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Comment

Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution

But if anyone causes one of these little ones who believe in me to sin, it would be better for him to have a large millstone hung around his neck and to be drowned in the depths of the sea. Woe to the world because of the things that cause people to sin! Such things must come, but woe to the man through whom they come!¹

Seeking to implement this biblical injunction, legislators, law enforcement officials, journalists, and the public in general have sharply responded to a sudden flood of child pornography and prostitution. Through the enactment of bold new laws, increased enforcement, and severe public pressure, they have gone about constructing large "millstones" as burdensome deterrents to producers, distributors, and retailers of child pornography in an attempt to curb the rapid growth of the multimillion dollar child sexexploitation² enterprise.

Unable to forecast the sudden appearance and rapid rise of child sexexploitation, scholars have been caught at a complete surprise and legal literature has yet to touch upon the subject fully. This comment will attempt to present an understanding of this important concern by reviewing the prior legislative voids as well as the problems confronting new legislation hastily drafted to prevent further spread of child sexexploitation. Finally, after understanding how society has contracted this social dis-

1. Matthew 18:6,7 (New International Version of the New Testament).

2. The term *child sexexploitation* refers to the sexual exploitation of minors for the commercial profit of adults using children as prostitutes and as subjects in pornographic materials, both obscene and non-obscene. Although the term is directed chiefly at adults who exploit the children in sexual poses and acts for commercial benefit, it may also include the acts of those who do so for their own gratification.

ease, and the harm that it will ultimately produce, this comment will set forth a proposal designed to soothe the trauma of this new form of child abuse.

I. UNDERSTANDING THE PROBLEM: A NEW FORM OF CHILD ABUSE

A. *Emergence, Nature, and Scope of Child Pornography*

Child pornography first began to cautiously appear in an "under-the-counter" fashion at adult bookstores in the late 1960's.³ It consisted of little girls, eight to fourteen years old, posing nude in magazines called *Lolliots* and *Moppits*.⁴ As the sexual appetite of pedophiles⁵ increased, so did the demand for child pornography. By 1976, child pornography had become a featured item among obscenity dealers,⁶ displaying in great volume and variety children aged three to sixteen in every conceivable sexual pose and act, heterosexual, and homosexual.⁷ Such magazines graphically exhibit children as young as three years old "in couplings with their peers of the same and opposite sex, or with adult men and women. The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism."⁸

Because of its clandestine operation it is difficult to determine the exact extent of child pornography production, distribution, and sale. Until recently, it was always assumed that child por-

3. Up until 1968 much of the purported child pornography was mostly fakery, using young looking women who dressed in children's garments. They exposed themselves in suggestive poses and acts amongst playgrounds and toys and were referred to as "Young Lolitas." *TIME*, April 4, 1977 at 55.

4. G. Frank, *Child Pornography Industry Finds a Home in Los Angeles*, *L.A. Daily Journal*, Nov. 28, 1977, at 19, col. 1 (hereinafter cited as *Child Pornography in L.A.*).

5. Those adults whose sexual preference is for children.

6. Recognizing child pornography's feature billing the California Attorney General's Advisory Committee on Obscenity and Pornography noted in its REPORT TO THE ATTORNEY GENERAL ON CHILD PORNOGRAPHY IN CALIFORNIA (June 24, 1977) that recently, on a single page of the *San Francisco Ball*, an underground newspaper printed in Van Nuys, California, no less than thirty-four advertisements for sexual materials appeared of which eighteen offered child pornography and nine of those eighteen offered materials depicting bestiality. CAL. ATT'Y GEN. ON CHILD PORNOGRAPHY 5 (1977). (Hereinafter cited as CAL. ATT'Y GEN.)

7. See R. Lloyd, *FOR MONEY OR LOVE: BOY PROSTITUTION IN AMERICA* (1976) wherein the author documents the existence of at least 264 different magazines sold in adult bookstores across the country bearing names such as *Torid Tots*, *Night Boys*, *Lolita*, *Boys Who Love Boys*, *Lolliots* and *Children-Love* that depict children engaging in sexually explicit conduct.

8. SENATE COMM. ON THE JUDICIARY REPORT ON S. 1585, PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION ACT OF 1977, S. Rep. No. 95-438, 95th Cong., 1st Sess. 6 (1977), (hereinafter *S. Rep. on 1585*).

nography was produced, for the most part, in Europe and Scandinavia.⁹ The public outcry, caused by recent publicity revealing the spread of child pornography, culminated in a series of Congressional Hearings¹⁰ which revealed that police have uncovered major child pornography production centers in Los Angeles, New York, Chicago and several other large cities.¹¹

The Sexually Exploited Child Unit of the Los Angeles Police Department estimates that 30,000 juveniles are sexually exploited annually in Los Angeles alone,¹² and of this number at least 3,000 are under the age of fourteen.¹³ Indeed, with its vast production facilities, film technicians, and printing houses, the "movie capital of the world" is the country's major center of the

9. "Indeed, it is quite common for photographs or films made in the United States to be sent to foreign countries to be reproduced and then returned to this country in order to give the impression of foreign origin." *S. Rep. on 1585, supra* note 8, at 6. *Accord: Child Pornography in L.A., supra* note 3; J. Densen-Gerber & S. Hutchinson, *Developing Federal and State Legislation to Combat the Exploitation of Children in the Production of Pornography*, JLM/LEGAL ASPECTS OF MEDICAL PRACTICE 19 (Sept. 1977). (Hereinafter cited as *Developing Legislation*).

10. *Proposed Amendments to the Child Abuse Protection and Treatment Act: Hearings on H.R. 6693 Before the House Education and Labor Subcommittee on Select Education, the House Judiciary Committee's Crime Subcommittee and the Senate Judiciary Subcommittee to Investigate Juvenile Delinquency*, 95th Cong., 1st Sess. (1977). (Hereinafter cited as *House Hearings on H.R. 6693*).

11. However, child pornography is by no means limited to large urban centers. Pornographic photographs and films are generally taken in private homes, hotel rooms, or abandoned buildings and therefore may be produced in any small community. Indeed, the Senate Judiciary Committee noted the arrest of independent producers in such unlikely places as Port Huron, Michigan and Winchester, Tennessee. *S. Rep. on 1585, supra* note 8, at 6.

12. Testimony has also been offered that between January, 1976 and June, 1977 as many as 300,000 children have been subjected to sexual exploitation nationally. *Child Pornography: Outrage Starts to Stir Some Action*, U.S. NEWS, June 13, 1977, at 66. (Hereinafter cited as U.S. NEWS).

13. CAL. ATT'Y GEN., *supra* note 6, at 16. *Accord: L.A. Times*, May 28, 1977, § 2 at 1, col. 4 (statement by Los Angeles Ass't Police Chief Daryl F. Gates at Congressional Hearings in Los Angeles.); *Developing Legislation, supra* note 9, at 19; J. Hurst, *Children—a Big Profit Item for the Smut Producer*, L.A. Times, May 26, 1977, § 2, at 1, col. 4 (Hereinafter cited as *Children—Big Profit*). It should be noted however that such estimates are speculative, and although no evidence can be found to confirm such figures, authorities are unable to refute it or show that it is in any way exaggerated. Nor can evidence be offered to show that the figures are not in actuality even higher for "a very high number of instances of this kind of sexual exploitation may go unreported, confounding any effort to arrive at an accurate estimate." CAL. ATT'Y GEN., *supra* note 6, at 17.

child pornography industry,¹⁴ and Hollywood, once famous for its stars of the screen, has become the center for sexually exploited children.¹⁵

The child pornography boom has spawned an enterprise that grosses more than a half-billion dollars a year¹⁶ and is still growing. Child pornographers cannot produce the material fast enough to meet the demand.¹⁷

Retail distribution of child pornography is an ideal investment that offers lucrative returns¹⁸ while overhead is kept at a bare minimum. Magazines that retail for \$7.50 to \$12.50 each can be produced for as little as thirty-five cents,¹⁹ and a cheap home movie camera can be used for two hours in a private home or hotel to produce a one dollar film that will retail at \$75.00 to \$200.00 a copy.²⁰ The California Attorney General's Office

14. In October, 1977 Los Angeles Sheriff deputies arrested five adults and seized 500 films showing boys and girls in sexual acts. It was believed to be one of the largest child pornography distributorships in the nation. *Child Pornography in L.A.*, *supra* note 4, at 19.

15. See generally: M. Wallace, *Kiddie Porn*, CBS 60 MINUTES, (produced by B. Lando, aired May 15, 1977). (Transcript of broadcast on file with the *Pepperdine Law Review*. Copyright © CBS Inc. 1977. All rights reserved). See also: *Children—Big Profit*, *supra* note 13, at 4.

16. U.S. NEWS *supra*, note 12, at 66; Los Angeles Police Investigator Lloyd Martin, an expert in the field of child sexexploitation has stated that the industry may in fact be approaching a \$1 billion-a-year business world wide. *Child Pornography in L.A.*, *supra* note 4, at 19.

17. "Police and prosecutors have seized mailing lists that contain tens of thousands of actual and prospective child pornography customers." *Id.* Former L.A. Police Chief Ed Davis has stated that "The number of establishments dealing in porno material in the city of Los Angeles has increased from eighteen in 1969 to 143 in July of 1976—almost 800%." E. Davis, *Kid Porn: Is it "the Nadir of Man's Depravity"?*, L.A. Times, September 18, 1977, § 5, at 3, col. 1 (hereinafter cited as *Man's Depravity?*).

18. While producers and retailers also claim large benefits, as much as 70% of the profits accrue to the distributors who are the true beneficiaries of child sexexploitation. Investigators point to evidence that some big distributors are placing their profits, as much as \$650,000 at a time in one case, in foreign bank accounts. *Child Porn in L.A.*, *supra* note 4, at 19.

19. Magazines are only one form of child pornography. Pedophiles can select ten to twelve minute film "loops," still photographs, slides, playing cards, video cassettes and a variety of other products. *S. Rep. on 1585*, *supra* note 8, at 6.

20. *Id.* See also CAL. ATT'Y GEN., *supra* note 6, at 21.

One graphic example of the economics of child pornography was presented at the Committee's Chicago field hearing. A police officer testified how undercover officers of the Chicago Police Department were able to infiltrate a group that was using two fourteen year old boys to make a pornographic film for national distribution. The cost of producing this 200 foot film was \$21 per copy and the retail selling price was to have been \$100. At the time of their arrest, the producers of the film stated that they might have been able to sell as many as 10,000 copies of the film over a six-month period.

S. Rep. on 1585, *supra* note 8, at 6.

concluded that, unless suppressed, the child pornography market will continue to increase:

[I]n 1972, a poor-quality pamphlet was published in Hollywood, California entitled *Where the Young Ones Are*. The pamphlet listed 378 places in 59 cities of 34 states where "... the young can be found." Listed were such places as bowling alleys, beaches, arcades, parks and the like. The pamphlet reportedly sold 70,000 copies at \$5.00 per copy. Moreover, at least two publications are presently being distributed on a nationwide basis which are apparently directed to child molesters.²¹

Child pornography is widely distributed through adult bookstores, on open display in some, while only in an "under-the-counter" fashion in others.²² The primary means of distribution is by mail order catalogue²³ which permits a pedophile to order materials anonymously according to his or her own sexual preference²⁴ and to establish contacts with other pedophiles, or even child models.²⁵

Authorities are split as to whether these high profits have attracted organized crime.²⁶ The New York State Select Legislative Committee on Crime recently found that the Mafia has begun to move back into prostitution, which it had largely aban-

21. CAL. ATT'Y GEN., *supra* note 6, at 21, 22. A child molester is one who makes indecent advances or sexually accosts minors of the opposite sex. *See, infra* note 48.

22. *S. Rep. on 1585, supra* note 8, at 6.

23. These distributors do their mail order business under many different company names, which they change regularly to avoid detection by law enforcement officials. The principal means by which the distributors advertise their pornographic wares are mailing lists that are purged every three months so as to reflect only those who purchase material, and to prevent unreceptive solicitees from complaining to the authorities. CAL. ATT'Y GEN., *supra* note 6, at 6,7.

24. Mail order material offers a wide selection of pornography from "hard-core" explicitness involving children in bizarre sexual activity with others (child or adult) to simple photographs of nude children, often in lewd poses. It is estimated that 80% of all child pornography is homosexual in nature. *Id.*

25. Indeed there appears to be an unofficial fraternity of thousands of pedophiles. In one recent San Francisco raid police confiscated among other things a mailing list containing 5,000 prospective child pornography customers. *See Child Pornography in L.A., supra* note 4, at 19. It should be noted however that all too often child pornographers have come to the attention of authorities merely because of inadvertence or mischance as a result of misdelivery of the mail or the breakdown of a film development computer. CAL. ATT'Y GEN., *supra* note 6, at 23.

26. Authorities have long known that organized crime is heavily involved in adult pornography. A California attorney general's report on organized crime said "80% of the production and distribution of adult pornography is mob controlled." *Child Pornography in L.A., supra* note 4, at 19.

done in the 1930's, primarily because of the lucrative profits from child sexploitation.²⁷ Additionally, the Commission concluded that the Gambino Mafia family and other organized mobsters have extensive interests in child pornography enterprises.²⁸ The Commission's position was perhaps best stated by State Senator Ralph Morino, Chairman of the State Crime Commission, who said that, "Organized crime has no shame and will stoop to any outrage to make a buck."²⁹ In contrast, others, including California Attorney General Evelle J. Younger, believe that organized crime is holding back in fear of the public outrage at child pornography and enforcement crack-downs by police.³⁰

Apart from organized crime few pornographers fit the stereotype of "the grimy old man prowling juvenile hangouts."³¹ In contrast, they are often wealthy, mobile, educated, and powerful pillars of the community getting rich off the exploitation of the powerless.³² Regardless of the participant's societal status, however, it is clear that this new form of child abuse and obscenity has outraged the public. California's State Senator Newton Russell has articulated much of this growing opposition stating "[Child pornography] is a reflection of the societal and spiritual morality of this nation. If there is to be any reversal of the trend, the place to start is child porn."³³

B. The Relationship Between Pornographic Material, Child Prostitution, and Child Molestation

Several authorities have found a close relationship between child pornography and the practice of child prostitution.³⁴ One is often a by-product of the other.³⁵ Children are invited to "parties" where they are encouraged to enter sexual acts so that photographs may be taken and circulated as advertisements for prostitution.³⁶ Frequently, the pictures are then reproduced and sold to distributors.³⁷

27. TIME, *Youth for Sale on the Streets*, Nov. 28, 1977, at 23 (hereinafter cited as *Youth for Sale*).

28. *Id.*

29. N.Y. TIMES, June 1, 1977, § 1, at 7, col. 1.

30. *Child Pornography in L.A.*, *supra* note 4, at 19.

31. U.S. NEWS, *supra* note 12, at 66 (report of Robert Leonard, president elect of the National District Attorneys' Association).

32. *Kiddie Porn*, *supra* note 15.

33. TIME, *Child's Garden of Perversity*, April 4, 1977 at 56, (hereinafter cited as *Garden of Perversity*).

34. *S. Rep. on 1585*, *supra* note 8, at 7.

35. *See generally Children—Big Profit*, *supra* note 13.

36. *See Garden of Perversity*, *supra* note 33, at 55.

37. *S. Rep. on 1585*, *supra* note 8, at 7, cites several examples and states that:

Numerous examples are available of child sexploitation for adult profit.³⁸ A recent example of child prostitution involved a Chicago based operation known as the Delta Project.³⁹ Delta Project leaders devised a series of "Delta Dorms" located in large cities around the country. An adult pedophile known as the Delta Don and four or five young boys as Delta Cadets would operate each Delta Dorm. After being solicited through the mails and paying a fee as a Delta sponsor, adult pedophiles would be able to make appointments at the dorms or arrange to have a cadet sent home with him. While it appears that no Delta Dorm was ever founded before the Project was foiled by Chicago undercover investigators, several young cadets were found to be actively promoting the scheme through a multi-state publicity campaign in which they visited one potential sponsor after another.⁴⁰

A few teenagers and young children live at home and "turn tricks" merely for pocket money.⁴¹ Most, however, are runaways, "the products of broken homes and brutality, often inflicted by alcoholic or drug addicted parents."⁴² Hungry for a meal and the slightest display of friendship they "take to the streets and use their body for survival and then, beaten by pimps and bereft of self esteem, live in fear of reprisal if they try

One such case involved the Reverend Claudius (Bud) Vermilye, Jr. who operated a home for wayward boys in Winchester, Tenn. The Reverend Vermilye encouraged the young boys in his charge to engage in orgies and filmed the orgies with a hidden camera. He then sold the films to certain "sponsors" of the home and also arranged for some of the sponsors to come to the farm and have sex with the boys.

38. *Id.* An example noted by the Senate Committee was that of two men who founded a Boy Scout Troop of 40 boys in New Orleans. About ten boys were regularly selected to go on Scouting trips with a ring of adult males (including three millionaires) with whom they were strongly encouraged to engage in various homosexual acts while being filmed. At the time of the report's publication nineteen adult males had been charged in connection with the case and a scoutmaster had been sentenced to seventy-five years in prison. *See also* U.S. News, *supra* note 12, at 66.

39. *S. Rep on 1585, supra* note 8, at 7,8.

40. Until recently, the shipment of boys across state lines for prostitution was not against any federal law as the Mann Act, 18 U.S.C. 2423 (1948), did not include males and pertained specifically only to prohibiting the interstate transportation of minor females for the purpose of prostitution. S. 1585 however, (passed by both houses of Congress January 24, 1977) amends 18 U.S.C. 2423 to prohibit the interstate transportation of *any minor* for the purposes of engaging in prostitution or prohibited sexual conduct.

41. *Youth for Sale, supra* note 27, at 23.

42. *Id.*

to escape the racket."⁴³ New York City is the reputed center for juvenile prostitution with an estimated 20,000 runaways under age sixteen available for pecuniary sex⁴⁴ with roughly 800 pimps plying their services.⁴⁵

The vast amount of child pornography seized by police officers at the time of child molestation arrests has convinced many law enforcement agencies that "a direct relationship exists between pornographic literature of this kind and [the] molestation of young children."⁴⁶ Amazingly, in a Los Angeles Police Department investigation, where more than 100 victims and suspects were interviewed in over forty child molestation cases during a five month period,⁴⁷ pornographic literature, often exhibiting children, was found to be present in *every* case.⁴⁸

Further, evidence indicates that in addition to personal gratification, child pornography is also employed by child molesters⁴⁹ "to arouse their victims"⁵⁰ and to persuade very young children that such behavior is permissible.⁵¹ The California Attorney General's Office noted the following example as illustrative:

... a 55 year old man was arrested for attempting to lure a five year

43. *Id.*

44. Pre-teen prostitutes only twelve years old regularly earn \$200 a night in Chicago and in Los Angeles; police estimate that as many as 3,000 girls and boys under the age of fourteen are actively engaged in prostitution. *Id.*

45. *Youth for Sale*, *supra* note 27, at 23.

46. CAL. ATT'Y GEN., *supra* note 6, at 18.

47. October 1976 to March 1977.

48. CAL. ATT'Y GEN., *supra* note 6, at 20. "In interviews with a great many police officers the Committee was frequently told: 'I never arrested a child molester who did not have pornography in his possession.' Evidence obtained regarding recent arrests supports these statements." *Id.*

49. An adult heterosexual who is sexually aroused by young girls is normally referred to very broadly as a child molester but an adult homosexual who is sexually aroused by young boys is more specifically termed a *chicken hawk*. Young boys who serve as prostitutes for older men are commonly referred to as *chickens*.

50. CAL. ATT'Y GEN., *supra* note 6, at 19, lists the example of how "a 33 year old man showed pornographic films to his twelve year old victim. The films depicted nude males in homosexual activity and were intended to arouse the victim to commit homosexual acts with the suspect."

51. *Id.* at 19, 20 cites the example of:

A 23 year old ... man arrested for sexually molesting two little girls, aged eight and seven. At the time of his arrest he had in his possession a large quantity of pornographic material in which young girls were depicted. Also discovered were a number of nude photographs taken by the suspect of local children. Police also found a letter written by the suspect to the publisher of a magazine which depicts nude children and which is distributed by a mail order firm in Southern California. In the letter the suspect expresses the hope that his own little girls (ages two and three) will be able to appear in the publication "when they get a little older."

old girl into his vehicle. In his possession was a brief case containing pornographic materials depicting children and adults. Because he was a heterosexual, the emphasis of the publications was on young girls. Also in his briefcase was a supply of quality candy, lollipops, small dolls in factory wrappers, books containing pornographic stories, and a tube of petroleum jelly. A two dollar bill was clipped to the flap of the briefcase. This suspect had prepared a 'child molesting' kit which included a large supply of pornographic material.⁵²

Thus, because of its apparent relation to child prostitution and molestation,⁵³ child pornography presents a greater danger than is at first apparent.⁵⁴

C. Profile of a Sexually Exploited Child

From among the estimated 700,000 to one million children who run away from home each year⁵⁵ pedophiles can select thousands of dispossessed "stars" for their books, magazines, films, or prostitution rings.⁵⁶ The lonely and hungry runaways serve as a "ready pool of 'acting talent' . . . eager to pose for \$5 or \$10—or simply a meal and a friendly word."⁵⁷ Child sexploiters recruit subjects at bus stations, hamburger stands, or amusement arcades offering gifts such as bicycles or drugs for sexual favors.⁵⁸ With small children, even candy or a trip to

52. *Id.* at 19.

53. *Cf. Man's Depravity?*, *supra* note 17, at 3 (wherein the author attempts to show that an increase in sex-oriented establishments are accompanied by a comparable increase in the amount of crime for that area).

54. *Cf. F. SCHAUER, THE LAW OF OBSCENITY* (1976) wherein the author states:

As to short-term effects there is fairly universal agreement among the studies done that exposure to erotica results in immediate sexual stimulation However, although there may very well be a cause-and-effect relationship (between pornography and sex offenders) the case histories do not present strong evidence of this. It may be just as well that the same mental or social aberrations which lead people to commit sex offenses also lead them to pornography. . . . While it seems clear that pornography cannot be shown to be the major cause of sexual anti-social acts, neither can it be completely excluded as a cause, at least among those who might otherwise be disposed. *Id.* at 60, 61.

See, e.g., REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 640-654 (N.Y. Times, ed. 1970) (Minority Report of Charles H. Keating, Jr.). *See also* Hoover, *Combating Merchants of Filth: The Role of the F.B.I.*, 25 U. PITT. L. REV. 469 (1964).

55. Recent findings of Senator Birch Bayh's Subcommittee on Juvenile Delinquency as noted in *Developing Legislation*, *supra* note 9, at 19. *See also, S. Rep. on 1585*, *supra* note 8, at 8.

56. *See S. Rep. on 1585*, *supra* note 8, at 8.

57. *Garden of Perversity*, *supra* note 33, at 55.

58. *S. Rep. on 1585*, *supra* note 8, at 8.

Disneyland may be sufficient consideration for sexual services.⁵⁹

Lloyd Martin, head of the Los Angeles Police Department's Sexually Abused Child unit, has said, "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."⁶⁰ Indeed, a Los Angeles Police Department investigation in September, 1976 revealed that:

The victims contacted were found to be in need of supportive services. They expressed relief that their activities had been discovered. They often however, expressed some affection for their abusers, similar to that found among children abused by their parents. One victim told the officer, "He (the suspect) is my best friend."⁶¹

Not all sexually exploited children are runaways. Many come from broken homes.⁶² Often parents and guardians are unaware of their children's sexual activity. In some of the most sordid cases, however, parents themselves have led or "sold" their children into pornography or prostitution.⁶³ Detective Martin has found "a constant rule seems to be that children under the age of nine are usually introduced to it (child pornography or prostitution) by their parents."⁶⁴ Often, parents involve their children because they themselves were once pornography stars or models,⁶⁵ or they may "sell" their children for money to support their drug or alcoholic addictions.⁶⁶

In a profile compiled by the Los Angeles Police Department from their investigations and interviews with pornographers,⁶⁷ the typical boy participant was described as:

1. Between the ages of 8 and 17;
2. An underachiever in school or at home;
3. Usually without previous homosexual experience;
4. From a home where the parents were absent either physically or psychologically;

59. *Child Pornography in L.A.*, *supra* note 4, at 19.

60. *Garden of Perversity*, *supra* note 33, at 55.

61. CAL. ATT'Y GEN., *supra* note 6, at 17,18.

62. They live apparently normal lives with their families and in school. S. Rep. 1585, *supra* note 8, at 8.

63. *Id.*

64. *Child Pornography in L.A.*, *supra* note 4, at 19.

65. "Some children in child pornography are victims of incest. Parents will have intercourse with a son or daughter, then swap pictures with other incestuous parents or send the photos to a sex publisher. Sex periodicals, particularly on the West Coast, publish graphic letters on parents' sexual exploits with their own children." *Garden of Perversity*, *supra* note 33, at 55.

66. See generally *Children—Big Profit*, *supra* note 13, at 5, col. 1 (where a young woman states that she allowed her boy of nine and girl of eleven to be photographed in sexually suggestive poses for \$150 because she had just finished school and needed money "... so the kids helped mom out.")

67. S. Rep. on 1585, *supra* note 8, at 8.

5. Without any strong moral or religious affiliations;
6. Suffering from poor sociological development.⁶⁸

The effect of child pornography and prostitution on its child participants is to produce psychological scarring and emotional distress for life.⁶⁹ New York psychoanalyst Herbert Freudenberg warns that "Children who pose for pictures begin to see themselves as objects to be sold. They cut off their feelings of affection, finally responding like objects rather than people."⁷⁰ Further, authorities⁷¹ generally agree that the deep psychological and humiliating impact of such sexual activity⁷² perpetuates

68. Such sociological factors prompted the Senate Judiciary Committee to remark:

It should be emphasized that child pornography and prostitution are just individual aspects or symptoms of a larger context of social problems that confront the nation. Broken homes, alienated and runaway children, emotionally disturbed juveniles, alcohol and drug abuse among the very young, and wide spread child abuse are among the national problems that help create the milieus in which child pornography and prostitution can thrive. *S. Rep. on 1585, supra* note 8, at 9.

The Committee concluded that:

Against the backdrop of the breakdown of the family and the fundamental values of our society, questions must be asked regarding the adequacy of our educational system, the effectiveness of our social agencies, our ability to deal with poverty and unemployment, and the quality of our justice system. Child pornography and prostitution are deadly serious problems. But even more menacing is the fact that these are only tips of the iceberg. *Id.*

69. *Developing Legislation, supra* note 9, at 20.

70. *Garden of Perversity, supra* note 33, at 55. Many psychiatrists maintain that sexually exploited children are often unable to find sexual fulfillment as adults.

71. *S. Rep. on 1585, supra* note 8, at 9. CAL. ATT'Y GEN., *supra* note 6, at 18, *Garden of Perversity, supra* note 33, at 55. *See generally* (authorities commenting on the harmful effect of disseminating pornographic materials to children) Dibble, *Obscenity: A State Quarantine to Protect Children*, 39 SO. CAL. L. REV. 345 (1966); Wall, *Obscenity and Youth: The Problem and a Possible Solution*, 1 CRIM. L. BULL., 8, 21 (1965); Note, 55 CAL. L. REV. 926, 934 (1967); Comment, 34 FORD L. REV. 692, 694 (1966); Green, *Obscenity, Censorship and Juvenile Delinquency*, 14 U. TORONTO L. REV. 229, 249 (1962); Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 373-385 (1954); Note, 52 KY. L.J. 429, 447 (1964). Especially see Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the views of some psychiatrists in Gaylin, *The Prickly Problems of Pornography*, 77 YALE L.J. 579, 592-93 (1968) where he states:

It is in the period of growth [youth] when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control—it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging.

72. *But see* R. Currier, . . . *Or a Sign of Society's Continuing Blindness?* L.A. Times, § 5, at 3, col. 2 (wherein the author argues that child sexuality and

a vicious cycle whereby the degraded child joins other deviant populations: drug addicts, prostitutes, criminals, and pre-adult parents.⁷³ More tragic, however, is the fact that sexually exploited children tend to become sexual exploiters of children themselves as adults.⁷⁴

Perhaps the affect on sexually exploited children is best summarized in the queries of Los Angeles Police Chief Davis, "Who could hold out any hope that children so abused in their formative years will ever make positive contributions to society? Child pornography has to be the nadir of man's depravity. What vice can possibly remain to be exploited?"⁷⁵

II. CONSTRUCTING AN EFFECTIVE AND PROPER CURE

A. *The Ineffectiveness of Existing Applicable Law*

The conclusion of the above overview is that child sexploitation is a new form of child abuse growing at an alarming rate whose effect is clearly damaging to the health of society as a whole, and the children so readily exploited. Strong, prosecutable, and effective law is urgently required to stall its spread and fill the void of existing state and federal legislation. Understandably, legislators could not have been expected to foresee child sexploitation's rapid rise.

Federal law presently prohibits the *distribution* of obscene materials. Four different agencies⁷⁶ are responsible for enforcing five federal obscenity laws which prohibit any mailing,⁷⁷ importation,⁷⁸ or interstate transportation of obscene materials,⁷⁹ broadcasts of obscenity,⁸⁰ as well as the interstate transportation of females under eighteen years of age for the purposes of prostitution.⁸¹ Additionally, the public may request that there be no further delivery of unsolicited mailings or advertise-

eroticism with other children or adults is "natural, normal, healthy and good" and has in actuality been suppressed in our society as a result of the adult sexual revolution).

73. *Developing Legislation*, *supra* note 9, at 20.

74. *S. Rep. on 1585*, *supra* note 8, at 9.

75. *Man's Depravity?*, *supra* note 17, at 3. It is recognized that former Chief Davis is not a child psychology expert, but he is nonetheless very well acquainted with the problem as a respected authority on vice related crimes and founder of the Sexually Exploited Child Unit in Los Angeles.

76. The Department of Justice, the Federal Bureau of Investigation, the Postal Service and the Customs Service.

77. 18 U.S.C. § 1461 (1948).

78. 18 U.S.C. § 1462 (1948).

79. 18 U.S.C. § 1465 (1955).

80. 18 U.S.C. § 1464 (1948).

81. 18 U.S.C. § 2423 (1948).

ments which are sexually offensive under the Anti-Pandering Act of 1968.⁸²

These federal statutes are not "adequate weapons to combat child pornography and child prostitution."⁸³ No federal statute specifically regulates the distribution of sexual material to children, or the production, distribution, and sale of child pornography in interstate commerce.⁸⁴ Also, federal law prohibiting the interstate transportation of young females for purposes of prostitution⁸⁵ is silent as to such practice with young boys.⁸⁶ The gap is widened by the practice of federal authorities to initiate investigations only when large manufacturers or distributors, including organized crime, are involved.⁸⁷

On the state level, forty-seven states and the District of Columbia have enacted statutes prohibiting the dissemination of obscene materials to minors.⁸⁸ However, only eight states have

82. 39 U.S.C. § 3008 (1968).

83. *S. Rep. on 1585, supra* note 8, at 9.

84. *See Developing Legislation, supra* note 8, at 19.

85. 18 U.S.C. § 2423 (1948).

86. *Youth for Sale, supra* note 27, at 23.

87. *S. Rep. on 1585, supra* note 8, at 9, 10. Therefore most of the sources of child pornography and prostitution never came within the purview of the statute.

88. CAL. PENAL CODE § 311-312 (West 1966); COLO. REV. STAT. ANN. § 40-9-16 to 40-9-27 (1963); CONN. GEN. STAT. REV. § 53-243 to 53-245 (Supp. 1965); DEL. CODE ANN., Tit. 11, §§ 435, 711-713 (1953); FLA. STAT. ANN. § 847.0011-847.06 (1965 and Supp. 1968); GA. CODE ANN., § 26-6301 to 26-6309 a (Supp. 1967); HAWAII REV. LAWS § 267-8 (1955); IDAHO CODE ANN §§ 18-1506 to 18-1510 (Supp. 1967); ILL. ANN. STAT. C38 §§ 11-20 to 11-21 (Supp. 1967); IOWA CODE ANN. §§ 725.4-725.12 (1950); KY. REV. STAT. §§ 436.100-436.130, 436.540-436.580 (1963 and Supp. 1966); LA. REV. STAT. §§ 14: 91.11, 14:92, 14:106 (Supp. 1967); ME. REV. STAT. ANN., Tit. 17, §§ 2901-2905 (1964); MD. ANN. CODE, Art. 27, §§ 417-425 (1957 and Supp. 1967); MASS. GEN. LAWS ANN., c. 272, §§ 28-33 (1959 and Supp. 1968); MICH. STAT. ANN. §§ 28.575-28.579 (1954 and Supp. 1968); MO. ANN. STAT §§ 563.270-563.310 (1953 and Supp. 1967); MONT. REV. CODES ANN. §§ 94-3601 to 94-3606 (1947 and Supp. 1967); NEB. REV. STAT. §§ 28-926.09 to 28-926.10 (1965 Cum. Supp.); NEV. REV. STAT. §§ 201.250, 207.180 (1965); N.H. REV. STAT. ANN. §§ 571-A:1 to 571-A:5 (Supp. 1967); N.J. STAT. ANN. §§ 2A:115-1.1 to 2A:115-4 (Supp. 1967); N.C. GEN. STAT. §§ 14-189 (Supp. 1967); N.D. CENT. CODE §§ 12-21-07 to 12-21-09 (1960); OHIO REV. CODE ANN. §§ 2903.10-2903.11, 2905.34-2905.39 (1954 and Supp. 1966); OKLA. STAT. ANN. Tit. 21, §§ 1021-1024, 1032-1039 (1958 and Supp. 1967); PA. STAT. ANN. Tit. 18, §§ 3831-3833, 4524 (1963 and Supp. 1967); R.I. GEN. LAWS ANN. §§ 11-31-1 to 11-31-10 (1956 and Supp. 1967); S.C. CODE ANN. §§ 16-414.1 to 16-421 (1962 and Supp. 1967); TEX. PEN. CODE: ARTS 526, 5276 (1952 and Supp. 1967); UTAH CODE ANN. §§ 76-39-5, 76-39-17 (Supp. 1967); VT. STAT. ANN., Tit. 13, §§ 2801-2805 (1959); VA. CODE ANN. §§ 18.1-227 to 18.1-236.3 (1960 and Supp. 1966); W. VA. CODE ANN. §§ 61 and 8-11 (1966); WYO. STAT. ANN. §§ 6-103, 7-148 (1957).

passed legislation to specifically prohibit the sexual exploitation of minors in pornographic materials or to regulate the distribution and sale of child pornography or child prostitution.⁸⁹

State statutes covering sex crimes are generally of no avail because the physical acts involved in producing child pornography may fall short of the criminal criteria⁹⁰ or they may be worded so broadly as to discourage courts from applying them in terms of significant sanctions that are directly on point.⁹¹ Another factor that makes it difficult to prosecute producers for sex abuse crimes is that while there may be ample evidence of such crimes in the pornographic material itself, the abused children are difficult to identify and rarely located.⁹²

Child welfare provisions in state education laws often regulate the employment of children in sexual activities, and prohibit immoral acts but generally are either not applicable when the child is working for a parent⁹³ (from which much pornography is derived⁹⁴) or the penalties are so limited as to pose no real deterrent.⁹⁵

Without any other effective alternatives available, most prosecutions must be for contributing to the delinquency of a minor,⁹⁶ or under the state's general obscenity laws which make no distinction between children and adults as pornographic models.⁹⁷ Such offenses are almost always only misdemeanors and pose no real hazard to producers of child pornography, much less distributors and sellers, who accept the low risk of prosecution

89. CAL. LAB. CODE §§ 1309.5-1309.6 (West 1977) and CAL. PENAL CODE § 311.4 (West 1977); CONN. GEN. STAT. ANN. § 53-25 (1977); N.C. GEN. STAT. § 14-190.1, *et seq.*, (1971); N.D. CENT. CODE §§ 12.1-27, 1-03, (1975); N.Y. PENAL CODE § 263.05 (McKinney 1977) recently held unconstitutionally overbroad in *St. Martin's Press Inc. v. Carey*, 46 U.S. L.W. 2297 (Nov. 28, 1977); S.C. CODE ANN. § 16-414.1 *et seq.* (1977); TENN. CODE ANN. § 39-3013 (1975); TEX. CODE ANN. § 43.24 (1977) recently held unconstitutionally overbroad on its face in *Graham v. Hill*, No. A-77-CA-188 (W.D. Tex., filed Jan. 30, 1978).

90. *E.g.*, rape, sodomy, incest, etc. *Developing Legislation*, *supra* note 9, at 20.

91. *Id.*

92. *See Garden of Perversity*, *supra* note 33, at 55.

93. *E.g.*, MICH. ACT 157, PUBLIC ACTS of 1947 (as amended) § 409:14 (1967).

94. *See* text and material accompanying notes 62-66.

95. *E.g.*, N.Y. EDUC. LAW § 3231(a), (c) (1972).

96. And as discussed previously, finding the minor is no easy task. *See* text accompanying note 92.

97. *Garden of Perversity*, *supra* note 33, at 55. "One result: many lawyers believe that the genital pictures in *Lolliotots*, however offensive, might be judged no more obscene under the law than similar photos of adult women in most men's magazines." *Id.*

as a cost of doing business for such high profits.⁹⁸

The ineffectiveness of existing laws becomes more evident when confronted with the difficult task of prosecution and conviction. Exploited children are rarely located to aid in prosecution. Producers insulate themselves by hiding behind a myriad of deceptive dummy corporations.⁹⁹ Perhaps more damaging is the fact that the courts themselves often discourage and frustrate the few criminal investigations that are successful. Such a case is that of Edward Mishkin, a leading wholesaler, who was arrested when New York City police, after a year's investigation, seized 1,200 pornographic films and magazines, many depicting children. Upon conviction he could have received up to a seven year prison sentence, but instead, was sentenced to weekends in jail for six months.¹⁰⁰

More recently, Judge Margaret Taylor of the New York Family Court caused a public uproar when she dismissed prostitution charges against a fourteen year old girl, ruling that prostitution laws are unconstitutional because unmarried adults, including prostitutes and their customers, have a constitutional right to privacy in the pursuit of pleasure.¹⁰¹ The judge stated in her decision that, "Sex for a fee is recreational . . . The arguments that prostitution harms the public health, safety or welfare do not withstand constitutional scrutiny."¹⁰²

Due to the newness of the criminal offense, lack of applicable and effective legislation, and poor enforcement record, virtually no decisional law exists wherein the central issue was the sexual exploitation of children in pornography or prostitution. In *People v. Byrnes*¹⁰³ an eleven year old girl testified that her father had taken her to a photographer's home where he filmed her and her father engaging in various sexual acts. On appeal from his conviction for rape, sodomy, and incest, the father argued that he was convicted solely on the uncorroborated testimony of his daughter. The court, however, held that photos of the explicit acts had been properly admitted as evidence.

98. As to profits, see text accompanying notes 16-21.

99. See *Garden of Perversity*, *supra* note 33, at 55.

100. MacPherson, *Children: The Limits of Porn*, Washington Post, Jan. 30, 1977, § C, at 1.

101. L.A. Times, Jan. 26, 1978, § I, at 1, col. 5.

102. *Id.* at 17, col. 1.

103. 33 N.Y. 2d 343, 308 N.E. 2d 435, 352 N.Y.S. 2d 913 (1974).

Similarly, in *State v. Kasold*,¹⁰⁴ the defendant was convicted on evidence that included photos of himself exposing his genitals before a fully clothed little girl who had her back to the camera.¹⁰⁵

A defendant had photographed a nude thirteen year old girl in *St. Paul v. Campbell*¹⁰⁶ and was convicted of disorderly conduct. On appeal the court declared that disorderly conduct was not the appropriate charge and reversed pointing out that a conviction would certainly have been reasonable for contributing to the delinquency of a minor or employing a minor for immoral purposes.

Finally, in *People v. Burrows*¹⁰⁷ the California Court of Appeals affirmed Burrows' conviction for false imprisonment and using a minor in the preparation of obscene materials when an adult had bound his twenty year old victim¹⁰⁸ hand and foot, sexually abused him, and then photographed him in indecent positions.

In light of the above discussion, it is evident there are voids in existing state and federal legislation in the prevention of child sexploitation that must urgently be filled with new, effective, and constitutionally appropriate legislation.

B. Overcoming Constitutional and Practical Hurdles

Regulating child sexploitation is a difficult and complicated task. The area is emotionally charged and intellectually confusing. The chief problem confronting legislators is the blending of two distinct, but related problems: the abuse of children in producing the pornographic materials and its distribution and sale. Both areas must be approached separately before enforcement can effectively be applied and constitutional problems can be avoided.

Child pornography is in essence a hybrid industry composed first of producers, who directly exploit the child physically to create a pornographic product, and secondly the close association of manufacturers, distributors, and retailers who cultivate and perpetuate the child pornography market.

104. 110 Ariz. 558, 521 P.2d 990 (1974).

105. Concerning the employment of photos of a person's anatomy as criminal evidence in trial, see Annot., 9 A.L.R.2d 889, 923-26 (1950).

106. 287 Minn. 171, 177 N.W. 2d 304 (1970).

107. 260 Cal. App. 2d 228, 67 Cal. Rptr. 28 (1968).

108. At the time of the crime, the age of majority was twenty-one and therefore the twenty year old victim was still deemed a minor.

Regulation of both aspects, the child abusing producer as well as the distribution and retail of the pornographic materials, must be dealt with individually and harmonized to provide the most powerful deterrent to the practice of child sexploitation. This would limit pornographic production and destroy the vast market upon which child sexploiters feed.

Penalizing producers alone would definitely not be enough to effectively deter child sexploitation or the child molestation encouraged by such pornographic material.¹⁰⁹ Legislation aimed solely at producers would only serve to drive them underground where they would continue their business. The already difficult problem of locating, prosecuting, and convicting child sexploiters would be even more difficult. Further, the common practice of film and magazine pirating will maintain retail supplies so that there will be no slack in the market. Distributors who receive most of the profits, are the principal figures in the child pornography enterprise. Products can continually be reproduced to the point that child subjects could someday be seen by their own children.¹¹⁰ Thus, for child pornography laws to be effective they must regulate not only production, but also the distribution and sale of the product as well.

Once the sexual exploitation is published in print or on film¹¹¹ it is then subject to first amendment scrutiny.¹¹² If it is considered legally obscene, it is not speech that is protectable by the first amendment. However, if not considered to be obscene¹¹³ it is protectable expression which cannot be infringed upon by the government.¹¹⁴

State and Federal legislators, responding to the urgent need, are proposing "a kind of end run around obscenity laws and the

109. See text and material accompanying notes 46-54 on the relationship of pornographic material to child molesting and abuse.

110. See *Child Pornography in L.A.*, *supra* note 3, at 19.

111. Motion pictures are clearly protected by the first amendment as an expression of speech even if shown or sold for commercial purposes. See *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495 (1952).

112. U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech or of the press."

113. Simply because material is considered to be pornographic (the depiction of erotic behavior intending to cause sexual excitement) does not necessarily determine whether or not the material is obscene and unprotected speech.

114. *Roth v. United States*, 354 U.S. 476 (1957) (hereinafter cited as *Roth*) (wherein the Court stated for the first time its reason that obscenity was not protected because it was without redeeming social importance).

first amendment problems attendant thereto—a ban on sexually explicit pictures of children, whether legally obscene or not.”¹¹⁵ Proponents of the wide sweeping legislation maintain that it is directed at deterring a specific type of *conduct*, child abuse, and is in no way seeking to impinge on free speech.¹¹⁶ Child pornography is therefore perceived as a form of abuse rather than a form of obscenity.¹¹⁷ An example of this type of law is H. R. 3913¹¹⁸ which would make *any* proven involvement with the production and sale of explicit sex pictures of children, *whether or not obscene*, a felony.¹¹⁹ It therefore not only reaches *all* of the conduct sought to be deterred but also *all* of the parties involved in perpetuating it without ever coming under the purview of the first amendment. Attempting to regulate the conduct, child abuse law regulates non-obscene and obscene as well and therefore impinges on protected speech as well as unprotected.

Opponents argue that since such legislation indiscriminately fails to discern between protected and unprotected obscene speech, it is void and unconstitutional for being overbroad.¹²⁰ *Roth v. United States*¹²¹ stood for the principle that only non-obscene speech is protectable against infringement because obscenity was “utterly without redeeming social importance.”¹²²

The Supreme Court announced its most recent test for determining whether or not certain material is obscene in *Miller v.*

115. *Garden of Perversity*, *supra* note 33, at 55, 56. See, e.g., N.Y. PENAL CODE § 263.05 (McKinney 1977); TEX. CODE ANN. § 43.24 (1977); Roth Amendment to S. 1585, Cong. Q. at 2205 (Oct. 15, 1977); H.R. 3913, 95th Cong., 1st Sess. (1977) (hereinafter cited as H.R. 3913).

116. See E. Goodman, *A Clear Case of Villainy*, L.A. Times, March 15, 1977, § 2, at 7, col. 1 where the author argues that:

This is not a First Amendment issue. It is not a matter of legislating the sexual fantasies of adults. It's a matter protecting the real lives of young models. We can take kid porn out of the realms of sex and into the realm of power where it belongs. The children are victims, and kid porn is the exploitation of the powerless by the more powerful. That exploitation is as common to adult-child relationships as is protection.

117. *Garden of Perversity*, *supra* note 33, at 56.

118. H.R. 3913, *supra* note 115.

119. Thus, “salesmen in an adult bookstore could be prosecuted as an active participant in the crime of sexually exploiting the children pictured in the store's magazines.” *Garden of Perversity*, *supra* note 33, at 56.

120. For a good discussion on the doctrines of both overbreadth and vagueness see *Grayned v. Rockford*, 408 U.S. 104 (1972).

121. *Roth*, *supra* note 114.

122. Often referred to as the Roth-Memoirs test from the case of *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413 (1966) (hereinafter cited as *Memoirs*) wherein the Court held that the utter absence of redeeming social importance would not be presumed from the fact that material was “obscene,” but rather it was an element which had to be proven in order to declare that the item was obscene.

California.¹²³ The Court said obscenity is determined¹²⁴ by testing whether the average person in the community would find the work *as a whole* appealing to the prurient interests¹²⁵ and lacking in serious social value.¹²⁶

Still, despite the great reception accorded the test in *Miller*, and all the reams of print and legal scholarship accorded the subject, determining what is and what is not obscene is no easier a task than when the debate began.¹²⁷ Existing and proposed statutes that ban material depicting children engaged in or observing "*any sexually explicit conduct*"¹²⁸ prohibit the distribution and sale of protectable and socially valuable materials that may contain only brief portions of child nudity or sexual activity as part of a more meaningful overall purpose. Such a ban

123. *Miller v. California*, 413 U.S. 15 (1973) (hereinafter cited as *Miller*). After *Roth*, no majority would concur in a single substantive obscenity opinion until *Miller*.

124. 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. *Id.* at 74.

125. "Prurient interest" is said to refer to a morbid interest in sex, presumably as differentiated from a normal, healthy interest in the same subject. The normative and subjective aspects of this definition have been a source of continuing problems.

126. With respect to redeeming social value, the *Miller* Court said:

We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs*; that concept has never commanded more than three Justices at one time. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States (are) adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. 413 U.S. at 24-25.

127. The difficulty is exemplified by the fact that such serious and critically acclaimed films as "Carnel Knowledge", and books like James Joyce's *ULYSSES* and D. H. Lawrence's *LADY CHATTERLY'S LOVER* have at one time or another been thought "obscene" by government censors. See DE GRAZIA, *CENSORSHIP LANDMARKS* (1968); B. Pines, *The Obscenity Quagmire*, 49 CAL. ST. B.J. 509 (1974); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934), while such celebrated works of erotica as "Behind the Green Door", "Deep Throat", and "Devil in Miss Jones" have repeatedly been found not to be obscene. See, *People v. Mitchell*, No. 31458699 (Cal., L.A. Mun. Ct. 1974); *People v. Gass*, No. M, 106475 (Cal., Citrus Mun. Ct. 1974); *City of East Detroit v. Adams*, No. 0-6823 (Mich., E. Detroit Mun. Ct. 1974).

128. See, e.g., H.R. 3913, *supra* note 115, N.Y. PENAL CODE § 263.05 (McKinney 1977); TEX. CODE ANN. § 43.24 (1977).

directed at actual conduct, as a form of child abuse, necessarily also regulates a form of free speech and therefore must comply with current obscenity standards as delineated in *Miller v. California*;¹²⁹ that "the average person applying contemporary community standards would find the work *taken as a whole*, appeals to the prurient interest . . . and whether the work, *taken as a whole*, lacks serious literary, artistic, political, scientific value."¹³⁰ (Emphasis added).

Such sweeping legislative prohibitions fall desparately short of *Miller* standards and are clearly overbroad.¹³¹ Legislative critics and civil libertarians quickly point out that such highly acclaimed films as "The Exorcist," which contains a brief scene in which a minor simulates masturbation, and "Romeo and Juliet," where a minor appears briefly in the nude, would be prohibited under such legislation even though they are clearly not obscene.¹³²

Likewise, even if new child pornography laws are not overbroad for prohibiting all materials depicting any and all child sexploitation, they may still be constitutionally void for vagueness because they often attempt to hedge beyond obscenity lines. Covering material containing "nudity,"¹³³ "sadism and

129. *Supra*, note 123.

130. 413 U.S. at 24.

131. Laws are unconstitutionally overbroad when they are susceptible of application to conduct protected by the first amendment. A statute which may be clear and precise as to the conduct proscribed nonetheless may be struck down as unconstitutionally overbroad where it sweeps within its ambit speech or conduct which is not subject to suppression. If so, it must be declared unconstitutional on its face, regardless of the fact that the conduct could be regulated by a more narrow statute. *Grayned v. Rockford*, 408 U.S. 104 (1972); *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

132. See *S. Rep. on S. 1585*, *supra* note 8, at 12-13. Accord H.R. Rep. No. 696, 95th Cong., 1st Sess. (1977) where the House Committee on the Judiciary concluded at 7:

We agree that there is no First Amendment question in providing for prosecution of persons who abuse children. However, once those photos and films are reduced to magazines, movies, etc., numerous court decisions including Supreme Court decisions, make clear that they are permissible under the First Amendment guarantee of free speech unless they are proven to be obscene.

Although H.R. 3913 purports to cover distributors and sellers as abusers, the fact is that they ordinarily are remotely removed from the actual abuse, and, in prosecuting them without showing any participation in the actual abuse, we are in fact prosecuting for the distribution or sale of the material.

133. *S. Rep. on S. 1585*, *supra* note 8, at 11 reviewing proposed legislation (S. 1011) which would prohibit the depiction of "Nudity, if such nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction" said:

[The] language is so broad that it could conceivably prohibit such innocent scenes as "skinny dipping" or even nude snapshots of babies that were mailed to grandparents. This is particularly true since the pro-

masochism,"¹³⁴ "any other sexual activity,"¹³⁵ and other general terms without specifically limiting its regulation to obscene materials, such laws are too vague to be within the specificity required by *Miller*. These vagaries, like overboard statutes, deter privileged activity as well as obscene activity and therefore are unconstitutional.¹³⁶

A recent case on first amendment overbreadth and vagueness is *Erznoznik v. City of Jacksonville*,¹³⁷ wherein the United States Supreme Court invalidated a local Florida ordinance which prohibited the showing, at certain locations, of motion pictures "in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown . . ."

In striking down the ordinance, the Court noted that the restriction was broader than permissible. The Court stated that the ordinance:

. . . sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it

posed test for offensiveness is the sexual stimulation or gratification of *any* individual rather than using the standard of the *average* individual as required by the Supreme Court in *Roth v. United States* 354 U.S. 476 (1957) and *Miller v. California* 413 U.S. 445 (1973).

134. See, e.g., *id.* at 27, where the example is given that:

"Sadism" and "masochism" are broad enough to cover activities which are not necessarily sexually oriented. They could include filmed episodes of physical mistreatment of orphans, child laborers or inmates of a juvenile detention facility or a child inflicting injury upon himself. Such portrayals would have no sexual appeal except, perhaps, to some tiny segment of society.

135. *Id.*, it was also noted that this phrase is so broad that it could conceivably prohibit such innocent conduct as hugging and kissing.

136. The United States Supreme Court has permitted broad standing to attack constitutionally overbroad statutes in order to prevent their existence from deterring others. For example, in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court stated that the litigants would be permitted to challenge the statute not only because their own rights of free expression were violated but because the mere existence of the statute could cause others not before the court to refrain from engaging in constitutionally protected speech or expression. See also *Gooding v. Wilson*, 405 U.S. 518 (1972) and *Lewis v. New Orleans*, 415 U.S. 130 (1974). In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the United States Supreme Court held that an actor had standing to challenge a statute as facially overbroad regardless of whether his own conduct could have been regulated by a more narrowly drawn statute. See also *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) where the United States Supreme Court held that public bars had standing to raise a challenge, based on an alleged violation of the first and fourteenth amendments, to the overbreadth of a town ordinance prohibiting bust exposure.

137. 422 U.S. 205 (1975).

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.¹³⁸

Child pornography statutes that reach protected expression as well as obscenity are therefore void on their face for overbreadth and may also be unconstitutional on grounds of vagueness.¹³⁹

Recognizing it is inevitable that child pornography legislation must subject itself to first amendment review,¹⁴⁰ some scholars argue that as applied to children, the Supreme Court should broaden its present obscenity standards and create a new definition of obscenity.¹⁴¹

The Court has permitted certain justifiable infringements on the expression of free speech where as stated in *United States v. O'Brien*¹⁴² regulation (1) is within the constitutional power of the government, (2) furthers an important or substantial governmental interest, unrelated to the suppression of free expression, and (3) imposes only an incidental restriction on an alleged first amendment right that is no greater than is essential to the furtherance of the interest.¹⁴³

Child pornography laws legitimately seek to further the government's important interest in protecting its children from sexual exploitation.¹⁴⁴ It is within the government's power and is unrelated to free speech. Analogously, the U.S. Supreme Court in *Ginsberg v. New York*¹⁴⁵ upheld a New York statute which made it a crime to disseminate obscene materials to minors because the legislature could rationally conclude that the exposure of minors to obscene material is harmful to their "ethical and moral development."¹⁴⁶ The Court said states could properly seek to support the interests of parents in controlling their children's access to obscene material.¹⁴⁷ *Ginsberg's* great significance to child pornography laws, however, is that it promulgated double obscenity standards, one applicable to adults and the other, more expansive in nature, to children. *Ginsberg* cited

138. *Id.* at 213.

139. *Id.* See also *Butler v. Michigan*, 352 U.S. 380 (1957).

140. *Supra* note 129.

141. See CONG. Q., Nov. 12, 1977 at 2416.

142. 391 U.S. 367 (1968).

143. *Id.* at 377.

144. See *Prince v. Massachusetts*, 321 U.S. 138 (1944).

145. 390 U.S. 629 (1968).

146. *Id.* at 641.

147. *Id.* at 639.

with favor the opinion of the New York Court of Appeal in *Bookcase, Inc. v. Broderick*¹⁴⁸ that:

Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.¹⁴⁹

Also in support of its expansive obscenity definition for children the Court repeated the concurring opinion of Chief Judge Fuld in *People v. Kahan*¹⁵⁰ where he stated:

While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.¹⁵¹

It has been argued that the logic of *Ginsberg*, should be applied to the abuse of minors in the production of obscene material to justify the recognized infringement that child pornography laws may impose on free expression.¹⁵² If the state can constitutionally protect a minor's welfare by restricting materials available to him or her, it follows that the state possesses authority to prohibit publication of sexually explicit materials which use minors as subjects.

In face of the strong constitutional protection accorded non-obscene material,¹⁵³ it cannot be concluded, with any certainty, that this rationale for the regulation of child pornography will withstand constitutional attack.¹⁵⁴ It should be noted that whereas *Ginsberg* dealt with the dissemination of obscenity to children, thus restricting the seller's right to distribute to chil-

148. 18 N.Y.2d 71, 218 N.E.2d 668 (1966).

149. *Id.* at 75, 218 N.E. 2d at 671.

150. 15 N.Y.2d 311, 206 N.E.2d 333 (1965).

151. *Id.* at 312, 206 N.E. 2d at 334.

152. *Developing Legislation*, *supra* note 9, at 23.

153. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Butler v. Michigan*, 352 U.S. 380 (1957).

154. *Accord, S. Rep. on 1585*, *supra* note 8, at 27.

dren and the children's right to buy, child pornography laws concern the *production* and distribution of pornographic materials in which children are subjects, and denies access by anyone, child or adult, to such material. The Senate Judiciary Committee reported in its review of proposed federal legislation prohibiting the sexual exploitation of children:

It was the opinion of the experts who testified before the Committee that virtually all of the materials that are normally considered child pornography are obscene under the current standards. Thus they can be prohibited under the existing federal obscenity statutes. Indeed as was noted earlier, federal authorities have already begun an extensive crack down on child pornography. In comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential. Thus it would be extremely unwise to jeopardize the effectiveness of any federal effort to combat hard core child pornography by also attempting to prohibit the sale and distribution of such non-obscene and relatively innocent materials as "The Exorcist" and "Romeo and Juliet".¹⁵⁵

Therefore, little would be lost by isolating the two areas of production and distribution and sale of child pornography, and handling them separately. The child abuse inherent in pornography production can be entirely prohibited by broad legislation unrelated to first amendment rights. At the same time increased penalties and extensive crackdowns on distributors and retailers will greatly enhance the deterrent effectiveness of present obscenity statutes while still staying safely within the bounds of first amendment confines.

Such a delicate balance appears to weigh in the favor of first amendment rights over any justifiable infringement, but this balancing decision is undoubtedly one that will ultimately be decided by the U.S. Supreme Court. Until then, it appears that initial confrontations have been decided in favor of free speech rights narrowly limiting child pornography legislation pertaining to publishers, promoters, distributors, and sellers. In *St. Paul's Press, Inc. v. Carey*,¹⁵⁶ a Federal District Court in New York granted a preliminary injunction preventing enforcement of a New York statute making it a felony to produce or promote any performance that includes sexual conduct by a child. In so deciding the court concluded that:

The New York legislature may have decided that it is too difficult if not impossible to stop this exploitation of children by going after only those who produce the photographs and movies, and that the most expeditious if not the only practical method of law enforcement is to dry up the market for this material by imposing severe criminal penalties on those promoting, distributing, advertising and selling the product. If so, the court believes there is a serious question whether the

155. *S. Rep. on S. 1585, supra* note 8, at 13.

156. 46 U.S. L.W. 2297 (Nov. 28, 1977).

state, in choosing to punish publishers, distributors, advertisers and booksellers for their activities with respect to a non-obscene book, has chosen the least drastic means of accomplishing its goal consistent with preserving first amendment rights.¹⁵⁷

Similarly, in *Graham v. Hill*,¹⁵⁸ the Federal District Court for the Western District of Texas declared a hurriedly enacted Texas child pornography statute¹⁵⁹ unconstitutionally overbroad. The court recognized the important state interest in deterring the sexual exploitation of minors,¹⁶⁰ but nonetheless stated "In this area, (free speech) the Court must be vigilant to safeguard legitimate first amendment rights, even if to do so may in some cases be a distasteful task."¹⁶¹

Because the Texas statute failed to require that the work be found obscene, the *Graham* court pointed out that "the statute would permit the suppression of a motion picture, and the imprisonment of a theatre manager or owner, regardless of whether or not, taken as a whole, the work is obscene."¹⁶² Further, unwilling to expand its definition of obscenity as to children¹⁶³ it was stated that:

The Court does not believe, either, that § 43.25 could pass constitutional muster as written on the justification that it is a measure to protect the safety and welfare of minors, or to prevent their exploitation and abuse. If the statute were limited to prohibiting the depiction of minors actually engaging in sexual conduct, or even if the statute

157. *Id.*

158. No. A-77-CA-188 (W.D. Tex., filed Jan. 30, 1978).

159. TEX. PENAL CODE § 43.25 (1977) 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 [sic] 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.

160. *Graham v. Hill*, *supra* at 5:

The Court's task is made even more difficult in a case such as this, where the state through its criminal laws seeks to control what it views as a serious problem created by the exploitation of minors in the making of pornographic photographs and films. This is an important matter; accordingly, the Court must and does give strong consideration to the state's interest in enforcing the policy expressed in the statute, and the Court by no means deprecates the state's concern for minors or its attempt to protect them.

161. *Id.* at 6.

162. *Id.* at 7.

163. See textual material accompanying notes 137-152.

merely prohibited the observance of actual sexual conduct by minors, the Court would likely have no hesitation in declaring its constitutionality. See *Ginsberg v. New York*, 390 U.S. 629 (1968). 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 any way involves sexual exploitation, renders the statute overbroad. In light of the total failure to require that the material proscribed by § 43.25 be obscene, the Court cannot avoid the conclusion that the statute clearly is overbroad, and that its deterrent effect on protected conduct is both real and substantial, especially considering the severe sanctions for violation of the statute.¹⁶⁴

Thus, overbroad state child pornography statutes have not fared well initially, but undoubtedly more confrontations between child abuse laws and first amendment rights have yet to take place.

Another important issue presented by child pornography laws is the imposition of criminal responsibility on parents who participate in the sexual exploitation of their children.¹⁶⁵ Legislators could rationally conclude that children are unable to make a free and understanding decision to participate in prohibited acts.¹⁶⁶ Further, parents who allow their children to participate in sexually explicit activities are central figures in the child pornography process.¹⁶⁷ It has been argued that children have a right of privacy with respect to the dignity of their bodies,¹⁶⁸ however, since a child's constitutional rights are subject to the control of its parents (at least until adolescence)¹⁶⁹ it is unclear what right a child possesses independent from his parent.¹⁷⁰ It is clear, however, that a parent's control does not include the right to engage in an unlimited variety of sexual activities in the home¹⁷¹ nor is there a right of privacy in family sexual affairs if photographs are taken with parental approval.¹⁷²

164. *Graham v. Hill*, *supra* at 10.

165. See *Developing Legislation*, *supra* note 9, at 21.

166. *Ginsberg v. New York*, 390 U.S. 629 (1968).

167. See *United States v. Perry*, 389 F.2d 103 (4th Cir. 1968); *Call v. United States*, 265 F.2d 167 (4th Cir. 1959), wherein suppliers of sugar and containers to illicit distillers were convicted under 26 U.S.C. § 5686(a) (1958), which forbids possession of property with intent to violate the internal revenue laws.

168. *Recent Decisions*, 12 DUQUESNE L. REV. 645 (1974).

169. See Note, *Torture Toys, Parental Rights and the First Amendment*, 465 S. CAL. L. REV. 184, 188-201 (1972).

170. See Note, *Parental Consent Requirements and the Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1008-09 (1975).

171. See *Cheesebrough v. State*, 255 So. 2d 675 (Fla. 1971), *cert. denied*, 406 U.S. 976 (1972).

172. Cf. *Lovisi v. Slayton*, 363 F. Supp. 620 (E. D. Val. 1973), *aff'd on other grounds*, 539 F.2d 249 (4th Cir. 1976).

Still another requirement that must be met if child pornography laws are ever to pass constitutional muster concerns the "knowledge" of the defendant. In *Smith v. California*¹⁷³ the court struck down, on free expression grounds, a Los Angeles city ordinance that imposed strict liability without requiring any element of knowledge.¹⁷⁴ The court articulated principles applicable here: in order to be constitutionally sound, any law restricting possession or distribution must require that the producer, possessor, or distributor know *both* that the material is obscene *and* that a minor under the stated age is depicted therein.¹⁷⁵

In light of the clandestine fashion in which child pornography is produced, the prosecution will not always be able to sustain such a burden of proof. It will often be difficult to prove the minority of the actor unless he or she is identified and produced in court or other competent evidence of the actor's age is available.¹⁷⁶ It is not necessary, however, to show the defendant knew specifically the minor's age but only that he or she was in fact a minor.¹⁷⁷

A final caution, pertaining to the drafting of realistic penalties and sanctions for violating child pornography statutes is in or-

173. 361 U.S. 147 (1959).

174. See also *Near v. Minnesota*, 283 U.S. 697 (1931).

175. *Smith* would also appear to prevent a state from requiring a bookseller or publisher from inspecting or reading every publication that he or she wishes to sell in that this would restrict the material that is available to the public to that which the seller is able to review. Such a requirement would severely limit the public's access to non-obscene material and therefore is impermissible. The exact mental element required is still in debate:

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime.

361 U.S. at 154.

176. *S. Rep on 1585*, *supra* note 7, at 28.

177. See *United States v. Hamilton*, 456 F. 2d 171 (3d Cir. 1972) stating that the Mann Act, 18 U.S.C. § 2423 (1948) does not require that the Government prove the girl's age in transporting her interstate for immoral purposes.

der. In the wake of public outrage accompanying the disclosure of the nature and extent of child exploitation, several proposed bills provided for extremely harsh penalties.¹⁷⁸ Prosecutors find juries very reluctant to convict defendants in cases where there is even the slightest doubt if it means subjecting them to severe penalties.¹⁷⁹ For this reason penalties must be severe enough to act as a formidable deterrent to both small and large scale child exploiters and still be reasonable enough so as not to present an impediment to attaining convictions.

Therefore, strong and effective child pornography laws should approach the hybrid problem separately, deal with the producer as a child abuser but distributors and retailers as sexual exploiters subject to first amendment obscenity standards. Parents too, who actively participate in the sexual exploitation, must be subjected to criminal liability if they fail in their parental responsibilities. Violators must know that the material is obscene and that a minor is depicted therein and the penalties which they are subject to must be strong deterrents but still reasonable in light of the offense.

C. Proposed Legislation

Suddenly aware of child pornography and prostitution's rapid growth a shocked public has demanded immediate legislative action. Former Mayor of New York Abraham D. Beame voiced commonly shared fears before the New York State Crime Commission saying "We have not yet sunk to the level of savage animals, but if we don't draw the line against pornography today, and specifically against child pornography, we can kiss good-bye to civilization as we know it and cherish it."¹⁸⁰

On the State Level

Under pressure to deal with such sentiments, lawmakers have hastily responded with a flood of new laws. The House Committee on the Judiciary in surveying all enacted, pending, and expected state laws which prescribe sexual child abuse and the production of child pornography noted that:

Prior to the 1977 legislative sessions, very few states had laws prohibiting the use of children in obscene materials or performances and

178. See, e.g., H.R. 6693, 95th Cong., 1st Sess. (1977) (as introduced) which as originally drafted provided for penalties of up to twenty years imprisonment and fines of up to \$50,000 or both. See also, Cal. A. B. 1597 (1977) (as introduced) which provided for punishment of up to \$100,000 a year and imprisonment of up to eleven years or both (which are longer than the five, six or seven year terms that California provides for attempted or second degree murder).

179. See B. Pines, *The Obscenity Quagmire*, 49 CAL. ST. B.J. 509, 514 (1974).

180. N.Y. Times, June 1, 1977, § I, at 7, col. 1.

those that did exist were generally written in broad language without adequate powers for prosecution. During this past year, however, 24 states considered legislation to outlaw this exploitation of children. Of these 24 states, the unusually high number of 15 states enacted strong, comprehensive laws and final approval is expected before the year's end in an additional 6 states. In addition to these 21 states with new statutes, the states of West Virginia and North Dakota had previously enacted laws in 1974 and 1975 respectively.

Legislative action will without a doubt be even more complete by the time legislatures adjourn in 1978. A number of the states indicated that legislation will be introduced in their upcoming sessions, and in many cases, bills have already been introduced. The 3 states that did not approve the bills last year will resume their consideration, and an additional 11 states will be considering legislation. In all these states, I can assure you the interest in passing legislation is very strong. It is very likely therefore that in 1978, 37 states will have adopted thorough prohibitions against using children sexually for preparing pornographic materials. I know of no other issue where state lawmakers have been able to react so quickly and completely to a problem confronting their states, as in curbing the sexual exploitation of children.¹⁸¹

As previously noted, at present there are only eight states with laws specifically pertaining to child pornography,¹⁸² prior to 1977 there were only four,¹⁸³ the expected total by mid-1978 is thirty-seven.

Recent legislation designed to effect a quick and stern remedy for such child abuse may raise serious constitutional problems¹⁸⁴ but has also spawned varied and innovated responses that offer great promise towards the goal of eradicating from society the sexual exploitation of children in pornographic materials and prostitution.

Many states, like New York and Texas,¹⁸⁵ approach the issue broadly and treat producers, distributors, and retailers as child abusers without regard to the first amendment. As has already been discussed, such laws have definite difficulties in passing constitutional muster.¹⁸⁶ Several states¹⁸⁷ presently attempt to

181. H. REP. NO. 696, 95th Cong., 1st Sess. at 9 (1977). Testimony of California Assemblyman Kenneth Maddy presenting the results of the study to the Subcommittee.

182. *Supra*, note 88.

183. North Carolina (1971), West Virginia (1974), North Dakota (1975), and Tennessee (1975).

184. See notes 152-155 and accompanying text.

185. N.Y. PENAL CODE § 263.05 (McKinney 1977); TEX. CODE ANN. § 43.24 (1977); both held unconstitutional broad. See textual material accompanying notes 153 *et seq.*

186. See notes 152-155 and accompanying text.

187. *E.g.*, N.C. GEN. STAT. § 14-190.1, *et seq.* (1971); TENN. CODE ANN. § 39-3013 (1975).

reach only the producers and thereafter make no distinction between the distribution and sale of obscene material that depicts children in sexually explicit conduct and that which does not. Other states, including California,¹⁸⁸ contemplate double-

188. See CAL. LAB. CODE §§ 1309.5-1309.6 (West 1977) and CAL. PENAL CODE § 311.4 (West 1977) covering production of child pornography.

Labor Code § 1309.5 provides:

(a) Every person who, with knowledge that a person is a minor under 16 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 16 years of age, knowingly sells or distributes for resale films, photographs, slides, or magazines which depict a minor under 16 years of age engaged in sexual conduct as defined in Section 311.4 of the Penal Code, shall determine the names and addresses of persons from whom such material is obtained, and shall keep a record of such names and addresses. Such records shall be kept for a period of three years after such material is obtained, and shall be kept confidential except that they shall be available to law enforcement officers as described in Section 830.1 of the Penal Code upon request.

(b) Every retailer who knows or reasonably should know that such films, photographs, slides, or magazines depict a minor under the age of 16 years engaged in sexual conduct as defined in Section 311.4 of the Penal Code, shall keep a record of the names and addresses of persons from whom such material is acquired. Such records shall be kept for a period of three years after such material is acquired, and shall be kept confidential except that they shall be available to law enforcement officers as described in Section 830.1 of the Penal Code upon request.

(c) The failure to keep and maintain the records described in subdivisions (a) and (b) for a period of three years after the obtaining or acquisition of such material is a misdemeanor. Disclosure of such records by law enforcement officers, except in the performance of their duties, is a misdemeanor.

Labor Code § 1309.6 provides:

(a) Any person who violates any provision of Section 1309.5 shall be liable for a civil penalty not to exceed five thousand dollars (\$5,000) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county council, or city attorney in any court of competent jurisdiction.

(b) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city.

Penal Code § 311.4 provides:

(a) Every person who, with knowledge that a person is a minor, or who, while in possession of such facts that he should reasonably know that such person is a minor, hires, employs or uses such minor to do or assist in doing any of the acts described in Section 311.2, is guilty of a misdemeanor.

(b) Every person who, with knowledge that a person is a minor under the age of 16 years, or who, while in possession of such facts that he should reasonably know that such person is a minor under the age of 16 years, knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 16 years, or any parent or guardian of a minor under the age of 16 years under his or her control who knowingly permits such minor, to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing a film, photograph, negative, slide, or live performance involving sexual conduct by a minor under the age of 16 years alone or with other

barrelled legislative attack which treats producers as child abusers whether or not the material is obscene, and deals with distributors and retailers of "obscene"¹⁸⁹ materials depicting minors under first amendment analysis.¹⁹⁰

persons or animals, for commercial purposes, is guilty of a felony and shall be punished by imprisonment in the state prison for three, four, or five years.

(c) As used in subdivision (b), "sexual conduct" means any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, any lewd or lascivious sexual activity, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct.

SEC. 4. (a) If any provisions of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 5. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to that section nor shall there be any appropriation made by this act because the Legislature recognizes that during any legislative session a variety of changes to laws relating to crimes and infractions may cause both increased and decreased costs to local government entities and school districts which, in the aggregate, do not result in significant identifiable cost changes.

SEC. 6. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

Recent findings have indicated the use of children in pornographic materials is increasing at an alarming rate. Los Angeles County alone estimates that 30,000 cases of child and teenage molestation, including cases of child pornography, will occur in 1977. Due to the seriousness of this problem, the Legislature declares that laws prohibiting the use of children in pornography must take effect immediately.

189. California and several other states still maintain as their definition of obscenity the test declared in *Roth*, *supra* note 113, that the material be "utterly without redeeming social importance." The Roth Test places an onerous burden of proof on the prosecution. See *Man's Depravity?*, *supra* note 17, at 3. In contrast however, the Supreme Court's most recent test in *Miller*, *supra* note 122, requires that it need only be shown that the material "lacks serious literary, artistic, political, or scientific value," a difficult but still much easier task. Cal. A.B. No. 1820 (April 25, 1977) which would call for abandoning the Roth Test in favor of the Miller Test is presently being considered.

190. See CAL. PENAL CODE §§ 311.2, 311.9 (West 1977) dealing with the manufacture, distribution, and retail of obscene material depicting children in sexually explicit conduct.

Penal Code § 311.2 provides:

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others for commercial consideration, or who offers to distribute, distributes, or exhibits to others for commercial consideration, any obscene matter, knowing that such matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual intercourse, masturbation, sodomy, bestiality, or oral copulation is guilty of a felony and shall be punished by imprisonment in state prison for two, three, or four years, or by a fine not exceeding fifty thousand dollars (\$50,000), in the absence of a finding that the defendant would be incapable of paying such a fine, or by both such fine and imprisonment.

(c) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

(d) Except as otherwise provided in subdivision (c), the provisions of subdivision (a) or (b) with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter.

Penal Code § 311.9 provides:

(a) Every person who violates Section 311.2 or 311.5, except subdivision (b) of Section 311.2, is punishable by fine of not more than one thousand dollars (\$1,000) plus five dollars (\$5) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars (\$10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of any offense in this chapter, or of a violation of Section 313.1, a violation of Section 311.2 or 311.5, except subdivision (b) of Section 311.2, is punishable as a felony.

(b) Every person who violates Section 311.4 is punishable by fine of not more than two thousand dollars (\$2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If such person has been previously convicted of a violation of former Section 311.3 or Section 311.4, he is punishable by imprisonment in the state prison.

(c) Every person who violates Section 311.7 is punishable by fine of not more than one thousand dollars (\$1,000) or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. For a second and subsequent offense he shall be punished by a fine of not more than two thousand dollars (\$2,000), or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If such person has been twice convicted of a violation of this chapter, a violation of Section 311.7 is punishable as a felony.

SEC. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The effect of such state laws is generally to make activities which are misdemeanors under general obscenity statutes felonies when children are sexually depicted therein.¹⁹¹ Some states are contemplating enhanced penalties that become more severe as the age of the child depicted in the sexually explicit matter becomes younger. California provides variable penalties for distributors and retailers which increase with the amount of material confiscated; the statute provides effective deterrence and appropriate punishment for distributors and retailers whether they operate on a small or large scale.¹⁹²

Such legislation generally also provides criminal liability for those parents who knowingly allow or cause their children to be involved in such sexually explicit conduct. Another innovative device employed by California is requiring all distributors¹⁹³ and retailers¹⁹⁴ who knowingly deal with child pornography to keep a record of all names and addresses of persons from whom such material is acquired for a period of three years. Violation subjects the distributor or retailer to a civil penalty of up to a \$5,000 fine.¹⁹⁵

States, through numerous innovations and remedies, are sure to develop strong, effective, and prosecutable laws to govern child pornography.

The proliferation of child pornography and the use of minors as subjects in child pornography pose a serious threat to the health and welfare of a large number of minors in California which necessitates immediate redress.

191. Compare CAL. PENAL CODE § 311.2(a) (West 1977) providing misdemeanor punishment for manufacture and distribution of adult obscenity, with § 311.2(b) providing felony punishment of two, three, or four years and/or a fine of up to \$50,000 for the same activity but with material depicting children in any sexually explicit manner.

192. See CAL. PENAL CODE § 311.9 (West 1977) providing a penalty for distribution of not more than \$1,000 plus five dollars for each additional unit confiscated and imprisonment for not more than six months plus one day for each additional unit.

193. See CAL. LAB. CODE § 1309.5(1)(a) (West 1977).

194. See CAL. LAB. CODE § 1309.5(1)(b) (West 1977).

195. Such a record keeping requirement is of tremendous aid to law enforcement officers in combating the largely clandestine child pornography enterprise, but it also raises serious constitutional fifth amendment issues by the state requiring defendants to, in essence, testify against themselves. It is not within the scope of this comment to address the constitutional problem created by registration.

On the Federal Level

From its constitutional right to regulate commerce¹⁹⁶ Congress derives its legislative power to bar any article it may deem undesirable from interstate or foreign commerce of the mails,¹⁹⁷ and to prohibit the manufacture of an article within a state if it will affect interstate or foreign commerce.¹⁹⁸ Congress may also punish conduct which has only a potential affect on interstate commerce and therefore can prohibit any child pornography as long as the producer knows, has reason to know, or intends that the materials will move in and affect interstate or foreign commerce.¹⁹⁹

In the midst of the growing public concern over the welfare of sexually exploited children, in the first months of the 95th Congress, four bills²⁰⁰ dealing with the sexual exploitation of children were introduced in the Senate and a series of bills,²⁰¹ one with 124 co-sponsors, was introduced into the House of Representatives. Ultimately each developed and passed its own legislation. The House bill²⁰² was broad and sweeping and made no distinction between obscene and non-obscene. The Senate bill²⁰³ was more defined and limited to production of pornog-

196. U.S. CONST. art. I, § 8, cl. 3.

197. *See, e.g.*, *United States v. Orito*, 413 U.S. 139 (1973); *United States v. Darby*, 312 U.S. 100 (1941); and *Periara v. United States*, 347 U.S. 1 (1954).

198. *See, e.g.*, *United States v. Darby*, *supra* at note 197; *Wickard v. Filburn*, 317 U.S. 111 (1942); and *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942).

199. *See, e.g.*, *United States v. Addonizio*, 451 F. 2d 49 (3d Cir. 1971); and *United States v. Prano*, 385 F. 2d 287 (7th Cir. 1967).

200. S. 1011, S. 1499, S. 1585, and S. 1040.

201. H.R. 3913, 3914, 4571, 5326, 5474, 5499, 5522, 6351, 6734, 6747, 7254, 7468, 7522, 7834, 7895, 8059.

202. H.R. 8059, 95th Cong., 1st Sess. (1977).

203. S. 1585, 95th Cong., 1st Sess. (1977). *See S. Rep. on 1585, supra* at note 8 at 17, 18 where the Senate Judiciary Committee stated:

The Committee has carefully considered the suggestion that the Federal laws be extended to make illegal the sale and distribution of materials whose production involved the use of minors in sexually explicit conduct as defined in Section 2251. The Committee recognizes, however, that the sale and distribution of such material cannot be approached in the same manner as its production. Attempts to prohibit the sale and distribution of such material necessarily involve an evaluation of the content of materials in question. Consequently, the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973) has held that in determining whether material is obscene and loses its First Amendment protection, the material must be judged in its entirety. Therefore, the Committee is of the view that an attempt to make illegal the sale and distribution of material regardless of whether such material when taken as a whole is obscene, would run counter to present Federal constitutional law as enunciated by the Supreme Court in *Miller*.

In considering the possibility that the Court would apply a broader obscenity standard in cases of child sexploitation the Committee concluded that:

While the Court has indicated that different standards may apply to the dissemination of allegedly obscene material to juveniles, it has not in-

raphic materials involving children under sixteen and was designed to avoid any confrontation with the first amendment. However, when the Senate bill went to the floor, an emotional floor battle led many senators to agree with the statement of Senator Hatch that "If we want to rid this country of child pornography, we must go after distributors of this filth with tough standards, not the watered-down obscenity standards for adults."²⁰⁴ Further, it was hoped that the Court would use more stringent obscenity standards than those for adults.²⁰⁵ Ultimately, the Senate adopted Senator Roth's amendment to the bill providing for criminal penalties for knowingly distributing or selling child pornography whether or not it was obscene.

Finally, in deference to the first amendment, the Senate and House Conference Committee added the word "obscene" to the Roth amendment before the bill was passed by both houses and became law. It thus decided to be safe within the first amendment and adopted the hybrid approach by punishing producers of child pornography as child abusers on one hand and sellers and distributors of *obscene* material depicting children in sexually explicit conduct on the other.²⁰⁶ In analyzing the effectiveness of the finished law, Senator Kildee, author of the House bill, stated that:

the term "obscene" would weaken the bill as a strictly child abuse measure but it should still cover virtually all child pornography. Since this law will make sellers and distributors of child pornography accessories to child abuse, its existence will discourage sales and will give convictions not possible under present law. Also, since we did not define "obscene" in the bill, we hope it may lead the court to adopt our definition of sexually explicit conduct as a separate definition for obscenity where children are concerned.²⁰⁷

The new federal law²⁰⁸ prohibits producers from using any child under sixteen to engage or assist in any sexually explicit conduct in the production of any visual of print medium.²⁰⁹

timated that different standards should apply to the dissemination of materials which portray juveniles in sexually explicit conduct, and the Committee believes that such an approach would not pass constitutional muster.

Id., at 18.

204. CONG. Q., Oct. 15, 1977, at 2131.

205. See textual material accompanying notes 138-153.

206. See CONG. Q., Nov. 12, 1977, at 2416.

207. *Id.* See also text accompanying notes 108-155.

208. 18 U.S.C. § 2251-2253 (1977).

209. 18 U.S.C. § 2251 (a) (1977).

Parents too are equally liable if they knowingly permit such conduct.²¹⁰ However, such parent or legal guardian must have control over the actions of the child when permitting the child to engage in sexually explicit conduct.²¹¹

Distribution and sale, however, of obscene materials under federal obscenity statutes was already a felony.²¹² Therefore Congress *doubled* the penalties whenever the materials depicted children in sexually explicit conduct.²¹³

The new law also updates the Mann Act²¹⁴ to prohibit the interstate transportation of young boys under eighteen, as with young girls, to engage in prohibited sexual conduct.

D. Other Factors of Influence

Strong and effective legislation alone cannot solve the problem of child pornography and prostitution and this comment would be remiss if it did not briefly observe other important factors that can control the spread of child pornography. The deterioration of the family and the fundamental values of our society, poverty, and unemployment, inadequate education and social agencies, and a general lack of caring in an impersonal society provides the perfect environment in which child sexploitation can fester and grow.

In April, 1977, the Los Angeles Police Department credited a substantial decline in the amount of books, magazines, and films depicting children in sexually explicit acts to "vigorous law enforcement and public pressure, including considerable publicity about the subject."²¹⁵

Even the broadest law under the most expansive definition of obscenity requires effective enforcement. Enforcement agencies should be well trained and acquainted with the child pornography industry and wherever possible special child sexploitation units, like that of the Los Angeles Police Department, should be set up to concentrate specifically on the overlapping problems of child pornography, child prostitution, runaways, and child molestation.²¹⁶ Prosecutors should be specially

210. 18 U.S.C. § 2251 (b) (1977).

211. CONF. REP. NO. 601, 95th Cong., 1st Sess., at 6 (1977).

212. *Supra*, notes 77-82.

213. 18 U.S.C. § 2252(b) (1977) providing for up to \$10,000 or imprisonment up to 10 years, or both, for a first time offender; \$15,000 and 15 years, or both, for a second time offender.

214. 18 U.S.C. § 2253 (1977).

215. CAL. ATT'Y GEN., *supra* note 6, at 4.

216. *Id.* at 30.

trained in order to insure convictions. Further, all state agencies should be well acquainted with the nature and extent of child sexploitation and prepared to deal harmoniously with each other. Enforcement should be swift and begin intensively against the most offensive material and continue down to the imposition of civil penalties and injunctions for certain parties where the imposition of criminal liability would be inappropriate.²¹⁷

Public pressure may well be the strongest deterrent to the child pornography and prostitution markets.²¹⁸ Educational programs can be presented to organizations that deal with children to recruit public involvement in the battle by being able to recognize early symptoms of a sexually exploited child or reporting observations of child exploitation. Public awareness reduces the amount of child pornography and prostitution available, encourages support of police enforcement efforts, and encourages a change in the "community attitudes" used to determine whether or not material is obscene in the *Miller*²¹⁹ test.

CONCLUSION

The sexual exploitation of children for profit in pornography and prostitution is growing at an alarming rate. Child pornography affects not only the child subjects but is also connected with other forms of child abuse and molestation. Thousands of children are involved in a business that has grown into a multi-million dollar industry.

Child pornography is a hybrid problem comprised of child abuse both in the product's creation and the distribution and sale that creates the market. The problem *cannot* be remedied

217. *E.g.*, such as against photographic laboratories which process films depicting children engaged in sexual conduct, which have been found to be "untouched links" in the process from production to ultimate retail sale of child pornography. CAL. ATT'Y GEN., *supra* note 6, at 25.

218. During the April, 1977 child pornography decline, as a result of public pressure, it was reported that Reuben Sturman, the primary national distributor of pornography, notified his 800 distributors and his 100 retail stores that he would not provide defense money for anyone in his employ who is arrested for selling or distributing child pornography. CAL. ATT'Y GEN., *supra* note 6, at 4.

219. *Supra* note 122.

unless both areas are properly approached. Statutes that attempt in a sweeping fashion to legislate both protected as well as unprotected speech are overbroad and cannot pass constitutional muster. Therefore production of child pornography must be controlled through strong child abuse laws and the market must be discouraged through effective first amendment legislation that offers harsh penalties for materials depicting children in any sexually explicit manner.

“Such things must come, but woe to the man through whom they come!”²²⁰

C. DAVID BAKER

220. Matthew 18:7 (New International Version of the New Testament).