alternatives, only we are to blame if they turn to sexual exploitation for survival. So long as the options for kids in need of money remains as limited as the present, it is a certainty that some kids will turn to easy sources for money.
> We must create jobs for youths who are able to work. We need to create shelters to which runaways can go with no sanctions and no strings attached. It is necessary to face the fact that the criminal process is wholly inappropriate to deal with such significant problems as runaways and the breakdown of the family.[169]

of new legislation instead of looking at the books to see what is already there," Gertz said in an interview.
"The attitude is: To hell with the old law—let's go for a new one. Very often, though, the new law is poorly drafted and very ineffective. Also, there's no publicity mileage in using the laws that exist. Prosecutors simply are not conditioned to look at what is on the books. They look for something new."
"*Child Pornographers Thrive on Legal Confusion*," Chicago Tribune series running May 15-18, 1977. (Statement of Elmer Gertz, civil liberties attorney.)

[168] S. Rep. No. 95-438, Sept. 16, 1977, to accompany S.1585.

It is fitting at the close of this article to address the question: why all this concern over the suppression of a few non-obscene works? What significant harm will result if *Show Me!*, "The Exorcist," "Taxi Driver," etc., never reach an audience? It seems a small price to pay for an efficient, "shotgun" approach to the child pornography problem. The flaw in this reasoning is that the laws of this country are only as good as the Constitution on which they are grounded. We presently have three exceptions to the rule that non-obscene works have first amendment protection: the obscenity-as-to-child-audiences exception, the zoning exception, and the prime-time radio exception.[170] It is possible that obscenity guidelines will follow the road of the search warrant requirement—an idealist restriction on government power rendered lame by the myriad exceptions. While there are certainly serious concerns at stake, an editing of constitutional principles should be a last resort.

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[169] *Senate 1977 Hearings, supra* note 2, at 94 (statement of Martin Guggenheim).

[170] FCC v. Pacifica Foundation, ___ U.S. ___, 98 S. Ct. 3026 (1978).